

ANTI-SLAPP MECHANISMS MONITORING STUDY



Spain
Justice and Environment 2021

Introduction

Justice and Environment (J&E) is participating in a European anti-SLAPP NGO coalition called CASE (www.the-case.eu) in order to investigate legal challenges faced by environmental activists and other watchdogs throughout Europe. Significant research has been published on this topic already (e.g. by the [Law Clinic of the University of Amsterdam](#)) but J&E would also like to contribute to the analysis of SLAPPs via its own means.

A SLAPP case consists of four components:

- * legal proceedings (generally civil lawsuits but also criminal complaints where these can be pursued privately)
- * filed by a private party (generally corporations or wealthy individuals, including government officials acting in a private capacity)
- * with the intent to silence another private party (generally activists, journalists, NGOs, or other public watchdogs)
- * in response to acts of public participation (including advocacy or criticism).

Our targets are the anti-SLAPP mechanisms enacted in Member State legislation or case law. We are not researching SLAPP cases. We are researching anti-SLAPP mechanisms in the law (or case law). We are looking for procedural rules or decisions, not limited to environmental ones.

Questions and Answers

1. Has law or case law defined SLAPP cases in any way? (e.g., by a court judgment calling a case frivolous or vexatious for having certain features, etc.)? If yes, in what way?

In 2015, the Spanish Supreme Court stated a lawsuit was false and frivolous in a parenthood case filed against the former Spanish King. The Court found many contradictions in the documents attached to the lawsuit as evidence as well as the statements by the plaintiff were contradictory. As a result, the Supreme Court rejected by a majority of seven votes to three the paternity suit brought against King Juan Carlos by the Belgian citizen Ingrid Sartiau and dismissed the case on the grounds that the paternity claim was *"plainly and simply false, frivolous and tortious"*.¹

¹ Order of the Spanish Supreme Court (Civil Division) of 28 January 2015 (appeal 1/2014).

2. Is there any law or case law that puts limits on cases with SLAPP characteristics (e.g., by defining lawful causes or capping the amount of compensation, etc.)? If yes, in what way?

Spain, in comparison with other states such as England² or Canada³, does not have any type of legal provision or rule that prevents and protects against vexatious litigation (in whose scope a SLAPP falls). Therefore, it is difficult to find in Spain, legal measures or any case law that restricts and curbs this type of cases, as there is a total lack of legal definition/concept of vexatious lawsuit/litigation in any Spanish code or law, which is the way in which other countries put limits to SLAPP lawsuits without directly addressing them.

Under the Spanish legal order, the only law that could be mentioned as an example limiting cases with SLAPP characteristics is *Law 7/2017 of 2 November, which transposes Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution in consumer matters into Spanish law*. This Law includes in its article 18, a *numerus clausus* list of the grounds on which a complaint may be dismissed, in which we find the following: "[. ...] b) *If the complaint is manifestly unfounded or if the rights and legitimate interests of the consumer are not affected; c) If the content of the complaint is vexatious. [...]*".⁴

Finally, the only case law in Spain that comes close to defining the concept of SLAPP and the definition of vexatious claim, by using adjectives that refer to such claims, is the one mentioned above, *Order of the Spanish Supreme Court (Civil Division) of 28 January 2015 (appeal 1/2014)*, in which the paternity claim was dismissed on the ground that it was considered false, frivolous and tortious.

3. If there are anti-SLAPP mechanisms in law or case law, are they effective, i.e., do they slow or stop the filing of lawsuits with the intention of silencing private parties?

No, the Spanish legal framework and case law do not contain definitions nor references to SLAPP.

² In England and Wales there are two methods of controlling vexatious litigants: *Civil restraining orders* (made by the courts themselves on application or on their own initiative); and *vexatious litigants orders* (made by the High Court under section 42 of the Senior Courts Act 1981 on the application of Her Majesty's Attorney General). Her Majesty's Courts and Tribunals Service maintains a list of vexatious litigants and those subject to a civil restraint order.

³ Article 40 (vexatious proceedings). Canadian Federal Courts Act states: "**40 (1)** *If the Federal Court of Appeal or the Federal Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may order that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court.*"

⁴ Article 18. Law 7/2017 of 2 November 2017 transposing Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution in consumer matters into Spanish law.

4. Is there law or case law to protect whistle-blowers? If yes, does that contain any reference to SLAPP cases and if yes, in what way?

There is no law or case law on this topic. Spain is preparing the transposition of the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (also commonly known as the Whistle-blowers Directive). In September 2016 a political party filed before the Spanish Parliament a proposal for an “Integral Law to Fight Corruption and to Protect Whistle-blowers”⁵, however the procedure to approved it expired in 2019⁶. In June 2020 the Ministry of Justice established a working group to transpose that Directive into Spanish Law⁷. In October 2020 there was a public consultation for the transposition of this Directive⁸ and the 2021 Normative Plan adopted by the Government in August 2021 announced that it is expected that Law regulating the protection of persons reporting normative infringements transposing Directive (EU) 2019/1937 shall be prepared. However, the Government prepares a law proposal that has to be sent to the Parliament for its debate and approval.

5. If, as mentioned above, there is law or case law to protect whistle-blowers, does this law in practice actually stop or slow SLAPP lawsuits?

Spain has not yet enacted the law that will transpose the EU Directive 2019/1937. As in the rest of the EU countries, the deadline for implementing this law is 17 December 2021. In Spain, the transposition process is already in its final stages as the draft law has already been debated in Congress. More specifically, the draft bill was brought to the lower house with proposals from the ERC, Compromís, BNG and Más País parties in January 2021. This debate was the result of an initiative submitted for public consultation on the website of the Ministry of Justice, which received more than 40 comments from individuals and organizations interested in the matter, including Transparency International-Spain.

6. Are there any additional laws in your jurisdiction which might protect parties against SLAPP suits, even if they were not designed for that specific purpose?

⁵ Proposed Comprehensive Law on the Fight against Corruption and Protection of Whistle-blowers (122/000022): http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas?piref73_2148295_73_1335437_1335437.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IW12&FMT=INITXDSS.fmt&DOCS=1-1&DOCORDER=FIFO&QUERY=%28122%2F000022*.NDOC.%29

⁶<http://www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=pu12&FMT=PUWXTDTS.fmt&DOCS=1-1&DOCORDER=LIFO&QUERY=%28BOCG-12-D-519.CODI.%29%0A>

⁷ <https://www.mjusticia.gob.es/es/elministerio/GabineteComunicacion/Paginas/justicia-avanza-trasposicion.aspx>

⁸<https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/Consulta%20Publica%20Whistleblowers%205%20ENE%2021.pdf>

Although not design to prevent SLAPP cases, a legal provision that could be used to protect parties against SLAPP suits is the *crime of false legal complaints or false allegations* provided by the Spanish Criminal Code, article 456 in Title XX on Crimes against the Administration of Justice, Chapter V: “False charges and reports and crimes simulation”.

According to this article, the *crime of a false legal complaint or charge* is understood as one, in which a person attributes certain facts constituting a criminal offence to another, while being aware of their falseness and/or in reckless disregard for the truth. Moreover, it is a multi-criminal offence, which means that it not only harms a specific individual (the defendant), but also the national Administration of Justice itself.

Moreover, in the Spanish legal system, it is not possible to speak of false allegations as such until the judicial authority that received the complaint issues a final judgement/ruling that leads to its dismissal. This is a 'sine qua non' requirement because first it is necessary to prove that the facts were not committed before determining whether there was malicious intent on the part of the plaintiff against the defendant.

In any case, once there is a decision or ruling to close or dismiss the case, the judge or court that heard the claim can act *ex officio* or at the request of the defendant act against the plaintiff. To do so, the court must consider that there is sufficient evidence that the charges were manifestly false, and that the claimant was fully aware of this.

Furthermore, Spanish case law has developed additional requirements for a complaint to be considered false, such as: ⁹

- a) The reported facts must be concrete and directed towards a determined and identified subject. By this we mean that they must appear with a name and surname.
- b) The alleged facts must constitute a criminal offence.
- c) The allegation must be manifestly false.
- d) There must be awareness of the false nature of the alleged facts, i.e., there must be criminal intent and bad faith with the purpose of harming the interests of another person.

A judgement of the Provincial Court of Barcelona (9th section) ruled in relation to a case of false reporting as follows: *"We can conclude that the plaintiff, in the knowledge that the content of her complaint was untrue, accused the defendant with the clear intention of harming him, at the very least, by being untruthful.*

The incident [...] should have been an administrative claim or a complaint but not the filing of a lawsuit which clearly caused serious moral damage to the victim, [...]

⁹ Criminal judgment of the provincial court of Valencia (no. 725/2011), 24th of October 2011.

Esther, as the perpetrator of a crime of false reporting under article 456.1.2.2 and 2 of the Criminal Code, is hereby sentenced to a twelve-month fine of six euros per day, with one day's imprisonment for every two missed payments, and to pay the legal costs of the private prosecution".¹⁰

It can be concluded that a SLAPP lawsuit could fall within the scope of this offence understanding the features that a false claim offence must include: a claim directed at a specific subject, who is usually accused of a crime (slander, defamation...), being false charges (alleged with the intention of causing harm to the defendant) and the overall claim is filed in bad faith, lacking a legitimate reason to request for judicial protection. Therefore, depending on the case and taking into account the characteristics and background of each one, a victim of a SLAPP could, in the Spanish legal system, file a lawsuit for *false claim* and thus obtain reparation for the damage that the SLAPP caused.

7. Which laws in your jurisdiction, civil or criminal, are commonly weaponized as SLAPPs to silence parties? Do you have any notable examples where these laws have been abused?

While freedom of expression is protected as a quasi-absolute right by the US First Amendment, in European national and regional systems a necessary balance is struck between this fundamental right and other interests - such as the right to reputation, recognized in *Article 10 (2) of the European Convention on Human Rights*. Therefore, in Spain, among the laws that are commonly weaponized as SLAPPs to silence parties, we find those that protect interests such as the *right to honour*, which represent a counterbalance/limit to the *right to freedom of expression*.

The legal basis of the *right to honour* appears in the Spanish Constitution as a *fundamental right*, *Chapter Two (Rights and Freedoms), Section 1 (Fundamental Rights and Public Freedoms), Article 18.1*:

"1. The right to honour, to personal and family privacy and to one's own image is guaranteed."¹¹

It is important to point out the clash that may occur between the *right to honour and privacy* and the *right to information* (recognized in Article 20 of the Spanish Constitution) and which is also a fundamental right. In this sense, the Spanish Constitution specifically indicates in point 4 of article 20 that *the right to freedom of expression, information and criticism* is limited by the rights recognized in the Constitution itself and the laws developing it. Thus, the Spanish Constitution a limitation on the *right to free speech* (on which most SLAPP defendants' defences are based)

¹⁰ Criminal Judgment of the Provincial Court of Barcelona (9^o section), 17th of April 2016 (No. 291/2016).

¹¹ Art. 18.1 CE <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229>

in favour of other rights recognized in the constitution and developed by law, such as the right to honour, which represent a potentially legal basis for a SLAPP.

Therefore, in the Spanish SLAPP context, *the right to honour, privacy and one's own image* is particularly important, because it is the right that most vigorously counteracts the *rights to information and freedom of expression*, being recognized in the Constitution and developed by a specific law.

Its content is developed by the *Organic Law 1/1982, of 5 May, on the civil protection of the right to honour, family privacy and one's own image*.¹² Neither the Constitutional text, nor the Organic Law 1/1982, gives an exact definition of what the right to honour is. Nevertheless, *article 7* of Law 1/1982 lists the behaviours that are considered an unlawful interference with the *protection of honour, family privacy and one's own image*. Among these interferences cited in article 7, and taking into account the context in which SLAPPS occur, the ones that could be used by a SLAPP plaintiff to support the accusation of infringement of his/her right to honour could be the following:

“3. Disclosing facts relating to the private life of a person or family that affect their reputation and good name [...].

4. Disclosing private data of a person or family known through the professional or official activity of the discloser (of the offender).

7. Injuring the dignity or reputation of another person through charging facts or the expression of value judgements.”

Furthermore, the Spanish Constitutional Court, in its *judgement 223/1992 of 14 December 1992*, ruling on the *Constitutional Complaint 653/1989*, established that the right to honour is an indeterminate legal concept, the definition of which can be found in the "language of all". Moreover, the Spanish Constitutional Court identified a connection between the right to honour with "*good reputation*" and fame, concepts related to "*the opinion that people have of a person, good or positive if they are not accompanied by any adjective*" and confirmed the following: *The common denominator, of all attacks or illegitimate intrusions, into the sphere of protection of this right, is the depreciation of the consideration of others, as a consequence of expressions that discredit or disparage someone or that are considered in the public mind as a confrontation*". In conclusion and according to the Constitutional Court, the honourability of individuals is determined by the collective opinion and is therefore a flexible and changing right

¹² Organic Law 1/1982, of 5 May 1982, on the civil protection of the right to honour, personal and family privacy and one's own image. <https://www.boe.es/buscar/act.php?id=BOE-A-1982-11196>

that will be influenced by the values, social norms/codes and ideas in force at any given time in a specific society.¹³

Although legal entities are not mentioned at any time in the Spanish Constitution or in the Law that develops this right, the doctrine established by the Constitutional Court does so, recognizing that legal persons are also holders of the right to honour, establishing in its Judgement 139/1995 that *"no rule, neither constitutional nor legal, prevents them from being subjects of fundamental rights"*.¹⁴

Moreover, the Spanish Criminal Code defines two crimes against honour in its *Title XI (Offences against honour) Book II, articles 205 and 208, the crime of slander and the crime of libel*. Article 205 tells us that *"slander is charging a crime made with knowledge of its falsity or reckless disregard for the truth"*. In other words, a person commits the crime of slander when, knowing it to be untrue, he or she accuses another of having committed a crime. In regard to the crime of libel article 208 of the Criminal Code states: *"Libel is the action or expression that injures the dignity of another person, undermining his or her reputation or undermining his or her own esteem"*.

The Criminal Code also establishes a series of requirements for these actions to be considered as crimes:¹⁵

- a) *They must be serious, in the sense that their dissemination is public and on a large scale.*
- b) *A complaint must have been filed by the offended party or their legal representatives if they are minors or incapable.*
- c) *Before filing the complaint, a conciliation hearing must have been attempted, as certification of the attempt at conciliation is required to initiate the complaint.*
- d) *The statute of limitations for these offences is one year.*

It should be noted that in case of acknowledgement, repentance or retraction on the part of the accused, the penalties can be reduced. And if the offended party grants forgiveness, the prison sentence (if any) is extinguished.

¹³ Judgment of the Constitutional Court 223/1992 (First Chamber), 14 December 1992 (appeal for amparo 653/1989).

¹⁴ Judgment of the Constitutional Court 139/1995 (First Chamber), 26th of September 1995 (appeal for amparo 83/1994). https://www.boe.es/diario_boe/txt.php?id=BOE-T-1995-22479

¹⁵ Spanish Criminal Code. Chapter III: General Dispositions, articles 211-216.

It is relevant to mention that the term "*defamation*", unlike in other countries, does not appear in Spanish law as such, but under the denomination of *slander* or *libel*, although it has a very similar meaning as it seeks to protect the same legal right: honour.

A notable example of how the right to honour has been recently weaponized in a SLAPP claim in Spain is the complaint filed by Coren Corporation in February 2020 against the environmental activist Manuel García. One year before, in 2019, Manuel appeared on a well-known television programme showing how a Coren's own farm irrigated a meadow with slurry and criticizing these polluting and harmful practices for the natural Galician environment and ecosystems. He affirmed in front of the cameras that these irrigations with untreated slurry contained antibiotics and many chemical products that were later absorbed by the soil and groundwater and also polluted surface water of various reservoir such as the 'As Conchas', something that had already been evidenced by official data and various scientific reports.

Five months later, Manuel Garcia received a civil complaint from Coren's legal services accusing him of *illegitimate infringement of the company's right to honour* (under the protection of the law 1/1982 articles 7 and 9) due to the false accusations made in the television programme. Coren's claim for damages amounted to one million euros and requested Manuel a public rectification of his criticisms. Nevertheless, in the conciliation proceedings that follow this type of lawsuits, which was held in the court of Xinzo (Orense, Galicia) in March 2020, Manuel García ratified his complaints against the lack of treatment of slurry and manure on Coren's farms and the responsibility of the company for the serious environmental problems caused in A Limia by its industrial livestock farming model.

Since then, the legal process has been paralyzed, but it is clear that Coren's intention was to intimidate Manuel García with an excessively high amount of damages and to silence him and the matter of public interest that his criticisms opened up. Moreover, Coren sued Manuel Garcia for making false accusations, when in fact, it has been established by various environmental organizations that Coren's agronomic practices in Galicia are harmful for the local environment. It is worth mentioning that environmentalists claim that Galicia is the only autonomous community in Spain that to date has not designated any Nitrate Vulnerable Zones, as required by the Nitrates Directive¹⁶. Spain's repeated failure to comply with this Directive led the European Commission to send a reasoned opinion in July of 2020, reiterating the obligation to comply with articles 2 and 5 of the Nitrates Directive.

Therefore, the complaint by Coren was filed in clear bad faith, knowing that the statements made by Manuel Garcia in the Spanish tv program were not false, and that on the contrary, Coren's agricultural practices were indeed causing a local environmental damage. This a clear matter of public interest that the company was not interested in being disseminated and

¹⁶ Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.

exposed and therefore used an intimidatory lawsuit to silent the matter, which falls squarely within the scope of a SLAPP.

8. Has international legislation played a role in SLAPP lawsuits in your jurisdiction? (e.g., European Union GDPR) If yes, to what end?

The *Toranzo Gómez v Spain* (26922/14), although not strictly speaking an example of SLAPP litigation, could serve as a precedent for future SLAPP cases in Spain.

The background to the case was as follows: Agustín Toranzo, a Spanish national, was part of a group of activists who occupied a social centre in an act of protest in 2007. Subsequently, a Spanish court ordered the eviction of the centre, and the police entered the building. Mr. Toranzo and another activist chained themselves to the ground through a concrete platform they had built under the building so that they could not be moved. They both had inserted an arm with an immobilized wrist into an iron pipe anchored to the ground. The police officers, in charge of clearing out the centre, tied a rope around Mr. Toranzo's waist and tried to pull him out by pulling on the rope. On November 30, 2007, the two men relented. The firemen were also involved in the attempt to extract the two men and had told them, in particular, that the building was in danger of collapsing and that the police could use gas against them.

In December, at a press conference, Mr. Toranzo described the actions of the police, who were trying to remove him, as torture. He stated that the means used had caused him great suffering and had led him to renounce the confinement. He also stated that the "act of torture" had been committed by the two policemen whose photograph had appeared in the press.

As a result of Mr. Toranzo's statements, in December 2007, the Andalusian Government Delegation filed a suit against him, which finally resulted in Mr. Toranzo being convicted for a crime of *slander and defamation*. He was fined 20 months at a daily rate of 10 euros and ordered to pay damages to the two policemen in the amount of 1,200 euros. The domestic court based their judgement on the following arguments: the police authorities acted proportionately with regard to the difficulty of extracting the activists from the centre and relied on the definition of "torture" found in the Spanish Criminal Code, definition which they stated, did not fit the actions carried out by the police and thus exceeded the defendant's right of expression. Mr Toranzo appealed to the Provincial Court of Seville and next appealed to the Constitutional Court. On 21 October 2013, the Constitutional Court dismissed Mr. Toranzo's constitutional complaint on the ground that the applicant had not met his burden of proving that the case was of "particular constitutional relevance".

Mr. Toranzo filed the case before the European Court of Human Rights on 26 March 2014 claiming that under Article 10 of the European Convention on Human Rights the judgement of the Spanish domestic courts finding him guilty of libel was an undue interference with his right to freedom of expression.

Article 10 of the Convention reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article does not prevent States from subjecting broadcasting, cinematography or television broadcasting undertakings to a system of prior authorisation.

2. The exercise of these freedoms, which carry with them 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 in the interests of 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 confidential information or for maintaining the authority and impartiality of the judiciary.

The ECHR considered that in *Mr. Toranzo's v Spain*, rights guaranteed by Article 10 had to be weighed against the rights of the police officers guaranteed by Article 8 (right to respect for private and family life) in order to rule the final judgement. Finally, the Court's judgement considered that the Spanish judges were too strict in their analysis of the use of the word "torture" and conclude that the young man used it in a colloquial way to describe an excessive use of force and to criticize the methods used by the police and firefighters. According to the judges, even if Mr. Toranzo exaggerated the pain he suffered during the police eviction, he "probably" suffered some kind of pain, fear and physical and mental suffering and therefore his statements had been formulated in good faith in the context of a debate on a matter of public interest.

The Court also ruled that the prosecution and subsequent punishment for libel and defamation may have had a "chilling effect" on the applicant's exercise of freedom of expression, as it may have deterred him from criticizing the actions of the police. Therefore, the ECtHR rebuked the Spanish judges for failing to properly balance and justify all the rights and interests of all those concerned in the case and ruled that *"The interference with Toranzo Gómez's rights was not necessary in a democratic society and there was a violation of Article 10,"*. Consequently, the ECtHR awarded the applicant EUR 1,200 for material damages, EUR 4,000 for non-material damages and EUR 3,025 for costs and expenses.

The importance of this case, the precedent it has set and its relationship to the SLAPP suits is that it demonstrates that the right to freedom of expression is one of the *"essential foundations of a democratic society,"* even if, as the ECHR judgment states, it offends or shocks, and can only be subject to restrictions which are necessary to meet a *"pressing social need."* Therefore, the final ruling also implies/requires that although paragraph 10.2 of the European Convention on Human Rights states that freedom of expression may be subject by states to *"certain formalities, conditions, restrictions or penalties prescribed by law, which are necessary in a democratic society in the interests of national security, territorial integrity or public safety, [...]"*

national authorities must always seek the last restrictive curtailing of this right in any given situation.

Finally, this case is also important in the field of SLAPPS and could be used in future cases as it brings out a very important point in the defence of a SLAPP response, the special European protection to making value judgements. The judicial practice of the European Court treats statements of facts differently from value judgments, i.e., opinions, and the *Toranzo v Spain* case confirms this. While allegation of false facts forms the basis of defamation claims, opinions enjoy a higher threshold of protection. The distinguishing factor is that, while the existence of facts can be demonstrated, the truth of value judgments is not testable. The requirement to prove the truth of a value judgment is impossible to comply with and violates the freedom of opinion itself, which is a fundamental part of the right guaranteed by Article 10 of the ECHR.

9. In SLAPP cases, do litigants tend to invoke due process rights? If yes, how do judges weigh the right to due process when balanced against concern about frivolous suits?

As mentioned above, in Spain, apart from the recent case of *Manuel Garcia v Coren*, there has been no further law cases of SLAPP.

However, the Spanish Constitution enshrines the *right to effective judicial protection (or right on access to justice)*, directly related to the *right to due process*, in its article 24. Effective judicial protection includes the right to be heard by judicial bodies established by the State, i.e., not only the right of access once the requirements established in procedural laws have been met but also the right to be heard by judicial bodies and the right to obtain a ruling based on law. In conclusion, the *right to effective judicial protection* aims to ensure that judgments are issued in accordance with Law, using the procedural mechanisms provided by law. In this sense, the parties of a litigation must file their claims to the jurisdictional bodies established by the State respecting the procedures provided by law. To this end, the persons concerned must also refrain from obstructing the administration of justice, avoiding unnecessary and useless acts.

It can therefore be concluded that the violation of constitutional rights relating to due process and effective judicial protection more than the right to defence represents an abuse to personal liberty and the presumption of innocence. This is so because it is not only a question of access to justice for protecting rights and interests but also relates to the right to effective protection of these rights and the right to obtain justice without undue delay.

However, the right enshrined in Art. 24 EC cannot be identified with an alleged right to a favourable ruling. What is relevant for these purposes is that a legally reasoned judicial ruling is obtained, even when the decision is one of inadmissibility.

For this reason, it is repeated doctrine of the Spanish Constitutional Court, to deny the existence of a violation to the right enshrined in art. 24.1 CE when a plaintiff alleges the lack of defence

which is assignable to his own conduct for not acting with due diligence or by having adopted a passive attitude.

10. Is there a need to reform legislation on a national level to prevent frivolous or SLAPP cases? If yes, what might that look like?

There is a strong need to reform Spanish legislation on a national level to prevent frivolous or SLAPP cases due to the fact that there is an absolute legal vacuum in the national legal order in terms of measures and mechanisms to be protected against this kind of lawsuits.

As discussed above, due to the rights recognized in the Spanish legal order to due process and effective judicial protection, the objective of any anti-SLAPP mechanism in Spanish law should not be to limit the ability of parties to assert their rights before the courts, but rather to establish a set of legal tools that allow the defendant to have sufficient capacity and options to fight vexatious claims that aim to limit his/her participation in public life.

These basic anti-SLAPP mechanisms consist of, on the one hand, the possibility to dismiss at an early stage of the litigation process those claims with SLAPP features and, on the other hand, a series of deterrent measures in which the SLAPP actor has to compensate and indemnify the victim of his claim.

11. Are there rules codified into professional or bar association codes of conduct which could prevent or punish lawyers from filing SLAPPs? If yes, are these rules typically enforced?

In Spain there are no rules codified into professional or bar association codes of conducts that directly address SLAPPs and prevent or punish lawyers that contribute to the filing of this type of lawsuits. Nevertheless, there are rules in professional or bar association codes that due their wide scope could be used to prevent or punish lawyers in SLAPP cases.

For example, in the *Spanish Code of Ethics for Lawyers*, Article 3 on the freedom of defence states: "(1) A lawyer has the right and duty to defend and advise his clients freely, without **using illicit or unfair means, or fraud** as a means of evading the law. (2) A lawyer is obliged to exercise his freedom of defence and expression in accordance with the **principle of good faith** and the rules of proper professional practice [...]"

Vexatious litigation is considered as a *legal action* against someone lacking merit and being brought with the main purpose of annoying, harming or maliciously harassing the defendant. Settled case law in other jurisdictions categorizes SLAPPs with features belonging to vexatious litigation, such as: *brought with the aim of causing a chill effect on the exercise of protected fundamental rights, abuse of judicial power, not properly based in legal arguments...* Consequently, there is a precise identification between SLAPPs and vexatious litigation, as confirmed by multiple common-law case law, which not only describe SLAPP's as having the

key features of vexatious litigation, but directly addresses them as such, in order to justify the dismissal of the case. This was the situation in *Wraypex (Pty) Ltd v Barnes* where the court finally dismissed the case for “vexatious litigation,” noting: “The litigation was purposeless from an economic point of view and if anything was more harmful to the Plaintiff than the words complained of. At the same time the four Defendants were unnecessarily involved in heavy expenditure in defending the cases brought against them.”

The conduct described as vexatious could be a case of *procedural abuse*, considering this to be an action or omission by the parties contrary to good faith, respect, loyalty, probity and rational use of the procedural system, due respect for the procedural subjects, the duty to cooperate with the administration of justice, malicious, reckless, negligent, disrespectful or generally fraudulent behaviour.^{17 18}

Therefore, due to the total identification between vexatious litigation and SLAPP’s, the latter ones would be then manifestly contrary to *Article 3* of the *Spanish Code of Ethics for Lawyers* as well as *Article 11: Relation with court*, which states the following: “1. Lawyers shall have the following obligations towards the courts: a) To act before them in good faith, loyalty and respect. b) To cooperate in the fulfilment of the aims of the Administration of Justice. [...] e) To contribute to the diligent handling of the matters entrusted to them and of the proceedings in which they intervene. [...]”.

Moreover, *article 31* of the *General Statute of the Spanish Legal Profession* states that lawyers are obliged to follow the legal, statutory and deontological rules, reinforcing the duty to comply with the already mentioned Code of Ethics for Lawyers, which, as pointed out, expressly prohibits the vexatious conduct and actions present in SLAPP’s.

This same *General Statute* establishes in *Article 36*: “The fundamental duty of a lawyer as a participant in the public function of the Administration of Justice is to cooperate with it by advising, conciliating, and defending in Law the interests that are entrusted to him/her. In no case the protection of such interests can justify the deviation of the supreme aim of Justice to which the Legal Profession is linked to”. This should prevent lawyers to file a SLAPP case.

12. What are the broad takeaways from SLAPP lawsuits in your jurisdiction? Are there unwritten norms or patterns which the cases tend to follow?

We cannot speak of broad takeaways from SLAPP lawsuits in the Spanish jurisdiction, as for now there has only been one case considered as SLAPP by the international community and by several NGOs such as Greenpeace. This is the case discussed in a previous section in which the meat corporation Coren sued Manuel García for defamation and infringement of the company’s right to honour. These accusations coincide with what is, according to the EU model

¹⁷ Artavia, Sergio, et.al. (s/f). Abuso procesal. Masterlex. Manríquez, Vicente. (2011).

¹⁸ Peyrano, Jorge, et.al. (2002). Abuso procesal. Rubinzal Culzoni Editores: Buenos Aires.

anti-SLAPP Directive (published in December 2020 by a board network of NGO's), the most common origin of SLAPP cases on EU territory, namely that the plaintiff files a complaint alleging *criminal defamation*.

The fact that the EU has not enacted any specific anti-SLAPP legislation or measures (and therefore there is no uniformity or harmonization in this respect in the EU territory) combined with a national context in which each member country protects in different ways rights that have a direct impact on the development of a SLAPP case, such as; *freedom of expression, the right to honour, the prevention of vexatious litigation...* cause that the conclusions of SLAPPS litigation at national level significantly vary and differ from one country to another. However, in European courts a similar takeaway in SLAPP litigation can be appreciated, and this is the tendency of the court to protect public participation through the right of freedom of expression (article 10 of the European Convention on Human Rights) regarding it with a higher value in comparison to other rights also protected like individual reputation (taking in consideration other circumstances that also support the case).¹⁹ This pattern is shown in numerous community case law, such as *Sunday Times v. UK*, *Thorgeirson v. Iceland* and *Steel and Morris v. UK*.

13. Based on your experience, what types of advocacy action can best prevent the initial filing of SLAPPs? What types of advocacy actions can be best for getting such suits dismissed once they are filed?

As mentioned in the previous section, litigations initiated by SLAPP's that end up in the European Court of Human Rights usually follow the takeaway of giving more value to the right to freedom of expression compared to other rights that may limit it (right to honour, individual reputation, private life...). As a result, judgments tend to rule in favour of the initial defendants (victims of a SLAPP lawsuit). However, this protection and this broad takeaway only occurs when the defendants have gone through all the national courts and therefore have already suffered psychological, reputational and economic damage, as well as having already triggered a chilling effect in society in general due to the dissemination of the litigation.

¹⁹ Bárd, P, Bayer. J, Chun Luk.N, Vosyliute, L & Carrera, S. (2020). *SLAPP in the EU Context*. Academic Network on European Citizenship Rights.

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