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SPECIAL COLLECTION OF THE CASE LAW ON FREEDOM OF EXPRESSION

# How are courts responding to SLAPPs? Analysis of selected court decisions from across the globe



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## Introduction

The increase of cases of strategic lawsuits against public participation (SLAPPs) is a growing concern for human rights bodies, the media, and civil society around the world. SLAPPs are a form of abusive litigation that intimidate and harass journalists, media outlets, protesters, or environmental and human rights defenders. These lawsuits are typically initiated by politicians, public officials, wealthy businesspeople, big companies, and public figures aiming to silence critical voices and stifle scrutiny and public debate. Rather than seeking to obtain a favourable decision and compensations, the aim of SLAPPs is to drain defendants in lengthy and expensive judicial processes. Those targeted by such costly legal proceedings are often ill-equipped to defend themselves and are targets of other forms of intimidation tactics. SLAPPs thus have a chilling effect on those critical of governments, public institutions, and other powerful actors.

Studies show that the increase and scale of SLAPPs is a global phenomenon. For instance, the report of the Business and Human Rights Resource Centre (BHRS), examining 355 SLAPP cases, found that 73% of cases were brought in countries in the Global South, including in Latin America (39%), Asia Pacific (25%), Europe and Central Asia (18%), Africa (8.5%) and North America (9%).<sup>1</sup> The danger of SLAPPs and their impact on journalists, human rights defenders, and the media have been also widely documented. ARTICLE 19's 2021 report on SLAPPs in 11 EU countries showed how SLAPPs are being initiated in nearly every country under the review and how they pose a threat not only to fundamental rights but also to media freedom and transparency.<sup>2</sup> In Latin America, a recent study about legal harassment against journalists and human rights defenders in Mexico and Colombia shows how SLAPPs happen in the context of numerous other attacks on journalists; in particular, physical violence against journalists and human rights defenders and broader discrediting campaigns.<sup>3</sup>

To respond to the dangers posed by SLAPPs, some states (in particular the USA and Canada) have adopted dedicated anti-SLAPP legislation. In general, anti-SLAPP statutes allow courts to assess if a claim is against activity in the public interest, examine if there is evidence of abuse of process, and review whether the case has sufficient merit – specifically if it has a realistic prospect of success. Anti-SLAPP statutes allow a motion to dismiss cases early on in public interest claims, which saves time and money, protects speech, and prevents a chilling effect on expression.

International and regional mechanisms are also starting to highlight the need to introduce stronger protection against SLAPPs in law and in practice. In 2020, the European Commission launched the Anti-SLAPP Initiative with the aim to adopt an anti-SLAPP directive.<sup>4</sup> The Council of Europe also put forward recommendations on the protection of journalists and other public watchdogs to the Member States in 2022.<sup>5</sup> The Special Rapporteurs on Freedom of Expression

1 Business and Human Rights Centre, [SLAPP but not silenced, Defending Human Rights in the face of legal risks](#), June 2021.

2 ARTICLE 19, [SLAPPs against journalists across Europe](#), Media Freedom Response, March 2022; and ARTICLE 19, American Bar Association and Independent Journalists' Association of Serbia (NUNS), [State of SLAPPs in Serbia, Country report](#), December 2021; and ARTICLE 19, [State of SLAPPs in Spain](#), country report, November 2021.

3 ARTICLE 19, FLIP and Justice for Journalists, [Laws to Silences, Judicial Harassment against the freedom of expression in Mexico and Colombia](#), 2021.

4 European Commission, [EU action against abusive litigation \(SLAPP\) targeting journalists and rights defenders](#).

5 The Council of Europe, [MSI-SLP Committee of Experts on Strategic Lawsuits against Public Participation](#).

of the Inter-American Commission on Human Rights has raised concerns about the impacts of SLAPPs in the region.<sup>6</sup>

In countries without specific legislative protection against SLAPPs, the courts can play a crucial role in ensuring that SLAPPs do not prevent the exercise of fundamental rights, do not limit the vital role of civil society and do not shrink civic space. This study examines some judicial responses to SLAPPs in a small sample of cases around the world. It looks into whether courts recognise the danger posed by SLAPPs and whether and how they assess SLAPP cases. While the research is not exhaustive and further in-depth research into individual jurisdictions is necessary, this study ascertains some basic trends from selected cases.

We hope that this analysis will demonstrate that although courts play a crucial role in rejecting SLAPPs, the gaps in legal protection against SLAPPs cannot be supplemented at the level of individual court decisions. It is clear that stronger protection against SLAPPs needs to be adopted on international, regional, and national levels. As such, we hope this study can contribute to global advocacy for the adoption of such protection.

The study is divided into three sections.

- First, we provide a brief overview of the concept of SLAPPs and why they are concerning from the perspective of freedom of expression and freedom of the media.
- Second, we try to deduct some key aspects of judicial responses to SLAPPs in jurisdictions without dedicated anti-SLAPP protection, determine whether these are adequate, and outline what underlying issues need to be addressed to eliminate the problem of SLAPPs.
- Finally, we offer a conclusion that provides some initial recommendations on how the good practices of courts and existing gaps should be addressed based on international freedom of expression standards.

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<sup>6</sup> See e.g. the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights, [Annual Report of the Inter-American Commission on Human Rights](#), 2021.

## SLAPPs under existing legal frameworks

There is no uniform definition of SLAPPs in national or international frameworks and different definitions are used in laws and advocacy.<sup>7</sup> In general, as noted earlier, SLAPPs are defined as abusive lawsuits pursued with the purpose of shutting down acts of public participation or the exercise of human rights. These legal actions are directed against individuals and organisations – including journalists, media outlets, whistle-blowers, activists, academics, and NGOs – that speak out on matters of public interest.<sup>8</sup>

Typically, SLAPPs are initiated under defamation laws, but studies show that they are also brought under privacy or data protection laws, public order laws (e.g. against protesters), or various criminal and anti-harassment provisions. Available evidence also shows that those initiating SLAPPs have a history of legal intimidation, use many of the same law firms to facilitate new lawsuits, and pursue a disproportionately large amount of compensation from the targets of SLAPPs.<sup>9</sup> This is similar in jurisdictions where abusive plaintiffs initiate both criminal and civil actions in parallel, as well as constitutional claims and administrative proceedings on the basis of damage to the “good name” and “honour” of individuals.<sup>10</sup>

### *Protection against SLAPPs in national laws*

The first protections against SLAPPs have been adopted in common law countries - USA, Australia and Canada.

At present, at least thirty US states have enacted protection against SLAPPs either in dedicated anti-SLAPP laws or in civil procedure statutes.<sup>11</sup> Although the determination of whether a case qualifies as a SLAPP, and the scope of its protection, varies significantly, these laws allow courts to dismiss SLAPP cases at the early stages of a civil proceeding and, in some cases, award costs and attorney fees to defendants.<sup>12</sup> For instance, California’s civil procedure rules recognise that participation in matters of public interest should not be chilled through abuse of the judicial process; they provide for special motions to dismiss cases that limit the exercise of constitutional rights or free speech in connection with a public issue or an issue of public interest.<sup>13</sup> By contrast, New York Civil Rights Law and Civil Procedure Law Rules allow only for the dismissal of SLAPPs

7 See e.g. Supreme Court of Canada, *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, Judgment 10 September 2020, the case summary of the decision by Global Freedom of Expression is available [here](#); American Civil Liberties Union of Ohio, *SLAPPED: A tool for activists. Part 1: What is a SLAPP suit?*; CASE, *Coalition Against Slapps in Europe*; or Business and Human Rights, *SLAPPs database*.

8 See e.g. the definition of SLAPPs by the UK Anti-SLAPP Coalition, in *On Countering Legal Intimidation and SLAPPs in the UK*, July 2021; G. W. Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 *Peace Environmental Law Review*. 3,1989, p. 6.; *Laws to Silence*, *op. cit.*, p. 7.

9 See e.g. University of Amsterdam/Greenpeace International, *SLAPP research: Provisional conclusions*, 2020; and Media Freedom Rapid Response, *SLAPPs against journalists across Europe*, March 2022.

10 *Laws to Silence*, *op.cit.*

11 See Public Participation Project, *State Anti-SLAPP score card*.

12 See S. Brown and M. Goldowitz, *The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA*, *Review of European Community & International Environmental Law* 3., 2010 19(1)); or *State Anti-SLAPP Scorecard*, *op.cit.*

13 *California Code of Civil Procedure, Part 2. Of Civil Actions*, Title 6. Of the Pleadings in Civil Actions, Chapter 2. Pleadings Demanding Relief, Article 1. 425.16. (a), (b) (1) and (e).



concerning “public petition-related activities.”<sup>14</sup>

**Australia** adopted limited protection against SLAPPs through the Public Participation Act in 2008 after the *Guns v Alexander Marr* case, brought against environmental groups in various regions of the country.<sup>15</sup> Responses were welcomed but the Australian Public Participation Act falls short of the protective approach against abusive litigation.<sup>16</sup> The Act puts emphasis on the “improper purpose” of the claimant’s suit, defined as a suit that aims to discourage public participation, divert the defendant’s resources, and punish the defendant’s public participation.<sup>17</sup>

In **Canada**, anti-SLAPP statutes were adopted in Ontario,<sup>18</sup> British Columbia<sup>19</sup> and Quebec<sup>20</sup> and are considered by many as models of strong protection against abusive litigation. In particular, the Ontario and Quebec laws have been promoted in civil law countries due to similar legal traditions.<sup>21</sup>

The key feature of anti-SLAPP laws is to a) *prevent* the chilling effect of SLAPPs on the protection of human rights, freedom of expression and participation in matters of public interest; b) allow *early dismissal* of these cases and c) provide the SLAPP targets with a *remedy* for costs accrued in legal proceedings.

### ***Protection against SLAPPs in international human rights standards***

Although the problem of SLAPPs has been increasingly recognised by international and regional human rights bodies, no specific/dedicated legal instrument has been adopted on the international level.

However, the UN, in the 2022 Resolution on the safety of journalists —adopted by consensus at the Human Rights Council on 6 October 2022—, introduced new commitments on SLAPPs. It expressed concern about the rise in the use of these lawsuits to exercise pressure, intimidate, or exhaust the resources and morale of journalists, then called on governments to “take measures to protect journalists and media workers from strategic lawsuits against public participation, where appropriate, including by adopting laws and policies that prevent and/or alleviate such cases and provide support to victims.”<sup>22</sup>

14 See New York Civil Rights Law, [Sections 70-a and 76-a, Actions involving public petition and participation; recovery of damages Reporters](#); see also Committee for Freedom of the Press, [Anti-SLAPP Legal Guide, New York](#).

15 Supreme Court of Victoria, *Gunns Limited & Ors v Alexander Marr & Ors*, 18 July 2005 [2005] VSC 251.

16 See e.g. European Parliament, [The Use of SLAPPs to Silence Journalists, NGOs, and Civil Society](#), Policy Department for Citizens’ Rights and Constitutional Affairs, June 2021, p. 17; M. Deturbide and E. J. Hughes, ‘Canada’ in Jan M Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar 2012) 132-136.

17 Australian Capital Territory, [Protection of Public Participation Act](#).

18 *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23, 2018 ONCA 685, 142 O.R. (3d) 161.

19 *Galloway v. A.B.*, 2019 BCCA 385, 30 B.C.L.R. (6th) 245.

20 *Klepper v. Lulham*, 2017 QCCA 2069 (CanLII).

21 *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society, op.cit.*, p. 17.

22 See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, [Reinforcing media freedom and the safety of journalists in the digital age](#), A/HRC/50/29, 20 April 2022; or the OSCE, Office of the Representative on Freedom of the Media, [Legal Harassment and Abuse of the Judicial System Against the Media](#), Special Report, November 2021.

The need to adopt protection against SLAPPs has been recognised in the reports of the special mandates – in particular, the special rapporteurs on freedom of peaceful assembly and extrajudicial, summary, or arbitrary execution;<sup>23</sup> the special rapporteur on freedom of expression, the OSCE representative on freedom of media, and the UN Working Group on Business and Human Rights.<sup>24</sup>

On a regional level, the European Parliament has called for specific anti-SLAPP legislation since 2018. In November 2021, the Parliament adopted an own-initiative report on SLAPPs that called on the European Commission to present a comprehensive package of measures against SLAPPs, including legislation.<sup>25</sup> Since 2020, the European Commission has been working on the EU directive on the topic, which is currently in the proposal stage.<sup>26</sup> In November 2021, the Council of Europe’s Committee of Ministers, made up of the foreign ministers of each of the member States, established a committee of experts on SLAPPs and tasked it with drafting a Recommendation on SLAPPs by the end of 2023.<sup>27</sup> No similar initiatives have been undertaken by other regional human rights bodies, such as those in the Inter-American system or in Africa.

Regional courts have also examined SLAPP cases, as explored later in this study. For example, the European Court did it for the first time in *Steel and Morris v United Kingdom* (2005).<sup>28</sup> Although the Court did not explicitly mention the concept of SLAPPs as such, it looked at the unfairness of the proceeding resulting from the denial of legal aid to applicants to protect their right to freedom of expression in a defamation case brought by a global corporation.<sup>29</sup> The next section examines the subsequent SLAPP cases on regional and national levels.

23 UN HRC, [Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary execution on the proper management of assemblies](#), UN Doc.A/HRC/31/66, 4 February 2016, para 84.

24 UN Working Group on Business and Human Rights, [Guidance on National Actions Plans on Business and Human Rights](#), 2016, p. 31.

25 European Parliament [resolution of 11 November 2021](#) on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society (2021/2036(INI)).

26 See [the 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”), April 2022.

27 [Committee of Experts on SLAPPs](#), set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2021)3 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

28 European Court, *Steel and Morris v. United Kingdom*, App. No. 68416/01, (2005).

29 *Ibid.*, paras 61, 63 and 67.

## Key findings from analysis of selected court decisions

This section examines how courts deal with SLAPP cases in the absence of specific legal protection against SLAPPs. The study is based on the analysis of 20 court decisions selected from the Global Freedom of Expression Database (GFoE).<sup>30</sup> Although it is impossible to deduct global trends from this small sample, the cases were selected to show responses from different jurisdictions and legal systems.

### *Courts are starting to explicitly recognise the concept and danger of SLAPPs*

In some cases reviewed for this study, the courts explicitly “qualified” cases as SLAPPs or made references to the concept of SLAPPs.

- In its November 2021 decision in *Palacio Urrutia and Others v. Ecuador*,<sup>31</sup> concerning criminal defamation charges brought by the then President of Ecuador against a national media outlet and journalists, the Inter-American Court of Human Rights for the first time in its history made a reference to the concept of SLAPPs. It recognised that the “recurrence of public officials resorting to judicial channels to file lawsuits for crimes of slander or insult, not with the objective of obtaining a rectification but to silence the criticisms made regarding their actions in the public sphere, constitutes a threat to freedom of expression”<sup>32</sup> and stated that “these types of proceedings, known as “SLAPP” (strategic lawsuit against public participation), constitute an abusive use of judicial mechanisms that deserve regulation and control by the States, in order to protect the effective exercise of freedom of expression.”<sup>33</sup>
- In the case of *OOO Memo v. Russia*,<sup>34</sup> concerning civil defamation proceedings brought by a public body against an online media outlet devoted to the political and human rights situation in southern Russia, the European Court of Human Rights referred to “the growing awareness of the risks that court proceedings instituted with a view to limiting public participation bring for democracy” and highlighted the report of the Council of Europe Commissioner for Human Rights “Time to take action against SLAPPs” of 27 October 2020.<sup>35</sup>
- In the Delhi High Court’s 2009 decision in *M/S. Crop Care Federation of India v. Rajasthan Patrika (PVT) LTD*<sup>36</sup> —a defamation lawsuit initiated against the newspaper and its editor by a group of businesses owners and shareholders of the pesticide industry—, it noted that the cases contained all the elements of a SLAPP. It stated that SLAPPs are lawsuits

30 In order to determine whether the case was a SLAPP case, we reviewed the type and profile of both plaintiffs and defendants and the power imbalance between them, legal grounds of claim, damages or sanctions sought and the context of the case.

31 Inter-American Court of Human Rights, *Palacio Urrutia v. Ecuador*, 24 November 2021. The case summary of the decision by Global Freedom of Expression is available [here](#).

32 *Ibid.*, para 95.

33 *Ibid.*

34 European Court of Human Rights (European Court), *OOO Memo v. Russia*, App. No. 2840/10, 15 March 2022.

35 *Ibid.*, para 43 in connection to para 23. The case summary of the decision by Global Freedom of Expression is available [here](#).

36 Delhi High Court, *M/S. Crop Care Federation of India v. Rajasthan Patrika (PVT) LTD*, 27 November 2009. The case summary of the decision by Global Freedom of Expression is available [here](#).

“intended to censor, intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.”<sup>37</sup> The Court opined that the plaintiff, by filing the case in a matter of public concern that needed debate, attempted to “stifle debate about the use of pesticides and insecticides.”<sup>38</sup> The Court noted that “whether such use, or overuse of pesticides over a period of time, affects life, plant or human, could be a matter of discourse, but certainly not one which could be stifled through intimidatory SLAPP litigation.”<sup>39</sup>

- In South Africa, the Western Cape High Court in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*,<sup>40</sup> concerning defamation suits initiated by mining companies against environmental lawyers and activities, defined the SLAPPs as “meritless or exaggerated lawsuits intended to intimidate civil society advocates, human rights defenders, journalists, academics and individuals as well as organisations acting in the public interest.”<sup>41</sup> The Court characterised SLAPP suits as those “disguised as an ordinary civil claim, designed to discourage others from speaking on issues of public importance and exploiting the inequality of finances and human resources available to large corporations compared to the targets. These lawsuits are notoriously, long drawn out, and extremely expensive legal battles, which consume vast amounts of time, energy, money, and resources.”<sup>42</sup> It added that SLAPP suits have the effect of weaponizing the legal system and shifting matters of public interest into technical legal disputes, and, because the plaintiffs often have significant financial advantages over the defendants and the damages sought are often exorbitant, they chill public debate by sending “a clear message to activists that there are unaffordable financial risks attached to public participation.”<sup>43</sup> The Court highlighted that the simple threat of having a SLAPP suit brought can “engender fear and intimidate the target.”<sup>44</sup>

The fact that courts are defining the cases as SLAPPs is important for setting up the framework for assessing the respective cases as a whole. The courts are recognising the SLAPP nature of the case as a key aspect of the matter. As such, the recognition of SLAPPs is an important step towards providing protection against them by courts.

### ***Courts are referring to anti-SLAPP protection in other jurisdictions***

When referring to the concept of SLAPPs, some court decisions referred to protection against SLAPPs in countries that have adopted specific anti-SLAPP legislation. For instance:

- In *Palacio Urrutia and Others v. Ecuador*, two judges of the Inter-American Court explic-

37 *Ibid.*, para 23.

38 *Ibid.*

39 *Ibid.*, para 23.

40 Western Cape High Court, *Mineral Sands Resources (Pty) Ltd v. Reddell; Mineral Commodities Limited v. Dlamini; Mineral Commodities Limited v. Clarke*, (7595/2017; 14658/2016; 12543/2016) [2021] ZAWCHC 22; [2021] 2 All SA 183 (WCC); 2021 (4) SA 268 (WCC) (9 February 2021). The case summary of the decision by Global Freedom of Expression is available [here](#).

41 *ibid.*, para 39.

42 *Ibid.*, para 40.

43 *Ibid.*, para 42.

44 *Ibid.*, para 43.

itly referred to the Ontario legislation as “a relevant example of the type of provisions that have been made to combat the SLAPP.”<sup>45</sup> They highlighted that “one of the purposes of the law is to discourage lawsuits that seek to limit freedom of expression in matters of public interest, and thus reduce the risk of participation in such matters. To achieve this, said law establishes mechanisms that allow a judge to dismiss this type of lawsuit when it is noticed that it refers to a matter of public interest, except in the exceptions that the norm itself provides. These exceptions refer, *inter alia*, to cases where the judge finds that the damage suffered by the plaintiff could exceed the public interest of the expression that generated it.”<sup>46</sup>

- Similarly, the Delhi High Court in *M/S. Crop Care Federation of India v. Rajasthan Patrika (PVT) LTD* cited the work of the University of Denver (US) professors Penelope Canan and George W. Pring on SLAPPs,<sup>47</sup> as well as US case law concerning the importance of discussions on matters of public interest in a democracy.<sup>48</sup>
- The Western Cape High Court, South Africa, in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*, highlighted the protection against SLAPPs in the legislation of the US states, certain provinces in Canada, and territories in Australia;<sup>49</sup> and also referred to the important decision in a SLAPP case by the Supreme Court of Canada in *Ontario Ltd. v. Pointes Protection Association* (2020).<sup>50</sup>
- Similarly, the Constitutional Court of South Africa, in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*,<sup>51</sup> concerning the appeal of the mining companies against the decision of the Western Cape High Court, relied on the definition and features of SLAPPs developed by the Supreme Court of Canada in *Ontario Ltd. v. Pointes Protection Association*.<sup>52</sup>

These examples show that the courts are studying comparative standards and using legislation and case law from other jurisdictions in their decisions. It is also evidence that positive jurisprudence and legislation from one country can serve as an important inspiration for legal protection elsewhere.

### ***Courts are highlighting the need to adopt legislative protection against SLAPPs***

In many countries, SLAPPs are enabled by problematic legislation that does not meet international freedom of expression standards, namely criminal defamation laws, vague and overbroad

45 *Palacio Urrutia and Others v. Ecuador*, *op. cit.*, Concurring opinion of the Judges Eduardo Ferrer Mac-Gregor Poisot and Ricardo C. Perez Manrique, para 15.

46 *Ibid.*

47 *M/S. Crop Care Federation of India*, *op.cit.*, para 24.

48 *Ibid.*, para 23.

49 Western Cape High Court *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*, *op.cit.*, para 44.

50 *Ibid.*, paras 52, 56 and 57.

51 Constitutional Court of South Africa, *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*, Case CCT 66/21, ZACC 37, 14 November 2022. The case summary of the decision by Global Freedom of Expression is available [here](#).

52 *Ibid.*, para 94.

civil defamation laws, slander and insult legislation, and public order laws. Importantly, in several cases under review, courts examined the legislation under which the SLAPP cases were initiated and noted that such legislation had to be amended. For instance:

- In *Palacio Urrutia v. Ecuador*, the Inter-American Court ordered to a) decriminalise criminal prohibitions of slander and insult against public officials under which SLAPP cases are initiated and b) establish alternative channels for the protection of the honour of public officials, including rectification and response, as well as civil law.<sup>53</sup> The Inter-American Court highlighted that the use of criminal law to stifle criticism of public officials “would directly or indirectly constitute intimidation which, ultimately, would limit freedom of expression and would impede public scrutiny of unlawful conduct, such as acts of corruption, abuse of authority, etc.”<sup>54</sup> It reiterated that “criminal prosecution is the most restrictive measure to freedom of expression, therefore its use in a democratic society must be exceptional and reserved for those eventualities in which it is strictly necessary to protect the fundamental legal interests from attacks that damage or endanger them, since to do otherwise would mean an abusive exercise of the punitive power of the State.”<sup>55</sup> Importantly, the Court’s order to adopt legislative measures to fulfil the State’s obligation to *prevent* lawsuits brought by public officials aiming to silence criticism is set under a *non-repetition* approach, a system used by the Inter-American Court to ensure the problem is tackled through comprehensive legislative measures.<sup>56</sup>
- Similarly, the European Court in *OOO Memo v. Russia* referred to the recommendation of the PACE Committee to Russia “to reform its defamation legislation to rescind additional defamation protection for public officials” and “to introduce a clear ban on public bodies to institute civil proceedings in order to protect their reputation.”<sup>57</sup> The European Court also stressed that the protection of legal entities exercising public powers is not a legitimate aim for restricting freedom of expression under Article 10 para 2 of the European Convention of Human Rights.<sup>58</sup> This means that civil defamation legislation should not protect public bodies exercising executive powers.
- The Western Cape High Court in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* noted that the interests of justice should not be compromised due to a lacuna or the lack of a legislative framework, as this could be exploited by corporates.<sup>59</sup> It highlighted that this exploitation has a draining effect on the public purse and participation, and is caused by a process that renders civil society vulnerable when corporates pursue legal challenges and raise legal defences. It then stated that the legislature should be left with the choice as to whether a SLAPP defence should be introduced into South African Law

53 *Ibid.* paras 96 in connection with para 103.

54 *Ibid.*, para 118.

55 *Ibid.*, para 117.

56 *Ibid.*, para 182.

57 *OOO Memo v. Russia, op. cit.*, para 22.

58 *Ibid.*, paras 47 and 49.

59 Western Cape High Court *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others, op.cit.*, para 65.

through special legislation to counter the prevalence of SLAPP suit litigation, as has been done in other jurisdictions.<sup>60</sup>

The courts recognise that the legislation under which SLAPPs cases are brought is problematic and enables abuse, especially in cases against public officials and public figures. Regional courts are directly or implicitly asking states to reform such legislation and bring it to compliance with international human rights standards. This has implications for the prevention of SLAPPs at the national level.

### ***Courts are relying on existing abuse of process provisions when dismissing SLAPP cases***

Even when the legal framework does not provide specific protection against SLAPPs, there might be other procedural remedies that allow for the dismissal of cases, such as “abuse of process” provisions or provisions prohibiting vexatious litigation. Some courts are accepting requests of defendants to dismiss such cases under these provisions, albeit in an inconsistent manner. When doing so, some courts might examine the motivation or conduct of the plaintiffs in bringing the case, while other courts look beyond motivation and consider whether the case has a reasonable chance to succeed. For instance:

- The motivation of the plaintiff was considered by the High Court of Delhi in [\*M/S. Crop Care Federation of India v. Rajasthan Patrika \(PVT\) LTD.\*](#) The Court considered that the plaintiff’s *attempt* was plainly to stifle public debate about the use of pesticides and insecticides.<sup>61</sup> The Court examined the case under Order 7 Rule 11 (which enables the court to summarily reject a suit at the very beginning, without proceeding to record the evidence or conduct a trial). The Court referred to the Indian Supreme Court decision that found that under these provisions, “if on a meaningful-not formal-reading of the plaint it is manifestly found to be vexatious and meritless, in the sense of not disclosing a right to sue, the judge should exercise his power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled.”<sup>62</sup> After considering the complaint as a whole and qualifying it as a SLAPP, the Court determined that the defendants were able to establish that the plaintiff did not disclose any triable cause of action on defamation.<sup>63</sup> The Court thus dismissed the case.
- The motivation of the plaintiff was also relied on under the abuse of process defence by the Western Cape High Court in [\*Mineral Sands Resources \(Pty\) Ltd and Others v Reddell and Others.\*](#) The Court first referred to the abuse of process doctrine from the common law and highlighted that “[i]t appears that the defamation suit is not genuine and bona fide, but merely a pretext with the only purpose to silence its opponents and critics. Litigation that is not aimed at vindicating legitimate rights, but is part of a broad and purposeful strategy to intimidate, distract and silence public criticism, constitutes improper use of the judicial

60 *Ibid.*, para. 21.

61 *M/S. Crop Care Federation of India v. Rajasthan Patrika (PVT) LTD, op.cit.*, paras 18 & 23.

62 *Ibid.*, para 20.

63 *Ibid.*, para 26.

process and is vexatious.”<sup>64</sup> The Court further considered the conduct of the plaintiffs in offering to make an apology as an alternative to the exorbitant damages pursued<sup>65</sup> and concluded that the vertical and unequal power relationship between the parties was glaringly obvious.<sup>66</sup>

In order to conclude that the abuse of process threshold was met, the Court adopted two important criteria from the [Supreme Court of Canada](#). First, it examined whether the tests of improper purpose were met; namely, that i) the defendant engaged in public participation on a public issue, ii) the plaintiff is pursuing an improper purpose, and iii) the lawsuit is *meritless*.<sup>67</sup> Second, the Court stated that it should not hear a SLAPP suit “unless the plaintiff can pass a rigorous test to show that it suffered real harm that outweighs the public interest in the expression of those views.”<sup>68</sup> Finally, the Court recognized the right to participate in environmental activism and the importance of protecting freedom of expression on matters of public interest.<sup>69</sup>

- The Constitutional Court of South Africa, when examining the appeal of the plaintiff in [Mineral Sands Resources \(Pty\) Ltd and Others v Reddell and Others](#), also considered the abuse of the process provisions in the case, albeit on a slightly different basis. The Constitutional Court accepted that both the motive of the plaintiff and the merit of the case were important. After adopting its own definition of “abusive litigation”, it established the following criteria for assessment. “The defendants will have to prove at trial that the defamation suit brought by the plaintiffs: (a) is an abuse of process of court; (b) is not brought to vindicate a right; (c) amounts to the use of court process to achieve an improper end and to use litigation to cause the defendant’s financial and/or other prejudice in order to silence them; and (d) violates, or is likely to violate, the right to freedom of expression entrenched in section 16 of the Constitution in a material way.”<sup>70</sup>
- In [Koko v. Tanton](#),<sup>71</sup> a case concerning a defamation application brought by a chief official in an electricity company against a 72-year pre-school principal, the Johannesburg High Court in South Africa relied on abuse of process provisions to dismiss the case. The Court found that Koko’s application constituted an abuse of the process<sup>72</sup> and that his conduct was vexatious.<sup>73</sup> The Court concluded that the conduct of the claimant (electricity company executive) was to punish the defendant and to prevent others from making public comments on matters of public importance.<sup>74</sup> As such, the conduct of the plaintiff “was not aimed at the reparation of his rights, constitutional or otherwise, and the restoration of his

64 *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*, *op. cit.*, para 66.

65 *Ibid.*, para 62.

66 *Ibid.*, paras 60 and 62.

67 *Ibid.*, para 45.

68 *Ibid.*, para 56.

69 *Ibid.*, para 56.

70 Constitutional Court of South Africa, *op. cit.*, paras 95 & 96.

71 High Court of South Africa, Gauteng Local Division, Johannesburg, [Koko v. Tanton](#), Case no. 2021/2012, 7 September 2021. The case summary of the decision by Global Freedom of Expression is available [here](#).

72 *Ibid.*, para 40.

73 *Ibid.*, para 48.

74 *Ibid.*, para 39.



reputation or to assuage his injured feelings.”<sup>75</sup> Instead, the plaintiff “wished to punish the respondent but also that he saw the opportunity to institute proceedings against the respondent [...] to teach others that the ‘time for impunity is gone’ and in so doing prevent public comment on his conduct and/or matters of public importance in which he may have been directly or indirectly involved.”<sup>76</sup> The Court also considered the nature of remedies sought, namely the request for an apology and a retraction.<sup>77</sup>

- The motive of plaintiffs was relied on in awarding damages in *Bombay in NSE v. Moneywise Media Private Limited*,<sup>78</sup> concerning an application for an interim injunction on a defamation action filed by one of the premier stock exchanges in India (NSE) against an online newspaper. The High Court declined the application<sup>79</sup> and awarded costs recognising that the application for injunction was an abuse of process brought in *mala fide*.<sup>80</sup> The Court imposed awards as a disciplinary measure to ensure Courts are not used “as playgrounds for imagined and imaginary slights for those who command considerable resources”.<sup>81</sup> The judge highlighted that there was no *prima facie* claim in the application, neither a question of balance of convenience or any sort of prejudice caused to the plaintiffs if the injunction was declined.<sup>82</sup>
- The rules on *abuse of the law* were used to qualify SLAPPs as a form of “judicial harassment” against freedom of expression in *Ciro Guerra Picón v. Catalina Ruiz-Navarro & Matilde de los Milagros Londoño*.<sup>83</sup> The case concerned a constitutional action (*amparo*) initiated by a famous movie director against two feminist journalists. The journalists published accusations of eight victims of sexual harassment and violence against this movie director. The Court denied constitutional protection of the claimant’s good name, honour, and presumption of innocence<sup>84</sup> after assessing whether the case constituted judicial harassment. The Court reached this conclusion by applying the following criteria: (i) the claimant makes use of the *right to litigate* with the purpose of silencing expression, especially when it concerns a public interest matter; (ii) the person has good economic resources that allow him/her to pay legal services and cover the costs of access to justice; (iii) there is a power imbalance between the parties; (iv) the claimant formulates disproportionate or impossible claims to be satisfied by the defendant, especially, millionaire compensations; (v) the action is filed seeking to generate a silencing effect or chilling effect.<sup>85</sup> The Court found *inter alia* power imbalance and the use of multiple legal avenues to claim damages

75 *Ibid.*

76 *Ibid.*, para 39.

77 *Ibid.*, paras 40 and 49.

78 The High Court of Judicature at Bombay, *National Stock Exchange of India Limited v. Moneywise Media Private Limited & Others*, Notice of Motion no. 1220 of 2015, Suit no. 627 of 2015, 9 September 2015. The case summary of the decision by Global Freedom of Expression is available [here](#).

79 *Ibid.*, para 27.

80 *Ibid.*, para 28 and 29.

81 *Ibid.*

82 *Ibid.*, para 27.

83 Constitutional Court of Colombia, *Ciro Guerra Picón v. Catalina Ruiz-Navarro & Matilde de los Milagros Londoño*, Sentence T-452/22, 12 December 2022. The case summary of the decision by Global Freedom of Expression is available [here](#).

84 *Ibid.*, para 431 in connection with paras 427-430.

85 *Ibid.*, para 426 in relation with 305 & 306.

impossible to pay by the defendants. Further, it stated that the request of ordering the journalist to refrain from mentioning him in future publications shows a pattern of abuse that translates into prior censorship of public interest discourse.<sup>86</sup>

The Court explicitly recognised the importance of victims of sexual violence exercising their right to freedom of expression to denounce this problem.<sup>87</sup> The victims did not pursue criminal complaints to report sexual abuse and violence due to insufficient judicial guarantees that protect the rights of women.

These cases show that defendants are increasingly using existing rules on abuse of process to get SLAPP cases dismissed. They also show that focusing on the motivation and conduct of the plaintiff alone may be insufficient to dismiss SLAPP cases. Moreover, while explicit rules on abuse of process may not exist in many jurisdictions, these cases demonstrate that defendants and courts could rely on existing procedural rules that allow dismissals of cases early on, as well as provisions on *abuse of law*, *mala fide* and baseless claims.

### ***Courts are considering whether defendants are targeted for expressions about matters of public interest***

In some SLAPP cases, courts have examined whether defendants' expressions concerned a matter of public interest and thus were in need of a high level of protection. For instance:

- In *Tata Sons Ltd. v. Greenpeace (India)*,<sup>88</sup> concerning the request for an interim injunction on the basis of unauthorised trademark use and loss of reputation by one of the biggest Indian companies against Greenpeace India, the High Court of Delhi refused to grant the injunction. It stated that granting the injunction would not be in the public interest<sup>89</sup> as it “would freeze the entire public debate on the effect of the port project on the Olive Ridley turtles” habitat.”<sup>90</sup> The Court also emphasised the importance of protecting speech that can include forms such as “caricature, lampoon, mime, parody and other manifestations of wit.”<sup>91</sup>
- Similarly, the High Court of Belgrade in *Popović v. KRIK and Dojčinović*, concerning a defamation suit brought by a member of the Serbian Government against an online investigative media outlet, regarded the public interest of the information as a determining aspect in dismissing the claim. The Court first looked at the effect of the articles noting that they contributed to a public interest debate. Second, it assessed the position of the plaintiff – a public figure – who had to tolerate a higher level of criticism than ordinary citizens.<sup>92</sup> Sub-

86 *Ibid.*, paras 427-429.

87 *Ibid.*, para 429.

88 The High Court of Delhi, *Tata Sons Limited v. Greenpeace International & ANR*, IA No.9089/2010 in CS(OS) 1407/2010, 28 January 2011. The case summary of the decision by Global Freedom of Expression is available [here](#).

89 *Ibid.*, para 43.

90 *Ibid.*

91 *Ibid.*

92 Higher Court in Belgrade, *Popović v. KRIK and Dojčinović*, 3 June 2019, para 18. The case summary of the decision by Global Freedom of Expression is available [here](#).

sequently, the Court ordered the plaintiff to pay the legal costs of legal representation to the defendants.

- Assessing the public interest of the defendant’s expression targeted by the SLAPP action was a key aspect in the Court’s deliberations in *Palacio Urrutia v. Ecuador*. The Inter-American Court relied on a three-part test to determine that “there [was] no doubt that it referred to a matter of public interest that was protected by the right to freedom of expression.”<sup>93</sup> It stated that these criteria encompass “(a) a subjective element, that is, that the person is a public official or the complaint made by public media; (b) a functional element, that is, that the person has acted as an official in the related events, and (c) a material element, that is, that the subject matter is of public relevance.”<sup>94</sup> The Court concluded that since an opinion article referred to a matter of public interest, it enjoyed special protection in view of the importance that this type of speech has in a democratic society.<sup>95</sup>

Similarly, the Supreme Court of Justice of Mexico in *Sergio Aguayo v Moreira*,<sup>96</sup> concerning a defamation lawsuit instituted by the former Governor of Coahuila against a journalist, considered “the public significance of the information [published by the journalist] and the possibility that its dissemination encourages citizen participation in society.”<sup>97</sup> The Court examined whether the facts under which the defendant built his opinion were of public interest and in doing so, listed some examples of what kind of information represents the public interest. In particular, it highlighted the “functions of the State, the impact on general rights or interests, the important consequences for society, the political discourse or if it contributes to or enriches the public debate, among others.”<sup>98</sup> The Supreme Court also stated that cases of *public relevance* require higher thresholds for the protection of the reputation of public officials. These cases occur when i) the alleged party affected in his/her honor is a public figure, as well as when ii) the information disclosed relates to matters of public interest.<sup>99</sup> It then held that when freedom of speech is exercised by journalists, it reaches the maximum level of protection given the key role of the press in democratic societies.<sup>100</sup>

- The Civil Court of Appeals of Argentina in *Cristina Fernández v. Eduardo Feinman*,<sup>101</sup> concerning a defamation suit filed by the former President of Argentina against a TV commentator, concluded that the journalist’s words were protected under the right to freedom of expression because they were related to a public interest investigation

93 *Ibid.*

94 Inter-American Court of Human Rights, *op. cit.*, para 113.

95 *Ibid.*, para 115.

96 Supreme Court of Justice of Mexico, *Direct Amparo no. 30/2020*, First Chamber, 15 March 2022. The case summary of the decision by Global Freedom of Expression is available [here](#).

97 *Ibid.*, para 89.

98 *Ibid.*, para. 99.

99 *Ibid.*, para 98.

100 *Ibid.*, para 102.

101 The Civil Court of Appeals of Argentina, *E. C. E. C/ F. E. G. S/ DAÑOS Y PERJUICIOS*, File N° 88115/2016, 29 April 2022, The case summary of the decision by Global Freedom of Expression is available [here](#).

against the politician. The Court found that the journalist did not intentionally harm the president and thus safeguarded his remarks. The Court noted that the plaintiff was one of the most prominent public figures in the country, so the comments related to her investigation were a matter of public interest.<sup>102</sup> Importantly, the Court referred to the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights and argued that in cases regarding public officials, the latter should be more tolerant and open to criticism because of the public nature of their duties.<sup>103</sup>

- The Supreme Court of Italy also accepted the public interest defence in the criminal defamation case of *Concita Di Gregorio and Claudia Fusani v Maria Mangano*.<sup>104</sup> The case concerned an article written by journalist Claudia Fusani, and published by the newspaper l'Unità, which reported that Maria Mangano was under investigation for alleged connections with an organized crime group in Southern Italy involved in human trafficking. Both l'Unità and its editor have been repeatedly the target of SLAPPs, always aiming at pecuniary compensation worth millions of euros. The lower courts rejected “the right to inform defence” put forward by the journalist and found her guilty of criminal defamation. The Supreme Court reversed these decisions and found that the journalists correctly exercised their right to report and criticise given the circumstances of the case.<sup>105</sup>
- The Constitutional Court of Colombia heavily relied on what constitutes “*specially protected speech*”, under the Colombian Constitution, to assess the public interest of the information in *Ciro Guerra Picón v. Catalina Ruiz-Navarro & Matilde de los Milagros Londoño*. The Court reiterated that, in line with previous judgements, both feminist discourse in general, and speech that involves specific reports about sexual harassment, abuse and violence in particular, enjoy special protection under the Constitution. In this case, the feminist journalistic article concerned allegations of sexual abuse and violence against the claimant. Thus, the Court concluded that the matter concerned political and public interest issues. This type of speech is specially protected by the Constitution. The Court added that they are particularly needed to confront discrimination against women and gender-based violence in society.<sup>106</sup> The Constitutional Court concluded that the intention of the publication was to contribute to the public debate about violence against women,<sup>107</sup> a matter of public concern.

By contrast, there are Courts that fail to consider the protection of information on public interest matters in SLAPP cases before them, especially in cases concerning the reputation of public officials and figures. For instance,

102 *Ibid.*, Consideration no. IV.

103 *Ibid.*

104 Court of Cassation, *Concita di Gregorio & Claudia Fusani against criminal sentence Sez. 5 Num. 15587*, 23 January 2017. The case summary of the decision by Global Freedom of Expression is available [here](#).

105 *Ibid.*, p. 2 and 4.

106 Constitutional Court of Colombia, *op. cit.*, paras 355 & 324.

107 *Ibid.*, para 374.

- In *Judge Svetlin Mihailov v. Mediapool and Boris Mitov*,<sup>108</sup> a defamation claim brought by a judge against an online media outlet, the Sofia City Court of Bulgaria determined that all expressions made in the articles were humiliating to the honor and dignity of the judge. In reaching this conclusion, the Court dismissed the defendant's arguments that the articles (concerning elections and candidates running for office) accurately discussed issues in the public interest. Although the Court recognised that the plaintiff was a public figure and enjoyed a lower level of protection of his privacy, it concluded that the reporting was "insulting" and put considerable weight on the "emotional damage" of the plaintiff.<sup>109</sup>
- Similarly, in *Cesar Acuña v. Christopher Acosta*,<sup>110</sup> regarding an aggravated defamation lawsuit filed by the leader of a political party against a journalist and the publishing company of his book, the Supreme Court of Justice of Peru sentenced a journalist to two years in prison despite recognising the public significance of the publication. The Supreme Court stated that the judgement did not seek to restrict or silence the journalistic investigation of a public interest matter but to *only* analyze the statements in the book and examine whether they respected the "right to honor" of the plaintiff.<sup>111</sup> The Court referred to the difference between *animus difamandi* and *animus informandi*, where the former means the intention to defame and the latter the intention to inform on a matter of public interest.<sup>112</sup> However, the Court only examined the *animus difamandi* aspect; that is, it only looked at whether the statement showed an intention to defame. It did not consider whether the information concerned a matter of public interest.<sup>113</sup>
- The explicit public interest exception in defamation law was also disregarded in *Gašić v. KRIK, Dojčinović and Vojinović*,<sup>114</sup> about a claim of reputational damage brought by the Director of the Security Information Agency in Serbia against an online investigative media outlet. The High Court of Belgrade did note the existence of Article 79 of the Public Information and Media Law which stipulates that honor and reputation are protected unless the public interest in publishing the information outweighs the protection of dignity and authenticity.<sup>115</sup> However, the Court ruled in favour of the plaintiff and awarded pecuniary damages by focusing on a) the title of the article as the damaging factor, and b) the mental distress caused by the publication.<sup>116</sup> The article concerned the trial against well-known Serbian

108 The Sofia City Court, *Judge Svetlin Mihailov v. Mediapool and Boris Mitov*, 21 December 2021. The case summary of the decision by Global Freedom of Expression is available [here](#).

109 *Ibid.*

110 The Supreme Court of Justice of Lima, *Cesar Acuña v. Christopher Acosta & Jerónimo Pimentel*, Thirteenth Criminal Court, exp. No. 03622-2021-0-1801-JR-PE-30, 10 January 2022. The case summary of the decision by Global Freedom of Expression is available [here](#).

111 *Ibid.*, para 4.11.

112 *Ibid.*, para 4.3.

113 *Ibid.*, "Ruling" section.

114 High Court of Belgrade, *Gašić v. KRIK*, Reference No. 25 P3 L97l2L, 4 October 2022. The case summary of the decision by Global Freedom of Expression is available [here](#).

115 *Ibid.*, p. 9.

116 *Ibid.*, p.11 & 12

‘gansters’, wherein a recording mentioned the plaintiff and indicated his involvement in the criminal group’s payroll. Although the Court recognised the plaintiff was a public figure, it failed to consider that public figures should have a higher level of tolerance towards criticism on matters of public interest.

These cases demonstrate that the courts are considering the nature of the activities of the defendants targeted through the SLAPP cases and are developing tests to assess what constitutes public interest. They also show that courts have disregarded the relevance and importance of information on matters of public interest based on disproportionate thresholds of protection of reputation. As it was shown, defamation laws enable SLAPPs that increase the likelihood of obtaining negative decisions against the protection of the right to freedom of expression.

### ***Protection for SLAPPs is offered by the courts of the highest level***

From the cases reviewed for this study, it is clear that protection from SLAPPs has been offered at the highest level of judicial protection, that is, at the level of constitutional or supreme courts or at the level of regional courts.

- For example, it took almost 6 years of litigation for a journalist targeted by a SLAPP suit in [Sergio Aguayo v Moreira](#) to get a final favorable decision from the Supreme Court of Justice of Mexico.<sup>117</sup> The proceedings were initiated a few months after publication in June 2016; the plaintiff sought *inter alia* approx. 500,000 USD in damages. While in March 2019 a first instance court ruled in favour of the journalist - after close to three years of litigation-, the plaintiff appealed the decision and in October 2019 the appeals court sentenced the journalists to pay the requested damages. The defendant had no option but to file a constitutional protection proceeding against the ruling. It took another two and half years, until March 2022, when the Supreme Court issued the final decision in the case. However, the proceeding before the Supreme Court did not serve as a deterrent. The plaintiff filed a second civil proceeding against the journalist in February 2022.<sup>118</sup>
- In [OOO Memo v Russia](#), concerning the protection of business reputation of an executive body, the Administration of the Volgograd Region, protection was only awarded at the level of the European Court after 14 years of legal proceedings. The Administration of the Volgograd Region filed a civil lawsuit in October 2008, three months after the publication made by the online media outlet. In April and July of 2009 respectively, both the District Court and the Court of Appeal held that the dissemination of the statements tarnished the business reputation of the executive body.<sup>119</sup> It was ten years later that the

117 Supreme Court of Justice of Mexico, *op. cit.*, ps. 2-12. See also ARTICLE 19, [Superior Tribunal of Mexico City rules against Sergio Aguayo and sets a dreadful precedent against the exercise of freedom of expression](#), 15 October 2019.

118 See ARTICLE 19, [Former Governor Humberto Moreira files a proceeding against journalist and academic Sergio Aguayo for a second occasion](#), February 2022.

119 [OOO Memo v Russia](#), *op. cit.*, para 13.

European Court had the opportunity to review the case and found a violation of Article 10 of the European Convention.<sup>120</sup>

- In *Concita Di Gregorio and Claudia Fusani v Maria Mangano*, it took more than six years of litigation for the editor of L'Unita, Concita Di Gregorio, to be acquitted of a criminal defamation SLAPP suit. The proceedings started in 2010 and the decision of the Supreme Court of Italy, recognising the correct exercise of the right to inform and criticise on judicial matters of public concern, was issued only in January 2017. This decision was preceded by the June 2015 ruling of the Court of Appeal of Catania which upheld a negative decision against the defendants, issued by a first instance court in 2012.<sup>121</sup> This case is particularly emblematic because in addition to this SLAPP suit, Di Gregorio faced fifty-three judicial proceedings for defamation between 2011 to 2018, a judicial, professional and personal burden that puts at risk the sustainability of this type of media. Lawsuits initiated against Di Gregorio were mainly lodged by right wing politicians as well as media and communication companies (e.g., MEDIASET, Silvio Berlusconi's media and communication company, and the second biggest television broadcaster after Radiotelevisione Italiana (RAI)).<sup>122</sup>

### ***Courts are/are not granting costs of litigation to victims of SLAPPs***

Courts' orders to pay litigation costs to victims of SLAPPs are inconsistent across jurisdictions. Some courts are granting costs once they recognise the claim as a SLAPP or issue decisions in favour of SLAPPs' victims:

- Litigation costs were granted to the defendants in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* and *Koko v Tanton*. In the former, the Constitutional Court of South Africa ordered those who initiated SLAPPs to pay 60% of the respondents' costs in the Constitutional Court's proceeding, including the costs of two counsels.<sup>123</sup> It determined that defendants deserved a reimbursement of a part of their costs as their success in securing the dismissal of the SLAPP case was substantial.<sup>124</sup> However, the Court decided that each party should pay its own costs in relation to the proceeding before the Western Cape the High Court as each party succeeded in their claims and exceptions.<sup>125</sup>

The Johannesburg High Court in South Africa took a different approach in *Koko v Tanton*. First, it ordered the plaintiff (who initiated the SLAPP case) to pay the costs of the defendant as the case lacked merits.<sup>126</sup> The Court relied on Rule 6(15) of the Uniform Rules of Court which allows courts to order the payment of costs when "an application order to be

120 *Ibid.*, para 50.

121 Court of Cassation, *op. cit.*, ps 1-3.

122 See summary of the [case](#) of Global Freedom of Expression database, Columbia University

123 Constitutional Court of South Africa, *op. cit.*, p. 2.

124 *Ibid.*, para 102.

125 *Ibid.*

126 High Court of South Africa, Gauteng Local Division, Johannesburg, *op. cit.*, para 21 in connection with 19 & 20.

struck out from any affidavit is scandalous, vexatious or irrelevant.”<sup>127</sup> Second, the defendant (the target of the SLAPP case) also requested the payment of punitive damages, which were subsequently granted by the High Court<sup>128</sup> alongside the attorney costs.<sup>129</sup> The Court made these conclusions on several basis: a) the plaintiff elected the incorrect proceeding to pursue relief,<sup>130</sup> b) the defendant had to launch a substantial defence against these proceedings and request the actual hearing<sup>131</sup> and c) the proceedings against the defendant were of a punitive nature.<sup>132</sup>

- By contrast, the High Court of Delhi did not grant payment of costs to SLAPP victims in *Tata Sons Ltd. v. Greenpeace (India)*. Although the Court did not grant an interim injunction to restrain the publication of material contributing to public debate —because it would be too onerous on the defendant to either stop publication of the material or an unjust restriction on the freedom of expression<sup>133</sup>— it failed to assess the need to provide pecuniary relief on the basis of unsubstantiated claims seeking to restrict the dissemination of information contributing to debate on matters of public concern.

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127 Southern African Legal Information Institute (SAFLII), Uniform Rules - Rules regulating the conduct of the proceedings of the Provincial and Local Divisions of the High Court of South Africa, p. 24.

128 High Court of South Africa, *op. cit.*, para 25.

129 *Ibid.*, para 49.2.

130 *Ibid.*, para 43.

131 *Ibid.*, para 32.

132 *Ibid.*, para 44.

133 The High Court of Delhi, *op. cit.*, paras 29 & 31.



## Conclusions

This study shows that in the examined cases many courts have provided protection against SLAPPs despite lacking special anti-SLAPP legislation, albeit in different ways and with varied implications. Several courts recognised that SLAPPs pose a threat to freedom of expression and media freedom. Some courts explicitly refer to definitions of SLAPPs in other jurisdictions, correctly apply international freedom of expression standards, and even apply available procedural protection that exists in national law in SLAPP cases (e.g. the abuse of process provisions).

However, all the cases reviewed in this study come from the case law collection of Columbia Global Freedom of Expression. It must be noted that most of these decisions come from high, supreme, or constitutional courts; as such most of them are actually examples of “positive” jurisprudence where courts set an important precedent on the matter, which is why they were included in the database. Also, most of these positive examples are recent, hence, it was not possible to establish how and to what extent will these decisions influence over subsequent judicial practices in the relevant jurisdictions, e.g., if lower courts will take the possibly precedential standard of the higher courts’ decisions into consideration in their later judgements.

In any case, all the decisions here studied show that when actual protection against SLAPPs was provided, it came mostly at the level of the highest courts. Thus, it came after the defendants in SLAPPs invested financial and other resources (time, energy, and psychological) to get the cases dismissed, typically after years of litigation. This is exactly the purpose and dangers of SLAPPs —drawing journalists, media outlets, or activists into years of legal proceedings and creating significant financial jeopardy through legal costs.

The cases reviewed for this paper, as well as the experiences documented in numerous reports on SLAPPs, show that legislative reform is needed to ensure that SLAPPs can be disposed of at a much earlier stage, establish a high threshold for public interest reporting; that defense costs are kept to a minimum, and that deterrents against the use of SLAPPs are created. Therefore, states should adopt comprehensive anti-SLAPP legislation on a domestic level. This should include, at minimum, the possibility to dismiss claims at the early stages of the proceeding and order payment of costs to defendants. In particular, this should include the payments of costs of attorneys and trial fees on behalf of the defendants.

At the same time, the study shows that underlying domestic legislations, under which many SLAPP cases are brought, need to be reformed. States must ensure that all legislations restricting freedom of expression meet international freedom of expression standards. Since various criminal defamation, insult, and slander provisions are used against media outlets, journalists, and activists, their decriminalisation should be a priority. All criminal defamation laws – including insult, libel, or slander – should be abolished without delay, even if they are seldom or never applied. They should be replaced, where necessary, with appropriate civil defamation laws.

This paper also shows that lower courts are not properly applying international freedom of expression standards in their cases, especially if they consider public figures. Hence, training should be provided to judges at all relevant courts to aid them in recognising SLAPPs and on applying relevant international and regional human rights standards.

At the same time, international and regional human rights bodies can provide stronger guidance and standards in this area. As a starting point, human rights bodies should provide guidance on how states can fulfil their duty to prevent the abuse of judicial proceedings to interfere with the exercise of the right to freedom of expression and participation on public interest matters. This can come in various forms, e.g. through thematic reports, resolutions, and guidelines, made by special rapporteurs of international and regional human rights bodies (especially in the Inter-American and African human rights systems) or collections on best practices for the judiciary.

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