Summary: An underestimated problem: disproportionate legal pressure on Dutch journalism

The impact of legal pressure on Dutch journalism is underestimated, and Dutch media have self-censored in response to legal pressure. That is the main finding of this survey, conducted by press freedom organisation Free Press Unlimited, among 50 journalists, chief editors, media lawyers, in-house lawyers and other parties. The study builds on a 2023 survey by the Dutch Association of Journalists and PersVeilig, which found that almost 50% of participating journalists and more than 90% of Dutch chief editors had occasionally faced threats of legal action following a publication.

This study looks specifically at 'legal pressure': cases where the use of legal means against journalists and media has a disproportionate effect on the journalists and their research in question. This is not only relevant for the media, but important for democracy: if journalists start self-censoring under pressure from legal proceedings, for example because they cannot bear the financial consequences of proceedings, this causes readers' access to information to be restricted. Thus, a chilling effect on press freedom can occur and journalists are less able to perform their monitoring 'watchdog' role. This undermines the critical role journalists play in observing and reporting on the actions of the government, public officials, corporations, and other powerful entities.

The heaviest, and most worrying, form of legal pressure are the so-called SLAPPs: Strategic Lawsuits Against Public Participation. These lawsuits are initiated by wealthy and powerful actors against journalists, human rights defenders and civil society organisations, with the main aim of intimidating and pressuring them. These cases are on the rise in Europe. In the week of 8 April 2024, the European Council and the European Parliament will sign a long-awaited European directive to protect journalists and human rights defenders from SLAPPs. Within two years, the directive should be transposed into Dutch law.

Of course, not all legal action after publication is disproportionate or intimidating: access to justice is an essential democratic value. As many journalists and media also emphasise: media are resilient and indicate that they consider it important to be accountable for mistakes and illegalities. Litigation against the media is therefore, in principle, obviously permissible.

The prevailing perception, as reflected in the most recent government survey, is that SLAPPs and the use of legal procedures to intimidate journalists do not occur in the Netherlands. In this report, we establish that this is not true and document representative examples of SLAPPs and legal pressure. By doing so, we aim to illustrate when we consider it justified to state that legal pressure or SLAPPs exist, what impact this has on Dutch journalism, and how it could be mitigated.

The majority of interviewees indicate that, in their experience, legal action in response to investigation, rebuttal and publication/broadcast is increasing. Estimates of, for example, the frequency of lawyer letters vary per medium, from one to two letters per month at national dailies (including online news outlets) to an average of 10 lawyer letters for every 16 broadcasts by radio and TV stations.

The most frequently cited examples of means that define the boundary for media outlets between a regular lawyer letter or subpoena and legal pressure are: personally subpoenaing journalists, demanding high (immaterial) damages, applying (simultaneous) pressure on sources, whistleblowers and experts involved, and reporting libel against journalists to the public prosecutor's office.

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Using the European anti-SLAPP directive and criteria developed by the European Coalition Against SLAPPs (CASE), we analysed cases that were described as (possible) SLAPPs during interviews with journalists and lawyers. In the third chapter we describe four examples of cases against journalists and media to which we apply these criteria and find that a SLAPP can be said to exist.

While the quantity of SLAPPs and examples of legal pressure are obviously not on a par with well-known 'SLAPP jurisdictions' like the UK, these examples and findings show that the existing safeguards against SLAPPs in the Netherlands need to be strengthened. The cases described illustrate that the existing safeguards in the Netherlands are insufficiently protective, and inadequate to put the brakes on a case at an early stage and limit its costs and impact for media and stakeholders.

Impact of legal pressure on Dutch journalism

We noted in 18 cases examples of self-censorship due to legal pressure. Here, (the risk of) proceedings either led directly to self-censorship - media (temporarily) stopped further research on a certain topic or, for example, pre-emptively omitted information such as names, even if they had enough evidence - or indirectly. In these cases, important conditions for journalism and news-gathering came under pressure, such as financial resources and cooperation from sources and experts. In some cases, legal pressure coincided with (fear of) physical or online harassment, and self-censorship was applied (also) for that reason.

Self-censorship is sensitive, and media naturally avoid it as much as possible. The examples we describe involve (temporarily) stopping research, postponing publications, omitting names or details (that are deemed relevant and well-founded), toning down the tone and/or adjusting the form so that the article evokes less resistance. Another important effect is the intimidating effect in second-line publications, where media do not continue or reproduce research and revelations by other titles, as they otherwise would have done, for fear of the same legal consequences affecting the original authors.

In addition, legal pressure can have significant financial consequences and requires time investment from the journalists involved. Local, small media and freelancers are particularly vulnerable to this, and are most likely to resort to self-censorship out of fear of it. Large media and employed journalists have better access to preventive measures and therefore enjoy more backing. At the same time, we also observe several examples of, and risks of, self-censorship among them, including unspoken concerns about consequences for job security, title or programme in case of high legal costs, the consequences of personally suing and attacking journalists, and the (concerns about) potentially divergent interests of employer, editors-in-chief and journalist.

Recommendations

In this report, we make recommendations to the Dutch government, the Bar Association and media. The main recommendation we make to the government is to tackle the transposition of the European directive in such a way that it leads to safeguards that are currently lacking in practice in SLAPP cases. We make some concrete proposals for this, such as extending the article of law on abuse of process (Art. 3:13 Burgerlijk Wetboek). We also suggest introducing the safeguards from the anti-SLAPP directive for all cases, and not only in cases with a cross-border element. The study shows that the vast majority of cases in the Netherlands involve cases between two Dutch parties, where the center of interests is in the Netherlands. This makes the Dutch legal system more resilient to these cases.
To the Bar Association, we recommend engaging in dialogue on the impact of legal pressure on independent journalism. To media outlets, we recommend better protection of freelancers and make concrete proposals to make the subject more debatable and thus further reduce the risk of self-censorship and impact on journalists.

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About Free Press Unlimited:
This is a summary of the report 'An underestimated problem: disproportionate legal pressure on Dutch journalism', by Free Press Unlimited. About Free Press Unlimited. Free Press Unlimited (FPU) is a non-profit press freedom organisation. We work from our Amsterdam office with more than 300 local media partners in over 50 countries. With them, we work on our mission to make independent news and information available to all.

This report was written as part of FPU's focus, in the Netherlands and abroad, on legal pressure on journalists and the impact of Strategic Lawsuits Against Public Participation (SLAPPs) on access to information.

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