



Doc. 15869 – Compendium of written amendments
25/01/2024

(Final version)

Countering SLAPPs: an imperative for a democratic society

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A. Draft Resolution

1. In recent years, there has been a steady increase in the number of Strategic Lawsuits Against Public Participation (SLAPPs). The term refers to abusive litigation and legal tactics designed to prevent, hinder or sanction public participation, that is the dissemination of information on sensitive issues and contributions to public debate on "matters of public interest", including a wide range of journalism, advocacy, communication and speech. In this respect, all matters where the public has a legitimate interest, including issues which affect the public and those which inspire controversy, but not issues of a purely private nature, must be considered of "public interest".
2. The Platform to promote the protection of journalism and the safety of journalists of the Council of Europe describes SLAPPs as a form of "harassment and intimidation of journalists" or "acts having a chilling effect on media freedom", depending on the source of the threat and the legal approach taken by the claimant. But while this worrying phenomenon seriously undermines media freedom, journalists are not the only victims, as such lawsuits may also target, for example, activists, whistle-blowers, human rights or environmental groups, trade unions, and any other individual or entity raising issues of public interest.
3. Although no European country has defined SLAPPs in law, they systematically present the following common features: i) they consist in legal actions, legal proceedings or other litigation that are initiated or pursued, or threatened to be, as a means of intimidating, harassing and silencing an individual or a legal person wishing to inform the public on a matter of public interest and/or to participate in a public debate on such a matter or in public affairs; and ii) they are a frivolous, vexatious or malicious – thus abusive – use of legal proceedings and legal guarantees with an aim or a concrete risk of preventing, hindering or sanctioning public participation.
4. There are other typical characteristics of SLAPPs, which however are not necessarily all simultaneously present in each case. Claimants are usually in a position of (economic and often political) power and have considerably more resources than the defendants they seek to intimidate and silence (journalists, media or activists). The claimants or their lawyers often advance aggressively framed or spurious arguments. Despite the weakness of their legal arguments, the claimants demand exorbitant amounts of damages and ramp up and draw out legal proceedings so as to force defendants to spend significant amounts of time and money defending their case. Sometimes, many co-ordinated legal actions related to the same event, and which can also have a cross-border element, are initiated by the claimants or their associated parties. The claimants may also orchestrate denigratory public relations campaigns against the

Amendment 1 Tabled by the Committee on Legal Affairs and Human Rights

In the draft resolution, at the end of paragraph 2, add the following sentence:

"The disclosure process in SLAPP cases can also threaten the protection of journalists' sources."

Amendment 2 Tabled by the Committee on Legal Affairs and Human Rights

In the draft resolution, replace paragraph 3 with the following paragraph:

"SLAPPs systematically feature two interconnected traits: i) they consist of legal actions that are initiated or pursued or threatened to be, to intimidate, harass or silence their target; and ii) they misuse or abuse legal proceedings and legal guarantees to prevent, hinder or penalise freedom of expression on matters of public interest and the exercise of rights associated with public participation."

Amendment 3 Tabled by the Committee on Legal Affairs and Human Rights

In the draft resolution, paragraph 4, replace the third and fourth sentences with the following sentence:

"The claimants or their lawyers often advance aggressively framed or spurious arguments, demand exorbitant amounts of damages, and/or ramp up and draw out legal proceedings so as to force defendants to spend significant amounts of time and money to defend their case."

defendants, to humiliate and delegitimise them. This is largely a matter of threats and the desire to intimidate and bully them into self-censorship, not so much to avert the risk of conviction, but to avoid the certainty of having to make considerable sacrifices for justice to be served.

5. SLAPPs may thus be regarded as a form of “lawfare”, a way of manipulating the judicial system and undermining its inherent protective role by misusing it to inhibit the right to freedom of expression and the right of citizens to receive information on matters of public interest. They prosper in jurisdictions which lack robust procedural guarantees to counter abusive lawsuits.
6. National authorities as well as international organisations have noted that measures are needed to combat this phenomenon the need to take action. In its January 2020 report entitled “Threats to media freedom and journalists’ security in Europe”, the Parliamentary Assembly identified several countries where this phenomenon has reached worrying proportions. In October 2020, the Commissioner for Human Rights of the Council of Europe called on States to tackle the problem. The Committee of Ministers of the Council of Europe is also in the process of adopting a recommendation on the issue.
7. Moreover, the European Union institutions are drawing up a directive to protect victims of SLAPPs or abusive court proceedings with cross-border implications and anti-SLAPP laws have recently been adopted or are being drawn up in some Council of Europe member States.
8. The Assembly recalls that under Article 10 of the European Convention on Human Rights (ETS No. 5) member States not only must refrain from interfering with the right to freedom of expression, but they also have a positive obligation to ensure a safe and favourable environment for participation in public debate by everyone, without fear, even when their opinions run counter to those defended by official authorities or significant parts of the public.
9. The Assembly also refers to Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, whereby “[m]ember States must exercise vigilance to ensure that legislation and sanctions are not applied in a discriminatory or arbitrary fashion against journalists and other media actors. They should also take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors”.
10. Similarly, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries calls on national authorities to consider adopting “appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression”.

**Amendment 4
Tabled by the Committee on Legal Affairs
and Human Rights**

In the draft resolution, paragraph 6, after the third sentence, insert the following sentence:

“The partner organisations to the Council of Europe Platform to promote the protection of journalism and safety of journalists have regularly highlighted SLAPPs in their annual reports.”

11. The Assembly considers that there is now an urgent need for all Council of Europe member States to act in a co-ordinated manner to successfully combat the phenomenon of SLAPPs and calls on them to strengthen their legislation to enable judges to effectively punish the perpetrators of such abusive litigation.

12. To this end, where legal action is directed against a form of expression or public participation on a matter of public interest and has the effect of preventing, hindering or sanctioning it, national authorities should provide for:

12.1. a procedure for the early dismissal of manifestly unfounded or abusive litigation, within a given time limit and based on specific criteria clearly defined in national legislation, including an appeal process conducted under an accelerated procedure;

12.2. the burden of proof on the claimant to prove that their lawsuit is not a SLAPP, where the court considers it established that the case concerns a form of participation in public affairs or expression on a matter of public interest;

12.3. the consolidation of proceedings concerning the same publication or a substantially similar element of the same publication, to avoid exhausting the defendant with multiple procedures the main objective of which is to paralyse the dissemination of information of public interest;

12.4. a stay of proceedings and claims for compensation in the event of the defendant's death;

**Amendment 5
Tabled by the Committee on Legal Affairs
and Human Rights**

In the draft resolution, at the end of paragraph 11, add the following words:

" , while ensuring that measures to address SLAPPs remain proportionate in the context of other rights protected under the European Convention on Human Rights (ETS No. 5), in particular the right to a fair trial (Article 6) and the right to respect for private and family life (Article 8)."

**Amendment 6
Tabled by the Committee on Legal Affairs
and Human Rights**

In the draft resolution, paragraph 12.1, replace the words "manifestly unfounded or abusive litigation" with the following words:

"a claim that is unfounded, abusive or would otherwise have a disproportionate impact"

**Amendment 7
Tabled by the Committee on Legal Affairs
and Human Rights**

In the draft resolution, after paragraph 12.1, insert the following paragraph:

"effective case management, and secure procedural expediency, in order to avoid or minimise the length and cost of proceedings;"

12.5. determination of the court with territorial jurisdiction on the basis of the defendant's domicile when the defendant is a private individual, and in any case, the defendant's access to appropriate remedies before the courts of the State where the action is brought;

Amendment 11
Tabled by the Committee on Culture, Science, Education and Media

In the draft resolution, paragraph 12.5, after the words "when the defendant is a private individual," add the following words:

"if this does not contravene international obligations, or the legislation of the European Union where applicable,"

Amendment 8
Tabled by the Committee on Legal Affairs and Human Rights

In the draft resolution, after paragraph 12.5, insert the following paragraph:

"the protection of journalists' sources during the litigation, particularly from disclosure;"

12.6. a maximum limit on the financial guarantees that may be required and imposed on the defendant, which must remain reasonable in the light of his or her actual means, precluding in principle the total freezing of his or her bank accounts;

Amendment 9
Tabled by the Committee on Legal Affairs and Human Rights

In the draft resolution, after paragraph 12.6, insert the following paragraph:

"a maximum limit on the damages and legal defence costs that may be imposed on the defendant;"

12.7. legal, financial and psychological assistance for victims of SLAPPs, including where the defendant is a legal entity;

Amendment 12
Tabled by the Committee on Culture, Science, Education and Media

In the draft resolution, replace paragraph 12.7 with the following paragraph:

"legal and financial assistance for the defendant, including where the defendant is a legal entity, and psychological support where the defendant is a natural person;"

Amendment 10
Tabled by the Committee on Legal Affairs and Human Rights

In the draft resolution, after paragraph 12.7, insert the following paragraph:

"access to early warning mechanisms for SLAPP targets in cases where their physical safety is threatened, and, in exceptional cases, to processes for voluntary evacuation and/or State protection;"

12.8. the right of the defendant to be fully and promptly reimbursed for all costs and expenses incurred in defending the case, as well as the right to be awarded, in addition to ordinary pecuniary damages, a reasonable compensation of non-pecuniary damages for the

emotional distress and punitive damages of a sufficiently substantial amount where the abusive nature of the claimant's action is established;

- 12.9. a fine or financial penalty to be paid by the claimant and to be collected by the State, for the damage caused to the judicial system by the bringing of abusive litigation; the amount of this financial penalty should be determined by the court, taking due account of the claimant's financial situation, in order to ensure that it has a genuine deterrent effect.
13. The Assembly notes that while SLAPPs are frequently civil lawsuits, they can also be in the form of administrative and criminal procedures. Therefore, it calls on member States to:
 - 13.1. review administrative and criminal procedures which may have a chilling effect on the freedom of expression and public participation, in order to offset or at least reduce such an effect, and, in particular, decriminalise defamation, as criminal prosecution on this basis constitutes the main threat for people reporting on matters of public interest;
 - 13.2. encourage administrative courts, public prosecutors and criminal jurisdictions to make use of the procedural powers they have to reduce the impact on public participation of administrative and penal lawsuits, namely fast-tracking criminal and administrative procedures which may hinder public participation, managing them to avoid useless delays and closing them as rapidly as possible;
 - 13.3. provide for rapid and full compensation of the defendant's costs and damages (including non-pecuniary ones) also in the framework of criminal procedures or administrative procedures which are eventually dismissed;
 - 13.4. provide that the defendant is eligible for (financial and other) support mechanisms also in case of criminal or administrative procedures, when public participation is at stake.
14. The Assembly considers that members of the judiciary and bar associations have a central role to play in combating SLAPPs. Accordingly, it calls on member States to:
 - 14.1. raise awareness among all judicial authorities of the phenomenon of SLAPPs, in particular by stepping up monitoring of the number and nature of SLAPP cases brought before the courts;
 - 14.2. include specific training in the curricula of judicial training institutions to make judges aware of the abusive nature of SLAPPs and the various strategies that claimants may employ so that they can detect and counter them;
 - 14.3. encourage the regulatory authorities of the legal profession to include the fight against SLAPPs explicitly in their codes of ethics, to improve the training of their members to make them aware of the phenomenon and to require them, on pain of disciplinary action, to refrain from knowingly participating in the actions of clients who are clearly seeking to abuse the legal system by bringing SLAPPs and deliberately prolonging such proceedings.

15. The Assembly stresses that developing multilateral co-operation at European level is key to countering SLAPPs effectively and calls on member States to strengthen judicial co-operation with a view to:
 - 15.1. develop smart procedural rules to avoid multiple SLAPPs in different States;
 - 15.2. ensure mutual recognition of decisions establishing that a lawsuit was a SLAPP, also to secure the implementation of dissuasive measures;
 - 15.3. set safeguards against judgments in favour of SLAPPs, in particular those issued in jurisdictions outside Council of Europe member States, to deny recognition and enforcement of these judgments.
16. The Assembly finally encourages media and watchdog organisations to adopt measures such as establishing an insurance mechanism or collective defence funds, pooling of resources for pre-publication legal review and the reporting of SLAPPs, especially in countries where journalists themselves are not yet sufficiently aware of the phenomenon.

B. Draft Recommendation

1. The Parliamentary Assembly, referring to its Resolution ... (2023) "Countering SLAPPs: an imperative for a democratic society", recalls that under Article 10 of the European Convention on Human Rights (ETS No. 5) member States not only must refrain from interfering with the right to freedom of expression, but they also have a positive obligation to ensure a safe and favourable environment for participation in public debate by everyone, without fear, even when their opinions run counter to those defended by official authorities or significant parts of the public.
2. Recommendation CM/Rec(2016)4 of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors calls on member States to "exercise vigilance to ensure that legislation and sanctions are not applied in a discriminatory or arbitrary fashion against journalists and other media actors. They should also take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors".
3. Similarly, Recommendation CM/Rec(2018)2 of the Committee of Ministers on the roles and responsibilities of internet intermediaries calls on member States to consider adopting "appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression".
4. However, SLAPPs are prospering in the jurisdictions of too many Council of Europe member States because of the lack of adequate procedural mechanisms to prevent, remedy and sanction abusive lawsuits which hinder the right to freedom of expression and public participation.
5. The Assembly is concerned by this phenomenon and warmly welcomes the initiative taken by the Committee of Ministers to entrust its Steering Committee on Media and Information Society (CDMSI) to draw up a draft recommendation of the Committee of Ministers to member States on countering the use of SLAPPs.
6. The Assembly commends the work accomplished by the CDMSI and its Committee of Experts on Strategic Lawsuits against Public Participation (MSI-SLP), to which the Assembly's rapporteur on this issue also contributed.
7. Therefore, the Assembly recommends that the Committee of Ministers:
 - 7.1. adopts a bold recommendation on countering the use of SLAPPs following CDMSI proposals;
 - 7.2. encourages and monitors the prompt and effective implementation by the member States of the guidelines set forth by the recommendation, including the wide range of safeguards mechanisms and remedies therein.