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Strategic Lawsuit Against Public Participation

A comparative study between the U.S. and Europe

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ABSTRACT

Strategic Lawsuits Against Public Participation is an increasing trend in today's society. This form of malicious lawsuit is carried out by powerful stakeholders against individuals, mainly investigative journalists, to silence and censor criticism. The cover up of these relevant public matters leads to the progressive deterioration of freedom of expression, freedom of press, and democracy. In this context, Europe, unlike the US, has disregarded this phenomenon. Hence, leaving SLAPPed victims unprotected. This essay aims to give light to this problematic in the European context, analyzing both the concept and root causes of the region's indifference towards SLAPPs, thus being able to offer appropriate solutions to tackle this worrying problem soon.

Key words: SLAPP, investigative journalism, freedom of expression, freedom of press, democracy.

RESUMEN

Las demandas estratégicas contra la participación pública, conocidas como SLAPP por sus siglas en inglés, son una tendencia creciente en la sociedad actual. Esta nueva forma de demanda maliciosa es llevada a cabo por poderosos grupos de interés contra individuos, principalmente periodistas de investigación, con el fin de silenciar y censurar las críticas. Este encubrimiento de asuntos públicos de gran relevancia conlleva un progresivo deterioro de la libertad de expresión y la libertad de prensa , así como la democracia. Europa, a diferencia de Estados Unidos, ha hecho caso omiso de este fenómeno, dejando desprotegidas a las víctimas de SLAPP. Este ensayo pretende arrojar luz sobre esta problemática en el contexto europeo, analizando tanto el concepto como las causas que explican la indiferencia de la región hacia las SLAPP, pudiendo así ofrecer soluciones adecuadas para atajar este preocupante fenómeno.

Palabras clave: SLAPP, periodismo de investigación, libertad de expresión, libertad de prensa, democracia.

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INTRODUCTION

Strategic Lawsuits Against Public Participation, also known as SLAPPs, are a concerning phenomenon targeting todays legal landscape all around the globe. SLAPPs can be understood as meritless lawsuits launched by powerful and private actors against individuals who can damage their interests. It is an increasingly common resource used to intimidate, silence, censor and harass critics and opponents.

The most vulnerable victims to this kind of strategy are investigative journalists, Human Rights defenders, academics, activists and communities affected by development project. Nonetheless, due to todays globalized Internet era, SLAPPs can affect anyone anywhere who expresses a critical view in a certain issue.

The relevance of this phenomenon lies in the type of speech being suppressed, as SLAPPs target matters of public or social concern. Thus, undermining freedom of expression, freedom of press as well as democratic quality.

SLAPPs have been vastly debated in the US political arena since the late 70s. Hence, raising awareness, promoting legislative reforms and judicial sensibilization towards the issue. On the contrary, this vexatious form of lawsuits has been overlooked by European stakeholders, leaving SLAPP victims in a critical and vulnerable position.

The reasons for this disparate reality vary – from sociological and historical arguments, to cultural and legal grounds. Arguably, a key differential factor might be the uneven protection that both regions grant to the right to honor and freedom of speech and press. While Europe tends to focus on the former, the US is a staunch advocate of the latter.

Europe's indifference has led to many SLAPP victims to endure financial and emotional distress while being forced to respond to multiple lawsuits in foreign plaintiff-friendly jurisdictions.

In the light of the foregoing, it is of upmost importance to correctly identify the root causes of Europe's detachment to enable an appropriate and coherent solution to be given with regards to the SLAPP challenge.

STATE OF THE ART

SLAPPs – Strategic Lawsuits Against Public Participation – is a fairly recent phenomenon that has been receiving academic attention since the decade of the late 1980s due to the boost of these kind of suits in the United States[1]. The term was first coined by two American professors, Pring and Canan, at the University of Denver. These two academics published in the year 1966 the book *SLAPPs: Getting Sued for Speaking Out* (Pring & Canan, 1996). They differentiated SLAPPs from other forms of lawsuits by placing their focus on the attack that such legal tools could and where having on the public participation.

This proposition was deeply connected with the generalized American vision that speech should be protected at all costs when the purpose of such speech is to publicly engage with the political elites[2]. In this respect, Pring and Canan elaborated four preconditions that a regular lawsuit had to meet in order to fall into the category of a SLAPP (Pring & Canan, 1996). These four requisites were the following. Firstly, the speech had to influence either a government action or outcome (Pring & Canan, 1996). Secondly, the lawsuit should be a direct consequence of such speech (Pring & Canan, 1996). Thirdly, the claim should be filed against an individual or organization that has no political involvement with the government (Pring & Canan, 1996). And lastly, the content of such speech has to be of a transcendent social or public nature (Pring & Canan, 1996).

In line with this approach, SLAPPs entail the employment of litigation in order to disrupt political statements, shifting the civic speech from the political arena to the legal one, as the latter is more advantageous for this regard (Vick & Campbell, 2001).

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[1] In order to view the first debate regarding SLAPPs please see the "*Fall Colloquium on Strategic Lawsuits Against Public Participation – Protecting property or Intimidating Citizens*" that took place at the Pace University School of Law Center Environmental Legal Studies in the year 1989.

[2] In this regard, the first Amendment of the United States Constitution clearly states that citizens ought to have their freedom of speech and press protected. Nonetheless, Pring and Canan traced a growing tendency of large multinationals entering into costly litigations against individuals or organizations that were carrying out activities or investigations contrary to these corporations' interests. Hence, limiting and constraining the exercise of these basic constitutional rights.

This first attempt to define and describe what can be understood as SLAPP can help us distinguish SLAPP suits from other forms of attacks to public speech. However, the definition given by Pring and Canan is intensely entrenched to the American Constitution and its attempt to protect public participation in the political arena. Hence, this particular protection to the freedom of speech lacks in many other jurisdictions (Abrams, 2017)[3].

Further academic input to the discussion of SLAPPs can be found outside the American context, with the contributions of three Canadian professors when they elaborated a report on such matter to the Ministry of Justice of their country (Macdonald, Noreau, & Jutras, 2007). These scholars defined a SLAPP as a legal procedure brought against an individual or organization that has engaged with the general public in issues of great social relevance with the sole purpose of cutting down their freedom of expressions (Macdonald, Noreau, & Jutras, 2007). Hence, these lawsuits aim to browbeat, exhaust and disincentivize the defendants from continuing with such behavior.

This academic proposition brings a key element to the concept of SLAPP: the ultimate reason behind the SLAPP lawsuit, namely, to intimidate and deter the defendant. Hence, it places the focus of the definition in the intention of the plaintiff with regards to the lawsuit rather than in the protection of the free speech.

Recent research has also referred to SLAPP as an endeavor to use meritless legal claims to silence critics (Costantini & Nash, 1991) when the content of such critics is related to a social issue of significant relevance (Shapiro, 2010).

This new form of lawsuit as well as initiatives promoting anti-SLAPP legislation have been gaining visibility and relevance not only in the US, but also in countries like Canada (Lott, 2004), Australia (Anthony, 2009) or South Africa (Marcus & Budlender, 2008), mainly because an increasing number of environmental activists have been the target of

[3] For more information regarding the special protection of the US Constitution towards free speech please see the conference of the 1st of June of 2017 that Floyd Abrams gave at the Carnegie Council of Ethics in International Affairs. Mr. Floyd is a renowned defender of freedom of speech as well as a prestigious lawyer known for conducting the legal advocacy of numerous means of communications in First Amendment cases.

such form of legal action. Nonetheless, little to no academic research regarding SLAPP has been carried out in Europe[4], a region that for the time being has failed to recognize the existence and threat of these new form of legal mechanism (Shapiro, 2010).

In the European context, while the number of SLAPP cases is growing exponentially over recent years, little to no research is to be found on academic papers or political agendas of European member states (Donson, 2000). And scant debate has been given to a potential anti-SLAPP legislation. This situation has led to several European non-governmental organizations to carry out a proposal for the implementation of an EU anti-SLAPP law (Ravo, Bord-Barthet, & Kramer, 2020). This proposition calls on politicians and legislators to protect public wardens such as journalists, activists, NGOs or Human Rights defenders from this new art of suit.

QUESTIONS AND OBJECTIVES

First and foremost, this paper will aim to analyze *what* constitutes a SLAPP, *who* are the main actors involved and *why* is this new legal form of lawsuit so relevant in Europe.

Once the questions of *what, who* and *why* are answered, the study will move forward to explaining the concrete ways on *how* SLAPPs are deteriorating the democratic environment within the European context.

Furthermore, the essay will try to illustrate why jurisdictions such as the US or Canada are well aware of the existence of strategic lawsuits and its potential negative effects, while European countries lack such research. This has led to the implementation in former countries of anti-SLAPP legislation, leaving Europe behind. No special protection is given to individuals and organizations in the latter, and this paper will try to explain why.

[4] For further discussion on SLAPPs in Europe, please see Christopher J. Hilson (2015). Environmental SLAPPs in the UK: threat or opportunity?, *Environmental Politics*, 25:2, 248-267, DOI: 10.1080/09644016.2015.1105176 and Bard, Petra & Bayer, Judit & Lluk, Ngo & Vosyliute, Lina (2020). Ad-Hoc Request: SLAPP in the EU context.

This last objective is of extreme importance, because, once we know the factors that explain the indifference of European policy makers towards this issue, it will be easier to suggest potential solutions to tackle the SLAPP issue.

In this vein, as a last objective, this research aims discuss what measures are required for an effective anti-SLAPP strategy in the European context.

HYPOTHESIS

The hypothesis of the present essay is as follows: Europe has less consideration towards SLAPP due to the different levels of protection of Europe when compared to the US regarding public participation and the protection of freedom of speech.

METHODOLOGY

Throughout this essay, the comparative method will be applied so as to find answers to the above-mentioned objectives. In this vein, a comparison between the United States and Europe will be carried out, analyzing therefore socio-historical, legal and jurisprudential differences between both regions.

1. CONCEPTUALIZATION OF SLAPP IN THE EUROPEAN CONTEXT

1.1. Introduction: SLAPP as an increasing phenomenon

All around the globe, dominant and well-heeled actors (mainly multinationals) are increasingly deploying laws to their advantage in order to overawe and suppress journalists and activists that investigate, discover and publish ugly truths and misconducts carried out by such organizations (Ciampi, 2017). However, such misbehaviors are of huge interest to the general public and require to be broadcasted, since many bring to light fraud scandals, shameful working conditions or flagrant environmental-related issues among others.

This worldwide growing phenomenon is hitting the European region as well, generating a negative impact in both our media and the quality of our democratic system. In this regard, cases of legal intimidation by the implementation of SLAPPs can be seen on a more frequent basis throughout the continent. In this light, a research carried out by The Foreign Policy Centre[5] showed that almost 75% of European investigative journalists have been legally notified in the wake of the materials they were publishing, and almost three quarters of these notifications came from powerful and influential enterprises (Coughtrie & Ogier, 2020).

In this vein, the case of Maltese investigative journalist Daphne Caruana is a paradigmatic example of what a strategic lawsuit implies and how it has been implemented in Europe (Allaby, 2019). This Maltese reporter had open over forty libel cases against her due to the publications she had been carrying out linking several Maltese politicians, businessmen and the Malta Pilatus Bank to corruption, racketeering and organized crime. Not only was she sued, but she also had her assets frozen as a "precautionary measure". She was then murdered by a car bomb in October of 2017.

Although most SLAPP cases are not of the same gravity as the one explained above, they are usually still serious and severe enough to be taken into account. Such episodes take

[5] The Foreign Policy Center is a British Think Tank that is involved in the spreading of accurate information and data, with a special focus on European affairs, that is elaborated by activists, academics and experts on the field. Thus, this institution works for the advancement of democracy, good governance and Human Rights.

place all around Europe, regardless of whether it is in a wealthy country like France[6] or Germany, a Mediterranean country like Spain[7], an eastern country like Poland[8] or a common law system like the United Kingdom.

Now that it has become clear that SLAPPs are an undeniable reality in the European arena, it is time to define and explain what this legal mechanism entails.

A Strategic Lawsuit Against Public Participation entails the initiation of a meritless lawsuit (Anthony, 2009) by a power subject that aims to silence and disincentivize the party being sued from further investigating or publishing a matter of public concern or social importance (Business & Human Rights Resource Centre, 2017)[9].

This mechanism can target broad forms of communications as well as a wide range of topics. In this regard, environmental issues have been the most affected field, or at least where more academics have placed their focus (Wilts, Brandes, & Roganchevsky, 2002), but by no means can be a SLAPP limited to this specific subject.

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[6] The construction company VINCI filed a defamation suit against the NGO Sherpa as well as against its employees, after Sherpa exposed Human Right violations (mainly forced labor) perpetrated by VINCI's subsidiary in Qatar. For more information see full article in https://www.business-humanrights.org/en/latest-news/vinci-entirely-refutes-sherpas-allegations-and-decides-to-file-a-lawsuit-for-defamation/

[7] In year 2020, environmental activist Manuel García was sued by the Spanish meat company COREN for exposing the mediocre waste management of the firm. The company demanded one million euros in damages. Full article available in https://europeanjournalists.org/blog/2020/11/19/slapps-eu-should-protect-journalists-against-vexatious-lawsuits/

[8] Polish Clothing Enterprise LLP suits two polish journalists for publishing a headline in the newspaper on how the Company had been sending protective masks to China, depriving Polish citizens of accessing to one. Full article available in https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-3&p_p_col_count=7&_sojdashboard_WAR_coesojportlet_alertPK=74637949

[9] The Business & Human Rights Resource Centre is a non-profit American organization working towards the improvement of Human Rights. Thus, by amplifying the voices of the vulnerable and human rights advocates worldwide as well as by elaborating and publishing reports on areas of particular interest, including SLAPPs. Thereby, making this organization a pioneer in the subject.

The particular scenario where this sort of lawsuit may be found usually entails the fulfillment of three different phases (Pring & Canan, 1996). The first stage involves a certain individual getting involved in a matter of public concern. On the practical front, this individual[10] will in the majority of cases be a journalist (Verza, SLAPPs' 5 W's: a background of the Strategic Lawsuits Against Public Participation, 2018), which is why the present study will primarily focus on such professionals. However, other actors may be affected by SLAPPs as well, such as local communities, trade unionists, lawyers, activists, academics, civil society organizations or whistle-blowers among others (Cramon-Taubadel, Casa, & Kouloglou, 2020). The number of potential targets is constantly growing due to the digitalization of democratic participation (Holt, 2019), thereby extending to ordinary citizens.

Subsequently, this interest leads the party to investigate on the specific issue and spread the information gathered. Such disclosure will directly or potentially affect the image and reputation of a powerful stakeholder. The actor who files the suit, also known as the *SLAPPer*, is commonly either a multinational company, a high-profile entrepreneur or a public authority (Verza, European Centre For Press & Media Freedom, n.d.). As a result, we enter a second phase, where the affected party, discontented with the citizen's action, will proceed to file a suit against the latter.

Hence, converting a matter of civic concern into a lawsuit of private nature (Ciampi, 2017). By doing so, the aggrieved actor manages to relocate the attention from the public sphere into the private one. Once the litigation starts, a final phase comes into play, where the citizen or entity will have his right to freedom of expression undermined and jeopardized.

1.2. Characteristics of a SLAPP: what makes this lawsuit unique

For a better understanding of what constitutes a SLAPP, it is required to analyze the specific features that make this form of legal action unique and different to any other.

[10] For further information on how SLAPP might affect each of these actors in a particular manner, please go to https://anti-slapp.org/slapp-stories

Therefore, the following section aims to explore the different elements that ought to be found in a SLAPP.

First and foremost, a SLAPP constitutes an attack to freedom of speech and, in many instances, freedom of press. Thus, SLAPPs are commonly designed to shut down democratic free speech and protest (Hilson, 2016), posing a threat to the development of social movements (Wells, 1998). In this vein, as Judge Colabella of the New York Supreme Court rightly mentioned, SLAPP suits are filed to "stop citizens from exercising their political rights or to punish them for having done so" (Matter of Gordon v. Marrone).

Secondly, it is relevant to note that this kind of lawsuit lacks legal merit (Mhainín, 2020) since the primary intention of the plaintiff is not to win the case[11], but rather to burden the defendants in lengthy and costly legal processes by means of procedural maneuvers and operations (Bárd, Bayer, Luk, & Vosyliute, 2020). According to a report carried out by the United Nations Special Rapporteur Ms. Annalisa Ciampi on the rights to freedom of peaceful assembly and of association, the plaintiff implements a wide variety of tricks used to prolong the judicial procedure which included motions, injunctions and other costly disclosure processes (Ciampi, 2017).

In this sense, the complaining party tends to abuse of both substantive and procedural rules to protract the trial for the maximum amount of time in order to make it as cumbersome as possible for the defendant. The typical tools to materialize these baseless claims are civil and criminal defamation (including libel cases) as well as liability cases (Merriam & Benson, 1993). In fact, plaintiffs initiate several lawsuits at once in an effort to overflow the counterpart in expensive litigation. All this, together with an unreasonable claim for damages[12].

[11] According to the academic research carried out by scholars Dwight Merriam and Jeffrey Benson, less than twenty percent of the suits filed by SLAPP plaintiffs prevail in court once the facts of the case are submitted and explained in front of a tribunal (Merriam & Benson, 1993). However, plaintiffs win the case after approximately three years of litigation. Therefore, plaintiff's underlying motives of overshadowing, depleting and silencing the speaker do prevail in many instances.

[12] A clear illustration of how exaggerated damages claims can be is to be found in the case of Bollore Group against France 2 TV Channel. On the 22nd of July of year 2016, the company Bollore seeked compensation for damages up to 50 million Euros for the broad of an interview carried out by the French news channel.

In many jurisdictions, including Malta, a single person can file several suits based on one sole statement (University of Amsterdam, n.d.). This is possible by dividing the text into different sentences, each of one can be the base for a potential libel action. This scenario simplifies the harassment of critics and explains why Maltese journalist Daphne Caruana Galizia could receive almost 20 lawsuits by one sole businessman in year 2017.

Therefore, the problem of these lawsuits is not the decision of the judge on the matter (as stated previously, defendants usually win the case and no damages are granted), but rather the wastefulness of time, resources and energy required during the process. As it will be later explained, this has an intimidating effect on the defendant, who on many occasions will not continue the research, but also a dissuading effect on other speakers due to the fear of a potential lawsuit against them.

Furthermore, these controversies are characterized by an imbalance of power between the parties (Reyes, 2020). In this vein, the role of plaintiff is more often than not played by large companies[13] or powerful people[14] that have both the knowledge and resources to silence the critics of citizens. Thus, escaping public scrutiny (Borg-Barthet, The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform, 2020). By contrast, the defendants' role is often assumed by freelance journalists or small independent media organizations (Demarco, 2020). This disparity of resources is exacerbated when SLAPPers file individual lawsuits,

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In such interview, a Cameroonian employer of the company affirmed to be working under miserable labor conditions. Bollore Group argued that such interview was false and also damaging the company's image.

[13] The most paradigmatic case is McDonald's Corporation v. Steel & Morris of year 1007, also known as the McLibel Case. Although this matter will be further analyzed in the future, it perfectly portrays the unequal and unfair balance of powers between plaintiff and defendant, for two regular activists had to face the giant company, who spent over 100 million pounds in order to win the litigation.

[14] The former president of the United States, Donald Trump, filed a multi-billion lawsuit against the writer Timothy O'Brien arguing he was defamed by the writer in his last book. This is a clear example of a famous and well-resourced businessperson who aims to shut down critics with unfounded threats to financially ruin an individual.

even if the speaker is working for a media business[15]. This strategy aims to isolate and alienate the defendant, disengaging him or her from their organization (Demarco, 2020). Placing the defendant in such a negatively unbalanced playing field, the procedure might in many instances compromise the fairness of the trial, which constitutes a right recognized under Article 6 of the European Convention on Human Rights (Council of Europe, 1952).

The imbalance of power and resources is exacerbated by a common practice in SLAPP cases, the so-called forum shopping[16] or libel tourism[17] (Reyes, 2020). Claimants select a certain jurisdiction for a variety of reasons, mainly because the chosen forum has either procedural rules, substantive laws or a practice that is "plaintiff-friendly" with regards to libel cases (Prévost, 2019).

An alarming example of libel tourism can be found in the aforementioned case of Daphne Caruana Galizia, where Pilatus Bank was able to circumvent Malta's jurisdiction (where damages would reach a maximum of 11,640 Euros), filing the lawsuit in Arizona's Tribunals instead (where the demand ascended to 40 million Dollars). Hence, lacking a real connection between the legal issue and the jurisdiction, since both the bank and the journalist were Maltese.

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[15] For instance, Carole Cadwalladr, a well-known British journalist, was sued by entrepreneur Arron Banks based on her comments and observations made in her personal Twitter account as well as in several television shows. Meanwhile, Arron Banks refrained from suing her directly for the work she carried out as a journalist in the newspaper *The Observer*. This approach contributed to her isolation from the newspaper, who is not covering the legal costs of her defense.

[16] This concept refers to the legal practice of choosing the court that will treat the plaintiff's claims most positively, which can only happen when different states have jurisdiction over a certain matter. While the ordinary chose of forum is perfectly legal, the problem arises when the jurisdiction selected has an insufficient connection with the subject matter of the controversy. In parallel, this practice has been criticized on the pretext that a plaintiff can determine the outcome of a legal controversy solely by wisely choosing the forum in which to file the lawsuit (Rosenbaum, 2011).

[17] When forum shopping takes place in a defamation case, it can be labelled as libel tourism, a concept credited to British media lawyer Geoffrey Robertson in year 2010. Although these two terms have subtle differences, for the purpose of this essay both concepts will be used indistinctly. Hence, in accordance with the approach taken by the Committee of Ministers of the Council of Europe (Council of Europe, 2016).

Although forum shopping is a technique that has been long used, there appears to be a new tendency towards its implementation in defamation cases (Fitzsimmons, 2006). This trend has appeared, among other reasons, due to the Internet and online communication era (Rosenbaum, 2011), which allows information to be published anywhere around the globe at any wanted time. These publications have nowadays the potential to reach millions of people in several states, making it easier for a claimant to file, for one single statement, the same label suit in multiple jurisdictions.

1.2.1. The phenomenon of forum shopping in the European Union

Due to the complexity of forum shopping in the European continent and its relevance in SLAPP litigations, a separated in-depth discussion of this phenomenon is required.

Private international law in the European Union, that is issues related to cross-border procedures, is regulated in two main legal provisions: Regulation Nº 1215/2012 (also known as Brussels I Regulation recast) and Regulation Nº 864/2007 (also referred to as Rome II Regulation). This set of rules might affect and facilitate forum shopping in two different ways: through direct international jurisdiction rules and through recognition and enforcement regulations (Bárd, Bayer, Luk, & Vosyliute, 2020). Since the former have greater impact on SLAPP cases (Bárd, Bayer, Luk, & Vosyliute, 2020), for the purposes of this essay the following segment will only focus on such norms.

In this regard, direct international jurisdiction rules determine which Court within the different Member States is allowed to hear of a certain issue (Lenhoff, 1964). In order to give jurisdiction to one tribunal and not another, EU norms look to a variety of connecting factors (Szászy, 1966). Hence, under EU rules, generally speaking, a claimant can file a lawsuit either in the courts of the Member State where the wrong allegedly occurred (*lex loci delicti*) or in the courts of the Member State of the defendant's domicile or habitual residence (*lex domicilii*) (McLaughlin, 1991).

Nonetheless, the European Court of Justice has broadened this approach for media-related controversies, more so in online defamation cases (Prévost, 2019). In this sense, the

European Court of Justice (ECJ) established in the Fiona Shevill case[18] of year 1995 that a plaintiff could also choose to file a suit in the courts of the state where the allegedly defamatory statement was published, or in any other jurisdiction where the claimant suffered the injury to his reputation (Shevill and other v. Presse Alliance S. A). This doctrine is now known under the name of the "mosaic approach" (Lutzi, 2017). In 2011, the Court further developed this approach, in light of the eDate case (eDate Advertising BmbH and Others v. X and Societé MGN LIMITED), in connection with the Robert Martinez case (Robert Martinez v. MGN Limited) extending it to online defamation as well (Bárd, Bayer, Luk, & Vosyliute, 2020). In this controversy, the Court conferred jurisdiction to tribunals in Member States where the plaintiff had its center of interests. Thus, further increasing the options of claimants seeking to sue.

Interestingly, the enhancement of claimant's forum options in the European context is a consequence of the judicial activity, as such broad interpretation is nowhere to be found in EU laws (Prévost, 2019). In fact, article 16 of Brussels I Regulation recast establishes that close connection is needed, particularly in personality rights cases such as defamation, when filing a suit in the Court of an EU country (Dickinson, Lein, & James, 2015). Thus, for the sake of legal certainty.

This context is adversely affected by the absence of a shared conflict law regulation in libel cases. While an attempt was made to achieve a clear choice-of-law standard trough Rome II, the European Commission ended up eliminating defamation provisions from the legal text (Commission of the European Communities, 2006)[19].

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[18] In this case, a French newspaper was sued in the UK despite the small number of copies that were distributed in the country (less than 300 hundred). The ECJ affirmed that Shevill's selection of forum was according to law and repudiated the concept of "most significant connection".

[19] The European Commission expressed that:

"Amendment 57 [The place-of-publication rule] would change the substance of the rule applicable to violations of privacy, particularly by the press. The Commission cannot accept this amendment, which is too generous to press editors rather than the victim of alleged defamation in the press and does not reflect the solution taken by a large majority of Member States. Since it is not possible to reconcile the Council's text and the text adopted by Parliament at first reading, the Commission considers that the best solution to this controversial question is to exclude all press offences and the like from the proposal and delete Article 6 of the original proposal".

In this vein, recommendations[20] have been made to limit the scope of the Mosaic doctrine, alleging that it hinders the principles of predictability and good administration of justice (Bárd, Bayer, Luk, & Vosyliute, 2020). To this effect, due to the plaintiff's range of forums to file a lawsuit, defendants have to endure greater levels of uncertainty and, in many cases, larger economic legal costs as well (as SLAPPers often seek to maximize the financial burden on defendants). However, the European Court of Justice does not appear to be willing to reconduct its Mosaic doctrine since it has rejected limited interpretations of this approach on several occasions (Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB).

1.3. Relevance of SLAPPs: what is at stake?

It is at this point of the analysis, after having explained what can be regarded as a SLAPP and what its main characteristics are, when it come necessary to elaborate on the potential effects that this legal tool is developing in our society. Thus, in order to acquire a better understanding on the relevance of SLAPPs, especially in the European context.

In general terms, SLAPPs cause a severe *chilling effect*[21] on public participation[22], affecting both defendants and the general audience. In this regard, the defendant has to deal with different obstacles.

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[20] Advocate General of the Court of Justice Michael Bobek has recommended the court to limit the plaintiff's forum choice to two options (Bárd, Bayer, Luk, & Vosyliute, 2020). Furthermore, the Council of Europe recommended the recognition of jurisdiction only when strong connection between the dispute and the jurisdiction takes place (Prévost, 2019). Lastly, several prestigious NGO's have urged for the revision of Brussels I (recast) and Rome II regulation (Borg-Barthet, Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union, 2020).

[21] The expression of a speech being "chilled" refers in general terms to the discouragement of communication. The concept is used to depict indirect and sophisticated controls of speech (like for example dubious legal provisions or exorbitant legal expenses) that generate incertitude and fear among reporters and writers (Schauer, Fear, Risk and The First Amendment: Unraveling the Chilling Effect, 1978). The catchword "chilling effect" was coined by the US judiciary, making its first appearance in the early 1950s (Wieman v. Updegraff, 1952).

[22] Hence, it does not come as a surprise that civil litigation, particularly SLAPP, has been identified and labeled as one of the greatest threats to freedom of press in the United States (Gimson, 2017).

On the one hand, the large economic burden of litigation may encourage the application of self-censorship so as to avoid further financial risks (Holt, 2019). On the other hand, many plaintiffs offer to drop charges in exchange for renouncing to their right to freedom of expression and publishing an official apology to the claimant (Holt, 2019). Furthermore, the chilling effect can be seen in other journalists and the general public as well, as many actors might be disincentivized to further investigate or publish on controversial public matters so as to avoid potential suits.

In this regard, a study carried out by the German Foundation Otto Brenner concluded that more often than not, the announcement and warning of a potential suit is more than enough to generate the desired chilling effect on media outlets (Gostomzyk & Moßbrucker, 2019). In fact, when analyzing their findings, the Foundation discovered that media's legal departments in Germany handled an average of three disclaimers every month.

1.3.1. Investigative journalism and democracy

It is precisely in this context where investigative journalism[23], a key pillar to any healthy and well-functioning democracy (Hamilton, Democracy's Detectives: The Economics of Investigative Journalism, 2016), struggles. This statement is in accordance with a research conducted by The Frontline Club[24], the results of which show that investigative journalism is a required and essential pillar upon which any healthy and democratic

[23] Investigative journalism can be defined as a way of doing journalism where reporters carry out long exhaustive investigations on a single issue that oftentimes expose scandals such as tax evasions, corruption practices, Human Rights violations or other issues of social relevance (What is Investigative Journalism?, n.d.). Rather than publishing leaked information, the investigative journalist discovers, thanks to his or her own research, unknown information.

[24] The Frontline Club is a London non-profit organization that gathers journalists all over the world. Through the organization of events and surveys, this charity aims to promote and support freedom of press as well as freedom of expression. It also advocates for the independence of professional investigative journalism.

society must be based (Gallagher, 2011). In this vein, investigative media helps to enhance the quality of democracy in two different ways.

First and foremost, investigative journalism can serve as a key instrument to held powerful and influential people as well as public institutions accountable (Waisbord, 2001). Thus, by spreading information and exposing cases of national and public interest that directly affect the citizenship. A matter is of public interest when it constitutes a detriment to a social group as so long as it is unknown and benefits that group once the information is disclosed (Dennis, 1974). When that matter affects a whole society instead of a limited community, public interest develops to national interest (Dennis, 1974).

An illustrative example could be the uncover of corruption scandals, where influential political and economic elites acquired profit at the cost of taxpayers' money. Therefore, investigative journalism fulfills the role of a watchdog in favor of the public interest (Waisbord, 2001).

It also serves as a checks and balances mechanism (Carson, 2013) against large multinationals and political elites, making sure they do not abuse their power or authority. It therefore prevents impunity (Waisbord, 2001), as it monitors public authorities and carries out the investigation of cases that official institutions, such as Congress or Tribunals, have failed to conduct. Thus, advancing the discovery of truth.

That is why, by limiting and suffocating investigative media, SLAPPs are also hindering democracy. In this sense, if less journalists are motivated to investigate controversial issues because of potential distressing lawsuits, fewer articles will be published. Accordingly, impunity will rise at the same speed as the level of unawareness of the general public with regards to relevant issues that directly affect them[25].

Secondly, investigative journalism provides, according to The Bureau of Investigative Journalism, true, qualitative and relevant information to the citizenry (Potter, 2010). Not

[25] History gives us plenty of examples in this regard, such as The Panama papers, The Watergate scandal, The Pentagon Papers or Catholic Archdiocese of Boston sex abuse scandal among others.

only does it provide news of interest, but it also generates a space of debate (UNESCO reinforces journalist' role in the coverage of elections as basic for democratic processes, 2013).

When a piece of investigation is published, oftentimes it creates indignation and resentment in the public. Hence, fostering public participation and opening a forum of discussion where different and alternative ideas and perspectives can be exchanged. This genuine and purposeful debate regarding public matters can sometimes lead to tangible and lasting changes in the political arena such as resignations or regulatory developments (Hamilton, Democracy's Detectives: The Economics of Investigative Journalism, 2016). In fact, controversial and polemical scandals have in certain occasions sparked enough collective indignation and social pressure to force politicians or empowered people into taking real action on the matter at stake[26].

Although investigative journalism is heavily targeted by SLAPP, it is important to bear in mind that SLAPPers also operate against other more generic forms of communication (such as media outlets or social media), which are also essential for the smooth functioning of democracy. Since communication empowers citizens and enables them to vote in an informed and responsible manner, it is safe to say that communication also improves the quality of democracy (Hamilton & Krosnick, Stanford Report: the link between journalism and democracy, 2020).

[26] An example that perfectly portrays the vital role that investigative journalism plays in democracy can be found in South Africa. In 2017, a group of journalists discovered the realization of improper dealings between the Indian Gupta Family and the former president of South Africa Jacob Zuma. The inquiry showed the public how the Gupta family had been exercising control over policies, appointments of ministers and other relevant governmental decisions for its own personal gain. This scandal generated an atmosphere of increasing discontent towards Zuma's Government which ultimately led to his resignation and the initiation of a former investigation for corruptive practices. However, if these journalists had not investigated this issue due to fear of being sued, the public would remain unaware of this scandal and Jacob Zuma would probably still be in power. More information on the case in https://www.gupta-leaks.com/.

1.3.2. European Union core values

SLAPP actions represent an attack to freedom of opinion and expression, freedom of press and media, the rule of law and democracy, all of which are fundamental values of the European Union. This idea may be concluded from Article 2 of the Treaty on European Union, which states that "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights*" (Council of European Communities & Commission of the European Communities, 1992).

The fundamental right to freedom of opinion and expression is one of the most treasured rights in international human rights treaties and liberal democracies (Index on Censorship, 2013). For this reason, it has been heavily regulated and can be found in article 19 of the 1948 Universal Declaration of Human Rights (UDHR), Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights (ECHR), all of which provide that such right includes "the *freedom to hold opinions without interference*[27] *and to seek, receive and impart information and ideas through any media and regardless of frontiers*". Furthermore, article 21.1 of the UDHR recognizes that everyone has the right to get involved in the governance of his country. Similarly, article 25 of the ICCPR states the right to play a part in the conduct of public matters.

As explained earlier, these fundamental rights are intimately connected with the quality of democracy (see 2.3.1.). They are also linked to the rule of law principle. According to Transparency International EU[28], the rule of law is negatively affected by SLAPP actions because claimants tend to make use of procedural maneuvers and obscure interpretations of common European provisions (such as Brussels I recast and Rome II Regulations) to prolong the case as long as possible (Aiossa, 2020). Thus, breaking the mutual trust

[27] According to the CCPR General Comment Nº 10 on freedom of expression, the right to hold opinion without interference is a right to which the Covenant allows no exception nor limitation (United Nations High Commissioner for Human Rights, 1983).

[28] Transparency International EU is part of Transparency International, a worldwide non-governmental and non-profit organization that fights corruption. Its' main objectives are to combat corruption and promote transparency and accountability among European institutions.

between Member States upon which these legal texts are based as well as the real intentions of the European legislator (Ravo, Bord-Barthet, & Kramer, 2020).

In conclusion, the limitations to freedom of expression, information and press as a consequence of SLAPP go against Article 2 of the Treaty on European Union. Thus, tolerating this legal practice puts at stake the core values that lie at the heart of the European Union project.

2. A BRIEF COMPARISON OF FREEDOM OF SPEECH BETWEEN THE US AND EUROPE

2.1. Introduction

For some time now, almost all liberal democracies secure and protect freedom of speech and freedom of press in one way or another (both from a legal and practical perspective). However, the terminology used to materialize such protection varies from country to country, more so from region to region, being "freedom of expression" the most popular formula (Matronic, 2020).

In this regard, the First Amendment of the Constitution of the US applies the terminology "freedom of speech"[29] and "freedom of press", while Article 10 of the European Convention on Human Rights refers to "freedom of expression". For the purposes of this essay, these terms will be used interchangeably.

Within the context of these communicative freedoms, SLAPPs have become a well-recognized figure in countries like the US, where it is perceived as a form of litigation that defies free speech and press, as well as the public participation of American citizens (Donson, 2000). The perception of SLAPP as a threat is visible and perceptible throughout society, from academics, to court rooms, and from governmental powers to civil society. This explains why to this date 30 American states (and the District of Columbia) have adopted anti-SLAPP laws[30].

Nonetheless, as noted above, SLAPPs persist to a large extent unknown in Europe (Donson, 2000). Thus, little attention has been given to its potential consequences and

[29] This paper will adhere to the clarification of the term carried out by the Supreme Court of the United States, where freedom of speech is broadly conceived (Cornell University, n.d.). It is understood that the First Amendment allows individuals the right to express themselves. Therefore, not only speech is protected, but also other forms of expression such as political speech, speech actions or publicizing written speech.

[30]These states are, in alphabetical order: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Virginia.

impacts on society in general, and free speech and press in particular[31]. In this sense, European judges are still unaware of this current legal strategy and lack to realize the chilling effects they generate on the defendants and the general public (Allaby, 2019).

The following section aims to compare both contexts, the American and European one, in order to explain the underlying reasons for the different treatment given to SLAPPs in both regions. Only by looking into these motives, and once it is understood why Europe is far behind in matters of SLAPP, will it be possible to tackle the problem and offer adequate solutions to Europe's current SLAPP challenges.

2.2. Historical background and culture

The United States has a strong commitment to the protective expressive freedoms laid down in the First Amendment. This near absolute protection to speech is, when compared to other nations, an exception rather than a norm (Gardbaum, 2008). By contrast, in European countries freedom of expression is treated in a more limited manner, as governmental authorities are allowed to regulate such freedom in order to safeguard other constitutional values such as dignity, equality or multiculturalism (Krotoszynski R. , 2009). The latter approach would be inconceivable in America, where the free speech doctrine is fiercely hostile to content regulation of public discourse (Weinstein, 2009). For this reason, the European viewpoint on free speech is catalogized as paternalism, while the American is defined as exceptionalism (Krotoszynski R. J., 2015).

American special treatment to free speech finds its justification in the sustained mistrust that Americans in general have towards the government and its institutions (Nye, Zelikow, & King, 1997). This suspicion dates back to the colonial era, as Americans had to endeavor major retaliation due to English oppressive speech laws. Thus, a generalized American dissatisfaction grew around the idea of a censorial government. And, though

[31] Before the 21st century, no book on "strategic lawsuits against public participation in the United Kingdom and Europe" was written by a scholar. The first publication on the matter was carried out by Fiona Donson, in her book Legal Intimidation, in the year 2000 (Biography, 2021). Until now, Fiona is considered one of the few academics that works on this matter within Europe.

this historical event dates back in time, the collective instinct of Americans is up to this moment highly defined by it (Nye, Zelikow, & King, 1997)[32].

Consequently, scholarly research argues that freedom of speech has grown into a core "American humanistic value", a value highly entrenched in American society (Sedler, 2006). It thus appears reasonable to think that American distrust is a contributory factor the country's strong libertarian approach towards constitutional rights (Schauer, The Exceptional First Amendment, 2005).

Moreover, during the battle for freedom of speech, Americans envisioned themselves as strong and capable citizens, not afraid of making their voice heard. This perception was then reflected in the US Supreme Court jurisprudence, where speech acquired special relevance because of the strong efforts made by such brave men. In Whitney v. California, the opinion of Justice Braneis perfectly captures this narrative when he argues that "*those who won our independence by revolution were no cowards. They did not fear political change … To courageous, self-reliant men, with confidence in their power of free and fearless reasoning* …" (Whitney v. California).

By contrast, the experience in Europe was completely different. During the twentieth century, Europe experienced two world wars, totalitarianism and the inhuman treatment of certain individuals and social groups. This heritage left marks in the region and highly influenced European countries in a totally miscellaneous direction, and efforts were rather placed in the protection of certain social groups and the safeguard of minimum standards of civility (Errera, 2003). A more protective approach stood up, with less tolerance to discourses that attacked individuals or particular groups.

According to the European vision, allowing this vilification would harm the entire community, which is why the application of legal instruments by the Government is legitimate on the basis of equality, human dignity and non-discrimination (Errera, 2003).

[32] It is argued that free speech remains the core value in American society because the path to obtaining such freedom was long and strenuous (especially during periods of war, civil unrest or domestic instability), as it took almost two hundred years to forbid any form of punishment or repression to unpopular political ideas (American Civil Liberties Union, n.d.; Balzan, 2018).

Therefore, Europe places more attention to personality rights and the protection of the identity, dignity, privacy, personal honor and autonomy of the individual. And a necessity to balance these private rights with free speech appears.

In conclusion, the accepted tolerance for speech in one region greatly differs from the other. Thus, due to historical experience. In no case does this mean that one is better than the other. Rather, such differentiation may be an explanatory factor behind the difference regarding SLAPP awareness in the two regions. Since America's efforts have been primarily focused on the advancement of freedom of speech, this might have allowed the region to develop a greater sensibility towards challenging elements that pose a threat to such freedom. A scenario where these malicious lawsuits are included. On the other side, Europe has been placing greater attention to the maturity of personal and private rights, thus making European authorities more reluctant to interpret freedom of expression in such a way as to limit other rights like honor, reputation or privacy (Errera, 2003).

Nonetheless, it is only fair to point out that America's greater awareness towards SLAPP litigation, when compared to Europe, might have also been influenced by the mere lapse of time[33]. In this respect, the United States enacted the First Amendment two hundred and thirty years ago, and relevant case law started to appear at the beginning of the twentieth century[34]. This means that the U.S. has had over one hundred years of judicial, public and political engagement with free speech related issues.

In contrast, the European Convention on Human Rights (Council of Europe, 1952), which is the basic legal instrument for the protection of human rights such as free speech in the European context, is only about seventy years old. And cases related to freedom of expression date back to only forty years ago (Velenchuk, 2019).

[33] To read an opposite opinion on this specific matter, please explore: Frederick Schauer, "The Exceptional First Amendment" (2004).

[34] Modern interpretations of free speech carried out by the Supreme Court date back to the year 1919, where turning point cases began to appear. In this regard, it is worth mentioning the cases of Schenk v. United States, Debs v. United States and Abrams v. United States.

All in all, American courts and citizenship have had more time to confront this kind of issues. Therefore, they have become more experienced and are one step ahead in terms of freedom of expression related issues.

2.3. Constitutional architecture

Constitutional rights and legislation vary across regions in both their architecture and substance, being the former analyzed hereafter. In this regard, rights can be formulated in broad and imprecise terms or in a limited and narrow manner; they can be interpreted as absolute, while others permit restrictions and overrides (Schauer, Freedom of expression adjudication in Europe and the United States: a case study in comparative constitutionel architecture, 2003).

To turn to the heart of the matter, in America, freedom of speech (as well as his partner, freedom of press) appears regulated in the Bill of Rights as the first and foremost right. According to a ruling carried out by former Supreme Court Justice Benjamin Cardozo in year 1931, freedom of speech is "*the matrix, the indispensable condition of nearly every other form of freedom*" (Palko v. Connecticut). Without it, other fundamental rights and democracy are threatened (Wermiel, n.d.).

Moreover, the First Amendment is drafted in such manner, "*Congress (and states)*[35] *shall make no law respecting an establishment of religion or prohibiting its free exercise. It protects freedom of speech, the press, assembly, and the right to petition the Government for a redress of grievances*", with no apparent limitation clauses, thus appearing to be written in absolute terms. Although in reality freedom of speech is subjected to a variety of exceptions, limitations, principles and tests (Velenchuk, 2019), the powerful drafting should be taken into account.

Conversely, article 10 of the European Convention on Human Rights uses a disparate approach. While article 10.1 seem to protect freedom of expression in absolute terms,

[35] Gitlow v. New York, 268 U.S. 652 (1925) allowed the application of the 1st Amendment provisions to states by virtue of the Due Process Clause of the 14th Amendment.

article 10.2 allows interferences to such right by establishing certain restrictions[36], namely "*national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*" (Council of Europe, 1952).

In this regard, the European protection given to freedom of expression is more cautious and might be balanced with other rights which are also guaranteed in the Convention. This is clearly established in Article 10.2 "since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society …" (Council of Europe, 1952).

Unlike European provisions, the First Amendment lists no limitations to freedom of speech in its text. And, while aware of the constraints that this legal provision has in practice, it is certainly feasible to presume that this broad composition has enhanced to some extent the advancement of a constitutional environment where free speech and press are considered of major importance (Schauer, The Exceptional First Amendment, 2005). In this respect, SLAPP related matters are included and greatly benefit from a free speech citizen-friendly atmosphere. The opposite result could be interred for the European context.

2.4. Liberty vs. Dignity

In the previous section, the formal (or "architectural") aspects of constitutional rights in Europe and U.S. legislation were under examination. Now, it is time to analyze the substantial features of this legal texts. Thus, departing from the fact that America's fundamental legal text is known as the "Constitution of liberty", while the legal framework in Europe, mainly in Germany, is labelled as the "Constitution of dignity" (Carmi, 2008).

[36] The argument for the limitation of rights relies on unpredictability (Ben-Dor, 2020). When the legislator codifies rights, it is impossible to forecast all possible scenarios. Therefore, rights need to be flexible when written, otherwise, they risk being ignored.

Americans place freedom of speech over other paramount rights, such as for instance human dignity or the right to privacy (Sedler, 2006). And whereas European Courts carry out a balancing of interests, the United States Supreme Court tends to denial and dismiss such practice (Sedler, 2006).

For this reason, it has been argued that America's Constitution follows a neo-liberal vision (Bognetti, 2003), placing individual freedom as the backbone value of the whole system. The justification for this perspective is to be found in the marketplace of ideas doctrine, a rationale that first appeared in year 1953 (United States v. Rumely)[37]. This tenet argues that all forms of speech should have the opportunity to be conveyed, and the competition of the different ideas in the market will ultimately uncover the truth. It became the prevalent rationale in American free speech law in year 1969 by virtue of the Supreme Court's decision in the 1969 textbook case Brandenburg v. Ohio (Schauer, The Exceptional First Amendment, 2005).

This approach comes as no surprise, since the freedom awarded to speech and press is understood by Americans as truly necessary so as to assure the optimal functioning of democracy (Cohen v. California). In this regard, the First Amendment assumes that the citizen or individual, rather than the Government, should be the one who values the information disseminated by media or other actors (Velenchuk, 2019)[38].

While America opts for a system that heavily relies on the individual initiative, an alternative attitude has been adopted by European basic legal frameworks, characterized by a democratic-social approach (Bognetti, 2003), placing upmost importance to social solidarity.

European approach had to be different, mainly because states were required to react to a rather dark historical period, where many citizens were treated as beasts, which explains

[37] In his judgement, Justice William Douglas defended the right of publishers to "bid for the minds of men in the marketplace of ideas", just like newspapers or books do.

[38] An example on how aggressive speech can lead to positive results can be found in the civil rights movements during the 60s and 70s, which allowed the citizenship to express existing relevant viewpoints throughout the country (Tuck, 2008).

why the unyielding defense of human dignity became of upmost importance. Furthermore, the preservation of social and democratic values has led to the prohibition of certain forms of speech in the European region, being hate speech and libel group the most paradigmatic examples of such restrictions[39] (Schauer, The Exceptional First Amendment, 2005).

By placing its focus on dignity when analyzing privacy right cases (Carver, 2020), the European Court of Human Rights is most undoubtedly enhancing the development of essential claims of the individual, such as reputation, honor and privacy. Nonetheless, this approach may cause a negative impact on SLAPP consciousness, as SLAPPers rely on precisely these values to bring their defamation cases to the courtroom. It is indeed this situation what will now require further analysis.

2.5. The particularity of defamation

2.5.1. Defamation in general

We now proceed to examine the particular case of defamation lawsuits in both regions. This concrete offence has been chosen because, as noted in prior sections, it is the most common legal mechanism used by SLAPPers in order to bring individuals to litigation (Merriam & Benson, 1993).

Defamation can be understood as "unlawful attacks" that undermine the honor or reputation of an individual (Carver, 2020). In certain legal systems, this concept is subdivided in two categories: libel and slander (Tiersma, 1987). Libel refers to a defamation that is carried out in a written manner, while slander stands for defamatory statements that are materialized in a verbal or non-permanent form (Tiersma, 1987). Nonetheless, for the purpose of this essay, we will be using the general term of defamation.

[39] For instance, statements denying the existence of the Holocaust are punished in France and Germany, nonetheless allowed in America (Schauer, The Exceptional First Amendment, 2005). Similarly, the U.S. Supreme Court affirmed in the Skokie case that a march carried out by the Nazi leader Frank Collin and his followers in the state of Illinois was permitted, and in fact protected, under the First Amendments (Nationalists Socialist Party of America v. Village of Skokie).

Traditionally, the United States catalogized defamation as a strict liability tort, just like the other common law countries (Carver, 2020). Under such context, a plaintiff only needed to prove that the defendant's publication harmed in some way the reputation or honor of the victim in order to win the case and receive damages. However, the defendant had to demonstrate that the published information was true, carrying the burden of proof in the procedure.

Nonetheless, in year 1964 the Supreme Court of the United States moved away from this tradition (Nolte, 2003) with its decision on the landmark case New York Times Company v. Sullivan[40]. Here, the Court shifted the burden of proof in defamation cases for certain individuals. In this sense, they stated that defamation lawsuits brought by public figures had to prove not only that the information was false, but also that the publisher released it with "actual malice"[41]. In the following years, the Supreme Court extended the Sullivan doctrine to candidates for public office and office holders (Monitor Patriot Company v. Roy) as well as to public figures and public officials (Curtis Publishing Company v. Butts; Associated Press v. Walker).

The category of public figures meant a substantial extension of this doctrine, since the Supreme Court included under such term famous people and business leaders among others (Stone, 2006). The Court went a step further by requiring private individuals to prove negligence for the case to win (Gertz v. Robert Welch).

On this matter, the difference between US and European defamation legislation is noteworthy. States with common law jurisdictions (United Kingdom, Ireland, Malta and Cyprus) go with the traditional American approach, placing the burden of proof in the defendant. Civil law countries follow an alternative approach[42], which however derives

[40] A complete analysis of the case can be found in Elena Kagan, "A Libel Story: Sullivan Then and Now (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991))," 18 Law and Social Inquiry 197 (1993).

[41] Actual malice is met when the publisher knew about the falsity of the statement or acted with reckless disregard for whether such information was true or false (Freedom Forum Institute, n.d.).

[42] Following the Roman tradition, civil law countries argue that the person who can prove the affirmative is the one to carry the burden of proof (Carver, 2020). Therefore, the burden of proving the veracity of the statements lies in the defendant.

in the same consequence. The European approach thus requires the plaintiff to prove that the alleged defamatory statement has been published or disseminated, leaving to the defendant the burden of proving that such information is true or/and legitimate (Prévost, 2019). In this affair, the European Court of Human Rights has been reluctant to apply the American Sullivan doctrine (McVicar v. The United Kingdom).

The unequal approach by both regions regarding defamation lawsuits can be construed as a key differential factor when trying to explain the lack of SLAPP awareness in the European continent. On the one hand, American Courts have been prepondering freedom of speech. Thus, recognizing the watchdog role that defendants play to powerful individuals or institutions (Blasi, 1977)[43]. By doing so, the U.S. has remarked the nation's serious commitment to ensuring a "robust", "inhibited" and "wide-open" public debate (Carver, 2020).

On the other hand, European countries have opted to place more wight on the reputational side rather than on the freedom of press, leaving defamation standards and remedies as they are (Carver, 2020). This status quo makes it harder for judges to identify potential SLAPP suits, as current legislation is more prone to side with plaintiffs.

2.5.2. Criminal defamation

Defamation laws can either be civil or criminal in nature. Although both forms produce a chilling effect, the latter has a stronger effect in communicative freedoms such as speech or press due to the possibility of imprisonment. The criminalization of defamation has been labeled as anachronistic and unnecessary (Carver, 2020) and many international organizations have argued in favor its derogation, as it is understood that civil defamation laws are enough guarantee to protect the reputation of a person.

[43] Columbian Law School professor Vincent Blasi argued that media professional should be taken into special consideration when applying the First Amendment, since Government abuse of power is likely to take place. Due to the dimension and sophistication of current governmental structures, it is imperative to have a well-resourced and well-safeguarded media.

In this regard, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression elaborated on this issue and condemned countries that still use this outdated practice (Hussain, 2000). In the same manner, the Council of Europe calls for the decriminalization of defamation (Council of Europe, n.d.)Nonetheless, in reality, many countries still regulate this form of penalization in their criminal codes.

Within this context, we find that many countries both in the European and American region have criminal defamation regulations. However, there are substantial differences between these two territories, which will be now introduced.

While some American countries still recognize criminal defamation[44], the Supreme Court of the United States has expressed in numerous cases (Richmond Newspapers, Inc v. Virginia; Florida Start v. BJ; Cox Broadcasting Corp. v. Cohn) the prevalence of freedom of press when confronted with the rights of victims in criminal lawsuits. Thus, according to a research carried out by the OSCE Representative on Freedom of Media, in the United States criminal libel is rarely used, much less in cases with a public element (Griffen, 2017). In fact, since the second half of the twentieth century, over forty states have abolished their criminal libel legislations (Griffen, 2017).

Nonetheless, within the European context (aside from common law countries, where criminal libel has fallen into disuse), cases of criminal defamation can be seen throughout the region (Griffen, 2017). What is more, in some Western countries, when the victim of the alleged defamation is a public official, penalties are more severe (Fargo & Wagner , 2015) [45]. This kind of trials is even conducted by countries that portray themselves as the

[44] According to a survey carried out by the International Press Institute, there are fifteen states that continue to recognize some form of criminal defamation, mainly on very specific and historic matters such as the questioning of a woman's chastity or the defamation of financial institutions (Fargo & Wagner , 2015).

[45] Andorra, Bulgaria, France, Germany, Italy, Monaco, Netherlands and Portugal have stronger penalties for defamation of public officials and, aside from France and Bulgaria, all of these countries still have imprisonment as a possible sanction (Fargo & Wagner , 2015).

guardians of freedom of expression, such as Denmark (Frisk and Jensen v. Denmark) [46] or Switzerland (International Press Institute, n.d.)[47].

The European Court of Human Rights has no caselaw regarding the condemnation of criminal defamation. Nonetheless, the Court has never upheld imprisonment convictions for a defamation lawsuit on the basis of the principle of proportionality (Council of Europe, n.d.). This court sets the guidelines for judicial and legislative powers across the European continent when facing questions on how to deal with fundamental rights such as freedom of speech or the right to defend one's reputation. Whereas the U.S. Supreme Court is giving clear preference to free speech and press over privacy rights in matters of criminal liability, the European Court is not. This might be one of the reasons why, despite existing criminal libel laws in both territories, in Europe criminal defamation cases are more recurrent.

[46] In this case, two Danish journalists were criminally charged for the publishing of a documentary criticizing the Copenhagen Hospital. The European Court of Human Rights understood that the conviction was not violating the freedom of both journalists, as it was "necessary in a democratic society" (Global Freedom of Expression, n.d.).

[47] In year 2016, the rock band "Frei.Wild" filed a lawsuit against a Swiss journalist. The band brough criminal charges of defamation because the journalists had portrayed them as "extreme right-wing", a term that Swiss Tribunals considered defamatory and harmful for the band's reputation.

3. POTENTIAL SOLUTIONS IN EUROPE

After having analyzed what constitutes a SLAPP and the reasons which explain why this new phenomenon is fairly unknown in Europe, it is now time to introduce some potential solutions to tackle the SLAPP dilemma. The current existence of criminal defamation, the abusive practice of libel lawsuits as well as the dysfunction and lack of harmonization of European private international law has triggered the current state of play.

In this vein, the following suggestions will be focused on eliminating, or at least alleviating, to some extent, the damaging effects that SLAPPs are currently provoking in the European region. Thus, to promote a suitable environment for the development and protection of democratic values in the European Union.

3.1. Preventative measures

This first set of proposals aims for SLAPPs to never reach the courtroom or, at the very least, to remain in the court as little time as possible. By doing so, the chilling effect of this legal malicious stratagem could be significantly reduced in two different ways. First, defendants would have the capacity to better foresee the duration of the litigation process. Hence, shrinking the unpredictability that characterizes SLAPPs (Miyandazi, 2019). Secondly, these solutions would meaningfully prune both the time and the legal costs that trial procedures require.

Firstly, this essay suggests the decriminalization of defamation suits (Menard, 2004). This proposal goes in line with several calls carried out by multiple Human Rights organizations[48] in hand with the Council of Europe. In 2004, the Committee of Ministers of the Council of Europe drafted "The Declaration on freedom of political debate in the media", where the Council established the main framework for the protection of Article 10 of the European Convention on Human Rights (Council of Europe, 2004).

[48] In recent years, many organizations have called for the decriminalization of this crime. Worth mentioning in this context is the work carried out by the International Commission of Jurists (International Commission of Jurists, 2016), the Resource Centre on Media Freedom in Europe (Holt, 2019) and the European Centre for Press and Media Freedom (ECPMF) (Holt, 2019).

Furthermore, in 2007, the Parliamentary Assembly of the Council of Europe urged in its recommendation number 10 of the Resolution 1577/2007 for the decriminalization of defamation in an attempt to show a stronger commitment towards the media in Europe (Parliamentary Assembly, 2007).

According to the Council of Europe, journalists should not be subjected to criminal proceedings due to their investigations and publications, which are often linked to critical views towards public institutions or public officials (Parliamentary Assembly, 2007). If at all, these cases should be dealt in dispute-resolution bodies or in civil courtrooms. The Council of Europe, aware that a strong chilling effect would remain even if defamation solely constituted a civil offense, gives further guidance to Member States in order to assure that proportionality and Human Rights are respected in their defamation laws (Holt, 2019).

Additionally, it is highly encouraged the implementation of an early dismissal mechanism (Hartzler, 2007). Hence, by introducing a new legal set of rules where national courts, at the petition of one party (or even by the Tribunal's own accord), have the ability to detain lawsuits when the judge perceives that the claim falls under the category of SLAPP. Proceedings that might fall under such category are for example suits that the Tribunal might consider abusive (when requested damages are unreasonably high), or disputes where freedom of expression and/or press in the public sphere is curtailed (Ravo, Bord-Barthet, & Kramer, 2020).

Nonetheless, this possibility conferred to the defendant is not absolute and can be turned down in specific circumstances (Ravo, Bord-Barthet, & Kramer, 2020). This limitation could be justified in cases where a judicial process seems to be of acute necessity in order to safeguard the rights of all the parties involved as well as the general interest at play[49].

Be that as it may, this constriction should be interpreted in a restrictive manner (Ravo, Bord-Barthet, & Kramer, 2020). In this respect, the option to file an early dismissal claim should never find a limitation in cases where the defendant is sued as a consequence of the disclosure of public information or critical advocacy. Such is the case of press

[49] Such is the case of claims based on the enforcement of the European Union law.

publications or communications carried out by non-profit organizations performing in a Member State.

In this regard, once the Tribunal receives the petition of early dismissal from the defendant, if the Court confirms the lack of legal merit of the lawsuit in question, the claim will be partly or fully dismissed. In this appreciation, the judge will need to take into account the claim by itself as well as the tactics that the counterpart has used during the legal procedure (Hartzler, 2007). The former refers to the proportionality and rationality behind the lawsuit when bearing in mind the facts and circumstances of the case (Hartzler, 2007). The latter relates to the existence of any ploy aiming to abuse the laws ruling the procedure (Hartzler, 2007), such as for example cases of forum shopping.

This is the approach adopted by the New York Civil Practice Laws and Rules provision, in Sections 3211 (g) and 3212 (h) (New York Civil Practice Law & Rules, 1992)[50]. A similar strategy can be found in the California anti-SLAPP legislation, in Sections 425.16, 425.17 and 425.18 (California Code of Civil Procedure, 2016). However, the latter has a peculiarity worth mentioning.

Under section 425.16 of the Californian provision, a motion to strike[51], rather than a motion to dismiss, is contemplated in lawsuits regarding public speech and public participation protected under the First Amendment (Digital Media Law, 2021). This particular measure allows defendants to bring to light all groundless claims of a multi-part lawsuit without having to prove the necessity of bringing down the whole claimant's case. Thus, only the parts which are vexatious are dealt with under Californian law.

Moreover, once the defendant succeeds in demonstrating that the information published falls under the scope of the First Amendment, the burden of proof directly shifts to the claimant's side (Franklin & Bussel, 1984).

[50] This US anti-SLAPP statute regulates two different forms to fight SLAPP lawsuits: a motion to dismiss the suit or a motion for a summary judgement.

[51] According to the Cornell Law School, a motion to strike can be defined as a request that a party makes to the judge, asking to remove part of the counterpart's pleading (Cornell Law School, n.d.)

This approach could be followed by European states, which can benefit from the American experience and apply the remedies that have proven to work the best in the US context. By implementing the Californian view, European tribunals would avoid difficult situations where only parts of a multi-faceted lawsuit appear to be SLAPP in nature. Thus, not having to choose whether to dismiss or accept the whole claim, but only the legal entitlements that are well grounded.

Moreover, the alleviation of the chilling effect could be increased if the rules on the burden of proof are reformed (Ravo, Bord-Barthet, & Kramer, 2020). By shifting the burden of proof to the claimant in prima facie SLAPP cases, an equilibrium between the SLAPPer and the defendant could be acquired. An equilibrium that, as noted in previous sections, frequently lacks in SLAPP cases (Reyes, 2020).

Lastly, in order to assure the efficiency of the aforementioned measures, it is of upmost importance to place a special effort on raising awareness of SLAPP in European countries (Besozzi, 2020). This consciousness is essential in order to educate both the general public and the legal professionals (especially lawyers and judges) on this matter.

An example to be followed is the online platform that the Council of Europe elaborated in 2015 in order to spread information across Member States concerning media freedom and its main struggles (Council of Europe, 2015). However, more efforts have to be placed in this regard by both European institution and Member States, as it is clear that not enough diffusion of SLAPP issues is yet to be seen in the region (Donson, 2000).

Also, international organizations can play a great role in this matter. Thus, by hosting expert conferences like the one organized by ECPMF in 2019, where many SLAPP specialists along with the European parliament gathered together to discuss the issue of SLAPPs in Italy (Miyandazi, 2019). Also, by mapping reported SLAPP threats across the continent and carrying out legal support trainings for journalists to better defend themselves when facing this kind of lawsuits, both initiatives carried out by the ECPMF (Holt, 2019).

In addition, it is worth mentioning the proposal “Protecting Public Watchdogs across the EU: a proposal for an EU anti-SLAPP law”, conducted by European non-governmental

organizations in relation to this issue (Ravo, Bord-Barthet, & Kramer, 2020). Firstly, Article 23 of the aforementioned proposal recommends the creation of a registry where court decisions relating SLAPPs ought to be included and accessible to the general public (Ravo, Bord-Barthet, & Kramer, 2020). Furthermore, Article 25 of the draft suggests the training of both judges and lawyers not only to raise awareness, but also to develop technical knowledge on how to fight this malicious practice (Ravo, Bord-Barthet, & Kramer, 2020).

Notwithstanding, this increasing awareness and publicity can find some challenges in the European region. Firstly, shifting the attention to SLAPPs might be a difficult task because Europeans do not place as much value (like the United States does) on the protection of freedom of speech and public participation in the political arena (Donson, 2000). Secondly, as pointed out above, activism and investigative journalism does not have the same level of protection in European states as under the Constitution of the United States (Donson, 2000), namely the First Amendment.

3.2. Deterring measures

The procedural and preventative measures explained above should be complemented with deterrent measures. Thus, so as to refrain further claimants from filing burdensome lawsuits. In this vein, the application of penalties by Tribunals can potentially become a strong discouragement for SLAPPers (Ball, 1955), as claimants would think twice before filling another baseless lawsuit.

In this context, the proposal "Protecting Public Watchdogs across the EU: a proposal for an EU anti-SLAPP law", urges Member States to *reverse the costs* of proceedings (Ravo, Bord-Barthet, & Kramer, 2020). If the claimant's case is dismissed, this part is the one who will have to bear the costs of the litigation process. This amount ought to include the attorney's fees, the court and expert's costs and all additional expenses within what is reasonable and appropriate in attendance to the concrete circumstance of the case (Ravo, Bord-Barthet, & Kramer, 2020).

Additionally, Article 21 of the proposal encourages European states to include the imposition of *penalties*[52] in cases where a Tribunal decides to dismiss a lawsuit due to its lack of merit (Ravo, Bord-Barthet, & Kramer, 2020). Moreover, in instances where the claim is filed by a legal person (like for example a large multinational company or a bank), it endorses the application of such penalties to the natural individuals behind the legal subject, since they are the ones responsible for the decision making of the corporate person (Ravo, Bord-Barthet, & Kramer, 2020). Thus, they are the ones who made the choice of initiating the SLAPP in the first place.

Last but not least, it is of great interest drawing attention to the so called SLAPPback strategy. A SLAPP-back is a counter suit filed by the SLAPP victim claiming, for example, abuse of the court's process, malicious prosecution or even coercion (Harrison, 2020). This counterclaim is argued to be the most effective long-sighted instrument to deter future SLAPPs (Merriam & Benson, 1993). This success has already reflected in US tribunals[53] (Association for Education in Journalism and Mass Communication, 1993), which sends a message of hope for European courts.

In fact, there has been a feeble attempt to apply this strategy in Europe (Grayling, 2010), and a SLAPP-back actually took place in British courtrooms during the year of 2010 (Leigh, 2010). In this case, the Danish radiologist Henrik Thomsen was sued by American GE Healthcare company for libel. The company filed a lawsuit due to the comments carried out by Mr. Thomsen both in a conference at Oxford as well as in a scientific revue,

[52] Many US states foresee penalties for malicious lawsuits. See for example the Connecticut General Statues, Title 52, Chapter 952, Section 52-568, where damages for groundless or vexatious suit or defense are regulated (CT Gen Stat §52-568 (2012)). In the same way is this strategy regulated in the Section 600. 2907 of the Michigan Revised Judicature Act of 1961 (Mich. Comp. Laws Ann. § 600.2907 (1961)).

[53] An emblematic case of US successful SLAPP-back can be seen in the case of a nine-year dispute between San Joaquin Valley agribusiness giant J.G. Boswell Company and three family farmers (Wegis v. J.G. Boswell Company). Here, the company filed a suit for libel against the farmers due to their publication in a newspaper, where they claimed that the enterprise refused to support a water project ballot measure. Once the case was dismissed, the farmers countersued. In 1991, California's state supreme court awarded the three individuals with 10.5 million dollars for punitive damages. The same year, the Clark County District Court in Nevada granted 9.8 million dollars to a doctor who had been SLAPPed by a well-known hospital network (Humana Inc v. Hemmeter).

where he criticized the drug elaborated by the Healthcare company, exposing the aftereffects that such medication had have on several of his patients. Thomsen then counter-sued the company for libel as well, which ultimately resulted in the withdrawal of charges by the American enterprise.

SLAPPback's weakest point is the personal and economic costs that victims have to endure in the process, as they require another round of costly litigation, which in many instances private parties cannot afford (California Anti-Slapp Project, n.d.). Therefore, a good measure to make such strategy more appealing to the general public would be to award high punitive damages (Merriam & Benson, 1993), like American tribunals tend to do (Harrison, 2020). By doing so, private individuals could have more incentives to seek justice and greater media attention would cover the story.

3.3. Reforming EU law

In its present form, European law (Brussels I recast and Rome II Regulation) gives room for abusive practices and vexatious lawsuits all over Europe (Miyandazi, 2019). According to The Shift[54], the misappropriation of private international law by powerful actors has resulted in the limitation of freedom of speech, the self-containment of scrutiny and the dilution of the rule of law, all of which are considered core elements that embody Europe's current values (Balzan, 2018). Thus, several reforms are urgently needed in relation to private international law in the EU context.

In the first place, a reform of Brussels I Regulation (recast) in required in order to grant jurisdiction to the defendant's domicile in defamation lawsuits, unless the parties agree otherwise (European Centre for Press & Media Freedom, 2020). Under the current status quo, claimants can unilaterally choose the jurisdiction that is more advantageous to their particular interests, or more vexatious to the counterpart, even if the court's connection to the legal issue is weak and questionable (Mendiola, 2012). Nonetheless, jurisdictional rules should, in theory, be neutral to both parties. In short, this reform would reinforce

[54] The Shift is a Maltese online independent platform specialized in investigative journalism and the promotion of freedom of press and democratic values.

foreseeability and the constraint of libel shopping, both essential values of Brussels I Regulation (recast) (Dickinson, Lein, & James, 2015) [55].

This is precisely what allowed Pilatus Bank to file a lawsuit in the United Kingdom and the United States instead of Malta, despite the immensely connecting factors that attached the case to the latter (Allaby, 2019). In fact, Daphne's investigations and publications as well as Pilatus establishment and main operations were carried out in Maltese territory.

Furthermore, an amendment of the Rome II Regulation needs to take place, as the current legislation does not say which national law applies in defamation lawsuits (Warshaw, 2006). This context gives SLAPPers the option of choosing the less favorable legislation towards the protection of freedom of speech and press (Ravo, Bord-Barthet, & Kramer, 2020). Thus, it is required the incorporation of a new rule which obligates particulars and judges to apply the law and legislation of the country where the information was published, or where the publication was sold (Warshaw, 2006).

Another creative solution was introduced by academic researcher Eduardo Álvarez-Armas, who proposed the introduction of a rule similar to Article 7 of Rome II, but inversely (Álvarez-Armas, 2021). Article 7 confers the "weaker" party in environmental related issues the prerogative of choosing the applicable law thanks to the so-called "theory of ubiquity" (von Hein, 2020). In the case of SLAPP lawsuits, this privilege should be inverted, and be rendered to the defendant, as he is the "real victim" in the conflict (Álvarez-Armas, 2021).

Despite the urgent need for reformation and harmonization of EU law in SLAPP cases, the vice-president of the European Commission Frans Timmermans surprisingly argued that the European Union shall respect private international rules as it lacks competence to blend substantive legislation regarding defamation (Timmermans, 2018). Nonetheless, this essay argues that the EU has competence to introduce new legislation, or at the very least, to reform the current regulation on the matter.

[55] Article 16 of the Rome II Regulation clearly expresses that "The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen".

In fact, the recently approved Whistleblower Protection Directive is a clear example on how the Union has competence in matters of defamation (Directive UE 2019/1937). In the draft version of this legal text, the European Commission gave no less than seventeen legal grounds for its competence[56].

Therefore, it makes little sense for the Commission to find competence regarding whistleblowers protection when turning to journalists, while simultaneously defending that journalistic activities fall out of the scope of EU's competence (Borg-Barthet, Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union, 2020).

Moreover, the Commission can also find its competence in Article 114 of the Treaty on the Functioning of the European Union (from now on TFUE), as defamation has a direct effect on the proper performance of EU's (Ravo, Bord-Barthet, & Kramer, 2020). In fact, as noted by Borg-Barthet: "*the effectiveness of EU law is reliant on the vigilance of individuals*" (Borg-Barthet, Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union, 2020), among which we find journalists who report and reveal information of public interest to the community.

Ultimately, legislative reform could be carried out on the basis article 352 TFUE (Borg-Barthet, Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union, 2020). Nonetheless, this should be the last resort, as unanimity of all Member States would be required.

By the same token, the above-mentioned measures should be complemented with a monitoring body and a budgetary fund (European Centre for Press & Media Freedom, 2020). The former would incorporate periodic evaluations on the legal environment of freedom of press and information within Member States, placing a special emphasis on investigative journalism. This revisionary mechanism should be complemented with an EU register, where states that fail to reach certain levels of protection regarding free

[56] To further read on the legal grounds developed by the Commission, please read "Proposal for a Directive of the European Parliament and of the Council" of 23. April. 2018, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0218&from=EN

speech and press ought to be publicly named and shamed. Moreover, a Justice Program fund should be created to assist SLAPP victims morally, economically and legally.

In conclusion, although an agreement to carry out legislative reforms does not seem likely in the short term, many potential solutions are available for Member States to counteract the SLAPP phenomenon.

CONCLUSIONS

The presence and increasing deployment of abusive lawsuits in our current society is an indisputable reality. Strategic Lawsuits Against Public Participation have proven to be a new tool used by the powerful aiming to silence all kinds of criticism. At this juncture Western countries have taken separate paths. On the one side, countries like the United States or Canada have been adopting more active approaches, both from a social and legal perspective. On the contrary, European countries have been more reluctant towards this new problematic, falling short of both the rise of awareness and the implementation of remedial measures when dealing with SLAPP lawsuits.

Regardless of the position adopted, SLAPPs remain to be present in all of these regions. For this reason, it is important to have a clear picture of what this modern form of lawsuit entails. A SLAPP can be understood as a malicious lawsuit filed by a powerful stakeholder, such a multinational company or a wealthy businessman, whose main objective is to muzzle, prevent and discourage the publication of relevant information addressing issues of societal importance that negatively affects the image of the claimant. Thus, there is a collision of two fundamental rights: the right to honor or reputation and the right to freedom of expression (including both freedom of speech and freedom of press).

Furthermore, these pernicious lawsuits make use of procedural maneuvers to prolong the procedure in order to increase the burden of defendants as much as possible. This scenario is aggravated by the imbalance of power and resources between both actors, as claimants are wealthy operators while defendants tend to be particular individuals with limited resources. The latter includes journalists, Human Rights activist and, in more generic terms, all the citizenry that decides to investigate and broadcast information in regard to controversial matters. This essay has focused its attention on investigative journalists as they are the most common victims in SLAPP related issues.

One of the most frequently used strategies to restrict freedom of expression in these cases is the so-called forum shopping. In this sense, SLAPPers are likely to file the legal request in foreign countries with little connection to the controversy. Moreover, several claims are initiated simultaneously on the same issue. This approach aims to exhaust the financial resources and emotional strength of defendants. In the European context, this approach is

carried out by virtue of European International private laws, mainly through the application of the Brussels I recast Convention and Rome II Statute. In fact, the jurisprudence carried out by the European Court of Justice to this day is more conducive to favoring plaintiffs in defamation cases dealing with private rights such as honor or reputation.

To properly deal with this subject, it is of upmost importance to understand what is at stake when analyzing the SLAPP problematic. In this vein, this form of vexatious lawsuit triggers a chilling effect and hinders the essential work that activists, journalists and academics carry out. On one side, journalists are induced to self-censorship in two different ways. Firstly, due to the fear of litigation many reporters may decide not to further investigate controverted topics that are highly likely to upset powerful stakeholders. Secondly, defendants are persuaded by multinationals to remove certain publications under the promise of withdrawing all charges.

On the other side, SLAPPs undermine the work undertaken by the news media, who serves as a watchdog over powerful individuals, companies and public institutions in today's society. Thus, limiting accountability and advancing impunity. To this must be added the essential informational role that media outlets fulfill with regards to the general public. Consequently, this legal strategy ultimately undermines democratic quality as well.

It is at this point, after understanding the essence and relevance of SLAPPs, when one might wonder why Europe has been overlooking this worrying reality while other countries have not. In this sense, there are some contributing factors that help to explain such careless behavior.

First and foremost, the European attitude is a result of the region's historical and cultural background. When analyzing America's history, one finds out that the relevance they have been giving to freedom has its roots in the era of British colonization. In fact, Americans had to withstand such a high level of repression and censorship during that historical period, that the U.S. Constitution now gives absolute protection to freedom of expression and press in its first Amendment. In contrast to the US exceptionalism, Europe had to endure a whole different experience. The horrors suffered during the first half of

the twentieth century, especially the inhuman treatment imparted to specific social groups, has led Europe to focus on dignity rather than freedom. Thus, the protection of private rights such as dignity or honor have a high profile in the European context.

Thus, the fundamental text in the US is known as the Constitution of freedom while the European one is categorized as the Constitution of dignity. It is in such a context when one can begin to understand why Europeans have a tendency to focus on protecting the so alleged defamed person's reputation rather than the defendant's right to freely express or publish issues of controversial nature.

Additionally, American jurisprudence is more reluctant to constrain free speech, since they perceive public participation as an essential element for a well-functioning healthy society. Therefore, by virtue of the Sullivan test, in defamation cases US judges place the burden of proof on the claimant's side. On the contrary, European jurisprudence of the European Court of Justice refuses this approach and establishes the standard of proof in the defendant's side.

In short, a compendium of factors play a part in Europe's lack of awareness when it comes to SLAPPs. Not only previous historical experiences, but also current narratives and legal mechanisms have encumbered the dissemination and awareness of this urgent matter.

Recognizing this, it is time for countries to address SLAPP problems at the European level. Accordingly, this essay suggests a variety of measures to prevent, deter and/or eliminate the detrimental effects that these vexatious lawsuits are triggering in Europe. With reference to the preventative measures, several potential solutions could come into place. First and foremost, the decriminalization of defamation lawsuits is urgently needed, as journalists and whistleblowers risk facing prison sentences for the mere dissemination of noteworthy information to the public. This aspect has an enormous chilling effect on freedom of expression and press, as the majority of individuals are not willing to take this hazardous chance.

Moreover, two procedural reforms are highly recommended: the implementation of an early dismissal mechanism and the shifting of the burden of proof. Both modifications would limit the economic and emotional duress that SLAPPers aim to inflict on

defendants. In addition, the latter would also greatly reduce any possibilities for these claims to succeed. Lastly, this first set of precautionary measures should include programs to raise awareness, especially to judges and lawyers.

Secondly, the adoption of a deterring strategy would discourage SLAPPers from filing such baseless lawsuits. Assigning the payment of all the costs of the procedure to the claimant's side can become an effective dissuasive action. However, this measure could become more efficient when, on top of the litigation costs, heavy penalties were imposed by judges whenever they detect clear cases of malicious prosecution. By doing so, the imbalance of power between SLAPPer and SLAPPed would be equalized. Additionally, defendants could SLAPP-back the claimant for coercion or abuse of the court's process for instance.

Lastly, some EU legislative measures are proposed with the aim of reversing the SLAPP trend. These final suggestions focus on the reformation of two international private norms. First, it is argued that Brussels I recast regulation should be amended in order to eliminate its current friendly-plaintiff approach. Thus, jurisdiction should be recognized to the defendant's domicile and, at the same time, restrictions need to be applied to plaintiff's current wide range of forum options. Secondly, Rome II regulation needs to be reformed so as to include specific guidelines on which national law is applicable in each defamation case. It is only after these modifications that libel shopping will stop from happening.

All in all, the current general picture in Europe is that SLAPPs are a sever threat to freedom of expression, press freedom as well as other core European values such as democracy and the rule of law. As this is a European problem, the solution needs to come from a European level as well. In this vein, the response as to be cohesive and as prompt as possible. Meanwhile SLAPP victims will continue to find themselves helpless to this legal form of intimidation.

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