

Call for submissions to the thematic report of the Special Rapporteur on Freedom of Opinion and Expression to the UN Human Rights Council: “Freedom of Opinion and Expression and Sustainable Development - Why Voice Matters”

SLAPPs in Switzerland

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Introduction

According to a recent study by the Swiss NGO HEKS/EPER, it has been found that more and more companies are turning to legal means to silence unwelcome public communication through a tactic known as strategic lawsuits against public participation (SLAPP). The study revealed that 6 out of 11 NGOs have faced civil or criminal lawsuits in response to reports they had published, particularly since 2018. None of these lawsuits have yet resulted in a first instance judgement. However, the NGOs have reported that the lawsuits have nevertheless already consumed a significant amount of their financial and personal resources.

In addition to the apparent burden on the individual NGOs sued, SLAPPs also pose two major challenges to the Swiss democratic society as such:

- i) They restrict public debate by creating a chilling effect on the publication of critical reports, leading to self-censorship and the diversion of personal and financial resources.
- ii) They also involve the abuse of the legal system and add an unnecessary burden on the courts.

Legal bases of SLAPPs

SLAPPs against Swiss NGOs often involve an international aspect, which requires Swiss courts to determine their *jurisdiction* and the *applicable law*. In most cases, jurisdiction is based on the domicile of the NGO or the individual person involved. As for the applicable law, claimants can generally choose between the law of the state in which the injured party resides, the law of the state in which the perpetrator is domiciled, or the law of the state in which the offense occurred (as per Article 139 of the Private International Law Act).

SLAPPs can take the form of both *criminal* and *civil lawsuits* against NGOs as an organization or against individual persons who are the authors or directors of the contested reports. Civil claims against NGOs for allegedly harmful reports have been based on the protection of personality rights under Article 28 *et seq* of the Swiss Civil Code. Alongside the standard civil process, companies may also seek interim measures such as an injunction order against a NGO to avoid the publication of an article.

From a criminal law perspective, the most relevant provisions are found in the defamation clauses of Article 173 *et seq* in the Swiss Criminal Code. Defamation lawsuits have typically been brought against individual persons, as primary criminal corporate liability in Switzerland is limited to only a few economic crimes.

Besides the above-mentioned “classical” legal bases for SLAPPs in Switzerland, abusive lawsuits may be litigated under the Unfair Competition Act (UCA). The reason is that NGOs’ public communication may qualify as an unlawful conduct under Article 3 paragraph 1 litera 1 UCA which is subject to civil and criminal liabilities.

Moreover, with the international coordinated release of accounts from Credit Suisse clients linked to criminal practices such as torture, drug trafficking, money laundering, and corruption (known under “Swiss Secrets”), the extensive phrasing of the confidentiality law in Article 47 of the Act has come to light. Article 47, while intending to uphold banking secrecy, can also result in journalists or NGO personnel facing punishment for reporting on related abuses. Following the Swiss Secrets leak, the Federal Prosecutor opened investigations against the whistle-blower who sent the incriminating data on the clients of Credit Suisse to journalists.

At least in the case of one of the concerned NGOs, the legal strategy deployed by a law firm which represented the SLAPP claimants has been alarmingly aggressive and injurious. This case shows the weak, respectively missing enforcement of professional standards of the legal profession.

Protection against SLAPPs *de lege lata*

Unlike other countries such as the US, Australia, and Canada, there is currently no specific law in place in Switzerland to frustrate SLAPPs. Furthermore, in contrast to the EU or UK, the government has not yet become legislatively active nor voiced any intentions in that regard. We generally observe a shrinking space for civil society and journalism in Switzerland, which is reflected in ongoing legislative adjustments, for example in planned adjustments to the law for the intelligence service (undermining the protection of professional secrecy and the protection of sources) and ongoing attempts to undermine the right to information act.

In sum, SLAPPs pose a significant threat to the freedom of expression in Switzerland. NGOs must devote considerable financial and human resources to defend themselves and their collaborators against malicious civil and criminal lawsuits. In addition, and as a result, this also increases the likelihood of self-censorship of NGOs, as there is currently no specific legislation to protect against SLAPPs and they must rely on general principles of good faith and protection

against the abuse of process. It remains to be seen whether first instance judges are willing to rely on these general principles of proper conduct to dismiss abusive lawsuits against NGOs.

Swiss courts tend to be cautious when it comes to applying general principles to specific problems, therefore it is rather unlikely for a dismissal to be made based on the mentioned provisions of good faith or against procedural abuse.