How European States Export Censorship

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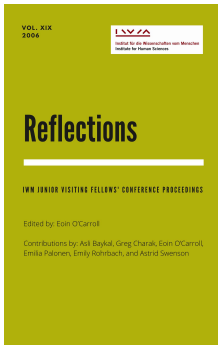

When Austrian cartoonist Gerhard Haderer wrote and illustrated a book in 2002 satirizing the Gospels, he no doubt anticipated controversy.[1] He did not, however, expect to face time in a Greek prison.

In his book titled The Life of Jesus, Haderer, best known for his biting caricatures in the German newsweekly *Stern*, depicts Jesus as a binge-drinking, pot-smoking surfer whose "miracles" are nothing more than unlikely coincidences. The 40-page book, which sold over 100,000 copies in Germany and has been translated into 10 languages, appeared only briefly in Greece in 2002 before authorities pulled it from bookstores at the insistence of the country's powerful Orthodox clergy.

In January 2005, an Athens judge handed Haderer a six-month suspended sentence *in absentia* for "malicious public blasphemy." Haderer appealed the ruling — risking a two-year prison sentence for doing so — and the case went to the Greek Supreme Court.

The 54-year-old cartoonist was facing the same charges that Socrates faced in Athens more than 24 centuries ago. But unlike Socrates, Haderer lacked the option of exile. Under an EU legal treaty that came into force in 2004, if the Greek court had issued a warrant for his arrest, Austria, and all other EU members, would have been obliged to honor it.

The cartoonist said that he did not even know that his book had been published in Greece until he received the court summons.

Fortunately for Haderer, on April 13 the Greek Supreme Court overturned his blasphemy conviction and lifted the ban on his book. According to the publisher's Web site, the cartoonist celebrated the ruling with a Greek salad and two shots of ouzo.

Haderer managed to avoid prison, but his case illustrates how, in world of increasing legal integration and transnational publishing, the shadow of censorship now falls across national borders. Threats to free expression no longer come only from local school boards and city councils, where writers and artists can face their censors. More and more, it is judges and lawmakers in foreign cities who decide what people can and cannot say.

The degree of free expression in the European Union varies widely. Freedom House, New York nonprofit that monitors political rights and civil liberties around the globe, has for the past 25 years assessed press freedom in 194 countries and territories by assigning a numerical score based on each country's legal, political and economic environment. The results of the group's most recent survey are worth examining.

Ranking best in the European Union and in the world are Finland and Sweden, countries that have long enjoyed constitutional protections of free expression and a vibrant independent media. Ranking last in Europe is Italy, where the government still imprisons journalists for crimes of opinion, and where the prime minister and his family own two of the eight national daily newspapers and six of the seven national broadcast stations. Globally, Italy ties with Bolivia, Bulgaria, the Philippines and Mongolia for 77 th place.

Italy's criminal code imposes prison sentences ranging from six months to five years for "offending the honor" of the president, public institutions, the flag or even the nation itself. According to Freedom House's 2004 report, Italy, along with Spain and France, successfully pressured the Council of Europe to recognize defamation laws that protect government institutions, such as the legislature and the army, thus disseminating throughout Europe a law drafted in 1930 by Benito Mussolini.

Libel tourism

But no other country currently exports its defamation laws as successfully as Great Britain. In many other Western countries, it is the plaintiff who must demonstrate the falsity of the statements in question. In many countries, including the United States since 1964, plaintiffs who are public figures must additionally prove that the false statements were made deliberately or recklessly.

British law is the opposite: the defendant bears the burden of proving that the statements are true, and must do so without re-using any of the evidence that is in dispute. British libel laws also offer no protection for defendants who exercise reasonable journalistic diligence. In Britain, libel is any false, damaging statement, even one that a reporter has properly sourced. Damages increase if the defendant tries and fails to prove the statements.

Such claimant-friendly laws make the United Kingdom an attractive forum for so-called libel tourists. In recent years, well-heeled businessmen from around the globe have made the British courtroom the venue of choice for protecting their public images.

Standing at the beginning of this trend was American oil tycoon and art collector Armand Hammer. In 1989, Steve Weinberg, a well-known investigative journalist who lived in Missouri, published an unauthorized biography of Hammer with a New York publisher. Weinberg's book enjoyed positive reviews, and the writer signed with Random House UK.

The moment the book was published in Great Britain, Hammer sued, citing about 150 separate instances of alleged libel. Weinberg spent the next two years in litigation, in what many expected to be the most costly libel trial in British history. Hammer died before the trial's conclusion, ending the lawsuit.

Hammer's suit opened the door to more extraordinary libel litigation. In 1996, Forbes magazine ran an article alleging that Russian billionaire Boris Berezovksy was a "godfather" of the Russian mafia. The story implicated him in the murder of a prominent Russian journalist. Berezovksy sued, not in Russia where he lived and where the piece was reported, nor in New York where Forbes was published. He sued in Great Britain, which had imported an estimated 2,000 copies of Forbes, less than a quarter of one percent of the magazine's total circulation. Britain's highest court ruled that Berezovksy was entitled to bring the libel action in a British court, and, following a five-year legal battle, Forbes ran a retraction. (A little over a year later, in 2004, the author of the story was gunned down outside the magazine's offices in Moscow.)

Following Berezovsky and other Russian oligarchs was a wave of wealthy Saudis seeking to protect their reputations after media outlets linked them to the Sept. 11, 2001 terror attacks in the United States. The most prominent among these Saudis is Sheikh Khalid bin Mahfouz, a former banker for the House of Saud and one of the richest men on earth.

Many books and newspapers have said that Mahfouz funneled money to Osama bin Laden and Al-Qaeda; some claiming, falsely, that the Saudi sheikh is bin Laden's brother-in-law. Mahfouz has fought these allegations ferociously in British courts, winning five judgments in the past two years alone. The sheikh, who holds Irish citizenship, defends his use of the British courts by saying that he has substantial connections to Great Britain.

The same cannot be said for the defendants. In May 2005, a justice in London's High Court awarded Mahfouz and two members of his family £30,000 in damages in a libel action against American author Rachel Ehrenfeld and her U.S. publisher, whose book "Funding Evil" sold all of 23 copies in the United Kingdom.

Many publishers are now getting cold feet. Random House, which had earlier spent millions defending one of its authors against Armand Hammer, backed down on publishing British editions of two bestselling American books examining the role of the Saudi royal family in international terrorism. Other books have undergone rewrites before being published in Britian: British readers of American political books will be treated to more charitable versions of Bill Clinton's opinions of Kenneth Starr, and of Michael Moore's opinions of stupid white men in general.

In the United States, British libel law is shaping up to be another means for scoring political points. In 2003, American policy advisor Richard Perle, in a rare acknowledgment of another country's laws, threatened to sue investigative journalist Seymour Hersh in a British court for a New Yorker piece that alleged conflicts of interest. Perle never followed through on his threat, but criticssuggestedthat the defense consultant and contractor wanted to scare off other journalists who might follow up on Hersh's story.

Today, the United Kingdom's position as global libel cop is firmly established. But for some claimants, winning damages in a civil case fails to constitute a sufficiently decisive victory. To deliver a genuine *coup de gras,* one has to go to France.

On April 19, 2005, police from Scotland Yard's extradition squad served summons to Times editors Richard Thomson and Dan Sabbagh, British nationals working for a British newspaper. David and Frederick Barclay, also British nationals, who owned The Telegraph, a rival British newspaper, accused the Times of violating French law.

The Barclay brothers had earlier said that the Times had libeled them in a 300-word November 3, 2004 article that attacked their business practices. After the story ran, the Barclays demanded a "right of reply," a proceeding that has no equivalent in British law. When the Times refused, saying that the paper was subject to British, not French, law, the Barclays launched criminal proceedings.

The Barclays were able to sue because the Times sells about 3,500 copies in France, out of a total circulation of about 680,000. A spokesman for the Barclay brothers said that they took their proceedings under French law because it was "quicker and simpler."

The Times editors are being charged with violating the French Press Law of 1881 . More than a century ago, Emile Zola fled to England to avoid a prison sentence under the same law. Today, the distance between the two countries is much shorter, and Thomson and Sabbagh are scheduled to appear in a criminal court in Paris on February 9, 2006.

In each of these defamation cases, both the plaintiff and the defendant lived in countries other than the one in which the trial took place. Additionally, a vast majority of the offending copies of the publication in question sold elsewhere. But in each case, at least a handful of physical copies made their way into the same jurisdiction as the trial. But in 2002, a court on the other side of the world erased even this standard.

"A bilateral act"

Two years earlier, Barron's Online magazine had posted a 7,000-word story about Australian mining magnate and rabbi "Diamond Joe" Gutnick. The story, titled "Unholy Gains," called Gutnick a tax-evader and a money-launderer.

Gutnick launched a defamation suit in Melbourne against Dow Jones, the New-York-based parent company of *Barron's Online*. As with Great Britain, Australia's defamation laws place the burden of proof on the defendant. Gutnick, citing that about 1,700 of the

magazine's 550,000 online subscribers paid with Australian credit cards, successfully convincedan Australian court to hear the case in his home town.

Dow Jones appealed, with amicus briefs filed by the largest American media and Internet companies, arguing that the case should be tried in New Jersey, where the magazine's file servers are located. On December 10, 2002, Australia's highest court ruled in favor of Gutnick.

The ruling hinged on the definition of the word "publish."

> "Harm to reputation," it read, "is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension."

Before this ruling, most Internet cases followed an "upload rule," which held that publication occurs at the location of the server. The Gutnick ruling replaced this with a "download rule." What is published online is published everywhere, in every jurisdiction that has Internet access.

The court addressed this omnipresence:

> "The Court was much pressed with arguments about the ubiquity of the Internet. That ubiquity, it was said, distinguished the Internet from practically any other form of human endeavour. Implicit in the appellant's assertions was more than a suggestion that any attempt to control, regulate, or even inhibit its operation, no matter the irresponsibility or malevolence of a user, would be futile, and that therefore no jurisdiction should trouble to try to do so. I would reject these claims. … The fact that publication might occur everywhere does not mean that it occurs nowhere."

In November of last year, Dow Jones settled the case, paying Gutnick U.S. $440,000 in fees and damages. In February 2005, the Guardian, a British newspaper, reported that the original Barron's story had registered only nine hits in Australia.

So far, courts in at least two other countries have cited the Gutnick ruling. In February 2004, an Ontario court cited the case when it agreed to hear a $9 million libel case brought against the Washington Post by a former UN officialwho was working in Kenya in 1997 when the newspaper published a critical story about him. That same month, a British court cited Gutnick when it allowed American boxing promoter Don King to sue American boxer Lennox Lewis in the United Kingdom for allegedly libelous remarks posted on boxing Web sites hosted in California.

Uncertainty about Internet jurisdiction has cast a measurable chill over American online media: according to an April 2004 survey conducted by the American Bar Association and the International Chamber of Commerce, "half of media company respondents indicated that they have adjusted their business operations in response to Internet jurisdiction risk."

But perhaps the greatest threats to free expression occur not when states disagree, but when they cooperate.

"A good corporate citizen"

At 5:18 GMT on Thursday, October 7, 2004, more than 20 news Web sites in 17 countries went offline. The sites belonged to the Independent Media Centers, an international network of media collectives publishing news and opinions for anti-globalization activists worldwide. The first of these collectives emerged out of the 1999 Seattle protests against the World Trade Organization, when activists set up an online newswire where visitors could freely post text, photos, audio and video footage. The second IMC launched in Boston in early 2000, and today there are more than 160 centers worldwide.

On that day, sites went down throughout Europe: in France, Belgium, Andorra, Portugal, Poland, Spain, Italy, the Netherlands, the Czech Republic, Yugoslavia and the United Kingdom. Sites in Brazil, Uruguay, and western Massachusetts were also shut down. All of these sites were hosted on two servers physically located in London. Shortly after the shutdown, administrators received an e-mail from the company that owned the servers, Rackspace Managed Hosting, headquartered in San Antonio, Texas. The e-mail explained that the company "received a federal order to provide [Indymedia's] hardware to the requesting agency."

Rackspace did not elaborate until the following day, when it sent another e-mail explaining that it was acting in compliance with a Mutual Legal Assistance Treaty, an international agreement that sets "procedures for countries to assist each other in investigations such as international terrorism, kidnapping and money laundering." The e-mail added that Rackspace was "acting as a good corporate citizen and is cooperating with international law enforcement authorities. The court prohibits Rackspace from commenting further on this matter."

Five days after the servers went offline, they were restored in London without explanation. Site administrators noticed that much of their data had been erased.

Because of the gag order imposed on Rackspace, Indymedia could get no more information on who seized their servers, what they were looking for, or why. All they knew is that, for five days, an unknown government was inspecting their files with the help of U.S. officials from an unknown agency.

Indymedia enlisted the help of the Electronic Frontier Foundation, a San Francisco nonprofit that advocates digital free speech and privacy rights. The EFF set up a special page on its site to publicize its efforts, and moved to have the gag order on Rackspace lifted. The district court in San Antonio refused, citing a clause in the Mutual Legal Assistance Treaty that permits the request from the foreign government to remain secret.

But in citing the treaty, the district court let slip one essential clue. Each of the 40 or so assistance treaties is negotiated separately, and therefore each one uses slightly different wording. By examining the language in all of the treaties, the EFF arrived at a conclusion

that was not at all surprising: the request to seize Indymedia's servers came from none other than the government of Italy.

Questions remain. What did the Italian government want with the servers? And what role, exactly, did the American, British and Italian governments play in seizing and searching the hardware, actions that are illegal in the United States under the Privacy Protection Act and in the United Kingdom under the Data Protection Act and the Regulation of Investigatory Powers Act.

The U.S. government refuses to take any responsibility, saying that it was simply carrying out a request by another anonymous government. The British government denies all involvement, even though the seizure occurred in London. And the Italian government is simply not talking.

Indymedia does not know where to begin. The secrecy of the request and number of jurisdictions involved lets each government to shift the blame. As far as public officials are concerned, because Indymedia's rights might have been violated everywhere, they were violated nowhere.

"Regardless of Frontiers"

The advent of an EU-wide justice system increases this diffusion of responsibility. As courts exercise greater control over writers and artists located in other member states, it becomes more convenient than ever for governments to ignore the rights of their own citizens, especially if they hold unpopular views.

After his blasphemy acquittal, Gerhard Haderer complained that the Austrian government had ignored him throughout his trials. Indeed, the only reason that Haderer faced the possibility of extradition in the first place was because of dead-letter laws that the Austrian legislature should have repealed long ago. Under the EU arrest warrant system, Austria is not required to extradite its own nationals for conduct that is not a crime in Austria. But unfortunately for Haderer's case, blasphemy remains a crime, albeit an unenforced one, in Austria's criminal code.

The same is true for the criminal codes of Ireland, Finland, Germany, the Netherlands, Spain, the United Kingdom and, naturally, Italy. Equally archaic laws, such as those that impose prison sentences for insulting people, still exist, and are occasionally enforced, throughout the European Union.

More chilling is that the EU warrant does away with this "dual criminality" for a number of serious crimes, which include murder, terrorism, drug trafficking and the crime of "racism and xenophobia," not recognized as a crime by all EU members. For example, only seven EU states make it a crime to deny the Holocaust. But in a post-Gutnick Europe, any European who denies the Holocaust online could find himself caught up in a fast-track extradition procedure, one in which his own government would be unable to intervene.

Dual criminality has also been eliminated for child pornography, even though different EU states still have different definitions of "pornography," and, more significantly, of "child." In Great Britain, the age of consent is 18; in Germany, it's 14.

All of this is not to say that legal integration always harms free expression. Humanity took a large step toward a world without censorship in December of 1948, when the United Nations General Assembly adopted the Universal Declaration of Human Rights, Article 19 of which reads:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The Universal Declaration is not itself legally binding, but the Council of Europe used the same language in drafting its free expression principles for the European Court of Human Rights. It added a list of legitimate restrictions "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Despite these restrictions, the Strasbourg Court, which has jurisdiction over 46 European states, has had some success in striking down many of Europe's more onerous censorship laws, including insult and blasphemy statues. And in February 2005, the court issued a ruling in Britain's infamous McLibel case, rulingthat the country's libel laws fail to protect the public's right to criticize large corporations.

But even high-minded human rights documents can be a tool for censorship. In a 1997 study titled "Perverse Result: How the European Convention on Human Rights supports global restrictions on press freedom," the World Press Freedom Committee found that from 1992 to 1996, the European Convention was used more than 1,000 times in 109 countries to justify the persecution and oppression of the media. The report, which examined almost 4,000 attacks on the news media worldwide, found that the highest number of abuses were in the name of protecting the reputation and rights of others.

The WFPC's report underscores the need to implement international laws that more forcefully prescribe protections of free expression, and to repeal those that enumerate restrictions on it. The more we tear down our borders, the more urgent it becomes to set up new borders protecting against state, corporate and ecclesiastical depredations against our right to say. Porosity invites opportunism; ambiguity invites deniability.

But laws alone, no matter how robust, do not secure freedom of expression. In order for this freedom to exist, a spirit of openness must exist in the wider population. And, to truly succeed, it must be an active openness, one that does not only refrain from censorship, but one that also refuses to allow censorship be carried out on our behalf.

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Note:

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