

Ain't that funny? A jurisprudential analysis of humour in Europe and the U.S.

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Abstract

This paper provides a legislative and jurisprudential comparative of European and U.S. case Law on humour. Whilst the Europe-U.S. comparison, in the ambit of expression, has been looked at extensively, there has yet to be a focus on the varying ways in which humour is treated in the two spheres. What will become evident is the intricacy of cultivating just legal tests to be used by the judiciary in deciphering an inherently abstract theme. At the core of these tests at the European level, is a balancing exercise between the right to offend and the right to be free from offence. However, the multitude of available interpretative routes, in addition to the array of differing human responses to humour, renders such tests and their application legally fragile. This reality raises concerns vis-à-vis the fundamental right of freedom of expression and becomes particularly topical within the current digital age and the “polarizing dynamics of social media” Godioli (2020:1). The analysis will demonstrate that humour receives much greater protection in the U.S. Framework due to the First Amendment whereas the highest regional human rights court in Europe, namely the European Court of Human Rights is quick to limit humorous speech on grounds of offending others, thereby demonstrating a backsliding of the fundamental freedom of expression, including humorous expression in the region.

Keywords: European Law, U.S. Law, parody, humour, freedom of expression.

1. Introduction

Since 1976, the European Court of Human Rights (ECtHR) has underlined that the freedom of expression does not just extend to ideas that are “favourably received,” but also to those which “shock, offend and disturb” (*Handyside v. The United Kingdom*) because “such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.” (*Handyside v. The United Kingdom*) General Comment 34 of the United Nations Human Rights Committee states that “freedom of opinion and freedom of expression are indispensable conditions for the full development of the person” and such speech includes “deeply offensive speech.” In an intervention to the ECtHR, the non-governmental organization Article 19 underlined that “freedom of expression, including the freedom to joke is a bedrock of a

democratic society.” (Written submission of Article 19 to the ECtHR in *ZB v. France*). Against this backdrop, this paper will critically assess the theme of humour in law by considering its limits as set out by U.S. and European courts. Whilst the Europe-U.S. comparison, in the ambit of expression, has been looked at extensively, there has yet to be a focus on the varying ways in which humour is treated in the two spheres. What will become evident is the intricacy of cultivating just legal tests to be used by the judiciary in deciphering an inherently abstract theme (Godioli 2020: 1). At the core of these tests at the European level, is a balancing exercise between the right to offend and the right to be free from offence. However, the multitude of available interpretative routes, in addition to the array of differing human responses to humour, renders such tests and their application legally fragile. This reality raises concerns *vis-à-vis* the fundamental right of freedom of expression and becomes particularly topical within the current digital age and the “polarizing dynamics of social media” (Godioli 2020: 1). Despite this, and apart from some input, there is still a need for scholarly investigation into the issue of humour and the law. In this paper, the word “humour” is used broadly, incorporating satire as well. The paper will start with an overview of humour in terms of looking at the concept in a semantical, contextual and historical manner. Further, for purposes of ascertaining the position of the highest human rights court in the European region, there will be a critical analysis of case-law involving humour at the ECtHR. Then, the position of the humour in U.S. law will be considered, given the stark variation between the more militant approach, adopted by the ECtHR to the freedom of expression and its (almost) absolutist counterpart found in the USA. The section will reveal that, despite the centrality of the First Amendment in anything to do with speech, when humour is used in cases of sexual harassment, the Courts turn to something else, namely, establishing whether or not a hostile environment (as a result of that humour) exists as per Title VII of the Civil Rights Act.

2. Humour: Semantics and notions

Terms such as humour and satire, are largely left undefined by courts, apart from one major exception referred to below. As will be demonstrated in the assessment of the case-law of the ECtHR, the latter chooses the term “satire” (rather than humour) as an umbrella term, even in cases of expression that does not actually appear to be satirical. Satire is left undefined by the ECtHR, although it does note that such expression entails, *inter alia*, an exaggeration and distortion of reality (*Vereinigung Bildender Künstler v. Austria* 2007). Satire is defined by the Oxford English Dictionary as “the use of humour, irony, exaggeration, or ridicule to expose and criticize people’s stupidity or vices, particularly in the context of contemporary politics and other topical issues” (Oxford Dictionary of Phrase and Fable 2000). Humour is given a much shorter definition by the same dictionary, namely, the “quality of being amusing or comic, especially as expressed in literature or speech” (Oxford English Dictionary 2020). The most extensive definition of a concept related to this paper’s analysis relates to parody. In *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* (2014), the Court of Justice of the European Union held that the concept of “parody” which is provided for by a European Directive on copyright, is an “autonomous concept of EU law.” It noted that the meaning of parody should be its usual meaning in “everyday language,” with its objective being “to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery” Radin (1927: 215-218).

Humour, particularly in the form of satire and parody, has, for time immemorial, been a popular tool for expressing and disseminating public opinion (Radin 1927: 215-218). In Ancient Greece “tongues were wagging freely” (Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Freedom of Artistic Expression and Creativity 2013). Democritus, known

as the “laughing philosopher” (Bremmer 1991: 15), would “laugh at the stupidity of his fellow citizens” (Bremmer 1991: 15). Plato was a stern critic of laughter, treating laughter as an irrational emotion and, in *The Republic*, he argued that state officials should avoid laughter “for ordinarily when one abandons himself to violent laughter, his condition provokes a violent reaction” (Lille 2009: 1355). Socrates argued that laughter targeted at authority must be regulated (Billig 2005: 41-42). Ancient Greek comedy itself went through phases of restriction, with Old, Middle and New Comedy. The first was unrestricted comedy, even including information on publicly known people, the second removed references to names, and the last included abstract illustrations of people. It could, thus, be assumed that norms had been developed in order to regulate humorous speech during the second and third phases of Greek comedy (Radin 1927: 215-218). Humour has, therefore, been part of European culture since democracy itself. Later philosophers, such as Pascal, embraced the significance of humour. He argued that “se moquer de la philosophie c’est vraiment philosopher” (Blaise Pascal, ‘*Géométrie-Finesse II – Fragment No. 2/2*)

So what is humour and how do we conceptualize it? There are three main theories that seek to do this, namely, the superiority theory, the incongruity theory and the release theory (Friend 2002: 80, 93). The Superiority theory is related to ancient thinkers such as Aristotle, Plato, Socrates and Cicero (Little: 2009: 1245). These thinkers linked humour to aggression, describing it as a “mechanism of disparaging others to enhance one’s own sense of well-being” (Martin 2000: 202-3). In *Philebus*, Plato argued that, by laughing at those who imagine themselves better than they actually are, we are being entertained by their self-ignorance, which is malicious and morally wrong. In *Nicomachean Ethics*, Aristotle argued that wit was of value to a conversation but agreed with Plato in relation to the immorality of mocking others. In *Enchiridion*, Epictetus said “let not your laughter be loud, frequent or unrestrained” (Stanford Encyclopedia of Philosophy, “Philosophy of Humour” 2020). These positions on humour and laughter shaped European culture that was developed over time, but also impacted the way in which humour was depicted in religion. In Psalm 2: 2-5:

The kinds of the earth stand ready and the rulers conspire together against the Lord and his anointed King... The Lord who sits enthroned in heaven laughs them to scorn; then he rebukes them in anger, he threatens them in his wrath.

(Psalm 2: 2-5)

The incongruity theory is linked to Immanuel Kant and Arthur Schopenhauer and suggests that humour is a result of “the juxtaposition of two incongruous or inconsistent phenomena” (Martin 2000: 203). Release theory looks at humour as a release of “repressed sources of pleasure,” (Strachey 1960: 98; Little 2009: 1255) or anxiety (Limon 2000: 39). Humour can also be a powerful tool to solve social tensions within a community (Little 2009: 1255) and to establish group identity (Quinn 2000: 1165).

In more recent times, Benatar argues that humour can be immoral in a case when it is intended to harm, it could be reasonably expected to harm, and the harm is wrongfully inflicted (Benatar 1999: 191). He underlines that “racist” and “sexist” humour are those which meet the three requirements of immoral humour, with this scholar endorsing a harms-based approach to humour. Lockyer and Pickering profess that humour is a central part of social relationships. In some frameworks, it may be viewed as something light-hearted but, in others, the possibility of harm exists. They also underline that humour is not the opposite of serious since humour can involve, for example, stereotypes and can have serious implications (Lockyer et al. 2008: 809). Authors, such as Husband and De Souza, argue that repeating jokes with, for example, gender stereotypes, contributes to cementing stereotypes in the public mind (Husband 1988: 153). However, scholars in a variety of disciplines, such as the humanities and social sciences, have noted the benefits of humour which include, *inter alia*, creative development, enhancement of

social cohesion and pain relief (Little 2009: 1237). Further, humour is marked by several human functions and aspects, namely, social, cognitive, emotional, psychophysiological and behavioural (Martin 2000: 202).

In relation to cartoons, in particular, these have been at the forefront of the international legal debate, as demonstrated in the controversy surrounding the cartoons of the Prophet Muhammed, described by Kuipers as the “first transnational humor scandal” (Kuipers 2011: 63-80). This controversy resulted from the publication of twelve cartoons of the prophet in a Danish newspaper “Jyllands-Posten.” Further to a complaint made by Muslim organizations, a trial never took place (Klausen 2009). The same cartoons were then shown in the French *Charlie Hebdo*, which resulted in a trial at the Paris High Court and the magazine being acquitted in 2006, before the attacks at its offices in 2015. It has been argued that visual humour, in the form of cartoons, demonstrates the “link between humour and ambiguity” (Godioli 2020: 1) which renders the balancing exercise to be conducted for free speech purposes a particularly tricky task. Whilst also looking at cartoons, this paper will examine other tunnels of humour.

Humour can be deemed by the recipients of the speech/image/broadcast/text as, for example, racist, sexist, homophobic, transphobic or other. It may be deemed to be offensive or insulting to particular individuals depicted, therein, or to those who share the characteristics of the “targets” of such speech. However, should such speech be restricted, even if it is offensive to others? Whilst this question will be discussed through the jurisprudential analysis below, for illustration purposes, I refer to Sacha Baron Cohen and his film “Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan.” Quotes include (amongst many others):

“Is it not a problem that a woman have a smaller brain than a man” – question posed to the Veteran Feminists of America.

“What’s up vanilla face” (to a White receptionist at a hotel).

“It is very good you allow a retard to eat with you in the same place” (during a dinner conversation where Borat confused the word ‘retired’ with ‘retard’).

The Guardian wrote that the film was “so funny, so breathtakingly offensive, so suicidally discourteous that strictly speaking it shouldn’t be legal at all” (Bradshaw, *The Guardian* 2006) demonstrating just how opposing the opinions on this film (and humour in general, particularly when it transcends into humour on protected characteristics such as sex or race) may be. To complicate the matter further, when it comes to the peripheries of free speech, in an interview with Baron Cohen, he said that such parts of his works are a “dramatic demonstration of how racism feeds on dumb conformity as much as rabid bigotry” (William, *The Telegraph* 2009).

3. The European Court of Human Rights

Article 10 of the European Convention on Human Rights (ECHR), provides that everyone has the right to freedom of expression and that “this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority.” This is the only article in the Convention to stipulate that the right comes with “duties and responsibilities” thereby demonstrating the weight attached to the negative impact speech may have. As a result, Article 10 limits free speech on the grounds of, *inter alia*, public order, public morals and for the protection of the reputation or rights of others, insofar as these restrictions are necessary in a democratic society. The ECtHR has dealt with several cases involving humour (and satire) which are discussed in this paper. As a starting point, it should be noted that Article

10 of the European Convention on Human Rights incorporates the right to freedom of artistic expression “which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.” (*Müller and Others v. Switzerland* 1998)

In *Vereinigung Bildender Künstler v. Austria* (2007), the applicant (an association of artists) held an exhibition which included the satirical painting “Apocalypse” which featured members of the Austrian Freedom Party as well as Mother Teresa and an Austrian cardinal engaging in graphic sexual acts. One of the politicians who appeared in the painting filed a lawsuit against the association who held the exhibition. The applicant was fined and banned from displaying this painting. The ECtHR found a violation of Article 10 and emphasized that: “satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist’s right to such expression must be examined with particular care.”

The ECtHR followed this reasoning (and the nature of satire) in the case of *Alves Da Silva v. Portugal* (2009). Here, the applicant had been convicted and given a fine for driving around the city during carnival with a puppet representing the mayor of Mortágua, with symbols of corruption on the puppet and for playing a recording of a satirical message which suggested that the mayor had received illegal sums of money. The ECtHR found that Article 10 had been violated and that the applicant’s actions were clearly satirical and, thus, a form of artistic expression and social commentary. The Court followed a similar route in *EON v. France* (2013). This case involved the applicant waving a small placard reading “Get lost, you sad prick” as the President’s party was about to pass by. He made an allusion to a phrase which the President had used when a farmer refused to shake his hand during an event earlier in the year. The applicant received a suspended fine of 30 Euros. In finding a violation of Article 10, the Court reiterated that satire is a form of artistic expression and social commentary which aim to provoke and agitate. Particular to this case, it noted that “by adopting an abrupt phrase that had been used by the President himself and had attracted extensive media coverage and widespread public comment, much of it humorous in tone, the applicant chose to express his criticism through the medium of irreverent satire.” It proceeded to find that criminal penalties for conduct such as that of the applicant would have a “chilling effect on satirical forms of expression related to topical issues.”

Despite satire being well protected in the above cases, in the similar case of *Palomo Sánchez and Others v. Spain* (2011), the ECtHR took a different view. The applicants were delivery men in a company against which they filed a series of proceedings in labour courts. In 2001, they set up a trade union to protect the rights of the delivery staff of the company. A 2002 bulletin of the trade union included a cartoon depicting two employees of the company waiting in line to perform oral sex on the company’s human resources manager. The two employees portrayed in the cartoon had testified against the trade union in the proceedings before the labour court. The applicants were dismissed for serious misconduct as a result of the cartoons and challenged the company’s decision on a national level and then at the ECtHR. In finding no violation of Article 10, the Court did not pick up on the satire which marked the cartoons, and endorsed the national court’s position that the cartoons were offensive personal attacks. Unfortunately, the Court completely disregarded its long-standing position on freedom of expression and its extent to ideas that “shock, offend or disturb” but, instead, highlighted the offensive nature of the cartoons and texts as a precept for its subsequent findings. The Court also disregarded the applicants’ arguments that the cartoons were to be viewed as caricatures and the articles as satirical. It was only in a joint dissenting opinion of five judges that the Court was reminded of the satirical nature of the cartoon, noting that:

As regards the cartoon on the newsletter’s cover, it is a *caricature*, which, while being vulgar and tasteless in nature, should be taken for what it is – a satirical representation. In other cases, the Court

has recognised the satirical nature of an expression, publication or caricature. In refusing to take that nature into account in the present case, the judgment gives the curious impression of placing trade-union freedom of expression at a lower level than that of artistic freedom and of treating it more restrictively.

(Joint dissenting opinion of Tulkens, Björgvinsson, Jočienė, Popović, Vučinić at para.11)

When it comes to speech and satire related to protected characteristics, the Court has found no value in protecting Article 10 when these have been brought by the “utterers” of the speech themselves. In *Féret v. Belgium* (2009), the Front National of Belgium published a series of cartoons and leaflets on themes such as immigration and Islam. One of the cartoons attributed the 9/11 attacks to the “couscous clan,” thereby linking Islam to terrorism. In Belgium, the applicant was convicted of incitement to hatred. The ECtHR found no violation of Article 10 and, in relation to the cartoon, considered that this linked all Muslims to terrorism and, thus, constituted an incitement to hatred. Its interpretation of such incitement was particularly broad:

The Court considered that incitement to hatred did not necessarily require the calling of a specific act of violence or another criminal act. Attacks on persons committed through insults, ridicule or defamation aimed at specific population groups or incitement to discrimination, as in this case, sufficed for the authorities to give priority to fighting hate speech when confronted by the irresponsible use of freedom of expression which undermined people’s dignity, or even their safety.

In *M’Bala M’Bala v. France* (2015), the applicant, a famous comedian, put on a performance during which he invited an academic, who had received a number of convictions in France for his negationist and revisionist opinions, to join him on stage at the end of the show. The applicant called an actor to the stage who was wearing a pair of striped pyjamas with a yellow star bearing the word “Jew” – to award the academic a “prize for unfrequentability and insolence.” The applicant was convicted for public insults directed at a person or group of persons on account of their origin or of their belonging, or not belonging, to a given ethnic community, nation, race or religion. The applicant argued that his freedom of expression under Article 10 had been violated. The ECtHR found that the performance was highly anti-Semitic, supported Holocaust denial and that the offending scene could not be regarded as entertainment but, rather, as a political engagement. The Court noted that art or humour did not provide any more protection to Holocaust denial than regular expression. More particularly, it held that:

The applicant cannot claim, in the particular circumstances and having regard to the whole context, that he acted as an artist with an entitlement to express himself using satire, humour and provocation. [...] the Court is of the view that this was a demonstration of hatred and anti-Semitism, supportive of Holocaust denial. It is unable to accept that the expression of an ideology which is at odds with the basic values of the Convention, as expressed in its Preamble, namely justice and peace, can be assimilated to a form of entertainment, however satirical or provocative, which would be afforded protection by Article 10 of the Convention.

Through the use of Article 17, the Court found the application incompatible *ratione materiae*. As with other Holocaust denial cases, there was no substantial examination of the alleged harm in the expression, with a disregard for issues such as the impact on the audience and the probability that they chose to watch the particular comedian. This case is of fundamental importance since we see the ECtHR using the non-destruction clause of Article 17, which is preserved for the most extreme of circumstances. Indicative of this is that this article was incorporated into the ECHR in order to prevent the abuse of Convention rights by totalitarian groups.

In *Sousa Goucha v. Portugal* (2016), the ECtHR dealt with a homophobic “joke” made against a homosexual television presenter. Since this case was brought by the recipient of the

speech, rather than by its utterer, as in the below cases, the Article relied on by the applicant was Article 8 (right to private life) in combination with Article 14 (non-discrimination) rather than Article 10. The applicant is a well-known TV presenter in Portugal who had made a public statement regarding his sexual orientation in 2008. During a quiz show, the players were asked “Who is the best Portuguese Female TV host?” The possible answers to the question included the names of three female television hosts and that of the applicant (with the last opinion being the “correct” answer). On a national level, the applicant filed a claim for defamation and insult against the television company, the production company, the directors of programming and content and the television host. His claims were dismissed. The ECtHR conducted a balancing exercise between Article 10 and Article 8. In finding no violation of Article 8-14, the Court reiterated satire as a form of artistic expression and social commentary which provokes and agitates as per *Vereinigung Bildender Künstler v. Austria*. The Court took note of the context that the “joke” occurred, namely, as stipulated by the national court, on a “playful and irreverent” television comedy show. The ECtHR also took note of the fact that, in dismissing the applicant’s defamation claim, the national court considered that the “joke” had not intended criticism of the applicant’s sexual orientation. Also, the Court referred to “the way in which a reasonable spectator of the comedy show” would react rather than the way the applicant felt about the joke. An interesting point in this case is that the Court did not view the speech within the ambit of hate speech as was put forth by one of the interveners. Once again, the Court adopts satire as a starting point for any case involving some sort of humour. The factual and contextual frameworks of this case and the Austrian case are very different whilst, at the same time, it is hard to link satire with the impugned speech in the Portuguese case. Either way, the Court met the standards it developed in earlier case law *vis-à-vis* freedom of expression, namely that this extends to ideas that shock, offend and disturb, something that it did not do in the majority of cases relevant to this paper.

Finally, in *Leroy v. France* (2008), the ECtHR dealt with the issue of glorifying violence through an application by a cartoonist who had been ordered to pay a fine for one of his works. Particularly, on 13 September 2001, Basque magazine *Ekaitza* published a satirical cartoon by the applicant which showed two planes crashing into the Twin Towers, accompanied by the caption (parodying Sony’s slogan) “We all dreamed of it... Hamas did it.” In finding no violation of Article 10, the ECtHR stated that the cartoon supported and glorified the violent destruction of the Twin Towers. The Court also noted the impact of this cartoon in a politically sensitive region, namely, the Basque country where the newspaper was circulated. The Court conducted no analysis of the satire that was manifested in the cartoon itself and, as such, humour was not part of the Court’s assessment. It reached the view of glorifying violence and the potential real-life impact of the cartoon without any scholarly, empirical or other support, extrapolation or evidence. Moreover, it did not take into account the applicant’s argument that the cartoon was depicting his opinions of the USA and American imperialism.

Therefore, although the ECtHR reiterates, time and again, that the freedom of expression includes the right to “shock, offend or disturb,” the above cases demonstrate that the Court has moved away from this in the majority of cases involving humour or satire with satire used rather broadly and, at times, incorrectly to cover a variety of manifestations which would reasonably fall under the concept of “humour.” In fact, in relation to cases brought by the utterers of the speech, it only found a violation of Article 10 when the “targets” of the humour or satire were public figures (*Vereinigung Bildender Künstler, Alves Da Silva v. Portugal* and *EON*). In all other cases, it was quick to side with national courts and did not adequately consider the element of satire or humour in its analysis. Feelings of offence marked the trade union case and also the case involving protected characteristics, with such offence contributing to the finding of no violation. More particularly, the rest of the assessed cases which involved protected characteristics, caricatures of private persons and the alleged (but unsubstantiated) glorification

and danger of real-life violence all led to a finding of non-violation. Interestingly, despite the Court's position in *Féret*, and the importance of protecting particular groups from discrimination or hatred, the Court found no violation of Article 8-14 in the Portuguese case brought by the "target" of the homophobic speech, demonstrating, in the latter, a proper application of the right to shock, offend and disturb. Moreover, imposing criminal penalties, as in the case of *Leroy*, can have a chilling effect on speech in general and on humour in particular. This is particularly damaging for the facilitation of freedom of expression on questions of public interest.

4. Humour and the U.S. First Amendment

Before proceeding with an analysis of U.S. law, it is important to acknowledge that this section includes a small initial sample of U.S. case law for comparison, many cases of which are of a particular context, namely sexual harassment in employment. This will allow for some interesting preliminary impressions upon which further research can be tailored to comparative settings.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law... abridging the freedom of speech..." Such protection does "not apply only to those who speak clearly, whose jokes are funny and whose parodies succeed." (*Yankee Publishing Inc v. News America Publishing*) The Supreme Court has underlined that satire, even when used as "a weapon of attack, of scorn" (*Hustler Magazine Inc. v. Falwell*) has "played a prominent role in political debate." (*Hustler Magazine Inc. v. Falwell*) The Supreme Court underlined that it is inappropriate to assess jokes based on alleged "outrageousness" because this "has an inherent subjectiveness about it" (*Hustler Magazine Inc. v. Falwell*).

An exception to the almost-absolutist approach to free speech in the U.S. is the framework of sexual harassment cases. As a starting point, such cases seek to "remedy oppressive statements and actions" creating a "hostile working environment" (Little 2009: 1273). Central to these cases is Title VII of the Civil Rights Act which prohibits discrimination in the workplace. The US Supreme Court noted that Title VII did not seek to impose "a general civility code for the American workplace" and that "simple teasing, offhand comments and isolated incidents (unless extremely serious) will not themselves suffice" (*Faragher v. City of Boca Raton*). There are several cases in which relevant cases have been rejected on the grounds of insufficient hostility or severity. Indicative of the latter approach is Judge Posner's reaction to the 1995 case of *Baskerville v. Culligan International Company* in which he stated that:

It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy – a woman mysteriously aloof from contemporary American popular culture in all its sex saturated vulgarity – would find the supervisor's patter substantially more, distressing than... heat and cigarette smoke.

(*Baskerville v. Culligan International Company*)

The above paragraph is preposterous in itself, since it essentially divides women into categories according to their sensitivity and utilizes current American culture as the reason why no woman, however sensitive, should be offended by sexual humour. This position was improved by 1998 and the case of *Onacle v. Sundowner Offshore Services Inc (1998)* which involved a same-sex harassment claim. Although this case included actions such as sodomy with a bar of soap and not only words, the U.S. Supreme Court developed a framework which also extends to expression, as evident in its formulation below. More particularly, in ascertaining the meaning of harassment under Title VII of the Civil Rights Act, the Supreme Court highlighted that:

common sense, and an appropriate sensitivity to social context will enable the courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

The reasonableness and particular context is, therefore, correlated with determining whether or not teasing/humour/jokes have transcended acceptable boundaries. Despite Judge Posner's view of the matter above, there has been a body of US case-law which demonstrates the "law's readiness to regulate superiority humour" (Laura 2009: 1275) in the workplace by recognizing the link between the "humour" and the creation of a hostile working environment. In *Robinson v. Jacksonville Shipyards Inc* (1991), the district court found that the comments uttered such as "hey pussycat, come here and give me a whiff" would likely lead to the "stereotyping of women in terms of their sex object status." In *Harris Forklift System* (1993), the Supreme Court found the environment to be hostile. In this case, a supervisor often told the plaintiff "You're a woman, what do you know?" He also suggested they go to a hotel to "negotiate raise" and asked whether she offered sex to secure a sale. The Supreme Court found that these jokes did not assert superiority but, nevertheless, considered them to entail sufficient hostility for purposes of remanding the case for further assessment in the framework of sexual harassment liability. In *McIntyre v Manhattan Ford* (1998), the impugned statements included that the plaintiff was obviously pregnant because "her tits were larger" and referred to her as a "bitch on a broom." In finding a hostile environment and, thus, liability, the Court noted that this humour constituted "barnyard type cruelty."

In *Lyle v. Warner Brothers Television Productions* (2004), the Court dealt with a sexual harassment claim by an assistant of the comedy writers who aided in the preparation of the programme *Friends*. The Court rejected the claim on the grounds that the defendants made the comments in a context "where comedy writers were paid to create scripts highlighting adult themed sexual humour and jokes, and where members of both sexes contributed and were exposed to the creative process spawning such humour and jokes." Due to the particular context, the Court considered that the sexual humour was "non-directed" and could not, therefore, lead to liability.

Some of the humour was non-directed, for example, the writers altered the word persistence to "pertits" and happiness to penis. However, other comments were personal but were not picked up on by the Court as leading to liability as it focused on the general context of the comedy production. In this ambit, the writers joked that one of the staff members had "dried twigs" or "dried branches in her vagina" when discussing her infertility. The Court related this humour with the "creative process" of the comedy production. In *Nitsche v. CEO of Osage Valley Electric Cooperative* (2006), the Court dealt with "unwanted sexual banter" by a male foreman towards another male foreman. The former would, amongst other things, read Playboy magazines in the plaintiff's presence, referring to female genital organs using crude names and pretended he had a pubic hair in his mouth. He also asked the plaintiff "how many wheels a menstrual cycle had" and posted a donkey picture with a penis drawing over a co-worker's engagement photograph. However, the Court did not find there to be a hostile environment and found the above to be evidence of the harasser's "repertoire of ribaldry" (Little 2009: 1279). The harasser's conduct in this case reaches a high level of crudeness which is parallel or more intense than that found in the previous cases discussed and in which the courts did find grounds for action.

As such, the US strictly protects the freedom of expression due to the First Amendment to its Constitution. Nevertheless, unlike, for example, the big majority of "hate speech" cases (see, inter alia, *RAV v. City of St. Paul* and *Snyder v. Phelps*), sexual harassment cases which involve humour is one of the areas where the Court has encroached upon an individual's freedom to speak freely, insofar as this speech creates a "hostile work environment." However, as reflected

above, not all sexual harassment cases involving humour result in a finding in favour of the plaintiff, with the Warner Brothers case focusing on the general context of comedy writing as a tool of depersonalizing the jokes (despite some being directed at the plaintiff herself) and *Nitsche* finding that the humour was merely part of the particular person's banter and was, thus, not directed at the plaintiff, *per se*, as was the case in, for example, McIntyre.

The courts have also dealt with sexual harassment cases involving the use of puns, rejecting liability in cases where prosciutto ham was referred to as prostitute ham (*Augustin v. Yale Club of N.Y. Cuty*) and rubber bands as rubbers (*Goede v. Mare Rest*) thereby reflecting the legal acceptance of humour as humour when this emanates from incongruous themes.

5. Conclusion

In sum, we do not all share the same sense of humour. Some may be offended, some may not. Some may laugh, some may not. The question is whether the law should intervene at any point. On an ECtHR level, when cases have involved public figures who cannot anyhow expect the same level of privacy, the Court has relied on the importance of satire as a form of artistic expression. The rest of the cases are marked by a generalized overview of the assumed (but unsubstantiated) harmful impact of the speech in question, with disregard to the element of humour and satire. Unfortunately, several of the cases in which the Court found no violation of Article 10 also included the use of criminal penalties which, the Court has itself stated in *EON v France*, can have a chilling effect on satirical expression. A stricter test which adheres to the paradigm set out by *Handyside v. The United Kingdom* which extends the freedom of expression to ideas that shock, offend or disturb is, therefore, necessary. The reality of the U.S. is quite different. As noted in *Yankee Publishing Inc. v News America Publishing* (1994), free speech does not only extend to parodies that succeed and to jokes that are funny. In simple terms, the fact that society may consider speech to be offensive (even if this is humorous) is not a sufficient rationale for its restriction (*FCC v. Pacifica Foundation*). This is in antithesis with the ECtHR's position which limits satirical/humorous speech on grounds of offence. The U.S. has, however, limited humour when it is ascertained that this humour creates a hostile working environment and, even then, has not always done so. The decisions before U.S. courts on some sexual harassment cases can be criticized, as done above (for example the disregard of the fact that some of the sexual humour was directed at the plaintiff and was not part of the general comedy writing for *Friends*). However, on a general comparative level, the judicial restraint to intervene on general humour, regardless of its offensive nature found in the U.S, endows the freedom of expression with its true status, that of a fundamental freedom which is central for pluralism and broadmindedness (as anyhow highlighted but not always adhered to) by the ECtHR.

References

- Benatar, D. (1999). 'Prejudice in jest: When racial and gender humor harms'. *Public Affairs Quarterly* 13 (2), pp. 191-203.
- Bernstein, D. E. (2003). *You Can't Say That! The Growing Threat to Civil Liberties from Anti-Discrimination Laws*. Washington: Cato Institute.
- Billig, M. (2005). *Laughter and Ridicule: Towards a Social Critique of Humour*. California: Sage.
- Bradshaw, P. (2006). 'Borat: Cultural learnings of America for make benefit glorious nation of Kazakhstan - review'. *The Guardian* (28 October 2006).
- Bremmer, J. (1991). 'Jokes, jokers and jokebooks in ancient Greek culture', in Bremmer, J. & Roodenburg, H. (eds.), *A Cultural History of Humour*, Oxford, Boston: Polity, pp. 11-18.

- Freud, S. (1960). *Jokes and Their Relation to the Unconscious*, (Ed: James Strachey). New York: Norton.
- Friend, T. (2002). 'What's so funny? A scientific attempt to discover why we laugh?' *New Yorker*, 11 November 2002, pp. 78-93.
- Godioli, A. (2020). 'Cartoon controversies at the European Court of Human Rights: Towards forensic humour studies'. *Open Library of Humanities* 6 (1), pp. 1-35.
- Husband, C. (1988). 'Racist humour and racist ideology in British television, or I laughed till you cried', in Powell, C. et al (eds.), *Humour in Society*, New York: Macmillan, pp. 149-178.
- Klausen, J. (2009). *The Cartoons that Shook the World*. New Haven: Yale University Press.
- Kuipers, G. (2011). 'The politics of humour in the public sphere: Cartoons, power and modernity in the first transnational humour scandal', *European Journal of Cultural Studies* 14 (1), pp. 63-80
- Limon, J. (2000). *Stand-Up Comedy in Theory or, Abjection in America*. Town: Duke University Press 2000.
- Little, L. E. (2009). 'Regulating funny: Humour and the law'. *Cornell Law Review* 94 (5), pp.1245-1279.
- Lockyer, S. & Pickering, M. (2008). 'You must be joking: The sociological critique of humour and comic media', *Sociology Compass* 2 (3), pp. 808-820.
- Martin, R. A. (2000). 'Humour and laughter', in Kazadin A. E (ed.), *Encyclopedia of Psychology*, Oxford: Oxford University Press.
- Oxford Dictionary of Phrase and Fable* (2005). Oxford: Oxford University Press
- Oxford English Dictionary*. Retrieved December 10, 2021 from <https://www.lexico.com/definition/humour>.
- Pascal, B. (1897). 'Géométrie-Finesse II – Fragment no. 2/2.
- Quinn B. A. (2000). 'The paradox of complaining: Law, humor and harassment in the everyday work world'. *Law and Sociology Inquiry* 25 (4), pp. 1151-1185.
- Radin, M. (1927). 'Freedom of speech in ancient Athens'. *The American Journal of Philology* 48(3), pp. 215-218.
- Stanford Encyclopedia of Philosophy (2020), 'Philosophy of humour', California: Stanford University Press.
- William, L. (2009). 'Sacha Baron Cohen, The mysterious master of public misbehaviour'. *The Telegraph*, 6 June 2009.

Case-Law

European Court of Human Rights

- Alves da Silva v. Portugal, Application No. 41665/07 (ECHR, 20 October 2009).
- EON v. France, Application No. 26118/10 (ECHR 14 March 2013).
- Féret v. Belgium, Application No 15615/07 (10 December 2009).
- Handyside v. The United Kingdom, Application No. 5493/72 (ECHR 1 December 1976).
- Leroy v. France, App. no. 36109/03 (ECHR 2 October 2008).
- M'Bala M'Bala v. France, Application Number 25239/13 (ECHR 20 October 2015).
- Müller and Others v. Switzerland, Application No. 10737/84 (ECHR 24 May 1998).
- Palomo Sanchez and Others v. Spain, Application nos. [28955/06](#), [28957/06](#), [28959/06](#) and [28964/06](#), (ECHR 12 September 2011).
- Vereinigung Bildender Künstler v. Austria, Application No. 68354/01 (ECHR 25 April 2007).

Court of Justice of the European Union

- Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others (2014).
ECLI:EU:C:2014:2132

U.S. Case Law

Augustin v. Yale Club of N.Y. City, No. 03-CV-1924 (KMK)WL 2690289 (2006).
Baskerville v. Culligan International Company, 50 F.3d 428,7th Cir.*1995).
Campbell v. Acuff-Rose Music 510 US 569 (1994).
Goede v. Mare Rest., No. 95 C 5238, WL 769 (1995).
Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
FCC v. Pacifica Foundation 438 US 726 (1978).
Lyle v. Warner Brothers Television Productions 132 P.3d 211 Cal. (2006).
Oncale v. Sundowner Offshore Services, 523 U.S. 82 (1998).
Nitsche v. CEO of Osage Valley Electric Cooperative 446 F.3d (2006).
Robinson v. Jacksonville Shipyards Inc, 760 F. Supp 1486 (M.S. Dla.1991) 1498 (1991).
Yankee Publishing Inc. v. News America Publishing Inc 809 F. Supp 267 (1992).
Hustler Magazine Inc. v. Falwell, 485 US 46 (1988).

UN Human Rights Committee

Ross v. Canada, Communication No. 736/97, (18 October 2000).

Other

UN Human Rights Council, Farida Shaheed, 'Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Freedom of Artistic Expression and Creativity' (2013).
UN General Comment No. 34: Article 19: Freedom of opinion and expression: International Covenant on Civil and Political Rights (2011).
ZB v. France, Application Number 46883/15: Written Submissions of Article 19.