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STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPP) IN LIGHT OF DISCLOSED SEXUAL VIOLENCE AT UNIVERSITIES IN POLAND – GENERAL REFLECTIONS RELATING TO LEGAL REGULATION AND PRACTICE

Abstract

This publication aims to present the problem of disclosed sexual violence at higher education institutions in Poland in the light of available anti-discrimination regulations introduced at the University of Warsaw and standards provided by national and EU law. The paper further presents *de lege lata* institutions used in Poland as SLAPPs with a critical assessment of them and legal instruments possible to use in defence against retaliation. The study proceeds to present *de lege ferenda* solutions. Within the framework of the developed proposals for legal changes, an analysis is made of actions taken at the international level, particularly within the European Union, which constitute proposed legal regulations aimed at preventing legal retaliatory actions in the future. The analysis of the regulations contained in EU documents was aimed at investigating whether the guidelines enacted take into account effective protection of persons who, by disclosing their experience of sexual violence, expose themselves to retaliatory actions from the perpetrators.

KEYWORDS

SLAPP, strategic lawsuits, sexual violence, campus sexual violence, defamation crime, decriminalisation of defamation, anti-SLAPP Law

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SLAPP, strategiczne pozwy przeciwko partycypacji publicznej, przemoc seksualna, przemoc seksualna na uczelniach wyższych, zniesławienie, dekryminalizacja zniesławienia, regulacje anty-SLAPP

1. INTRODUCTION

During the last decade of the 21st century, Strategic Lawsuits Against Public Participation (known as SLAPPs) began to be filed, both throughout the world and in Poland, against women experiencing sexual violence. Social and cultural changes around the issue of gender equality including the #MeToo movement¹, led to the exposure of sexual violence, in particular sexual harassment, experienced by women over the years. This, in turn, has led to a situation where the SLAPP strategy has started to be used not only – as it has been until now – by those aiming to restrict media freedom, but also by perpetrators of sexual violence when those affected by them decide to speak up about their experiences and engage the available legal instruments to seek justice, thereby punishing perpetrators.

For many years there has been a legal and social debate concerning the *ratio legis* of the regulation of the crime of defamation in the criminal codes of EU countries² and the justification of its decriminalisation³. This topic appears most

¹ MeToo is a social movement launched in 2017. Its aim is to draw attention to the scale of the problem of sexual violence through public sharing of these experiences by women. The ‘Me Too’ slogan was first used by Tarana Burke on the social networking site MySpace in 2006 as part of a campaign to promote ‘empowerment through empathy’ to women who had experienced sexual violence. The name was used in the hashtag #Metoo used to tag social media posts on the subject.

² See, for example, CoE Parliamentary Assembly Resolution 1577 (2007): Towards Decriminalization of Defamation, 4 October 2007, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en> (accessed 6 June 2023). S. Griffen, *Out of Balance – Defamation Law in the European Union: a Comparative Overview for Journalist, Civil Society and Policymakers*, ‘I.P.I.’ 2015, p. 6, <http://ipi.media/wp-content/uploads/2016/08/IPI-OutofBalance-Final-Jan2015.pdf> (accessed 20.06.2023).

³ See, for example, Defamation Laws in Europe; <http://legaldb.freemedia.at/defamation-laws-in-europe/> (accessed 20.06.2023). Joint Declaration of the UN and OSCE Rapporteurs on Freedom of Expression in favour of the abolition of criminal liability for defamation, 10.12.2000;

often in situations where this regulation is used as a so-called SLAPP against journalists⁴ and in the context of media freedom and has concerned Poland as well as most EU countries⁵. One of the main points raised in the discussion on decriminalisation of defamation are examples of legal retaliation strategies aimed at restricting journalists' freedom of expression, which pose a serious threat to democracy. In other words, SLAPPs have become the most widespread legal strategy used to intimidate people who exercise their civil and political rights around the world⁶. It is important to emphasise – right at the beginning of this paper – that the primary purpose of the SLAPP strategy is not and never has been to seek justice, but – solely – to intimidate and 'silence' those exercising their rights. As pointed out in a report published by the Case Coalition against SLAPP in Europe, "In the last years, there has been an escalation of assaults on freedom of expression and the right to public participation, such as reporting violations of the law or ethical norms, writing to government officials or corporate customers, circulating petitions, being parties in litigation designed to advance social change, engaging in peaceful protests or boycotts, or simply speaking out against abuse/corruption etc. Journalists, activists, whistle-blowers, advocacy groups and other public watchdogs, have long been the target of various forms of abuse"⁷.

The issue of the SLAPP strategy in the context of freedom of expression has been the subject of numerous studies⁸ and reports⁹ over the years. The phenomenon of using this strategy in relation to victims of sexual violence, on the other hand, has emerged relatively recently and is a reaction to the disclosure of sexual violence experienced by women in all spheres of society for many years. One such

Resolution of the Parliamentary Assembly of the Council of Europe No. 1577 (2007) of 4.10.2007, Towards the decriminalisation of defamation; Article 212. The ombudsman proposes changes to defamation laws (brpo.gov.pl) (accessed 6.06.2023).

⁴ See Civil Liberties Union for Europe, *Liberites. Media Freedom Report 2023*, https://hfhr.pl/upload/2023/04/liberties_media_freedom_report_2023_1.pdf (accessed 15.07.2023).

⁵ See Council of Europe action to protect journalists: Platform to promote the protection of journalism and safety of journalists, <https://fom.coe.int/en/accueil> (accessed 15.07.2023).

⁶ As reported in CASE Coalition against SLAPPs in Europe, *Shutting out criticism: How SLAPP's threaten European Democracy. A report by case*, 2022, p. 17: "Between 2019 and 2021, ALCs and CASE collected data from its members and other civil society groups on apparent SLAPPs filed between 2010 and 2021. On the basis of this data CASE has identified 570 legal cases from across Europe as SLAPPs." The full list of these cases can be found here: <https://bit.ly/CASESLAPP>.

⁷ CASE Coalition against SLAPPs in Europe report. *Shutting out criticism: How SLAPP's threaten European Democracy. A report by case*, 2022, <https://www.the-case.eu/wp-content/uploads/2023/04/CASereportSLAPPsEurope.pdf> (accessed 15.07.2023).

⁸ See e.g. European Parliament, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, 2021, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf) (accessed 02.09.2021).

⁹ See e.g. P. Bárd et al., *SLAPP in the EU context*, Academic Network on European Citizenship Rights 2020, https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf (accessed 02.09.2021).

area of disclosure of sexual harassment is the university space¹⁰. This phenomenon is also taking place in Poland¹¹.

The disclosure of harassment and sexual harassment experienced by female students at Polish universities has led to the introduction of anti-discrimination procedures as part of the autonomous legal measures put in place throughout universities. Within the framework of those university-regulated instruments, however, the reactions to the complaints reported started to become retaliatory, as they were being implemented by the perpetrators and consisted, most often, in filing private defamation charges or, less often, lawsuits for violation of personal rights, which has a consistently chilling effect on current and future persons experiencing sexual violence.

The above-mentioned issues lead to a discussion on an analysis of Polish criminal law, both substantive and procedural, from the point of view of its effectiveness in protecting victims of sexual violence who experience legal retaliatory actions carried out by their perpetrators. It is necessary to consider whether legal regulations sufficiently protect victims from retaliatory strategies and, if not, whether it is necessary to change the law in this respect and introduce legal, anti-SLAPP regulations in Poland, which would prevent such criminal trials against victims of sexual violence. As an aside, it should be pointed out that sexual harassment at universities is only one example of public spaces where, for about a decade, sexual violence began to be exposed. Thus, the *de lege ferenda* anti-SLAPP regulations postulated in this study will apply to all areas of public life, effectively protecting all persons experiencing discrimination from legal retaliation by perpetrators. At the same time, the proposed regulations can also be an effective measure for journalists, activists, whistle-blowers and all those who, as indicated above, have been exposed to legal retaliation aimed at restricting freedom of expression for years.

The reality today means that the following research problems arise: first and foremost, we have the frequently raised¹² general question about justification of criminalisation of defamation. It turns out that this criminal law measure, in a current social reality, is used in cases of sexual harassment victims most often for retaliatory purposes and in order to intimidate their victims. Irrespective of the above question, a critical analysis of the effectiveness of criminal law regulations (especially criminal procedural law) concerning the protection of vic-

¹⁰ A.R. Leader, *A 'SLAPP' in the Face of Free Speech: Protecting Survivors' Rights to Speak up in the 'Me Too' Era*, 'North Carolina Law Review' 2019.

¹¹ See Helsinki Foundation for Human Rights, *Sqd: złożenie skargi zarzucającej molestowanie nie jest zniesławieniem*, 09.12.2022, <https://hfhr.pl/aktualnosci/zlozenie-skargi-zarzucajacej-molestowanie-nie-jest-znieslawieniem> (accessed 15.07.2023).

¹² See e.g. OSCE, *Ending the Chilling Effect – Working to Repeal Criminal Libel and Insult Laws*, Vienna 2004; D. Sześciło, *Paragraf 212: Karanie dziennikarzy za zniesławienie w polskiej praktyce*, Warsaw 2009; I. Zgoliński, *Zniesławienie w regulacjach prawnych wybranych państw*, 'Ius Novum' 2022, No. 3, A. Zoll, *212 k. k. : wykreślić czy zmienić?*, 'Na Wokandzie' 2012, No. 14.

tims of sexual violence against retaliatory actions of perpetrators of such violence becomes important. Not underestimating in any way the enormous threat that SLAPPs have – for years – posed to the freedom of the media and all those concerned with freedom of expression identified above, it is necessary to point out the existing difference in the situation of this group of persons – often supported by a powerful press corporation, that provide funding for litigation – and victims, who are firstly confronted with the experience of sexual violence and who – more often than not – are not in a position, mentally and financially, to face, in addition, the legal retaliation, putting the actual victim in the role of a litigant. The question therefore arises as to whether Polish law stipulates effective anti-SLAPP regulations and, if not, how the existing legal regulations should be amended so that they are best adapted to this new social reality, effectively preventing perpetrators of violence from intimidating victims with private defamation or personal injury lawsuits.

In view of the above, this publication aims, firstly, to present the problem of disclosed sexual violence at universities in Poland in the light of available anti-discrimination regulations introduced at the University of Warsaw and standards provided by national and EU law. Secondly, the paper will present *de lege lata* institutions functioning in Poland as SLAPPs with a critical assessment of them and legal instruments possible to use in defence against retaliatory actions. Thirdly, this study will propose concrete *de lege ferenda* solutions. Within the framework of presenting proposals for legal changes, an analysis will further be made of measures taken at the international level, particularly within the framework of the European Union, which constitute proposed legal regulations aimed at preventing legal retaliatory actions in the future. The analysis of the regulations contained in the EU documents is aimed at examining whether the enacted guidelines take into account the effective protection of persons who, by disclosing their experience of sexual violence, expose themselves to retaliatory actions on the part of the perpetrators.

2. SEXUAL HARASSMENT AT UNIVERSITIES IN POLAND AS A MANIFESTATION OF GENDER DISCRIMINATION – FACTS AND LEGAL REGULATIONS BASED ON THE CASE OF THE UNIVERSITY OF WARSAW

Recent research¹³ shows that the phenomenon of sexual violence and, above all, sexual harassment in the university campus is one of the significant problems

¹³ Report on sexual harassment at selected Polish universities: Badanie molestowania seksualnego na uczelni: powszechność zjawiska oraz analiza dostępności wsparcia na Uniwersytetach

of higher education institutions both in Poland and worldwide¹⁴. This phenomenon, therefore, requires an effective and efficient legal response which would enable female students who have been wronged to enforce their rights¹⁵. The development of effective legal regulations with regard to sexual harassment in public spaces, however, has proven to be a difficult task. When enacting such a law, it is necessary not only to have a broad knowledge of the issues regulated, but also to be particularly sensitive to manifestations of any kind of discrimination, as well as to exhibit a political will for social change, both at the level of national institutions and within all public and private entities, and especially within public and non-public universities. Preventing and combating inequalities in the academic space, with particular focus on the problem of harassment and sexual harassment, should therefore be one of the priorities of the authorities of any academic community.

In view of the above problem, the Rector of the University of Warsaw issued Ordinance No. 205 of 31 August 2020 on the anti-discrimination procedure at the University of Warsaw, together with an annex regulating the basic principles of the introduced procedure¹⁶. Pursuant to § 1 of the Ordinance, the anti-discrimination procedure sets out rules for discrimination (including sexual harassment) at the University, and the purpose of its introduction is to support anti-discrimination measures and to protect employees, doctoral students and students against the occurrence of discrimination in the workplace or in connection with work and in cases of such occurrences. The purpose of the procedure is to issue an opinion on whether discrimination has taken place when a person who feels that he or she has been subjected to discriminatory action lodges a complaint (§ 7(7) and § 6(1) of the Ordinance). Opinions are issued by the Anti-Discrimination Committee, established by the Ordinance, which is a collegiate body appointed by the Rector to investigate complaints of discrimination and to prevent and counteract discrimination occurrences at the University of Warsaw.

Jagiellońskim, Warszawskim oraz Wrocławskim dla osób studiujących, które go doświadczają, Warsaw 2022, published on the website of the Polish Society of Anti-Discrimination Law (accessed 15.07.2023), and the results of a study conducted in 2017, entitled, "Experience of harassment among male and female students" within the Gender-Based Violence, Stalking and Fear of Crime project (EU Project 2009 – 2011, JLS/2007/ISEC/415): http://www.gendercrime.eu/pdf/gendercrime_final_report_printable_version.pdf (accessed 15.07.2023).

¹⁴ S. Prior, B.A. De Heer, *Campus Sexual Violence. A State of Institutionalized Sexual Terrorism*, London and New York 2023.

¹⁵ It should be pointed out that male student-victims of acts classified as gender-based violence also benefit from looking at the victimisation of victims of sexual violence. It should be recalled that the fact that there is a clear overrepresentation of women among victims of sexual harassment does not mean that men cannot also be victims in individual cases. In their case, too, it is a question of control exercised over them by the perpetrators by placing them in a position of subordination and dependence (analogous to that of women in society).

¹⁶ Monitor Uniwersytetu Warszawskiego (Monitor of the University of Warsaw), item 384, hereinafter as: "Ordinance".

The definition of discrimination regulated in the Ordinance (§ 2) indicates that it is understood as unequal treatment with regard to the establishment and termination of the employment relationship, terms and conditions of employment, promotion and access to training to improve professional qualifications, in particular on the basis of gender, age, disability, race, religion, nationality, political opinion, union membership, ethnic origin, religion, sexual orientation, and on the grounds of employment for a definite or indefinite period of time or full-time or part-time employment, whether in the form of direct or indirect discrimination.

The concept of unequal treatment implemented by the University's anti-discrimination regulation, particularly the concept of sexual harassment, should be interpreted in accordance with the provision of Article 8(1)(1) and the provision of Article 3 of the Act of 3 December 2010 on Implementation of Certain Provisions of the European Union on Equal Treatment¹⁷. The provision of Article 8(1)(1) of the Anti-Discrimination Act prohibits unequal treatment of individuals on the basis of gender with regard to undertaking vocational training, including further training, in-service training, retraining and apprenticeships, as well as in other regulations of the indicated Act. This interpretation is confirmed in views of legal scholars and commentators¹⁸, as well as by the CJEU¹⁹. According to the provision of Article 3 of the aforementioned Act, harassment should be understood as any unwanted behaviour the purpose or effect of which is to violate the dignity of an individual and to create an intimidating, hostile, degrading, humiliating or derogatory atmosphere towards them. Sexual harassment, on the other hand, is defined as any unwanted conduct of a sexual nature or relating to sex which has the purpose or effect of violating the dignity of an individual, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment with regard to them; such conduct may consist of physical, verbal and/or non-verbal elements. An identical definition of the term "sexual harassment" is contained in Article 18^{3a}(6) of the Polish Labour Code. It is therefore possible to refer to the body of legal commentary and judicial decisions developed in the field of labour

¹⁷ Dz. U. (Journal of Laws) 2020, item 2156, hereinafter: anti-discrimination law.

¹⁸ K. Kędziora, K. Śmiszek, (in:) Z. Jabłońska, M. Kułak, K. Kędziora, K. Śmiszek (eds), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania. Komentarz*, Warsaw 2017, Article 4, LEX, nb. 3.

¹⁹ Judgment of the CJ of 2 February 1988, in Case C-24/86, *Vincent Blaziot v. Université de Liège and Others*, emphasised that any form of education which prepares for qualification for a particular profession or employment or provides the necessary training and skills is to be regarded as vocational training under the Treaties. The Court emphasised that we are dealing with vocational training not only when the final academic examination directly provides the required qualification for a specific profession, trade or employment, but also when the student needs the knowledge so acquired in order to, for example, exercise a profession, even if no statutory or administrative provisions stipulate that the acquisition of this knowledge is a prerequisite for this purpose. Although the proceedings before the Court concerned the issue of discrimination on the basis of nationality, in access to education at a veterinary university, the judgment nevertheless set a high standard of protection against biased, unequal treatment.

law. Harassment, which refers to discrimination on the basis of sex, has been called, following the example of EU directives, sexual harassment²⁰. The definitions of harassment and sexual harassment indicated above should be applied to discriminatory behaviour that occurs at the University of Warsaw.

According to the above definition, the most common behaviours which constitute harassment or sexual harassment in the academic space, including at the University of Warsaw²¹, include: unwanted physical contact (touching, stroking, patting, pinching), attempts to bring about unwanted contact, verbal remarks or comments with sexual overtones (e.g. inappropriate jokes with sexual overtones made during a lecture, even if made with the intention to “lighten the mood”) and telling sexist jokes verbally or via email or telephone correspondence. In addition, there are also more drastic manifestations of sexual harassment at universities that can also constitute an offence against sexual freedom and involve forced sexual contact in the form of proximity, kissing, genital touching or sexual intercourse or coercion to perform another sexual act. Offensive flirting, demanding sexual favours, making sexist remarks or commenting on appearance or clothing also constitute sexually motivated behaviours that fall under sexual harassment.

The available results of current research²² clearly show that all the above-mentioned behaviours constituting sexual harassment are the most frequently disclosed form of discrimination at universities in Poland after the year 2015, which – on the one hand – should be noted as a positive consequence of the #MeToo campaign. It is clear that no legal regulations have contributed as effectively to combating sexual violence as this campaign. On the other hand, it also means that such cases of gender discrimination are most prevalent, and that their concealment, and thus the impunity of the perpetrators, has severely impeded progressive legal and cultural change.

The changes currently taking place at universities should therefore be viewed in a positive light, consisting of, firstly, the implementation of effective anti-discrimination instruments, and secondly, the introduction of good practices, for example in the form of anti-discrimination training for all members of the academic community, and thirdly, the support of cultural changes that shape awareness around the subject of sexual violence. All these activities lead to the elimination of this kind of violence and discrimination from the academic space, which also involves exposing such cases, which – unfortunately – happen all the time.

²⁰ M. Tomaszewska, (in:) K.W. Baran (ed.), *Kodeks pracy. Komentarz*, Vol. I., art. 1-113, 5th edition, Warsaw 2020, LEX, nb. 13.

²¹ See the research results presented in: M. Budziszewska, W. Soral, A. Świdorska, M. Witkowska, K. Hansen, *Równe traktowanie ze względu na płeć – raport z badania społeczności UW*, Warsaw 2019, https://rownowazni.uw.edu.pl/wp-content/uploads/sites/105/2022/11/raport_rowne_traktowanie_2019.pdf (accessed 15.07.2023), pp. 5 ff.

²² See Helsinki Foundation for Human Rights report, J. Gerlich, *Molestowanie na polskich uczelniach publicznych*, Warsaw 2019, pp. 14–20.

As a negative consequence of complaints filed by persons from the University of Warsaw's academic community²³, retaliation by the perpetrators became part of the anti-discrimination procedures. This was the case in the 2022-2023 academic year in several sexual harassment cases at the University of Warsaw²⁴. Such legal retaliations are a threat to the creation of a discrimination-free and safe community for students. This is because they intimidate victims in an attempt to silence them, which may consequently lead to more people not reporting sexual violence they might experience, exposing the significant ineffectiveness of anti-discrimination regulations enacted at universities. This is why it is so important to identify the legal institutions that are used by perpetrators of sexual violence as retaliation, and then to develop a critical analysis of the legal regulations available in Poland that can – at present – provide solutions to Anti-SLAPP Law, and, as *de lege ferenda* postulates, taking into account the guidelines contained in international standards.

3. STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPP)

The term SLAPP was coined in the 1980s by Pring and Canan²⁵ for the express purpose of naming unwarranted actions in the form of lawsuits or private indictments against persons who exercised their civil or political rights, most often in connection with emerging violations or problems of public interest and the reporting conducted about them, which occurred primarily in situations where the right

²³ See herstories of women who experienced sexual violence in the space of the University of Warsaw in the following publications: A. Goc, "Językoznawca": molestowanie seksualne na UW, 'Tygodnik Powszechny', 21.03.2022, https://www.tygodnikpowszechny.pl/jezykoznawca-molestowanie-seksualne-na-uw-172263?gclid=CjwKCAiAmZGrBhAnEiwAo9qHia_48tIt2x9cP9cCq1HKStnssnk3EDiSWCOCcqf0CgMMixxiT7omBoCufUQAvD_BwE (accessed 15.07.2023); from by A. Czarnacka, Znany profesor molestował. Za karę odejdzie na emeryturę, 'Polityka', 22.03.2022, <https://www.polityka.pl/tygodnikpolityka/spoleczenstwo/2159275,1,znany-profesor-molestowal-za-kare-odejdzie-na-emeryture.read> (accessed 15.07.2023); W. Karpieszuk, Molestowanie seksualne na UW. Rektor odsuwa znanego profesora od zajęć, wykładowca ma odejść z uczelni, 'Gazeta Wyborcza', 21.03.2022, <https://warszawa.wyborcza.pl/warszawa/7,54420,28240469,molestowanie-seksualne-na-uw-rektor-odsuwa-znanego-profesora.html> (accessed 15.07.2023); A. Porażka, Uniwersytet Warszawski. Profesor i znany językoznawca oskarżany o molestowanie. "Przyciskał do ściany, dotykał", 'Gazeta.pl', 24.03.2022, <https://wiadomosci.gazeta.pl/wiadomosci/7,114883,28256857,profesor-universytetu-warszawskiego-mial-przez-30-lat-molestowac.html> (accessed 15.07.2023).

²⁴ See Helsinki Foundation for Human Rights, *op. cit.*; see also: PTPA, *Sukces*, 'FB', 23.03.2023, <https://www.facebook.com/StowarzyszeniePTPA/photos/a.106893379426848/4903663919749746/?type=3> (accessed 15.07.2023).

²⁵ G. Pring, P. Canan, *SLAPPs: Getting Sued for Speaking Out*, Philadelphia 1996.

to freedom of expression was exercised. Once again, it is important to emphasise that the primary, if not the only, aim of SLAPPs is to intimidate, to silence those exercising their rights, rather than to seek justice.

Retaliation in the form of SLAPP strategies has become a problem for many European and global states. According to a recent study, SLAPPs “are groundless or exaggerated lawsuits and other legal forms of intimidation initiated by state organs, business corporations and individuals in power against weaker parties. [The latter includes] journalists, civil society organisations, human rights defenders – and others who express criticism or transmit messages uncomfortable to the powerful, on a public matter”²⁶.

In general, SLAPPs limit the participation of citizens and the media regarding issues of importance within public debate. The EU’s 2022 report, makes clear the diversity of retaliation they enable, pointing out that “Intentions behind SLAPPs may differ between different initiators of the court proceedings. When SLAPPs are initiated by businesses or wealthy individuals, they are typically aimed at protecting their financial interest or reputation. When initiated by state entities, they may also be aimed at protecting the politicians’ position, or even at undermining the freedom of speech as the primary objective. In any case, SLAPPs have a common denominator – creating a chilling effect among NGOs, whistle-blowers, journalists (or more broadly – news outlets) and all citizens involved in public debate, and thus avoiding public scrutiny for the actions of their initiators. Another common theme of SLAPP is an abuse of process by the claimant, or filing of excessive claims in matters in which the defendant is exercising their constitutionally protected right”²⁷.

With the recognition of the increasing number of people who – for various reasons – are vulnerable to retaliation, there was a need for new legislation to comprehensively protect them. As a first step, an analysis of the legal instruments that are most commonly used by those who employ SLAPPs for retaliation was conducted.

Analysing the legal remedies that are used most frequently in EU countries²⁸ for SLAPP purposes, it is necessary to point to criminal and civil law regulations concerning defamation, violation of personal rights, protection of personal data,

²⁶ P. Bárd et al., 2020, *op. cit.*, p. 5.

²⁷ Commission staff working document: analytical supporting document accompanying a Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participations from manifestly unfounded or abusive court proceedings (‘Strategic lawsuits against public participation’) and a Commission Recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (‘Strategic lawsuits against public participation’), COM(2022) 177 final – C(2022) 2428 final, p. 5.

²⁸ See J. Bayer, P. Bárd, L. Vosyliute, N. Chun Luk, *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study*, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4092013 (accessed 20.06.2023), pp. 44 ff.

and – less frequently – criminal law regulations concerning the fight against terrorism, money laundering or facilitation of illegal migration, and civil law regulations such as copyright and tax obligations.

In Poland, the most common form of legal strategy for retaliatory actions carried out is the use of an instrument of criminal law in the form of initiating private criminal prosecution for the offence of defamation. Criticised for years, the regulation of the offence of defamation in the provision of Article 212 of the Criminal Code²⁹ thus creates the legal possibility to formulate intimidating accusations against journalists, social activists, whistle-blowers, as well as persons who have experienced sexual violence. For this reason, above all, the criminalisation of defamation must be viewed negatively, as has been expressed more than once by legal commentators³⁰ and in international guidelines.

Despite the lack of postulated³¹ decriminalisation of defamation, the scope of criminal liability for this offence is systematically limited by regulations contained in the provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights, on the basis of the protecting standard of freedom of expression³².

Freedom of expression is one of the foundations of any democratic society and, in Poland, it is guaranteed both in the provisions of the Constitution of the Republic of Poland (Article 54) and in the provisions of the European Convention on Human Rights (Article 10)³³. In addition, the content of Article 10 ECHR should be interpreted in the light of the jurisprudence of the European Court of Human Rights³⁴, which has repeatedly stressed that “freedom of expression is a condition not only for the development of a democratic society, but also for

²⁹ Pursuant to Article 212(1) of the Criminal Code, defamation is the slander of a person of such conduct or qualities as to bring him or her into disrepute in public opinion or to expose him or her to the loss of confidence necessary for a given position, profession or type of activity.

³⁰ See e.g. A. Biłgorajski, *Granice wolności wypowiedzi. Studium konstytucyjne*, Warsaw 2013; A. Gaberle, *Kontrowersje wokół art. 212 k.k. Podsumowanie debaty*, in: A. Szwarc (ed.), *Prawnokarne granice dopuszczalnego pomawiania. Materiały Zjazdu Katedr Prawa Karnego (Gniezno, 26-29 września 2006 roku)*, Poznań 2008.

³¹ See e.g. D. Sześciło, 2009, *op. cit.*; A. Kosz, *Art. 212 Kodeksu Karnego – jeśli chcecie go zostawić, to go zmieńmy. Debata u Rzecznika*, ‘BIP RPO’, 27.02.2019, <https://bip.brpo.gov.pl/pl/content/debata-wolnosc-slowa-a-znieslawienie> (access 15.07.2023); Currently, the repeal of Article 212 of the Criminal Code is even advocated by the Minister of Justice – cf. [https://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-1307-2023/\\$file/9-020-1307-2023.pdf](https://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-1307-2023/$file/9-020-1307-2023.pdf).

³² The ECtHR pays particular attention to the individual’s right to criticism. In a dominant line of jurisprudence, the ECtHR points out that the fact that critical assessments were not made public by the complainants, but were contained in private letters addressed to the competent authorities to deal with such complaints, is relevant to the resolution of complaints cases, see e.g. ECtHR Judgment of 21 December 2010 in *Sofranschi v. Moldova*, Application No. 34690/05.

³³ Hereinafter: ‘ECHR’, ‘Convention’.

³⁴ Hereinafter: ECtHR.

the individual's possibility of self-fulfilment"³⁵. According to Article 10(2) of the ECHR, interference with freedom of expression is only permissible if a total of three conditions are met. First, the possibility of interference must be provided for by national law (this is the so-called criterion of formal legality). Second, the interference must be necessary in a democratic society (the criterion of necessity). Thirdly, the interference can only take place if it serves to protect the good or interests expressly designated by Article 10(2) (the purposefulness criterion).

The right to freedom of expression is specifically the right of persons – who have experienced gender-based violence, including sexual violence and sexual harassment – to speak publicly about their experiences. Victims have the right to decide how they want to conduct their testimony and disclose their experiences. Importantly, the passage of time since the incident(s) described is irrelevant. As the Committee on the Elimination of Discrimination pointed out, Elimination of Discrimination against Women, “Women’s right to a life free from gender-based violence is indivisible from and dependent on other human rights, including the rights to life, health, liberty and security of the person, equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, and freedom of expression, movement, participation, assembly and association”, thus emphasising that freedom of expression is indivisible from and dependent on women’s right to a life free from gender-based violence³⁶. In many countries in Europe and around the world, in the wake of the #MeToo movement, women experiencing sexual harassment largely in the workplace have started to speak out about the problem and use available legal remedies, such as reporting a crime, using the anti-discrimination procedure in the workplace or filing a lawsuit in civil or labour courts.

In response to the legal actions pursued by victims, perpetrators of violence have begun to use a strategy of retaliation in the form of private defamation indictments, as well as in the form of civil suits for violation of personal rights against victims of sexual harassment. Such actions in the form of SLAPPs are aimed solely at intimidating victims and forcing them to either withdraw their complaints or to abandon complaints altogether for those victims who have only considered taking legal action. The purpose of SLAPPs is thus solely for a ‘chilling effect’, the SLAPP is – in this case – an individual retaliation and reaction to the exposure of sexual violence that has been hidden for years and carried out, mostly by men, and is solely aimed at silencing victims and forcing them not to make any complaints to legitimate entities.

At the same time, this is a form of secondary victimisation of a victim of sexual violence and/or harassment, who, after experiencing sexual violence and hav-

³⁵ Judgment of the ECtHR of 7 December 1976 in *Handyside v. the United Kingdom*, Application No. 5493/72.

³⁶ General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation. No. 19 (1992), CEDAW/C/GC/35, para. 15.

ing to face the trauma associated with it, additionally becomes an accused person, who does not have, within the framework of criminal procedural regulations, the rights of a victim in a criminal trial. It seems, however, that the indicated legal and human rights standards, which may meet certain criteria of effectiveness in relation to retaliatory actions used against journalists, are no longer so effective in the situation of their conduct against persons experiencing sexual violence. For in their case, any process is itself secondary victimisation.

Leader³⁷, describing cases of reported sexual harassment complaints by female students at colleges and universities in the US, indicates that “Retaliatory defamation lawsuits against people speaking up about sexual violence are not unusual. In the age of “Me Too,” survivors have been emboldened to come forward and speak up about experiences with sexual violence and harassment. Unfortunately, their speech can come with the cost of litigation initiated by those they have accused. Some, [...] are lucky; their states have protective statutes that allow survivors to respond to frivolous defamation claims with a special motion that allows them to be dismissed quickly and easily. However, many jurisdictions lack these statutes or their statutes lack the specificity necessary to best serve survivors of violence”³⁸.

The quoted statement demonstrates a full understanding that, in order to be effective in protecting people experiencing sexual violence from legal retaliation, every state should put in place anti-SLAPP solutions to prevent and eliminate strategic retaliation.

4. ANTI-SLAPP LAW

The negative SLAPP phenomenon described above and the increasing number of retaliatory actions carried out year after year – throughout Europe and the world – has led to initiatives being taken to introduce so-called ‘anti-SLAPP regulations’ into legal systems.

The current diversity of actors experiencing SLAPPs, including primarily journalists, social activists, activists, whistle-blowers or, increasingly, people experiencing sexual violence, makes it necessary to analyse the existing regulations with a view to assessing their effectiveness in protecting all of the above-mentioned people. It should also not be forgotten that potentially retaliation could affect any person who wishes to make their views known on a topic of social, political or economic importance. If we also consider the functioning of

³⁷ A.R. Leader, 2019, *op. cit.*

³⁸ *Ibidem*, p. 1.

societies in the virtual space, it could be that each of us is at risk of legal action aimed at intimidating or limiting our rights.

Recently, the problem of SLAPPs has been recognised by international institutions. The Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, drew attention to the positive obligation arising from the case law of the ECtHR to ensure the exercise of the rights enshrined in Article 10 of the Convention. This means that every State, not only has to refrain from any unjustified interference with an individual's freedom of expression, but also has a positive obligation to protect the individual's right to freedom of expression from any infringement, including by private individuals³⁹. This obligation also derives from Article 1 of the Convention, according to which it is the responsibility of States Parties to secure, for everyone within their jurisdiction, the rights and freedoms expressed therein, including, precisely, freedom of expression. However, it seems that the above-mentioned regulations, contained in the ECHR and developed in the ECtHR case law, are not sufficient in the situation of victims of sexual violence, where the primary goal is to end the criminal or civil proceedings as soon as possible and not to hold any court hearings. It should therefore be pointed out that it is necessary to take steps towards the development of specific Anti-SLAPP legal regulations, especially in the field of procedural regulations.

Such concrete action is being taken at the level of the European Union. The European Commission on 17 April 2022 presented recommendations⁴⁰ and a draft directive⁴¹ on the protection of persons who engage in public debate from unfounded or abusive legal proceedings.

There is no doubt that one of the priority guidelines is to be able to close the case as quickly as possible, without a trial, and this applies to both criminal and civil measures. Such an arrangement is included in the EU recommendations (points 1 and 2 of the Recommendation), stating that "This Recommendation sets out guidance for Member States to take effective, appropriate and proportionate measures to address manifestly unfounded or abusive court proceedings against public participation and protect in particular journalists and human rights defenders against such proceedings, in full respect of democratic values and fundamental rights. Member States should aim to ensure that procedural safeguards to grant an early dismissal of manifestly unfounded court proceedings against

³⁹ Position paper by Council of Europe Commissioner for Human Rights Dunja Mijatović: Time to take action against SLAPPs, 27.10.2020, <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps> (accessed 15.07.2023).

⁴⁰ Commission (EU) Recommendation of 27 April 2022 on the protection of journalists and human rights defenders who engage in public debate from manifestly unfounded or abusive legal proceedings ('strategic actions aimed at stifling public debate'), OJ L 138, 17.5.2022, p. 30–44.

⁴¹ Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ("Strategic lawsuits against public participation"), Brussels, 2.03.2023, COM/2022/177 final.

public participation are available. They should also aim to provide other remedies against abusive court proceedings against public participation, namely the award of costs meaning that a claimant who has initiated abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, the compensation of damages for any natural or legal person who has suffered harm as a result of abusive court proceedings against public participation, and the possibility to impose effective, proportionate and dissuasive penalties on the party who initiated abusive court proceedings against public participation”.

The inclusion in the Recommendation of a procedural solution consisting in the possibility of terminating the proceedings without a trial (i.e. discontinuance of the criminal proceedings or dismissal of the action without a trial) allows a positive assessment of the developed guidelines.

The original version of the draft EU directive, guided by the EU Recommendation, contained a number of provisions that, if applied, would allow for effective solutions to combat SLAPPs in national laws, such as: early dismissal of SLAPP strategies as a key procedural safeguard, security of costs, award of costs and damages to victims of legal retaliation, effective, proportionate and dissuasive sanctions.

Unfortunately, the common position on the draft anti-SLAPP directive, approved by EU governments on 8 June 2023, significantly altered the Commission’s original proposal, adopting far less effective legal solutions and limiting the future effectiveness of this instrument for SLAPP victims across the European Union. CASE identified the most concerning drawbacks contained in the position presented by the Council of the EU: “The exclusion from the directive’s scope of civil claims brought in criminal proceedings. Significant weakening of the early dismissal mechanism, including by means of a very restrictive definition of manifestly unfounded cases and by ruling out the possibility to appeal decisions refusing early dismissal. The deletion of the provision on damage compensation in favour of SLAPP targets. The extension of the transposition period to 3 years, against the background of increasing SLAPPs targeting journalists and human rights defenders across the EU”.

A critical assessment of the amendments made to the drafted EU Directive, led to the proposed changes, which are “core components and strengths included in the Commission’s proposal in the final law, including:

1. A broad personal scope, to encompass the full diverse range of SLAPP victims.
2. An innovative notion of cross-border relevance expanding the scope to cover certain domestic cases as well.
3. Early dismissal of SLAPP cases as a key procedural safeguard.
4. Security for costs, award of costs and damages on the defendant side.
5. Effective, proportionate and dissuasive sanctions.

6. Removal of the dichotomy of ‘abusive proceedings’ versus ‘manifestly unfounded proceedings’ (early dismissal and other procedural safeguards and protection measures should apply to manifestly unfounded and abusive proceedings alike).
7. Replace the “manifestly unfounded” threshold with a requirement for the claimant to establish a “prima facie case” as to each essential element of the cause of action within the early dismissal mechanism.
8. Making sure security for costs includes indirect costs and damages, such as legal representation and associated costs.
9. Making sure the award of costs and damages is automatic. As regards damage compensation in particular, victims should not have to make a separate claim.
10. Including a provision requiring member states to review ethical standards to discourage lawyers from engaging in SLAPP tactics.
11. Making third-party legal interventions in court broadly accessible, including to professional associations.
12. The new Directive should also apply to pending cases⁴².

The legal regulations presented above and the constructive criticism levelled at them lead to the view that it is necessary to introduce the indicated changes to the proposed directive. This is because the consequence of the lack of effective regulation in individual EU countries will lead to an increase in the number of retaliatory actions initiated, which will have a negative impact on the fundamental rights of citizens, especially freedom of expression.

5. CONCLUSIONS AND PROPOSALS FOR CHANGE

Turning to the issue of whether and to what extent the current Polish criminal law regulations implement – in an effective manner – the guidelines presented in the EU Recommendations and in the draft EU Directive, the following should be indicated.

Firstly, it seems that the need to decriminalise defamation should be stressed once again. As already indicated above, the existence of the provision of Article 212 of the Criminal Code, in its current form, creates the possibility (already made a reality) to use it as a SLAPP. The repeal of this provision would therefore constitute the most far-reaching, but at the same time the most effective guarantee

⁴² See CASE, *Governments’ agreed stance on EU anti-SLAPP directive – a disappointing failure to support the adoption of robust safeguards for public watchdogs*, 13.06.2023, <https://www.the-case.eu/latest/governments-agreed-stance-on-eu-anti-slapp-directive-a-disappointing-failure-to-support-the-adoption-of-robust-safeguards-for-public-watchdogs/> (access 15.07.2023).

for all those who wish to exercise their rights without fear of criminal proceedings being initiated against them. At the same time, without repeating the arguments presented in legal writings and judicial decisions of this provision would not create a gap in legal protection against abuse of freedom of expression, given the existence of a civil route in the Polish legal system in this regard. This solution thus appears to be both the most far-reaching and the best, also due to its universality. It does not only apply to selected cases (e.g. victims of sexual harassment, journalists, etc.), but constitutes a solution that protects all persons at risk of SLAPP.

In the absence of implementation of the above postulate *de lege ferenda* in the area of substantive criminal law, another proposal should be considered, which is a postulate *de lege lata*, concerning the appropriate application of the rules of criminal procedure. At present, a legal solution, theoretically ensuring the protection of victims of sexual violence from the SLAPP strategy – in the situation of a private indictment for defamation – is the institution of discontinuation of criminal proceedings, even before the trial and at the hearing, pursuant to the provision of Article 339(3)(1) of the Code of Criminal Procedure in conjunction with Article 17(1)(2) of the Code of Criminal Procedure.

Referring the assessment of the theoretical solution proposed above to its effective functioning in practice, it should be pointed out that the jurisprudence of the Supreme Court⁴³ indicates, however, that discontinuation of criminal proceedings at a sitting, before a trial, may take place under Article 17(1)(2) of the Code of Criminal Procedure only if it follows from the evidence gathered in the pre-trial proceedings that the act charged against the accused does not contain the statutory attributes of a prohibited act. Thus, the Supreme Court clearly indicates the exceptional character of the possibility to apply the institution of discontinuance of proceedings pursuant to Article 17(1)(2) of the Code of Criminal Procedure. Thus, the possibility of discontinuance depends on the court's discretionary assessment as to whether – in a given case – the prerequisites indicated in the provision are met. Consequently, it should be noted that the Polish legal system provides for the possibility to discontinue proceedings, even before the trial. On the other hand, however, this is not an automatic mechanism and does not apply directly to SLAPP-related actions.

In view of the above circumstances, a *de lege lata* proposal would be to adopt an interpretation of Article 17(1)(2) of Poland's Code of Criminal Procedure in the light of which, in the case of a private indictment constituting a SLAPP against a victim of sexual violence, its application would lead to mandatory discontinuance of criminal proceedings. This would occur in a situation where the victim has used legal means to punish the perpetrator of this kind of violence. The court should then discontinue the criminal proceedings on the grounds contained in the provision of Article 17(1)(2) of the Code of Criminal Procedure given that

⁴³ Order of the Supreme Court of 9 December 2020, IV KK 169/20.

it is dealing with the lack of fulfilment of the statutory elements of the offence. The non-fulfilment of the elements of the offence of defamation by persons who have experienced sexual harassment is clear from the non-statutory counter-truth, which is the right to criticism, freedom of expression and the right to file complaints or petitions, regulated by Article 63 of the Constitution of the Republic of Poland. In such situations, the complaint of the aggrieved person is the realisation of the constitutional right to complain. This kind of interpretation could also be applied in all other cases where the SLAPP victim has used the legal route (criminal, civil, administrative, disciplinary, etc.).

It must be stressed that this kind of reasoning would be a *de facto* guarantee of the right to criticism, whereas the opposite reasoning would often lead to the impossibility of exercising the individual's constitutional rights, making it illusory. Included in the right to criticism is the right to complain to authorised entities and to use the legal instruments available in the legal system, e.g. to notify the public prosecutor's office of an offence, to complain to the disciplinary ombudsman at a university, to complain to the Anti-Discrimination Commission operating in a particular workplace. Legal commentators and judicial decisions do not differentiate the right to criticism according to the seriousness of the accusations and the final decision of the authorised body or court. If an individual submits a notification to the competent authority, they act within their powers and do not commit the offence of defamation. The Supreme Court, in its judgment of 11 December 1996, made it clear that "The raising of accusations against state officials by a citizen in a complaint addressed to the authorities does not constitute an offence of defamation, even if they are likely to humiliate the persons concerned or to expose them to the loss of confidence necessary for the exercise of a profession or the pursuit of a specific activity. Indeed, writing and directing complaints and requests to the relevant authorities is the prerogative of the individual subjectively defending their rights, regardless of whether their claims are legitimate, and regardless of whether they can prove those claims"⁴⁴.

If the proposal presented above as a *de lege lata* postulate does not meet with the approval of legal scholars and judges, a *de lege ferenda* postulate should be considered – a legislative change in the form of introducing point 12 to Article 17(1) of the Code of Criminal Procedure which reads: "Proceedings shall not be initiated, and initiated proceedings shall be discontinued, when: 12) a complaint from a private prosecutor constitutes an abuse of the law or is manifestly unfounded, and was preceded by a lawful action of the accused".

Such a provision would give legislative form to the *de lege lata* proposal indicated above.

⁴⁴ Judgment of the Supreme Court of 11 December 1996, III KKN 98/96.

In light of the arguments presented in this publication, it appears that a state response to SLAPPs will be required fairly soon. The conclusions presented above have the ambition to contribute to future legislative solutions.

REFERENCES

- Bárd P., Bayer J., Chun Luk N. and Vosyliute L., *Ad-hoc Request – SLAPP in the EU Context*, EU-Citizen: Academic Network on European Citizenship Rights 2020
- Bárd P., *SLAPP in the EU Context*, Academic Network on European Citizenship Rights 2020, https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf (accessed 02.09.2021)
- Bayer J., Bárd P., Vosyliute L., Chun Luk N., *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study*, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4092013 (accessed 20.06.2023)
- Biłgorajski A., *Granice wolności wypowiedzi. Studium konstytucyjne*, Warsaw 2013
- Budyszewska M., Soral W., Świderska A., Witkowska M., Hansen K., *Równe traktowanie ze względu na płeć – raport z badania społeczności UW*, Warsaw 2019
- Gaberle A., *Kontrowersje wokół art. 212 k.k. Podsumowanie debaty*, (in:) A. Szwarc (ed.), *Prawnokarne granice dopuszczalnego pomawiania. Materiały Zjazdu Katedr Prawa Karnego (Gniezno, 26-29 września 2006 roku)*, Poznań 2008
- Gerlich J., *Molestowanie na polskich uczelniach publicznych*, Warsaw 2019
- Griffen S., *Out of Balance – Defamation Law in the European Union: a Comparative Overview for Journalist, Civil Society and Policymakers*, ‘I.P.I.’ 2015, <http://ipi.media/wp-content/uploads/2016/08/IPI-OutofBalance-Final-Jan2015.pdf> (accessed 20.06.2023)
- Kędziora K., Śmiszek K., (in:) Z. Jabłońska, M. Kułak, K. Kędziora, K. Śmiszek (eds), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania. Commentary*, Warsaw 2017, Article 4, LEX, nb 3
- Leader A.R., *A ‘SLAPP’ in the Face of Free Speech: Protecting Survivors’ Rights to Speak up in the ‘Me Too’ Era*, ‘North Carolina Law Review’ 2019
- Pring G., Canan P., *SLAPPs: Getting Sued for Speaking Out*, Philadelphia 1996
- Prior S., De Heer B. A., *Campus Sexual Violence. A State of Institutionalized Sexual Terrorism*, London and New York 2023.
- Sześciło D., *Paragraf 212: Karanie dziennikarzy za zniesławienie w polskiej praktyce*, Warsaw 2009
- Tomaszewska M., (in:) K.W. Baran (ed.), *Kodeks pracy. Komentarz*, Vol. I., art. 1-113, 5th edition, Warsaw 2020, Article 18(3(a)), LEX, nb. 13
- Zgoliński I., *Zniesławienie w regulacjach prawnych wybranych państw*, ‘Ius Novum’ 2022, No. 3
- Zoll A., *212 k. k. : wykreślić czy zmienić?*, ‘Na Wokandzie’ 2012, No. 14.