
# THE IMPACT OF ENGLISH LIBEL LAW ON FREEDOM OF EXPRESSION

A REPORT BY ENGLISH PEN & INDEX ON CENSORSHIP

2009

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# TERMS OF REFERENCE

1. The Inquiry was set up to assess the impact of English libel law on freedom of expression, both in the UK and internationally

2. The Inquiry was conducted in partnership by English PEN and Index on Censorship

3. Index on Censorship promotes the public understanding of freedom of expression through the Writers and Scholars Educational Trust (registered charity, number 325003)

4. English PEN is a registered charity (number 1125610), with the object of promoting the human rights of writers, authors, editors, publishers and other persons similarly engaged throughout the world

5. The Inquiry was overseen by a Committee representing both organisations

6. The Inquiry held roundtable meetings with (1) lawyers, (2) editors, (3) publishers and (4) bloggers

7. Members of the Inquiry Committee also met a number of stakeholders individually

8. Members of the Inquiry Committee carried out research, through print and online sources and by attending relevant conferences and seminars

9. This Report represents the conclusions of the Inquiry Committee

# EXECUTIVE SUMMARY

After a year-long Inquiry, English PEN and Index on Censorship have concluded that English libel law has a negative impact on freedom of expression, both in the UK and around the world. Freedom of expression is a fundamental human right, and should only be limited in special circumstances. Yet English libel law imposes unnecessary and disproportionate restrictions on free speech, sending a chilling effect through the publishing and journalism sectors in the UK. This effect now reaches around the world, because of so-called 'libel tourism', where foreign cases are heard in London, widely known as a 'town named sue'. The law was designed to serve the rich and powerful, and does not reflect the interests of a modern democratic society.

In this report, we cut through the intimidating complexity of English libel law to show how the legal framework has become increasingly unbalanced. We believe that the law needs to facilitate the free exchange of ideas and information, whilst offering redress to anyone whose reputation is falsely or unfairly damaged. Yet our inquiry has shown that the law as it stands is hindering the free exchange of ideas and information. We repeatedly encountered the same concerns, expressed by lawyers, publishers, journalists, bloggers and NGOs, who have no wish to abolish libel law, but know from experience of its chilling effect on legitimate publication. In response to their concerns, which are set out below, we offer the following recommendations to restore the balance between free speech and reputation:

1. **In libel, the defendant is guilty until proven innocent**

   *We recommend: Require the claimant to demonstrate damage and falsity*

2. **English libel law is more about making money than saving a reputation**

   *We recommend: Cap damages at £10,000*

3. **The definition of 'publication' defies common sense**

   *We recommend: Abolish the* Duke of Brunswick *rule and introduce a single publication rule*

4. **London has become an international libel tribunal**

   *We recommend: No case should be heard in this jurisdiction unless at least 10 per cent of copies of the relevant publication have been circulated here*

5. **There are few viable alternatives to a full trial**

   *We recommend: Establish a libel tribunal as a low-cost forum for hearings*

6. **There is no robust public interest defence in libel law**

   *We recommend: Strengthen the public interest defence*

7. **Comment is not free**

   *We recommend: Expand the definition of fair comment*

8. **The potential cost of defending a libel action is prohibitive**

   *We recommend: Cap base costs and make success fees and 'After the Event' (ATE) insurance premiums non-recoverable*

9. **The law does not reflect the arrival of the internet**

   *We recommend: Exempt interactive online services and interactive chat from liability*

10. **Not everything deserves a reputation**

    *We recommend: Exempt large and medium-sized corporate bodies and associations from libel law unless they can prove malicious falsehood*

In order to facilitate a thorough democratic debate about this crucial subject, we recommend that these measures should be incorporated in a Libel Bill, which would simplify the existing law, restore the balance between free speech and the protection of reputation, and reflect the impact of the internet on the circulation of ideas and information.

# BALANCING FREE SPEECH AND REPUTATION

Free speech is internationally recognised as one of the most important of all our human rights. The Universal Declaration of Human Rights – written in the aftermath of the Second World War – describes free speech as 'the highest aspiration of the common people'. The European Court of Human Rights has historically kept this in mind, describing free speech as 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.[1] The Court has also noted that free speech protects not only information and ideas 'that are favourably received or regarded as inoffensive or a matter of indifference, but also those that offend, shock or disturb'.[2] The Human Rights Act (1998) gives British citizens the right to free speech as set out in Article 10 of the European Convention on Human Rights: the freedom 'to receive and impart information and ideas without interference by public authority and regardless of frontiers'. This formalises a long tradition in British society, which has respected free speech because of its importance for democracy, for scientific inquiry, and for self-fulfilment.

Free speech is a cornerstone of democracy. Without free speech, we could not hold the government to account; nor could we represent our political views or expose the wrongdoing of those who represent us. This is why MPs claim an 'absolute privilege' to make or repeat defamatory remarks in the House of Commons. It enables them to air their constituents' concerns without the fear of a libel action. The importance of this principle was reaffirmed in October 2009, when an injunction was used in an attempt to block the reporting of parliamentary business. In the wake of this scandal, Westminster, the media and the public have been reminded of the essential value of free speech to democracy.

The recent revelations about MPs' expenses – which have contributed to a process of democratic renewal – would not have been possible without public access to closely-guarded information. Even as campaigners attempted to use the Freedom of Information Act to uncover MPs' expenditure, the Speaker turned to a libel law firm, Carter-Ruck, to protect his reputation.[3] Other MPs threatened to sue for libel in the wake of the revelations. Before this information became public, such threats could have silenced critical reports. Now that the public knows how the expenses system was operated, MPs would find it hard to mount a successful libel action. Yet public figures in other countries continue to use English libel law to silence their critics, from Ukraine to Iceland (see Appendix).

Free speech is not only vital for democracy; it is also necessary for the pursuit of knowledge. From Socrates to Galileo, philosophers and scientists have been penalised for challenging received wisdom. New ideas can be deeply unsettling. Backed up by scientific research, they can force us to rethink our place in the universe. Science depends on rigorous debate, which is best conducted within a scientific framework, not a court of law, as the ongoing case of *British Chiropractic Association v Singh* demonstrates (see Appendix). Free speech is also important for self-fulfilment. We all benefit from being able to speak our minds, to express our emotions and to understand the emotions of those around us. Novelists and other creative writers depend on their right to freedom of expression to illuminate the human condition. Yet libel law has been used against at least one novelist in recent years who inadvertently created a character resembling a real person, who subsequently sued for libel (see Appendix).

Free speech is also essential in order for a strong and independent media to hold the state to account, to expose corruption, and to host national debates on matters of public interest. This does not mean that the media should be free to defame members of the public or public figures with impunity. However, journalists have an important role to play in society, and so long as they exercise that role responsibly, the public interest is served better by a liberal regulatory regime that allows occasional mistakes, than by a stricter regime that curtails media freedom. Societies live and breathe through the oxygen of free speech.

Sometimes the atmosphere can become polluted. We don't always like what we hear, and some speech can be disturbing. No one would deny that speech is powerful. We are linguistic animals, and if speech didn't have the power to change our lives we wouldn't have bothered to invent it. It is in recognition of the special power of speech that Article 10 of the Human Rights Act sets out a number of interests that may occasionally justify constraints on the right to freedom of expression, such as national security, public order, and 'the rights and reputations of others'. This means that any legal restraints on our speech (and other forms of expression such as

1 *Handyside v UK* (1976) 1 EHRR 737 para 49
2 *Ibid.*
3 See *Daily Mail*, 10 August 2007

writing and art) must be justified by one of these concerns. For instance, the Official Secrets Act limits the freedom of soldiers and public officials to share their knowledge of sensitive issues. However, in order to prevent governments imposing undue restraints on free speech, the European Court of Human Rights has established some key principles here: any restraints must be (1) necessary in a democratic society; (2) proportionate to the threat posed; and (3) subject to legal certainty – in other words, the law must be clear and consistent.

The law of libel developed many centuries before the idea of human rights entered the statute books, as part of the arsenal of the wealthy. From its origins in the eleventh century to today's million-pound court cases, libel law has been used to protect the rich and powerful from criticism and has come to be associated with money rather than justice. The high costs involved and the scale of potential damages have chilled free speech. A major report published last year by the Programme in Comparative Media Law and Policy at the Oxford Centre for Socio-Legal Studies revealed that the cost of libel actions in England and Wales is 140 times higher than the European average.[4]

Libel law exists to protect people against statements that have a meaning lowering them 'in the estimation of right-thinking members of society generally', or exposing them to 'hatred ridicule or contempt' or causing them to be 'shunned and avoided'.[5] It is always presumed that such statements are false, just as it was once presumed that a gentleman must be blameless. In English law, the defendant in a libel case is asked to prove the truth of their statement, or that it was a 'fair comment', not intended as a statement of fact, or that the allegation, even if false, was made in the public interest. Thus the defendant carries the burden of proof. The English approach to libel therefore suggests that the reputation of the claimant is more important than the free speech of the defendant. This feature is one of the reasons why foreign claimants choose English courts over other jurisdictions that do not presume falsity. It is also an anomaly in English law, where defendants are usually presumed innocent until proven guilty.

Most countries in the world have some form of civil libel law, which allows ordinary citizens to defend their reputation in court. Indeed, the Universal Declaration of Human Rights (1948) recognised the right to legal protection against 'attacks upon (…) honour and reputation'. However, the architects of the European Convention of Human Rights did not include a primary right to reputation. They recognised the potentially chilling effect of creating such a right. Our reputation is a function of the interplay between how we behave and what is considered acceptable in our society. Liberals have a bad reputation in a fascist society; fascists have a bad reputation in a liberal society. No one can go through life expecting to maintain a good reputation, regardless of their words or actions. In order to avoid the chilling effect of creating a right to reputation, whilst acknowledging the need for some legal protection against defamation, the Convention defines 'reputation' as a *potential* constraint on the fundamental right to free speech. The state is responsible for finding an appropriate balance between free speech and the protection of reputation.

In the past decade, probably the most significant development in libel law has been the evolution of the Reynolds defence, which derives from a judgment made in 1999 by the House of Lords on a case brought by the former Irish Taoiseach Albert Reynolds against the *Sunday Times*. In their judgment, the Lords ruled that under certain circumstances, the media could mount a 'public interest' defence against allegations that turned out to be false. However, the defendant would have to demonstrate that they had acted responsibly, and the judgment outlined several possible criteria that judges could use to determine whether the defendants had done so. A Reynolds defence has since been used successfully in *Jameel v Wall Street Journal* and in the case of *Bent Coppers* (see Appendix). Lord Hoffman said in Jameel that this defence should apply 'to anyone who publishes material of public interest in any medium', not merely to professional journalists and editors. However, the prohibitive costs of libel law and the misplaced burden of proof have deterred potential defendants from testing this defence in court.

4 *A Comparative Study in Defamation Proceedings Across Europe*, Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies, University of Oxford, December 2008

5 See Andrew Nicol, Gavin Millar and Andrew Sharland, *Media Law and Human Rights*, second edition (Oxford: Oxford University Press, 2009), p. 81

On 21 July 2008, the United Nations Human Rights Committee issued a damning critique of English libel law. The UN stated that the 'practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work'.[6] The report also highlighted the impact of the internet, which 'creates the danger that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest'. Over the last decade, increasing numbers of foreign claimants have brought libel actions in the English courts, often against defendants who are neither British citizens nor resident in this country. This phenomenon, known as 'libel tourism', has led American states to pass legislation protecting their citizens against the financial consequences of such rulings and the House of Representatives passed a bill this year to protect all US citizens. This has come to be known as 'Rachel's Law', after the American academic Rachel Ehrenfeld who was sued in London by the Saudi businessmen Khalid bin Mafouz over allegations in her book *Funding Evil*. Only 23 copies of the book were available in the UK, but the English courts still heard the case (see Appendix).

In its 2008 report, the UN indicated that English libel law may breach Article 19 of the International Covenant on Civil and Political Rights, the right to freedom of expression. It was this report that prompted Index on Censorship and English PEN to launch this inquiry. We soon realised that the problem of 'libel tourism' cannot be addressed in isolation. Foreign claimants choose English courts to silence criticism, not only because of a jurisdictional loophole but because English libel laws are favourable to the claimant. We might close this loophole, yet the problem for British writers and journalists would remain. Moreover, in today's fragmented media environment, it is not only the traditional media companies – newspapers, broadcasters and book publishers – that have an interest in free speech. Everyone with access to the internet now has the capacity to create a blog, or post material to YouTube or other social networking sites. The rise of 'citizen journalism' and the readiness of newspapers such as the *Guardian* to host post-moderated material on their websites alongside editorial content have blurred the old boundaries between the media and the public. This means that, increasingly, private citizens without the resources of a newspaper or publisher are being forced to defend themselves in an expensive, complex and unfair environment, in which their basic rights are not respected. Many bloggers receive writs to take down content on their website posted by other people. The moderators of (and some contributors to) the football fan forum 'Owlstalk' were subjected to a sustained legal assault by the directors of Sheffield Wednesday FC (see Appendix).

In its early days, the internet was heralded as a device that would globalise free speech, by creating new opportunities to 'seek, receive and impart information and ideas'. Whilst it has certainly allowed millions of people the freedom to blog about their lives, and to share their views with the world, the internet has also given states and corporations unparalleled powers of scrutiny over citizens' communications. New technologies of censorship and surveillance have developed in competition with the technology of freedom. Meanwhile, libel laws that were created in an age of manuscript circulation are now being applied against twenty-first century communications. Libel law urgently needs to be reformed to meet the new demands of global publishing. It is time now for the British state to restore common sense to this area of law, which has an enormous impact on the fundamental right to freedom of expression, both in the UK and internationally. All arms of the state – legislature, executive and judiciary – must be involved in this process, which is too important to leave to the courts alone. Civil society also has an important role to play, as charities and NGOs such as English PEN and Index on Censorship have shown by conducting this inquiry. Ultimately, we believe that legislation will be required to set an appropriate balance in law between the protection of reputation and the fundamental importance of free expression. In the following section we set out the ten primary failings in the current legal system, and offer solutions to these failings.

6 UN Human Rights Committee, 21 July 2008

# RESTORING THE BALANCE

In the course of our Inquiry, we encountered the following complaints about English libel law:

1. **In libel, the defendant is guilty until proven innocent**
2. **English libel law is more about making money than saving a reputation**
3. **The definition of 'publication' defies common sense**
4. **London has become an international libel tribunal**
5. **There are few viable alternatives to a full trial**
6. **There is no robust public interest defence in libel law**
7. **Comment is not free**
8. **The potential cost of defending a libel action is prohibitive**
9. **The law does not reflect the arrival of the internet**
10. **Not everything deserves a reputation**

These concerns are held by a wide variety of authors, publishers, journalists, lawyers and new media practitioners. In each case, we have identified a means of restoring the balance between free speech and reputation, as follows:

### 1. In libel, the defendant is guilty until proven innocent

Because of the antiquated presumption of falsity, libel law requires the defendant to do all the heavy work of proving either the truth of their allegations; or that their publication constitutes fair comment; or that they were protected by some form of privilege – such as the absolute privilege of a parliamentarian, or the qualified privilege of some journalists. There is no requirement for the claimant to establish the falsity of the allegation; nor are they required to show that it has caused them any tangible harm or that the defendant has made any allegations recklessly or maliciously.

In order to bring a libel action, a claimant theoretically needs to have a reputation in the UK and to show that a statement is defamatory. However, it is very rare in practice for a court to reject a claim. With no requirement on the claimant to prove that their reputation has actually been damaged, their threat of a libel action, even if a bluff, can be enough to silence journalism that may be in the public interest. It is this, above all, which gives libel its unique chilling effect on free speech. In most other jurisdictions in the world, it is the claimant's responsibility to show falsity.

To remedy this, we recommend that the claimant should have to demonstrate damage in order to bring a libel action. It will no longer be enough simply to claim that a reputation has been damaged, but it will be necessary to demonstrate that damage has been caused.

We also recommend that the claimant be required to provide evidence of falsity or unfairness when they bring a libel action. This reform would reverse the burden of proof, bringing English libel law up to global standards. We recognise that there are cases where it may be impossible for a claimant to provide evidence of the falsity of an allegation and in these instances the defendant may be required to bring evidence supporting the truth of what they have written.

*We recommend: Require the claimant to demonstrate damage and falsity*

### 2. English libel law is more about making money than saving a reputation

The chief remedy in libel should be an apology, not financial reward. The law supposedly exists to restore the claimant's reputation, not to enhance their bank statement with hefty awards for damages. The courts should take the financial incentive out of libel law by capping damages at £10,000. If a claimant wishes to demand more, then they would need to prove material damage such as loss of earnings.

*We recommend: Cap damages at £10,000*

### 3. The definition of 'publication' defies common sense

The definition of 'publication' in libel is no longer appropriate for the age of global communication and the internet. Each newspaper sold or website hit currently constitutes a new libel – the so-called 'multiple publication' rule – a principle that renders online newspaper archives uniquely vulnerable to libel actions. The rule dates from the 1849 *Duke of Brunswick* case, in which the Duke's manservant travelled from Paris to London in order to purchase a copy of a 17-year-old journal in which the Duke belatedly found himself to be defamed and consequently sued for libel.

We welcome the government's consultation on single publication and believe that the introduction of a single publication rule would bring online publication in line with print, ensuring that no libel

action can be brought a year after publication. We recommend that the *Duke of Brunswick* rule be abolished.

*We recommend: Abolish the* Duke of Brunswick *rule and introduce a single publication rule*

### 4. London has become an international libel tribunal

The multiple publication rule, coupled with the global reach of the internet, has contributed to the phenomenon of forum shopping and libel tourism. A book that would once have been available only in the United States can now be bought here. An online publication or article can be downloaded anywhere. The number of cases that can be, and are, brought to the English courts has multiplied as a result. This exposes the English legal system to abuse by claimants with no reputation to defend in this country.

We propose that libel cases should be heard in this jurisdiction only if it can be shown that at least 10 per cent of the total number of copies of the publication distributed have been circulated here. Cases relating to publication on a foreign internet site should only be heard if the article in question has been advertised or promoted in England and Wales by or on behalf of the defendant. This reform would address the international embarrassment of the UK being used as an international libel tribunal – and would introduce a more equitable system for hearing libel cases in an age of global communication.

*We recommend: No case should be accepted in this jurisdiction unless at least 10 per cent of copies of the relevant publication have been circulated here*

### 5. There are few viable alternatives to a full trial

Having launched a libel action, claimants currently have little interest in mediation or arbitration. They have the financial incentive of seeking damages in an open trial or settling out of court. Because of the costs of defending a libel action, and the onerous burden of proof in a trial, defendants are unwillingly inclined to settle. The Press Complaints Commission may resolve some potential libel cases, but this option is not open to book publishers, bloggers and NGOs. The absence of any credible forum in which complaints may be heard turns libel into an all-or-nothing decision for most defendants.

We propose that mediation is made a requirement for anyone bringing a libel action, leading to binding arbitration. We also recommend further reducing the financial costs of litigation by making it possible for a defendant, where appropriate, to issue a declaration of falsity. This would allow redress to injured parties and require minimum involvement of lawyers, along the lines of an employment tribunal. A dedicated libel tribunal could reduce the immense costs of a libel trial. It would also have the power to determine meaning and to establish fair comment as a defence at an early stage.

*We recommend: Establish a libel tribunal as a low-cost forum for hearings*

### 6. There is no robust public interest defence in libel law

Although Reynolds privilege and the subsequent ruling in *Jameel* have gone some way to providing journalists with a public interest defence, it has not been applied widely enough beyond investigative journalism.

We would like to see a stronger public interest defence that also extends to journalists and writers who may not appear to be obvious candidates for a Reynolds defence. Such a reform would significantly strengthen the right to free expression in the UK.

The court should also take into account the capacity of the defendant to follow all the steps required for a Reynolds defence. Defendants writing about totalitarian regimes, for instance, may not be able to corroborate their reports safely. Journalists and others should be allowed to publish statements which they believe to be true and in the public interest.

*We recommend: Strengthen the public interest defence*

### 7. Comment is not free

There needs to be a broader and more relaxed definition of what constitutes fair comment in order to provide greater protection for free debate. At present, defendants have to jump through too many hoops for their publication to qualify as 'comment', while judges tend to be overly analytical in their approach. The courts should be looking at the context in which a piece is published in order to determine whether it is intended or likely to be read

as a statement of fact, or one of comment. Today's readers are perfectly capable of distinguishing between statements of fact and comment as they navigate the media-saturated environment. The courts should recognise that robust debate is essential to the democratic process and should be allowed to flourish.

*We recommend: Expand the definition of fair comment*

### 8. The potential cost of defending a libel action is prohibitive

Because of the high hourly rates of many libel lawyers, coupled with the 100 per cent uplift that some lawyers impose upon the successful completion of a case where Conditional Fee Agreements (CFAs) are used, defendants may face extortionate legal bills for the other party. Coupled with their own costs – which even if successful they may have no hope of recovering from the other party – this can make a trial impossible to contemplate.

Conditional fee agreements were introduced in order to secure wider access to justice. The irony is that so far as libel is concerned, CFAs have diminished access to justice for newspapers, publishers, NGOs and writers who cannot afford to defend a libel action against a claimant lawyer acting on a CFA.

We welcome the government's consultation on costs, but believe that the measures do not go far enough. We propose abolishing the recovery of success fees from losing defendants in libel cases and mandatory cost-capping of base costs to limit the level of fees.

Libel insurance costs also deter many publishers from contesting a claim. Knowing that their premium will reflect any costs incurred by their insurers, publishers may be extremely unwilling to contest a libel action, and are once again inclined to settle out of court. Meanwhile, claimants are currently able to take out 'After the Event' (ATE) insurance in the knowledge that if their case is successful, their premium will be paid by the losing party.

We suggest that ATE premiums should not be recoverable.

*We recommend: Cap base costs and make success fees and 'After the Event' (ATE) insurance premiums non-recoverable*

### 9. The law does not reflect the arrival of the internet

A single publication rule, as proposed above, would at long last recognise the complete transformation that has taken place in the media landscape since the mid-nineteenth century. But there are other urgent areas that need to be addressed to allow free speech to thrive online.

Because of the nature of the internet – in which defamatory comments may be posted without the knowledge of the website publisher – it is essential that libel law is adapted to meet the new challenges.

While the author will always be liable for his or her writing – on a blog or elsewhere – the host should not be liable when material on their site is from a third party. This is an important distinction from traditional publishing and would be an enlightened reform, recognising that internet publishers do not always exercise editorial control but should be treated more like distributors.

We also propose exempting online interactive chat from liability. Action should only be brought with proof of special damage.

*We recommend: Exempt interactive online services and interactive chat from liability*

### 10. Not everything deserves a reputation

We propose limiting the ability of corporations and associations to sue. Australia has already successfully recognised the damaging impact of allowing large corporations to sue for libel without restriction and has introduced a law that prevents corporations with more than ten employees from suing. It would still be possible for an individual working for the corporation to sue if his or her own reputation had been damaged. It is already the case that public bodies and 'emanations of the state', such as quangos and nationalised industries, are not allowed to sue for libel in the UK. We propose limiting the opportunities for corporations and associations to sue to instances of malicious falsehood only.

*We recommend: Exempt large and medium-sized corporate bodies and associations from libel law unless they can prove malicious falsehood*

# RECOMMENDATIONS

Having considered the existing law in light of the need to balance free speech against the protection of reputation, we have developed the following recommendations. These are intended to restore the balance, so that everyone shares in the benefit of an open, tolerant society.

1. **In libel, the defendant is guilty until proven innocent**

   *We recommend: Require the claimant to demonstrate damage and falsity*

2. **English libel law is more about making money than saving a reputation**

   *We recommend: Cap damages at £10,000*

3. **The definition of 'publication' defies common sense**

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# APPENDIX: CASE STUDIES

The following case studies demonstrate the way in which English libel law has been used to stifle free speech and prevent legitimate discussion of matters that may be in the public interest.

## LETTER TO THE EDITOR (1984-97)

*Claimant: Vladimir Telnikoff, journalist, Russia*
*Respondent: Vladimir Matusevitch, journalist, USA*

A spat between two Russians in 1984 sparked a decade-long libel case, which brought into clear focus the differences between English and American libel law. Vladimir Telnikoff, a journalist, complained in an article in the *Daily Telegraph* that the BBC's Russian Service employed too many Russian-speaking minorities, and not enough of those who associated themselves ethnically or religiously with the Russian people. Another journalist, Vladimir Matusevitch, a US citizen, who was working at the time for Radio Free Europe, wrote a letter in response, also published in the *Daily Telegraph*. Telnikoff sued, claiming that Matusevitch had imputed 'racialist views' to him, comments which he said were libellous.

Matusevitch refused to apologise for his letter, claiming he was making 'comment' and not stating fact. Although this argument initially prevailed in the High Court in 1989, the case was eventually decided in Telnikoff's favour in 1991, following an appeal to the House of Lords. It was found that what had to be considered was Matusevitch's letter *in itself*, rather than in the context of the original article by Telnikoff. It was found that the letter to the editor conveyed the 'fact' that Telnikoff was a racialist. Damages of £240,000 were awarded.

Matusevitch then moved to Maryland, in the United States, where Telnikoff sought to enforce his UK judgment. The Maryland Court of Appeals, in a 6:1 majority judgment, found that recognition of the English judgment would be 'repugnant to the public policy of Maryland'. The court said that 'American and Maryland history reflects a public policy in favor (*sic*) of a much broader and more protective freedom of the press than ever provided for under English law', and that 'the importance of (the) free flow of ideas and opinions on matters of public interest' meant that Maryland could not enforce the English libel judgment.

## FREQUENT FLYER (1997-2003)

*Claimants: Boris Berezovsky and Nikolai Glouchkov, businessmen, Russia*
*Respondents:* Forbes Magazine, *USA*

The House of Lords allowed Russians Berezovsky and Glouchkov to sue the American *Forbes Magazine* over an article concerned with their business activities in Russia, which contained accusations of gangsterism and corruption. Around 780,000 copies of the magazine were sold in the United States, while only around 6,000 copies were accessed in print or via the internet in the UK.

It is important to note that English courts do have certain tools available to them to combat libel tourism. These include refusing permission to serve court documents out of the jurisdiction as an abuse of process, if the claimant has only a minimal reputation to defend in this jurisdiction. The second weapon in the armoury is the doctrine of *forum non conveniens*. Under this doctrine, a claim may be dismissed if a defendant can demonstrate that another jurisdiction is more appropriate to hear the case.

Applying the *forum non conveniens* principle, the trial judge initially ruled that Russia or the United States would be a more appropriate jurisdiction in which to hear the case, not least because Berezovsky's reputation was primarily founded in Russia. As a result, proceedings would be stayed. In a landmark 3:2 majority decision, the House of Lords overruled on the grounds that Berezovsky's daughter was in Cambridge and because of the frequent business trips he made to this jurisdiction. A majority of the Lords decreed that, in fact, he did have a reputation to defend in the UK, and that a Russian judgment would not be sufficient to clear his reputation in this jurisdiction.

*Forbes* and Berezovsky settled in 2003 with a reading of a statement in the High Court, a retraction of the offending article, and the publication of a correction.

## RACHEL'S LAW (2004-08)

*Claimant: Sheikh Khalid bin Mahfouz, businessman, Saudi Arabia*
*Respondent: Rachel Ehrenfeld, journalist, USA*

Dr Rachel Ehrenfeld is the author of *Funding Evil: How terrorism is financed – and how to stop it.* The book, published in 2003 in New York, argued that money from drug trafficking and wealthy Arab businessmen was funding terrorism. The book made several allegations about the Saudi billionaire Khalid bin Mahfouz, including that he channelled money to Al Qaeda. The book was not only published in hard copy, but the first chapter was also available online at ABCNews.com.

Mahfouz would have had little prospect of successfully suing Ehrenfeld in the US courts, as a result both of First Amendment protection and of the Supreme Court ruling in *New York Times v Sullivan*. The *Sullivan* case established the principle that those who sue have to demonstrate that the defamatory statements complained of are made with 'actual malice', that is, with knowledge that a statement is false, or with reckless disregard as to its accuracy. What is more, such malice cannot be presumed, but must be demonstrated by the plaintiff with evidence of 'convincing clarity'. As a result, Ehrenfeld's allegations about Mahfouz would plainly not have crossed the high threshold required by American libel standards.

Notwithstanding the above, under US principles of personal jurisdiction, a plaintiff must also demonstrate that a defendant's internet publication is targeted directly at the state in which a case is subsequently brought. That a publication is merely available in the jurisdiction is in no way sufficient in the US to found jurisdiction. The exact opposite is true in the UK. English courts have said that by publishing on the internet, a libel defendant has targeted every jurisdiction in which that publication may be downloaded.

Chillingly, the advent of internet publishing meant that 23 copies of *Funding Evil* had been sold via the web to addresses in Britain, while the ABCNews.com posting meant that it could be downloaded in this jurisdiction. Despite *Funding Evil* having been distributed overwhelmingly in the United States, the few copies sold in this jurisdiction allowed Mahfouz to claim reputational harm in the UK and found a cause of action. As a result, Mahfouz sued in London in 2005, where the *Sullivan* principle does not apply, and where, subsequent to 9/11, Mahfouz had sued or threatened to sue dozens of American writers.

Ehrenfeld refused to acknowledge the jurisdiction of the UK courts in this matter and took no steps to participate in the case. Mr Justice Eady then made a summary ruling that the allegations were unsubstantiated. Judgment in default was granted in favour of Mahfouz and his two sons. Each was awarded £10,000 in damages, the maximum permitted under the summary procedure utilised by Mahfouz, and their legal fees.

There remained the question of whether the judgment was enforceable in the US. Previously, the principle of 'international comity' would have meant that an award of damages in the UK courts could be enforced in the US. Although Mahfouz did not seek to enforce the judgment, Ehrenfeld counter-sued Mahfouz in New York, concerned that a defamation ruling was hanging over her. Citing the *Telnikoff v Matusevitch* case, she sought a declaration that to enforce the UK judgment would be 'repugnant' to her First Amendment rights.

The New York Court of Appeals decided that it could not rule on the matter, because Mahfouz (a Saudi citizen and resident) had not conducted business in the state of New York. This was a significant finding, given Mahfouz's use of the English courts despite Enrenfeld's almost non-existent connection to that jurisdiction. This

decision therefore left open the questions of whether the UK judgment could be enforced in the US, and whether writers had adequate protection against foreign libel judgments.

Unsurprisingly, the decision provoked an outcry, and the New York State Assembly acted to remedy the uncertainty. In February 2008, New York State passed the Libel Terrorism Protection Act, nicknamed 'Rachel's Law'. This legislation declares foreign libel judgments unenforceable unless the foreign law grants the defendant the same First Amendment protections as are available in New York State. Subsequent to New York State's actions, anti-libel tourism legislation has been passed in Illinois, Florida and California, while the Free Speech Protection Act 2009 is pending before the US Congress. This bill, which would provide protection from libel tourism at a national level, is supported by the majority of free speech advocates in the United States, as well as by news organisations such as the *Washington Post* and the *Los Angeles Times*.

### HUMAN RIGHTS WATCH (2005)

*Claimant: Unnamed*
*Respondent: Human Rights Watch, NGO, USA*

In the aftermath of the Rwandan genocide, Human Rights Watch (HRW) produced an investigative report into the massacres, *Leave None to Tell the Story*. The report, written in 1999 by Dr Alison Des Forges, presented eyewitness testimony alongside Rwandan government documents, and named numerous persons who played a role in or facilitated the genocide.

In 2005, one of the men named in the report threatened a defamation suit against HRW in the UK, although only a handful of the reports were in circulation at that time and an extremely small number of people had even accessed the report online from the UK.

HRW reviewed the evidence behind its report, going to Rwanda to reconfirm facts and locate sources at great expense. At the time of the research of the report, the complainant, like many in the former government, had fled the country and his whereabouts were unknown. HRW paid for mediation of the claim, despite the individual being under investigation for genocide by the Rwandan government.

The mediation resulted in HRW clarifying certain details of the report, but not changing its substance as to the main allegations concerning the complainant.

### SLAVE (2005-08)

*Claimants: Abdel Mahmoud Al Koronky, former diplomat, and his wife, Sudan*
*Respondent: Little, Brown, publishers, UK*

Mende Nazer published an account of her experiences in Khartoum and London, in which she described her life as a modern slave to a Sudanese businessman, Abdel Mahmoud Al Koronky, a former Sudanese diplomat, and his wife. The claimants, both resident in Sudan, but with the benefit of a conditional fee agreement, brought proceedings for libel in London, denying that they had kept Nazer as a slave.

The court ordered the claimant to provide £375,000 security for costs, to be paid into court before the case could continue. The case was stayed pending this payment, but the claimants appealed against the order, first in the Court of Appeal and then to the House of Lords. This process took over two years.

Both appeals were unsuccessful, and the case was dismissed. The Respondents were awarded costs, but these proved impossible to recover from the claimant.

### JOHNNY COME HOME (2006)

*Claimant: Frederick Gladstone Were, musician, UK*
*Respondent: Jake Arnott, author, London; Hodder & Stoughton, publishers, UK*

Jake Arnott's novel *Johnny Come Home* was published by Hodder & Stoughton in 2006. The book was set in the pop-culture world of 1970s London. Although an entirely fictional piece of work, it was set against a backdrop of real events, and included a made-up character called Tony Rocco. In the book, Rocco was depicted as a sexual predator with a particular predilection for young boys.

Publication came as something of a shock to the real-life musician Tony Rocco, who had had a hit single, *Stalemate*, in the 1960s, and who apparently still performed on the London cabaret and club scene. The real Tony Rocco, in actual fact called Frederick Gladstone Were, sought damages from both Arnott and his publishers.

Arnott and Hodder & Stoughton maintained that they were unaware that their fictional character shared a name with a real-life performer. The case did not go to full trial and was settled out of court. Arnott and his publisher apologised to Mr Were and paid significant damages and costs. The original print run of the book was withdrawn and pulped, and reissued the following year with the name of the character altered.

### JAMEEL (2006)

*Claimant: Mohammed Yousef Jameel, businessman, Saudi Arabia*
*Respondent: Dow Jones/*Wall Street Journal Europe

The *Wall Street Journal* reported on US and Saudi government surveillance of the bank accounts of prominent Saudi citizens who were suspected of channelling funds to terror groups. On a supplementary, hyper-linked web page, Yousef Jameel was among those named as being monitored. He subsequently brought proceedings against the American publisher in London.

During the case, it transpired that only five people in the UK had downloaded the list of names, three of whom were associated with the claimant. Despite this, jurisdiction was accepted by the English courts, and a jury found that the article was defamatory of Jameel. On final appeal to the House of Lords, it was held that the Court of Appeal had denied the *Wall Street Journal* a Reynolds defence on very narrow grounds. Reynolds was intended to liberalise and protect publication when subject matter is deemed to be in the public interest. Baroness Hale, in her judgment, said that serious journalism is to be encouraged.

*Jameel* is a significant case, as it demonstrated and codified the liberalising effect of Reynolds when applied correctly. The *Bent Coppers* case, discussed below, also illustrates how the Reynolds principle applies not just to newspapers and magazines, but also to those who write and publish books, and, as Lord Hoffmann said in *Jameel*, 'to anyone who publishes material of public interest in any medium'.

### AN ICELANDIC CHILL (2006-2008)

*Claimant: Kaupthing, Investment Bank, Iceland*
*Respondent:* Ekstra Bladet, *Denmark*

The Danish tabloid *Ekstra Bladet* was sued in London by Kaupthing, an investment bank in Iceland, over articles it had published that criticised advice the company had given to wealthy clients about tax shelters.

Kaupthing, through its solicitors Schillings, successfully claimed UK jurisdiction because some of the critical articles had been posted on the paper's website, and had been translated into

English. It was also noted that the chairman of the bank, Sigurdur Einarsson, about whom some of the articles were written, was resident in London.

*Ekstra Bladet* initially refused to retract the articles, but was eventually forced to settle the case before it went to trial. The paper had to pay substantial damages to Kaupthing, cover Kaupthing's reasonable legal expenses, and was forced to carry a formal apology on its website for a month.

It is understood that *Ekstra Bladet's* editors are now reconsidering their policy of providing English translations of their articles online.

### ALMS FOR JIHAD (2007)

*Claimant: Sheikh Khalid bin Mahfouz, businessman, Saudia Arabia*
*Respondent: J Millard Burr and Robert O Collins, authors; Cambridge University Press, UK*

Khalid bin Mahfouz brought a libel claim in August 2007 against Cambridge University Press over *Alms for Jihad*, a book written by two Americans, J Millard Burr and Robert O Collins. As in the case of *Funding Evil* (see above), the book examined how Islamic charities were used to channel money to Al Qaeda operations, and once again tied Mahfouz to terrorism funding.

Although the authors wished to fight the case, and disputed all of Mahfouz's claims, Cambridge University Press decided to withdraw and pulp the book, rather than defend the action. Their Intellectual Property Director, Kevin Taylor, said in the *Bookseller* that 'it would not be a responsible use of our resources, nor in the interests of any of our scholarly authors, to attempt to defend a legal action (in this case)'.

Cambridge University Press acknowledged the falsity of the relevant statements in the book, posted an apology on its website, calling the claims made in the book 'manifestly false', wrote to libraries around the world to request that they remove the book from their shelves, and paid out unspecified damages and legal costs. Tellingly, neither Burr nor Collins agreed to put their names to the apology.

### OWLSTALK (2007)

*Claimant: Sheffield Wednesday FC, UK*
*Respondents: Owlstalk, Internet Forum; Owlstalk users, UK*

'What an embarrassing, pathetic, laughing stock of a football club we've become.'

Lawyers for the football club and seven of its directors launched legal action against the proprietors of an independent Sheffield Wednesday Football Club supporters website, Owlstalk.co.uk, over 11 messages about the club's board and management, which had been posted on the site's discussion board. The site is freely accessible, but those who post on it have to register their details, and give themselves a pseudonym by which they are then known.

Interestingly, the site's terms and conditions stated that those who post comments on the site must not publish defamatory or false statements or comments. The club considered the posts to be 'false and seriously defamatory messages', and wished to bring a libel claim against whoever had posted them. In the first instance, they brought a legal claim against Neil Hargreaves, the owner of Owlstalk.co.uk, to force him to reveal the names of those who had posted the allegedly defamatory comment.

Applying the conditions required to be satisfied before such an order is granted, the judge in the case found that seven of the 11 postings bordered on the trivial. To order disclosure of the identities of the authors of these posts would be 'disproportionate and unjustifiably intrusive'. The remaining four identities were to be revealed, although the case was eventually dropped.

In a separate case, supporter Nigel Short received warning letters from the club over comments he made on Owlstalk.co.uk in February 2006. The club rejected Short's offer of an apology, and pursued him for damages. Short was able to recruit George Davies Solicitors to fight his case, and eventually the club backed down, paying his legal costs. However, Short suffered two years of legal wrangling, during which time he lived in fear of bankruptcy.

### AL ARABIYA (2007)

*Claimant: Sheikh Rashid Ghannouchi, Tunisia*
*Respondent: Al Arabiya, Satellite News Channel, Dubai*

A satellite television network, Al Arabiya, based in Dubai and broadcasting in Arabic, was successfully sued in London by Tunisian Sheikh Rashid Ghannouchi, the leader of the exiled An Nahda party, over a news broadcast that linked him to Al Qaeda and suggested that he was amongst Islamic figures being targeted in Britain in the wake of the July 2005 bombings in London.

The importance of the case is that the programme was broadcast in Arabic, but was available via satellite receivers in this jurisdiction. Ghannouchi was awarded £165,000 in November 2007.

### BENT COPPERS (2007)

*Claimant: The Police Federation, UK; Michael Charman, former police officer, UK*
*Respondent: Graeme McLagan, journalist, UK; Orion publishing group limited, UK*

In 2003, Orion published Graeme McLagan's book, *Bent Coppers: The Inside Story of Scotland Yard's Battle Against Police Corruption*. The book told the 'inside story' of the 'Ghost Squad' and claimed to reveal police corruption.

Police officer Michael Charman claimed that the book had libelled him by suggesting there were 'cogent grounds' for suspecting him of corruption.

In October 2005, the trial judge, ruling on meaning, decided that the ordinary reasonable reader would conclude that the book meant that there were cogent grounds to suspect that Charman had abused his position. The defences of qualified privilege raised by the publisher were dismissed. The defendants appealed. By the time the case was heard in the Court of Appeal, the decision in *Jameel* had been handed down in the House of Lords. Applying *Jameel* to *Bent Coppers*, it was found that McLagan had acted with 'proper professional responsibility' and that the trial judge had not sufficiently considered the issues of public interest and responsible journalism in the context of the work as a whole. Applying the Reynolds criteria as *Jameel* said they should, it was found that *Bent Coppers* was indeed a piece of responsible journalism, and the appeal was allowed.

It is believed, however, that fighting the case cost the publishers £2m in legal fees.

### LAND GRAB (2007-08)

*Claimant: Rinat Akhmetov, businessman, Ukraine*
*Respondent:* Kyiv Post, *Ukraine*

Rinat Akhmetov is one of the richest men in Ukraine. He sued the *Kyiv Post* in London over allegations contained in an article published in October 2007, entitled 'Appalling Kyiv City Council Land Grab', which concerned land deals and corruption in Kiev. The article alleged that Akhmetov had acted unlawfully in respect of various real estate transactions.

The article was written in Ukrainian, and the paper has only around 100 subscribers in the UK.

The paper apologised as part of an undisclosed settlement out of court in February 2008.

### DEFAULT JUDGMENT (2007-08)

*Claimant: Rinat Akhmetov, businessman, Ukraine*
*Respondent: Obozrevatel, two of its editors, and one of its journalists, Ukraine*

Obozrevatel is a Ukraine-based internet news site that publishes in Ukrainian, with only a few dozen readers in Britain. This case was brought by Akhmetov in relation to a series of four articles about Akhmetov's youth, published in January and February of 2007. Default judgment in Akhmetov's favour was obtained, along with damages of £50,000 and costs, in June 2008. There is no doubt that these cases will have had a chilling effect on Ukrainian journalists.

### BAD SCIENCE (2007-08)

*Claimant: Matthaias Rath, vitamin pill manufacturer, South Africa*
*Respondent: Ben Goldacre, journalist, UK; and the* Guardian*, UK*

Matthaias Rath, a vitamin pill manufacturer, had taken out full-page advertisements in South African publications denouncing AIDS drugs as ineffective, while simultaneously promoting his own supplements. Ben Goldacre, a *Guardian* columnist, raised concerns about these aggressive advertising strategies in a series of three articles in January and February 2007. Rath sued for libel.

Although Rath dropped the case a year later, the *Guardian* had by this time racked up legal costs of over £500,000 with no guarantee that these would be recovered. While the *Guardian* was awarded initial costs of over £200,000, there can be little doubt that the case was brought by Rath in an attempt to prevent journalists questioning his business activities.

### A SUITABLE CASE FOR TREATMENT (2008-2009)

*Claimant: British Chiropractic Association (BCA), UK*
*Respondent: Simon Singh, journalist and author, UK*

Simon Singh, the best-selling author of *Fermat's Last Theorem* and *The Code Book*, published an article in the *Guardian* in April 2008 in which he discussed chiropractic treatment with reference to the British Chiropractic Association. In a passage describing the BCA's claims about the treatment of a number of childhood ailments, Singh wrote that 'even though there is not a jot of evidence' the BCA 'happily promotes bogus treatments'.

Despite the article being published in the *Guardian*, Singh was sued personally. Mr Justice Eady decided on the issue of meaning in May 2009, and found that Singh's comments were statements of fact, rather than expressions of opinion, which implied that the BCA was being deliberately dishonest. It was a meaning that Singh has said he never intended. Eady refused to grant leave to appeal, although permission was granted by the Court of Appeal itself in October 2009.

As a result of this case, the charity Sense About Science launched a petition for libel reform. Richard Dawkins has said that if Singh loses, it would have 'major implications on the freedom of scientists, researchers and other commentators to engage in robust criticism of scientific, and pseudoscientific, work'.


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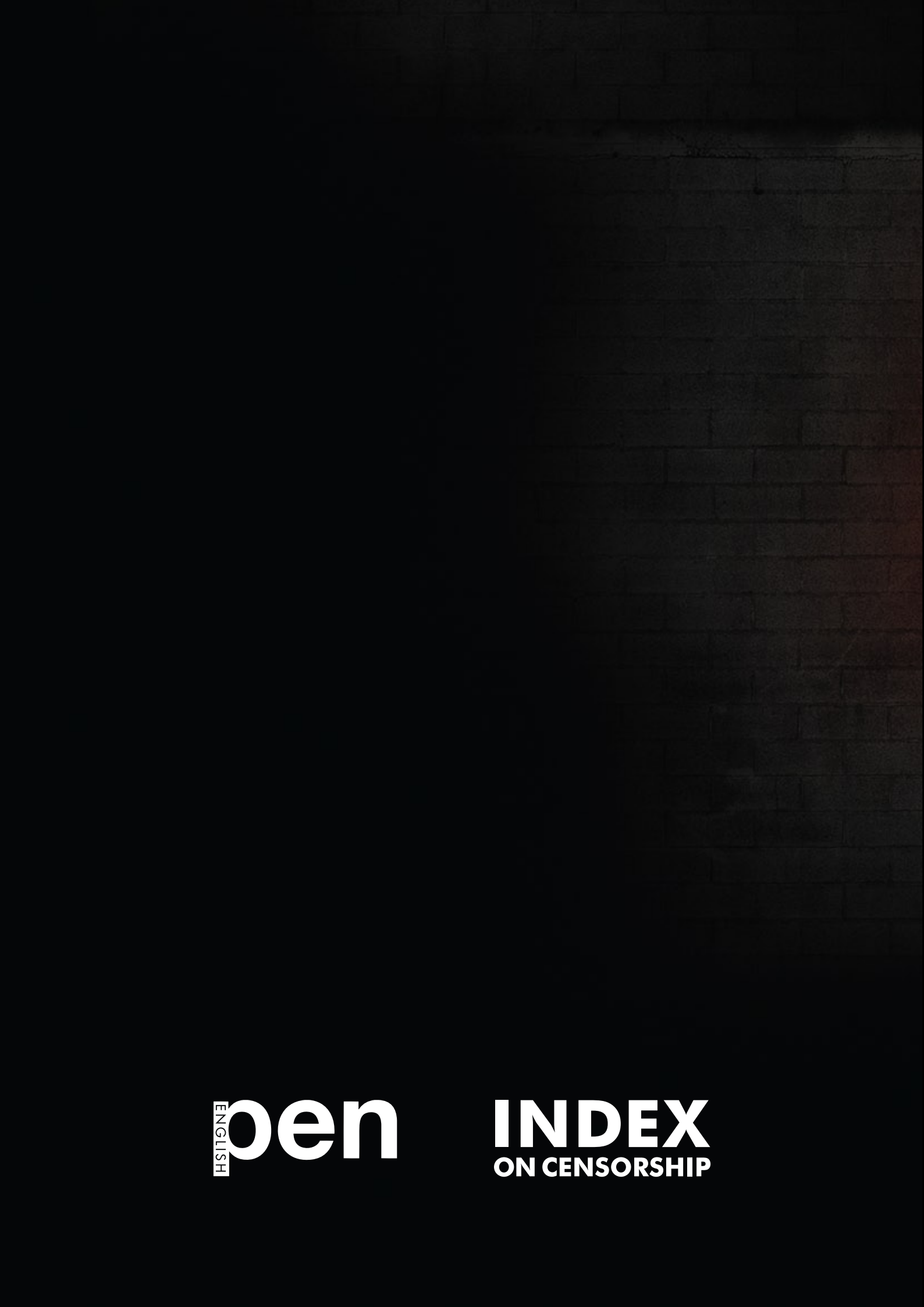
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