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A 'SLAPP' to Democracy?
Case Study of the Effects
of Strategic Lawsuits Against Public Participation in Slovenia

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ABSTRACT

In recent years, several concerns have been raised over the threat of Strategic Lawsuits against Public Participation (SLAPP) to European democracy. This thesis explores the effects of SLAPP lawsuits both on public watchdogs as individual targets and a broader community, and how they essentially undermine democracy. The threat to democracy is explored with the analysis of freedoms and human rights that are restricted due to SLAPP effects, as well as with a single-country case study of Slovenia. Although it is maintaining a relatively high level of democracy, Slovenia has been recognized as a country under the threat of SLAPPs. For a better understanding of the effects, in-depth interviews were conducted with SLAPP victims and experts familiar with this phenomenon. Participants represented different spheres that SLAPPs in Slovenia are targeting: media, environmentalism, activism, and academia. First, the analysis focuses on the individual experiences and observations from the participants on the specifics and extent of SLAPP effects in each sphere. Then, it explores the relationship between the country's state of democracy, recent political changes, and SLAPP cases. The analysis shows that despite the recent political shift from a right-wing government known for undemocratic actions to a left-liberal one, the threat of SLAPPs is still present. While the threat of state-led SLAPP has diminished, critical voices are still targeted by a variety of powerful actors with either political or economic goals to silence them. As emphasized by the participants, legal countermeasures are needed to tackle SLAPP lawsuits, since political changes alone will not save democracy.

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TABLE OF ABBREVIATIONS

CASE	Coalition Against SLAPPs in Europe
CFR	Charter of Fundamental Rights of the European Union
CM	Committee of Ministers
CoE	Council of Europe
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
FH	Freedom House
ICCPR	International Covenant on Civil and Political Rights
KRIK	Crime and Corruption Reporting Network
NGO	Non-governmental organisation
SLAPP	Strategic Lawsuits against Public Participation
UDHR	Universal Declaration of Human Rights
UN	United Nations

CASE STUDY ABBREVIATIONS

SAJ	Slovene Association of Journalists	Društvo novinarjev Slovenije
SNFA	Slovenian Native Fish Association	Društvo za preučevanje rib Slovenije
LNPD	Legal Network for the Protection of Democracy	Pravna mreža za varstvo demokracije
SDS	Slovenian Democratic Party	Slovenska Demokratska Stranka

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1.

INTRODUCTION

In 2020, Dunja Mijatović, the Council of Europe Commissioner for Human Rights, called on Europe that ‘it is high time to tackle a practice which puts pressure both on journalists and on civil society as a whole and dissuades them from critical reporting’. She was referring to the practice of the so-called Strategic Lawsuits against Public Participation (SLAPP) – lawsuits initiated by powerful and wealthy people with the goal to silence critical voices, such as journalists, activists, and advocacy groups. She warned that the use of such practice is on the rise across the European countries, affecting not only the media but several other public interest activities, hence restricting fundamental freedoms such as freedoms of expression and of assembly.¹

Soon, numerous public figures and organisations in Europe joined her calls, expressing concerns about SLAPPs. In March 2022, the organisation CASE (Coalition Against SLAPPs in Europe) published a report on SLAPP lawsuits, claiming that such lawsuits threaten European democracy by preventing civil society to engage in public participation. In their report, where they analysed 570 legal cases from 30 European countries to measure the scale and nature of SLAPP lawsuits in Europe, they warned that their findings represent only a fraction of the true extent of SLAPPs in Europe. As they believe, many targets choose not to report their cases, often due to concerns of further retaliation from the claimant. However, drawing from the data they had successfully collected, they confirmed that the typical profile of plaintiffs is that of powerful and wealthy people, whose main objective is not to prove the legal breaches but rather to intimidate the defendants – various public watchdogs who expose the matters of public interest.²

¹ Dunja Mijatović, ‘Time to Take Action against SLAPPs’ (*Commissioner for Human Rights*, 27 October 2020) <www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps> accessed 28 May 2023.

² Coalition against Slapps in Europe (CASE), ‘Shutting Out Criticism: How SLAPPs Threaten European Democracy’ (2022) 1–3 <<https://www.the-case.eu/wp-content/uploads/2023/04/CASereportSLAPPsEurope.pdf>> accessed 7 April 2023.

In recent years, public watchdogs themselves have voiced concerns over SLAPPs, especially regarding their devastating effects. They shared that due to time-consuming lawsuits they are facing financial and psychological burdens. Moreover, the lawsuits have an impact both on their professional and private life. For example, in an interview with Article 19, an organisation that promotes freedom of expression, journalist Clare Rewcastle Brown, said that throughout the legal proceedings, she was ‘putting her family through the prospect of imminent ruin by sticking to her guns’. Brown faced a SLAPP lawsuit and an arrest warrant due to her exposure of a corruption scandal that involved the former Prime Minister of Malaysia. Furthermore, Polish journalist Ewa Ivanova, told Article 19 that due to a SLAPP lawsuit, she lost her job. She believes that many journalists in Poland fear going to legal battles and a lack of support from their editors, which ultimately leads them to self-censorship and avoidance of certain topics. The experiences of journalists Brown and Ivanova are only a few of a larger pattern of issues that SLAPP targets are facing.³

While it may seem that SLAPPs only concern the defendants who directly experience their effects, several discussions have been highlighting their broader effect. That is, the effects of the SLAPP lawsuits can lead not only to the silencing of public watchdogs but also to a broader chilling effect on public debate, as the public is deprived of information of public interest. Therefore, this raises the question of what implications SLAPP lawsuits have for democratic societies, where freedom of expression is considered one of the enablers of democracy. Moreover, the effects of SLAPP lawsuits extend to other freedoms and rights. For instance, lawsuits can target activists for their advocacy activities like protests, undermining not only the freedom of assembly for the defendant but also discouraging others from engaging in activism due to fear of legal repercussions.⁴

Considering all that, this thesis researches how and to what extent SLAPP lawsuits affect a democratic society. To provide a comprehensive understanding of the SLAPP phenomenon and the extent of its effects, the focus is put on a single-country case study of Slovenia. According to the latest Freedom House (FH) report, an organisation that measures the

³ ‘Europe: Journalists Speak of the Devastating Impact of SLAPPs’ (*ARTICLE 19*, 20 September 2022) <www.article19.org/resources/europe-journalists-speak-impact-slapps/> accessed 1 July 2023.

⁴ Coalition against Slapps in Europe (CASE), ‘SLAPPs in Europe: How the EU Can Protect Watchdogs from Abusive Lawsuits’ (2022) 2 <https://dq4n3btxmr8c9.cloudfront.net/files/tw11IX/SLAPPS_IN_EUROPE_HOW_THE_EU_CAN_PROTECT_WATCHDOGS_FROM_ABUSIVE_LAWSUITS.pdf> accessed 7 April 2023.

strengths of democracies worldwide, Slovenia scores the highest level of democracy, and embodies practices of liberal democracy.⁵ However, in the aforementioned CASE report, Slovenia was listed as a country with the second-highest number of SLAPP lawsuits per capita, hence perceived as a country whose democracy is endangered.⁶ SLAPP cases in Slovenia did not go unnoticed in Europe. Mijatović in her calls to ‘take action’ against SLAPPs specifically referred to lawsuits targeting an investigative media outlet in Slovenia.⁷ Furthermore, the organisation Civil Liberties Union for Europe which annually publishes country reports on the state of the rule of law, warned about the legal harassment of civil society actors in Slovenia, including by initiating SLAPPs.⁸ Case study of Slovenia, a country recognized as being under the threat of SLAPP, therefore allows this thesis to delve into the specifics and effects of SLAPPs in a democratic society. Moreover, it provides an analysis of the extent of their effects on democracy.

1.1 METHODOLOGY

1.1.1 Interdisciplinary approach

This thesis is encompassing different disciplines to cover and provide the most accurate explanation of the phenomenon of SLAPP. The legal aspect of the matter helps in understanding the complexity of lawsuits, how the courts are dealing with cases and what legislative measures have been thus taken to counteract the abusive lawsuits. With the help of case law, their interpretation in legal journals, and different reports, it is possible to review the definitional elements and historical context of SLAPPs. Furthermore, the international human rights law and its protection mechanisms, enable an analysis of how SLAPP lawsuits affect democracy. The thesis also includes some elements of political science, communication and media studies, and sociology. Analysis of political drives behind some SLAPP cases, as well as of the political climate in which they occur, can help to understand

⁵ ‘Slovenia: Freedom in the World 2023 Country Report’ (*Freedom House*, 2023)
<<https://freedomhouse.org/country/slovenia/freedom-world/2023>> accessed 9 June 2023.

⁶ Coalition against Slapps in Europe (CASE) (n 4) 15.

⁷ Mijatović (n 1).

⁸ Civil Liberties Union for Europe, ‘Liberties Rule of Law Reports 2023 Slovenia’ (2023) 24
<https://dq4n3btxm8c9.cloudfront.net/files/3as1s/RuleOfLaw_Report_2023_Slovenia_EU.pdf> accessed 1 July 2023.

the extent of SLAPPs' impact on democracy. Furthermore, understanding the role of the press in a democratic society enhances the analysis of SLAPPs as a threat to freedom of expression. Lastly, by analysing the phenomenon from the perspective of social impacts, this thesis is able to present all the risks SLAPPs impose on a democratic society. Among other things, sociology encompasses the aspects of power dynamics in SLAPP cases, the effects of lawsuits on individual targets, as well as the broader community.

1.1.2 Case study

The case study research, focused on a single-country Slovenia, is included in the thesis to explore the research questions: How and to what extent do SLAPP lawsuits affect a democratic society? For the research conducted in the empirical part of the thesis, the qualitative approach was recognized as the most appropriate methodology.

Semi-structured, in-depth interviews were used as the main method for collecting the necessary data. The interviewees were invited to participate in the study due to their personal experience with the SLAPP lawsuit or their comprehensive knowledge on the SLAPP phenomenon in Slovenia; therefore, the sample included SLAPP victims, and media, legal or other experts in this field.

The interviews with ten participants were conducted in the period from 16 May to 27 June 2023. The duration of the interviews ranged from 13 to 36 minutes. Depending on the circumstances and the agreement between the researcher and the participant, they were done via phone or video call. They were all conducted in Slovenian language, and then translated to English for the final analysis purposes. The basis for the interviews was formed by around three open-ended main questions, which allowed the participants to freely express their views and knowledge, and the researcher to ask additional questions that may have emerged during the interview. The interview questions are included in the appendix.

1.1.3 Limitations and ethical considerations

Since SLAPP lawsuits are a relatively new phenomenon in Europe, there is not much existing scholarly literature that would comprehensively cover the topic on its own.

Therefore, the reports and analyses conducted by the organisation CASE, as well as those supported by the European Union (EU), are included in the thesis to fill in the gap and provide a better understanding of SLAPPs in Europe. They allow for a description of common definitional elements of SLAPP lawsuits, thus the identification of certain SLAPP cases in Slovenia. Furthermore, other studies that were done in Slovenia and media reporting of particular SLAPP cases facilitated the selection process of participants in the study.

The biggest limitation of this thesis is the lack of an official and uniform definition of SLAPP. Related to that, there is a lack of official data on SLAPP lawsuits, making it impossible to analyse their extent with a quantitative approach. Therefore, this thesis relies on a qualitative approach to analyse the occurrence of SLAPP lawsuits in certain periods, their specifics, and the extent of their effects.

Regarding the ethical considerations, all participants in the study were opted with a chance to participate anonymously in case of discomfort or fear of further legal harassment from SLAPP initiators. In the given informed consent form, they were introduced to the scope and purpose, a description of the procedures, as well as the risk and benefits of the study. However, they have all agreed to participate and to the revelation of their identity in the study.

1.2 STRUCTURE OF THE THESIS

The second chapter presents the origins of the term SLAPP and the findings of the initial studies done on this topic. It discusses the broad definition of SLAPP, along with common definitional elements that have thus helped researchers in the identification of such lawsuits. The introduction of the definitional elements, specifically the motives behind the lawsuits, contributes to a better understanding of the extent and manner in which SLAPPs affect democracy. Legal bases used for SLAPP lawsuits and two other accompanying elements are also presented in this chapter, namely the multiplication of lawsuits and their cross-border nature.

In the third chapter, history and development of the SLAPP phenomenon are examined. Specifically, their occurrence and the already introduced countermeasures in the United States (US), Canada, Australia, and the Philippines. Following that, the chapter scrutinizes

the rise of SLAPPs and their recognition in Europe, both at the Council of Europe (CoE) and EU level. Proposed counteractions in Europe are introduced as well, as they are relevant for the country case study, Slovenia.

Chapter four touches upon the effects of SLAPP lawsuits on individual targets and the broader community, particularly their chilling effect. Then, it focuses on the effects of SLAPP lawsuits as a threat to democracy. First, the relationship between democracy, the principle of the Rule of Law, and human rights is explored, as this allows further discussion on how SLAPPs undermine democracy through the restriction of certain freedoms and rights. To support the significance of protecting these human rights, the relevant jurisprudence of the European Court of Human Rights (ECtHR) is presented.

Chapter five delves into the case study of Slovenia. It first overviews the political system, state of democracy and respect for human rights, as well as recent political changes in the country. Following that, sections are divided based on different spheres that SLAPPs are targeting in Slovenia, presenting specific cases in each of them. In each case, particular focus is put on presenting the characteristics of lawsuits, namely the political or economic drives behind them, as this allows for a subsequent analysis of the relationship between the political dynamics in the country, and the prevalence and effects of SLAPP lawsuits. Lastly, the chapter delves into the potential future solutions: mitigation of the effects and the legislative reforms aimed at addressing SLAPPs at the national level.

2.

ORIGIN OF THE TERM SLAPP AND ITS DEFINITIONAL ELEMENTS

2.1 BROAD DEFINITION

The term Strategic Lawsuits against Public Participation was first coined by the researchers Penelope Canan and George W. Pring in the 1980s. Through the University of Denver, they conducted the first study of SLAPPs, nationwide and globally. Drawing on data collected from 100 lawsuits, which they recognized as attempts to prevent people from expressing their political views, they called this new phenomenon SLAPPs. They identified the key characteristics of these lawsuits and discussed their impact on political participation within the American society.⁹

For their categorization of a lawsuit as a SLAPP, it had to have the following characteristics: it had to be a civil lawsuit seeking monetary damages; targeting nongovernmental individuals or organisations; it had to be based on sort of an advocacy before the government bodies; and lastly, the advocacy in question had to be related to a matter of public concern.¹⁰

Based on data collected in their nationwide study they provided an illustrative case of such a lawsuit and its foreseeable outcome. First, aggrieved citizens address the public issue to a branch of government with the help of petitioning activities and boycotts, which is in the US considered a normal and constitutionally protected political behaviour. However, by expressing their political opinion, they threaten the interests of other entities. Consequently, those who feel threatened initiate legal actions against the citizens, usually based on defamation claims, interference with business or nuisance. Finally, the outcome of the lawsuit favours the citizens that have in their defence claimed the US constitutional protection of

⁹ Penelope Canan and George W Pring, 'Strategic Lawsuits against Public Participation' (1988) 35 Social Problems 506, 506.

¹⁰ Penelope Canan and George W Pring, 'Studying Strategic Lawsuits against Public Participation: Mixing Quantitative and Qualitative Approaches' (1988) 22 Law & Society Review 385, 387.

their actions.¹¹ Namely, the Petition Clause of the First Amendment of the US Constitution guarantees the US citizens the right to petition, to promote or discourage government actions without being punished.¹² For that reason, in most of the examined SLAPP cases in the US, the outcome turned out to be a clear legal victory for the defendants. This prompted Canan and Pring's further discussion on what is the intention of such lawsuits since the legal outcome is in most cases foreseeable. They presented the possible motives behind the lawsuits, such as producing 'the ripple effect'; regardless of the lawsuit's outcome, the plaintiffs seek not only to intimidate the defendant but also to deter other citizens from engaging in similar political activities in the future. Canan and Pring in their further discussion agreed that SLAPPs are larger than just a legal dispute, as they raise many micro- and macro-sociological questions, which need to be studied.¹³ Canan in her later study of SLAPPs from a socio-legal perspective reasoned:

SLAPPs are not events, rather they comprise a political legal phenomenon. This means that we must treat each SLAPP as a window on a much larger process. So, each SLAPP is not just the story of a legal dispute between opposing hostile parties. Rather, each SLAPP is a window on the relationship between democratic structures and judicial rules. It is a window on the link between political tolerance and economic dominance, and a window on the tension between constitutionalism and capitalism.¹⁴

Nowadays, the SLAPP phenomenon has indeed reached – or better said, been noticed – in several disciplines of studies. Academics and experts are now studying it as a legal, political, and social phenomenon, which ultimately allowed certain jurisdictions to develop counteracts. Several authors and experts have conducted studies in the US following Canan and Pring's research, leading certain US states to identify these abusive lawsuits and develop anti-SLAPP laws. However, in the US there is no federal anti-SLAPP law, leading to different legal definitions of SLAPPs over the US jurisdictions. Similarly, at the EU level,

¹¹ Canan and Pring (n 9) 508.

¹² First Amendment, U.S. Const. amend. I.

¹³ Canan and Pring (n 9) 506.

¹⁴ Penelope Canan, 'The SLAPP from a Sociological Perspective' (1989) 7 *Pace Environmental Law Review* 23, 24.

where attempts have been made to develop an effective anti-SLAPP legislation, they are facing definitional issues.¹⁵ Definitions of SLAPPs are still very broad since they are initiated for different reasons with different goals and have taken over different legal branches. Although Canan and Pring in their pioneer study presented a typical lawsuit in a form where a citizen is targeted with a civil lawsuit for addressing some public issue to a governmental authority, that is not always the case. Nowadays, SLAPPs cases are restricting all sorts of public participation, including for example journalistic expressions and negative reviews of businesses.¹⁶

Despite the lack of an official legal definition, this thesis examines definitional elements that have been recognized in recent studies of SLAPPs. Specifically, the definitional elements from the comparative study of SLAPPs in the EU, conducted by Bayer et al. in the light of the European Commission (EC) agenda for countering SLAPPs, are applied in this thesis.¹⁷ Their study provides a description of target and plaintiff profiles, motives and merit(lessness) of the lawsuits, and effects. Although the effects of the SLAPP lawsuits are perhaps the most important definitional element, they are examined separately from the other elements, as this allows for a more comprehensive analysis of the effects as a threat to democracy.

In the following sections, the dynamics in SLAPP cases, specifically the power dynamics between the SLAPP plaintiff and its target, and plaintiffs' motives for initiating such lawsuits, which are often perceived as meritless, are explained. Additionally, the legal bases used for SLAPPs and two other features accompanying the phenomenon are presented, that is the multiplication of the lawsuits and their cross-border nature.

2.2 SLAPP TARGETS

The term SLAPP itself signifies that these lawsuits specifically aim to target acts of public participation. They target a person or group that is engaging in activities such as participating

¹⁵ Justin Borg-Barthet, Benedeta Lobina and Magdalena Zabrocka, 'The Use of SLAPPs to Silence Journalists, NGOs and Civil Society' (European Parliament 2021) 20–21.

¹⁶ Petra Bard and others, 'Ad-Hoc Request. SLAPP in the EU Context' (EU-CITZEN: Academic Network on European Citizenship Rights 2020) 14.

¹⁷ Judit Bayer and others, 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union' (EU-CITZEN: Academic Network on European Citizenship Rights 2021) A Comparative Study <<http://dx.doi.org/10.2139/ssrn.4092013>> accessed 10 April 2023.

in demonstrations, circulating petitions, lobbying for legislative reform, reporting about violations done by the public authorities or business figures, or using any other means to raise awareness about some public concern. It is generally believed that their actions serve the public interest and that they are not motivated by personal gain or money.¹⁸ These critical voices consist of a wide range of individuals and organisations that are speaking out about a public matter with a political or societal significance. This encompasses environmental activists, journalists, academics, human rights defenders, civil society organisations, trade unions, whistle-blowers and others who alert and inform society about issues of public interest.¹⁹

SLAPPs are therefore not limited only to a particular field of public interest. As the studies have shown, the fields in which SLAPPs arise nowadays vary from civil rights, animal welfare, journalism, political criticism, and corruption.²⁰ The data collected by the organisation CASE and the Amsterdam Law Clinics had shown that in the last decade, the main targets of such lawsuits in Europe are journalists and media outlets, followed by activists, non-governmental organisations (NGOs), and academics. CASE's study of SLAPPs in Europe had also shown that the lawsuits are affecting the most freelancers in the media industry, as they often have fewer resources for their legal defence.²¹

2.3 SLAPP PLAINTIFFS

The plaintiffs or so-called SLAPPers are mostly individuals or groups in power such as corporations and other businesspersons, as well as politicians and governments.²² Canan and Pring in their pioneer study identified typical SLAPPers who are involved in such cases; these include business owners, real estate developers, police officers, as well as state or local government agencies. They discussed that SLAPPers are using the court system as a 'strategy to win a political and/or economic battle'.²³ In their 1996 opinion piece in the New York

¹⁸ Alice Glover and Marcus Jimison, 'S.L.A.P.P. Suits: A First Amendment Issue and Beyond' (1995) 21 North Carolina Central Law Review 122, 127.

¹⁹ CASE (n 4) 2.

²⁰ Bard and others (n 16) 14–15.

²¹ CASE (n 2) 34.

²² Thalia Anthony, 'Quantum of Strategic Litigation — Quashing Public Participation' (2009) 14 Australian Journal of Human Rights 1, 3.

²³ Canan (n 14) 26–30.

Times, they criticized corporations for portraying themselves as victims of lawsuits, when in reality the corporations are the ones initiating counter-lawsuits and thereby intimidating people.²⁴ As they explained, corporations are in some cases using litigation as a tool to counteract legal actions against them. For example, the oil company Chevron filed many lawsuits only to challenge the legal processes running against them for serious oil pollution. The company lost a lawsuit filed by the affected communities in Ecuador and was supposed to pay them \$9 billion for the damage. However, the company decided to use the ‘attack to defend’ strategy and avoid the responsibility by initiating a lawsuit against the affected Ecuadorians and their lawyers.²⁵

Subsequent studies by other scholars and organisations that are dealing with SLAPPs affirm the typical profile of SLAPPers. For example, in the CASE’s study of cases in Europe in the period 2010–2021 the most common plaintiffs identified were businesspersons, followed by politicians or people working in the public service, and the state-owned entities.²⁶ CASE recognized legal actions as a SLAPP mainly if they were initiated by private parties and not the state itself. They only identified one state-led lawsuit as a SLAPP; in the case of the Kingdom of Morocco suing journalists and NGOs in France, who worked on the Pegasus Project. CASE recognized that the state filed these defamation lawsuits only to silence and halt journalistic investigations.²⁷

Nevertheless, state actors often oppose acts of public participation in their private capacities. Perhaps one of the biggest concerns is SLAPPs initiated by politicians, including government officials, which are due to their position expected to have a higher level of tolerance towards criticism compared to other citizens. These types of lawsuits often occur in Poland and Croatia.²⁸ For example, since 2015, *Gazeta Wyborcza*, the largest high-quality daily newspaper in Poland, has been facing several lawsuits, with the majority of them initiated by the ruling Polish political party Law and Justice. These lawsuits are

²⁴ George W Pring and Penelope Canan, ‘Opinion | Slapp-Happy Companies’ *The New York Times* (29 March 1996) <<https://www.nytimes.com/1996/03/29/opinion/slapphappy-companies.html>> accessed 3 April 2023.

²⁵ Jeremie Gilbert, ‘Silencing Human Rights and Environmental Defenders: The Overuse of Strategic Lawsuits against Public Participation (SLAPP) by Corporations’ (*The Corporate Social Responsibility and Business Ethics Blog*, 30 April 2018) <<https://corporatesocialresponsibilityblog.com/2018/04/30/silencing-human-rights/>> accessed 10 April 2023.

²⁶ CASE (n 2) 37–38.

²⁷ *ibid* 14–15.

²⁸ *ibid* 54.

encompassing civil defamation claims and alleged violations of personal interests of several actors, including the party's leader Jarosław Kaczyński. They are suing the media due to articles published in the newspaper or on their website, addressing topics such as corruption scandals, controversies related to reprivatisation, and business associations linked to the leader of the party.²⁹

2.3.1 Power imbalances

Furthermore, the identification of typical SLAPPers and their targets reveals another important characteristic of these lawsuits: the power imbalance between the involved parties. SLAPPers are normally individuals or groups with political and/or economic power, whereas targets do not possess such powers and, for example, often face a greater financial burden of the lawsuit than the plaintiff.³⁰

The theory of power imbalance and disparity of resources between the parties was tested in CASE's study of SLAPPs in Europe. They randomly selected 10% of the cases studied and the sample confirmed the power imbalances within the cases. Almost 90% of the sampled cases presented a lawsuit in which the complainant had greater wealth or power than the target.³¹ Moreover, Anthony in her 2009 article about SLAPPs in Australia discussed how some corporations could even gain financial power through SLAPP cases, that is with tax deductions. According to the information at that time, corporations were taxed based on their profit rate, and by considering the litigation costs as 'counted as a cost incidental to a development venture', they could receive tax reductions. To simplify, for every dollar spent on a SLAPP lawsuit, they would receive a tax reduction, while their targets who were not involved in profit-making activities, most likely did not receive any tax deductions. Moreover, if the corporation lost the lawsuits, all the legal costs were accounted for as a business expense, while if the case was lost by the SLAPP targets, they would risk losing a large amount of their personal assets to cover all the legal costs.³²

²⁹ 'The Gazeta Wyborcza Newspaper Received 63 Lawsuits and Legal Threats' (*Mapping Media Freedom*, 2015) <www.mapmf.org/explorer> accessed 20 May 2023.

³⁰ Bayer and others (n 17) 19.

³¹ CASE (n 2) 29.

³² Anthony (n 22) 8–9.

2.4 MOTIVES AND MERIT(LESSNESS)

The following section joins two definitional elements of SLAPP lawsuits, the motives and merit(lessness) of the lawsuits.

Drawing from 228 cases, Canan and Pring identified four general motives for initiating SLAPPs. Filers' motive is to revenge the targets for their opposing an issue of public interest; secondly, they want to prevent a competent opposition of targets on public policy issues in the future; thirdly, they intend to intimidate targets and send them a message that they will be punished for their actions; and lastly, they want to use this lawsuit and court system as another tool in their strategy of winning a political or economic battle.³³

In recent years, with SLAPPs gaining attention worldwide, new studies have emerged, and authors identified different motives for initiating abusive lawsuits. Most common intentions have been identified, which helped in defining SLAPPs and separating them from other (legitimate) lawsuits. Perhaps the most notable difference is in what such lawsuits are not planning to achieve; that is the legal victory over their target. In their initial study of SLAPPs Canan and Pring found that in over half of the studied cases, it was the defendant who won the legal battle and not the SLAPP filer.³⁴ Since then several authors and organisations dealing with the phenomenon of SLAPPs have agreed that the filers do not expect success given the failure rate of such cases and that the legal outcome is usually foreseeable. The lawsuits are therefore designed only to pursue other interests and 'not to achieve the purpose of legal actions, such as compensation for the wrong'.³⁵ Furthermore, this usually portrays in the accusations made in the lawsuits, as they are lacking legitimate legal or factual basis and have no credibility. Therefore, they have been recognized as meritless lawsuits that are designed only to pursue other interests of the plaintiffs.³⁶

Merriam and Benson discussed that the plaintiffs are motivated by their subtle political or economic interests. That is, they may want to establish their political control by suing those who oppose their political actions or protect their economic interests by suing those who

³³ Canan (n 14) 30.

³⁴ Canan and Pring (n 9) 514.

³⁵ Anthony (n 22) 12.

³⁶ Edmond Costantini and Mary Nash Paul, 'SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response' (1991) 7 *Journal of Law & Politics* 417, 423.

oppose their projects, such as urban development projects. Authors recognized the criterion of ulterior political or economic motives as significant for understanding SLAPPs and for distinguishing them from legitimate lawsuits. For example, if a citizen publicly criticises a developer's new project in his neighbourhood only to extract some money from the developer, then it is understandable that the developer will sue him for legitimate reasons. However, the situation is different, when a citizen merely expresses his concerns over a new development project to protect his neighbourhood, and for that receives a lawsuit from the developer for interfering with his business. In such a case, we can assume that the developer used this lawsuit only to silence the citizen, accomplish his project no matter the public concerns and fulfil his economic interest. Knowing the intentions, whether they are of political or economic background, is therefore essential in understanding SLAPPs. However, recognizing the subtle motivations can be challenging when examining lawsuits superficially. There are cases, in which it is clear that the defendant did nothing wrong and the lawsuit is driven by some other motives, but there are also many grey area cases, in which the plaintiff has an arguable claim.³⁷

Furthermore, several authors have agreed that the main intentions of SLAPPs are harassment and intimidation of the target through lengthy legal processes. Essentially, the litigation process alone and not the legal outcome causes more harm to the defendant. Silenced by the Lawsuit Research Group conducted research of cases filed in the EU countries between 2015 and 2020 and based on a sample of cases they learned that on average the SLAPP case in Europe lasts for 1,89 years. To compare, in Canada and the US, where anti-SLAPP laws are adopted, the average lifespans of a SLAPP are 0,76 and 1,41 years.³⁸ Time-consuming litigation processes can target a defendant's life in many aspects and are therefore a perfect tool for intimidation of the target. Hartzler suggested that SLAPP fillers are more interested in burdening the target with a lengthy process as this can also inflict financial harm with accompanying legal costs.³⁹ For example, according to CASE's

³⁷ Dwight H Merriam and Jeffrey A Benson, 'Identifying and Beating a Strategic Lawsuit Against Public Participation' (1993) 3 Duke Environmental Law & Policy Forum 17, 18–19.

³⁸ Silenced by Lawsuits Research Group, 'European Union Action Against Abusive Litigation (SLAPP) Targeting Journalists & Human Rights Defenders' (*Center for Media, Data and Society Blog*, 17 December 2021) <<https://medium.com/center-for-media-data-and-society/political-sentiments-are-changing-against-slapp-but-do-anti-slapp-law-work-7268a286da2>> accessed 20 April 2023.

³⁹ Shannon Hartzler, 'Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant' (2007) 41 Valparaiso University Law Review 1235, 1240.

analysis of SLAPPs in Europe, even though over two-thirds of the cases were resolved through dismissal, withdrawal, or settlement, the defendants were responsible for their own legal fees, which presented a financial burden for them. Although they were not found guilty and did not have to pay damages, they were still forced to bear the burden of defending themselves, including covering the defence costs, in a case that ultimately did not result in a determination of wrongdoing.⁴⁰

Additionally, SLAPP filers might initiate a lawsuit as a form of retaliation against targets and to protect their own reputation. Lott discussed the status of SLAPPs in Canada, where many cases presented corporate retaliation against consumers who complained about some matter and in that way threatened the public reputation of SLAPP filers. For illustration, Lott presented a case of a citizen Nancy Carter that faced legal threats from her Internet service provider because she complained about it to the Privacy Commissioner and made their dispute public. Carter cancelled her account at the service provider due to payment issues and later discovered that they suspended her email account but still absorbed all of her emails onto their server. To access her emails, she was told that she had to pay the disputed account amount, and that if she cancelled the account all her emails will be destroyed after 30 days. She later discovered that in that period she had missed an email about a job opening and missed the opportunity to apply. That is why, she filed a complaint with the Privacy Commissioner, which found that the Internet service provider's policy of withholding emails was not transparent enough and that her complaint was valid. For filing a complaint, and in that way bringing the matter to the public eye and informing other consumers, the service provider threatened Carter with a lawsuit. She received a letter from its lawyers, in which they stated that due to her actions – bringing the matter 'to the attention of various associations or governmental bodies' – they will take legal action against her. Although the case was later settled out of court with Carter receiving compensation for damages, it illustrates the abuse of legal action for retaliation and reputation protection.⁴¹

Finally, perhaps the primary drive behind SLAPPs, encompassing all other motives as well, that can affect not only the target but also a broader community, is the attempt to

⁴⁰ CASE (n 2) 30.

⁴¹ Susan Lott, 'Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada' (The Public Interest Advocacy Centre 2004) 16–18.

prevent targets' further public participation on the issue concerned, that is to silence them.⁴² Silencing can be done by inflicting financial, emotional, reputational, or other harm upon the defendants and, in that way, discouraging them from speaking out. Moreover, successfully silencing one individual target can have a deterrent effect on activists, journalists, human rights defenders, and others that are revealing issues in the public interest but are due to fear of lawsuits silenced. This leads to the concern of a broader effect the lawsuits might have on the community that is deprived of knowledge on public matters and concerns.⁴³ The effects, as another definitional element, are examined in chapter four, along with the threat they pose to democracy.

2.5 LEGAL BASES USED FOR SLAPP LAWSUITS

Already the initial studies have shown that SLAPPs are initiated on various legal bases. In 1988, Canan and Pring identified defamation as the most prevalent legal claim in SLAPPs, followed by 'business torts, conspiracy and judicial process abuse, constitutional rights, and nuisance'.⁴⁴ In the US plaintiffs began employing alternative types of claims instead of defamation due to the 'actual malice' requirement in defamation cases after the *New York Times Company v Sullivan* case.⁴⁵ Both in the US and Australia business torts have been frequently used to initiate SLAPPs, such as the claim of intentional interference with contractual relations.⁴⁶

CASE in its study found that in Europe most of the SLAPP lawsuits are based on national defamation laws or provisions related to insult or honour. However, it also found that an increasing number of cases have been filed under several other provisions. For example, some were based on privacy and data protection claims, mostly using the EU General Data Protection Regulation.⁴⁷

⁴² A Society of Professional Journalists and Baker & Hostetler LLP, 'A Uniform Act Limiting Strategic Litigation Against Public Participation' 5 <<https://www.spj.org/pdf/antislapp.pdf>> accessed 12 April 2023.

⁴³ Borg-Barthet, Lobina and Zabrocka (n 15) 13.

⁴⁴ Canan and Pring (n 9) 511.

⁴⁵ See the case in chapter three on page 22.

⁴⁶ Anthony (n 22) 6–7.

⁴⁷ CASE (n 2) 19–20.

Bayer et al. in their comparative study of SLAPPs in the EU, with the help of academics and legal experts, provided an overview of the most typical legal instruments abused for SLAPPs in the EU Member States. Generally, their findings showed that SLAPPs have taken over several legal branches – from public and private law, criminal and civil, to international human rights law – which is why it is hard to address all the issues in one counteract, such as one legal instrument.⁴⁸ They found that most of the cases in the EU were based on criminal and civil defamation claims, privacy and data protection laws, as well as other provisions within criminal legislation such as anti-terrorism. In this context, the authors also pointed out that most Member States criminalize defamation despite the international recommendations on decriminalising it.⁴⁹ For instance, the ECtHR stated that imprisonment sanction is disproportionate for defamation cases as it has a chilling effect on public debate. Although the EU Member States impose different criminal sanctions, most of them still use imprisonment as one of the possible punishments for defamation.⁵⁰ The purpose of criminal law, in particular imprisonment sanction, is to prevent perpetrators from repeating some crime rather than to punish someone for expressing themselves. Using civil instead of criminal law for defamation is thus considered more suitable as it allows sanctions like retraction, apology, or compensation for damages. Moreover, the threat of imprisonment and the social stigma associated with criminal proceedings can have a significant chilling effect on the target, thereby making criminal law more likely to be abused for SLAPP purposes of silencing the target.⁵¹

2.6 MULTIPLICATION OF LAWSUITS AND CROSS-BORDER CASES

In the Bayer et al. study, experts from the States also reported that some lawsuits are multiplied or repeated, which presents an additional burden to the target. That is why the authors of the study recommended that the courts, when deciding whether they should recognize a case as SLAPP, should examine whether the lawsuit has been multiplied by the

⁴⁸ Bayer and others (n 17) 85.

⁴⁹ *ibid* 43–45.

⁵⁰ *ibid* 232.

⁵¹ *ibid* 82–83.

same plaintiff against the same defendant, or others but on the same basis.⁵² Examples of such SLAPPs include lawsuits against Serbian media outlet KRIK⁵³ and lawsuits against the Maltese investigative journalist Daphne Caruana Galizia⁵⁴, which ultimately raised the attention to the SLAPP phenomenon in Europe.

The threat of multiple lawsuits is often amplified by the cross-border nature of cases, as plaintiffs will try to initiate them in different jurisdictions. Such a practice is called ‘forum shopping’, whereby the plaintiff will strategically file a lawsuit in a specific jurisdiction or court, as the latter might have better laws or other features that put the plaintiff at an advantage. For example, in the US, where only certain States have enacted anti-SLAPP legislation, plaintiffs will select a jurisdiction, where no such safeguards are available to the defendant, even though that jurisdiction is not most closely connected to the case.⁵⁵ One such example is the lawsuits initiated by Californian politician Devin Nunes against his critics, including Twitter and CNN. Despite him and the defendants being based in California, he filed the lawsuits in other jurisdictions like Virginia, which has weaker anti-SLAPP legislation. The absence of better legislation in such jurisdictions has allowed him to file SLAPPs without facing significant consequences or costs.⁵⁶

Furthermore, forum shopping is not excluded from the EU context, which does not have anti-SLAPP legislation in place yet. The plaintiffs will take advantage of the Brussels I Regulation 2012, which ‘allows libel proceedings to be brought in a jurisdiction in which the harmful event occurred or may occur’ and consequently allows the plaintiff to initiate a cross-border SLAPP case.⁵⁷ Ultimately, defending oneself in an unfamiliar jurisdiction can impose even more financial and psychological burdens on the defendant. The defendant may need to hire lawyers in multiple jurisdictions, travel in order to attend the proceedings, as well as translate relevant documentation.⁵⁸

⁵² *ibid* 87.

⁵³ See chapter four on page 30.

⁵⁴ See chapter three on page 25.

⁵⁵ Borg-Barthet, Lobina and Zabrocka (n 15) 14.

⁵⁶ California Anti-SLAPP Project, ‘Devin Nunes – California’s SLAPP-Filer-in-Chief’ (8 September 2020) <www.casp.net/in-the-news/devin-nunes-californias-slapp-filer-in-chief/> accessed 19 May 2023.

⁵⁷ Borg-Barthet, Lobina and Zabrocka (n 15) 14.

⁵⁸ *ibid* 33.

In CASE's study of SLAPPs in Europe, 62 out of 570 were cross-border cases. Most of them occurred in the United Kingdom and France.⁵⁹ Case *Tony Robbins v BuzzFeed UK Ltd* from 2019 illustrates the problematic cross-border nature of SLAPP lawsuits. Robbins, an American self-help guru, filed a lawsuit against BuzzFeed UK for publishing an article, alleging him of sexual harassment and bullying some individuals at his event. Although the article was published by an American journalist, based in the US, working for the US-based online portal of BuzzFeed, and that the alleged abuses happened in the US, Robbins filed a lawsuit in Dublin. Ultimately, the Irish High Court allowed him to do so, also due to claims that the article was viewed by more than 13 thousand times by users geo-located in Ireland. Furthermore, this case exposes the risks of new opportunities for plaintiffs initiating cross-border cases due to the Internet.⁶⁰

Both the multiplication of lawsuits and their cross-border nature were acknowledged by the EC as it included these features of SLAPPs in its Proposal for an anti-SLAPP Directive in 2022. They listed 'the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters' as one of the indicators that the court proceedings are being abused to halt public participation. Related to the cross-border nature of SLAPPs, they also recognized the risk of online media motivating such cases. They warned that 'online media content is accessible across jurisdictions and that may open the way for forum shopping and hamper effective access to justice and judicial cooperation'. They also warned that the effect of SLAPPs is stronger when they are launched outside of the EU and that the cross-border nature of cases adds an extra layer of complexity and burden to the defendants.⁶¹

The EU initiatives and similar calls for action at the European level are further examined in the following chapter. As previously mentioned in this chapter, the US has developed countermeasures, whereas Europe, particularly the EU Member States, have been making efforts to introduce effective anti-SLAPP protection measures in the past few years. The upcoming chapter, therefore, delves into the historical development of this phenomenon in

⁵⁹ CASE (n 2) 23.

⁶⁰ *ibid* 37.

⁶¹ European Commission, 'Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")' COM (2022) 177 final.

the US, Europe, and other nations, while also examining the steps taken thus far to tackle this issue.

3.

DEVELOPMENT OF THE SLAPP PHENOMENON

3.1 HISTORICAL DEVELOPMENT

Academic discussion about SLAPPs began in the 1970 and 1980s following the rise of such lawsuits in the US. All lawsuits that Canan and Pring, who coined the term SLAPP, analysed were filed after 1970.⁶²

In early discussions, academics put more emphasis on SLAPPs in the environmental and urban development area. In 1989, former attorney general of New York Robert Abrams in his address at the conference about SLAPPs at the Pace University School of Law presented several cases, in which environmental activists that were critical of pollution and other harm done to the planet were silenced by the lawsuits. He urged the need to act and save the citizen activism in the environmental area as it is crucial for preserving our planet.⁶³ Canan and Pring also warned about cases, in which corporations targeted environmentalists and other individuals who were expressing their views and concerns. They named the attempts of silencing the environmental activists the ‘Eco-SLAPPs’.⁶⁴ An example of such a SLAPP lawsuit in the US is the *Webb v Furry* case from 1980. Rick Webb, a farmer from West Virginia, was an environmental activist who was sued by the coal company for \$200,000 due to his complaint to the governmental Environmental Protection Agency that the company is polluting the Buckhannon River and causing many trout to die. Another famous SLAPP lawsuit that Canan and Pring examined was the *Warembourg v. Louisville* case from 1983. Four individuals, along with the town of Louisville, were facing a lawsuit because of their petitioning against the planned annexation of Warembourg’s farmland to the town for a housing development project by the Medema Homes Corporation. The citizens were worried that this annexation might impact their life, as it could increase the public costs, so they

⁶² George W Pring, ‘SLAPPs: Strategic Lawsuits against Public Participation’ (1989) 7 Pace Environmental Law Review 3, 4.

⁶³ Robert Abrams, ‘Strategic Lawsuits against Public Participation (SLAPP) Address’ (1989) 7 Pace Environmental Law Review 33, 41.

⁶⁴ Pring and Canan (n 24).

circulated a petition to persuade the city council to put the moratorium on annexation until the proper analysis of the project's effects on their town is done. However, because of their petitioning, they faced a lawsuit filed by the farmer and the Corporation.⁶⁵

Even though the first studies and warnings of SLAPPs in the US mainly focused on the environmental and urban development area, such lawsuits were not only present in that area. The press in the US faced lawsuits that could be identified as SLAPPs already in the 1960s. An important case from that period is the *New York Times Company v. Sullivan* in 1964. The New York Times faced a libel lawsuit filed by the city commissioner Sullivan because of an advertisement, published in the newspaper, that allegedly discredited him. This was happening in the time of the Civil Rights movement and the ad was made by the supporters of Martin Luther King Jr., which, as it turned out, did contain factual inaccuracies and the commissioner won the case. The New York Times first appealed to the State Supreme Court, which affirmed the verdict, and then took the case to the US Supreme Court, which ruled for the newspaper company. The court unanimously held that in the defamatory or libel cases concerning public figures, it is not enough to show that the press published false information, instead, the plaintiff must prove that the information was published with 'reckless disregard for its falsity' or in other words with the actual malice.⁶⁶ The case can be identified as a SLAPP due to its characteristics, such as the power imbalances between the parties involved, but what is more important, its outcome introduced a tool to tackle SLAPPs concerning the press. In this landmark decision, the Supreme Court established The New York Times doctrine in defamation cases concerning the press, which shifts the burden of proof from the defendant to the plaintiff. That way, the press experiences less stress when dealing with the lawsuit, and their right to freedom of expression, allowing public criticism, is better protected. However, the doctrine does not address procedural issues, such as legal costs, and additional measures to tackle such cases in the US were needed.⁶⁷

Over the years several US states have passed their anti-SLAPP laws. The laws vary from state to state but for the most part, they enable the quick dismissal of SLAPP lawsuits before the costly court processes can begin. As of April 2022, when Kentucky joined, 32 states and

⁶⁵ Canan and Pring (n 9) 508–509.

⁶⁶ *New York Times Co. v. Sullivan*, 376 US 254 (1964).

⁶⁷ Pamela Shapiro, 'SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International' (2010) 19 *Review of European Community & International Environmental Law* 14, 17–18.

the District of Columbia have enacted its anti-SLAPP law.⁶⁸ However, there is no federal law addressing these abusive lawsuits in the US yet, which allows the plaintiffs to practice ‘forum shopping’ – file a lawsuit in a different state, where there is no anti-SLAPP law, and thus have a better chance at achieving their goals. In September 2022, the SLAPP Protection Act of 2022 was introduced in the US Congress, aiming to provide anti-SLAPP legislation at the federal level.⁶⁹

Similar to the US history of SLAPPs, Canada recognized such cases mainly in the environmental and urban development area in the early 1990s. For example, in Eastern Ontario in 1990, citizens were threatened with a lawsuit after expressing their concern over the use of a toxic chemical called Dombind for suppressing dust on townships’ roads. Citizens were concerned that this chemical presents a threat to public health, which is why, five individuals together with environmental organisations organised a public campaign to ban the use of Dombind in their region. As a result of this campaign, the individuals were threatened with a libel lawsuit by the manufacturer of the chemical Norampac. Four of them stopped their campaigning, scared of the legal battle and costs, but one individual decided to continue. Ultimately, their campaign succeeded, and the chemical was banned. This case is a good illustration of the SLAPP threat, as the company managed to silence four individuals that had no financial power only through a threat of a lawsuit.⁷⁰ In Canada, three provinces passed the anti-SLAPP legislation. Quebec passed Bill 9, which addresses abuses of courts for halting public participation.⁷¹ The other two provinces, Ontario and British Columbia, have both passed anti-SLAPP laws called the Protection of Public Participation Act that allow the early dismissal of a lawsuit if it is recognised as a SLAPP.⁷²

In 1990, the SLAPP phenomenon also reached Australia, but it drew more attention later in 2004 with the *Gunns 20* case, which also boosted the anti-SLAPP measures. The case concerned 20 environmentalists sued by the timber giant Gunns Ltd because of their

⁶⁸ Austin Vining and Sarah Matthews, ‘Anti-SLAPP Laws Introduction - Reporters Committee’ (*The Reporters Committee for Freedom of the Press*) <www.rcfp.org/introduction-anti-slapp-guide/> accessed 6 April 2023.

⁶⁹ Strategic Lawsuits Against Public Participation Protection Act of 2022, H.R.8864, 117th Cong. (2022).

⁷⁰ Lott (n 41) 13–15.

⁷¹ Bill 9, *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*, 1st Sess, 39th Leg, Quebec, 2009.

⁷² *Protection of Public Participation Act*, SO 2015, c 23; *Protection of Public Participation Act*, SBC 2019, c 3.

campaign to protect Tasmania's forests. The case went on for years and was reported nationwide, as well as caused public outrage. During that time the company revised and dropped several of its claims and finally dropped the case in 2010. The case presented a threat to freedom of speech and public participation, as it could discourage other forest protection activists to express their concerns in public.⁷³ That is why, in 2008 the Protection of Public Participation Act⁷⁴ was passed in Australia as their first anti-SLAPP law. It mainly protects the right to participation and guides the courts to dismiss cases that interfere with this right. However, it has been criticised for not being strong enough in tackling SLAPP lawsuits.⁷⁵

SLAPPs soon reached other parts of the world, or to be more accurate, such abusive lawsuits gained more public attention. Following the awareness of the issue several academics and organisations called for counteracts. For example, in the Philippines, the Supreme Court addressed the issue of SLAPPs in their 2010 rules of procedure concerning environmental cases.⁷⁶ Furthermore, steps to address SLAPPs have also been taken in South Africa. In November 2022, the South African Constitutional Court made landmark judgements in which it recognized SLAPPs as an abuse of process and a threat to activists and others exercising their right to political participation.⁷⁷

3.2 DEVELOPMENT IN EUROPE

Whereas the US and other nations first recognized SLAPP cases that were targeting environmentalists, Europe recognized SLAPPs when they were causing trouble in the media sphere; targeting journalists, especially the investigative reporters.⁷⁸ But this threat has only been recognized in recent years, whereas earlier not many studies or academic pieces on SLAPPs in Europe are available.

⁷³ Greg Ogle, 'Anti-SLAPP Law Reform in Australia' (2010) 19 *Review of European Community & International Environmental Law* 35, 38–40.

⁷⁴ *Protection of Public Participation Act 2008 (ACT)*.

⁷⁵ Ogle (n 73) 38–40.

⁷⁶ Rules of Procedure for Environmental cases, A.M. No. 09-6-8-SC (2010) (Republic of the Philippines).

⁷⁷ *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* [2022] ZACC 38 (Constitutional Court of South Africa).

⁷⁸ CASE (n 4) 9.

In 2010, Donson argued that SLAPPs are present in Europe but have been neglected. She recognized cases that fall into the category of SLAPP but were at that point not recognized as such, since the concept of SLAPP was not well-known in Europe. One such example is *McDonald's Corporation, McDonald's Restaurants v. Steel and Morris* or better known as the McLibel case from 1997. It is known for becoming one of the longest trials in English legal history as it lasted 314 days, as well as costing McDonald's around £10 million. The McDonald's Corporation sued individual environmental activists of London Greenpeace for allegedly circulating a pamphlet, in which they accused McDonald's of animal abuse, environmental and other harm, including calling them the company of 'McGreed' and 'McCancer'. This pamphlet had a low circulation level, but the Corporation still decided to sue the activists for their criticism. Throughout the proceedings activists Morris and Steel, had to represent themselves because they were refused legal aid, whereas McDonald's had high-profile lawyers, specialized in defamation law. After three years, the judgement was made in McDonald's favour. Steel and Morris appealed the decision, but the appeal was dismissed. They later took the case to the ECtHR, which ruled in their favour.⁷⁹ As Donson recognized back in 2010, this case could fall under the SLAPP categorization. There was a clear power imbalance between the parties involved, and the goal of the plaintiff (McDonald's) was to silence the target (activists), thus protecting its own interests. However, what differs in this case from a typical SLAPP is that the silencing goal was not achieved and, as the author discussed back then, this could be one reason why there were few instances of SLAPP actions using libel laws in Europe. Steel and Morris did not step down due to legal threats, and they fought the case, as well as used this opportunity to force McDonald's to hand over several documents about their practices. Moreover, the case got a lot of media coverage, which attracted even more attention than the initial pamphlet, circulated by the activists.⁸⁰

A more serious threat of SLAPPs was recognized later in 2017, after the assassination of Maltese investigative journalist Daphne Caruana Galizia due to her reporting on corruption and organized crime in Malta. Daphne was repeatedly receiving legal threats and was at the

⁷⁹ See the ECtHR judgement in chapter four on page 44.

⁸⁰ Fiona Donson, 'Libel Cases and Public Debate - Some Reflections on Whether Europe Should Be Concerned about SLAPPs' (2010) 19 *Review of European Community & International Environmental Law* 83, 83-87.

time of her death facing 43 civil and five criminal libel suits, mostly from Maltese politicians and their business associates. Among the plaintiffs was also the now-former Prime Minister Joseph Muscat. After Daphne's assassination, the lawsuits were passed on to her family, who has since been fighting them all.⁸¹ In February 2018, shortly after Daphne's assassination, Europe was shocked by another event concerning investigative journalists. Slovak journalist Ján Kuciak and his fiancé were found shot dead, which was soon believed to be a work-related murder. Kuciak investigated tax fraud and shady deals involving Slovak businessmen, close to the ruling party, and due to his reporting he was receiving threats months before his death.⁸² In the context of these events, the safety of journalists in Europe became a bigger concern, with SLAPP lawsuits being recognized as one of the emerging threats to their safety. Ultimately, Europe expressed the need for action.⁸³

3.2.1 Council of Europe

In 2012, the Committee of Ministers (CM) of the CoE issued a Declaration dealing with the issue of 'Forum Shopping in respect of Defamation, Libel Tourism'. The Declaration did not specifically address the issue of SLAPP, but it recognized cross-border court abuses related to it. They called the practice of filing defamation complaints in a foreign jurisdiction, seeking a favourable judgement, libel tourism. Through the Declaration CM alerted Member States that this practice presents a threat to freedom of expression and encouraged them to prevent such cases.⁸⁴ Later in 2018, CM first referred to SLAPP in their Recommendation to Member States on the roles and responsibilities of internet intermediaries, which calls on the States to protect freedom of expression in the digital environment; including by adopting the

⁸¹ 'Defence against Frivolous and Vexatious Libel Suits' (*The Daphne Caruana Galizia Foundation*) <www.daphne.foundation/en/justice/vexatious-libel-cases> accessed 23 May 2023.

⁸² 'IPI Condemns Murder of Slovak Journalist and Fiancée' (*International Press Institute*, 26 February 2018) <<https://ipi.media/ipi-condemns-murder-of-slovak-journalist-and-girlfriend/>> accessed 23 May 2023.

⁸³ Meera Selva, 'Fighting Words: Journalism Under Assault in Central and Eastern Europe' (Reuters Institute for the Study of Journalism at the University of Oxford 2020) 18.

⁸⁴ Council of Europe Committee of Ministers, Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to ensure Freedom of Expression (Adopted by the Committee of Ministers on 4 July 2012 at the 1147th meeting of the Ministers' Deputies).

anti-SLAPP legislation.⁸⁵ However, it was not until 2020 when the CoE started addressing this issue on a more serious note. In October 2020, when CoE Commissioner for Human Rights Dunja Mijatović addressed SLAPPs, she was also referring to several lawsuits targeting Maltese journalist Daphne and called for action at the CoE level.⁸⁶ Following that, in March 2021, 104 organisations – representing journalists, lawyers, activists and others dealing with SLAPPs – urged the CoE to take action, as their growing number of evidence showed the rise of such lawsuits in Europe.⁸⁷ Finally, in 2021 the CM set up a special Committee of Experts on SLAPP, which is instructed to draft a Recommendation on tackling SLAPPs by the end of 2023. The recommendation will serve as a non-binding guidance to the Member States.⁸⁸

3.2.2 The European Union

Perhaps more ambitious are the latest actions against SLAPPs at the EU level. In January 2018, six Members of the European Parliament addressed the threat of SLAPP to media freedom in the EU due to their silencing effect on investigative journalists, referring to the case of Maltese journalist Daphne, as well as to the lawsuits against the Guardian and the BBC. In light of that, they called for an EU anti-SLAPP Directive, which would, among other things, allow early dismissal of such abusive lawsuits.⁸⁹ In February, Members continued with their calls for anti-SLAPP legislation with a letter to the Vice President of the EC Frans Timmermans. In the letter they also warned about the cross-border nature of the practice, in which lawsuits against journalists are filed in a jurisdiction outside of the EU.⁹⁰ In April, this

⁸⁵ Council of Europe Committee of Ministers, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies).

⁸⁶ Mijatović (n 1).

⁸⁷ CASE, 'Statement on The Need for a Council of Europe Recommendation on Combatting SLAPPs' (March 2021) <<https://edri.org/wp-content/uploads/2021/03/CoE-SLAPP-Statement.pdf>>.

⁸⁸ 'MSI-SLP Committee of Experts on Strategic Lawsuits against Public Participation - Freedom of Expression' (Council of Europe) <www.coe.int/en/web/freedom-expression/msi-slp> accessed 28 May 2023.

⁸⁹ 'MEPs Call on EC to Protect Investigative Journalists and Stand for Media Freedom' *The Malta Independent* (12 January 2018) <www.independent.com.mt/articles/2018-01-12/local-news/MEPs-call-on-EC-to-protect-investigative-journalists-and-stand-for-media-freedom-6736183522> accessed 28 May 2023.

⁹⁰ Letter from David Casa and others to EC Vice-President Frans Timmermans (19 February 2018) <www.eppgroup.eu/sites/default/files/pr_attachment/Timmermans%20Letter_SLAPP.pdf> accessed 28 May 2023.

was followed by the Resolution of the EP for protection of investigative journalists in Europe. The EP condemned the murders of journalist Ján Kuciak and his fiancé and warned that this attack was followed shortly after the assassination of Daphne. In this Resolution, the EP for the first time encouraged both the Commission and the Member States to develop anti-SLAPP rules.⁹¹ Following that, the EP issued several other Resolutions concerning SLAPP and called its Member States on the adoption of anti-SLAPP rules.⁹² Such resolutions and calls for action at the EU level increased in the current parliamentary term.⁹³ In December 2020, the EC issued a European Democracy Action Plan, in which it announced a set of measures to protect journalists and promote public participation, including the initiative to fight SLAPPs.⁹⁴

Finally, on 27 April 2022, the EC issued a Proposal for an anti-SLAPP Directive, which aims to provide procedural safeguards against SLAPP lawsuits targeting people due to their public participation, in particular journalists and human rights defenders. The proposed procedural safeguards would apply in cross-border cases and would allow an early court and tribunal dismissal of cases identified as SLAPPs. One of the features included is also the shift of the burden of proof in an early dismissal application from the defendant to the claimant, which has ‘to prove that the claim is not manifestly unfounded’. Among other things, it proposed remedies in SLAPP cases: the claimant, who abused the court proceedings, should bear the legal costs and be proportionally penalized for that; and the SLAPP victim on the other side should obtain compensation for the damages done.⁹⁵ On the same date, the EC together with the proposed Directive also issued a Recommendation as a guidance to the

⁹¹ European Parliament, '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.

⁹² European Parliament, Resolution of 3 May 2018 on media pluralism and media freedom in the European Union', P8_TA(2018)0204; European Parliament, 'Resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance', P8_TA(2019)0240; European Parliament, '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)0328.

⁹³ 'EU Rules Needed against Abusive Lawsuits Targeting Critical Voices | News | European Parliament' (*European Parliament*, 11 November 2021) <www.europarl.europa.eu/news/en/press-room/20211108IPR16838/eu-rules-needed-against-abusive-lawsuits-targeting-critical-voices> accessed 28 May 2023.

⁹⁴ 'Legislative Initiative on the Protection of Journalists and Rights Defenders Facing Strategic Lawsuits against Public Participation (SLAPP)' (*EUR-lex*, 2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=pi_com%3AAres%282021%296011536> accessed 28 May 2023.

⁹⁵ Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”) (n 61).

Member State on how to protect journalists and other human rights defenders from SLAPPs.⁹⁶

However, one year later, in March 2023, after the Council of the EU published a draft of the compromised proposal of the Directive⁹⁷, civil society expressed concern that the proposed anti-SLAPP measures are now not efficient enough. The organisation CASE wrote a letter to the Swedish Presidency of the Council of the EU, criticizing that the compromised proposal weakens the anti-SLAPP safeguards proposed in the initial Directive from April 2022. Among other things, CASE warned that the revised Proposal excludes the compensation of damages for SLAPP victims and that the definition of a ‘manifestly unfounded’ claim is now too narrow, which makes the early dismissal of a case almost impossible.⁹⁸

As already indicated in the thesis, all these calls for immediate action in Europe have risen due to the recognition of the harmful effects of SLAPP lawsuits. Although chapter two examines the plaintiff’s motives for initiating such lawsuits and suggests that their goal is to silence the defendant, it does not address the extent of the effects of SLAPP lawsuits that go beyond an individual. The upcoming chapter, therefore, delves into the effects on all levels – individual and broader community – to provide a better understanding of how democratic societies are threatened by SLAPP lawsuits, thus why action is needed.

⁹⁶ Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (‘Strategic lawsuits against public participation’) (2022) OJ L138/30.

⁹⁷ Presidency of the Council of the European Union, ‘Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”) – Presidency draft compromise proposal’, 2022/0117(COD) <<https://aeur.eu/f/5ng>> accessed 28 May 2023.

⁹⁸ Letter from CASE to the Swedish Presidency of the EU Council about the draft compromise proposal for the European anti-SLAPP Directive (9 March 2023) <www.the-case.eu/latest/draft-anti-slapp-compromise-proposal/> accessed 28 May 2023.

4.

EFFECTS OF SLAPP LAWSUITS

4.1 EFFECTS AS A THREAT TO INDIVIDUALS

Additional definitional element of SLAPP lawsuits, the effects, reveals that the consequences of SLAPP lawsuits are felt not only by the defendants but also by the broader community. However, this section first examines the effects on individuals, as they often lead to the effects on a whole society. As previously mentioned, defendants face lengthy litigation processes, often resulting in financial and other burdens. This section further explores the effects, as well as the accompanying threats, that the defendants experience.

To illustrate the threat of the effects on an individual target, a case of Serbian investigative media outlet Crime and Corruption Reporting Network (KRIK) is presented. KRIK has been fighting SLAPP lawsuits for about five years, which is now threatening the media's existence. In 2018, Nenad Popović, a former Minister for Innovation and Technology, filed four defamation lawsuits against KRIK due to published articles about his offshore assets, which were revealed as part of a global investigation project Paradise Papers. He filed four separate lawsuits claiming reputational damages and requesting about €8,500 per article. Although they were all filed in the same court, the proceedings were not consolidated, and the Minister did not appear to any of the hearings, which prolonged the proceedings. Ultimately, all four cases were dismissed, however, KRIK had to attend the trials, prepare an evidentiary basis for their articles, and invest other resources in their legal defence for over 18 months.⁹⁹ Later in 2021, KRIK faced ten different lawsuits, recognized as SLAPPs, as they were initiated by businesspeople or other people in power, close to the government and the Serbian president Aleksandar Vučić. These lawsuits all together requested about €767,000, which represents three times the media's annual budget. Additionally, one of the

⁹⁹ Article 19, American Bar Association (ABA) Center for Human Rights, and Independent Journalists' Association of Serbia (NUNS), 'State of SLAPPs in Serbia' (2021) 24 <https://en.nuns.rs/media/2022/02/A19-Serbia-SLAPPs-report_Final_16Feb22.pdf> accessed 9 May 2023.

lawsuits was a criminal complaint, so journalists could face jail time.¹⁰⁰ In May 2023, KRIK faced yet another lawsuit, filed by Nikola Petrović. This is his third lawsuit against KRIK in the past two years. Petrović, who is a close associate of Serbia's president Vučić, is demanding a retraction of one article and around €1,700.¹⁰¹ No matter the outcome of these lawsuits, their effects are present. During the proceedings, KRIK faces high legal costs, spends countless hours preparing for trials, attends hearings, and works with the lawyers instead of continuing their work as journalists. Moreover, journalists of KRIK have been facing not only lawsuits but all kinds of intimidation and harassment from pro-government tabloids and anonymous sources, including death threats on Twitter.¹⁰²

As exemplified by the case of KRIK, SLAPP cases are often accompanied by other forms of harassment and violence, used as tactics to suppress journalism and other forms of public participation.¹⁰³ They can negatively affect targets' both online and physical safety. The connection between legal harassment and online abuse can be illustrated by the legal battles of investigative journalist Maria Ressa. Since the Philippines' presidential elections in 2016, when she started critically reporting on the then-president Duterte's actions, she has been facing government investigations and prosecutions, as well as death and rape threats and other abusive content on Facebook and Twitter. The content not only undermined public trust in her journalistic work and threatened her safety, but also created an encouraging environment for the authorities in her persecution. Among other things, she was receiving over 90 hate messages per hour on Facebook. Social platforms, therefore, served as channels for harassment and facilitating State-led legal actions against her, which resulted in her conviction on a criminal cyber-libel charge and further arrest warrants and court cases.¹⁰⁴ In 2021, Maria Ressa won the Nobel Peace Prize for her fight to protect freedom of expression. In her award speech, she pointed out the government (legal) attacks against her, but more

¹⁰⁰ 'Serbia: Wave of SLAPPs against KRIK Chills Media Freedom' (*European Centre for Press and Media Freedom*, 21 December 2021) <www.ecpmf.eu/serbia-wave-of-lawsuits-against-investigative-portal-krik-chills-media-freedom/> accessed 9 May 2023.

¹⁰¹ Zdravko Ljubas, 'Another SLAPP against Serbian Investigative Outlet KRIK' (*OCCPR*, 11 May 2023) <www.occpr.org/en/daily/17619-another-slapp-against-serbian-investigative-outlet-krik> accessed 29 May 2023.

¹⁰² Ilya Lozovsky, 'Serbian Investigative Journalists Are Fighting to Stay Alive. Will Europe Hear Them?' *KRIK* (25 December 2021) <www.krik.rs/en/serbian-investigative-journalists-are-fighting-to-stay-alive-will-europe-hear-them/> accessed 9 May 2023.

¹⁰³ Bard and others (n 16) 24.

¹⁰⁴ Julie Posetti and others, 'The Chilling: Global Trends in Online Violence against Women Journalists' (UNESCO 2021) 45–47.

importantly, she warned about the online violence she experienced with that and urged the counteracts.¹⁰⁵ In 2023, there are still three remaining active cases against her, brought by the State, thus she is still facing decades in prison.¹⁰⁶

Lawsuits, therefore, come with all sorts of threats and burdens, which are not necessarily related to the financial aspects. SLAPP targets may be concerned about the effects of the lawsuits on their professional work, such as reputational damage.¹⁰⁷ They may also fear the effects of the lawsuits on their psychological well-being, as the stress could not only affect their professional but also their personal life.¹⁰⁸

Fearing the aforementioned possible effects of SLAPP, victims might try to avoid legal battles. Especially in the media, this can be done by practising self-censorship. Journalists, and often editors as well, will rather not speak about their investigations and findings out of fear that their reporting could result in (yet another) lawsuit.¹⁰⁹ For example, Turčilo and Buljubašić warned in their research that due to lawsuits against journalists and editors, high-quality investigative content has disappeared from the media in Bosnia and Herzegovina. They found that Bosnian ‘journalists do not want to go through painful court processes again, and rather decide not to report at all or report on some topics superficially, without any additional research’.¹¹⁰ This opens up a question of how the lawsuits affect not only the target but also a broader community, who is scared of speaking out or deprived of information that they would normally receive from journalists.

¹⁰⁵ ‘The Nobel Peace Prize 2021’ (*NobelPrize.org*, 2021)

<www.nobelprize.org/prizes/peace/2021/ressa/facts/> accessed 10 May 2023.

¹⁰⁶ David Maas, ‘4 down, 3 to Go: Cataloging Maria Ressa’s Legal Battles in Early 2023’ (*International Journalists’ Network*, 2 February 2023) <<https://ijnet.org/en/story/4-down-3-go-cataloging-maria-ressa%E2%80%99s-legal-battles-early-2023>> accessed 10 May 2023.

¹⁰⁷ CASE (n 2) 48.

¹⁰⁸ Reed Richardson, ‘Stopping the Scourge of SLAPPs and Legal Harassment of Journalists’ (*Global Investigative Journalism Network*, 26 January 2022) <<https://gijn.org/2022/01/26/stopping-the-scourge-of-slapps-and-legal-harassment-of-journalists/>> accessed 10 May 2023.

¹⁰⁹ Maria Francesca Rita, Sofia Verza, and Luisa Chiodi, ‘Interviewing Journalism. Needs and Gaps in Support for European Journalists.’ (OBC Transeuropa 2021) 6 <www.balcanicaucaso.org/eng/Occasional-papers/Interviewing-journalism> accessed 10 May 2023.

¹¹⁰ Lejla Turčilo and Belma Buljubašić, ‘Alternative Facts and Post-Truth in Bosnia-Herzegovina: Who (Really) Creates The Agenda of Media?’ (2018) 22.

4.2 EFFECTS AS A THREAT TO A BROADER COMMUNITY: THE CHILLING EFFECT

Continuing from the previous section, the effects of SLAPPs extend beyond their direct impacts on the targeted individuals. First, they can intimidate and silence other critical voices, and second, they can deprive the public of information in the public interest. Although not personally involved in a lawsuit, citizens can fear that their speaking out might result in the same way, so they become more cautious in their political activities. Ultimately, this can refrain individuals and organisations from participating in public life, as well as deprive a broader audience of learning about matters of public interest and prevent public discussion.¹¹¹

To describe and encompass all these deterrent effects caused by SLAPP lawsuits, the term ‘chilling effect’ is commonly used. The chilling effect is considered to be a flexible metaphor, applied to describe a ‘negative deterrence of communication: that a person or organisation is made physically colder by inhibiting the exercise of their right to free expression’. It is used to describe censorship, legal or other acts that discourage people from expressing themselves.¹¹²

The term originated in the context of the deterring effects of government laws and actions on the First Amendment rights in the US, namely the right to freedom of speech, the press, assembly and to petition the Government. It emerged during the 1940s and 1950s when the federal government had actively restricted these freedoms to those who were accused of disloyalty, mainly of being a communist sympathizer. Through case law, the US Supreme Court developed the chilling effect doctrine to prevent the government from restricting the First Amendment freedoms for the purposes of silencing dissent voices and in that way threatening American democracy.¹¹³

As Canan and Pring in their pioneer studies of SLAPP lawsuits in the US recognized, SLAPP lawsuits also present a threat to rights, protected by the First Amendment. Therefore, when describing the possible effects of such lawsuits, threatening constitutional rights, they

¹¹¹ CASE (n 2) 52–53.

¹¹² Judith Townend, ‘Freedom of Expression and the Chilling Effect’ in Howard Tumber and Silvio R. Waisbord (eds), *Routledge companion to media and human rights* (Routledge 2017) 73.

¹¹³ Ralph Michael Stein, ‘SLAPP Suits: A Slap at the First Amendment’ (1989) 7 *Pace Environmental Law Review* 45, 49–51.

used the term chilling effect.¹¹⁴ Similarly, in 1989, Stein in his exploration of SLAPP lawsuits as a threat to the First Amendment expressed that the chilling effect doctrine should be applied to SLAPP cases. Although SLAPP lawsuits differ from the types of lawsuits in which the doctrine was first applied – the political motives behind SLAPPs are harder to recognise – their intention of a chilling effect on free speech and related rights is the same.¹¹⁵ Therefore, when some States in the US introduced the anti-SLAPP laws, they were following similar goals as the doctrine; they were all established with an intent to protect the constitutional rights of freedom of speech and petitioning.¹¹⁶

The concept of the chilling effect has also been used in the jurisprudence of the ECtHR. Primarily the Court uses it in cases concerning journalists and freedom of expression, as well as in cases concerning judges and the threat of chilling effect on judicial independence.¹¹⁷ In 2022, it also used this concept in the case of *OOO Memo v. Russia*, in which it referred to SLAPP lawsuits for the first time.¹¹⁸ Nowadays, the term chilling effect has been generally accepted for addressing all the deterring effects of SLAPP lawsuits from public participation. It was also used in the EU proposed anti-SLAPP Directive, which states that the ultimate goal of SLAPP lawsuits is to ‘achieve a chilling effect’. The Proposal uses the term in relation to how the lawsuits discourage people from public debates and other forms of public participation, and how they silence journalists and other human rights defenders.¹¹⁹

¹¹⁴ Canan and Pring (n 9) 507.

¹¹⁵ Stein (n 113) 51–52.

¹¹⁶ Justice and Environment, ‘Anti-SLAPP Legislation in the U.S. and Canada’ (2022) 2 <<https://justiceandenvironment.org/wp-content/uploads/2023/03/Anti-SLAPP-legislation-in-the-US-and-Canada.pdf>> accessed 6 April 2023.

¹¹⁷ Laurent Pech, ‘The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU’ (Open Society European Policy Institute 2021) 8 <www.opensocietyfoundations.org/uploads/c8c58ad3-fd6e-4b2d-99fa-d8864355b638/the-concept-of-chilling-effect-20210322.pdf> accessed 14 May 2023.

¹¹⁸ *Ooo Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022).

¹¹⁹ Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”) (n 61).

4.3 EFFECTS AS A THREAT TO DEMOCRACY: THE RULE OF LAW PRINCIPLE AND HUMAN RIGHTS

The majority of reports used in this thesis have consistently highlighted the threat posed by SLAPP lawsuits to democracy. Additionally, this thesis seeks to explore how SLAPPs affect democracy, including by focusing on the case study of Slovenia. However, to accomplish that, it is necessary to first explain the theory of democracy applied in this thesis, along with an overview of its relationship with the Rule of Law principle and human rights.

Democracy, at its core, requires both the equality of all citizens and inclusive citizenship. One of the essential elements of democracy considered is the majority rule, meaning that public decisions should be made by popular majorities where every citizen's vote counts equally, and such decisions should cover a wide range of public matters. However, the majority rule has to be constrained in order to safeguard the liberties, such as freedom of expression, of every citizen that has the right to influence public decisions.¹²⁰ This leads us to the definition of liberal democracy, which this thesis relies on to provide a better understanding of the recent challenges to democracies, such as SLAPPs. Liberal democracy supports the idea of separation of powers, typically into executive, legislative, and judicial branches. In this context, media is often considered the 'fourth estate', meaning that with its role as a public watchdog, it presents an independent branch of power. Furthermore, liberal democracy is characterized by free and fair elections, the respect of the rule of law, as well as by the protection of human rights, and civil and political liberties of all people. The rights and freedoms protected in liberal democracies, among others, include rights to equality before the law, freedom of speech, assembly, and religion.¹²¹

As the case study of Slovenia employs Freedom House reports as well to portray the state of democracy in the country, it is important to note that the organisation, too, relies on the theory of liberal democracy when measuring the strength of democracies. Among other things, it has been monitoring political rights and civil liberties, which encompass freedom of

¹²⁰ William A Galston, 'The Populist Challenge to Liberal Democracy' (2018) 29 *Journal of Democracy* 5, 9.

¹²¹ European Center for Populism Studies, 'Liberal Democracy', *Dictionary of Populism* <www.populismstudies.org/Vocabulary/liberal-democracy/> accessed 2 July 2023.

expression and belief, associational and organizational rights, and the rule of law, in each country.¹²²

In recent years, liberal democracy in European countries has been challenged, specifically by populism. Populism attempts to create a divide between democracy and liberalism, as it argues that liberal norms and policies undermine democracy and negatively impact the people. For example, due to European countries' liberal approach to immigration and their failure to address the concerns of some that perceived migrants as a threat to their job security and cultural norms, the public demanded stronger leaders, who would protect their rights and values.¹²³ This led to the rise of populist leaders, such as the Hungarian leader Victor Orban that has been continuously opposing liberal-democratic principles such as minority rights, freedom of the press and the Rule of Law. To describe his political vision, he uses the term 'illiberal democracy'. Although his regime supports democracy in the sense that it relies on elections as the will of the majority, it will tend to fringe civil liberties, the rule of law and the rights of individuals. The rise of populism and 'illiberal democracy' has not been the case only in Hungary, but even in longstanding Western liberal democracies.¹²⁴ As it is presented later in the case study, democracy in Slovenia has also been threatened by populist and illiberal practices. The connection between the illiberal practices and SLAPP lawsuits is not clear at this point but is explored later in the case study.

Returning to the premise that SLAPPs pose a threat to (liberal) democracy, several international and regional human rights organisations have expressed concerns over the threat of SLAPPs to democratic societies, by endangering human rights and freedoms. In 2002, the former United Nations (UN) Commission on Human Rights declared that one of the key components of a democratic society is the recognition and protection of human rights and fundamental freedoms.¹²⁵ Therefore, any threat to freedoms and rights consequently undermines democracy. In her 2017 mandate, the UN Special Rapporteur on freedom of peaceful assembly and of association, Annalisa Ciampi, warned that SLAPPs pose a threat to

¹²² 'Freedom in the World Research Methodology' (*Freedom House*) <<https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology>> accessed 31 May 2023.

¹²³ Galston (n 120) 5–8.

¹²⁴ Marc F Plattner, 'Illiberal Democracy and the Struggle on the Right' (2019) 30 *Journal of Democracy* 5, 10.

¹²⁵ UN Commission on Human Rights, 'Resolution 2002/46: Further measures to promote and consolidate democracy' (23 April 2002) UN Doc 2002/46.

advocacy activities, thereby undermining the capacity of civil society actors to effectively exercise their rights to freedom of expression, assembly, and association.¹²⁶ Also at the European level, CoE Commissioner for Human Rights Dunja Mijatović cautioned that SLAPPs are threatening the rights to freedom of expression, freedom of assembly, and to require information for the public interest.¹²⁷

Similarly, the EU recognized the threat of SLAPPs to its founding values; respect for the rule of law, democracy, and human rights.¹²⁸ Since 2020 the EC has been listing SLAPPs as a serious threat to its founding values in the annual reports on the rule of law situation in the EU Member States. The EU recognizes media freedom as one of the key enablers for the rule of law, thus States are required to provide a safe environment for journalists and ensure their protection from abusive SLAPP lawsuits.¹²⁹ However, in the context of the EU core values, this thesis will not analyse how SLAPP threaten the rule of law directly but through analysing the threat they present to human rights, which are related to the principle itself. The strong interdependence of human rights and the Rule of Law principle was emphasized by the Venice Commission of the CoE in its Rule of Law Checklist:

The Rule of Law would just be an empty shell without permitting access to human rights. Vice-versa, the protection and promotion of human rights are realised only through respect for the Rule of Law: a strong regime of the Rule of Law is vital to the protection of human rights. In addition, the Rule of Law and several human rights (such as fair trial and freedom of expression) overlap.¹³⁰

¹²⁶UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, ‘SLAPPs and FoAA Rights’ (2017) Info Note
<<https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>> accessed 30 May 2023.

¹²⁷ Dunja Mijatović, ‘Speech by Dunja Mijatović’ (European Anti-SLAPP Conference, 20 October 2022)
<<https://rm.coe.int/speech-at-the-european-anti-slapp-conference-by-dunja-mijatovic-commis/1680a8a1ec>>
accessed 30 May 2023.

¹²⁸ Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 2.

¹²⁹ European Commission, ‘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.

¹³⁰ Council of Europe, European Commission for Democracy Through Law, ‘The Rule of Law Checklist’ (2016) <www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> accessed 6 June 2023.

This exposes yet another important aspect of the rule of law in relation to SLAPP actions: the importance of States' strong regime of the rule of law for preventing such abusive lawsuits. Among other things, the principle of the Rule of Law requires States to act in accordance with the law and democratic processes and to provide effective judicial protection by independent and impartial courts.¹³¹ Courts have an important role in identifying abusive lawsuits and putting a halt to them in the early stages, thus preventing SLAPP effects. In countries with the rule of law backslide, where judicial independence is in question, the courts may not be able to protect citizens against SLAPPs initiated by the entities with strong economic or political power, including the state organs.¹³²

However, the following sections focus more on the SLAPP effects on the rule of law and not vice versa. As the concepts of the rule of law, human rights and democracy are interrelated, the upcoming sections examine the effects of SLAPP on democracy mainly by analysing the most affected freedoms and rights, deriving from the human rights doctrines. Along with the ECtHR's jurisprudence, they aim to provide a better understanding of how restrictions on certain freedoms consequently undermine democracy.

4.3.1 Freedom of expression

Freedom of expression is a right protected by several international and regional human rights instruments. It is enshrined both in the Universal Declaration of Human Rights (UDHR)¹³³ and in the International Covenant on Civil and Political Rights (ICCPR)¹³⁴ that everyone has the right to freedom of opinion and expression, without interference, and the right to receive information through any media.

Protection is also provided at the European level, namely within the European Convention on Human Rights (ECHR).¹³⁵ Due to the protection of such rights under the ECHR, the majority of State Parties have incorporated it into their national legislation, thus making it

¹³¹ European Commission (n 129) 1.

¹³² Bayer and others (n 17) 72.

¹³³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 19.

¹³⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 19.

¹³⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 10.

binding on their national courts and the State authorities to protect, fulfil and respect them. The ECHR is also a source of the Charter of Fundamental Rights of the European Union (CFR) which constitutes general principles of the EU law.¹³⁶ In Article 10 it obliges States to protect the right to freedom of expression, including the right to hold opinions and receive information without interference by public authorities.¹³⁷ However, it also allows some restrictions of the right if they are necessary in a democratic society. For example, if by exercising this right interests of national security, public safety, or the rights of others are endangered.¹³⁸ What is protected under the right to freedom of expression, and under which conditions the States are allowed to restrict it, has become clearer with the ECtHR's jurisprudence and the interpretation of certain provisions.

Bychawska-Siniarska, human rights lawyer specialised in freedom of expression, in her handbook for legal practitioners explained Article 10, divided into three components. First, everyone has the right to hold opinions. This obliges States to avoid the promotion of one-sided information, and to not distinguish between individuals holding different opinions. Second, everyone has the right to impart information and ideas. This allows everyone to freely criticize the government, thus, enabling political participation in a democratic society. Third, everyone has the right to receive information and ideas. This relates not only to the media but allows everyone to gather and seek information through any lawful sources, as well as gives them the right to be informed about the matters of public interest.¹³⁹

All the components of this right were upheld by the ECtHR several times in cases concerning the right to freedom of expression. One such case that established a precedent is *Lingens v. Austria* from 1986, in which the Court balanced the freedom of expression against the right to private life and reputation. A case concerned Austrian journalist Lingens, who published two articles about the Austrian Chancellor Bruno Kreisky, who had just won the general elections with his Austrian Socialist Party. In the articles, Lingens was critical of Kreisky's possible coalition with the Liberal Party, whose president Friedrich Peter has a Nazi background. Among other things, he criticised Kreisky for having an 'accommodating attitude towards former Nazis' and that his behaviour is 'immoral' and 'undignified'. This led

¹³⁶ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

¹³⁷ ECHR (n 135), art 10(1).

¹³⁸ ECHR (n 135), art 10(2).

¹³⁹ Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights - A Handbook for Legal Practitioners* (Council of Europe 2017) 13–15.

Kreisky to file two defamation lawsuits against the journalist, which the Austrian courts found guilty and sentenced him to a fine and confiscation of the articles. Lingens then decided to lodge an application with the ECtHR, convinced that the Austrian government interfered with his right to freedom of expression.¹⁴⁰ The ECtHR held that there was indeed a violation of Article 10 and set important guiding principles of what is protected under it. It emphasized that the press has a right to impart information and ideas on political issues and other matters of public interest, as well as the public has the right to receive such information. It further held that the freedom of political debate is essential for a democratic society, thus politicians should ‘display a greater degree of tolerance’ to criticism by the press and the public. Although their reputation has to be protected as well, ‘in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues’.¹⁴¹ Furthermore, the Court recognized that the penalty sentenced by the Austrian courts, a fine and confiscation of the articles, could have a deterring effect on journalists, performing their role of public watchdogs. Such sanctions could discourage the journalist in this case, as well as the others, from further criticism and reporting on issues of public concern.¹⁴² The ECtHR stated several other times that such sanctions ordered by the national court can cause a chilling effect and threaten the freedom of expression. It has also held that the national courts should refrain from applying criminal sanctions, such as imprisonment, as this can cause a chilling effect on public debate, censor the media, and halt the press in its role as a public watchdog. Additionally, the Court has recognized that high fines and trial expenses can interfere with the right to freedom of expression, as it threatens the financial survival of the losing party.¹⁴³

Furthermore, under the ECHR States are not only obliged to refrain from interfering with the right to freedom of expression, but also to protect it. This was upheld by the ECtHR decision in the case *Dink v. Turkey* in 2010. Dink was a Turkish journalist, who in his articles, published between 2003 and 2004, wrote about the Turkish citizens of Armenian origin and their need to be recognized as victims of genocide. Due to his writing, Dink was killed in 2007 by a member of the ultranationalist group. The Court in its decision stated that

¹⁴⁰ *Lingens v Austria* (1986) Series A no 103.

¹⁴¹ *ibid*, paras 41–42.

¹⁴² *ibid*, para 44.

¹⁴³ *Bychawska-Siniarska* (n 139) 81–82.

under Article 10 States are obliged to undertake positive protective measures to protect freedom of speech against violations, coming also from private persons.¹⁴⁴ Moreover, States must create an environment, which allows everyone to participate in public debates, allowing them to express their opinions and ideas without fear, even if they are contrary to those defended by the official authorities or by the public.¹⁴⁵ Ultimately, the Court held that Turkey failed not only at protecting Dink's life but also at its positive obligation to protect his freedom of expression.¹⁴⁶

Bychawska-Siniarska in her work argued that it is undeniable that without the protection of the right to freedom of expression, 'there is no free country, there is no democracy'. She discussed that freedom of expression also plays an important role in protecting other rights under the ECHR. Therefore, without the effective protection of it, other rights can be threatened as well, such as the right to freedom of assembly.¹⁴⁷

4.3.2 *Freedom of assembly and association*

Same as freedom of expression, the right to freedom of peaceful assembly and association is protected both under the UDHR¹⁴⁸ and the ICCPR¹⁴⁹. It is also protected within the European framework of human rights protection, namely under the CFR¹⁵⁰ and the ECHR¹⁵¹. This right allows people to gather in public or private life and interact peacefully with each other. Protection of this right is considered as one of 'the foundations of a democratic, tolerant and pluralist society'. By allowing everyone the public participation and dialogue in matters of public interest, corporate entities, public institutions and governments can be held accountable for their acts. Furthermore, this right gives voice to everyone with different backgrounds and beliefs, including minorities and other underrepresented groups.¹⁵²

¹⁴⁴ *Dink v Turkey* App nos 2668/07 and 4 others (ECtHR, 14 September 2010), para 106.

¹⁴⁵ *ibid*, para 137.

¹⁴⁶ *ibid*, para 138.

¹⁴⁷ Bychawska-Siniarska (n 139) 11.

¹⁴⁸ UDHR (n 133), art 20.

¹⁴⁹ ICCPR (n 134), art 21.

¹⁵⁰ Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 12.

¹⁵¹ ECHR (n 135), art 11.

¹⁵² Council of Europe, European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights, 'Guidelines on Freedom of Peaceful Assembly' (2019) 4 <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017-e)> accessed 1 June 2023.

As it protects different opinions, it is often closely related to the right of freedom of expression. This was recognized by the ECtHR in several cases, where restrictions on assemblies automatically affected peoples' right to freely express themselves. In its final judgement in *Ezelin v France* from 1991, the Court held that 'the protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11'.¹⁵³ In several cases, it recognized that there is no need to make a separate examination of a case under Article 10 and Article 11 as one can fall under the scope of another. Another example is *Yezhov and Others v. Russia* case from 2021, concerning three Russian nationals who were arrested due to their protesting against a new law that would have changed some social benefits in the country. At the protest, they were throwing leaflets out the window, threw out the portrait of the Russian President, and called the Minister for Health to his resignation. After getting arrested at the demonstration, the national courts decided to sanction them each with five years of prison. Protesters took the case to the ECtHR, alleging that both their freedom of expression and freedom of assembly had been violated. The Court held that due to the facts in the case, there was no need to examine the complaint separately under both Articles.¹⁵⁴ It stated that the protest can 'constitute expressions of opinion within the meaning of Article 10'.¹⁵⁵

ECHR allows the right to freedom of assembly to be restricted, but only if the restriction is prescribed by law and necessary in a democratic society, such as for preventing disorder, protecting public health and national security.¹⁵⁶ The Court in deciding whether such restriction of the right was proportionate to the aim pursued also considers the chilling effect of the measures. In the *Nurettin Aldemir and others v. Turkey* case from 2007, the Court considered that the police interference in the public demonstrations against a new bill, proposed by the Turkish Parliament, and subsequent prosecution of some protestors (the applicants), 'could have had a chilling effect and discouraged the applicants from taking part in similar meetings'. The Court noted that although the charges were later dropped, the prosecution alone can produce a chilling effect.¹⁵⁷

¹⁵³ *Ezelin v France* (1991) Series A no 202, para 37.

¹⁵⁴ *Yezhov and Others v Russia* App no 22051/05 (ECtHR, 29 June 2021), para 40.

¹⁵⁵ *ibid*, para 26.

¹⁵⁶ ECHR (n 135), art 11(2).

¹⁵⁷ *Nurettin Aldemir and Others v Turkey* App nos 32124/02 and 6 others (ECtHR, 18 December 2007), para 34.

Protection of the right to peaceful assembly is essential for enabling public participation of people, hence it is closely connected to Article 25 of the ICCPR which protects the right of every citizen to participate in public affairs, to vote and to be elected, and to have equal access to public service.¹⁵⁸ This does not support only direct participation like running for elections, but also other forms of participation, in which the citizens can express their own opinion on matters of public interest. In General Comment to Article 25 the UN Human Rights Committee recognized that in order to protect all forms of public participation both freedom of expression and of assembly have to be ensured.¹⁵⁹ This includes the freedom of sharing opinions about political issues between citizens and elective representatives, freedom of the press to comment on public matters without censorship or any other restraint, as well as the freedom to hold peaceful demonstrations and meetings to discuss or protest some political ideas or other public concerns.¹⁶⁰

4.3.3 *Right to a fair trial*

Additionally, SLAPP lawsuits can affect the target's right to a fair trial. As already mentioned in chapter two, one of the characteristics of SLAPP lawsuits is the power imbalances between the parties in dispute. This can ultimately threaten the right to a fair trial, protected by international and regional human rights doctrines such as the ICCPR¹⁶¹ and ECHR. Under Article 6 of the ECHR, individuals have the right to a fair and public hearing before an independent and impartial tribunal established by law.¹⁶² Furthermore, Article 6(3) protects the minimum rights of everyone charged with a criminal offence, including free legal assistance in cases where the defendant does not have enough resources to cover the lawsuit expenses.¹⁶³ Although the Convention primarily addresses the right to legal aid in criminal cases, the ECtHR has recognised this right in civil matters as well.¹⁶⁴

¹⁵⁸ ICCPR (n 134), art 25.

¹⁵⁹ UN Human Rights Committee, 'General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 8.

¹⁶⁰ *ibid*, para 25.

¹⁶¹ ICCPR (n 134), art 14.

¹⁶² ECHR (n 135), art 6.

¹⁶³ ECHR (n 135), art 6(3).

¹⁶⁴ Borg-Barthet, Lobina and Zabrocka (n 15) 29.

Protective measures like legal aid guarantee the basic principle of the right called the ‘equality of arms’, where both parties have the same access to a fair trial. However, in SLAPP cases plaintiffs normally possess political and/or economic power, hence resources, whereas targets on the other side are ordinary citizens, who are often more financially burdened by the lawsuit and court processes. Thus, this can compromise the target’s right to a fair trial.¹⁶⁵

Although not identified as a SLAPP back then, the ECtHR recognized power imbalance, leading to inequality of arms, in *Steel and Morris v. The United Kingdom* case from 2005. Applicants took the case to the ECtHR, alleging that their right to a fair trial was violated due to lack of legal aid provided by the State when fighting the fast-food restaurant chain and corporation McDonald’s. They argued that ‘the inequality of arms could not have been greater’ as at the time of the proceedings in the United Kingdom McDonald’s had an enormous economic power, whereas one applicant was a part-time bar worker and the other an unwaged single parent. Furthermore, while McDonald’s was represented by highly qualified lawyers, the applicants were assisted by pro bono working lawyers that were often inexperienced and had little resources to provide an effective defence. Applicants also argued that since the burden of proof was on them, they had to cover other costs such as the travelling expenses of witnesses and paying for the transcripts of daily court proceedings. Among other things, they believed that if they had been provided with legal aid, they could have proved the truth of certain allegations and made fewer procedural mistakes.¹⁶⁶ Ultimately, the ECtHR found that the denial of legal aid to the applicants indeed contributed to the inequality of arms, deprived the applicants of an effective defence, thus violated their right to a fair trial.¹⁶⁷

Another important principle arising from this case and that is relevant in SLAPP cases, is the high protection of freedom of expression of activists and others, not only journalists. The United Kingdom government argued that the applicants were not journalists, therefore higher tolerance against their criticism is not required under Article 10. However, the ECtHR assessed that even individuals and small groups, such as activists in this case, must be able to contribute to public debate and speak out on matters of public interest like health and the

¹⁶⁵ Bayer and others (n 17) 19–20.

¹⁶⁶ *Steel and Morris v the United Kingdom* ECHR 2005-II 1, paras 50–52.

¹⁶⁷ *ibid*, para 72.

environment; hence, protection of their freedom of expression is necessary for a democratic society. As the Court in this regard reminded, such safeguards are applicable only when journalists, and others who engage in public debate, act in good faith, providing reliable and accurate information, thus respecting the reputation and rights of others.¹⁶⁸

4.3.4 *Prohibition of abuse of rights*

Lastly, the notion of SLAPP is potentially threatening the protection against the abuse of rights. Article 17 of the ECHR prohibits the State, groups and individuals the destruction of rights and freedoms, protected in the Convention. Specifically, it prevents them from using any provision from the Convention for the purpose of destroying other rights or limiting them to a greater extent than is allowed.¹⁶⁹ Equivalent protection is guaranteed in other human rights instruments, namely under the UDHR¹⁷⁰, ICCPR¹⁷¹, and CFR¹⁷².

Prohibition of abuse of rights is designed to protect democratic systems: safeguarding the functioning of democratic institutions, and preventing extremist groups, totalitarians, or others to exploit rights in the Convention for their own interests, thus undermining democracy.¹⁷³ Such abuse can be recognized in SLAPP cases targeting public watchdogs. To illustrate, an individual will file a lawsuit, claiming his reputational rights were violated, although his real intention was to hide his actions from the public and restrict the freedom of expression of a journalist, who revealed the person's actions that were in some way threatening democracy. Whenever a real motive behind such legal action is to suppress the uncovering of the litigant's undemocratic actions, the lawsuit could be regarded as an abuse of rights.¹⁷⁴

The concept of abuse of rights is also addressed under Article 35 of the ECHR. Relevant provision 3(a) allows the ECtHR to dismiss an individual application if it is recognized as 'incompatible with the Convention, manifestly ill-founded or an abuse of the right of

¹⁶⁸ *ibid*, paras 89–90.

¹⁶⁹ European Court of Human Rights, 'Guide on Article 17 of the Convention – Prohibition of Abuse of Rights' (2022) para 11 <https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf> accessed 7 June 2023.

¹⁷⁰ UDHR (n 133), art 30.

¹⁷¹ ICCPR (n 134), art 5.

¹⁷² Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 54.

¹⁷³ European Court of Human Rights (n 169), para 3–5.

¹⁷⁴ Bayer and others (n 17) 36–37.

individual application'.¹⁷⁵ SLAPP lawsuits often include vexatious claims, are restricting others' rights, and are in some cases repeatedly lodged on the same vexatious grounds. Considering all this, filing a SLAPP lawsuit can be categorized as an abuse of the right to individual application. Moreover, understanding these basic concepts of the abuse of rights can be useful in forming and applying the anti-SLAPP measures, intended to prevent abusive lawsuits and their chilling effect.¹⁷⁶

4.3.5 European Court of Human Rights and recognition of SLAPP

Before moving on to a case study, this section presents one last ECtHR judgement, which not only reaffirms the importance of protecting journalists' right to freedom of expression but also recognizes the threat of SLAPPs to democracy.

In March 2022, the ECtHR for the first time referred to the notion of SLAPP in the *OOO Memo v. Russia* case. The case concerned a civil defamation lawsuit targeting media company OOO Memo, specifically its online media outlet Kavkazskiy Uzel, which reports on the political and human rights situation in the south of Russia, including the Volgograd Region. In 2008, the media outlet published an article, in which it criticized the Administration of the Volgograd Region, a regional state body, for suspending the transfer of the funds intended as a subsidy to the Town of Volgograd. Consequently, the Administration filed a lawsuit, claiming that the article was damaging to their business reputation, and demanded its retraction. The domestic courts judged that the article was indeed defamatory and ordered the media to publish a retraction and the operative part of the judgement on its website. OOO Memo decided to take the case to the ECtHR, alleging that its right to freedom of expression, protected under Article 10, had been violated.¹⁷⁷

The Russian government did not deny their interference with the applicant's freedom of expression; however, it had argued that the interference was lawful, pursued a legitimate aim of protecting the reputation, and was proportionate to the aim sought.¹⁷⁸ The Court accepted the claim that the interference was prescribed by law, as the protection of business reputation

¹⁷⁵ ECHR (n 135), art 35(3a).

¹⁷⁶ Bayer and others (n 17) 37.

¹⁷⁷ *Ooo Memo v. Russia* (n 118).

¹⁷⁸ *ibid*, para 29.

of public authorities could be guaranteed under the Russian Civil Code.¹⁷⁹ However, when deciding whether the government pursued a legitimate aim, the Court came to different conclusions. In assessing this matter, it considered ‘the growing awareness of the risks that court proceedings instituted with a view to limiting public participation bring for democracy’. Herein, the Court was highlighting the statements of the CoE Commissioner for Human Rights, which were also included in the relevant legal framework for this case.¹⁸⁰ In her statements, she was warning about the threat of SLAPP lawsuits, including their intent to intimidate public watchdogs, the power imbalance between parties, and that the plaintiff’s aim is not to win the case but to stifle criticism.¹⁸¹ Furthermore, in assessing whether the government pursued a legitimate aim, the Court considered that public executive bodies, like the Administration in this case, are funded by tax-payers, thus their activities are subjected to close scrutiny by the public in order to prevent corruption and the abuse of powers. That is why, such public executive bodies are essentially different from profit-making entities that compete in the marketplace and must protect their good reputation to gain customers. The Court also considered that such defamation lawsuits of the executive bodies against the media put a ‘disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task of purveyor of information and public watchdog’.¹⁸² Applying all this to the case in question, the Court noted that it is hardly conceivable that the Administration of the Volgograd Region with its defamation lawsuit intended to protect commercial interests or the wider economic good, which would justify the lawsuit for reputational damages. Therefore, the Court found that the interference with the media’s freedom of expression did not pursue a legitimate aim, hence there has been a violation of Article 10.¹⁸³

Dirk Voorhoof, from the Human Rights Centre UGent and Legal Human Academy, commented on the significance of this judgement for SLAPP cases, not only due to the Court’s first reference to the SLAPP notion but also due to their new approach to cases concerning the right to reputation and freedom of expression. When assessing whether the interference was justified, the Court normally applied the proportionality test of whether the

¹⁷⁹ *ibid*, para 34.

¹⁸⁰ *ibid*, para 43.

¹⁸¹ *ibid*, para 23.

¹⁸² *ibid*, para 44–46.

¹⁸³ *ibid*, para 48–50.

interference was necessary in a democratic society, however, by finding that the claimant in this case had no legitimate aim to justify the interference, this sets a precedent for possibly preventing similar executive bodies from proceeding with defamation lawsuits. Put simply, in the future similar cases, including SLAPPs, initiated by executive bodies, could be dismissed at the early stage of proceedings on the grounds of inadmissibility due to a lack of legitimate aim. Voorhoof found ECtHR's approach, in this case, important, as it 'contributed to the "growing awareness" of the dangers of at least one type of SLAPPs, and it created an additional possibility and even a compelling reason to have defamation claims by executive bodies dismissed'.¹⁸⁴

¹⁸⁴ Dirk Voorhoof, 'OOO Memo v. Russia: ECtHR Prevents Defamation Claims by Executive Bodies' (*Strasbourg Observers*, 1 April 2022) <<https://strasbourgobservers.com/2022/04/01/ooo-memo-v-russia-ecthr-prevents-defamation-claims-by-executive-bodies/>> accessed 5 June 2023.

5.

CASE STUDY OF THE EFFECTS OF SLAPP LAWSUITS IN SLOVENIA

5.1 INTRODUCTION OF SLOVENIA AND THE STATE OF DEMOCRACY

Case study of the SLAPP phenomenon, in particular of its effect on democracy, is focused on Slovenia, which the organisation CASE listed as the country with the second-highest number of SLAPP lawsuits per capita, according to the data they had collected for the period from 2010 to 2021.¹⁸⁵ Based on the available studies and participants' experiences the case study examines the effects of SLAPP lawsuits in Slovenia, divided into four different spheres: media, environmentalists, activists, and experts and academia. However, for a better understanding of the SLAPP specifics in relation to the country, an overall introduction to the country is needed first. The following sections, therefore, present Slovenia and its political system, the country's involvement in the international community and respect for international law, as well as recent changes in the political sphere, consequently, changes in the state of democracy.

Slovenia is a parliamentary democratic republic, in which all adult citizens have the right to vote in free and fair elections to choose representatives. The government is divided into three branches: legislative, executive, and judicial. The parliament made up of the National Assembly and the National Council, holds the legislative power. Among other things, the National Assembly adopts amendments to the Constitution and laws, ratifies international treaties and elects the Prime Minister and ministers, judges of the Constitutional Court and the Human Rights Ombudsman. The executive power lies with the Government, composed of ministers, which must direct and coordinate the implementation of state policy in accordance

¹⁸⁵ CASE (n 2) 15.

with the Constitution and laws.¹⁸⁶ Currently, there are 19 ministries in the country, established to carry out the administrative tasks.¹⁸⁷ Each ministry also has specialised bodies, such as inspectorates and public agencies.¹⁸⁸ The judicial power in Slovenia is separated from both the legislative and executive branches and is bound by the Constitution to be established by law and to act impartially and independently. The judicial system is composed of specialized and general courts; local, district, higher and the Supreme Court.¹⁸⁹

Slovenia is a relatively young country. Before becoming independent in 1991, it was a part of the Socialist Federal Republic of Yugoslavia. In the 1990s referendum, 88% of Slovenian voters supported the country's independence. Shortly after becoming a newly formed state, it joined the UN in 1992, then the CoE in 1993, and the EU in 2004.¹⁹⁰ It is a party to several international and regional human rights doctrines such as the ICCPR, ECHR, and the CFR of the EU.¹⁹¹ When introducing the country's role in the international community, the government's official website states that Slovenia actively supports 'the respect for international law, the rule of law, human rights and fundamental freedoms, and democratic principles'.¹⁹² Furthermore, as a Member State of the EU, Slovenia has to implement and apply the EU law. This is important in the context of the proposed EU anti-SLAPP Directive, which was discussed in previous chapters. Once the Directive is adopted at the EU level, it has to be incorporated into the national laws of each Member State, but it is up to each individual state to decide which measures it will take to achieve the goal of the Directive.¹⁹³ Therefore, if an Anti-SLAPP Directive is adopted, Slovenia will have to develop or adapt its laws to prevent SLAPP lawsuits.

¹⁸⁶ Government Communication Office, 'Political System' (*Portal GOV.SI*, 27 December 2022) <www.gov.si/en/topics/political-system/> accessed 9 June 2023.

¹⁸⁷ Government Communication Office, 'Ministries' (*Portal GOV.SI*, 25 January 2023) <www.gov.si/en/state-authorities/ministries/> accessed 9 June 2023.

¹⁸⁸ Government Communication Office, 'Bodies within Ministries' (*Portal GOV.SI*, 20 February 2023) <www.gov.si/en/state-authorities/bodies-within-ministries/> accessed 9 June 2023.

¹⁸⁹ Government Communication Office, 'Political System' (n 186).

¹⁹⁰ 'Slovenia - Historical Development' (*Eurydice*, 13 June 2022) <<https://eurydice.eacea.ec.europa.eu/national-education-systems/slovenia/historical-development>> accessed 9 June 2023.

¹⁹¹ Ministry of Foreign and European Affairs, 'International Human Rights Law Documents and Slovenia's Reporting' (*Portal GOV.SI*, 24 January 2023) <www.gov.si/en/topics/international-human-rights-law-documents-and-slovenias-reporting/> accessed 9 June 2023.

¹⁹² Ministry of Foreign and European Affairs, 'Slovenia and the Council of Europe' (*Portal GOV.SI*, 3 February 2023) <www.gov.si/en/topics/slovenia-and-the-council-of-europe/> accessed 9 June 2023.

¹⁹³ 'European Union Directives' (*EUR-Lex*, 16 March 2022) <<https://eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html>> accessed 9 June 2023.

In its latest 2023 report, Freedom House listed Slovenia among the countries with a consolidated democracy regime, which by their methodology represents the highest level of democracy. Slovenia received 5.75 out of seven democratic scores, meaning that it embodies practices of liberal democracy, but faces some challenges related to corruption that lower its democratic score.¹⁹⁴ The country lost most of the democratic scores in the measuring of freedom of expression, specifically in assessing whether the country has free and independent media, which plays an important role in fighting corruption. FH among other things found that journalists are subjected to pressure from powerful business interests and that several media outlets are vulnerable to political pressures. However, FH also considered that several interferences with media freedom were caused by the former Prime Minister Janez Janša, from the right-wing Slovenian Democratic Party (SDS), and his associates. Compared to its 2022 report, FH found that democracy in the country progressed since the parliamentary elections in April 2022, in which Janša's right-wing government was replaced by a left-liberal coalition, led by the new Prime Minister Robert Golob.¹⁹⁵ According to their 2023 Nations in Transit report, democracy in Slovenia improved from 5.71 to 5.75 democratic scores.¹⁹⁶

Similarly, the Varieties of Democracy Institute (V-Dem), which also measures different attributes to democracy, reported that Slovenia's democracy has improved. In its latest 2023 Democracy Report, it listed Slovenia among the countries whose democracy managed to recover after a period of democratic backsliding. V-Dem, same as FH, pointed out that in 2022 Janez Janša's government was replaced by new leaders, who aim to restore liberal democracy.¹⁹⁷

¹⁹⁴ 'Nations in Transit Methodology' (*Freedom House*, 2023) <<https://freedomhouse.org/reports/nations-transit/nations-transit-methodology>> accessed 9 June 2023.

¹⁹⁵ 'Slovenia: Freedom in the World 2023 Country Report' (n 5).

¹⁹⁶ 'Slovenia: Nations in Transit 2023 Country Report' (*Freedom House*, 2023) <<https://freedomhouse.org/country/slovenia/nations-transit/2023>> accessed 12 July 2023.

¹⁹⁷ Evie Papada and others, 'Democracy Report 2023: Defiance in the Face of Autocratization' (V-Dem Institute at the University of Gothenburg 2023) 28–29 <https://v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf> accessed 12 July 2023.

5.1.1 Recent political changes

Both V-Dem and FH reported about the increasing backsliding of democracy in Slovenia during the period of Janša's government (March 2020 – June 2022). V-Dem data shows that in that period Slovenia's liberal democracy was endangered: on the interval from 0 (low) to 1 (high), liberal democracy index declined from 0.65 in 2020 to 0.6 in 2021. This was the lowest rating Slovenia ever received as an independent country.¹⁹⁸ Similarly, FH reported that Slovenia's democracy score declined from 5.86 to 5.71 during Janša's tenure in 2021.¹⁹⁹

According to FH, freedom of expression declined due to the government's increasingly hostile behaviour against the media and withholding the financial support for the Slovenian Press Agency. Janša's government also attempted at restricting the right to assembly and association, as it forcefully disrupted the anti-government protests. Furthermore, they attempted to restrict funding for NGOs, whom Janša often criticized and accused of business lobbying interests. FH also reported about the decline in respect for the rule of law in the country; the government had ignored many judicial rulings such as the one about its obligation to fund the Slovenian Press Agency, and Janša had continuously discredited and criticised the judiciary.²⁰⁰ Janša's actions, especially concerning the media, raised concerns in the international community. The European Commission, for example, condemned his insulting comments on Twitter about the journalist of POLITICO, accusing them of lying.²⁰¹ In December 2021, the EP due to his problematic actions issued a resolution on fundamental rights and the rule of law in Slovenia, in which it expressed concerns over the state of media freedom and the rule of law, as well as over the level of public debate and deep polarisation in the country, which had eroded trust in public bodies.²⁰²

¹⁹⁸ V-Dem, 'Country Graph – V-Dem' (*Varieties of Democracy*) <https://www.v-dem.net/data_analysis/CountryGraph/> accessed 12 July 2023.

¹⁹⁹ 'Slovenia: Nations in Transit 2022 Country Report' (*Freedom House*, 2022) <<https://freedomhouse.org/country/slovenia/nations-transit/2022>> accessed 12 July 2023.

²⁰⁰ 'Slovenia: Freedom in the World 2022 Country Report' (*Freedom House*, 2022) <<https://freedomhouse.org/country/slovenia/freedom-world/2022>> accessed 9 June 2023.

²⁰¹ Hans von der Burchard, 'EU Commission Condemns Slovenian PM Janša's Attacks on Journalists' *POLITICO* (18 February 2021) <www.politico.eu/article/european-commission-condemns-attacks-on-journalists-by-slovenian-prime-minister/> accessed 10 June 2023.

²⁰² European Parliament, 'Resolution of 16 December 2021 on fundamental rights and the rule of law in Slovenia, in particular the delayed nomination of EPPO prosecutors', P9_TA(2021)0512.

In their article about the challenges under Janša's government, Novak and Lajh discussed that the SDS party, due to their national and conservative beliefs, can be labelled as a type of political populism that is closer to extreme right-wing populism. SDS especially attacked and wanted to control the media sphere, as they put their own cadre on the supervisory board of the national television broadcaster RTV and politically interfered with its programme. At the same time, the right-wing supporting media outlets Nova24 and Planet TV, associated with SDS, received additional funding from parties related to Hungarian Prime Minister Viktor Orban, known for his populist behaviour.²⁰³ Janša and Orban have established a close relationship, and there are evident elements of hard-right populism within Janša's SDS. Over time, SDS has adopted the illiberal democratic practices of Orban's regime, leading to attempts to interfere in the judiciary, civil society, and the media under their government.²⁰⁴

Although Janša's government was replaced by a left-liberal coalition in April 2022, still several challenges to democracy remained in the country due to the previous government's actions. For example, the current government only managed to depoliticize the supervisory board of RTV in May 2023, more than a year after the change of government.²⁰⁵ Furthermore, Janša is a well-known politician in Slovenia as he had an important role in Slovenia's transition to an independent country and has been a member of the parliament ever since. His party SDS is one of the oldest right-wing parties in Slovenia and still has a lot of supporters. The latest May 2023 opinion poll, carried out by Mediana for the newspaper Delo, shows that although the support is dropping, SDS still has the second biggest electorate base, right after the current Golob's leading party.²⁰⁶

²⁰³ Meta Novak and Damjan Lajh, 'Challenges Facing Organised Interests Under a Populist Right-Wing Government in Slovenia' (2022) 11 *Politics and Governance* 28, 29–30.

²⁰⁴ Marko Lovec, Faris Kočan and Melika Mahmutović, 'The "Brussels Bubble": Populism in Slovenia in the EU Crises Context' [2022] *Teorija in praksa* 509, 516.

²⁰⁵ K J, 'Constitutional Court Gives Green Light for New RTV Slovenia Act' *rtvslo.si* (26 May 2023) <www.rtvsl.si/radio-si/news/constitutional-court-gives-green-light-for-new-rtv-slovenia-act/669655> accessed 10 June 2023.

²⁰⁶ STA, 'Anketa: Najvišjo podporo ima Gibanje Svoboda, podpora SDS-u nekoliko upadla' *rtvslo.si* <www.rtvsl.si/slovenija/preberite-tudi/anketa-najvisjo-podporo-ima-gibanje-svoboda-podpora-sds-u-nekoliko-upadla/667433> accessed 10 June 2023.

5.2 PRESENCE OF SLAPP LAWSUITS IN THE MEDIA SPHERE

The European Parliament in its resolution from 2021, mentioned in the previous section, expressed concerns not only over the political pressures on media but also over the threats and lawsuits journalists in Slovenia are facing. The resolution specifically referred to the threat of SLAPP lawsuits, brought by the authorities and public officials, including by the members of the government. In this context, the EP also pointed out that defamation in Slovenia has not yet been fully decriminalised, which can lead to self-censorship and cause a chilling effect on the freedom of expression.²⁰⁷ Similarly, the Human Rights Ombudsman of Slovenia in the 2022 Rule of Law report called for the authorities to refrain from using SLAPP lawsuits to intimidate actors, who speak out on matters of public interest, such as journalists.²⁰⁸ Although these calls have been made relatively recently under Janša's government, the available studies, presented in the upcoming section, indicate that journalists have been facing SLAPP lawsuits in the years prior to his tenure as well.

5.2.1 Studies on SLAPP lawsuits

In 2015, the Slovene Association of Journalists (SAJ) published an analysis of lawsuits targeting Slovenian journalists and media outlets in the period between 2009 and 2014. The authors of the research gathered data from 12 media outlets and found that during the analysed period 127 civil and criminal proceedings were brought against the journalists. The majority of them presented civil disputes and were mainly initiated by natural persons (around 70%), while only 7,2% of them were filed by officials. Although the authors pointed out that the data is incomplete due to the media's uncooperative nature and although they did not specify whether all these lawsuits fall in the category of SLAPP lawsuits, their findings

²⁰⁷ European Parliament, 'Resolution of 16 December 2021 on fundamental rights and the rule of law in Slovenia, in particular the delayed nomination of EPPO prosecutors' (n 202).

²⁰⁸ The Human Rights Ombudsman of the Republic of Slovenia, 'State of the Rule of Law in Europe in 2022: Slovenia' (2022) 10 <https://ennhri.org/wp-content/uploads/2022/07/Slovenia_CountryReport_RuleofLaw2022.pdf> accessed 10 June 2023.

are still relevant for the context of lawsuits targeting journalists in Slovenia and were used in a subsequent study on SLAPPs.²⁰⁹

In 2023, Transparency International Slovenia in collaboration with Oštro, a centre for investigative journalism, upgraded SAJ's analysis, including by identifying which lawsuits fit into the categorization of SLAPP. Based on data, gathered from 14 Slovenian media outlets, the authors found that during the years 2015 and 2022 media outlets faced 183 lawsuits, with 74 of them, equivalent to 40%, being recognized as SLAPP. Some of the media provided them data specifically for SLAPP lawsuits, whereas others provided data on all lawsuits, without specifying whether they fall into the category of SLAPP. Therefore, the authors themselves tried to identify, which lawsuits fit the categorization by using CASE methodology, based on two questions: was the lawsuit filed by a private party and does it target the acts of public participation? If the answer to both was affirmative, then they tried to recognize the purpose behind the lawsuit: whether the intent was to silence the journalist.²¹⁰ Klara Škrinjar, one of the authors, in the interview for this thesis, explained that they identified the purpose by analysing specifics in each case, including by researching whether the plaintiff is an individual with political or economic power, has a history of filing SLAPP lawsuits, or is demanding disproportionate remedies.²¹¹

From the sample of recognized SLAPP lawsuits, they identified some of the main features of SLAPPs in Slovenian media: 70% of them were initiated concerning online media content, in 92% the plaintiffs were natural persons, in 51% they were targeting journalists directly, around 70% of SLAPP cases are still ongoing, and in 18 civil disputes the sum for the compensation claimed amounts to €39.3 million. Contrary to the findings of the 2015 study, the majority of SLAPP lawsuits were based on criminal law, specifically on defamation claims.²¹² Regarding the cross-border nature of cases, Škrinjar mentioned that there was only one SLAPP lawsuit, in which the plaintiff was from another jurisdiction, thus could be recognized as a cross-border case.²¹³

²⁰⁹ Anuška Delić and Špela Stare, 'Analiza Tožb in Ovadb Medijev' (2015) <<https://novinar.com/novica/analiza-tozb-in-ovadb-medijev/>> accessed 12 June 2023.

²¹⁰ Klara Škrinjar and Nina Trček, 'Strateške Tožbe Za Onemogočanje Udeležbe Javnosti: Kako Nanje Strateško Odgovoriti?' (2022) 8–9 <www.transparency.si/wp-content/uploads/2023/03/ti-slapp-disscusion-paper-web.pdf> accessed 12 June 2023.

²¹¹ Interview with Klara Škrinjar, Journalist, Oštro (2 June 2023).

²¹² Škrinjar and Trček (n 210) 13.

²¹³ Škrinjar (n 211).

However, Škrinjar pointed out that the data they had received from media outlets are disparate in time and content, and incomplete. Consequently, nobody really knows, to what extent SLAPP lawsuits are present in the Slovenian media landscape. It is also not clear if the number of such lawsuits is increasing. Nevertheless, Škrinjar assumes that the number could be higher than their study has shown, as some media, for unknown reasons, did not respond to their study and send the data. She expressed hope that in the future they will be more cooperative, as this could help raise awareness about the threat of SLAPP and in finding solutions.²¹⁴

5.2.2 Case of the investigative news outlet *Necenzurirano*

In 2021, the CoE Commissioner for Human Rights noted that journalists in Slovenia are threatened by SLAPPs, specifically referring to a case of investigative news outlet *Necenzurirano* that was targeted with 39 defamation lawsuits in 2020.²¹⁵ This SLAPP case is well-known in Europe due to the multiplication of lawsuits by the same plaintiff targeting three individual journalists from the same media. To gain a better understanding of the case and the SLAPP effects on a target, an interview with Primož Cirman was conducted.

Over the last three years, Cirman and two of his colleagues have been reporting about the businesses of Rok Snežič, including his alleged involvement in the illegal financing of Janez Janša's SDS party. Snežič, Janša's unofficial financial advisor, is running a tax 'optimisation' company and has been the subject of investigations both in Slovenia and Bosnia and Herzegovina due to allegations of money laundering, fraud, and tax evasion.²¹⁶ Since under the Slovenian criminal law, it is not possible to sue media entities, Snežič has been targeting each of the three journalists with approximately 15 lawsuits till today. Since the spring of 2020, he has been prolonging the proceedings by not paying the court taxes or attending the

²¹⁴ *ibid.*

²¹⁵ Council of Europe Commissioner for Human Rights, Memorandum on freedom of expression and media freedom in Slovenia (4 June 2021) CommDH(2021)17.

²¹⁶ 'Slovenian Investigative News Outlet *Necenzurirano* Hit with 39 SLAPP Lawsuits' (*International Press Institute*, 25 November 2020) <<https://ipi.media/slovenian-investigative-news-outlet-necenzurirano-hit-with-39-slapp-lawsuits/>> accessed 21 June 2023.

hearings. Furthermore, in these three years, there was no single substantive hearing yet, and only a few cases were consolidated by the court because they presented similar issues.²¹⁷

Cirman believes that their reporting was ‘a matter of the highest degree of public interest’ as the stories included financing of SDS and were related to important Slovenian politicians. When asked if he ever considered to stop reporting on this topic due to continuous lawsuits, he responded that by filing the lawsuits Snežič is ‘showing that he is afraid of something, that there is something worse that he is hiding but we had not yet uncovered, and that is what drives us on’.²¹⁸

However, he pointed out that these SLAPP cases have been extremely time-consuming, along with imposing financial and psychological burdens. All expenses related to the lawsuits are covered by journalists’ personal assets, and as they estimated, by the end of this ‘farce’, each of them will have around €20,000 of costs. Cirman also mentioned all sorts of accompanying pressures and smear campaigns by the media that is supporting Snežič, as well as other forms of harassment from Snežič himself. For instance, on Valentine’s Day, he received a card from Snežič, saying that he had heard that the journalist has no room left in the mailbox for court mail. ‘Not just my family, also my neighbours and post workers had noticed that I have been receiving court mail for over three years’, said Cirman. Considering that due to his long working hours, he sometimes misses the opening hours of the post office, he occasionally receives the court mail directly to his home from a process server: ‘And my children see that, asking me, why is he visiting us.’²¹⁹

The lawsuits have further affected the media and his professional reputation. He discussed that although some people are aware of the SLAPP notion behind these cases, there are others, who believe that since his reporting is a subject of lawsuits, he must have done something wrong. This not only applies to the general public but to some extent also to his journalistic colleagues. He said that even though he has received support and understanding from other journalists, their attention has gradually dropped, and he is still ‘very much alone in this fight’.²²⁰

²¹⁷ Interview with Primož Cirman, Journalist, Investigative news outlet Necenzurirano (24 May 2023).

²¹⁸ *ibid.*

²¹⁹ *ibid.*

²²⁰ *ibid.*

Drawing from his impressions, Snežič not only aimed to pressure the journalists financially and psychologically but rather to ‘kill the story’. Cirman has noticed that he ultimately succeeded at this, as other media outlets in Slovenia stopped or have limited their reporting on him and his businesses.²²¹

5.2.3 *The chilling effect*

‘SLAPP is not only a threat to freedom of expression of the journalists who are being sued but also a silent threat to all other journalists and media,’ said the media expert and professor at the University of Ljubljana Marko Milosavljevič, who himself as an expert was a target of a SLAPP lawsuit.²²² Apart from his case, which is examined in the later section, we also discussed SLAPP effects in the Slovenian media sphere.

Referring to what also happened in the case of Necenzurirano and Snežič, he said that the subject of SLAPP lawsuits – ‘the story’, often disappears from other media or they reduce the amount of coverage on it. Although the media will often claim that this is only due to coincidence, he recognized, from talking to individual journalists and editors, that they employ such a practice of avoiding certain topics in the media. He links this to the financial and psychological effects of SLAPP lawsuits, which financially burden not only freelancers and small media outlets but also bigger media companies with in-house lawyers. To avoid ‘unnecessary costs’ related to lawsuits, especially in the case of their multiplication, and time-loss due to long court proceedings, media will avoid publishing investigative content. After all, as Milosavljevič continued, click-bait news about celebrities can have the same reach as investigative content, but with the difference that it will most likely not be the subject of a lawsuit, causing financial loss and other negative effects to the media.²²³

Another participant in this study, Špela Stare, secretary general at the Slovene Association of Journalists, pointed out the threat of financial burden, especially considering the relatively small media market in Slovenia. Even bigger media companies with in-house lawyers can struggle with responding to SLAPP lawsuits and they usually out-source them to other legal

²²¹ *ibid.*

²²² Interview with Marko Milosavljevič, media expert and professor, University of Ljubljana (21 May 2023).

²²³ *ibid.*

offices, therefore, smaller media with limited time, financial and staff resources, can be ‘pushed to the edge of existence’ by such lawsuits.²²⁴

SAJ has been monitoring all sorts of physical and verbal attacks and threats targeting media workers in Slovenia, including legal threats, reported by the workers themselves or others but with their consent.²²⁵ According to Stare SLAPP lawsuits are only one type of attacks that journalists are facing. During the interview she remembered the case of an attempt to systematically intimidate media and prevent them from reporting on a subject through abusing the SAJ’s Journalists’ Ethics Council, their self-regulatory body that examines the alleged violations of the Ethics Code. In 2016, an organisation SAZAS filed 26 complaints against 15 different media outlets that were reporting about SAZAS, allegedly violating the Code. However, the Council rejected SAZAS’ complaints as the organisation simultaneously proceeded with legal actions, which is not allowed by the Council’s Rules of Procedure. The Council recognized these complaints as an attempt to abuse the Council’s role.²²⁶ Although such cases are not common, it exemplifies, how different proceedings can be abused for the purpose of silencing journalists, Stare added.²²⁷

5.2.3.1 Criminal lawsuits

In the interview, Stare discussed another concerning aspect of SLAPP lawsuits in the Slovenian media sphere. As already mentioned, according to the latest study of SLAPP by the Transparency International Slovenia and Oštro, most of the lawsuits were based on criminal law.²²⁸ In 2015, SAJ proposed to the Ministry of Justice and the government to decriminalize crimes related to honour and reputation in the Slovenian Criminal Code. Five offences relating to honour and reputation are covered by the Criminal Code, punishable by a minimum of three months imprisonment and, in the case of slander, even up to two years imprisonment. SAJ discussed that criminal prosecution and sanctions can cause self-censorship in media and that they believe that the criminal treatment of offences against

²²⁴ Interview with Špela Stare, Secretary general, Slovene Association of Journalists (30 May 2023).

²²⁵ ‘Prijavi napad’ (*Društvo novinarjev Slovenije*, 2 June 2016) <<https://novinar.com/prijavi-napad/>> accessed 21 June 2023.

²²⁶ ‘Zavržba pritožb Združenja Sazas in Matjaža Zupana’ (*Novinarsko častno razsodišče*, 2 June 2016) <<https://razsodisce.org/2016/06/zavrzba-pritozb-zdruzenja-sazas-in-matjaz-a-zupana/>> accessed 21 June 2023.

²²⁷ Stare (n 224).

²²⁸ *ibid.*

honour and reputation is unnecessary when individuals can defend their reputations in civil courts or by other means, such as self-regulatory means.²²⁹

Stare said that SAJ is still encouraging the debate on gradual decriminalization of offences against honour and reputation, or at least abolishment of imprisonment sanction, due to the deterrent effects of such lawsuits, not only in SLAPP cases. However, she warned that the public discourse is becoming more and more polarised and extreme, which needs to be regulated as well. She believes that the right balance must be found: ‘On the one hand, it is necessary to have effective legal measures to address hate speech, and on the other, it is necessary to protect the freedom of expression and reduce the pressure of SLAPP lawsuits.’²³⁰

To recall from the previous chapters, the necessity to decriminalise defamation was also addressed by the international community, including the ECtHR, which discussed the chilling effect of imprisonment sanctions on public debate. However, no significant changes have been made yet in Slovenia to implement such recommendations.

5.3 ECO-SLAPPS? SILENCED BY A LEGAL THREAT ONLY

In Slovenia, legal threats and actions are additionally abused to stop environmental NGOs and activists from raising awareness on projects that potentially threaten the environment. However, the presence of SLAPP lawsuits related to the environment cases is less apparent compared to those related to the media sphere. Drawing from the conversations with environmental activists and NGOs, and a journalist covering environmental issues, it seems that in many cases public participation in the environmental sphere is halted one stage earlier – with a legal threat only.

Uroš Macerl, environmentalist and president of the Eko Krog NGO, is not aware of many SLAPP lawsuits, however, legal threats to environmental activists in Slovenia are widely present. When asked if such threats prevent environmental activists from further participation, he said that one can succumb very quickly: ‘They are silenced, and such cases

²²⁹ ‘Priporočila za reformo žaljenskih deliktov’ (*Društvo novinarjev Slovenije*, 23 April 2015) <<https://novinar.com/novica/priporocila-za-reformo-zaljenskih-deliktov/>> accessed 21 June 2023.

²³⁰ Stare (n 224).

are not few. In fact, they do not even come out in public. There is no evidence of it. Most of the time it is verbal threats.’²³¹

One such example of legal threats is the case of an environmental NGO Eko Anhovo and Soča Valley Association. The NGO has been receiving all sorts of legal threats from the biggest cement factory in Slovenia Salanit Anhovo, including for publishing a study on waste incineration in cement plants and its impact on the public health and environment, focusing on the factory. Macerl said in the interview that Eko Anhovo has succumbed to the pressure of a legal threat and removed the study from its website. However, convinced that the study is credible and important, Macerl’s NGO Eko Krog decided to publish it on its own website, which immediately made them a target of legal threats from Salanit Anhovo’s lawyers. Furthermore, they threatened their website provider, who due to pressure asked the NGO to take down the study. Ultimately, this forced the NGO to move its website to a provider in a foreign country. Macerl was determined to keep the study online and make the issue public by organising a press conference.²³²

Despite the strong determination, he said, the fear is always present, but what matters is ‘how you show it on the outside’. His NGO went into this fight with years of experience and courage, however, he is aware that in several cases, fights for the environment can be stopped out of fear: ‘On one side you have capital, with unlimited resources for lawyers, who will try to get you out of money, and on the other, you are an individual or NGO with minimal resources’.²³³

Additionally, Macerl pointed out fines as another form of halting the public participation of environmental activists. For example, in 2010, activists blocked the road to stop former Prime Minister Borut Pahor in a sign of protest towards his inactions and a lack of dialogue regarding the waste incineration emissions from the Lafarge factory in Trbovlje. Even though there was no official protest organizer known, Eko Krog received a fine of €12,000 and Macerl personally a fine of €800 for blocking the road. Although they later succeeded at proving their right and not paying the fines, Macerl believes that such an amount of money

²³¹ Interview with Uroš Macerl, environmentalist and president of Eko Krog NGO (19 May 2023).

²³² For more information see N.S., “‘Temu je treba reči stop. Ne gremo niti koraka nazaj’” *24ur.com* (3 September 2019) <www.24ur.com/novice/slovenija/temu-je-treba-reci-stop-ne-gremo-niti-koraka-nazaj.html> accessed 22 June 2023.

²³³ Macerl (n 231).

was disproportionate and that its only purpose was to silence the NGO, which has little resources and works voluntarily.²³⁴

5.3.1 Case of the environmental NGO fighting legal battles with the local inspectorates

Despite the lack of data and public attention given to such cases, there is one specific case that, due to its characteristics, could be recognized as an Eco-SLAPP. During an interview, Andreja Slameršek, the president of the environmental NGO Slovenian Native Fish Association (SNFA), pointed out that their case might not be recognized as a SLAPP because it was initiated by state organs rather than private entities, driven by economic interests. However, given the lack of a uniform and official definition, particularly in terms of defining the plaintiff, this thesis adopts an approach that follows the definitional elements of SLAPP lawsuits, explained in the second chapter. Since they include state organs as potential plaintiffs, the following case is included as an example of a SLAPP lawsuit targeting the environmental sphere.²³⁵

SNFA, an organisation acting in the public interest of nature conservation, mainly with the goal to protect fish and their habitats, has been a target of various pressures from the hydroelectric power company HESS. The association is opposing the company's construction of the hydroelectric power plant Mokrice as it could have harmful effects on the environment.²³⁶ In 2018, the legal representative of HESS reported the association to the police and three inspection bodies for carrying out the ichthyological research on the rivers Sava and Krka, where the construction of a hydroelectric power plant is planned. The police arrived at the site on the same day as SNFA was carrying out its research and found no irregularities and that the association had all the necessary licences. Later, the police contacted them again, but soon dropped the prosecution as they provided them with evidence that the research was permitted. Despite that, HESS decided to report them to three inspectorate bodies. While the Administrative inspection dropped the prosecution, two local inspections – Inspectorate for Hunting and Fisheries and the Inspectorate for Natural

²³⁴ *ibid.*

²³⁵ Interview with Andreja Slameršek, environmentalist and president of the Slovenian Native Fish Association (14 June 2023).

²³⁶ *ibid.*

Resources and Spatial Planning – proceeded with the case. The fishery inspectorate insisted that SNFA did not have the necessary licence and that they were fishing with the use of electricity, it further claimed so even after the District Court ruled in favour of SNFA, and later took the case to the Higher Court. On the other side, the environmental inspectorate, among other things, insisted that the members of the SNFA were illegally driving a motorboat while carrying out the research. Both inspectorates fined SNFA and its president Andreja Slameršek for alleged offences, together accounting for around €6,400. After altogether four years, the Higher Court in both, separate, proceedings ruled in favour of SNFA as it had found no alleged violations.²³⁷

Slameršek believes that the intention behind these prosecutions was to exhaust the NGO financially and psychologically, thus preventing them from further opposition to the HESS project: ‘They wanted to incapacitate and bankrupt us at the same time, we even had to raise donations.’ While SNFA, as an official participant party, was expected to contribute their opinions on the environmental impact assessment process for the project, they were distracted by the proceedings initiated against them for altogether four years.²³⁸

Considering their case, she highly questions the independence of local inspectorates and believes that they are influenced by economic interests, specifically of the energy industry. She said that it was only after the SNFA had asked the court about where the case with the environmental inspectorate stands, that it discovered that the judgement was in its favour. It found that the inspectorate failed to serve the judgement to the association for ten months nor did it refund the money, which was required from it to do. Furthermore, she also questions judicial independence in their case. In 2019, the District Court denied the association’s request for judicial protection in the case of the environmental inspectorate, but the reasoning behind the judgement was in Slameršek's opinion biased and unprofessional.²³⁹ SNFA found that the Judge who denied their request was in one of his private court cases represented by the same lawyer, who represents company HESS and had reported SNFA to the inspectorates. This private case reached the Constitutional Court in 2015, and one of the

²³⁷ DPRS, ‘Inšpektorat »skrival« razsodbo 10 Mesecev!’ (26 August 2022) <www.dprs.si/sl/235-inspektorat-skrival-razsodbo-10-mesecev.html> accessed 22 June 2023.

²³⁸ Slameršek (n 235).

²³⁹ *ibid.*

Constitutional Court judges even explicitly disclosed in a separate opinion that the judge and his lawyer are friends.²⁴⁰

5.3.2 Strong energy industry

As already indicated in the previous section, the interests of the energy industry in Slovenia are often in conflict with the interests of environmental groups and activists. This was also discussed in the interview with Monika Weiss, a journalist, who mainly covers the stories on financial industry. As she explained, her stories often include environmental issues due to ‘a major clash’ between financial, specifically the energy industry, and environmental interests in Slovenia.²⁴¹

Recalling the case of SNFA, she pointed out that one big concern in Slovenia is the strong lobbying power of the energy sector, influencing the state organs as well. She said that the energy sector is one of the richest industries with the highest salaries in the country, also partially state-owned, meaning, that its people have a lot of power:

They have the money to hire the best law firms, the best PR services, and the best lobbyists, so compared to the local environmental associations, which have little money, there is a great power imbalance here. While these industries have all the capital in the world, the environmentalists have nothing, except some hope that the rule of law in the country works.²⁴²

In this case, she recognized the final decision of the Higher Court as an indicator that the rule of law is functioning well in the country. However, on the other side, she problematized the questionable independence of inspectorates – whom they favour and how they operate due to ‘capital’ pressures. She believes that the proceedings should not have been started in the first place as it was already clear from the first police inspection that the association had not violated any regulations.

²⁴⁰ DPRS, ‘Povezanost Ovaditelja in Sodnika - Tožba DPRS’ (20 August 2020) <www.dprs.si/sl/211-povezanost-ovaditelja-in-sodnika-v-primeru-tozbe-p.html> accessed 23 June 2023.

²⁴¹ Interview with Monika Weiss, Journalist, Mladina (26 May 2023).

²⁴² *ibid.*

Since Weiss is well familiar with other ‘environmental fights’ in Slovenia, we discussed the presence of similar SLAPP lawsuits in this sphere. Same as Macerl, she pointed out that environmental activists are usually silenced with a legal threat only. Although such cases do not result in a lawsuit, she recognizes legal threats as a successful method of silencing, similar to SLAPP.

In this context, she also referred to legal threats in the case of Eko Anhovo, a small environmental NGO that publicly expressed concerns over the harmful effects of waste incineration from the cement factory Salanit Anhovo in their area. Among other things they warned about the prolonged industrial pollution with asbestos, causing many people to have asthma and even lung cancer. They started advocating that waste incineration needs to be limited to protect future generations from having similar health issues. Resulting from this, Salanit’s lawyer started to write letters to all individuals who were publicly raising concerns, demanding that they retract their statements. Weiss further explained that individuals who expressed concerns about their living environment and were consequently seen as a threat to Salanit included not only members of Eko Anhovo but also other concerned individuals who had personally suffered from asbestos contamination in the past. The stories of these individuals and the legal threats they were facing grabbed Weiss’ attention, so she decided to collect the letters they had received and send them to the Slovenian Bar Association in the belief that the lawyer had broken the Code of Ethics. Although the Association first decided that the lawyer’s letters were unethical but later changed the ruling in her favour, Weiss’ action had an overall good outcome as the individuals stopped receiving letters from Salanit.²⁴³

5.4 SLAPP LAWSUITS TARGETING OTHER FORMS OF PUBLIC PARTICIPATION

5.4.1 *Activists*

The following sections show that SLAPPs and similar methods of silencing are used not only on journalists and environmentalists but also on others who in any way participate in public. Moreover, they show the political motives behind such actions.

²⁴³ Weiss (n 241).

One such example, where both fines and SLAPP lawsuits were used, is the case of Jaša Jenull. Similar to the case of the environmental association SNFA, these actions were also led by the state organs. It all started in 2020, when Janša got to the head of the government and the anti-government protests were formed. The protests increased during the pandemic of Covid-19 when many people disagreed with the anti-covid measures and Janša's politics in general. Jaša Jenull was one of the well-known individuals who participated in the so-called Friday's anti-government protests, and consequently, soon faced lawsuits for allegedly organizing them.²⁴⁴

The Ministry of the Interior, represented by the State Attorney's Office, filed three lawsuits against him, in which it claimed for the costs of police security at the protests. In the first, they claimed around €2000, in the second around €3000, and in the last €43,000. In the interview with Jenull, we discussed that such lawsuits are time-consuming and stressful, that they pose a financial threat, as well as impact one's public reputation. In his case, it impacted his professional life as a self-employed person in culture. He explained that in that period he was supposed to participate in one exhibition project that had no relation to the protests, however, the artistic director insisted on his removal from the project because 'he is too controversial'.²⁴⁵

Jenull reminded that in the case of Friday protesters not only SLAPPs but also financial penalties were used for the purpose of shutting down public participation. He received a fine each Friday for not registering the protest, as he was allegedly its organizer, as well as for other alleged violations such as for writing on the ground with chalk. Altogether he received around 60 to 70 fines, which he paid from his personal assets, or from the money raised at the protests. He believes that the purpose of these fines was to scare people from protesting, not only the ones targeted with a fine but also others, who are afraid of finding themselves in the same position.²⁴⁶

This case was also noticed by the CoE Commissioner for Human Rights Dunja Mijatović, who expressed concerns over the harassment of civil society activists, among them Jaša Jenull. She called on the government to stop it immediately, as such practices are

²⁴⁴ The Human Rights Ombudsman of the Republic of Slovenia (n 208) 10.

²⁴⁵ Interview with Jaša Jenull, Self-employed in culture and activist (16 May 2023).

²⁴⁶ *ibid.*

incompatible with Slovenia's obligation to respect the right to peaceful assembly.²⁴⁷ This was taken into account in 2022 when the new government decided to reimburse all fines that they perceived unlawful. Moreover, the Ministry of Interior withdrew all three lawsuits against Jenull. However, they did not waive the claims, which means that in the future they could reopen the cases, Jenull pointed out: 'Theoretically, if Janša were to come back to power, he could do it again, he could open the process again.'²⁴⁸

5.4.2 *Experts and academia*

SLAPP lawsuits, especially the politically motivated ones, have also been targeting the academia and experts in Slovenia. Recently, a media expert and a professor at the University of Ljubljana Marko Milosavljević, received a lawsuit from the media company Nova24TV, closely associated with Janša and his party SDS.

'My case is actually one of the few in Slovenia that shows the broader dimension of SLAPP lawsuits. It shows that they are directed not only against the journalist but against public participation of anyone,' Milosavljević said in the interview. He believes that anyone, who is critical of politicians or other powerful actors can be the subject of such a lawsuit.²⁴⁹

Milosavljević was sued because he publicly said that Nova24TV is not a real media. He argues that due to its nature, which is not neutral in its reporting, it is more of a promotional platform that serves to spread the propaganda of a particular party rather than a real media. Moreover, several shareholders of the media company are associated with SDS, including the party's leader Janez Janša. However, at Nova24TV they claimed that they are not associated with the SDS party. The fact that Janša and other co-owners are related to SDS, is in their view a mere coincidence, said Milosavljević.

He believes that the lawsuit is driven by a political goal to silence him. Among other things, Nova24TV in the lawsuit seeks an apology and retraction of his statement, payment of a financial penalty and a commitment to refrain from making any further similar statements about SDS and Nova24TV in the future. 'If you are an expert, you are allowed to comment

²⁴⁷ 'Slovenia: lawsuits and fines against peaceful demonstrators should be dropped' (*Council of Europe Commissioner for Human Rights*, 25 May 2022) <www.coe.int/nb/web/commissioner/-/slovenia-lawsuits-and-fines-against-peaceful-demonstrators-should-be-dropped> accessed 25 June 2023.

²⁴⁸ Jenull (n 245).

²⁴⁹ Milosavljević (n 222).

like that,' he pointed out and expressed concern that SLAPP lawsuits can hit anyone, including experts in any field.²⁵⁰

Recognizing the similarities of the case to the one of another academic Rudi Rizman, who was sued by the SDS party, Milosavljević expects that his case will go on for at least two years.²⁵¹ Rudi Rizman, a sociologist and political scientist, was in 2020 hit with a lawsuit for commenting on the financing of the SDS party from abroad, specifically from Hungary. The lawsuit demanded the retraction of the statement and €8,000 in damages.²⁵² In 2022, the Higher Court ruled in Rizman's favour and ordered the party to reimburse him all costs for the court proceedings. It ruled that the statement constituted admissible criticism of the activities of a political party, which were of utmost public interest. Furthermore, it found that his criticism was based on sufficient factual basis as the funding of SDS was investigated both by the media and state organs. After winning the case, Rizman gave a comment to the media that this was not a personal victory but above all an 'important message to citizens in civil society that it is legitimate to criticise the authorities in a democratic society and that critics should not fear reprisals for doing so'.²⁵³

5.5 DISCUSSION

The presented case study was following the research questions of how and to what extent SLAPP lawsuits affect a democratic society. While the effects of lawsuits on an individual target as well as on the broader community were evident, the extent of their impact on democracy was more difficult to analyse.

The personal experiences of participants presented in this study are comparable to the effects of lawsuits analysed in chapter four. Although there are some differences in cases depending on the sphere, certain effects on an individual target seem to be common to all of them. All participants reported about the time burden due to long proceedings and managing the formalities around the lawsuits. Furthermore, they spoke about financial, psychological,

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

²⁵² STA, '»Tožba SDS Proti Ugledni Javni Osebnosti Razumemo Kot Pritisk«' *Mladina.si* (14 November 2020) <www.mladina.si/202804/tozbo-sds-proti-ugledni-javni-osebnosti-razumemo-kot-pritisk/> accessed 26 June 2023.

²⁵³ Mirt Bezljaj, 'Tožba SDS proti Rudiju Rizmanu v celoti neutemeljena' *Delo* (3 June 2022) <www.delo.si/novice/slovenija/tozba-sds-proti-rudija-rizmanu-v-celoti-neutemeljena/> accessed 26 June 2023.

and reputational harm. They also shared their views on the effects on a broader community, such as the chilling effect in the media, which can be related to those in chapter four. Based on their views, it can be concluded that this case study affirms the effects of SLAPP lawsuits, analysed in chapter four, as a threat to individual targets, the broader community, and democracy.

Moving on to the extent of the effects, specifically to what extent lawsuits affect democracy, the analysis is divided into two sections. First, general observations regarding the extent of SLAPPs and their effects on democracy in relation to each of the spheres are presented. Then, the analysis considers the extent of the effects by examining the influence of political dynamics within the country.

5.5.1 Extent of the effects on democracy in relation to different spheres

Some general observations can be presented regarding the extent of effects on democracy, in relation to different spheres in Slovenia.

Perhaps the biggest concern regarding the effects in the media sphere is the observation that certain content can disappear from the media due to fear of lawsuits and their effects, such as financial burden. The chilling effect was noted by all the participants in the media sphere, who observed that it does not necessarily halt the work of an individual target, but rather of others who are discouraged to report on certain topics that could result in lawsuits. Similarly, the halting of public participation was observed in the environmental and activism spheres. Although not necessarily caused by the lawsuits, it can result from other legal actions such as disproportionate monetary penalties for engaging in advocacy activities.

Already in the selection process of the participants, some SLAPP effects were observed. While it was easier to identify SLAPP cases related to the media, activism, and experts and academia, it was more difficult to find an example of SLAPPs targeting the environmental sphere. Some parallels can be drawn to the findings of CASE in their study of SLAPPs in Europe, in which they cautioned that the study does not necessarily reflect the true extent of SLAPP lawsuits as victims will not report their cases, often due to fear of further retaliation from the SLAPP initiators.²⁵⁴ It could also be related to the silencing effect prior to the

²⁵⁴ CASE (n 2) 3.

lawsuits, as the participants in this sphere emphasized. They pointed out that environmental activists and NGOs can be silenced with a legal threat only, and that such cases do not even reach the public eye. This indicates that the silencing effect, resulting from the threat of SLAPP, can be successful.

In contrast, SLAPP cases related to other spheres were relatively easier to find. It is not clear whether this was due to their prevalence in Slovenia compared to the environmental sphere or due to the targets' will to make such cases public. Their cases were either presented in the media or they made them public themselves. For example, expert Milosavljević posted about his case on social media.

Considering this, future research could explore the reaction and resilience of different targets to SLAPP lawsuits. Moreover, it could examine these factors in relationship with the state of democracy, that is the level of protection of freedoms and human rights and the strength of the rule of law in a particular country. This approach would provide an even deeper understanding of the effects of SLAPP lawsuits on democracy.

5.5.2 Relationship between the political dynamics and SLAPP effects in the country

Considering that the cases of Cirman, Jenull, Milosavljević, and Rizman are all somehow related to the former Prime Minister Janez Janša or his party SDS, the question that arises is whether SLAPP lawsuits presented a bigger threat to democracy in Slovenia under the right-wing government of Janša. Furthermore, it raises the question of whether the recent change of government potentially prevented the extent of SLAPP effects in the country, considering also that the organisations like FH recently reported about the improvements in Slovenia's democracy.

Due to a lack of data and studies on SLAPP lawsuits in Slovenia, it is impossible to answer these questions with a quantitative analysis of how SLAPP increased or decreased in a certain period. However, by recognizing the specifics of SLAPPs in a certain period and with the help of participants in this study, it is possible to make a qualitative analysis of how and to what extent did the political dynamics in the country impact the SLAPP phenomenon.

The case of Jenull occurred specifically in the period when Janša was in power, and it was considered to be highly politically motivated. It was also one of the rare examples of State-led SLAPPs in Slovenia. Jenull pointed out that the new government not only withdrew the

lawsuits but also adopted a law, with which they will be able to reimburse the money to Friday protesters, who received unlawful fines. He believes that due to a change of government SLAPPs today are less of a threat, however, he realizes that the danger will always be present since they are employed by various plaintiffs.²⁵⁵

Although both cases of Rizman and Milosavljević are related to the criticism of party SDS, they did not occur in the same period. Whereas Rizman was hit with the lawsuit by SDS when they were a leading party in the government, Milosavljević received a lawsuit in 2023 from a media company, closely associated with SDS. Furthermore, Milosavljević believes that the danger of SLAPPs has not diminished in any way due to a change in the government. However, the change has impacted the general feeling of media freedom, he added: ‘Let’s say there are fewer attacks or vulgarities against journalists, especially women journalists, by the new government than we saw in the previous government.’ He pointed out that unless the legislation and court practice change, the danger of SLAPPs remains the same.²⁵⁶

Stare from the Slovene Association of Journalists and Škrinjar, author of the study on SLAPPs, shared his views. Stare pointed out that such lawsuits are abused by various actors and are not only politically motivated. Furthermore, studies done till now, presented in section 5.2.1, show that SLAPP lawsuits have been targeting the media even before Janša’s tenure. In the interview, Škrinjar said that the question of who is in power mainly matters in a sense, how they will implement the EU Directive and provide the anti-SLAPP legislation.²⁵⁷

Similarly, Cirman who has since 2020 been targeted with multiple lawsuits, reminded that SLAPPs are often initiated by businessmen. To explain his view on how politics influences the SLAPP phenomenon, he compared two media landscapes in Europe. He said that in Eastern European and Balkan countries, where the media is often controlled by politicians and faces pressure from authoritarian rulers, SLAPPs serve as a tool for political pressure. In contrast, in Western Central Europe, where media freedom is relatively higher, including in Slovenia, SLAPPs are used by businessmen to cause financial pressure and silence the media, environmentalists, and other voices on their own.²⁵⁸

²⁵⁵ Jenull (n 245).

²⁵⁶ Milosavljević (n 222).

²⁵⁷ Stare (n 224).

²⁵⁸ Cirman (n 217).

Environmentalists expressed that no matter the shift of government, the threat of SLAPP will always be present due to a strong capital power, specifically of the energy industry, influencing the state organs as well. Slameršek, the president of SNFA, which was targeted with a SLAPP from the state organs, warned that the current Prime Minister Robert Golob is coming from the powerful energy industry as well. She said that although in the previous right-wing government, the link was more obvious – former Minister of the Environment Andrej Vizjak was before his minister position closely associated with the energy corporation HESS that reported SNFA to the inspectorates²⁵⁹ – their association has been experiencing political pressures even under the more left-oriented governments. That is, the lawsuits against them were initiated by the local inspectorates back in 2018 when the centrist-left government was in power.²⁶⁰

‘The only difference with the previous government is that the current one is more elegant,’ Slameršek said. In her view, they are not considering the opinions of NGOs and experts enough, however, they are for now not attacking them in an obvious way.²⁶¹ Monika Weiss, a journalist covering financial and environmental stories, agreed that although this government is not as aggressive in pursuing its goals, they are still not putting a stop to projects that harm the environment.²⁶²

In conclusion, the participants' views and the specifics of SLAPPs during Janša's government, which used illiberal and undemocratic practices, suggest a correlation between the country's political dynamics and the effects of SLAPP lawsuits. However, the connection only applies to the cases directly involving the State, as was in the case of Jenull. Experiences from other participants indicate that the danger of SLAPPs and their effects is present no matter the ruling government, as lawsuits can be initiated by various actors, including politicians acting in private capacities. Therefore, it is important to consider the specific factors in each SLAPP case, namely who is behind the lawsuit, to analyse the extent of the effects on democracy.

²⁵⁹ ‘DPRS prijavilo ministra za okolje in prostor Andreja Vizjaka!’ *Bakos.si* (9 June 2020) <www.bakos.si/druzba/dprs-prijavilo-ministra-za-okolje-in-prostor-andreja-vizjaka/> accessed 10 July 2023.

²⁶⁰ Slameršek (n 235).

²⁶¹ *ibid.*

²⁶² Weiss (n 241).

5.6 MITIGATION OF THE EFFECTS

During the interviews, participants referred to different means of mitigating the effects of lawsuits that were either relevant in their case or might be helpful in the future when dealing with SLAPPs in Slovenia.

In the environmental sphere, both Macerl and Weiss referred to the importance of media and public support, by spreading awareness and making SLAPP cases public, thus limiting the silencing effect.²⁶³ Additionally, Weiss emphasized the role of autonomous inspectorates, who will not surrender to political or economic pressures, and the role of lawyers, who will work with a ‘moral compass’ that is less influenced by capital.

Some participants spoke about the Legal Network for the Protection of Democracy (LNPD) as an organisation that has recognized the phenomenon in Slovenia and helped mitigate the effects of SLAPP lawsuits, as well as of other means of silencing. Macerl, for example, mentioned that when he attended one of Friday’s anti-government protests, where he was encouraging the public to attend the referendum against the government’s changes in the Water Law and got fined for doing so, LNPD helped him by assigning him to a law firm.²⁶⁴

To gain a better understanding of the Legal Network’s role in addressing the SLAPP phenomenon in Slovenia, an interview with two of its members, Anuška Podvršič and Jasna Zakonjšek, was conducted. Their role, as well as their thoughts on SLAPP effects in Slovenia, are presented in the upcoming section.

5.6.1 Legal Network for the Protection of Democracy

LNPD is a network of four non-governmental organisations that was established at the beginning of 2021 with the aim to protect the rule of law and human rights in times of the Covid-19 pandemic, especially since this period coincided with the formation of Janša’s government. With the use of legal means, they decided to help individuals whose human

²⁶³ Macerl (n 231); Weiss (n 241).

²⁶⁴ Macerl (n 231).

rights are violated, either by the state or some other powerful actors. Podvršič and Zakonjšek explained in the interview that by monitoring such violations they came across the phenomenon of SLAPP lawsuits. Later, they also partnered with the project PATFox, which is made up of NGOs from several European countries that aim to educate legal professionals and the general public on SLAPPs.²⁶⁵

The first case they encountered that appeared to be SLAPP was the one of Jenull, who was targeted with three lawsuits by the State. When asked, whether SLAPP lawsuits have influenced his activism, Jenull stated that they would have absolutely reduced his ability to engage as an activist if not for the assistance of the LNPD, which offered him free legal protection. He further explained that he authorized them to handle the lawsuits and fines, managing their substance and all the formalities around that.²⁶⁶

When discussing his case, Podvršič and Zakonjšek pointed out the time burden as a typical effect of the lawsuits, saying that Jenull was often running late with bringing them the necessary papers or had difficulty keeping track of the stage of the proceedings. Zakonjšek considers the time dimension as one of the biggest obstacles that SLAPP targets face, as they have to allocate time for meetings with the law firm, collection of the evidence and for attending the hearings: ‘It may sound trivial, but if you have 40 lawsuits, just going to the post office and keeping the records, if you picked up that mail and brought it to the lawyer... that is already a great time burden.’²⁶⁷

Considering that Jenull was targeted with lawsuits from Janša’s government, we also discussed the threat and effects of SLAPPs in relation to political dynamics in the country. Their views were similar to those of other participants, and they confirmed the findings of this study. They both agreed that today the threat is lower when it comes to State-led SLAPPs, as was in the case of Jenull. However, they believe that they are not limited to political motives – the state acting against an individual – but are in several cases related to economic interests, such as in the media and environmental sphere. ‘Just changing the government is certainly not going to solve the matter,’ said Zakonjšek, and emphasized the

²⁶⁵ Interview with Anuška Podvršič and Jasna Zakonjšek, Lawyers, Legal Network for the Protection of Democracy (29 May 2023).

²⁶⁶ Jenull (n 245).

²⁶⁷ Podvršič and Zakonjšek (n 265).

importance of continuing to raise awareness on SLAPPs, as they target not only an individual but also a broader community with their chilling effect.²⁶⁸

Furthermore, when discussing the definition of SLAPP and in which cases it can be applied, they said that in their understanding SLAPPs can appear in any form of legal measure with the goal of silencing the target, such as in the case of fines for anti-government protesters. However, they pointed out that identifying whether a case is a SLAPP or not, gives the target no legal advantage. They explained that even if a case is identified as a SLAPP, there are no legal tools available yet that could protect the target or, for example, shorten the proceedings based on this identification. In this context, they also reminded that the proposed EU Directive, which would provide legal tools, has a narrow understanding of SLAPPs, and that further issues will need to be addressed at the national level.²⁶⁹

5.6.2 Legislative reform: The proposed EU Directive and implementation at the national level

In Slovenia, the Ministry of Justice is responsible for the negotiations on the proposed EU anti-SLAPP Directive. Jurij Mesec, from the Ministry's Office for International Cooperation and International Legal Assistance, was interviewed for this thesis. Since the beginning of the anti-SLAPP initiative, he has been participating in the meetings of the European Council's working party on civil matters, thereby providing this thesis insight into their work. Moreover, he introduced Slovenia's plan for the implementation of the Directive.

He said that the negotiations between Member States on the proposal have progressed relatively quickly, thus it was clear that they all support the objective pursued by the Directive. However, throughout the negotiations the main issue was to find the right balance between two rights: while some countries were more in favour of protecting freedom of expression of journalists on one side, others expressed concern that the anti-SLAPP measures could threaten the other side, individuals' access to court.²⁷⁰ At the beginning of June 2023, the general approach to a draft was adopted, meaning that the EU Member States and the

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ Interview with Jurij Mesec, Secretary, Ministry's Office for International Cooperation and International Legal Assistance (27 June 2023).

Council have reached a common position on the anti-SLAPP Directive.²⁷¹ Referring to criticism from the civil society that the proposed measures are now not efficient enough, Mesec reminded that the Directive is not finalised yet and that the formal triilogue will follow, which could turn in a more positive direction, for better protection of journalists.²⁷²

Considering that the proposed measures would apply only in cross-border SLAPP cases, and with only one such recognized case according to the latest study Slovenia²⁷³, the question arises, how effective will be the safeguards, when implemented at the national level? Mesec said that, as the Ministry considers the proposed solutions too intrusive into the existing law (Civil Procedure Act), they are planning to draft a new law, which would extend the measures to all national cases rather than just to the cross-border ones.²⁷⁴

Another question that arises is, what will happen with the cases that are based on criminal laws, as the proposed Directive is only applicable in civil proceedings? To recall, the latest study on SLAPPs in Slovenian media showed that the majority of lawsuits were based on criminal law.²⁷⁵ Mesec said that regarding the criminal matters, it will be more complicated to find solutions within the new law as it is ‘difficult to include both criminal and civil proceedings in one law’. He did not want to further comment on this issue, since he is only responsible for the negotiations around the EU Directive and did not feel competent to comment on other possible solutions, such as the decriminalization of defamation laws.²⁷⁶

Regarding the mitigating effects at the national level, Mesec also pointed out the EC Recommendations on SLAPPs as an effective ‘soft-law’ measure. He elaborated that the Commission will monitor the implementation of recommendations very closely, also by making them part of their annual report on the rule of law. Among other things, the Recommendation calls for the States to raise awareness on SLAPPs and to establish one national focal point, which would provide information and support to SLAPP victims. Mesec said that until they find an NGO through a public call for tender, the Ministry of Justice will

²⁷¹ ‘Stronger Press Freedom and Free Speech Protection: Council Agrees Position on Anti-SLAPP Law’ (Council of the European Union, 9 June 2023) <www.consilium.europa.eu/en/press/press-releases/2023/06/09/stronger-press-freedom-and-free-speech-protection-council-agrees-position-on-anti-slapp-law/> accessed 30 June 2023.

²⁷² Mesec (n 270).

²⁷³ Škrinjar (n 211).

²⁷⁴ Mesec (n 270).

²⁷⁵ Škrinjar and Trček (n 210) 10.

²⁷⁶ Mesec (n 270).

be the focal point for that in Slovenia. He continued that the Ministry is also trying to find solutions regarding the systematic monitoring of SLAPP lawsuits. Since there is no official legal definition of SLAPP yet, the Ministry is unable to gather official data on how many SLAPP lawsuits are in Slovenia. He explained that, for now, they are relying on unofficial data from the studies, such as the one conducted by the Transparency International Slovenia and Oštro.²⁷⁷

In conclusion, preventive and mitigative measures for SLAPP lawsuits at the national level are under preparation, however, several questions remain open. Meseč expressed that he is rather optimistic since in his view the current government has a strong interest in comprehensively tackling this issue. After all, as this thesis has shown, SLAPP lawsuits affect different acts of public participation, from journalism to environmentalism and academia, on different legal grounds, and are being employed by various actors, including the state organs. To address all that, different legal measures are needed, as they seem to be the main solution to prevent the abuses of power – either by the capital or politics.

²⁷⁷ *ibid.*

6.

CONCLUSION

This thesis explored how and to what extent Strategic Lawsuits against Public Participation affect a democratic society. It aimed to present the threat they pose to European countries, as a relatively new phenomenon that has not been properly tackled yet. First, this was pursued by exploring the broad definition of SLAPP or, to be more precise, its definitional elements, which allowed further analysis of SLAPP's impact on democracy. Definitional elements exposed the power imbalances between the plaintiffs and defendants: powerful and wealthy people on one side, and public watchdogs with fewer resources to fight such legal battles, on the other side. Furthermore, they exposed the political and economic motives of the SLAPP initiators, which leads to the belief that their intent is not to prove legal breaches but rather to prevent the defendant from further public participation using legal actions. Based on that, the thesis explored how and to what extent is their intent effective and what this means for democracy. The analysis was supported by a single-country case study of Slovenia, which allowed a deeper understanding of the effects – on individuals, the broader community, and democracy.

Based on prior studies and reports, and media coverage of certain cases, the most common effects were overviewed in the thesis. Several public watchdogs have been reporting about the lengthy legal proceedings, causing them financial, psychological, and reputational harm. However, as this thesis has shown, these effects are relevant not only for SLAPP targets but go beyond an individual to a broader community, hence threatening its democratic society. By silencing a journalist, the public is deprived of information of public interest, such as corruption. By silencing an environmental activist, the public is deprived of information of public interest, such as the harmful projects that impact the environment and public health. By silencing any other critical voice, the broader community is deprived of public debate on matters of public concern, which is necessary for sustaining a democratic society.

To further argue and show how SLAPPs affect democracy, this thesis relied on the theory of liberal democracy, which requires respect for the rule of law, the protection of human

rights, and the civil and political liberties of all people. Therefore, by examining the specific freedoms and rights that are restricted due to SLAPP lawsuits, the thesis demonstrated the effects of SLAPPs on democracy. It examined the significance of freedom of expression, considering how SLAPPs often silence the media and other critical voices. Following that, it delved into the importance of freedom of assembly and association, as SLAPPs can discourage activism activities. It further analysed the significance of the right to a fair trial, specifically focusing on the principle of 'equality of arms', which is endangered due to the power imbalances between parties, given that the plaintiffs typically possess greater power and resources than the defendants. Lastly, it examined the potential threat of SLAPPs to the protection against the abuse of rights, which prohibits exploitation of rights, guaranteed under the human rights instruments, for undemocratic purposes. Freedoms and rights were examined along with the jurisprudence of the European Court of Human Rights to prove their significance, thereby highlighting their crucial role in safeguarding democracy.

Case study of Slovenia, a country previously recognized as being under the threat of SLAPP but maintaining a relatively high level of democracy, was applied to examine not only how SLAPPs affect democracy, but also what is the extent of their effects. First, the individual experiences of participants in the case study affirmed all aspects of the SLAPP effects both on targets and the broader community, such as the chilling effect in media. Then, the case study focused on the extent of the effects: both by analysing their extent in different spheres that SLAPPs are targeting, and by analysing the relationship between the country's state of democracy, recent political changes, and SLAPP cases.

First, the analysis indicated that the extent of the effects varies in different spheres of SLAPP targets; media, environmentalists, activists, academia and experts. Although similar effects have been observed in all spheres, there were some differences related to the silencing effect. For instance, environmentalists are often silenced with a legal threat only, and such cases do not even reach the public eye. This was also evident in the selection process of the participants, where SLAPP cases related to media, activism, and experts and academia, were easier to find, as they were presented in the media or targets themselves made them public. In contrast, SLAPP cases related to environmentalism were relatively more difficult to identify. Based on that, a recommendation for future research was made to explore the reaction and

resilience of different targets to SLAPP lawsuits, as this would provide an even deeper understanding of the SLAPP effects on democracy.

Second, the analysis showed that the extent of the effects is not exclusively related to the political climate in the country. Although certain SLAPP cases related to the state or politicians occurred under the right-wing government of Janez Janša, who is known for his illiberal and undemocratic practices, the threat in the country has not diminished due to a shift of government to a left-liberal one. The reason for that seems to be the variety of SLAPP initiators in Slovenia. Several public watchdogs, especially in the media, are targeted by powerful businessmen rather than by politicians or the State itself. Furthermore, this thesis showed that irrelevant of the government in power, politicians can initiate SLAPPs in their private capacities. In conclusion, SLAPP lawsuits pose a threat to democracy regardless of the political landscape, and the extent of their effects cannot be mitigated solely by political changes.

However, this thesis presented other potential solutions to mitigate the effects of SLAPP lawsuits. Participants have discussed different mitigation methods, such as the important role of media and public support in raising awareness about SLAPP cases, thus limiting their silencing effect. But more importantly, the need for legislation that will comprehensively tackle the SLAPP phenomenon was emphasized. Anti-SLAPP legislation is being discussed and in preparation both at the EU and national level, however, as the analysis has shown, certain questions about its effectiveness remain open. Hence, with SLAPPs and their harmful effects spreading across Europe, this thesis is echoing the CoE Commissioner for Human Rights' words that it truly is 'a high time to tackle this practice' and save democracy.²⁷⁸

²⁷⁸ Mijatović (n 1).

7.

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Interview with Jaša Jenull, Self-employed in culture and activist (16 May 2023)

Interview with Jurij Mesec, Secretary, Ministry's Office for International Cooperation and International Legal Assistance (27 June 2023)

Interview with Klara Škrinjar, Journalist, Oštro (2 June 2023)

Interview with Marko Milosavljević, Media expert and Professor, University of Ljubljana (21 May 2023)

Interview with Monika Weiss, Journalist, Mladina (26 May 2023)

Interview with Primož Cirman, Journalist, Investigative news outlet Necenzurirano (24 May 2023)

Interview with Špela Stare, Secretary general, Slovene Association of Journalists (30 May 2023)

Interview with Uroš Macerl, environmentalist and president of Eko Krog NGO (19 May 2023)

APPENDIX: INTERVIEW QUESTIONS

SLAPP VICTIMS

How did the SLAPP lawsuit affect you?

Did it affect your work or public participation in the time of legal proceedings or after?

To what extent do you think SLAPPs threaten democracy in Slovenia?

OTHER PARTICIPANTS WITH KNOWLEDGE OF THE SLAPP PHENOMENON IN SLOVENIA

How do SLAPP lawsuits affect public watchdogs²⁷⁹ in Slovenia?

Do they prevent them from continuing their work during or after the court proceedings?

To what extent do you think SLAPPs threaten democracy in Slovenia?

In the latest 2023 report from Freedom House Slovenia gained democratic scores due to the newly elected left-liberal government in 2022. In light of these improvements, has the threat of SLAPPs diminished in the last year?

MINISTRY OF JUSTICE

How are you currently dealing with the issue of SLAPP lawsuits?

Do you keep statistics on SLAPP lawsuits in Slovenia?

The proposed EU Directive tackles civil proceedings and cross-border SLAPP cases. According to the latest study on SLAPP lawsuits in Slovenia, conducted by the Transparency International Slovenia and Oštro, most of the lawsuits were based on criminal law, and only one case was of a cross-border nature. What will be the Ministry's approach regarding this?

²⁷⁹ Interview questions were tailored to each specific sphere, addressing the media, environmentalists, activists, and experts.