



# EU-CITZEN: ACADEMIC NETWORK ON EUROPEAN CITIZENSHIP RIGHTS

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## Strategic Lawsuits Against Public Participation (SLAPP) in the European Union

A comparative study

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## Executive Summary

The European Commission has added the issue of Strategic Lawsuit(s) against Public Participation (SLAPP or SLAPPs) onto its legislative agenda for 2021. In particular, the European Democracy Action Plan targets SLAPP phenomenon.<sup>2</sup> This study aims to shed light on the legal environment of SLAPP in the European Union and its Member States. This includes an overview of the legislative environment and court practices relevant to SLAPP. The study also analyses specific cases of the European Court of Human Rights (ECtHR) in the context of SLAPP. Moreover, an assessment is made of how democracy, the rule of law, and fundamental rights are interconnected with the issue of SLAPP.

SLAPP cases impose a chilling effect on the free press and the work of civil society organisations. Investigative journalism contributes to the fight against corruption, fraud, clientelism, and other illegal actions or anomalies which have a negative effect on national economies and the EU budget. The effect produced by SLAPP cases discourages inquiry and disclosure which could otherwise lead to a better enforcement of EU law.

The study builds on the results of a previous, preliminary paper by the same research team.<sup>3</sup> The researchers used a three-step data collection methodology: 1) a preliminary survey from civil society to map the major issues across the EU, 2) qualitative expert country notes produced by a network of academics and legal practitioners covering all 27 EU Member States, and 3) a focus group discussion to identify solutions at the EU level to the most complex issues.

### **SLAPP: a threat to fundamental rights, democracy, and the rule of law**

SLAPPs can affect the foundations of European integration and values enshrined in Article 2 TEU, such as fundamental rights, democracy, and the rule of law. The main objective of SLAPPs is to create a chilling effect on a speaker criticising an applicant. As such, they risk jeopardising fundamental rights, mainly freedom of expression, the right to receive information, and potentially fair trial rights. Next to ordinary people, entities that serve a public watchdog function overseeing entities in power and that have a special importance in transmitting knowledge -such as the press, civil society organisation including human rights NGOs and academia - are vulnerable to SLAPP cases.

SLAPPs have a ripple effect on democratic discourse and democratic society as well. In SLAPP cases, issues of public interest are at stake, such as for example environment, corruption, or migration, i.e., topics about which a vivid public debate should evolve in a deliberative democracy. Intimidating critical voices on matters of public interest, therefore, not only limits the individual rights of the speaker and the potential receivers, the voters, but also prevents people from making informed choices and from making debates meaningful in a democracy. Jeopardising freedom of expression via SLAPP suits has implications for the rule of law as well. Individuals must know what public policy is, how they will be affected and what alternative solutions there are. The outcome of legislative

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<sup>2</sup> European Commission (2020), A European democracy action plan, COM(2020) 790 final, Brussels, 3.12.2020.

<sup>3</sup> Bárd, Bayer, Luk and Vosyliute (2020), op. cit.



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processes, i.e. legal instruments, can only be regarded as legitimate if they have been adopted based on deliberation, in a fair and discursive process equally open to all.

In sum, SLAPP actions may have negative implications for individual fundamental rights, for democratic public participation, and for the rule of law, core values the European Union and the Member States share and are obliged to respect and promote.

## Mapping results

The mapping exercise established that there are significant differences between Member States with regards to their vulnerabilities to SLAPP and its specificities. All but six Member States criminalise defamation, and in all but one of those, the sanction can be imprisonment. In ten Member States, criminal defamation is reported to be more commonly used to protect reputation than civil defamation. Eight Member States maintain higher penalties for public dissemination, particularly for the press. Eleven Member States provide for stricter protection of public officials, monarchs, or heads of states.

Civil defamation procedures also have their risk factors for abuse of rights.<sup>4</sup> First, the burden of the proof lies on defendants. Second, plaintiffs may enjoy the power to increase the length and complexity of the procedure. Exaggerated damages have generally been less reported as a problem in the continental legal system. It was regarded as a pressing problem in Ireland, whereas Malta has introduced a damage cap by law.

Privacy and data protection laws have been used as a pretext for litigation in vexatious lawsuits, as reported by nine Member States. The possibility provided by Article 85 GDPR for Member States to exempt the press from most parts of the data protection regulation, opened the door for divergent state practices. In fact, several Member States have not enacted the necessary exempting regulations.

Some other legal grounds were abused for SLAPP purposes only sporadically in a small number of states, such as tax measures, false accusation, or copyright. The criminal provision of “facilitation of irregular migration” has been applied by authorities in eight Member States in a vexatious manner, purposefully seeking a chilling effect on civil society actors, journalists, or artists.

The possible defences of journalists and civil society actors have been compared. Most states have the defence of good faith and public interest in line with the ECtHR’s case law. The explicit legal possibility for judges to interpret a claim in the wider context, based on principles such as abuse of right, bad faith of the litigant/vexatious litigation is given in eight Member States.

Legal aid and free legal representation may be applied for in 15 Member States, but its conditionality in 13 Member States may exclude the typical SLAPP targets. Six Member States reported that the costs that are covered are lower than the real procedural costs and are reimbursed with a delay. NGOs and journalistic unions also offer legal aid in 11 Member States. As another alternative to protect against bad faith complaints, in 13 Member States, the whole judicial costs of a criminal

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<sup>4</sup> Abuse is used in the meaning of the ECtHR: “the harmful exercise of a right for purposes other than those for which it is designed”. This also includes vexatious applications or law. Source: The Court’s Admissibility guide: *Practical Guide on Admissibility Criteria*. p. 48-51.



proceeding are to be paid by the complainant if the criminal complaint was utterly false and was lodged with malice or gross negligence, or if the facts were maliciously distorted.

In 12 Member States journalists and NGOs were almost equally targeted, in three states along with academics and researchers. Initiators of SLAPPs that were observed include, among others, politicians, public officials, as well as corporations.

The study has identified promising practices that are able to successfully deter SLAPP cases or mitigate their negative effects. Beyond what has been applied by several states (legal aid, the bad faith complainant bears the costs), some practices have been identified in one or a few states only; nevertheless, they appear to be useful in other states as well. The **most promising practices** selected are:

- Specific prosecutors and specific courts designated to prosecute journalists, and to handle freedom of press cases.
- Prosecution of journalists allowed only in case of public interest.
- Wide discretion for the trial judge (or a supervising judge) to control the course of the procedure and reject bad faith attempts of vexatiously using procedural rights (such as intentional lengthening of the procedure by the plaintiff).
- Autonomy of the trial judge to reject vexatious complaints in an early phase in both civil and criminal proceedings.
- The possibility for judges to order the plaintiff, when it sees fit, to provide a deposit to cover the expected procedural defences of the defendant.
- Coverage of legal costs by insurance companies.
- Granting of injunctions to stop publication only if the publication is not of an important public interest.
- Decriminalisation of defamation (see below).

### **Standards of the European Court of Human Rights and their application**

The analysis of the case law of the ECtHR led to the conclusion that a consistent application of the principles in the pre-litigation phase could deter SLAPP cases at their outset. A consistent application of ECtHR standards has been reported in 11 Member States, and a less consistent application in 10 more Member States. In four states, lower courts were not seen to apply the standards, whereas higher courts do.

In the case law of the ECtHR, a number of cases carried the typical characteristics of SLAPP cases, and the Court consistently established violation of Article 10. The principles that the ECtHR has developed in this field are the public interest principle, higher tolerance required from public officials, the defence of truth, and the defence of good faith. Moreover, the Court established that civil society organisations and activists deserve similar protection to press workers, that legal aid should be provided to defendants, and deplored excessive damages for defamation. The Court also held that prison sentences were generally disproportionate for defamation, in line with Resolution 1577 (2007) of the Council of Europe.

Besides the Council of Europe and its Court, all other major international human rights institutions call for the decriminalising of defamation, such as the United Nations and the Organisation for Security





and Cooperation in Europe. In comparing the features of criminal and civil defamation, it was found that criminal defamation has features (the procedural burden is not on the complainant, high chilling effect, no benefit expected for the complainant) that make it prone to abuse for the purposes of SLAPP.

## Recommendations

The study recommends an EU-wide legislative procedural instrument to establish the abuse of process with legal certainty: an anti-SLAPP motion. This would be invoked by the defendant at an early stage of the procedure, arguing that the litigation is manifestly unfounded, lacks merits and/or that there are elements indicating abuse of rights or procedure.

The criteria to invoke an anti-SLAPP motion should be sufficiently narrow to avoid abuse and sufficiently broad to provide autonomy for judicial reasoning and to adapt to emerging situations. The recommended criteria for the courts to consider are:

- the speaker is a journalist, NGO or whistle-blower, with less power than the plaintiff;
- the lawsuit is meritless or frivolous;
- the claim is disproportionate compared to the severity of the harm;
- the activity previously shown by the defendant, or the content published was in the public interest;
- the sanction claimed would have a chilling effect on democratic participation.

The study elaborates on some details of the recommended motion. Further recommendations are made to mitigate the harms caused by vexatious litigation, such as improvement of the legal aid system so that it is more generally available to defendants in SLAPP-suspicious procedures or procedures connected to freedom of expression. For civil defamation, it is recommended that the defences of good faith and public interest should become a robust part of the defence line, and that professional workers of the press or NGOs should be shielded from personal liability by a single-personal-liability carried by the publisher or the responsible executive leader of the NGO.

To avail of the possibility offered by Article 85 GDPR on balancing the right to freedom of expression with the right to data protection, the European Data Protection Board should issue guidelines for a harmonised EU application of this exception. For the reasons stated above, decriminalisation of defamation is recommended. Alternative recommendations are given to abolish prison sentences, introduce the defence of public interest and of truth in all cases, and wider tolerance of criticism for public officials.

As a final remark, recommendations formulated in this paper or any anti-SLAPP legislation incorporating these recommendations will only be effective when judicial independence is guaranteed. Judges have to recognise vexatious lawsuits by the initiators of SLAPPs and ensure that the anti-SLAPP motion is used appropriately against the applicants who are typically powerful business entities or state organs.



## List of abbreviations and definitions

Abbreviation	Definition
AT	Austria
BE	Belgium
BG	Bulgaria
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COVID-19	Coronavirus disease 2019
CSO	civil society organisation
CY	Cyprus
CZ	Czech Republic
DAP	Democracy Action Plan
DE	Germany
DG JUST	Directorate-General for Justice and Consumers
DK	Denmark
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECPMF	European Centre for Press and Media Freedom
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EE	Estonia
EL	Greece
EP	European Parliament
ERCI	Emergency Response Center International
ES	Spain
EU	European Union
EUR	Euro
FI	Finland
FR	France
FRA	European Union Agency for Fundamental Rights
GDPR	General Data Protection Regulation
GONGO	Government-organised non-governmental organisation
HR	Croatia
HU	Hungary
ICCPR	International Covenant on Civil and Political Rights
IE	Ireland
IT	Italy
LT	Lithuania



LU	Luxembourg
LV	Latvia
MT	Malta
NGO	non-governmental organisation
NL	Netherlands
OCCPR	Organized Crime and Corruption Reporting Project
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
SLAPP	Strategic Lawsuit(s) against Public Participation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States (of America)

# 1. Introduction

SLAPPs – Strategic Lawsuits Against Public Participation – are a phenomenon endangering democracy and related values across the European Union. They are meritless or vexatious lawsuits and other forms of legal action initiated by state organs, business corporations and individuals in power against weaker parties – journalists, civil society organisations, human rights defenders, and others – who express an opinion or convey information on a public matter that is perceived as unfavourable or otherwise uncomfortable to the powerful. The main aim of SLAPP suits is not to obtain a favourable judgment in court, but instead to initiate legal proceedings in an attempt to intimidate and deplete the resources of the targets of SLAPP suits. The ultimate goal is to discourage them and others from expressing their critical views.<sup>5</sup>

The reality of SLAPPs is not new. The term “SLAPP” was coined by professors Canan and Pring to describe a phenomenon observed as early as the 1980s.<sup>6</sup> It has however, only more recently become a topic of concern in Europe, especially following the case of the Maltese investigative journalist Daphne Caruana Galizia.<sup>7</sup> As noted by Bárd et al., SLAPP cases have also been identified as a growing concern in Croatia, France, Italy, Hungary, and Slovakia, among other EU Member States.<sup>8</sup> For instance, in Croatia, a substantive number of defamation lawsuits were filed against journalists.<sup>9</sup>

Several resolutions of the European Parliament (EP), in particular resolutions of 3 May 2018,<sup>10</sup> 28 March 2019,<sup>11</sup> 17 September 2020,<sup>12</sup> and 25 November 2020<sup>13</sup> have referred to SLAPP as phenomenon of concern for EU policy makers.

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<sup>5</sup> P. Bárd, J. Bayer, N.C. Luk and L. Vosyliute (2020), “Ad-hoc request. SLAPP in the EU context”, Brussels, Academic Network on European Citizenship Rights, European Commission, 2020, [https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf).

<sup>6</sup> See for example P. Canan and G.W. Pring (1988), “Strategic Lawsuits against Public Participation”, *Social Problems*, Vol. 35, No. 5, pp. 506-519; G.W. Pring and P. Canan (1996), *SLAPPs. Getting Sued for Speaking Out*, Philadelphia, PA: Temple University Press, 1996.

<sup>7</sup> See E. Allaby (2019), “After journalist’s murder, efforts to combat SLAPP in Europe”, *Columbia Journalism Review*, 24 April 2019, <https://www.cjr.org/analysis/slapp-daphne-caruana-galizia-malta.php>; ECPMF (2020), “People from across the EU need to be protected from SLAPPs”, 16 November 2020, <https://www.ecpmf.eu/people-from-across-the-eu-need-to-be-protected-from-slapps/>; CoE Commissioner for Human Rights, “Time to take action against SLAPPs”, Strasbourg, Council of Europe, 27 October 2020, <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>.

<sup>8</sup> See Bárd, Bayer, Luk and Vosyliute (2020), op. cit.

<sup>9</sup> Cf. “New wave of SLAPPs hits Croatian media and journalists”, *European Federation of Journalists*, 4 November 2020, <https://europeanjournalists.org/blog/2020/11/04/new-wave-of-slapps-hits-croatian-media-and-journalists/>; J. Prtoric (2020), “Vexatious lawsuits a SLAPP in the face for journalists in Croatia”, *International Press Institute*, 11 November 2020, <https://ipi.media/vexatious-lawsuits-a-slapp-in-the-face-for-journalists-in-croatia/>.

<sup>10</sup> European Parliament (2018), Resolution of 19 April 2018 on protection of investigative journalists in Europe: the case of Slovak journalist Ján Kuciak and Martina Kušnírová, P8\_TA(2018)0183, [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0183\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0183_EN.html).

<sup>11</sup> European Parliament (2018), Resolution of 3 May 2018 on media pluralism and media freedom in the European Union, P8\_TA(2018)0204, [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0204\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0204_EN.html).

<sup>12</sup> European Parliament (2019), Resolution of 28 March 2019 on the situation of the rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia, P8\_TA(2019)0238, [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0328\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0328_EN.html).

<sup>13</sup> European Parliament (2020), Resolution of 25 November 2020 on strengthening media freedom: the protection of journalists in Europe, hate speech, disinformation and the role of platforms, P9\_TA(2020)0320, [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0320\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0320_EN.html).



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The European Commission announced an initiative on SLAPP in its work programme for 2021. In its European Democracy Action Plan, adopted in late 2020,<sup>14</sup> the European Commission set out that it will submit an “initiative to protect journalists and civil society against SLAPP”. An expert group has been set up, consisting of legal practitioners, journalists, and academics, among others to “advise the Commission on matters relating to the fight against SLAPP or the support to their victims”.<sup>15</sup>

This study aims to map the situation in the Member States and explore the possibilities for EU solutions to the phenomenon and effects of SLAPP suits. It follows up on a prior study conducted by the authors on the same topic.<sup>16</sup> Chapter 2 explores the relationship between SLAPPs and the EU founding of democracy. Chapter 3 sets out the methodological choices and constraints of this study, while Chapter 4 reflects on definitional considerations of the term “SLAPP”. Chapter 5 provides an overview of the European Convention on Human Rights and the European Court of Human Rights’ case law of relevance for SLAPPs. Chapter 6 goes into detail on the concept of ‘abuse of rights’ that exists in some EU Member States. Chapter 7 maps the legal instruments that may be used in SLAPP suits and potential defences against SLAPP currently existing in the EU Member States. Chapter 8 explores and analysis the rule of law and fundamental rights factors that deeply impact regulatory perspectives. Chapter 9 provides a concluding summary of the findings of the study. Finally, Chapter 10 sets out a number of recommendations and considerations for any EU anti-SLAPP action.

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<sup>14</sup> European Commission (2020), A European democracy action plan, COM(2020) 790 final, Brussels, 3.12.2020.

<sup>15</sup> <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3746>.

<sup>16</sup> Bárd, Bayer, Luk and Vosyliute (2020), op. cit.

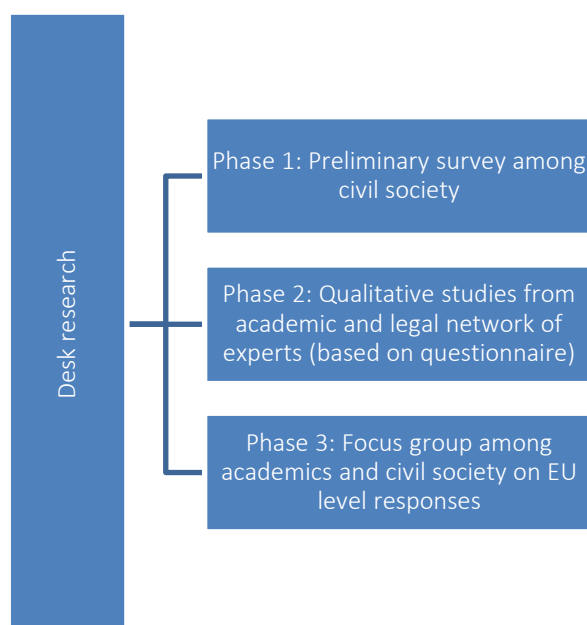
## 2. Methodology

This study aims to understand which legal provisions (civil, criminal, administrative or other) are prone to be misused to initiate SLAPPs, as well as under which conditions such vexatious litigations can have a chilling effect on freedom of expression. The study provides a list of evidence-based recommendations, including on how the EU legislators could address SLAPPs within the European Union’s competences.

### 2.1. Data gathering methods

In addition to the desk research, the authors have employed three qualitative data gathering methods to ensure that data is cross-checked and triangulated.

Table 2.1. Data gathering methods



Source: Authors, 2020.

#### 2.1.1. Desk research

A 2020 paper on SLAPP in the EU context<sup>17</sup> serves as the basis of the current study. This initial study provided a general overview and comparison of the Common law and Continental law traditions and national systems’ specificities. It was found that, for instance, in common law countries, SLAPPs are creating more negative impacts than in continental law countries, when taking into account different substantive law provisions:

<sup>17</sup> Bárd, Bayer, Luk and Vosyliute (2020), op. cit.



‘constitutional differences [...]; the nature of defamation laws; or from procedural distinctiveness, such as jury trial, length of procedures as legal costs, excessive attorney’s fees, the amount of damages and whether a cap to damages is defined; the availability of legal aid; or the existence or lack of adequate safeguards to protect against abuse of rights’.<sup>18</sup>

The present comparative study aims to analyse in more depth the differences and similarities found across the 27 EU Member States. Besides defamation laws, the study also maps other civil and criminal law provisions, in particular procedural aspects. In addition, the study investigates how other administrative provisions, labour or tax law have been or could be used to initiate SLAPPs. The comparative analysis has drawn on the preliminary surveys, in-depth questionnaires among academics and legal practitioners and desk research of legal scholarship, as well as the relevant case law in national and regional courts. It takes account of the standards set by the European Court on Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

However, this study does not seek to provide a fully comprehensive overview of national case-law on SLAPPs. It does not aim to provide quantitative evidence on the legal provisions misused for SLAPPs across the EU, but rather gives a qualitative overview on the type of issues that have been identified in relation to SLAPP by our academic and legal network and civil society. In the comparative analysis, the authors use some national cases as an illustration of legal specificities. Descriptions and references to cases can be found in the country notes annexed.

### *2.1.2. Preliminary survey of civil society actors*

During the preliminary phase, in the period between October 14 and October 30, 2020, we contacted 51 civil society actors (at least two per country) and received 17 completed questionnaires from **15 civil society organisations** active at the national level in 13 EU Member States (BG, HR, CY, CZ, DE, ES, EL (2 respondents), IT, LV (2), MT, SK(2), SL). Two umbrella organisations based in NL and LU covered several Member States in their responses, thereby providing sufficient coverage of the issue across the EU. Information provided was cross-checked against data gathered via desk research by the authors.

Survey responses have aided in identifying some of the recurring issues in the EU Member States, particularly regarding vexatious claims that human rights defenders and environmental activists have been facing. The responses received from civil society were assessed in the light of desk research. Thus, the preliminary survey has informed the comparative legal analysis of the study. Civil society responses were further triangulated with the questionnaires completed by academic and legal experts and the outcome of the focus group discussion with civil society and academics. The focus group discussions with the latter assessed the SLAPP phenomenon at the EU level.

### *2.1.3. An in-depth questionnaire among the network of experts*

The second phase involved identifying academic and/or legal experts with proven expertise on SLAPPs. We aimed to receive balanced insights about the SLAPP situation, as well as information about the

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<sup>18</sup> Ibid.



legal background in each of the EU Member States. We selected primarily scholars. Some of the contributors are practicing lawyers who have had experience with SLAPP cases, or who have been contributing to the academic debate on SLAPPs, freedom of expression, media law, and related issues.

From 1 November 2020 until 22 February 2021, **117** legal experts on media law, freedom of speech and criminal law had been contacted, inviting them to join a network of experts. As a result, a network of **31** experts was created specifically for this study, with at least one legal expert covering each of the 27 EU Member States.

Academics and legal practitioners received an ‘in-depth questionnaire’, which consisted of six categories of open-ended questions. The ‘country notes’ have been elaborated by national experts based on the authors’ feedback on the in-depth questionnaires. The experts remain the independent and sole authors of the country fiches, while the co-authors of this study remain solely responsible for the comparative legal analysis.

National experts have prepared 22 country notes annexed to this study (BE, BG, CY, CZ, DE, EL, ES, FI, FR, HR, HU, IE, IT, LV, MT, NL, PL, PT, RO, SE, SK, SV). In five remaining Member States (AT, DK, EE, LT and LU) none of the experts contacted were available to commit to elaborating self-standing country notes.<sup>19</sup> In these five countries, interviews and/or in-depth questionnaires were used instead to collect the necessary information. Their feedback was collected by the authors so as to ensure an EU-wide comparative analysis.

#### *2.1.4. Expert discussion on EU entry points to address SLAPPs*

The preliminary survey with civil society and country notes produced by the national experts have shown that different laws and practices are being misused for SLAPPs and that addressing SLAPP may require a mix of approaches. Thus, the authors convoked a focus group, formed by experts with extensive knowledge of the EU legal framework and policies, to discuss potential EU entry points to address SLAPPs. Authors invited key experts, who have extensive knowledge of the EU legal framework and policies. In total, 23 academics, legal practitioners and civil society representatives working at the EU level on public international law, rule of law, not-for-profit law, criminal law, human rights law and media law issues were invited. Of the experts invited, 12 joined the online discussions organised on 3 December 2020. The focus group discussion consisted of two rounds:

- The first round of discussion focused on exploring avenues available in EU law that have been, or could be, used to solve concrete SLAPP cases in Croatia, Malta, Poland, and France. Experts also proposed using some existing policy tools, such as calling for the democratic accountability at EU level by the European Parliament, by setting up an inquiry into specific countries. The discussion among experts revealed that although there was a broad consensus on SLAPPs as a phenomenon, concrete definitional issues, what qualifies as SLAPP and under what conditions, raised many questions. Therefore, definitional elements are further clarified in this study (see chapter 4).

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<sup>19</sup> For example in Denmark 11 experts were contacted, all refused.





- During the second round of discussion, the potential to close gaps in the substantive and procedural laws across the EU that could give rise to SLAPPs was addressed. The Focus group also analysed an Anti-SLAPP Model Directive developed at the initiative of a coalition of more than 60 civil society organisations.<sup>20</sup> As a matter of policy choice, the model directive currently proposed by civil society covers aspects relating to civil procedural law. The experts discussed the EU's competence to intervene in procedural criminal law, for instance in ensuring the conditions for mutual trust in criminal law areas where there is established police and judicial cooperation.

## ***2.2. Other methodological considerations***

Gathering evidence on the prevalence of SLAPP cases in the EU has proven challenging. While the phenomenon has been researched before, none of the previous analyses have examined court or administrative practices and cases in a comprehensive manner to identify SLAPPs. Several national experts reported that the notion of SLAPP is not widely known in their country, and while they are aware of cases which fit the category, an overarching review of court and administrative practices would be necessary to get a full picture. In addition, there is no widely accepted definition of SLAPP at the EU level, and legal databases in Member States are not always publicly accessible.

Consequently, the assessment in this study of criminal and civil procedures and potential vulnerabilities of laws to give rise to SLAPPs is based on national experts' research and their practical experiences and insight, which have been complemented with, and supported by, with a selection of case examples.

Highlighting the issues signalled by NGOs, the authors asked academics and legal practitioners to explain the legal context, the vulnerabilities of the substantial and procedural laws, the typical pitfalls, and if there were any promising practices or safeguards to prevent SLAPP. Besides their expertise on national laws, we also sought the experts' professional assessment on relevant factors that impact the phenomena of SLAPP in their countries.

We found that the lack of apparent SLAPP cases did not necessarily prove the non-existence of the problem. In many instances, a chilling effect was achieved through certain (and less formal) practices, including corporate lawyers and politicians threatening journalists or civil society with a lawsuit. Not all SLAPP victims take the risk of going to court. Some of them opt instead to settle the case<sup>21</sup> and thus neither enter the judicial system, nor get media attention.

This is well exemplified by the famous case between McDonalds and two NGO activists, where McDonalds (the fast-food chain owner) repeatedly offered attractive settlement bargains, as it has done so many times before to critical journalists in similar cases.<sup>22</sup> The two activists in this instance

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<sup>20</sup> Liberties, Protecting public watchdogs across the EU: A proposal for an EU Anti-SLAPP Law, 2020, <https://www.liberties.eu/en/news/stop-slapps-model-directive/19777>.

<sup>21</sup> Index on Censorship, *A gathering storm: The laws being used to silence the media* (2020), p. 10, <https://www.indexoncensorship.org/wp-content/uploads/2020/06/a-gathering-storm.pdf>.

<sup>22</sup> *Steel and Morris v. UK*, Application no. 68416/01, 15 February 2005; See also M. Oliver (2005), "McLibel", *The Guardian*, 15 February.



decided to carry their case up to the ECtHR, resulting in a legal battle which lasted from 1986 until 2005.<sup>23</sup>

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<sup>23</sup> *Steel and Morris v. UK*, Application no. 68416/01, 15 February 2005; See M. Oliver (2005), op. cit.



### 3. Implications for European democracy, fundamental rights and the rule of law

SLAPPs can affect the foundations of European integration and values enshrined in Article 2 TEU, such as democracy, fundamental rights, and the rule of law.

#### 3.1. Democracy

SLAPPs' main aim is to have a **chilling effect** on the speaker who criticises the applicant, which in itself may jeopardize freedom of expression, and thus can be dissuasive to democratic discourse. SLAPPs do not only aim at **shrinking the space for criticism**, but they have an additional characteristic, namely the **power imbalance** between the parties, to the detriment of the defendant. Applicants in SLAPP cases are powerful individuals or corporations, or state agents that wish to silence criticism and prevent public scrutiny. In SLAPP cases issues of **public interest** are at stake, including topics such as the environment, corruption, or migration, about which a vivid public debate should evolve in a deliberative democracy. Proving the interrelatedness of democracy and fundamental rights, freedom of expression is – according to the instrumental theory – crucial for democracies in contributing to citizens' understanding of participation in public matters and promoting their involvement in the governance of their own communities.<sup>24</sup> At the same time, it enhances – even if it does not necessarily lead to – the discovery of the truth. Democratic participation and freedom of speech are thus two sides of the same coin. Intimidating critical voices on matters of public interest therefore not only limits the individual rights of the speaker (the right of freedom of speech) and the potential receivers, i.e., the voters (the right to receive information), but also prevents people from making informed choices and engaging in meaningful democratic debate, democracy being a value enshrined in Article 2 TEU.

#### 3.2. Fundamental rights

SLAPPs affect in particular another value incorporated into Article 2 TEU: fundamental rights, and in particular the right to **freedom of expression**, the **right to receive information** and the **right to public participation**. These rights belong to the basic tenets of the European understanding of fundamental rights, as incorporated into Articles 2 and 6 TEU. European bills of rights, such as Article 11 of the EU Charter of Fundamental Rights (Charter) or Article 10 of the European Convention on Human Rights (ECHR) regard freedom of expression and the right of access to information as the passive side of free speech. Article 19 of the International Covenant on Civil and Political Rights as well as the Universal Declaration of Human Rights guarantee the right to hold opinions without interference, and the right to freedom of expression, which also includes the “freedom to seek, receive and impart information and ideas of all kinds”. As to the latter aspects, Article 21(1) of the 1948 Universal Declaration of Human Rights provides that “everyone has the right to take part in the government of his country”. Article 25 of the International Covenant on Civil and Political Rights also guarantees the right “to take part in the conduct of public affairs”.<sup>25</sup> Privileged entities with respect to transmitting knowledge

<sup>24</sup> E.M. Barendt (2005), *Freedom of Speech*, Oxford: Oxford University Press, 2005, p. 19-20.

<sup>25</sup> These provisions are basically identical to the provision set forth in the First Amendment to the US Constitution.



include the free press, civil society organisation including human rights NGOs, and academia. The public watchdog function of journalists and NGOs has also been acknowledged by the European Court of Human Rights, and because of this role they were granted special protection in the Strasbourg jurisprudence. These entities are all at special risk from SLAPP cases.

SLAPPs jeopardize fundamental rights from another aspect, namely the **right to a fair trial**. Applicants or alleged victims starting SLAPP cases might refer to their own access to justice and fair trial rights, but in reality, their primary aim is not to exercise these rights, but to limit the other party's rights. On the one hand, SLAPPs are started with the objective to limit the defendant's freedom of speech, and on the other, SLAPP cases may also result in distorting the respondent's or suspect's fair trial rights. Equality of arms is one of the very basic tenets of the right to a fair trial, as enshrined in Article 6 of the ECHR, Article 47 of the Charter, and in national European constitutions. The expression "equality of arms" itself does not appear in the mentioned European documents, but case-law has established it as an autonomous component of a fair trial.<sup>26</sup> Equality of arms and thus fair trials rights can be at stake if there is a considerable power imbalance between the parties that leads to one party being able to exercise his or her rights, whereas the other one cannot – due to financial burdens for example – as often happens in SLAPP cases. The main objective of a SLAPP suit is not to pursue a legal remedy, but to silence and intimidate through the legal process. Abusing procedure and one's power position in a manner that the state – via anti-SLAPP laws or judicial interpretation – cannot prevent,<sup>27</sup> compromises the fair trial rights of individuals.

### 3.3. *The rule of law*

Let us add a third layer, namely the rule of law, highlighting the interdependent nature of three Article 2 TEU values: democracy, fundamental rights, and the rule of law.<sup>28</sup> Individuals must know what public policy is, how they will be affected, and what alternative solutions there are.<sup>29</sup> The outcome of legislative processes, i.e. legal instruments, especially if covering controversial topics, can only be regarded as legitimate if they have been adopted based on deliberation, in a fair and discursive process equally open to all.<sup>30</sup> Accordingly, the Venice Commission's Rule of Law Checklist, consequently referenced by the Commission,<sup>31</sup> introduces the following benchmark for law-making

<sup>26</sup> ECtHR, Cases *Bulut v. Austria*, 17358/90, 22/2/1996; *Foucher v. France*, 22209/93, 18/3/1997; *Platakou v. Greece*, 38460/97, 11/1/2001; *Bobek v. Poland*, 68761/01, 17/7/2007.

<sup>27</sup> Prevention of abuse may happen by dismissing the case by the prosecution or courts for example, or by preventing frivolous claims for prolongation of the process.

<sup>28</sup> S. Carrera, E. Guild and N. Hernanz (2013), "The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU", *CEPS Paperbacks*, Brussels, CEPS, 2013.

<sup>29</sup> ECtHR, *Leander*; *Gaskin v. United Kingdom*, 10454/83, 7/7/1989; *LCB v. United Kingdom*, 23413/94, 9/6/1998; *Roche v. United Kingdom*, 32555/96, 19/10/2005; *Társaság A Szabadságjogokért v. Hungary*, 37374/05, 14/4/2009; *Guseva v. Bulgaria*, 6987/07, 17/2/2015.

<sup>30</sup> J. Habermas (1996), *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg, Cambridge: MIT Press, 1996, pp. 447-448, 107; A. Gutmann and D. Thompson, *Democracy and disagreement*, Cambridge, MA: Belknap Press of Harvard University Press, 1996; "The rule of law 'requires not just that we have rules, and that government is bound by rules, but also that these rules should be based on purposes and reasons which are open to public debate'" Patrick Selim Atiyah, *Pragmatism and Theory in English Law*, The Hamlyn Lectures (Stevens and Sons, 1987), p. 144.

<sup>31</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union: A



processes: “Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?”<sup>32</sup> Preventing individuals from expressing their opinions on matter of public interest or silencing certain views that some powerful entities – whether public or private – dislike, is a direct threat to public debate.

The output side, a vivid and unconstrained exchange of ideas about public issues, is important in ensuring that laws comply with the rule of law. Furthermore, a specific aspect of the rule of law, namely judicial independence, is important for the input side, i.e., for identifying SLAPP suits, and when appropriate, halting them at an early stage (for details, please see Chapter 8). SLAPPs are disguised attempts to silence journalists, NGOs, academics, and other actors. Because the person or entity initiating a SLAPP suit refers to their rights as a pretext, it is difficult to distinguish such cases from justified lawsuits where the applicant genuinely seeks a legal remedy for a perceived wrongdoing. Anti-SLAPP laws can to a certain extent prevent vexatious lawsuits, but it remains ultimately up to the courts that assess each case individually and identify unfounded ones.

In sum, SLAPP actions might have negative implications for democratic public participation, fundamental rights and the rule of law, core values the European Union and the Member States share and are obliged to respect and promote.<sup>33</sup>

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blueprint for action, Brussels, 17 July 2019, COM(2019) 343 final; Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report The rule of law situation in the European Union, COM(2020) 580 final, 30 September 2020.

<sup>32</sup> European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, 18 March 2016, CDL-AD(2016)007rev. See also Commission Better Regulation. “Public consultation is an essential element of all impact assessments, evaluations and fitness checks”

<sup>33</sup> Articles 2-3 TEU.



## 4. Definitional elements

The complexities surrounding the phenomenon of SLAPP are evident when trying to identify SLAPP cases. The consultation of civil society organisations, as described in Chapter 2 of this report, demonstrates that the lines between SLAPP suits and legitimate legal proceedings is not always straightforward. They should be decided on a case-by-case basis, by the court. One crucial element in tackling SLAPP suits is thus the independent and adequately trained judiciary which is entrusted to decide whether a claim is an abuse of the right of access to court or not. Domestic courts can, among others, rely on the case law developed by the ECtHR, for instance on the concept of abuse (See chapter 6). While the wisdom and independence of judges is an inevitable element, having indicators which are commonly accepted as pertaining to SLAPPs would contribute to enhancing the calculability and uniformity of judicial decisions.

SLAPP was a term first adopted by Pring and Canan to describe a specific phenomenon in the United States, whereby legal action was undertaken against individuals and organisations exercising their rights to petition the government under the First Amendment (Petitions Clause).<sup>34</sup> The phenomenon of SLAPP has been noted in a variety of manners, including as “the use of litigation to derail political claims, moving a public debate from the political arena to the judicial arena”,<sup>35</sup> “legally meritless suits designed from their inception to intimidate and harass political critics into silence”,<sup>36</sup> “attempts to use civil tort action to stifle political expression”,<sup>37</sup> and “the initiation of a lawsuit that has the principal effect of silencing representations being made in the public sphere by the person being sued, when the impugned representations have to do with an issue of social significance”.<sup>38</sup>

The literature has focused on four (or five) definitional elements of what constitutes SLAPP.<sup>39</sup> For example, Pring adopted a set of four criteria to determine whether a lawsuit should be considered as SLAPP, namely whether the lawsuit is 1) a civil complaint or counterclaim (for monetary damages and/or injunction), 2) filed against non-governmental individual and/or groups, 3) filed because of communications to a government body, official, or the electorate, 4) on an issue of some public interest or concern.<sup>40</sup> A fifth “additional” definitional element of SLAPP is the (lack of) merit of the legal action undertaken.

Based on the abovementioned, the following section sets out five elements/aspects which characterise the SLAPP phenomenon: the persons filing suit and who is targeted by such a lawsuit (*ratione personae*); the subject matter of the lawsuit (*ratione materiae*); the (*lack of*) merit of SLAPP

<sup>34</sup> See P. Canan and G.W. Pring (1988), “Strategic Lawsuits Against Public Participation”, *Social Problems*, Vol. 35, No. 5, pp. 506-519; P. Canan (1989), “The SLAPP from a Sociological Perspective”, *Pace Environmental Law Review*, Vol. 7, No. 1, pp. 23-32; G.W. Pring (1989), “SLAPPs: Strategic Lawsuits against Public Participation”, *Pace Environmental Law Review*, Vol. 7, No. 1, pp. 3-22.

<sup>35</sup> Canan (1989), *op. cit.*, p. 23.

<sup>36</sup> E. Constantini and M.P. Nash (1991), “SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response”, *Journal of Law and Politics*, Vol. 7, No. 3, pp. 417-480.

<sup>37</sup> Canan and Pring (1988), *op. cit.*, p. 506.

<sup>38</sup> P. Shapiro (2010), “SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International”, *Review of European Community & International Environmental Law*, Vol. 19, No. 1, pp. 14-27.

<sup>39</sup> For a summary of the literature, see R.A. Macdonald, P. Noreau and D. Jutras (2007), “Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)”, Report of the Committee for the Minister of Justice, Montreal, 15 March 2007, pp. 2-9; Bárd, Bayer, Luk and Vosyliute (2020), *op. cit.*, pp. 11-16.

<sup>40</sup> Pring (1989), *op. cit.*, p. 8.



suits; the (presumed) *intent* of the SLAPP applicant; and the (intended) *effect/impact* of SLAPP suits on the SLAPP victim.

#### 4.1. *Ratione personae*

The *ratione personae* of SLAPP suits concerns two parties, namely the party filing the lawsuit considered as SLAPP (SLAPP actor) and the defendant of a SLAPP suit (SLAPP target). As originally perceived in the 1980s, defendants of SLAPP suits are predominantly individuals or organisations who have submitted a petition to, or otherwise approached, a governmental body or office concerning a particular issue (primarily issues of economic or environmental concern).<sup>41</sup> The filers of SLAPP suits according to this definition were commonly “real estate developers, property owners, police officers, alleged polluters, business owners, and state or local government agencies”.<sup>42</sup>

SLAPP suits have typically been observed with respect to the exercise of free speech (beyond “petitioning the government”), such as in the context of journalism and advocacy.<sup>43</sup> Ravo, Borg-Barthet and Kramer note that SLAPP suits often target “journalists, human rights defenders, academics and civil society organisations” given the role they play in “transmitting knowledge, information, ideas and opinions on issues of public interest”.<sup>44</sup>

Importantly, within the context of ‘journalism’, the dramatic change of the media landscape with the rise of online journalism,<sup>45</sup> and the multitude of emerging media and communication channels, such as blogs, social media posts and comments, substantially changed the notion of who may be considered as a ‘journalist’ or exercising ‘media freedom’. In Europe, the judgment of the ECtHR in *Steel and Morris v UK* (also known as the “McLibel” case)<sup>46</sup> has extended the understanding of individuals exercising their right under Article 10 ECHR beyond a ‘passive’ recipient of information.<sup>47</sup> Similarly, the CJEU adopts a broad interpretation of the notion of ‘journalism’ and the role of individuals in the disclosure of information to the public as a component of the freedom of expression.<sup>48</sup> Individuals thus exercising their right to freedom of expression as ‘watchdogs’ or

<sup>41</sup> Canan and Pring (1988), op. cit., pp. 508-511; Pring (1989), op. cit., pp. 25-26

<sup>42</sup> Pring (1989), op. cit., p. 26.

<sup>43</sup> See e.g. J. Ní Mhainín (2019), “A gathering storm: The laws used to silence the media”, Index on Censorship, <https://www.indexoncensorship.org/campaigns/the-laws-being-used-to-silence-media/>; CoE Commissioner for Human Rights (2020), “Time to take action against SLAPPs”, Strasbourg, Council of Europe, 27 October 2020, <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>; S. Hartzler (2007), “Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant”, *Valparaiso University Law Review*, Vol. 41, No. 3, pp. 1235-1284.

<sup>44</sup> L. Ravo, J. Borg-Barthet and X. Kramer (2020), “Protecting Public Watchdogs across the EU: A Proposal for an EU anti-SLAPP Law”, available at [https://dq4n3btxmrc9.cloudfront.net/files/zkecf9/Anti\\_SLAPP\\_Model\\_Directive.pdf](https://dq4n3btxmrc9.cloudfront.net/files/zkecf9/Anti_SLAPP_Model_Directive.pdf).

<sup>45</sup> B. Martens, L. Aguiar, E. Gomez-Herrera and F. Mueller-Langer, “The digital transformation of news media and the rise of disinformation and fake news – An economic perspective”, *Digital Economy Working Paper 2018-02*, <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc111529.pdf>.

<sup>46</sup> *Steel and Morris v. UK*, Application no. 68416/01, 15 February 2005.

<sup>47</sup> Donson, F. (2010), p. 89.

<sup>48</sup> In *Satakunnan Markkinapörssi and Satamedia*, the CJEU considered, among others, that journalism is to be interpreted broadly, applying to all individuals engaging in journalistic activities. Neither the profit-making nature nor the method of communication preclude a particular expression from being considered as a journalistic activity (see C-73/07 *Tietosuoja-vaalutuettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, judgment of 16 December 2008, para. 56-61). In *Buivids*, the CJEU further clarified that the concept of ‘journalistic activity’ does not only apply to professional journalists (C-345/17 *Sergejs Buivids*, judgment of 14 February 2019, para. 55).





‘information providers’ have correspondingly also seen the emergence of SLAPP suits issued against them for their ‘speech’ online and on social media platforms.<sup>49</sup>

It is important to note that, as observed by Bárd et al., within the context of SLAPP, the specific category or role of SLAPP parties are generally of less importance than the “imbalance of power and means” between the applicant and defendant, whereby the party filing a SLAPP suit is in a position of ‘power’.<sup>50</sup> The Council of Europe’s Commissioner for Human Rights describes this as “the power imbalance between the plaintiff and the defendant”.<sup>51</sup> Discussed further below, it is the asymmetry of power that permits the initiator of a SLAPP suit to exhaust and financially drain the defendant through lengthy litigations.

#### **4.2. *Ratione materiae***

As briefly touched upon above, SLAPP suits are not restricted to any specific form of expression or petition. While the concept of SLAPP primarily concerned issues of economic interest or petitioning governmental authorities,<sup>52</sup> it evolved to encompass a non-exhaustive listing of subject matters, which have given rise to SLAPP suits. The relevant literature has identified the following: petitioning governmental action, electoral campaigns, calling for a boycott, journalistic expressions, and forms of expressions ranging from dissatisfaction with governmental services to negative reviews of businesses, including speech on the internet and social media.<sup>53</sup>

Moreover, the existing SLAPP literature contains ample evidence suggesting that SLAPP is not limited to any specific field of public interest. Thus, SLAPP suits have been observed on matters of civil rights,<sup>54</sup> environmental interests,<sup>55</sup> land use rights,<sup>56</sup> (sub)urban development,<sup>57</sup> neighbourly disputes,<sup>58</sup> as well traditional topics of public interest including political criticism and corruption.<sup>59</sup>

#### **4.3. *Merit(lessness)***

A third characteristic typically discussed with respect of SLAPP cases are their merits, or lack thereof. SLAPP suits are often labelled as meritless, if not *frivolous*, lawsuits.<sup>60</sup> The first study, upon which the

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<sup>49</sup> Cf. R.D. Richards (2011), “A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites”, *DePaul Journal of Art, Technology & Intellectual Property Law*, Vol. 21, No. 2, pp. 221-256.

<sup>50</sup> Bárd, Bayer, Luk and Vosyliute (2020), op. cit., p. 14. Cf. also Ní Mhainín (2019), op. cit.

<sup>51</sup> Council of Europe (2020), op. cit.

<sup>52</sup> Canan and Pring (1988), op. cit.

<sup>53</sup> See *ibid.*, citing inter alia Canan and Pring (1988), op. cit.; Richards (2011), op. cit.; CLDC (2014), “Strategic Lawsuits against Public Participation”, website of the Civil Liberties Defense Center, 24 April 2014, <https://cldc.org/slapp-suits/>; S.P. Trende (2006), “Defamation, Anti-SLAPP Legislation and the Blogosphere: New Solutions for an Old Problem”, *Duquesne Law Review*, Vol. 44, No. 4, pp. 607-648; Hartzler (2007), op. cit.; T. Murombo and H. Valentine (2011), “SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa”, *South African Journal on Human Rights*, Vol. 27, No. 1, pp. 95-96.

<sup>54</sup> Canan and Pring (1988), op. cit., p. 506.

<sup>55</sup> Canan (1989), op. cit., p. 25; D.H. Merriam and J.A. Benson (1993), “Identifying and Beating a Strategic Lawsuit Against Public Participation”, *Duke Environmental Law & Policy Forum*, Vol. 3, No. 1, p. 17; Murombo and Valentine (2011), op. cit.

<sup>56</sup> Merriam and Benson (1993), op. cit., p. 17.

<sup>57</sup> Canan and Pring (1988), op. cit., p. 508; Canan (1989), op. cit., p. 25.

<sup>58</sup> Canan and Pring (1988), op. cit., p. 510.

<sup>59</sup> Bárd, Bayer, Luk and Vosyliute (2020), op. cit., op. cit.

<sup>60</sup> See for example Platform for the protection of journalism and the safety of journalists/Council of Europe (2020), “Hands Off Press Freedom: Attacks on media in Europe must not become a new normal”, Strasbourg, Council of Europe, April 2020,





present study is based, highlighted that the majority of SLAPP suits filed (between 70% and 80%) were eventually dismissed in court.<sup>61</sup> More importantly, however, is the reference in the literature to the fact that, for the SLAPP suit filers, the merit of the case (or lack thereof) is of little consequence.<sup>62</sup> For example, Merriam and Benson consider it essential in defining SLAPP suits that “the suits are without merit and contain an ulterior political or economic motive”.<sup>63</sup> Similar references to the (lack of) merits of, or subjective reasoning behind legal action have been expressed by academics,<sup>64</sup> NGOs,<sup>65</sup> and even judicial authorities.<sup>66</sup> This is related to the question of the intent of SLAPP suits.

#### 4.4. Intent

SLAPP suits are often filed without consideration of the merits, or irrespective of the chances of success, of said suits. Instead, the literature identifies other considerations of SLAPP applicants in commencing legal proceedings against the defendants of SLAPP suits. For example, Canan identified four potential motivations for filing SLAPP suits:

- (1) the intent to retaliate for successful opposition on an issue of public interest;
- (2) the attempt to prevent expected future, competent opposition on subsequent public policy issues;
- (3) the intent to intimidate and, generally, to send a message that opposition will be punished; and
- (4) a view of litigation and the use of the court system as simply another tool in a strategy to win a political and/or economic battle.<sup>67</sup>

In particular, the intent to intimidate (point 3 above) is most often cited in the literature when discussing the issue of SLAPP.<sup>68</sup> Hartzler describes the intended use of SLAPP suits as a means “to deter or to punish a party for exercising its political rights by forcing that party to waste time and resources defending its petitioning activity in court”.<sup>69</sup> Ashenmiller and Norman note that “the threat of large personal liability and the costs and uncertainties of extended legal proceedings are thought to have deterrent effects on the willingness of the targeted citizens and others around them to

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p. 21 (“Strategic Lawsuits Against Public Participation (SLAPP) refer to (typically civil) lawsuits brought by powerful individuals or companies that **have no legal merit** and are designed to intimidate and harass the target – especially through the prospect of burdensome legal costs – and not to be won in court”, emphasis added).

<sup>61</sup> Canan and Pring (1988), op. cit., p. 514; Pring (1989), op. cit., p. 12.

<sup>62</sup> Cf. Hartzler (2007), op. cit., p. 1240.

<sup>63</sup> D.H. Merriam and J.A. Benson (1993), “Identifying and Beating a Strategic Lawsuit Against Public Participation”, *Duke Environmental Law & Policy Forum*, Vol. 3, No. 1, p. 18.

<sup>64</sup> Murombo and Valentine (2011), op. cit., p. 84.

<sup>65</sup> RCFP, “Understanding Anti-SLAPP laws”, website of the *Reporters Committee for Freedom of the Press*, <https://www.rcfp.org/resources/anti-slapp-laws/>; WCEL (2002), *Strategic Lawsuits Against Public Participation Handbook*, Vancouver, West Coast Environmental Law, November 2002, <https://www.wcel.org/publication/strategic-lawsuits-against-public-participation-handbook>.

<sup>66</sup> See S. Lott (2004), “Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPS) in Canada”, Ottawa, the Public Interest Advocacy Centre, September 2004, p. 9, referring to the judgment of the Supreme Court of New York in *Gordon v Marrone*, 616 N.Y.S.2d 98.

<sup>67</sup> Canan (1989), op. cit., p. 30.

<sup>68</sup> Cf. Murombo and Valentine (2011), op. cit., p. 84; B. Ashenmiller and C.S. Norman (2011), “Measuring the Impact of Anti-SLAPP Legislation on Monitoring and Enforcement”, *The B.E. Journal of Economic Analysis & Policy*, Vol. 11, No. 1 (Topics), Article 67, p. 2; Constantini and Nash (1991), op. cit., pp. 420-423; Merriam and Benson (1993), op. cit., pp. 21-23; S. Verza (2018), “SLAPP’s 5 W’s: A background of the Strategic Lawsuits Against Public Participation”, published in the Resource Centre on Media Freedom in Europe, 28 June 2018;

<sup>69</sup> Hartzler (2007), op. cit., p. 1240.



participate in the public process”.<sup>70</sup> Ravo, Borg-Barthet and Xander note that SLAPP suits “are deliberately initiated with the intent to intimidate, drain the financial and psychological resources of their targets, rather than genuinely exercising or vindicating a right or obtaining a redress for a certain wrong”.<sup>71</sup> According to the Council of Europe Commissioner for Human Rights, the aim of an applicant of a SLAPP suit is

“[...] not to win the case but to divert time and energy, as a tactic to stifle legitimate criticism. Litigants are usually more interested in the litigation process itself than the outcome of the case. The aim of distracting or intimidating is often achieved by rendering the legal proceedings expensive and time-consuming. Demands for damages are often exaggerated.”<sup>72</sup>

The findings of the original research conducted by Canan in 1989 best demonstrate how the costs of SLAPP suits potentially leads to a chilling effect. Claims for damages from SLAPP suits in the US average around USD 9 million.<sup>73</sup> Moreover, the costs involved in actually defending against SLAPP suits (e.g., lawyer’s fees), notwithstanding that most SLAPP suits end up being dismissed, pile up if one considers that a final court decision take an average 36 months of litigation across multiple judicial levels.<sup>74</sup> While the amounts of legal fees<sup>75</sup> and damages awarded<sup>76</sup> for (civil) defamation cases in the EU are not as high as in the US, these costs are still sufficiently significant to be capable of (being perceived as) producing a chilling effect.<sup>77</sup>

The question of whether intent is a necessary criterion for the determination of whether a case is to be considered as SLAPP is not uncontested in the literature. On the one hand, proponents argue that the criterion of ‘intent’ is necessary to distinguish SLAPP suits from other ‘genuine’ recourses to the judicial system.<sup>78</sup> Macdonald, Noreau and Jutras argue, for example, that the distinction between SLAPP suits and the legitimate exercise of rights lies in the ‘instrumentalisation’ of legal proceedings in the ‘individual political interest’ (*intérêts politiques particuliers*).<sup>79</sup> Ravo et al describe SLAPP suits as “attempts to abuse the law and the courts to undermine the right of individuals or organisations to engage in public participation”.<sup>80</sup>

Opponents of the ‘intent’ criterion draw attention to its lack of utility or effectiveness as a legal criterion. Shapiro, for example, challenges the use of intent as a criterion in any anti-SLAPP legal or policy strategies as being ineffective. Thus, Shapiro notes that

“If the standard for engaging anti-SLAPP provisions is set as either malicious intent or a complete lack of foundation for the case, then all but the most blatantly malicious or ill-founded lawsuits are likely to proceed to a full trial. In addition, by essentially making the issue to be determined the alleged SLAPP

<sup>70</sup> Ashenmiller and Norman (2011), op. cit., p. 2.

<sup>71</sup> Ravo, Borg-Barthet and Xander (2020), op. cit., p. 7.

<sup>72</sup> CoE Commissioner for Human Rights (2020)

<sup>73</sup> Canan (1989), op. cit., p. 26.

<sup>74</sup> Canan (1989), op. cit., p. 26.

<sup>75</sup> Cf. T. Evas and W. van Ballegooij (2019), “Common minimum standards of civil procedure. European added value assessment accompanying the European Parliament’s legislative own-initiative report”, PE 642.804, Brussels, European Parliamentary Research Service, November, p. 28.

<sup>76</sup> IPI (2017), “IPI Report: Trends in Civil Compensation for Defamation in Europe”, 9 June 2017.

<sup>77</sup> Cf. J. Ní Mhainín (2020), “To save European journalism, we need an anti-SLAPPs directive”, *Euractiv*, 14 July 2020.

<sup>78</sup> Cf. Merriam and Benson (1993), op. cit., p. 18.

<sup>79</sup> Macdonald, Noreau and Jutras (2007), op. cit., pp. 6-7.

<sup>80</sup> Ravo, Bor-Barthet and Xander (2020), op. cit., p. 8.



plaintiff's intent or state of mind in filing the suit, extensive discovery and complexity of proof become even greater factors in all SLAPP cases. As such, the cases can be just as complex, lengthy, and expensive to defend as without anti-SLAPP legislation."<sup>81</sup>

#### 4.5. Effects

The most often discussed aspect of the effect of SLAPP suits is the chilling effect thereof on public participation. This chilling effect arises from the high costs involved in the litigation of or defence against SLAPP suits. Further potential effects include the depletion and diversion of resources, as well as psychological trauma.<sup>82</sup> Hartzler notes, for example, that SLAPP suit defendants, even if they are ultimately successful in court, may have spent "months or years defending the suit and accumulated significant legal fees".<sup>83</sup> This focus on the high financial (and psychological) costs involved in SLAPP suits has further been stressed by Shapiro,<sup>84</sup> Richards,<sup>85</sup> Merriam and Benson,<sup>86</sup> and Rosà and Pierobon.<sup>87</sup>

The chilling effect produced by the perceived costs involved in SLAPP suits implicates more than just SLAPP suit defendants. Canan and Pring note, for example, how this "'ripple effect' from the folklore surrounding SLAPPs may discourage political participation by other citizens and groups".<sup>88</sup> In the context of journalistic speech, for example, the Council of Europe Commissioner for Human Rights notes that SLAPP suits are aimed at producing the effect of journalists "abandoning their investigation" or "halting journalistic investigation and reporting".<sup>89</sup> Rosà and Pierobon note that the intended effect of SLAPP suits against journalists is often self-censorship or even 'giving up free speech' in exchange for the lifting of the SLAPP suit.<sup>90</sup> More generally, the chilling effect of SLAPP suits are similarly capable of dissuading the exercise of free speech or public participation *by non-governmental organisations, activists and citizens more generally*.<sup>91</sup>

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<sup>81</sup> Shapiro (2010), op. cit., pp. 24-26.

<sup>82</sup> Ibid.

<sup>83</sup> Hartzler (2007), op. cit., p. 1241.

<sup>84</sup> Shapiro (2010), op. cit., p. 16.

<sup>85</sup> Richards (2011), op. cit., p. 231.

<sup>86</sup> Merriam and Benson (1993), op. cit., p. 21-22.

<sup>87</sup> P. Rosà and C. Pierobon (2020), "SLAPPs: Strategic Lawsuits Against Public Participation", <https://www.balkanicaucaso.org/eng/ECPMF/ECPMF-news/SLAPPs-Strategic-Lawsuits-Against-Public-Participation-198695>.

<sup>88</sup> Canan and Pring (1988), op. cit., p. 515.

<sup>89</sup> CoE Commissioner for Human Rights (2020), op. cit.

<sup>90</sup> Rosà and Pierobon (2020), op. cit.

<sup>91</sup> Cf. Murombo and Valentine (2011), op. cit., p. 95; Hartzler (2007), op. cit., p. 1241; Barylak (2010), op. cit., pp. 845-846; J.A. Preston (2014), "Participation from the deep freeze: 'Chilling' by SLAPP suits", *Environmental and Planning Law Journal*, Vol. 31, No. 1, pp. 47-63; Greenpeace (2020), "Sued Into Silence: How the rich and powerful use legal tactics to shut critics up", Brussels, Greenpeace EU, July 2020; R. Wilts, O. Brandes and B. Rogachevsky (2002), "The West Coast Environmental Law SLAPP Handbook", Vancouver, BC, West Coast Environmental Law, p. 3; Ecojustice (2010), "Breaking the Silence: The urgent need for anti-SLAPP legislation in Ontario", Toronto, ON, Ecojustice, November 2010, p. 7-8; Merriam and Benson (1993), op. cit., p. 22.



## 5. The practice of the ECtHR in the context of SLAPP

As explained in Chapter 2 of the present study, EU Member States subscribe to a set of common values which are expressed in Article 2 TEU, such as freedom, democracy, the rule of law, and respect for human rights. Freedom of expression, freedom of assembly, and the right to an effective remedy and to a fair trial are also expressed in the EU Charter of Fundamental Rights (Article 11, Article 47). However, given its 70-year-history, the most influential international human rights framework for the Member States of the European Union is the European Convention of Human Rights, together with the practice and interpretation of the European Court of Human Rights (ECtHR). In a previous study, we examined how the principles of freedom of expression crystallised in the practice of the European Court of Human Rights reflect the values that call for the explicit protection of SLAPP victims from vexatious lawsuits.<sup>92</sup> This study focuses specifically on principles and case law which can be brought in close connection with practical considerations to tackle SLAPP cases.

The principles that the ECtHR has developed in defamation cases through its decisions are:

1. The **'public interest'** principle: publications which contribute to a debate on a matter of public interest or general concern enjoy a higher threshold of protection.<sup>93</sup> There lies also a public interest in the protection of journalistic sources.<sup>94</sup>
2. The **higher tolerance for public officials**: the limits of acceptable criticism are wider for public figures, especially politicians, state officials and employees.<sup>95</sup>
3. The possibility to **prove the truthfulness** of factual statements.<sup>96</sup>
4. **Good faith of journalists** when reporting about a matter of public concern;<sup>97</sup> not having disproportionate expectations regarding journalistic duty.<sup>98</sup>
5. The **need to examine statements in context**.<sup>99</sup>

Further, some more specific principles were declared in a lawsuit which is a typical SLAPP case:<sup>100</sup>

6. NGOs and activists enjoy protection similar to press workers.
7. The state has an obligation to ensure the possibility of defendants to receive legal aid, in order to ensure equality of arms.<sup>101</sup> The lack of legal aid rendered the defamation proceedings unfair, in breach of Article 6 § 1 ECHR.<sup>102</sup>

<sup>92</sup> Bárd, Bayer, Luk and Vosyliute (2020), op. cit.

<sup>93</sup> ECtHR, *Jersild v. Denmark*, Appl.No. 15890/89, judgment of 23 September 1994; ECtHR, *Sunday Times v. the United Kingdom*, Appl.No. 6538/74, judgment of 26 April 1979; ECtHR, *Thorgeir Thorgeirson v. Iceland*, Appl.No. 13778/88, judgment of 25 June 1992.

<sup>94</sup> ECtHR, *Goodwin v. UK*, Appl.No. 17488/90, judgment of 27 March 1996.

<sup>95</sup> ECtHR, *Lingens v. Austria*, Appl.No. 9815/82, judgment of 08 July 1986.

<sup>96</sup> ECtHR, *Castells v. Spain*, Appl.No. 11798/85, judgment of 23 April 1992.

<sup>97</sup> ECtHR, *Bladet Tromsø v. Norway*, Appl.No. 21980/93, judgment of 09 July 1998

<sup>98</sup> ECtHR, *Thoma v. Luxembourg*, Appl.No. 38432/97, judgment of 29 March 2001. The author of the article accused officials of the Water and Forestry Commission of taking a percentage on plant purchases made with a view to reforestation and of carrying out repeated planting for that purpose, when a single planting would have sufficed. Sixty-three civil servants sued the radio speaker for damage to their reputation who reported about this article. The Court found that the journalist satisfied his journalistic duties when he pre-warned of the content of the article, named its author, and sought the opinion of a woodlands owner to test the truth of the allegations.

<sup>99</sup> ECtHR [GC], *Morice v. France*, Appl.No. 29369/10, judgment of 24 April 2015; ECtHR, *Roland Dumas v. France*, Appl.No. 34875/07, judgment of 15 July 2010.

<sup>100</sup> ECtHR, *Steel and Morris v. UK*, Appl.No. 68416/01, judgment of 15 February 2005.



8. Excessive damages may also make an interference disproportionate.<sup>103</sup>

It must be noted that SLAPP cases have relatively low chances of reaching the ECtHR. First, SLAPP cases are generally meritless, and therefore likely to be rejected by courts, albeit often only after the court has assessed the merits of the claim, i.e., by the end of (often lengthy) legal proceedings. If the domestic court found in favour of the defendant, vexatious litigants are less likely to apply to the ECtHR. In case the domestic court decided the case in favour of the plaintiff, the case is likely to be not entirely meritless, although it may still be unfounded.<sup>104</sup> It is then an additional moral and financial burden for the victim to apply to the ECtHR, which would not be taken on by all SLAPP victims.

There is a fine line between general freedom of expression cases where balancing is required, and SLAPP cases, where the claim is without merit or an abuse of process (see more in Chapter 7). In our previous study, we discussed the ways in which balancing was exercised by ECtHR by developing and relying notably on the principles listed above. The study demonstrated how the public interest objective pushed the balance to favour press freedom.<sup>105</sup> Below, we focus our analysis on cases which evidence other factors characteristic of SLAPP. Our analysis extended to the jurisprudence of Article 10 of ECHR (freedom of expression), Article 8 of ECHR (the right to private and family life) and Article 6 of ECHR (the right to a fair trial). In cases that carried the elements of SLAPP, the ECtHR typically found a violation of Article 10, and sometimes also of Article 6. Article 8 ECHR is usually balanced against Article 10 and prevails only in exceptional cases.

Freedom of assembly (Article 11 ECHR, Article 12 Charter) is central for public participation. Restricting this right by prohibiting or restricting demonstrations and protests restricts public participation. The assessment of restrictions is similar to Article 10 ECtHR (Article 11 Charter): Restriction can be illegitimate, unnecessary or disproportionate, but the straightforward nature of the restriction would not leave room for inspection of vexatious or abusive motives. For these reasons, balancing of this right and its legal background are not specifically analysed in this study.

### ***5.1. Public authorities, including civil servants and the judiciary***

As the ECtHR has formulated in a number of decisions, civil servants acting in an official capacity, just like politicians, are also subject to wider limits of acceptable criticism.<sup>106</sup>

<sup>101</sup> As the Court held, the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There had, therefore, been a violation of Article 6 § 1.

ECtHR, *Steel and Morris*, op. cit.

<sup>102</sup> ECtHR, *Steel and Morris*, op. cit., § 95.

<sup>103</sup> ECtHR, *Steel and Morris*, op. cit.; ECtHR, *Ghiufer Predescu v. Romania*, Appl.No. 29751/09, judgment of 27 June 2017. In *Ghiufer Predescu v. Romania*, the journalist who commented on the mayor's activities on television, was ordered to pay 50.000 lei damages. The Court found this compensation extremely high and one which had the potential to exercise a chilling effect.

<sup>104</sup> ECtHR, *Krone Verlag GmbH & Co. KG v. Austria*, Appl.No. 34315/96, judgment of 26 May 2002. The newspaper published about a politician unlawfully receiving three salaries.

<sup>105</sup> ECtHR, *Bladet Tromsø*, op. cit.; ECtHR, *Jersild v. Denmark*, op. cit.; ECtHR, *Sunday Times v UK*, op. cit.

<sup>106</sup> ECtHR, *Mariapori v. Finland*, Appl.No. 37751/07, judgment of 06 July 2010; ECtHR, *Nikula v. Finland*, Appl.No. 31611/96, judgment of 21 March 2002.



In several cases, members of the judiciary found it difficult to tolerate criticism. For example, the 'Borrel-case', an investigation into the contested suicide of a judge, attracted considerable criticism of the judiciary around the publication of a specific article, resulting in three different applications at the ECtHR.<sup>107</sup> The ECtHR concluded that the article in question was a report of a press conference in a case of public interest. The article was found to have used the conditional tense, with inverted commas in various places in order to avoid any confusion in the reader's mind between the source of the remarks and the newspaper's analysis, citing each time the names of the persons speaking for the reader's information. Therefore, it could not be maintained, as the domestic court did, that some passages were imputable to the applicants. The ECtHR found a violation of Article 10 and awarded a compensation of 7500 EUR for non-pecuniary damages and approximately 15.000 EUR for costs.<sup>108</sup>

In a second related case, *Le Monde* published an interview with the lawyer of Judge Borrel's widow, who expressed harsh criticism, claiming that that the previous procedure of two judges were "completely at odds with the principles of impartiality and fairness".<sup>109</sup> The ECtHR found that, while the lawyer's remarks were at times hostile and negative, "the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression".<sup>110</sup> In addition, lawyers should be able to draw the public's attention to potential shortcomings in the justice system and the judiciary might benefit from constructive criticism. Therefore, the ECtHR unanimously decided for violation of both Article 10 and Article 6. The factors examined were the following: (1) the remarks affected the operation of the judiciary which was a matter of public interest; the case in question attracted considerable public interest; (2) persons of authority are afforded a particularly narrow margin of appreciation; (3) the remarks were more value judgments than statements of fact; in addition there was a sufficiently close connection between the facts of the case and the remarks, which therefore could not be regarded as misleading or as a gratuitous attack. (4) The fine and the compensation were considered to be exaggerated and the ECtHR awarded 15.000 EUR for non-pecuniary damage to the applicant.

In similar cases, other national judges' reactions to legitimate criticism, and in particular to the imposition of criminal penalties, were found to be disproportionate and in violation of Article 10.<sup>111</sup>

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<sup>107</sup> ECtHR, *Floquet and Esménard v. France*, Appl.Nos. 29064/08 and 29979/08, decision of 10 January 2012; ECtHR, *July and Sarl Liberation v. France*, Appl. No. 20893/03, judgment of 14 February 2008; and ECtHR, *Morice v. France* op. cit. In the first case, criticism on the proper functioning of the judiciary was formulated by the journal *Libération* and its publication director Serge July.

<sup>108</sup> ECtHR, *July and Sarl Liberation*, op. cit.

<sup>109</sup> The lawyer had been involved previously with one of the criticised judges in another high-profile case related to the church of Scientology, where – just like in the Borrel case – procedural irregularities had been detected. In the Borrel case, both judges were exempted from their duty. They accused *Le Monde*'s publication director, the journalist and the lawyer for defamation and domestic courts found them guilty, imposed a fine on all of them and ordered to pay a compensation of 7500 EUR to each of the judges.

<sup>110</sup> ECtHR, *Morice v. France* op. cit. at 167.

<sup>111</sup> ECtHR, *L.P. and Carvalho v. Portugal*, Appl. Nos. 24845/13 and 49103/15, judgment of 08 October 2019; ECtHR, *Pais Pires de Lima v. Portugal*, Appl.No. 70465/12, judgment of 12 February 2019. In *Pais Pires de Lima v. Portugal*, the Court found it disproportionate when a lawyer was fined 100.000, later reduced to 50.000 EUR in compensation for unfounded statements about a judge in a confidential impartiality procedure.





## 5.2. Fair trial

The appellant of a SLAPP case is likely to refer to his or her right to access to court and the right to a fair trial when initiating his or her vexatious lawsuit.

First, the right to access to a court will be discussed. Article 6(1) enshrines the right to a court, of which the right to access to a court is an important aspect: “in the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>112</sup> Access to a court, incorporated primarily in the civil limb<sup>113</sup> of Article 6, is indeed an important element of the rule of law and the protection of all other rights. But the right of access to justice, as with any right, is subject to some limitations, as long as these limitations do not impair the very essence of the right.<sup>114</sup> Limitations to the right to access must have a legitimate aim, and must be both necessary and proportionate.<sup>115</sup> With regard to the proportionality of the restriction, the state’s margin of appreciation may depend on relevant international law obligations, and on whether there is a European cultural consensus in the area.<sup>116</sup> An Article 6 violation cannot be found in case the rights restriction is compatible with principles established by the ECtHR.<sup>117</sup> An envisaged anti-SLAPP law would serve the protection of the rights of others, which is a legitimate aim under subsection 2. of Article 10 of ECHR.

The right to access to a court is not applicable to the victims of crimes. Should the victim not be able to file charges for a crime, not their right to access to a court, but their substantive right will be limited.<sup>118</sup> Therefore, access to a court from the victim’s perspective arises only in relation to the substantive right in question, e.g., the right to reputation. Since, however, the aim of SLAPP is not to pursue a particular outcome, the genuine objective of the case is not to protect a particular substantive right. The lack of merit of the case, or the malicious intent to vex the defendant may be clear at this early stage.<sup>119</sup> Therefore, the prosecutor or the court may discontinue the case on the basis of anti-SLAPP legislation.

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<sup>112</sup> ECtHR, *Golder v. the United Kingdom*, Appl.No. 4451/70, judgment of 21 February 1975; ECtHR [GC], *Zubac v. Croatia*, Appl. No. 40160/12, judgment of 5 April 2018; ECtHR, *Běleš and Others v. the Czech Republic*, Appl.No. 47273/99, judgment of 12 November 2002; ECtHR [GC], *Naït-Liman v. Switzerland*, Appl.No. 51357/07, judgment of 15 March 2018.

<sup>113</sup> The alleged victim has no right to an access to a court under the criminal limb. Instead, his or her substantive right is limited in case the criminal behaviour is not tackled in the frame of criminal proceedings. Criminal cases will be discussed *infra*.

<sup>114</sup> ECtHR, *Philis v. Greece (no.1)*, Appl. Nos. 12750/87; 13780/88; 14003/88, judgment of 27 August 1991; ECtHR, *De Geouffre de la Pradelle v. France*, Appl.No. 12964/87, judgment of 16 December 1992; ECtHR [GC], *Stanev v. Bulgaria*, Appl.No. 36760/06, judgment of 17 January 2012; ECtHR [GC], *Baka v. Hungary*, Appl.No. 20261/12, judgment of 27 May 2014.

<sup>115</sup> ECtHR [GC], *Lupeni Greek Catholic Parish and Others v. Romania*, Appl.No. 76943/11, judgment of 29 November 2016; ECtHR [GC], *Naït-Liman v. Switzerland*, op. cit.

<sup>116</sup> ECtHR [GC], *Naït-Liman v. Switzerland*, op. cit., §§ 173-175.

<sup>117</sup> European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb), updated to 31 August 2020, [https://www.echr.coe.int/documents/guide\\_art\\_6\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_eng.pdf), § 112.

<sup>118</sup> In domestic violence cases for example, instead of an Article 6 violation, an infringement of Article 8 is determined. See ECtHR, *A. v. Croatia*, Appl.No. 55164/08, judgment of 14 October 2010.

<sup>119</sup> As we argued earlier, when assessing meritlessness and intent, the burden of the proof could be reversed. Once the defendant submits evidence that the claim has been made because of his or her public participation, the plaintiff should need to provide substantial evidence to prove that his or her claim indeed has merit. “This substantial evidence needs to satisfy a higher threshold than usual, because it ought to demonstrate that the claim is supported by facts, which, if true



Second, the right to a fair trial also enshrined in Article 6 is relevant to SLAPP cases and may apply to both the civil and the criminal prong of the provision. In particular, the principle of 'equality of arms' has relevance for SLAPP targets. According to this principle,<sup>120</sup> each party must be afforded a reasonable opportunity to present his case "under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".<sup>121</sup> The principle has been reinforced in *Steel and Morris v. UK*,<sup>122</sup> the landmark SLAPP case at the ECtHR between McDonald's and Greenpeace.

Article 6 considerations may also serve as inspiration for stopping a criminal case at an early phase. In relation to cases involving agent provocateurs, the ECtHR refused to go into the merits when checking the fairness of the trial. Instead, it held that the undercover agents' "intervention and its use in the impugned criminal proceedings meant that, *right from the outset*, the applicant was definitively deprived of a fair trial" (emphasis added).<sup>123</sup> Similarly to certain types of SLAPP cases, entrapment cases involving agent provocateurs feature a vertical power imbalance, as it is the state which abuses its position (SLAPP suits can be both horizontal or vertical). This case-law is useful to show that certain criminal cases are faulty from their beginning, and the abuse poisons the process to such a grave extent, that there is no need to look at the entirety of the procedure.

Article 6 may also be relevant in freedom of expression cases, such as those discussed above. In one criminal defamation case, a lawyer criticised the judges of a murder trial for supposedly paying insufficient attention to the proceedings. He was sentenced to five days imprisonment for his criticism. The ECtHR found that the professionalism and fairness of judicial trials is of public interest, therefore the resultant domestic ruling that penalised the lawyers' criticism with an immediate prison sentence, ought not have taken place. The trial judges' reaction and concluding sentencing of the trial lawyer for his complaint and remark was concluded to have been exaggerated and disproportionate.<sup>124</sup>

### 5.3. Prison sentence

Disproportionate legal claims or consequences are typical causes for qualifying a lawsuit as a SLAPP case.<sup>125</sup> Any criminal penalty is generally regarded as disproportionate for defamation cases by the ECtHR. ECtHR held prison sentences acceptable only in exceptional cases such as hate speech or incitement to hatred, where other fundamental rights are severely violated.<sup>126</sup>

In a classic case of defamation in a matter of legitimate public interest against public officials (e.g., tax authorities), a prison sentence – even a conditional one – would be unjustifiable and "by its very

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would lead to a favourable judgment. Importantly, at this stage, the court does not weigh the evidence, neither examines their veracity, which is assumed" *Bárd, Bayer, Luk and Vosyliute* (2020), op. cit., p. 28.

<sup>120</sup> ECtHR, *Szwabowicz v. Sweden*, Appl.No. 434/58, decision of 30 June 1959.

<sup>121</sup> ECtHR, *Ankerl v. Switzerland*, Appl.No. 17748/91, judgment of 23 October 1996; ECtHR, *De Haes and Gijssels V. Belgium*, Appl.No. 19983/92, judgment of 24 February 1997.

<sup>122</sup> ECtHR, *Steel and Morris v. UK*, op. cit.

<sup>123</sup> ECtHR, *Teixeira de Castro v. Portugal*, Appl.No. 25829/94, judgment of 9 June 1998.

<sup>124</sup> ECtHR [GC], *Kyprianou v. Cyprus*, Appl.No. 73797/01, judgment of 11 December 2005.

<sup>125</sup> ECtHR, *Steel and Morris*, op. cit.; ECtHR, *Ghiufer Predescu v. Romania*, Appl.No. 29751/09, judgment of 27 June 2017.

<sup>126</sup> Explained in ECtHR [GC], *Cumpănă and Mazăre v. Romania*, Appl.No. 33348/96, judgment of 17 December 2004; ECtHR, *Ruokanen and Others v. Finland*, Appl.No. 45130/06, judgment of 06 April 2010; ECtHR, *Atamanchuk v. Russia*, Appl.No. 4493/11, judgment of 11 February 2020.





nature, will inevitably have a chilling effect on public debate".<sup>127</sup> Custodial sentences were seen as disproportionate even without the public interest element.<sup>128</sup>

Similarly, where the press is concerned, criminal-law penalties are generally considered too severe, even when relatively minor or suspended,<sup>129</sup> with special regard to the stigmatising nature of the criminal conviction itself.<sup>130</sup>

ECtHR also referenced Resolution 1577 (2007)<sup>131</sup> of the Council of Europe, in which the Parliamentary Assembly declared that prison sentences for defamation should be abolished without delay (point 13). Nevertheless, prison sentences are still foreseen for defamation in many Member States of the European Union.

In this Resolution, the Parliamentary Assembly also addressed several other relevant factors of SLAPP cases. Among them, it condemned "abusive recourse" to unreasonably large awards for damages and interest in defamation cases (point 14). Besides having called upon the states to abolish prison sentences for defamation, it also called upon them to:

- guarantee that there is no misuse of criminal prosecutions for defamation and safeguard the independence of prosecutors in these cases (point 17.2);
- remove from their defamation legislation any increased protection for public figures, in accordance with the Court's case law, (point 17.6);
- ensure the 'equality of arms', including the possibility to prove the truth of their assertions; as well as to rely on the general interest; (point 17.7);
- set reasonable and proportionate maxima for awards for damages (caps on damages) (point 17.8);
- provide appropriate legal guarantees against disproportionate awards for damages (point 17.9).

#### **5.4. Removal from the office**

Labour sanctions have been identified as a consequence of public participation. Some victims of vexation for performing their public duty have successfully applied to the ECtHR. Laura Kövesi, the former chief prosecutor of the Romanian National Anticorruption Directorate, was removed from her office before the end of her second term lapsed, following her criticism of legislative reforms in the area of corruption. She claimed that she was unable to start a court procedure which would have examined her substantive argument. The Court found a violation of both Article 6 and Article 10.<sup>132</sup> A

<sup>127</sup> ECtHR, *Mariapori v. Finland*, op.cit., para. 68.; ECtHR [GC], *Cumpănă and Mazăre v. Romania*, op.cit.; ECtHR, *Balaskas v. Greece*, Appl.No. 73087/17, judgment of 05 November 2020; ECtHR, *Mika v. Greece*, Appl.No. 10347/10, judgment of 10 December 2013.

<sup>128</sup> ECtHR, *Kanellopoulou v. Greece*, Appl.No. 28504/05, judgment of 11 October 2007, ECtHR, *Sallusti v. Italy*, Appl.No. 22350/13, judgment of 07 March 2019.

<sup>129</sup> ECtHR, *Haldimann and others v. Switzerland*, Appl.No. 21830/09, judgment of 24 February 2015. Journalists secretly filmed an insurance broker to prove malpractice. Swiss courts found that the private life of the broker was violated and imposed fines. The Court found that the public interest to report about penalties overrode the private interest.

<sup>130</sup> ECtHR, *De Carolis and France Télévisions v. France*, Appl.No. 29313/10, judgment of 21 February 2016.

<sup>131</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17588&lang=en>

<sup>132</sup> ECtHR, *Kövesi v. Romania*, Appl.No. 3594/19, judgment of 5 May 2020.



similar case was presented in *Baka v. Hungary*, where the President of the Hungarian Supreme Court was removed from his mandate following his criticism of legislative reforms.<sup>133</sup> Outside the Council of Europe setting, the Whistleblower Directive of the EU may provide protection in such cases.<sup>134</sup>

### 5.5. Balancing with the right to privacy

Unlike reputation, the right to the protection of private and family life is recognised as an autonomous human right in the ECHR and incorporated as Article 8. This provides a stronger status to this right than being merely a legitimate aim for restriction of the right to freedom of expression. When an expression is thought to violate privacy, two equal fundamental rights need to be balanced by the ECtHR.

The ECtHR examines the usual factors when balancing between the two rights of Article 8 and 10: contribution to the democratic public discourse; and matter of public interest. In several landmark cases, the ECtHR declared and reiterated that "the limits of permissible criticism are wider as regards a politician than as regards a private individual. Unlike the latter, the former inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance."<sup>135</sup> The Court reiterated, that civil servants acting in an official capacity are, like politicians..."<sup>136</sup> For example, the Court established violation of Article 10 in cases where the press reported on politicians' private family life,<sup>137</sup> and found that the public interest argument held even when one of the data subjects did not have official responsibility. Similarly in *Axel Springer v. Germany*, the Court found that the case had a public interest even without the data subject having official responsibility, when he was sufficiently well known to qualify as a public figure.<sup>138</sup> In *Axel Springer*, the Court examined three criteria: (1) the published facts were "public judicial facts" of the arrest and conviction which could be considered as having a general public interest, (2) the actor had actively sought the limelight by revealing details about his private life in a number of interviews. Therefore, his legitimate expectation of his protected privacy was reduced; and (3) the information was factual and received through official channels.

The right to private life prevailed against freedom of expression in rare cases, such as when the press showed the dead body of a murdered public official<sup>139</sup> or when photos were taken surreptitiously during a summer holiday.<sup>140</sup>

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<sup>133</sup> ECtHR [GC], *Baka v. Hungary*, op. cit.

<sup>134</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

<sup>135</sup> ECtHR, *Lingens v. Austria*, Appl.No. 9815/82, judgment of 8 July 1986, para. 42.

<sup>136</sup> ECtHR, *Thoma v. Luxembourg*, Appl.no. 38432/97, judgment of 29 March 2001.

<sup>137</sup> ECtHR, *Flinkkilä and Others v Finland*, Appl.No. 25576/04, judgment of 6 April 2010. A criminal incident within the private life of a public personality, which led to his dismissal, was discussed in press. The Court found no violation of Article 8, with regard to the public office of one of the convicted persons, and the direct involvement of the other convicted person; and ECtHR, *Saaristo and Others v Finland*, Appl.No. 184/06, judgment of 12 October 2010. Press reports about politicians' private relationships with each other, in an objective and not illicit manner; ECtHR [GC], *Couderc & Hachette Filipacchi Associes V. France*, Appl.No. 40454/07, judgment of 10 November 2015: the press reported about the extramarital born son of the Prince of Monaco - the Court found no violation of Article 10.

<sup>138</sup> ECtHR, *Axel Springer AG v Germany*, Appl.No. 39954/08, judgment of 07 February 2012, § 71.

<sup>139</sup> ECtHR, *Hachette Filipacchi Associes v. France*, Appl.No. 71111/01, judgment of 14 June 2007.



Since the GDPR has established a more solid data protection regime in the European Union, personal data and privacy has acquired a stronger legal status, which may more often get into conflict with freedom of expression. Importantly, Article 85 of the GDPR provides for Member States to create certain exemptions from the rules on data protection necessary to reconcile the right to the protection of personal data with the freedom of expression and information. Thus, in theory, the regulation is apt to remain in harmony with the practice of the ECtHR which systematically favours freedom of expression. However, as Article 85 provides relative freedom for the Member States in defining the detailed rules, a diverging and sometimes restrictive practice can be observed (see more in Chapters 5 and Chapter 8).

### ***5.6. Summary***

These principles, which have crystallised in the ECtHR's practice, ought to be respected by all Member States of the Council of Europe, including EU Member States. A consequent application of these principles in a pre-litigation phase could lead to the recognition and an early dismissal of SLAPP cases. The mapping research results show that there is room in some Member States to further educate judges about the ECHR and relevant case law.

The principles that were identified as possible anti-SLAPP tools affect procedure (access to a court, fair trial, equality of arms and legal aid); content (public interest); personal scope (same protection for journalists, NGOs and activists; higher tolerance against criticism and scrutiny required from public officials, including public servants, state officials, judges and publicly well-known figures); the good faith of journalists and fulfilment of ethical standards as a defence; and have certain consequences (proportionate, not exaggerated, and no criminal penalties).

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<sup>140</sup> As opposed to the second case by the same applicant, when Photographs were taken during a walk in a skiing resort, and the article was about the poor health of the prince - no violation of Article 10 was found. ECtHR [GC], *Von Hannover v. Germany* (no. 2), Appl. Nos. 40660/08 and 60641/08, judgment of 7 February 2012. See also the first *Von Hannover* case: ECtHR, *Von Hannover v. Germany* (no. 1), Appl.No. 59320/00, judgment of 24 June 2004.



## 6. The 'abuse of right' concept

"Powerful private individuals, as well as desperate people, unscrupulous thugs, courts, administrators and legislators abuse the law by accepting or creating rights abuse, among other things. But the preachers of the impeccable majesty of law do not like to talk about this." (András Sajó, former judge of ECtHR, constitutional scholar)<sup>141</sup>

### 6.1. Abuse of rights and resilient democracy

The concept of 'abuse of rights' aims to protect democracy from those who, exploiting the rights and freedoms enabled by the democratic system, would strive to overthrow it and gain (or retain) undemocratic or illegal power.

Contemporary democracy is based on civic processes,<sup>142</sup> and the active participation of civil society in the democratic public discourse.<sup>143</sup> Suppression of civil participation in public discourse, whether through assembly, expression or advocacy activities endangers the operation of the civic processes of democracy. With a chilled public discourse, democracies may remain operational for some time, but run a risk of erosion. According to the cascade effect '*one event increases the likelihood of a different second one that disproportionately increases the likelihood of an evil consequence*'<sup>144</sup>, and the tipping point cannot be calculated.

### 6.2. Development of the concept abuse of rights in Europe

The concept of abuse of rights emerged in Continental private law in the second half of the 19th century, as a reaction against the absolutism of possessive individualism.<sup>145</sup>

In legal doctrine, the idea of an abuse of rights originates in the idea that rights serve a larger social purpose.<sup>146</sup> The legal philosopher Josserand argued at the beginning of the 20th century that rights are social constructions and can be interpreted only in the context of the society in which they emerge. This is in synchrony with the idea of public participation in a democracy, the public watchdog role of the press and of other entities such as NGOs, or individual journalists, bloggers and whistleblowers. The public watchdog function inherently includes a discovery of unpleasant facts, and the criticism of anomalies within the democratic system. This is often perceived as an attack generating counterattacks by those criticised, in the form of legal or non-legal actions and rhetoric aimed at silencing the watchdog or discrediting their findings. The real motive of these legal actions (rather than the official pretext of some legal aim, such as the protection of an individual's reputation, or the prudence of taxation) is to suppress the uncovering and exposure of a litigants' harmful or

<sup>141</sup> Sajó, A. (2006) 'Abuse of Fundamental Rights or the Difficulties of Purposiveness', in: Sajó, A. (ed.), *Abuse: The Dark Side of Fundamental Rights*, Utrecht: Eleven International Publishing, p. 33.

<sup>142</sup> U.K. Preuß, 'Die empfindsame Demokratie', in: C. Leggewie and H. Meier (eds.), *Verbot der NPD oder mit Rechtsradikalen leben?*, Frankfurt am Main: Suhrkamp, 2002, p. 104-119, cited in Niesen, *German Law Journal*, par. 43.

<sup>143</sup> Bayer et al. (2019) *Disinformation and Propaganda*. pp. 52-53.

<sup>144</sup> Sajó, A. (2006) From Militant Democracy to a Preventive State, *Cardozo Law Review*, 27:5, 2255-2294, 2287.

<sup>145</sup> Sajó, 'Abuse of Fundamental Rights or the Difficulties of Purposiveness', in: A. Sajó (ed.), *Abuse: The Dark Side of Fundamental Rights*, Utrecht: Eleven International Publishing, 2006, p. 29.

<sup>146</sup> De Morree, 140.



illegal actions against the public interest. For this reason, if a legal action comes as a response to a criticism in a public matter, it should be regarded as an abuse of law, or an abuse of rights.

Below, we introduce some basic concepts of the abuse of rights that could be useful when designing anti-SLAPP measures.

Special attention will be devoted to the abuse clause of the European Convention on Human Rights, Article 17 and its judicial practice. Moreover, notice is taken of the corresponding clauses of other human rights documents, such as Article 30 UDHR, Article 5 ICCPR, and Article 54 of the European Union Charter of the Fundamental Rights.<sup>147</sup> Apart of the European Court of Human Rights (the jurisprudence of which will be explored in detail), the European Court of Justice also has applied the principle of prohibition of abuse of rights, or also called "abuse of law", in particular in commercial law, tax law or criminal law.<sup>148</sup> Some scholars argue that the Court of Justice has also opened the door for claims in the field of non-commercial matters,<sup>149</sup> though the Court of Justice did not accept Member State claims of abuse of rights in migration cases.<sup>150</sup>

Vexatious claims are specifically addressed by the ECHR: Article 35 (3)(a) of ECHR provides that applications are inadmissible if they are an abuse of the right of individual application.<sup>151</sup> According to the ECtHR's own interpretation<sup>152</sup> this is to be understood as "*the harmful exercise of a right for purposes other than those for which it is designed*", including vexatious applications, and manifestly ill-founded applications which are repeatedly lodged.

However, the ECtHR interprets this clause even more narrowly: "*it requires not only manifest inconsistency with the purpose of the right of application but also some hindrance to the proper functioning of the Court or to the smooth conduct of the proceedings before it*" (S.A.S. v. France, 43835/11, 01/07/2014, para. 66, referring to *Miroļubovs and Others v. Latvia*, no. 798/05, 15 September 2009, para. 65.). The main motive of ECtHR to ward off vexatious complaints is to avoid gratuitous work, especially such which would be incompatible with its real functions under the Convention.

The terms 'abuse of law' and 'abuse of right' are sometimes used interchangeably,<sup>153</sup> although the term 'abuse of law' is often used in the context of public law, whereas 'abuse of rights' refers to the

<sup>147</sup> De Morree, 135., citing the Opinion of Advocate General Bot delivered on 5 May 2011 in the joined cases C-244/10 and C-245/10, *Mesopotamia Broadcast A/S METV and Roj TV A/S v. Bundesrepublik Deutschland*, [2011] ECR I-08779-8796, par. 69. "The freedom of expression guaranteed in Article 11 of the Charter ceases to operate when the message infringes other principles and fundamental rights recognised by the Charter, such as the protection of human dignity and the principle of non-discrimination".

<sup>148</sup> CJEU Case C-255/02, *Halifax*, [2006] ECR I-1609; CJEU Case C-110/99, *Emsland-Stärke*, [2000] ECR I-1569.

<sup>149</sup> K. E. Sørensen, 'What is a General Principle of EU Law? A Response', in: De la Feria and Vogenauer, *Prohibition of Abuse of Law, A New General Principle of EU Law?*, Oxford/Portland: Hart Publishing, 2011. p. 29.

<sup>150</sup> De Morree, 138.

<sup>151</sup> Within the meaning of Article 35 § 3 of the ECHR, if the conduct of the applicant is contrary to the purpose of the right of application.

<sup>152</sup> The Court's Admissibility guide: *Practical Guide on Admissibility Criteria*. p. 48-51.

<sup>153</sup> de Morree, 154-157; [Opinion of Advocate General Bobek](#) delivered on 7 September 2017. *Edward Cussens and Others v T. G. Brosman*. Request for a preliminary ruling from the Supreme Court (Ireland), Direct applicability of the principle of prohibition of abuse of rights recognised in *Halifax and Others (C-255/02)* Case C-251/16.



misuse, i.e., the "unreasonable, ill-intentioned or harmful" use, of human rights by the right holder themselves.<sup>154</sup>

In the context of SLAPP, both interpretations can be relevant. SLAPP may be initiated by private natural or legal persons, as well as governmental authorities to suppress public criticism.

### ***6.3. Abuse of rights in the ECtHR case-law***

The core purpose of Article 17 is the protection of the democratic regime, and the prevention of the revival of totalitarian ideas through any exploitation of the rights and freedoms granted in the ECHR.

Article 17 says:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 17 applies theoretically to all the rights enshrined in the Convention. However, in the case *Lawless v. Ireland*, the Court limited its application to those rights that directly contribute to the destruction of other rights guaranteed in the Convention.<sup>155</sup> In the *Lawless* case, the Court contradicted the Irish government which asked the Court to deny ECHR protection for the applicant because he was a member of the IRA. The Court held that to achieve the purpose of Article 17, it is "not necessary to take away every one of the rights and freedoms guaranteed in the Convention from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms" (para 6.). It pointed out that Article 17 is negative in scope, meaning that it cannot be relied on "in order to justify or perform acts contrary to the rights and freedoms recognised therein", but it cannot be construed *a contrario* as depriving a physical person of other fundamental individual rights guaranteed by the Convention (para 7.)

#### ***6.3.1. The right to reputation in the Convention***

While not all rights may be relevant for the abuse clause,<sup>156</sup> both Article 10 as well as Article 8 ECHR (on the right to respect of private and family life, which embraces the right to reputation and which is invoked in case of defamation) are relevant. However, reputation is not an explicit right in the Convention, but is merely mentioned as a legitimate aim of restriction in Article 10 (2). This has been declared by the ECtHR in the case *Lingens v. Austria* (9815/82, 08/07/1986), when the ECtHR rejected the Government's argument that the case concerned a conflict between Convention rights, holding that "there is ... no need in this instance to read Article 10 in the light of Article 8" (Lingens at para. 38.). This was reinforced in *Karakó v. Hungary*, where the Court established that "reputation has only been deemed to be an independent right sporadically and mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life" and that "the purported conflict between Articles 8 and 10 of the Convention,

<sup>154</sup> See [Opinion of Advocate General Bobek](#), A. 23-26.

<sup>155</sup> ECtHR *Lawless v. Ireland*, (no. 3), Appl.No. 332/57, judgment of 1. July 1961.

<sup>156</sup> For instance, the absolute right on the prohibition of torture enshrined in Article 3 ECHR would not be relevant.



as argued by the applicant, in matters of protection of reputation, is one of appearance only.”<sup>157</sup> Somewhat inconsistently, in the case *Pfeifer v. Austria*, the Court acknowledged: “a person’s right to protection of his or her reputation is encompassed by Article 8 as being part of the right to respect for private life”.<sup>158</sup> In this context, it is quite clear that when it comes to the reputation of a legal entity, freedom of expression, and the interests of the democratic public discourse must always prevail.

#### **6.4. Scope and application of Article 17 ECHR**

The provision remains "applicable only on an exceptional basis and in extreme cases".<sup>159</sup> In the *Paksas* case, the former President of Lithuania had been impeached for a corruption case and prevented by law to run for office a second time. He challenged this law at the ECtHR relying on Article 3. of Protocol No. 1. "The right to free elections". The Court rejected the Lithuanian government’s request to apply Article 17, finding that the former President of Lithuania did not pursue totalitarian aims. In another case, the Court also rejected to invoke Article 17 because it was "not immediately clear" that the applicant in question had sought to stir up hatred or violence with a speech negating the Armenian genocide.<sup>160</sup> Like many of the Court's justifications in relation to Article 17, *Perinçek's* reasoning is contested. In this case, the reason of criticism is that in other cases of denial of genocide and crimes against humanity, the Court never examined the context, the intention, or the effect of the speech, on which factors the *Perinçek* decision was based.<sup>161</sup>

##### *Inadmissibility vs. balancing*

The abuse clause may be invoked by the relevant Member State (the defendant in the process), or by the ECtHR *ex officio*. Ideally this may occur in the admissibility stage, and, if accepted, results in immediate rejection of the complaint without examination of merit.<sup>162</sup> It is also sometimes invoked however in the balancing phase.<sup>163</sup> While this inconsistency may be criticised, it allows flexibility for the ECtHR in cases where the reasons for invoking the abuse clause are identified only at a later phase of the procedure. Its use in the early dismissal phase is also called the ‘guillotine application’, emphasising that it abruptly causes the end of the proceeding.<sup>164</sup> When it is used during the assessment phase, Article 17 is used as an element in the balancing exercise “as a strong magnetic pole that often draws the judicial compass-needle towards the conclusion that no violation of the right has occurred”.<sup>165</sup>

<sup>157</sup> *Karakó v. Hungary* 39311/05, 28/04/2009.

<sup>158</sup> *Pfeifer v. Austria*, 12556/03, 15/11/2007

<sup>159</sup> *Paksas v. Lithuania*, 34932/04, 6/1/2011.

<sup>160</sup> *Perinçek v. Switzerland*, 27510/08, 17/12/2013.

<sup>161</sup> J. Bayer and P. Bárd (2020), “Hate speech and hate crime in the EU and the evaluation of online content regulation approaches”, Study for the European Parliament, Policy Department C: Citizens’ Rights and Constitutional Affairs, PE 655.135, Brussels, European Parliament, July 2020.

<sup>162</sup> Direct application, *Glimmerveen and Hagenbeek v The Netherlands* 8348/78, 8406/78, 11/10/1979; *Schimanek v Austria*, 32307/96, 12774/87, 1/2/2000; *H., W., P. and K. v Austria*, 12774/87, 10/12/1989; *Norwood v UK*, 23131/03, 16/11/2004.

<sup>163</sup> Indirect application, *Féret v. Belgium*, 15615/07, 16/07/2009; *Kühnen v. Germany*, 12194/86, 12/05/1988; *Witzsch v. Germany*, 41448/98; 20/4/1999; *Schimanek v. Austria*, 32307/96, 1/2/2000.

<sup>164</sup> Haeck, *Handboek EVRM. Deel 2*, p. 249. See also Flauss, *Revue Universelle des Droits de l’Homme*, p. 464.

<sup>165</sup> Buyse, *Shaping Rights in the ECHR*, p. 198.





Some authors are of the opinion that Article 17, when applied during the procedure, rather than to dismiss the claim at an early phase, is less problematic, as it does not carry the risk of depriving the claimant from the right to court.<sup>166</sup> Some argue that this is the case when the 'abuse of right' clause becomes superfluous, as a judicial balancing would come to the same just conclusion without it.<sup>167</sup> Opposing this view, Sajó calls these "balancing (proportionality) theories [which] deny the possibility of abuse, promising the best of both worlds [...] where they can eat the cake and have it as well".<sup>168</sup>

The context of SLAPP gives a specific perspective to these considerations. Anti-SLAPP measures are meant to strike off claims without inspection in merit. Similar to rejections on the basis of Article 17, an anti-SLAPP motion will help protect against abuse of rights. In SLAPP cases it is especially important that the procedure is stopped at an early phase, to protect the SLAPP victim against the chilling effect caused by procedure-related intimidation and costs.

On the other hand, everyone has the right to court, and any mistaken application of anti-SLAPP measures risks violating this right. However, rather than dismissing the idea of the abuse clause in its entirety, its conditions should be carefully identified, and safeguards should be built into the procedure.

In criminal defamation cases, the possibility to invoke the abuse of rights clause to dismiss the claim at an early stage seems to be the most appropriate procedural instrument. In cases where the prosecutor represents the charges, it is easier to introduce the concept in countries which adhere to the model of opportunity (*Opportunitätsprinzip, principe d'opportunité*).<sup>169</sup> But even in countries following the principle of legality, a law could allow for an exception in the form of prosecutorial discretion in SLAPP cases.<sup>170</sup> This would not be unprecedented, since even jurisdictions following a comparatively strict model of legality allow for a number of exceptions.

Should the prosecutor be granted full discretion to dismiss the case, either for a lack of a legal good to be protected or the lack of social harmfulness (*offensività*) of the alleged crime, the alleged victim should logically not be able to challenge the prosecutorial decision. But even in cases where the victim has opportunity to oppose the decision and/or take over the charges, or if the victim represents the charges from the outset instead of the public prosecutor, the judiciary should be given the opportunity to dismiss the case. This might be even more advantageous for the defendant, i.e.,

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<sup>166</sup> J.A. Frowein, 'How to save democracy from itself?', in: Y. Dinstein and F. Domb (eds.), *The Progression of International Law. Four Decades of the Israel Yearbook on Human Rights – An Anniversary Volume*, Leiden: Martinus Nijhoff Publishers, 2011, p. 167.

<sup>167</sup> de Morree, p. 109-110.

<sup>168</sup> Sajó (2006) 'Abuse of Fundamental Rights or the Difficulties of Purposiveness' in: *Abuse: The Dark Side of Fundamental Rights*, Utrecht, Eleven Publishing. p. 37.

<sup>169</sup> "...the literature commonly refers to two basic principles of prosecution, the legality principle and the opportunity principle (or expediency principle). In its extreme form, the legality principle requires that the prosecutor brings charges whenever there is sufficient evidence of the guilt of an identifiable suspect. The opportunity principle, in turn, gives the prosecutor discretion to decide, in any individual case, whether there exists a public interest (or other overriding interest) in prosecution." See Károly Bárd, Matti Joutsen, Seppo Leppä, *A Backgrounder to the Criminal Justice Systems of the Region* In: Kauko Aromaa; Seppo Leppä, Sami Nevala, Natalia Ollus (eds.) *Crime and criminal justice systems in Europe and North America 1995-1997: report on the Sixth United Nations Survey on Crime Trends and Criminal Justice Systems*, Helsinki: European Institute for Crime Prevention and Control (HEUNI), (2003) pp. 14-22, p. 15

<sup>170</sup> *Ibid.*





the SLAPP-target, since judicial decision creates *res judicata*, whereas a prosecutorial decision to drop the case is not final in many jurisdictions.

Should the case reach the merits phase in a criminal procedure, the burden of the proof is already on the prosecutor. Here we additionally suggest the following requirement to be introduced: if the defendant demonstrates the likelihood of good faith and public interest on their side, then the burden of proving the contrary should fall on the prosecutor.

All the above considerations become void in case defamation as a crime is abolished in its entirety, as in Cyprus, Malta, the Czech Republic or Romania. In this regard, it should be emphasised that the Council of Europe<sup>171</sup> and several international groups have called for the complete abolishment of criminal defamation.<sup>172</sup> Criminal penalty in defamation cases is generally regarded as disproportionate by the ECtHR.<sup>173</sup>

Sajó calls "good faith" the "functional equivalent" of the abuse of right concept.<sup>174</sup> In this perspective, it would suffice, if the "good faith" would always be a defence in defamation cases and would lead to exemption from liability without further balancing. However, not all SLAPP suits are defamation cases, as shown in chapter 5, and the abuse of rights or abuse of law could be used in a wider range of SLAPP cases.

### ***6.5. The limits of using the analogy of Article 17 ECHR***

A new legislative action could benefit from the abuse of rights jurisprudence. Just like applicants who seek protection for hate speech, SLAPP applicants are abusing substantive and procedural rights. The additional requirement established by the Strasbourg jurisprudence concerning the "hindrance to the proper functioning of the Court"<sup>175</sup> should not apply in front of domestic courts. Constitutional or supreme courts have wider room to manoeuvre to admit or dismiss cases they deem relevant, and it is reasonable for them to decide by discretion whether a certain case is deemed important for shaping lower courts' case law. Alternatively, an additional requirement could be introduced similar to the Strasbourg test, holding that SLAPP cases (the aim of which is not to have a certain outcome

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<sup>171</sup> CoE (2018) "[Defamation - Brief overview](#)"; CoE Resolution 1577 (2007) [Towards decriminalisation of defamation](#).

<sup>172</sup> Transparency International (2016) "[Panama: Release Dutch Journalist and Abolish Criminal Defamation Charges](#)", 25 November 2016, website of the Transparency International; Article XIX (2004), Briefing Note on International and [Comparative Defamation Standards](#); UN (1999) "[Promotion and protection of the right to freedom of opinion and expression](#)", UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.; IoC - by Dohel, I. (2009), "[Freedom from Fear](#)", *Index on Censorship*, Vol. 38, no. 2; the Committee to Protect Journalists, CPJ, "[Critics are not criminals](#)", Comparative study of criminal defamation laws of the Americas, ; IPI (2001) "[Letter: EU defamation laws](#)", 13 June 2001.

<sup>173</sup> See *Cumpănă and Mazăre v. Romania*, 33348/96, 17/12/2004. The journalists of Telegraf published an article about assumed corruption by the local government in relation to the street parking company (April 1994). Official audit confirmed the suspicions in March and June 1994. The applicants were sentenced to 10 months imprisonment.

*Ruokanen and Others v. Finland*, 45130/06, 06/04/2010. Extraordinarily high compensation for damages and costs (89.000.EUR) and fines of 3540 and 1920 EUR. The published article alleged that a rape was committed at the party of the famous baseball team, which put all the team members in suspicion.

*Atamanchuk v. Russia*, 4493/11, 11/02/2020. Businessman's conviction for inciting hatred, sentenced to a fine of 5,086 euros plus prohibition from exercising journalistic and publishing activities.

<sup>174</sup> Sajó (2006) 'Abuse of Fundamental Rights or the Difficulties of Purposiveness' in: *Abuse: The Dark Side of Fundamental Rights*, Utrecht, Eleven Publishing. p. 32.

<sup>175</sup> Article 35.3.a. ECHR.



achieved, but to have the procedure for the sake of its chilling effect) are an unnecessary burden, and an unjustified consumption of state resources.

All the international applications of the abuse of rights clause differ around how it should be used in SLAPP cases in one important aspect: it is the respondent state that invokes the abuse clause, to point at an individual's abuse of their rights. In the case of the ECtHR, this means that the clause is invoked *against* the speaker who claims their right to freedom of expression, in cases when the exercise of this right is claimed to be an abuse. Whereas, in SLAPP cases the clause is to be invoked *by the speaker*, in favour of freedom of expression (or other right of public participation).

But the invocation of Article 17 at the ECtHR equally serves the public interest, the public discourse, and the democratic participatory rights of others, as with anti-SLAPP motions.<sup>176</sup>

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<sup>176</sup> See more on the chilling effect of hate speech in: J. Bayer and P. Bárd (2020), "Hate speech and hate crime in the EU and the evaluation of online content regulation approaches", Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 655.135, Brussels, European Parliament, July 2020.



## 7. Mapping of the substantive and procedural tools that may be used in Member States for the purposes of SLAPP

The following findings are based on qualitative research conducted with the help of academic and legal experts knowledgeable of the relevant issues in the European Member States, as described in chapter 2.

The qualitative country fiches on which the following findings are based form of the Annex to this study, therefore no specific references are given in each case. Footnotes are used to provide additional information or guide the reader towards additional, relevant information. The primary purpose of the mapping was to compare the legal background of the Member States, and the secondary purpose to collect information on the abuse of mentioned laws.

It should be noted that lacking a legal definition of SLAPP, judgements on the vulnerability of substantial or procedural laws, the elements relevant for SLAPP and whether a case was SLAPP or not, is based on the insights and opinions of our country experts. Various research methods have been combined and special care taken in the selection of the experts (see more in chapter on Methodology) to maximise reliability of findings. Legal information provided has been processed, analysed, and summarized below. The full text of written contributions may be found in the Annex.

Our research shows that SLAPP is a common phenomenon in 7 Member States of the European Union (BG,<sup>177</sup> EL, F, HU, IT,<sup>178</sup> SK, SI). Despite an appropriate legal environment, SLAPP suits drag on and inconsistent application of freedom of expression standards within the judiciary was reported by the experts (BG, HR, HU, IT, MT, PT, RO, SK, ES). This often meant a favourable decision is reached only at the second instance for the defendant (HR, HU, LV, MT, SK), putting an unnecessary burden on the press and the judicial system.

In some European countries SLAPP suits are less of a problem (CZ,<sup>179</sup> DE, DK, EE, LT, LU) or are consequently dismissed by the courts (FI, NL, SE).<sup>180</sup> Some states reported that while SLAPP suits are not common, a chilling effect is achieved by legal threats against journals and activists, which are commonly used by powerful corporations or politicians (AT, DE).

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<sup>177</sup> While SLAPP as such is not in the discourse, various judicial and extrajudicial procedures in order to exert pressure and to prevent citizens, journalists, media and organizations that are critical of the current governance and the related economic status quo from exercising their freedom of expression and other civil and political rights.

<sup>178</sup> Irrationally high number of cases are observed in Italy, although 70% are rejected at the preliminary phase. See more in: “[SLAPPs: The Italian Case](#)”. An Italian study proves [evidence of chilling effect](#).

<sup>179</sup> SLAPP was more common before 2016. Some examples are still available, especially from 2017: One of the few examples of monitored SLAPP cases is provided by the <https://pravdaovode.cz/> site, operated by the Endowment Fund “Truth about water”. Among other things, the website provides examples of disputes that website operators perceive as an attempt to silence their actions and criticism concerning entities operating in the field of water management in several localities of the Czech Republic. Against the background of commercial disputes, there were also disputes against persons who commented publicly on this issue.

<sup>180</sup> J. Söderström (2021), “Familjeaffären som skakar Danderyd” (Family affair that shakes Danderyd), *Aktuellt i Politiken*, 5 January 2021, <https://aip.nu/2021/01/05/familjeaffaren-som-skakar-danderyd/>.



## 7.1. Legal instruments

This section of the study provides an overview of the legal instruments which have been most typically abused for the purpose of SLAPPs, as reported by the country experts. Based on preliminary research and desk research, a pool of legal instruments was set up upon which country experts were asked to reflect and whether or not they knew about abusive lawsuits in their country being grounded in these legal instruments. The most commonly abused tools were criminal and civil defamation, privacy and data protection, and criminal law provisions such as legislation on anti-terrorism, money laundering or facilitation of irregular migration. Other laws were reported by a few state experts, such as copyright and tax investigation. No SLAPP case has been reported relating to blasphemy and state secrets. These have nevertheless been included these as they can also be regarded as potential vulnerable points.

### 7.1.1. Criminal defamation

(AT, BE, BG, CY, DE, EE, EL, ES, FI, FR, HR, HU, IE, LV, LT, LU, NL, PL, PT, SE, SK, SV)

Most EU Member States criminalise defamation.<sup>181</sup> In the following, we will group Member States, starting with those that follow the most human rights-friendly approach (decriminalisation), up to countries that foresee aggravated penalties for certain speakers.

Six Member States followed international recommendations and decriminalised defamation (CY, CZ, EE, IE, MT, RO). This notwithstanding, *several* forms of expressions are still criminalised in these countries (CY). Moreover, in Croatia, the so-called “severe shaming”, which was practically an institution of criminal defamation, was abolished. It used to exist between 2011-2019, allowing for proving the truth only in case statement(s) were made in the public interest among other justifications.

In Sweden, a criminal case against a media outlet must be based on the special provisions of the constitutional laws for the freedom of the press and the freedom of speech.<sup>182</sup> These formulate specific rules in regard of the press and freedom of speech. Amendments to the Criminal Code, if they are not included in the Freedom of the Press Act and the Freedom of Expression Act, are not applicable for media outlets. However, social media does not qualify as a media outlet.

Furthermore, in Sweden, “defensibility” is applied, i.e., a balancing between the conflicting values; with the public interest argument also built in. It is independent from the truth-factor and precedes it.

In Belgium, besides defamation, a specific criminal provision applies to opinions as “press offence”, which can, however, be initiated only at the Assize Court. Because of this special procedure, the prevalence of defamation cases against the press is lower.

With respect to criminal sanctions, in Croatia criminal defamation is punishable only with a fine and no imprisonment, following international recommendations. In most Member States, however,

<sup>181</sup> See for example the visualisation by the International Press Institute, “Defamation laws in Europe”, <http://legaldb.freemedia.at/defamation-laws-in-europe/>.

<sup>182</sup> Freedom of the Press Act, *Tryckfrihetsförordning*, 1949:105 and Freedom of Expression Act, *Yttrandefrihetsgrundlag*, 1991:1449.



imprisonment remains a possible sanction. There are aggravated (higher) penalties applicable for public dissemination (HU, FR, IT, PT, ES). Some states provide for higher penalties for the press and media (IT, LV, PT) without providing specific protection for these entities.

In practice, criminal defamation has been reported to be rare and mostly unsuccessful in Sweden, and not a prominent issue in Croatia. In Slovakia, cases used to be few and scattered, but now are reported to be on the rise. In some Member States criminal defamation is more commonly used for reputation protection than civil defamation, (CZ, BE, BG, EL, FR, FI, HU, IT, LT, SI), in Greece so is slanderous defamation, claiming that the defendant knew that the statement was false being extensively applied (See detailed information in the country reports attached in the Annex).

### 7.1.2. Criminal defamation against public officials, monarchs, heads of foreign states

(AT, BE, DK, FI, EE, EL, ES, HU, IT, PT, SK)

According to internationally recognised principles of freedom of expression, public officials and public figures should tolerate a higher level of criticism, in order to allow government watchdogs to fulfil their function and openly discuss matters of public interest. This is a basic foundation of the democratic system and promotes greater transparency around elected powers (see more in chapter 6).

However, some states have preserved an enhanced protection, or special procedural privileges for public personalities. Three provide for an *ex officio* procedure if a public official is defamed (AT, EL, HU),<sup>183</sup> higher penalties for defaming political, administrative or judicial bodies (IT), or covering a wide range of actors (ES, PT)<sup>184</sup> Estonia, while having decriminalised defamation in general, maintained defamation against internationally protected persons and representatives of state authority.

Special protection is granted to the monarch (BE, ES), the monarchy and related persons (ES). Imprisonment may go up to 24 months if the offence is deemed serious (ES). *Lèse majesté* is vanishing from European legal systems,<sup>185</sup> but in Cyprus an insult of *foreign* head of state is still a *sui generis* crime.

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<sup>183</sup> In case the victim is a public official, the state takes over the burden of prosecution: the police will conduct the investigation, the prosecutor will make the accusation, and the complainant (victim) does not have to pay for all of this (HU). This policy was abolished in Greece only in 2019, where public officials are now treated equally.

<sup>184</sup> The Parliament, the Council of State, the Ministry of the Republic; police and security service officers; public, civil, and military officials; judges, lawyers, witnesses, and jury members; ministers; university professors (PT) and national government, the General Council of the Judiciary, the Constitutional and Supreme Courts (national and those of an autonomous community), the armed forces and security forces (ES).

<sup>185</sup> "The idea of 'lese majeste' dates back to a long-gone era, it no longer belongs in our criminal law," said Justice Minister Heiko Maas during the public debate of a respective German Criminal Code provision. On 1 July 2017 the Bundestag decided to quash the respective criminal law provision, and the amendment deleting it entered into force on 1 January 2018. The provision was rarely used, and its dangers came to the forefront after the so-called Böhmermann affair, also known as Erdogate where a German satirist criticised the Turkish President in an offensive manner, and the latter sued under the 'lese majeste' provision. The case was dropped against Böhmermann, but it illustrated how outdated the provision was that eventually got quashed by the Parliament.

In 2018 the Dutch Parliament passed a law replacing the provision of insulting of the king (or any other head of state) and making such a behaviour equivalent to insulting state agents performing public functions.



In Italy, alleged defamation is justified where concerning the conduct of a public officials in the exercise of their official functions. In the past, Slovakian courts had awarded extremely high damages to politicians and judges. Damages up to 100.000 EUR were reported by our expert (even the average damages are relatively high at between 10.000-20.000 EUR). This has changed in recent years, particularly following the murder of the investigative journalist Jan Kuciak (SK).

Germany respects the wider limits of reputation for public figures, applying the limit defined in the Strauss Constitutional Court decision.<sup>186</sup> Public activities are explicitly exempted from defamation law in Finland.

In 2017, Denmark has criminalised harassment and insult any public official, as a reaction to large numbers of harsh criticisms published on social media. The crime is punishable with imprisonment or a fine, and its judicial practice is currently being developed.<sup>187</sup>

### 7.1.3. Civil defamation

*(All 27 EU Member States)*

In comparison with criminal defamation, civil defamation provides compensation to the defamed person, and the burden of the proof is on the defendants to prove truth of the information, or good faith, where this is a defence.

Even though civil defamation is considered as a less restrictive instrument than criminal defamation from a constitutional perspective, it can be equally, or even more frightening for the press. First, there are fewer procedural safeguards for the protection of the defendant than for the accused in a criminal procedure. Second, the burden of proof is on the defendant, rather than on the prosecution (in a criminal procedure, the prosecution needs to prove beyond doubt that the defendant is guilty of the crime.) Third, with no caps on damages, compensation sums can be high. Fourth, civil procedures may provide more room for abuse of process, because private plaintiffs have more leeway in their procedural actions. High compensation can impose a pressure similar to a criminal penalty. A possible vulnerability of legal systems may be that generally there are no negative consequences for initiators of SLAPP lawsuits even if their claims are rejected.<sup>188</sup>

Several states have a general protection of personality under civil law (BG, EL, HU, NL<sup>189</sup>).

Legal persons are generally not explicitly excluded from the possibility to sue for damages, with only two exceptions (FI, SE). They are explicitly entitled to claim the protection of reputation in Spain, Ireland and Slovakia (ES, IE, SK). France has a specific protection for the reputation of companies

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<sup>186</sup> Strauß-Case BVerfGE 75, 369.

<sup>187</sup> Article 119a of the Danish Criminal Code.

<sup>188</sup> See more in in T. McGonale et al. (2020), "Safety of journalists and the fighting of corruption in the EU", Report requested by the European Parliament's LIBE committee, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 655.187, July 2020, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655187/IPOL\\_STU%282020%29655187\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655187/IPOL_STU%282020%29655187_EN.pdf).

<sup>189</sup> It should be noted that in the Netherlands, no empirical data proves the existence of SLAPP. The mentioned provisions are "suspicious" provisions, see: T.E. van der Linden (2020), "Strategisch procederen tegen activisten: Over Strategic Lawsuits Against Public Participation (SLAPP's) in Nederland", *Nederlands Tijdschrift voor Burgerlijk Recht* 2020/9, pp. 65-78.



('denigration' in the Civil Code), which has been used several times against NGOs. The proceedings are more flexible than defamation which is a vulnerability for SLAPPs (see cases in Annex).

The time span within which such a claim can be filed is also meaningful: at within six years, it is longer than the typical time span in Italy (IT).<sup>190</sup>

In some states, demanding compensation for damages in reputation has some conditions (HR, PT, SK). It can be demanded only in connection with criminal charges, with several exceptions (PT), only if correction or apology had been previously demanded, (HR) or when no other means of redress proves sufficient (SK).

The only state that reported having a damage cap was Malta. Explicitly low damages were reported from Denmark and Lithuania. The expert for Ireland has highlighted the lack of a damage cap as a specific problem due to relatively higher damages awarded than on the continent.<sup>191</sup> A further specific vulnerability within the Irish common law system concerns the involvement of a jury, which adds to the length and cost of the procedure.<sup>192</sup>

To sum up, the main vulnerabilities of civil cases are:

1. no preliminary scrutiny by the judicial authority like an investigative judge in criminal procedure, or preliminary screening by a prosecutor;
2. the burden of proof is on the defendant;
3. no caps on damages;
4. the plaintiff can more easily dilate the procedure both in time and complexity, through amendments to pleas and related arguments.

#### 7.1.4. Misdemeanours, especially defamation or violation of assembly rights

(CZ, ES, FI, HU, RO)

Misdemeanours are administrative procedures belonging to a branch of public law, like criminal law, and can result in high fines, but without the high financial burden of litigation and without the threat of the prison sentence (CZ, HU, ES). These have been frequently used to curtail the right to free assembly, against protesting and demonstrating (HU).

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<sup>190</sup> Article 2947(3) of the Civil Code.

<sup>191</sup> Independent Newspapers (Ireland) Limited v. Ireland, Application no. 28199/15, 15 June 2017. See Tarlach McGonagle, "EHRM (nr. 28199/15: Independent Newspapers (Ireland) / Ireland", *European Human Rights Cases*, 2017(12), 574; and Ronan Ó Fathaigh, "Independent Newspapers v. Ireland: €1.25 million defamation award against newspaper violated Article 10", Strasbourg Observers, 19 June 2017, <https://strasbourgobservers.com/2017/06/19/independent-newspapers-v-ireland-e1-25-million-defamation-award-against-newspaper-violated-article-10/>.

<sup>192</sup> NewsBrands Ireland, "Ireland's Draconian Defamation Laws Must Be Urgently Reformed – It's in The Public Interest", <http://newsbrandsireland.ie/policy-issues/defamation/>.





#### 7.1.5. Laws (over)protecting the state

(CY, HU, LT, PT)

The criminal prohibition of false news, without adequately narrowing the malicious and mass dissemination of it,<sup>193</sup> is overly restrictive of freedom of expression. Similarly over-restrictive (and therefore a vulnerable point for unjustified restrictions) are defamation of state authorities (CY,<sup>194</sup> PT), are criminal provisions concerning "insult of armed forces" (CY), or "protection of the Republic of Latvia" (LV).

The Hungarian legislative amendment to strengthen the crime of 'scaremongering' under the pretext of a COVID-related infodemic has been abused to silence any critical opinions of the government (HU).<sup>195</sup>

#### 7.1.6. Privacy and data protection laws

(AT, EE, EL, HR, HU, LV, RO, SI, SK)

Data protection has been increasingly cited as a means to restrict publications. Article 85 GDPR obliges Member States to provide for exemptions or derogations from practically the entire content of GDPR, except Chapter VIII (Remedies, liability and penalties – thus providing for derogations from Chapters II, III, IV, V, VI, VII, IX), if that is necessary to reconcile the right to the protection of personal data pursuant to GDPR with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression. Member States have space to determine the scope of derogation in their national law. As a result, the implementation of this rule among the Member States is diverse, and in some cases, it does not adequately prevent the misuse of GDPR to suppress freedom of expression.<sup>196</sup> In one instance,<sup>197</sup> the RISE Project reported abuse of EU funds in relation with the President of the ruling government party. RISE was subsequently threatened by the Data Protection Authority with the maximal fine (20 million

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<sup>193</sup> See more on a freedom-of-expression-friendly regulatory recommendation in J. Bayer, N. Bitiukova, P. Bárd, J. Szakács, A. Alemanno, and E. Uszkiewicz (2019), "Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States", report requested by the European Parliament's LIBE committee, PE 608.864, February 2019.

<sup>194</sup> 'False news' (Art. 50 of the Criminal Code): any person who publishes, in any form, false news, or information that may otherwise undermine public order or the public's confidence in the state or organs or cause fear or concern to the public or interfere with any way the common peace and orderliness is guilty of a misdemeanour. The punishment is imprisonment for up to two years or a fine.

<sup>195</sup> Scaremongering, Act C of 2012 on the Criminal Code, Section 337. See criticism: C. Gyorgi (2020), "Fighting Fake News or Fighting Inconvenient Truths?", *Verfassungsblog*, 11 April 2020, <https://verfassungsblog.de/fighting-fake-news-or-fighting-inconvenient-truths/>; A. Sandford (2020), 'Hungary: "Critics Silenced" in Social Media Arrests as EU Mulls Powers'. *Euronews*, 14 May 2020, <https://www.euronews.com/2020/05/14/hungary-critics-silenced-in-social-media-arrests-as-eu-debates-orban-s-powers>.

<sup>196</sup> N. Bitiukova (2020), "Journalistic Exemption under the European Data Protection Law", *Policy Paper Series*, Vilnius Institute for Policy Analysis, Vilnius, 13 April 2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3531977](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3531977).

<sup>197</sup> Case study documented based on the OCCRP website, 09.11.2018, *OCCRP Strongly Objects to Romania's Misuse of GDPR to Muzzle Media*, <https://www.occrp.org/en/40-press-releases/press-releases/8875-occrp-strongly-objects-to-romania-s-misuse-of-gdpr-to-muzzle-media>. See the letter of EDPB: [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_letter\\_to\\_civil\\_society\\_organisations\\_on\\_romanian\\_dpa\\_investigation\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_letter_to_civil_society_organisations_on_romanian_dpa_investigation_en.pdf).





EUR) if they failed to reveal their sources. The European Commission warned Romania not to abuse the EU's new data protection regulation, and the case was eventually dropped.<sup>198</sup>

As the Staff Working Document of the Commission's Communication (on the basis of two years' worth of application of GDPR) notes, some Member States lay down precedence of freedom of expression over data protection where journalistic, academic, artistic, and literary expression is at stake. Others lay down precedence of data protection and provide exemptions only in the exceptional cases such as when public officials are affected. Yet still other states provide for a balancing or a case-by-case approach.<sup>199</sup>

In some Member States, violation of the right to data protection may be a crime to which imprisonment is attached (HR, HU, SK). In Finland, matters of public interest have been exempt from personal privacy protection since 2013 (FI), if proportionate.

### 7.1.7. Other speech restrictions

*(BG, DE, HU, IT, MT, RO, SE, SI, SK)*

Based on the preliminary survey research and desk research, country contributors were asked to reflect on whether the following legislative instruments have been seen to be abused with the purpose of suppressing public participation: state secrets and blasphemy, copyright, right of reply, false accusation. Vexatious use of some of these legal instruments was mentioned only by a few experts, while abuse of other legal instruments listed above was reported by none of the experts. There is no further objective evidence that the listed legal instruments were used for SLAPP. Beyond what is set out below, sporadically, vexation by the competition authority (BG), abuse of freedom of information request and injunction against such request in order to halt publication (DE,<sup>200</sup> SI) and extraterritorial litigation (RO,<sup>201</sup> MT) have been observed. No abuse of the crime of blasphemy or state secrets has been reported.<sup>202</sup> Unnecessary or disproportionate restriction of the right to

<sup>198</sup> euObserver (Nielsen, N). 2018) EU warns Romania not to abuse GDPR against press. <https://euobserver.com/justice/143356>

<sup>199</sup> COMMISSION STAFF WORKING DOCUMENT Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Data protection rules as a pillar of citizens empowerment and EUs approach to digital transition - two years of application of the General Data Protection Regulation, SWD/2020/115 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0115&from=EN>

<sup>200</sup> Metzelder case. Metzelder, a well-known soccer player, is accused of having stored child pornographic material on his computer. This case has received wide attention. The claim for injunction has recently been rejected by the competent administrative court. <https://www.granzin-rechtsanwaelte.de/de/news/der-fall-metzelder-eine-kurze-rechtliche-einordnung/>.

<sup>201</sup> Tăpălagă, Dan, "All about the Broidy case. How one of President Trump's fundraisers initiated legal action against me" (Totul despre cazul Broidy. Cum m-a dat în judecată la Londra unul dintre fundraiserii președintelui Trump), *G4Media.ro*, <https://www.g4media.ro/all-about-the-broidy-case-how-one-of-president-trumps-fundraisers-initiated-legal-action-against-me.html> (in native language published at <https://www.g4media.ro/totul-despre-cazul-broidy-cum-m-a-dat-in-judecata-la-londra-unul-dintre-fundraiserii-presedintelui-trump.html>)

<sup>202</sup> There is currently a criminal investigation against Helsingin Sanomat journalists, who have been suspected of presenting state secrets in an article published in Helsingin Sanomat.



assembly is also a suppression of public participation. Its application, however, is more obvious and straightforward, even if the reason to restrict the right is clearly a pretext.<sup>203</sup>

### State secrets and blasphemy

*(All 27 EU Member States)*

Violation of official secrecy and a special duty of confidentiality is, in all Member States, a crime. No abuse of these legal instruments has been reported during our research, yet it is included in our research as a vulnerable point for investigative journalism. State secret laws exist in all states, and they may have a legitimate use, but governmental excesses are also reported. A general anti-SLAPP legislation could potentially protect against such excesses.

The German Constitutional Court has found the crime of state secret violation unconstitutional, leading to a subsequent amendment to existing regulation.<sup>204</sup> Receipt or publication of state secrets is not punishable by law, only in certain circumstances relating to the intent of any public divulgence of the secret, as for example in cases driven by financial gain.

As with state secrets, blasphemy was not been reported as a foundation for SLAPP. It is included here because it is considered vulnerable to vexatious litigation. In accordance with current standards, offence to religious sensibilities should fall within the realm of freedom of expression, while inciting hatred against religious groups should fall in the realm of hate speech. In opposition to this, several states still criminalise offences the former, despite ongoing debate around this practice (CY).

### Copyright

*(DE, FR, SE)*

Copyright laws have been used to support cases that can be qualified as SLAPP in some Member States (DE, FR, SE). In two from these three states (DE, SE) other type of SLAPP cases not been reported. A prevalent German case was related to classified documents and governmental action rather than commercial copyright, but the case was based on copyright claim. In this case, the *Westdeutsche Allgemeine* had published secret situation reports of the German Armed Forces on the Afghanistan mission in 2012. The German government sued the newspaper for copyright infringement, which the Federal Supreme Court rejected with the argument of an overriding interest of the media.<sup>205</sup>

### Right of reply

*(IT, SK)*

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<sup>203</sup> See more in: Guidelines on Freedom of Peaceful Assembly (3rd Edition). CDL-AD(2019)017. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017-e).

<sup>204</sup> Cicero case (BverfGE) 117, 244 et seq., 2005

<sup>205</sup> BGH-Pressmitteilung Nr. 045/2020 vom 20.02.2020.



This legal instrument is provided by the Audiovisual Media Services Directive.<sup>206</sup> Two experts have reported that the right of reply has been applied in a way which resulted in a disproportionate restriction of the freedom of expression in their countries. In Slovakia, a vague legal definition (“incomplete statement”) allowed for the publication of an excessive and subjective versions of the events (SK), although these were redressed subsequently through court order. The right of reply for public officials has been reintroduced in 2018 (after having been revoked in 2011). An omission or incomplete reply may result in a high fine (IT, SK). In some instances, vexatious litigants have filed multiple claims relating to all “incomplete” statements within the same article (SK).

### False accusation

(FR, HU, SI, SK)

Experts from four Member States indicated that, false accusation is used against journalists as a basis for SLAPP (FR, HU, SK, SI); in Slovenia it represents 44% of the lawsuits and criminal complaints against journalists.<sup>207</sup>

#### 7.1.8. Labour law consequences

(CZ, HU, LV, NL, RO)

Dismissal, or other sanctions at the workplace were reported by a few experts (HU,<sup>208</sup> LV, NL<sup>209</sup>) and court procedures have been able to correct some of these abuses (HU, LV, but only 1 of 9 in NL).

In Romania and Hungary, the Chief Justice and the Chief Prosecutor were removed from their offices for their critical opinion of the government's actions. Both high-level officials won their case at the ECtHR. However, as the Hungarian example demonstrates, a Strasbourg decision cannot fully remedy the situation, since Judge Baka was not reinstated to his original position (and the issue became moot with regard to the former Romanian Chief Prosecutor Laura Kövesi, since she had become European Chief Prosecutor by the time the ECtHR decision was rendered).<sup>210</sup>

<sup>206</sup> Chapter IX, Article 28 of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

<sup>207</sup> Slovene Association of Journalists research on lawsuits and criminal complaints against journalists 2014-2015. A. Delić and Š. Stare (2015), “Analiza tožb in ovadb medijev” (Analysis of lawsuits and media complaints), novinar.com, 23 April 2017, <https://novinar.com/novica/analiza-tozb-in-ovadb-medijev/>.

<sup>208</sup> Hungarian Helsinki Committee (2019) Jogerős: jogsértő volt Szert Boglárka kirúgása. <https://www.helsinki.hu/jogeros-jogserto-volt-szert-boglarka-kirugasa/>

TASZ (Hungarian Civil Liberties Union) (2017) Nem taníthat egy Facebook poszt miatt. [https://ataszjelenti.blog.hu/2017/10/19/nem\\_tanithat\\_egy\\_facebook\\_poszt\\_miatt](https://ataszjelenti.blog.hu/2017/10/19/nem_tanithat_egy_facebook_poszt_miatt)

<sup>209</sup> F.G. Laagland & J. Kloostra, *GS Arbeidsovereenkomst*, Article 7:611 BW, note 6.1 and 6.3.

<sup>210</sup> See Kövesi v. Romania, and Baka v. Hungary, *supra* note. A similar case is the initiation of a disciplinary procedure against the lawyer of a watchdog organisation at the Bar, see Veolia against Štauderová (CZ).



#### 7.1.9. Measures related to taxation

(BG, DE, HU, LV, RO)

Launching a tax inspection procedure does not have specific conditions in Bulgaria, and can last from one to three years, consuming a significant amount of the attention and resources of the person or entity checked. In Bulgaria, recent years have seen a number of such proceedings, pressuring journalists etc., even targeting the President of the Supreme Court of Cassation through tendentious measures of tax control, with a visible connection between the intervention of the tax authorities and a number of his publicly declared positions related to corruption and encroachments against the independence of the judiciary.

In Germany, NGOs with a public service status<sup>211</sup> may draw tax-deductible donations from companies as an important source of income. The NGO 'Attac' was deprived of its public service status by a decision of the Federal Court of Finance, the highest tax court in Germany. Several other NGOs (supporting, for example, democratic education) have subsequently also been deprived of their public service status on the basis of the same federal court decision.<sup>212</sup>

In Hungary, sudden changes to the laws on non-profit financing practically deprived independent theatres – representatives of critical opinions in a less than plural media market – from their pre-calculated income. Anomalies relating to the Norwegian Fund, a key financier of civil society organisations, have been described in a previous study.<sup>213</sup>

#### 7.1.10. SLAPPs based on EU criminal law provisions: anti-terrorism, money laundering and facilitation of irregular migration

(BE, CY, DK, ES, EL, HR, HU, IT)

There is academic evidence in the EU of vexatiously using the criminal definition of 'facilitation of irregular migration' for silencing civil society actors,<sup>214</sup> journalists,<sup>215</sup> and movie-makers.<sup>216</sup> Another vexatiously used EU law-based provision is the definition of 'organised criminal group' in the context

<sup>211</sup> [Abgabenordnung § 52. \(1\)-\(2\).](#)

<sup>212</sup> <https://freiheitsrechte.org/gemeinnuetzigkeit/>. See also S. Unger (2020), *Rechtsgutachten erstattet im Auftrag der Gesellschaft für Freiheitsrechte e.V. zum Thema Politische Betätigung gemeinnütziger Körperschaften*.

<sup>213</sup> Bárd, Bayer, Luk and Lina Vosyliute (2020), *op. cit.*

<sup>214</sup> "Greek Government Accuse Foreign Aid Workers of Migrant Smuggling and Spying", *InfoMigrants*, 29 September 2020 .

<sup>215</sup> Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliūtė (2019), *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society*, Hart Publishing, London (<https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/>); Fekete, L., F. Webber and A. Edmond-Pettitt (2019), "When witnesses won't be silenced: citizens' solidarity and criminalisation", *Institute of Race Relations*; Sanchez, G., and Achilli, L. (2019), "Critical insights on irregular migration facilitation: global perspectives", *European University Institute*, Florence.

<sup>216</sup> See also actions against movie-makers, at Vosyliūtė, L. and C. Conte (2019 a) *ReSOMA Final Synthetic Report: Crackdown on NGOs assisting refugees and other migrants*, June, <http://www.resoma.eu/node/194>; 'Canadian Held on Lesbos over Alleged Migration Law Violations', by Yiannis Souliotis, *Kathimerini*. <https://www.ekathimerini.com/259421/article/ekathimerini/news/canadian-held-on-lesvos-over-alleged-migration-law-violations>.



of anti-money laundering and terrorism related crimes.<sup>217</sup> It is important to highlight that ‘organised criminal group’ or ‘money laundering’ can only be invoked in relation to a substantial crime, and in the area of migration and asylum, this often goes back to ‘facilitation of irregular migration’.

The EU Facilitation Directive does not require ‘financial or other material benefit’ for facilitation of irregular entry or transit (Article 1.1(a)), to qualify this behaviour as crime,<sup>218</sup> and indeed only four countries in the EU require profit motive (DE, IE, LU, PT).<sup>219</sup> The EU’s provisions regarding residence and stay contain a profit requirement (Article 1.1(b)), however, several Member States have not yet adapted their national legislation to these provisions and continue to criminalise not-for-profit behaviour, like giving free food, shelter, or a lift with a car for undocumented migrants (BE, DK, EE, EL, FI, HR, LV, LT, MT, RO, SI). France used to belong to this category of Member States, but after the Cedric Herrou judgement of 2018,<sup>220</sup> changed the law.

The EU Facilitation Directive also contains an optional ‘humanitarian exemption clause’ (1.2.) in the context of facilitation of entry. Some sort of explicit humanitarian exemption has been introduced by several Member States (BE, EL, ES, FI, MT).<sup>221</sup> By contrast, the Hungarian Constitutional Court has interpreted the above exemption clause as an optional provision, allowing Member States to decide whether or not to criminalise humanitarian acts.<sup>222</sup> The European Commission subsequently started an infringement procedure against Hungary for criminalising information sharing and legal assistance, however with the aim of harmonising criminal laws, but because the Hungarian law precludes implementation of the EU’s asylum directives.<sup>223</sup>

Academia and civil society<sup>224</sup> as well as international and regional bodies have started to pay increasing attention to the so called ‘criminalisation of solidarity’ cases, as they entail serious chilling effects for civil society, in particular, the freedom of association and freedom of speech.<sup>225</sup> Procedural

<sup>217</sup> Vosyliūtė, L., and Luk, N.C. (2020) “Protecting Civil Society Space: Strengthening freedom of association, NGOs and human rights defenders in Europe”, Study for the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, October, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659660/IPOL\\_STU\(2020\)659660\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659660/IPOL_STU(2020)659660_EN.pdf).

<sup>218</sup> Article 1 of the Directive 2002/90 of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 17–18.

<sup>219</sup> European Union Fundamental Rights Agency (FRA) (2014), “Criminalisation of Migrants in an Irregular Situation and of Persons engaging with them”, Vienna, March.

<sup>220</sup> [Dossier documentaire décision 2018-717/718 DC du 6 juillet 2018 M. Cédric H. et autre \[Délit d’aide à l’entrée, à la circulation ou au séjour irréguliers d’un étranger\] \(conseil-constitutionnel.fr\)](https://www.conseil-constitutionnel.fr/decisions/2018-717/718-DC-du-6-juillet-2018-M.-Cedric-H.-et-autre-Delict-d-aide-a-l-entree-a-la-circulation-ou-au-sejour-irreguliers-d-un-etranger-conseil-constitutionnel.fr)

<sup>221</sup> Carrera, S., L. Vosyliūtė, S. Brenda Smialowski, J. Allsopp, G. Sánchez, (2019) “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update”, January. (<https://www.ceps.eu/publications/fit-purpose-facilitation-directive-and-criminalisation-humanitarian-assistance>).

<sup>222</sup> Hungarian Constitutional Court, Decision 3/2019. (III. 7.) AB, Budapest, 25 February 2019, Constitutional Court file No.: IV/1564/2018. Published in the Official Gazette (Magyar Közlöny) MK 2019/36, available at [https://hunconcourt.hu/uploads/sites/3/2019/05/3\\_2019\\_en\\_final.pdf](https://hunconcourt.hu/uploads/sites/3/2019/05/3_2019_en_final.pdf).

<sup>223</sup> CJEU, Case C-821/19, *European Commission v Hungary*, pending. Commission’s action brought on 8 November 2019 available at

[http://curia.europa.eu/juris/document/document.jsf?text=&docid=222334&pageIndex=0&doclang=en&mode=req&dir=&oc\\_c=first&part=1&cid=18499068](http://curia.europa.eu/juris/document/document.jsf?text=&docid=222334&pageIndex=0&doclang=en&mode=req&dir=&oc_c=first&part=1&cid=18499068).

<sup>224</sup> Human Rights Watch (2018) “Greece: Rescuers at Sea Face Baseless Accusations.”, 5 November, <https://www.hrw.org/news/2018/11/05/greece-rescuers-sea-face-baseless-accusations>.

<sup>225</sup> For instance, Ferstman, C. (on behalf of the CoE Expert Council on NGO Law of the Conference of INGOs of the Council of Europe), ‘Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States: A Review of The Practice and the Identification of Guidelines’, Strasbourg, December 2019. <https://rm.coe.int/expert-council-conf-exp-2019-1-criminal-law-ngo-restrictions-migration/1680996969>; N Special Rapporteur on the human rights of migrants, Felipe Gonzales, ‘Report on Right to freedom of association of migrants and



rules may have an equally chilling effect. In August 2018, a case was started against ERCI volunteers, including charges of facilitation of irregular migration, espionage, and participation in an organised criminal group.<sup>226</sup> Several volunteers were arrested in the Lesbos airport as they attempted to go back to Berlin to continue their studies. They were held for 100 days in the highest security prison in Greece, until they were released on bail. European and international institutions deemed such pretrial measures disproportionate.<sup>227</sup>

A high number of criminal investigations have been started in Italy for the facilitation of irregular migration against NGOs conducting search and rescue operations.<sup>228</sup> The law exempts from criminal liability for humanitarian assistance provided to persons already present on the territory, therefore most of the cases were dropped, but contributed to an atmosphere of fear among activists, which in turn had a chilling effect on public participation (IT).

In Cyprus, the NGO KISA, was subject to accusations of money laundering and profiteering at the expense of migrants and refugees for personal gain.<sup>229</sup> The case escalated to the de-registration of KISA from the public registry (CY).

In Greece, NGOs were forced to re-register, on the basis of anti-money laundering regulation. The new laws place NGOs operating in the area of asylum, migration, and integration under the direct control and supervision of the Ministry of Interior in Greece (EL).<sup>230</sup>

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their defenders', to the 44<sup>th</sup> Session of the UN Human Rights Council, A/HRC/44/42, 13 May 2020. Available at: <https://undocs.org/en/A/HRC/44/42>.

<sup>226</sup> Human Rights Watch (2018) "Greece: Rescuers at Sea Face Baseless Accusations.", 5 November, <https://www.hrw.org/news/2018/11/05/greece-rescuers-sea-face-baseless-accusations>.

<sup>227</sup> UN Special Rapporteur on the human rights of migrants, Felipe Gonzales, 'Report on Right to freedom of association of migrants and their defenders', to the 44<sup>th</sup> Session of the UN Human Rights Council, A/HRC/44/42, 13 May 2020. Available at: <https://undocs.org/en/A/HRC/44/42>.

<sup>228</sup> EU Agency for Fundamental Rights, (2018) Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations (2015-2018).

<sup>229</sup> KISA (2020), "KISA calls on the Minister to retract his defamatory statements and to proceed to a dialogue with the stakeholders and NGOs concerned" website of KISA, 3 March 2020.

<sup>230</sup> See: J. Allsopp, L. Vosyliūtė and S.B. Smialowski (2021), "Picking 'Low-Hanging Fruit' While the Orchard Burns: the Costs of Policing Humanitarian Actors in Italy and Greece as a Strategy to Prevent Migrant Smuggling", *European Journal on Criminal Policy and Research*, Vol. 27, No. 1. See also Council of Europe (2020), "Expert Council on NGO Law Calls Greece to Revoke Restrictions on the Registration and Certification of NGOs", Newsletter of the CoE Special Representative of the Secretary General on Migration and Refugees, November 2020.



Table 7.1. Summary of legal instruments that may be used in SLAPP suits in the EU Member States

EU Member State	Civil Defamation	Criminal Defamation	Higher criminal; for defaming public official/institution	Tax Law	Employment law	Other civil	Other criminal	Other administrative	Other procedural
<b>Austria</b>	Yes	Yes	No	n/a	n/a	n/a	n/a	Protection of official secrets	n/a
<b>Belgium</b>	Yes	Yes	No	n/a	n/a	Misuse of GDPR	n/a	n/a	Misuse of provisional measures
<b>Bulgaria</b>	Yes	Yes	Yes	Yes	No	Privacy-related (Economic Code)	Market manipulation	n/a	n/a
<b>Croatia</b>	Yes	Yes	n/a	No	No	No	Facilitating irregular migration, illegal use of personal data	NGO related/funding	n/a
<b>Cyprus</b>	Yes	No	n/a	Yes	No	n/a	Illegal fundraising, rioting, conspiracy, obstructing police work	NGO related law & registry	n/a
<b>Czechia</b>	Yes	No	n/a	No	n/a	n/a	n/a	n/a	Easy to start criminal procedure
<b>Denmark</b>	Yes	Yes	Yes	No	Yes	n/a	Harassment of public officials; facilitation of irregular migration	n/a	Pressures for pre-trial settlement; possibilities to prolong procedure
<b>Estonia</b>	Yes	No	Yes	n/a	n/a	n/a	n/a	n/a	Action guarantee procedure; possibility to preclude publications
<b>Finland</b>	Yes	Yes	No	n/a	n/a	n/a	n/a	n/a	n/a
<b>France</b>	Yes	Yes	Yes	n/a	n/a	Limitation of freedom of assembly, personal injury	Facilitation of irregular migration; occupation of public land; damages for preventing constructions	Protest rules	Pressures for pre-trial settlement; possibilities to prolong procedure
<b>Germany</b>	Yes	Yes	Yes	Yes	n/a	n/a	n/a	NGO-related law	Pressures for pre-trial settlement



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EU Member State	Civil Defamation	Criminal Defamation	Higher criminal; for defaming public official/institution	Tax Law	Employment law	Other civil	Other criminal	Other administrative	Other procedural
Greece	Yes	Yes	Yes	Yes	n/a	Privacy related	Facilitation of irregular migration, espionage, occupation of public space (for protest), threatening state sovereignty	NGO related law/ registries	n/a
Hungary	Yes	Yes	No	Yes	Yes	Misuse of GDPR	Illicit data collection, journalists summoned as witnesses	n/a	Witness hearing
Ireland	Yes	No	No	n/a	n/a	n/a	n/a	n/a	n/a
Italy	Yes	Yes	Yes	n/a	n/a	Maritime safety, flag state requirements	Facilitating irregular migration	Code of Conduct for SAR NGOs	n/a
Latvia	Yes	Yes	Yes	n/a	n/a	n/a	Actions directed against the state, criminalisation of fake news	n/a	State Security Service investigations
Lithuania	Yes	Yes	Yes	n/a	n/a	Law on juvenile protection against the adverse effects of public information (anti-LGBT)	Misuse of incitement of hate crime and hate speech, blasphemy	Damages for delaying urban planning and public contracts	Misuse of interim measures or injunctions
Luxembourg	Yes	Yes	Yes	n/a	n/a	n/a	Theft, violating trade secrets, secrecy laws	n/a	n/a
Malta	Yes	No	Yes	No	Yes	n/a	n/a	NGO related law	n/a
Netherlands	Yes	Yes	Yes	n/a	Yes	Tort in unlawful demonstrations (Civil Code)	n/a	n/a	Possibilities to prolong procedure
Poland	Yes	Yes	Yes	n/a	n/a	n/a	n/a	LGBTQ free	Misuse of injunctions





Towards an EU-wide approach to anti-SLAPP?

EU Member State	Civil Defamation	Criminal Defamation	Higher criminal; for defaming public official/institution	Tax Law	Employment law	Other civil	Other criminal	Other administrative	Other procedural
								cities/zones	
<b>Portugal</b>	Yes	Yes	Yes	No	n/a	Yes	False information, false public accusation	n/a	Civil claims in conjunction with criminal
<b>Romania</b>	Yes	No	Yes	Yes	n/a	Misuse of GDPR	Riots, blackmail, tax fraud	n/a	State Security Service's investigations
<b>Slovakia</b>	Yes	Yes	No	n/a	n/a	n/a	Privacy related provisions	n/a	n/a
<b>Slovenia</b>	Yes	Yes	Yes	Yes	n/a	n/a	Privacy related provisions	n/a	n/a
<b>Spain</b>	Yes	Yes	Yes	n/a	Yes	n/a	Civil protection law, terrorism-related provisions	n/a	n/a
<b>Sweden</b>	Yes	Yes	No	n/a	n/a	Copyright and piracy	Revealing secret information, treason	n/a	n/a

Source: Authors' own elaboration based on the feedback provided by a network of experts consulted covering all 27 EU Member States



## 7.2. Defences against SLAPP

There are several tools which can provide a defence against SLAPP cases. They are presented below, starting with defences which can lead to exemption from either criminal or civil liability for defamation or violation of reputation. The chapter also looks the possibility of applying the abuse of rights principle in national procedures.

### 7.2.1. Public interest and good faith

(AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LV, LT, LU, NL, PL, PT, RO, SE, SI, SK)

According to the contemporary human rights standards based on the jurisprudence of the ECtHR, when a publication serves the public interest, then its restriction can be considered necessary and proportionate in a democratic society only if exceptional circumstances justify such restriction. The right to freedom of expression is protected even in the case that the publication is untrue, but its author complied with journalistic professional standards, acted in good faith and the publication addresses a cause for public concern.

Public interest and good faith, conjunctively, are a defence in most of the Member States (AT, CY, CZ, BE, DE, DK, EE, FR, FI, HR, IE, IT, LT, LU, LV, NL, PT, RO, SE, SK). Their respective weight and formulation vary across legal systems. In some states, they provide explicit exemption (HR, NL), in others they are subject to additional requirements such as compliance with journalistic ethics (CZ, DK, SK) or that the content relates to a public person (LT). In Poland, the good faith standard is limited to journalists and applicable only since 2005 and is increasingly applied. Maltese court practice also demonstrates a willingness to apply good faith, despite not being formally established as a defence by law.

The truthfulness of a publication should in principle exempt the author from liability, but this is not the case in some states (BE<sup>231</sup>, HU). Truthfulness can be used as a defence in criminal procedures, but often only in conjunction with public interest (EL, ES, DK, HU, IE, PT, SE). In these states, in the absence of public interest, truthfulness may not be used as a defence. In other states, truth is an unconditional defence (CY, BG).

Good faith is also a possible defence in criminal proceedings (AT, CY, DK, EL, F, HR, SI, PT). Rather than explicitly laid down in law, it is applied only based on judicial case law in Greece (EL). Good faith is not really considered in criminal proceedings in other states (BG, HU).

Further defences may be the reliance on official information or official reporting (CY, HU SK), or if the defamation is a direct response to a provocation (IT).

<sup>231</sup> In the case of defamation, where truth is not an excuse. In slander, it is a defence and possible to prove it. See Annex.



### 7.2.2. Defence at the level of principles

(AT, BE, ES, HU, IT, LV, NL, PT)

Rights should be exercised in harmony with their social goal (see more in chapter 6.) Abuse of right as an abstract legal concept has been reported to be a defence by the experts in only three states (AT, HU, NL). In Austria, abuse of rights should be considered by the prosecutor and the court *ex officio*, but the defence may also bring it forward. In the Netherlands, every person who exercises their rights should respect the rights of others and the public interest. A right is abused when it is exercised for the sole purpose of harming another person (*animus nocendi*), or where it is exercised with another purpose than that for which it was granted, or where its exercise was unreasonable, given the disproportion between the interest in its exercise and the harm caused thereby. In Hungary, the abuse of rights argument is not part of substantial law and therefore it can be applied only joining a substantial claim (HU).

A court can impose a fine on the plaintiff when they recognise that a claimant tries to submit false information in bad faith, to achieve an unlawful objective or prevention of the protection of rights (LV). Reckless and vexatious litigation may result in fines, and both parties may claim compensation for the damages linked to the other party's abuse of process (BE).

It is an offence to make false allegations in written statements (affidavit) by the plaintiff to assert the facts on defamation (IE).<sup>232</sup>

The exercise of a right is a cause of exclusion from civil liability (PT), and also from both civil and criminal liability (ES, IT).

### 7.3. Procedural cost and legal aid

The financial costs linked to legal procedures is an important factor contributing to a chilling effect. Irrespective of the outcome of the lawsuit, defendants must cover legal fees and other procedural costs; at least for the duration of the legal proceedings. Table 7.2 below shows the procedural rules in Member States that aim to improve the equality of arms of both parties in the procedures, and thereby improving the chances of a fair procedure. In more than half of the Member States the losing party pays the legal costs (AT, BG, CY, CZ, DK, EE, HU, HR, IE, FI, EL, IT, LT, LV, MT, NL, PT, RO, ES, SE). However, this is paid in form of a reimbursement, at times several years after the lawsuit ended and often does not cover the full amount (AT, HU, DK, EE, LV, MT, NL, SK).<sup>233</sup>

Legal aid, in the form of free legal representation and legal advice exists in several Member States (AT, BG, CY, CZ, DK, EE, ES, FI, HU, IT, LT, LV, MT, NL, PT). It is generally subject to meeting certain social circumstances (AT, CY, CZ, DK, EE, ES, FI, IT, LT, LV, MT, NL, PT, see Table 7.2). Many SLAPP targets cannot benefit from this type of assistance, given the restrictive and narrow scope of the conditionality criteria that apply. Experts of some countries reported that their use is not widespread for these reasons (DK, EE, IT, LT, MT, PT, ES). Other issues related to this type of assistance are that

<sup>232</sup> Defamation Act 2009, Section 8(6), <http://www.irishstatutebook.ie/eli/2009/act/31/section/8/enacted/en/html#sec8>.

<sup>233</sup> See also information on recoverability of legal fees in Justice Scoreboard 2020, Figure 26 [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf)



the estimated costs are often lower than the real costs (PT, LT, MT, SK, ES), courts may decide to reduce the amount granted (NL), attorneys may be not interested in performing their compulsory (and generally low-paid) duties (AT, DK, HU), or that the aid needs to compensate the state fully or partially for the fee and costs paid to an attorney (EE). In Ireland, legal aid is not available for defamation claims.<sup>234</sup> Similarly to other court costs, payments are also made late.

Besides the state legal aid, in several states NGOs (DE, HU, IT, LV) or the journalistic unions (CY, DK, FI, HR, IT, EL, LT) offer legal aid. Journalists' Unions or Chambers often provide for insurance and interest-representation to journalists (CY, IT).

The whole judicial costs of criminal proceeding are to be paid by the complainant if the criminal complaint was utterly false and was lodged with malice or gross negligence or if the facts were maliciously distorted (AT, BG, CY, CZ, DE, DK, HR, FI, HU, IT, PT, SI, SE). However, in Slovenia, this has little to no deterrence effect since legal costs regarding defamation procedures are low in comparison to other kinds of disputes. In cases of demonstrated gross negligence, damages are to be paid (IT, PT, ES).

In Italy, a fine can be imposed if the judge establishes an abuse of process in civil cases (IT).

In other Member States, it is possible or even common to include coverage of legal costs into household insurance (CY, DE, DK, FI, IE, SE). The conditions and pricing of the coverage (whether it applies to defamation, or other lawsuits) are defined by the private insurance company (see Table 7.2 below).

Journalists' Unions or Chambers can also provide access to insurance schemes and representation of interest to journalists (CY, IT).

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<sup>234</sup> Civil Legal Aid Act 1995, Section 28(9)(b)

**Table 7.2. Rules on financial support during procedures in the Member States**

Member State	In a civil lawsuit, does the losing party pay the legal fees of both parties?	In a criminal procedure, if the accuse is found baseless, does the accuser have to pay the costs?	Is there legal aid to the defendants in a criminal procedure? Is this really helpful in practical terms?	In a civil procedure, is there legal aid to the defendants? Is this really helpful in practical terms to the defendants?	Does household insurance cover the costs of litigation if one is sued?
Austria	Yes	Yes	Yes	Yes	No
Belgium	Yes	Other	Other	Other	Other
Bulgaria	Yes	Yes	Yes	Yes	N/A
Croatia	Yes	Yes	Yes	Yes	No
Cyprus	Yes	Yes	Yes	Yes	Other
Czechia	Yes	Yes	Yes	Yes	N/A
Denmark	Yes	Yes	Yes	Only exceptionally	Yes
Estonia	Other	Other	Yes	Yes	No
Finland	Yes	Yes	Yes	Yes	Yes
France	Other	Other	Yes	Yes	Other
Germany	Yes	Yes	Yes	Yes	Yes
Greece	Yes	Yes	Yes	Yes	N/A
Hungary	Yes	Yes	Yes	Yes	N/A
Ireland	Yes	Yes	Yes	Yes	Other
Italy	Other	Other	Yes	Yes	No
Latvia	Yes	No	Yes	Yes	No
Lithuania	Yes	Other	No	No	No
Luxembourg	No	N/A	Yes	Yes	N/A
Malta	Yes	N/A	N/A	Yes	No
Netherlands	Yes	N/A	Yes	Yes	N/A
Poland	Yes	Yes	Yes	Yes	No
Portugal	Other	Other	Other	Other	No
Romania	Yes	Yes	N/A	N/A	N/A
Slovakia	Other	N/A	N/A	N/A	N/A
Slovenia	Yes	Yes	Yes	Yes	No
Spain	Other	Other	Other	Other	No
Sweden	Yes	Yes	N/A	N/A	Yes

Source: Authors' own elaboration.

#### 7.4. Promising practices

The mapping exercise conducted in this study has identified a number of promising practices that provide protection against SLAPP suits. These include the following (see also Table 7.3):



- In **Sweden**, there is an interplay between constitutional rules, criminal law rules, tort law rules and principles and procedural rules that, taken together, set up a system that makes it very difficult to win a case that would restrict freedom of expression, for example, against a media company. Furthermore, individual journalists working for a newspaper cannot be sued or charged in connection with their professional activity. This Swedish comprehensive set of promising practices includes the following package of special privileges to the press:
  - Constitutional “authorisation” is required to enact limiting laws (SE).
  - Single personal responsibility means that only one person is responsible, journalists are thus practically protected from personal civil and criminal litigation (SE),<sup>235</sup> or only from civil litigation, but still may be targeted by criminal procedures (SK).
  - Ordinary prosecutors are not allowed to prosecute journalists, only the “Justice chancellor” may do so, and only in case of public interest (SE).<sup>236</sup>
  - Extreme strong protection of sources: (SE: it is a crime to disclose sources). In Sweden, even public servants may disclose secret information to the media, even if it is otherwise illegal to share the information, constituting a strong whistle-blower protection.<sup>237</sup> France similarly has an effective whistle-blower protection.
  - Special courts designated to handle freedom of press-cases, jury (SE).
- The Dutch court system comprises a so-called ‘supervising judge’ (*regierechter*), which allows the courts to maintain a firmer control on the judicial process and ensure the proper course of the proceedings (NL).<sup>238</sup>
- The court may require in certain cases that the plaintiff provide a security to cover the expected procedural expenses of the defendant (EE).
- In a criminal procedure, if the accusation is found baseless, the complainant bears all the costs in some Member States (BG, CY, CZ, DE, DK, HR). In others, this is the case only if they have been found to have used false facts (EL, FI, HU, PT, SI, SE). (In Slovenia, this has little deterring effect as legal costs for defamation procedures are relatively low.)
- Legal aid is provided in civil and/or in criminal cases (AT, BG, CY, CZ, DE, DK, EE, F, FI, HR, IT, EL, HU, LT, LU, LV, NL, PT, SI).
- Insurance companies offer coverage of legal costs if the insured person sues or gets sued. (Whether defamation is covered and what the cap of the cost is, depends on the insurance company and the plan, but the cap is usually rather low) (CY, DE, DK, SE). In Finland there are insurance schemes, but if the person loses the case, the insurance company does not cover legal costs (FI). The Italian Journalist Association and the Press Trade Union negotiated professional

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<sup>235</sup> The idea of sole responsibility is called “*ensamansvaret*” in Swedish, regulated by ch. 8 of The Freedom of the Press Act and ch. 6 of The Freedom of Expression Act.

<sup>236</sup> The position is directly appointed by the government and generally held by senior civil servants; the last three persons were former Supreme Court judges. In illiberal or captured states, or where the political polarisation is high, this procedure would not ensure the requirement of independence.

<sup>237</sup> See for an overview: Thomas Bull, *Blowing in the Wind: Swedish Protection of Whistle-Blowers in the Public Sector*, *Scandinavian Studies in Law* 52, Stockholm 2007, p. 65-78, available online on <https://scandinavianlaw.se/pdf/52-5.pdf>

<sup>238</sup> Article 19(2) Rv). This also includes making sure that the procedure is not unnecessarily delayed (Article 20 Rv). See also: C.J.M. Klaassen, ‘Advocaat, let op uw saeck!’ Enkele opmerkingen over de regierol van de civiele rechter en de rol van de advocaat onder ‘KEI’, *NJB* 2017/617, p. 724-733.



insurance for journalists and editors that also covers litigation (IT). In Cyprus, associations representing the interests of journalists can provide for insurance.

- Injunctions may be granted only if it does not preclude an important public interest (PL) with special caution (EE).
- Six Member States followed international recommendations and decriminalised defamation (CY, CZ, EE, IE, MT, RO).

**Table 7.3. Promising practices identified in the mapping exercise**

Constitutional law	Substantive law	Procedural law	Other measures
Constitutional “authorisation” is required to enact laws limiting freedom of expression (SE)	Individual journalists working for a newspaper are immune against both criminal <i>and</i> civil responsibility (SE)	Ordinary prosecutors are not allowed to prosecute journalists, only the “Justice chancellor” may do so, and only in case of public interest (SE).	Insurance companies often offer (partial) coverage of legal costs if the insured person sues or gets sued (CY, DE, DK, FI, IE, SE).  Coverage is provided only if the person wins the case (FI).
	Extreme strong protection of journalistic sources (SE)	Special courts designated to handle freedom of press-cases, jury (SE).	The professional journalistic association negotiated insurance for journalists and editors which also covers litigation (IT)
	Employed journalists are protected from civil litigation, but still may be targeted by criminal procedures (SK, LV).	A ‘Supervising judge’ ( <i>regierechter</i> ) gives the courts a firmer grip on the judicial process and prevent abusive procedural actions (NL).	The Journalists' Union or Chambers may provide access to insurance schemes and interest representation for journalists (CY, LT).
	Strong whistle-blower protection (SE, FR)	If the accusation is found grossly baseless, the accuser pays the costs (BG, CY, CZ, DE, DK, HR) (EL only if the accusation used false facts), FI, HU, PT, SI, SE).	
	Abolishment of criminal defamation (CY, CZ, EE, IE, MT, RO);  No imprisonment for defamation claims (HR).	Legal aid is provided in criminal and/or civil cases (AT, BG, CY, CZ, DE, DK, EE, EL, FR, FI, HU, HR, IT, LT, LU, LV, MT, NL, SI) but subject to conditions (ES).	
		Injunctions to stop	

	<p>publication may be granted only if it does not preclude an important public interest (PL) with special caution (EE).</p>
	<p>The court may require in certain cases that the plaintiff provide a security to cover the expected procedural expenses of the defendant (EE).</p>

## 7.5. Systemic safeguards

### 7.5.1. Early dismissal in criminal proceedings

(ES, FI, IT, LT, SK)

The possibility for the prosecutor to dismiss the complaint is a main safeguard against SLAPP cases, still, only a few Member States (IT, LT, ES, SK) foresee this option in their criminal proceedings, along with a "pre-trial admissibility filter" exercised by the judge for preliminary investigations (IT, ES). In practice, it would appear that in Spain, prosecutors are reluctant to use this tool.<sup>239</sup> However, the offended party can oppose a decision of dismissal, and become a private prosecutor (ES, FI, IT). In this quality, they can also appeal against the investigative judge's decision of dismissal (ES).

During criminal proceedings: the trial judge has the power to stop proceedings (IT) when he or she is satisfied that there are reasons that exclude criminal liability (see more in Annex).

### 7.5.2. Early dismissal in civil proceedings

(ES, HR, IT, NL, PT, SK)

Early dismissal is not common in civil proceedings, except in Ireland, where the court may summarily dispose of a claim if it is satisfied that the statement in respect of which the action was brought is "not reasonably capable of being found to have a defamatory meaning."<sup>240</sup> Most country experts reported that it was not possible for the judge to dismiss a case at an early stage of the procedure and avoid full discovery and a decision on the merits (IT, HR, PT, SK). In Spain, claims can be dismissed when inappropriate, i.e., where they are found to disproportionate or exaggerated or with no legal merits, but judges rarely apply this possibility.

<sup>239</sup> See for example Article 19, Spain: Concerns as Penal Code used to criminalise jokes and misinformation about coronavirus (2020), cited. A report by Article 19 on prosecutorial practices is due for publishing shortly at the time of writing.

<sup>240</sup> Defamation Act 2009, Section 34(2), <http://www.irishstatutebook.ie/eli/2009/act/31/section/34/enacted/en/html#sec34>.





Although not specifically at an early stage of the legal proceedings, courts can decide in some Member States to dismiss the case because of an abuse of the (civil) process, i.e., reckless, or frivolous litigations, and order the plaintiff to pay damages (ES, NL, PT).

### *7.5.3. Press Council*

*(AT, BE, CY, CZ, DE, DK, FI, HR, LV, LT, NL, SE, SI, SK)*

In most Member States press councils or similar entities have been set up. They are responsible for the self-regulation of written and electronic media, and they implement a journalists' code of Practice and deal with complaints from the public (AT, BE, HR, CY, CZ, DE, DK, EE, FI, LT, LV, NL, SK, SI, SE). In most countries, however, this does not shield the press against lawsuits.

In Cyprus, the Press Council represents the interests of the public against the journalists' conduct (CY), whereas in Germany it is seen as a lobby organisation of powerful media companies (DE).

Journalists' Unions or Chambers often provide access to insurance schemes and represent the interests of journalists (CY, DK, IT, LV).

Sweden's Press Council has the power to issue a fine and order the printing of the decision.

### *7.5.4. Remedies*

*(AT, BG, CY, CZ, FR, IT, LT, NL, PT)*

Remedies for abuse of process are not widely established in the Member States. In a few states, the crime of "false accusation" may be applied against those initiating meritless criminal lawsuits (CZ, FR, IT, PT). In Portugal, a person targeted by an abusive criminal complaint may submit a counter criminal complaint for false public accusation (a criminal offence). In France, courts sometimes impose a civil fine on the plaintiff for unmeritorious litigation (see Annex). The crime of false accusation exists also in other states but is not applied for the purpose of fighting SLAPP (AT, HU, SK). In fact, it may be used against journalists as part of SLAPP (HU, SK, SI).

Theoretically, it is possible to ask for damages as well, but the difficulty of providing evidence may prevent wider practical usage (AT, CZ, CY, FR, LT, NL).

The trial judge has the power to impose fines for non-compliance with orders given in court proceedings. Judges can issue sanctions for certain forms of bad faith and procedural abuses attempting to, for example, to excessively prolong the legal proceedings (BG).

### *7.6. Adaptation practices and other forms of support to SLAPP targets*

*(BG, DE, HU, IT, RO, SI)*

The following practices have been developed by civil societies to provide effective assistance to deal with SLAPP cases.



- Financial independence of media is ensured through crowdfunding, grants from private donors (RO, HU).
- Cooperation with NGOs, law houses, or organising themselves into NGOs or working groups for various editorial projects (i.e., *Să fie lumină*) called a “hybrid media model” (RO).<sup>241</sup>
- NGOs intervene as third parties in lawsuits in some Member States, bringing international human rights arguments when the court otherwise would not do so (HU, SI).
- NGOs offer pro-bono legal assistance to journalists and bloggers facing legal charges or suits.<sup>242</sup> (DE, HU, IT). A specific legal aid fund was established in DE by an NGO to support court defence of journalists and researchers writing about the role of the Hohenzollern family under the *Nationalsozialismus* (DE). The fund was created in reaction to the repeated lawsuits by Georg Friedrich Prinz of Preußen to prevent investigation of his family’s ownership matters (DE).<sup>243</sup>
- NGOs take on the case and submit it to the ECtHR (HU, RO).<sup>244</sup>
- Advocacy work and awareness raising activities to give visibility to SLAPP cases (BG).

The collection of these practices shows that in some states, NGOs are active in defending themselves against SLAPP initiatives. However, certain governments have established government-organized non-governmental organizations (GONGOs) to convey political messages in an informal manner.

## 7.7. Vulnerabilities

### 7.7.1. Instruments that can be abused to vexatiously lengthen the proceedings

(BG, CY, CZ, EL, ES, FR, HU, IT, MT, NL, PT, RO, SI)

Lengthy proceedings are a major problem in a number of Member States (CY, CZ, EL, ES, FI, IT, FR, NL, MT, BG, PT, RO, SI)<sup>245</sup> which plays in favour of SLAPP plaintiffs. In some member states, even the preliminary phase of criminal proceedings (after which the case is rejected) lasts 30 months *on average*, during which period defendants receive no financial support. In Hungary, cases typically last for 3-5 years, with a first instance decision likely to be reached in the 3rd year. In Cyprus, a typical court procedure lasts for 9 years.

It is a typical SLAPP technique for plaintiffs to intentionally try to lengthen the procedure, attempting to exhaust the financial resources of the defendant.<sup>246</sup> (HU, IT, LT, NL, RO<sup>247</sup>)

<sup>241</sup> Preoteasa, Manuela, Schwartz, Andrei, 22.03.2018, “Romanian Hybrid Media Model”, *European Journalism Observatory*, <https://en.ejo.ch/media-economics/romania-hybrid-media-model>

<sup>242</sup> For more information, see Media Freedom Resource Centre, OBC Transeuropa, Legal Defence Centres Fighting for Press Freedom in Italy (2018), [Legal Defence Centres Fighting for Press Freedom in Italy](https://www.mediafreedomresourcecentre.org/en/legaldefencecentresfightingforpressfreedominitaly).

<sup>243</sup> <https://fragdenstaat.de/aktionen/prinzenfonds/>, <https://www.br.de/nachrichten/deutschland-welt/prinzenfonds-gegen-hohenzollern-jedes-wort-zaehlt,S4LvD9m>

<sup>244</sup> Media Defence, 03.05.2020, *The citizen journalist Elena Popa*, <https://www.mediadefence.org/casestudies/citizen-journalist-elena-popa>

<sup>245</sup> See among others: Justice Scoreboard, 2020, Figure 5. [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf)

<sup>246</sup> R. Abrams, ‘Strategic Lawsuit Against Public Participation (SLAPP)’, (7) *Pace Environmental Law Review* 1989-1990, p. 33; A. Glover & M. Jimison, ‘S.L.A.P.P. Suits: A First Amendment Issue and Beyond’, (21) *North Carolina Central Law Journal* 1995, p. 123; J. Gleason, ‘Strategic lawsuits against public participation’, in: S.Stec (ed.), *Handbook on Access to Justice under the*



The typical dilatory practices used are amendments to pleas, claims and arguments, intentionally filing a lawsuit with incomplete information, can be and are used to lengthen the procedure (IT, HU).

Dutch civil procedural law contains different tools that can be misused to unnecessarily prolong and complicate the procedure. These include, for instance, amending claims during the procedure, raising procedural issues, requesting a witness hearing or expertise, requesting a change of date for the witness hearing, requesting an oral hearing (which is not directly necessary for the case);<sup>248</sup> or applying for a postponement of the judgement.<sup>249</sup> However, the procedural rules also provide judges with strong control over unnecessary delays in the course of the procedure (NL).

### 7.7.2. Other vulnerable points within the court procedures

(BE, DE, EE, ES, HR, HU, IT, LV, PT)

- Preliminary injunctions can postpone the publication of an article to avoid instant harm (HU, DE, EE). This can be abused by plaintiffs to postpone the publication of an inconvenient story until it loses relevance. In Hungary, asking for a preliminary injunction does not entail that a lawsuit is initiated. Broadly formulated temporary injunctions can remain in force for up to one year, renewed any number of times until the end of the procedure.
- The 'kort geding' procedure allows the plaintiff to claim an injunction without the knowledge of the defendant (BE).
- In Italy, court may oblige the defendant to deposit the estimated damage before the verdict (IT).<sup>250</sup> For small and medium size outlets, this provisioning often leaves the outlet without financial liquidity and can paralyse their functioning.
- The difference between judicial practice of the lower courts and higher courts means that meritless claims are dismissed only in the second instance proceedings (EE, ES, HU, HR, LV).
- When a private accuser takes over the role of the public prosecutor, it is generally regarded as a risk to the fairness of the procedure. In Portugal, it is possible to bypass prosecutors which is seen as to increase the opportunity for frivolous lawsuits to reach courts (PT).<sup>251</sup>

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Aarhus Convention, Hungary: The Regional Environmental Center for Central and Eastern Europe 2003, p. 59; C.H. Barylak, 'Reducing Uncertainty in Anti-SLAPP Protection', (71) Ohio State Law Journal 2010, no. 8, p. 845.

<sup>247</sup> For example, in the "Football Leakes case", the trial was postponed six times upon request of the plaintiff, beyond three postponements for other reasons. According to the Romanian Centre for Investigative Journalism - CRJI, as cited by the Council of Europe's Platform to promote the protection of journalism and safety of journalists, 27.10.2020, *Lawsuits Filed against the Romanian Centre for Investigative Journalism*, [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_pos=5&p\\_p\\_col\\_count=10&\\_sojdashboard\\_WAR\\_coesojportlet\\_alertPK=74621243](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-2&p_p_col_pos=5&p_p_col_count=10&_sojdashboard_WAR_coesojportlet_alertPK=74621243)

<sup>248</sup> Article 4.1 Procesreglement civiele dagvaardingszaken bij de rechtbanken (7th edition, 2019).

<sup>249</sup> T.E. van der Linden, 'In de hoogste versnelling. Over de invloed die partijen hebben op de doorlooptijd van een civiele procedure', *Nederlands Juristenblad* 2020/1318, p. 1528.

<sup>250</sup> Article 2424 bis (3) of the Civil Code, rules on legal entities' financial management requires provisioning the likely amount of the damage the court could condemn the outlet to pay (based on the request of the claimant).

<sup>251</sup> The private party lodging the criminal procedure takes the decision to file charges. If charges are filed, the defendant then has the opportunity ask a judge to review and decide if the case should go to trial. This possibility to bypass prosecutorial judgment is seen by some experts as potentially increasing the opportunity for frivolous claims to reach court. [https://ipi.media/wp-content/uploads/2016/08/PortugalCriminalDef\\_IPI\\_ENG.pdf](https://ipi.media/wp-content/uploads/2016/08/PortugalCriminalDef_IPI_ENG.pdf)



- The opposite of single person-liability: multiplication of the lawsuit by suing various actors for the same cause: journalist, producer, publisher, sharer on social media (EE).

### 7.7.3. Other, non-procedural issues

(CZ, FI, DE, IT, RO, SI)

- Threats and harassment against journalists, judges, civil servants, nurses and other professionals through messaging, social media, letters, and phone calls (FI, RO, SI). The harassment is reportedly severe<sup>252</sup> (RO) and continuous (SI), with a lack of response from the criminal justice system.
- Threatening with illegal action in case the content is published (DE).<sup>253</sup>
- Pre-litigation calls to publish retraction, apology, and pay financial satisfaction are common (CZ, DE, FI). Pre-publication letters (DE) are increasingly common: press law information letters, which are labelled as "providing accurate information to the publisher", which, however, are perceived as threats with litigation in case the original information is published.<sup>254</sup>
- Editors refuse to cover damages for statements which have been found defamatory by courts (IT). By contrast, in Sweden individual journalists cannot be sued only their publisher.
- Small media and journalist teams do not have at their disposal the personnel and financial backing required for confrontation and the defence of their interests (SI).<sup>255</sup>

### 7.8. How Member States and domestic courts comply with the practice of the ECtHR

As shown in Chapter 5, the jurisprudence of ECtHR relating to Article 6, 8, 10, and 17 has the capacity to strike off SLAPP claims. However, by the time a case reaches the ECtHR, financial and personal resources have been sacrificed for a lawsuit which could have been prevented by appropriate anti-SLAPP legislation. A consistent application of the ECtHR principles at the domestic, even local level (and ideally in a pre-liminary phase of the procedure) would provide meaningful protection against SLAPP cases.

In several Member States, ECtHR practice is followed consistently (AT, BE, CZ, DK, F, FI, LT, LV, NL, SE, SI), while in others its application varies across courts (BG, CY, EE, EL, ES, HR, IT, MT, RO, SK, PT). Improvement in higher courts was reported by the experts consulted (ES, IT, PT) following several

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<sup>252</sup> Euroscientist.com, 24.06.2019, *Is it life-threatening to investigate plagiarism?*, <https://www.euroscientist.com/is-it-life-threatening-to-investigate-plagiarism/>. The case of investigative journalist Emilia Şercan.

<sup>253</sup> In the Blinkfuer-Case the Federal Constitutional Court (BVerfGE 25, 256) stated that an economic boycott is not protected by freedom of expression if it is not based solely on intellectual arguments, i.e., if it is not limited to the persuasiveness of statements, explanations and considerations, but also uses the means of threatening serious disadvantages and exploiting social or economic dependence. In Blinkfuer, such disadvantages were promised if the publisher delivered its television magazine "Blinkfuer" with the GDR television program in Hamburg.

<sup>254</sup> Tobias Gostomzyk/Daniel Moßbrucker, „Wenn Sie das schreiben, verklage ich Sie!“ Studie zu präsentiven Anwaltsstrategien gegenüber Medien, 2019, 5 f. According to court interpretation, nothing is wrong as long as the letters are not practically threatening with lawsuits unless their version of the truth is published.

<sup>255</sup> *Ibidem*.



cases and criticism, whereas lower courts were reported to be potentially less experienced in applying the principles of ECtHR (HU, SK).

Some states incorporated the wording of ECHR Article 10 entirely, or almost entirely literally (AT, CY, DK, HR), but the courts (especially lower courts) do not necessarily apply it (CY, HR).

According to the expert report from Greece, ECtHR practice or principles were not always applied; in particular, facts and value judgments were not distinguished.<sup>256</sup>

In Portugal, some courts have questioned the compatibility of certain principles elaborated by the ECtHR with Portuguese constitutional norms. In Hungary, both the execution of the ECtHR judgements<sup>257</sup> and respecting the ECtHR principles in the jurisprudence have proved problematic.<sup>258</sup>

Dutch civil courts have taken a rather pragmatic and casuistic stance regarding the effect of Article 10 and 11 ECHR on national legal concepts.<sup>259</sup> The ECtHR found freedom of expression to be even too far-reaching in Sweden.<sup>260</sup> (For ECtHR-related case law and detailed accounts see Annex.)

### ***7.9. Targets and perpetrators***

SLAPP can target all members of civil society. In our questionnaire, we asked our country experts which type of actors are most typically targeted by vexatious lawsuits. In 12 Member States journalists, bloggers and activists were similarly targeted (BE, BG, DE, EE, ES, F, HU, IT, LT, MT, PT, SK). In some countries, attacks are mainly limited to journalists or the media (AT, EL, HR, LV, NL), especially minority journalists (LV), academics or researchers (HU, NL, SI). In particular, environmental activists were targeted in some states (PT, SI). According to Dunja Mijatovic, the Council of Europe Commissioner for Human Rights: "Public watchdogs in general are affected, (...) all those who speak out in the public interest and hold the powerful to account."<sup>261</sup>

SLAPPs are typically initiated by persons or entities in powerful positions. We asked experts to confirm whether those holding political power, or those holding corporate power were more represented. The replies show a considerable overlap of both kinds of actors, with the balance tipping lightly in favour of persons holding political power. Politicians and public officials were indicated in several states, (AT, BE, CZ, EE, HR, HU, IT, LT, LV, MT, SK, SI), including law enforcement authorities, (ES, PT,

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<sup>256</sup> Antonis Manidakis 'Κρίσεις και κριτική από τον τύπο της προσωπικότητας, δημόσιου, πολιτικού προσώπου' (manidakis.gr) <http://www.manidakis.gr/krisis-ke-kritiki-apo-ton-typo-tis-prosopikotitas-dimosiou-politikou-prosopou/>.

<sup>257</sup> According to the report of the European Implementation Network, Hungary has not implemented 81% of leading judgments in the past 10 years, overall 54 judgments. Only Russia and Azerbaijan have worse numbers in the Council of Europe (89% and 97%). <http://www.einnetwork.org/hungary-echr>.

<sup>258</sup> Certain court judgments—including a clarifying decision of the Highest Court of Hungary—have declared that courts are bound only by Hungarian laws in the event that they are in contravention with the ECHR's judgments. Kúria (the highest court of Hungary) Bfv. II. 1812/2014., and 3/2015. BJE., <http://www.kuria-birosag.hu/hu/joghat/32015-szamu-bje-hatarozat>. See more in Bayer, J (2018) Media freedom and pluralism: legislation and enforcement at the European level. ERA Forum, Journal of the Academy of European Law. Springer.

<sup>259</sup> J.M. Emaus, Handhaving van EVRM-rechten via het aansprakelijkheidsrecht (diss. Utrecht), Den Haag: BJu 2013, p. 21.

<sup>260</sup> *Arlewin v. Sweden*, 22302/10, 1/3/2016 holding a violation of Article 6 ECHR.

<sup>261</sup> CoE Commissioner for Human Rights issues a Human Rights Comment on SLAPPs. Time to take actions against SLAPPs, Dunja Mijatovic, Strasbourg 27 October 2020, Available at: <https://www.coe.int/en/web/media-freedom/-/coe-commissioner-for-human-rights-issues-a-human-rights-comment-on-slapps> (Accessed, 21 November 2020)



BG) and members of the judiciary (IT). In comparable numbers, corporations and private individuals (AT, BE, BG, CZ, DE, EE, F, HU, IT, SK, SI, PT) were also reported to litigate with the aim of vexation.

The kinds of publications at stake are for instance reports of wrongdoings or corruption, (BG, SK, PT) satire and manifestation of criticism (ES, PT), blogs and press-reports, (DE, EE, IT), defamatory statements or offensive value judgments (EE, HR). The forms of expression were online publications, printed publications or demonstrations.



## 8. Rule of law aspects with an emphasis on the role of courts

### 8.1. Types of laws that can serve as the basis of SLAPPs from the viewpoint of the rule of law

As mentioned earlier, there is a power imbalance between the parties to the detriment of the defendant. This imbalance often manifests itself in the vertical relationship between the state versus the individual. As opposed to business corporations, state organs may not only invoke existing laws to silence the individual by exhausting or intimidating him or her through the legal process, but they also have the power to pave the way for groundless or exaggerated lawsuits by passing laws that are inviting potential applicants – including state organs – to initiate vexatious procedures. We can differentiate three types of laws: (1) laws, which can incidentally be used for SLAPP, (2) laws that have a design failure and invite applicants, typically state organs, for starting a SLAPP suit, where the disadvantages to the defendant can be compensated by the ordinary judiciary; and (3) laws with a design failure that have no human rights friendly interpretation and can only be struck down by a court exercising constitutional scrutiny. (See Table 2.1).

1. No law can be made entirely SLAPP-proof by the legislative, i.e., laws serving perfectly legitimate purposes, like defamation laws, may always be triggered for intimidating the defendant, or at least the applicant may make attempts to do so. Even anti-SLAPP laws may be invoked in a distorted manner to silence speech. Courts may put a halt to such procedures, and carefully assess when an anti-SLAPP measure is relevant or not.

2. We have also identified laws *designed* to silence critical voices. The latter type of laws will refer to certain state objectives as pretext, such as security for example, in the name of which rights need to be limited. However, the rights limitations would not appear necessary nor proportionate. An example is the Hungarian Stop Soros law, whereby – according to the Commission – Hungary violated EU law when criminalising activities designed to enable asylum proceedings to be brought in respect of persons who do not meet the criteria established in national asylum law.<sup>262</sup> According to this law, individuals, typically lawyers and human rights activists helping asylum seekers might be sentenced to jail for facilitating illegal immigration. Those mobilising for asylum seekers' rights (via protests for example) might also end up in prison. While the fight against illegal immigration and the prevention of civil disturbance are legitimate state objectives, the Stop Soros law appears to serve a different purpose, namely the intimidation of civil society actors and the shrinking of space for individuals' participation in public matters.<sup>263</sup>

3. Finally, there is a category of laws (columns 5-6 *infra* in section 2.5), Table 2.1), where even an independent and impartial judiciary fulfilling its function of protecting individual rights will not be able to remedy, since there is no fundamental rights-friendly interpretation of the given law. They will not exist in well-functioning rule of law-based democracies since these laws – in the unlikely case they are adopted – will not survive constitutional scrutiny and will be struck down. The law underlying the case of French farmer Cédric Herrou illustrates these types of legislation well. In this case the court

<sup>262</sup> Action brought on 8 November 2019 in the Case C-821/19 European Commission v Hungary.

<sup>263</sup> Carrera, S., L. Vosyliūtė, S. Brenda Smialowski, J. Allsopp, G. Sánchez, (2019) "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update", January. (<https://www.ceps.eu/publications/fit-purpose-facilitation-directive-and-criminalisation-humanitarian-assistance>), 61.





balanced the criminal law provision on the facilitation of irregular migration against the French constitutional principle of ‘fraternity’ to prevent SLAPPs from occurring.<sup>264</sup> Cédric Herrou was convicted by the ordinary judiciary in a criminal case for ‘crimes of solidarity’,<sup>265</sup> i.e., for the facilitation of irregular migration in accommodating in his farm destitute migrants and asylum seekers.<sup>266</sup> When he challenged the constitutionality of this Criminal Code provision, the French Constitutional Council – in light of the ‘fraternity’ principle – exempted from criminalisation the assistance provided to those migrants and asylum seekers who are already in France (‘movement and irregular stay’).<sup>267</sup>

## 8.2. Judicial independence

### 8.2.1. Theoretical considerations

Courts play a vital role in putting a halt to SLAPPs. The judicial system might compensate for the weaknesses of the defendant in a SLAPP case and introduce an EU and constitution-friendly interpretation of the respective provisions or may stop frivolous claims at an early stage of the proceeding so that a minimum harm is inflicted on the SLAPP-victim (columns 1 and 3 *infra* in section 2.5, Table 2.1.). In cases where there is no constitution-friendly interpretation, the constitutional court or another court exercising constitutional scrutiny will step in.

But in countries where judicial independence is not fully warranted, the courts may not be able to fulfil their function and step up against powerful entities and state organs as applicants (columns 2 and 4 *infra* in section 2.5, Table 2.1.). As the two Article 7(1) TEU procedures,<sup>268</sup> a set of infringement cases,<sup>269</sup> preliminary rulings,<sup>270</sup> and monitoring exercises<sup>271</sup> show, judicial independence is under

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<sup>264</sup> Conseil constitutionnel 6 July 2018, Décision n° 2018-717/718 QPC du 6 juillet 2018, M. Cédric H. et autre [Délit d'aide à l'entrée, à la circulation ou au séjour irréguliers d'un étranger], [https://www.conseil-constitutionnel.fr/decision/2018/2018717\\_718QPC.htm](https://www.conseil-constitutionnel.fr/decision/2018/2018717_718QPC.htm).

<sup>265</sup> L. 622-1 of the French Code on the Entry and Residence of Foreigners and the Right to Asylum (CEDESA). See also L. Vosyliūtė and C. Conte, “Crackdown on NGOs assisting refugees and other migrants”, *ReSOMA Final Synthetic Report*, June 2019, <http://www.resoma.eu/node/194>.

<sup>266</sup> “French Court Scraps Farmer’s Conviction for Helping Migrants Cross Border.” *The Guardian*, 13 May 2020, <http://www.theguardian.com/world/2020/may/13/french-court-scraps-olive-farmers-conviction-for-helping-migrants-cross-border>.

<sup>267</sup> [Dossier documentaire décision 2018-717/718 DC du 6 juillet 2018 M. Cédric H. et autre \[Délit d’aide à l’entrée, à la circulation ou au séjour irréguliers d’un étranger\] \(conseil-constitutionnel.fr\)](https://www.conseil-constitutionnel.fr/decision/2018/2018717_718QPC.htm) As a consequence, Cedric Herrou has been acquitted, when the appeal court quashed his suspended sentence in light of the Constitutional Council’s interpretation. Amnesty International (2020 a) France: Acquittal of Farmer Who Helped Asylum Seekers Shows That Solidarity Is Not a Crime. <https://www.amnesty.org/en/latest/news/2020/05/france-acquittal-of-farmer-who-helped-asylum-seekers-shows-that-solidarity-is-not-a-crime/>.

<sup>268</sup> European Parliament (2018), Resolution of 1 March 2018 on the Commission’s decision to activate Article 7(1) TEU as regards the situation in Poland (2018) <[https://www.europarl.europa.eu/doceo/document/TA-8-2018-0055\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0055_EN.html)>; European Parliament (2018), Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018) available at: <[https://www.europarl.europa.eu/doceo/document/A-8-2018-0250\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.html)>.

<sup>269</sup> Cases C-192/18, C-619/18, C-791/19; C-83/19, Asociația ‘Forumul Judecătorilor Din România’ v Inspekția Judiciară, C-127/19 Asociația ‘Forumul Judecătorilor Din România’ and Asociația ‘Mișcarea Pentru Apărarea Statutului Procurorilor’ v Consiliul Superior al Magistraturii and C-195/19 PJ v QK and in Cases C-291/19 SO v TP and Others, C-355/19 Asociația ‘Forumul Judecătorilor din România’, Asociația ‘Mișcarea Pentru Apărarea Statutului Procurorilor’ and OL v Parchetul de pe lângă Înalta Curte de Casație și Justiție –Procurorul General al României and C-397/19 AX v Statul Român –Ministerul Finanțelor Publice.





threat in a number of Member States. In these countries there is an increased risk that courts may not be able to provide safeguards against SLAPPs with the state (state organs, state-owned entities, etc.) as a party.

In a state with certain, and even more so in states with systemic rule of law problems, laws with design failures may continue to apply and be invoked against critics. Furthermore, their sheer existence is likely to have a chilling effect. An example is the Hungarian Lex NGO, which was a thinly veiled attempt to intimidate and silence civil society organisations, especially human rights NGOs. The law was not quashed by the Constitutional Court, which stopped its proceeding in the name of a judicial dialogue with the case pending in front of the CJEU. The Luxembourg court found the law to be contrary to various aspects of EU law.<sup>272</sup> But without a constitutional or supreme court interfering, even the best-equipped domestic court is not in the position to give the law a narrow interpretation so that fundamental rights are not jeopardized.<sup>273</sup> The intervention of the CJEU might help, but unlike a constitutional court, it cannot strike down legislation, and therefore enforcement is not guaranteed. The Hungarian Lex NGO provides again an example; not only did the Hungarian government not implement the judgment in Lex NGO, it also started to apply the law after the judgment had been passed with regard to the allocation of EU funding. A government-created public foundation in charge of distribution of funds rejected an NGO's grant application on the grounds that it had failed to comply with Lex NGO.<sup>274</sup> In such cases the only option is to quash the law via the constitutional court or if the national lawmaker withdraws (Column 5 *infra* in section 2.5, Table 2.1.) But neither of this will necessarily happen in a state with systemic rule of law deficiencies. Since the constitutional court is typically among the first targets of an increasingly autocratic regime to be captured, it is unlikely that an abusive law will be screened out through constitutional scrutiny.<sup>275</sup> In such cases, the European Union should focus on restoring constitutional democracy and the rule of law (Column 6 *infra* in section 2.5) Table 2.1.).

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<sup>270</sup> See for example with regard to Poland cases C-522/18, C-537/18, C-585/18, C-624/18, C-625/18, C-668/18, C-842/18, C-487/19, C-508/19, C-748 to 754/19, C-55/20, C-132/20, C-491 to 496/20, C-506/20, C-509/20, C-511/20, and with regard to Hungary Case C-564/19.

<sup>271</sup> See for example European Commission (2020), "2020 Rule of Law Report: The rule of law situation in the European Union", COM(2020)580 final, Brussels, 30.9.2020, [https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en).

<sup>272</sup> Case C-78/18 Commission v Hungary (transparency of associations). The judgment has not yet been implemented at the time of writing this paper.

<sup>273</sup> The Hungarian Constitutional Court could have struck down the law, but instead it waited for the Court of Justice's ruling under the pretext of "constitutional dialogue". <https://hunconcourt.hu/kozlemeny/in-the-spirit-of-the-european-constitutional-dialogue-the-constitutional-court-suspended-its-procedures-in-the-cases-related-to-the-act-on-national-higher-education-and-the-act-on-ngos>. "Whereas this justification may sound as persuasive and Europe-friendly, in reality it is a fake argument, an abuse of a legal concept, so as ... to grant more time to the government to harass and intimidate NGOs". P. Bárd (2020), "The Hungarian "Lex NGO" before the CJEU: Calling an Abuse of State Power by its Name", *Verfassungsblog on Matters Constitutional*, 27 January 2020, <https://verfassungsblog.de/the-hungarian-lex-ngo-before-the-cjeu-calling-an-abuse-of-state-power-by-its-name/>, P. Bárd, J. Grogan and L. Pech, "Defending the Open Society against its Enemies: The Court of Justice's ruling in C-78/18 Commission v Hungary (transparency of associations)", *Verfassungsblog on Matters Constitutional*, 22 June 2020, <https://verfassungsblog.de/defending-the-open-society-against-its-enemies/>.

<sup>274</sup> A.K. Kádár: A warning to the guardians, 26 October 2020, <https://www.euractiv.com/section/justice-home-affairs/opinion/a-warning-to-the-guardians/>

<sup>275</sup> P. Bárd, L. Pech (2019), "How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The 'Hungarian model'", *RECONNECT Working Paper* No. 4, October 2019, <https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>



### 8.2.2. Experts' findings on judicial independence

It is difficult to distinguish justified lawsuits by individuals and organizations that genuinely seek a legal remedy from cases where legal instruments are misused for silencing journalists or other actors expressing views on matters of public interest. Courts play a decisive role in assessing each case individually and discarding unfounded ones.

The feedback from experts consulted for the study was overall positive on the role of courts. Where judges are seen to be consistently applying the case law and principles developed by the ECtHR, the phenomenon of SLAPP appears to be less prominent and/or the protection for targets more effective (CZ, DE, FI, LU, LT, NL, SE). Irish courts have a wide discretionary role, and there is evidence that they have recently used it to lower the amount of granted damages, hence contributing to making the lodging of a claim less attractive.<sup>276</sup> In contrast, a court's unnecessarily narrow interpretation of the law may also give more room to SLAPPs, according to the experts consulted.

Experts from a number of Member States reported that the courts, in all instances, applied the law in harmony with the legal principles protecting freedom of expression, as laid down by ECtHR. Should a vexatious litigation emerge, there is both evidence and trust that the court would divert the case in a simple procedure (AT, CZ, DE, DK, EE, FI, LU, LT, NL, SE). At times, courts with the best intentions to halt attacks against public participation did not have the necessary means to do so efficiently (BE, BG, HR, F, IE, IT, LV).

The independence of the courts has been questioned by the national experts and shows a backsliding tendency in several states<sup>277</sup> (BG, CY,<sup>278</sup> HU, RO, SK) or systemic issues albeit with an improving tendency (MT). Pressure is exercised on the judiciary to refrain from criticising state power. It is possible to remove judges and prosecutors from office for their opinions (RO).<sup>279</sup> Repeated issues with the impartiality of the judges has been reported from Cyprus. The judiciary in Slovakia enjoys the lowest level of trust within the whole European Union (SK). (See Annex for more information and references).

Lower courts were subject to criticism related to freedom of expression, with second instance courts better equipped to apply legal principles and international standards (ES, HU, LV). Two Member States have reported that the Constitutional Court's intervention was sometimes necessary to make the necessary corrections (DE, SK).

<sup>276</sup> *Christie v. TV3 Television Networks Limited* [2017] IECA 128.

<sup>277</sup> The statement is based on experts' reports, see the Annex. In addition, Cf. the serious concerns regarding judicial independence in Hungary as identified in the Rule of Law Report prepared by the European Commission. 2020 Rule of Law, Country Chapter on the rule of law situation in Hungary, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0316&from=EN>.

<sup>278</sup> *ENCI/CCBE Survey among lawyers on the independence of Judges 2018-2019*, available at: <https://bit.ly/2JYlwVr>.

<sup>279</sup> "Article 9 (3), Law No 303/2004, introduced by Law No 242/2018. These provisions have been previously criticized by the Venice Commission (see Opinion No. 934/20 October 2018). See also: Selejan-Gutan, Bianca, 22.02.2019, "New Challenges against the Judiciary in Romania", *Verfassungsblog*, <https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/>. Dragoș, Călin, 16.06.2020, "The Recent ECHR Judgment Kövesi v. Romania. Reactions of Romanian Authorities and Implications regarding the Rule of Law", *Strasbourg Observers*, <https://strasbourgobservers.com/2020/06/16/the-recent-echr-judgment-kovesi-v-romania-reactions-of-romanian-authorities-and-implications-regarding-the-rule-of-law>.



As an example of the enhanced procedural authority of courts, the Dutch judicial system includes a so-called ‘supervising judge’ (*regierechter*), whose strong controlling rights over the procedure can prevent the usage of abusive practices by either party and ensure fairness.

The limitation of an anti-SLAPP law in light of the status of rule of law Member States are not clustered according to their health if the rule of law. This exercise may be done by EU institutions, extra-EU entities, or academics.<sup>280</sup> The present subchapter is rather a warning to lawmakers and policymakers about the limits of any anti-SLAPP legislation adopted along the recommendations formulated in the present paper. As the UN Office of the High Commissioner for Human Rights – and on that basis the Fundamental Rights Agency – showed in its S-P-O (structure, process, outcome) analysis, laws, institutions (structures) and policies (processes) might be present and adequate, but the situation on the ground (outcome) may still not exhibit the desired changes.<sup>281</sup>

In light of the importance of the judiciary, and the possible different approaches of a state to the rule of law and judicial independence, we have elaborated a model for clustering Member States into three scenarios (see Table 1. Possible scenarios of SLAPPS in the different clusters, in previous section 2.5 for more in-depth elaboration):

- A: Democracies based on the rule of law;
- B: Democracies based on functioning rule of law with some serious challenges in specific areas (fundamental rights, corruption), but where the judiciary is independent;
- C: State capture, including in particular judicial capture, where rule of law is no longer guaranteed.

The hypothesis is that SLAPPS can occur also in democracies with strong rule of law safeguards, however on a more ad-hoc basis. (CLUSTER A in Table 2.2. *infra*) Well-established democracies based on the rule of law will have laws that SLAPP applicants might attempt to abuse, but the judiciary will be in a position to prevent such abuses. Laws with a design failure – as defined in the previous section – are not adopted in a functioning democracy.

In scenario B, SLAPPS typically relate to some serious, but individual sporadic challenges (i.e., challenges not effecting the state as a constitutional democracy based on the rule of law), such as migrants and asylum seekers’ treatment, unresolved environmental issues, or minorities’ rights (CLUSTER B in Table 2.2. *infra*). Hence states in Scenario B have no systemic rule of law issues, but any deep societal problems or other controversies the country faces with regard to some specific topics, such as migration, will be reflected in SLAPP cases. In countries with sporadic rule of law problems, the judiciary will be in the position to prevent reliance on legal instruments in order to launch

<sup>280</sup> For such exercises see for example <https://www.v-dem.net/>; <https://freedomhouse.org/>; <https://www.bti-project.org/en/home.html?&cb=00000>; <https://worldjusticeproject.org/rule-of-law-index/global/2020>.

<sup>281</sup> Promoting the rule of law in the European Union. FRA Symposium Report, 4th Annual FRA Symposium, Vienna, 7 June 2013, <http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf>. A pilot study conducted by the Fundamental Rights Agency covering Finland, Ireland and the Netherlands, in (i) hate crime, (ii) access to justice and (iii) discrimination and independence of non-judicial bodies, vividly showed these difficulties. Talk of G. Toggenburg, Senior Legal Advisor, European Union Agency for Fundamental Rights at the LIBE Committee on Civil Liberties, Justice and Home Affairs meeting on 10 December 2015.



vexatious lawsuits. Whereas laws with design failures might be adopted, the judiciary will again interpret these laws in a fundamental rights-friendly manner. SLAPP cases could already fail at the prosecutorial stage for being meritless or frivolous, or in criminal law terminology for the lack of a legal good to be protected, or the lack of social harmfulness. (See in particular Chapters 7.4. and 10.4.) Should there be no interpretation of the law that is compatible with human rights allowing the prosecutor or the judge to halt the case, the law will fail under constitutional scrutiny, or in front of European courts, and judgments will be duly executed.

Scenario C covers countries with systemic rule of law problems (CLUSTER C in Table 2.2. *infra*), i.e., where “elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.”<sup>282</sup> In such jurisdictions judicial independence is likely to be jeopardized, or courts might even be captured.

As in CLUSTER B, in countries belonging in CLUSTER C, both neutral and abusive laws will be invoked by SLAPP applicants, and the judiciary might or might not prevent vexatious lawsuits. Even if a judicial system is not independent, there will always be autonomous judges who adhere to the rule of law and prevent abuses. Also, many cases are not politically sensitive, and for these cases the judges will not have to fear retaliation by other branches of government. However, since power imbalance is a main characteristic of SLAPPs and often the state or a state agent is the applicant or the alleged victim,<sup>283</sup> the likelihood that the judiciary will not be able to fulfil its role is likely (see the Annex).

Finally, in this scenario, the constitutional court – which is typically among the first targets of state capture – will not be able to declare abusive laws null and void, and full implementation of European court judgments will also be doubtful. Scenario C would require a ‘rule of law’ approach before any recommendations on countering SLAPP cases could be successful.

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<sup>282</sup> L. Pech, K.L. Scheppele (2017), “Illiberalism Within: Rule of Law Backsliding in the EU”, *Cambridge Yearbook of European Legal Studies*, Vol. 19, pp. 3-47.

<sup>283</sup> See the country reports in the Annex.



Table 8.1. Possible scenarios of SLAPPS in the different clusters

	1. Laws that might incidentally result in SLAPP, fixed by judicial interpretation	2. Laws that might incidentally result in SLAPP, not fixed by judicial interpretation	3. Laws with design failures, “inviting” SLAPPS, fixed by judicial interpretation	4. Laws with design failures, “inviting” SLAPPS, not fixed by judicial interpretation	5. Laws with design failures, “inviting” SLAPPS, that cannot be fixed by judicial interpretation struck down	6. Laws with design failures, “inviting” SLAPPS, that cannot be fixed by judicial interpretation stay in force
CLUSTER A: Democracies based on RoL	Meritless cases are likely to be dismissed by courts, the scope for abuse of procedure is limited	n/a	n/a	n/a	n/a	n/a
CLUSTER B: Democracies based on RoL with some deep problems in individual areas	Meritless cases are likely to be dismissed, the scope for abuse of procedure is limited	n/a	Courts apply fundamental rights test when applying Abusive laws in the given problem areas are given a rights-friendly interpretation, meritless cases are likely to be dismissed	n/a	Abusive laws in the given problem areas are struck down by the constitutional court or when CJEU/ECtHR judgments are implemented	n/a
CLUSTER C: State capture, including in particular judicial capture	A judiciary is never wholly compromised, some issues may be fixed by some judges	Judiciary does not prevent abuse of (neutral) law and procedure.	A judiciary is never wholly compromised, some issues may be fixed by some judges	Judiciary does not prevent application of (abusive) law and abuse of procedure.	Abusive laws in the given problem areas are struck down by the constitutional court or when CJEU/ECtHR judgments are implemented	National constitutional scrutiny does not work, and/or European judgments are not implemented



Source: Authors

Table 8.2. Clusters A, B, C

	Fixed by judicial interpretation	Not fixed by judicial interpretation	Cannot be fixed by judicial interpretation, so the law is quashed	Cannot be fixed by judicial interpretation, the law remains in force
Laws that might incidentally result in SLAPP, not fixed by judicial interpretation	A, B, C	C		
Laws with design failures	B, C	C	B	C

Source: Authors

**Empty fields:** problem is not existent in the given cluster

**Light green fields:** scenario applicable in the given cluster, no state-related problem is identified  
SLAPP-related recommendations are relevant.

**Dark green fields:** scenario applicable in the given cluster, system-relevant problem identified, which can be fixed by the judiciary  
SLAPP-related recommendations targeting the judiciary are relevant.

**Red fields:** scenario applicable in the given cluster, problem cannot be fixed  
SLAPP-related recommendations are irrelevant, or highly unlikely to be followed, instead the EU’s rule of law tools shall be activated.



## 9. Conclusions

Protecting targets from the use and effects of SLAPP cases requires a mix of measures. This study has identified the following three strands:

1. A consistent judicial practice respecting the principles of freedom of expression as developed by the ECtHR.
2. Financial and organisational support, as well as legal protection for targets.
3. Legal protection against abuse of process, for instance in the form of specific anti-SLAPP legislation.

### *9.1. The challenge of SLAPP cases*

Strategic lawsuits against public participation can take on many forms. The most typical grounds on which these lawsuits are filed are defamation, privacy or data protection, and copyright. Beyond criminal and civil procedures, administrative procedures may also be applied for the vexation of citizens in public participation. While criminal procedures may have a stronger chilling effect due to the severity of the sanctions, the procedure also provides stronger safeguards to defendants. Administrative procedures may take the form of a misdemeanour of defamation, or public investigations related to taxation or competition. Beyond litigation or administrative procedures, legislative instruments are sometimes designed specifically to chill various types of public participation. These may have a reading which allows human rights-friendly interpretation, but sometimes they have not – in these cases, the harm to human rights can be remedied only by annulment of the law.

It is worth noting that not all SLAPPs reach the court; often the threat of a lawsuit is effective. Evidence on this is limited as targets avoid referring to it. Even in Member States where SLAPP is not perceived as prevalent, such informal pressures have been reported (IE, F, DE, see chapter 7).

The social costs of SLAPP suits are twofold:

(1) SLAPP targets are dissuaded from investigating and informing the public on issues of public interest. They are hindered in fulfilling their watchdog role, in drawing attention to cases of potential corruption and clientelism, environmental damage and other issues. This interferes with the space for a healthy and transparent public debate and can therefore represent a threat to the health of democracies.

(2) Meritless litigation also represents a burden for judicial systems. Even where courts successfully address lawsuits that qualify as SLAPP, dealing with the cases requires time and resources. To save the public resources of the judiciary, SLAPPs should be stopped at an early, when relevant, prosecutorial phase of the procedure.

Ensuring that the legal systems have the adequate mechanisms to ensure that those lodging a SLAPP case bear all the legal costs involved by the procedure and will face any concluding consequences (e.g. in the form of sanctions should a case be found to be vexatious) could act as a powerful deterrent.



## 9.2. Strategies against SLAPP

The study has presented a series of practices in place in some Member States that, if adapted to the specific context of SLAPPs, could feed into the strategies developed by other Member States.<sup>284</sup>

Building on the clustering of possible scenarios described in chapter 8, we established the following two main categories of safeguards to strengthen the protection against SLAPP:

1. specific laws and legal measures protecting against SLAPP,
2. independent and strong courts which can prevent abuse of process.

When courts have strong competences to supervise the procedure, and the behaviour of the parties, they are better equipped to control delays and variations of claims and proposals, and thus are better equipped to prevent abuse of process. Moreover, ensuring that judges are trained in the balancing of conflicting fundamental rights and applying the principles of ECtHR would ensure that they are able to identify and address unjustified claims in the SLAPP context. Finally, specialised courts are in a better position to master the peculiarities of balancing freedom of expression and legitimate interests, and may be more aware of the broader social issues which trigger SLAPPs.

### 9.2.1. The abuse clause: anti-SLAPP

On the basis of the research conducted here, and building on recent developments such as the Whistleblower Directive,<sup>285</sup> this study is recommending the introduction of an EU-wide legislative procedural instrument to establish the abuse of process with legal certainty: an anti-SLAPP motion. This is also suggested by a coalition of NGOs that has drafted a proposal for an EU anti-SLAPP legislative initiative.

In addition to contributing to build a legal environment that is favourable to freedom of expression, such a procedural instrument presents the advantage of sparing resources for the judiciary and those targeted by SLAPP cases.

The envisaged anti-SLAPP instrument would be invoked by the defendant at an early stage of the procedure, arguing that the litigation is manifestly unfounded, lacks merits and/or there are elements indicating abuse of rights or procedure. The factors which give indication to invoke the 'abuse of right clause' are largely the same listed as characteristic of SLAPP cases.<sup>286</sup> The defendants in both civil and criminal, as well as administrative procedures should be entitled (and have the practical possibility) to invoke this clause. The motion to dismiss the case is to be assessed and taken by the judge.

Access to court is also a fundamental right, and squashing claims should take place only with good reason. Therefore, the criteria to invoke an anti-SLAPP motion should be sufficiently narrow to avoid

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<sup>284</sup> Practices which have proved useful in some Member States, cannot guarantee that their application will yield similar results in other Member States, because of the different constitutional, legal and judicial systems, also considering the different economic and cultural environment.

<sup>285</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

<sup>286</sup> Bárd, Bayer, Luk and Vosyliute (2020), op. cit., p. 13-14.





abuse,<sup>287</sup> as well as broad enough to provide autonomy for judicial reasoning to adapt the decision to emerging situations.<sup>288</sup> The following criteria are thought to strike the right balance:

- the speaker is a journalist, NGO or whistle-blower, in a less powerful position than the plaintiff;
- the lawsuit is meritless or frivolous;
- the claim is disproportionate compared to the severity of the harm;
- the activity shown previously by the defendant, or the content published was in the public interest;
- the claimed sanction would have a chilling effect on democratic participation.

The intent to intimidate has been consciously omitted from the list, as it was considered, in line with authoritative literature,<sup>289</sup> to result in an overly narrow take on abusive or SLAPP lawsuits.

### 9.2.2. *Cost, legal aid*

It has been found that the burden of litigation is to a large extent a financial one. In particular smaller media teams, freelancer journalists and NGOs living on donations that do not have at their disposal the personnel and financial backing required to organise and finance the defence of their interests, can be intimidated even by pre-litigation letters.

Most Member States have a system in which the loser pays the costs of the procedure. However, the legal fees and other costs must be covered for the duration of the proceedings. Moreover, not all legal costs are fully covered in the end.

Several states have established a system of legal aid, but it is subject to conditions that many SLAPP targets do not meet. If granted, the amounts are often lower than the actual costs incurred for the defence. Some NGOs provide pro-bono legal assistance, but the volume of this cannot cover all the needs, and the problem of financing spreads to the similarly vulnerable NGO sector.

Beyond the financial burden, reports have been given indicating the emotional burden that SLAPP victims suffer when they face the vexatious lawsuits, which are sometimes repeated or multiplied, claim irrationally large damages, threaten with imprisonment, initiated in a foreign country or are coupled with extra-legal harassment.<sup>290</sup> The emotional resilience of targeted persons can be increased with a supporting network and mental health services.

It is therefore recommended, that in case of a SLAPP-suspicious procedure, the costs of the defendant and the envisaged damages payable if the SLAPP is established, should be deposited by the

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<sup>287</sup> Vagueness of the criteria establishing abuse of right (Article 17 ECHR) was criticised: De Morree p. 111, and Dissenting opinion by Judge Sajó (Hungary), joined by Judges Zagrebelsky (Italy) and Tsotsoria (Georgia) in the case ECtHR 16 July 2009, *Féret v. Belgium*, appl. no. 15615/07, p. 26.

<sup>288</sup> Sajó (2006), 'Abuse of Fundamental Rights or the Difficulties of Purposiveness' in: *Abuse: The Dark Side of Fundamental Rights*, Utrecht, Eleven Publishing, p. 35.

<sup>289</sup> P. Shapiro (2010), "SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International", *Review of European Community & International Environmental Law*, Vol. 19, No. 1, pp. 24-26. and Sajó (2006) Abuse of Fundamental rights or the Difficulties of Purposiveness. In: *The Dark Side of Fundamental Rights*. Eleven Publishing, p. 40.

<sup>290</sup> "[...] defending a lawsuit in a foreign jurisdiction implies higher costs of proceedings and psychological distress caused by the lack of familiarity with foreign law", in: ECPMF (2019), "SLAPPs: Strategic Lawsuits Against Public Participation", Resource Centre on Media Freedom in Europe, 19 December 2019. See also Bárd-Bayer, 2020.



plaintiff. At the same time, legal aid in SLAPP-suspicious criminal and civil procedures should be provided upon merely *demonstrating* the need for such legal aid. This may require an amendment to the Legal Aid Directive.<sup>291</sup>

### 9.2.3. Criminal defamation

Most European Member States (21 of the 27) include criminal defamation in their legal systems, most of them with the threat of imprisonment. In ten Member States, criminal defamation is more commonly used for reputation protection than civil defamation.

All international human rights institutions maintain an unambiguous position of calling for the abolishment of criminal defamation. The ECtHR held that a criminal penalty is disproportionate for defamation cases and found that all criminal consequences, even if suspended, had a chilling effect on public debate and was therefore unjustifiable.<sup>292</sup> The Council of Europe's Parliamentary Assembly urged to remove any prison sentence as a consequence of criminal defamation (point 13, Resolution 1577 (2007), followed by one EU Member State). Beyond this, the Council of Europe promotes decriminalisation of defamation.<sup>293</sup>

The OSCE Representative for Media Freedom has issued repeated calls for the decriminalisation of defamation,<sup>294</sup> as did the UN Special Rapporteur on Freedom of Expression.<sup>295</sup>

Several European states even have an enhanced protection of monarchs or public officials against defamation in their criminal code (see above in Section 7). This is in contrast with the ECtHR's case law which holds that public officials are expected to show a higher tolerance threshold against criticism (see above). Removal of the enhanced protection for public figures from defamation laws has been called for by the Council of Europe Parliamentary Assembly as well.<sup>296</sup> The UN Special Rapporteur Frank La Rue, besides urging "all States which have not already done so to repeal criminal defamation laws in favour of civil laws", added that "any provisions that allow public officials to bring defamation suits with regard to their actions in public office should be totally eliminated."<sup>297</sup>

<sup>291</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

<sup>292</sup> ECtHR [GC], *Cumpăna and Mazăre v. Romania*, Appl.No. 33348/96, judgment of 17 December 2004; ECtHR, *Ruokanen and Others v. Finland*, Appl.No. 45130/06, judgment of 06 April 2010; ECtHR, *Atamanchuk v. Russia*, Appl.No. 4493/11, judgment of 11 February 2020.

<sup>293</sup> "Defamation", website of the Council of Europe, <https://www.coe.int/en/web/freedom-expression/defamation>. See also: Council of Europe (2018), "Decriminalisation of defamation: Council of Europe guidance on proportionality of laws and conformity with human rights", website of the Council of Europe, Strasbourg, 13 July 2018.

<sup>294</sup> OSCE (2020), "OSCE Representative on Freedom of the Media welcomes move to decriminalize defamation in Kazakhstan", website of the OSCE, Vienna, 7 May 2020. See Council of Europe (2016), "Draft Bill to Tighten Criminal Penalties for Defamation", website of the Council of Europe, Strasbourg, 27 May 2016.

<sup>295</sup> "The Special Rapporteur would like to reiterate that defamation should be decriminalized", in: Human Rights Council (2011), "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue", A/HRC/17/27, 16 May 2011.

<sup>296</sup> 17.1, 17.6., 17.7 of the Parliamentary Assembly of the Council of Europe Resolution 1577.

<sup>297</sup> UN (2009), "UN rights expert pleaded defamation no longer criminal offence in Maldives", UN News, 1 December 2009.



Beyond international bodies, several international groups have also called for the complete abolishment of criminal defamation.<sup>298</sup> In 2001, nine prestigious NGOs concerned with journalism urged<sup>299</sup> the European Council to consider abolishment of criminal defamation.<sup>300</sup>

The procedural difference between civil and criminal defamation is that in the case of criminal defamation, the prosecution represents the charges. The alleged victim of the defamation does not need to pay court fee, does not need an attorney, and does not need to be involved with the procedure. Defamation is not a victimless crime such as incitement to hatred, where the state is responsible to apply its *ultima ratio*<sup>301</sup> in order to protect the rights of others and social piece. Criminal law, as the *ultima ratio*, should be applied only if the legitimate purpose cannot be reached by other legal tools. Other legal tools for the reputation and privacy (like civil defamation, insult, the misdemeanour of defamation, the right of reply, or privacy protection) are better suited to give redress to persons whose rights were violated with a publication, by providing them with retraction, apology, and compensation for pecuniary and moral damages. Criminal consequences do not lead to these results: they represent retributive justice, rather than restorative justice. Their primary purpose is to exercise a chilling effect: to retaliate and to prevent the perpetrator and other members of the society from repeating the crime.

This makes criminal defamation particularly prone to be abused for SLAPP purposes. While, on the one hand, the defendant also enjoys the protective features of a criminal procedure; a higher threshold of proof, an assigned defender (whose fee is paid by the defendant only if convicted), and (unlike in civil procedures) no high damages to be paid. On the other hand, however, the looming prison sentence and the socially stigmatising effect of a criminal procedure may have a considerable chilling effect on effected persons.

To sum up, criminal defamation has features that make it an easy weapon for initiators of SLAPP: (1) the procedural burden is on the state and not on the complainant; (2) the chilling effect on speech is high and; (3) the purpose of the claim is not to remedy the harm caused by the speech.

#### 9.2.4. *Balancing privacy with freedom of expression*

The study showed that the European data protection framework can be used to silence reporting in some Member States (GR, HU, HR, RO, SK). While GDPR provides a strong and uniform protection of personal data, its Article 85 provides for reconciling the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic, or literary expression. Article 85(2) obliges Member States to

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<sup>298</sup> Transparency International (2016), "Panama: Release Dutch Journalist and Abolish Criminal Defamation Charges", website of Transparency International, 25 November 2016; Article XIX (2004), Briefing Note on International and Comparative Defamation Standards (<https://www.article19.org/data/files/pdfs/analysis/defamation-standards.pdf>); UN (1999) "Promotion and protection of the right to freedom of opinion and expression", UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28; I. Dohel (2009), "Freedom from Fear", *Index on Censorship*, Vol. 38, No. 2 ; CPJ (2016), "Critics are not criminals: Comparative study of criminal defamation laws of the Americas", study by Debevoise & Plimpton LLP, in partnership with Thompson Reuters Foundation and the Committee to Protect Journalists, March; IPI (2001), "Letter: EU defamation laws", 13 June 2001, <https://ipi.media/letter-eu-defamation-laws/>.

<sup>299</sup> IPI (2001), op. cit.

<sup>300</sup> See a more elaborated reasoning in Chapter 8, and a detailed discussion on balancing in Chapter 5.

<sup>301</sup> R. Christopher (ed.) (2013), *George Fletcher's Essays on Criminal Law*, Oxford: Oxford University Press, 2013, p. 32.



provide exemptions and derogations from practically all data protection rules and principles.<sup>302</sup> Member States have space for manoeuvre to determine the scope of derogation in their national law. As a result, the implementation of this rule among the Member States is diverse, and in some cases, it is unable to prevent that the GDPR is not misused to suppress the freedom of expression.<sup>303</sup>

The Report of 24 June 2020<sup>304</sup> on the implementation of the General Data Protection Regulation acknowledged that the reconciliation of the right to freedom of expression and data protection remains a "specific challenge" and that the practices of Member States are divergent. It states: "Data protection rules (as well as their interpretation and application) should not affect the exercise of freedom of expression and information, for instance by creating a chilling effect or putting pressure on journalists to disclose their sources." The Commission decided that it will "support further exchanges of views and national practices between Member States on topics... such as the freedom of expression".

It is found that a more efficient action is required beyond "further exchanges of views and national practices". It is part of EDPB's task to issue guidelines in order to encourage consistent application of GDPR (Article 70. 1. e) GDPR).<sup>305</sup> Therefore, it is recommended that the EDPB (using its power defined under Article 70. 1. e) GDPR) issues guidelines<sup>306</sup> on Article 85 towards a harmonised balance between data protection and freedom of expression in the EU.<sup>307</sup> Alternatively, EDPB can advise the Commission on this matter (Article 70. 1. b) GDPR.) and assist the Commission in passing an instrument for the purpose of interpretation.

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<sup>302</sup> Affected chapters of the GDPR are chapters 2,3,4,5,6,7,9. Exceptions are Chapter 1 (General provisions) and 8 (Remedies, liability and penalties).

<sup>303</sup> N. Bitiukova (2020), "Journalistic Exemption under the European Data Protection Law", *Policy Paper Series*, Vilnius Institute for Policy Analysis, Vilnius, 13 April 2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3531977](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3531977).

<sup>304</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0264&from=EN>

<sup>305</sup> Article 70.1.e) GDPR: "examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of this Regulation and issue guidelines, recommendations and best practices in order to encourage consistent application of this Regulation". See also: Recital 124 of GDPR: Within its tasks to issue guidelines on any question covering the application of this Regulation".

<sup>306</sup> EDPB: Our Work & Tools: Guidelines, Recommendations, Best Practices. [https://edpb.europa.eu/our-work-tools/general-guidance\\_en](https://edpb.europa.eu/our-work-tools/general-guidance_en).

<sup>307</sup> Its predecessor, the Working Party 29 had had an Opinion on the data protection and media in 1997. Given that there is a new legal instrument since 2018, the GDPR, and a new competent body, the EDPB, it would be timely to review and update the previous Opinion and issue new guidelines.



## 10. Recommendations

### 10.1. Call for an EU-wide legislative procedural instrument (*anti-SLAPP motion*)

#### 10.1.1. Possible legal bases for EU-initiatives on SLAPP

The phenomenon of SLAPP overarches legal branches, such as public and private law, criminal, civil and administrative law, substantive and procedural law, international private law, and human rights law. To get a grip on this comprehensive set of issues, a complex set of tools might have to be envisaged, rather than one instrument, as one EU legal instrument may not be able to address all the issues. Needless to say, depending on the branch of law covered, different legal bases must be identified in line with a vertical separation of powers, and more precisely Article 5 TEU. The following subchapter is devoted to identifying possible legal bases on which the recommendations of this study to address SLAPP suits could be based.

Articles 81(2) (f) of the Treaty on the Functioning of the European Union (TFEU) provide the necessary legal bases for the adoption of common norms in light of the principle of conferral of powers as enshrined in Article 5(2) TEU.

SLAPP suits may take the form of administrative, civil, and criminal lawsuits. Anti-SLAPP model laws proposed for the EU<sup>308</sup> and in third countries<sup>309</sup> tackle civil cases. But the abuse of criminal defamation procedures is just as problematic and must also be addressed.

According to Article 82(1) TFEU, EU judicial cooperation in criminal matters is to be based on the principle of mutual recognition of judgments and judicial decisions. These judgments and judicial decisions must have been issued by an independent judiciary in a fair trial, as provided for in the Treaties and the Charter of Fundamental Rights.<sup>310</sup> The right to a fair trial may be seen as the other side of the coin of judicial independence. Whereas the latter approaches the problem from a perspective of the rule of law, the right to a fair trial is broader (even an independent judiciary might sometimes violate fair trial rights) as well as more specific insofar as it shifts the focus to the effects on the individual. Here the relevant provisions are Article 47 of the Charter of Fundamental Rights on the right to an effective remedy and to a fair trial, and Article 6 of the European Convention on Human Rights on the right to a fair trial (criminal limb). The fairness of the procedure will fundamentally be questioned if it was vexatious, i.e., it has been used for the purpose of harassing, intimidating, exhausting the defendant, and national law was incapable of counteracting these phenomena.

<sup>308</sup> Liberties, Protecting public watchdogs across the EU: A proposal for an EU Anti-SLAPP Law, 2020, <https://www.liberties.eu/en/news/stop-slapps-model-directive/19777>.

<sup>309</sup> G. Pring and P. Canan, *SLAPPs: Getting Sued for Speaking Out*, Temple University Press, 1996; Institute for Justice, *Model Anti-SLAPP Legislation*, 2011, <https://ij.org/wp-content/uploads/2015/07/anti-slapp-model.pdf>; ALEC Public Participation Protection Act, 2019, <https://www.alec.org/model-policy/public-participation-protection-act/>; Society for Professional Journalists (SPJ), Baker & Histetler LLP, *A Uniform Act Limiting Strategic Litigation Against Public Participation*, n.d. <https://www.spj.org/pdf/antislapp.pdf>; ALICE Model Anti-SLAPP Act: Act to Stop Strategic Lawsuits Against Public Participation (SLAPPs), n.d., [http://medialaw.org/images/stories/Committees/Anti-SLAPP\\_Committee/Model\\_Anti-SLAPP\\_Law\\_-\\_American\\_Legislative\\_and\\_Issue\\_Campaign\\_Exchange.docx](http://medialaw.org/images/stories/Committees/Anti-SLAPP_Committee/Model_Anti-SLAPP_Law_-_American_Legislative_and_Issue_Campaign_Exchange.docx).

<sup>310</sup> The condition of an *independent judiciary* is anchored in Articles 2 and 19 TEU. As the Court of Justice of the EU noted, the independence of the judiciary and the right to a fair trial are closely intertwined: only an independent domestic court can guarantee the values incorporated in Article 2 TEU. Case C-619/18, *Commission v. Poland*, Judgment of the Court (Grand Chamber) of 24 June 2019, EU:C:2019:531, paras. 55–58. (See chapter 8 of this study)



Should a case have a cross-border element, a point might be reached where a domestic judgment will need to be recognised by another Member State's court. Under EU law the latter court will need to trust the other country's legal system and presume that the judiciary is independent, that the defendant got a fair trial, and almost automatically recognise the judgment in question.<sup>311</sup> Should however this latter court have passed the judgment in a SLAPP-suit, potentially in violation of the defendant's right to a fair trial, the principles of mutual trust and mutual recognition, the cornerstones of EU criminal justice, will be jeopardized. Since all domestic judgments can potentially end up in a situation when they need to be recognised by another Member State's court, it may be justified to adopt an EU-wide law preventing criminal SLAPP suits. It would be more advantageous, and much more in line with legal security and foreseeability to have an anti-SLAPP law for the EU than would be forcing the CJEU to come up with a jurisprudence establishing various tests for situations when mutual recognition-based laws may be suspended on a case-by-case basis.<sup>312</sup>

Vexatious lawsuits might or might not have a European dimension. They might have, if for example the critiques organize themselves across borders, if there is cross-border evidence, or cross-border publication of the relevant criticism. In such cases, , to the extent necessary to facilitate mutual recognition in cross-border cases and along Article 82(2) TFEU, the European Parliament and the Council may adopt a Directive in line with the ordinary legislative procedure, to establish minimum rules on the rights of individuals in a criminal procedure (Article 82(2)(b) TFEU). Such rules might incorporate the recommendations formulated in this paper. Additionally, the Council might unanimously – after obtaining the consent of the European Parliament – identify by a decision any other specific aspects of criminal procedure, which shall be regulated by a Directive. (Article 82(2)(d) TFEU) Such as Decision might cover vexatious procedures, or abuse of rights. An EU-wide anti-SLAPP law of a criminal nature is necessary to facilitate mutual recognition of judgments and judicial decisions and police judicial cooperation in criminal matters. While there exist already important pieces of EU laws on the rights of suspects or accused persons in criminal proceedings, including on legal aid in criminal proceedings, these are insufficient for tackling SLAPP cases, as the country reports in the Annex indicate.

In the criminal law domain, a separate consideration is worth mentioning. According to the Lisbon Treaty, the EU has legislative powers in substantive criminal law, whether in the fields of “euro-crimes” such as corruption or organised crime, or accessory crimes, or in an area where the approximation of offences or sanctions is essential for the implementation of a harmonized EU policy (see Article 83 TFEU).<sup>313</sup> EU laws can be (and as national experts have shown, are sometimes) interpreted in some EU Member States in a way that gives room to SLAPPs, thus hindering EU values. The European Union's lawmakers have a vested interest in preventing European norms from being used for vexatious

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<sup>311</sup> For a case-by-case assessment of the presumptions underlying mutual trust, see the case-law by the CJEU, in particular Case C-216/18, *Minister for Justice and Equality (Deficiencies in the system of justice), proceedings relating to the execution of European arrest warrants issued against LM*, Judgment of the Court (Grand Chamber) of 25 July 2018, ECLI:EU:C:2018:586; Joined Cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission), proceedings relating to the execution of European arrest warrants issued in respect of L and P*, Judgment of the Court (Grand Chamber) of 17 December 2020.

<sup>312</sup> *Id.*

<sup>313</sup> Péter Csonka, Oliver Landwehr, 10 Years after Lisbon – How “Lisbonised” is the Substantive Criminal Law in the EU?, *Eurocrim*, 4/2019, pp 261 – 267



lawsuits in violation of fundamental rights enshrined in primary EU laws and EU values, including democracy.

#### 10.1.2. *Anti-SLAPP motion or 'abuse of process' claim*

It is recommended to introduce an EU-wide legislative procedural instrument to establish the abuse of process with legal certainty.

1. In any lawsuit, civil, criminal, or administrative, the defendant should have the possibility to file a motion of abuse of process (anti-SLAPP motion), claiming that the legal action has been initiated against them because of their previous publicly shown behaviour, which was exercised in the public interest.
2. The person filing an anti-SLAPP motion should demonstrate a correlation with previously behaviour in the public interest. If the court is satisfied that the reasons are demonstrated – not proven –, then the burden of the proof should lie on the claimant to prove the lack of correlation, providing substantial evidence to the contrary of the facts and circumstances demonstrated by the defendant, otherwise the lawsuit should be dismissed by the court.
3. In cases relating to freedom of expression, such as actions for civil or criminal defamation, and actions related to the protection of privacy and personal data, if the defendant has demonstrated that the subject matter of the procedure is a reporting or disclosure on a matter of public interest relating to public officials, done in good faith, or conducted within the realm of journalistic activity covered under Article 85 of the GDPR (including, among others, blogging), it should not be necessary for the court to allow the claimant to prove the contrary, but the claim should be dismissed without further inspection of its merits.
4. The conditions which the court should examine when deciding about the anti-SLAPP motion are as follows:
  - a. the activity shown previously by the defendant, or the content published was in the public interest;
  - b. the speaker is a journalist or NGO less powerful than the plaintiff;
  - c. the lawsuit is meritless or frivolous;
  - d. the claim is disproportionate compared to the severity of the harm;
  - e. the claimed sanction would have a chilling effect on democratic participation;
  - f. multiple lawsuits are initiated against the same defendant, or against other defendants but on the same basis.
5. If one or more of the conditions listed in point 4 are given, the judge should be obliged to take notice of the abuse of right and react *ex officio* as if there had been a motion for anti-SLAPP, accordingly, in the public interest.
6. In criminal cases, the above considerations in points 4 and 5 should guide the prosecutor. In cases where the prosecutor represents the charges, the concept will be easier to introduce in countries adhering to the model of opportunity (*Opportunitätsprinzip, principe d'opportunité*). But even in countries following the principle of legality, a law could allow for prosecutorial discretion in SLAPP cases.
7. Should the prosecutor dismiss the case for the lack of a legal good to be protected, or the lack of social harmfulness, the alleged victim of a criminal defamation should not be able to challenge the prosecutorial decision.





8. In cases where the victim can oppose the decision to discontinue prosecution due to the abusive nature of the process, or if the victim can represent the charges from the outset, the judiciary should be given the opportunity to dismiss the case according to the conditions of anti-SLAPP, as provided for in points 4, 5 and 10.
9. The defendant should be granted the right to submit anti-SLAPP claims at any point in the procedure.
10. The court should be allowed to revisit the motion at a later point in the procedure if it finds it necessary, in the light of new events or information, in particular related to the course of the litigation strategies. Especially the use of delaying or stalling tactics or moves which make the procedure more burdensome for the defendant should be taken into account when re-examining the motion.
11. The motion should be decided within a reasonable time limit, such as 2-3 months.
12. Multiple lawsuits against the same defendant or against various defendants but on the same, or similar basis, should be recognized and evaluated by the court as a SLAPP suit.

### ***10.2. Costs and legal aid***

1. To cover the costs and provide support for the defendant, it is recommended that Member States provide for financial and psychological support systems for defendants in civil, criminal, and administrative procedures. This should include the coverage of their legal costs if the SLAPP is dismissed in an early phase; and free legal aid and advice, as well as psychological support services once defendants have demonstrated that the litigation is related to previous public participation or reporting action.<sup>314</sup>
2. The losing party of the procedure should ultimately bear the legal costs, as is now the case in several Member States. Where abuse of right is established, the total costs of the defendant should be covered by the claimant.
3. The legal or natural person who initiated a legal action which was found to be abusive, should be liable to pay a proportionate penalty in compensation of the instrumentalisation of the judiciary, and compensation for the damages caused to the victim, beyond the costs of the procedure.
4. Once an anti-SLAPP motion has been submitted, and the plaintiff/complainant appealed against the 'dismissal due to abuse'-decision, and if the judge decided to continue the procedure, the court may order that the plaintiff to deposit a security to cover the costs of the procedure before the procedure is continued.
5. Generally, Member States should take necessary measures to ensure that the legal costs of a procedure do not place a burden on defendants of SLAPP suits, so as to avoid a chilling effect on the exercise of fundamental rights of free speech and public participation. In particular, defendants should never be demanded to deposit the envisaged amount of compensation.

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<sup>314</sup> See more on the psychological burden of SLAPPs in 4.4 and 8.8.





### ***10.3. Decriminalisation of defamation***

#### **1. The European Commission should encourage Member States to abolish criminal defamation.**

*Reasoning:* International human rights bodies and international NGOs have unanimously and repeatedly called for the abolishment of criminal defamation. Even if criminal provisions are not used in practice, the simple awareness of a possible sanction can impose a chilling effect on discussion of public matters. This proposal corresponds to the concept of limited government, and the rule of law which manifests in criminal justice in the well-established principle of *ultima ratio*.

**1/A. Substantial amendments to criminal defamation.** Exceptionally, where decriminalisation of defamation is seen as a threat on the protection of citizens from untrue allegations which harm their reputations, then, as a minimum, in accordance with the approach of the Council of Europe, the following is recommended:<sup>315</sup>

##### *1/A.1. Prison sentence as a penalty for defamation should be abolished.*

*Reasoning:* The criminal penalty of a fine and the relating labelling effect gives ample weight to the criminal policy response and has a sufficiently deterrent effect.

##### *1/A.2. The public interest privilege.*

If the defaming statement was made in relation to a matter of public interest, then the defendant should be given the opportunity to demonstrate their good faith. Should the good faith be sufficiently underpinned by evidence, the defendant should not be held guilty of defamation. Member States should amend their criminal codes according to this principle or prescribe the application of this principle in their procedural laws.

*Reasoning:* Due to its importance to democratic discourse and democracy in general, speech on matters of public interest should be privileged.<sup>316</sup>

##### *1/A.3. Proving the truth of the statement should be an option in all cases. Member States should amend their criminal code or criminal procedure according to this principle.*

In the case when a true statement violates a person's reputation (e.g., publishing a shameful but not illegal fact which is of no public interest), then the available legal instruments for the protection of personal data should be applied instead of defamation. This way, defamation could be deprived of its over-restrictive nature, but the privacy of persons could still be protected.

*Reasoning:* ECtHR has recommended that proving the truth should be possible in all defamation cases. Beyond this, if public interest is demonstrated, then it should be enough to demonstrate the good faith of the speaker, and not the whole truth (see above under 2.). Our mapping has found that in

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<sup>315</sup> For more detail, see Chapter 5.3.

<sup>316</sup> See a more detailed discussion of balancing in Chapter 5. 1.



several states, the possibility to prove the truth is given only if the statement was in the public interest. It is recommended that the Member States follow the recommendation of the ECtHR.

*1/A.4. Public officials should not enjoy a privileged status in defamation procedures, on the contrary, their wider tolerance against criticism should be a guiding principle in the balancing exercise. The respective criminal provisions should be abolished.*

*Reasoning:* In accordance with the principles of freedom of expression, and the public watchdog function of the press in democracies, the public should be able to freely discuss anomalies and suspicions which affect matters of public interest, even when they are closely related with a public official. A public official should be understood covering civil servants, state employees, or members of the judiciary. The same principles should apply to public figures who have an influence on public opinion, such as politicians or famous actors.

#### ***10.4. Amending the rules of civil defamation<sup>317</sup>***

It is recommended to harmonise the rules of civil defamation in a way which is resilient to abuse under SLAPP, in line with freedom of expression jurisprudence.

##### **1. Good faith and public interest defences should be explicitly incorporated into the law.**

*Reasoning:* These principles are in line with the European understanding of freedom of expression, as expressed by ECtHR, and also the practice of the individual Member States. However, they are often elaborated on by the case-law, and show discrepancies, even within an individual country.

##### **2. Professional workers (employees) of the press, media or NGOs should not owe a personal liability for their professional activity, instead the publisher or employer should bear liability, in order to protect the vulnerable individuals.**

Member States should amend their civil and/or criminal liability rules, as well as procedural rules accordingly.

Alternatively, Member States could provide for appropriate application of this principle through self-regulatory initiatives, where the publishers voluntarily stand behind their employees. However, this might need a regulatory change as well so that publishers are enabled to take over the place of the defendant in a procedure, as described in Article 19 of the Anti-SLAPP Model Directive, which provides for the possibility to have the defendant be replaced by a substitute party.

*Reasoning:* The good practices of Member States have shown that financial and organisational stability is a key factor in withstanding SLAPPs. Due to their stability, these organisations cannot be silenced or intimidated. However, freelance journalists, smaller media outlets and blogs are more

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<sup>317</sup> See more on the elements of balancing in Chapter 5., introductory section.



vulnerable to SLAPPs by powerful corporations or official entities, and reportedly often choose to avoid covering topics to which they would otherwise call attention or reveal important anomalies such as corruption or environmental damage (self-censorship).

### 3. Anti-SLAPP laws should foresee a cap on damages for defamation.

To create an EU-widely harmonised and fair calculation of the damage cap, the differences between incomes and cost of living in the various Member States should be taken into attention. For example, the reference point could be the purchasing power of each Member State where the defendant resides or draws his income.<sup>318</sup>

*Reasoning:* Damages and the feeling of insecurity created by the possibility of disproportionately high, or unforeseeable damages have a chilling effect on the defendant.

### 4. Right of reply: it is recommended that the omission of or incomplete or belated completion of the right of reply is examined by a judge under the same principles as other freedom of expression related cases, and the imposition of high fines is avoided.

*Reasoning:* The right of reply is meant to be an instrument which can correct failures of journalism without the chilling effect of retaliating penalties. Should the request for reply remain unsuccessful, courts should decide about the appropriate consequence which should not be exaggerated.

#### 10.5. Balancing GDPR with freedom of expression

**The European Data Protection Board (EDPB) should issue guidelines on Article 85 GDPR**, to clarify how to balance the data protection rights with the rights to freedom of expression and information.

*Reasoning:* Article 85 GDPR left room for manoeuvre to MSs to define the particularities of journalistic exemption. As a result, individual domestic rules are divergent. Providing clear guidance on how to balance data protection rights with the rights of freedom of expression or information would contribute to a more harmonised approach across the EU. The EDPB's predecessor, the Working Party 29, dealt with various aspects of data protection law and the media (See Recommendation 1/97). The media environment has changed considerably since 1997, the governing European law has been reformed, and there is a European Data Protection Board dedicated to harmonising how Member States apply GDPR, therefore issuing a guideline appears to be an appropriate action.

#### 10.6. Systemic safeguards

1. Member States should provide for the organising and support, at the national and European level, of training for judges, prosecutors, members of the investigative authorities or prosecution relating to the questions of SLAPP, whistleblowing, and, where relevant, the practice of the ECtHR.

<sup>318</sup> Eurostat, (2021) GDP per capita in PPS.  
<https://ec.europa.eu/eurostat/databrowser/view/tec00114/default/table?lang=en>



It should be noted that the application of the ECtHR principles in a pre-litigation phase could result in the early recognising and dismissal of SLAPPs.

2. A data-collection monitoring program should be initiated by the European Commission, with the cooperation of the judicial systems of the Member States, in order to get authentic data about the existence and practice of SLAPP cases within the European Union. In possession of a legal definition of SLAPP cases, the occurrence of such cases should be registered and forwarded to a designated European Union body which keeps the database.
3. Member States should enable in their procedural laws NGOs, academics, or other persons to submit *amicus curiae* in court procedures where the matter is of public interest.
4. Member States shall provide for at least one organisation which represents the interests and the ethical standards of the press. This organisation should provide physical protection if necessary, and emotional support to the journalists, including bloggers, freelancers, and NGO members, who are increasingly harassed by letters, messages and other communication means. Member States should ensure that attacked journalists, bloggers and NGO members can report their harassment and ask for surveillance, support or protection from an ombudsperson or similar responsible official or civic forum.
5. Member States should encourage the Press Council or Press Union to organise a fund to offer legal advice, physical and emotional support for their members, as well as other journalists, bloggers and freelancers who are more vulnerable than journalists employed. Alternatively, Member States should provide for creating a favourable environment to negotiate insurance for journalists and editors by private insurance companies, which cover the costs of litigation, and eventually damages under certain conditions.
6. The European Commission and the Member States should make the necessary steps to raise awareness of the concept of SLAPP, and the possibility of defence among the press and the general public, in order to minimise the chilling effect achieved by informal communication methods that threaten with lawsuits. Information and advice on SLAPP and the possibility and conditions of anti-SLAPP motions should be easily accessible free of charge to the general public, but in particular to journalists, bloggers, and NGO members, echoing Article 20(1)(a) Whistleblower Directive.



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## Annex. Country notes

This Annex contains the country notes drafted by national academics and experts, based on a pre-defined template provided to them by the authors of this study. While the authors have undertaken the utmost effort to ensure consistency, comparability and sufficiency of the contents, the contributors/national experts remain ultimately responsible for the content of their country notes.

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The legal background of SLAPP cases in

## Austria (questionnaire)

Response to questionnaire by Karin Bruckmüller, Konrad Lachmayer,  
and Dominik Prankl (Sigmund Freud University Vienna)<sup>319</sup>

*Information on SLAPPs in Austria was obtained by means of a questionnaire*

### 1. Introduction

Strategic lawsuit against public participation (SLAPP)<sup>320</sup> are a topic which is not known as a concept in Austria. There is neither a scholarly nor a public debate on SLAPPs in Austria. It is, however, not the case, that there are no SLAPPs existing in Austria. They just have not been analysed so far. The following report is documenting certain cases as well as analysing the legal situation in Austria.

An overall evaluation about the Austrian situation regarding SLAPP can summarize that SLAPPs are not a dramatic problem in Austria, but pressure on journalists and media houses take place on a regular basis, especially initiated by politicians, companies and also state-related actors. In most of the cases (especially in the last decade) the independent judiciary proved efficient to prevent SLAPPs from being successful. Nevertheless, the pressure built simply by threatening SLAPPs or starting procedures does its damage. The relevant legal knowledge is not known by all journalists. Other fields besides journalism concerning SLAPPs refer to NGOs; one recent example concerning academia can be referred to. The independent judiciary safeguards the rule of law in Austria effectively.

The following Austrian examples of SLAPPs can be mentioned:

#### 1. Actual Cases:

- In February 2021, the Public Prosecution Authority fighting against Economic and Corruption Crimes conducted a house search at the Austrian Federal Minister of Finance, who is member of the Conservative Party. He was under the suspicion of corruption. The Conservative Party rejected the accusations and started to sue 13 persons, who posted in social media, regarding defamation, libel and slander.<sup>321</sup>
- In January 2021, the Public Prosecution Authority fighting against Economic and Corruption Crimes sued a journalist from the daily newspaper “Die Presse” regarding defamation, libel and slander. This caused an uproar in the Austrian media. The competent Public Prosecution

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<sup>320</sup>See regarding the concept of SLAPPs [https://rsf.org/sites/default/files/anti-slapp\\_model\\_directive\\_paper\\_final.pdf](https://rsf.org/sites/default/files/anti-slapp_model_directive_paper_final.pdf).

<sup>321</sup> See further details <https://www.derstandard.at/story/2000124161396/oevp-klagt-in-13-faellen-wegen-aussagen-zu-bluemel>



Authority Vienna, however, rejected the criminal complaint and stated that there was not even an initial suspicion.<sup>322</sup>

## 2. Recent Cases:

- In December 2020 the Austrian Constitutional Court decided in favor of the freedom of speech regarding a statement of a political scientist and political analyst, who criticized a politician in a primitive way. The attorney of the politician sued the scientist at the media authority and finally lost the case at the Constitutional Court.<sup>323</sup>
  - In October 2020, a local energy company confronted activists protesting against an electric line with property disturbance lawsuits and used them primarily to threaten the activists with further claims for damages.<sup>324</sup>
  - In 2020, ex-Vice Chancellor Heinz Christian Strache, who was main actor in the Ibiza-Scandal, threatened journalists with court action.<sup>325</sup>
  - In 2019 a professor at the Vienna University of Economics, who was criticizing the bad habits of massive data collection by the Austrian Post (postal service), was threatened with court action for an injunction.<sup>326</sup>
  - In 2018, a media-watch blog criticized Austrian biggest daily newspaper to agitate against cyclists. The media house threatens the blog with court action.<sup>327</sup>
3. Start-ups, which established rating platforms, e.g. regarding physicians or teachers, have been pressurized by the Medical chamber or Teacher's Union on the basis of data protection concerns<sup>328</sup> (2018/2019). Typically, the courts safeguarded the freedom of speech, the financial implications due to ongoing litigation created significant pressure (See question 6, 17).
4. Another older example refers to the animal welfare process in 2010/2011, which treated an animal welfare NGO (called VGT, association against animal factories) as a criminal association. While the criminal procedure ruined the accused members of the NGO financially (the reimbursement of cost was limited to a lump sum), the charges were unfounded and thus dismissed.<sup>329</sup>

<sup>322</sup> See further details <https://www.derstandard.at/story/2000123358084/korruptionsstaatsanwaelte-zeigten-journalistin-wegen-uebler-nachrede-an>.

<sup>323</sup> See further details <https://orf.at/stories/3195580/>.

<sup>324</sup> See further details <https://salzburg.orf.at/stories/3072479/>.

<sup>325</sup> See further details: <https://wien.orf.at/stories/3063958/>.

<sup>326</sup> See further details <https://www.derstandard.at/story/2000108056482/warum-eine-professorin-per-post-von-der-post-ingeschuechtert-wurde>.

<sup>327</sup> See further details <https://www.derstandard.at/story/2000083199029/kroneat-chefredakteur-droht-kobuk-blog-mit-klage>.

<sup>328</sup> See further details <https://www.derstandard.at/story/2000123877403/musterklage-gegen-lehrerbewertungs-app-lernsieg-abgewiesen>

<sup>329</sup> [https://de.wikipedia.org/wiki/Wiener\\_Neust%C3%A4dter\\_Tiersch%C3%BCtzerprozess](https://de.wikipedia.org/wiki/Wiener_Neust%C3%A4dter_Tiersch%C3%BCtzerprozess)



## 2. Questionnaire

### (1) Are SLAPPs generally a problem, and issue in your country?

SLAPPs are generally not understood as a problem in Austria. One of the reasons is that SLAPP is not identified as a societal problem on a scholarly or political level.

From a civil law perspective, it is not a common phenomenon and for this reason has not been highlighted in the academic literature. This is probably also due to the fact that Austrian civil procedure law provides for the reimbursement of costs by the losing party. This circumstance limits the threat potential of (unjustified) lawsuits. Nonetheless, from time to time, cases that could be assigned to the category of SLAPPs make their way into the media. For example, it recently became public that a local energy company confronted activists protesting against an electric line with property disturbance lawsuits and used them primarily to threaten the activists with further claims for damages.

From a perspective of criminal law: SLAPPs are not a problem in Austria. Only in rare cases a SLAPP is to be presumed as a reason for a criminal complaint. Like in the beginning of this year, when a journalist was criticizing the actions and decisions of a government agency in her article. The complaint against the journalist were of the following offences: “*Üble Nachrede*” (defamation, § 115 Austrian Criminal Code – öStGB), “*Beleidigung*” (slander, 117 öStGB) and “*Verleumdung*” (libel, § 279 öStGB). However, none of the mentioned offences were pursued by the prosecution, as from their point of view not even an initial suspicion was established, which would be a precondition a further prosecution.

### (2) IF NO: Is this because they are not initiated, or are they consequently dismissed by courts?

Another reason that the Austrian legal system (especially procedural law) prohibits the possibilities to increase pressure by lawsuits (see questions 4,5,7,8). SLAPPs are insofar a problem as persons concerned do not know that they have possibilities to defend themselves.

Strategic criminal proceedings are hardly initiated as Austrian criminal law neither enables intimidation tactics nor lengthy proceedings. The criminal procedural law in particular states obstacles which make abusive criminal complaints come to nothing.

According to prosecutors and police officers:

Usually in such ex-officio cases (see also below 11.) the pre-trial proceeding cannot be opened due to the lack of initial suspicion. If the case is opened because of an initial suspicion, it will be dismissed rapidly, because the preconditions for further court proceedings – a concrete suspicion or legal and factual reasons for a prosecution – are absent.

After a dismissal the (suspected) victim has the right to bring in a so called “continuation request” (Fortführungsantrag) including a substantiation. This empowers the person, or the company initiated the SLAPP, because usually he/she or it has the role of the victim in such cases. However, a continuation request is not a promising approach in SLAPP cases in practice.



Currently, SLAPP cases do not have a realistic chance to come to the criminal court proceedings.

Furthermore, abusing criminal complaints is a criminal offense; hence the person or company bringing in the complaint becomes the offender. Punishment by the offenses libel (*Verleumdung*) or faking a criminal act (*Vortäuschen einer mit Strafe bedrohten Handlung*) in particular will be the result.

More “room for manoeuvre” for SLAPPs would exist for the indictment for offenses against honour. Offenses such as defamation (*Üble Nachrede*) or slander (*Beleidigung*) are mostly offences with so called private prosecution. This means that not the public prosecution, but only the suspected victim(s) has/have the right to accuse the suspected offender. This means in SLAPP cases, that the person or company, who/which wants to accuse abusively, is empowered. Moreover, in such cases the accused has the burden of proof (burden of truth and good faith). Even if SLAPPs were to be established easier in cases of private prosecution, the criminal proceedings are not “instrumentalized” in such a manner.

### **(3) Which is more common: civil or criminal defamation?**

Although no statistics exist so far, it can be assumed that civil lawsuits are more common as they give more control to the plaintiff than criminal law procedures.

### **(4) Criminal: is it punished with imprisonment?**

Defamation can refer to several different offenses in the Austrian Criminal Code: Libel (*Verleumdung*) is accusing someone knowingly and wrongly of a crime and is punishable by a fine or a prison sentence of up to one year; in some cases, punishable up to 5 years. Likewise, offences against honour such as defamation (*Üble Nachrede*) or slander (*Beleidigung*) in particular are subject to a prison sentence. The former is subject to a fine and prison sentence of up to 6 months, while the latter is punishable also by a fine or a prison sentence of up to 3 months.

#### ***a. are public officials, monarchs, heads of states more protected by criminal defamation or other criminal protection of their reputation?***

There is no more or special protection in Austrian Criminal Law. The Criminal Code only makes clear, that these offences mentioned above are also be committed against government agencies or the military. While offences against honor are offences of private prosecution (*Privatanklagedelikte*), in these cases the prosecutor has to accuse after an authorisation of the representative of the relevant authority/military (*Ermächtigungsdelikt*).

### **(5) Civil:**

#### ***a. are there caps on damages?***

Austrian tort law generally does not contain any caps on liability. In principle, the injured party is entitled to the total amount of the damage caused to him. Limitations exist only insofar as lost profits are not compensated in the case of slight fault. It should be noted that conversely, Austrian law does





not include punitive damages. The primary purpose of the tort law is to compensate for damages suffered.

***b. can legal persons sue for the protection of reputation?***

In Austria, it is possible to take action against claims that damage a company's reputation by filing an action for an injunction. At the same time, the revocation of the relevant allegation and, if necessary, its publication can be claimed. In principle, it is also possible to claim compensation for damage to reputation. However, the practical significance of tort law in this area is small because it is regularly very difficult to prove the damage.

***c. does compensation for damages have some conditions, e.g. in connection with criminal charges, or correction?***

In principle, there is no connection between civil damages and criminal prosecution. The claim for compensation can therefore be made independently of any criminal proceedings. However, the two proceedings are not completely separate. If someone suffers damage as a result of a criminal act, the victim has the right to join the criminal proceedings as a private party. This is a cost-effective way of obtaining compensation for damages through the criminal proceedings. Private party Joining also interrupts the civil statute of limitations. Conversely, if an action for damages is brought in which criminal behaviour is also asserted, the civil proceedings may be interrupted until the criminal proceedings are concluded.

**(6) Are there other instruments in the legal system which are sometimes abused to pressurize journalists, civil activists? e.g. misdemeanor of defamation, GDPR -related laws, state secret laws, tax investigations, labour consequences, copyright, blasphemy, anti-terrorism, anti-migration...**

Although a comprehensive answer to this question is not possible an example with regard to GDPR-related laws can be given (see also in the introduction): Start-ups, which established rating platforms, e.g. regarding physicians or teachers, have been pressurized by the Medical chamber or Teacher's Union on the basis of data protection concerns. Typically, the courts safeguarded the freedom of opinion, the financial implications due to ongoing litigation created significant pressure.

Another example refers to the animal welfare process in 2010/2011, which treated an animal welfare NGO (called VGT, association against animal factories) as a criminal association. While the criminal procedure ruined the accused members of the NGO financially (the reimbursement of cost was limited to a lump sum), the charges were unfounded and thus dismissed.



The structural use of these instruments does not seem usual, the potential role of data protection as a SLAPP tool seems, however, very high. The role of state secret laws, tax investigations, labour consequences, copyright or blasphemy does not seem relevant.

**(7) Defences:**

- a. good faith in civil, together with public interest /explicit exemption /journalistic ethics, too?*
- b. Truthfulness - is it conditional?*

In principle, it should be noted that Austrian civil procedure is not a fight between the parties, in which any measure is permissible. Rather, civil proceedings are characterized by the principle of cooperation. One expression of this is the duty of truthfulness and completeness. The parties are obliged to tell the truth in their pleadings and may not omit any relevant circumstances. It must be conceded, however, that the duty of truthfulness and completeness is not directly sanctioned in civil proceedings. At best, criminal consequences are conceivable (e.g. procedural fraud).

- c. good faith an excuse in criminal def? only in court practice, or explicit?*

For crimes against honour, proof of truth and proof of good faith are mentioned explicitly in the law as a reason for exemption of punishment.

- d. abuse of right?*

An abuse of rights should be considered by the prosecutor and the court ex officio. However, the defence can bring forward an abuse of rights claim as well.

**(8) Procedural costs and legal aid:**

- a. born by the losing party?*

Civil law: Austrian civil procedure law generally establishes an obligation to reimburse costs by the losing party. In the literature, this is commonly referred to as the "net principle". The winning party should - at least according to the principle - come out of the process financially unharmed.

Criminal law: In case of a conviction the convicted has to bear the costs; is the verdict not guilty the state or – in cases of offences against honour – the private person, who accused, has to pay. Is the cause of the trial a knowingly wrong complaint (libel; Verleumdung) the cost is to bear by the person bringing in the complaint.

- b. whole costs or a lump sum? reduced by courts?*

Civil law: The reimbursement of costs is determined by a tariff. This is calculated according to the amount in dispute and the number of procedural acts or the duration of the court hearings. It should be noted that only the reimbursement of costs by the unsuccessful party is determined according to this tariff. How much is to be paid to the own lawyer is determined by the fee agreement made with



him. If an hourly rate agreement has been made with one's own lawyer (which practically often happens), the prevailing party may not be reimbursed for the entire costs of the proceedings (if the hourly rate exceeds the costs under the tariff).

Criminal law: The costs of a criminal proceeding include a lump sum (between 50 € for a district court proceeding up to 10 000 € for a complex proceeding with a jury), if applicable fees for experts, costs for the criminal lawyer, for copies of court files and sometimes court fees.

***c. free legal aid?***

Civil law: The Austrian civil procedure contains a provision for legal aid, which is referred to as "Verfahrenshilfe". However, this is only available to parties to proceedings who would not be able to cover the costs of the proceedings without affecting their necessary livelihood. The law does not specify any absolute amounts in this context. According to judicial decisions, the necessary livelihood of a party is considered to be impaired if, taking into account the expected costs of the proceedings, there are insufficient funds left for a simple standard of living.

Criminal law: If the stated preconditions of the Criminal Procedure Law are met, legal aid (a criminal lawyer at no charge) is granted. Namely when the accused cannot bear the total or only partial costs of a lawyer and a defence is necessary such as in cases where a defence is obligatory, or a difficult factual or legal position is at hand.

***d. any conditions to be awarded?***

Civil law: See already above. In addition, the litigation must not be malicious or have no chance of success.

Criminal Law: Especially – as said above – awareness has to be raised, that costs in libel-cases (*Verleumdung*) have to be paid by the person bringing in the complaint.

***e. real costs or reduced?***

Civil law: The party receiving legal aid shall be exempt from all costs (court fees, expert fees, costs of its own attorney). However, if the party is unsuccessful, it is obliged to reimburse the costs to the successful party.

Criminal Law: Convicted are exempt from the costs in cases the compensation to the victim and/or alimonies are at risk.

***f. any other problems that limits its protective nature?***

Civil law: A certain problem lies in the fact that the lawyer who is appointed to assist the party in the proceedings does not receive a fee if he loses the case. This can lead to the fact that the lawyer does not conduct the proceedings with the same commitment as he does in case of an unconditional fee claim.



*g. do NGOs or journalistic unions provide effective legal aid?*

Journalists are usually protected by media houses. This is not the case if they just use social media or other internet platforms.

Typically, unions support legal conflict regarding the employer.

Not in criminal proceeding cases.

*h. compensation if malicious litigation? (fine?)*

Civil law: In principle, it is possible to claim damages in the event of malicious litigation. Such a claim can either be filed independently or already applied for in the malicious lawsuit. In practice, however, this almost never happens because the obstacle to asserting the claim is high. In principle, this is justified because in a state governed by the rule of law, the plaintiff must also have the opportunity to bring doubtful claims to court without immediately having to fear liability for damages.

Criminal Law: Punishment with fine or imprisonment by the offenses libel (*Verleumdung*) or faking a criminal act (*Vortäuschen einer mit Strafe bedrohten Handlung*) in particular will be the result.

*i. household insurance?*

Civil law: Household insurance policies regularly do not include a general legal protection module. A separate legal protection insurance is provided for this purpose, but only very few people in Austria have concluded it.

Criminal law: This is also true for criminal proceedings.

*j. COST table.*

Civil law: See already b.

Criminal law: See also above.

**(9) any good practices which protect people, journalists against SLAPPs?**

Besides the mentioned legal structures, which limit the possibilities of SLAPPs no best practices can be put forward.

**(10) any vulnerabilities, bad practices, which expose...**

*a. lengthy proceedings?*

Problems in the area of litigation length do not really exist. Civil proceedings are generally brought to a conclusion within an adequate period of time.



***b. preliminary injunctions***

Austrian civil procedural law knows preliminary injunctions. Overall, however, the system is well-balanced, so that the potential for abuse is limited. This is also helped by the fact that the applicant is subject to strict liability in the event of unjustified preliminary injunctions.

***c. multiplication of lawsuits***

It is possible that several lawsuits are filed against one person. However, this is not possible if they relate to the same facts ("Streitgegenstand"). In this respect, there is a procedural obstacle to the initiation of further proceedings, which leads to the dismissal of the action.

***d. difference between the judicial practices of the lower courts and higher courts***

None known.

***e. other: threats, harassment against journalists.***

Threats and harassment against journalists take place. Statistical data or concrete cases cannot be provided.

**(11) Pre-trial dismissal: criminal. - can the offended party carry on the case?**

***a. Is the criminal system a system of opportunity; can the victim appeal against dropping the charges?***

In Austria, the principle of ex officio prosecution is applicable. Only in exceptional cases is a private prosecutor (*Privatankläger*) allowed to accuse, or the prosecutor needs an authorisation by the (suspected) victim (*Ermächtigungsdelikte*) – see above.

The victim may even file a continuation request within 14 days. The request has to be substantiated and is possible i.a. if new evidence can be provided. The victim has to be informed of this option.

***b. Can you claim damages in the criminal procedure?***

Yes, this is possible in criminal proceedings. The victim has to notify the court in a statement (and becomes a so called "Privatbeteiligter"). The victim has to be informed of this possibility. A determination of damages has to be possible based on the criminal proceedings or by simple inquiries. In case this is not possible the victim is referred to civil proceedings.

**(12) Pre-trial dismissal: civil: (uncommon)**

Austrian civil procedural law does not allow lawsuits to be dismissed prior to the commencement of proceedings.



**(13) Press Council: *Verband österreichischer Zeitung***

- a. deals with complaints?*
- b. Shields journalists from liability?*
- c. represents the interests? Chamber?*

The Austrian Press Council<sup>330</sup> serves as a self-control of journalism and deals with complaints of individuals against journalists, which are not complying with the ethics' codex of journalism in Austria. In the general procedure the Senate of the Press Council checks if the relevant article complies with the codex. In a specific procedure an arbitration agreement is concluded to waive due legal recourse. In 2019 the Press Council decided in about 300 cases, identifying 37 violations of the codex.

The whole procedure might serve to calm an upset situation but does not shield journalists from SLAPPs.

**(14) Are there any remedies against SLAPPs e.g. false accusation, damages for abusive litigation?**

In principle, it is possible to claim damages for abusive litigation. However, due to the high requirements, this has no practical relevance. However, the law on reimbursement of costs does act as a corrective. The winning party is entitled to reimbursement of the costs incurred by the losing party in accordance with the tariff ("RATG"). Abusive litigation can have criminal consequences, especially if false statements are made in court.

**(15) Compliance with ECHR**

- a. perhaps written in law explicitly?*

The ECHR is part of Austrian Constitutional Law. A breach of the ECHR would mean a breach of the Austrian Constitution.

- b. consistently follows / followed but inconsistently*

Besides struggles of the ordinary courts some decades ago (see question 16), the compliance with the ECHR is part of the Austrian constitutional tradition. In some parts of the case law there is a deviation (e.g. regarding the ne bis in idem-principles). This deviation is not based on political motivation, but on different legal approaches of the judges.

- c. criticised, doubted, not followed?*

See above b.

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<sup>330</sup> <https://www.presserat.at/>.



**(16) Is the court's role satisfactory in dealing with SLAPP and protecting the press against this?**

***a. doing their best, but not enough?***

Nowadays, the ordinary courts regularly will protect the press sufficiently. Some decades ago, SLAPPs by politicians (especially far-right freedom party against journalists) led to conviction (with regard to a senate in a Higher Regional Court in Vienna). This led to the famous case law of the ECtHR regarding the freedom of speech (Art. 10 ECHR) – Austrian cases.

***b. independence of the judiciary: doubtful or not?***

Overall, there is no doubt about the independence of the judiciary in Austria. Financial pressure due to cost savings, however, were discussed in the last years. In 2021, the potential political influence (by the Minister of Justice) on the public prosecution shall be abolished by the establishment of an independent Federal Director of Public Prosecution.

**(17) Do governmental outlets or gongo's weaponise the media or defamation in their political battles?**

See regarding the following example already question 6: Start-ups, which established rating platforms, e.g. regarding physicians or teachers, have been pressurized by the Medical chamber or Teacher's Union on the basis of data protection concerns. The medical chamber is established by law and is part of the constitutional concept of state-based self-government. Although the Teacher's Union is a private association, teachers are civil servants. Moreover, the Ministry of Education also raised concerns.

Typically, the courts safeguarded the freedom of opinion, the financial implications due to ongoing litigation created significant pressure.

**(18) Targets: mainly journalists, bloggers and also activists, or only journalists?**

As already mentioned above typically journalists are involved. See also the cases against startups, which established – based on the freedom of speech – rating platform regarding physicians or teachers (questions 6 and 17).

Regarding the other groups, certain examples can be found, a bigger structural issue cannot be identified so far.

***a. academics and researchers?***



Typically not. There has been a case against a professor at the Vienna University of Economics. She was criticizing the bad habits of massive data collection by the Austrian Post (postal service) and threatened with court action for an injunction.<sup>331</sup>

***b. environmental activists?***

Typically not. As already mentioned (see question 6), there has been an animal welfare process in 2010/2011, which treated an animal welfare NGO (called VGT, association against animal factories) as a criminal association. The public prosecution penetrated the association secretly. Although there had been no proof of substantial offense, a huge criminal law process was started. While the criminal procedure ruined the accused members of the NGO financially (the reimbursement of cost was limited to a lump sum), the charges were unfounded and thus dismissed.

***c. the attackers are: politicians and public officials? law enforcement, judges?***

Yes, politicians are suing journalists but are not very successful. Attackers also might be private companies, which are creating pressures on media houses.

Typically law enforcement and judges are not attacking; but see the introductory example of the Public Prosecution Authority fighting against Economic and Corruption Crimes.

***d. reports of wrongdoing or corruption/satire/blogs/offensive value judgments?***

Question not clear.

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<sup>331</sup> <https://www.derstandard.at/story/2000108056482/warum-eine-professorin-per-post-von-der-post-ingeschuechert-wurde>.





The legal background of SLAPP cases in

## Belgium

Contribution by Lien Stolle (Tilburg University)

In Belgium, there is currently a lack of information regarding intimidating litigation. As this report will indicate, while Belgian law does have a legal basis for reckless and vexatious litigation, existing case law and legal doctrine on the subject provides not sufficient insight. For example, it is not immediately clear to what extent this provision is successfully invoked and to what extent this provision brings satisfaction to the parties involved. In addition, cases / situations in which one was 'successfully' intimidated fall off the radar. More research is needed in relation to the use of SLAPPs.

### 1. Laws most likely to be used for SLAPPs

#### 1.1. Criminal law

##### 1.1.1. Criminal defamation

One of the most common legal grounds for a SLAPPs can be found in defamation-related legislation. Within Belgium, two main offences can be found in the Belgian Criminal Code - i.e. slander and defamation under [Article 443 of the Criminal Code](#). It covers cases where “*maliciously attributing a precise fact to another person may harm that person's honour or expose him/her to public contempt*”.

In regard to the national court's jurisdiction, a distinction must be made between general defamation acts and criminal press offences. A press offence is committed when an offensive opinion is included in a text that is reproduced and effectively disseminated by a printing press or similar process, so that there is actual public disclosure (racism and xenophobia are excluded<sup>332</sup> and there is a household exception).<sup>333</sup> In other words, the notion of ‘press offence’ includes three important criteria: (1) an offensive opinion, (2) in a text (i.e. not by words during a press conference<sup>334</sup>), and (3) a disclosure requirement (i.e. actual publicity). Litigious pamphlets distributed exclusively among the staff members of a hospital, in the building itself, and therefore not intended for the public who could not inspect them, will not be considered public. However, if these pamphlets were distributed on the public road, the requirement of publicity is fulfilled.<sup>335</sup>

If the case concerns a press offence, the case will be brought before the Court of Assize.<sup>336</sup> If not, the Correctional Court will have competence. There is still some uncertainty about precise interpretation

<sup>332</sup> Artikel 1 van de wet van 7 mei 1999 over wijzigingen aan de Grondwet.

<sup>333</sup> Cass. 21 oktober 1981, Arr. Cass., 1981-82, 271; Cass. 9 oktober 1985, Arr. Cass., 1985-86, 152; Cass 6 maart 2012, Nr. P11.0855.N en Nr. P11.1374.N.

<sup>334</sup> F. Deruyck, and A. De Nauw, *[Misdaden en wanbedrijven tegen personen] Aanranding van de eer of de goede naam van personen*, in F. Deruyck, and A. De Nauw, *Inleiding tot het bijzonder strafrecht*, Mechelen: Wolters Kluwer Belgium, 2020, 395.

<sup>335</sup> Ibid, 397.

<sup>336</sup> Artikel 150 van de Belgische Grondwet (Belgian Constitution).



of a ‘press offence’. Traditionally, a press offence concerns the use of printing press.<sup>337</sup> Yet, this offence can also be committed through a ‘similar process’, which can be interpreted in a more technology neutral way, such as digital distribution (opinions on the radio and television are not included).<sup>338</sup> This could include tweets with a repetitive nature. There are, however, still cases where the Correctional Court considered itself competent, which has been criticized in the legal doctrine.<sup>339</sup>

This debate is important when discussing the use of SLAPPs on grounds of defamation. The issue of *de facto* impunity for press offences has been discussed for a long time. It is argued that due to the competence of the Assize Court, very few criminal cases for defamation have been initiated.<sup>340</sup> This is also understandable given the cumbersome nature of the proceedings and high costs involved. However, this is not to say that some plaintiffs will be deterred from bringing (or threatening to bring) proceedings for press offences. Furthermore, it is also important to underline that cases of defamation and slander can still be brought before the criminal court when the case cannot be qualified as a ‘press offence’ (or when it is argued by the plaintiff that there is no press offence). In addition, and this is further explained below, the plaintiff can also still make use of the civil procedure in defamation as tort.

With regard to the head of state, there is a law on the criminalization of insulting the King (criminal liability).<sup>341</sup>

## 1.2. Civil law

### 1.2.1. Civil liability

In relation to civil lawsuits, notice must be given to [Article 1382 - 1383 of the Civil Code](#). According to this provision, everyone is bound to act lawfully, or with due care and attention. In relation to journalists, this means that each publication must be able to stand the test of this criterion of lawfulness or care.<sup>342</sup> Based on these provisions it is possible to take legal action against unlawful publications.<sup>343</sup> When assessing the unlawfulness of public statements, in particular those made through the press, judgement is made from the perspective of ‘a normally careful journalist’.<sup>344</sup> These provisions can be invoked on their own, but also in conjunction with the provisions discussed below.

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<sup>337</sup> This is the creation of a writing, by printing on a paper or other substance, which is produced in several copies, using the same form of graphic characters.

<sup>338</sup> Cass. 6 maart 2012, AR P.11.1374.N.; Cass. 6 maart 2012, AR P.11.0855.N; Cass. 2 juni 2006, Arr.Cass. 2006, nr. 309, concl. Adv. Gen. P. De Koster; F. Deruyck, and A. De Nauw, *[Misdaden en wanbedrijven tegen personen] Aanranding van de eer of de goede naam van personen* in F. Deruyck, and A. De Nauw, *Inleiding tot het bijzonder strafrecht*, Mechelen: Wolters Kluwer Belgium, 2020, 396.

<sup>339</sup> J. Vrieling, “Goed gesmurft: internetbelediging levert (toch) persmisdrijf op”, *Juristenkrant* 2018, afl. 366, 4; S. Royer, *Beledigingen via sociale media en het drukpersmisdrijf*, *NJW* 2018, afl. 387, 650-651, bij Brussel 10 januari 2018, Corr. Brussel 18 februari 2016 en Corr. Antwerpen 24 april 2018.

<sup>340</sup> D. Voorhoof, *Vrijheid van meningsuiting en persvrijheid*, Die Keure, Brugge, 2015, 597 – 598; L. Gyselaers, “Vers van de (druk)pers: Hof van assisen bevoegd voor strafbare meningen”, *Nieuwsbrief 37* Gevaco, <https://www.advocatenbureau-gevaco.be/nieuwsbrieven/nieuwsbrief-37/vers-van-de-druk-pers-hof-van-assisen-bevoegd-voor-strafbare-meningen/>.

<sup>341</sup> [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1847040630&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1847040630&table_name=wet)

<sup>342</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*, 4e editie, Bruxelles: Larcier, 2014, 204.

<sup>343</sup> *Ibid*, 205.

<sup>344</sup> *Ibid*, 208.



In contrast to the criminal claim, filling a civil liability claim is much simpler. Whereas in the case of criminal proceedings a criminal investigation is initiated, in the case of civil liability it is sufficient to file a petition.<sup>345</sup> The parties are then notified and invited to appear before the court.<sup>346</sup> As a result, the claim is immediately initiated before the court. Furthermore, and under Article 1382 – 1383 Civil Code, the smallest error can lead to liability. A certain behaviour is labelled as faulty as soon as there is a deviation from the assumed behaviour of the *bonus pater familias*. Every shortcoming, even the smallest, can lead to liability (*culpa levissima*).<sup>347</sup> It will still be up to the plaintiff to show that his claim is actually justified. What this principle actually demonstrates is that there is no "threshold" with respect to fault for bringing a civil action. Anyone who wants to bring a civil claim for an error can do so, he/she just has to be able to substantiate it in the pleadings submitted to the court. Of course, by that time, the court proceedings have already been initiated.

### 1.2.2. Civil defamation

Due to the de facto criminal immunity for press offences (cf. competence of the Court of Assize), civil liability under Article 1382 – 1383 of the Civil Code for press publications has become increasingly important. The competence of the Court of Assizes concerning press offences does not affect the right to bring a civil action, which is explicitly provided for in art. 764, 4° of the Judicial Code, even without requiring a previously established press offence.<sup>348</sup> Even without the establishment of a violation of a criminal provision, a publication may still be considered unlawful under Article 1382 of the Civil Code and give rise to damages. These are civil lawsuits concerning 'unlawful' journalism that do not immediately constitute a crime (or where the question of the quasi-criminal nature is left open).<sup>349</sup> This allows a party to easily initiate a (civil) SLAPP by filing a civil lawsuit claiming damages harm resulting from 'unlawful' journalism (civil defamation).<sup>350</sup>

Even though these lawsuits do not always result in the awarding of damages under Article 1382 or 1383 (e.g. the Apache cases), these cases have a chilling effect because of the time and resources that have to be invested in them. Although the Belgian law requires the plaintiff to bear the burden of proving a liability claim<sup>351</sup>, it is still the defendant that will need legal assistance to address (the merits of) the plaintiff's claims in the legal proceedings (costs and time).

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<sup>345</sup> Article 1034bis Judicial Code (on petition or on summons) ([link](#)); Article 1025 e.v. Judicial Code ([link](#)).

<sup>346</sup> Article 1034bis Civil Code; Article 1034sexies Judicial Code ([link](#))

<sup>347</sup> R. De Corte, *Overzicht Van Het Burgerlijk Recht*, 5e herwerkte uitgave, Mechelen: Kluwer, 2003, 557.

<sup>348</sup> Brussel, 5 februari 1990, R. W., 1989-90, 1464.

<sup>349</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*, 4e editie Bruxelles: Larcier, 2014, 208.

<sup>350</sup> However, in the case where both criminal and civil proceedings are instituted for a particular press offence, it may be requested that the civil proceedings be suspended on the basis of Article 4 of the Code of Criminal Procedure in order to avoid contradictions (e.g. no civil damages are awarded but the criminal court decides on defamation). The situation discussed here is more about recognizing that one can bring civil proceedings without having to bring criminal proceedings.

<sup>351</sup> L. Cornelis, *Algemene theorie van de verbintenissen*, Antwerpen/Groningen: Intersentia Rechtswetenschappen, 2000, 212.



### 1.2.3. *Infringement of privacy rights*

Claims for violation of privacy are also possible under Articles 1382 – 1383 of the Civil Code. Usually, these claims are accompanied by another infringement, such as a claim for libel and defamation or an infringement of the right to image.<sup>352</sup>

With regard to the right to privacy, reference is made to [Article 22 of the Belgian Constitution](#) and Article 10 of the ECHR. Article 22 GW provided that "*everyone has the right to respect for his private and family life, except in the cases and conditions determined by the law*".

The portrait right and the right of reproduction have their basis in [Article XI.174 of Book XI of the Economic Code](#). The liability claim for infringement of the right to image is based on Sections 1382 - 1383 of the Dutch Civil Code. In addition to the portrait right, Article XI.174 of Book XI of the Economic Code lays down the basic rule that publication of a photograph of a person without his/her explicit consent is not permitted.<sup>353</sup>

### 1.2.4. *Code for the Council of Journalists*

In 2010, the Press Council adopted the [Code of the Press Council](#). This compiles the rules of journalistic professional ethics and is intended to serve as a guide in practice and in examining the questions and complaints received by the Council. In 2012, three judgments of the courts of Brussels and Bruges on civil liability for press publications or broadcasts on television under Articles 1382 and 1383 of the Civil Code referred to the provisions of the Code of the Press Council. This Code was used as a guide to determine whether the journalist had behaved as a normal and careful journalist. As a result, the Code can also be invoked *against* a journalist in conjunction with Article 1382 – 1383 of the Civil Code.<sup>354</sup> Of course, the other party can also rely on the Code to argue that the journalists were in fact acting like a normal and careful journalist, but it is important to notice that it can be used *in jucto* with Article 1382 – 1383 Civil Code.

Nevertheless, the mere violation of certain deontological rules of the Code is not sufficient: it must be shown that it involved behaviour that a normally careful journalist would not undertake.

## 1.3. *Procedural rights*

### 1.3.1. *Unilateral petition brought by the plaintiff on the basis of article 584, §3 of the Judicial Code*

A unilateral petition by 'kort geding' on the basis of [Article 584, §3 of the Judicial Code](#) is a particular legal proceeding. This procedure should be distinguished from (a) the proceedings via 'kort geding' under Article 584, §1 Judicial Code and (b) cases in which the law expressly requires that the initiation

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<sup>352</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*, 4e editie Bruxelles: Larcier, 2014, 236; F. Jongen, *Tendances récentes de développement de la responsabilité civile des médias écrits et audiovisuels*, in X., *La responsabilité civile liée à l'information et au conseil. Questions d'actualité*, Brussel : FUSL, 2000, 192.

<sup>353</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*, 4e editie Bruxelles : Larcier, 2014, 239 – 240.

<sup>354</sup> Rb. Brugge (1e k.) 30 april 2012, AM 2012, afl. 6, 592, noot D. Voorhoof.



of the case be by unilateral petition<sup>355</sup> (the latter will not be discussed). Both the notion of ‘kort geding’ and ‘unilateral petition’ need a brief explanation.

‘Kort geding’ is a Dutch legal term that is difficult to translate into English. It is often translated as “*summary proceedings*”, “*provisional measures*” or “*interim injunction proceedings*”.<sup>356</sup> Overall, and pursuant to Article 584, §1 of the Judicial Code, the President of the Court of First Instance can, in cases which he deems to be urgent, pass provisional measures. The judge does not rule on the merits of the case. He merely examines the ‘desirability’ of taking certain measures.<sup>357</sup> In principle, both parties are still involved in the proceedings. Article 584, §3 of the Judicial Code is an exception to this.

Article 584, §3 provides for the possibility of filing a unilateral application ([Article 1025 – 1034 of the Judicial Code](#)) and initiate a ‘kort geding’, whereby the party against whom the claim is made is excluded from the debates.<sup>358</sup> Two criteria are put forward: (1) urgency and (2) absolute necessity. The urgency exists when an immediate decision is desirable to prevent damage of a certain magnitude or to avoid serious inconveniences.<sup>359</sup> The latter implies that only the immediate and sudden application of the requested measure can guarantee its full effectiveness.<sup>360</sup> A requested measure must therefore be so urgent or of such a nature that there would be a risk of using the ‘normal’ procedure. Again, the judge cannot rule on the merits of the case and on the rights of the parties, but he can order the requested measures, which may even lead to a ‘permanent’ disadvantage. The legal doctrine and jurisdiction distinguish three cases in which absolute necessity is present: (1) extreme urgency, which occurs when any delay would seriously affect the rights of a party; (2) the impossibility of identifying the other party; and (3) when the nature of the measure sought requires the use of the unilateral procedure - i.e. when the measure sought risks becoming unusable if not imposed unilaterally.<sup>361</sup>

An important difference between the ‘normal’ procedure and this procedure is that not all parties involved are involved in the proceedings, which means that the other party is (initially) not aware of the petition that has been filed. Often the other party is not informed until the order containing such measures is served. There are also cases where the order was served just ‘after’ the event that was prohibited through order (e.g. Extinction Rebellion).

The measures can be diverse, including a publication ban, the removal of certain articles, an injunction regarding protest actions and so on. Given the absence of any debate with the party concerned, whereby they cannot make their interests heard, this form of procedure is often considered intimidating. There are cases where it was argued that the other party was not known, whereas in reality this was possible (e.g. Extinction Rebellion case). Also, a periodic penalty payment

<sup>355</sup> A. Vanderhaeghen, “Eenzijdig verzoekschrift en kort geding”, NJW 2008, afl. 193, 941.

<sup>356</sup> X. E. Kramer, “Over taalkwesties in de Europese Unie en de kunst van het juridisch vertalen”, Nederlands Internationaal Privaatrecht (NIPR), 2006(3), 254-257.

<sup>357</sup> B. De Groote, D. Bruloot, R. De Corte, *Privaatrecht in hoofdlijnen*, Intersentia, 2020, 353 – 354.

<sup>358</sup> W. Vandebussche en N. De Lathauwer, ‘Een veralgemeend bewijsbeslag in de burgerlijke procedure’, noot bij Gent 4 November 2013, 4.

<sup>359</sup> Cass. May 21, 1987, Arr.Cass. 1986-87, 1287.

<sup>360</sup> C. VAN REEPINGHEN, “Verslag over de gerechtelijke hervorming”, Doc. Parl. Senaat, Zitting 1963-1964, n°60, pagina 141; W. Vandebussche en N. De Lathauwer, “Een veralgemeend bewijsbeslag in de burgerlijke procedure”, noot bij Gent 4 November 2013, 5.

<sup>361</sup> *ibid.*



can be requested and attached to the order. There are cases known where (initially) large sums are demanded from the plaintiff (e.g. Extinction Rebellion case). Although the judge often lowers the amount requested, it does have an intimidating effect.

With regard to the **vexatious and reckless** litigation, this still needs to be decided by a judge and therefore this needs to be brought before the court. The judge will more likely rule on this at the end of the proceedings, because then the judge will be able to rule with knowledge of the facts and thus after the pleadings of both parties. Even if the claim is **meritless**, the judge must rule on this - again, the judge can only rule when he / she knows all the facts of the case. If this were not the case, it would raise the question of a violation of Article 6 ECHR.

## 2. Potential defences

### *2.1. Slander and defamation under Article 433 of the Penal Code*

#### *2.1.1. Good faith*

For Article 443 to apply, a moral component is required: the person must have the intent of causing harm to another person's honour or reputation.<sup>362</sup> This means that it is not sufficient to prove that a person acted with knowledge of the falsehood he or she was telling. In other words, the intention to harm is an essential element of the crime. In some cases, this may be evident from the nature of the statements or the circumstance in which they took place.<sup>363</sup> It is up to the defendant to prove the absence of malice and to prove his good faith.<sup>364</sup> Claiming that a person handled in good faith requires that s/he was convinced and had no reason to doubt the truth of what was said, but it also requires that s/he could not know or suspect that his statement could in any way tarnish honour or reputation. Malice is not present if the perpetrator acted with honest intent, with a view to serving a public or even private interest that led him to disclose the facts.<sup>365</sup>

#### *2.1.2. Truth*

A distinction between slander and defamation concerns the provision of proof of the veracity of the act: whereas slander concerns an act of which the accused can provide proof, in the case of defamation the proof of the act is not permitted or possible. Defamation is deemed to be proven as soon as all elements of the offence have been demonstrated (incl. malice), even if there is doubt about the veracity of the statements. These doubts cannot/may not be removed by investigation or proof.<sup>366</sup> In the case of slander, the defendant is allowed to provide evidence. If the defendant can demonstrate / prove the truth of the alleged fact, he must be acquitted. In principle, the proof is provided by a judgement (often when the judgement concerns a criminal offence) or another

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<sup>362</sup> I. DELBROUCK, "Aanranding van de eer of de goede naam van personen", *Postal Memorialis*, 2007, afl. 5, 32.

<sup>363</sup> *Ibid*, 33.

<sup>364</sup> *Ibid*.

<sup>365</sup> *Ibid*.

<sup>366</sup> *Ibid*, 37.



authentic act (e.g. birth certificate).<sup>367</sup> In exceptional cases, the general rules of evidence laid down by law are also admissible.<sup>368</sup>

Thus, anyone who can prove the veracity or truthfulness of a statement will not be prosecuted for slander, whereas in the case of defamation, a malicious allegation is always punishable regardless of whether the allegation is true or not. The reasoning behind this is that requiring proof for the defamatory statement would compromise the victim's personal integrity (e.g. the allegation of adulterous or incestuous parentage).<sup>369</sup>

## 2.2. 'Unlawful' publications under Articles 1382-1383 Civil Code

When determining the civil liability of the journalist on the basis of Articles 1382 - 1383 of the Civil Code, strict correctness, scientific accuracy or absolute reliability of published information cannot be required.<sup>370</sup> Rather, a journalist must behave like a "normal, careful and circumspect journalist"<sup>371</sup> and has a duty to investigate the reliability of the sources and the veracity of the facts discussed by the journalists. This is, incidentally, an obligation of means. There is no obligation of results regarding the truthfulness of the facts. Thus, in the event of a civil liability claim, it can be argued that the journalist in question behaved in the same way that a normal diligent journalist would have behaved in the same circumstances.<sup>372</sup> This, of course, depends on the specific circumstances of the case (public person or ordinary citizen, value judgment or fact, etc.). A normally careful and circumspect journalist who relies on testimonies, for example, cannot be expected to examine every detail of these testimonies.<sup>373</sup>

## 3. Compliance with ECHR principles

### 3.1. Statement of opinions and value judgments enjoy more freedom than false factual statements

The existing case law of the ECtHR on the distinction between facts and value judgements is confirmed in Belgian case law (value judgments enjoy a higher protection).<sup>374</sup> It is acknowledged that it is quite impossible to provide evidence in relation to a value judgement. The Council for Journalism also acknowledges this, and this is reflected in article 5 of the Press Council Code.<sup>375</sup> The facts on

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<sup>367</sup> Ibid, 37 - 38.

<sup>368</sup> Ibid, 38; 13 april 2019 – Burgerlijk Wetboek - BOEK VIII : Bewijs, publicatie 14 mei 2019.

<sup>369</sup> I. Delbrouck, "Aanranding van de eer of de goede naam van personen", *Postal Memorialis*, 2007, afl. 5, 36 – 37.

<sup>370</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 220.

<sup>371</sup> Rb. Brussel 21 september 1999, AM 2000/3, 334. Zie ook Rb. Brussel 26 april 1991, JT 1992, 315.

<sup>372</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 221 ; Rb. Brussel 13 december 2011, AM 2012/6, 597.

<sup>373</sup> Rb. Leuven (5de kamer) 22 mei 2013, in de zaak van Pol Van Den Driesshe, eiser, t. Jan Antonissen, verweerder en HUMO NV, als vrijwillig tussenkomende partij, onuitg.; D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 213.

<sup>374</sup> K.I Brussel 29 oktober 2014, JT 2015, 381, noot B. MOUFFE, "du droit de la libre critique sur les forums"; zie ook; Brussel 26 september 2008, AM 2010, 336; Rb. Brussel 13 september 2002, AM 2003, 132; E. Brewaeys, "Persvrijheid: feiten en waardeoordelen", NJW 2015, afl. 324, 457-458; Cass. (3e k.) AR C.09.0216.F, 23 mei 2011.

<sup>375</sup> E. Brewaeys, "Persvrijheid: feiten en waardeoordelen", NJW 2015, afl. 324, 457-458; Rvdj 2015-07, Vlerick/De Morgen en Vandeweghe.





which the judgment is based must still be sufficiently solid and journalists must refrain from malicious expression, but a value judgment is not subject to the same duty of truth and objectivity like factual statements.<sup>376</sup>

### ***3.2. Publications which contribute to a debate on a matter of public interest or general concern enjoy a higher threshold of protection***

The case law of Article 10 ECHR has been incorporated into Belgian jurisprudence, including the consideration of the public interest in a public debate when assessing restrictions on freedom of expression.<sup>377</sup> The jurisprudence recognizes the press's role in a democratic society i.e. *“transmitting information and ideas on matters of public interest and provides an essential forum for public debate and an indispensable instrument of supervision.”*<sup>378</sup> When restricting one's freedom of expression, a balancing exercise must be made between the public interest protected by the freedom of the press and the private interests of individuals concerned, without the public interest immediately prevailing over individual interests.<sup>379</sup> When a publication falls outside the public interest, the assessment will tend more toward the unlawfulness of the publication.

### ***3.3. The limits of acceptable criticism are wider for public figures, especially politicians, state officials, and employees***

Defamatory or insulting criticism towards public figures is more tolerated, in particular towards politicians or public figures and depending on whether this criticism relates to political matters or facts that are the subject of public debate.<sup>380</sup> Thus, in principle, a journalist has the freedom to criticise politicians, meaning that insults or allegations relating to public figures carrying out a public function are allowed.<sup>381</sup> While politicians still have a right to reputation, this must be balanced against the interests of public debate and free discussion on political matters.<sup>382</sup> A politician's private life should not be unnecessarily compromised, but journalists are allowed to report on issues that are part of the public debate (e.g. sexual allegations against politician).<sup>383</sup> Furthermore, the general rules on freedom of the press still apply (e.g. defamatory allegations or critical value judgments rely on reliable or carefully collected factual material. Overall, greater freedom is granted with regard to criticism of public figures. There is also more room for criticism towards government agencies.<sup>384</sup> A higher degree of tolerance of criticism is also expected from public figures who are not politicians.

<sup>376</sup> Voorz. Rb. Brussel 26 mei 1999, AM 2000, 108; Voorz. Rb. Brussel 24 maart 2005, JT 2005, 583; Rb. Brussel 14 januari 2014, AM 2014, 274; Rb. Namen 26 oktober 1995, JLMB 1998, 810; Cass. (3e k.) AR C.09.0216.F, 23 mei 2011.

<sup>377</sup> Cass. AR 7332, 13 september 1991 (De Haes / De Man).

<sup>378</sup> Cass. (3e k.) AR C.09.0216.F, 23 mei 2011.

<sup>379</sup> Cass. AR 7332, 13 september 1991 (De Haes / De Man).

<sup>380</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 210.

<sup>381</sup> Rb. Brussel 28 december 1983, onuitg., gecit. in D. Voorhoof, “De eer en goede naam van politici”, RW 1986-87, 1781.

<sup>382</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 211

<sup>383</sup> Rb. Leuven (5de kamer) 22 mei 2013, in de zaak van Pol Van Den Driesshe, eiser, t. Jan Antonissen, verweerder en HUMO NV, als vrijwillig tussenkomenende partij, onuitg.; D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 213.

<sup>384</sup> Rb. Brussel 26 oktober 2001, AM 2002/1, 88; D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 212.





People with certain functions (e.g. delegated director of the National Railway Company or a police commissioner who is spokesman for the police in his city) expose themselves to greater criticism than the ordinary citizen.<sup>385</sup>

There are also limits to formulating negative criticism or defamatory allegations against politicians or public figures. In particular, imputations that are not based on a ground of truth or for which there are at least serious and objective indications and thus completely disregard the duty to investigate will not be tolerated.<sup>386</sup> Especially when those imputations have nothing to do with a politician's policy but only relate to facts that impugn his honour and dignity as a human being.<sup>387</sup> In assessing whether the criticism is unlawful or not, it is also possible to distinguish between different categories of public figures. For example, it is believed that press criticism of politicians may go further than that of magistrates.<sup>388</sup>

### ***3.4. Vertical power-relationship between participants in SLAPP-like cases in national law or court practice***

With respect to public figures (such as politicians), if this topic falls into the public debate, criticism is more likely to be allowed (see above).

Currently, neither national legislation nor existing legal practice makes any mention of the economic power relationship between the plaintiff and the defendant. This, of course, does not prevent this imbalance from being presented in support of the counterclaim on the grounds of aggravated and reckless litigation. In some cases, for example, the party's pleadings stated that "the defendant has sufficient financial resources and does not have to worry much about the financial consequences." However, to what extent this is taken into account by the judge needs to be further investigated.

When it comes to the balancing of the freedom of expression and the interests of the other party (who is bringing an action), the nature of the interests of the parties is taken into account (e.g. in the Apache judgments, the judge did refer to the fact that the plaintiff was a company and therefore it concerned commercial interests). This, of course, falls under the balancing test under Article 10 of the ECHR (or Articles 19 and 25 of the Belgian Constitution).<sup>389</sup>

Although this does not concern the balance of power between the two parties, it is interesting to note that financial capacity of the losing party does play a role in the determination of the legal costs (art. 1022, third paragraph Judicial Code - see below - deviation from the basic amount). The lack of financial standing can reduce the amount, but it cannot increase the amount.

In terms of whistleblowers, Belgium still has a legal gap. So far, there is only a whistleblower procedure in the public sector ([the Act of 15 September 2013](#)) and a whistleblower system for the

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<sup>385</sup> Rb. Brussel 19 maart 2002, AM 2002/6, 532.

<sup>386</sup> Rb. Luik 7 mei 2002, AM 2002/4, 370; D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 216.

<sup>387</sup> Gent 11 mei 1978, RW 1977-78, 46;

<sup>388</sup> D. Voorhoof and P. Valcke, *Handboek Mediarecht*. 4e editie Bruxelles: Larcier, 2014, 219.

<sup>389</sup> K. Van Den Broeck, "De zaak-Apache: de vonnissen", 2018, <https://www.apache.be/2018/02/22/de-zaak-apache-de-vonnissen/>.



private sector in as required by the European Market Abuse Regulation of 2014 ([the Act of 31 July 2017](#)). However, this only applies to financial institutions and for those who wish to notify the FSMA of breaches by that financial institution. The implementation of the Whistleblower Directive has not taken place so far.

## 4. Systemic safeguards

### 4.1. *The legal costs (Article 1017 – 1024 of the Judicial Code)*

The final judgment shall order the unsuccessful party to pay the costs of litigation (Article 1017, first paragraph of the Judicial Code). Costs of litigation include miscellaneous, registry and registration fees, expenses related to all investigative measures, costs and legal fees ('*gerechtsplegingsvergoeding*', Article 1022 Judicial Code) and so on (cf. Article 1018 Judicial Code).

Article 1022, paragraph 1 of the Judicial Code provides for a lump sum compensation to the lawyer's costs and legal fees of the successful party. This provision aims at restoring the (financial) balance that was disrupted by the need to file a lawsuit, either as a plaintiff or as a defendant. The basic, minimum and maximum amounts of the litigation fee are set by a [Royal Decree](#) depending, among other things, on the nature of the case (e.g. labour law cf. Article 4 of the Royal Decree) and the value the claims (Article 2).<sup>390</sup> Also, for claims that for legal actions relating to non-monetary claims, the basic amount of the court fee is 1,200 euros, the minimum amount is 75 euros and the maximum amount is 10,000 euros. This concerns, for example, a claim for annulment of a deed or the claim for a publication ban. Often, this does not reflect the complexity of each court case and will not suffice to cover the costs and legal fees.<sup>391</sup> More so, this may also deter the (opposing) party from defending its rights and interests. There is a chance that one is still ruled against and in that case one is asked to pay not only one's own legal costs and fees but also those of the other party.

At the request of one of the parties, however, the compensation can be reduced or increased when there is a manifestly unreasonable character of the situation (Article 1022, paragraph 3 Judicial Code) (e.g. reckless and vexatious clause). Also, in proceedings initiated by a unilateral petition, there will be no reference to the legal costs: necessarily, those costs are to be borne by the applicant.<sup>392</sup>

### 4.2. *A reckless and vexatious clause (het roekeloos en tergend geding)*

[Article 780bis of the Judicial Code](#) discusses the abuse of process by one of the parties. In short, this provision provides a two-fold sanction for abusive and reckless litigation. One sanction serves to compensate for the damage suffered by a litigant himself as a result of the other's abuse of process. The other sanction is the fine intended to punish the prejudice caused to the public service of the

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<sup>390</sup> Koninklijk besluit van 26 oktober 2017 tot vaststelling van het tarief van de rechtsplegingsvergoeding bedoeld in artikel 1022 van het Gerechtelijk Wetboek en tot vaststelling van de datum van inwerkingtreding van de artikelen 1 tot 13 van de wet van 21 april 2007 betreffende de verhaalbaarheid van de erelonen en de kosten verbonden aan de bijstand van de advocaat.

<sup>391</sup> B. Van Den Bergh & S. Sobrie, *De rechtsplegingsvergoeding in al zijn facetten*, Mechelen : Kluwer, 2016, 5, nr. 6

<sup>392</sup> F. Meersschaet, "Draaglast van de gedingkosten," *Jura Falc.* 1986-87, 291.



administration of justice by manifestly suspensive acts – i.e. manifestly delaying or unlawful purposes (€15 to €2,500).

It is not because a claim is groundless that it is in recklessness. If the defendant believes that a claim is aggravated and reckless, it must show this and must prove the particular intent to harm that characterizes the aggravated and reckless claim.<sup>393</sup> A lawsuit may be reckless or vexatious not only when a party intends to cause harm to an opposing party, but also when that party exercises its right to sue in a manner that evidently exceeds the limits of the normal exercise of that right by a thoughtful and careful person.<sup>394</sup>

In order to claim damages for the abuse of process, one must rely on Article 1382 – 1383 of the Civil Code. Article 780bis of the Judicial Code only mentions the possibility but is not the legal basis for awarding damages.<sup>395</sup> Traditionally, the object of compensation has been the "disadvantage ... which has not been remedied by the award of costs." This disadvantage traditionally includes the fees and expenses of the lawyer of the party who had to undergo the aggravated litigation. The value is determined *ex aequo et bono*.<sup>396</sup>

#### **4.3. Code of ethics for lawyers**

Article 1 [Code of Ethics for Lawyers](#) refers to respecting the principles of dignity, probity and electitude. These principles serve to ensure the proper practice of the profession in the service of those seeking justice. This includes the duty of loyalty and confraternity to promote fair and proper administration of justice and organizing oneself in such a way as to avoid any futile delay in a case to be tried. If the lawyer cannot properly justify the reason for which he proposed the disruptive litigation conduct on behalf of the litigant, he risks a disciplinary sanction.<sup>397</sup>

#### **4.4. Press Council**

Yes, the Council for Journalism (VVJ) was established in 2002 for the Dutch-language media.<sup>398</sup> The tasks of the Press Council include both an internal and an external component, as well as an individual and a collective component. This refers to the fact that the council has a task both in relation to its own professional group and in relation to citizens with questions or complaints about the media and society as a whole.<sup>399</sup>

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<sup>393</sup> Oost-Vlaanderen Rechtbank van Eerste Aanleg 26/07/2016, Rechtskundig Weekblad, 2016, Nr. 42 p. 1666.

<sup>394</sup> Cass. (2e k.) AR P.11.0711.F, 28 september 2011 (George & Compagnie sa, CFF Recycling sa e.a. / Société Nationale des chemins de fer belges, A.P., E. e.a.).

<sup>395</sup> B. Vanlerberghe en S. Rutten, *Artikel 780bis van het Gerechdelijk Wetboek en de onduidelijkheid inzake het (ver)nieuw(de) toepassingsgebied van de nietigheidsleer herbekeken*, in P. Van Orshoven en B. Maes (eds.), *De procesrechtswetten van 2007 ... revisited!*, Brugge: die Keure, 2009, 93.

<sup>396</sup> J. Hendrix, "Op zoek naar de grens tussen de kennelijk onredelijke procesvoering en het tergend en roekeloos geding", P&B 2020, afl. 2, 74.

<sup>397</sup> T. De Jaeger, "Verstorend procesgedrag: doeltreffend sanctioneren voor een efficiënte procesvoering", TPR 2017, afl. 4, 1263 – 1265.

<sup>398</sup> De Statuten verschenen in de bijlage tot het Belgisch Staatsblad van 17 oktober 2003.

<sup>399</sup> A. Verdoodt, "Zelfregulering in de journalistiek De formulering en handhaving van deontologische standaarden in en door het journalistieke beroep", Proefschrift, KU Leuven, 2006 – 2007, 604.



## 5. The court's role and independence

Dirk Voorhoof recently underlined the need to assess counterclaims for defiance and recklessness more seriously when legal proceedings are brought that threaten freedom of expression.<sup>400</sup> It concerns a statement of a recent case in which the counterclaim for reckless and vexatious conduct was dismissed by the court, because it was not shown that there was an intention to cause damage, nor was it a legal claim that manifestly went beyond the bounds of a normal exercise of that right by a thoughtful and careful person. In particular, the criticism is that the reasoning in the judgment seems to be very limited. In addition to that, there is mainly criticism of the existence of the possibility of a publication or broadcasting ban on a unilateral petition without hearing the journalist (see above).<sup>401</sup>

## 6. Case law

Considering the lack of research into the practice of SLAPPs within Belgium, it is not possible to answer these questions with certainty.

- ***Which type of speakers are the most effected by SLAPP-type actions? (Journalists, bloggers, civil society activists, academics, ordinary citizens exercising watchdog function)***

The cases that are currently getting press coverage and that are claimed to be intimidating mainly concern journalists and civil society activists.

- ***Which type of actors are most likely to sue? (e.g. corporations, public officials, organizations, other)***

As far as known at the moment, and those are the cases that are currently getting more press coverage, are corporations and public officials.

- ***Which type of actions are targeted by SLAPP suits? (e.g. publications, FOI claims, demonstrations, reporting corruption to supervisor or authorities...)***

Especially publications and demonstrations seem to be the target of a SLAPP suit.

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<sup>401</sup> D. Voorhoof, "Grondwetsartikels over persvrijheid voor herziening vatbaar: wat nu?", *Juristenkrant*, nr. 402, 2020, 12.



The legal background of SLAPP cases in

## Bulgaria

Contribution by Hristo Hristev (Law Faculty of Sofia University “Sv. Kliment Ohridski”)

In general, the notion of SLAPP case is unknown in Bulgarian law as a definition for a special category of cases. This type of case has not been yet the subject of a targeted analysis of neither legal researchers nor analysts in the field of political sciences, journalism or public communications. In this light, as of now there is no clear overview of the SLAPP cases which occurred in front of the Bulgarian courts. However, a number of lawsuits against journalists, media, NGOs or civil activists which can be considered as SLAPP cases are already known to the public. Along with cases that correspond to the classic understanding of SLAPP, where claims are usually introduced by individuals or private entities, in Bulgaria there is clear tendency to directly use public authorities in order to achieve purposes similar to those of SLAPP.

There is also a wide network of “paramedia”, working in violation of generally accepted standards of journalistic ethics, which are systematically used for public insults and targeted defamation campaigns against socially active citizens, civil society organizations, journalists and traditional media, that adhere to generally accepted standards for objectivity and journalistic ethics<sup>402</sup>. Different signs of coordination can be found between the campaigns for destruction of the public image and the reputation of active citizens, journalists, media and organizations, conducted by the “paramedia” and the actions of state bodies against the same subjects.

Even if the concept of SLAPP is not formally known in Bulgaria, it is possible to summarize that there is a clear tendency to use various judicial and extrajudicial procedures in order to exert pressure and to prevent citizens, journalists, media and organizations that are critical of the current governance and the related economic status quo from exercising their freedom of expression and other civil and political rights. The crossing between this trend and the gradual restriction of media freedom, combined with the creation of a powerful network of “paramedia”, which works through disinformation methods while completely violating basic standards of journalistic ethics, is a particularly significant risk to the democratic model in the country.

### 1. Laws most likely to be used for SLAPP

1.1. With regard to the cases that can be defined as classic SLAPP, where private individuals or private entities initiate legal proceedings due to the use of the freedom of expression by the defendants or due to their positions on issues of general interest, the publicly known cases of that category are normally filed as tort claims from defamatory and insulting allegations under civil law, or as private

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<sup>402</sup> Regarding the state of the media environment in Bulgaria, see “Bulgaria: Media ownership in a “captured State”. ECPMF. Osservatorio Balkani e Caucaso. SEEMO. 2018; The Media freedom White Paper. Union of the Publishers in Bulgaria, 2018; World Press Freedom Index 2018, Reporters without borders, report for Bulgaria, <https://rsf.org/en/bulgaria>.



accusations of defamation under criminal law, combined with claimed compensation for damages suffered from the defamatory allegations.

1.2. The claims for damages from defamatory allegations under civil law are based on the general provisions governing tort liability in Bulgarian law, particularly on the art. 45 and 49 of the Obligations and Contracts Act. These provisions state as follows:

“Art. 45. Every person shall be obliged to redress the damage they have faultily caused to another person.

In all cases of tort, fault shall be presumed until otherwise proved.

Art. 49. One who has assigned a job to another shall be liable for the damage caused by the latter in, or in connection with, the performance thereof”.

1.3. In that type of SLAPP cases, the applicants normally claim that they suffered moral or/and material damages, due to false statements, misleading information or offensive allegations by journalists/media or active citizens/organizations.

1.4. The use of tort claims as the main form of SLAPP is a logical approach, as like the legislation in any modern state, Bulgarian law provides that anyone who claims that another person has unlawfully caused damage in his legal sphere is entitled to claim compensation for that damage before the civil courts. In addition, in civil claims for damages, the fault for causing harm is presumed until otherwise is proven. The tort claim is not subject to specific conditions for admissibility, other than the demand for compensation of the damage caused by unlawful conduct, the presentation of evidence in support of the claim, the payment of a state fee of 4% of the requested compensation, and the filing of the case within the general limitation period of 5 years. For that reason, the tort claim is a convenient means of intimidation against people who exercise their freedom of expression, being journalists or active citizens, when through their work or positions they affect the interests of private individuals or entities, related to public authorities which respectively decide to take retaliatory action against them.

1.5. Although rarer, there are examples of SLAPP cases that use the Criminal law possibility to prosecute in defamation or insult under victim's complaint (private prosecution), combined with a claim for damages for defamation or insulting allegations in criminal proceedings (the so-called civil action in criminal proceedings). Given the relatively higher standard of proof as well as the more formalized process where the burden of proof rests with the private party, prosecuting in defamation or insult, these types of cases are not a preferred means of SLAPP in Bulgaria. The possibility of the emergence of a hypothesis of allegation of crime in case the private accusation is rejected by the court also remains open. The Criminal Code states:

“Art. 147. (1) Whosoever divulges an ignominious circumstance regarding another or fastens a crime on him shall be punished for libel by a fine of three thousand to seven thousand levs and by public reprimand.

(2) The perpetrator shall not be punished if the genuineness of the divulged circumstances or of the fastened crime is proven.



Art. 148. (1) For insult:

1. for an insult in public;
  2. circulated through a printed matter or in any other way;
  3. of an official or a representative of the public during or on occasion of his duty or functions and
  4. by an official or representative of the public during or on occasion of fulfilment of his duty or function
- the penalty shall be a fine of three thousand to ten thousand levs and public reprimand.

(2) For a libel committed under the conditions of the preceding para, as well as for a libel as a result of which grave circumstances have occurred, the penalty shall be a fine of five thousand levs to fifteen thousand levs and public reprimand.

(3) Applied in the cases under para 1, item 1 can be para 2 of art. 146”.

1.6. Some particularities in the legal framework of the prosecution and the criminal proceedings in Bulgaria such as the possibility to use the criminal investigation or the criminal prosecution for the purposes of SLAPP are also to be mentioned. The Bulgarian criminal justice system is based on the principle of legality of criminal prosecution which presupposes that the prosecution service should take action to investigate every potential case of a crime. Due to this peculiarity of the Bulgarian criminal justice system, a practice to open preliminary inspections for every complaint or information submitted to the prosecutor's office for an eventual case of a criminal act, unless it is clearly unfounded or completely meaningless, was developed. There are no strict deadlines for the preliminary inspections, nor a strictly defined procedure for their conduct which allows the continuation of open preliminary inspection for a significant period of time, including repeated interrogations and other actions affecting the legal sphere of the person against whom the complaint or the information was filed. The actions of the prosecution office and the investigation services in the phase of the preliminary inspections are not subject to judicial control beyond the possible subsequent initiation of an official investigation, the formal indictment, or the implementation of measures of restraint. Moreover, in case of unscrupulous exercise of the powers of the state prosecution, it is possible to initiate pre-trial criminal proceedings and to indict the person with accusation, without bringing the accusation before a court for a long period of time. Although the Code of Criminal Proceedings provides possibility for the indicted person to address the court with demand to accelerate the criminal proceedings by setting a deadline for its completion, the practice developed so far shows that the proceedings can continue beyond the court deadline by adding new elements to the case. The main provisions relevant to the described practice are the following:

#### **Judiciary System Act**

“Art. 145. (1) In performing the functions provided for in the law, the prosecutor may:

1. to request documents, information, explanations, expert opinions and other materials, setting a deadline for their receipt;
2. to personally carry out inspections;
3. in case of data for crimes or for illegal acts and actions to assign to the respective bodies to carry out inspections and revisions within a term determined by him, presenting to him conclusions, and upon request - all materials of the case;
4. to summon citizens or authorized representatives of legal entities, and in case of non-appearance without valid reasons to order forced bringing;
5. to send the materials to the competent authority when it finds that there are grounds for seeking responsibility or for applying coercive administrative measures which it cannot carry out personally;



6. to apply the measures provided by law in the presence of data that a crime of a general nature or another violation of the law may be committed.

(2) The inspection under al. 1, items 2 and 3 shall be carried out within two months, which if necessary may be extended once by the administrative head of the respective prosecutor's office by one month. The prosecutor shall rule on the materials from the inspection within one month from their receipt.

(3) The orders of the prosecutor, issued in accordance with his competence and the law, are obligatory for the state bodies, the officials, the legal entities and the citizens.

(4) The state bodies, the legal entities and the officials shall be obliged to render assistance to the prosecutor in the exercise of his powers and to provide him with access to the respective premises and places.

(5) Within the scope of his competence and in accordance with the law, the prosecutor may issue obligatory written orders to the police authorities.

(6) The prosecutor may demand the annulment or amendment of illegal acts within the time limit and in the manner prescribed by law. He may suspend the execution of the act until the examination of the demand by the respective body, if this is provided by law”.

1.7. The wide discretion in the exercise of the powers of other law enforcement authorities, such as the revenue authorities (National Revenue Agency), the Financial Supervision Commission (FSC) or the Commission for Protection of Competition (CPC), also presents serious risks of using the proceedings before these authorities to pressure active citizens, organizations, journalists and media. Each of these specialized law enforcement agencies has broad powers to carry out control and sanction measures in the field of its competence. The opening of inspections is not subject to particularly strict or clearly defined by law requirements. This accordingly allows for a certain degree of intervention in the legal sphere of the private persons under the full free discretion of the respective law enforcement body. For example, revenue authorities may open inspections and initiate audits with full operational autonomy without the need to meet any special requirements. Both the inspection and the audit can continue for a significant period of time even if no violations in the fulfilment of the tax obligations are established – the inspection up to 1 year and the audit up to 3 years, involving significant attention and resources on the part of the controlled person or entity.

In the development of public relations in Bulgaria in recent years, there are already a number of examples of the use of the above-mentioned law enforcement authorities for the purpose of pressure on journalists, media, active citizens and even companies whose owners or employees have participated in protests or have stated a critical position towards the government. It is publicly known that even the President of the Supreme Court of Cassation became the target of massive pressure through tendentious measures of tax control, with a visible connection between the intervention of the tax authorities and a number of his publicly declared positions related to corruption and encroachments against the independence of the judiciary.

## 2. Potential defences

The majority of publicly known SLAPP cases were dealt with under the general procedural order of the respective type of proceedings, and the claims were rejected, or the issued sanctioning acts were annulled. In view of this, it can be assumed that the judicial authorities have fulfilled their obligations





to resolve the cases referred to them accordingly to the law, the objective reality and the need to ensure justice through acts of the court. It can be also assumed that at the current stage of development, adherence to the truth and the good faith of the defendants against which SLAPP cases are conducted, are an effective guarantee for their protection from the misuse of various legal remedies. It can also be concluded that it is essential for the effective protection in SLAPP cases to make these cases widely public and to draw the attention of the general public, of various international organizations and institutions. At the same time, even in few cases there are examples where, contrary to the facts, the applicable law and the established European and international standards for the protection of fundamental rights, SLAPP cases have ended with the condemnation of the subjects against whom they are directed. A particularly telling example in this regard is the criminal conviction of Rosen Bosev, journalist from “Capital” newspaper, due to publications he made about facts duly established in court proceedings.

### 3. Compliance with ECHR principles

3.1. Freedom of expression is not only protected as a fundamental right in the constitution but is also subject to regulation in some provisions of the Radio and Television Act – art. 5, art. 2; art. 10, al. 1, p. 1, 2, 3; art. 11; art. 15; art. 16. There is no other special legislation that implements in specific legal rules the main principles on the exercise and the limitation of freedom of expression established in the caselaw of the ECtHR. At the same time, it is explicitly established in the caselaw of the Constitutional Court that the rights regulated in the Bulgarian Constitution which correspond to the rights regulated in the ECHR, should be interpreted in accordance with the meaning and content which they have under the Convention<sup>403</sup>.

3.2. In general, the main principals on the application of freedom of expression, established in the case law of the ECtHR, are correctly reflected in the case law of the Bulgarian courts, related to disputes where damages of defamatory and insulting allegations are claimed. Particular importance in this connection has the distinction between allegations of facts and allegations expressing an opinion or assessment. Bulgarian courts have a clear tendency to more easily engage defendants' liability in the event of false allegations of fact, while in disputes involving evaluative allegations or fact-based opinions, upholding claims usually depends on whether such allegations are offensive.

3.3 There is also a clear tendency for a higher standard of protection of freedom of expression to be applied in disputes related to matters of public interest or disclosed information and opinion expressed regarding persons holding public office. At the same time, although in some cases, there is a gross deviation from the established common European standards for the protection of freedom of expression, such as the criminal conviction of journalist Rosen Bosev or the actions taken by the prosecution office against the journalist Boris Mitov in view of the possible commission of a crime of disclosure of a state secret.

3.4. At the same time, in the caselaw of the Bulgarian courts there is no clear line of consideration of the importance of the good faith of journalists / media in considering claims for damages for

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<sup>403</sup> Judgment No 2 from 18 of February 1998, case 15/1997.



defamatory allegations. The most important element for the court's assessment remains to what extent the allegations of facts correspond to the objective reality or respectively differ from it.

## 4. Systemic safeguards

4.1. As part of the continental legal tradition, the Bulgarian legal system provides some natural systemic guarantees that protect or mitigate to some extent the effect of SLAPP cases:

- in both civil and administrative or criminal proceedings, the losing party is entitled to cover the costs of attorney's fees, state fees and expertise at the expense of the winning party;
- in all types of proceedings, a party who does not have the objective means of securing its protection due to its financial situation is entitled to legal aid;
- in the framework of criminal and administrative justice, the courts are responsible to control *ex officio* the legality, and as a result to secure all necessary evidence to that purpose, which presupposes that along with the legal arguments and procedural actions of the defense, the court has an independent obligation to reveal the objective truth and to relegate *proprio motu* all relevant elements for lawful resolution of the dispute;
- courts have the power to impose fines for non-compliance with orders given in court proceedings, which allows for the sanctioning of certain forms of bad faith and procedural abuses aimed, for example, at excessive procrastination of SLAPP cases;
- as a general rule, both civil and administrative and criminal cases are conducted on a principle of publicity, which allows attracting public attention and ensuring the necessary degree of transparency of SLAPP cases.

4.2. In Bulgaria there is a special legal framework only with regard to electronic media (radio and television stations). Within the framework of the Radio and the Television Act, special forms of control over radio and television operators are provided which allow to apply sanctions for violations of the legal requirements for their activity. The implementation of this way of control is not a precondition for the possible referral to the court of claims for compensation for damages from defamatory allegations or for defamation under criminal law. In any dispute concerning the eventual exceeding of the limits of freedom of expression and provoking damage to a private entity, the court may be addressed directly with a claim for damages. In case of alleged defamation or insult, a private criminal charge may be brought in criminal court.

## 5. The court's role and independence

The current development of the SLAPP cases in Bulgaria clearly shows the enormous importance of the independence of the court and the reliable performance of the duties of the judges in considering and resolving such cases. Despite the lack of special legislation, most of the publicly known SLAPP cases have so far ended in dismissing claims or accusations and ensuring the effective protection of the rights of the persons against whom these cases are directed. At the same time, given the general context of the erosion of the rule of law in Bulgaria and the frequent attempts to put pressure on magistrates including the President of the Supreme Court of Cassation, committed by the current



government and related figures, it should be considered that the adoption of a specific legal framework establishing criteria for delimiting SLAPP cases and providing for specific measures that strengthen the protection of the persons concerned, may be a crucial solution to reverse this trend and to strengthen the democratic model in Bulgaria.<sup>404</sup>

## 6. SLAPP Cases and Case law

6.1. The overview of the publicly known SLAPP cases allows to establish some general conclusions about the development of this issue in Bulgaria. The main part of SLAPP cases so far has been focused primarily on two groups of publicly active persons – 1) civic activists, representatives of civil society or politically engaged people who have an active position on various important issues of public interest such as corruption in infrastructure projects and European funding, construction of real estate or management of private pension funds, ineffectiveness of anti-corruption activity, implemented by the competent law enforcement agencies; 2) journalists and media who have a critical publications or positions towards the current government and different “parapolitical” or “parabusiness” subjects, related to the government, revealing problems of corruption and arbitrary exercise of public power.

6.2. Two groups of actors emerge as the main drivers of pressure through SLAPP cases – 1) large private companies that are affected by revelations about violations and irregularities in public procurement, management of infrastructure projects, regulation of construction; 2) law enforcement authorities which, on their own initiative or on the basis of information from an appropriate private person, undertake visibly unfounded actions or actions out of their general practice targeting the persons affected by the SLAPP approach.

6.3. The main reasons for taking various forms of pressure through SLAPP cases are actions, publications or statements made by the subjects against whom such cases are directed. In their actions the SLAPP-ed persons normally reveal cases of corruption or bad government or criticize the inaction of the competent institutions to counteract such phenomena. Moreover, all major public cases of SLAPP are directed against individuals or organizations that have consistent and proactive behavior in detecting cases of corruption, criticize the inaction of competent state authorities on these issues and uphold different decisions to overcome the general trend of endemic corruption in Bulgaria.

6.4. The following cases outline in a relatively clearly manner the main trends of SLAPP cases in Bulgaria.

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<sup>404</sup> Regarding the pressure on the President of the Supreme Court of Cassation and the threats to the independence of the court, see Simeon STOYCHEV. This is how Bulgarian judicial independence Ends...Not with a Bang but a Whimper. *Verfassungsblog.de*, <https://verfassungsblog.de/this-is-how-bulgarian-judicial-independence-ends-not-with-a-bang-but-a-whimper>. Radosveta VASSILEVA. Capturing Bulgaria's Justice System: The Homestretch. *Verfassungsblog.de*, <https://verfassungsblog.de/capturing-bulgarias-justice-system-the-homestretch/>. See also MEDEL letter to the President of the EU Commission and to the EU Commissioner of Justice about the CVM report on Bulgaria and Romania, <https://www.medelnet.eu/index.php/news/europe/483-medel-letter-to-the-president-of-the-eu-commission-and-to-the-eu-commissioner-of-justice-about-the-cvm-report-on-bulgaria-and-romania>.



### The case of Yvo Bojkov

Ivo Bozhkov is one of the first online freelance reporters in Bulgaria. He is also civic activist and municipal councilor in the Municipal Council of Sofia. He is known for his critical views on the way Sofia municipality has been governed since the city is in the hands of Prime Minister Borissov's party. Trace Group Hold AD is one of the largest Bulgarian construction companies, which for years has won public procurement contracts from the Bulgarian government and Sofia Municipality, participating in the implementation of a number of the largest infrastructure projects in Sofia and the country<sup>405</sup>.

In August 2018, a severe bus accident occurred on the Sofia-Svoge road, killing 17 people. The section of the road where the accident took place was repaired by Trace Group before the accident. Public statements were made by various senior officials, including prosecutors, that a special investigation into the renovation of the road section where the accident took place will be carried out. Law enforcement agencies entered the above-mentioned company publicly using the support of the gendarmerie to ensure the collection of the necessary evidence to verify the case<sup>406</sup>. On August 28, 2018, Ivo Bozhkov published a status with the following content on his Facebook account: „Do you know why Trace, like other well-known companies, is winning big contracts? Because they sponsor the election campaigns of all political parties!“.

In October the same year, Trace Group Hold AD and the company Galini-N EOOD, a shareholder in Trace Group Hold AD, filed two partial claims for damages under Art. 45, al. 1 of the Obligations and Contracts Act, each for the amount of BGN 20,000, as part of a total of BGN 111,000 and BGN 117,067.50 respectively, claiming that with his Facebook status Bozhkov had made false and misleading allegations that affected the share price of Trace Group Hold AD and led to significant losses. For the overall assessment of the case it is also important to mention that Bozhkov had previously expressed a critical position towards Trace Group, for example in connection with the renovation of Dondukov Boulevard (Sofia) in 2017<sup>407</sup>.

In 2020, the two lawsuits were rejected at first instance by the Sofia District Court, for various grounds, but both decisions emphasized that Ivo Bozhkov had exercised his right to freedom of expression as a journalist and municipal councilor, stating position on an issue of significant public interest. The court held that Bozhkov had expressed a personal critical attitude of an evaluative nature based on his own perception of the facts which could not be regarded as a defamatory allegation prejudicial to the applicant companies.<sup>408</sup>

### The “Golden Age” case

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<sup>405</sup> For the period from 2007 to 2017, Trace Group has won public procurement worth a total of nearly BGN 1 billion (EUR 500 million), publication in “Banker” newspaper from 27 of August 2018, <https://www.banker.bg/upravlenie-i-biznes/read/treis-grup-hold-108-obshtestveni-poruchki-za-pochti-1-mlrd-leva>.

<sup>406</sup> See on the blocking of the Trace Group building for the purpose of gathering evidences – publications in Bulgarian: <https://news.bg/crime/sledovateli-vlyazoha-v-sgradata-na-treys-grup.html>; <https://webcafe.bg/bulgaria/257244540-zhandarmeriya-vleze-v-ofisa-na-treys-grup.html>; <https://eurocom.bg/new/razsledvashti-vliazoha-v-druga-firma-svurzananas-stroitelstvoto-na-putia-svoge>;

<sup>407</sup> See personal blog of Yvo Bozhkov <https://www.yvoboikov.com/2019/02/TraceVsYvo.html>.

<sup>408</sup> See Judgment No 294007 from 5 of December 2019, Sofia District Court, civil case No 68845/2018 и Judgment No19842 from 22 of January 2020, Sofia District Court, civil case No70576/2018.



"Golden Age" is a project for a skyscraper type of building (34 floors / 120 m.) in "Lozenets" - one of the central districts of Sofia - characterized by a high density of construction but with predominantly low buildings. The investor in the project is the construction company Arteks. The company is one of the major players in the real estate market in the capital which implemented a significant number of investment projects over the past 20 years. Disputes over the legality of the construction of the "Golden Age" building occurred and a civic committee was established in order to protest against the project. The committee had been holding protest demonstrations since 2017.

In 2019 a media inquiry revealed the existence of luxury properties purchased by the head of the parliamentary group of the ruling party Tsvetan Tsvetanov and the Minister of Justice Tsetska Tsacheva, at prices significantly lower than the market ones. The properties were sold to the two leading figures of the ruling party by Arteks directly or through intermediary. In the scandal surrounding this information which became known as "Apartmentgate", it became clear that in 2017 the parliamentary majority, led by Tsvetan Tsvetanov, adopted a modification in the legislation regulating the territory which allows to eliminate one of the main legal problems questioning the legitimacy of the "Golden Age" project<sup>409</sup>.

The public attention to the disputed case led the competent authorities to order the halt of the construction of the "Golden Age" as well as to a subsequent court battle over the legality of the suspension of construction. In mid-2019, two companies from the Arteks group filed lawsuits for damages against two of the more prominent members of the civic committee against the construction of the "Golden Age" building - Nikola Vaptsarov and Marian Bashur, each for BGN 100,000. The claims were filed under Art. 45, art. 1 of the Obligations and Contracts Act, pretending damages from insulting and defamatory allegations against Arteks, made in front of electronic media.

In the lawsuit against Nikola Vaptsarov, Arteks claims that the statements made over the legality of the "Golden Age" project, and in particular, the allegations made in the context of the "Apartmentgate" scandal, that Arteks enjoys political protection, practically suggested Arteks's participation in corruption schemes and damaged the good reputation and the trade name of the company, creating a negative image in the public sphere that did not correspond to the real situation<sup>410</sup>.

In June 2020, the Sofia city court dismissed the action as unfounded, holding that Nikola Vaptsarov had not acted unlawfully in so far as he had exercised his fundamental right to freedom of expression without exceeding the limits of his freedom under the Constitution and the ECHR<sup>411</sup>. According to the court, Vaptsarov expressed an opinion containing assessment judgments and did not make any allegations of non-existent facts damaging Arteks. The court also emphasized that the opinion expressed is part of the activities of the defendant as a member of a citizens' initiative committee which acts on an issue of public interest. Arteks appealed against the first-instance decision and the case is currently pending at the second instance before the Sofia Court of Appeal.

<sup>409</sup> See "The skyscraper of Arteks, which could not have emerged without the help of GERB", a publication of Radio Free Europe in Bulgarian, 21 of March 2019, <https://www.svobodnaevropa.bg/a/29834412.html>.

<sup>410</sup> See Judgment of 04 of June 2020, civil action No 7326/2019, Sofia City Court.

<sup>411</sup> Ibid.



The lawsuit against Marian Bashur has not yet been resolved at first instance. What is more, no public statements have been made by Bashur himself. Consequently, it will not be the subject of the present statement.

### **The case of Valeri Simeonov**

#### *A typical SLAPP-case (BJ)*

In 2017, Valeri Simeonov, Deputy Prime Minister and one of the leaders of the far-right nationalist Patriotic Front, a coalition partner in the current Bulgarian government, filed a lawsuit for defamation and insulting allegations against the “Sega” newspaper. The tort claim concerned materials published in May of the same year. The materials represented evaluative comments in the context of a scandal with photos of representatives of the Patriotic Front, posing with a raised hand in a Hitler salute in front of a tank exhibit at the National Museum of Military History and a wax figure of Nazis officer at the Greven Museum in Paris. They also had in mind Simeonov's attempt to neglect the behavior of Patriotic front’s representatives with the statement: "Who knows what prank photos from Buchenwald I have !?". Using words from earlier statement of Valeri Simeonov, in which he called Bulgarian citizens of Roma origin "ferocious humanoids", the newspaper "Sega" titled one of its articles "Ferocious humanoids do not know their laughter". In other articles different negative assessments are attributed to the representatives of the Patriotic Front, which Valeri Simeonov considered offensive. He filed a lawsuit for BGN 35,000 for damaged reputation, mental pain and suffering.

At first instance, the Sofia City Court upheld the claim, awarding compensation in the amount of BGN 5,000. At second instance, the Sofia Court of Appeal overturned the decision and dismissed the claim. The Court of Appeal held that the materials did not allege non-existent facts but made judgments of an evaluative nature.

In addition, it is stated that “[...] *politicians, due to the public importance of their work, should be much more criticized for their activities and words in public than other citizens*”. The decision of the Court of Appeal was upheld by the Supreme Court of Cassation, which ruled “[...] *the case law unanimously accepts that it is not illegal to behave in a journalistic opinion with a negative assessment which affects a particular person when his actions are commented on in connection with a public issue related to his position, activity or occupation. Freedom of expression and its dissemination by word of mouth, written or oral, sound, image or otherwise, guaranteed as a constitutionally protected value, is excluded only in cases where it is used to infringe the rights and reputation of another and to calling for a forcible change of the constitutional order, for committing crimes, for inciting enmity or for violence against the person. In the absence of any of the exceptions listed above, journalists may legitimately express their judgments*”.

### **SLAPP cases related to the Financial Supervision Commission (FSC) and Stoyan Mavrodiev**

Among the cases of pressure on media and journalists through sanction procedures carried out by law enforcement agencies, the case with the numerous fines imposed by the Financial Supervision



Commission (FSC) over Economedia, the company publishing two of the largest Bulgarian newspapers “Dnevnik” and “Capital”, is particularly typical. In 2013, “Dnevnik” and “Capital” published information that in a criminal case for drug trafficking against one of the internationally known Bulgarian drug traffickers - Evelin Banev-Brendo, a connection was established between FSC Chairman Stoyan Mavrodiev<sup>412</sup> and documents used to launder money from Banev's criminal activity. The court found it proven that in his work as a lawyer Stoyan Mavrodiev had certified documents that were used for transfers of money that fall within the scope of the accusation against Banev. Following these publications, the FSC imposed unprecedented in number and size sanctions on Economedia on various grounds related to compliance with the legislation on financial stability – a total of 123 decrees with fines totaling over half a million BGN.

In 2015, the FSC imposed a new series of fines on Economedia - four fines totaling BGN 160,000, as sanctions for publications from 2014 related to the bankruptcy of one of the largest Bulgarian banks - Corporate Commercial Bank (CCB). According to the financial regulator, through the publications in question, Economedia have manipulated the stock markets in violation of Bulgarian and European legislation. The fines were related, on the other hand, to the refusal to disclose journalistic sources of information concerning the bankruptcy of CCB and the deliberate creation of a situation of instability around another large bank - First Investment Bank. The fines-imposed lead to a number of lawsuits before the administrative courts, in most of which the imposed sanctions have been annulled, including the largest ones.

Along with the fines imposed and the resulting administrative cases, Stoyan Mavrodiev filed criminal defamation lawsuits against the executive director of Economedia, Galya Prokopieva, as well as against the journalists Desislava Nikolova and Rosen Bosev. The charges against Galya Prokopieva and Desislava Nikolova were rejected, but Rosen Bosev was convicted of defamation by the Sofia City Court at second and last instance. The case is particularly telling because, on the one hand, Rosen Bosev is one of the most recognized investigative journalists in Bulgaria, author of a very large number of investigations and publications on corruption, including in the judiciary. On the other hand, Bosev was convicted by a court panel in which judge-rapporteur was Petya Krancheva, a judge with a controversial reputation, for whom Bosev had made a number of publications revealing irregularities in her judicial work<sup>413</sup>.

Despite repeated requests for Krancheva's removal from the panel, insofar as she has been the subject of a number of critical publications by the journalist, she has not been removed from the panel, stating that she has not read the articles and cannot be influenced in her impartiality. In the course of the proceedings, as judge-rapporteur, Krancheva ordered the search for Rosen Bosev as an

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<sup>412</sup> Stoyan Mavrodiev is a former lawyer and tax consultant (1991-2009), former treasurer of the Boyko Borissov's GERB party, ruling Bulgaria since 2009 with a break from 2013-2014, an MP from the same party (2009-2010). In the period 2010-2017 he was Chairman of the Financial Supervision Commission, and from 2017 to 2020 he was the Executive Director of the Bulgarian Development Bank, a specialized state-owned banking institution, which aims to finance the industrial growth of the Bulgarian economy.

<sup>413</sup> In 2010, Bosev published an article about information contained in special intelligence tools, in which witnesses commented that Petya Krancheva had taken a bribe to release Zlatko Ivanov-Baretata, a well-known figure from the shadow world in Bulgaria, suspected of involvement in various forms of organized crime such as trafficking in women, stolen cars and drugs. In 2012, Rosen Bosev also published articles in connection with the appointment of Krancheva as Deputy Chairman of the Sofia City Court, including on alleged cases of manipulation the date of publication of court acts, as well as on Krancheva's dubious decisions in a case against Evelin Banev-Brendo.





accused of a serious crime, which the defamation charge does not constitute. The court decision in the case contradicts the established practice of the Bulgarian courts and the ECtHR in cases related to freedom of expression and is in direct conflict with decisions in other cases relating to the facts from the same case. In addition, Rosen Bosev was practically convicted of allegations of court-established facts<sup>414</sup>. The judgment in Bosev's case was published on a website part of the network of controlled "paramedia" close to the government, before it was officially published by the court or communicated to Bosev himself.

### **SLAPP proceedings related to the prosecution office and investigative services**

The use of the broad powers of the prosecution office to open and conduct preliminary investigations and formal investigations for the purpose of pressure on journalists, media and socially active citizens is particularly eloquently illustrated by the case of the investigation initiated against Boris Mitov in 2013. As of 2013, Mitov is a crime reporter for the electronic media "Mediapool". In April of the same year, he published an article entitled: "Bulgarian Watergate: Who will check the examiner?"<sup>415</sup>. In his article, Boris Mitov raises the question, what is the guarantee that the Chief Prosecutor Sotir Tsatsarov (2012-2019) and the Deputy City Prosecutor of Sofia Roman Vassilev can conduct an objective investigation into the case of the alleged illegal wiretapping of political figures and businessmen, conducted by the Ministry of Interior under the period of Tsvetan Tsvetanov's Ministry, provided that three years earlier violations of the lawful application of special intelligence tools in the work of the same Minister of Interior have been found concerning the work of both Tsatsarov and Vassilev. The publication also contains facsimiles of two documents, revealing the violations, signed by Sotir Tsatsarov in his capacity as Chairman of the Plovdiv Regional Court at the request of Roman Vassilev. Two hours after the material appeared, Boris Mitov was summoned for questioning by the Sofia City Prosecutor's Office. During the interrogation, the prosecutor's office insisted that Mitov reveal the source of the documents reflected in the publication. When the journalist refused to disclose the source of the information, he was warned by a prosecutor that an investigation for disclosing a state secret would be filed against him. Later in the day, the press center of the prosecutor's office issued a press release, according to which an investigation was initiated in view of a possible crime of disclosing information constituting a state secret. After a sharp reaction from journalists and human rights activists and organizations, the investigation was terminated two weeks later without consequences.

In 2020, several cases became known in which investigation officers of the Ministry of Interior summoned journalists, civil activists and trade unionists, conducting interrogations relative to their actions to inform the public or to protect the public interest. After a mass demonstration against the current government and the Prosecutor General, which took place on September 2, 2020, in which a massive police force was used against protesting citizens, including against peacefully protesting citizens and journalists, the journalist in "Sega" newspaper Martin Georgiev asked officially several

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<sup>414</sup> See on the case the detailed publication of the Bulgarian edition of Radio Free Europe - <https://www.svobodnaevropa.bg/a/29979582.html> (in Bulgarian).

<sup>415</sup> See "Bulgarian Watergate: And who will check the inspectors?" Mediapool, April 5, 2013 <https://www.mediapool.bg/balgarskiyat-uotargeit-a-koi-shte-proveryava-proveryavashtiya-news204856.html>, (in Bulgarian).





questions to the Ministry of Interior. The questions were related to far-right symbols seen in photos from the September 2 protest, worn on police officers' uniforms, as well as boxes, worn by police officers who took part in the units sent against the protesting citizens, depicted in photos.

On September 14, Georgiev was summoned to the police station in connection with the questions asked. He was demanded to explain by whom and when the photos were taken, whether he had personally seen police officers with boxes or police officers wearing stripes typical of far-right groups<sup>416</sup>. During the conversation in the police, a suggestion was made that it may be necessary for some police officers to have the appearance of robust figures from the shadows in order to ensure that there will be no incidents such as two well-known murders – the murders of the Belneyski sisters and the murder of the journalist Victoria Marinova. After other media asked the Interior Ministry why Georgiev was summoned for questioning, the agency replied that the journalist had been summoned because the questions he had asked were qualified as an information of illegal behavior by police officers. A month later, the journalist Martin Georgiev was again summoned for questioning by the police to explain why he had consulted the Property Register about the possession of real estate by an agent of the National Security Service<sup>417</sup> involved in a scandal for the illegal closure of a public beach by the leader of the Movement for Rights and Liberties Ahmed Dogan for the needs of his private residence near Burgas. Both cases have been identified by several authoritative international organizations as alarming signs of inadmissible pressure on a journalist for his public information activities<sup>418</sup>.

In December 2020, Vanya Grigorova, a trade union expert and civil activist, was summoned to the General Directorate of the National Police for information in connection with a signal filed against her by the Bulgarian Association of Supplementary Pension Insurance Companies. Although no copy of the signal was provided, Grigorova was told that it concerns "a damage to the pension system". Her lawyer was not allowed to be present on the questioning, due to "anti-epidemic measures". In fact, Grigorova is one of the public figures who has consistently criticized the functioning of private supplementary pension funds, questioning the effectiveness of the management of the money invested in them and pleading for the transfer of these funds to the public National Social Security Institute.

Again, in December 2020, Reporters Without Borders announced that Dimitar Stoyanov, journalist in the investigative electronic media "Bivol", had been summoned for questioning in connection with an investigation initiated at the behest of businessman Yordan Hristov. The name of Hristov is linked to money laundering investigation in Barcelona, concerning his former woman, who is also allegedly

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<sup>416</sup> See "How a journalist was summoned to the Ministry of Interior because of questions asked", Internet edition of Radio Free Europe in Bulgarian, 15.09.2020, <https://www.svobodnaevropa.bg/a/30840164.html>.

<sup>417</sup> The National Security Service is a specialized state agency insuring the protection of high state officials in Bulgaria.

<sup>418</sup> Вж. Position of the Association of European Journalists in Bulgaria, <https://aej-bulgaria.org/16-09-2/>; Police violence and press restrictions raise further red flags in Bulgaria, International Press Institute, <https://ipi.media/police-violence-and-press-restrictions-raise-further-red-flags-in-bulgaria/>; Bulgarian reporter Martin Georgiev summoned for questioning over request for comment on police brutality, <https://cpj.org/2020/09/bulgarian-reporter-martin-georgiev-summoned-for-questioning-over-request-for-comment-on-police-brutality/>.



close to the Prime Minister Boyko Borissov<sup>419</sup>. After an attempt by Dimitar Stoyanov to interview Hristov, the businessman introduced a complaint to the police in Primorsko. An investigation was launched, during which Stoyanov was summoned for questioning a total of four times, without being clear at all what exact crime the police wanted to interrogate him for.

### **SLAPP cases related to the tax administration and other specialized law enforcement agencies**

There are also examples showing that as a mean of pressure on active citizens, organizations and media, and more broadly, against different figures publicly criticizing the current government and status quo in Bulgaria, the revenue administration bodies are increasingly used. An illustrative example in this regard is the case of the political movement "Yes, Bulgaria" and its leader Hristo Ivanov. Hristo Ivanov is a former Minister of Justice who gained wide publicity while actively advocating for reforms in the judiciary trying to solve corruption problems from which Bulgaria has suffered for years. In 2017, Ivanov initiated the creation of a new political movement focused on the anti-corruption policies. Shortly after the creation of "Yes, Bulgaria", Ivanov himself, as well as other public figures associated with the movement were subjected to tax inspections and audits. A tax audit was also organized for the newly formed party, which is funded entirely by donations from its members and supporters.

Quite representative of the use of the revenue administration as a tool for pressure is the case of the tax inspection and the audit of the President of the Supreme Court of Cassation Lozan Panov. After taking publicly a critical position against the lack of adequate measures to overcome the problems with the ineffective functioning and corruption in the judiciary and law enforcement agencies by the Supreme Judicial Council and the current Bulgarian government, the President of the Supreme Court of Cassation Lozan Panov became the subject of a series of inspections by various state control institutions, including the National Revenue Agency. After carrying out a full tax audit for the period 2011-2016, the NRA issued a revision act against Panov, and on the basis of an internal expert evaluation, made for the purposes of the audit, proceed to the conversion of the value of a bungalow purchased by him from BGN 26,000 to BGN 112,000, established unpaid tax liabilities in the amount of at BGN 16,000 BGN<sup>420</sup>. The revision act became an occasion for a court dispute between the chairman of the Supreme Court of Cassation and the tax administration.

Another case particularly indicative of the general approach of flexible repressive pressure to install fear and refrain from public participation in Bulgaria became known in the course of the mass protests against the current government and the Prosecutor General in the summer of 2020. After

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<sup>419</sup> Catalan police investigating money laundering scheme connected to PM Boyko Borissov, Mediapool 21.02.2020, <https://www.mediapool.bg/catalan-police-investigating-money-laundering-scheme-connected-to-pm-boyko-borissov-news303768.html>; Bulgarian PM Again Faces Money-Laundering Allegations, Radio Free Europe/Radio Liberty, 25.02.2020, <https://www.rferl.org/a/bulgarian-pm-borisov-again-faces-money-laundering-allegations/30452538.html>; At EU summit, Bulgaria's Borissov fends off accusations of money laundering, Euroactive, 21.02.2020, <https://www.euractiv.com/section/justice-home-affairs/news/at-eu-summit-bulgarias-borissov-fends-off-accusations-of-money-laundering/>; Una investigación por blanqueo de dinero en Barcelona apunta al primer ministro de Bulgaria, El Periodico, 21.02.2020; <https://www.elperiodico.com/es/politica/20200221/primer-ministro-bulgaria-mossos-investigacion-blanqueo-7848274>.

<sup>420</sup> "Lozan Panov appealed in court the revision act of the National Revenue Agency", Lex.bg, June 10, 2019, <https://news.lex.bg/лозан-панов-обжалва-в-съда-ревизионни/>.



the use of excessive police force against peaceful protesters on September 2, the owner of the largest chain of toy stores “Hypoland” made a public statement, that his 17-year-old son was a victim of police violence against protesting citizens and declared his indignation at the government's approach to the protesters. Less than 24 hours later, a massive inspection by several law enforcement institutions began in the “Hypoland” chain. State department inspectors raided “Hypoland” headquarters, warehouses and stores. After a sharp public reaction, the inspections were terminated. Two months later, however, the Commission for Protection of Competition (CPC) imposed a fine of BGN 124,000 on “Hipoland” for unfair competition. The inspection, which led to the imposition of a fine, was initiated at the complaint of a private person. The infringement found by the Commission for Protection of Competition is related to the promotion of Lego products from the beginning of 2020. According to the CPC, “Hipoland” has misled consumers that if Lego products are sold out online, they can be found in the store, and thus: “[...]Once left with the conviction that if they could not buy the desired product in the online store of the respondent company, they could buy it in some of the stores throughout Bulgaria, consumers would go to some of the stores and in the absence of demand from product, especially given the fact that not every promotional one is available in every store, to buy another”. In order to establish a violation and impose a fine, the CPC relied on the fact that a “random” consumer went to buy six pieces of Lego in the store in a promotion, but there were only five. There was a sixth product in other stores, but as the consumer is not under obligation to go around all the stores, there was a violation of the competition law, according to CPC.



The legal background of SLAPP cases in

## Croatia

Contribution by Vesna Alaburic (Lawyer, Vesna Alaburic Law Office)

### 1. Laws most vulnerable to abuse

#### 1.1. Civil defamation laws

##### 1.1.1. The Media Law and the Civil Code

The Media Law<sup>421</sup> regulates civil responsibility of publishers for the damage caused by the information published in a media (newspapers, magazines, radio, television, electronic media). In general, the Media Law is in accordance with the highest freedom of expression legal standards and prescribes, inter alia:

- (i) Limitations to the freedom of the media shall be permitted only when and to the extent necessary in a democratic society in the interest of national security, territorial integrity or public peace and order, prevention of disorder or criminal acts, protection of health and morality, protection of the reputation or rights of others, prevention of disclosing confidential information or for the purpose of preserving the authority and impartiality of the judiciary solely in a manner stipulated by law (Art.3/3);
- (ii) Non-pecuniary damage shall be compensated, as a rule, by publishing a correction of the information and with the publisher's apology and with the payment of compensation pursuant to the general regulations of the law on obligations (Art.22/1);
- (iii) A person who previously did not request from the publisher that a correction of the disputable information is published, or the publisher's apology when the correction is not possible, shall have no right to file a claim for the compensation of non-pecuniary damage (Art.22/2);
- (iv) A compensation claim may be filed not later than within three months from the day of learning about the publication of the information which caused the damage (Art.23);
- (v) The publisher shall not be liable for the damage if the information which caused the damage is:
  - a. an accurate report from a discussion during the session of bodies of legislative, executive or judicial power and bodies of local and regional self-government units, or at a public gathering, or if it was transmitted from a legal act of bodies of legislative, executive or judicial power or bodies of local and regional self-government units, without changing its meaning by editorial processing,
  - b. published within an authorized interview,
  - c. based on truthful facts or facts for which the author had justified reason to believe that they were truthful, and he undertook all necessary measures to verify their

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<sup>421</sup> The Media Law, unofficial translation, <https://digarhiv.gov.hr/arhiva/263/33319/039526.pdf>



- truthfulness, while there was a justified interest on the part of the public for the publishing of that information, and if the activity was undertaken in good faith,
- d. a photograph of the affected party taken in public, or a photograph of the affected party taken with his knowledge and consent for publishing purposes, whereby the affected party failed to prohibit the publication, that is, to restrict the right of the author of the photograph to use the work,
  - e. truthful and the circumstances of the case indicate that the journalist was able to determine in good faith that the affected party agreed with the publication thereof,
  - f. based on the author's value judgements the publication of which was in the public interest and provided in good faith (Art.21/4).
- (vi) The publisher cannot be released from liability if:
- a. the damage was caused by publishing **personal data the confidentiality of which is stipulated by law**,
  - b. the information relates to **minors**,
  - c. the information has been **collected** in an illegal manner (Art.21/5).

The Civil Code (The Civil Obligation Act)<sup>422</sup> prescribes the general rule about the just pecuniary compensation for the violation of personality rights: the court shall, where it finds that this is justified by the seriousness of the violation and circumstances, award a just pecuniary compensation and, deciding on the amount of just pecuniary compensation, the court shall take into account a degree and duration of the physical and mental pain and fear caused by the violation, the objective of this compensation, and the fact that it should not favour the aspirations that are not compatible with its nature and social purpose. (Art.1100)

### 1.1.2. Legal costs

Since SLAPPs are a tool for intimidating and silencing criticism through the threat of an expensive lawsuit, especially if a winning defendant is not entitled to recover attorneys' fees and other legal costs (court fees, translation costs etc.) from the plaintiff, it is of utmost importance to analyze the Civil Procedure Act,<sup>423</sup> which regulates the payment of legal costs. The Law (Art.154) prescribes:

- (i) a party that loses a case completely is obliged to pay the costs to the opposing party (attorney's fee and costs, court fee, translation and expert costs, etc.),
- (ii) if parties partially succeeded in the case, a party who has succeeded to a greater extent is entitled to a proportional share of costs,
- (iii) if a party has not succeeded in a proportionally insignificant part of his/her/its claim, the court may decide that the opposing party pay all the costs.

The right to get the reimbursement of legal costs include only costs which were necessary for the conduct of the case. The court makes decision which costs were necessary, taking careful consideration of all the circumstances. If attorney's fees and costs are prescribed by the tariff, these

<sup>422</sup> Civil Code (Civil Obligation Act), [http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation\\_Civil-Obligations-Act.pdf](http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation_Civil-Obligations-Act.pdf)

<sup>423</sup> Civil Procedure Act, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83913/92975/F765377768/HRV83913.pdf>



costs shall be calculated according to the tariff, even if a party paid higher fee upon the agreement with the attorney. (Art.155)

### *1.1.3. Conclusion*

Croatian media laws are in accordance with the ECHR and the jurisprudence of the ECtHR. The legislative framework in general allows that media organisations win the case if disputed information/idea fulfils criteria of “responsible journalism”, as defined by the ECtHR. Since the winning party has right to get reimbursement of legal costs from the losing party, these legal proceedings do not represent a financial burden in the long run.

## ***1.2. Criminal defamation laws***

### *1.2.1. Insult and defamation*

Section XV of the Croatian Criminal Code<sup>424</sup> “Criminal Offences against Honour and Reputation” has been often amended, last time at the end of 2019. There are two forms of offences to honour of a person or legal entity at the moment (January 2021): defamation and insult.

Defamation (Art. 149) is defined as knowingly presenting or disseminating untrue factual statement about a person before a third party that may harm that person’s honour or reputation. The penalty is a fine up to 360 times the daily rate. The plaintiff has to prove that the claim is untrue, and that the defendant knew that the claim was untrue.

Insult (Art. 147) is defined as insulting another person. This offense includes all forms of reputation damage, save intentional defamation as defined above, including damage caused by the offensive value judgement or true factual statement. The penalty is a fine up to 90 times the daily rate.

If any of these offences is committed through the press, television, radio, computer system or network, at a public gathering or otherwise in a manner accessible to a large number of people, the penalties are increased.

The liability for the criminal offence of insult is exempted if the disputed factual claim or value judgement was asserted or disseminated in the course of journalistic work or in the public interest or for some other justifiable reason. (Art.148a)

According to Art.150 of the Croatian Penal Code, all criminal cases for insult and defamation shall be prosecuted privately (not by a public, state prosecutor).

### *1.2.2. Legal costs*

When the court finds the defendant guilty, it shall state in the judgment that he/she must pay the costs of criminal proceedings.<sup>425</sup>

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<sup>424</sup> Criminal Code, changes as of 2011 not included in the unofficial English version on the following link <http://www.mvep.hr/files/file/dokumenti/prevodenje/zakoni/kazneni-zakon-nn-125-11-eng.pdf>. Criminal Code, unofficial consolidated version, in force in January 2021 <https://www.zakon.hr/z/98/Kazneni-zakon>.



The private prosecutor shall pay the costs of criminal proceedings (the necessary expenses of the defendant and the necessary expenses and fees of his defence counsel) if the proceedings are terminated by a judgement of acquittal or a judgement rejecting the charge or a ruling discontinuing the proceedings, except if the proceedings are discontinued or if a judgement rejecting the charge is rendered because of the death of the defendant or his permanent mental illness or because the period of limitation for the institution of prosecution has expired due to the delay of proceedings which cannot be blamed on the private prosecutor.<sup>426</sup>

### 1.2.3. Criminal offence “Severe shaming” abolished at the end of 2019<sup>427</sup>

The Penal Code has been changed at the end of 2019 by abolition of the offence “Severe shaming”, earlier “Shaming” (Art.148), which was serious threat to freedom of expression. The legal provision read as follows at the time of the enactment the law (2011):

- (1) Whoever asserts or disseminates in front of a third party a factual claim about another person which can damage his or her honour or reputation, shall be punished by a fine of up to one hundred and eighty daily units.
- (2) Whoever commits the offence referred to in paragraph 1 of this Article through the press, radio, television, computer system or network, at a public gathering or in some other way, thus making the insult accessible to a large number of persons, shall be punished by a fine of up to three hundred and sixty daily units.
- (3) There shall be no criminal offence referred to in paragraphs 1 and 2 of this Article if the perpetrator proves that the factual statements asserted or disseminated by him or her are true or that there existed a serious reason why he or she, acting in good faith, believed them to be true.
- (4) If the perpetrator did **not** assert or disseminate factual **claim in the public interest or for some other justified reason** but acted, for the most part, with the aim of dishonouring or damaging the reputation of another person, especially if the claims concern another person's personal or family life, he **or she shall not be allowed to prove the circumstances** referred to in paragraph 3 of this Article.
- (5) If the perpetrator admits that his or her claims are not true and retracts them, the court may remit his punishment.

This new criminal offense was significant regression in the Croatian criminal defamation legislature, which was at the very edge of decriminalisation of defamation. The provision of the paragraph 4 seriously threatened that truth of the factual statement would not be sufficient defence and, furthermore, that journalists and other defendants **would not be even allowed to defence by the truth**. The Penal Code was in force as of 1 January 2013. The number of criminal cases against journalists soon started to grow, as well as sentencing judgements for the offence of “shaming”.

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<sup>425</sup> Criminal Procedure Code, Art. 148/1

[https://www.legislationline.org/download/id/7895/file/Croatia\\_Criminal\\_proc\\_code\\_am2009\\_en.pdf](https://www.legislationline.org/download/id/7895/file/Croatia_Criminal_proc_code_am2009_en.pdf)

<sup>426</sup> Ibid, Art. 149/3

<sup>427</sup> This report contains a review of the criminal offense of “severe shaming” (unintentional defamation) although it has been abolished as of 1 January 2020 because the criticisms of the Croatian Criminal Code in recent years have referred precisely to this criminal offense.



Croatian Journalists Association organized campaign to amend the Penal Code, with the ultimate aim of decriminalisation. In 2015, finally, paragraphs 3 and 4 of the Article 148. (now called offence of “severe shaming”) have been changed<sup>428</sup> as follows:

(3) There shall be no criminal offence of severe shaming if the perpetrator proves that the factual claims made or propagated by him or her are true or that there existed a serious reason why he or she believed them to be true.

(4) It is not allowed to prove circumstances referred to in paragraph 3 of this Article if the factual claims concern another person's personal or family life.

At the same time the Penal Code was amended by the Article 148.a “Exemption from liability for criminal offences of insult and severe shaming”,<sup>429</sup> which stated that there were no criminal offences of insult and severe shaming if disputed factual claim or value judgement was asserted or disseminated in the course of journalistic work or in the public interest or for some other justifiable reason.

Finally, as already explained, the Penal Code was amended again at the end of 2019 and the criminal offense “severe shaming” was abolished as of 1 January

#### 1.2.4. Conclusion

Freedom of expression and journalists’ rights in Croatia are not endangered by the criminal defamation laws.

### 1.3. Data protection

GDPR (General Data Protection Regulation) and the Act on Implementation of GDPR are implemented to media organisations, without exemptions. Media organisations are treated as “controllers” when processing personal data with the view to publication or make the editorial content available. Croatia failed to prescribe by law exemptions from the GDPR implementation. Data subjects do not have to prove that editorial content to which they object is false, defamatory or private. Their complaint that the name or some other personal data was published or made available to public without their consent is sufficient that Croatian Personal Data Protection Agency (CPDPA) started the proceedings against the media organisation. The media organisation has right to reply to the complaint and the CPDPA decides about the case. A publication of any personal data is forbidden without the consent of a person, save the public interest prevails and justifies publication. The CPDPA’s decision is effective immediately, there is no appeal against the decision, but the media organisations have right to file the lawsuit against the CPDPA before the Administrative Court, which does not delay the enforcement of the decision (to remove personal data from the article).

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<sup>428</sup> The Law on amendments of the Penal Code, Art.42, [https://narodne-novine.nn.hr/clanci/sluzbeni/2015\\_05\\_56\\_1095.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2015_05_56_1095.html).

<sup>429</sup> Ibid, Art.43.





CPDPA in general decides in favour of the personal data and does not implement freedom of expression legal standards established by the jurisprudence of the ECtHR. Many administrative court proceedings are pending, and established case-law does not exist yet.

The Penal Code prescribes the criminal offence of “illegal use of personal data” (Art.146). The provision reads as follows:

- (1) Whoever, contrary to the conditions set out by the law, collects, processes or uses personal data of physical persons shall be punished by imprisonment not exceeding one year.
- (2) Whoever, contrary to the conditions set out by the law, transfers personal data outside of the Republic of Croatia for further processing, or makes them public or in some other way available to a third party, or whoever by the act referred to in paragraph 1 of this Article acquires considerable material gain for himself or herself or for another or causes considerable damage shall be punished by imprisonment not exceeding three years.
- (3) The same punishment as referred to in paragraph 2 of this Article shall be inflicted on whoever commits the offence referred to in paragraph 1 of this Article against a child or on whoever, in contravention of the conditions set out by the law collects, processes or uses personal data of physical persons on the racial or ethnic origin, political views, religious or other beliefs, trade union membership, health or sex life or the personal data of physical persons on criminal or misdemeanour proceedings.
- (4) If the criminal offences referred to in paragraphs 1 through 3 of this Article is committed by a public official in the exercise of his or her authorities, he or she shall be punished by imprisonment from six months to five years.

Only a few criminal proceedings for the offence of illegal use of personal data are pending. However, this provision can be abused since the prevailed public interest as defined by the GDPR is the only defence and the prescribed imprisonment sentence has huge chilling effects.

#### ***1.4. Copyright, intellectual property and other personal rights***

Various Croatian laws, civil and criminal, protect copyright and other intellectual property, as well as other personal rights. These laws, in general, cannot be abused by SLAPPers.

## **2. Potential defences**

In civil media defamation or invasion of privacy cases defences are:

- (i) accurate reporting about the public events, including debates in the parliament and sessions of other public authorities,
- (ii) information obtained from the document of the legislative, executive or judicial authority or bodies of local and regional self-government units,
- (iii) dissemination of the statement of the third person in an interview,
- (iv) truthful information,
- (v) reasonable ground to believe that the information was true, if all necessary measures to verify their truthfulness were undertaken, if public interest justified publishing and if the activity was undertaken in good faith;



- (vi) a photograph taken in public,
- (vii) value judgement published in public interest and in good faith.<sup>430</sup>

There is no defence if the damage has been caused by publishing personal data confidential by law, if the disputed statement relates to minors or if the information was collected in an illegal manner.<sup>431</sup>

The plaintiff has to prove the existence of liability (especially the damage that justifies financial or some other form of the requested compensation) and defendant has to prove the existence of preconditions for the release from liability, as explained above.<sup>432</sup>

Burden of proof in the criminal defamation case (intentional defamation) is on the plaintiff (private prosecutor), who has to prove that the statement is defamatory (capable to harm reputation) and false and that the defendant knew that the statement was false. This is very high standard of proof and conviction, in general, is not likely.

Defence in criminal insult cases is, inter alia, public interest or some other justified reason for assertion or dissemination of the disputed factual statement/value judgement. The public interest defence include various circumstances of the case, including current cause, context, previous behaviour of the plaintiff, truth of the factual statement, factual ground of the offensive value judgement, contribution to the public debate on political or another relevant topic etc. The defendant has the burden of proving all these circumstances. If the insult is committed by a journalist in performing his professional work and the topic is of public interest, the defendant should be acquitted.

### 3. Compliance with ECHR principles

ECHR, as well as other international conventions ratified by the Croatian parliament, are an integral part of the Croatian legislative, and have primacy over domestic laws.<sup>433</sup> Thus the jurisprudence of the ECtHR is one of the most relevant sources of law in Croatia and can be implemented directly. If a Croatian law is not in conformity with the ECHR, the ECHR has the priority.

Basic principles of freedom of expression, as developed by the ECtHR, are implemented in Croatian laws.

The Croatian Constitutional Court's jurisprudence in recent years is completely in accordance with the jurisprudence of the ECtHR, which significantly affected regular courts. The public interest, truth of statement of fact, sufficient factual ground of the insulting value judgement, good faith, fair reporting about the public events, public authority as the source of the disputed information, dissemination of statements made by another person in an interview, wider limits of acceptable criticism of politicians and other public officials etc. become effective defences in media cases.

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<sup>430</sup> Media Law, Art.21/4.

<sup>431</sup> Media Law, Art.21/5.

<sup>432</sup> Media Law, Art.21/6

<sup>433</sup> The Constitution of the Republic of Croatia, Art. 134,

[https://www.usud.hr/sites/default/files/dokumenti/The\\_consolidated\\_text\\_of\\_the\\_Constitution\\_of\\_the\\_Republic\\_of\\_Croatia\\_as\\_of\\_15\\_January\\_2014.pdf](https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf)



However, not a small number of judges of lower courts still adjudicate in freedom of expression cases as in ordinary litigation for damages, limiting themselves to establishing that the statement was defamatory, and that the defendant had not proved the truthfulness of the statement. Fair balance between the relevant interests of both parties and conflicted human rights sometimes is not even mentioned in judgements. Legal standards as “necessary in a democratic society”, “pressing social need” and “proportionality” are still very abstract for some judges. General impression that some judges have more understanding for claims about harmed reputation than for abstract principles of freedom of expression and its role in a democratic society stimulates persons injured by the published information/idea to sue media organisation and easily obtain financial compensation (of average 3-5.000 EUR). This lucrative motive, no doubt, results in numerous lawsuits.

Croatian judges usually refuse to establish and evaluate the fact that the plaintiff filed lawsuits against other publishers or several lawsuits against the same publisher. Such practice makes it almost impossible to prove that these are SLAPP lawsuits.

#### 4. Systemic safeguards

It is not possible to quash SLAPP lawsuits at an early stage. If all formal preconditions are fulfilled (e.g. lawsuit filed within the statute of limitations, an action which is a presumption of admissibility of the lawsuit performed, etc.), the court has to decide on the merits of the case.

Croatian Journalists Association’s Ethical Council decides about complaints against the articles published in media, but injured persons have right to file lawsuits at the same time. Ethical Council’s decision in favour of the complainant in general is not sufficient satisfaction.

In the early 90s the Council for the Protection of the Public Information Freedom was established.<sup>434</sup> Although authorized to decide about complaints against press, the Council never became authoritative enough to replace courts. The Council was abolished in 1996.

In 2011 journalists and publishers established the Council for Media, as the self-regulatory body. This body did not have significant effect and soon ceased to exist.

Legislature and jurisprudence in favour of the freedom of expression is the best protection from SLAPP lawsuits, especially if the losing party has to pay legal costs of the opposing party.

#### 5. The court’s role and independence

The court does not have discretionary powers to dismiss SLAPP lawsuit. However, the court is obliged to evaluate all relevant circumstances of the case in order to establish a fair balance between the conflicted human rights. If the court realizes, or even gets the impression, that the case is of SLAPP nature, it will certainly influence the judgement in favour of a defendant because it shows that the plaintiff actually did not suffer the damage which has to be compensated as requested by the lawsuit.

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<sup>434</sup> The Law on Public Information, 1992, Art.23-28. [https://narodne-novine.nn.hr/clanci/sluzbeni/1992\\_04\\_22\\_490.html](https://narodne-novine.nn.hr/clanci/sluzbeni/1992_04_22_490.html)



## 6. Case law

### 6.1. Civil

More than 1000 defamation cases against publishers and journalists are pending at this moment in Croatia.<sup>435</sup> HANZA MEDIA d.o.o. (the publisher of dailies JUTARNJI LIST and SLOBODNA DALMACIJA and periodicals) is defendant in 502 cases (average claim 15.000 EUR), STYRIA GROUP (dailies VECERNJI LIST and 24 SATA) in 170 cases (average claim 20.000 EUR), five media organisations are defendant in more than 20 cases.<sup>436</sup>

Some persons and legal entities filed dozens of lawsuits against publishers/media organisations and journalists. Two of them were public officials (ex-vice-president of the Parliament Miljan Brkić and ex-minister Tomislav Tolušić) and two are public institutions (public broadcaster Croatian radio television and the University in Zagreb and its officials). These lawsuits were reasonably considered as SLAPPs, with the main purpose to silence comments and critics. Soon after filing lawsuits, under public and government's pressure, the Croatian radio television settled the cases against publishers.

### 6.2. Criminal

Truth and public interest are defences in the Croatian criminal defamation/insult proceedings. The burden of proof for the criminal offence of intentional defamation (knowingly asserting or disseminating untrue statement) is on the plaintiff and the proceedings usually ended by the acquittal.

It should be noted that the court is not bound by the legal qualification of the criminal offence,<sup>437</sup> but only by the factual description of the offence presented in the indictment. For that reason a defendant accused of the offence of defamation can be sentenced for the offence of insult, if the plaintiff did not succeed to prove that the defendant knew that the disputed statement was false, but the evidence proved that the offence of insult was committed. This is the reason that plaintiffs usually sue for the offence of defamation, even if they do not have single evidence that the defendant knowingly asserted untrue statement.

Since the journalists' work and public interest, or other justified reasons for asserting or disseminating disputed statements/ideas are sufficient defences against charges for the insult, convictions are very rare. However, very offensive value judgements (like "idiot") sometimes are still evaluated as unjustified attack on reputation and defendants are sentenced.<sup>438</sup>

<sup>435</sup> Croatian Journalists' Association conducted a survey about pending media cases, but not all media organisations provided data and accurate number of pending cases is thus unknown. <https://www.hnd.hr/europska-studija-tuzbe-protiv-novinara-u-hrvatskoj-sistemska-problem-koji-gusi-slobodu-medija>

<sup>436</sup> Croatian Journalists' Association survey, May 2020, <https://hnd.hr/hnd-ova-anketa-u-hrvatskoj-aktivno-najmanje-905-tuzbi-protiv-novinara-i-medija>

<sup>437</sup> Penal Procedure Code, Art.449/2.

<sup>438</sup> Ex-president Stipe Mesic sued Hrvoje Hitrec (writer and politician, minister in the Government in 1991) who said in the interview, on the request of the journalist to comment a Mesic's statement, that Mesic was "idiot". Hitrec was sentenced, but the Constitutional Court decided that the convicted judgement violated Hitrec's freedom of expression rights. The Constitutional Court based its decision on the jurisprudence of the ECtHR, especially the judgement in the case *Oberschlich v. Austria* (2) ([https://sljeme.usud.hr/Usud/Praksaw.nsf/C12570D30061CE54C12584CE00331A36/\\$FILE/U-III-1084-2015.pdf](https://sljeme.usud.hr/Usud/Praksaw.nsf/C12570D30061CE54C12584CE00331A36/$FILE/U-III-1084-2015.pdf) ). In the retrial Hitrec was sentenced again. The appeal is pending.



In 2018 ten public persons, mentioned in the bulletin of the Serbian National Council (organisation of the Serb minority in Croatia) in the context of hate speech and revisionism,

accused the author Tamara Opacic and editor Sasa Milosevic for the crime of defamation. One proceeding has been ended by rejection of the indictment (private lawsuit) because of formal deficiencies and other proceedings are pending. All indictments were filed at the same time and plaintiffs are represented by the same attorney at law. Publicity given by certain media to these accusations, public statements of the plaintiffs, announcement that they would file civil lawsuits against defendants requesting high compensation right after convictions indicated that these lawsuits might have the SLAPP purpose.<sup>439</sup>

### ***6.3. Concluding remark***

SLAPPs are primarily directed against media organisations and journalists. Plaintiffs are public officials and public persons, or public institutions. SLAPP lawsuits target publication of the alleged defamatory statements and/or offensive value judgement.

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<sup>439</sup> The author of this country note is Tamara Opacic's defence lawyer.



The legal background of SLAPP cases in

## Cyprus

Contribution by Natasa Mavronicola (Birmingham Law School),  
Athanasia Hadjigeorgiou (University of Central Lancashire Cyprus), and  
Anastasia Karatzia (University of Essex)

Given that a study of SLAPP requires us to identify legal mechanisms by which powerful entities can be shielded (or shield themselves) from accountability and obstruct public participation, we are adopting an expansive focus in this respect to consider obstacles to accountability/public participation arising not only in respect of political/public accountability and freedom of expression, but also in relation to the Cyprus conflict and access to justice.

### 1. Laws most vulnerable to abuse

#### 1.1. *Issues emerging from the Cyprus conflict*

'The Cyprus conflict' refers to the ongoing dispute between Greek Cypriots and Turkish Cypriots/Turkey, which historically consisted of two major events: inter-ethnic violence in 1963-1964 and Turkey's invasion of the Republic of Cyprus (RoC) in 1974. As a result of the latter, the internationally recognised RoC only exercises effective control over part of the island, and it is these areas that the report is concerned with.

The doctrine of necessity started its life as a mechanism to respond to the withdrawal of Turkish Cypriots from state institutions in 1963 but is being used today to justify a range of policies that are not necessarily connected to its original purpose. What is most relevant here is **that the doctrine of necessity has hindered public accountability cases** and limited the rights of different groups of citizens within the RoC.

The doctrine of necessity was established by the Supreme Court decision *The Attorney-General of the Republic v Mustafa Ibrahim and Others*,<sup>440</sup> in which the government successfully argued that the withdrawal of Turkish Cypriots from the executive and legislative branches made it impossible for state bodies to function in accordance with the 1960 Constitution. The Supreme Court in *Mustafa Ibrahim* decided that the circumstances were such that the continued operation of all state bodies without their Turkish Cypriot members, contrary to the provisions of the Constitution, could be justified under the doctrine of necessity. Since then, the doctrine of necessity has been used to justify violations of human and communal rights in ways that would not be considered acceptable under the letter of the Constitution itself.<sup>441</sup>

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<sup>440</sup> *The Attorney-General of the Republic v Mustafa Ibrahim and Others* (1964) CLR 195.

<sup>441</sup> *Ambrosia Oils v Bank of Cyprus* [1983] 1 CLR 55. See also, Nasia Hadjigeorgiou and Nikolas Kyriakou, 'Entrenching Hegemony in Cyprus: The Doctrine of Necessity and the Principle of Bi-communality' in Yaniv Roznai and Richard Albert, *Constitutionalism under Extreme Conditions: Law, Emergency, Exception* (Springer, 2020), 291-312.



The juxtaposition of the right to property and right to vote case law suggests that the Courts have used the doctrine of necessity in an inconsistent manner. They have sometimes interpreted it broadly (as in *Solomonides*<sup>442</sup>) and sometimes narrowly (as in *Aziz*<sup>443</sup>), with both approaches resulting in the limitation of the applicant's human rights.

### ***1.2. Access to justice***

Procedural rules are apt for abuse by SLAPPers. The judicial system in Cyprus is **notoriously slow and inefficient**. A Functional Review of the Courts System of Cyprus 2017-2018 identified major deficiencies in court management and leadership, institutional structures, and procedures and infrastructure to support the efficient operation of the courts.<sup>444</sup> The Review found that the problem of delay is chronic, getting worse every year, and exacerbated by significant backlogs. Data indicates that some civil cases can take more than 9 years from the court of first instance to the conclusion of the appeal in the Supreme Court. Furthermore, all the court processes remain manual and paper based. The recent establishment of the Administrative Court is expected to reduce the burden on the Supreme Court. A process of reform and modernisation of the judicial system focusing on e-justice and the introduction of technology-based systems in courts was initiated in 2020, thus its outcome will not be immediately apparent. The prolonged judicial procedure, together with burdensome litigation processes, make the system prone to abuse by litigants who might wish to maximise the burden of a lawsuit on the defendant by tiring out and exhausting the resources of the defendant.

### ***1.3. Political and public accountability through free expression***

Cyprus criminalises various instances of expression, including blasphemy. It is important to highlight these not necessarily because they lead to a vast number of cases (to our knowledge), but because of their significant potential 'chilling effect'. Moreover, **Cyprus' defamation law (which has remained in the realm of civil law since relevant criminal provisions were repealed in 2003) has been employed to attack journalists and others expressing views or allegations against powerful/political figures.**

#### ***1.3.1. Criminal law, notably provisions criminalising certain speech***

The Cyprus Criminal Code (Cap. 154)<sup>445</sup> criminalises a number of exercises of expression. This criminalisation can have a 'chilling effect' and/or be used in a manner that falls within the SLAPP umbrella. Examples of what is criminalised are as follows:

- 'False news' (Art. 50 of the Criminal Code): any person who publishes, in any form, false news, or information that may otherwise undermine public order or the **public's confidence in the state or**

<sup>442</sup> *Solomonides v Minister of the Interior as the Custodian of Turkish-Cypriot Properties* (2003) 1B CLR 1275

<sup>443</sup> *Aziz v Cyprus* (2005) 41 E.H.R.R. 11.

<sup>444</sup> IPA Ireland, *Functional Review of the Courts System of Cyprus* (2018), available at: [https://www.cyprusbarassociation.org/files/publications/Functional\\_Review\\_of\\_Courts\\_System\\_of\\_Cyprus\\_IPA\\_Ireland\\_-\\_Final\\_Report.pdf](https://www.cyprusbarassociation.org/files/publications/Functional_Review_of_Courts_System_of_Cyprus_IPA_Ireland_-_Final_Report.pdf)

<sup>445</sup> Ο περί Ποινικού Κώδικα Νόμος (ΚΕΦ.154).



**organs** or cause fear or concern to the public or interfere with any way the common peace and orderliness is guilty of a misdemeanour. The punishment is imprisonment for up to two years or a fine. (It is relevant to note here that a similar law recently passed in Hungary on misinformation has been identified in a key SLAPP study as capable of authoritarian abuse or misuse against those opposed to the ruling party.<sup>446</sup>)

- Insult of the armed forces (Art. 50D of the Criminal Code): Publicly insulting the army (Army of the Republic, National Guard or any other military force established by law) is a criminal offence. The punishment is imprisonment for up to two years of a fine or both.
- Insult of foreign heads of state (Art. 68 of the Criminal Code): Publishing anything intended to be read, or any sign or visible representation, that aims to humiliate, insult or expose to hatred or contempt a foreign head of state, ambassador or other foreign dignitary with the goal of compromising the peace and friendship between Cyprus and the foreign country in question is a misdemeanour.
- Public vilification (Art. 99 of the Criminal Code): publicly insulting another person in a manner capable of provoking an assault is a criminal offence punishable with imprisonment for up to one month or a fine.
- Deliberately offending a person's religious sentiments through speech (Art. 141 of the Criminal Code). The penalty is imprisonment for up to one year. Additionally, publishing books, pamphlets, letters or articles in magazines and newspapers with the intent of humiliating a religion or insult those who follow it is a misdemeanour under Art. 142.<sup>447</sup> (It is worth noting that this law has recently been the subject of debate in attacks on the iconoclastic works of an artist named George Gavriel, whose paintings depicted Jesus naked or riding a motorcycle, and mocked priests and the Church. Attacks by the Cyprus Archbishop and even prominent Ministers against the artist were meant with significant pushback by others and led to calls for repealing Cyprus' blasphemy laws.<sup>448</sup>)
- Libelling the memory of a deceased person (Art. 202A of the Criminal Code): The punishment is imprisonment for up to one year. Criminal prosecution is only possible when the relatives of the deceased file a complaint.

### 1.3.2. *Civil law, notably defamation law*

Defamation law protects reputation. Defamation involves the making of a statement that damages the reputation of a natural or legal person. Defamation that is communicated orally is called 'slander' («συκοφαντία»), while defamation that is communicated in written form is called 'libel' («λίβελλος»).

The relevant provisions on defamation in Cyprus law can be found in Articles 17-24 of the Cyprus Civil Wrongs Code (Cap. 148).<sup>449</sup> In cases of libel, the law presumes you suffered damage; but in the case

<sup>446</sup> Petra Bárd et al, *SLAPP in the EU Context* (EU CITIZEN 2020) 20, available at: [https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf).

<sup>447</sup> See, further, Arts. 138-142 of the Cyprus Criminal Code.

<sup>448</sup> See, for example, George Koumoullis, 'Art uproar shows ditching blasphemy law long overdue', *Cyprus Mail*, 27 September 2020, available at: <https://cyprus-mail.com/2020/09/27/art-uproar-shows-ditching-blasphemy-law-long-overdue/>.

<sup>449</sup> Ο περί Αστικών Αδικημάτων Νόμος (ΚΕΦ.148).





of slander, the person claiming to have been defamed has to prove damage suffered from this, bar in a limited number of exceptional situations (eg when the defamation alleged accuses the person defamed of serious crime or, if they are a woman, of adultery, seeks to harm the person in their particular occupation, or ascribes to them a contagious disease) – Art.17. Importantly, it may be easier for a public figure than a less widely known individual to demonstrate that they have suffered damage through defamation, as widely known figures (or legal entities) may more easily tie damage to their reputation to material losses.<sup>450</sup> Polyvios Polyviou notes, as a general point, that compensation sums have been on an upward trajectory since the early 1990s.<sup>451</sup>

## 2. Potential defences

### 2.1. Political and public accountability through free expression

#### 2.1.1. Criminal law on statements

It is worth noting that, in respect of ‘false news’ (criminalised under Art. 50 of the Criminal Code), there will be no punishment if the defendant demonstrates to the Court’s satisfaction that the publication was made in good faith and that it was based on facts justifying this publication.

#### 2.1.2. Civil law on defamation

The following constitute defences to civil suits on defamation:<sup>452</sup>

(i) *Truth* (Art.19(a) of the Civil Wrongs Code)

The defence of truth is a complete defence to defamation suits. It falls to the defendant to prove the truth of the relevant statement(s). It is enough for the defendant to demonstrate that the statements are ‘substantially true’ – *Εκδόσεις Αρκτίνος κ. Δώρου Γεωργιάδη*.<sup>453</sup> It is not enough, however, simply to demonstrate their good faith or even reasonable belief in the truth of the statement(s). The use(fulness) of the defence of truth has declined over time, as defences such as those of qualified privilege or fair comment (see below) are considered generally to be more generous to defendants.<sup>454</sup>

<sup>450</sup> Alex Danos, ‘Cyprus: Defamation Law In Cyprus’, *Mondaq*, 27 June 2019, available at: <https://www.mondaq.com/cyprus/libel-defamation/819466/defamation-law-in-cyprus>; Πολύβιος Πολυβίου, *Η Δυσφήμιση στο Κυπριακό & Ευρωπαϊκό Δίκαιο* (Νομική Βιβλιοθήκη 2019) [Polyvios Polyviou, *Defamation in Cypriot and European Law* (Nomiki Vivliothiki 2019)] 18-19.

<sup>451</sup> Πολύβιος Πολυβίου, *Η Δυσφήμιση στο Κυπριακό & Ευρωπαϊκό Δίκαιο* (Νομική Βιβλιοθήκη 2019) [Polyvios Polyviou, *Defamation in Cypriot and European Law* (Nomiki Vivliothiki 2019)] 327-343.

<sup>452</sup> The key reference text for this section is Πολύβιος Πολυβίου, *Η Δυσφήμιση στο Κυπριακό & Ευρωπαϊκό Δίκαιο* (Νομική Βιβλιοθήκη 2019) [Polyvios Polyviou, *Defamation in Cypriot and European Law* (Nomiki Vivliothiki 2019)].

<sup>453</sup> *Εκδόσεις Αρκτίνος κ. Δώρου Γεωργιάδη* (118/2008), (2011) 1 Α.Α.Δ. 407 [Arktinos Publications v Doros Georgiades (2011) 1 CLR 407].

<sup>454</sup> Πολύβιος Πολυβίου, *Η Δυσφήμιση στο Κυπριακό & Ευρωπαϊκό Δίκαιο* (Νομική Βιβλιοθήκη 2019) [Polyvios Polyviou, *Defamation in Cypriot and European Law* (Nomiki Vivliothiki 2019)] 149-150.



(ii) *Absolute Privilege* (Art.20 of the Civil Wrongs Code)

Publications are absolutely privileged if they fall within a set of categories specified in Art. 20 of the Civil Wrongs Code, such as that:

- the publication has been issued by the President of the RoC or the Ministerial Cabinet or any legislative body in formal documentation or procedure;
- the publication is issued as part of a judicial process by someone involved in this process as a judge, lawyer, witness or party to the proceedings;
- the person publishing the relevant publication is obligated by law to do so.

In respect of absolutely privileged communications, untruth or bad faith are irrelevant.

(iii) *Qualified Privilege* (Art.21 of the Civil Wrongs Code)

A publication enjoys qualified privilege in a set of circumstances specified in Art.21 of the Civil Wrongs Code, such as that the publication is made **for the protection of the rights or interests of the person publishing it, or the person to whom it is disseminated**. This privilege is lost if untruth or bad faith are demonstrated by the claimant. This is an important defence for the press and can be used in respect of the critique of public figures.

(iv) *Fair comment*

It is a defence in cases of defamation that the relevant statements constituted fair comment on a matter of public interest (Art.19 of the Civil Wrongs Code). For this defence to stand, the following elements must be shown:

- that the relevant statement constituted a comment or opinion and not an account of fact;
- that the statement concerned a matter of public interest;
- that any facts to which the statement alludes reflect reality and are substantially true (or are covered by qualified privilege);
- and that there is no malice, at least as regards the description of the facts that form the subject of the relevant comment.

This is a highly significant defence in respect of the freedom of the press, particularly because it is accepted that critique of political figures, public servants, or other publicly renowned persons (such as a well-known musician) and their activities will tend to be considered a matter of public interest.<sup>455</sup>

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<sup>455</sup> See, for example, *Δρουσιώτης κ. Παπασάββα* (Πολιτική Έφεση 236/11, Απόφαση ημερ. 6.3.2015) [*Drousiotis v Papasavvas* (Appeal no 236/11, Judgment of 6 March 2015)]; *Εκδόσεις Αρκίνοσ κ. Δώρου Γεωργιάδη* (118/2008), (2011) 1 A.A.Δ. 407 [*Arktinos Publications v Doros Georgiades* (2011) 1 CLR 407].



(v) *Reportage Defence*

The reportage defence concerns instances of dissemination of a defamatory statement where there is no assumption/adoption of the veracity of the statement(s), but a mere reporting of the defamatory statements made by others.

(vi) *Innocent Dissemination*

This defence, premised on the common law, operates in respect of persons whose dissemination of a defamatory publication is of a secondary role (e.g. in the case of a bookseller or newspaper seller).

(vii) *Special Defence in respect of publication in newspaper*

This special defence (under Art.24 of the Civil Wrongs Code) applies in relation to lawsuits against a newspaper owner in respect of a defamatory publication within that person's newspaper, as long as there was no malice or serious omission in diligence involved, and a prompt apology is issued.

### 3. Compliance with ECHR principles

In Cyprus, freedom of expression is safeguarded under Article 19 of the Constitution, which provides that 'every person has the right to freedom of speech and expression in any form' and the right 'includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority'. Article 19 allows for 'such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary'. Article 21 of the Constitution safeguards the freedom of assembly, Article 28 safeguards the right to equality (including equality before the law), and Article 30 protects the right to a fair trial. These provisions largely align with those of the ECHR.

'Defamation' per se is no longer criminalised in the RoC and is dealt with through civil law actions. Nonetheless, as outlined in response to question 1, Cypriot law criminalises certain utterances that may be tied to public participation and the holding to account of public/powerful figures. With respect to the civil wrong of defamation, the defence of 'fair comment' in particular (see above) tends to accommodate the three criteria outlined in the question.

Overall, relevant case law suggests that Cypriot law – including, to a large extent, judicial doctrine – tends to conform to the ECHR as interpreted and applied by the ECtHR, with some notable violations nonetheless having been found by the ECtHR. However, some caution is worth applying in this area given that cases decided by the ECtHR apply a margin of appreciation. Where Cyprus has fallen foul of the ECHR, the issue of Article 6 has also been prominent (see *Kyprianou* and *Koulias*, below).



A key case decided by the ECtHR concerning Cyprus' defamation law is *Alithia Publishing Company Ltd & Constantinides v Cyprus*.<sup>456</sup> The case concerned the applicants' (the publisher and editor-in-chief of the newspaper *Alithia*) complaint under Article 10 ECHR about the outcome of defamation proceedings brought against them regarding articles which alleged that a former Minister of Defence was corrupt. The ECtHR found that the Cypriot courts had undertaken a careful assessment of the case and had concluded that the applicants had not sufficiently proven their allegations and had acted contrary to principles of responsible journalism. The Court held that the domestic findings were persuasive and concluded there had been no violation of Article 10. In another case concerning broadcasting regulations, the ECtHR did not find violation of Article 10.<sup>457</sup>

A prominent case concerning freedom of expression in Cyprus is the earlier case of *Kyprianou v Cyprus*.<sup>458</sup> The applicant had been acting as defence counsel during a murder trial and had been interrupted by the court while cross-examining a witness for the prosecution. He alleged that while he cross-examined, members of the bench had been chatting and sending each other notes ("*ravasakia*" - which can mean secret letters/love letters). The judges stated they had been "deeply insulted" and could not "conceive of another occasion of such a manifest and unacceptable contempt of court". The court found the advocate in contempt of court and sentenced him to five days' imprisonment. The ECtHR made the following findings in this case:

- There had been a violation of Article 6(1) ECHR, in particular of Mr Kyprianou's right to be tried by an independent and impartial tribunal.
- There had been a **violation of Article 10 ECHR**. The ECtHR considered that the penalty imposed had been disproportionately severe and **capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel**. In the circumstances, the ECtHR found that the domestic court had failed to strike the appropriate balance between the need to protect the authority of the judiciary and the need to protect freedom of expression.

Finally, the recent case of *Koulias v Cyprus*<sup>459</sup> addresses an important dimension of defamation proceedings: the **impartiality** of the court. The application concerned a successful civil defamation suit against the applicant, an advocate and Member of Parliament of the RoC, concerning allegations he made during a radio programme against a former Minister and high-ranking member of a political party in respect of the latter's alleged taking of money from a Turkish company and statements that

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<sup>456</sup> *Alithia Publishing Company Ltd & Constantinides v Cyprus* App no 17550/03 (ECtHR, 22 May 2008). The case concerned the applicants' (the publisher of the daily morning newspaper *Alithia* and its editor in chief Alecos Constantinides) complaint about the outcome of defamation proceedings brought against them following the publication in *Alithia* of a series of articles which alleged that a former Minister of Defence, Mr Aloneftis, was corrupt. They relied on Article 10 ECHR. The ECtHR found that the Cypriot courts had made a carefully balanced examination of the case against the applicants and had concluded that the applicants had not sufficiently proven their primarily factual allegations but had rather acted maliciously in disregard of the principles of responsible journalism. *Alithia Publishing Company Ltd & Constantinides v Cyprus* App no 17550/03 (ECtHR, 22 May 2008).

<sup>457</sup> *Sigma Radio Television Ltd v Cyprus* App Nos 32181/04 and 35122/05 (ECtHR, 21 July 2011). The case concerned a number of fines imposed on Sigma Radio Television for a number of breaches of broadcasting regulations. The ECtHR held that the interference with Sigma's rights had been proportionate to the aims pursued – which included the protection of consumers and children from unethical advertising practices and from broadcasts containing violence, as well as ensuring that viewers were informed of the true content of broadcasts through relevant warnings, protecting pluralism of information, and addressing discrimination – and that the reasons given in justification had been relevant and sufficient.

<sup>458</sup> *Kyprianou v Cyprus* App No 73797/01 (ECtHR, 15 December 2005).

<sup>459</sup> *Koulias v Cyprus* App No 48781/12 (ECtHR, 26 May 2020).



there is no pseudo-state in Northern Cyprus. The applicant complained that, contrary to Article 6(1) ECHR, the lawsuit was determined by a tribunal (a composition of Cyprus' Supreme Court) which lacked impartiality, as the son of the presiding judge hearing the case worked at the plaintiff's lawyer's firm; and that his right to freedom of expression under Article 10 ECHR was violated, arguing that the interference with his right was neither necessary nor proportionate, citing his contribution to a debate in the public interest. The ECtHR held that Article 6(1) had been violated: there was an objectively grounded appearance of partiality, and the domestic law and practice did not provide sufficient procedural safeguards in this respect. The Article 10 claim was rejected for non-exhaustion of domestic remedies.

There is a prominent case currently pending before the ECtHR: *Drousiotis v Cyprus* (Application no. 42315/15, lodged on 24 August 2015). The case relates to civil **defamation** proceedings instituted against the applicant, a journalist, as well as the publisher of the newspaper *Politis*, for an article published in 2005, which concerned the Deputy Attorney-General and the extension of his mandate. The local court found the article to be defamatory, rejecting the defences of fair comment and qualified privilege, and ordered the applicant and publisher to pay damages of 25,000 euros. These findings were upheld by the Supreme Court. The applicant complains that these findings disproportionately interfered with his right to freedom of expression under Article 10 ECHR.

While freedom of expression is protected in Cyprus, a challenge that arises in respect of the holding to account of powerful/authority figures is that freedom of expression does not solely protect those who seek to hold public officials or other powerful persons or entities to account. **It can also shield attacks against civil society organisations** or against persons who challenge dominant practices. For example, organisations that prominently defend asylum-seekers' rights in Cyprus, such as ENAR (European Network Against Racism) and KISA, have been repeatedly **accused of conspiring in support of terrorist organisations seeking to infiltrate the RoC.**<sup>460</sup>

#### 4. Systemic safeguards

In terms of the **availability of legal aid** for defendants in possible SLAPP lawsuits, the Legal Aid Law 165(I) of 2002 provides for free legal aid in the form of advice, assistance and representation in criminal and some civil lawsuits taking place in the RoC and in some civil lawsuits taking place outside the RoC. Although the law does not specifically refer to SLAPP lawsuits, it covers situations which might be relevant to such lawsuits. Notably, the Law only covers civil lawsuits that concern a violation of fundamental rights (as well as certain family law and asylum law proceedings). For example, the scope of legal aid covers criminal proceedings before a court, against any person for an offence for which imprisonment exceeds one year, including the stages of interrogation prior to the initiation of criminal proceedings and where the offence concerned violations of human rights. It also covers civil proceedings against the RoC, but only to the extent that they concern damages resulting from violations of human rights. A certificate of legal aid is granted by the Court and covers all the costs of the trial. In deciding whether to grant legal aid, the Court will examine the applicant's income and

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<sup>460</sup> See, for example, the facts outlined in this letter by ENAR (European Network Against Racism) issued in March 2020: <https://www.statewatch.org/media/documents/news/2020/mar/cy-enar-govt-defamatory-statements-pr-24-2-20.pdf>.



whether the legal aid is in the interests of justice, having regard to all the facts including a report by the Department of Social Welfare Services concerning the financial and social status of the applicant. A Court's decision not to grant legal aid is subject to appeal.

In terms of political and public accountability through free expression, the combination of legal regulation and self-regulation in respect of the press, in addition to the laws outlined above, make for a regulated but simultaneously largely 'free' press.<sup>461</sup>

The 1989 Press Law («Περί Τύπου Νόμος») safeguards the freedom of the press, the unhindered circulation of newspapers, the right of journalists not to disclose the sources of their information and access to official information. Under the Press Law (Art.7), all journalists, Cypriot or foreign, have the right to free access to State sources of information, to seek and obtain information from any competent State authority, and the freedom to make this public. The relevant State authority must provide the requested information unless it pertains to national security or public safety or must be withheld to protect public morals or the honour or rights of third parties. According to Art.8, all journalists are entitled not to reveal their source of information and to refuse to give testimony without being liable to prosecution for doing so. However, they may be required to reveal the source if the information is clearly related to a criminal offence, cannot be obtained otherwise, and reasons of imperative public interest require that it be disclosed. The Press Law also provides for a right of reply whereby natural or legal persons or public institutions that are named or indirectly referred to in a press report or article are entitled to reply if they consider the information concerning themselves to be untrue or misleading. Their reply must be published, free of charge, within three days of its receipt. There is a special provision for the right of reply and correction for civil servants or their agency (see Articles 38-39). Non-statutory guidelines have also been laid down and journalists are expected to exercise self-regulation to address complaints or non-compliance with journalistic standards.

Regarding gatekeeping organisations, the Cyprus Radiotelevision Authority is an independent authority responsible for the regulation of the radio and TV sector.<sup>462</sup> It has the power to examine complaints against the media and adopt administrative sanctions ranging from warnings to fines.<sup>463</sup> In addition, The Cyprus Media Complaints Commission (CMCC) («Επιτροπή Δημοσιογραφικής Δεοντολογίας») is **an independent press council responsible for the self-regulation of written and electronic media**. The Commission implements a Journalists' Code of Practice («Κώδικας Δημοσιογραφικής Δεοντολογίας») and deals with complaints from the public on issues such as accuracy of information, the right of rebuttal, reporting of financial news, professional privilege and public interest.<sup>464</sup> These two bodies act as gatekeepers protecting the public from the journalists' conduct rather than gatekeepers protecting the media against defamation complaints.

There is also a Press and Information Office (PIO), which is tasked with publicising the work of the Cyprus Government and the Cyprus House of Representatives, while also overseeing the

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<sup>461</sup> Cyprus is ranked 27<sup>th</sup> in the World Press Freedom Index: <https://rsf.org/en/ranking>.

<sup>462</sup> See the website of the Cyprus Radiotelevision Authority: <http://www.crt.a.org.cy/default.asp?id=1>

<sup>463</sup> This is established in Law 7(I) of 1998, applicable to 2020, which is available (in Greek) at: [http://www.crt.a.org.cy/images/users/1/1Enopiem.%2020%CE%9Domos%20207\(%CE%99\).98%2020mexri%2020%CE%A4rop.%202075\(I\).2020.pdf](http://www.crt.a.org.cy/images/users/1/1Enopiem.%2020%CE%9Domos%20207(%CE%99).98%2020mexri%2020%CE%A4rop.%202075(I).2020.pdf)

<sup>464</sup> See the website of the Cyprus Media Complaints Commission: [http://www.cmcc.org.cy/about\\_us.html](http://www.cmcc.org.cy/about_us.html)

implementation of media laws and regulations. According to its website, the PIO's 'vision' is - *inter alia* - 'to 'create the "Brand Cyprus"' and ensure a 'resilient reputation for the country'.<sup>465</sup> The PIO is not an independent body, and its role should be appraised accordingly.

A safeguard in respect of press freedom in Cyprus is the strong unionisation of journalists. The Union of Cyprus Journalists («Ένωση Συντακτών Κύπρου») has many hundreds of members and embraces all professional journalists in Cyprus, whether they are employed in newspapers, periodicals, the radio, television, or other news agencies. The union provides forms of insurance to journalists. It responds to current events in defence of press freedom. It also often makes representations on behalf of journalists in Cyprus and obtains important gains or concessions for journalists as a collective. For example, it recently asked, and obtained agreement from the Supreme Court, for improving journalists' access to courtrooms in the context of the pandemic.<sup>466</sup>

## 5. The court's role and independence

**The doctrine of necessity** marks the operation of the judiciary's relationship to the executive. The rights of the Turkish minorities are not appropriately respected. Among others, all laws of the Republic are drafted and published in Greek only which makes it significantly harder for Turkish Cypriots to access and challenge these laws.

With regard to the Courts' discretion, the Cyprus Criminal Code provides for maximum prison sentencing time and/or fine for specific offences or misdemeanours but Cyprus courts enjoy wide discretion regarding the nature, type, and level of punishment in a case, in light of the statutory ceiling. According to Art.29 of the Code, except in premeditated murder and the offences of treason and instigation of war, if a criminal offence is punishable by life imprisonment or any other sentencing, the trial court has the discretion to impose a more lenient prison sentence or a fine. According to the 'golden rule' in sentencing, judges need to take into consideration the seriousness of the crime but also the defendant's personal circumstances, thus balancing aggravating with mitigating factors before sentencing an individual.

**Regarding political and public accountability through free expression**, the Courts' discretion is apparent in defamation cases, where there is always scope for the exercise of interpretive and evaluative judgement by judges. Some elements of the law rely on the demonstration of facts to the court's 'satisfaction'. Accordingly, the role of the courts can be significant in shaping outcomes for parties involved in SLAPP cases. It is also worth noting that **prosecutorial discretion** shapes whether certain utterances potentially considered criminal under the Criminal Code are prosecuted in practice.

**Judicial independence and impartiality** are a live issue in Cyprus and has been the subject of proceedings before the ECtHR, including in the recent case of *Koulias v Cyprus* (see above). A further case that is relevant in this respect is *Nicholas v Cyprus*,<sup>467</sup> where the ECtHR found that Cyprus' Supreme Court, which had examined the appeal proceedings on his allegations of wrongful dismissal

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<sup>465</sup> See the website of the PIO: <https://www.pio.gov.cy/en/mission-and-vision/>.

<sup>466</sup> Examples of its work are documented on its Facebook page, available (in Greek) at: <https://www.facebook.com/cyprusjournalistsunion/>.

<sup>467</sup> *Nicholas v Cyprus* App No 63246/10 (ECtHR, 9 January 2018).





and defamation against an airline, had not been objectively impartial. The reason for this was that the son of one of the Supreme Court judges who had decided on his case had been married to the daughter of the managing partner of the law firm representing the airline and the couple had both worked at this law firm. The Cyprus Code of Judicial Practice was amended in 2019 and now stipulates that such an employment connection constitutes grounds for a judge's withdrawal. The amendments to the Code provide that a judge, whether sitting alone or as a member of a panel of judges, cannot adjudicate on a case in which one of the parties is represented by a lawyer who is a family member of the judge or in the same law firm as a family member of the judge. The amendment does not apply to cases heard before the full bench of the Supreme Court or in respect of procedural determinations.

In a recent survey conducted by the European Network of Councils for the Judiciary, Cyprus-based lawyers rated the independence of judges in Cyprus, on a 10-point scale, at just over 5.<sup>468</sup>

## 6. Case law

As explained above, there are various examples of cases or other actions taken against journalists and others seeking to participate in broadly conceived watchdog functions or critiques of public figures in Cyprus, some of which have gone as far as the ECtHR. It is worth here citing three further recent examples.

In a court case decided in 2020, KISA (an NGO whose name and objectives signify Action for Equality, Support, Antiracism) was found to have committed 'defamation' and 'harmful forgery' on account of a document drafted in 2010 calling for the termination of the appointment of two individuals to the Management Board of the EU's FRA.<sup>469</sup> Currently, the threatened deregistration of KISA (and other NGOs) for failing to fulfil certain regulatory requirements within a limited time period has been identified as a threat to the defence of human rights in Cyprus.<sup>470</sup> Such deregistration would be irreversible and entail a prohibition on continuing their operations.

Recently, the law on libel has been employed against a journalist by Justice Minister Emily Yiolitis, who had her lawyers send a 'Cease and Desist' letter to a Kathimerini newspaper columnist, Theano Kalavana, regarding Kalavana's Twitter posts describing links between Emily Yiolitis' former law firm and the provision of 'golden passports'. The letter asked Kalavana to delete the relevant posts and issue an immediate apology. The posts had conveyed that Emily Yiolitis' former law firm had secured four 'golden passports' in respect of a casino project, one of these being 'very dirty'. Emily Yiolitis' former law firm issued a statement which did not wholly clarify whether they had represented clients linked to a casino who have obtained Cypriot passports.<sup>471</sup> The dispute is ongoing.

<sup>468</sup> ENCI/CCBE Survey among lawyers on the independence of Judges 2018-2019, available at: <https://bit.ly/2JYwVr>.

<sup>469</sup> Κληρίδης και Ξενοφώντος κ. ΚΙΣΑ (Αρ. Αγ. 4420/2010, Απόφαση ημερ. 5.6.2020) [*Clerides and Xenofontos v KISA* (Application No 4420/2010, Judgment of 5 June 2020)].

<sup>470</sup> 'Cyprus: 37 organisations denounce the ongoing harassment against a leading human rights group', *OMCT*, 19 February 2021, available at: <https://www.omct.org/en/resources/urgent-interventions/cyprus-37-organisations-denounce-the-ongoing-harassment-against-kisa-and-call-on-the-cypriot-authorities-to-reinstate-their-official-registration-as-a-non-governmental-organisation>.

<sup>471</sup> See the account in Kathimerini, 'Cypriots to protest over golden passports probe', *Kathimerini*, 6 November 2020, available at: <https://knews.kathimerini.com.cy/en/news/citizens-to-protest-over-passport-probe>.





The Justice Minister (Ms Yiolitis) has also been implicated in a very recent mobilisation of criminal law enforcement in response to the activities of a satirical Twitter account parodying her. She filed a formal criminal complaint regarding the account (with accusations of forgery (“πλαστογραφία”) using a computer, and violation of data protection laws), prompting police to obtain a search warrant and search the home and belongings of a woman suspected of running the account, and to seize her computer. Following wide public and political outcry, including by a number of legal practitioners and politicians (including parliamentarians) who labelled this an abuse of power and egregious incursion on freedom of expression, no further action against the woman was taken.<sup>472</sup> The woman targeted by the police appealed to the Supreme Court, which effectively declared the police search warrant unlawful. Discussions and accountability processes on this matter have progressed within the House of Representatives, where the Minister has insisted that she made the complaint in a personal capacity and did nothing wrong.<sup>473</sup>

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<sup>472</sup> George Psyllides, ‘Justice minister under fire for reporting Twitter parody account to police (updated)’, *Cyprus Mail*, 29 December 2020, available at: <https://cyprus-mail.com/2020/12/29/justice-minister-under-fire-for-reporting-twitter-parody-account-to-police/>.

<sup>473</sup> George Psyllides, ‘Justice minister under fire for reporting Twitter parody account to police (updated)’, *Cyprus Mail*, 29 December 2020, available at: <https://cyprus-mail.com/2020/12/29/justice-minister-under-fire-for-reporting-twitter-parody-account-to-police/>. ‘MPs grill Justice Minister for reporting parody account’, *Financial Mirror*, 15 February 2021, available at: <https://www.financialmirror.com/2021/02/15/mps-grill-justice-minister-for-reporting-parody-account/>.



The legal background of SLAPP cases in

## Czech Republic

Contribution by Helena Chaloupková (Lawyer) and Jiří Kučera (Lawyer)

### 1. Laws most vulnerable to abuse

Goodwill, Civil law § 81 (human) and § 135 (legal entity) of the act no. 89/2012 Coll., the Civil Code. Protection of goodwill is often abused for lawsuits aimed solely at restricting freedom of expression and intimidating journalists, watchdog activists, etc. Courts are required to carry out a test of proportionality between freedom of expression and the protection of reputation or personal rights. We may document such abuse on the recent case of the major Czech credit company – Home Credit who threatened a lawsuit against Sinopsis – civil activists group focusing on China, who informed about Chinese citizens complaining on unlawful approach and practices of Home Credit branch in China. It may be easily abused as it requires the defendant to prove that the published information (harmful to the Complainant) was indeed truthful and correct and was not motivated by causing harm to the complainant. In the Czech legal environment, the goodwill lawsuit (or prelawsuit notice) is the most common form of abuse.

Defamation, Criminal law § 184 of the act no. 40/2009 Coll., the Criminal Code. In general, anyone who reports false information about another, which is capable of significantly endangering his or her seriousness with his fellow citizens, especially damaging him at work, disrupting his family relationships or causing him other serious harm, may be punished by imprisonment for up to one year. However, differently from the civil goodwill lawsuit, it is the public prosecutor who must prove beyond reasonable doubt that the information was false and potentially harmful. This makes it less susceptible to abuse. On the other hand, it is easier for the complainant to file a criminal complaint to reach its goal as it exposes the target to a threat of a potential imprisonment for up to one year and also may give grounds for a counter campaign against the target based on the false criminal report. However, the complainant in such SLAPP case is under the risk of committing a crime of his own - False accusation according to the § 345 of the Criminal code. More details in subchapter 4.

It is also important to point out that there is a risk of higher punishment (imprisonment for up to two years or a ban of activity) if the defamation is committed by the press, film, radio, television, a publicly accessible computer network or any other similarly effective means.

Slander, Misdemeanour law § 7 of the act no. 251/2016 Coll., the Misdemeanour Code. Less serious form a defamation can be committed by anyone who "harms another's honour by making fun of him or otherwise grossly insulting him". As a consequence, a fine of up to CZK 10.000 may be imposed on a defamator for such conduct, or up to CZK 15.000 if the offense is committed repeatedly. It may be abused in the same way as a crime of defamation, however, without the consequence of potentially committing a false accusation crime.

Disciplinary hearing, Bar legislation. § 32 and following of the act no 85/1996, Coll, the Act on advocacy + the resolution of the Board of directors of the Czech Bar Association no. 1/1997, the Code of ethics. Sometimes SLAPP actors may direct their assaults not only against the watchdogs,



but also against their legal representatives. In such a case they abuse a notion to the Bar to initiate a disciplinary hearing against the legal representative thus causing them to change focus on their own defence. This practice may be documented on the Case of company Veolia against Štauderová, who was an attorney-at-law defending her client from a SLAPP lawsuit. VEOLIA filed a complaint to the Bar accusing Štauderová of breaching the Bar's Code of Ethics, specifically breach of obligation of honest, fair and decent conduct and of obligation to keep the attorney's speeches factual, sober and not knowingly untrue. This breach was supposedly conducted in a news interview, where Štauderová commented on practice of VEOLIA. Complaint of VEOLIA against Štauderová was later dismissed by the Bar.

## 2. Potential defences

Defendants can defend themselves against an action by proving the truth of the allegations, by reference to the public interest and, in the case of criticism, also by proving the real basis for the criticism. It is important to determine whether the person of the complainant (plaintiff) had the opportunity to comment on the matter. It is up to the defendant to prove the truth. Intelligence constitutes the protection of the public interest only if it concerns matters of legitimate public interest and if it serves that legitimate public interest. Freedom of expression and the right to information can only be invoked in relation to reporting on matters of public interest if journalists act in good faith to provide accurate and credible information and act in accordance with journalistic ethics. The difference is whether a citizen or a journalist refers to good faith. A journalist is expected to verify all information with great care and not just rely on information from a random person. The courts say that if anyone wishes to disclose information of a defamatory nature about another person, it must be demonstrated that he or she has taken reasonable steps to verify the veracity of such information, to the extent and to the extent that verification of the information would be permissible. reason not to believe that the defamation information is untrue. Good faith plays an important role, especially where information is obtained from a person (expert) who must have had sufficient and relevant information about the matter.

In the case of the exercise of the right of criticism, the form of the expressed opinion also plays an important role. It is acknowledged that exaggeration, irony, can be used, and the news can shock. The courts have also repeatedly stated that if a published opinion deviates from the boundaries of a generally accepted rules of decency in a democratic society, it loses the character of fair judgment. The courts, however, admit that it is possible to commit a certain simplification in the exercise of the right to criticize. It is not always possible to insist on absolute accuracy, in which case it is important that the overall message of certain information corresponds to the truth.

Any person who is damaged by a civil or criminal defamation case may seek remedy of the damage (both material and immaterial). There is no damage cap set by the law. The material damage (actual damage and loss of profit) is compensated in the full amount, the amount of compensation of immaterial damages is decided in each individual case by court after consideration of all specifics of the case (e.g. the extent and form of the defamation, goodwill of the defamed person, effect of the defamation etc). The amount of damages may therefore, depending on the case, vary from thousands of CZK to hundreds of thousands CZK, in exceptional cases even to millions of CZK.



The defendants of SLAPP lawsuits may use legal help of qualified attorneys with all of the above-mentioned cases. Individuals in unfavourable social situation may even seek free legal help.

### 3. Compliance with ECHR principles

The principles of the ECtHR are recognized by national law both in the decision-making practice of general courts and developed in the case law of the Supreme Court of the Czech Republic, or the Supreme Administrative Court of the Czech Republic, but especially by the Constitutional Court.

In court proceedings, a distinction is always made as to whether it is an allegation that is subject to proof of truth. When it comes to opinion, criticism, the courts proceed from the conclusion that it is a subjective attitude, but it must be proved that criticism concerns something real and is not a fictional thing. Recently, so-called hybrid data have also been assessed, i.e. statements that combine a factual and evaluative element.

With regard to criticism of a public official (politicians and civil servants), the limits of acceptable criticism are broader as far as these persons are concerned. It is admitted that it is these people who have to endure more criticism than the average citizen. On the other hand, the need to protect ordinary civil servants is avoided in order to avoid unacceptable scandal.

### 4. Systemic safeguards

There is no similar organisation as a 'Press council' in the Czech Republic that would oversee the good journalistic practice of print media. However, the media are obliged to follow the good journalistic practice and the act no. 46/2000 Coll., the Press Law.

A very important document in the Czech media space is also the Code of Ethics of Journalists, which is based on the study of international and national documents prepared by the Syndicate of Journalists of the Czech Republic. This Code is binding on all its members and journalists who are not members of the Syndicate were invited to observe it (Syndicate of Journalists, 1998, /online/).

In case the press follows the good journalistic practice and faces charges of defamation against it, they must defend their rights at the civil court.

In case of most SLAPP lawsuits the intention is not to win the lawsuit and as such the downfall of them is that the judicial costs are born by the losing party (It is a rule in the Czech procedure law). This usually serves as a deterrent against the lawsuit and the SLAPP activity is often restricted only to the prelawsuit notice. However, if the case goes to the court, the compensation of the judicial costs does not equal the real costs, as it is a flat-rate compensation. The real costs to defend against the lawsuit may thus be higher than the received compensation (but in some cases even lower). This may often be the factor for filling the SLAPP lawsuit in order to achieve the desired goal.

A very effective way to defend against a SLAPP criminal complaint for defamation is to file a counter complaint for false accusation according to the § 345 of the Criminal code. This especially applies for the SLAPP cases. Whoever falsely accuses another of a crime commits a crime of his own and may be punished by imprisonment for up to two years (or more depending on consequences).



Effective way of defence may be also a lawsuit for compensation of damages caused by the SLAPP lawsuit (see subchapter 2 above). This, however, requires an actual damage (material or immaterial) to be caused by the SLAPP and to be proven by the damaged person.

## 5. The court's role and independence

The courts (especially those dealing with appeals against decisions of courts of first instance, or the Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic) carefully consider - in the exercise of their discretion - the question of whether protection is appropriate. It is based on the fact that if an honor is tarnished by an unfounded accusation expressed in public, and even more so in the media, a person's reputation and honor may be damaged forever, especially if there is no possibility of rehabilitation. Therefore, they emphasize that the honor and reputation of those active in public life must not be discussed within a framework made of false claims.

On the other hand, with regard to the manifestations of political curtains, the need to preserve space for the free dissemination of views is emphasized and any restriction is not appropriate. The Constitutional Court of the Czech Republic states that if false information is not provided, privacy is not interfered with, in this case there is no room for the intervention of courts that would act as arbitrators of correctness, relevance or suitability of value preferences.

## 6. Case law

SLAPP cases are not common in the Czech Republic. Only a few cases from the past could be considered SLAPP cases. Attempts to silence critics usually end before the lawsuit is filed; critics are usually called upon in a pre-litigation call to remove some of the disputed information and to refrain from further disclosure of information about the person being criticized (natural or legal). An apology and a financial satisfaction paid is required. There is usually no litigation, so these cases are not presented to the public. SLAPP cases are not comprehensively monitored (not even on the internet). One of the few examples of monitored SLAPP cases is provided by the <https://pravdaovode.cz/> site, operated by the Endowment Fund "Truth about water". Among other things, the website provides examples of disputes that website operators perceive as an attempt to silence their actions and criticism concerning entities operating in the field of water management in several localities of the Czech Republic. Against the background of commercial disputes, there were also disputes against persons who commented publicly on this issue.

For example:

- Action of February 2017 for the protection of the reputation of a legal entity (V. and MV). The defendant R.N. was requested to refrain from the allegations made in the application, to apologize to the applicants and also to remove specific articles published on specified websites. It is clear from the information available that the action was withdrawn during the proceedings. The case was closed in 7/2020.
- Action of November 2017 for unfair competition against R.N. The defendant was accused of running a defamation media campaign, formulating public opinion through websites, organizing



petitions and other events, and filing lawsuits with the courts. The requirement was to refrain from conduct which the applicants considered undesirable and to remedy the consequences of those interventions. It is clear from the information available that the action was withdrawn during the proceedings. The case was closed in 6/2018.

- Complaint of the Czech Bar Association against the lawyer E. Štauderová for her statement in the news and journalistic program of public television in 1/2017 (see Chapter 1 above). The complaint was rejected by the Czech Bar Association.
- The pre-litigation appeal and against J.S. (journalist) of 6/2017 concerning articles from the period of 2011-2017. The plaintiffs alleged that their reputation was systematically damaged by the publication of false, misleading information and was required to refrain from its actions and take the necessary steps to eliminate articles which infringed the applicants' reputation.

Another relevant disputes concern period before 2016.

As an example of SLAPP in the Czech Republic, a lawsuit against two journalists M.M. and J.P. concerning two articles from 2016 about the entrepreneur K.P., on the website of the TM server and the pages of the weekly D.

In the articles the plaintiff was associated with controversial cases of some entrepreneurs and the company K.I. Plaintiff had considered that the articles damaged parts of his honour, dignity and good name in society. He demanded an apology and compensation from each defendant for immaterial damage in the amount of CZK 5,000,000. The action was directed against journalists, although both of them were employed by a news publisher and it was argued that they cannot be directly held liable for the alleged infringement as they were fulfilling the obligations assigned by their employer. The court of first instance and the court of appeal ruled in their favour and dismissed the action. The courts stated that the exception from the liability of the employer and direct responsibility of the journalists can be invoked only in so-called excesses of the journalists. However, according to the courts, that was not the case here. It was proved that the articles were prepared in accordance with the instructions of the employer and in accordance with the long-term editorial program of the weekly. Nevertheless, the plaintiff insisted on the responsibility of journalists and filed an extraordinary appeal with the Supreme Court of the Czech Republic. The plaintiff alleged that the defendants abused the trust placed in them by their employer, and their articles contained a number of false and defamatory allegations instead of duly verified information, thereby violating the weekly's code of ethics and acting excessively in relation to their duties. The plaintiff was convinced that the defendants pursued their own interests by publishing articles, thus they committed excess, that is, exceeding the scope of their journalistic activities, and that the conclusions of both courts were incorrect in this respect. In 11/2018, the Supreme Court of the Czech Republic rejected the appeal as inadmissible.



The legal background of SLAPP cases in

## Denmark (interview)

Summary of semi-structured interview with Mads Krøger Pramming (Lawyer, Ehmer Pramming)

*Information on SLAPPs in Denmark was obtained by means of a semi-structured interview based on a predefined set of questions*

**(1) Are SLAPPs generally a problem, and issue in your country?**

*No, they are not.*

**(2) IF NO: Is this because they are not initiated, or are they consequently dismissed by courts?**

*They are settled before they reach the courts, i.e. journalists receive letters from lawyers, sometimes this is used as a method to soften the argument.*

**(3) Which is more common: civil or criminal defamation?**

*Civil defamation is more common.*

**(4) Criminal: is it punished with imprisonment?**

- a. Are public officials, monarchs, heads of states more protected by criminal defamation or other criminal protection of their reputation?*

*There was no special rule until not long ago. It is since recently a criminal offence to harass or insult a public official. Broad definition. The line between justified criticism and 'harassment' is not clear though, as it can mean simply writing critical things about public official. For instance, in one case, the person who criticised the public social workers as 'incompetent' on social media was sued under such harassment clause. The estimation of damages is enshrined in the 119a of the Criminal Code and goes as follows:*

*"For the purposes of paragraph 119, the persons referred to in paragraph 119 may be contacted in accordance with the provisions of this Regulation. Stk. 2. The speed of operation on the scale shall be determined at the same time as the retrieval, which may have been determined on the basis of the type or weight."*

**(5) Civil:**

- a. Are there caps on damages?*

*No.*



*b. Can legal persons sue for the protection of reputation?*

Yes

*c. Does compensation for damages have some conditions, e.g. in connection with criminal charges, or correction?*

(6) Are there other instruments in the legal system which are sometimes abused to pressurize journalists, civil activists? e.g. ~~misdemeanor of defamation~~, GDPR -related laws, state secret laws, tax investigations, labour consequences, copyright, blasphemy, anti-terrorism, anti-migration.

*All instruments could be misused in theory, but no known practice.*

(7) Defences:

*a. Good faith in civil, together with public interest /explicit exemption /journalistic ethics, too?*

*Yes, but the journalist has to prove that he did everything to investigate.*

*b. Truthfulness - is it conditional?*

*Yes, for public interest. It is at the court's discretion.*

*c. Good faith an excuse in criminal def? only in court practice, or explicit?*

*d. Abuse of right?*

(8) Procedural costs and legal aid:

*a. Born by the losing party?*

*Yes, by law: the whole, but practically nowhere near the real costs, since the court decides about the amount of all costs/fair costs for the lawyers. In practice, such sums are extremely low, and lower than the fee for a lawyer. This is one of the key questions discussed in the Danish lawyers' bar association.*

*b. Whole costs or a lump sum? reduced by courts?*

*They are decided and reduced by courts in line with the person's/company's financial capabilities to pay it off.*





**c. Free legal aid?**

*In criminal case: always. Not in civil cases, as free legal aid is only available for very poor persons, based on their tax record. Only 10% of persons would qualify for it in Denmark. Also, sometimes free legal aid is provided when it is a principled or strategic case – on a very new or important legal question. The rules are the same for plaintiffs and defendants.*

**d. Any conditions to be awarded?**

*See above.*

**e. Real costs or reduced?**

*The lawyer is paid directly, the costs are awarded by the court, which has a cap. Thus, most lawyers do not want legal aid cases because of the limited award. This problem has been identified recently and is widely discussed in the legal profession and the society.*

**f. Any other problems that limits its protective nature?**

**g. Do NGOs or journalistic unions provide effective legal aid?**

*No, but the Union does provide some legal aid. It does not seem very effective, or partial, since some journalists go to private lawyers to consult with them.*

**h. Compensation if malicious litigation? (fine?) -**

**i. Household insurance?**

*Yes, it is common, but within the same frame as governmental legal aid. The lawyers only get what is awarded by the court and therefore they are not interested in taking the case. It is prohibited for lawyers to also bill to the client when they are paid by the insurance company. Winning fee is uncommon, but you could do it. Not charging, unless you win the case.*

**(9) Any good practices which protect people, journalists against SLAPPs?**

*No known SLAPPs and practices.*

**(10) Any vulnerabilities, bad practices, which expose...**

**a. Lengthy proceedings?**

*Not particularly long. Judges had the power to protect the integrity of the procedure. The usual length of proceedings – as from the filing of the case – is at least one year, with appeal adding another year. It is possible to prolong proceedings, e.g. by asking for new arguments. The courts have discretionary power to decide what is a ‘reasonable time’.*



*b. Preliminary injunctions*

*c. Multiplication of lawsuits*

*It is possible, but doesn't happen.*

*d. Difference between the judicial practices of the lower courts and higher courts*

*e. Other: threats, harassment against journalists.*

No.

(11) Pre-trial dismissal: criminal. - can the offended party carry on the case?

Yes.

*a. Is the criminal system a system of opportunity; can the victim appeal against dropping the charges?*

*b. Can you claim damages in the criminal procedure?*

(12) Pre-trial dismissal: civil: (uncommon).

(13) Press Council:

*a. Deals with complaints?*

*b. Shields journalists from liability?*

*c. Represents the interests? Chamber?*

(14) Are there any remedies against SLAPPs e.g. false accusation, damages for abusive litigation?

*No law for this, normal tort litigation. No abuse clause in the procedural law. Ethics code of lawyers, e.g. if it is suspected that there has been an abuse of the procedure with no legal grounds at all. Such lawyers would be fined; however, it is hard to prove that the lawsuit was purely abuse of proceedings.*

(15) Compliance with ECHR

*a. Perhaps written in law explicitly?*

*Yes, there is a Danish law on ECHR. The law is directly applicable by courts.*



*b. Consistently follows / followed but inconsistently*

*ECHR is consistently followed.*

*c. Criticised, doubted, not followed?*

**(16) Is the court's role satisfactory in dealing with SLAPP and protecting the press against this?**

*No known SLAPP cases. However, the courts are seen as independent. They would be dealing with SLAPP: if you could prove that it is legal harassment and that there were no legal grounds for the lawsuit, then the lawyer could be sued for infringing their ethics code. However, this does not really happen, and it would be really hard to prove that there were no legal grounds whatsoever.*

*a. Doing their best, but not enough?*

*b. Independence of the judiciary: doubtful or not?*

**(17) Do governmental outlets or GONGO's weaponise the media or defamation in their political battles?**

**(18) Targets: mainly journalists, bloggers and also activists, or only journalists?**

*No known SLAPP cases. According to the media, 230 individuals who gave a lift in 2016 with their car to irregular migrants were fined for facilitating irregular migration.<sup>474</sup> Among them were celebrities and public officials who posted about helping refugees on social media. The fine at the district court was 22.500 DKK (€3.000) and the appeal court raised that to 25.000 DKK (€3.333).*

*a. academics and researchers?*

*b. environmental activists?*

*c. the attackers are: politicians and public officials? law enforcement, judges?*

*Not common. Examples of companies and public officials.*

*d. reports of wrongdoing or corruption/satire/blogs/offensive value judgments?*

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<sup>474</sup> Voice of America (2016) "Danes Face Smuggling Charges for Giving Migrants a Lift", April 26. <https://www.voanews.com/europe/danes-face-smuggling-charges-giving-migrants-lift>.



The legal background of SLAPP cases in

## Estonia (questionnaire)

Response to questionnaire by Karmen Turk (Lawyer, TRINITI Law Firm)

*Information on SLAPPs in Estonia was obtained by means of a questionnaire.*

**(1) Are SLAPPs generally a problem, and issue in your country?**

Not an immense problem per se, however used as a strategy occasionally.

**(2) IF NO: Is this because they are not initiated, or are they consequently dismissed by courts?**

As these are used, N/A

**(3) Which is more common: civil or criminal defamation?**

Civil defamation

**(4) Criminal: is it punished with imprisonment?**

Yes, up to 2 years.

***a. Are public officials, monarchs, heads of states more protected by criminal defamation or other criminal protection of their reputation?***

Only internationally protected persons (Penal Code § 247) and representative of state authority (Penal code § 275')

**(5) Civil:**

***a. Are there caps on damages?***

No

***b. Can legal persons sue for the protection of reputation?***

Yes

***c. Does compensation for damages have some conditions, e.g. in connection with criminal charges, or correction?***



No, however persons existing reputation is a factor in granting compensation

(6) Are there other instruments in the legal system which are sometimes abused to pressurize journalists, civil activists? e.g. misdemeanor of defamation, GDPR -related laws, state secret laws, tax investigations, labour consequences, copyright, blasphemy, anti-terrorism, anti-migration...

Yes, GDPR; copyright (e.g. use of screenshots from webpages); security for covering procedural expenses, injunctions etc.

(7) Defences:

*a. Good faith in civil, together with public interest /explicit exemption /journalistic ethics, too?*

All the above (explicitly in Law of Obligations Act § 1046 (Unlawfulness of damaging personality rights) and § 1047 (Unlawfulness of disclosure of incorrect information)

*b. Truthfulness - is it conditional?*

Yes. Conditional if the overall content can be interpreted as a value judgement based on untruthful facts or undue value judgement if based on truthful facts.

*c. Good faith an excuse in criminal def? only in court practice, or explicit?*

Under Penal Code, very rare to prosecute:

- In total regards Penal Code § 247 (internationally protected persons) – 1 case in total and does not use a good faith excuse
- In total of Penal code § 275' (representative of state authority) – 7 cases in total and none of them uses good faith excuse

*d. Abuse of right?*

Yes, this is a usual basis for defamation case (civil) against journalists and publishers; bloggers and other freedom of expression related cases. Sometimes referred to us “grave insulting”.

(8) Procedural costs and legal aid:

*a. Born by the losing party?*

By law, yes (Civil Procedure Code Act). However, it is common practice left to both parties in parties.

Secondly, in the event that an action is granted partially, the parties cover the procedural expenses in equal parts unless the court divides the procedural expenses in proportion to the extent to which the action was granted or decides that the procedural expenses must be borne, in part or in full, by the parties themselves.



Furthermore, if the losing party is natural person, the court may decide pursuant to Act's § 162(4) in the cases where imposing the obligation to pay the opposing party's costs on the party against whom the court decides would be extremely unfair or unreasonable, the court may decide that the costs be covered, in part or in full, by the party who incurred them

***b. Whole costs or a lump sum? reduced by courts?***

Reduced by courts pursuant to Civil Procedure Code § 174 stating: "The amount of procedural expenses in money is determined on the basis of the division of procedural expenses to the extent necessary and reasonable by the court which dealt with the civil matter in connection with which they arose."

***c. Free legal aid?***

Yes

***d. Any conditions to be awarded?***

Conditions for free legal aid are stated in State Legal Aid Law Act under which generally a natural person may receive state-funded legal aid where the person is unable to pay for competent legal services due to the person's financial situation at the time the person needs legal aid or where the person is able to pay for legal services only partially or in instalments or where the person's financial situation does not allow for meeting basic subsistence needs after paying for legal services.

***e. Real costs or reduced?***

Both are possible

***f. Any other problems that limits its protective nature?***

Yes, firstly, no protection against bearing legal costs of other parties and secondly, a general rule is that after termination of the provision of a person with legal services the court determines the obligation of the recipient of state-funded legal aid to fully or partially compensate the state for the fee and costs paid to the attorney to the justified and necessary extent thereof.

***g. Do NGOs or journalistic unions provide effective legal aid?***

NGOs do not generally provide legal aid (except for Human Rights Center for strategic litigation cases).  
Journalistic Unions do not provide legal aid.



*h. Compensation if malicious litigation? (fine?)*

In caselaw pursuant to Civil Procedure Code § 174 stating: “The amount of procedural expenses in money is determined on the basis of the division of procedural expenses to the extent necessary and reasonable by the court which dealt with the civil matter in connection with which they arose.” Has been used for cases of maliciousness and delay.

No more fines for delaying in civil procedure (used to be, till 2009).

*i. Household insurance?*

No

*j. COST table.*

No, not anymore (was deemed to be unconstitutional by Supreme Court)

**(9) Any good practices which protect people, journalists against SLAPPs?**

There are some examples.

Firstly, Supreme Court’s decision in media case of known politician against Estonia’s daily commercial magazine publisher. In addition to the action, politician also filed an application for securing the action, which was granted by Harju County Court blocking republishing of the contested sentences until the end of the main dispute. Publisher challenged the order securing the action.

The Supreme Court assessed an important question – whether and how the press can be restricted under the so-called 'action guarantee procedure', i.e. before the court ruling that entered into force. The Supreme Court formulated two positions of principle. Firstly, a restriction on forward-looking freedom of expression should only be possible in exceptional cases. Secondly, when deciding whether an action is to be enforced in order to restrict freedom of expression, the courts should be guided by the possibility available in civil proceedings to hear the other party in advance. The enforcement of an action in media disputes, where the court prohibits the publication of information in the future, must be treated with special caution.

Unfortunately this decision of the Supreme Court is not always followed by lower courts.

Secondly, the Civil Procedure Act foresees a possibility for security for procedural costs, usually a lump sum to be paid to the court’s bank account. The code, § 196 states that in an action, the court may require at the request of the defendant that the plaintiff provide a security to cover the expected procedural expenses of the defendant if the plaintiff is not a citizen of the Republic of Estonia, another Member State of the European Union or a state which is a contracting party to the EEA Agreement and he or she has no residence in Estonia, another Member State of the European Union or a state which is a contracting party to the EEA Agreement; If the plaintiff is a legal person whose seat is not in Estonia, another Member State of the European Union or a state which is a contracting party to the EEA Agreement; if due to the plaintiff's economic situation or for another reason,



collection of the expected procedural expenses of the defendant is clearly impracticable and, above all, in the cases where the plaintiff has been declared bankrupt, bankruptcy proceedings have been initiated against the plaintiff or if, within the year prior to the filing of the action, enforcement proceedings have been conducted in respect of the plaintiff's property without satisfaction being provided to the claim filed in the enforcement proceedings.

Thirdly, good examples where the claimant has been a political party or private undertaking the courts have stricken the cases out due to lack of standing (regards undue value judgements).

#### **(10) Any vulnerabilities, bad practices, which expose...**

##### ***a. Lengthy proceedings?***

Only one remedy available: Civil Procedure Code § 333' application for expediting court proceedings in a civil matter

##### ***b. Preliminary injunctions***

Yes, please see above. Furthermore, if the preliminary injunction is granted it usually regards either deletion or a block from republishing statements. Both of these are considered to have chilling effects to the journalistic freedoms as the court does not decide on the substance.

##### ***c. Multiplication of lawsuits***

Yes, no limit on how and against how many actors the claim is submitted (journalist, producer, publisher, television service provider, sharer on social media).

##### ***d. Difference between the judicial practices of the lower courts and higher courts***

Yes, specifically on applying general principles derived from the European Court of Human Rights.

##### ***e. Other: threats, harassment against journalists.***

Direct civil suits against each separate publisher: a journalist, publishing company / television organization, producer of a content, poster on social media platform.

#### **(11) Pre-trial dismissal: criminal. - can the offended party carry on the case?**

##### ***a. Is the criminal system a system of opportunity; can the victim appeal against dropping the charges?***

Rarely used, in total of 8 cases for criminal defamation after decriminalization and only against state representatives.





***b. Can you claim damages in the criminal procedure?***

Yes, as a civil applicant

**(12) Pre-trial dismissal: civil: (uncommon).**

Uncommon.

**(13) Press Council:**

***a. Deals with complaints?***

Yes, by Press Council (<https://meedialiit.ee/pressinoukogu/>).

***b. Shields journalists from liability?***

No, only voluntary pre-trial mechanism.

***c. Represents the interests? Chamber?***

Incorporated under Media Organizations' Union, however the Press Council consists of experts in addition to representatives of members.

**(14) Are there any remedies against SLAPPs e.g. false accusation, damages for abusive litigation?**

No

**(15) Compliance with ECHR**

***a. Perhaps written in law explicitly?***

No

***b. Consistently follows / followed but inconsistently***

Followed, but in parts principles not followed (e.g. based on only what is actually published; defence of quotes, citations and interviews)

***c. Criticised, doubted, not followed?***

Rather doubted



**(16) Is the court's role satisfactory in dealing with SLAPP and protecting the press against this?**

*a. Doing their best, but not enough?*

Courts are rather neutral towards SLAPP and rather taking a position of reasonable doubt for the benefit of applicants.

*b. Independence of the judiciary: doubtful or not?*

No, no doubt.

**(17) Do governmental outlets or GONGO's weaponise the media or defamation in their political battles?**

No. Political outlets however yes (similarly to other political outlets in other countries).

**(18) Targets: mainly journalists, bloggers and also activists, or only journalists?**

Well known bloggers as well.

*a. Academics and researchers?*

Rarely.

*b. Environmental activists?*

Rarely.

*c. The attackers are: politicians and public officials? law enforcement, judges?*

Politicians, powerful companies. Public official and judges and law enforcement very rarely.

*d. Reports of wrongdoing or corruption/satire/blogs/offensive value judgments?*

Yes, specifically lately – social media sharing activities, bloggers have been targeted in numerous claims, specifically based on claims for undue value judgements as well as untrue factual statements.



The legal background of SLAPP cases in

## Finland

Contribution by Riitta Ollila (University of Jyväskylä)

### 1. Laws most vulnerable to abuse:

SLAPPs are not generally a problem, and issue in Finland. The term SLAPP should be examined from different viewpoints depending on structures of legal systems in each country. The SLAPP cases with risks to high legal costs seem to be very different in common law countries than in Scandinavian countries like Finland.

The restrictions to the freedom of expression come mainly from Penal Code in Finland. The Freedom of the Press Act regulates the responsibility of the editor. The police conduct the investigations, and the public prosecutor examines if there are doubts and evidence to raise the prosecution of defamation, privacy violations, hate speech, threats and stalking. Private prosecutions or civil lawsuits in defamation and privacy violations have not often initiated and most of them have been consequently dismissed by courts. There have not been cases in courts that could be regarded as SLAPP's in Finland.

The prosecution of defamation in criminal procedure is more common than suing damages on defamation in civil law procedure. The lawsuit on civil law basis is possible but the elements of criminal law defamation must be fulfilled as a condition to damages.

#### *1.1. Criminal defamation*

**Criminal procedures on defamations** against journalists based on media publications were common until 2010's in Finland. Since the ECHR judgements concerning violations of Article 10 by convictions of journalists and media, these kind of cases against journalists are quite seldom nowadays in courts.<sup>475</sup> Also defamations between ordinary people based on written or oral words were common.

Since 2010's the convictions of defamations in internet or social media committed by ordinary people have increased. When ordinary people send messages in social media, they may use rude and robust language of other ordinary people without any connection to discussion on matters of public interest.

The defamation in Finnish Penal Code includes use of political, economic or public power as a defense and public interest defense.

Section 9 - **Defamation** (879/2013)

(1) A person who (1) spreads false information or a false insinuation of another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt, or (2)

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<sup>475</sup> ECHR Karhuvaara and Iltalehti 16.11.2004, ECHR Selistö 16.11.2004, ECHR Mariapori 6.7.2010, ECHR Niskasaari and others 6.7.2010, ECHR Flinkkilä and others 6.4.2010, ECHR Reinboth and others 25.1.2011



disparages another in a manner other than referred to in paragraph (1) shall be sentenced for defamation to a fine.

(2) Also a person who spreads false information or a false insinuation about a deceased person, so that the act is conducive to causing suffering to a person to whom the deceased was particularly close, shall be sentenced for defamation.

There is no special protection for public officials or heads of states Finland. On contrary, they must stand more critics against their political activities or activities in office:

(3) Criticism that is directed at a person's activities in politics, business, public office, public position, science, art or in comparable public activity and that does not obviously exceed the limits of propriety does not constitute defamation referred to in subsection 1(2).

(4) Presentation of an expression in the consideration of a matter of general importance shall also not be considered defamation if its presentation, taking into consideration its contents, the rights of others and the other circumstances, does not clearly exceed what can be deemed acceptable.

There have been cases of aggravated defamation with imprisonment judgements. The cases have concerned ordinary people who have expressed critics in internet or social media against other ordinary people using vulgar words.

Section 10 **Aggravated defamation** (879/2013)

If, in the defamation referred to in section 9(1), considerable suffering or particularly significant damage is caused and the defamation is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated defamation to a fine or to imprisonment for at most two years.

An example:

**Ilja Janitskin** - the founder of anti-immigration websites MV-lehti and Uber Uutiset - was found guilty of 16 criminal charges related to his websites and handed a prison sentence of one year and 10 months by Helsinki District Court on Thursday. He was also ordered to pay the lion's share of some 136,000 euros in damages to harassment victims. Some 90 criminal complaints related to the site were filed in connection with the expansive case, including aggravated defamation and ethnic agitation. Janitskin died before trial in Helsinki Appeal Court and the conviction lapsed. Janitskin was convicted of 16 crimes including defamation and breaches of confidentiality related to an [online harassment campaign](#) directed at Yle journalist **Jessikka Aro**, among others. She had reported on Russian online influencing campaigns including so-called 'troll factories' and was subsequently subject to a campaign of harassment and intimidation.

### ***1.2. Civil defamation***

There are no caps on damages, but the recommendations of the Board on Damages will be usually followed. The Board of Damages is an independent body, but it is occupied within the Ministry of Justice.

The legal persons cannot sue damages for pain and suffering because they do not have feelings. The legal persons can sue for the protection of economic damages if there have been wrong facts about their activities and the circumstances are very aggravated. There have been two cases where it was sued for damages of economic losses on wrong facts.



Eg. other instruments like misdemeanor of defamation, GDPR -related laws, state secret laws, tax investigations, labour consequences, copyright, blasphemy, anti-terrorism, anti-migration...in the legal have not been abused in Finland to pressurize journalists or civil activists. The prosecution of defamation requires the announcement of the victim to the police. However, there is an ongoing criminal investigation against Helsingin Sanomat journalists, who have been suspected of presenting state secrets in an article published in Helsingin Sanomat.

## 2. Potential defences

There is public interest defence and use public or economic defence even in criminal defamation if it is in public interest to publish the story.

The defence of truth is usually very powerful. However, in privacy violations even publishing truthful private facts can be punished.

### Section 8 – Dissemination of information violating personal privacy (879/2013)

A person who unlawfully (1) through the use of the mass media, or (2) otherwise by making available to many persons disseminates information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall be sentenced for dissemination of information violating personal privacy to a fine.

(2) The spreading of information, an insinuation or an image of the private life of a person in politics, business, public office or public position, or in a comparable position, does not constitute dissemination of information violating personal privacy, if it may affect the evaluation of that person's activities in the position in question and if it is necessary for purposes of dealing with a matter of importance to society.

(3) Presentation of an expression in the consideration of a matter of general importance shall also not be considered dissemination of information violating personal privacy if its presentation, taking into consideration its contents, the rights of others and the other circumstances, does not clearly exceed what can be deemed acceptable.

These aggravated privacy cases have concerned putting naked photos on the internet or in social media if the case has been serious. Those cases have often been revenge pornography.

### Section 8(a) – Aggravated dissemination of information violating personal privacy (879/2013) (1)

If the dissemination of information violating personal privacy causes considerable suffering or particularly extensive damage and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated dissemination of information violating personal privacy to a fine or to imprisonment for at most two years.

Good faith in matters of public interest can be an excuse in criminal defamation.

## 3. Compliance with ECHR

There is no written in law explicitly that the courts follow consistently the case law of the ECHR. There has been no criticism against the case law of the ECHR.

There are no SLAPP cases in Finland so it is difficult to say what should we do more. We might be blind to some aspects to our legal system. In my opinion the prison sentences of ordinary people in defamation cases are the blind aspects of Finnish court practice.



## 4. Systemic safeguards

Procedural costs and legal aid:

In civil law cases the losing party pays the legal costs of the winning party.

In criminal law procedure the state pays the legal costs of the defendant if the prosecution will be rejected.

The whole costs will be compensated both in civil law cases and in criminal law cases and they are not reduced by courts.

Free legal aid is possible in situations where there are no incomes or incomes are low. The Journalist union offers legal aid to its members.

The real costs shall be compensated. The journalistic union provides effective legal aid to its members. The aid of NGO's depends on the resources they have for the legal aid.

In case of malicious litigation there are no special fines available, but loser has to pay the cost.

Household insurance covers legal costs. In cases of intentional acts it does not cover the legal costs of the defendant. Only if the prosecution has been rejected, the household insurance helps.

### *The Press Council*

The Finnish Press Council deals with complaints. Any person who considers that there has been a breach of good professional practice by the press, radio or television may complain to the Press Council. The Council can also process a complaint concerning online material if the material is considered to have been published in an online media.

The matter does not need to concern the complainant personally, but the consent of the injured party must be included in order for the case to be processed. If the Council believes that the media has breached good professional practice, it issues a notice which the party in violation must publish within a short time span. If the media that has received the notice does not publish it, the notice will be otherwise made public.

The Press Council does not shield journalists from liability, but it examines if the good journalistic practices have been followed. The Press Council does not examine complaints if the complainer is going to the court. The complaint in Press Council and the litigation in court are for different purposes. The Press Council in Finland is not gatekeeper for defamations against press in courts. The cases in Press Council are milder than in courts. Nowadays journalists are not very often sued in courts but the ordinary people of insulting words in social media. The members of the Press Council consist of three interest groups; the editors, the journalists and the audience, 1/3 of each group.

There are no special remedies against SLAPPs like false accusation, damages for abusive litigation. False accusation can lead to criminal responsibility and the losing party pays all the legal costs of the winning party.



## 5. The court's role and independence

Lengthy proceedings are a problem in Finland and the proceedings can take several years. There are no preliminary injunctions or interim injunctions in Finland. The multiplication of lawsuits is not usual in Finland. There is no difference between the judicial practices of the lower courts and higher courts. Of course it is possible that the judgement can change in higher court. In cases before the Supreme Court where leave to appeal must first be granted before an appeal is allowed from a decision of a lower court. The case should have some preliminary ruling aspects in order to get admissibility.

The threats and harassment against journalists by e-mails and in social media are nowadays quite common.

The case of Lokka v. Vehkoo is controversial in applying defamation against journalist who criticized Lokka of harassment in Facebook. Lokka is a local politician and anti-immigration activist and has previous convictions for ethnic agitation. Oulu local court convicted and fined journalist **Johanna Vehkoo** for defamation, after she called Lokka a "racist" and "Nazi clown," among other things. The court found that Vehkoo's comments constituted a personal attack on Lokka and that she did not focus her criticism on his politics. The case is pending to the Supreme Court.

Ordinary people can send threats and harassment messages against journalists. If those messages are anonymous, the police usually have no resources to investigate the case. There has been discussion in Finland if this kind of targeting journalists with hundreds of messages should be criminalized.

The offended party can carry on the case even if the public prosecutor does not go on. The victim can also appeal against dropping charges if the prosecutor does not go to the Court of Appeal.

It is ordinary in Finland that the public prosecutor sues prosecution of defamation and victim sues damages in the same process. The victim has no risk of paying legal costs to the defendant even if the court rejects the prosecution and damages. The state pays the legal costs of the defendant if the prosecutor loses the case.

### *Independence of the judiciary*

The Finnish judiciary is very independent without any doubts.

The governmental outlets cannot weaponise the media because media is very independent in Finland. The media is like public watchdog to government and other public authorities.

The **threats and harassment** of journalists, academics and researchers and other people have increased in electronic communications and social media. Those who send the threats are usually ordinary people, not any government agents.

There is criminal offence of threatening called **menace** in Finnish Penal Code. However, there are nowadays threats against journalist, judges, civil servants, nurses and other professionals doing their job. They should announce the case to the police investigation and then ask the public prosecutor to proceed to the court. A government proposal amending the right to prosecution has introduced to the Parliament. If the proposal shall be accepted the public prosecutor can raise the prosecution without the consent of the claimant. However, the claimant must usually make the announcement to



the police before anyone knows of those threats. The reasoning of the proposal rests that it is in the public interest to prevent the hate speech and threats.

Section 7 - **Menace** (578/1995)

A person who raises a weapon at another or otherwise threatens another with an offence under such circumstances that the person so threatened has justified reason to believe that his or her personal safety or property or that of someone else is in serious danger shall, unless a more severe penalty has been provided elsewhere in law for the act, be sentenced for menace to a fine or to imprisonment for at most two years.

Section 7(a) - **Stalking** (879/2013)

A person who repeatedly threatens, observes, contacts or in another comparable manner unjustifiably stalks another so that this is conducive towards instilling fear or anxiety in the person being stalked, shall, unless an equally or a more severe penalty is provided elsewhere in law for the act, be sentenced for stalking to a fine or to imprisonment for at most two years.

## 6. Summary

The Finnish legal system rest on criminal law, police investigation and the decisions of the public prosecutor. The functionality of the system lies on resources of police and prosecutors. The announcement to police of defamation or threat may become rejected if they do not find the suspected person or if the case is not clearly offensive. This procedure is restricting police investigation. It is an alternative to raise a private prosecution or civil claim of defamation, privacy violations and threats. If the claim shall be rejected, you shall pay the legal costs of the defendant. Nowadays there are not very many private claims, but claims go through the public prosecutor in criminal procedure.

The criminal law system with police investigation and discretion of public prosecutor may have chilling effect if the discretion is arbitrary. Serious defamations and privacy violations in internet and social media may lead situations, that the abstract legal rules shall be applied also to milder cases. The Finnish ECHR cases with violations of art. 10 came from wrong applications of legal rules and overriding reputation and privacy interests. The development of free internet and social media lead to circumstances where the contributors do not always behave in responsible way to others. With this development it is easier to see the risks of unlimited free speech instead of advantages of the freedom of speech. Those who have been convicted of threats and stalking are ordinary people and not journalists.





The legal background of SLAPP cases in

## France

Contribution by William Bourdon (Lawyer, Bourdon & Associés)

### 1. Law most vulnerable to abuse

#### ***1.1. Defamation – Criminal libel or slander (Section 29 of the Freedom of the Press Act of 29 July 1881)***

Defamation suits are often used by SLAPPers for the sole purpose to intimidate journalists, watchdogs' activists, NGOs etc. and restrict their freedom of expression.

Traditionally, Courts had to evaluate good faith on the basis of 4 criteria (for libel): absence of a personal animosity, legitimacy of the aim, caution and serious investigation. If the person pursued met these criteria, he/she was acquitted. If not, he/she was convicted.

For over a decade, under the influence of the ECHR, these criteria have become much more flexible.

It should be noted that the complainant in such SLAPP cases is under the risk of being prosecuted for false accusation according to Section 226-10 of the Penal Code.

In France, defamation suits are the most common form of abuse.

#### ***1.2. Infringement of copyright – Criminal offence (Sections L.335-2 and L.335-3 of the Intellectual Property Code):***

Infringement of copyright suits have been newly abused by SLAPPers for several years. This offence punishes "any edition of writings, musical compositions, drawings, paintings or other printed or engraved production made in whole regardless of the laws and rules concerning the authors property".

As an example, oil company ESSO filed a lawsuit against NGO Greenpeace because the latter launched a campaign using the slogan "Stop E\$O". The lawsuit only aimed at the withdrawal of this campaign, in order to silence Greenpeace. However, the Court of Appeals of Paris rejected ESSO's request considering that it acted in bad faith.

Finally, in 2008, the Court of cassation ruled, in a litigation opposing Areva to Greenpeace that: "these NGOs act in accordance with their objects, in the general and public health interest by proportionate means, have not abused their right to freedom of expression".

Considering this decision, it seems that such lawsuits could not prosper anymore.

#### ***1.3. Denigration – Civil law (Section 1240 of the Civil Code):***

Denigration is considered to be an unfair competition practice consisting in bringing public discredit of a company by disparaging its products or services.



This civil offence has been defined by case law on the basis of Section 1240 of the Civil Code that provides for civil liability.

Contrary to defamation which protects the honour of the attacked person, denigration protects companies against unfair competition.

However, companies try to abuse this law by suing NGOs which use their slogans or logos for their campaigns. It should be noted that civil proceedings are more flexible, and the statutory limitation is 5 years (versus 3 months for defamation).

As an example, SMP Technologies corporation (Taser group) filed an action for denigration against the NGO RAIDH after it published a report the risks with exposures to taser. The Paris Court of appeals has rejected this claim, arguing that the report was based on an adequate factual basis, in accordance with the association's object.

Even if Courts do not seem to be willing to give good reason to SLAPPers, the latter keep using denigration proceedings to intimidate and pressure activists and NGOs.

#### ***1.4. False accusation – Criminal law (Section 226-10 of the Penal Code):***

False accusation is also used by SLAPPers against NGOs and activists.

There are several essential elements of this offence:

- The accusation may result in administrative, criminal or disciplinary penalties,
- It shall be spontaneous,
- It shall be addressed to an authority competent to take action,
- The facts described shall be false,
- The plaintiff shall have acted in bad faith.

Even if it is very complicated for SLAPPers to prove NGOs' bad faith at the moment of the accusation, SLAPPers still use this offence as an intimidation tool.

## **2. Potential defences**

In the case of defamation, defendants may base their defence on two arguments:

- The truth of the allegations by producing written and testimonial evidence,
- Their good faith based on the 4 traditional criteria (absence of a personal animosity, legitimacy of the aim, caution and serious investigation) and the new criteria defined by ECtHR (factual basis, public interest of the information ...)

The Courts' assessment of good faith has become more and more flexible under the influence of the ECtHR, particularly for individuals that do not perform a function of informing citizens (as professional journalists).



Indeed, good faith is widely appreciated when it concerns the expression of an activist or someone involved in a political controversy. Judges also accept irony and exaggeration when the defendant is personally involved, when he/she is an activist, or when the expression is a humorous comment.

Courts have to carry a test of proportionality between freedom of expression and harm to reputation.

In the case of infringement of copyright or denigration proceedings, defendants may raise the same arguments of public interest and factual basis. They may also, when they are NGOs, show that the action was consistent with its purpose.

In the case of whistleblowers acting in a work-related context, the Sapin Act protects them from criminal proceedings by granting them immunity if they acted in good faith.

Defendants may also benefit from free legal aid even if this kind of cases are pretty complex and generally require the help of a specialist lawyer.

Case law more and more liberal towards defendants when public interest is at stake, even when their expression was not cautious enough, particularly when they aim at big companies and public figures.

The paradox is that even if SLAPPers know that they are going to lose the case, they still initiate SLAPP proceedings to intimidate defendants.

### 3. Compliance with ECHR principles

The principles of the ECtHR are recognized and implemented by French judges:

- Statements of opinion and value judgments are not sanctioned by libel, unless they are insulting (slander),
- Publications which contribute to a debate on a matter of public interest or general concern enjoy a higher threshold of protection
- The limits of acceptable criticism are wider for public figures, especially politicians and State officials.

The vertical power-relationship between the plaintiff (SLAPPer) and the defendant (SLAPPe) is taken into account by Courts informally. Judges widely appreciate good faith in these cases and generally consider that there is no abuse. However, this does not apply for journalists whose job is to inform the public. Courts are also more likely to punish abuses when there is a vertical power-relationship.

### 4. Systemic safeguards

Several systemic safeguards exist in French law.

However, there is no “Press council” or similar organisation like in Sweden.

There is a consignment when an action is taken but the amounts are generally too low to be deterrent for SLAPPers.



Courts sometimes punish the abuses by imposing a civil fine to the plaintiff. As an example, the Bolloré Group has been sentenced to pay a fine for its unmeritorious case against Nicolas Vescovacci, author of a book named “Almighty Vincent”.

Defendants may also seek damages when the proceedings were abusively started by the plaintiff.

Finally, the SLAPPers may also be prosecuted for false accusation, according to Section 226-10 of the Penal Code.

## 5. The court’s role and independence

The courts’ role has always been prominent in France regarding cases involving freedom of expression. The Freedom of the Press Act of 29 July 1881 is considered very important and emblematic law that Courts have assimilate.

For over a decade, the courts’ assessment of good faith has become more and more flexible under the influence of ECtHR. The public interest of the information and the status of the defendant (activist, individual, NGO) are now considered the main criteria for good faith.

## 6. Case law

In France, SLAPP cases have become more and more common these past few years. In 2018, NGOs and journalists have called on public opinion to denounce the increasing number of SLAPP cases initiated in France.

In 2017, the NGO Sherpa also issued a press release alerting on the increasing number of SLAPPs proceedings initiated by multinational companies in order to silence human right defenders.

However, it is hard to evaluate the size of this problem since many times, the dispute remains at a pre-litigation level and the cases are not revealed to the public.

Journalists, NGOs and activists are often the victims of SLAPP proceedings.

Recently, global concern grew because more and more scientists and teacher-researchers have started to be subject to SLAPPs. A commission was even appointed by the Government in and published a report in 2017 on this matter.<sup>476</sup>

In the same way, Bolloré Group and its partners have initiated many worrying SLAPP proceedings these past few years. Indeed, since 2009, more than twenty defamation suits have been launched against journalists, NGOs, lawyers and media directors for revealing information detailing its activities in Africa.

Such methods are particularly alarming, considering that Bolloré owns several press bodies and just bought Prisma Media group.

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<sup>476</sup> [https://cache.media.enseignementsup-recherche.gouv.fr/file/2017/50/2/Rapport\\_Commission\\_Mazeaud\\_754502.pdf](https://cache.media.enseignementsup-recherche.gouv.fr/file/2017/50/2/Rapport_Commission_Mazeaud_754502.pdf)



#### Examples of emblematic SPLAPPs:

- *Bolloré Group v. Bastamag*: in 2012, Bastamag published an investigation on the land grabbing practiced by Bolloré Group in Cameroun. Defamation proceedings were initiated and have last for five years at the end of which Bolloré Group lost. More than just Bastamag, many individuals who published the article on their blogs were also prosecuted, which has a very strong deterrent effect;
- Denis Robert, who investigated for several years on the activities the Bank Clearstream and published several books was prosecuted 63 times in five different countries for ten years. He eventually won all the proceedings;
- *Bolloré Group v. three newspapers (Mediapart, L’Obs, Le Point) and two NGOs (Sherpa and React)*: in 2018, Socfin and its Cameroon subsidiary (Bolloré Group) launched a defamation suit against media and NGOs that relayed the news of farmers’ mobilization against these companies in West Africa.
- *Chimirec Trafic*: in 2014, the environment and sustainable development magazine published an article, signed by a law Professor, regarding a judgment rendered by the Paris Criminal Court in 2013 against Chimirec Group in a waste trafficking trial. Several companies of the Chimirec Group sued the author of the article and the publishing director of the magazine for defamation. Both were acquitted and the Paris Court of Appeals ruled that the analysis of justice decisions can never be defamatory unless personal animosity;
- *Patrick Buisson and Fiducial v. Alain Garrigou*: Professor of Political Science Alain Garrigou was brought before court on defamatory charges by Nicolas Sarkozy’s special advisor Patrick Buisson, for having accused him of corruption. Fiducial, company specializing in tax advice, also accused him of defamation for saying that it had “affinities with the far right”. Both of them lost their trial and the judges considered that these proceedings were SLAPPs.

## 7. Conclusion

SLAPPees are rarely convicted, and case law is in their favour (for example, *Bolloré*), but SLAPPers keep initiating proceedings because even if they don’t prosper, the public announce of a complaint still has a deterrent effect.



The legal background of SLAPP cases in

## Germany

Contribution by Bernd Holznel (University of Münster)

### 1. Laws most vulnerable to abuse

There may be a number of legal claims under civil law against a report of a journalist that can be made. These can be used by SLAPPers. By means of injunctive relief according to §§ 1004 Abs. 1 823 BGB it can be prevented that illegal statements may be further disseminated regardless of whether they are factual claims or expressions of opinion. Claims for removal according to §§ 1004 para. 1, 823 BGB oblige in case of success in court to revoke or correct or supplement untrue factual statements. The claim for counterstatement, which is anchored in the press laws of the countries (Länder), allows the persons concerned to express their point of view with regard to a certain fact. Furthermore, there are claims for damages according to § 823 BGB, which can also include compensation for pain and suffering for the compensation of immaterial damage. These measures have a particularly detrimental effect if no adequate financial resources for legal defence are available.

In recent years, there has been an increasing number of attempts to prevent certain types of reporting. The instrument of a preventive injunction usually fails in practice because the requests cannot be formulated with sufficient precision at this point in time. This is because the applicant does not always have precise knowledge of the planned reporting. SLAPP litigants have therefore started to warn against taking on negative reporting from other media (so-called press law information letters).<sup>477</sup> It is argued that the reporting is illegal. Journalists often perceive this as a threat. If the costs of litigation are estimated to be too high, the persons concerned comply with such information letters. Since the resources for legal disputes in the press sector have been reduced in recent years, these letters can be quite effective in practice.

The reporting in the press or in blogs can also be the subject of investigations by the public prosecutor. Here the criminal offences of slander (§ 187 StGB), defamation (§ 186 StGB) and insult (§ 185 StGB) come first. Slander and defamation are only considered if it is about a factual claim. The media can refer to the justification of the perception of legitimate interests according to § 193 StGB. However, this can only be applied if the journalistic duty of care (journalistische Sorgfaltspflichten) has been observed. When examining § 193 StGB, the courts repeatedly fail to give sufficient consideration to freedom of opinion and freedom of the press. The Federal Constitutional Court must therefore repeatedly intervene to correct this, so that numerous decisions are issued on this complex. It would be desirable if the judiciary received better training in the importance of freedom of opinion.

Members of the media have repeatedly been exposed to investigations by law enforcement agencies when they have published classified material they have received. The criminal offence of violation of official secrecy and a special duty of confidentiality according to § 353b StGB (German Criminal Code)

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<sup>477</sup> Tobias Gostomzyk/Daniel Moßbrucker, „Wenn Sie das schreiben, verklage ich Sie!“ Studie zu präventiven Anwaltsstrategien gegenüber Medien, 2019, 5 f.



is of great importance. The mere publication of the material was considered a criminal offence and a search of the editorial offices was ordered. This practice has been classified as unconstitutional by the Federal Constitutional Court in the Cicero case (BVerfGE 117, 244 et seq.). § 353b StGB was therefore amended by the legislator to the effect that a criminal liability of an aiding and abetting act is excluded if it is limited to the receipt or publication of the secret. It remains punishable, if the break of the secret for example by money payments is incited.

The right to refuse to testify for members of the media (§ 53 para. 1 no. 5 StPO) and the ban on confiscation in favor of the media (§ 97 para. 5 StPO) initially only covered periodic printed works and radio broadcasts. Self-researched material and material collected by bloggers were often confiscated there. A reform of these regulations closed this protection gap for the media. The new regulations cover self-researched material and material that is collected for an Internet publication, for example.

Recently, SLAPP litigants have also been making increasing efforts to prevent certain reporting by using copyright. The "Westdeutsche Allgemeine" had published secret situation reports of the German Armed Forces on the Afghanistan mission in 2012. The German government sued the newspaper for copyright infringement, which the Federal Supreme Court rejected with the argument of an overriding interest of the media.<sup>478</sup>

According to the state press laws, journalists are entitled to information from the public prosecutor's office, for example (§ 4 of the Press Laws). This is a special Freedom of Information claim. SLAPP litigants increasingly try to prevent such information or even press releases by means of injunctive relief (here §§ 80, 123 VwGO). This case constellation recently became known to a broad public in the Metzelder case. Metzelder, a well-known soccer player, is accused of having stored child pornographic material on his computer. This case has received wide attention. The claim for injunction has recently been rejected by the competent administrative court.

Donations can be deducted from the tax burden if the beneficiaries have been granted non-profit status. SLAPP litigants have questioned this status with some NGOs. This issue became known to a broad public after the Federal Court of Finance, the highest tax court in the Federal Republic of Germany, revoked Attac's charitable status.

## 2. Potential defences

Truth and good faith can be a defence. In the case of the right to injunctive relief (§§ 1004 para. 1, 823 para. 1, 2 BGB) it is often relevant whether the statement is an untrue factual statement. As is well known, in Germany, the expression of opinion when making a consciously untrue or provenly false statement of facts is generally secondary to the right of personality.<sup>479</sup> Moreover, the right to express an opinion must be weighed against the right of personality. This also applies in the event that the truth of a factual statement cannot be established. According to case law, those who have made or disseminated a possibly untrue assertion cannot be prohibited from doing so as long as they

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<sup>478</sup> BGH-Pressemitteilung Nr. 045/2020 vom 20.02.2020.

<sup>479</sup> BVerfG NJW 1992, 1439.



have carried out sufficiently careful research into its validity in advance.<sup>480</sup> However, this duty of care (journalistische Sorgfaltspflicht) must not be overstretched. In the interest of freedom of opinion, the Federal Constitutional Court believes that the duty of truth must not be made subject to any requirements that reduce the willingness to make use of the fundamental right.<sup>481</sup>

### 3. Compliance with ECHR principles

The Federal Constitutional Court has consistently held that the conscious or proven untrue assertion of facts is not covered by the protection of freedom of opinion. A law that made it a punishable offence to deny the persecution of Jews was therefore not to be considered an encroachment on freedom of opinion. *Auschwitzlügen-Case* BVerfGE 90, 241).

*Lüth-Case*: In 1958, Lüth filed a constitutional complaint on the basis of Article 5 I of the Basic Law against a civil court decision that sentenced him to refrain from calling for a boycott of a film containing National Socialist ideas. The civil courts based their decision on § 826 BGB, immoral damage. According to the Federal Constitutional Court (BVerfGE 7, 198) basic rights are not only "rights of defence against the state", but also abstract, objectified principles, which "apply as a basic constitutional decision for all areas of law". Civil law open facts must be interpreted in the light of the basic rights (indirect third-party effect of the basic rights). The protection of a private legal asset must be all the more inferior the more the statement is a contribution to the intellectual struggle for opinion in a question that substantially affects the public by someone legitimized to do so. Here, the presumption speaks for a precedence of free speech over "ordinary expressions of opinion" and "economic opinions".

The Bavarian Minister President Strauß is depicted in a caricature as a sexually active pig. If politicians have pointedly expressed their opinions in the battle of opinion, those affected by the criticism may be entitled to a "right of retaliation". The limit is reached in the case of abusive criticism and in the case of an offence against human dignity. (*Strauß-Case* BVerfGE 75, 369).

In the *Blinkfüer-Case* the Federal Constitutional Court (BVerfGE 25, 256) stated that an economic boycott is not protected by freedom of expression if it is not based solely on intellectual arguments, i.e., if it is limited to the persuasiveness of statements, explanations and considerations, but also uses the means of threatening serious disadvantages and exploiting social or economic dependence. In *Blinkfüer*, such disadvantages were promised if the publisher delivered its television magazine "Blinkfüer" with the GDR television program in Hamburg.

For whistleblower cases, the jurisdiction of the ECHR on this subject applies to industrial relations. The Whistleblower Directive will be implemented in German law at the end of 2021.<sup>482</sup>

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<sup>480</sup> BGH GRUR 2016,532 (533 f.).

<sup>481</sup> BVerfG NJW 2016, 3360 (3361); NJW 1992, 1439; NJW 1980, 2072.

<sup>482</sup> <https://dip21.bundestag.de/dip21/btd/19/219/1921941.pdf>





#### 4. Systemic safeguards

SLAPP lawsuits are most effective if the attacked like bloggers do not have funds to hire lawyers. Publishers or others should build up funds to help bloggers if they are attacked because someone does not like their reporting. This happened in the “Hohenzollern”-case. Georg Friedrich Prinz of Preußen sued against publications that questioned his and his family’s ownership of (former) Hohenzollern castles and properties. A Prinzenfonds helped the attacked to defend in court.<sup>483</sup>

<b>In a civil lawsuit, does the loser party pay the legal fees (also of the other party)?</b>	The question of costs is decided by the court depending on the outcome of the lawsuit. The rule is: Who loses has to pay. But costs can also shared by quota, if one party brings forward an exaggerated claim and only wins part/part.
<b>In a criminal procedure, if the accuse is found baseless, does the accuser have to pay the costs?</b>	The costs are regularly paid by the state because the accusation is the states (the prosecutors) responsibility. But court can decide that a part has to be paid by the accuser, if he/she is found guilty of intentionally using false facts.
<b>Is there legal aid to the defendants in a criminal procedure? Is this really helpful in practical terms to the defendants?</b>	Germany has a system of legal aid in cases of severe crime and in all cases the defendant is put into custody. A lawyer of the defendants choice has the right to attend from the beginning and the state guaranties a basic fee. This is very helpful, especially when court has to decide whether person is to be incarcerated. Costs can be put on the defendant only if he/she is convicted.
<b>In a civil procedure, is there legal aid to the defendants? Is this really helpful in practical terms to the defendants?</b>	There is legal aid for people in need. It is granted by court on the basis of a provisional decision, whether the lawsuit is brought forward wantonly or without any chance to win. If legal aid is granted the person can choose a lawyer of his/her own choice.
<b>Does household insurance cover the costs of litigation if one is sued?</b>	No. But one can buy a special legal protection insurance.

In criminal law cases, the prosecution offices work under the principal of legality. The opportunity principles apply in exceptional cases (see § 153 criminal procedure act). The abuse of rights argument or the exception of good faith arguments are often used in criminal and civil law cases. If these arguments are used depend on the facts of a case. A capping of claims is possible if a plaintiff only wins the case partly. In general, there are no fines in case the case is judged abusive.

There is a press council in Germany. The council could act as gatekeepers for defamation etc. for their members. The work of the press council can be recommended as good practice. However, the rules governing the press council should be prescribed by law. This could help to increase legal certainty in this area.

<sup>483</sup> <https://www.br.de/nachrichten/deutschland-welt/prinzenfonds-gegen-hohenzollern-jedes-wort-zaehlt,S4LvD9m>



## 5. The court's role and independence

Courts must always interpret laws. In this context, freedom of opinion or freedom of the press must regularly be weighed up against the conflicting interests such as the protection of honour. The result of the weighing depends strongly on the context. It is of central importance that freedom of opinion and freedom of the press are sufficiently taken into account. If this is not done appropriately, those affected can lodge a constitutional complaint with the Federal Constitutional Court. The Federal Constitutional Court must then correct the lower courts and overturn the ruling. There are no doubts about the independence of the courts in Germany.

## 6. Case law

Journalists and Bloggers are most effected by SLAPP-type actions. NGO's can be attacked if their status of "Gemeinnützigkeit" is questioned. Corporations will be most likely to sue. They can also be private individuals if they disagree with a report and feel their personal rights have been infringed. First and foremost, SLAPP suits target reporting in the press or blogs.



The legal background of SLAPP cases in

## Greece

Contribution by Niovi Vavoula (Queen Mary University of London)

### 1. Laws most likely to be used

The legal rules that are most often abused by SLAPP actors are the so-called offences against honour as enshrined in the Greek Penal Code and the rules on the protection of one's personality. In particular:

#### Offences against honour, particularly slanderous defamation – Greek Penal Code

The Greek Penal Code distinguishes among different offences against honour; insult (Article 361)<sup>484</sup>, defined as insulting the honour of another person through spoken words, actions or in any other way or otherwise, except in cases of defamation or slanderous defamation (see below); defamation (Article 362),<sup>485</sup> defined as claiming or disseminating before a third party with regard to another person a fact that can harm the honour or reputation of the latter and slanderous defamation, which is of particular interest for the purposes of this research.

Slanderous defamation (Article 363): If in the case of Article 362, the claim about the fact is false and the responsible person knew it was false. This offence is more serious than defamation in that the penalty framework is higher; whereas for defamation the maximum term of imprisonment is two years, in the case of slanderous defamation the imprisonment may be between 3 months and up to five years. In addition, in cases of slanderous defamation a criminal fine may also be imposed as well as deprivation of political rights.<sup>486</sup>

This provision has been particularly used by claimants of SLAPPs, by claiming that the defendants knew that the claim they were making was false, as it entails a higher penalty framework as opposed to defamation.

Defamation [and slanderous defamation] of a legal entity (*société anonyme*) (Article 364) (prior to the revision of the Greek Penal Code in 2019): Claiming or disseminating before a third party a certain fact concerning a *société anonyme* relevant to its business practices, financial situation, or dealings in general, or the persons managing or directing it, and may harm the trust of the public in the company and its business in general. This Article was abolished by Law 4619/2019, revising the Greek Penal Code, due to a lack of substantive criminal offence and the possibility of separate filing of civil claims under tort law.

#### Privacy and data protection laws – Greek Civil Code

Right to personality (Article 57 of the Greek Civil Code): A person who has suffered an unlawful infringement on his personality has the right to claim the cessation of such infringement as well as the

<sup>484</sup> Greek Penal Code as amended by Law 4619/2019 (GG A' 95/11.6.2019) [hereinafter Greek Penal Code], art. 361.

<sup>485</sup> Greek Penal Code art. 362.

<sup>486</sup> Greek Penal Code art. 363.



non-recurrence thereof in the future. A tort claim for compensation is not excluded. This claim is based on Article 932 of the Greek Civil Code concerning claims for compensation in cases where there has been an infringement of someone's personality.<sup>487</sup>

A lawsuit on the basis of the Greek Civil Code may also follow a criminal conviction for insult, defamation or slanderous defamation. There is no cap in damages.

### Civil liability of the press

Law 1178/1981 (GG A, as amended by Law 4356/2015 (GG A 181/24-12-2015)): According to its Article 1, in cases where printed material offends the honour and reputation of a person, the liability of the owner of the printed material is strict, whereas the liability of the publisher - director is not a strict one but a liability based on fault. Therefore, the publisher – director is liable when he has included the offensive article in the material to be printed, out of his own fault and knowing that its content is offensive. These provisions can be abused in SLAPP cases because of the financial implications they may have for the publisher. Law 1178/1981 has been heavily criticised by the Journalists' Union of Athens Daily Newspapers (ESIEA - ΕΣΗΕΑ Ένωση Συντακτών Ημερήσιων Εφημερίδων Αθηνών) as a 'media-killer law' due to its potential to support the 'lawsuits industry that aim at combating freedom of media'.<sup>488</sup>

## 2. Potential defences

Article 366 of the Greek Penal Code prescribes that in cases of defamation if the fact is true, the act shall remain unpunished. Attempts at proving the veracity of the fact, however, are prohibited when the fact refers exclusively to relationships of family or private life that are not harmful to the public interest and the claim or dissemination was committed maliciously (see also below regarding the role of the Court).<sup>489</sup>

Furthermore, as regards defamation [and slanderous defamation] of a *société anonyme*, Article 364(2) of the Greek Penal Code foresaw that if the defendant proved that the fact that he had claimed or disseminated was true, then he would not be punished. However, as mentioned above, this provision has been abolished.

Moreover, Article 367(1) of the Greek Penal Code excludes the following from being considered as unlawful acts: a) unfavourable criticism of scientific, artistic or professional projects;<sup>490</sup> b) unfavourable statement contained in a document of a public authority regarding issues related to its services; c) manifestations made in the execution of legal duties, the exercise of lawful power, or for the safeguarding (protection) of a right, or due to any other justified interest<sup>491</sup> or d) any similar

<sup>487</sup> Greek Civil Code as amended by Law 4714/2020 (GG A' 148/31.7.2020) [hereinafter Greek Civil Code], art. 57.

<sup>488</sup> 'Να καταργηθεί άμεσα ο τυποκτόνος νόμος' (ESIEA, 5 February 2015) <https://www.esiea.gr/na-katargithei-amesa-o-typoktonos-nomo/>.

<sup>489</sup> Greek Penal Code art. 366.

<sup>490</sup> For case law see Supreme Civil and Criminal Court (Areios Pagos), Decision no. 907/89; Decision no. 1838/97.

<sup>491</sup> For case law see Supreme Civil and Criminal Court (Areios Pagos), Decision no. 533/10. In relation to justified interest in particular see Supreme Court Decisions no. 73/2002; Decision no. 1216/2014 and Decision no. 521/2018.



cases.<sup>492</sup> Article 367(2) excludes critiques and statements fulfilling the constituent elements of defamation or when the manner of expression or the circumstances under which the act has been committed indicate the purpose of insult.<sup>493</sup>

According to Article 368(1) of the Greek Penal Code, prosecution for the offences described in Articles 361-365 may only be initiated upon criminal complaint but may be conducted *ex officio* when the offended party is a public official. This provision has been abolished by Law no. 4619/2019. The offences against the honour of the person can, now, only be initiated upon criminal complaint.<sup>494</sup> Afterwards, the procedure is *ex officio* run by the Prosecutor's Office. Then, the procedure takes place in accordance with the prescriptions of the Greek Code for Criminal Procedure.

Despite the defences which stem from the Greek Penal Code, the Supreme Civil and Criminal Court of Greece (Areios Pagos) accepts good faith as a defence in cases involving journalists. Particularly, in the case 632/2015 (civil), Areios Pagos stated that notwithstanding the harsh language that the defendants (journalists) used in the article in question, this does not constitute defamatory facts which are offensive to the personality of the plaintiff. The Court arrived at this conclusion relying upon the fact that the defendants acted in good faith by exercising their constitutional right as journalists to disclose any information of public interest. The right is arising from article 14 par. 2 of the Greek Constitution, article 10 of the ECHR and the laws on freedom of the press, which establish the duty of truth and investigation of the news that must govern the operation of the media.<sup>495</sup>

### 3. Compliance with ECHR principles

Older case law reveals that the Greek Courts can sometimes get carried away by the tone of the characterisations made by the media and consider that criticism has exceeded the degree of acceptable criticism disregarding that Article ECHR protects not only the content of the ideas, but also the tone and the way in which these ideas may be spelled out.<sup>496</sup> Later jurisprudence confirms this approach that the Greek Courts have repeatedly and provocatively ignored ECtHR's case law concerning SLAPP cases. Particularly, Professor Antonis Manitakis, underlines that Greek Courts fail to distinguish between the notions of 'facts' and 'judgments'. The distinction between the two notions is fundamental for the establishment of the offences of insult, defamation and slanderous defamation. Consequently, Prof. Manitakis states that in a democracy, judgments or criticisms by journalists involving public figures and when they are expressed in the context of a political dialogue, even if they are extreme, fall under the freedom of speech and cannot be treated as offences.<sup>497</sup>

Our research does not provide any findings in respect of whether the vertical power-relationship between participants in SLAPP-like cases noted by national law or court practice.

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<sup>492</sup> Greek Penal Code art. 367(1).

<sup>493</sup> Greek Penal Code art. 367(2).

<sup>494</sup> Greek Penal Code art. 368.

<sup>495</sup> The Constitution of Greece art. 14(2).

<sup>496</sup> In accordance with *Ligens v. Austria*, *Oberschilk v. Austria*, *Bergens Tidende v. Norway*. See for example Supreme Court, Decision 1407/1988; Athens Court of Appeal, Decision 769/1999; Supreme Court 1095/1999,

<sup>497</sup> Antonis Manitakis 'Κρίσεις και κριτική από τον τύπο της προσωπικότητας, δημόσιου, πολιτικού προσώπου' (manitakis.gr) <http://www.manitakis.gr/krisis-ke-kritiki-apo-ton-typo-tis-prosopikotitas-dimosiou-politikou-prosopou/>.



#### 4. Systemic safeguards

To the best of our knowledge, specific legal safeguards catered for SLAPP cases do not exist, as this matter is unregulated by national legislation. There exist more generally techniques to disincentivise the launching of SLAPP lawsuits concerning the payment of the judicial costs by the losing party being the most prominent one.

In particular, with regard to criminal procedures, Article 580 of the Criminal Procedure Code foresees that the criminal courts when they adjudicate in cases where the criminal prosecution has commenced upon criminal complaint, they impose the payment of the judicial costs to be carried out by each person who filed a criminal complaint if they are certain that the criminal complaint was utterly false and was lodged with malice or gross negligence or that the facts were maliciously distorted so that the act would be labelled more seriously or that the prosecution would include persons completely unrelated to the punishable act.<sup>498</sup>

Furthermore, Article 167 of the Greek Code of Civil Procedure foresees that the losing party must pay judicial costs.<sup>499</sup>

There has been an attempt to exclude offences against honour from the special form of summary proceedings that applies in relation to offenders caught in the act (flagrant crime or crimes *in flagrante delicto*). In the revision of the Greek Code of Criminal Procedure in 2019, a proposed amendment involved the revision of Article 417, which concerns the arrest and application of the summary procedure followed before Courts in connection to flagrant misdemeanours.<sup>500</sup> Under the proposed amendment, the arrest and application of the procedure would be excluded for offences against honour, namely insulting behaviour, defamation and slanderous defamation. According to the explanatory memorandum of the Code the rationale behind the proposed amendment was that as a general rule in relation to these offences there is no clear picture of the crime in terms of evidence that must exist so that the exceptional procedure for flagrant offences is activated, which restricts the rights of the defendant. These remarks are all the more applicable in relation to the offence of slanderous defamation, where it must be proved that the information stated or disseminated by the defendant is false. This amendment had been heralded as a major step forward so that summary proceedings are concentrated in specific cases.<sup>501</sup> However, the final version of the Greek Code of Criminal Procedure, as published in Law 4620/2019 (GG 96/A/11-6-2019) does not exclude these offences from the possibility of having the accused arrested and brought before justice under the

<sup>498</sup> Greek Code of Criminal Procedure as amended by Law 4689/2020 (GG A' 103/27.5.2020) [hereinafter Greek Code of Criminal Procedure], art. 580.

<sup>499</sup> Greek Code of Civil Procedure as amended by Law 4700/2020 (GG A' 127/29.6.2020) [hereinafter Greek Code of Civil Procedure] art. 167.

1.1. 500 See Ioanna Mandrou, 'Greece to bolster presumption of innocence; decriminalize defamation' (*eKathimerini*, 4 February 2019) <https://www.ekathimerini.com/237338/article/ekathimerini/news/greece-to-bolster-presumption-of-innocence-decriminalize-defamation>. Also see 'GREECE: Growing protection concerns as journalists targeted by violent actors' (Civil Space Watch, 23 July 2019) <https://civicspacewatch.eu/greece-growing-protection-concerns-as-journalists-targeted-by-violent-actors/>.

<sup>501</sup> See Panagiotis Stathis, 'Οι δημοσιογράφοι, το Αυτόφωρο και η αναγκαία κατάργηση' (*Capital*, 11 February 2019) <https://www.capital.gr/epikairota/3342898/oi-dimosiografoi-to-autoforo-kai-i-anagkaia-katargisi>.



summary procedure. As a justification for retaining the status quo, the explanatory memorandum of the Code explains that first, the prosecutor's office at an early stage determines whether there exist any indications concerning the *actus reus* and *mens rea* of the offence in question and second, Article 417 gives the prosecutor the discretion to not apply the summary procedure for flagrant crimes where special reasons exist. It is further submitted that practice shows that the procedure is not abused and therefore legislative intervention (that would violate the principle of equality) is not required.<sup>502</sup>

The aforementioned safeguard would have been crucial in order to ensure that defendants in SLAPP cases are given time to ascertain the truth of the fact they claim or disseminate.

Legal aid in general may be provided in accordance with Law 3226/2004,<sup>503</sup> as amended by Law 4745/2020.<sup>504</sup> Outside the legal system, the role of the Journalists' Union is important as it provides legal aid to defendants.<sup>505</sup>

## 5. The court's role and independence

Whereas the Greek legislator has failed to capture the need for legislative intervention in relation to SLAPP cases, the Court's role is crucial. In that respect, there are two issues that merit further attention:

First, Article 366(2) of the Greek Penal Code prescribes that if the fact that the charged person has claimed or disseminated refers to a punishable act for which prosecution has been commenced, the trial (for discreditation or defamation) shall be suspended until the end of the criminal prosecution; it is considered to be proven that the fact to which the discreditation or defamation refers is true if the judgment is one of conviction and false if the judgment is one of acquittal based on the fact that it has not been proven that the discredited or defamed person ever committed the punishable act.<sup>506</sup>

This provision thus potentially links criminal proceedings and may provide a protective cloak to defendants. However, it may equally be considered that until the end of the proceedings for the act to which the discreditation or defamation refers to, the defendant of this act is presumed guilty. At the moment, of defendant's acquittal the fact to which the discreditation or defamation refers to would be false, therefore, up until that moment the defamation or discreditation stands, as violating the presumption of innocence.

Second, with respect to judicial independence, there has been one incident that is worth pointing it out: in relation to the journalist Kostas Vaxevanis, who as it is shown below, has been subjected to criminal litigation for slanderous defamation on several occasions, he has claimed through his published work that a specific judge has been appointed to 3 out of 5 cases against him. In one of the cases Kostas Vaxevanis was convicted in first instance. The journalist implied through an article that this is not coincidental. The judge in question had put a motion to be removed from the last pending

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<sup>502</sup> Explanatory memorandum of the Greek Code of Criminal Procedure, 113-114.

<sup>503</sup> Law 3226/2004, GG 24/A/4-2-2004.

<sup>504</sup> Law 4745/2020, GG 214/A/6-11-2020.

<sup>505</sup> See <https://www.esiea.gr/na-katargitheis-amesa-o-typoktonos-nomo/>.

<sup>506</sup> Greek Penal Code art. 366(2)



case.<sup>507</sup> However, it is impossible to know if the judge requested to be removed from one of cases as a result of the article published from the defendant or it was done as a move to demonstrate their judicial independence. Therefore, this gesture might imply that the judicial body cannot be manipulated, and that the conviction was not led by personal motives of the Judge but came as an application of the law.

## 6. Case law

The cases below reveal that those most affected by SLAPP lawsuits are journalists.

1. In 2006, Aggeliki Mika, then a municipal counsellor in Nigrita, wrote a newspaper article containing allegations that the mayor of Nigrita had shown favouritism when hiring officials. In 2008, a Court of First Instance convicted Mika of defamation and imposed a sentence of eight-month imprisonment that was suspended in addition to €50 in damages. In 2009, the Court of Appeal of Thessaloniki upheld the conviction, but reduced the sentence to imprisonment of seven months. Mika appealed to the Supreme Court (Areios Pagos), which dismissed her appeal. In 2013, the ECtHR found that Mika's right to free expression had been violated due to the severity of the punishment.<sup>508</sup>

2. In March 2015, a court sentenced journalist Kostas Vaxevanis, then editor of the investigative magazine 'HotDoc', to imprisonment of 26 months, suspended for three years. The charges were in relation to an article that analysed a businessman's alleged involvement in the 2012-2013 Cypriot financial crisis. In September 2016, the Three-Member Athens Court of Appeal unanimously reversed Vaxevanis' conviction.<sup>509</sup>

3. In July 2016, the Northern Aegean Court of Appeal confirmed the criminal conviction for insult of journalist Stratis Balaskas, editor-in-chief of the newspaper Empros in Lesvos. The case related to an article Balaskas published in November 2013 in which he referred to the headmaster of a local high school as the 'Golden Dawn [...] and neo-Nazi headmaster'. The headmaster filed criminal charges against Balaskas for slanderous defamation. Despite the evidence presented, the Three-Member Mytilene Misdemeanour Court changed the charges from slanderous defamation to insult (Article 361) and sentenced the journalist for using the characterisation 'neo-Nazi' to six months in prison.<sup>510</sup> On appeal, the Northern Aegean Court of Appeal agreed that 'neo-Nazi' constituted an insult.<sup>511</sup> However, it reduced the punishment and sentenced Balaskas to imprisonment of three months, which was redeemable for €1,603, allowing Balaskas to avoid imprisonment. In 2017, the Supreme Court (Areios Pagos) dismissed Balaskas's appeal on points of law.<sup>512</sup> In 2020, the ECtHR declared Balaskas's application admissible and held that there has been a violation of Article 10 ECHR.

4. In January 2017, the then Defence Minister Panos Kammenos, leader of the party Independent Greeks (ANEL), brought charges against Giannis Kourtakis and Panagiotis Tzenos, the publisher and director respectively of the newspaper 'Parapolitika'. Kammenos accused the defendants of slanderous defamation and attempted extortion through attacks against him on the radio station of

<sup>507</sup> See <https://www.iefimerida.gr/ellada/bullying-baxebani-dikastes-paraitoyntai>

<sup>508</sup> ECtHR, *Mika v. Greece* (Appl. No. 10347/10) Decision of 13 December 2013.

<sup>509</sup> See <https://www.kathimerini.gr/society/874468/to-efeteio-plimmelimatou-athinas-athoouse-toys-vaxevani-kai-symeonidi/>.

<sup>510</sup> Three-member Mytilene Misdemeanour Court, Decision no. 1264/2013

<sup>511</sup> Northern Aegean Court of Appeal, decision no. 112/2016.

<sup>512</sup> Supreme Court, Decision no. 686/2017.





Parapolitika. Kammenos claimed that the two journalists tried to blackmail him in order to force him to withdraw his accusations that Kourtakis and Tzenos allegedly received nearly €1.5 million in improper funding from the Hellenic Centre for Disease Control and Prevention (KEELPNO). Among other things, Kammenos alleged that the broadcasts insinuated links between Kammenos' son and Pola Roupa, a Greek terrorist. The criminal complaint was lodged in the aftermath of the newspaper's article concerning a trip that Kammenos took in Alpes. The allegations about attempted extortion were shelved, but the allegations for slanderous defamation reached the Court of First Instance which in a flagrant (summary) procedure found Kourtakis guilty of slanderous defamation in respect of his insinuations regarding the link between Kammenos' son and Pola Roupa. Kourtakis was condemned to imprisonment of 23 months, which was suspended for three years. Tzenos was found innocent.<sup>513</sup> This SLAPP must be seen in the broader context of the numerous lawsuits between Kammenos and Kourtakis, who has repeatedly lodged civil lawsuits against Kammenos for a series of false allegations that he made in public defaming Kourtakis, shielding behind his parliamentary immunity.

5. In March 2015, Panos Kammenos filed a civil lawsuit against cartoonist Andreas Petroulakis, the website Protagon and the owner of the website Stavros Theodorakis for an article. Petroulakis considered that certain nationalist and anti-European ideas of the Minister were reflected on the whole government. With the civil lawsuit, the Minister requested the extraordinary amount of 2 million Euros as a compensation for infringement of the right to personality (Article 57 of the Greek Civil Code). Kammenos filed a new civil lawsuit later requesting a compensation of 100.000 euros. Eventually, the Court of first instance rejected the lawsuit. Interestingly the Minister did not file a criminal lawsuit for slanderous defamation alongside with the civil lawsuit.<sup>514</sup>

6. In another case originating by Kammenos, on 22 September 2018, the police arrested the publisher, editor in chief and political editor of Fileleftheros newspaper. Kammenos filed charges against seven journalists for an article published on 21 September 2018 on the alleged mismanagement of EU funds. The journalists were released later with no charges. The Fileleftheros publisher stated that Kammenos aimed at the intimidation of the journalists.<sup>515</sup>

7. In November 2016, the Heraklion Court of First Instance acquitted journalist Alekos Andrikakis of charges for slanderous defamation against the former mayor of Heraklion, Yannis Kourakis. Andrikakis published an article in the local newspaper 'Patris' – he was also the editor-in-chief – claiming that Kourakis, unlawfully issued payment orders without the approval of the Local Financial Department. Kourakis brought charges against Andrikakis for slanderous defamation. In addition to imprisonment, Kourakis also requested €10,000 for each time Andrikakis insulted him in the future. The court ordered Kourakis to pay €2,300 of Andrikakis' legal expenses.

8. In 2014, before the municipal elections in Volos an article was published by the local newspaper 'Magnisia' regarding a municipal candidate, Achilleas Mpeos suggesting that he, should settle his pending allegations that he had formed a criminal organisation and fixed football matches (he was the

<sup>513</sup> See <https://tvxs.gr/news/ellada/enoxos-o-koirtakis-gia-sykofantiki-dysfimisi-toy-kammenoy-leei-o-eisaggeleas>.

<sup>514</sup> Lina Giannarou 'Απερίφθη η αγωγή Καμμένου κατά Πετρούλακη' (*Kathimerini*, 13 July 2017) <https://www.kathimerini.gr/politics/918121/aperrifthi-i-agogi-kammenoy-kata-petroylaki/>

<sup>515</sup> 'OSCE Representative denounces arrest of Greek journalists after criminal defamation suit by Defence Minister, urges decriminalization of defamation' (*OSCE*, 24 September 2018) <https://www.osce.org/representative-on-freedom-of-media/397163>.



president of the Greek football team Olympiakos Volou. In December 2015, and after Mpeos's election he was suspended from his duties until the final decision on the case. Meanwhile, Mpeos launched a legal attack against Dimitris Kareklidis (owner of the newspaper). Kareklidis stated that by that time, two lawsuits for slanderous defamation were already rejected and a third one was in the preliminary investigation stage. Moreover according to Kareklidis, Mpeos also filed three civil suits for slanderous defamation, which were again rejected.<sup>516</sup> Mpeos also precluded the newspaper from publishing publications of the Municipality of Volos, which are compulsory by law. The aim of that exclusion was to financially exhaust the newspaper. In that respect, the Three-Member Court of First Instance of Volos sentenced Mpeos to 15 months of imprisonment for repeated breach of duty. On appeal despite the Prosecutor's proposal, Mpeos was acquitted.<sup>517</sup> This case shows sometimes SLAPP lawsuits may be accompanied by other mechanisms to delimit freedom of press.

In 2016, Mpeos filed a lawsuit for slanderous defamation again but this time against Katerina Tassopoulou, a columnist at the local newspaper; Thessalia'. According to her, Mpeos's motive was the financial exhaustion those who criticise him.

9. At the time of writing, there is a pending case before the Florina Three-Member Misdemeanour Court stemming from the criminal complaint of the Greek société anonyme for electricity (DEI – ΔΕΗ Δημόσια Επιχείρηση Ηλεκτρισμού) against Nikolaos Stefanis, a citizen who had 25 years of experience in the mining of lignite in DEI. The case concerns the criminal complaint that Stefanis lodged against DEI regarding the landslide that occurred near the Amyndaio mine for which he alleged that DEI may have liability. DEI claims that the criminal complaint was falsely lodged and filed a criminal complaint for false accusation and defamation of a legal entity (under the now abolished Article 264 of the Greek Penal Code).<sup>518</sup>

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<sup>516</sup> Lambrini Papadopoulou, 'In Greece, local mayor targets press with defamation suits' (IPI, 22 February 2018) <https://ipi.media/in-greece-local-mayor-targets-press-with-defamation-suits/>.

<sup>517</sup> See <https://magnesianews.gr/slider/enochos-gia-ton-eisaggelea-athoos-sto-dikastirio.html>

<sup>518</sup> 'Για τη μήνυση της ΔΕΗ κατά του Νίκου Στεφανή' (The Press Project, 10 November 2020) <https://thepressproject.gr/gia-ti-minysi-tis-dei-kata-tou-nikou-stefani/>.



The legal background of SLAPP cases in

## Hungary

Contribution by Bea Bodrogi

### 1. Laws most vulnerable to abuse

#### *1.1. The General Data Protection Regulation (GDPR)*

Since personal information and stories about natural persons are the basic raw materials for journalism, GDPR has major implications for the work of the press.<sup>519</sup> In general, GDPR leaves the handling of the potential conflict between the right to the protection of personal data and the right to freedom of expression and information to be resolved in national legal frameworks and calls for the Member States to reconcile them. According to recent decisions, however, Hungarian authorities have so far failed to adequately take free expression into account when balancing between these two fundamental rights. As a result, GDPR can be used by data subjects to silence publishers and journalists in Hungary as a SLAPP tool.<sup>520</sup>

In the following, three kinds of procedures involving GDPR will be introduced that can be used and misused by data subjects: i) preliminary injunction prior to initiating a lawsuit under civil law; ii) initiating a lawsuit under civil law to finalize prior restraint by injunction; iii) and initiating the investigation of the National Authority for Data Protection and Freedom of Information (hereinafter: Authority). The cases of Forbes represent these three SLAPP tools (see the detailed case description in the Annex).

First, data subjects can request a civil court to issue an injunction (interim measure) according to Section 108 of the Code of Civil Procedure<sup>521</sup> against the publisher of a press organ which is preparing a report featuring the data subjects' personal data.<sup>522</sup> Data subjects can claim that the publication of their personal data would pose an imminent threat to their rights to be vindicated in a future lawsuit and would result in irrecoverable harm without an interim measure. In case of granting the injunction, the publication is blocked temporarily, and to-be plaintiffs have approximately a month to launch the lawsuit if they do want the interim measure to stay in effect. **A typical SLAPP strategy involves using procedural tricks, such as filing a lawsuit with missing information that would result in a court request for more information from the plaintiff, thus further time may elapse before the actual lawsuit begins –**

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<sup>519</sup> Regulation (E) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), Article 85.

<sup>520</sup> The Hungarian Civil Liberties Union (HCLU) represents four cases in GDPR based civil and administrative procedures in which the right to data protection was invoked to repress the freedom of press, available at: <https://bit.ly/3mnh2XM>

<sup>521</sup> Act CXXX of 2016 on the Code of Civil Procedure, Section 108, Subsection 1): A request for provisional measures may be submitted before submitting a statement of claim, if any of the conditions specified in Section 103 (1) is met and the petitioner, with regard to the passing of time, substantiates the frustration of achieving the goal of ordering provisional measures, had the request been submitted after bringing the action. The Act is available at: <https://bit.ly/2VlGpV>

<sup>522</sup> Act V of 2013 on the Civil Code, Section 2:43, Subsection e): The right to the protection of personal data: Violation of personality rights means in particular violation of the right to keep personal secrets and the right to the protection of personal data, available: <https://bit.ly/3qggCEU>



or before the interim measure loses effect. These decisions might be alarming for the freedom of the press because petitioners manage to silence journalists by abusing the GDPR and civil procedural rules. Even if data subjects ultimately decline to initiate a lawsuit, the injunction itself is enough to delay publication by at least one month, by which time the content would lose relevance and public interest.

The second type of proceeding in SLAPP strategy is the civil law litigation to finalize prior restraint. Data subjects who have been granted an injunction must ultimately initiate a civil lawsuit in order to keep the injunction in effect, and to finalize the effect of the restraint. However, petitioners of an injunction are not required to initiate a lawsuit even if the injunction is granted. The biggest concern in SLAPP involving GDPR procedures is that data subjects may achieve their aim of silencing the press or delaying the publication of a material that quickly loses relevance, **without assuming the burdens of pursuing a lawsuit**. If petitioners of the injunction do launch a lawsuit, the injunction stays in effect until the first instance ruling of the court is delivered. This can take several months, if not years. Along with the passing of time as a way of silencing the press, these procedures also impose a considerable financial burden on the defendant publisher.

In the third type of procedure, data subjects can file a complaint to the Hungarian National Authority for Data Protection and Freedom of Information (hereinafter: Authority) claiming unlawful processing of personal data; violation of the rights to be informed and lack of justification of overriding public interest. According to the interpretation of Article 13 and 14 by the Authority in its recent decisions in the Forbes cases (see the description in the Annex), GDPR prescribes the duty to inform the data subjects on purposes and legal basis of the data processing, which encompasses the duty of the publisher of a press organ to inform data subjects on the criteria used in applying the “legitimate interest test” as well as its result. Since Forbes failed to carry out this obligation, the Authority imposed a fine of 3000 EUR in each case. The above interpretation of the data regulations (including GDPR and the Act on the Right to Informational Self-Determination and Freedom of Information<sup>523</sup>) imposes a considerable administrative and financial burden on the publishers and causes a chilling effect on journalistic investigative reporting on business life and the interrelations of economic and political influence.

## *1.2. Criminal defamation*

According to Hungarian legal regulations, defamation lawsuits can be initiated both under civil<sup>524</sup> and criminal law<sup>525</sup> and the two types of proceedings can be initiated in parallel. However, criminal defamation can be considered as a typical and frequently used SLAPP suit, mostly initiated by politicians against journalists, bloggers and civil rights activists. There are two defamation-related offences in the Hungarian Criminal Code.

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<sup>523</sup> Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information (available only in Hungarian at: <https://bit.ly/36p4t94>)

<sup>524</sup> Defamation, Violation of good reputation, Act V of 2013 on the Civil Code, Section 2:45., available at: <https://bit.ly/3o4QSte>

<sup>525</sup> Defamation, Act C of 2012 on the Criminal Code, Section 226; Libel, Act C of 2012 on the Criminal Code, Section 227, available <https://bit.ly/33xrgNQ>



- Defamation (Criminal Code Art. 226; rágalmazás): Defined as engaging in the written or oral publication of anything that is injurious to the good name or reputation of another person, or using an expression directly referring to such a fact. The penalty is imprisonment for up to one year. Offenders are punished with imprisonment for up to two years if the act of defamation is committed “for a malicious motive or purpose”, is published with great publicity, e.g. in the media, or causes “considerable injury” to the claimant.
- Libel (Criminal Code Art. 227; becsületsértés): Defined as disseminating a false publication orally or any other way tending to harm a person’s reputation either in connection with his professional, public office, or public activity or in broad publicity.

The penalty is imprisonment for up to one year. In practice, prison sentences are often converted into a fine. “In 2014, 316 were convicted for defamation, resulting in 16 prison sentences (suspension not qualified) and 62 criminal fines, while 213 people were convicted for libel, resulting in 2 prison sentences and 21 criminal fines.”<sup>526</sup>

According to Article 52 (1) of the Hungarian Code of Criminal Procedure<sup>527</sup>, prosecutions for defamation and libel may only be initiated by the victim as a private accusation. However, when libel or defamation is committed against a public official in connection with official duty or operations, prosecution is carried out by a public prosecutor.<sup>528</sup> This means that the state takes over the burden of prosecution: the police will conduct the investigation, the prosecutor will make the accusation, and the complainant (victim) does not have to pay for all of this.

Another problem is the length of the procedures, since criminal defamation cases might last for several years before a final judgement is reached. According to the experiences of lawyers representing journalists and civil rights activists, the criminal procedures might last up to 3-5 years. For example, in the case of the 444.hu reporter who was attacked in 2017 in a campaign event of the governing party, the court delivered the first instance judgment in November 2020, finding the journalist guilty of criminal defamation for publishing a story of the incident.<sup>529</sup> At the same time, however, it is often the case that the accused chooses not to appeal against the verdict.<sup>530</sup> One of the reasons is that because the accused might feel intimidated or tired out by the burden of the procedure, or in politically sensitive cases – e.g. where the applicant is of the local authority such as a mayor - the accused may struggle to find a local lawyer who would represent him/her in court. As a result, the applicants reach their goal in achieving a chilling effect and silencing the critics. In addition, the costs of the legal procedure might also cause extra burden on the “potential perpetrators.”

Indicted people will be fingerprinted and photographed, as if they had committed some serious crime and they would have to hire an attorney to represent them in the criminal proceeding. Although in criminal cases the state offers free legal aid, attorneys are often disinterested in performing their

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<sup>526</sup> The problem of criminal defamation in Hungary vs. European Union by Justyna Józwiak, 2019, available at: <https://bit.ly/2L4AsTw>.

<sup>527</sup> Act XC of 2017 on the Code of Criminal Procedure

<sup>528</sup> Ibid, Article 53 (3)

<sup>529</sup> <https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/25849024>

<sup>530</sup> Based on the experiences of the legal aid service of the Hungarian Civil Liberties Union (HCLU). The interview was conducted with one of the in-house lawyers of HCLU, 20 November 2020.



compulsory and low-paid duties. (See the case example under the “Systematic safeguards” subchapter in this regard).

In sum, criminal proceedings based on defamation may lead to the further mitigation of criticism; threatening journalists and critical voices with criminal proceedings, making it increasingly difficult to control the power and disclose corruption. The draconian penalties have a chilling effect on freedom of speech and the freedom of the press, silences critics, reduces the amount of criticism towards the state, and even reduces the number of corruption scandals made public because journalists and concerned citizens fear being sanctioned both financially and criminally for expressing their opinions.

### *1.3. Petty offence procedures*

Another legal SLAPP tool used by Hungarian authorities to silence active citizens critical of the government is initiating petty offence procedures against the organizers and the participants of demonstrations.<sup>531</sup> In this case the concern is not the law itself, but how authorities apply the legal provisions to discourage people from protesting by fining them on different legal grounds. In the past few years, authorities have been initiating mass procedures against protesters on various occasions and for various reasons. Several student-protests took place in Budapest in 2017 and 2018, for education rights and for better education in general. After the end of these protests, groups of students started a spontaneous demonstration in the nearby streets. At this time the roads were still blocked by police to secure the demonstration, there was no car traffic, thus, protesters had a reason to believe that they were not committing any violations with the march. However, shortly after police blocked their way and started a petty offence procedure against them on the ground of traffic offence because they stepped off the sidewalk and marched on the road. Later, the participants received a fine of 30.000-50.000 HUF (approx. 90-150 EUR). In all known cases the court seized the fine but gave a warning, so they still found the demonstrators liable.<sup>532</sup>

In March 2020, during the first wave of the COVID-19 pandemic a state of danger was announced by the Hungarian government<sup>533</sup>. During this period organizing and participating in demonstrations were banned. Because of the general ban on public gatherings active citizens who wanted to express their opinions in accordance with the provisions had to find creative ways to do so. Such were the so-called “car-honking protests” organized five times in Budapest, in April and May 2020<sup>534</sup>. The purpose of the demonstrations was to protest against some of the government’s measures against the pandemic such as the hurried eviction of patients to free up hospital beds. The participants also criticized the new scaremongering law adopted by the government under the veil of a quasi-state of emergency (as described below). Protesters expressed their opinions by driving a few laps in a certain roundabout with their car while honking. Their behaviour complied with the epidemiological measures, they did not come into physical contact with each other and remained in their car all the way. Police officers,

<sup>531</sup> Act II of 2012 on infractions, infraction procedure and the infraction records system, Section 224 on minor traffic offence, available at: <https://bit.ly/33xK3Zv> (no English translation available).

<sup>532</sup> The information is based on the interview conducted with the in-house lawyer of the Civil Liberties Union, 20 November 2020.

<sup>533</sup> Government Decree 40/2020 (11 March) on the declaration of state of danger, available at: <https://bit.ly/3fQ46Ho>

<sup>534</sup> <https://english.atlatszo.hu/2020/05/25/car-honking-protests-cancelled-due-to-astronomical-fines-handed-out-by-budapest-police/>



however, fined protesters and initiated petty offense procedures in 104 cases<sup>535</sup> on the ground of traffic offense for “making sound signals without reason” and for participating at a demonstration during the general ban. In some cases, they even fined cyclists for using their bike bells. Later, the participants received a fine of about 100.000-200.000 HUF (approx. 280-550 EUR), the largest known fine was HUF 750.000 (EUR 2.100).

As of now there is no final decision, the courts have yet to decide whether the protesting drivers did commit a petty offense or solely practiced their right to freedom of expression - but this can take several months or even a year. The HCLU and the Hungarian Helsinki Committee offered free legal aid to the participants.<sup>536</sup> Due to the high amount of the fines, there were no more “car-honking” demonstrations in Budapest since participants were afraid to risk another petty offense procedure and several of them could not afford to pay this amount of money multiple times. In conclusion, petty offense procedures (which often take years to reach a final decision) can be an effective SLAPP tool since it’s sufficient at achieving chilling effect, intimidating, tiring out, and consuming financial resources of people wanting to express their opinion.

#### ***1.4. Scaremongering***

The Hungarian Parliament has tightened the rules of the Criminal Code on scaremongering<sup>537</sup> in March 2020, punishing with one to five years of imprisonment anyone who, during the period of a special legal order in front of a large audience, states or disseminates any untrue facts or true facts in such a distorted way that it can hinder or foil effectiveness of the protection against the danger. The amendment’s goal was supposedly to take action against false rumours that may hinder the effectiveness of the defence against the COVID-19 pandemic, in practice however, it was used by authorities to silence citizens critical of the government’s measures related to coronavirus.

The provisions were attacked in front of the Constitutional Court (hereinafter: CC), which found the legal provision in compliance with the Constitution. According to their decision<sup>538</sup>, tightening the rules of scaremongering does not disproportionately restrict freedom of speech because the offense can only be committed intentionally. As a constitutional requirement, the CC found that the provision on scaremongering threatens to punish only the disclosure of a fact which the perpetrator should have known to be false at the time the act was committed. However, the decision did not address the fact that the amendment could intimidate citizens from expressing their views freely. At the time of the decision, it was already known that several citizens had to face criminal proceedings only because they had shared their opinion about the government’s measures on social media platforms.<sup>539</sup> In addition, these incriminated opinions were rather critical than misinformative, which were obviously not able to hinder the state’s defence against COVID-19. In one, the accused posted a video on Facebook writing about poor hospital conditions she had witnessed during her COVID testing.

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<sup>535</sup> Based on the official reply of police for a data request by HCLU. (The Hungarian Helsinki Committee and the HCLU had filed a joint complaint to the Ombudsman's Office about the actions of police).

<sup>536</sup> <https://www.helsinki.hu/ha-lagzin-vagy-focisikert-unnepelve-lehet-dudalni-akkor-tiltakozaskeppen-is-szabad/>, Hungarian Helsinki Committee reported 17 cases, including 4 cases initiated against journalists.

<sup>537</sup> Scaremongering, Act C of 2012 on the Criminal Code, Section 337.

<sup>538</sup> Decision no. 15/2020. (VII. 8.) of the Constitutional Court, available at: <https://bit.ly/2Jngo7B>

<sup>539</sup> <https://www.euronews.com/2020/05/14/hungary-critics-silenced-in-social-media-arrests-as-eu-debates-orban-s-powers>





According to the police her video was able to weaken the people's trust in public healthcare and the government's pandemic related measures. Although these proceedings were later terminated, the arrests were videotaped and published by police and the law itself have a serious chilling effect on freedom of expression of journalists and ordinary social media users.

## 2. Potential defences

In the civil procedures of the GDPR related cases, the burden is on the plaintiff to prove his/her statements whereas the defendant also needs to provide counter argument to challenge the claim. Based on the arguments of the parties, the court delivers the judgement based on the laws and its interpretation of the law. It is important to highlight that Article 153 of the Preamble (GDPR) declares that the right to the protection of personal data has to be reconciled with the right to freedom of expression and information, as enshrined in Article 11 of the Charter of Fundamental Rights. Consequently, member states have the duty to protect freedom of expression from the abusive enforcement of GDPR rights. Therefore, the potential defense should be based on the importance of the fair balance which courts would need to take into account at an early stage of the procedure when they directly apply the provisions of the GDPR.

In criminal defamation cases, the offender is not punishable if the stated facts prove to be true. However, **proving the truth is not permissible in all cases**: it is permissible only if the communication of the fact was justified by the public interest or the legitimate private interest of anyone. In case of ordering to prove the truth, the burden of proof is reversed, while the general rule resulting from the presumption of innocence is that the accuser has to prove i.) the statement of facts was made, ii.) it was performed by the accused person, iii.) in a wilful manner – after which the defendant has to prove the truth of their allegation, namely, that, regarding its essence, the assertion is objectively true. Since the burden of proof is on the side of the communicator, if the defendant cannot prove the truthfulness of the fact communicated by him/her, he or she is found guilty of defamation. However, both the police and the court can terminate the criminal procedure at any time and any stage during the procedure, if the act '*does not constitute a crime*'. Since the higher courts are familiar with the Constitutional Court and the ECHR principles (see the same argument in the following subchapter, compliance with ECHR principles), criminal defamation cases often result in acquittal based in freedom of expression principles. It should be noted that defence based on ECHR principles is only effective if authorities at all levels are aware of these human rights standards and they consequently apply them as early as possible.

As for petty offense procedures the burden of proof lies with the authority. No one is required to prove his or her innocence.<sup>540</sup> In the case of a formal violation of the law a potential defence is that the act is '*not a danger to society*', for example if the petty offense has been committed for the purpose of expressing an opinion in a public matter. According to the legal regulations, petty offenses have two conditions: the act must be punishable under this act and must also mean a danger to society.<sup>541</sup> According to a recent decision of the Constitutional Court<sup>542</sup> in assessing the criminal nature of an act, it must also be borne in mind that if an act qualifies as an exercise of a fundamental

<sup>540</sup> Act II of 2012 on infractions, infraction procedure and the infraction records system, Section 32

<sup>541</sup> Ibid., Section 1

<sup>542</sup> Decision no. 14/2019. (IV. 17.) of the Constitutional Court, paragraph 21, available at: <https://bit.ly/3qcfMsV>





right protected by the Fundamental Law, its danger to society is precluded. The HCLU has based the defence on this CC's decision in the case of the aforementioned protesters who had been fined for using their car's honks without a good reason. As of now, however, there are no final court decisions in these cases.<sup>543</sup>

### 3. Compliance with ECHR principles

The principles of freedom of expression as developed by the ECtHR are recognized in national law and jurisprudence. Among the case law of ECtHR, the Constitutional Court has recognized in its decisions the importance of freedom of expression when opinions or factual statements concern a debate on a public affair and/or when the criticism is related to a public figure. These decisions are mainly recognized in the practice of the higher courts (such as regional courts and courts of appeal) as well. However, most of the lower courts (district courts) are not familiar with or are not prone to using these principles which may result in the conviction of the accused on the first instance even if the statement is clearly protected by freedom of speech.

Case example:<sup>544</sup> B. József, a resident of the small village of Tomajmonostora, Hungary, gave an interview to a TV channel about alleged corruption of the local mayor in 2017. In the report, B. József said that each time the village wins a public procurement, a little renovation is being added to the mayor's house as well. The mayor, who wanted to silence the critique, initiated prosecution for defamation and libel against him. The court of first instance acquitted him, the mayor, however, appealed against the court's decision and B. József was found guilty of defamation by the court of second degree. In September 2020, after three years of having to bear the burden of a criminal procedure, the court of third instance finally acquitted him, stating that his statement was closely related to public affairs, therefore, not considered defamatory.

With regard to the power relationship, the vertical power-relationship between participants in SLAPP-like cases in Hungary are absolutely not noted.

### 4. Systemic safeguards

There are various legal safeguards and techniques in the national legal system that could prevent or disincentivise the launching of SLAPP lawsuits. The aforementioned burden of proof in criminal and petty offense proceedings, the existence of **abuse of rights arguments**<sup>545</sup>, the **payment of judicial costs by the losing party** and the **free legal aid** offered by the state in criminal proceedings are all examples of good practices against SLAPP lawsuits. However, the application of these tools in practice is often problematic. For example, in criminal cases the state offers free legal aid, attorneys are often disinterested in performing their compulsory and low-paid duties.

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<sup>543</sup> Based on an interview with the in-house lawyer of HCLU, 20 November 2020.

<sup>544</sup> Ibid.

<sup>545</sup> With regard to the application of the 'abuse of rights' argument, the judicial practice regards it as a principle applicable throughout the legal system, attributing to the 'abuse of rights' fundamental functions. This means that it does not accept a stand-alone reference to the abuse of rights, rejecting the admissibility of the dispute solely on the basis of the prohibition on abuse. See: The abuse of rights in the judicial practice by Tercsák Tamás, summary findings available at: <https://ptk2013.hu/szakcikkek/tercsak-tamas-a-joggal-valo-visszaeles-ujabb-biroi-gyakorlatahoz-reszletek/6642>



Case example: In a criminal case initiated for scaremongering<sup>546</sup> in April 2020, the court appointed an attorney to the client (defendant) under the state legal aid program. However, the defendant has neither seen nor spoken to her attorney throughout the entire procedure. Meanwhile, on the 28th of April, police conducted a house search and confiscated her cell phone which she had primarily used for work. Later that day she was taken to the police station for questioning where her attorney was not able to be present. On the 7th of May she was summoned to a second interrogation by police, where her attorney was absent again. Without her cell phone she was struggling to find sufficient legal aid but finally managed to contact the Hungarian Civil Liberties Union (hereinafter: HCLU). An attorney of HCLU took over her case, filed a complaint against unlawful accusation and unlawful confiscation of her cell phone and as a result, on the 22nd of May the investigation was terminated by the prosecutor. In sum, she had two interrogations without any legal help and her phone was taken from her for almost a month which her appointed attorney did not file a complaint against.<sup>547</sup> This problem is prevalent, albeit with less severe circumstances in most of the cases.

## 5. The court's role and independence

There are serious concerns regarding judicial independence in Hungary as identified in the Rule of Law Report prepared by the European Commission.<sup>548</sup> According to the main findings of the report, over the past years, judicial independence in Hungary has been raised by EU institutions as a source of concern, including in the Article 7 procedure initiated by the European Parliament. The problems concern the challenges National Judicial Council faces in counter-balancing the powers of the President of the National Office for the Judiciary in charge of the management of the courts; the decision of the Supreme Court (Kúria) to declare unlawful a request for preliminary ruling to the European Court of Justice; the new rules allowing for appointment to the Supreme Court of members of the Constitutional Court, elected by Parliament, outside the normal procedure.

However, with regard to SLAPP-like cases, the problem is not judicial independence but the narrow application of the concerning legal regulations in all types of cases as described in subchapter 1.

## 6. Case law

In GDPR related cases, journalists and bloggers are affected because of their watchdog function. In criminal defamation and petty offence cases, journalists, bloggers, active citizens and demonstrators are the main targets.

In GDPR related cases corporations, banks, public officials and public figures are most likely to sue. In defamation cases, mostly politicians and public figures file complaints. In petty offence cases, the police in charge are initiating the legal procedures against the demonstrators.

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<sup>546</sup> Act C of 2012 on the Criminal Code, Section 337, Subsection 2

<sup>547</sup> Based on an interview with in-house lawyer of HCLU, 20 November 2020.

<sup>548</sup> 2020 Rule of Law, Country Chapter on the rule of law situation in Hungary, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0316&from=EN>

See more detailed analysis on judicial independence in the rule of law report prepared by eight Hungarian civil society organisations, May 2020, available at: <https://bit.ly/3mnnluz>



In GDPR and criminal defamation cases journalistic publications, blogs and social media posts are the main targets while in petty offence cases, the demonstrations are targeted.

## Annex. The Hungarian Forbes list<sup>549</sup>

In November 2019 the owners of Hell Energy Ltd. – an energy drink manufacturer – were informed by the journalists of Forbes Hungary that they would appear on the annual lists presenting the most successful family-owned companies and the richest Hungarians. The owners objected and demanded the restriction of the processing and the deleting of their personal data from the publisher.

- **Injunction in order to block the appearance on the Hungarian Forbes list**

The data subjects petitioned the Metropolitan Court of Budapest for an injunction to block any publication by Forbes Hungary. The court granted the injunction for the data subjects in its ruling on 19<sup>th</sup> December 2019, prohibiting Forbes from the publication of any personal data related to the petitioners. The decision was upheld by the Court of Appeal and the Curia (Supreme Court). The case was brought to the Constitutional Court, because the injunction has blocked Forbes from producing and circulating information in the public interest for more than 10 months now without any proper consideration of the rights of the press. Since the injunction is in force until the final judgment in the merits, it will take up to 2 or 3 years to exercise the rights enshrined in the Fundamental law, in Article 11 of the Charter and in Article 10 of the European Convention of Human Rights.

- **Civil law claim**

After 9 months, the claimants of the injunction petitioned the Metropolitan Court to decide the case in merits.) The central claim asks the court to establish the violation of personality rights under the Civil Code as a result of the unlawful processing of the data. As a result of the complexity of the Hungarian civil procedure, the petition is challenged on procedural basis as well as on the merits. The case is still pending.

- **Procedures by the National Authority of Data Protection and Freedom of Information<sup>550</sup>**

The owners of Hell Energy Ltd. also initiated an administrative procedure at the Authority. The application raised the same claims: unlawful processing of personal data; violation of the rights to be informed; lack of justification of overriding public interest. Similarly, another family (owners of the biggest building company) launched an application with the Authority, objecting their appearance on the Forbes lists, raising similar questions. The Authority delivered its decision on 27<sup>th</sup> of July 2020, and respectively on 4<sup>th</sup> of August 2020. The common findings were the following. Forbes failed to carry out a reasonable “legitimate interest test”, consequently it did not document it properly, and it did not give appropriate information for the data subjects. For these violations of data protection laws, Forbes was ordered to pay 3000 EUR fine in each case (6000 EURE combined).

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<sup>549</sup> The Hungarian Civil Liberties Union provided legal representation to Forbes in two cases both initiated in civil and administrative procedures, therefore the case description can also be found on the HCLU’s website, available at: <https://bit.ly/39oWomF>

<sup>550</sup> [https://edpb.europa.eu/news/national-news/2020/hungarian-dpa-fines-forbes\\_hu](https://edpb.europa.eu/news/national-news/2020/hungarian-dpa-fines-forbes_hu)



Forbes petitioned the Metropolitan Court of Budapest for the judicial review of the decision. The main argument is that the legal basis of the processing is Article 6 (1) e) of the Regulation, therefore the legitimate interest test and the attached proactive duty to inform the data subjects do not burden Forbes. The case is still pending.



The legal background of SLAPP cases in

## Ireland

Contribution by Ronan Ó Fathaigh (University of Amsterdam)

### 1. Laws most vulnerable to abuse:

The law most vulnerable to abuse for Strategic Litigation Against Public Participation (SLAPP) in Ireland is civil defamation law.<sup>551</sup> While Ireland is one of only four EU member states to have decriminalised defamation,<sup>552</sup> civil defamation in Ireland still remains a widely recognised threat to freedom of expression, and open to abuse through SLAPP. The free expression organisation Index on Censorship's recently-published report on SLAPP against journalists and media outlets in Europe contained significant criticism of Ireland's defamation law, stating that Ireland's legal system was among the "most vulnerable in Europe to abuse by vexatious litigators", including as a "hub for libel tourism".<sup>553</sup> According to Index on Censorship, major problems with Ireland's defamation law include no limits on damages, juries determining defamation damages, and significant defence costs, resulting in the "burden" of a defamation suit being "high enough to close a media outlet for good".<sup>554</sup> Indeed, the European Commission's 2020 Rule of Law Report on Ireland singled out defamation law as a particular concern, stating that frequent defamation suits, high costs and high damages awarded by Irish courts are "seen as an inducement to self-censorship and a constraint to media freedom", and "raise concerns".<sup>555</sup>

The current statutory law on defamation is contained in the Defamation Act 2009.<sup>556</sup> Importantly, an Irish government review of the Defamation Act 2009 was launched in 2016, with a public consultation,<sup>557</sup> and a high-level symposium in 2019,<sup>558</sup> but at the time of writing, the review had not

<sup>551</sup> On Ireland's defamation law, see Neville Cox and Eoin McCullough, *Defamation: Law and Practice* (Clarus Press, 2014).

<sup>552</sup> See Section 35 of the Defamation Act 2009, which abolished the criminal offences of defamatory libel, seditious libel and obscene libel (<http://www.irishstatutebook.ie/eli/2009/act/31/section/35/enacted/en/html#sec35>). See also Mario Viola de Azevedo Cunha and Luc Steinberg, *Decriminalisation of Defamation* (Centre for Media Pluralism and Media Freedom, 2019), <https://cmpf.eu.eu/wp-content/uploads/2019/01/decriminalisation-of-defamation-Infographic.pdf>.

<sup>553</sup> Index on Censorship, *A gathering storm: The laws being used to silence the media* (2020), p. 10, <https://www.indexoncensorship.org/wp-content/uploads/2020/06/a-gathering-storm.pdf>. See also Scott Griffen, "Libel damages squeeze Ireland's press", *International Press Institute*, 4 January 2017, <https://ipi.media/in-depth-libel-damages-squeeze-irelands-press/>.

<sup>554</sup> Index on Censorship, *A gathering storm: The laws being used to silence the media* (2020), p. 10.

<sup>555</sup> European Commission, *2020 Rule of Law Report: Country Chapter on the rule of law situation in Ireland*, SWD(2020) 306 final (30 September 2020), pp. 1 and 13. On the threat of SLAPP in Europe, see Tarlach McGonagle, Ronan Ó Fathaigh, Gionata Bouché, Melinda Rucz, Sarah Stapel, Michelle Seel, and Anne van der Sangen, *Safety of Journalists and the Fighting of Corruption in the EU* (European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2020), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2020\)655187](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)655187).

<sup>556</sup> Defamation Act 2009, <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/index.html>.

<sup>557</sup> See Tarlach McGonagle, *Review of the Defamation Act 2009*, 31 December 2016, [http://www.justice.ie/en/JELR/Dr\\_Tarlach\\_McGonagle.pdf/Files/Dr\\_Tarlach\\_McGonagle.pdf](http://www.justice.ie/en/JELR/Dr_Tarlach_McGonagle.pdf/Files/Dr_Tarlach_McGonagle.pdf).

<sup>558</sup> See Neville Cox, "Defamation Law and the 2009 Defamation Act", Symposium: Reform of Defamation Law, Royal Irish Academy, Dublin, 14 November 2019; and Tarlach McGonagle, "Defamation law reform, the European Convention on Human Rights and EU law", Symposium: Reform of Defamation Law, Royal Irish Academy, Dublin, 14 November 2019 [http://www.justice.ie/en/JELR/Pages/Symposium\\_Reform\\_of\\_Defamation\\_Law](http://www.justice.ie/en/JELR/Pages/Symposium_Reform_of_Defamation_Law).



been published.<sup>559</sup> Notably, the representative body for Irish newspapers has labelled the Defamation Act 2009 as “not fit for purpose and serves neither the public nor freedom of the press”.<sup>560</sup> In this regard, there are a number of specific issues with the Defamation Act 2009 which are open to abuse through SLAPP and in need of reform. First, Section 31 of the Defamation Act 2009 allows for the imposition of damages for defamation,<sup>561</sup> while Section 32 allows for the imposition of aggravated and punitive damages.<sup>562</sup> Two of the major criticisms of these provisions are that there is no statutory cap on damages that may be awarded, and most importantly, a jury may determine the amount of damages where the court sits with a jury. In this regard, Section 31(8) provides that “[i]n this section “court” means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury”.<sup>563</sup> The representative body for Irish newspapers has argued that the Defamation Act 2009 must be reformed to (a) impose a cap on damages, as defamation damages are higher and “often multiples of the equivalent awards in Europe”; and (b) abolish juries for defamation proceedings, as the use of juries “considerably lengthens the duration of the trial, thus increasing legal costs, and the outcome and, and can result in unpredictable levels of awards”.<sup>564</sup>

A second major criticism on the Defamation Act 2009 is that there is no serious harm test for a defamation action. For example, Section 1 of the UK’s Defamation Act 2013 provides that “[a] statement is not defamatory unless its publication *has caused or is likely to cause serious harm* to the reputation of the claimant”.<sup>565</sup> There is no equivalent serious harm test under Ireland’s Defamation Act 2009, and it has been argued that including a serious harm test would discourage “trivial claims that can chill free expression and inundate Irish courts with lengthy and costly court cases”.<sup>566</sup> Section 6(2) of Ireland’s Defamation Act 2009 merely provides that the “tort of defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person)”,<sup>567</sup> and a defamatory statement is defined as a statement that “tends to injure a person’s reputation in the eyes of reasonable members of society”.<sup>568</sup> However, as discussed below, a court may summarily dismiss a defamation action where the court is satisfied the statement is “not reasonably capable of being found to have a defamatory meaning”.<sup>569</sup>

A third provision of the Defamation Act 2009 open to abuse is Section 12, which allows a corporation to initiate defamation suits, and provides that a corporation may bring a defamation action in respect

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<sup>559</sup> For criticism of the slow pace of reform, see Editorial, “Pace of defamation law reform is not reassuring”, *Irish Examiner* (28 October 2020), <https://www.irishexaminer.com/opinion/ourview/arid-40072019.html>.

<sup>560</sup> NewsBrands Ireland, “Ireland’s Draconian Defamation Laws Must Be Urgently Reformed – It’s in The Public Interest”, <http://newsbrandsireland.ie/policy-issues/defamation/>.

<sup>561</sup> Defamation Act 2009, Section 31, <http://www.irishstatutebook.ie/eli/2009/act/31/section/31/enacted/en/html#sec31>.

<sup>562</sup> Defamation Act 2009, Section 32, <http://www.irishstatutebook.ie/eli/2009/act/31/section/32/enacted/en/html#sec32>.

<sup>563</sup> See, e.g., NewsBrands Ireland, “Ireland’s Draconian Defamation Laws Must Be Urgently Reformed – It’s in The Public Interest”, <http://newsbrandsireland.ie/policy-issues/defamation/>.

<sup>564</sup> NewsBrands Ireland, “Ireland’s Draconian Defamation Laws Must Be Urgently Reformed – It’s in The Public Interest”, <http://newsbrandsireland.ie/policy-issues/defamation/>.

<sup>565</sup> Defamation Act 2013, Section 1(1), <https://www.legislation.gov.uk/ukpga/2013/26/crossheading/requirementofseriousharm/enacted>.

<sup>566</sup> See, e.g., NewsBrands Ireland, “Ireland’s Draconian Defamation Laws Must Be Urgently Reformed – It’s in The Public Interest”, <http://newsbrandsireland.ie/policy-issues/defamation/>.

<sup>567</sup> Defamation Act 2009, Section 6(2), <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/print#sec8>.

<sup>568</sup> Defamation Act 2009, Section 2, <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/print#sec2>.

<sup>569</sup> Defamation Act 2009, Section 34(2), <http://www.irishstatutebook.ie/eli/2009/act/31/section/34/enacted/en/html#sec34>.



of a statement that it claims is defamatory “whether or not it has incurred or is likely to incur financial loss as a result of the publication of that statement”.<sup>570</sup> As such, a corporation can initiate a defamation action without even demonstrating *it is likely* to incur financial loss. In contrast, the UK Defamation Act 2013 contains the serious harm test mentioned above, and in relation to corporations, provides that “[f]or the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss”.<sup>571</sup>

## 2. Potential defences

There are a number of important defences to defamation proceedings, which are contained in Part 3 of the Defamation Act 2009. These include the defences of truth,<sup>572</sup> honest opinion,<sup>573</sup> innocent publication,<sup>574</sup> absolute privilege,<sup>575</sup> and qualified privilege.<sup>576</sup> Most notably, Section 26 of the Defamation Act 2009 provides for a defence of fair and reasonable publication on a matter of public interest.<sup>577</sup> However, in order to benefit from the defence, the defendant to a defamation action must prove a number of complicated matters, including that the statement was published (a) in good faith, and in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit; (b) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient; and (c) in all of the circumstances of the case, it was fair and reasonable to publish the statement.<sup>578</sup> However, there has been considerable criticism of the operation of this public-interest defence. For example, the Irish public broadcaster RTÉ, in its submission to the review of the Defamation Act 2009, argued that the Section 26 defence was “so hedged and rigid that it is a statutory dead letter”, and it “does not protect a defendant from liability for the publication of a potentially defamatory statement where the defence’s conduct in publishing the impugned piece for fair and reasonable and related to a matter of public interest”.<sup>579</sup>

## 3. Compliance with ECHR principles

It is debateable whether a number of principles of freedom of expression as developed by the European Court of Human Rights are sufficiently recognised in Irish law. First, in relation to the principle that statements of opinions and value judgements enjoy more freedom than false factual statements, as mentioned above, the Defamation Act 2009 provides for a defence of honest

<sup>570</sup> Defamation Act 2009, Section 12, <http://www.irishstatutebook.ie/eli/2009/act/31/section/12/enacted/en/html#sec12>.

<sup>571</sup> Defamation Act 2013, Section 1(2), <https://www.legislation.gov.uk/ukpga/2013/26/section/1>.

<sup>572</sup> Defamation Act 2009, Section 16, <http://www.irishstatutebook.ie/eli/2009/act/31/section/16/enacted/en/html#sec16>.

<sup>573</sup> Defamation Act, 2009, Section 20, <http://www.irishstatutebook.ie/eli/2009/act/31/section/20/enacted/en/html#sec20>.

<sup>574</sup> Defamation Act 2009, Section 27, <http://www.irishstatutebook.ie/eli/2009/act/31/section/27/enacted/en/html#sec27>.

<sup>575</sup> Defamation Act 2009, Section 17, <http://www.irishstatutebook.ie/eli/2009/act/31/section/17/enacted/en/html#sec17>.

<sup>576</sup> Defamation Act 2009, Section 18, <http://www.irishstatutebook.ie/eli/2009/act/31/section/18/enacted/en/html#sec18>.

<sup>577</sup> Defamation Act 2009, Section 26, <http://www.irishstatutebook.ie/eli/2009/act/31/section/26/enacted/en/html#sec26>.

<sup>578</sup> Defamation Act 2009, Section 26(1), <http://www.irishstatutebook.ie/eli/2009/act/31/section/26/enacted/en/html#sec26>.

<sup>579</sup> See Submission by RTÉ on the Review of the Defamation Act 2009 by the Tánaiste and the Minister for Justice and Equality (December 2016), p. 7, <http://www.justice.ie/en/JELR/RTE.pdf/Files/RTE.pdf>.





opinion.<sup>580</sup> However, in order to invoke the defence under Section 20, the defendant must prove the opinion was “honestly held”, including (a) the defendant “believed in the truth of the opinion”, (b) the opinion was based on allegations of fact specified in the statement containing the opinion, or referred to in the statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published, and (c) the opinion related to a matter of public interest.<sup>581</sup> The provision has been criticised due to its formulation being “challenging” to deploy.<sup>582</sup> Further, Section 21 also provides criteria for a court when distinguishing between allegations of fact and a statement consisting of opinion.<sup>583</sup>

Second, in relation to the principle that publications which contribute to a debate on a matter of public interest or general concern enjoy a higher threshold of protection, again, as mentioned above, the Defamation Act 2009 provides for a defence of “fair and reasonable publication on a matter of public interest” under Section 26.<sup>584</sup> However, the convoluted formulation of the defence has led to it being described as a “statutory dead letter”, and that it “does not protect a defendant from liability for the publication of a potentially defamatory statement where the defence’s conduct in publishing the impugned piece for fair and reasonable and related to a matter of public interest”.<sup>585</sup> Third, in relation to the principle that the limits of acceptable criticism are wider for public figures, especially politicians, State officials and employees, the Defamation Act 2009 does not explicitly contain such a principle. However, Irish courts have referred to this principle in case law.<sup>586</sup>

Finally, it must be mentioned that in 2017, the European Court of Human Rights delivered an important judgment against Ireland, holding that a €1.25 million damages award made against an Irish newspaper for defamation violated the right to freedom of expression.<sup>587</sup> The European Court applied the principle that “unpredictably” large damages’ awards in defamation cases are capable of having a “chilling effect”, and held that the Irish Supreme Court, in awarding €1.25 million in damages, had failed to provide “relevant and sufficient reasons” for award, and thus resulted in a violation Article 10’s guarantee of freedom of expression.<sup>588</sup> Although the judgment in *Independent Newspapers v. Ireland* concerned Irish defamation law prior to the Defamation Act 2009 being enacted, the European Court stated that it “welcome[d]” the Irish Supreme Court’s indication of

<sup>580</sup> Defamation Act 2009, section 20, <http://www.irishstatutebook.ie/eli/2009/act/31/section/20/enacted/en/html#sec20>.

<sup>581</sup> Defamation Act 2009, section 20(2), <http://www.irishstatutebook.ie/eli/2009/act/31/section/20/enacted/en/html#sec20>.

<sup>582</sup> See Submission by RTÉ on the Review of the Defamation Act 2009 by the Tánaiste and the Minister for Justice and Equality (December 2016), p. 5, <http://www.justice.ie/en/JELR/RTE.pdf/Files/RTE.pdf>.

<sup>583</sup> Defamation Act 2009, Section 21, <http://www.irishstatutebook.ie/eli/2009/act/31/section/21/enacted/en/html#sec21>.

<sup>584</sup> Defamation Act 2009, Section 26, <http://www.irishstatutebook.ie/eli/2009/act/31/section/26/enacted/en/html#sec26>.

<sup>585</sup> See Submission by RTÉ on the Review of the Defamation Act 2009 by the Tánaiste and the Minister for Justice and Equality (December 2016), p. 7, <http://www.justice.ie/en/JELR/RTE.pdf/Files/RTE.pdf>.

<sup>586</sup> See, e.g. *Hunter v. Gerald Duckworth & Co Ltd. & Anor* [2003] IEHC 81 (31 July 2003); and *Mahon Tribunal v. Keena & anor* [2009] IESC 64 (31 July 2009).

<sup>587</sup> *Independent Newspapers (Ireland) Limited v. Ireland*, Application no. 28199/15, 15 June 2017. See Tarlach McGonagle, “EHRM (nr. 28199/15: Independent Newspapers (Ireland) / Ireland”, *European Human Rights Cases*, 2017(12), 574; and Ronan Ó Fathaigh, “Independent Newspapers v. Ireland: €1.25 million defamation award against newspaper violated Article 10”, *Strasbourg Observers*, 19 June 2017, <https://strasbourghobservers.com/2017/06/19/independent-newspapers-v-ireland-e1-25-million-defamation-award-against-newspaper-violated-article-10/>.

<sup>588</sup> *Independent Newspapers (Ireland) Limited v. Ireland*, Application no. 28199/15, 15 June 2017, para. 105.





developing domestic practice towards the provision of “more detailed guidance” to juries on the amount of damages for defamation.<sup>589</sup>

#### 4. Systemic safeguards

There are certain legal safeguards that can prevent or disincentivise the launching of SLAPP. First, Section 34 of the Defamation Act 2009 provides for a summary mechanism to dispose of defamation actions. Section 34 states that a court may summarily dispose of a defamation action if the court is satisfied that the statement in respect of which the action was brought is “not reasonably capable of being found to have a defamatory meaning.”<sup>590</sup> However, as mentioned above, a higher threshold for launching defamation actions (e.g., serious harm test under the UK Defamation Act 2013) would be a stronger protection from SLAPP than the current Section 34. Second, Section 8 of the Defamation Act 2009 provides that where a plaintiff in a defamation action serves on a defendant any pleading containing “assertions or allegations of fact”, the plaintiff “shall swear an affidavit verifying those assertions or allegations”.<sup>591</sup> Notably, it is an offence to make a statement in an affidavit that is false or misleading in any material respect, and that one knows to be false or misleading.<sup>592</sup> Finally, there is the Press Council of Ireland,<sup>593</sup> which can act as a gatekeeper for defamation complaints against the press. Indeed, the Defamation Act 2009 provides for the designation of a press council under Section 44 where it satisfies a number of minimum requirements, including independence, under the Act, and the designation was made in 2010.<sup>594</sup> All daily Irish newspapers and many other media outlets are members of the Press Council, and individuals may make a complaint based on the Code of Practice of the Press Council of Ireland,<sup>595</sup> first to the Office of the Press Ombudsman, and then on appeal to the Press Council.

#### 5. Court's role and independence

Irish courts have an important discretionary role in relation to SLAPP cases on the specific issue of damages in defamation cases. This was actually highlighted by the European Court of Human Rights, and as mentioned above, the Court noted that the Irish Supreme Court had recognised that prior to the Defamation Act 2009, trial judges in Ireland were “limited as to the directions that could be given to a jury on the subject of the quantum of damages”.<sup>596</sup> However, while assessment of damages still remains a matter “entirely for the jury” under the Defamation Act 2009, it is “now possible for the trial judge to give more detailed directions to a jury as to the assessment of damages”.<sup>597</sup> Importantly, the European Court welcomed the Supreme Court’s view on developing practice on giving more

<sup>589</sup> Independent Newspapers (Ireland) Limited v. Ireland, Application no. 28199/15, 15 June 2017, para. 106.

<sup>590</sup> Defamation Act 2009, Section 34(2), <http://www.irishstatutebook.ie/eli/2009/act/31/section/34/enacted/en/html#sec34>.

<sup>591</sup> Defamation Act 2009, Section 8(1), <http://www.irishstatutebook.ie/eli/2009/act/31/section/8/enacted/en/html#sec8>.

<sup>592</sup> Defamation Act 2009, Section 8(6), <http://www.irishstatutebook.ie/eli/2009/act/31/section/8/enacted/en/html#sec8>.

<sup>593</sup> Press Council of Ireland, <https://www.presscouncil.ie>.

<sup>594</sup> S.I. No. 163/2010 - Defamation Act 2009 (Press Council) Order 2010, <http://www.irishstatutebook.ie/eli/2010/si/163/made/en/print>.

<sup>595</sup> Code of Practice of the Press Council of Ireland, <https://www.presscouncil.ie/code-of-practice>.

<sup>596</sup> Independent Newspapers (Ireland) Limited v. Ireland, Application no. 28199/15, 15 June 2017, para. 106.

<sup>597</sup> Independent Newspapers (Ireland) Limited v. Ireland, Application no. 28199/15, 15 June 2017, para. 106.



detailed guidance to juries on damages, and it is this discretionary role that is most important for protecting against the threat of unpredictably high damages as a result of SLAPP.

Notably, there have been some positive examples on the issues of damages recently. First, in *Christie v. TV3*, the Irish Court of Appeal set aside a €140,000 damages award for defamation made against a broadcaster by a High Court judge and substituted a substantially lower award of €36,000.<sup>598</sup> (this may demonstrate appeal courts working to reduce damages, but Irish media are still being required to initiate costly appeals to ensure proportionate awards). And second, in *Kehoe v. RTÉ*, in a defamation action taken by a former elected local official against a public broadcaster, the jury awarded only €3,500 in damages against the broadcaster.<sup>599</sup> This was one of the lowest defamation awards made against a media defendant in Ireland. It was made possible by a judgment of the High Court that held that a jury in a defamation trial may apportion liability between a broadcaster and a programme contributor, even where the contributor is not a party to the case.<sup>600</sup>

## 6. Case law

A feature of SLAPP cases in Ireland, as Index on Censorship and others have noted, is that because of the chilling effect of vexatious defamation suits, “[f]ew media outlets decide to take the risk of going to court, often opting to settle instead”.<sup>601</sup> As such, SLAPP can chill public interest expression even before the case reaches court. This makes recording SLAPP cases quite difficult. However, for the first time, in September 2020, the first alert against Ireland over a SLAPP was filed with the Council of Europe’s Platform to promote the protection of journalism and safety of journalists.<sup>602</sup> The alert detailed a defamation suit which have been launched by a political activist against a local Dublin news outlet (Dublin Inquirer), over an article on a matter of public interest.<sup>603</sup> Indeed, eight free expression and media freedom organisations wrote a joint-letter to the Irish government over the defamation suit, claiming that it was a SLAPP, and “intended to intimidate and silence an independent media outlet that is reporting in the public interest”.<sup>604</sup> The purpose of the lawsuit was “not to succeed in court, but to drain their targets of money, time, and energy in an effort to discourage them from reporting further on a particular person or issue”.<sup>605</sup> At the time of writing, the Irish government had

<sup>598</sup> *Christie v. TV3 Television Networks Limited* [2017] IECA 128.

<sup>599</sup> See Ronan Ó Fathaigh, “Jury determines public broadcaster 35% liable for defamatory comments made during programme” (2018) IRIS 2018-9/25, <http://merlin.obs.coe.int/article/8394>.

<sup>600</sup> *Kehoe v. Raidió Teilifís Éireann* [2018] IEHC 340.

<sup>601</sup> Index on Censorship, *A gathering storm: The laws being used to silence the media* (2020), p. 10, <https://www.indexoncensorship.org/wp-content/uploads/2020/06/a-gathering-storm.pdf>.

<sup>602</sup> Lawsuit filed against the “Dublin Inquirer”, Alert – 8 September 2020, Council of Europe Platform to promote the protection of journalism and safety of journalists, [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_count=1&sojdashboard\\_WAR\\_coesojportlet\\_alertId=71014913](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-4&p_p_col_count=1&sojdashboard_WAR_coesojportlet_alertId=71014913)

<sup>603</sup> Lawsuit filed against the “Dublin Inquirer”, Alert – 8 September 2020, Council of Europe Platform to promote the protection of journalism and safety of journalists, [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_count=1&sojdashboard\\_WAR\\_coesojportlet\\_alertId=71014913](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-4&p_p_col_count=1&sojdashboard_WAR_coesojportlet_alertId=71014913).

<sup>604</sup> Index on Censorship, “Ireland notified by Council of Europe over legal action against media outlet”, 8 September 2020, <https://www.indexoncensorship.org/2020/09/ireland-notified-by-council-of-europe-over-legal-action-against-media-outlet/>.

<sup>605</sup> Index on Censorship, “Ireland notified by Council of Europe over legal action against media outlet”, 8 September 2020, <https://www.indexoncensorship.org/2020/09/ireland-notified-by-council-of-europe-over-legal-action-against-media-outlet/>.



Towards an EU-wide approach to anti-SLAPP?

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yet to respond to the alert on the Council of Europe's Platform to promote the protection of journalism and safety of journalists.



The legal background of SLAPP cases in

## Italy

Contribution by Linda Ravo (Legal and Policy Consultant)<sup>606</sup>

### 1. Laws most vulnerable to abuse

Based on reports and information available, the following may be regarded as laws more vulnerable to abuse in Italy when it comes to lawsuits intended to chill public participation. This should however not be considered as an exhaustive illustration, given that a variety of legal provisions can be relied on in order to achieve that aim, also depending on the nature of the public participation conduct targeted (e.g. protests and assemblies) and the existing relationship between the parties (e.g. an employment relationship).

#### 1.1. Criminal defamation

Defamation is a criminal offence punished by Article 595 of the Criminal Code,<sup>607</sup> by a penalty of a fine up to 1.032 EUR or custody of up to one year. Penalties are increased if:

- the defamation concerns an accusation of fact (ie, the attribution to a person of a specific conduct, “attribuzione di un fatto determinato”) in which case the penalty is a fine up to 2.065 EUR or custody of up to two years;
- the defamation targets a political, administrative or judicial body (other than the offence pursuant to Article 342 of the Criminal Code concerning declarations in front of the body);
- the defamation is committed by means of an official act (“atto pubblico”) as defined in Article 2699 of the Civil Code (penalty of a fine of minimum 516 EUR or custody between 6 months and 3 years)
- the defamation is committed through press or through any other form of public dissemination (penalty of a fine of minimum 516 EUR or custody between 6 months and 3 years).

In the case of defamation committed through public dissemination, Article 596 bis of the Criminal Code provides for the criminal liability of the editors/deputy editor and publisher or the printer (for non-periodical press) for failure to conduct supervision of the content of the publication.

The defamation committed through press is specifically regulated in the sectorial Press Law n 47/1948,<sup>608</sup> which provides, in its Article 13, for increased penalties of a fine of minimum 516 EUR or

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<sup>606</sup> This paper was authored by dr. Linda Maria Ravo as expert adviser to the Civil Liberties Union for Europe. The author is very thankful to Andrea Di Pietro, lawyer and legal adviser of Ossigeno per l’Informazione, to Paola Rosà, Media Freedom Resource Centre, OBC Transeuropa and to experts from the non-governmental organisations Article 19, Greenpeace European Unit, Greenpeace International and Index on Censorship for their contributions and comments. The usual disclaimer applies.

<sup>607</sup> [Royal Decree of 19 October 1930, n. 1398.](#)



<sup>608</sup> [Law of 8 February 1948, n. 47.](#)

custody of between one and six years. In order for defamation to be punishable under the Press Law, it must involve an accusation of fact.

A criminal complaint is necessary for the prosecution of these offences (Article 597 of the Criminal Code), to be filed within 3 months from the moment the complainant is aware of the fact (Article 124 of the Criminal Code). The person filing the criminal complaint is also able to file claim for damages within the criminal proceedings (Article 185 of the Criminal Code and Article 74 of the Code of Criminal Procedure<sup>609</sup>), as well as additional compensation in case of defamation through press (Article 12 of Press Law n 47/81948).

The crime is time-barred in 6 years (Article 157 of the Criminal Code), although various existing procedural rules (see in particular Article 160 of the Criminal Code) allow complainants to easily interrupt this term which can be de facto prolonged up to 7 and a half years.

Data collected on 2017 show that, in that year alone, 9,479 criminal defamation lawsuits were filed out of which around 70%, or two-thirds, were dismissed at a preliminary stage of proceedings by the judge for the preliminary investigation.

year	criminal lawsuits filed according to the Press Law (with accusation of fact)	stopped by the Judge for the preliminary investigation 	going to trial 
2011	4524	3057 (67,6%)	710 (16%)
2017	9479	6350 (67%)	625 (6,6%)

Source: Claudia Pierobon, Paola Rosà, Media Freedom Resource Centre, OBC Transeuropa [“SLAPPs: The Italian Case”](#) (2019)

There is ample evidence of the severe chilling effect of these provisions on freedom of expression and freedom of the press.<sup>610</sup>

### ***1.2. Civil liability actions in connection to criminal defamation***

Civil liability actions are routinely filed to claim compensation for damages connected to a criminal defamation complaint (Article 185 of the Criminal Code and Article 2043 of the Civil Code<sup>611</sup>).

Defamation committed through press is also regulated in the sectorial Press Law n 47/1948 which provides for special rules on civil liability of the editors/deputy editor and publisher or the printer (for non-periodical press) for the failure to conduct supervision of the content of the publication.

Applicable procedural rules make these civil lawsuits potentially even more harmful than criminal ones, considering that:

<sup>609</sup> [Decree of the President of the Republic of 22 September 1988, n. 477.](#)

<sup>610</sup> See for example Autorità per le Garanzie nelle Comunicazioni, [Osservatorio sul giornalismo – II edizione](#) (2017).

<sup>611</sup> [Royal Decree of 16 March 1942, n. 262.](#)

- there is no preliminary scrutiny by the judicial authority;
- there is no cap on damages;
- the action can be filed within as long as 5 years (pursuant to Article 2947(3) of the Civil Code) – a term which can actually be easily and repeatedly interrupted in practice by means of a simple letter directed at the concerned person;
- rules on evidence provide that when the plaintiff argues the defamatory nature of a certain statement, it is incumbent on the defendant to prove the existence of a cause of justification/exclusion, including as regards the exercise of the right to news or critical reporting (“diritto di cronaca e di critica”, see below);
- existing rules on concurrent proceedings provide for the civil liability action to be suspended until a final decision is taken in the related criminal proceedings (Article 75 of the Code of Criminal Procedure), but then to continue with a view to a decision meant to apply the outcomes of the judgment rendered in the criminal proceedings;
- amendments to the pleas and related arguments are possible, provided that they are connected to the substantial matter raised, pursuant to Article 183 of the Code of Civil Procedure<sup>612</sup>, and can be used to lengthen the procedure (see also Suprema Corte di Cassazione, order of 7 September 2020 n. 18546).

The considerable length of civil proceedings in Italy exacerbates the chilling effect that abusive civil liability actions have on SLAPP targets.

### ***1.3. Right to rectification and reply***

This right is regulated by Article 8 of Press Law n 47/1948. Failure by the editor or other responsible person to publish rectifications and replies within the time limits or with the modalities set by this provision enables the complainant to obtain an injunction to coerce publication (Article 700 of the Code of Civil Procedure) and may be punished with a fine of between 7.746 and 12.911 EUR.

### ***1.4. Criminal charges for facilitating irregular migration***

Research<sup>613</sup> points at a high number of criminal investigations initiated pursuant to Article 12 of the Legislative Decree n 286/1998 on immigration<sup>614</sup> on the facilitation of irregular migration, and then mostly discontinued, against non-governmental organisations conducting search and rescue operations. These may be relevant to consider for the purpose of this study considering that these activities may be regarded as ‘public participation’. It is however important to note that recent cases have been mainly prompted by the Ministry of Interior in the exercise of officials’ functions.

In this respect, it is worth noting that the law provides for an exclusion of criminal liability for humanitarian assistance provided to persons already present on the territory. It is also common

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<sup>612</sup> [Royal Decree of 28 October 1940, n. 1443](#).

<sup>613</sup> EU Agency for Fundamental Rights, [Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations](#) (2018).

<sup>614</sup> [Legislative decree of 25 July 1998, n. 286](#).



understanding based on jurisprudence that criminal liability for humanitarian assistance is to be excluded pursuant to Articles 51 or 54 of the Criminal Code.

## 2. Potential defences

Generally, the exercise of fundamental rights can represent a cause of exclusion from criminal liability (pursuant to Article 51 of the Criminal Code) as well as from civil liability.

As regards defamation, the exercise of the right to news and critical reporting is reaffirmed by Article 21 of the Constitution and represents a cause of exclusion from criminal liability pursuant to Article 51 of the Criminal Code as well as from civil liability, subject to certain conditions defined by jurisprudence (see below).

Other possible justifications as regards defamation are contained in Article 596 of the Criminal Code (admissibility of evidence as regards the truthfulness of the facts concerned in certain cases, e.g. where the alleged defamation concerns the conduct of a public officials in the exercise of their official functions) and in Article 599 of the Criminal Code (exclusion of criminal liability if the alleged defamation is a direct response to a provocation).

Article 54 of the Criminal Code on the state of necessity is another general provision that can be relied on to exclude criminal liability, for example as regards facilitation of irregular migration if the conduct amounts to the provision of humanitarian assistance (see above).

It is also worth noting that, according to Article 368 of the Criminal Code, false accusation of a crime can amount to the criminal offence of calumny (“calunnia”) when the person making the accusation is aware that the person concerned is not guilty of the crime and the accusation is made through a complaint or any other act or request directed at the judicial authorities or any other authority referring to judicial authorities. This applies also to anonymized acts or requests or acts or requests made under a false name. This would allow a person targeted, for example, by an abusive criminal defamation complaint amounting to a SLAPP to submit a counter criminal complaint for calumny and/or file a claim for damages (see Suprema Corte di Cassazione, judgment of 21 February 2002 n. 2515). However, it is to be noted that it is generally very hard to produce sufficient evidence as to the awareness of the accusing person that, at the moment of the accusation, the person concerned was not guilty of the crime.

## 3. Compliance with ECHR principles

As regards the balance between the protection of reputation and the exercise of the right to freedom of expression, and particularly the right to right to news and critical reporting, a landmark judgment of the Italian Supreme Court (Suprema Corte di Cassazione, judgment of 18 October 1984 n. 5259) set out three basic criteria:

- the social utility or social relevance of the information;
- the truthfulness of the information (which may be presumed if the person has seriously verified their sources);



- restraint (“continenza”), which refers to the need for the statements to be expressed in a civilised manner, which must not violate the basic dignity to which any human being is entitled.

Consistent jurisprudence has been developing the scope and application of such criteria, which demonstrate, among others, the account given in balancing rights to (critical) statements’ contribution to a debate on a matter of public interest or general concern, which may also be inferred from the circumstance that the statements concern public figures such as politicians (see for example Suprema Corte di Cassazione, judgment of 8 May 2019 n. 19694). Nonetheless, as stated above, Article 595(4) of the Criminal Code provides for aggravated sanctions if the statements are referred to a political, administrative or judicial body and therefore reflects an increased protection granted as a matter of principle to these actors.

The relevance of the vertical power-relationship between the parties, or the existence of an imbalance of power between the parties, is generally not considered in court practice.

In this context, it is worth recalling that the European Court of Human Rights (ECtHR) has condemned Italy on various occasions for the disproportionate interference with the right to freedom of expression due to the mere existence of prison sentences for defamation (e.g., ECtHR, *Belpietro v. Italy* and *Ricci v. Italy*). A recent judgment has been rendered by the Constitutional Court on this matter, which confirms the principles developed by ECtHR jurisprudence calling for a reform of defamation provisions contained in Article 595 of the Criminal Code and Article 13 of the Press Law n 47/1948 (Corte Costituzionale, order of 9 June 2020 n 132<sup>615</sup>). Discussions have been ongoing on a proposed reform of criminal provisions on defamation<sup>616</sup>. The proposed solution would exclude prison sentences as a sanction for this criminal offence but would however introduce much higher financial penalties (which could always be translated into forms of deprivation of liberty in the impossibility to pay the fines pursuant to existing rules<sup>617</sup>). This attracted harsh criticism by experts.<sup>618</sup>

#### 4. Systemic safeguards

As regards criminal defamation, the main safeguards against possible SLAPPs lie in the possibility for the prosecutor, who represents the criminal charges following a criminal complaint submitted by the offended person, to request the judge to dismiss the case if it finds the complaint to be unfounded (Article 408 of the Code on Criminal Procedure). The judge has to assess the request and may refuse it and order the proceedings to continue (Article 409 of the Code on Criminal Procedure). The decision not to press charges may also be opposed by the offended person, with a request directed to the judge to order the investigation to continue with an indication of the relevant elements to be further investigated. In cases where the prosecutor decides to press charges, a further pre-trial admissibility filter is exercised by the judge for preliminary investigations (GIP). The trial judge also has the power

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<sup>615</sup> Full text available [here](#).

<sup>616</sup> [Disegno di legge S. 812 – 18° legislatura](#).

<sup>617</sup> Article 102 of Law of 24 November 1981, n. 689.

<sup>618</sup> See Andrea di Pietro, Ossigeno per l’informazione, [Defamation bill. The maxi-fine proposed by the Senate are more punishing than prison](#) (2020).





to stop proceedings pursuant to Article 129 of the Code of Criminal Procedure when it is satisfied that there are reasons that exclude criminal liability.

When, as an outcome of proceedings, defendants are declared innocent, they may claim the reimbursement of legal fees (Article 427 of the Code of Criminal Procedure). However, a rather wide margin of discretion is recognized to the court which may decide that the fees need to be otherwise compensated between the parties. In cases of demonstrated gross negligence on the part of the accuser, the accused, if declared innocent, may claim damages (Article 542 of the Code of Criminal Procedure).

As regards statutory caps, a cap on applicable financial penalties for crimes results from Article 24 of the Criminal Code, although the threshold set is very high (50,000 EUR), and there is no cap for damage compensation that a complainant may request, including as regards defamation.

In civil proceedings, it is not possible for the judge to early dismiss a case and avoid full discovery and a decision on the merits (claims can be declared inadmissible essentially only for the lack of respect of procedural formalities).

Mandatory conciliation (which applies to civil liability action for defamation through press or other public dissemination pursuant to existing rules on mediation<sup>619</sup>) could be regarded as a possible safeguard, but it does not necessarily favour the SLAPP target.

As in criminal proceedings, there is no cap on damages.

Pursuant to Article 91 of the Code of Civil Procedure, the losing party is in principle condemned to pay the costs of proceedings and the legal fees of the other party. However, an ample margin of discretion is recognized to the court which may (and often does) decide to compensate part of or all the legal fees (see Article 92 of the Code of Civil Procedure and related case-law). Cases where judges have made use of the possibility to impose the payment of legal fees on the complainant when dismissing a civil claim for defamation as unfounded seem to be considered rather exceptional<sup>620</sup>.

Pursuant to Article 96 of the Code of Civil Procedure, a losing party who has acted or resisted in court with bad faith or gross negligence may, at the request of the other party, be condemned to pay damages, including punitive or exemplary damages (see Suprema Corte di Cassazione, order of 12 June 2018 n. 15209). However, the Supreme Court clarified that such abusive use of the process cannot be relied on to declare the inadmissibility of the claim (Suprema Corte di Cassazione, order 3 May 2010 n 10634). A bill proposing additional safeguards to counter vexatious defamation lawsuits through regulating in particular the possibility to obtain punitive damages, was proposed in 2019 but is yet to be discussed<sup>621</sup>, while amendments have already been proposed to weaken the proposed safeguards.

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<sup>619</sup> Article 5(1-bis) of Legislative Decree of 4 March 2010 n. 28.

<sup>620</sup> See for example the reaction by the national journalists association to a case where, following the dismissal of a one million EUR defamation complaint against a news outlet by the enterprise responsible of the Trapani Airport, the judges condemned the complainant to pay the costs of proceedings: Federazione Nazionale Stampa Italiana, [Trapani, querela giornalista e chiede un milione di euro. Tribunale dice no e lo condanna a pagare le spese](#) (2020).

<sup>621</sup> [Disegno di legge n. 835 – 18° legislatura](#).



As regards legal aid, no special rules apply to cases which are likely to qualify as SLAPPs: the targeted person may apply to legal aid under the general rules which revolve mainly around the person's income.<sup>622</sup> As reported by experts<sup>623</sup> as well as non-governmental organisations<sup>624</sup>, existing rules on legal aid are rather restrictive and, coupled with several problems reportedly hampering the effective functioning of the legal aid framework, reportedly allow only a very limited number of persons to benefit from legal aid.

In addition, besides specific insurance framework contracts that may be available to editors and journalists that are members of journalists associations<sup>625</sup>, insurance companies do not generally offer insurance against litigation, in particular for defamation, to journalists and editors, also due to the fact that no statutory cap on damages exists. The exposure of journalists is reportedly made even more difficult by the fact that editors refuse to cover damages for statements ascertained as defamatory by a court's judgment.

Another aspect which is worth mentioning is that, pursuant to existing rules on legal entities' financial management (Article 2424 bis (3) of the Civil Code), a media outlet targeted by a civil claim for damages, such as for defamation, involving liability of the editor, is under an obligation of provisioning the likely amount of the damage the court could condemn the outlet to pay (based on the request of the claimant). For small and medium outlets, this provisioning often leaves the outlet without liquidity and can paralyse their functioning.

The National Council of the Chamber of Journalists committed to take action to support journalists targeted by SLAPPs.<sup>626</sup> There is however no such thing as a press council capable of acting as a filter on complaints against the press. A helpdesk was opened by the union Associazione Stampa Romana<sup>627</sup> and a non-governmental organization advocating for freedom of expression and press freedom, Ossigeno per l'Informazione, offers pro-bono legal assistance to journalists and bloggers facing legal charges or suits.<sup>628</sup> However, efforts remain fragmented and are not supported by the authorities.

## 5. Court's role and independence

Courts have played a key role in ensuring an interpretation of existing provisions in accordance with the fair balance to be struck between conflicting rights in line with constitutional and international human rights standards.

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<sup>622</sup> [Presidential Decree of 30 May 2002, n. 115](#).

<sup>623</sup> AGI, [Sempre più difficile ottenere l'avvocato gratis. Il declino del gratuito patrocinio](#) (2019).

<sup>624</sup> See for example Italian Coalition for Civil Liberties and Rights (CILD) and Associazione Antigone, Italy, in Civil Liberties Union for Europe, [A response to the European Commission consultation on rule of law in the EU](#), (2020).

<sup>625</sup> Such agreements were negotiated by the [journalists association](#) and by a [press trade union](#) for freelance journalists and for editors respectively, back in 2016 and 2019.

<sup>626</sup> Ordine dei giornalisti, [Querele temerarie: l'impegno del CNOG per sostenere i giornalisti oggetto di azioni legali intimidatorie](#) (2019).

<sup>627</sup> Libera Informazione, [Lo Sportello Roberto Morrione – Querele Temerarie](#) (2011).

<sup>628</sup> For more information, see Media Freedom Resource Centre, OBC Transeuropa, [Legal Defence Centres Fighting for Press Freedom in Italy](#) (2018).



However, this is not sufficient to remedy the harmful effect of abusive lawsuits in the absence of adequate safeguards, as research shows.<sup>629</sup> In Italy, the lack of effective safeguards, in particular with a view to obtain an early dismissal of proceedings, is among others amplified by the systemic issue of the excessive length of proceedings in civil trials, as reflected in consistent ECtHR jurisprudence. In criminal cases, existing safeguards are also frustrated by the length of preliminary investigations: a recent study commissioned by the European Parliament<sup>630</sup> reports that, “while unfounded claims are mostly dismissed in the preliminary stages of criminal proceedings, these last for an average period of 30 months, during which the accused has to sustain all related costs in both financial and psychological terms and may consequently be deterred from undertaking further investigations before a verdict is issued”.

## 6. Overview and examples of SLAPP-type cases

The Italian Media Regulatory Authority has recognised SLAPPS as a main source of concern for media freedom in the country.<sup>631</sup> According to data collected by the non-governmental organization Ossigeno per l’Informazione, SLAPPs amount to over 30 % of the overall threats received by journalists in the year 2019.<sup>632</sup> However, data collection on SLAPPs in Italy is made difficult by the way data on lawsuits are registered and compiled by the Italian National Institute of Statistics. As regards civil lawsuits in particular, this is due to the fact that data are recorded on the basis of the type of action so that an in-depth analysis of each claim for damages would be necessary to link such claims to public participation conducts and/or defamation complaints. Furthermore, statistics do not consider the extensive number of out-of-court settlement of disputes.

Based on information collected in relevant reports<sup>633</sup> and databases<sup>634</sup> by independent non-governmental organisations, reports by international bodies<sup>635</sup>, and reports of prominent cases in the press, it seems that abusive lawsuits against public participation that can qualify as SLAPPs are mainly brought:

- against journalists, bloggers and activists,
- by politicians and public officials, in particular members of the judiciary, although cases brought by prominent businesses are increasing;
- targeting reports of wrongdoings or corruption, satire and manifestation of criticism.

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<sup>629</sup> Ossigeno per l’Informazione, [Shut up or l’Il sue you!](#) (2016).

<sup>630</sup> European Parliament, [Safety of journalists and the fighting of corruption in the EU](#) (2020), p. 46.

<sup>631</sup> Autorità per le Garanzie nelle Comunicazioni, Osservatorio sul giornalismo – II edizione, cited.

<sup>632</sup> European Parliament, [Safety of journalists and the fighting of corruption in the EU](#) (2020), cited, p. 45.

<sup>633</sup> Ossigeno per l’Informazione, [Shut up or l’Il sue you!](#), cited.

<sup>634</sup> Ossigeno per l’Informazione, [La tabella dei nomi](#).

<sup>635</sup> Organization for Security and Co-operation in Europe (OSCE), [Defamation and Insult Laws in the OSCE Region: A Comparative Study](#) (2017).



Selected examples of prominent defamation cases against journalists and bloggers are regularly pointed at by non-governmental organisations.<sup>636</sup> These include cases brought by enterprises and businesses.<sup>637</sup>

The press has also reported about a number of defamation lawsuits filed against activists and civil society organizations, including a recent case<sup>638</sup> concerning a defamation claim against an environmental activist and a civil society organization for an anti-pesticide campaign and a first instance ruling rendered on another case<sup>639</sup> concerning criticism expressed by an animal rights activist towards a well-known football player practicing hunting. Examples of cases where criminal charges were pressed against civil society organisations and activists engaging in search and rescue operations (most of which were later declared unfounded) have been compiled, among others, by the EU Agency for Fundamental Rights.<sup>640</sup>

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<sup>636</sup> See for example International Press Institute, [Media Laws Database – Italy](#) and the [compilation of cases](#) by the Italian non-governmental organisation Articolo 21.

<sup>637</sup> Among recent prominent cases, the recent legal action brought by ENI against the Italian newspaper Il Fatto Quotidiano (Il Fatto Quotidiano, [E' vietato raccontare i guai di Descalzi & C. La causa civile di Eni contro Il Fatto Quotidiano](#) (2020)), the 1 million EUR civil liability action brought by the enterprise managing the Trapani airport against a news outlet, alter dismissed (Articolo 21, [Trapani. Querela civile da un milione di euro](#) (2017)) and the 39 million EUR claim filed against journalist Nello Trocchia by an online academic institution (Il Fatto Quotidiano, [Una 'querela-bavaglio' da 39 milioni di euro per intimidire Nello Trocchia](#) (2018)).

<sup>638</sup> European Changemakers, [South Tyrol SLAPP case: Karl Bar](#) (2020).

<sup>639</sup> Il Fatto Quotidiano, [Roberto Baggio vince la sua causa per diffamazione al Tribunale di Padova. Condannato l'animalista che lo insultò](#) (2020).

<sup>640</sup> EU Agency for Fundamental Rights, [Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations](#) (2018), cited.



The legal background of SLAPP cases in

## Latvia

Contribution by Lolita Buka (University of Latvia)

### 1. Laws most vulnerable to abuse:

As an introductory point, it should be noted that SLAPP cases, or at least the ones that have been discussed publicly or information about which is available on the public domain, are rather an exception than norm. According to the report of Reporters Without Borders politicians are attacking and suing journalists quite often, especially around elections.<sup>641</sup> However, the term “quite often” is rather subjective in nature and fails to describe the situation even in comparative terms. There has been no overarching research with an aim to analyse court or administrative practice and try to identify instances of SLAPP in Latvia. Such a research would require time and financial resources as well as requesting access to databases that are not publicly accessible. Therefore, also the findings included in this template are based on general observations rather than scrutinous analysis of the practices of courts and administrative institutions.

The two norms that can be invoked rather easily by the SLAPPers are the norms against defamation in Criminal and Civil Laws of the Republic of Latvia.

**Article 157 of the Criminal Law of the Republic of Latvia**<sup>642</sup> provides for criminal liability if a person publicly, knowingly and intentionally distributes fictions, knowing them to be untrue and defamatory of another person, in printed or otherwise reproduced material, as well as orally. Second part of the article provides for liability if the defamation takes place in mass media. It also provides for higher penalty - temporary deprivation of liberty (up to 3 months) or community service, or a fine.

Criminalisation of defamation and providing prison sentences for defamation is of itself against the existing trends in Europe<sup>643</sup> and Latvia has been criticised for not decriminalising the offence<sup>644</sup>. In the context of SLAPP litigations, such a heavy punishment can cause even more detrimental chilling effect on journalists and others reporting on publicly relevant issues. At the same time, it should be taken into account that the author was unable to find any decisions which would apply deprivation of liberty as a punishment for criminal defamation. Even more, majority of decisions, in which the norm was applied, dealt with materials relating to online publications of private individuals trying to defame others after personal conflicts.

Some politicians have tried to use the norm against investigatory journalists, but the police and the prosecutor’s office have refused to initiate cases, among other things, stating that the allowable

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<sup>641</sup> <https://rsf.org/en/latvia>

<sup>642</sup> <https://likumi.lv/ta/en/en/id/88966-criminal-law> (in English); <https://likumi.lv/ta/id/88966#p157> (in Latvian)

<sup>643</sup> See for example, Recommendation of the Parliamentary Assembly of the Council of Europe <https://pace.coe.int/en/files/17587/html>

<sup>644</sup> See for example the report of Freedom House <https://freedomhouse.org/country/latvia/freedom-world/2020>



criticism against politicians is very high.<sup>645</sup> Such activities by the politicians did not go unnoticed by the broader society. For example, the Latvian Writers Association publicly criticised the politicians arguing that they are trying to interfere with freedom of expression.<sup>646</sup>

Thus, it can be concluded that the Article 157 of the Criminal Law can be invoked by SLAPPers, especially because of the seriousness of its penalty, but the application of this article by the relevant institutions mitigates it.

**Article 2352<sup>1</sup> of Civil Law of the Republic of Latvia<sup>647</sup>** provides that each person has the right to bring court action for the retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true. The article also includes the procedure for retracting the defamatory statements and states that a court can determine amount of the compensation to be paid.

Article 7, Paragraph five of the Law “On the Press and Other Mass Media” also provides that it is prohibited to publish information which offends the honour and dignity of natural and legal persons and raises them into disgrace. Pursuant to Article 21 of this law natural and legal persons have the right to seek apologies in cases of insult to honour and dignity. In its turn, article 28 of the said Law provides that damage, including moral damage caused by a mass media to a natural or legal person, by providing false information, defamation and insulting its honour and dignity by publishing news and information the publication of which is prohibited by law, must be reimbursed to this person in accordance with the procedures prescribed by law.

Reading Article 23521 of Civil Law in conjunction with the Law on the Press and Other Mass Media<sup>648</sup> a claim can be brought against the medium itself, its editor or the journalist in question.<sup>649</sup> It means that this norm can be easily used as SLAPPers to target particular media or even journalists. One of the most discussed defamation cases against journalists in Latvia was also based on this particular article of the Civil Law.<sup>650</sup>

Another specificity that should be taken into account when analysing whether a particular case can be considered as SLAPP is the divide between Latvian and Russian language mediums and society in general. For example, mainly the Russian speaking press and civil society have raised alarm that a Russian journalist might have been “framed” by the Security Police for keeping pornographic materials.<sup>651</sup> Sometimes this alarm has even attracted international attention, such as in the case when a journalist from Russian State Television was expelled from Latvia.<sup>652</sup> However it should be

<sup>645</sup> <https://rebaltica.lv/2019/02/usakovs-un-gobzems-zaude-prasiba-ierosinat-kriminalprocesu-pret-rebaltica-zurnalistem/>

<sup>646</sup> <https://www.delfi.lv/news/national/politics/draudot-ar-tiesvedibu-tiek-ierobezota-zurnalistu-varda-briviba-uzskata-rakstnieku-biedriba.d?id=50376257>

<sup>647</sup> <https://likumi.lv/ta/en/en/id/225418-the-civil-law> (in English), <https://likumi.lv/ta/id/225418-civillikums> (in Latvian)

<sup>648</sup> <https://likumi.lv/ta/en/en/id/64879-on-the-press-and-other-mass-media>

<sup>649</sup> See the Decision of the Supreme Court of the Republic of Latvia of 8 May 2002 in the Case No. [SKC-261/2002](#).

<sup>650</sup> <https://www.lsm.lv/raksts/zinas/latvija/stajies-speka-administratoram-sprudam-nelabveligs-spridums-prasiba-pret-ir-a226699/> , <https://www.tiesas.lv/aktualitates/pieejams-rigas-apgabaltiesas-spridums-mara-spruda-prasiba-pret-zurnalu-ir-7153>

<sup>651</sup> <https://rus.delfi.lv/news/daily/latvia/pb-prosit-nachat-ugolovnoe-presledovanie-zhurnalista-i-redaktora-yuriya-alekseeva-po-trem-statyam.d?id=50554171&all=true>

<sup>652</sup> <https://www.osce.org/fom/364821>



noted that the legal norms applied in those instances vary from norms of Criminal Law providing penalty for child pornography to norms of Immigration Law prohibiting entrance in the country for blacklisted persons. Therefore, even in the case if those could be considered to be instances of SLAPPING (such a conclusion would require deeper analysis of information not available on public record), they would not allow to make any conclusions about particularly vulnerable laws, but rather on their application. In addition, the tensions between Latvian and Russian speaking parts of the society might add an emotional background that admittedly can influence the possibilities and temptations for SLAPP-like cases but might also make real cases look like SLAPPS.

At the same time, several norms of the Criminal Law of the Republic of Latvia<sup>653</sup> can be considered vague and could theoretically be abused:

- Article 80 criminalises actions directed against the Republic of Latvia without specifically describing these actions, thus allowing a wide margin of appreciation in its application.
- Article 80 criminalises invitations to act against the interests of the Republic of Latvia in rather vague terms. The UN Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression and on the rights to freedom of peaceful assembly and of association have expressed their concern about the vagueness of this and the previously mentioned norm.<sup>654</sup>
- Article 231 criminalises hooliganism (a gross disturbance of the public order, which is manifested in obvious disrespect for the public or in insolence, ignoring generally accepted standards of behaviour and disturbing the peace of persons or the work of institutions, undertakings or organisations. This article has been applied in various situations, including the spreading of fake news. However legal practitioners are not of the same mind whether such an application is foreseeable enough.<sup>655</sup>

At the same time the lack of case law applying these norms precludes to draw any conclusions on whether these norms can actually be abused by SLAPPers.

## 2. Potential defences

According to the case law, civil liability and the duty to retract defamatory statements arises only if the published information is false (untrue) and defamatory. Thus, the courts analyse:

1. Does the published information contain facts or opinions;
2. Can the facts be verified and proved;
3. Is the information defamatory.<sup>656</sup>

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<sup>653</sup> <https://likumi.lv/ta/en/en/id/88966-criminal-law> (in English); <https://likumi.lv/ta/id/88966-kriminallikums> (in Latvian)

<sup>654</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=13407>

<sup>655</sup> <https://m.juristavards.lv/doc/277529-huliganisms-interneta-vai-varda-brivibai-ir-robezas/>

<sup>656</sup> See for example the Judgment of the Riga District Court of 4 April 2016 in the case No. C27251812. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/300841.pdf>



Therefore, the claimant must submit proof to the court on why they think the publication is defamatory. One of the lines of the defendant can then be that the facts published are truthful or they are basing their opinion on truthful information.<sup>657</sup> At the same time a journalist cannot be held liable of information which he reasonably and in good faith suspected to be true, but later it turned out to be fake.<sup>658</sup> Thus it can be concluded that good faith can be used as a defence even in cases where the published information is untrue. However, the subjective attitude of the publisher (journalist) and the objective indicators will be taken into account by the court as well.

### 3. Compliance with ECHR principles

Article 89 of the Constitution of the Republic of Latvia provides that the State recognises and protects fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia.<sup>659</sup> The Constitutional Court has repeatedly emphasized that it means that the fundamental rights recognised in the Constitution must be interpreted in accordance with the rights enshrined in the European Convention of Human Rights, including the right to freedom of expression.<sup>660</sup> Thus also the principles developed by the European Court of Human Rights can be and have been directly applied by the courts in assessing cases dealing with freedom of expression. Two very notable cases against Latvia, namely, *a/s Diena and Ozolins v. Latvia* and *Nagla v. Latvia*, of the European court of Human Rights in which violations of article 10 of the European Convention of Human Rights were found, have helped to raise the importance of these principles in the eyes of the courts.

The Latvian Courts apply the principles developed by the ECtHR in civil and criminal cases in evaluating whether the information published is a fact of opinion,<sup>661</sup> arguing that the publicly well-known persons have wider margin of criticism<sup>662</sup> and in other cases. The Supreme Court has also repeatedly emphasized the importance of these principles in their compilations of case-law on various topics (such as civil defamation<sup>663</sup> and hate speech<sup>664</sup>) which in turn are used as guidelines by the

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<sup>657</sup> See for example the Judgment of the Supreme Court of the Republic of Latvia of 28 February 2018 in the case No. SKC-68/2018 (ECLI:LV:AT:2018:0228.C31370910.1.S), Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/345669.pdf>

<sup>658</sup> See for example the Judgment of the Supreme Court of the Republic of Latvia of 26 January 2005 in the case No. SKC-41/2005 (C2839702), Available at: <http://at.gov.lv/downloadlawfile/3565>

<sup>659</sup> <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> (in English); <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme> (in Latvian)

<sup>660</sup> See for example judgment of the Constitutional Court of the Republic of Latvia of 22 February 2010 in the case No.2009-45-01, Available at: [https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-45-01\\_Spriedums.pdf#search=](https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-45-01_Spriedums.pdf#search=)

<sup>661</sup> See for example the Judgment of Riga district court of 14 February 2018 in the case No. C30552217, Available at: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:RVPT:2018:0214.C30552217.1.S>

<sup>662</sup> See for example the Judgment of Latgale Regional court of 9 October 2018 in the case No. KA03-0142-18, Available at: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:LAAT:2018:1009.11903037615.7.S>

<sup>663</sup> [http://at.gov.lv/files/uploads/files/6\\_Judikatura/Tiesu\\_prakses\\_apkopojumi/2018/Gods\\_un\\_ciena\\_apkopojums\\_30012019.docx](http://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/2018/Gods_un_ciena_apkopojums_30012019.docx)

<sup>664</sup> [http://at.gov.lv/files/uploads/files/6\\_Judikatura/Tiesu\\_prakses\\_apkopojumi/2018/Naida%20runa%20un%20varda%20briviba\\_Apkopojums\\_2018\\_22\\_10\\_2018.doc](http://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/2018/Naida%20runa%20un%20varda%20briviba_Apkopojums_2018_22_10_2018.doc)





lower courts and other practitioners applying the norms. At the same time it should be noted that not every judgment dealing with online publications, especially if they are not made by journalists or do not deal with topics of public interest, include detailed argumentation on how the particular case affects freedom of expression.<sup>665</sup>

The lack of number of the cases that can be positively identified as SLAPP precludes to draw such far-reaching conclusions. However, as noted before, the courts do evaluate whether the person criticised is a publicly well-known figure. In addition, as can be seen, for example, from the actions of the police, who have refused to initiate criminal proceedings even after repeated applications by politicians (including from the mayor of the capital city),<sup>666</sup> or administrative court which has recognised that role of the arguments of investigative journalists may be attached more power than those of a municipality,<sup>667</sup> the vertical relationship that may exist between the claimants may not be detrimental to the outcomes of the cases.

#### 4. Systemic safeguards

The Civil Procedure Law<sup>668</sup> provides for several procedural aspects that could disincentivise SLAPPers from launching SLAPP lawsuits:

- Article 73.<sup>1</sup> which is called “Use of Rights and Obligations in Bad Faith or Disrespect Against a Court” provides for the possibly the most direct safeguard against SLAPP litigations. The third part of this article provides that “a court may impose a fine of up to EUR 1200 on a party for submission of a knowingly false application, statement of claim, or complaint, except for an ancillary complaint, notice of appeal or cassation, for the purpose of achievement of an unlawful objective or prevention of the protection of rights or lawful interests.” Thus, if a court recognises that a particular case is a SLAPP litigation, a fine may be imposed on the claimant. However, the particular norm was introduced into the law only at the end of 2018 and the legal practice is insufficient to make any conclusions regarding its application and influence. It also should be taken into account that the maximum penalty amounts only to 1200 euro (a little more than 2 minimum salaries in Latvia in 2021), which might be too low to actually deter persons from submitting false claims (especially if those persons are well situated as politicians, corporations etc.).
- As mentioned before, the burden of proof on why a particular information published is harmful is upon the claimant. Thus, the claimant has to come up with arguments on the defamatory or otherwise harmful nature of the information.

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<sup>665</sup> See for example the Judgment of Zemgale Regional court of 3 September 2020 in the case No. 12220001716 <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:ZAT:2020:0903.12220001716.9.S>

<sup>666</sup> <https://rebaltica.lv/2019/02/usakovs-un-gobzems-zaude-prasiba-ierosinat-kriminalprocesu-pret-rebaltica-zurnalistem/>

<sup>667</sup> See for example the Judgment of the Supreme Court of the Republic of Latvia of 18 April 2019 in the case No. SKA-917/2019; Available at: [ECLI:LV:AT:2019:0418.A420169118.5.S](https://ecli.lv/AT:2019:0418.A420169118.5.S)

<sup>668</sup> <https://likumi.lv/ta/en/en/id/50500-civil-procedure-law> (in English); <https://likumi.lv/ta/id/50500-civilprocesa-likums> (in Latvian)



- Article 34 provides for court fees to be paid when submitting an application to the court. The general rule there is that the higher the compensation the claimant wants to receive, the higher the fee. Thus, this norm may deter persons (except well-situated ones) from requesting very high compensations.
- Article 43 provides that the losing party in the case must cover all the legal expenses (some of them are capped) for the winning party.

There are two self-regulatory authorities, which aim to protect journalists and their press freedom - Latvian Journalists Association and Latvian Journalists Union. Latvian Journalists Association may review complaints about journalist activities and breaches of the Code of Ethics. In the area of television and radio media, the Latvian Broadcasters Association is a self-regulatory body promoting broadcasters' freedom and independence, whereas the Latvian Press Publishers Association unites publishers of printed media. However, a journalist or medium is not obligated to be a member of these self-regulatory bodies.

At the end of 2020 the Latvian Journalists Union announced the creation of a legal help centre for journalists and media involved in legal proceedings. The aim of the centre is to provide legal help to those media and journalists who cannot afford it themselves.<sup>669</sup>

The National Electronic Mass Media Council is authorised on basis of the Electronic Mass Media Law to review complaints about and apply sanctions for electronic mass media.<sup>670</sup> In addition, as of the 1 January 2021 the Law on Public Electronic Media and Governance has come into force providing for the creation of an Ombudsperson for public electronic media.<sup>671</sup> Article 19 of the Law provides that the Ombudsperson, among other things will oversee the compatibility of the programs of the public media with the codes of ethics. However, at the time of writing this submission, the office has not yet been created.

## 5. The court's role and independence

Two arguments must be taken into account when assessing this question.

Firstly, as stated before the norms that can be used against journalists and abused by SLAPPers are rather vague (for example, the norms that provide criminal liability for calls against the Latvian state). The less concrete the norm, the more discretionary power is left to the courts.

Secondly, as illustrated by the examples given before, the courts have rather wide discretionary power in deciding on how to balance freedom of expression and other interests. The criteria that have to be taken into account in carrying out this balancing test are not set in a statutory law but can be derived from the case law of the European Court of Human Rights and national courts (most notably, the Supreme Court of the Republic of Latvia). This allows for some much-needed flexibility in deciding the cases that may differ in nature. At the same time, it may mean that the outcome of the

<sup>669</sup> <http://www.latvijaszurnalisti.lv/lza-juridiskas-palidzibas-centrs/>

<sup>670</sup> <https://www.neplpadome.lv/en/home/about-us/competence-of-the-council-in-the-field-of-electronic-mass-media.html>

<sup>671</sup> <https://likumi.lv/ta/id/319096-sabiedrisko-elektronisko-plassazinas-lidzeklu-un-to-parvaldibas-likums>



case is very dependent on the particular court and its understanding of broadly formulated terms, such as context<sup>672</sup> or subjective attitudes of the publisher.<sup>673</sup> As a counterbalancing tool to ensure legal certainty the Supreme Court has emphasized the duty of the lower courts enshrined in article 5 of the Law of Civil Procedure to follow the guidance provided by the case-law of the Supreme Court unless the lower court can provide a good argumentation not to do so.<sup>674</sup>

## 6. Case law

*Could you please give an overview or examples of the SLAPP-type cases in your national legal system?*

- *Which type of speakers are the most effected by SLAPP-type actions? (Journalists, bloggers, civil society activists, academics, ordinary citizens exercising watchdog function)*

Majority of SLAPP-type actions are brought against journalists and media companies themselves. Some of the mediums and their representatives have been targeted several times, such as IR<sup>675</sup> and TvNet<sup>676</sup>. The Baltic Center for Investigative Journalism Re:Baltica,<sup>677</sup> which is a non-profit organization that produces investigative journalism, has also been attacked by SLAPPers multiple times. Seemingly the SLAPPers have targeted privately owned mediums and their employees rather than public broadcasters.

- *Which type of actors are most likely to sue? (e.g. corporations, public officials, organizations, other)*

As can be concluded from the case law and also various reports by international organizations evaluating the situation in Latvia, politicians,<sup>678</sup> especially around elections, are trying to influence their public appearance, also through SLAPP-type actions. The ex-mayor of Riga (now an MP of the Parliament of the European Union) whos' party controlled the power in the municipality of the capital but was in the opposition in the Parliament for several terms has been especially productive in this sense, suing mediums for publishing information several times, but not being very successful. But also

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<sup>672</sup> See for example the Judgment of the Civil division of Latgale regional court of 22 November 2017 in the case No. C26153116 ; Available at: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:LAAT:2017:1122.C26153116.1.S>

<sup>673</sup> See for example the Judgment of the Supreme Court of the Republic of Latvia of 10 July 2019 in the case No.SKC-40/2019, Available at: <http://at.gov.lv/downloadlawfile/5945>

<sup>674</sup> See for example the Judgment of the Supreme Court of the Republic of Latvia of 25 November 2020 in the case No.SKC-41/2020; Available at: <http://at.gov.lv/downloadlawfile/6897>

<sup>675</sup> See for example the Judgment of the Riga District Court of 4 April 2016 in the case No. C27251812. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/300841.pdf> ; Judgment of Riga Regional Court of 20 June 2014 in case No. C27230712, Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/238200.pdf>

<sup>676</sup> Judgment of Riga Regional Court of 20 November 2013 in case No. C30787112, Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/211571.pdf>

<sup>677</sup> See the information on police investigations: <https://rebaltica.lv/2019/02/usakovs-un-gobzems-zaude-prasiba-ierosinat-kriminalprocesu-pret-rebaltica-zurnalistem/> ; Judgment of the Supreme Court of the Republic of Latvia of 18 April 2019 in the case No. SKA-917/2019; Available at: <ECLI:LV:AT:2019:0418.A420169118.5.S>

<sup>678</sup> See for example, Judgment of Riga Regional Court of 20 June 2014 in case No. C27230712, Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/238200.pdf>; Judgment of Riga Regional Court of 20 November 2013 in case No. C30787112, Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/211571.pdf>



other well-known persons, such as insolvency administrators<sup>679</sup> have tried to influence the voices of media.

- *Which type of actions are targeted by SLAPP suits?* (e.g. publications, FOI claims, demonstrations, reporting corruption to supervisor or authorities...)

The SLAPP suits mostly have targeted online publications.

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<sup>679</sup> See for example the Judgment of the Riga District Court of 4 April 2016 in the case No. C27251812. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/300841.pdf>



The legal background of SLAPP cases in

## Lithuania (questionnaire)

Response to questionnaire by Vigita Vėbraitė (Vilnius University Faculty of Law)

*Information on SLAPPs in Lithuania was obtained by means of a short note drafted based on questionnaire*

There is no official or in court practice used concept of SLAPP in Lithuania. I believe most judges and legal practitioners do not know the word SLAPP. The discussions on this phenomenon have only begun. In practice, on the other hand, there are lawsuits that could be characterized as SLAPP. Most such cases involve journalists or blog writers. Some of them involve activists of local communities or urban planning opponents. Some of lawsuits against some famous journalists are quite recent and they called out recent discussions in parliament and some TV shows about SLAPP phenomenon. Still, for instance, some civil servants in Ministry of Justice say that they are not really acquainted with SLAPP and say that laws can protect against such lawsuits and long proceedings.

Civil defamation is much more common and is more widely applied. Criminal proceedings can only start if there is a complaint by a victim. A prosecutor can decline to prosecute defamation, such refusal can be appealed to the higher prosecutor. It is said that such appeals are usually not successful. Criminal Code states that defamation is punishable by a fine or arrest, or imprisonment for up to one year. Whoever defamed a person, whether he or has committed a serious or very serious crime, either through the media or in print, shall be punishable by a fine or by arrest or by imprisonment for a term not exceeding two years.

Art. 2.24. of Civil Code states that:

1. a person shall have the right to demand refutation in judicial proceedings of the publicised data, which abase his honour and dignity, and which are erroneous as well as redress of the property and non-pecuniary damage incurred by the public announcement of the said data. After person's death this right shall pass on to his spouse, parents and children if the public announcement of erroneous data about the deceased person abases their honour and dignity as well. The data, which was made public, shall be presumed to be erroneous as long as the person who publicised them proves the opposite.

2. Where erroneous data were publicised by a mass media (press, television, radio etc.) the person about whom the data was publicised shall have the right to file a refutation and demand the given mass medium to publish the said refutation free of charge or make it public in some other way. The mass medium shall have to publish the refutation or make it public in some other way in the course of two weeks from its receipt. Mass medium shall have the right to refuse to publish the refutation or make it public only in such cases where the content of the refutation contradicts good morals.

3. The request to redress the property or non-property non-pecuniary damage shall be investigated by the court irrespective of the fact whether the person who has disseminated such data refuted them or not.



4. The mass media, which publicised erroneous data abasing person's reputation shall have to redress property and non-pecuniary damage incurred on the person only in those cases, when it knew or had to know that the data were erroneous as well as in those cases when the data were made public by its employees or the data was made public anonymously and the mass medium refuses to name the person who supplied the said data.

5. The person who made a public announcement of erroneous data shall be exempted from civil liability in cases when the publicised data is related to a public person and his state or public activities and the person who made them public proves that his actions were in good faith and meant to introduce the person and his activities to the public.

The notion of public person is interpreted by the case law. Legal persons can also sue for damages on the reputation. Usually, defamation regarding crimes would determine higher damages. Nevertheless, it is broadly acknowledged that damages awarded for defamation, particularly non-pecuniary damages, are quite low. It can be mentioned that in most civil cases, including medical disputes, awarded sums of non-pecuniary damages are still low in Lithuania. There are no caps on damages and courts are free to decide.

Other legal instruments are not often used. Perhaps, mostly tax investigations or labour consequences. GDPR has not been applied often in such disputes so far. There have been several investigations by State Data Protection Inspectorate on investigative journalists, but these investigations have not been finished so far.

The defendants can defend themselves by proving that the facts are true or public interest to know the facts. Case law in Lithuania usually motivates that also according to ECHR practice statements of facts and value judgments are distinguished. For instance, in quite recent case No. e3K-3-218-684/2020 „the panel of Supreme Court judges found that, there is no basis in the case for deciding that the defendant, in expressing its opinion on the events, published information which degraded the applicant's honour and dignity and did not correspond to reality. The defendant, although using statements of strong emotional weight, essentially expressed its views on the applicant's actions and, in the defendant's view, the consequences thereof. Admittedly, the applicant 's criticisms of its conduct were not intended to humiliate or downplay it and, with positive aims, to highlight the shortcomings of his activities as chairman of the rural community”.

In other case it was stated that “In deciding on the liability of the media, the factual circumstances relating to the reliability and authority of the source of information quoted by the media must be established in each case and the reliability of the media's reliance on such sources must be assessed in accordance with standards of ethics of journalists” (Case No. 3K-3-340/2011).

From the procedural side, the defendant can argue that the abuse of procedural rights. Art. 95 of Code of Civil Procedure states that “a party, who dishonestly files a groundless statement of claim (appeal of a judgment, cassation appeal) or deliberately acts against the just and expeditious hearing and resolution of the case, may be obligated by the court to reimburse the other party for the losses incurred by the latter. A reasoned petition for the reimbursement of losses may be submitted prior to the conclusion of the hearing of the case on the merits. A court, after establishing the abuse of procedural rights may impose a fine of up to 5000 Eur”.



It is very difficult to receive the legal aid for defendants in SLAPP cases. Legal aid in Lithuania is provided for persons according to their level of income. Losing party pays the costs of proceedings. Lawyer representation costs are rewarded according to the set recommendations. Also, success fee can be applied in such cases. In civil cases, as well as in criminal proceedings, the lawyer's fees may be agreed so that the amount of these fees depends on the outcome of the case, provided that this is not contrary to the principles governing the activities of lawyers.

There is no insurance for litigation costs.

In some cases, journalist union helps to find lawyers for journalists (defendants) and pay the costs of legal representation. In some cases, lawyers have worked pro bono. Journalist union also tries to collect info on such cases.

Prosecutor can agree not to start the criminal proceedings or that the cases lack evidence to go to court. In such cases person can appeal the decision to the higher prosecutor and the decision of the higher prosecutor can be appealed to the court.

Usually, civil proceedings in Lithuania are quite effective and last 6-8 months (first instance). In SLAPP cases proceedings can last longer as ways could be found to prolong the proceedings (for instance, participants to the proceedings could say they would consider settlement, need to collect more evidence, etc.). Actually, the court has powers to prevent delay of the proceedings. The problem is that the court sometimes does not apply in civil cases all possibilities to fight the deliberate delay of the proceedings. Pre-trial dismissal is not possible in Lithuania.

But, for example, court could decide not to apply asked interim protective measures if it thinks that the lawsuit is not well grounded. Practitioners state that in recent years interim protective measures are quite rare in such civil cases. If court sees that several lawsuits submitted to the same defendant and the claims are really similar, the court can decide to merge cases into one.

There is an inspector of journalist ethics in Lithuania. Complaint can be submitted to the inspector if particular media and publication or broadcast which disseminated information degrading honour and dignity of the person who submitted the complaint or violated the right to the protection of privacy or interests of minors. Such complaint is not obligatory, and inspector cannot decide on damages. Inspector can draw up reports of administrative offences in the cases set out in the Code of Administrative Offences (mostly connected with interests of minors); request that a producer or disseminator of public information refute, in accordance with the established procedure, the published false information degrading the honour and dignity of a person or damaging his professional reputation or legitimate interests, or provide the person with a possibility to reply and refute such information himself.

In 2005 code of ethics of journalists and publishers was adopted. The code was adopted by all associations of journalists and publishers. Still, not all journalists are members of such associations, especially not all influencers of social media belong to these associations.

ECHR practice plays quite a huge role in Lithuanian case law, especially for higher courts (Courts of Appeal of Lithuania, Lithuanian Supreme Court). "The right to a fair trial is also a value protected by the Convention for the Protection of Human Rights and Fundamental Freedoms, which is why the case law of the Supreme Courts and other courts consistently refer to the jurisprudence of the



European Court of Human Rights” (Case No. e2S-736-643/2020, Vilnius district court). The courts either follow ECHR practice or does not apply it, but it is very difficult to find cases where court would criticize ECHR practice.

Overall, there are no big issues regarding independence of judiciary, there are perhaps only some problems with individual judges. Judges can exercise their discretion independently.





The legal background of SLAPP cases in

## Luxembourg (questionnaire)

Response to questionnaire by Cristina M. Mariottini  
(Max Planck Institute Luxembourg for Procedural Law)

*Information on SLAPPs in Luxembourg was obtained by means of a questionnaire*

### **(1) Are SLAPPs generally a problem, and issue in your country?**

No. Only 1 case that I am aware of: *Sandstone v EUobserver*

In 2019, EUobserver published an article in English investigating the actions of a British PR firm, Chelgate, on behalf of the Maltese state. According to the investigation, Maltese authorities hired Chelgate to defend the image of the former prime minister of Malta, Joseph Muscat, in EU capitals during the investigation into the murder of Daphne Caruana Galizia. Part of its work was to defend Muscat in a UK inquiry into “fake news”. But EUobserver said Chelgate also hired a private intelligence firm in Luxembourg called Sandstone to compile a report on Daphne Caruana Galizia’s killing. Excerpts of Sandstone’s research, obtained by EUobserver, contained accusations that Russian president Vladimir Putin and Azerbaijan president Ilham Aliyev had conspired to murder Caruana Galizia, using a Chechen assassin. Chelgate, and its associates also briefed targeted European media about Daphne Caruana Galizia, promoting these and similar conspiracy theories about her, EUobserver said.

This article brought about a number of responses from Sandstone, including a legal letter sent to EUobserver asking them to publish journalistic sources and documentation. While EUobserver offered the right to reply and a number of changes, Sandstone did not agree and in May 2020 it was reported that Sandstone had filed both civil and criminal charges before Luxembourg authorities against EUobserver based on the original article. On 7 May 2020, the local prosecutor dismissed the case arguing that it should be filed before civil courts. Sandstone missed a three-month deadline to file a civil defamation lawsuit before Luxembourg’s civil court. A few days later it was reported that Sandstone plans to bring another action against EUobserver in Belgium.

### **(2) IF NO: Is this because they are not initiated, or are they consequently dismissed by courts?**

n/a

### **(3) Which is more common: civil or criminal defamation?**

The two are intertwined. See Art. 443 et seq Lux Criminal Code (CrC).

Court case data not available



#### (4) Criminal: is it punished with imprisonment?

Yes. See Art. 443 et seq CrC

*a. Are public officials, monarchs, heads of states more protected by criminal defamation or other criminal protection of their reputation?*

Not in accordance with the CrC (which, however, has specific provisions against threats and attempts against the safety of the Granducal family: cf Art. 101 et seq CrC).

#### (5) Civil:

Luxembourg's free expression act prohibits defamation in all media. The prohibition of defamation and infringement of good reputation (*droit au respect de son honneur et de sa réputation*) must at all times be complied with. When this obligation is not complied with, a judge can take all necessary measures to end such non-compliance, at the cost of the party responsible. See Act of 8 June 2004 on the Freedom of Expression in the Media, Chapter V, Art. 16.

*a. Are there caps on damages?*

Damages are not capped.

Punitive damages are not allowed under Luxembourg law.

In some cases, a claimant may request another party to execute its obligations, potentially with a daily penalty. However, these remedies are not frequently awarded.

Penalty clauses are also enforceable under certain conditions.

*b. Can legal persons sue for the protection of reputation? n/a*

*c. Does compensation for damages have some conditions, e.g. in connection*

with criminal charges, or correction? No

#### (6) Are there other instruments in the legal system which are sometimes abused to pressurize journalists, civil activists? e.g. misdemeanor of defamation, GDPR -related laws, state secret laws, tax investigations, labour consequences, copyright, blasphemy, anti-terrorism, anti-migration

n/a

#### (7) Defences

*a. Good faith in civil, together with public interest/explicit exemption/journalistic ethics, too?*

Yes



*b. Truthfulness*

Yes

*c. Good faith an excuse in criminal defamation? Only in court practice, or explicit?*

n/a

*d. Abuse of right?*

n/a

**(8) Procedural costs and legal aid**

To ensure access to legal redress for people without sufficient funds, the Luxembourg government provides them with free and full legal assistance to defend their interests in Luxembourg.

This assistance is provided by the Bar Councils of Luxembourg and Diekirch and includes the right to be assisted by a lawyer and any other ministerial officer, such as a notary or a bailiff, whose assistance may be necessary.

Legal assistance is granted both in judicial and extrajudicial matters, with respect to both litigation and non-contentious matters, and whether the person in question is the plaintiff or the defendant. It applies to any matter brought before a judicial court or administrative court. Legal assistance may be requested during the proceedings for which it is sought; if granted, it will be backdated to the date on which the proceedings were commenced.

It covers all expenses relating to the cases, procedures or actions for which it is granted.

The following are eligible for legal assistance:

- Luxembourg nationals;
- foreign nationals with a Luxembourg residence permit;
- nationals of a European Union (EU) Member State;
- foreign nationals with the right to the legal assistance as received by Luxembourg nationals pursuant to an international treaty;
- third-country nationals illegally staying in Luxembourg for the purpose of recovering their remunerations due pursuant to the Labour Code.

Legal assistance may be granted both to adults and to minors.

In cross-border disputes, a person domiciled or usually resident in Luxembourg may receive legal assistance for purposes of obtaining legal advice, including help in preparing an application for legal assistance in another EU Member State.

Moreover, a foreign national domiciled or resident in another EU Member State, with the exception of Denmark, may also receive legal assistance in Luxembourg for cross-border disputes. However,



such litigants must apply to the competent authority in their home country, which will forward the information to the Luxembourg Ministry of Justice.

Legal assistance may also be granted to any foreign national with insufficient resources to pursue proceedings concerning asylum, entry into Luxembourg, temporary or permanent residency, or deportation.

Each party, even if they win the case, must pay all their own legal expenses.

Judges may, however, exceptionally and on express demand, order the unsuccessful party to pay the other party procedural costs. These types of ruling are, however, often symbolic and only cover a portion of the lawyers' fees.

In civil proceedings, the losing party will ultimately be responsible for paying witness fees (paid to witnesses in court proceedings to compensate them for travel/accommodation costs and for their time lost as a result of the proceedings) as well as for paying any legal experts' fees. Sometimes judges issue orders for costs to be shared between the various parties to the proceedings.

Under Luxembourg law, damages are calculated based on the losses suffered by the victim and the profits made by the responsible party.

The calculation of damages depends on the matter in which the dispute arose. The party claiming damages bears the burden of proof to demonstrate the damage suffered.

Only external costs (service costs) and a minor portion of other costs are allocated to the prevailing party.

A losing party can also be ordered to pay a procedural indemnity aiming to partially compensate costs that are not covered otherwise (Article 240 of the Civil Procedure Code).

There are no court fees applicable in Luxembourg.

Costs are calculated in accordance with a specific regulation. Interest does not accrue on costs calculated on this basis.

A defendant cannot request the court to order the plaintiff to provide security for costs.

However, when the plaintiff is living or domiciled in a foreign country which is not a member of the European Union or the Council of Europe, or which has not signed a dedicated convention with Luxembourg, the defendant may request the court to order a deposit of a certain amount of money with the Caisse de Consignation at the Luxembourg State Treasury (Article 257 of the Civil Procedure Code). The value of this deposit is calculated following an assessment of the proceedings' costs and the potential damages.

#### **(9) Any good practices which protect people, journalists against SLAPPs?**



n/a

(10) Any vulnerabilities, bad practices, which expose...

n/a

(11) Pre-trial dismissal: criminal. - can the offended party carry on the case? n/a

*a. Is the criminal system a system of opportunity can the victim appeal against dropping the charges?*

n/a

*b. Can you claim damages in the criminal procedure?*

Yes: see Art. 443 et seq CrC

(12) Pre-trial dismissal: civil: (uncommon).

n/a

(13) Press Council:

n/a

(14) Are there any remedies against SLAPPs e.g. false accusation, damages for abusive litigation?

n/a

(15) Compliance with ECHR:

n/a

(16) Is the court's role satisfactory in dealing with SLAPP and protecting the press against this?

n/a

(17) Do governmental outlets weaponise the media or defamation in their political battles?

n/a

(18) Targets: mainly journalists, bloggers and also activists, or only journalists?



Towards an EU-wide approach to anti-SLAPP?

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Based on the data available, it is not possible to make a general statement on this issue.



The legal background of SLAPP cases in

## Malta

Contribution by Justin Borg-Barthet (University of Aberdeen)

### 1. Laws most vulnerable to abuse:

#### 1.1. Defamation Law

Most SLAPP cases in Malta are brought under the [Media and Defamation Act 2018](#), which repeals and replaces the [Press Act 1974](#) (as amended). The Defamation Act 2018 introduced several reforms which were intended to modernise Maltese libel laws, broadly reflecting the UK's Defamation Act 2013. Reforms include the abolition of criminal libel, and the introduction of a threshold of serious harm for the establishment of civil liability (Section 3(4)).

The extent to which interpretation of the 2018 Act will depart from earlier law is as yet unclear. Judgments of the Court of Appeal continue to cite earlier case law in determining the requisite threshold of harm necessary to establish liability in defamation (see e.g. [Case 246/2018 Marlene Mizzi vs David Casa](#)).

In the judgment in [Case 185/2019 Maria Pia Zammit vs Victor Vella](#), however, the Court of Magistrates' interpretation of the facts of the case appeared to establish a particularly high threshold for a finding of serious harm. The threshold established in this case is not consistent with other decisions of the courts, or indeed of the very same magistrate in other cases (see e.g. [Case 299/2018 Onor. Rosianne Cutajar vs Rachel Antoinette Williams et](#)). This may be indicative of concerns regarding politicisation of the judiciary (see Part 5 below).

The applicant in *Zammit vs Vella* was a civil society activist who also happens to be an actress. Among her past roles was a stage production of *Allo Allo*, a World War 2-themed comedy. In this case, a newspaper which is closely associated with the governing party published a photograph of the actress posing with Nazi regalia while backstage during the performance of the play. The newspaper headline characterised the photograph as "controversial". Sure enough, controversy ensued when the headline was circulated by government appointees on social media. The court found that the publication did not meet the threshold of harm required by the 2018 Act.

This judgment is subject to appeal. Should it be upheld and applied consistently, the effect would be to raise the bar for a successful defamation claim. It is submitted, however, that the effect for freedom of expression more broadly would not necessarily be positive. Indeed, the targeting of civil society activists by partisan media, amplified by government appointees on social media, could have a chilling effect on freedom of expression.

Furthermore, the 2018 Act remains susceptible to abusive deployment as a consequence of procedural weaknesses. The [Code of Organization and Civil Procedure](#) (Chapter 12 of the Laws of Malta) lacks provisions which are sufficient to dissuade the institution of vexatious or meritless claims. Moreover, the inefficiency of the judicial system results in prolonged litigation and appeals, which increase direct costs and opportunity costs for respondents in defamation cases.



These weaknesses result in numerous instances of the institution and litigation of defamation claims which are withdrawn at the stage in proceedings when evidence which might be deleterious to the claimant's case is about to be heard. These include cases brought by two senior ministers and [the Prime Minister's Chief of Staff](#) against Daphne Caruana Galizia, independent newspapers, and the [former Leader of the Opposition](#). Each of these cases had been litigated at great length before they were relinquished. In one case, a minister had gone so far as to seek and obtain garnishee orders against Daphne Caruana Galizia (and subsequently against her estate), but [terminated proceedings once it became clear that potentially compromising evidence could be brought against him](#).

Political control of prosecutors also renders the institution of proceedings for perjury particularly unlikely. Indeed, no action has ever been brought against politicians who manifestly made false statements to support their defamation claims. This renders the institution of baseless claims a relatively risk-free exercise for claimants who wish to weaponise judicial process.

In addition, there remain several legacy cases brought under the 1974 Act which are still in the process of being litigated. These include 25 cases brought against Daphne Caruana Galizia prior to her assassination, potential liability for which is inherited by her estate.

### ***1.2. Private International Law***

Maltese private international law lacks robust defensive mechanisms against the institution of cases in third countries, or the enforcement of judgments obtained outwith the Brussels/Lugano system. This is compounded by weaknesses in the [Brussels Ia Regulation](#) and the [Lugano Convention](#) which enable a significant degree of forum shopping in defamation cases.

In 2018 and 2020, an Opposition Member of Parliament [introduced two bills](#) which were intended to restrict the enforcement of judgments in defamation cases introduced abroad. These were not enacted by the House of Representatives, however, [due to their incompatibility with the Brussels Ia Regulation](#). The Maltese Government also argued that existing *ex post* public policy defences to enforcement suffice to protect putative judgment creditors.

The absence of *ex ante* defensive mechanisms has a significant effect on press freedoms, with numerous reported cases of deletion or alteration of online reporting resulting from the mere threat of litigation abroad. Notorious incidents include [threats of litigation by Henley and Partners](#), concessionaires for Malta's citizenship by investment scheme, and by Pilatus Bank.

Pilatus Bank, an entity established in Malta, had been embroiled in controversy concerning [allegations of money laundering and failure to abide by due diligence obligations](#). The [goings-on at Pilatus](#) were widely reported in Malta since it was alleged that the bank had processed illicit transactions to and between several politically exposed persons connected to government flagship initiatives. The bank was established in Malta, under Maltese law, and, at the relevant time, operated almost exclusively in Malta, but targeted its business to international clients including numerous international [politically exposed persons such as Azerbaijan's presidential family](#). Relevant reports were published by Maltese newspapers, and directed towards a Maltese audience, albeit in a language and via a medium which rendered them accessible worldwide.





Legal action was threatened in the United Kingdom and United States, a strategic gambit which was motivated primarily by the cost of proceedings, as well as the psychological effects of a lack of familiarity with foreign law and procedure (partly as a consequence of the exclusion of defamation from the scope of the [Rome II Regulation](#)). The cost of litigation was enough to persuade the [three independent Maltese newspapers of note](#), as well as [at least one popular online portal](#), to delete or alter online content as requested by the bank. [The media outlets invariably stood by the veracity of their published accounts of the facts, noting that the deletion and alteration was not an admission of guilt but a consequence of economic duress.](#)

Notably, the Pilatus Bank affair was not an isolated incident. [The editor of the Malta Today newspaper observed that it is commonplace for transnational businesses to use the threat of libel to force the deletion of factual reporting.](#) He cites four separate incidents involving unrelated businesses in which his newspaper acquiesced in the demands of transnational business entities to delete reports, implicitly suggesting that this was not due to the strength of the claim, but the force with which it was made.

Another Maltese news site, which was established following the assassination of Daphne Caruana Galizia, noted a further example in which it was the [only news organisation to refuse to delete or alter online content following threats from the concessionaire for Malta's lucrative Citizenship by Investment programme.](#) Those threats were not followed through despite the media entity's refusal to acquiesce.

### ***1.3. Administrative Law and the Exercise of Executive Powers***

Administrative measures have also been deployed to suppress campaigns by civil society activists, including the family of Daphne Caruana Galizia and others demanding justice for her assassination. This includes the removal of billboards and banners under purported authority conferred by Article 70(2) of the [Development Planning Act 2016](#). The Planning Authority was found to have breached the right to freedom of expression in [Case 79/2018 Peter Caruana Galizia et vs Awtorità tal-Ippjanar](#). Nevertheless, this was not before the campaign had been suppressed, and was only one of several instances in which executive power was deployed to suppress protest. Other cases include [the daily removal of materials from a protest site demanding justice for Daphne Caruana Galizia](#), and [the immediate removal of civil society billboards for want of a permit \(notwithstanding the toleration of routine illegality in other instances\).](#)

Other instances of exercise of executive power to limit freedom of expression include political influence over employment in the public sector. The most notorious case is that of the [targeting of the employment of one of Daphne Caruana Galizia's sons](#). Andrew Caruana Galizia was employed as a diplomat at the Maltese High Commission in India. In 2017, he was recalled at short notice and without explanation. Mr Caruana Galizia noted that, other than when she was assassinated, this was [the only occasion on which his mother had ever stopped writing.](#)



## 2. Potential defences

Article 3 of the Defamation Act 2018 establishes a threshold of “serious harm” in order for a defamation claim to be successful. The claimant need not show that serious harm has ensued from a publication, but only that it is likely to do so. Respondents in defamation cases may plead in their defence that (i) the statement was substantially true, or (ii) it was an opinion. The defence of substantial truth is not framed with reference to good faith, but more reasoned judgments do tend to consider publications in the round (see Part 3 below).

## 3. Compliance with ECHR principles

Generally, the standards of freedom of expression established in the ECHR are codified in Articles 4 and 5 of the Defamation Act 2018 which establish defences to a defamation claim. Article 4 establishes the defence of substantial truth and provides specific protection to expressions of opinion. Article 5 provides additional protection in respect of publications concerning matters of public interest. Consequently, the vertical relationship between State actors and respondents is accounted for clearly in the legislation. Economic asymmetry does not enjoy the same degree of explicit protection, however.

ECHR standards are, at least nominally, recognised and upheld by the courts. There is, however, a significant degree of inconsistency in the lower courts, which often requires respondents in defamation claims to incur the cost of appeals in order for their freedom of expression to be upheld. By way of example, in [Case 416/2014 Patrick Dalli vs Caroline Muscat](#) an appeal was required to establish that reporting of financial matters concerning a minister’s husband was in the public interest. The lower court had found that the reporting constituted a breach of the applicant’s right to privacy. Similarly, in [Case 415/2014 Patrick Dalli vs Caroline Muscat](#), an appeal was required to establish that the threshold of accuracy of individual statements was to be understood with reference to harm to the applicant’s reputation.

A lack of effective whistleblower protection is also problematic insofar as the imposition of the burden of proof on the respondent renders a legal defence more difficult or impossible insofar as evidence cannot be produced without disclosing the identity of whistleblowers.

## 4. Systemic safeguards

The Defamation Act 2018 includes a number of safeguards which are designed to limit the chilling effect of defamation claims. In particular, Article 9 establishes an upper limit of €11,640 in damages for a successful defamation claim.

There are few effective procedural safeguards to dissuade the institution of SLAPP cases, however. Malta lacks independent institutions with powers comparable to the Swedish press council or Dutch ombudsman. Article 10 of the Act provides for expeditious amicable resolution to be reached through a preliminary hearing. This, however, requires the court to conclude that there is a prospect of agreement between the parties, possibly by way of mediation. Accordingly, the summary conclusion



of proceedings requires the agreement of both parties. Where a claim is designed to vex the respondent, this provision affords little comfort.

While the payment of judicial costs by the losing party constitutes some measure of safeguard against SLAPPs, this is limited to nominal costs at to be liquidated at the end of proceedings. For as long as proceedings are ongoing, the respondent is required to bear the full effects on cash flow and opportunity costs of litigation. Nor does the payment of judicial fees cover the full cost of a legal defence. The fees payable are established in a pricing schedule to be found in Annex I of the Code of Organization and Civil Procedure. These are nominal figures which cover only costs directly related to appearing or pleading in court. Ordinarily, this would not represent the full cost of legal representation, or even necessarily a significant portion thereof.

The upper limit for eligibility to legal aid is particularly low, resulting in most economically active persons being excluded. Article 912 of the [Code of Organization and Civil Procedure](#) limits eligibility to legal aid to persons having assets amounting to no more than €6,988.12 or income amounting to no more than the national minimum wage.

In the ongoing litigation in [Case 323/2018 Dr Peter Caruana Galizia et vs Dr Christian Cardona](#), arguments concerning liability for the institution of vexatious claims are being tested in court. It is as yet unclear whether the courts will be sympathetic to claims that a discontinued defamation claim would result in liability on grounds of abuse of rights. Moreover, the case has been ongoing for two years and has been subject to multiple deferrals, resulting in the incurrence of further opportunity costs for the claimants.

## 5. The court's role and independence

The independence of the judiciary in Malta lacks robust guarantees as a consequence of the retention of control of appointments by the executive. Longstanding weaknesses arising from executive dominance were exacerbated following the 2013 election. Former ECHR judge [Giovanni Bonello notes](#) that the vast majority of appointees since the 2013 change of government have either occupied a prominent role in the governing party or have close family or business relations with persons who do.

The threat to the independence of the judiciary is to be considered in [a broader context of institutional capture](#). The Maltese constitution relies on trust insofar as the separation of powers is concerned. The executive has extensive powers of appointment and removal in respect of officials responsible for the enforcement of criminal law, including financial crimes. This has always been problematic in conceptual terms, and internal criticism is not a new phenomenon. Recent events, however, demonstrate that there has been significant movement towards a [deliberate culture of impunity](#) in the highest political offices.

Consequent to Venice Commission scrutiny of the rule of law in Malta, a number of reforms have been introduced to enhance judicial independence and the separation of powers more broadly. While the broad tenor of reforms has been welcomed by international observers, [there remain concerns regarding transparency and executive control of process](#).



## 6. Case law

A key distinction to be drawn in respect of SLAPP-type cases in Malta is as between cases actually instituted and cases in which the mere threat of litigation suffices to chill speech.

The former is usually initiated by politicians against journalists and other politicians. Notorious examples which bear the hallmarks of SLAPP are noted in Part 1.1 above.

The threat of transnational litigation is usually more effective. These threats are usually made by corporations, also against journalists and politicians. However, there is evidence that in some instances these corporation act as proxies for the government. In the case of Henley and Partners, it is a matter of record that [all such threats were agreed with the Government of Malta, including the Prime Minister](#). In the case of Pilatus Bank, while there is no public record of state collusion in the bringing of claims, it is noteworthy that relevant media reports concerned matters which implicated state actors.

Administrative measures are usually brought against civil society activists.



The legal background of SLAPP cases in

## The Netherlands

Contribution by Tess van der Linden (Radboud University)

### 1. Laws most vulnerable to abuse

Empirical data on abuse by SLAPPers is lacking thus far. It is therefore difficult to assess if SLAPPs occur in the Netherlands and, if so, how often statutory provisions are abused for the sole purpose of intimidation. The intention of claimants remains difficult to track down.

The following statutory provisions are suspect to abuse by (potential) SLAPP claimants. First of all, the general tort law clause (Article 6:162 *Burgerlijk Wetboek* (Dutch Civil Code, hereafter 'BW')) is thought to be most vulnerable to abuse.<sup>680</sup> This provision constitutes a rule of fault liability on the basis of which a person can be held liable for his intentional or negligent conduct. For an act to be unlawful, it has to violate a norm laid down by law, infringe a subjective right, i.e. an entitlement, or it has to violate a rule of unwritten law pertaining to proper social conduct.<sup>681</sup> Article 6:162 BW is often invoked in civil defamation cases or cases concerning unlawful demonstration.

Second, criminal defamation is maintained in the Netherlands. Pursuant to Article 261(1) *Wetboek van Strafrecht* (Dutch Criminal Code, hereafter 'Sr'), "any person who, by alleging a particular fact, intentionally injures the honour or reputation of another person, with the evident intention of giving publicity to the allegation, shall be guilty of slander and shall be liable of imprisonment not exceeding six months or a fine of the third category." A similar rule for libel is codified in Article 261(2) Sr. The sanction for libel is imprisonment not exceeding one year or a fine of the third category. If the offender knows that the allegation is untrue, he shall be liable of aggravated defamation and shall be liable to a term of imprisonment not exceeding two years or a fine of the fourth category (Article 262 Sr). The Dutch Criminal Code also forbids simple defamation (Article 266 Sr): "Any insult, which is not of a slanderous or libellous nature, intentionally expressed either in public verbally or in writing or by means of an image, or verbally against a person in his presence or by other acts, or by means of written matter or an image sent or offered, shall constitute simple defamation and shall be punishable by a term of imprisonment not exceeding three months or a fine of the second category."

Third, a SLAPPER may abuse provisions of labour law. For instance, a SLAPPER may terminate a contract of employment (Article 7:677 BW) or disadvantage an employee in any other way for reporting a malpractice, as referred to in the *Wet Huis voor klokkenluiders* (Act on the House for Whistleblowers). This pertains to malpractices relating to public matters, such as human health, threats to the environment, threats to a person's life, or mismanagement of a company or a public body. According to Article 7:658c BW, an employer may not disadvantage an employee during or after the period that the employer or competent administrative authority deals with the reported

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<sup>680</sup> T.E. van der Linden, 'Strategisch procederen tegen activisten: Over Strategic Lawsuits Against Public Participation (SLAPP's) in Nederland, *Nederlands Tijdschrift voor Burgerlijk Recht* 2020/9, p. 65-78.

<sup>681</sup> Article 6:162(2) BW.



suspicion of malpractice, on account of the fact that the employee acted in good faith and duly reported such suspicion.<sup>682</sup>

Fourth, the rules of civil procedure are vulnerable to abuse. A possible SLAPP technique is to intentionally delay the procedure, thereby trying to exhaust the financial resources of the defendant.<sup>683</sup> Dutch civil procedural law provides for several options to prolong or complicate procedures.<sup>684</sup> For instance, a party may amend claims during procedure (Article 130 or 283 *Wetboek van Burgerlijke Rechtsvordering*, Dutch Code of Civil Procedure, hereafter ‘RV’); raise a procedural issue (Article 208 RV);<sup>685</sup> request a witness hearing (Article 166 RV); request a change of date on which the witness hearing is to take place (Article 169 RV); request an unnecessary oral hearing,<sup>686</sup> or apply for a postponement of the judgement.<sup>687</sup> Mention should be made, however, that the courts have several tools at their disposal to prevent unnecessary delays.<sup>688</sup>

## 2. Potential defences

The most important defence is the infringement of freedom of speech (Article 7 Dutch Constitution and Article 10 European Convention of Human Rights, hereafter ‘ECHR’) or – in the case of demonstrations – freedom of demonstration (Article 11 ECHR). Articles 10 and 11 ECHR often serve as a means to interpret open norms in private law, such as the “unwritten norm pertaining to proper social conduct” (Article 6:162(2) BW)<sup>689</sup> or the notion of “a good employee” (Article 7:611 BW).<sup>690</sup> Dutch civil courts have taken a rather pragmatic and casuistic stance regarding the effect of Article 10 and 11 ECHR on national legal concepts.<sup>691</sup> Considerations of a private law nature and of a fundamental rights nature are often interwoven.<sup>692</sup>

Freedom of speech (Article 10 ECHR) is also a potential defence in criminal defamation cases. A criminal court may set aside Articles 261, 262 and 266 Sr on the basis of Article 94 of the Dutch

<sup>682</sup> Translation: M.W. Josephus Jitta, in: H. Warendorf et al. (eds.), *Warendorf Dutch Civil and Commercial Law Legislation*, Deventer: Wolters Kluwer 2016.

<sup>683</sup> R. Abrams, ‘Strategic Lawsuit Against Public Participation (SLAPP’, (7) *Pace Environmental Law Review* 1989-1990, p. 33; A. Glover & M. Jimison, ‘S.L.A.P.P. Suits: A First Amendment Issue and Beyond’, (21) *North Carolina Central Law Journal* 1995, p. 123; J. Gleason, ‘Strategic lawsuits against public participation’, in: S.Stec (ed.), *Handbook on Access to Justice under the Aarhus Convention*, Hungary: The Regional Environmental Center for Central and Eastern Europe 2003, p. 59; C.H. Barylak, ‘Reducing Uncertainty in Anti-SLAPP Protection’, (71) *Ohio State Law Journal* 2010, no. 8, p. 845.

<sup>684</sup> T.E. van der Linden, ‘In de hoogste versnelling. Over de invloed die partijen hebben op de doorlooptijd van een civiele procedure’, *Nederlands Juristenblad* 2020/1318, p. 1528.

<sup>685</sup> This might only lead to a limited delay due to the fact that the court is not obliged to deal with the procedural issue before proceeding with other issues. H.J. Snijders, C.J.M. Klaassen & G.J. Meijer, *Nederlands burgerlijk procesrecht*, Deventer: Wolters Kluwer 2017. Raising multiple procedural issues might, however, qualify as an abuse of process. For instance: District Court Utrecht 17 October 2012, ECLI:NL:RBUTR:BY1265.

<sup>686</sup> Article 4.1 *Procesreglement civiele dagvaardingszaken bij de rechtbanken* (7th edition, 2019).

<sup>687</sup> Article 5.6 in conjunction with 2.12 *Procesreglement civiele dagvaardingszaken bij de rechtbanken* (7th edition, 2019).

<sup>688</sup> See also §5 of this report.

<sup>689</sup> Asser/Hartkamp 3-I 2019, nr. 221ff.

<sup>690</sup> F.G. Laagland & J. Klooster, *GS Arbeidsovereenkomst* (online), Article 7:611 BW, note 6.1 and 6.3; F.G. Laagland, ‘Wet Huis voor klokkenluiders: een versterking van de juridische positie van de rechtspersoon’, in: G. van Solinge, M. van Olfen, C.D.J. Bulten, *Toezicht* (VDHI nr. 151), Deventer: Kluwer 2018.

<sup>691</sup> J.M. Emaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht* (diss. Utrecht), Den Haag: Bju 2013, p. 21.

<sup>692</sup> Emaus 2013, p. 21.



Constitution<sup>693</sup> if a conviction would be contrary to Article 10 ECHR.<sup>694</sup> The defendant can invoke Article 10 ECHR and the principles formulated by the ECtHR directly.<sup>695</sup> Criminal courts may also interpret the description of the offence in light of Article 10 ECHR.<sup>696</sup> The Dutch Criminal Code also provides for a similar, albeit more limited, defence; Article 261(3) Sr determines that neither slander nor libel shall exist if the offender's act was necessary in defence of his own or another person's interests or if he could have believed in good faith that the allegation was true and was required in the public interest. A similar defence is laid down in Article 266(2): "Acts which are intended to express an opinion about the protection of public interests and which are not at the same time designed to cause any more offence or cause offence in any other way than follows from that intent, shall not be punishable as simple defamation." The dismissal of a claim on the basis of Article 10 ECHR leaves unaffected any claim on the basis of Article 261(3) or 266(2) Sr.<sup>697</sup>

Whistleblowers may derive a defence from Article 7:658c BW, which protects employees who report a suspicion of malpractice (as referred to in the Act on the House for Whistleblowers), provided that those employees acted in good faith and duly reported such suspicion.

Another important civil law defence is abuse of rights. Article 3:13 BW sets down the doctrine on the abuse of rights: the holder of a right may not exercise it to the extent that its exercise constitutes an abuse.<sup>698</sup> The rationale behind this provision is that every person, when exercising his rights, ought to be aware of the rights of others and – more generally – of the public interest.<sup>699</sup> The criteria for abuse of rights are codified in the second paragraph of Article 3:13 BW. Pursuant to this second paragraph, a right is abused where it is exercised for the sole purpose of harming another person (*animus nocendi*); where it is exercised with another purpose than for which it was granted (*détournement de pouvoir*); or where its exercise was unreasonable, given the disproportion between the interest in its exercise and the harm caused thereby.<sup>700</sup> Pursuant to Article 3:15 BW, Article 3:13 BW also applies in the situation of an alleged abuse of *procedural* rights.

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<sup>693</sup> Article 94 of the Dutch Constitution reads: "Statutory regulation in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons." Translation of the Constitution of the Kingdom of the Netherlands 2008, published by the Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Division in collaboration with the Translation Department of the Ministry of Foreign Affairs.

<sup>694</sup> For instance: Hoge Raad 16 June 2009, ECLI:NL:HR:2009:BG7750, *NJ* 2009/379, with annotation by E.J. Dommering, in which there was no pressing social need and the limitation of Article 10 ECHR was not necessary in a democratic society. See more recent: Hoge Raad 2 July 2019, ECLI:NL:HR:2019:1059, *NJ* 2019/348, with annotation by E.J. Dommering.

<sup>695</sup> F. Janssens, *Tekst & Commentaar Strafrecht, Smaad(schrift) bij: Wetboek van Strafrecht, Artikel 261* (online resource, last updated 1 July 2020).

<sup>696</sup> F. Janssens & A. Nieuwenhuis, 'Smaad, eenvoudige belediging en het maatschappelijk debat', *Ars Aequi* February 2020, p. 140. See also with regard to simple defamation: HR 10 April 2018, ECLI:NL:HR:2018:539, *NJ* 2018/283, with annotation by E.J. Dommering.

<sup>697</sup> Hoge Raad 14 June 2011, ECLI:NL:HR:2011:BP0287, *NJ* 2011/504, with annotation by E.J. Dommering.

<sup>698</sup> Translation: I. Sumner, in: H. Warendorf et al. (eds.), *Warendorf Dutch Civil and Commercial Law Legislation*, Deventer: Wolters Kluwer 2020.

<sup>699</sup> Parliamentary History Book 3, p. 1039-1040; B.T.M. van der Wiel, *De rechtsverhouding tussen procespartijen* (diss. Leiden), Deventer: Kluwer 2004; J. Vlek, *Parallele procedures en misbruik van procesrecht onder de EEX-Verordening II* (BPP, nr. XVI) (diss. Amsterdam VU), Deventer: Kluwer 2015.

<sup>700</sup> Translation: I. Sumner in: H. Warendorf et al. (eds.), *Warendorf Dutch Civil and Commercial Law Legislation*, Deventer: Wolters Kluwer 2020.





### 3. Compliance with ECHR principles

In its landmark case *Gemeenteraadslid*, the *Hoge Raad* (the Dutch Supreme Court) formulated several parameters, which serve as guidelines for lower courts to evaluate whether a publication or statement is unlawful on the basis of tort law.<sup>701</sup> These parameters include: a) the nature of the allegations published and the seriousness of the expected consequences for the person involved; b) the seriousness (seen from the perspective of public interest) of the alleged abuse; c) the available evidence concerning the alleged abuse at the time of publication; d) the way in which the allegations were formulated; e) the probability that the aim of the publication could also have been achieved by other, less damaging, means; and f) the possibility of reducing the detrimental effect of the publication in case it would have received publicity without the contested delivery to the press.<sup>702</sup> Although the *Hoge Raad's* parameters resemble, to a large extent, the parameters formulated by the European Court of Human Rights (hereafter 'ECtHR'), the *Hoge Raad* did not explicitly mention Article 10 ECHR or the ECtHR's parameters. This changed in 1995, when the *Hoge Raad* explicitly mentioned the Convention rights that were at stake in its case *Het Parool v. Van Gasteren*.<sup>703</sup> The *Hoge Raad* held that it should be taken into account whether the publication or statement was in the public interest and whether the research was done thoroughly, i.e. the extent to which the allegations were factual. By explicitly mentioning these parameters, the *Hoge Raad* recognised the principles of freedom of expression as developed by the ECtHR and built a bridge between its own case law and the case law of the ECtHR.<sup>704</sup>

Lower court practice shows some additional parameters that can be taken into account, such as: the authority of the source; the type of medium that published the alleged unlawful statement; whether the journalist worked according to the principle *audi alteram partem*; and whether the statement or publication concerns a public figure.<sup>705</sup>

In cases concerning unlawful demonstrations<sup>706</sup> and in cases concerning labour law issues,<sup>707</sup> the public nature of the demonstration or report is taken into account by the courts as well.

<sup>701</sup> Hoge Raad 24 June 1983, NJ 1983/801, with annotation by M. Scheltema (*Gemeenteraadslid*).

<sup>702</sup> Translation by O. Cherednychenko, 'The Impact of Fundamental Rights on Dutch Private Law: Revolution or Evolution?', in: V. Trstenjak, P. Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Springer International Publishing 2016, p. 464. Parameter (f) deals with the situation that the contested information has become public knowledge due to any other source than the contested statement or publication. The parameter has rarely been applied by the courts.

<sup>703</sup> Hoge Raad 6 January 1995, ECLI:NL:HR:1995:ZC1602, NJ 1995/422, with annotation by E.J. Dommering (*Het Parool v. Van Gasteren*).

<sup>704</sup> Hoge Raad 6 January 1995, ECLI:NL:HR:1995:ZC1602, NJ 1995/422, with annotation by E.J. Dommering (*Het Parool v. Van Gasteren*). See in particular E.J. Dommering's annotation, note 3. G.A. Schuijt, 'Hoge Raad niet meer bang voor de uitingsvrijheid?', *Informatierecht/AMI* 1996, issue 2, p. 23.

<sup>705</sup> See for an overview: O.M.B.J. Volgenant, *GS Onrechtmatige daad* (online), note VII.2.1.3 and VII.7.6.1; A.J. Nieuwenhuis, 'Laveren tussen persvrijheid en respect voor het privéleven. De jurisprudentie van het EHRM', *Mediaforum* 2012/1, p. 2-13; A.J. Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting. Theorie, rechtsvergelijking, discriminatie, pornografie*, Nijmegen: Ars Aequi 2015.

<sup>706</sup> B. Roorda, *Het recht om te demonstreren. Een vergelijkende studie naar de betogingsvrijheid in Nederland, Duitsland en Engeland vanuit internationaalrechtelijk perspectief (dissertation RUG)*, Den Haag: Boom juridisch 2016. See also: case note of Roorda: District Court Amsterdam 5 October 2012, ECLI:NL:RBAMS:2012:BX9310, (38) *NJCM-Bulletin* 2013, issue 2, p. 283-298.

<sup>707</sup> F.G. Laagland & J. Kloostera, *GS Arbeidsovereenkomst*, Article 7:611 BW, note 6.1 and 6.3.





As has been mentioned in paragraph 2 of this report, the principles of freedom of expression, as developed by the ECtHR, are also recognised in criminal defamation cases.

## 4. Systemic safeguards

### 4.1. *Inadmissibility of a claim*

The abuse of procedural rights (Article 3:13 in conjunction with Article 3:15 BW) is a ground for inadmissibility of a civil claim. However, it should be borne in mind that access to a court is one of the fundamental principles available to everyone (Article 6 ECHR). Due to this fundamental principle, the *Hoge Raad* has held that courts should review claims regarding alleged abuses of process cautiously. A refusal of access to a court can only be granted in exceptional cases.<sup>708</sup> Two types of exceptional claims are specifically relevant to this context. First, if the court finds that a claim is filed with the sole purpose of harming the defendant, it might declare the claim inadmissible. This occurs only on rare occasions, since the burden of proving this malicious intent is on the defendant (Article 150 Rv).

Second, if the court finds that a SLAPPer's claim is frivolous, it might declare the claim inadmissible. The *Hoge Raad* has formulated a standard by which courts can determine whether a claim is frivolous. A claim is frivolous if the claimant based his claim on facts or circumstances, which he knew or which he ought to have known to be incorrect, or if he based his claims on arguments, which he knew or ought to have known beforehand that they would not stand a chance.<sup>709</sup>

In theory, the inadmissibility of a claim (on the grounds of abuse of rights or lack of reasonable interest) is a proper solution for SLAPPs. To have preventive effect, the inadmissibility should occur before the case is judged on its merits.<sup>710</sup> In that case, a summons is denied legal effect.<sup>711</sup> In reality, however, it is difficult to ensure this preventive effect, as courts often need to judge cases on their merits before they can reach the conclusion that a claim is frivolous.<sup>712</sup> Moreover, as has been said before, it is difficult to strike out a claim due to the fundamental principle of access to the courts (Article 6 ECHR).

### 4.2. *Damage awards*

Another remedy available to a potential SLAPP defendant is a claim for damage awards. In order to be compensated, it must not only be established that Article 3:13 BW has been violated, but that this violation also constitutes a tort (Article 6:162 BW).<sup>713</sup> For the imposition of liability on the basis of this latter statutory provision, several criteria have to be met, including: the existence of an unlawful act

<sup>708</sup> Hoge Raad 29 June 2007, ECLI:NL:HR:2007:BA3516, *NJ* 2007/353 (*Waterschappen/Milieutech*); Hoge Raad 6 April 2012, ECLI:NL:HR:2010:BV7828, *NJ* 2012/233 (*Grand Café A./Achmea*). See also: Asser/Giesen 2015/185; M. Chébt, 'Misbruik van procesrecht door advocaten, rechterlijke terughoudendheid en het recht op toegang tot de rechter', *WPNR* 2015/7087, p. 1057.

<sup>709</sup> Hoge Raad 29 June 2007, ECLI:NL:HR:2007:BA3516, *NJ* 2007/353, para. 3.3. This ruling was confirmed in: Hoge Raad 6 April 2012, ECLI:NL:HR:2012:BV7828, *NJ* 2012/233 (*Grand Café A./Achmea*).

<sup>710</sup> Van der Wiel 2004, p. 321-322.

<sup>711</sup> Van der Wiel 2004, p. 322.

<sup>712</sup> Van der Wiel 2004, p. 321.

<sup>713</sup> E.J.H. Schrage, *Misbruik van bevoegdheid* (Mon. BW. A4), Deventer: Kluwer 2019, p. 68.



or omission, imputability, causation, damage and ‘relativity’. What is problematic with such a request for damage awards is the fact that such a claim is to be judged on the merits. This means that parties may be involved in time-consuming and costly legal procedures. Moreover, it is questionable if the threat of damage awards has any preventive effect. Unlike various US anti-SLAPP initiatives, Dutch law does not allow for punitive damages.

#### ***4.3. Burden of proof***

The burden of proof is favourable to SLAPP defendants. Pursuant to Article 150 Rv, the burden of proof is on the part appealing to the legal consequences of certain facts or rights, unless the division of the burden of proof should be different because of a substantive rule of tort law or according to the standards of reasonableness and fairness. In defamation cases, it is general court practice to place the obligation to furnish facts (*‘stelplicht’*) on the claimant, and to place the burden of proof on the defendant.<sup>714</sup> In other words, it is often up to the claimant to state which aspects of the allegation (statement) are incorrect and it is up to the defendant to prove that his statement is supported by facts, and/or that the statement is not frivolous. It should be mentioned that there have been exceptions to this practice. One example is a case from 1982, in which the President of the District court Amsterdam held that the public watchdog-role of the press may form a reason for restraint in placing the burden of proof on the press.<sup>715</sup> With regard to proving the damage incurred and the existence of a causal connection between the damage and the unlawful act, the burden of proof is in principle on the claimant.

#### ***4.4. Payment of judicial costs by the losing party***

Dutch civil procedure law determines that the judicial costs are to be paid by the losing party (Article 237 Rv). The judicial costs are calculated according to a court-approved scale of costs (Articles 237-240 Rv). In case the court finds an abuse of process, it is possible that it rules that the abusing party is obliged to pay the full amount of the judicial costs (*volledige proceskostenvergoeding*).<sup>716</sup>

#### ***4.5. Legal aid***

As laid down by Article 18 of the Dutch Constitution, each citizen has the right to apply for legal advice and representation and, if unable to bear the costs, receive state-financed legal aid. The conditions for receiving legal aid are set down in the Legal Aid Act. Legal aid is funded by the state (the Legal Aid Fund). The applicant only has to pay a small, income-related contribution. The organisation and

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<sup>714</sup> Volgenant, *GS Onrechtmatige Daad*, VII.9.4.4. and VII.9.4.5; I. Giesen, *Bewijs en aansprakelijkheid. Een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsoveringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht* (diss. Tilburg), Den Haag: BJu 2001, p. 261-263. One example in the context of a claim against an NGO: District Court Amsterdam 6 January 2005, ECLI:RBAMS:2005:AR8854 (*Super de Boer/Milieudefensie*).

<sup>715</sup> President of the District Court Amsterdam 24 November 1982, KG 1982/216.

<sup>716</sup> For instance: Hoge Raad 15 September 2017, ECLI:NL:HR:2017:2366, NJ 2018/64, with annotation by S.D. Lindenbergh.



supervision of this subsidised legal aid is entrusted to *The Raad voor de Rechtsbijstand* (Legal Aid Board), an independent governing body instituted by the minister of Justice and Security.<sup>717</sup>

#### ***4.6. Capping of claims***

No cap on damages has been introduced. Nevertheless, the court may reduce an obligation to pay damages if a full award of damages would lead to obviously unacceptable results considering the circumstances of the given situation, including the nature of the liability, the legal relationship between parties and their financial resources (Article 6:109 BW). This power cannot be excluded by contract (Article 6:109(3) BW). Additionally, the court may reduce the amount of judicial costs that have to be paid by the losing party (Article 242 Rv).

#### ***4.7. Press Council***

In the Netherlands, a Press Council (*Raad voor de Journalistiek*) is entrusted with the examination of complaints against violations of good journalistic practice, including defamation complaints. The Press Council is not a disciplinary council, but a so-called ‘council of opinion’. This means that the Press Council cannot impose sentences or provide for financial compensation. The Press Council publishes its opinions on its website and informs various news media.

## **5. The court’s role and independence**

Traditionally, the court has had a passive role in civil law cases. The court’s role has, however, become more active since the Dutch legislator introduced the concept of the ‘supervising judge’ (*regierechter*). Consequently, the courts have obtained a firmer grip on the judicial process.<sup>718</sup> The court is responsible for monitoring the progress of the procedure. It is obliged to take all decisions necessary for a proper course of the proceedings (Article 19(2) Rv). This also includes making sure that the procedure is not unnecessarily delayed (Article 20 Rv). The court decides on every request for extension of terms (e.g. Article 133 Rv) and has various sanctions at its disposal in case it finds that one of the parties unnecessarily delays the procedure, such as assessing the evidence to the detriment of the delaying party, ordering the delaying party to pay the judicial costs, or forbidding the delaying party to bring forward any new evidence.<sup>719</sup>

Furthermore, on a more substantial level, civil courts have a discretionary role in SLAPP cases. The statutory provisions most vulnerable to abuse (paragraph 1 of this report) concern open norms, which enables courts to use their discretionary powers when balancing the interests of both parties.

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<sup>717</sup> Brochure ‘Legal Aid in the Netherlands’, retrievable from: <https://www.rvr.org/english> (last accessed 12 December 2020).

<sup>718</sup> C.J.M. Klaassen, ‘Advocaat, let op uw saeck!’ Enkele opmerkingen over de regierol van de civiele rechter en de rol van de advocaat onder ‘KEI’, *NJB* 2017/617, p. 724-733.

<sup>719</sup> Explanatory memorandum to the concept bill concerning the simplification and modernisation of the law of evidence, p. 7-8, 21-22.



## 6. Case law

As stipulated in the first paragraph, empirical evidence on the intention of defamation claimants is lacking. Therefore, it is unknown whether SLAPPs occur in the Netherlands. The following paragraph provides several examples of defamation cases that were dismissed.

Three categories of potential SLAPP targets can be distinguished. First of all, journalists and media organisations are most likely to be affected by SLAPP-type actions. According to an empirical study by Odekerken & Brenninkmeijer, 61% of Dutch journalists have dealt with threats from ordinary citizens, criminal suspects, companies or politicians. Almost half of these threats (43%) pertain to *legal* threats.<sup>720</sup> Exemplary are the more than 120 lawsuits telecom company Pretium and its founder, Hans Nyks, have initiated against various critics, the majority being journalists or other media outlets that reported on Pretium's questionable business tactics. Most of these lawsuits concerned publication restrictions and defamation claims.<sup>721</sup> Another example is a defamation suit against a journalist and the editor-in-chief of *De Telegraaf*, one of the biggest Dutch newspapers, for speaking up against the alleged mismanagement of a class action representative body. The claim was dismissed.<sup>722</sup>

Secondly, civil society actors are potential SLAPP targets. NGOs are often sued for organising alleged unlawful demonstrations or direct-action protests.<sup>723</sup> Defamation cases against environmental organisations are rare. One exception is a lawsuit instigated by Super de Boer, a large supermarket chain, against Milieudefensie, a Dutch environmental organisation.<sup>724</sup> In December 2004, Milieudefensie put a message on its website stating that grapes sold by Super de Boer contained an unlawfully high amount of pesticides. The statement received quite some publicity in the media. Super de Boer sued Milieudefensie on the basis of Article 6:162 BW and claimed that Milieudefensie had violated an unwritten norm pertaining to proper social conduct by making misleading and/or unlawful statements. The District Court of Amsterdam held that Milieudefensie did not violate any norm pertaining to proper social conduct, as it based its statement on a report by independent research organisation TNO. Examples of defamation cases against other civil society organisations, such as consumer organisations or trade unions, are more common.<sup>725</sup>

Thirdly, **academics** have become affected by threats of defamation claims as well. For instance, when Dutch criminologist Willem de Haan investigated the complicity of Akzo Nobel with crimes against humanity in Argentina, he was threatened with a publication restriction by the chemical corporation.

<sup>720</sup> M.W.A. Odekerken & A.F.M. Brenninkmeijer, Een dreigend klimaat: verslag van het onderzoek 'Bedreigingen van Nederlandse journalisten', Nederlandse Vereniging van Journalisten 2017, online retrievable: [https://www.nvj.nl/system/files\\_force/bijlages/Een%20dreigend%20klimaat%20Odekerken%20%26%20Brenninkmeijer.pdf?download=1](https://www.nvj.nl/system/files_force/bijlages/Een%20dreigend%20klimaat%20Odekerken%20%26%20Brenninkmeijer.pdf?download=1)

<sup>721</sup> J. Benjamin, 'Onderzoeksjournalist Olsthoorn mag publiceren over Pretium Telecom', *NRC Handelsblad* 30 November 2016. The Pretium cases led to a motion by two Members of Parliament to investigate the position of journalists (*Kamerstukken* 34 550 VII, nr. 82) and a roundtable at the Ministry of Justice and Security about the issue (14 March 2018).

<sup>722</sup> Court of Appeal Amsterdam 9 April 2019, ECLI:NL:GHAMS:2019:1200.

<sup>723</sup> See for an overview of these cases: Roorda 2016.

<sup>724</sup> District Court Amsterdam 6 January 2005, ECLI:RBAMS:2005:AR8854.

<sup>725</sup> District Court The Hague 6 November 2018, ECLI:NL:RBDHA:2018:13142; District Court The Hague 7 February 2018, ECLI:NL:RBDHA:2018:13142; District Court The Hague 12 January 2017, ECLI:NL:RBDHA:2017254; District Court The Hague 30 September 2015, ECLI:NL:RBDHA:2016:11224; District Court Midden-Nederland 22 July 2015, ECLI:NL:RBMNE:2015:5393; District Court Midden-Nederland 29 April 2015, ECLI:NL:RBMNE:2015:2912.



Akzo, however, never instigated legal proceedings and the research was published nevertheless.<sup>726</sup> A more recent example is a legal claim against researchers from Utrecht University, who had investigated the treatment of victims of sexual abuse in the community of Jehovah's Witnesses. The Jehovah's Witnesses claimed that the study was defamatory. The court, however, dismissed the Jehovah's Witnesses' claim and held that the research was conducted with due care, that the statements made in the report were factual and that the report served the public interest.<sup>727</sup>

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<sup>726</sup> J. van Erp & T.E. van der Linden, 'Silencing those who speak up against corporate power: SLAPP Suits in Europe' (forthcoming).

<sup>727</sup> District Court Midden-Nederland 23 January 2020, ECLI:NL:RBMNE:2020:227.



The legal background of SLAPP cases in

## Poland

Contribution by Ireneusz C. Kamiński (Jagiellonian University in Kraków)

### 1. Laws most vulnerable to abuse:

In cases that can be perceived as SLAPP ones, provisions of both civil (private) and criminal law are used. These are:

#### **Criminal Code of 6 June 1997:**

##### **Slander**

Article 212

§ 1. Anyone who slanders another person, a group of people, a business entity or an organisational unit without the status of a business entity, about conduct, or characteristics that may discredit them in the face of public opinion, or result in a loss of confidence necessary to perform in a given position, occupation or type of activity is liable to a fine or the restriction of liberty.

§ 2. If the offender commits the act specified in § 1 through the mass media, he or she is liable to a fine, the restriction of liberty or imprisonment for up to one year.

§ 3. When sentencing for an offence specified in §1 or 2, the court may award exemplary damages to the aggrieved party or the Polish Red Cross, or to another social cause designated by the aggrieved party.

§ 4. The prosecution of the offence specified in § 1 or 2 takes place at a private motion.

##### **Insult**

Article 216

§ 1. Anyone who insults another person in his or her presence, or publicly in his or her absence, or with the intention that the insult will reach such a person, is liable to a fine or the restriction of liberty.

§ 2. Anyone who insults another person using the mass media is liable to a fine, the restriction of liberty or imprisonment for up to one year.

§ 3. If the insult was caused by the provocative conduct of the aggrieved party, or if the aggrieved party responded with a breach of the personal inviolability or with a reciprocal insult, the court may waive the imposition of a penalty.

§ 4. In the event of a conviction for the offence specified in § 2, the court may decide to set compensatory damages to the aggrieved party, the Polish Red Cross or towards another social cause indicated by the aggrieved party.

§ 5. Prosecution takes place at a private motion.

All criminal convictions result in the insertion of the convicted individuals' names (personal data) into the Criminal Register/Criminal Convictions Record. Moreover, some public functions are dependent on not being convicted for any crime committed intentionally (slander and insult are intentional crimes). Some other functions require only that the individual has not been convicted for a crime



prosecuted at a public motion (thus, this prohibition does not apply to slander and insult that are prosecuted at a private motion).

## Civil Code of 23 April 1965

### Protection of personal goods/interests

Art. 23. The personal goods of a human being, in particular health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or innovation achievements are protected by civil law, independently of protection under other regulations.

### Means of protection

Art. 24. § 1. Any person whose personal goods are threatened by another person's actions may demand that the actions be ceased, unless they are not unlawful. In the case of infringement he may also demand that the person committing the infringement perform the actions necessary to remove its effects, in particular that the person make a declaration in the appropriate form and substance. On the terms provided for in this Code, he may also demand monetary compensation or payment of an appropriate amount of money for an indicated social purpose.

§ 2. If, as a result of infringement of a personal good, financial damage is caused, the aggrieved party may demand that the damage be remedied in accordance with general principles.

§ 3. The above provisions do not prejudice any rights provided by other regulations, in particular by copyright law and the law on inventions.

These two traditional legal avenues (criminal and civil ones) should not be considered as overused or abused by SLAPP-ers. Of course, it is evident that institution of criminal proceedings may exert adverse effects on the affected speakers, but the number of cases under Articles 212 and 216 that result in convictions is limited. At the same time it should be stressed that those instituting criminal proceedings (called private prosecutors in this context) nor rarely demand penalties (sanctions) located around the upper ceiling of what the Criminal Code allows.

It is more the private law avenue that use individuals likely to be called SLAPP-ers. However, the SLAPP-like effect is not brought about by the institution of legal proceedings under Article 23 of the Civil Code itself. It is a combination of Article 23 with other provisions of civil law. In this context Article 448 of the Civil Code must first of all be mentioned.

Art. 448. In the event of infringement of one's personal interests the court may award to the person whose interests have been infringed an appropriate amount as monetary compensation for the harm suffered or may, at his demand, award an appropriate amount of money to be paid for a social purpose chosen by him, irrespective of other means necessary to remove the effects of the infringement.

It happened and still happens on many occasions that plaintiffs, being politicians, public figures, business entities, demand significant, and sometimes enormously high amounts of money for "a social purpose". By so doing they pretend to demonstrate (or generate impressions) that they do not act selfishly "to get money" for themselves from the speaker but want "their compensation" serve a



social purpose. But usually if courts find for such plaintiffs, they are likely to reduce the compensation or do not award it at all, noting the social/public status of the plaintiff, public interests in the publication/speech, characteristic of the speech (political speech, speech on matters of public interest, press/media speech). Nevertheless, demanding significant amounts of money may create a chilling effect of the speaker and, more broadly, on the public opinion.

Another civil law provision broadly used (and abused) in SLAPP-like cases relates to protective measures (injunctions) the court may award when the case is pending or even before it is instituted.

Art. 755 § 2. In matters for the protection of personal rights, the protective measure consisting in the prohibition of publication may be granted only if it does not preclude an important public interest. When granting the protective measure, the court shall determine the duration of the prohibition, which may not be longer than one year. If the proceedings in the case are pending, the entitled person may, before the expiry of the period for which the prohibition of publication was ordered, request further protection; the provisions of the first and second sentences shall apply. If the entitled party has requested further protection, the prohibition of publication shall remain in force until the application becomes legally final.

Such “temporary measures” of protection remain in force even many years and are formulated very broadly, e.g. not allowing any publication on a certain issue or about a certain person/entity.

Lastly, it must be emphasised that once the basic remedy the courts award is apology or retraction (being traditional forms of *a declaration in the appropriate form and substance*), plaintiffs sometimes demand that such declarations be published in numerous media, be repeated for a number of days, or be posted permanently on some sites for a certain period of time (on home page of Internet media). As a result, the costs of such publications may become enormously high, exceeding many times the amount of (demanded) pecuniary compensation or the amount of money for a social purpose. For example, in a civil law case instituted against journalist Jan Pinski by lawyer Jacek Dubois, the court awarded 5,000 PLZ (around 1,200 Euro) to be paid for a social purpose, whereas the costs of publishing the apology in two press titles amounted to around 100,000 PLZ (24,000 Euro) (as they are to be published as paid advertisements). Furthermore, there were already cases in which the plaintiffs deliberately demanded a large-scale publication of apologies in order to make its overall cost extremely high. In 2013 minister Sławomir Nowak asked for the publication of apologies in numerous print, television and Internet media, whose total cost was estimated as reaching around 30 million PLZ (7.2 million Euro). The lawsuit was then withdrawn from the court.

## 2. Potential defences

The Criminal Code provides expressly for a defence of fair criticism:

Art. 213

§ 1. The offence specified in Article 212 § 1 is not committed if the allegation was not made in public and is true.

§ 2. Anyone who raises or publicises a true allegation in defence of a justifiable public interest is deemed not to have committed the offence specified in Article 212 § 1 or 2 where:

- 1) it concerns the conduct of a person performing a public function, or
- 2) it uses a defence of a legitimate social interest.





If the allegation regards private or family life, evidence of truth is only carried out when it serves to prevent a danger to someone's life or health, or to prevent the corruption of a minor.

The civil law landscape is not that clear. Traditionally, it was held that all untrue allegations (factual statements) are illegal and bring about legal responsibility for violation of personal goods (here mainly good name, honour). This legal standard applied to all speakers and all kinds of speech, even of the media. No exceptions of acting in public interest or of “excusable mistake” were permitted. Only by a resolution of seven judges adopted on 18 February 2005 (III CZP 53/04) did the Supreme Court hold that journalists must not be required to write only truth but are subject to the proviso that “while collecting and using press materials, they acted in defense of socially justified interests and fulfilled the obligation to exercise due diligence and reliability” (thus, this new standard mirrored the principles from the ECtHR judgment in *Bladet Tromsø and Stensaas v. Norway* – journalists are protected if they act in good faith, diligently and follow the rules of professional ethics). However, this good faith standard remained limited to journalists only and other individuals participating in debates on matters of public interest did not enjoy it. It led to the ECtHR judgment in *Brown v. Poland*, finding a violation of Article 10 (4 November 2014). Currently, the standard of good faith is more likely to be followed in courts decisions.

The Supreme Court resolution III CZP 53/04 made the application of the new standard dependent upon the condition that “if the allegation turns out to be untrue, the journalist is obliged to revoke it”. There is no case law on this “obligation to revoke” but it is rather unlikely the courts would read and apply it rigorously; it would suffice that new facts are invoked and made public.

The defence of truth is applied when speech/publication, coming usually into conflict with different privacy interests, concerns a matter of public interest. Also the status of the person/entity to whom the publication relates is important (broader scrutiny vis-à-vis politicians, public figures).

As regards opinions/value judgments, there is a strong trend visible in recent jurisprudence consisting in allowing harsh, even exaggerated criticism if it is addressed towards politicians and political actors. Polish criminal courts are permissive in that context, and do not make opinions and criticism subject to the condition it has “a sufficient factual basis” (as elaborated in the relevant ECtHR standard).

### 3. Compliance with ECHR principles

Up until the end of 2020, the ECtHR has rendered 48 judgments in freedom of expression cases against Poland, finding a violation of Article 10 in as many as 34 cases. A pretty huge number of other cases on Article 10 have been settled amicably with the applicant (with the ensuing decision of the ECtHR accepting the settlement) or the ECtHR accepted a unilateral declaration by which the Government recognised that there had been a violation of freedom of expression and offered the applicant a certain sum of money as just satisfaction. Accordingly, the number of freedom-of-expression cases against Poland that gave satisfaction to the applicants at the ECtHR is much higher than the number of judgments finding a violation of Article 10.

The reasons for the ECtHR finding violations of Article 10 resided in non-observance by Polish courts of basic principles on freedom of expression as derived from Article 10 in the relevant ECtHR case-law.



Those are: the lack of distinction between factual statements and value judgments; wide tendency of qualifying opinions/value judgments as factual statements with the resulting obligations to establish their veracity instead of demonstrating that the opinion has a sufficient factual basis; not giving sufficient weight to the fact that political speech or speech on issues of public interest was involved; disregarding the specific role of the media as a public watchdog; not following the principle that politicians expose themselves to control and that the protection they enjoy must be adequately tailored to allow fair and acceptable criticism in public interest; availing of criminal law and imposing penal sanctions in freedom of expression cases.

Looking retrospectively, the current situation of freedom of expression must be considered much better than a decade, and all the more, two decades ago. Polish judges have become aware (Strasbourg's freedom of expression cases on Poland commented in the media and, more broadly, in the public discourse; training sessions for judges) or are likely to become aware in a given case pending (legal representatives invoking the case law from the ECtHR; amicus curiae briefs lodged in the course of legal proceedings by NGOs, e.g. Helsinki Foundation of Human Rights) of the freedom of expression principles developed by the ECtHR. Moreover, there have been significant changes in the legislation relevant for freedom of expression (some provisions of criminal code were declared unconstitutional by the Constitutional Tribunal) and in the case law of freedom of expression (e.g. by resolutions of the Supreme Court). See supra (part 2) on the Supreme Court's resolution (III CZP 53.04).

Currently, the basic freedom of expression standards elaborated by the ECtHR seem to be noted by Polish courts even at the first instance. It concerns such aspects as: who is the speaker (journalist, NGO), what is the matter discussed of (political issue, matter of public interest) and whom the speech concerns (politician, public office holder, public entity, State/public institution). However, when such standards are applied to commercial entities, courts are likely to consider economic and business interests of such entities (the best-known example being the so-called Am-way case/"Welcome to life" documentary film, with the injunction on publication remaining in force throughout the entire period of legal proceedings, i.e. 17 years; 1997-2014).

There are not many cases of corporations/commercial entities acting against activists/NGOs. (Not so many) high profile cases instituted by corporations were directed against journalists and the media (who revealed malpractices, law violations).

Neither are whistleblowing cases widespread in Poland.

The idea of enacting of a parliamentary act dealing comprehensively and specifically with (the protection of) whistleblowing was part of the governmental plan on combatting corruption 2014-2019. It was dropped from the agenda following the criticism voiced by national business organisations arguing the necessary protection was already secured by other pieces of legislation, e.g. on non-discrimination. The idea was taken afresh in 2016-2017 by the Ministry of Justice but soon the discussion ceased following the initiative of adopting a directive on the protection of whistleblowers at the EU level (it is now Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law).



## 4. Systemic safeguards

The SLAPP phenomenon as a specific construct has not by now become a subject of legal, and more broadly, public debate in Poland. Only recently was it mentioned by some scholars (on social media). Lawsuits initiated by politicians or public figures/entities as well as demands of high compensation formulated in such cases were and are still mostly criticised in terms of classical arguments serving the protection of the freedom of expression and freedom of the media (public watchdog function, chilling effect, broader criticism vis-à-vis politicians, special protection of political speech and speech on matters of public interest).

Also, the courts do not perceive SLAPP-like cases as specific instances of harassing or silencing those speaking. The same legal standards of constitutional and international (first of all, European Convention on HR) standing are applied in all cases on freedom of expression.

Due to high publicity given to SLAPP-like cases that involve politicians, public figures/entities, such cases are debated and commented. They draw the attention of NGOs working on human rights protection; some of them have special programs dedicated to freedom of expression/freedom of the media (Helsinki Foundation on Human Rights; Polish Journalists' Association). These NGOs issue public statements critical of legal actions undertaken in the field of freedom of expression. Some organisations, especially Helsinki Foundation on Human Rights, make systematically use of different forms of participation in legal proceedings allowed by procedural regulations (criminal, civil and before administrative courts). First, they may observe legal proceedings (by sending an observer, whose presence is notified in advance to the court). Second, they may present an *amicus curiae* brief to the court. Third, they may get involved in the proceedings as a third party.

In some cases, NGOs arrange for lawyers to represent (usually) defendants in legal/court proceedings, very often *pro bono*.

## 5. The court's role and independence

There is no ceiling/capping of claims in Polish legislation, thus there were and are cases in which some plaintiffs demanded exorbitant sums as compensation or a payment (for a social purpose. However, when a case concerns matters of public importance it is unlikely that the court might accept such claims. If a certain case is decided for the plaintiff, the court rejects pecuniary claims altogether or – what does not happen often – it makes pecuniary awards but reduces it significantly. It is very unlikely that the compensation and/or payment might exceed 10,000 PLZ. What the successful plaintiffs get from the court is limited usually to the publication of apology/retraction.

Compensation and payments are more likely to be awarded in cases on violation of privacy where no issue of public interest is involved (celebrities cases, “curiosity cases”). The highest awards only incidentally exceed 100.000 PLZ.

As already mentioned in part 1, in some cases the costs of the publication of apology/retraction awarded by the court happened to be very high. But judges become more and more aware of the actual publication costs and curtail the publication demands accordingly, e.g. by limiting it to only one press title.



## 6. Case law

SLAPP-like cases are instituted mostly by politicians, public figures/entities unhappy with publications of the media or criticism expressed by other participants of public debates. Sporadically there are cases started by political parties, social organisations or local authorities willing to protect their “good name”. Those targeted are usually journalists and media entities. At the local level, SLAPP-like cases are directed against bloggers writing on local issues.



The legal background of SLAPP cases in

## Portugal

Contribution by Linda Ravo (Legal and Policy Consultant)<sup>728</sup>

### 1. Laws most vulnerable to abuse

Based on reports and information available, the following may be regarded as laws more vulnerable to abuse in Portugal when it comes to lawsuits intended to chill public participation. This should however not be considered as an exhaustive illustration, given that a variety of legal provisions can be relied on in order to achieve that aim, also depending on the nature of the public participation conduct targeted (e.g. protests or assemblies) and the relationship between the parties (e.g. an employment relationship).

#### *1.1. Criminal defamation, insult and false accusation*

The Criminal Code<sup>729</sup> sanctions defamation and insult as criminal offences. In particular:

- Article 180 punishes defamation (“difamação”), defined as alleging a fact or formulating a judgment (or reproducing such) about a third person that is offensive to that person’s honour or reputation. Sanctions amount to up to six months in prison or a fine of 240 days.
- Article 181 punishes insult (“injúria”), defined as alleging a fact or expressing offensive words directly to a person that is/are offensive to that person’s honour or reputation. Sanctions amount to up to three months in prison or a fine of up to 120 days.

According to Article 183, when an act of defamation or insult is committed with “publicity” or concerns an allegation that the defendant knew to be untrue, this constitutes calumny (“calúnia”), and the potential maximum punishments are raised by one-third. In addition, the same provision provides that, when defamation or insult is committed through the media, punishments increase to a prison term of up to two years or a fine of not less than 120 days.

Article 184 of the Criminal Code reflects an increased protection of public officials against defamation, insults and calumny. According to this provision, the minimum and maximum punishments provided for in Articles 180, 181 and 183 are raised by one-half. The provision is applicable to a wide range of government and public figures, including members of Parliament, the Council of State, or the Ministry of the Republic; police and security service officers; public, civil, and military officials; judges, lawyers, witnesses, and jury members; ministers; university professors. Other criminal provisions exist which protect the honour of the State, its institutions and its symbols (see in particular Articles 187, 323, 328 and 332 of the Criminal Code).

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<sup>728</sup> This paper was authored by dr. Linda Maria Ravo as expert adviser to the Civil Liberties Union for Europe. The author is very thankful to experts from the non-governmental organisations Article 19, Greenpeace European Unit, Greenpeace International and Index on Censorship for their contributions and comments. The usual disclaimer applies.

<sup>729</sup> [Law Decree of 15 March 1995 n. 48.](#)



Furthermore, Article 365 of the Criminal Code punishes false public accusation (“denúncia caluniosa”), defined as publicly accusing or casting suspicion on a person of having committed a crime while knowing the accusation to be false. The penalty is imprisonment for up to three years or a fine (or, if the accusation is of a misdemeanour, up to one year of imprisonment or a fine of up to 120 days). If the accusation results in the victim’s incarceration, the penalty is up to eight years in prison.

### ***1.2. Judicial secrecy***

Article 371 of the Criminal Code punishes anyone who disseminates the content of an act of criminal procedure that is covered by secret of justice, or that is otherwise not meant to be disclosed to the public, with a sanction of imprisonment of up to 2 years or with a fine of up to 240 days.

### ***1.3. Civil defamation***

The Civil Code<sup>730</sup> provides for a high level of protection for the right to a good name. In particular:

- Article 70 offers general protection against any harm or threat of harm to someone’s physical or moral personality, including through civil liability and interim or protection measures;
- Article 484 is a special tort liability provision which, in addition to the general liability for torts provided for in Article 483, explicitly provides for the right to claim damages against whomever damages the reputation or good name of an individual or of a collectivity.

### ***1.4. Civil liability actions in connection to criminal offences***

Compensation for damages suffered in connection to a criminal offence must be claimed, as a rule, within the criminal proceedings. However, Article 72 of the Code of Criminal Procedure<sup>731</sup> provides that a civil claim for damages on the basis of the commission of a crime may be brought autonomously before a civil court where:

- a) the criminal proceeding has not led to prosecution within eight months of the crime being known, or is in progress at that moment;
- b) the criminal proceedings have been terminated or suspended, or proceedings have been extinguished before trial;
- c) the procedure depends on a complaint or private accusation (which is the case, for example, for the crimes of defamation and insult);
- d) there is no damage at the time of the indictment, damages are not known or are not known to the full extent;
- e) the criminal sentence has not dealt with the request for civil liability, pursuant to Article 82(3) of the Code of Criminal Procedure;
- f) it is brought against the accused and other persons with mere civil liability, or only against these persons where the defendant's main intervention has been caused in that action;

<sup>730</sup> [Law Decree of 25 November 1966, n. 47344.](#)

<sup>731</sup> [Law Decree of 17 February 1987, n. 78.](#)



- g) the value of the claim would give rise to proceedings before a court, but the criminal proceedings are adjudicated by a single judge;
- h) the criminal proceedings are conducted in accelerated form;
- i) the injured party has not been informed of the possibility of claiming damages within the criminal proceedings or has not been notified to do so.

### ***1.5. Right to rectification and reply***

The right to make corrections to publicly available information is protected by Article 37 of the Constitution. The exercise of the right of rectification and reply is regulated in Articles 24-27 of Press Law n. 2/1999<sup>732</sup>. According to these provisions, natural and legal persons have a right to respond to media content that may affect, even indirectly, their reputation and good name.

## **2. Potential defences**

As regards defamation, the Criminal Code explicitly provides the defences of truth and good faith for statements made in support of “legitimate interests” or to exercise a right, as a special norm reflecting the general exception relating to the exercise of a right provided for in Article 31 of the Criminal Code. Article 180(2) provides that the conduct shall not be punishable when the statements are made in the exercise of legitimate interests and the accused proves their truth or proves the existence of serious reasons to consider them true in good faith.

A person targeted by an abusive criminal complaint may submit a counter criminal complaint for false public accusation which, as stated above, is a criminal offence under Article 365 of the Criminal Code. This however presupposes the evidence that the accuser accused the person concerned of acts or facts with the knowledge that they are false.

The Civil Code does not mention freedom of expression or information explicitly, nor does it consider any type of defence, such as truth or public interest, in relation to civil defamation. Nonetheless, the exercise of a right can generally be a cause of exclusion from civil liability, in accordance with Article 18(2) of the Constitution, and freedom of expression and of information, as well as freedom of the press, are protected, respectively, by Articles 37 and 38 of the Constitution.

## **3. Compliance with ECHR principles**

Portugal has been the object of numerous condemnations by the ECtHR for violation of freedom of expression.<sup>733</sup> Existing research analysing ECtHR judgments rendered against Portugal on grounds of the right to freedom of expression between 2005 and 2015<sup>734</sup> has pointed out that:

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<sup>732</sup> [Law of 13 January 1999, n. 2.](#)

<sup>733</sup> European Court of Human Rights, [Press Country Profile – Portugal](#) (2020), p. 5-6.

<sup>734</sup> International Press Institute, [Briefing: criminal defamation in Portugal](#) (2015).



- out of 18 ruling condemning Portugal for the violation of this right, 12 concern convictions for criminal defamation;
- among these 12, in six cases the party convicted was a journalist, editor or publisher; among the other six were a historian, two authors, and a politician;
- five of the criminal cases involved a conviction for aggravated defamation against a public official (Article 184 of the Criminal Code);
- three cases related exclusively to civil liability for defamation;
- two to the violation of judicial secrecy (“segredo de justiça”).

ECtHR rulings have exposed in particular the courts’ failure to balance freedom of expression and the right to one’s reputation and good name, including for not adequately taking into account the contribution of concerned statements to a public interest debate (see for example *Amorim Giestas and Jesus Costa Bordalo v. Portugal* (2014)). The ECtHR has also criticised the severe chilling effect arising from the awarding of disproportionate sanctions and/or damages, including imprisonment, in defamation cases (see for example *Azevedo v. Portugal* (2008)).

Judicial interpretation of the balance to be struck between freedom of expression and the right to reputation and good name has evolved in the past years following ECtHR’s repeated condemnations, in particular as it concerns criminal defamation complaints. Judicial practice has been giving increasing account to the criteria of truthfulness, public interest and the need to acknowledge the wider limits of acceptable criticism for public figures (see for example the Supreme Court’s overturning a 2009 [decision](#) by the Lisbon Court of Appeal<sup>735</sup>). Case-law shows, however, that the truthfulness of the statements may not necessarily exclude liability pursuant to Article 484 of the Civil Code: this interpretation purported by the Supreme Court in a decision of 2007 was the object of the ruling of the European Court of Human Rights (ECtHR) in case [Público - Comunicação Social, S.A. and Others v. Portugal](#) (2010).

#### 4. Systemic safeguards

As regards criminal proceedings, the Code of Criminal Procedure provides for the possibility to bring cases through private prosecution (Article 285). Under this system, after an initial inquiry by the prosecutor, the private party lodging the criminal takes the decision to file charges. If charges are filed, the defendant then has the opportunity ask a judge to review and decide if the case should go to trial. This possibility to bypass prosecutorial judgment is seen by some experts as potentially increasing the opportunity for frivolous claims to reach court.<sup>736</sup>

When, as an outcome of proceedings, defendants are declared innocent, they may claim the reimbursement of fees from the accusing party who acted in bad faith or with gross negligence (Article 520 of the Code of Criminal Procedure). The accused may also claim damages from the complainant.

<sup>735</sup> For more information, see Sindicato dos Jornalistas, [SJ saúda absolvição de jornalistas Célia Rosa e Isabel Stilwell](#) (2013).

<sup>736</sup> International Press Institute, Briefing: criminal defamation in Portugal (2015), cited.





As regards civil proceedings, there is no possibility to obtain the early dismissal of an abusive claim. There are also no established maximum limits to damages.

The Code of Civil Procedure<sup>737</sup> regulates the consequences of the abuse of process (Article 542), which can give rise to a fine as well as compensation of damages upon the other party's request. According to case-law, this presupposes a clear malicious intention or severe negligence (see for example Supreme Court, [judgment](#) of 12 November 2020 in case 279/17). Abuse of process is the only situation where the losing party can also be condemned, at the court's discretion, to pay lawyers' fees with no limitation (Article 543 of the Code of Civil Procedure), which are normally excluded as such from the application of the loser pays principle.

The system of court fees may also be seen as offering a certain degree of protection against abusive civil proceedings. Payments of court fees, which are reportedly very high in Portugal, are due at two distinct moments of the proceedings: an "initial justice fee" to be paid at the beginning, when the case is attributed to a court; and the payment of remaining court fees at the end of the written proceedings, before the hearing. However, it should be born in mind that excessive court fees, for which Portugal has been criticized by international monitoring bodies<sup>738</sup>, also exacerbates the impact of abusive litigation for SLAPP targets.

As it concerns legal aid, no special rules apply to cases which are likely to qualify as SLAPPs: the targeted person may apply to legal aid under the general rules which revolve mainly around the person's income.<sup>739</sup> In this respect, it is worth noting that the restrictive requirements to access legal aid and the delays in obtaining such support are another issue over which Portugal has been criticized by international monitoring bodies<sup>740</sup> – gaps which the government has recently tried to address.<sup>741</sup>

## 5. The court's role and independence

While, as stated above, jurisprudence as regards the balance between the protection of reputation and good name, on the one hand, and freedom of expression, on the other hand, has been evolving in recent years to better align itself with that of the ECtHR, experts underline that a degree of uncertainty and arbitrariness persists.<sup>742</sup> This is also due to the fact that some courts have questioned the compatibility with Portuguese constitutional norms of certain principles elaborated by the ECtHR (see for example Tribunal of Lisbon, [judgment](#) of 26 January 2017 in case 2175/11).

This uncertainty is further amplified by the fact that, under Portuguese law, there are limitations on the leave to appeal which relate to set thresholds of the sanctions or damages awarded. As a general rule, the Supreme Court hears appeals whose value exceeds the limit of the appeal courts (30,000

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<sup>737</sup> [Law of 26 June 2013, n. 41.](#)

<sup>738</sup> Office of the UN High Commissioner for Human Rights, [Portugal must ensure justice is accessible to all, UN rights expert warns](#) (2015).

<sup>739</sup> [Law of 29 July 2004, n. 34.](#)

<sup>740</sup> Office of the UN High Commissioner for Human Rights, [Portugal must ensure justice is accessible to all, UN rights expert warns](#) (2015), cited.

<sup>741</sup> Government of the Portuguese Republic, [Aprovado Novo Regime Jurídico do Acesso ao Direito e aos Tribunais](#) (2019).

<sup>742</sup> See for example Francisco Teixeira da Mota, [Liberdade de expressão – a jurisprudência do TEDH e os tribunais portugueses](#) (2017).



EUR) and appeal courts hear cases whose value exceeds the limit of judicial courts of first instance (5,000 EUR). That makes it unusual in practice, in particular for criminal defamation cases, to advance beyond regional appeal courts.

## 6. Overview and examples of SLAPP-type cases

Based on information collected and compiled by independent non-governmental organisations, and reports of prominent cases in the press, it seems that abusive lawsuits against public participation that can qualify as SLAPPs are mostly brought:

- against media outlets, journalists, bloggers and activists;
- by politicians and public officials, including law enforcement authorities, as well as companies;
- targeting reports of wrongdoings or corruption, satire and manifestation of criticism.

Examples of prominent cases, in particular against journalists, can be found in the Media Laws Database of the International Press Institute.<sup>743</sup> These include the paradigmatic case of the 70 million EUR claim for damages filed by the investment group Ongoing Strategy Investments against the weekly newspaper *Expresso* and one of its journalists, which was dismissed by a Lisbon court in 2012.<sup>744</sup> Among other recent cases, one relates to the multiple civil and criminal lawsuits filed by the Universal Church of the Kingdom of God (UCKG) against Alexandra Borges, a Portuguese investigative journalist, and the television station *Televisão Independente (TVI)* for an investigative series concerning a network of illegal adoptions that took place in Portugal in the 1990s, broadcasted on TVI.<sup>745</sup> UCKG is known for having, in the past, filed more than 100 lawsuits against the daily newspaper 'A Folha de São Paulo' in 20 different Brazilian states, following the publication of an article about the UCKG's sizeable assets.<sup>746</sup>

Portugal is also one of the countries where abusive lawsuits against environmental activists and organisations by big businesses have been reported.<sup>747</sup> These include a 250,000 EUR civil defamation claim<sup>748</sup> brought against an activist of the non-governmental organization Pro-Tejo by eucalyptus pulp mill operator Celtejo in 2017, later withdrawn.<sup>749</sup>

Environmental activists are not the only targets of lawsuits filed by entrepreneurs. A recent well-known case concerning is the civil defamation lawsuit brought by businesswoman Isabel dos Santos against MEP Ana Gomes, for posting tweets calling out dos Santos for money laundering a few months before it became a global scandal.<sup>750</sup> The case was dismissed in early 2020.

<sup>743</sup> International Press Institute, [Media Laws Database – Portugal](#).

<sup>744</sup> For more information, see Publico, [Balsemão e Nicolau Santos absolvidos de pagar 70 milhões à Ongoing](#) (2012).

<sup>745</sup> See what reported by Sabado, [IURD apresenta queixas contra jornalistas da TVI](#) (2019).

<sup>746</sup> See what reported by Observador, [A estratégia da IURD para pressionar jornalistas nos tribunais](#) (2017).

<sup>747</sup> See Greenpeace European Unit, [Sued Into Silence - How the rich and powerful use legal tactics to shut critics up](#) (2020).

<sup>748</sup> For more information, see Civicus, [Company targets environmental activist in SLAPP lawsuit](#) (2018).

<sup>749</sup> See Publico, [Desistência de processo judicial da Celtejo é “vitória para o Tejo”](#) (2019).

<sup>750</sup> For more information, see Expreso, [Justiça dá razão a Ana Gomes em processo de difamação movido por Isabel dos Santos](#) (2020).



The legal background of SLAPP cases in

## Romania

Contribution by Manuela Preoteasa (University of Bucharest)

### 1. Laws most vulnerable to abuse:

Most of the SLAPP cases or SLAPP-like intimidation attempts resides in the legal provision protecting reputation, which is provided for by the civil code. The appetite for suing journalists had origin in the former anti-defamation provision of the Criminal Code, which has incriminated journalists for over a decade, harassing journalists in long-lasting suits, in a judicial system over years criticized for malfunctioning and even corruption, and keeping them under the pressure of the potential imprisonment sentences. The prosecutorial attitude of various public officials and their interest-related groups (including among key owners of media outlets) has been maintained although the prejudices to reputation have not longer been criminal offences. It took, however, more sophisticated forms, especially between 2015-2019 and relies not only on the protection of reputation in the civil code, but other forms of harassment – from political leaders obscurely trying to put pressure on journalists and on other civil voices to businesspeople harassing them in Romanian and/or international courts. The use of riot police to beat citizens in the street riots in 2018 left 452 wounded, including Romanian journalists and a camera operator from the Austrian public television channel, ORF, during demonstrations on 10 August 2018.<sup>751</sup> The International and European Federations of Journalists and a series of organisations firmly condemned the violent clashes join their Romanian affiliate. Romanian gendarmes assaulted and verbally attacked with no reason journalists covering the protest around Victoriei Square, in Bucharest.<sup>752</sup>

“On 6 July 2017, tax inspectors raided the offices of the investigation network Rise Project at the same time that it was announced that a major article was to be published revealing that Liviu Dragnea, President of the ruling Social Democrat Party, exercised control over the Romanian secret services: on 28 January 2018, a confidential report by the Romanian tax authorities on Rise Project was disclosed to the press and used in a defamation campaign.”<sup>753</sup> A case of a Romanian citizen journalist, Elena Popa, is considered by the organization Media Defense “pivotal because it likely to have a significant impact on both the function and safety of citizen journalists – as well as the audiences that rely on the information and forums they provide. This is particularly true in countries where press freedom may be restricted and

<sup>751</sup> Council of Europe – Parliamentary Assembly, 03.01.2020, *Threats to media freedom and journalists' security in Europe*, <https://www.ecoi.net/en/file/local/2022212/Threats+to+media+freedom+and+journalists+security+in+Europe+%5BDoc.+15021%5D.pdf>

<sup>752</sup> European Federation of Journalists (EFJ), 14.08.2018, *Romania: Journalists beaten by riot police during Bucharest protest*, <https://europeanjournalists.org/blog/2018/08/14/journalists-beaten-by-riot-police-during-bucharest-protest>. According to EFJ, cases of physical attacks were reported by journalists **Robert Mihăilescu** (Hotnews.ro), **Cristi Stefanescu** (DW) and **Vlad Ursulean** (Casa Jurnalistului), by photojournalists **Ioana Moldovan** (Documentaria.ro) and **Silviu Matei** (Agerpres), and by reporter **Cristian Popa** and cameraperson **Cristi Ban** (Digi24 news TV). A camera operator of the Austrian public television ORF, **Robert Reinprecht**, was also beaten by the riot police after the square was cleared.

<sup>753</sup> Council of Europe – Parliamentary Assembly, 03.01.2020, *Threats to media freedom and journalists' security in Europe*, <https://www.ecoi.net/en/file/local/2022212/Threats+to+media+freedom+and+journalists+security+in+Europe+%5BDoc.+15021%5D.pdf>



the internet plays an important role in communicating, receiving and disseminating information of public interest. For vulnerable populations such as domestic caregivers, the internet and social media platforms often serve as the primary and principle means for them to exercise their right to freedom of expression.”<sup>754</sup>

The most commonly used legal background on which an action can be taken in court against a journalist in Romania resides in the civil code, which remained the legal basis for lawsuits, after the repealing of various forms of defamation from the Criminal Code. The Parliament decided to repeal the slander, the liber and the state from the Criminal Code through Law no. 278/2006, enforced since 12 August 2006, as “under the rule of a permanent threat of criminal sanction, freedom of expression is significantly affected”, according to the motivating memorandum<sup>755</sup>. The perspective of the criminal offenses imposes on the person “an attitude of self-censorship, which should be determined only by ethical reasons and not by the fear of an immediate criminal punishment”<sup>756</sup>. The application of a criminal penalty was considered at the time “manifestly disproportionate”<sup>757</sup> to the purpose pursued by the sanctioning of such an act, even in the event of damage to a person's dignity by exercising freedom of expression, regardless of the damage caused.

The media organisations have fought decades to eliminate the label and from the Criminal Code and there are still voices in the judicial environment which considers that the elimination of those propagated the hate speech even more in the media, with no control. “Calumny and insult were sanctioned by articles 205 and 206 of the old Criminal Code as offenses, but in the new legislation they no longer constitute offenses, but are subject to criminal and civil sanctions, because the injured party can claim material damages for the damage suffered.”<sup>758</sup> In Romania, the protection of public against SLAPP is almost inexistent.

The provisions protecting the human dignity are currently protected by the new civil code<sup>759</sup>. Art 72 of the Civil Code protects the right to dignity: “Everyone has the right to respect for his dignity” (Art 72.1) and “any prejudice to the honor and reputation of a person is prohibited, without his/her consent or without respecting the limits provided by Art. 75”. The limits refers at the “violations permitted by law or by the international conventions and pacts regarding the human rights to which Romania is a party” and those “do not constitute an infringement of the rights provided in this section.”<sup>760</sup> The legislator is limited, therefore, to the consecration of the right to dignity, without, however, defining this

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<sup>754</sup> Media Defence, 03.05.2020, *The citizen journalist Elena Popa*, <https://www.mediadefence.org/casestudies/citizen-journalist-elena-popa>

<sup>755</sup> Explanatory Memorandum at the adoption of the Law no. 278/2006 for amending the Criminal Code (*Lege 278/2006 pentru modificarea și completarea Codului penal, precum și pentru modificarea și completarea altor legi*), Monitorul Oficial no. 601/2006, <http://www.cdep.ro/proiecte/2006/000/20/4/em24.pdf>

<sup>756</sup> id

<sup>757</sup> Explanatory Memorandum at the adoption of the Law no. 278/2006 for amending the Criminal Code, as cited

<sup>758</sup> Tărchiță, Petru, “Respect for the Honor, Privacy and Dignity of the Human Person”, *AGORA International Journal of Juridical Sciences*, No.1 (2020), <http://univagora.ro/jour/index.php/aijs/article/view/4011/1576>, p. 37

<sup>759</sup> Civil Code, consolidated version as republished, *Monitorul Oficial* no. 505 of 15 July 2011, enforced since 01.10.2011

<sup>760</sup> Civil Code, as cited.



concept, an approach, of course, problematic, given that the object of such a right is, by its nature, irreducible to a precise definition”.<sup>761</sup>

In case of abusive exercise of freedom of expression, the injured person has the possibility to obtain in civil way the reparation of the suffered damage based on the article protecting the reputation. Dignity is a basic value of the Convention of Human Rights, explicitly protected by the Romanian Constitution. “Constitution of Romania invoked dignity as a supreme value, an interpretive Leitmotiv, a basis for the limitation of rights and freedoms, and a guide to the principled resolution of constitutional value conflicts.”<sup>762</sup> Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable through Constitution (art 30.1)

“This right is not defined, the legislator limiting to consecrate the existence of the right to dignity, offering protection to all individuals, irrespective of their social statute or other criteria. It is not a fundamental right, but a subjective one with protection at constitutional level.”<sup>763</sup> Concerning the content of the right, it is narrower than the value protected by the constitutional law, being restricted to honor and reputation. These two concepts should be regarded in a tight interdependence, the honor being innate and the reputation being gained.<sup>764</sup>

In the post-communist era, a rapid overview of a series of defamation cases in the Romanian courts reveals that key principles like proportionality, which ensures the balance between dignity/reputation and freedom of expression, were ignored in Romanian judiciary practice. In the case Ileana Constantinescu v. Romania<sup>765</sup>, in which the European Court of Human Rights considered that the provisions of art. 10 of the Convention, namely the applicant's right to freedom of expression was violated by her conviction for libel, “finding that the reasons given by the Romanian courts could not be considered relevant and sufficient to justify interference with the the applicant, which was disproportionate to the legitimate aim pursued, namely the protection of the reputation of others”<sup>766</sup>

In Romania, the free expression of the judicial people was at risk. The period between 2015 and 2019 excelled in and “one of the most controversial change of the judiciary legislation”<sup>767</sup>, namely the special section for the investigation of offences within the judiciary has started to show its effects in

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<sup>761</sup> Matefi, Roxana, “The right of the person to a reputation, in the context of national and international legal regulations and relevant case law”

*Universul Juridic no 3/2019*, [http://revista.universuljuridic.ro/wp-content/uploads/2019/05/06\\_Revista\\_Universul\\_Juridic\\_nr\\_3-2019\\_PAGINAT\\_BT\\_R\\_Matefi.pdf](http://revista.universuljuridic.ro/wp-content/uploads/2019/05/06_Revista_Universul_Juridic_nr_3-2019_PAGINAT_BT_R_Matefi.pdf), p. 58

<sup>762</sup> Popescu, Ramona Delia, “Constitutionalization of Civil Law: The Right to Respect for Private Life and Human Dignity”, *AGORA International Journal of Juridical Sciences No. 1 (2013)*, <https://www.corteidh.or.cr/tablas/r31684.pdf>, p. 154

<sup>763</sup> Popescu, Ramona Delia, as cited, p.154

<sup>764</sup> Popescu, Ramona Delia, as cited, p. 154

<sup>765</sup> ECHR, 27.06.2020, *Constantinescu vs Romania*, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%7B%22001-58737%22%7D>

<sup>766</sup> Matefi, Roxana, 2019, “The right of the person to a reputation, in the context of national and international legal regulations and relevant case law”, *Universul Juridic no 3/2019*, [http://revista.universuljuridic.ro/wp-content/uploads/2019/05/06\\_Revista\\_Universul\\_Juridic\\_nr\\_3-2019\\_PAGINAT\\_BT\\_R\\_Matefi.pdf](http://revista.universuljuridic.ro/wp-content/uploads/2019/05/06_Revista_Universul_Juridic_nr_3-2019_PAGINAT_BT_R_Matefi.pdf), p 60

<sup>767</sup> Selejan-Gutan, Bianca, 22.02.2019, “New Challenges against the Judiciary in Romania”, *Verfassungsblog*, <https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/>



February 2019.<sup>768</sup> “Article 9 (3), Law No 303/2004, introduced by Law No 242/2018 – Judges and prosecutors are obliged, in the exercise of their duties, to refrain from any defamatory manifestation or expression, in any way, against the other powers of the state – legislative and executive). These provisions have been previously criticized by the Venice Commission (see Opinion No. 934/20 October 2018). It is also necessary to prohibit by law the possibility of revoking prosecutors or judges from their offices held in magistracy for critical opinions on public policy issues of interest to the judiciary.”<sup>769</sup>

## 2. Potential defences

Although Romania is mentioned by international monitoring reports<sup>770</sup> among the prominent cases of SLAPP suits against journalists, those are little visible in the Romanian public debate. At the age when slander and libel were criminal offences the media NGOs were highly vocal on the harassment of journalists through lawsuits, however the concept of SLAPP is not largely familiar as such to journalists and civil society, and they have difficulties in defend themselves; the empathy and solidarity emerging in the past, when a suit could have ended in a detention sentence, has gone and the lawsuits based on the civil code are a difficult burden which mostly resides on the journalists’ shoulders.

The mainstream media almost abandoned hard investigative reporting, which remains the mission of courageous journalists, which usually associate themselves in NGOs (Recorder, G4Media, Rise Project, part of the Organised Crime and Corruption Reporting Project, the Romanian Centre for Investigative Journalism (CRJI), the Centre for Media Investigations). They rely on crowdfunding, grants from foreign donors and transparent sources so they can stay independent from what they call “groups of interest”<sup>771</sup>

Ranked with the high-risk score from the perspective of the media pluralism (market conditions, political independence and social inclusiveness)<sup>772</sup>, the media landscape is characterized through “the failure of crucial formal means and mechanisms necessary to safeguard public interest information production and to uphold at the same time the freedom and professional standards of journalism”<sup>773</sup>.

<sup>768</sup> The chain of events started in January 2017 with the Emergency Government Ordinance 13, which attempted to indirectly decriminalise some graft offences and the adoption of which generated massive street protests against corruption. The attacks on the fields of justice came along with forms of repressions towards the freedom of expression: magistrates protesting against the measures were sanctioned and the whole society felt the effect of intimidation.

<sup>769</sup> Dragoş, Călin, 16.06.2020, “The Recent ECHR Judgment Kövesi v. Romania. Reactions of Romanian Authorities and Implications regarding the Rule of Law”, *Strasbourg Observers*, <https://strasbourgobservers.com/2020/06/16/the-recent-echr-judgment-kovesi-v-romania-reactions-of-romanian-authorities-and-implications-regarding-the-rule-of-law/>

<sup>770</sup> Article 19, 2020, *Protecting Public Watchdogs Across the EU: a Proposal for an EU Anti-SLAPP Law*, [https://www.article19.org/wp-content/uploads/2020/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.article19.org/wp-content/uploads/2020/12/Anti_SLAPP_Model_Directive-2-1.pdf)

<sup>771</sup> “Journalists for citizens, not for interests” is the slogan of Recorder, represented by SC Harfa Online Publishing srl and the Association Recorder Community.

<sup>772</sup> Popescu, Marina, Bodea, Roxana, Toma, Raluca, CMPF, 2020, *Media Pluralism Monitor 2020 – country report Romania: Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania and Turkey* in the years 2018-2019, [https://cadmus.eui.eu/bitstream/handle/1814/67815/romania\\_results\\_mpm\\_2020\\_cmpf.pdf?sequence=1&isAllowed=yhttps://cmpf.eui.eu/mpm2020-results/](https://cadmus.eui.eu/bitstream/handle/1814/67815/romania_results_mpm_2020_cmpf.pdf?sequence=1&isAllowed=yhttps://cmpf.eui.eu/mpm2020-results/)

<sup>773</sup> Popescu, M., Bodea, R., Toma, R., CMPF, *Media Pluralism Monitor 2020*, as cited



To resist in such unfriendly environment, where the independent investigative journalism is rather not welcomed, the independent journalists valuing the professional standards often adopted a “hybrid media model”<sup>774</sup>, organizing themselves in associations (NGOs) or groups of work on various editorial project (i.e. *Să fie lumină*) and collaborating with law houses or NGOs protecting media freedom. Freedom House Romania set up a hub of the local press, PressHub.ro, in an attempt to support the independent investigative effort in local media, which has been put over years under political and social pressures.

Investigative journalist (for 22 years) and a lecturer (for 7 years) at University of Bucharest, Faculty of Journalism and Communication Sciences, Department of Journalism, Emilia Șercan looked into cases of plagiarism by government officials, on 15 April 2019 she reportedly received death threats.<sup>775</sup> She filed a criminal complaint, and on September 18, DGA prosecutors charged the former rector of the National Police Academy, Adrian Iacob, and the former deputy rector, Mihail-Petrica Marcoci, with instigating blackmail and instructing police officer Gheorghe Adrian Barbulescu to issue death threats against the reporter to stop her investigations. On December 10, Bucharest Court sentenced Barbulescu to one year in prison. The media environment showed solidarity with the journalists and sent especially on social media support message condemning the harassment of investigations.<sup>776</sup>

In such unfriendly environment, where journalists can be threatened with death<sup>777</sup> or being threaten with lawsuit by representatives of a well-known lobbyist, Broidy, apart from the public request to the state authorities that a journalist to be investigative<sup>778</sup> there is little public awareness on SLAPP and on potential defence strategies or at least solidarity among professionals. Journalists end up facing enormous challenges, on one hand, being intimidated by significantly more financially powerful people, on the other hand, having their professional status endangered because significant claims for financial compensation.

The legal provisions on defamation in the old Criminal Code were intended to provide a remedy against false assertions of fact. Truthful statements, as well as opinion, were not actionable. Based on the former Criminal Code provisions, all individuals, including public officials, had a legitimate right to protect their reputations if untruthful statements have been made about them. Oral defamation was *slander (art 205)*; defamation in writing or other permanent forms such as film was *libel (206)*. The article of the old Criminal Code 207 referred at the “proof of truth”, the notion is not defined in the Civil Code. Defamation of *public officials, the nation, or government organs* a discrete offense, as distinct from defamation of a person (art 236 -239 Old Criminal Code) – sentences to prison. The provisions of the Civil Code refer to “good faith”: “the exercise of constitutional rights and freedoms

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<sup>774</sup> Preoteasa, Manuela, Schwartz, Andrei, 22.03.2018, “Romanian Hybrid Media Model”, *European Journalism Observatory*, <https://en.ejo.ch/media-economics/romania-hybrid-media-model>

<sup>775</sup> Euroscientist.com, 24.06.2019, *Is it life-threatening to investigate plagiarism?*, <https://www.euroscientist.com/is-it-life-threatening-to-investigate-plagiarism/>

<sup>776</sup> US Department of State, 2019, *Country Reports on Human Rights Practices: Romania*, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/romania/> p. 19

<sup>777</sup> The death threats following an investigation on plagiarism by Emilia Șercan

<sup>778</sup> Threats towards journalist Dan Tăpălagă both on commercial side (related to an investigation covering Circinus and Broidy; and by Liviu Dragnea, a formerly powerful politician in Romania after the information of a potential secret )





in good faith and in compliance with the international pacts and conventions to which Romania is a party does not constitute a violation of the rights provided in this section” (Art 72.2, Civil Code<sup>779</sup>)

Currently, the use of civil laws to punish defamation is permissible under international free speech norms and in relation with international treaties. The civil legislation does not make distinction neither between truth/ untruth or to the good faith, nor between public official / person.

### 3. Compliance with ECHR principles

Two kinds of problems have identified.<sup>780</sup> The national legal framework does not provide specific basis or tool for judges to unitarily apply the principles of freedom as developed by the ECHR. After analysing the freedom of expression vs the right to dignity – implementation of the ECHR standard in national jurisprudence<sup>781</sup>, Stoicescu noted: „The national jurisprudence analyzed supports the conclusion that national courts generally follow the Conventional standard, which they prove to be aware of and respect, according to Article 11 and Article 20 of the Romanian Constitution. However, on the one hand, many national judgements reach different conclusions than the Court in similar cases - either due to the evolving approach of the Court’s case law or, perhaps, due to the multiple interpretations which can be attributed to some considerations of the European Court of Human Rights, these combined altogether with a high degree of complexity of the case itself. On the other hand, in some cases, national courts show a tendency towards using a theoretical Conventional standard, whose application remains at an abstract level.”<sup>782</sup>

When applying to journalists or in the case of the citizen journalism, the jurisprudence does not seem to defend the freedom of expression, as it can be noticed from the recent case studies. The Romanian state lost a series of legal actions at ECHR after the Romanian courts have applied the legal provisions of the former Criminal Code on defamation. However, despite the public awareness in prominent cases like Feri Predescu against the former Mayor of Constanța, Radu Mazăre, the tendency of journalists being harassed by powerful entities have continued and seem to become more intimidating. Interestingly, if in the age of the old Criminal Code the alert with regard to the lawsuits had largely echoed the Romanian media NGOs and the professionals, currently the lawsuits and/or the threats of lawsuits and/or other forms of harassment rather become subject of the international alerts than in the Romanian public sphere. Due to the gravity of the situations – like the threats to death towards the journalist and university lecturer Emilia Șercan, or the threat with lawsuit addressed by a powerful politician, Liviu Dragnea, towards the highly-reputed journalist Dan Tăpălagă.

Legal actions with significant economic consequences – powerful, sometimes highly-influential people and companies against investigative journalists acting mostly independent, without the

<sup>779</sup> Civil Code, as cited

<sup>780</sup> Stoicescu, 2018, „*The role of the national judge in ensuring a fair balance between freedom of expression and the right to reputation in the light of the jurisprudence of the European Court of Human Rights*”, [https://drept.unibuc.ro/dyn\\_doc/oferta-educationala/scoala-doctorala/rezumat-teza/ABSTRACT%20-%20lb%20engleza.pdf](https://drept.unibuc.ro/dyn_doc/oferta-educationala/scoala-doctorala/rezumat-teza/ABSTRACT%20-%20lb%20engleza.pdf)

<sup>781</sup> Stoicescu, S., 2019, *Libertatea de exprimare vs dreptul la reputație - aplicarea standardului CEDO în jurisprudența națională*,

<sup>782</sup> Stoicescu, 2018, „*The role of the national judge in ensuring a fair balance between freedom of expression and the right to reputation in the light of the jurisprudence of the European Court of Human Rights*”, [https://drept.unibuc.ro/dyn\\_doc/oferta-educationala/scoala-doctorala/rezumat-teza/ABSTRACT%20-%20lb%20engleza.pdf](https://drept.unibuc.ro/dyn_doc/oferta-educationala/scoala-doctorala/rezumat-teza/ABSTRACT%20-%20lb%20engleza.pdf)





support of a big media entity are less visible in the Romanian public discussion. The threat on behalf of the Circinus and Broidy, an ex-fundraiser for Trump, with a potentially expensive lawsuits had not echoed much in Romanian media, despite the vertical power-relation. The journalist Dan Tăpălagă pointed to the absurdity of the situation, him being contacted by a lawyer allegedly in the name of Circinus to be asked for a postal address so the company to send him the notification about the legal action to be taken against him.

#### 4. Systemic safeguards

Romania have not adopted legal techniques in its national legal system that could prevent or disincentives the launching of SLAPP lawsuits except of the payment of judicial costs by the losing party. On the contrary, in the case of CRJI the lawsuits were preceded by an 'emergency' gag order, which significant financial pressures on journalists. The lawsuits filed against CRJI (NGO) was also very little visible in the public debate, despite the gag order application at the time, granted by a Romanian judge in January 2019. In July 2019, the judge imposed a fine on CRJI of RON 1000 (€200) for each day the stories remain online, so far accruing fines of over RON 300,000 (more than €60.000)<sup>783</sup>.

#### 5. The court's role and independence

#### 6. Case law and case studies

##### Case study 1 OCCRP – alleged misuse of GDPR and tax<sup>784</sup>

(Case study documented based on the OCCRP website, 09.11.2018, OCCRP Strongly Objects to Romania's Misuse of GDPR to Muzzle Media)

RISE Project, an award-winning investigative journalism online outlet in Romania and OCCRP's partner, was ordered Thursday by the Romanian Data Protection Authority to reveal its sources under the threat of a fine of up to €20 million based on the European Union's General Data Protection Regulation (GDPR) directive 679/2016.<sup>785</sup> The data protection authority asked the journalists to reveal how and when got the information published on their social media page, their sources, how they stored the documents and "what other personal information RISE Project has on Dragnea, Tel Drum executives and their friends"<sup>786</sup> and gave reporters a deadline of 10 days or they went to face fines. In case of non-compliance, they were to pay a fine of up to 3.000 lei (approx. 644 Euro) for each day of

<sup>783</sup> Details are included in the case studies on CRJI.

<sup>784</sup> Case study documented based on the OCCRP website, 09.11.2018, *OCCRP Strongly Objects to Romania's Misuse of GDPR to Muzzle Media*, <https://www.occrp.org/en/40-press-releases/press-releases/8875-occrp-strongly-objects-to-romania-s-misuse-of-gdpr-to-muzzle-media>

<sup>785</sup> Case study documented from OCCRP website, as cited

<sup>786</sup> Case study documented from OCCRP website, as cited



delay, calculated since the date stated by the decision.<sup>787</sup> OCCRP and Rise Project find the timing and circumstances of this action suspicious.<sup>788</sup> RISE Project readers, as well as lawyers consulted by the organization, noted the speed at which the Romanian Data Protection Authority reacted in this case while many other cases submitted by Romanian citizens linger for months without action. The president of the PSD never sued but soon after these threats were made, the Romanian Anti-Fraud Authority (ANAF) raided RISE Project's offices, saying they suspected the organization of fraud. The investigation carried out by ANAF never uncovered any such fraud.<sup>789</sup> RISE Project discovered that the initial complaint ANAF used to target RISE was a forgery filed by a non-existent person, with a non-existent physical address who falsely claimed that she worked as an accountant at the media house.<sup>790</sup> The case was included in the report of the Parliamentary Assembly of the Council of Europe.<sup>791</sup>

### Case study 2: Dan Tăpălagă, sued by Circinus, Elliott Broidy, represented by Latham&Watkins LLP

(Source: The Press Release of the Latham & Watkins, as published by *Evenimentul Zilei*<sup>792</sup> and Dan Tăpălagă's article on G4Media.ro<sup>793</sup>)

The legal actions against the journalist Dan Tăpălagă were distributed through a press release. On 28 March 2020 the journalists received a phone call and someone presenting himself as representing a law house on behalf of the client Circinus wanted the contact postal contact data of the journalist, letting him know that he was going to be sued in London. Later the received by email a claim form through which the company asked claiming compensation for the articles published by him<sup>794</sup>. A press release<sup>795</sup> by the law house Latham&Watkins LLP representing the client Circinus was sent shortly to some media, some of which announcing the legal action against the journalists. In their statement, Circinus representatives say the journalist has published „a series of defamatory articles about Mr. Elliott Broidy”, alleging that “these recent articles and subsequent statements also contain wrong, false, manipulative information and serious omissions in a manner which appears to be aimed at damaging Mr. Broidy's reputation”.<sup>796</sup> In a response to the action, G4Media.ro publicly announced “to continue to serve the public interest despite unprecedented pressure on independent journalists. Considering the major public interest surrounding Elliott Broidy's and his company's actions in

<sup>787</sup> OCCRP, 09.11.2018, English Translation of the Letter from the Romanian Data Protection Authority to RISE Project, <https://www.occrp.org/en/16-other/other-articles/8876-english-translation-of-the-letter-from-the-romanian-data-protection-authority-to-rise-project>

<sup>788</sup> Case study documented from OCCRP website, as cited

<sup>789</sup> Case study documented from OCCRP website, as cited

<sup>790</sup> Case study documented from OCCRP website, as cited

<sup>791</sup> Council of Europe – Parliamentary Assembly, as cit.

<sup>792</sup> No authored article, 30.03.2018, “Dan Tăpălagă, dat în judecată din cauza „informațiilor false și manipulatorii”. O casa de avocatură din SUA este pe urmele sale”, *Evenimentul Zilei*, <https://evz.ro/dan-tapalaga-dat-in-judecata-broidy.html>

<sup>793</sup> Tăpălagă, Dan, “All about the Broidy case. How one of President Trump's fundraisers initiated legal action against me” (Totul despre cazul Broidy. Cum m-a dat în judecată la Londra unul dintre fundraiserii președintelui Trump), *G4Media.ro*, <https://www.g4media.ro/all-about-the-broidy-case-how-one-of-president-trumps-fundraisers-initiated-legal-action-against-me.html> (in native language published at <https://www.g4media.ro/totul-despre-cazul-broidy-cum-m-a-dat-in-judecata-la-londra-unul-dintre-fundraiserii-presedintelui-trump.html>)

<sup>794</sup> Tăpălagă, Dan, G4Media, 02.04.2018, as cited

<sup>795</sup> No authored article, 30.03.2020, *Evenimentul zilei*, as cited

<sup>796</sup> Press-release by Latham&Watkins LLP, according to 30.03.2020, *Evenimentul zilei*, as cited



Romania, we will continue to make public all information, facts and documents that are relevant for the public opinion, no matter the risks, and will try to shed light in this case, as do our colleagues in the US media.”<sup>797</sup>

### Case study 3: Lawsuit two years after the publishing of the stories

The Romanian Centre for Investigative Journalism (CRJI) faced accruing fines and two protracted lawsuits, relating to online “Football Leaks” project, in cooperation with European Investigative Collaborations, a series of stories on the global football industry, which led to a number of criminal investigations and prosecutions worldwide, for crimes of money laundering, fraud and tax evasion.<sup>798</sup> The stories published by CRJI on BlackSea.eu were the “only ones resulting in lawsuits from the Arif family and Doyen, despite many of EIC network's partners publishing similar, and sometimes identical versions of the stories and the legal action”<sup>799</sup> and were published two years after the reports got published - the first suit was filed in December 2018 and the second in November 2019<sup>800</sup>. The lawsuits were preceded by an 'emergency' gag order, filed in December 2018, which demanded the removal of all stories that mentioned the Arif family and the Doyen company. According to CRJI, neither CRJI nor The Black Sea was informed of the gag order application at the time, which was granted by a Romanian judge in January 2019.<sup>801</sup> Six month later 2019, the judge imposed a fine on CRJI of RON 1000 (€200) for each day the stories remain online, so far accruing fines of over RON 300,000 (more than €60.000).<sup>802</sup> On 23 June 2020, a Bucharest court ordered the Romanian Centre to pay a “definitive and enforceable” fine of 329,000 RON (€67,000) for not having removed the stories.<sup>803</sup> The first hearing for the lawsuits was due to take place on 24 June 2020 in Bucharest, but at the request of the Arif family, it has been postponed until the end of July. This is the eighth time that the would-be first hearing has been postponed; two postponements have been due to the coronavirus pandemic and a judges strike, and six have been at the request of the Arif family or due to their procedural requests.<sup>804</sup> In an answer for the platform of the Council of Europe, the Romanian state replied that “after ECHR decision in Cumpănă and Mazăre from 2004, Romania repealed the criminal provisions incriminating insult and defamation. There were no other ECHR judgments pointing to possible legislative issues that would impede upon the freedom of expression and that the

<sup>797</sup> Tăpălagă, Dan, G4Media, 02.04.2018, as cited

<sup>798</sup> Football leaks stories published by CRJI at <https://theblacksea.eu/stories/?dossier=Football%20Leaks>, last consulted on 11.01.2020

<sup>799</sup> According to the Romanian Centre for Investigative Journalism - CRJI, as cited by the Council of Europe's Platform to promote the protection of journalism and safety of journalists, 27.10.2020, *Lawsuits Filed against the Romanian Centre for Investigative Journalism*, [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_pos=5&p\\_p\\_col\\_count=10&\\_sojdashboard\\_WAR\\_coesojportlet\\_alertPK=74621243](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-2&p_p_col_pos=5&p_p_col_count=10&_sojdashboard_WAR_coesojportlet_alertPK=74621243)

<sup>800</sup> Ministry of Justice, the portal of the Romanian courts, File 27181/302/2018 of 21.12.2012, [http://portal.just.ro/302/SitePages/Dosar.aspx?id\\_dosar=3020000000369838&id\\_inst=302](http://portal.just.ro/302/SitePages/Dosar.aspx?id_dosar=3020000000369838&id_inst=302)

<sup>801</sup> Council of Europe's Platform to promote the protection of journalism and safety of journalists, 27.10.2020, as cited.

<sup>802</sup> Council of Europe's Platform to promote the protection of journalism and safety of journalists, 27.10.2020, as cited.

<sup>803</sup> id

<sup>804</sup> ibid



audiovisual law (which cannot be applied in the CRJI case) includes provisions regarding protection of sources.”<sup>805</sup>

#### Case Study 4: 50 thousand euro against the TVR union and a paper

(Source: Alert verified and published by Media Freedom Rapid Response, Resource Centre on Media Freedom in Europe Romania)

Following the denunciation of irregularities in the management of the Romanian public television station TVR by the Romanian journalists' union FAIR-Mediasind, TVR's management has instructed the law firm Zamfirescu Racoti & Partners to take legal action for defamation against the union and against the journalists of the daily newspaper "Libertatea".<sup>806</sup> The union said TVR had allocated a public budget of 50,742 euros to the law firm to bring these legal actions. FAIR-Mediasind issued a statement on 28 July accusing the director of the TV station, Doina Gradea, of attempting to intimidate and harass the journalists' union.<sup>807</sup>

#### Case study 5: Citizenship journalism

(source: Media Defence NGO, Citizen Journalism, 03.05.2020)

“Beware of dishonest intermediaries” was a platform set up by Popa in 2015 for workers to share information on unlawful activities and warn one another about organisations and individuals. The group reached over 24,000 caregiver members, before Popa was forced to shut it down as Popa has been subjected to a barrage of civil lawsuits in Romania. Recruitment companies sued her for defamation as a result of posts made in the Facebook group she administered. She was accused of facilitating discourse that tarnish their reputation, with some citing several conversations and posts that Popa herself did not post but allowed to remain on the forum.<sup>808</sup> In 2019, Media Defence filed third party interventions in three domestic cases against Popa, the pleading being based on the international legal standards on public interest journalism and intermediary liability on social media platforms, which were successful. The fourth was lost, however, the case was submitted to the ECHR in December 2019 based on the arguments that Elena Popa was engaged in public interest journalism and is therefore entitled to heightened protection under Article 10, the right to freedom of expression in the European Convention on Human Rights.<sup>809</sup>

“A. Popa’s case is one among a growing trend not just in Europe but across the world of strategic litigation being used in order to crackdown on journalists, bloggers, academics and activists engaged in public interest journalism – lawsuits that are commonly referred to in the US and elsewhere as ‘SLAPP’ (Strategic Litigation against Public Participation) lawsuits. These lawsuits are designed not only to

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<sup>805</sup> *ibid*

<sup>806</sup> Alert verified and published by Media Freedom Rapid Response, Resource Centre on Media Freedom in Europe Romania: Judicial Intimidation Targeting Newspaper Libertatea, 12.08.2020, <https://www.rcmediafreedom.eu/News/Romania-Judicial-Intimidation-Targeting-the-Romanian-Union-of-Journalists-and-Daily-Newspaper-Libertatea>

<sup>807</sup> Alert verified and published by Media Freedom Rapid Response, 12.08.2020, as cited.

<sup>808</sup> Media Defence, 03.05.2020, *The citizen journalist Elena Popa*, <https://www.mediadefence.org/casestudies/citizen-journalist-elena-popa>

<sup>809</sup> Media Defence, 03.05.2020, as cited



intimidate and silence individuals conducting investigations and exposing malpractice in sectors like domestic care, but to impose a chilling effect on freedom of expression and advocacy rights that constrain civil society.”<sup>810</sup>

### Case study 6: Predescu vs. Romania at ECHR

(Source: International Press Institute, 2018, *Monitoring report: Defamation laws still concern for Europe media*, <http://legaldb.freemedia.at/2018/01/30/defamation-laws-still-concern-for-europe-media>)

Ghiufer Predescu v. Romania: ECHR found that “the Romanian courts had applied a sanction that “lacked appropriate justification” and did not provide for a fair balance among different rights.”<sup>811</sup> The journalist Predescu made comments in a local television in Constanța, Romania that the mayor Radu Mazăre’s activities were contributing to an “ungovernable” city. Following a lawsuit by the mayor, the appeals court partially ordered Predescu to pay the mayor 50,000 lei in non-pecuniary damages and 7,197 in legal costs (from 200,000 Romanian lei claimed). Analysing the case, ECHR found that Predescu’s comments, under the circumstances, should be understood as value judgments on a matter of public interest for which there was also a sufficient factual basis. The ECHR also found that the amount of compensation imposed was “extremely high” and had the potential to cast a chilling effect on Predescu’s freedom of expression.<sup>812</sup>

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<sup>810</sup> Media Defence, 03.05.202, as cited

<sup>811</sup> International Press Institute, 2018, *Monitoring report: Defamation laws still concern for Europe media*, <http://legaldb.freemedia.at/2018/01/30/defamation-laws-still-concern-for-europe-media>

<sup>812</sup> International Press Institute, 2018, as cited



The legal background of SLAPP cases in

## Slovakia

Contribution by Tomas Langer (Lawyer, Paul Q Law Firm)

### 1. Laws most vulnerable to abuse

Slovak legal system recognizes various legal instruments aimed at protecting the reputation of natural persons or legal entities. They all may be misused in excessive ways against media outlets or directly against the journalists.

#### *1.1. Civil Code*

The most commonly abused institute is the civil action for the protection of reputation under the act No. 40/1964 Coll. of the Civil Code, which protects the individual's personal rights, including honour, human dignity, privacy, name and expressions of a personal nature.

Pursuant to section 13 (1) of the Civil Code *"A natural person has the right to demand, in particular, that any unlawful interferences with the right to the protection of his personal rights cease, the removal of the consequences of such interferences and the provision of adequate compensation"*.

An adequate compensation may include moral compensation (apology, withdrawal of defamatory statements), as well as financial compensation. The amount of compensation shall be determined by the court while taking into account the seriousness of the harm incurred and the circumstances under which the right was violated.

The libel action under the Civil Code always represents severe risk for the media due to 2 reasons: (i) neither Civil Code, nor other Slovak law establishes limits regarding compensation for non-pecuniary damages, and (ii) the criteria for determining the financial compensation are very vague and can be broadly (mis)interpreted by the courts.

The legal framework for the protection of reputation of legal entities is stipulated in section 19b (3) of the Civil Code. Basically, the same principles and risks as in the protection of the reputation of natural persons apply. This kind of lawsuit is becoming more popular among large Slovak corporations and financial groups.

#### *1.2. The Press Act*

Other widely (mis)used legal instrument often applied against the media is the right of correction and right of reply. These rights are laid down in the Act No. 167/2008 Coll. of the Press Act<sup>813</sup>.

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<sup>813</sup> [https://www.culture.gov.sk/wp-content/uploads/2020/02/tlacovy\\_zakon\\_aj\\_1326893237-2.pdf](https://www.culture.gov.sk/wp-content/uploads/2020/02/tlacovy_zakon_aj_1326893237-2.pdf)



According to Section 7 (1) of the Press Act, *“If a periodical contains a false statement of facts about a person from which the person or entity can be precisely identified, that person has the right to demand publication of a correction of the false statement of fact.”*

The right of reply is provided under Section 8 (1) as follows: *“If a periodical contains a false, incomplete or distorting statement of fact that impinges on the honour, dignity or privacy of a natural person, or the name or good reputation of a legal entity, from which the person or entity can be precisely identified”*.

Especially the right of reply is widely misused due to its vague definition concerning an “incomplete statement”. It is almost impossible to prove the completeness of any fact statement. Such inconcrete legal provision allows individual complainants to apply this right and demand publication of their excessive and subjective versions of the events.

### Legislative changes in 2018

It should be pointed out that several unfavourable provisions were re-introduced to the Press Act in its amendment in 2018. Firstly, the right of reply for public officials was re-approved after its revocation in 2011. Secondly, the section 10 (4) of the act was also reinstalled, and it provides the right for the applicants to receive the adequate monetary compensation if the publisher does not publish the correction or reply. The amount of the compensation is set and ranges from 1660 EUR to 4980 EUR.

### ***1.3. Act on Broadcasting and Retransmission***

The right of reply is also laid down in Section 21 of the act No. 308/2000 Coll. on Broadcasting and Retransmission<sup>814</sup> and it relates to the statements published by TV media. The legal regulation is similar as in the Press Act.

### ***1.4. Criminal Code***

Persons concerned by the media content may also use the instruments of criminal law against them. The practise of filing criminal notices against media became increasingly common in past few years.

The police are obliged to review all criminal notices. For this purpose, the journalists or representatives of media, incl. editors-in-chief are often summoned by the police for interrogation.

Most common criminal notice to harass or auto-censor the journalists is slander. It is defined in section 373 (1) of the Act No. 300/2005 of The Criminal Code as follows: *“Whoever communicates false information about another person, which is capable of considerably damaging the respect of fellow citizens for such a person, their career and business, their family relations, or that causes them other grievous harm, shall be punished by a prison sentence of up to two years”*.

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<sup>814</sup> [https://www.culture.gov.sk/wp-content/uploads/2020/02/308\\_aj\\_342-2.pdf](https://www.culture.gov.sk/wp-content/uploads/2020/02/308_aj_342-2.pdf)



So-called “journalist crimes”, with which the journalists are often confronted include False accusation (section 345 of the Criminal Code), Illegal use of personal data (section 374), Infringement of foreign rights (section 375), Violation of the confidentiality of spoken conversation and other personal expressions (section 377), Endangering of trade, banking, postal, telecommunications and tax secrets (section 264), Endangering confidential and classified information (section 353).

## 2. Potential defences

It should be stated at the outset that within last decade there has been significant positive development in the courts’ assessment of the civil defamation cases. In the past, the courts mostly focused on the defendant’s ability to bear the burden of proof and prove the veracity of the contested statement.

Since then, the courts have taken into greater account the standards anchored in the jurisprudence of the European Court of Human Rights (ECHR). The references to the principles and standards of the ECHR became a regular standard. These positive trends have emerged mainly thanks to progressive judicature of the Slovak Constitutional court, which introduced and developed a number of defence tools favouring the media.

Nowadays the “proof of truth” is not the only key criterium, and it is possible for the media to be successful in a dispute even if the published statements are proven untrue. In such case, however, the publisher must prove that it acted in good faith and fulfilled its duties and responsibilities.

Slovak courts now appear to be more aware of the need to carefully assess the conflict between the freedom of expression and personality rights. According to the multiple and stabile rulings of the Slovak Constitutional court, proportionality test shall be the inevitable part of every court’s decision in civil defamation cases. The test shall be carried out based on finding answers to the questions: WHO, ABOUT WHOM, WHAT, WHERE, WHEN and HOW in the respective case "spoke". The courts shall determine which right is to be given priority based on the answers to these six questions.

### Defences recognised by the courts:

- Increased protection of statements published in good faith and the right of the media to justifiable error

Since approximately the time of adoption of ECHR judgment in *Axel Ringier Springer Slovakia, a.s. v. Slovakia* as of 26 July 2011, the Slovak courts began examining more closely if articles were published in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

- Information from official sources

Good faith defence is often accompanied by the argument that the media have the right to rely on the information received from the official sources without obligation to undertake independent research. According to constant ECHR case law, as well as the jurisprudence of Slovak Constitutional





court, the journalists disseminating the information from the official sources are considered to act in good faith and their freedom of expression should be protected. However, there are certain exceptions from such trends.

- Predictability and proportionality of the sanction for reputational damage

Compensation for non-pecuniary damage must be reasonably adequate to the damage the reputation of the victim suffered (e.g. decision of Slovak Constitutional court I. US 408/2010, ECHR case *Tolstoy Miloslavsky v. the United Kingdom*) and courts must base the amount of compensation on evidence indicating the intensity of the damage (e.g. *Flux v. Moldova*, *Steel and Morris v. the United Kingdom*). It should also be comparable to other financial compensations, e.g., those awarded to victims of crimes pursuant to Act 274/2017 Coll. on Crimes Victims. In this Act, the compensation for death committed by crime is determined in the amount of 50 minimum wages, e.g. 31,150 EUR.

- The key role of the media as a "watchdog" of democracy ("public watchdog") and a very strict assessment of any interference with media freedom of expression.

With this respect, the courts usually refer to ECHR judgments, e.g. *Castells v. Spain*, *Bladet Tromso a Stensaas v. Norway*, etc.

- Protection not only of the content of speech, statement or idea, but also of the manner, or the forms in which they are expressed

Reference is often made to ECHR decisions in case *Handyside v. United Kingdom*, *Lingens v. Austria*, *Prager and Oberschlick v. Austria*.

### 3. Compliance with ECHR principles

The ECHR principles are not laid down in Slovak national law. Some courts or judges still do not apply principles expressed in the jurisprudence of the ECHR or Slovak Constitutional Court. We still may find cases where courts award exaggerated amounts of financial compensation to plaintiffs and ignore the obligation to carry out the proportionality test or burden of proof for the plaintiffs which have to prove the intensity of the damage caused.

Various ECHR principles are described in previous Section 2 of this paper. In addition, the following principles are worth mentioning:

#### *(1) distinction between facts and value judgements*

Slovak courts recognize the difference between these two statements and ECHR jurisprudence is widely accepted. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof (e.g. ECHR case *Lingens v. Austria*).



In their case law, the Slovak courts describe some statements as hybrid, as they can be both fact statements and value judgments<sup>815</sup>. The courts always examine whether the value judgments (and also hybrid statements) are based on a realistic factual basis (Feldek v. Slovakia, De Haes a Gijssels v. Belgium).

*(2) Increased protection for the dissemination of information and ideas on matters of public interest (Thorgeir Thorgerson v. Iceland)*

This principle is mostly accepted by the Slovak courts and ECHR case law is well known and often cited in the judgments.

*(3) Wider limits of acceptable criticism by the press to public figures*

The Slovak courts more frequently adhere to the principle that public figures and public officials (politicians, judges, etc.) have to accept a higher level of scrutiny and that even their private activities may be the object of legitimate media interest.

Slovak Constitutional court ruled that even the private lives of judges may be a focus of criticism and that leisure activities such as hunting may be the subject of legitimate media interest.

Also, the scope of persons with decreased protection of their personalities were significantly broadened by the Slovak Constitutional court. In the decision, case No. IV. US 302/2010 the court ruled that the matter of public interest is not only the entire agenda of state bodies and state institutions, but also persons working in public life, e.g. the activities of politicians, officials, judges, attorneys or candidates for these posts; art is also a public issue, including journalistic activities and showbusiness, as well as everything that attracts public attention. The judiciary also generally accepts that also the state employees in the performance of their official duties, must, like politicians, endure the broader limits of acceptable criticism.

### **Vertical power-relationship between participants in SLAPP-like cases**

In defamation cases, the courts usually do not take into the consideration the economic power of the participants. However, several judgments occurred when the court refused to award the big broadcaster the compensation of the costs of proceeding, in which it faced an absolutely unfounded libel action. The court reasoned its decision by argument, that the defendant is a large corporation with high annual turnovers, and it does need the compensation of its costs from the plaintiff, which is a common natural person.

Naturally, if the jurisprudence and ECHR standards considers the position of the party as relevant for the assessment of the case (e.g. wider limits or criticism towards the politicians, privileged position of the journalists in terms of protection of the freedom of expression, etc.), then it is taken into account by the court in its decision-making process.

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<sup>815</sup> I.e. decision of Constitutional court as of 19 October 2011, case No. I. US 390/2011



## 4. Systemic safeguards

There is no anti SLAPP legislation in force in Slovakia.

It is practically impossible to stop a SLAPP lawsuit in its early stage. In civil proceeding, the lawsuit may be dismissed by the court only if it is incomplete or incomprehensible and the plaintiff does not remove its shortcomings upon the court's request. The submissions with the sole purpose of disrupting and harassing the media outlets rarely lack of required essential elements of the action.

If the lawsuit is apparently unfounded, the court may only ask the plaintiff to withdraw it. If the withdrawal is refused, the court shall commence the proceeding and hear the case.

In criminal law, the legislation provides sufficient safeguards against the filing of frivolous criminal notices against the media and journalists. The act No. 301/2005 Coll., the Code of Criminal procedure set out that the police or prosecutor shall refuse the ungrounded criminal notice within the period of 30 days. After the initial interrogation of the journalist, the criminal proceeding is usually terminated without notifying the suspect, i.e., the journalist. In most of the cases, the police summons the journalists mentioned in the criminal notice for questioning, even if it is aware that the notice is ungrounded and will be refused.

The filling of ungrounded criminal notice cannot be punished. In theory, the accusation of another person of a criminal offence with the intention of bringing about their criminal prosecution may fulfil the substance of the crime "False accusation". However, such development in case of criminal notices against the media has never materialised.

### Financial penalties

The financial penalties for the unsuccessful plaintiff in case of SLAPP lawsuits are absolutely insufficient in the Slovak legal system. The court fee is rather low<sup>816</sup> and therefore lays an easily accessible path for the plaintiffs to file their lawsuits. In case the frivolous lawsuit is dismissed by the court, the plaintiff shall be ordered to pay the reimbursement of fees to the defendant. The amount of these fees is strictly set by the Decree of the Slovak Ministry of Justice. The maximum compensation for one legal act in the proceeding concerning libel action or action under the Press Act is limited to approximately 100 EUR. In practise, the publisher involved in a 5-year long proceeding concerning 2 court instances is usually eligible to a compensation of around 1500 EUR. Such compensation is much lower than the actual costs incurred in relation to the case.

In Slovakia there is a self-regulating media body established: The Print-Digital Council of the Slovak Republic<sup>817</sup>. The Print-Digital Council assesses the complaints regarding possible violation of journalistic ethics, as well as motions concerning restraining the journalists' access to information. Its

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<sup>816</sup> In case of civil action for the protection of reputation under the Civil Code, the court fee is 66 EUR + 3% of claimed financial compensation

<sup>817</sup> <https://trsr.sk/english/>



competences are limited to issuing warnings to specific media outlets, should it identify a breach of the Code of Journalistic Ethics.

## 5. The court's role and independence

Due to rather vague wording of the applicable laws, the role of the courts is crucial in assessing whether the interference to the personality rights has occurred by the media. Also the award depends solely on the discretion and legal consideration of the acting judges.

The courts in the past set the trend of awarding excessive compensation for non-pecuniary damage, particularly in cases in which judges and active politicians were plaintiffs. Whereas the ordinary citizens usually receive the compensation in the range from 10.000 EUR to 20.000 EUR, there are several judgments concerning judicial officials and politicians, with the adjudicated financial compensation up to 100.000 EUR.

Nowadays there is visible a different approach and in recent years and it seems that since the murder of the journalist Ján Kuciak in 2018 the courts treat media more carefully and realise their special position as democracy watch dog.

The judiciary ought to bear in mind the alarming state of the public perception of the judiciary in Slovakia, which enjoys the lowest level of trust within the whole European Union.

## 6. Case law

Under stable case law developed in past decade concerning protection of personality, the journalists are not responsible for their work for the media. The responsibility shall be borne by the media outlets publishing the journalist's work. Therefore, most of the SLAPP-type actions in civil proceedings are filed against the publishers. However, the journalists as natural persons are often targeted in criminal proceedings.

There is also a rising activity of the plaintiffs against the bloggers. However, the bloggers mostly publish their blogs on platforms ran by specialised companies, mostly news publishers. According to the Slovak law<sup>818</sup>, the objective responsibility for the published content on the website lays on the website operator as soon as it notified about the potentially illegal content.

SLAPP actions are mostly filed by the politicians and corporations or the entrepreneurs.

Generally, it can be summarised that in Slovakia the SLAPP actions mostly target the publication of articles and information. The contested information usually links the plaintiffs to the controversial events and entities, e.g. financial groups, politics and criminal groups or also corruption, unfavourable trades with the state and suspicious court decisions.

### Overview of selected SLAPP cases in Slovakia.

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<sup>818</sup> Act No. 22/2004 Coll. on Electronic Commerce



No.	Case description	Subject matter of the case	Background
	Penta vs. N daily publisher	In total, 12 actions on correction under Press Act or libel actions under Civil Code were filed by Penta	Penta financial group and its main shareholder Jaroslav Haščák are main persons of Gorilla scandal (a transcript of a Slovak secret service surveillance operation, in which oligarchs and politicians admitted to stealing public money and rigging the system in their favour). Penta objects a number of articles in N daily linking it to Gorilla case. So far, all the lawsuits were rejected by the various courts.
	Mr. Oszkár Világi and SLOVNAFT vs. TV MARKÍZA broadcaster	Action of correction under the Act on broadcasting and retransmission	Mr. Világi and also the company SLOVNAFT, a.s. represented by him contested the reference made by the news redactor to the file Gorilla. The Constitutional court already ruled in the past that the existence of this file is not disputed, and the journalists have right to refer to it. The redactor stated that according to Gorilla file, people from top politics and business, including Mr. Világi were to be involved in the corruption and embezzlement. The courts dismissed the action. The case is currently tried before the Supreme court.
	Ján Culka and his private Complex Central Rescue System organisation (CCRS) vs. SME daily publisher	4 actions under Press Act and 2 libel actions under Civil Code	Mr. Culka and CCRS filed altogether 6 lawsuits for 1 article published in SME daily and www.sme.sk concerning services provided by CCRS to state in connection with the quarantine ordered due to COVID-19 pandemic. They object the publication of information about Mr. Culka's criminal convictions in the past due to the passage of time. Mr. Culka was considered a close person to government politicians and known for the generous contracts with the state.
	Former chairman of Specialised Criminal court Michal Truban vs. SME daily publisher	Libel action under Civil Code. Claim 150,000 EUR for compensation of non-pecuniary damage	SME daily published an article about Mr. Truban and his leisure activities. Specifically, the article highlighted the fact that the judge hunted for free. The district and regional courts, and even the Supreme Court, ruled that daily SME should apologise to the judge. Also the compensation 90,000 was awarded. The Constitutional Court reversed the judgment. It declared that even the private



			lives of judges may be a focus of criticism and that leisure activities such as hunting may be the subject of legitimate media interest. The case is currently held at ECHR in Strasbourg.
	Publisher of www.hlavnespravy.sk vs. konspiratori.sk (initiative that maintains the list of the websites lacking credibility and content quality)	- action on unfair competition, - action on protection of reputation of the publisher, - criminal complaint	www.hlavnespravy.sk is considered to be most influential website spreading hoaxes and conspiracy theories in Slovakia. Its publisher filed two civil lawsuits against the civic organisation operating the website containing the list of conspiracy websites (including hlavnespravy.sk), and also against all members of its review board (in total more than 20 natural persons). Due to the criminal complaint of plaintiff's attorney, the police investigate the alleged crimes caused by creating a list of conspiracy websites.
	Ex-minister and vice-speaker of the Parliament Martin Glváč vs. journalists	Criminal complaint for alleged committing of criminal offense: damage of a third-party rights under Article 376 of the Slovak Criminal code	Mr Glváč filed a criminal complaint against the journalists, who allegedly damaged his rights by publishing his SMS communication with Alena Zsuzsová. She was a honey trap of mobster Marian Kočner, who was trying to seduce influential people like Mr. Glváč. Currently she is indicted, inter alia, for a murder of the journalist Ján Kuciak and his fiancée.  Mr. Glváč (counselled by another ex-minister of interior Róbert Kaliňák) denied for a long time any contacts with Ms. Zsuzsová. Despite the fact that the authenticity of the conversation was repeatedly confirmed. Several journalists were interrogated by the police. The outcome of the investigation is unknown.
	Michal Havran (publicist and theologian who writes opinion pieces for SME daily)	Criminal accusation by the police for the crime: defamation of the nation, race and belief and also for slander under the Slovak Criminal code	Michal Havran was accused over an article criticizing the radical Catholic priest Marián Kuffa and his attitude towards homosexuals as well as his alliance with the far-right extremists in the People's Party Our Slovakia led by Marián Kotleba.
	Peter Tóth vs. Marek Vagovič (senior editor in news portal aktuality.sk)	12 criminal complaints for various criminal offences, incl. slander, were filed by Mr. Tóth against the journalist Marek Vagovič.	Peter Tóth is a former friend of mobster Kočner currently accused of numerous crimes, incl. murder. He was also a journalist and Slovak secret service official. He objects constant media coverage of his person and the links made to him and his potential participation in the criminal



Towards an EU-wide approach to anti-SLAPP?

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			activities organised by Mr. Kočner.
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The legal background of SLAPP cases in

## Slovenia

Contribution by Sandra Bašić Hrvatinić (University of Primorska) and Lenart J. Kučič

### 1. Laws most vulnerable to abuse

In 2017 the Slovene Association of Journalists (in continuation of the text SJA) conducted a research in which they analyzed the lawsuits and criminal complaints filed against journalists between the years of 2014 and 2017. Their research can be used as an indicator of *Strategic Lawsuits Against Public Participation* (in continuation SLAPP) in Slovenia.

The research found that there were 127 processes initiated, out of which 76 were civil disputes worth 3,2 million euros and the remaining 46 criminal proceedings.<sup>819</sup> The majority (just below 70 percent) of the lawsuit cases analyzed were started by natural persons. Only 10 cases (7,2 percent) were filed by officials.

Reproached criminal offenses initiated against journalists, editors and media companies were predominantly complaints against criminal offenses against honor and reputation. The accusations that lead the way are notably those of injurious accusation (Article 160 of the [Penal Code](#)), representing 44 percent of all of the analyzed cases; followed by reproaches of insult (Article 158 of the Penal Code) accusing journalists or their employers in 15 percent of the cases (7 in total).

The SJA research has shown that Penal Code<sup>820</sup> and [Obligation Code](#) are the legal rules that are most often abused by SLAPPers in Slovenia. Furthermore, the prevalence of civil disputes as opposed to criminal proceedings and of natural persons over legal persons and officials as plaintiffs raises the question of the reasonableness of criminal prosecution against journalists (and others) for offenses against honor and reputation.<sup>821</sup>

Civil and criminal law regarding the defamation (and claims of invasion of privacy) is also often abused by SLAPPers in Slovenia. On the other hand, it has been practically impossible to successfully process hate speech under article 297 (Public Incitement to Hatred, Violence or Intolerance in Penal Code) while it has been quite easy to file fraudulent claims against reporters because of an article, and some cases even satire.

The laws concerning classified information and freedom of information<sup>822</sup> have also been abused for political gain. As did the Mass Media Act and its clauses on the right of reply and the right to

<sup>819</sup> Anuška Delić Špela Stare, Analysis of lawsuits and criminal complaints against media (Analiza tožb in ovadb medijev), novinar.com, 23.4.2017. Available at <https://novinar.com/novica/analiza-tozb-in-ovadb-medijev/> (Accessed <https://novinar.com/novica/analiza-tozb-in-ovadb-medijev/> (accessed 21 November 2020).

<sup>820</sup> Penal Code, <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5050>

<sup>821</sup> Zloraba tožb za zastraševanje ter finančno in administrativno izčrpavanje medijev?, Stališče DNS 25.9.2020, novinar.com, Available at: <https://novinar.com/novica/zloraba-tozb-za-zastrasevanje-ter-financno-in-administrativno-izcrpavanje-medijev/> (accessed 21. November 2020). Ibidem

<sup>822</sup> The Public Information Access Act (Zakon o dostopu do informacij javnega značaja) <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO3336>





correction.<sup>823</sup> In addition to legal proceedings that produce intimidating effects individuals with critical voices are facing continuous online harassment, smear campaigns on the political party's media outlets and life threats. Such (quasi)media outlets have also been used to smear the reporter and his defence witnesses in an attempt to influence and prolong the case.

All this is lacking a response from the criminal justice.

### ***1.1. The Obligations Code (Obligacijski zakonik)***

Articles of the Obligation Code most often abused by SLAPPers:

- Article 134 (request to cease infringement of personal rights),
- Article 147, paragraph 2 (employer liability),
- Chapter V. Reimbursement of Immaterial Damage:
  - article 178 (publication of judgement or correction),
  - article 179 (monetary compensation),
  - article 183 (monetary compensation for legal person)

### ***1.2. The Penal Code (Kazenski zakonik)***

Articles of the Penal Code most often abused by SLAPPers:

- Chapter eighteen (Criminal offences against honour and reputation)
  - Article 169 (insult),
  - Article 170 (defamation),
  - Article 171 (injurious accusation),
  - Article 172 (exposure of personal and family circumstances).

Claimants file civil or criminal lawsuits on the grounds of defamation and/or invasion of privacy despite knowing that they will most likely not be successful. However, they are prepared to take on the final costs of the procedure (their legal costs and the legal costs of the opposing party) because legal costs regarding defamation procedures are low in comparison to other kinds of disputes.

Another problem are lengthy procedures that have been going on for five years or more.

## **2. Potential defences**

In civil and criminal cases, the defendant must prove either that the published information was true or, if it fails to meet that demand, that it was published in good faith.

Compliance with all other ECHR principles stated below is also a valid defence.

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<sup>823</sup> The Mass Media Act (Zakon o medijih), Chapter 6 (Right to reply and right to correction), Articles 26-45 <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1608>



### 3. Compliance with ECHR principles

Courts from the first instance onward rely on and cite ECHR case law. The balancing test between freedom of expression and the rights of the claimant as developed in ECHR case law is fully adopted by Slovene courts. However, due to the nature of the competing rights it is often hard to predict the outcome of the dispute. But even in the cases where the outcome can be safely predicted it is the length of procedure that is burdensome to the defendant.

In most SLAPP cases the courts accept the argument that there is a wider limit of criticism of politicians, political parties, people with formal (or informal) power as it is established in the ECHR case law.

### 4. Systemic safeguards

There are some safeguards such as exception of good faith and payment of judicial costs by the losing party, but they do not seem to prevent SLAPPers from filing lawsuits. The main reason it seems is that the SLAPPers believe that gains (silencing journalists, media companies, and activists by putting them under pressure, or preventing their further actions) outweigh the losses (payment of all judicial costs by the losing party).

Under current rules a non-profit news organization cannot apply for an official status that it works in the public interest (a de facto NGO status). The Association of Journalists is active in this field. They are voicing concern and doing advocacy, but these can hardly be considered “safeguards”.

#### 4.1. *The Press Council and Ethics Commission*

One of the very few systemic safeguards is The Press Court and Ethics Commission. This self-regulatory body ensures that the members of the journalistic community and the authors of journalistic texts and articles comply with ethical and professional rules.

The complaints can be made on breaches to the Code of Journalists of Slovenia.<sup>824</sup> The Council is ruled by a tribunal, which consists of nine elected journalists and editors as well as two representatives of the public and addresses of anyone trying to protect their rights or promote better journalistic ethics.

The Press Court and Ethics Commission received 47 complaints in 2019 and issued 32 decisions. The Court concluded that the journalists breached the Code in slightly less than half of the cases and Journalists most often breach the first article of the Code (fact-checking, mistakes and corrections).

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<sup>824</sup> Code of Journalists of Slovenia, <https://novinar.com/drustvo-novinarjev-slovenije/o-nas/dokumenti/kodeks/>



The Press Court and Ethics Commission is generally respected by journalists. However, not all media companies and media workers recognise its authority.

## 5. The court's role and independence

In most cases the court rulings are in accordance with the ECHR case law and in most cases the courts strike the right balance between the competing rights (freedom of expression vs. reputation and privacy). But the courts put no relevance on the fact that they might be dealing with the SLAPP case and are treating SLAPP cases as they would treat any other defamation case.

The reason for that may be that there is no legal reason for courts to acknowledge that they are dealing with SLAPP case since such an acknowledgment would bring no legal consequences. In addition, Judges often have poor understanding of journalism as a profession or media in general. In a criminal case against a reporter, a judge presented his past work for a local soft-core erotic magazine as journalism in the context of substantiating his claim of understanding journalism.

The Higher Court in Ljubljana has cautioned in a verdict passed on 11. January of 2017 that the Constitution of Republic of Slovenia guarantees everyone the right to judicial protection, but this does not mean that the protection is unlimited. As it is with every right, this should be exercised fairly and according to its purpose. The judicial practice formed the standpoint that wanton and unfounded filing of lawsuits or other legal instruments as well as the misuse of legal proceedings with malicious intent represents unacceptable action which is one of the elements of liability for restitution.<sup>825</sup>

When confronted with one of the SLAPP cases described in the next section (Necenzurirano) the state of Slovenia gave the following official response: The Constitution of the Republic of Slovenia provides every person the protection of their privacy and personal rights which enables anyone who thinks their rights have been violated, a right to legal protection and remedy which are ensured and specified in the legislation. Due to the principle of separation of state powers and the independence of the judiciary from the executive state power, the Government therefore has no influence on the court proceedings. On the other hand journalists (media) who work in the public interest by providing credible information, have the obligation to follow ethical and professional code of conduct and impartially provide accurate and verified information since they can be held accountable for the information they publish.<sup>826</sup>

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<http://www.pisrs.si/Pis.web/sodnaPraksaRSSearch?search=zloraba%20pravnih%20sredstev&filter=visje&chosenFilters=vsiPr edpsi&od=&do=&sortOrder>

<sup>826</sup> Reply by the Government of the Republic of Slovenia regarding the alert published on the Platform to promote the protection of journalism and safety of journalists on 30 September 2020 titled „39 Lawsuits Against Journalists from Necenzurirano“, whole reply is available at: <https://rm.coe.int/slovenia-replyfinal-en-39-lawsuits-against-journalists-from-necenzurir/1680a0233d>. (accessed 21 November 2020)



## 6. Case law

### 6.1. SLAPP cases against journalists

The most recent example of a systematic persecution of journalists are a series of lawsuits against three journalists (Primož Cirman, Vesna Vuković and Tomaž Modic) who are working for the online media *necenzurirano.si* for their writings about the business(es) of Rok Snežič.

The latter has opted for the criminal prosecution of the journalists, starting a civil lawsuit because of the allegation of criminal offenses against honor and reputation, filing in total 39 lawsuits (13 against Cirman, 13 against Vuković and 13 against Modic) concerning 12 allegedly disputable articles and suggesting for the trial to be held in Maribor (the registered seat of the online media in question is in Ljubljana). Defamation is punishable with a fine or up to a year in prison under Slovenian law (Penal Code).

Cirman and his colleagues said the lawsuits are an effort to intimidate by draining them of time and money, and by attempting to damage their professional reputations. The journalists have also been subject to smear campaigns in the recent months.<sup>827</sup>

CoE Commissioner for Human Rights issues, Dunja Mijatović, wrote a public announcement on 27 of October 2020 with the title »A Human Rights Comment on SLAPPs«: This problem goes beyond the press. Public watchdogs in general are affected. Activists, NGOs, academics, human rights defenders, indeed all those who speak out in the public interest and hold the powerful to account might be targeted.<sup>828</sup>

The smear campaign of the accused journalists, the SJA and anyone who attempted to defend the media platform in any kind of way aired mostly on Nova 24 TV that is used by the political party SDS as a propaganda bulletin.

### 6.2. SLAPP cases against environmentalist NGOs

SLAPP lawsuits are also used in Slovenia to weaken the environmentalist NGOs by (private and state) investors that are trying to carry out projects harmful for the nature and the environment.<sup>829</sup>

Slovenian Native Fish Association (SNFA) which is opposing the construction of the hydroelectric power plant Mokrice on the river Sava has been included since 2015 in the formal proceedings concerning the construction of the hydroelectric power plant Mokrice as an association acting in the public interest of nature conservation (as defined by the Nature Conservation Act).

<sup>827</sup> CoE Platform to promote the protection of journalism and safety of journalists, 27 October 2020, 39 Lawsuits Against Journalists from *Necenzurirano* [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesoportlet&p\\_p\\_lifecycle=2&p\\_p\\_cacheability=cacheLevelPage&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_pos=2&p\\_p\\_col\\_count=3&sojdashboard\\_WAR\\_coesoportlet\\_alertPK=74638683&sojdashboard\\_WAR\\_coesoportlet\\_cmd=get\\_pdf\\_one](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesoportlet&p_p_lifecycle=2&p_p_cacheability=cacheLevelPage&p_p_col_id=column-4&p_p_col_pos=2&p_p_col_count=3&sojdashboard_WAR_coesoportlet_alertPK=74638683&sojdashboard_WAR_coesoportlet_cmd=get_pdf_one)

<sup>828</sup> CoE Commissioner for Human Rights issues a Human Rights Comment on SLAPPs. Time to take actions against SLAPPs, Dunja Mijatovic, Strasbourg 27 October 2020, Available at: <https://www.coe.int/en/web/media-freedom/-/coe-commissioner-for-human-rights-issues-a-human-rights-comment-on-slapps> (accessed 21 November 2020)

<sup>829</sup> We interviewed several activists during our research. Monika Weiss, freelance journalist who covers environmental stories for years was most helpful for this part of research.



Since 2015 the SNFA has been affronted with various types of pressure by the state investor in the hydroelectric power plant Mokrice – the company HESS – Hidroelektrarne na Spodnji Savi [*Hydroelectric power plants on the Lower Sava*].

The legal representative of the company HESS reported the association to the police and three different inspection bodies in 2018. The proceedings that had thus far been concluded (all of them in favor of SNFA) have had a significant impact on the work of the SNFA over the past two years (the association has no employees; it is based on volunteer work) since they were completely unfounded and clearly instigated with the single intent: punishing SNFA for advocating against the irregularities concerning the construction of the hydroelectric power plant Mokrice – which has been finally reaffirmed by the Administrative Court.

Another example is the case of the members of the Eko Anhovo in river Soča Valley Association that unites the local population of Anhovo.

The Association has been cautioning since 2015 against the deadly consequences of the pollution caused by factory Salonit (factory has a century long existence, now 74% owned by Wietersdorfer Alpacem GmbH company) decades ago using asbestos, as well as advocating against the ramifications of the burning of toxic waste in the last decades (latest environmental “accident” polute water, leaving local population without drinking water for more than four months).

The members of the association have been receiving letters from the legal firm hired by Salonit every time they publicly came forth with a statement about their living space (be it a statement for the media or a speech at the meetings of the Municipal Council). The letters contained allegedly disputable statements by the members of the Association and the remarks Salonit gave as response, denominating practically every statement about the environment as contentious.

The legal firm usually concluded the letters addressed to the members of the Association by stating that »according to the type and severity of violations the conditions for restitution liability have been unquestionably fulfilled«, which has caused many of the Association’s members, legal laymen, to fear the inevitable restitution and remain silent.

These methods have been subjected to assessment by the ethical committee of Chamber of Notaries of Slovenia in the recent months because of their (mis)use for the intimidation of the Association’s members when speaking up about their living space. Salonit and its legal representatives have ceased with these practices only when their unacceptable actions have been brought to the public’s attention by the influential environmental activist Uroš Macerl, the winner of the Goldman Environmental Prize in 2017.



### 6.3. SLAPP cases against academics and artists

The emeritus professor dr. Rudi Rizman that is being sued<sup>830</sup> by the ruling party SDS for his statement in the central news broadcast aired on the Slovene public television RTVSLO – the statement concerns the financing of the political party’s media with funds from Hungary.

“During the presentation of a public letter from 150 intellectuals who warned against authoritarian tendencies, incitement and political polarization during the formation of the current government coalition, Rizman mentioned a piece of information that had been reported by the media several times before. It concerns the sale of Nove24TV, whose indirect co-owner was the SDS party, to a Hungarian owner linked to the Orban regime, which the media and many other commentators described as possible financing of the party from abroad. Despite the fact that the story is known to the general public and that prof. Rizman mentioned it as a side argument in the justification of the letter from 150 intellectuals, the ruling party SDS is suing him.

We understand the lawsuit of the party in power against a prominent public figure as pressure against a critical stand towards any government, which is a civic and professional duty of all intellectuals”

stated the Faculty of Arts in their [statement of support](#).<sup>831</sup>

In December 2020 the Ministry of Culture erased Slovenian musician Zlatan Čordić (better known for his stage name Zlatko) from the register of freelancers before his status expired and thus abolish his state-funded social security contributions.

The Ministry accused Mr Čordić that he spent a considerable amount of his time for “other activities” and not for his artistic work. Mr Čordić was given no opportunity to complain to their decision. He believes that he was erased because of his political activism because he attended many anti-government protests.

The Administrative Court has annulled a culture ministry decision and tasked the ministry to decide on the matter again<sup>832</sup>. But the decision of the Ministry of Culture had a chilling effect on around two thousand Slovenian artists that have state-funded social security contributions and have been heavily struck by the COVID-19 epidemic.

That was not the only example of SLAPP attempts against artists. In December 2020 The Slovenian Soldiers' Trade Union urged members to authorize a law firm to bring damages suits against Slovenian singer Jadranka Juras, a director Dejan Babosek, and against public broadcaster for airing their statements<sup>833</sup>.

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<sup>830</sup> MMC: No settlement in SDS suit against Rizman for allegation that the party is financed by a foreign regime (V tožbi SDS-a proti Rizmanu zaradi očitka, da stranko financira tuj režim, ni poravnave): <https://www.rtv slo.si/slovenija/v-tozbi-sds-a-proti-rizmanu-zaradi-ocitka-da-stranko-financira-tuj-rezim-ni-poravnave/542335> (accessed 21 November 2020)

<sup>831</sup> <https://www.ff.uni-lj.si/novice/oznaka/pismo-podpore>

<sup>832</sup> MMC: Zlatko: administrative court has annulled the decision to be erased from the register (Zlatko: Upravno sodišče je odpravilo odločbo o izbrisu iz registra samozaposlenih) <https://www.rtv slo.si/kultura/glasba/zlatko-upravno-sodisce-je-odpravilo-odlocbo-o-izbrisu-iz-registra-samozaposlenih/546576> (accessed 21 November 2020)

<sup>833</sup> MMC: The Slovenian Soldiers' Trade Union announces damages suits against Jadranka Juras and insults of the guard of honor (Sindikot vojakov napoveduje tožbo zaradi izjave Jadranke Juras in žaljenja garde) <https://www.rtv slo.si/slovenija/sindikot-vojakov-napoveduje-tozbo-zaradi-izjave-jadranke-juras-in-zaljenja-garde/544928> (accessed February 10, 2021)



Dejan Babosek was also shown on public television during the anti-government protests where he called the members of the guard of honor “traitors” for supporting the government.

In late November 2020 Jadranka Juras appeared in a late-night talk show “Zadnja beseda” on the public television<sup>834</sup>. When asked about Slovenian soldiers being sent on international missions as members of joint NATO forces, she said that “it is a big responsibility to go to military missions and kill local people. It is a big responsibility that our soldiers go to places where they do not in fact defend Slovenia but are involved in a global war on terror that started in 2001 and there is still no end to it”.

The minister of defense Matej Tonin and force commander Miha Škerbinc publicly condemned<sup>835</sup> her statement and called The Slovenian Soldiers' Trade Union to collect 2000 signatures and collectively sue the singer for one million euros “to give a lesson” to anybody that would “dare to insult members of Slovenian Armed Forces”.

## 7. Conclusion

In September of 2020, the SJA published its standpoint on SLAPP in the light of numerous legal proceedings initiated against the media. According to the SJA, the filing of civil disputes and criminal proceedings against journalists and media can be justified, although it can at the same time be misused and employed as a tactic of intimidation and financial and administrative depletion of the media.

These legal complaints are a form of mistreatment used to silence and harass the critics by forcing them to use their (financial and time) resources to defend themselves against unfounded lawsuits.<sup>836</sup>

Especially vulnerable are small media and journalist teams that do not have at their disposal the personnel and financial backing required for confrontation and the defense of their interests.<sup>837</sup>

It is clear that the objective of those starting SLAPP lawsuits is primarily to target and intimidate the very ones that are publicly advocating against the dubious actions of the plaintiffs. Practice shows that this means the media has to spend time and money for defense against unfounded lawsuits. The intimidating effects of these kind of lawsuits on the work of journalists are primarily the silencing of the critical voices, the journalists avoiding to address topics that are of public interest but their publication might harm the work of the journalist and the media in question.

This is the reason for which ever more media decide to not report on these kinds of topics or agents. When the public no longer has access to information that is of their interest, when the media exercise self-censorship and avoid reporting on topics for which they risk being targeted with a SLAPP lawsuit, then the freedom of expression is endangered. There is a very fine line between justified lawsuits by

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<sup>834</sup> RTV Slovenija, Last word (Zadnja beseda) <https://4d.rtvlo.si/arhiv/zadnja-beseda/174735573> (accessed February 10, 2021)

<sup>835</sup> Dnevnik: We are all Jadranka Juras (Mi vsi smo Jadranka Juras) <https://www.dnevnik.si/1042945599> (accessed February 10, 2021)

<sup>836</sup> Zloraba tožb za zastraševanje ter finančno in administrativno izčrpavanje medijev?, Stališče DNS 25.9.2020, novinar.com, Available at: <https://novinar.com/novica/zloraba-tozb-za-zastrasevanje-ter-financno-in-administrativno-izcrpavanje-medijev/> (accessed 21 November 2020)

<sup>837</sup> Ibidem.



affected individuals or organizations and the misuse of legal instruments for the silencing of journalists, for this reason the role of the courts should be to carefully study each filed lawsuit and discard the unfounded prosecutions.

Apart from the critical media and journalists, the environmentalist NGOs comprised mostly of volunteers in dire need of critical public eye, the victim can become anyone that wishes to publicly denounce the unacceptable practices of the political and economic elites.

SLAPP lawsuits became the most powerful weapons and tools used by those in power to attack, intimidate and finally silence those who publicly speak out against the misuse of power. Whistle blowers and other advocates against corruption prefer to stay silent because of the mere possibility of being targeted with criminal proceedings and restitution lawsuits. Despite censorship being forbidden and the freedom of press guaranteed and protected, the SLAPP lawsuits represent a way of silencing the voices of criticism. In the absence of critical public scrutiny and critical media, there is an open way for totalitarianism.





The legal background of SLAPP cases in

## Spain

Contribution by Linda Ravo (Legal and Policy Consultant)<sup>838</sup>

### 1. Laws most vulnerable to abuse

Based on reports and information available, the following may be regarded as laws more vulnerable to abuse in Spain when it comes to lawsuits intended to chill public participation. This should however not be considered as an exhaustive illustration, given that a variety of legal provisions can be relied on in order to achieve that aim, also depending on the nature of the public participation conduct targeted (e.g. protests or assemblies) and the relationship between the parties (e.g. an employment relationship).

It is also important to note in this context that experts variably underlined<sup>839</sup> that the legal provisions pointed at below, and in particular the criminal provisions listed, seem to represent in themselves a problem for the exercise of freedom of expression and of information which is more general in nature than their vulnerability to abuse for SLAPP litigation. According to experts, legal and judicial practice shows that the application of these provisions can lead to unjustified and disproportionate interferences with the fundamental right to freedom of expression and of information as it results from regional and international human rights standards, even beyond instances of abuse. At the same time, this makes these provisions *a fortiori* vulnerable to such abuse.

#### *1.1. Slander, defamation and other “honour” offences in the Criminal Code*

The Criminal Code<sup>840</sup> recognises a number of punishable offences harming reputation and honour.

Slander (“calumnia”) refers to the false accusation of a crime, made with knowledge of its falsehood or reckless disregard for the truth (Article 205 of the Criminal Code). The crime is punishable under Article 206 of the Criminal Code with a fine of six to twelve months.<sup>841</sup> Where the offence of slander is committed through public dissemination (press, broadcasting or any other equivalent means of dissemination, pursuant to Article 211 of the Criminal Code), Article 206 provides for aggravated penalties of imprisonment of between six months and two years or a fine of twelve months to two

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<sup>838</sup> This paper was authored by dr. Linda Maria Ravo as expert adviser to the Civil Liberties Union for Europe. The author is very thankful to experts from the non-governmental organisations Article 19, Greenpeace European Unit, Greenpeace International, Index on Censorship and Rights International Spain for their contributions and comments. The usual disclaimer applies.

<sup>839</sup> See for example Article 19, [Spain: Speech related offences of the Penal Code](#) (2020) and Joan Barata, Plataforma en Defensa de la Libertad de Informacion, [Informe jurídico sobre la adecuación a los estándares internacionales en materia de libertad de expresión de determinados preceptos del Código Penal español](#) (2020).

<sup>840</sup> [Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal](#).

<sup>841</sup> It is to be noted that the daily amount of the fine to be applied is to be established by the judge depending on circumstances of the case having regard to the thresholds and the principles established in Article 50 of the Criminal Code (in general, thresholds are set as between 2 and 400 EUR per day for natural persons and 30 and 5,000 EUR per day for legal persons).



years. It is defined as “accusing another person of a felony while knowing it is false or recklessly disregarding the truth” (Article 205 of the Criminal Code).

Defamation (“injuria”) refers to a behaviour or expression that harms the dignity of another person, his good name or reputation (Article 208 of the Criminal Code). Article 208 clarifies that defamation amounts to a crime only where, due to its nature, effects and circumstances, it is to be considered serious. The provision further provides that defamation which consists in the imputation of a fact or an action shall not be considered serious unless the imputation is made with knowledge of its falsehood or reckless disregard for the truth. The crime is punishable pursuant to Article 209 of the Criminal Code with a fine of three to seven months. Where the offence is committed through public dissemination (press, broadcasting or any other equivalent means of dissemination, pursuant to Article 211 of the Criminal Code), an aggravated fine of six to fourteen months applies. Additional sanctions are also prescribed by Article 213 of the Criminal Code if defamation is committed against payment (the offender may be barred from certain rights, such as holding public office or practicing a particular profession, for six months to two years).

### ***1.2. Criminal offences toward the monarchy or State authorities***

The Criminal Code also establishes specific offences for statements harming the reputation and honour of the monarchy or the State. Namely, where slander or defamation are directed “against the King, the Queen, any of their ascendants or descendants, the consorts, the regent or a member of the regency, or the Prince or Princess of Asturias” they amount to a specific criminal offence under Article 490(3) of the Criminal Code. In the offence is serious, the penalty is imprisonment from six months to two years. If not, the penalty is a fine of six to twelve months. Any other act of slander or defamation against a royal is punishable by a fine of four to twenty months (Article 491(1)). The misuse of a royal’s image in a way that “may damage the prestige of the Crown” is also a specific criminal offence under Article 491(2). The punishment is a fine of six months to two years.

Among the offences concerning defamation of State authorities, it is worth mentioning here Article 504 of the Criminal Code punishes with a fine of twelve to eighteen months serious slander or defamation directed at the national government, the General Council of the Judiciary, the Constitutional and Supreme Courts (national and those of an autonomous community), the armed forces and security forces.

### ***1.3. Criminal blasphemy***

Article 524 of the Criminal Code punishes “profane acts” offensive to religious feeling that are performed in a religious setting. The punishment is a fine of twelve months to two years or imprisonment between six months to one year.

Article 525 of the Criminal Code punishes offences to the feelings of members of religious groups or the public disparaging their dogmas, beliefs, rites, or ceremonies, as well as insults against non-religious persons. The punishment is a fine of eight to twelve months.



#### ***1.4. Criminal offences related to the protection of public security and the fight against terrorism***

Organic Law n 4/2015 on the Protection of Citizen Security<sup>842</sup> contains a number of provisions which gave rise to a surge of fines imposed on journalists and activists over the past years, reflecting concerns raised by both non-governmental organisations<sup>843</sup> and international monitoring bodies.<sup>844</sup>

For the purpose of this paper, the following provisions of this Law seem particularly worth mentioning:

- Article 37(4), which criminalises any act lacking respect or consideration of a member of the State police and security forces in the exercise of her public duties, with applicable fines ranging between 100 and 600 EUR;
- Article 36(23), which punishes the “unauthorized use of images or personal data of public officials or members of State security forces that may endanger the personal safety or that of agents’ families, protected premises or put at risk the success of an operation” with fines for up to 30,000 EUR.

Certain terrorism related provisions of the Criminal Code, as amended following a reform in 2015, are also worth mentioning in this context. In particular:

- Article 578 of the Criminal Code, which punishes “the glorification or justification of acts of terrorism and their perpetrators” and “acts that discredit, disdain or humiliate victims of terrorist crimes or their families”. The penalty is imprisonment from one to three years or a fine of twelve to eighteen months. The offence is to be subjected to an aggravated penalty if the act is committed through public dissemination (press, media, internet or other electronic communications services or information technologies);
- Article 579 of the Criminal Code, which punishes the public dissemination of messages or slogans suitable to incite others to commit terrorist crimes.

#### ***1.5. Civil defamation***

Law n 1/1982 on the Protection of Honour, Privacy and Right to a Respectful Image<sup>845</sup> can be relied on to file a broad range of claims against defamatory statements, including the defence of honour, personal and family intimacy, as well as personal image. Both natural and legal persons have legal standing under this Law (see Constitutional Court Decision of 26 September 1995 n 139). Unlike for criminal defamation, no qualification exists that differentiate between serious and non-serious defamation.

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<sup>842</sup> [Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana.](#)

<sup>843</sup> See for example Rights International Spain, [Análisis del Anteproyecto de Ley de Seguridad Ciudadana](#) (2014), [Say No to the ‘Gag Law’ Campaign](#) (2015), and [Recommendations to the Parliamentary Groups for the reform of the Organic Law 4/2015, on the Protection of Citizen Security](#) (2019).

<sup>844</sup> See for example the [Letter](#) of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression/UN Special Rapporteur on the rights to freedom of peaceful assembly and of association/UN Special Rapporteur on the situation of human rights defenders/UN Special Rapporteur on the human rights of migrants (2015).

<sup>845</sup> [Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen.](#)



There is no statutory cap on damages. The Law itself (Article 9) determines the criteria for determining the amount of compensation for damage (including moral damage, for which *a iuris et de iure* presumption exists), which apply to both criminal and civil cases involving protection of honour.

As also underlined in a recent study commissioned by the European Parliament<sup>846</sup>, the Law is seen by experts as problematic due to the absence of a cap on immaterial damages that may be awarded and the lack of a clear definition of the possible standard defences available (e.g., truth and reasonable publication).<sup>847</sup>

Research exists which points at moral damages claimed, and awarded, under these provisions as a means of unjust enrichment.<sup>848</sup>

### ***1.6. Civil liability actions in connection to criminal offences***

Compensation for damages suffered in connection to a criminal offence can be claimed pursuant to Article 109 of the Criminal Code. The concerned party may make a claim for damages within the criminal proceedings or opt to initiate a separate civil action. If criminal proceedings are initiated, civil claims will be suspended if (1) the parties' pleas are based on one or more grounds that are being investigated as a criminal matter, and (2) the decision of the criminal court may have a decisive influence on the civil case.

As regards liability for statements disseminated through press, the application of the principles *culpa in vigilando* and *culpa in eligendo* imply joint liability of the author of the statements, the editor and the publisher pursuant to Article 1903 of the Civil Code<sup>849</sup> and Article 65(2) of Law of 18 March 1966 n 14 on the Press<sup>850</sup>.

As regards slander, defamation and other honour offences, the criteria established in Article 9 of the Law n 1/1982 on the Protection of Honour, Privacy and Right to a Respectful Image apply (see above).

### ***1.7. Right of reply***

The right of rectification and reply is regulated by Organic Law 2/1984.<sup>851</sup> Any natural or legal person has the right to rectify the information disseminated by any means of social communication of facts that allude to them, which they consider inaccurate and whose disclosure may cause them harm. The exercise of this right is without prejudice to criminal or civil actions in relation to the concerned statements.

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<sup>846</sup> European Parliament, [Safety of journalists and the fighting of corruption in the EU](#) (2020), p. 65.

<sup>847</sup> See for example International Press Institute, [State of Press Freedom in Spain: 2015](#) (2015).

<sup>848</sup> See International Press Institute, [Analysis: Financial compensation for violations of the right to honour in Spain](#) (2017).

<sup>849</sup> [Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil](#).

<sup>850</sup> [Ley 14/1966, de 18 de marzo, de Prensa e Imprenta](#).

<sup>851</sup> [Ley Orgánica 2/1984, de 26 de marzo, reguladora del derecho de rectificación](#).



## 2. Potential defences

As regards slander, the untruthfulness of the fact related is a constitutive element of the offence, lacking which there is no criminal liability (Article 207 of the Criminal Code).

As regards defamation, the so called *exceptio veritatis* is contemplated in Article 210 of the Criminal Code where statements concern the conduct of public officials in the exercise of their functions.

Generally, the exercise of fundamental rights can represent a cause of exclusion from criminal liability (pursuant to Article 20(7) of the Criminal Code) as well as from civil liability. Freedom of expression and of information is protected by Article 20 of the Constitution<sup>852</sup> and includes the right to news and critical reporting as well as satire. Constitutional jurisprudence has differentiated between “freedom of expression” as referring to subjective messages, i.e., thoughts and opinions and “freedom of information” as referring to messages that are facts, i.e., messages that refer to a reality external to the speaker.

However, it is to be noted that experts have been pointing at the jurisprudence of Spanish courts, including the Supreme Court and the Constitutional Court, as falling short of respecting the right to freedom of expression and information, in particular when criminal law is relied on (see also below).<sup>853</sup>

## 3. Compliance with ECHR principles

The conditions under which fundamental rights, and in particular the right to freedom of expression and of information, can successfully be invoked to resist criminal charges and civil actions targeting public participation conducts have been sometimes interpreted restrictively by the jurisprudence.

As mentioned above, the jurisprudence of Spanish courts, including the Supreme Court and the Constitutional Court, has been criticized by experts as falling short of respecting the right to freedom of expression and information, in particular when criminal law is relied on. Indeed, Spain has been condemned on several occasions by the European Court of Human Rights (ECtHR) for violation of the right to freedom of expression in cases concerning charges brought on the basis of criminal provisions on slander, defamation and other honour crimes, against persons engaging in criticism and satire, including against the monarchy and State authorities (see among others the well-known ECtHR judgments in cases [Torranzo Gomez v Spain](#), [Castells v Spain](#) and [Otegi Mondragon v Spain](#)).

In recent years, some efforts have been made by the Constitutional and Supreme Courts to better align their jurisprudence with that of the ECtHR. As regards, in particular, the balance between the protection of reputation and the exercise of the right to freedom of expression and of information, courts (building on the landmark Constitutional Court Decision of 17 July 1986 n. 104) variably take into account the following elements:

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<sup>852</sup> [Constitución Española](#).

<sup>853</sup> See for example [Informe conjunto](#) presentado por la Plataforma en defensa de la libertad de informacion, Access Info Europe, Federacion de sindicatos de periodistas, y Grupo de estudios de politica criminal y Grupo de investigacion “Regulacion juridica y participacion del ciudadano digital” 5Universidad Complutense de Madrid), con relacion el examen periodico universal del Reino de Espana (2019).

- the social utility or social relevance of the information;
- the exercise of the right to freedom of expression and of information by professional journalists and more generally for the purpose of shaping public opinion;
- the social prominence of the subject that is concerned by the statements (see eg Constitutional Court's decisions n 105/1990 and n 29/2009);
- the truthfulness of the statements and the sufficient and responsible efforts made to verify the information;
- the intensity of the language and the need for the statements not to amount to insults (see eg Supreme Court's Decision of 13 May 2015 no. 288).

However, recent decisions of the Supreme Court and of the Constitutional Tribunal concerning freedom of expression, as well as prosecutorial practices, continue to be the object of criticism by experts, in particular as regards the interpretation of the scope of relevant criminal provisions and a restrictive approach over the level of protection to be granted to freedom of expression, which appears at times incompatible with international and regional human rights standards.<sup>854</sup>

#### 4. Systemic safeguards

As regards criminal proceedings, the main safeguard against possible SLAPPs lies in the possibility for the public prosecutor to dismiss the complaint and in the pre-trial admissibility filter further exercised by the judge in charge of the preliminary investigation. However, some experts have pointed out that in practice, prosecutors seem to be reluctant to dismiss such complaints even where defences related to the exercise of freedom of expression or other public participation related rights appear applicable<sup>855</sup>. In addition, the law allows the offended person to bring an action against the public prosecutor's decision not to press charges and become a private prosecutor.<sup>856</sup> As a private prosecutor, the offended person can, among others, appeal against the investigating judge's decision to end the proceedings, i.e. dismiss the case.

When, as an outcome of proceedings, defendants are declared innocent, they may claim the reimbursement of fees. The accused may also claim damages from the complainant pursuant to Article 1902 of the Civil Code. Recent jurisprudence, as analysed by commentators<sup>857</sup>, also seems to point at the possibility for the accused, in case the criminal complaint is considered unfounded, to claim damages deriving from the harm to their honour (see Supreme Court judgment of 29 May 2017 n 2024).

<sup>854</sup> See, for example, Plataforma en Defensa de la Libertad de Informacion, [La PDLI rechaza la condena por enaltecimiento a 'La Insurgencia' y urge a modificar el Código Penal](#) (2020) and Article 19, [Spain: Sentencing of rapper highlights urgent need to reform Penal Code](#) (2020), [Spain: Concerns as Penal Code used to criminalise jokes and misinformation about coronavirus](#) (2020). See also Article 19, [Briefing paper for the Expert Dialogue on freedom of expression and 'hate speech' in Spain](#) (2020), which analyses a ruling of the Supreme Court concerning hate speech with freedom of expression standards.

<sup>855</sup> See for example Article 19, Spain: Concerns as Penal Code used to criminalise jokes and misinformation about coronavirus (2020), cited. A report by Article 19 on prosecutorial practices is due for publishing shortly at the time of writing.

<sup>856</sup> Articles 101 to 103, 270, 280 and 281 of the Code on Criminal Procedure.

<sup>857</sup> Arturo Muñoz Aranguren, [Comentario a la sentencia del Tribunal Supremo de 29 de mayo de 2017 \(337/2017\) - La vulneración del derecho al honor derivada del ejercicio de acciones legales infundadas. Abuso del derecho a la tutela judicial](#) (2018).



As regards civil proceedings, the Civil Code allows claims to be dismissed at a preliminary stage of proceedings if, among others, they are “inappropriate” (Article 416 of the Civil Code). This may refer to disproportionate or exaggerated claims (pursuant to Article 422 of the Civil Code) or to claims with no legal merits (Article 423 of the Civil Code), although decisions pursuant to these provisions seem to be very rare. The abuse of the process is explicitly contemplated by the Civil Code and can give rise to damages pursuant to Article 7(2) and/or 1902 of the Civil Code. The court may also impose costs when it deems that a party has litigated recklessly or frivolously. In such cases, the limitation of the amount of costs to be paid by the losing party (established in one third of the value of the claim) do not apply (Article 394(3) of the Code of Civil Procedure<sup>858</sup>). The Code of Civil Procedure also provides for the possibility for the court to declare inadmissible procedural acts carried out with manifest abuse of right or of process, and to impose a fine of between 180 EUR and 6,000 EUR (without exceeding one third of the amount of the dispute) in the event of non-respect of procedural good faith (Article 247 of the Code of Civil Procedure).

As it concerns legal aid, no special rules apply to cases which are likely to qualify as SLAPPs: the targeted person may apply to legal aid under the general rules which revolve mainly around the person’s income.<sup>859</sup> In this respect, it is worth noting that non-governmental organisations have pointed out that existing rules on legal aid are rather restrictive and therefore allow only a limited number of persons to benefit from this right.<sup>860</sup> In particular, existing rules are criticized for not contemplating the concept of the interest of justice and for high thresholds set as regards the proof of the insufficiency of resources. Low and late payments to legal aid lawyers also reportedly hamper the effective functioning of the legal aid framework.

## 5. The court's role and independence

As stated above, while the jurisprudence of the Constitutional and Supreme Courts as regards the balance between the protection of reputation and freedom of expression has been evolving in recent years to better align itself with that of the ECtHR, experts underline that a degree of uncertainty and arbitrariness persists, due to the problematic nature of relevant provisions with respect to freedom of expression standards.<sup>861</sup> This lack of consistency in court practice often leads to (either criminal or civil) claims being dismissed only in second instance proceedings.

Existing procedural safeguards, in particular the early dismissal of “inappropriate” civil claims, seem, as mentioned above, to be rarely applied. Protection against harmful effects of SLAPP lawsuits is

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<sup>858</sup> [Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.](#)

<sup>859</sup> [Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita.](#)

<sup>860</sup> See for example the letter to the European Commission by Rights International Spain and Jueces para la democracia, [Systemic threats to the rule of law in Spain](#) (2015) and Rights International Spain, Spain, in Civil Liberties Union for Europe, [A response to the European Commission consultation on rule of law in the EU](#) (2020).

<sup>861</sup> See Article 19, Spain: Speech related offences of the Penal Code (2020) and Joan Barata, Plataforma en Defensa de la Libertad de Informacion, Informe jurídico sobre la adecuación a los estándares internacionales en materia de libertad de expresión de determinados preceptos del Código Penal español (2020), cited.





further frustrated by important delays in judicial proceedings which are considered endemic in Spain also due to a lack of resources.<sup>862</sup>

## 6. Overview and examples of SLAPP-type cases

Based on information collected and compiled by independent non-governmental organisations, and reports of prominent cases in the press, it seems that abusive lawsuits against public participation that can qualify as SLAPPs are mostly brought:

- against media outlets, journalists, bloggers and activists,
- by politicians and public officials, including law enforcement authorities,
- targeting reports of wrongdoings or corruption, satire and manifestation of criticism.

Criminal charges for slander and defamation are commonly brought against media outlets and journalists, with the majority of them dismissed. Examples of prominent cases can be found in the Media Law Database of the International Press Institute.<sup>863</sup> As testimonies illustrate, in many cases, criminal charges and civil claims are filed at the same time, exposing SLAPP targets to particularly lengthy proceedings.<sup>864</sup> This has a severe chilling effect on press freedom, in an environment where journalists are reportedly subject to increasing pressure.<sup>865</sup>

A number of abusive defamation lawsuits targeting environmental activists and civil society organisations have also been reported. Among recent prominent cases, the 1 million EUR criminal defamation claim brought against environmental activist Manuel García by intensive livestock business Coren<sup>866</sup> and the lawsuit filed against Greenpeace Spain inhouse lawyer Lorena Ruiz-Huerta.<sup>867</sup>

Journalists and bloggers have also been convicted with heavy fines for offences damaging the reputation of the monarchy.<sup>868</sup> Criminal charges for blasphemy are also frequently brought by religious groups against activists and have prompted concerns as regards respect of freedom of expression and artistic freedom.<sup>869</sup>

Cases of journalists, photographers, artists and activists targeted through the above-mentioned provisions of the Organic Law n 4/2015 and the new offences of glorification, justification and incitement to terrorism introduced by the 2015 reform of the Criminal Code have reportedly

<sup>862</sup> See the recent report by the Defensor del Pueblo, [Retrasos en la administracion de la justicia](#) (2019).

<sup>863</sup> International Press Institute, [Media Law Database – Spain](#).

<sup>864</sup> See for example International Press Institute, [In Spain, journalists covering corruption are targeted in court](#) (2018).

<sup>865</sup> European Center for Press and Media Freedom, [Interview: Spain has experienced an unprecedented decline in press freedom, says PDLI](#) (2019).

<sup>866</sup> For more information, see the report by Greenpeace Spain, [Coren contra Manuel - Un caso de SLAPP en la campaña gallega](#) (2020).

<sup>867</sup> For more information, see European Democratic Lawyers, [Criminalization of jurists for their public denunciation of torture and mistreatment](#) (2020).

<sup>868</sup> Some of the most prominent cases are illustrated in the report by the Organization for Security and Cooperation in Europe, [Defamation and Insult Laws in the OSCE Region: A Comparative Study](#) (2014), p. 220.

<sup>869</sup> See La Marea, [La blasfemia no puede ser delito en una sociedad democrática](#) (2020).





continued to increase<sup>870</sup>, also in the framework of the emergency situation related to the outbreak of the COVID-19 pandemic. <sup>871</sup>

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<sup>870</sup> For an illustration of selected cases, see Article 19 and European Centre for Press and Media Freedom, [Submission to the Universal Periodic Review of Spain](#) (2019), p. 5, Article 19, Spain: Concerns as Penal Code used to criminalise jokes and misinformation about coronavirus (2020), cited and Article 19, Spain: Sentencing of rapper highlights urgent need to reform Penal Code (2020), cited.

<sup>871</sup> Plataforma en defensa de la libertad de informacion, [La PDLI presenta en Europa el balance de la situación de la libertad de información en España durante el estado de alarma](#) (2020).



The legal background of SLAPP cases in

## Sweden

Contribution by Marten Schultz (Stockholm University)

### 1. Laws most vulnerable to abuse:

The question of which are the legal rules that most often abused by initiators of SLAPP lawsuits is difficult to answer in a Swedish context since there are no rules, in my view, that are “often” abused in the way SLAPP’s are defined and used in other jurisdictions. There are examples of lawsuits by companies that could be categorized as, to some extent, strategic, but they seem not to fit within the description of SLAPP’s.

I will focus on the risk of SLAPP’s against people, organisations and companies that aim to stifle freedom expression. To be able to understand the Swedish situation it is necessary to first provide some outlines of the basis legal structure.

#### *The Swedish constitutional system and the protection of freedom of expression*

In Sweden lawsuits against traditional media are unusual and mostly unsuccessful. The reason for this is the constitutional system. Sweden has a long tradition of giving particular protection to freedom of speech. Freedom of the press was given special constitutional protection already in The Freedom of the the Press Act from 1766. The basic principles of this constitutional document are still in force. Only some expressions are covered by this constitutional protection. Expressions that fall outside of the special constitutional system are instead handled by “normal” laws: criminal and civil law statutes and – when it comes to civil law responsibility – general unwritten principles. Whether an expression falls under the constitutional laws or under general laws depends primarily on its form. Printed media are covered by the constitutional protection, as well as television and radio. Postings on social media fall within the rules of general criminal and tort law. There are, however, some difficulties on how to categorize particular expressions on the Internet, that will be discussed below.

The current Freedom of the Press Act (*tryckfrihetsförordning*, 1949:105) is from 1949 and is one of Sweden’s four constitutional laws and the one with the oldest traditions. All expressions that have been printed in a printing press are regulated in the rules of this act, not only books and newspapers but also prints on t-shirts and flags.

In 1991, the Freedom of the Press Act was supplemented with The Freedom of Expression Act (*yttrandefrihetsgrundlag*, 1991:1449). The Freedom of Expression Act builds upon the rules in Freedom of the Press Act and expand them to also cover other media, such as television and radio etc.

As for digital publications some fall under The Freedom of Expression Act but others do not. Internet sources related to traditional media outlets (a webpage associated with a printed newspaper for instance) will automatically be covered by the constitutional protection. Other internet publications will be covered if they apply for a special permit by the Government (*utgivningsbevis*), which will only be granted if some requirements are fulfilled. A key requirement for such a permit is that it is not possible for someone other than the publisher to alter the published material – the publisher must



have control over the publication. It is therefore not possible to get the constitutional protection of The Freedom of Expression Act for publications on social media platforms such as Facebook, since Facebook has the possibility to alter and remove information.

The other constitutional documents are The Act on Succession (*successionsordningen*, 1810:926), which sets up the rules on succession in the royal family (Sweden is a monarchy). The Governmental Code (*regeringsform*, 1974:152) is the most important constitutional document and provides the general rules on the democratic system, division of powers etc.

The Governmental Code has a charter of human rights (ch. 2), which includes rules protecting freedom of speech. These rules, however, are in practice less important than those in the special freedom of expression statutes mentioned above.

### ***The basic tenets of the constitutional protection of freedom of expression***

The Swedish protection of freedom of expression for information that falls under the special constitutional statutes is arguably the strongest in the world. There are jurisdictions with more far-reaching substantial rules on what can be expressed. It is often presumed that the first amendment of the US constitution provides the most extensive cover of freedom of expression. In Sweden, however, there is an interplay between constitutional rules, criminal law rules, tort law rules and principles and procedural rules that taken together set up a system that makes it very difficult to win a case against, for instance, a media company. Furthermore, the system makes individual journalists working for, as an example, a newspaper immune against criminal *and* civil responsibility.

The special constitutional protection of freedom of speech revolves around a couple of basic tenets. Not all of these are of interest here, but some are. One basic principle is the idea of sole responsibility (*ensamansvaret*). This principle holds that one and only one person is solely responsible for everything that is included in one publication (ch. 8 of The Freedom of the Press Act and ch. 6 of The Freedom of Expression Act). When it comes to media, responsibility generally falls upon one, singular person because of the position she or he has within the publication. At newspapers, the responsibility rests upon a designated “responsible publisher” (*ansvarig utgivare*), which is often – but not always – the editor in chief. The same holds for television programs and radio. When it comes to book, the “responsible publisher” is the author.

This system of responsibility entails that employees working for media companies is never responsible for the information published.

Another basic tenet of the constitutional statutes of freedom of expression is the protection of sources. It is generally criminal for a journalist to disclose a person that has provided her information (ch. 3 sect. 3-4 of The Freedom of the Press Act and ch. 2 sect 3-4 of The Freedom of Expression Act). However, the protection goes even further. The Freedom of the Press Act and The Freedom of



Expression Act include strong rules of whistle-blower protection, which means that public servants may disclose secret information to media even if it is otherwise illegal to share the information.<sup>872</sup>

One other thing among the special rules for the media that plays a special role in this context is the special procedural system. Within the particular procedural system for media, “ordinary” prosecutors are not allowed to prosecute. The only public servant that can press charges against a newspaper, a television channel or a radio channel, is the “justice chancellor” (*justitiekanslern*). The last three persons that have held the position were previously Supreme Court justices. The Justice Chancellor is one of few high-ranking positions that do not have an open application procedure. Justitiekanslern is directly appointed by the government and the position is generally held by senior civil servants.

The Justice Chancellor is an old authority with a peculiar set of assignments. The justice chancellor works as the “lawyer of the Government”, when the state is sued. It has some supervisory duties. But it is also the leading authority when it comes to freedom of the press and the only public prosecutor when the media is accused of crimes.

In practice, all this means that media outlets are very seldom prosecuted. Defamation is only prosecuted when there is a pressing societal interest. Defamation prosecution, brought by the government (the justice chancellor) has only occurred one time every ten years in the last decades. When it comes to hate crimes, prosecution occur sometimes – mostly against antisemitic white power Internet pages. (Sweden’s strong protection of freedom of speech has made it a popular place for publishers of Nazi propaganda, especially white power rock music.)

In the rare cases when someone is prosecuted by the justice chancellor or by a private person that brings her own case against a publisher the procedural setting is different than in other court cases. Proceedings under the freedom of expression laws are tried by special courts designated to handle freedom of the press-cases. This is also the only type of cases that are tried by juries in Sweden. Before the jury deliberates the judge will instruct it to especially consider the value of protecting freedom of speech.

### ***Prohibited speech***

As already mentioned, there are two separate but linked systems of criminal responsibility for expressions: The particular constitutional system for press, tv, radio etc., which primarily covers media, and the general criminal system, which covers all other kinds of expressions, such as statements in e-mail, on social media or in direct physical contact with someone. This dual system is somewhat complicated.

Publications protected by the constitutional laws can only be subject to responsibility if there is a special criminal rule within the constitution itself. Media outlets cannot be subject to criminal responsibility if there is no rule within the constitution – it is thus not enough that a particular kind of publication is the criminalized within “normal” criminal law in the Criminal Code (*brottsbalken*, 1962:700).

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<sup>872</sup> See for an overview, Thomas Bull, *Blowing in the Wind: Swedish Protection of Whistle-Blowers in the Public Sector*, Scandinavian Studies in Law 52, Stockholm 2007, p. 65-78, available online on <https://scandinavianlaw.se/pdf/52-5.pdf>



As an example, it can be mentioned that the legislator criminalized “revenge porn” and similar expressions a couple of years ago, but this criminalization does not cover traditional media – such as newspapers – only, for instance, social media. If a newspaper publishes a secretly made film of, say, a celebrity having sex the rule against revenge porn gives no protection, in contrast with the situation when someone uploads the film on one of the large pornography pages on the Internet.

Both constitutional laws protecting freedom of speech – The Freedom of the Press Act and The Freedom of Expression Act – have sets of criminal rules that mirror many of the rules in the general criminal code. It is thus illegal to threaten, defame and to incite violence, even if it is through a protected medium.

In these cases criminal responsibility thus follows from the rules of “illegal threat”, “defamation” and “incitement” within the rules in the constitutional documents (ch. 7 of The Freedom of the Press Act and ch 5 of The Freedom of Expression Act). These rules are more or less identical to the rules in the general Criminal Code (illegal threat, ch. 4, sect. 5; defamation, ch. 5, sect 1 and incitement, ch. 16, sect. 5). When someone threatens, for instance, another person via Instagram she will be charged under the rule in the Criminal Code, ch. 4 sect. 5, which substantially is the same as the rule in the Freedom the Press Act, ch. 7, sect. 2.

### ***Exceptions from the constitutional protection***

There are also some types of expressions that fall outside of the constitutional protection, even if it is published in a form that – in general – falls under the freedom of expression laws. Child pornography is thus outside of the constitutional laws in general, as well as commercial messages (advertisements) and information covered by copyright. These exceptions from the constitutional protection follows directly from rules in the codes, ch. 1, sect. 11-14 of The Freedom of the Press Act and ch 1, sect. 18-21 of The Freedom of Expression Act.

### ***Rules on prohibited speech: Examples***

#### ***Defamation***

Swedish criminal law has several rules protecting honour, or reputation (in Swedish: *ära*). Responsibility for *defamation* is regulated in ch. 7 of The Freedom of the Press Act and ch 5 of The Freedom of Expression Act, and ch. 5, sect. 1 of the Criminal Code. It requires that someone has been portrayed as criminal or blameworthy, in a way that is inclined to make that person subject to contempt by people in her social context. To be clear, defamation is supposed to protect the reputation of the person – not his or her privacy.

However, it is sometimes (in reality: often) acceptable to characterize someone as criminal, for instance when news outlets report on a crime. According to the second sub-section of the mentioned rule, it is allowed to describe someone as criminal or blameworthy if it is “defensible”.

The assessment of defensibility rests on a balancing of the interest of freedom of speech and the interest of protecting the described person’s dignity and honour. One thing that must be made clear here is that it can be indefensible to describe someone as criminal or blameworthy even if it is true.



In some recent cases people have been held criminally responsible for sharing recent court decisions on Facebook, even though these decisions were correct in the sense that the documents had not been manipulated. In some of the recent cases on defamation in the aftermath of the #metoo-movement the question of defensibility has been central. The perhaps most well-known case involves a leading Swedish feminist and famous journalist, C, that accused another famous male journalist, F, of rape, that according to C had happened several years ago. The accusation took place on Instagram and C was therefore not protected by the constitutional rules. The case is still ongoing when this is written but the first-instance court found that the accusation was a portrayal of F as a criminal and that this portrayal was indefensible. It did not, in this case, matter whether F had in fact raped C or not. It was indefensible no matter what had happened. (Judgment of Stockholm's tingsrätt, 2019-12-09, in B 1755-18.)

If, on the other hand, the portrayal of someone as criminal or blameworthy *is* defensible, the issue of truth comes up. This may be the case, for instance, when a newspaper writes about a politician that is described as having committed a crime or having done something unacceptable. Such reporting will, in fact, often be defensible. However, that is not enough. After it has been decided that the description was defensible the court will assess whether the person that made the expression has shown that the description was true, or whether she had sufficient reasons to think it was true.

In NJA 2014 p. 808, a harsh decision by the Supreme Court, two university students had written a small essay on a person that had been convicted of economic crimes in many cases. The students got one of the decisions wrong, however. They wrote correctly about many of his convictions but in one case they missed that the conviction from the first instance court had been reversed by the court of appeals. The Supreme Court found that the students portrayed the person as having been convicted of the crime in question. This portrayal was, under the circumstances, defensible. However, it was not true nor were there reasonable to think it was true – it was a simple mistake – and the students were therefore responsible for defamation.

In NJA 2006 p. 16 a policeman was described by Sweden's largest newspaper as a criminal. The policeman had been involved in the investigation of the murder of prime minister Olof Palme and had been convicted of assault, which Aftonbladet wrote about, and he was also a suspect of other crimes. According to the courts, the description itself fell under the rule of defamation but it was considered to have been defensible. Since Aftonbladet had taken the information from an official Government report the paper also had sufficient reason to think it was true.

Only physical persons can be defamed under Swedish law. There are no rules that criminalizes "defamatory" expressions about companies or other legal entities.

### *Insult*

The rule on defamation is only one of the rules on protection of honor in the criminal code. It can also be criminal to *insult* someone (*förolämpning*). According to the rule in ch. 5 sect. 3 it can be criminal to insult someone by accusing her of, for instance, a crime, or to talk to someone in a derogatory manner or to humiliate her.



When one reads this rule, it looks like it criminalizes many kinds of insults that are more or less common in, for instance, political debates. In practice, however, the rule is almost never used to sue someone and when it is used it is mostly against 1) insults against police officers in their service or 2) racial insults. Two examples from the courts of appeal illustrate when the rule is sometimes used and I deliberately use the offensive language of the actual cases to show how the cases that result in convictions are often serious.

In RH 2013:61 a person called a (female) police officer in charge of investigating a suspicion of domestic violence “a fucking whore”, “whore devil” and “fucking police fucker” during a questioning. The court of appeals convicted the person for the crime of insult.

In RH 2011:5 a teenage student in a school, E, called his classmate a “fucking negro cunt”. Even though E was only 15 years old at the time he was convicted of insult.

### *Copyright*

In other cases rules on copyright may be used to stifle opinions. These rules are rather black-and-white and more or less similar in all of the E.U. I will provide an example on a famous copyright case below.

### *Other rules*

In addition, there are rules on threats, identity theft and fraud, to take some examples, but these rules would seldom give rise to SLAPP-related questions in Sweden. One criminal offense that are sometimes described as a rule used to silence political dissidents is the most important rule against hate crime “*hets mot folkgrupp*” (the Criminal Code, ch. 16, sect. 8). “*Hets mot folkgrupp*” literally translates as “incitement against a group of people” but is often simply named “hate speech” in translation.

This rule criminalizes agitation against a particular group of people, for instance ethnic or religious groups. Protected groups include sexual minorities but misogynistic hate speech is not covered. The rule is not restricted to minorities, but in practice most if not all cases of prosecution have dealt with hate speech of this kind.

The rule does not, however, really fit within the SLAPP-category, since “*hets mot folkgrupp*” is a construed as a victimless crime. It is a crime against society, not against any or several persons belonging to the group. It is thus not possible for a Jewish person to bring her own lawsuit against someone that writes antisemitic things in a newspaper or on Twitter and there is no basis for damages in these cases.

There are quite many cases of prosecution under the rule in Swedish law and this is the criminal rule in the constitution that is mostly used by the Justice Chancellor, especially against Nazi oriented internet publications. However, the rule is quite narrowly defined. General and offensive slurs against groups such as Jews, Muslims or gays are thus often allowed. On the other hand, denying that the Holocaust happened or stating that “all Muslims are criminals” will often be criminal.



### *Examples of SLAPP-related lawsuits in Sweden: Defamation*

The background sketched above explains why there are few cases of SLAPP-related lawsuits in Swedish law. There are, however, some examples of lawsuits against journalists for their actions outside of the special constitutional protection.

One example may be when a Swedish artist and politician, Richard Herrey, sued a journalist working for Sweden's largest newspaper Aftonbladet, as well as Aftonbladet as employer for the journalist. This was a defamation case, albeit with focus on tort responsibility and not criminal law. The background was that the journalist had called Herrey an "old racist" on Twitter (without any clear reason – Herrey is not known for being racist). Since the journalist expressed this view on Twitter and not in the newspaper his speech fell outside the scope of the constitutional laws and he was tried under the "normal" rules of criminal law. The court found that Herrey had not been defamed; the main reason was that wording – including the phrase of Herrey being an "old racist" – was not precise enough for it to be taken seriously.

The Herrey case fits badly within the SLAPP-category. Herrey was on his own and had to pay for his own trial. He is not a billionaire; on the other hand the media company that owns Aftonbladet is a billion Euro company that has no problem paying for lawyers. Also, of course, Herrey lost.

### *General thoughts on defamation after #metoo*

During the #metoo-movement many people, especially women, came forward with stories about sexual abuse and sexist cultures. Some of these women also took to social media to accuse identified men of rape. This has led to a handful of defamation prosecutions by public prosecutors and a couple of convictions. Some of these trials are still ongoing.

One idea behind the Swedish rule on defamation is that it should not be legal to publicly accuse others of crimes; such matters should be handled by the legal system. However, there has been some criticism against these cases under the argument that these women were, in fact, crime victims that have been let down by the legal system and that they should have the right to tell their stories without risking criminal responsibility.

These cases do not really fit within the SLAPP-category either, since these lawsuits come from the government and there are seemingly no strategic interests behind them other than upholding the law.

### *Copyright and pirates*

One type of cases that perhaps fit better within the SLAPP category are copyright cases initiated by big media companies, for instance the major movie studios. Sweden has for a long time been associated with copyright pirates. The Pirate Bay, run by Swedes, was previously one of the most visited pages on the Internet. From that page one could find other users that shared media protected by copyright and download it illegally.

The people behind the page were prosecuted for being accessories to the copyright infringements by its users. They were convicted, sent to prison and were sentenced to pay large amounts in compensation to the copyright holders.





After the judgment against the Pirate Bay media companies have continued to report to the police other cases of copyright infringements on the Internet, such as illegal streaming sites. This can be described as a strategic use of legal instruments to block one type of (illegal) expressions. Whether this focus on pirating was proportionate or not is open to discussion. Many of the police reports by the media have led to convictions in the courts. Today it seems more or less to have been forgotten but the pirate movement, at least parts of it, did view itself as a political force. Sweden's Pirate Party had, for a while, two members in the European Parliament.

## 2. Potential defences

### *Crimes against honour in general*

Crimes against honour include insult and defamation. Although not a defence there is a rule in the Criminal Code that protects insulters and defamers against public prosecution. According to ch. 5 sect. 5, a prosecutor should only sue if it is in the public interest. In practice this means that public prosecutions are fewer than one might think.

The last years have seen a surge in cases emanating from the #metoo-movement. These cases can perhaps be explained as a pushback on what the legal society perceives as an unwanted use of social media as a public court. They can also be seen unfair targeting of women that have chosen to share their stories after the judicial system had failed them.

### *Defences*

The Criminal Code contains general defences, ch. 24. These include consent, self-defence and necessity.

As mentioned above, truth is not in itself a defence against responsibility for defamation.

The rules on insult, defamation and "hets mot folkgrupp" will often involve more or less open assessments of proportionality, where the interest of freedom of expression in the individual case is compared to the interest protected by the rule in question.

## 3. Compliance with ECHR principles

### *Freedom of Speech in the ECHR and Swedish law*

Swedish law is in line with these principles. Value judgements do not fall within the scope of the rule on defamation. To say that someone is ugly, fat, vicious or unfit for service cannot be defamatory under Swedish law. Publications that contribute to a public discussion will have stronger protection than if someone simply writes swearing words on another's persons Facebook page.

There has been some discussion on whether there is a wider scope for expressing defamatory views within a public debate than in other situations. In a court decision by a first instance a politician for



Sweden's largest party, the Social Democrats, was acquitted in a case of defamation.<sup>873</sup> The politician, A-S, had previously been local government commissioner (*kommunalråd*), which is the highest public servant function in municipalities, in Gothenburg. In that function the politician was responsible for the city's organization to provide grants to different cultural events. The decisions to – for instance – give economic support to a theatre or a film festival were made by other officials, but as the highest politician A-S often had the final say in these matters. A decision by a lower ranking official gave rise to a discussion. In the decision economic support had been given to a cultural event on Muslim experiences. The decision was criticized under the argument that the persons given the grant had supported Islamic extremist views. A-S changed the decision and wrote about the decision on her private blog where she also accused named persons of being extremists and terrorist defenders. The court found that these remarks were defamatory, that they were defensible and that A-S had sufficient reason to believe they were true.

### *General remarks on the European Convention and Swedish Law*

The European Convention and decisions by The European Court of Human Rights (ECHR) are often mentioned in Swedish court practice and in legislative work. Sweden's constitutional protection of freedom of expression has in some cases been considered too far-reaching the ECHR, see for instance *Arlewin v. Sweden*, decision March 1, 2016 where the Court found that these protective rules violated art. 6 of the convention.

## 4. Systemic safeguards

### *Self-regulation etc.*

Sweden has a media ethics system for a long time. For more than 100 years the Press Council (*Pressens opinionsnämnd*) has heard complaints against publications in print media. It has its own ethical code.

These are rules that the traditional media industry by and large accepts as valid and try to adhere to, even though they do not follow from law but from a voluntary collaboration between different stakeholders in the media industry. If, for instance, a newspaper is criticized by the Council it needs to pay a sum in a fee and print the decision by the Council. The money goes to financing the system – not to the victim.

In addition to the press ethics system another system set up ethical standards for television and radio. This system, in contrast, is a legal construct, the Radio and TV Act, ch. 16, sect. 2 (*radio och tv-lag*, 2010:696). The reason is that the state regulates tv and radio media (of the traditional kind – not on the Internet) and decides who gets permit to broadcast in Sweden.

This year a new media ethics system was constructed. Since January 2020 Press Council is called the Media Council and the person overseeing the system is called the Media Ombudsman. The Media

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<sup>873</sup> See Mårten Schultz, Tingsrätten gör det inte lätt för sig, SvD 2020-02-12, <https://www.svd.se/forvanande-hur-domstolen-kom-fram-till-domen>



Ombudsman is, like the Press Ombudsman before, a self-regulatory structure set up by different media organizations. It covers the press, but also some publications on the internet.

### ***Legal fees***

Sweden generally follows the loser pays approach to legal costs.

Most people in Sweden have a private insurance, connected to their homes. This insurance includes coverage of legal costs if the insured sues or gets sued, but not all kinds of litigation are covered. Defamation lawsuits may sometimes be covered, but the insurance companies have different regulations. Also, the cap is generally quite low.

As for drawbacks a reoccurring critique against the Swedish system is that it is too difficult to sue newspapers and other media. It is very difficult to win a case against media outlets. The case will almost never be prosecuted by a public prosecutor, which means that the person will either need to prosecute herself or bring a civil lawsuit (which is equally difficult). Since the media companies are often wealthy corporations private persons will often find it economically difficult to sue. It is also unusual that rich people sue media in Sweden.

## **5. Court's role and independence**

*How do you see the court's discretionary role in SLAPP cases (as opposed to the statutory law)?*

Since there are few clear-cut SLAPP cases in Swedish law, the question of the court's discretionary role in SLAPP cases is difficult to answer.

## **6. Case law**

To the extent that any category can be seen as affected by SLAPP-type-actions it would be people accused of copyright infringements, where the big media companies as well as shadier businesses such as companies that sell pornography, often use the possibilities of the copyright legislation to press charges. The most well-known case is the previously mentioned decision regards The Pirate Bay (Judgment of Svea hovrätt, 2010-11-09, in B 4041-09).

From media reports it seems that these claims are often settled. Some of them are settled even though the defendant argues that she/he had, in fact, not downloaded or shared the material in question. When it comes to alleged copyright violations involving pornography a lawsuit may be socially shameful.

Recently, a couple of cases have been reported by the media that may or may not be connected to the SLAPP theme. A Swedish businessman has, allegedly, sued a digital Swedish news outlet – Realtid – as well as persons employed by company that publish it, in an English court. (I have not myself been able to get hold of any court documents.) The lawsuit has been criticized by press organizations and



described as a case of libel tourism.<sup>874</sup> It seems not clear whether this fits within the category of libel tourism, since the claim seems to be – according to media reports – based on the argument that Realtid caused economic damage to an English company in England, albeit the company was owned by a Swedish citizen.

Another example of a SLAPP-related issue that has recently been reported by media has to do with criticism against a local politician in Danderyd, outside of Stockholm. The background was that the municipality of Danderyd had sold a school to a private company for approximately 1000 Euros. The buyer of the school was the mother-in-law of the chairman of the municipal board, a politician of the Moderate party (*Moderaterna*). A politician from another party, the Centre party (*Centern*), wrote in a comment on Facebook that the sale was “rotten” and accused the responsible politicians of nepotism. A police report on defamation was filed by representatives of the municipality and written in the name of the municipality, on behalf of the chairman of the board. The police report did not lead to any legal actions by a prosecutor.<sup>875</sup>

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<sup>874</sup> Hanna Lundquist, Utgivarna: Regeringen måste agera mot förtalsturism, Journalisten, 2020-12-07, <https://www.journalisten.se/nyheter/utgivarna-regeringen-maste-agera-mot-fortalsturism>.

<sup>875</sup> Jan Söderström, Familjeaffär som skakar Danderyd, Aktuellt i politiken, 2021-01-05, <https://aip.nu/2021/01/05/familjeaffaren-som-skakar-danderyd/?fbclid=IwAR0xd-GXLtnQOB5zIOHtdQ7o-9ba4A8rjUsKLLDwYvinHY6cS-T6vi-QUIQ>.