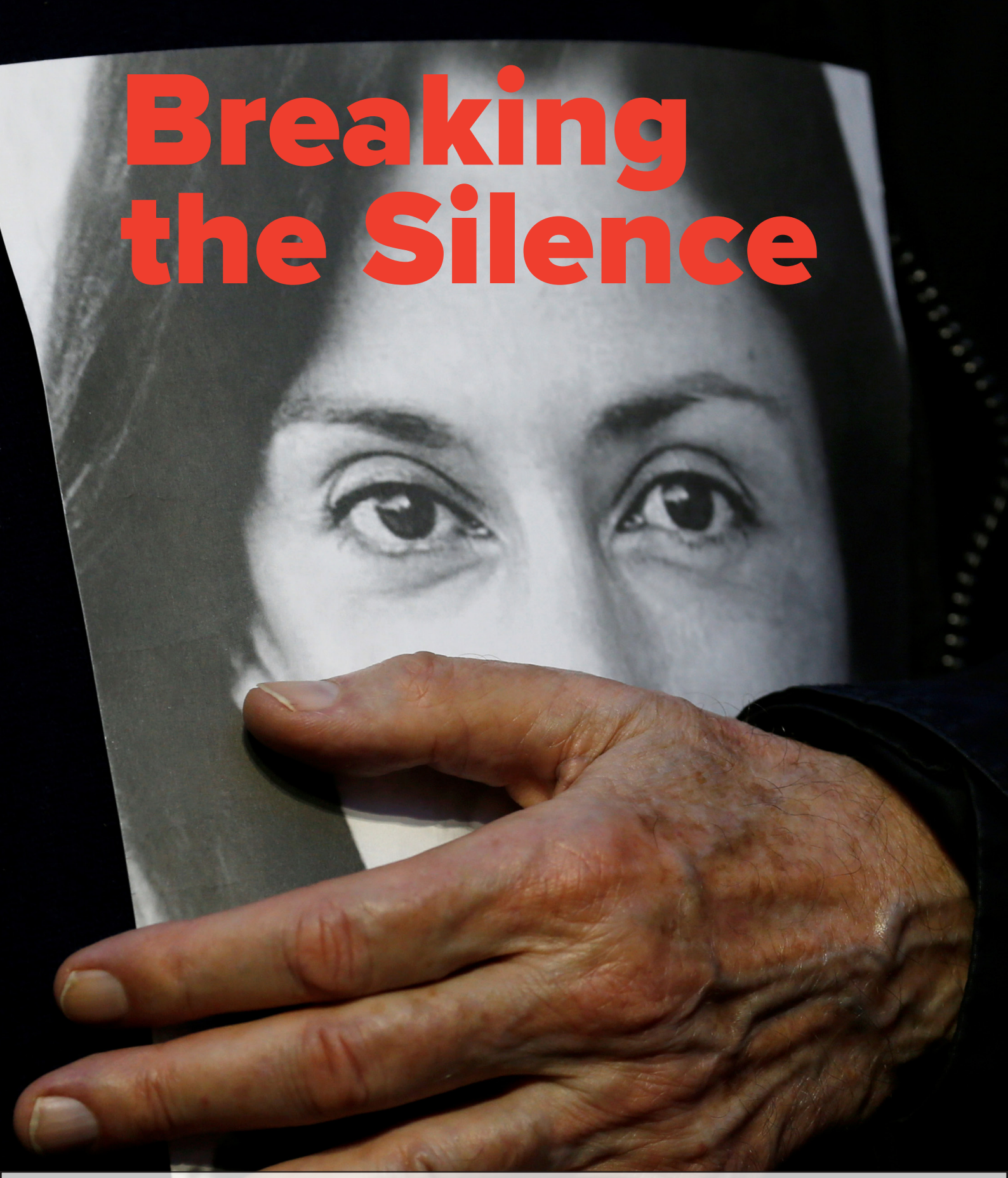


Breaking the Silence

A new report on the legal measures that will give journalists back their voices

index
the voice of free expression

Contents

This report was written by Jessica Ní Mhainín, Index on Censorship's Senior Policy Research and Advocacy Officer and edited and designed by Associate Editor Mark Frary.

Introduction

On 8 July 2020, Index on Censorship brought together a group of distinguished legal experts and practitioners from across Europe for a virtual roundtable to discuss the vexatious use of the law and the threat it poses to media freedom in Europe. The discussion took place on the back of the publication of the report, "A gathering storm: the laws being used to silence the media", which was published by Index on Censorship in June.

The purpose of the roundtable was to discuss the trends raised by the report with a view to identifying implementable measures that could prevent Slapps (strategic lawsuits against public participation). The group also heard from a United States-based lawyer, Thomas R. Burke, who outlined the anti-Slapp legislation that was enacted in California in 1992.

The roundtable took place under the Chatham House Rule, but the salient points from the discussion form the basis for this report. The report also includes separate inputs from three lawyers: Swedish lawyer Ulf Isaksson, Italian lawyer Andrea di Pietro, and Norwegian lawyer Jon Wessel-Aas.

Executive summary

A Slapp is a type of legal action not taken to succeed but to induce fear, silence and inaction.

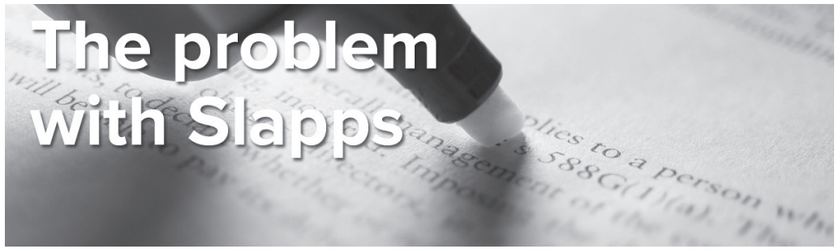
They tend to have minimal legal merit, being used in an effort to exhaust their victims of time, money, and energy, so as to discourage them from expressing critical opinions on matters of public interest. They endanger not only independent journalism but academia, activism, and other forms of civic engagement.

The roundtable participants discussed the main issues around vexatious legal threats and actions, including Slapps, around Europe. These included:

- Excessive length of judicial procedures and statutes of limitation for defamation cases
- Abuse of privacy and data protection laws to target the media
- Tendency to file lawsuits in plaintiff-friendly jurisdictions
- Growing distrust and increased hostility toward the media

The roundtable's participants also discussed a number of measures that could be introduced in order to provide journalists with greater protections when faced with a Slapp, that could stop Slapps from being so time-consuming and expensive, and that could ultimately prevent Slapps from being filed altogether:

- Better application of European Court of Human Rights case law
- Training for judges and journalists
- Introduction of anti-Slapp legislation
- Rethinking the role of the jury
- Increasing the use of press councils and ombudsmen
- Building networks and encouraging solidarity



The problem with Slapps

The participants discussed the main trends and issues with regard to vexatious lawsuits against journalists in Europe. They identified four key areas of concern:

Defamation laws

The excessive length of the judicial process in both civil and criminal defamation cases is having a chilling effect in several countries. "Even though we know that they [journalists] will win, it still takes several years," said one participant with regard to criminal lawsuits in Hungary.

In Sweden, rather than length judicial process itself, it is the statute of limitations for libel offences – which enables legal action to be brought up to a year after publication – that is a threat to the media. "It is not, in my personal view, in conformity with European standards," said lawyer Ulf Isaksson. "

Because the threshold of harm is so low for civil cases and much higher for criminal cases (enabling most journalists to be acquitted), one lawyer said that from a practical point of view, he thought his clients were sometimes better off facing a criminal rather than a civil lawsuit. The higher level of protection provided for public figures and public authority representatives in countries like Hungary is also having a chilling effect, some participants said.

Although Malta, Ireland, Romania, and the United Kingdom have abolished criminal defamation from their statutes, they are also among the countries where the media is facing the most serious threat from civil defamation. Should the abolition of criminal defamation continue to be a goal? Everyone agreed it should, but amendments should be made to better protect the media from vexatious actions.

Privacy and GDPR

Several participants noted that privacy and data protection actions were increasingly being used to target the media. "In terms of substantive legal proceedings they are always an add-on," described one participant with regard to Northern Ireland.

Despite the journalistic exemption, take-down requests under article 17 of GDPR ("the right to be forgotten") are being used by some individuals in an effort to have their history erased from archive material. One participant said that due to the fact that media organisations do not want to spend time and money on assessing the merits of a request, they sometimes comply automatically. The case of Hells Energy against Forbes Hungary earlier this year was cited as an example of the abuse of GDPR.

Although GDPR states that the concept of journalism should be broadly interpreted (recital 153) and despite the CJEU's preliminary ruling in February 2019 stating that citizen journalists were not excluded from the journalistic exemption (article 85.2), the issue of whether the GDPR exemption applies to citizen journalists has been an issue in several countries.

For example, a statement published by police in the Polish city of Olsztyn earlier this year referred to GDPR stating that "publishing videos from police interventions may give rise to liability for violation of the provisions on the protection of personal data". The statement was made after an arrest by Olsztyn police was recorded and shared on social media. The Commissioner for Human Rights subsequently released a statement, confirming that they had contacted Olsztyn police requesting that the their statement be amended given that, according to the commissioner, "it may mislead citizens as to their rights and limit the actual exercise of them as part of exercising social control of the activities of public authority functionaries through public opinion". The commissioner's statement also referred to GDPR's journalistic exemption.

Libel tourism

The roundtable raised the issue of libel tourism, both in terms of journalists being victims of libel tourism and of countries being (and becoming) libel tourism hotspots. One participant noted that threats of legal actions from other jurisdictions are especially effective because of journalists' and lawyers' lack of familiarity with foreign legal systems.

Malta was cited as an example of a country whose journalists have become targets of libel tourism. According to one expert, on the day that Daphne Caruana Galizia was killed in October 2017, Maltese news organisations were subject to legal threats from law firms in the UK and USA. "The economic analysis of those outlets led them to believe that they were better to remove the materials than defending them. They stood by the veracity of what they had published, but removed them anyway."

This trend continues. Between 1 May and 26 June 2020, two law firms – the US-based Lambert Worldwide and the UK-based Atkins Thomson – sent legal letters to Times of Malta, Malta Today, Malta Independent, Lovin Malta and The Shift News in relation to their reporting.

Some countries, such as the UK, are well-known libel hotspots. Some expressed concern that other countries, particularly Ireland, may become hubs for libel tourism in the future. This was a possibility, particularly given that the damages awarded by Irish courts tend to be the highest in Europe (see our earlier report). The number of tech companies that are based in Dublin was also seen as a potential incentive for taking legal action in Ireland. "And if an award for damages is granted in one EU country, it is automatically enforceable elsewhere in the EU," warned the lawyer.

Increasingly hostile media environment

Some participants perceived the current environment facing the media across Europe as an aggravating factor, both in terms of the amount of Slapp cases that are being brought against the media, and in terms of the prospect of action being taken to counter them. According to Italian lawyer Andrea di Pietro, "journalists in Italy are seen as a nuisance - as people who poke their noses into events. They are not seen as a resource for democracy".

The fact that the daily newspaper Gazeta Wyborcza has faced more than 55 legal threats since 2015 was mentioned as an example of this trend. "The media is seen as an enemy of the people," one participant said.

With regard to the prospect of introducing legislation aimed at protecting the media, another participant said, "Politicians are very reluctant at the moment to give additional protections to online media and social media. There's rather a tendency to restrict and repress".

Measures that could prevent Slapps

The participants discussed a number of measures that could be introduced in order to protect journalists and prevent Slapps from being brought. They identified six key areas:

Full application of European Court of Human Rights case law

There was agreement that the criteria, standards and principles developed by the European Court of Human Rights (ECtHR) on the basis of article 10 of the European Convention should be better integrated at national level. "If the case law of the ECtHR was better applied in the member states, we would have less problems with Slapp and vexatious litigation against journalists," one participant said.

Norway's experience was given by way of example. "In the 1980s and 1990s, defamation cases were a problem – a big problem for the Norwegian press because we had not incorporated properly the jurisprudence of the European Court," one lawyer explained. The Human Rights Act came into force in 1999 and it empowered the courts to enforce the European Convention directly as Norwegian law. This enables all the same defences provided for by ECtHR jurisprudence to be used in Norwegian courts. "It doesn't mean the media don't lose cases," the lawyer said, "but it's a much more realistic attitude toward press freedom".

Training for judges and for journalists

Several participants emphasised the need for training to be made available for judges, given that (in most cases) judges are not specialised. This, according to participants, results in judges being educated about the nuances of media and freedom of expression while in the courtroom. "That's a difficult thing to do," explained one participant, "you're starting on the back foot". Another participant agreed, saying that although most media cases in Poland refer to the ECtHR's jurisprudence, "they are often quite superficial".

One lawyer explained that a training course that had been organised for judges in Hungary enabled editors-in-chief and judges to informally discuss Article 10 cases. "That helped a lot," the participant said. "This is not the solution, but education is important."

Journalists should be better educated, believed the participants, particularly with regard to two areas of the law. Firstly, regarding what journalists need to do pre-publication in order to protect themselves from potential legal threats or actions. "A big issue is the education of the journalists because they don't necessarily understand the importance of conveying to the court that they actually undertook that decision-making prior to processing the data," explained one participant.

Secondly, journalists need to be educated as to their rights and obligations under GDPR, so as to avoid automatic take-downs purely out of caution. "It's crucial that they understand their defences and their obligations," said one participant. "It has become more complex."

Introduction of anti-Slapp legislation

The group heard from Thomas R. Burke, a United States media lawyer and author of Anti-SLAPP Litigation. He outlined the main features of the California anti-Slapp statute, which was enacted in 1992. Under the statute, defendants may file a special motion to dismiss complaints through a very early and fast summary judgement-like procedure. Once the motion is filed there is an automatic freeze on discovery (the most expensive stage of litigation in the US), amendments to the complaint are not permitted, and the plaintiff cannot dismiss the complaint without facing mandatory lawyer fees. The court should hear the motion within 30 days. If the motion is granted, the action is dismissed and the defendant recovers their fees and costs. If the motion is denied, the defendant may appeal.

Burke described the anti-Slapp statute as a "a remarkable development". However the California anti-Slapp statute includes exemptions, which he warned against including in future such measures in Europe. "They are nightmarish in their application," he said. "If it's a worthwhile case, they will survive the anti-Slapp."

Unlike in the US, where anti-Slapp laws have been introduced in thirty states, there is no clear hierarchy between privacy and freedom of expression in Europe. The question was raised as to whether any jurisdictions have deployed their margin of appreciation in constitutional terms in favour of privacy. Would that constitute an impediment to having an EU-wide preference for freedom of expression, which would be within the margin of appreciation, should there not be national constitutional impediments? The margin of appreciation potentially causes a problem for having a European standard.

Given that plaintiffs who are natural persons have a right to privacy under Article 8 of the European Convention, it would be more difficult for the courts to throw out alleging that their rights have been violated. Courts would be concerned that could be found to have violated Article 8. It is still open as to whether corporations or state authorities are protected under Article 8.

Council of Europe was mentioned as a potential avenue for developing an aspirational model anti-Slapp law, which could provide for more robust measures to be put in place.

Rethinking the role of the jury

The issue of jury trials was raised as a significant obstacle to quickly "weeding out" Slapp cases. "If you bring an application to strike out a case for being vexatious, the judge hearing the application will invariably say 'well I think I'll let the jury make that decision' so everything goes around in a circle," explained one participant regarding the situation in Ireland. The necessity to have a jury adjudicate on every media case not only increases the time and cost, but makes outcomes more difficult to predict. Participants agreed that putting a defence – such as responsible journalism or public interest – before a jury was very difficult. In England and Wales, the abolition of jury trials for cases of civil defamation has led to a quicker, less complicated process.

Although press offences that are punishable under criminal law are the exclusive competence of a jury court (the Assises Court) in Belgium (except for incitement to racism and xenophobia), the fact that journalists and editors enjoy de facto criminal impunity for press offences means that media law cases are never subject to a jury.

But according to lawyer Ulf Isaksson, juries are "extremely important for the freedom of press situation in Sweden." "The Swedish jury is entrusted with only one task," he explained, "and that is to decide whether this specific dissemination was legal or not legal." However, judges are not bound by the juries' decision. "So they can still acquit the defendant." Juries are part of judicial proceedings in mass media cases only. They jury may deliberate outside the presence of the judges, but may consult the presiding judge with specific questions on the law.

Norway has done away with juries altogether in favour of lay judges, which are used in criminal cases. Lay judges, which are common in civil law jurisdictions, are distinct from juries in that they have equal status to the presiding judge, and as such, have an inquisitorial role. They have been credited with being an efficient and less expensive way of expanding public participation. Norway has decriminalised defamation, but violation of privacy is still formally criminalised, although the authorities rarely investigate or prosecute alleged violations when the media is involved.

The roundtable raised the question of whether there are constitutional protections on a right to jury trial in civil defamation cases.

Press councils or ombudsmen

"We do think that a press council is a good idea," said one participant, referring to its usefulness in identifying and weeding out meritless complaints. However, its positive impact is reduced when filing a complaint with the press council doesn't prevent legal action. "We've had cases, where the claimant has brought something to the press ombudsman, has received a favourable decision, and has subsequently sued," said one participant with regard to Ireland.

In a case involving the Norwegian daily Aftenposten, Norway's Supreme Court ruled in 2015 that a condemnation from the press council does not automatically presume a violation of the law, as the journalistic ethics upheld by the council are intended as an ideal. Asked about the case, lawyer Jon Wessel-Aas (who represented Aftenposten in the case) said that when considering whether to impose legal sanctions, the courts have to take a much broader approach than press councils. "Deviations from the 'ideal' cannot automatically lead to legal liability," he said. "Such deviations have to be weighed against all the other factors which, according to the ECtHR's jurisprudence, are part of the balancing test between ECHR article 10 and article 8, including the degree of public interest involved."

While most participants agreed that the press councils were a force for good with regard to preventing Slapp actions, some warned that there was a need to ensure they were completely independent. "There is a danger in some jurisdictions that press councils could be captured by political actors," one expert said. For example, in its 2019 election manifesto Poland's Law and Justice Party (PiS) proposed to introduce a "self-government" watchdog body aimed at "regulating the journalistic profession". They have not (yet) taken action on this.

Building networks and encouraging solidarity

One of the reasons why Norway was said to have been quite successful in protecting its journalists from undue legal threats was due to the well-organised nature of their editors' and press associations. In contrast, journalists in Italy – who are frequently threatened with legal actions – were said to be isolated and disconnected from their colleagues. According to Andrea di Pietro, "journalists are really economically isolated, also from a trade union perspective, therefore weakening a journalists with a lawsuit is very possible thanks to a legal system that doesn't punish [the vexatious litigators]". Freelance journalists are particularly vulnerable to vexatious legal threats and actions: they are more risk-averse given their limited time, resources, and support.

The participants discussed the need to build solidarity within the media community, as well as with legal practitioners, experts, and civil society. The roundtable suggested two ways that this could be done:

- **Building a catalogue of Slapp cases**

  One participant said how useful it would be to have a list of all the Slapp cases in Europe. "There is a strategy happening all over Europe, if we had the cases that could help us to push for the anti-Slapp law." Attention was drawn to the Council of Europe Platform, which is one of the ways currently being used to help catalogue Slapp cases. Would a database exclusively for Slapp cases be useful and feasible?

- ***Amicus curiae***

  The need to grant access to civil society organisations to amici curiae (an independent advisor who is not party to a case) was one means by which the media could be supported when faced with these legal actions. "Collective intervention makes people feel less vulnerable," said one participant. Associations in Norway were said to have been successful in intervening in strategic cases. "That has done a lot of good," the participant said.

Annexes

Acknowledgments

Photo credits: Darrin Zammit Lupi/ Reuters (cover image), Tumisu (sshh!), Shaun_F (highlighted text), Mahesh Patel (newspapers), Ethan Doyle White (memorial), ElasticComputeFarm (books)

This report has been supported by the Swedish Postcode Foundation. The foundation is a beneficiary to the Swedish Postcode Lottery and provides support to projects that foster positive social impact or search for long-term solutions to global challenges. Since 2007, the foundation has distributed over 1.5 billion SEK in support of more than 600 projects in Sweden and internationally.