

Worldwide libel

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Are English courts following in the footsteps of their French counterparts and establishing themselves as the censors of research worldwide? According to David Chekroun, “libel tourism” is on the rise and England is becoming a magnet for those who want to sue researchers and journalists.

In an op-ed published in *Le Monde* on May 19, 2010 concerning the extraordinary case of Joseph Weiler, Messrs. Cuniberti and Hofmann¹ expressed a legitimate concern about the fact that France and its repressive courts are establishing themselves as the censors of university research worldwide. Judge for yourself: Mr. Weiler is a professor at the *New York University Law School* who runs an Internet website specializing in the review of books on international law (www.globallawbooks.org). For his website, Mr. Weiler had commissioned a distinguished German professor to write the review of a book written in English by an Israeli university professor on the procedure in the International Criminal Court. This review, which was not favorable and published online, was not to the taste of the author of the book, who, following a heated exchange (the letters are published on the website www.ejiltalk.org), decided to press charges against Mr. Weiler and lodged a complaint of criminal defamation. Last September, Mr. Weiler was summoned to appear before an Examining Magistrate in Paris. The verdict will be given on March 3rd. We will know by then if “France has anything better to offer to the distinguished academics of this world than its magistrates’ courts”, to quote Mr. Cuniberti and Mr. Hofmann’s conclusion.

“Libel tourism”: a variant of “forum shopping”

¹http://www.lemonde.fr/opinions/article/2010/05/19/la-france-censeur-mondial-de-la-recherche-universitaire-par-gilles-cuniberti-et-herwig-hofmann_1353649_3232.html

This article does not intend to investigate or discuss the Weiler case further, but it is hoping to make the academic community aware of an existing threat that is coming from England these days, and which is far greater, more immediate, and more real than its uncertain French counterpart. This procedure bears the evocative name of “libel tourism” because it offers plaintiffs the possibility of taking civil action before the courts that are more likely to be sympathetic to their libel claims – thus avoiding recourse to a natural judge who may be less inclined to embrace their cause.

Libel tourism is an instance of what lawyers call – using an expression whose etymology is both English and Latin – “forum shopping”. It consists for the complainant (and, in some rarer instances, for the defendant) of securing access to the forum or the court that is the most likely to be favorable to his or her cause, and to defend his or her interests. In some ways, and to put it more simply, it amounts to shopping around for a “good” judge or a good forum.² This forum shopping is nothing new in the system of Romano-Germanic law (like the French law, for instance) or in the system of Common Law (as we know it in the United States or in the UK), but lately, it has become widespread because of the internationalization of trade and the intensification of international exchanges. So much so, that we can say that the globalization of the economy is accompanied today by a globalization of rights. This globalization is something that we can no longer ignore: the law has become a product that can be exported and, as Julie Allard and Antoine Garapon rightly point out, that can “infiltrate itself, sometimes without a visa, from one national sphere to the next.”³

And yet this globalization of the law is itself accompanied by a globalization of justice, with the constitution of a kind of universal supermarket of justice. It is in this space that forum shopping can blossom and spread, as the activities of companies are intensifying and money markets located are in multiple areas. As a result, as soon as an industrial accident or an ecological catastrophe takes place in a subsidiary company, or when a product is judged non-compliant in a country other than the one in which the

² D. Cohen, « Contentieux d'affaires et abus de forum shopping », Dalloz, April 22, 2010, p. 975 sq.

³ J. Allard, A. Garapon, *Les Juges dans la mondialisation. La nouvelle révolution du droit* La République des idées, Seuil, 2005, p. 1.

company that has produced it is registered, there is the possibility of forum shopping. Recall that after the explosion of the American company Union Carbide in the Indian city of Bhotal, the sinking of the Amoco-Cadiz in France, or the crash of the Egyptian charter plane Flash Airlines off the coast of Sharm el-Sheikh, it was American courts that were solicited, not the courts of the countries – respectively India, Egypt, and France – in which the damage had taken place, because the victims and their families thought they could obtain a more generous compensation in the United States than anywhere else, partly thanks to a liberal method of assessment of the loss sustained, and partly because of the presence of a civil jury.

As is becoming clear, forum shopping is concerned as much with the substance of the case as with the procedure itself. Today, the benefit that one expects from forum shopping has less to do with the application of the law than with the possibility for both parties to have access to the protection of American and English courts⁴ and their legal arsenal. First of all, it is a matter of being able to access evidence detained by the adversary, known as discovery.⁵ Second, the contingency fees that allow poorer plaintiffs to hire lawyers who are willing to get paid by a commission based on the damages obtained are very much sought after, since this kind of practice is illegal in many countries, including France. Third, group or class actions allow a large number of people – often groups of consumers or investors – to sue a company in order to obtain an

⁴ In a famous case, “The Atlantic Star” ([1973] Q.B. 364, spec. p. 381; [1972] 3 All ER 705; [1972] 3 WLR 746), Lord Denning claimed about English justice that « No one who comes to these courts asking for justice should come in vain. He must, of course, come in good faith. The right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum shopping" if you please, but if the forum is England it is a good place to shop in, both for quality of goods and the speed of service. »

⁵ We should point out that the discovery procedure is a mode of investigation governed by Anglo-American law in which the lawyers and their clients can ask the defendant to provide any document that may be useful in proving their case. Discovery procedures are unknown to French law since they clash with the French conception of the trial. In France, both parties must provide proofs of their allegations and only very exceptionally are they allowed to ask for elements of proof held by the other party. Therefore, in the case of transnational litigation, it is not uncommon to see the plaintiff trying to initiate a lawsuit in the United States so that the judge grants discovery, which offers two concrete advantages to the plaintiff. First, it forces the adversary to disclose an extraordinary number of documents (emails, correspondence between employees and company managers, contracts and work documents). Second, this procedure can be a weapon of choice to deter those who do not have the means, or the wish, to reveal the information requested. However, these discovery procedures are problematic in transnational disputes since their consequences often interfere with international treaties or national laws, such as the Privacy Protection (in France, for instance).

important financial compensation from a civilian jury. These three specific procedural aspects, unknown to many other law systems – such as the French one, for instance – have the effect of turning plaintiffs away from their natural judge and encouraging them to look instead to the competence of an American, or sometimes English, judge. In this way, French or European litigants have been able to sue many French and European companies – like Vivendi, Alstom, Dexia, Parmalat, or Société Générale – in American courts.

In defamation cases, the lawsuits linked to this type of forum shopping – or “libel tourism”, as we call it – are legion, and English courts are courts of choice for this kind of tourism. One only needs to look at a few specific examples to understand the strategies of the plaintiffs, who no longer hesitate to solicit English courts for the benefit of their cause. As far as the press is concerned, we can mention the following successful lawsuits: a famous American actress against the *National Enquirer*, a Saudi investor against the *Guardian*, a Greek citizen against *The New York Times*, and a Tunisian political refugee in exile against *Die Zeit*. Similarly, we may recall the successful lawsuit of the Russian businessman, Boris Berezovsky, against the American magazine *Forbes* in 1996, following the publication of an article entitled “Godfather of the Kremlin”, or, more recently, in 2005, the lawsuit of Polish-French film director Roman Polanski, who, for fear of being extradited to the United-States, was allowed to testify from France against the American magazine *Vanity Fair*. In the academic domain, we can note that copies of a book about terrorism written by the American professor Robert Collins, *Alms for Jihad: Charity and Terrorism in the Islamic World*, and published by Cambridge University Press, were destroyed as a preventive measure, for fear that the lawsuit brought by the complainant would lead either to a joint condemnation of the author and his publisher, or to very onerous penalty.

The Ehrenfeld case

But it is the Ehrenfeld case that seems to be the most emblematic of this new kind of “tourism”. Rachel Ehrenfeld, an Israeli-born writer and United States citizen, published a book in the United States on the funding of terrorism. In *Funding Evil: How*

Terrorism is Financed and How to Stop it, she alleged that the Saudi businessman Khalid bin Mahfouz and his family were providing financial support to some terrorist groups close to al Qaeda. The author also made it clear that neither her American publisher, nor she, had the intention of publishing her book in the UK. However, as the English court case later revealed, twenty-three copies of her book had been purchased online by people who were living in England and the first chapter had been available on an American website and was therefore accessible to English readers. Khalid bin Mahfouz and his two children then lodged a complaint of defamation in London and sued Rachel Ehrenfeld and her publisher. The twenty-three copies of the book that had been sold in England and the information available on the Internet justified the submission of this case to the jurisdiction of the English courts. Britain's High Court awarded a default judgment against Rachel Ehrenfeld and granted £10 000 damages to each of the claimants; it also ordered that the legal fees – which were somewhere in the region of £ 115 000 – be paid by the defendant; and finally, it enjoined the author and her publisher to take all the books off the shelves and withdraw any information accessible to English Web users as well.

This case caused quite a stir in the United States and the author countersued Khalid bin Mahfouz in New York federal courts in order to dismiss the lawsuit and the judgment on the ground that they violated her First Amendment rights under the U.S. Constitution.⁶ The appeal decision of December 20, 2007 confirmed the judgment of incompetence established by the New York judge on May 3, 2005, citing a lack of characteristic links with the United States. At this point, the discussion moved from the judiciary to the legislative level. In reaction to this case, the State of New York passed a new law on May 1, 2008, the *Libel Terrorism Protection Act*, enabling the New York courts to assert that it is within their jurisdiction, first of all, to be informed of the declaratory actions initiated by New York State residents engaged in judicial procedures

⁶ I should mention that in the law, the recognition and execution of foreign judgments is a very common practice, and an old one. This practice allows a judgment that has been passed in a specific country to be effective in another country without the need to start a new trial. (It is the recognition of a foreign judgment.) More particular is the case of the execution of a foreign judgment that requires the control and, sometimes, the granting of the *exequatur* by a local judge, which constitutes the necessary precondition to practice a right of recourse on the assets of the debtor.

in foreign countries and, second of all, to refuse to recognize foreign judgments against these same residents. The New York law also spurred a bi-partisan effort in Congress to pass a national version of “Rachel's Law” entitled the *Free Speech Protection Act*.

In practice, the jurisdiction of English courts can be exercised as long as the information (announcement from companies, articles published in the press, academic books) is accessible in English on the Internet or on the websites of online retailers (like Amazon), whatever the nationality of the parties.⁷ This specific notion allows English judges to exercise their jurisdiction even if the quasi-totality of the books or its readership is located in a country other than England. The method used by English law to arrive at this conclusion has to do with the possibility of separating the damages according to the location of access to the information or to the book. There is not, as in most judicial systems (notably in the United States), a “single publication rule” so that the litigation is considered globally, by a single judge and in a single country, for all the copies purchased in the world, or for the whole of the information accessible online. As a result, with the Internet and the current circulation of knowledge through websites like Amazon, the British courts and their judges potentially have the authority to be informed of all the libel actions concerning all the books and all the websites published in English. This explains why, for instance, an investment bank located in Iceland was able to sue a Danish newspaper for libel in a London court in 2008, with regard to an article published in Danish but partially translated into English on the newspaper’s website.⁸

The conflicts between judicial and constitutional cultures

In all these cases, the stakes are high and go beyond the simple question of the competent judge and applicable jurisdiction, because it has to do with the decision to intervene and, more generally, with the academic freedom of expression. More than ever, Pascal’s *Pensée*, “It is a funny sort of justice whose limits are marked by a river; true on this side of the Pyrenees, false on the other”,⁹ enlightens us with its wisdom. In libel

⁷ For an analysis in international private law, see T. Hartley, “Libel Tourism & Conflicts of Laws”, ICLQ vol. 59, January 2010, p. 25 sq.

⁸ D. Carvajal, « Britain, a destination for « Libel tourism », *New York Times*, January 20, 2008.

⁹ Pascal, *Pensée* 294.

cases, there is a real conflict between the different judicial or constitutional cultures, which may consider differently the balance between, on the one hand, the right to freedom of speech and freedom of press, and, on the other hand, the right to protect the honor and reputation of the individual. And we know that, because of their different constitutional traditions or by an act of political rationalization, different countries may insist more upon one than the other.

Being fervent supporters of free speech, the United States and its courts guarantee the liberty of expression for its press, its firms, its academic researchers, and its Internet users. In courts, therefore, in cases of libel actions, the proof of evidence falls entirely upon the plaintiff. The complainant must prove that the derogatory information that has been spread is false and that there was an intention of wrongdoing or malice on the part of the defendant. In reality, the chances of success of the complainants in such cases are very slim, as the landmark judgment of the Supreme Court¹⁰ in the case known as *New York Times v. Sullivan* of March 9, 1964, has shown, under the license of the first amendment of the American Constitution that establishes an almost absolute right to the freedom of expression.

At the opposite end of the spectrum, England, like France, sides with the advocates of the right to protect one's reputation. In English courts, therefore, the contentious allegation is considered false in the first place and it is the responsibility of the defendants to establish the truth of the facts that they have claimed. Unsurprisingly, plaintiffs are welcome with open arms and, in most instances, their efforts are successful because of this inversion of the burden of proof (which effectively means that in a British court, it is the professor, the researcher, or the journalist himself or herself who must prove that all of his or her claims are true and justified) and the question of malicious intention is not an issue. As for the motivation of lawyers in assisting plaintiffs, it is reinforced by two procedural rules: the "no win no fee" – a system by which the lawyer is paid only if the outcome of the lawsuit is favorable to his client – and the possibility of the pact of "*quota litis*", which is the convention between a lawyer and his client that sets

¹⁰ United States Supreme Court, *New York Times v. Sullivan*, March 9, 1964 (376 U.S. 254).

his fees in advance to a percentage of the amount that will be awarded by the court. We should point out that the amount of the fees granted by judges to the lawyers of the winning party can be very high and amount to hundreds of thousands of pounds. To get a better sense of what we are talking about, it is sufficient to mention that the most costly libel action so far was in excess of three million pounds in 2008.

Toward a reform of Libel Tourism

These various legal actions have given rise to an extensive public debate¹¹ in Britain about the freedom of press, free speech, and the right to protect one's reputation and honor. On this occasion, some NGOs, journalists, and academics have criticized this tendency to "forum shopping" which turns London civil courts into a kind of universal censor of academic research and forces authors to self-censorship. The former secretary of State for justice, Jack Straw, has taken up the issue and created a committee with the task of considering lawsuits initiated by foreign plaintiffs and to reconsidering the judicial framework for these actions, in the hope of eventually reducing their number.¹² Three courses of action have been envisaged so far: the inversion of the burden of proof, the limitation of the rule of the "no win no fee", and the reduction by 90% of the "success fees" granted by the judges to the lawyers of the winning party. In fact, the British government that was elected on May 11, 2010 has indicated in its program that it intends to continue this reform and that it will soon be able to propose new solutions. No doubt these solutions will have an impact (probably much more than the Joseph Weiler case) on research published in English!

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¹¹ For example, this conference on May 2, 2008 in London at the *Foreign Press Association* on the theme of "Libel Tourism": *The Chilling Effect on Free Speech*, in the presence of representatives from NGOs, such as *Freedom House*, and newspapers like the *Financial Time* and *The Observer*.

¹² I. Oakeshott, S. Swinford, "Jack Straw pledges action to end libel tourism", *The Sunday Times*, November 22, 2009, accessible online: <http://business.timesonline.co.uk/tol/business/law/article6926997.ece>.