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Restrictions on Satire, Parody and Caricature in the Case Law of the European Court of Human Rights

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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ABSTRACT

Freedom of expression as one of the fundamental rights to ensure a person's self-fulfillment has been protected by the Convention and the Court for several decades. This right applies also to artistic expression, including satire, parody and caricature. These types of ridicule have been among the most popular ways of expressing public opinion throughout time.

This bachelor thesis analyzes the European Court of Human Rights' case law in instances of restrictions on freedom of expression in satire, parody and caricature. The analysis focuses on the Court's depth of understanding and approach to the particularities of satirical work.

Key words: Freedom of expression, satire, parody, caricature, restrictions on artistic expression, margin of appreciation, purpose of freedom of expression.

SUMMARY

The right to freedom of expression has been protected by the Convention and the Court for several decades. This right applies also to artistic expression, including satire, parody and caricature, which have been among the most common ways of expressing public opinion since ancient times. However, the Court has been criticized for its inconsistency when approaching artistic expression. This particular research explores the Court's approach to interference with freedom of expression in satire, parody and caricature over time.

For a comprehensive and interdisciplinary analysis this paper consists of an introduction, two main parts each containing four chapters, and conclusions. The methods used in this research are the historical method – for analyzing the historical development of the Court's approach to violations of article 10 in satire, parody and caricature; the analytic method – for reviewing the existing jurisprudence on freedom of expression, the Court's doctrine as well as the concepts of satire, parody and caricature; the inductive and deductive methods – for determining the coherence, consistency and depth of the Court's approach in these types of expressions.

As its judgments cover all the member states of the Council of Europe, the scope of this paper is set on the Court. The first part of the paper focuses on theory and main concepts of freedom of expression and its limitations, the three part test developed by the Court, its doctrine of the margin of appreciation and the main characteristics and purposes of satire, parody and caricature.

The second part is devoted to the analysis of the Court's case law regarding satire, parody, caricature and aspects of artistic expressions in general. The chapters provide an analysis of the consistency and development of the Court's approach as well as the consideration given to the particular characteristics and role of satire and artistic expressions.

The findings of this paper show that the Court's approach has not been coherent as it often disregards its own precedent. Out of the different levels of the purpose of freedom of expression, as determined in the first part of the paper, the Court

emphasizes most in a paraphrased way. The Court argues that a democracy calls for difference in opinions and should support also offensive and unfavorable expressions. However, the most common reason for restricting satirical expressions has been exactly for being considered offensive towards someone.

The aforementioned three part test was applied to essentially all cases examined in this paper, nevertheless, no special regard for satire, parody and caricature was observed. Also the margin of appreciation has not led to different conclusions - the Court's application is inconsistent and not justified substantially enough. Overall its approach to satire, parody and caricature is superficial and lacks depth. There are indications that the Court does not fully grasp the essence and aim of satirical work, and does not indulge in a more comprehensive analysis. This is also supported by several harsh dissenting opinions expressing strong opposition towards the final judgment.

The Court repeatedly stresses the aspect of humor in satire. However, this should not be a feature that determines satire, parody or caricature, because the aim of these expressions is to pick at society's failings and vices, to induce contemplation and change. Humor is there to help soften the reaction of the receivers of these expressions.

While it is necessary to protect repressed minorities or religious groups that carry a historical burden, for example, the Jewish minority, from harmful expressions, this kind of protection should not be a default approach for any religious group, unless necessary. Feelings of offence alone should not be sufficient for restrictions on satire, parody and caricature. This, however, has not been the case with the Court, which seems to give special regard to all religious groups.

Altogether, although the recognition and protection of artistic expression has become broader, there is a pattern of inconsistency and generalization in the Court's approach to cases dealing with satirical expressions.

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LIST OF ABBREVIATIONS

| | |
|----------------|--|
| The Court | The European Court of Human Rights |
| The Convention | The European Convention on Human Rights |
| UDHR | Universal Declaration of Human Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |

INTRODUCTION

The more the intellectual and informative environment we live in expands due to globalization and digitalization, the more complex it becomes. This applies to the legal field as well, as areas that previously did not naturally go together, are becoming interlinked.¹ Fundamental human rights concepts and systems of protection were rapidly developed for the simple reason of moving away from the horrors of both World Wars. For several decades the European Court of Human Rights has performed judicial functions and substantially advanced its case law.² Nevertheless, criticism has been expressed³ towards its consistency when approaching violations of the right to freedom of expression and even more – artistic expression.

Satire, parody and caricatures have since ancient times been one of the most popular styles and tools of expressing public opinion.⁴ It allows for criticism through irony and humor, which supposedly lessens the impact – and possible offence – towards the discussed subject, value or phenomenon. It undoubtedly has played and plays today an important role in the social information space.

For a comprehensive and successive approach to answering **how the restrictions on freedom of expression in satire, parody and caricature have developed over time in the Court**, this research will consist of an introduction, two main parts each containing four chapters, and conclusions.

The scope of this paper is set on the Court as its judgments cover all the member states of the Council of Europe, thus providing a broad amount of cases within a somewhat narrow topic. The most relevant and publicly debated cases will be analyzed in-depth, while other national and international case law will be mentioned for comparative purposes. Most sources used in this work will be in English, but for the sake of a broader perspective and availability, also some materials in German will be reviewed.

¹ Lazerow, Herbert I. *Mastering Art Law*. Durham, NC: Carolina Academic Press, 2015, p. 3-4

² Council of Europe. *The Conscience of Europe*. Third Millennium Publishing Limited, 2010, p. 16-19. Accessed on: https://www.echr.coe.int/documents/anni_book_chapter01_eng.pdf

³ Polymenopoulou, Eleni. *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights*, Human Rights Law Review, Volume 16, Issue 3, 2016, p. 511–514.

⁴ Radin, Max. *Freedom of Speech in Ancient Athens*. The American Journal of Philology 48, no. 3, pages 215 – 218.

At first, an overview of the main conceptual topics is provided, starting with the purposes of freedom of expression as such. Although due to the limited space this chapter does not provide a general overview of the historical development of freedom of expression, it touches upon some important historical aspects, the necessity and functions of this fundamental freedom. This is followed by an explanation of the limitations of free expression. It includes the three-part test⁵ used by the Court to determine the lawfulness and necessity of interference with the freedom of expression set out in article 10 of the Convention. Further the concept of “a margin of appreciation”⁶ will be considered in order to set out not only the way in which the Court limits itself, but also why that puts a responsibility on the Court to be elaborate when justifying the reason for interfering with a domestic court’s decision. Lastly, a review of the concepts of satire, parody and caricature will be provided. Different angles – jurisprudence, philology, philosophy and a journalistic view – will ensure a diverse representation as well as highlight the common.

The second part of the research is devoted to the analysis of the Court’s case law regarding satire, parody, caricature and aspects of artistic expressions in general. Its chapters are structured in accordance with the rights, against which the Court weighs the right to freedom of expression or the justification for allowing restriction. This chapter will consist of a case analysis, where the Court’s decisions will be held under examination in context of consistency, development, consideration of the distinct characteristics and position of satire and artistic expressions.

The current assumption in form of a hypothesis is: **Restrictions on freedom of expression in satire, parody and caricature are mostly weighed against the right to private and family life. The Court’s approach and reasoning in balancing these rights is extensive, but incoherent.**

In order to accurately determine the answer to the given research question and test the hypothesis, several methods will be used. The historical method will be applied when analyzing the historical development of the Court’s approach to violations of article 10 in satire, parody and caricature. Meanwhile the analytic

⁵ Callamard, Agnes. *Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence*. Geneva, UN HCHR Expert meeting on the links between articles 19 and 20 of the ICCPR, 2008, p. 5.

⁶ Greer, Steven. *The Margin Of Appreciation: Interpretation And Discretion Under The European Convention on Human Rights*. Council of Europe Publishing, Human Rights Files no. 17, 2000, p. 5-6

method will be applied when reviewing the existing jurisprudence on freedom of expression, the Court's doctrine as well as the concepts of satire, parody and caricature. The coherence, consistency and depth of the Court's approach and criteria to restrictions on freedom of expression in these types of expressions will be determined using the inductive and deductive methods.

1. FREEDOM OF EXPRESSION IN ART

This chapter concerns foundations necessary for a discussion on the extent of freedom of expression in satire, parody and caricature. It will set out the main functions and purpose of this fundamental right in society. The principles and values on which legal tools and instruments such as the Convention, the UDHR, the ICESCR and others are built will be underlined. The right to freedom of expression, including artistic expression does not only provide the means for self-determination, but also performs functions necessary for development and sustainability of a society.⁷ Artistic expressions both reaffirm existing notions and ideas as well as challenge them.⁸ Structuring the essential functions and purpose of the right to freedom of expression will reveal also the reasons for the necessity of artistic freedom.

At the same time it is important to note that artistic rights are complex also in the way that they are not merely the moral rights of the creator, but on some level the rights of society as well. The public mostly has a moral interest in an artwork on from two aspects. First of all, its interest lies in the possibility for the work to have potential of becoming or having already become an important part of its culture. The same may apply to works created in response of iconic works, creations that carry references to cultural icons. Secondly, the innovative element of a work may be at the heart of the public's interest. Such cases may be works that contain new styles or ideas that promote the development of the art industry or even other fields. It may as well be a new philosophically based idea that challenges or critiques an existing view or ideal.⁹

Both notions correspond with the test established by *Axel Springer AG* examined further in this research, which sets out the method for weighing the right to freedom of expression against the right to respect for one's private and family life.

⁷ *Handyside v. United Kingdom*, 1976, Application No. 5493/72, para. 49

⁸ Shaheed, Farida. *Report of the Special Rapporteur in the Field of Cultural Rights: the right to freedom of artistic expression and creativity*. Geneva: United Nations, 2013, p. 3

⁹ Hansmann, Henry and Santilli, Marina. *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*. *The Journal of Legal Studies*, Vol. 26, No. 1, 1997, p. 105-10

1.1. The purpose of freedom of expression

The most common academic debate about freedom of expression begins at fairly recent times – the drafting of the UDHR or the Bill of Rights and its' First Amendment – and the roots tend to be forgotten, although they provide valuable indications about free expression and the unchanging need for it in society, especially a democratic one.

Ancient scholarly writing has suggested that in Ancient Athens some early formation of freedom of speech existed, because in all Ancient Greece “tongues were wagging freely”, unrestricted speech and imparting of ones ideas and opinions were already valued. Nevertheless, hints exist that over the duration of time – fixed by the Attic comedy – a sort of censorship occurred or was imposed. To illustrate, over its time there were three phases for Greek comedy – the Old, the Middle and the New Comedy. In the first type parodies or images of people were very precise, they used to have such detail that publically known people were easily recognizable, even named. These were usually political personas. The Middle comedy did not use the names of these people anymore. The Old had already transformed into typology, where parodies and satirical depictions were ambiguous, merely showing a type of person or some peculiar characteristics. These changes are said to be sudden, not gradual, therefore it is argued that it is reasonable to assume there could have been laws and norms imposed to regulate speech and expression.¹⁰ Thus clearly, the freedom to create and show caricatures of public persons in order to encourage humorous discourse on politics and ongoings in the city-state has been important to society since ancient times. Artistic mediums of expression have therefore been detrimental not only for the sake of entertainment, but also promotion of a public dialogue. The restrictions on such forms of art are at least as old.

Later, during the seventeenth century strict censorship rules were imposed in England, and at that time a significant pinpoint in time became John Milton's work *Aeropagitica*, in which he proposed the following idea:

Truth and understanding are not such wares as to be
monopolized and traded in by tickets and statutes and standards. [...]

¹⁰ Radin, Max. *Freedom of Speech in Ancient Athens*. The American Journal of Philology 48, no. 3, pages 215 – 218

Give me the liberty to know, to utter, and to argue freely according to
conscience, above all liberties.¹¹

The last sentence is the predecessor of what can be found in article 10 of the Convention with the formulation “freedom to hold opinions and to receive and impart information and ideas without interference”¹². The need for expression was already then interpreted as a gateway for circulation of knowledge and understanding.¹³ Thus, what Milton is arguing in *Aeropagitica*, is that opinions and factual information are not something to turn into a market good, both are fundamental to creation of knowledge and development. Knowledge drives opinions and the other way around. In the same work he set out one of the fundamental concepts of free expression, the analogy of free expression as a “marketplace of ideas”. A widely known work of later origin concerning this same concept was also John Stuart Mill’s “On Liberty”. Both compare the free movement and surfacing of ideas as a vital necessity that leads to the truth. Similarly as in a free market where the unsuccessful projects naturally perish, but the best and most effective emerge, compete and prevail.¹⁴ In order for true or “qualitative” ideas to live on and be accepted, a variety needs to be present.

Thus, a developing and healthy society needs interaction between the individuals and their intellectual “baggage”. The broader importance and purpose of freedom of expression in society is explained in brilliant structure by Thomas Emerson.

Emerson has argued that there is a system of freedom of expression, which apply to any democratic society, and that there are four consecutive pillars to it – (1) “assuring individual self-fulfillment”; (2) “advancement of knowledge and discovery of truth”; (3) “providing for participation in decision-making by all member of society” and (4) “balancing between healthy cleavage and necessary consensus”. The quote of Milton also contains already two of these pillars – individual self-fulfillment and the idea that free expression leads to more and better knowledge and truth.¹⁵ First

¹¹ Coase, R. H. *Advertising and Free Speech*. The Journal of Legal Studies 6, no. 1, 1977, page 3

¹² Council of Europe. *European Convention on Human Rights, article 10*. Accessed on: https://www.echr.coe.int/Documents/Convention_ENG.pdf

¹³ Curtis, Michael Kent. *Free speech, "the peoples darling privilege": struggles for freedom of expression in American history*. Durham (N.C.): Duke University Press, 2000, page 29

¹⁴ Ingber, Stanley. *The Marketplace of Ideas: A Legitimizing Myth*. Duke Law Journal, Vol. 1984, No. 1, 1984, p. 1-9

¹⁵ Emerson, Thomas I. *The system of freedom of expression*. New York: Vintage Books, 1971, pages 6-7

of all, people truly *need* to express themselves. Also in Milton's writing it was evident that it is hard to restrain yourself, to not share what we believe or know.

The human truth is never objective, but nevertheless a goal to be achieved, and the only way to move towards it is to revise the existing knowledge or opinions and to challenge them. To weed out outdated facts and data, one needs to look at other sides of an issue, new ideas and the opinions of other people, especially those who have taken on an opposing view, and that can only be done through discourse – the synergy of the expressions of two sides is what leads to advancement of knowledge. This correlates with the above mentioned function of artistic expression, which is the challenging of existing ideas and concepts.¹⁶ The same applies to the particular subject of this paper – satire, caricature and parody, which are to be discussed to a greater extent at the end of the first part of this research.

Further, in order to shape a society and its realm in accordance with who the people living in it actually are – and also make political decisions that shape the state or community – they need to be free to express themselves through all kind of mediums that have a political impact. These are not just speech or writing, but also subtle ways, such as lifestyle or being part of a sub-culture, or – creative, artistic statements.¹⁷

Ergo, the main observations in regards to the purpose of freedom of expression are, first of all, that it functions to fulfill a basic intellectual and emotional human need. Consequently, if all individuals are allowed self-fulfillment by expression, they produce diversity of opinion, where the most convincing ones can survive and thrive. Thus, ultimately this broad “market of ideas” provides and drives two forces.

One is democracy, where everyone has equal rights to express themselves and where the majorities' ideas rule.¹⁸ The other is development in the sense that the debate opened by conflicting opinions, ideas or knowledge lead to further examinations of either a person's own or the opponent's views. This, in turn, either

¹⁶ Shaheed, Farida. *Report of the Special Rapporteur in the Field of Cultural Rights: the right to freedom of artistic expression and creativity*. Geneva: United Nations, 2013, p. 3.

¹⁷ *Ibid.*, 3-4

¹⁸ Krouse, Richard W. *Polyarchy & Participation: The Changing Democratic Theory of Robert Dahl*. *Polity* 14, no. 3, 1982, p. 441-444

consolidates or corrects one's position.¹⁹ Either way, it leads to new discoveries, deeper understanding and development. Thus, we need freedom of expression for self-realization and growth – on the individual as well as societal level.

1.2. Limits of freedom of expression

The problem with the previously mentioned concept of a “free marketplace of ideas” is that the analogy, when set in the real world, would work somewhat differently. And the problem, in fact, explains the necessity for a certain degree of limitations on this freedom. The model of this analogy is that of *laissez-faire* economics, which prescribe absolute non-interference from the government or any other body or instrument that is not directly involved in market affairs. What is faulty in this is that economists have long established – the market does actually need interference to “correct failures in the economic market caused by real world conditions”. Similarly with the right to freedom of expression, the “marketplace of ideas” needs a moderate, balanced amount of regulation.²⁰ Why so?

One of the problems lies in the assumption that free circulation of ideas inevitably leads to the truth. In order to form an objective train of thought that leads to the truth, people would need to make not only very intelligent determinations, but also utterly rational ones. So far throughout time societies, civilized or not, have unfortunately shown that human rationality is not as reliable as we would like to think. Stanley Ingber has argued that:

The market model avoids this danger of officially sanctioned truth; it permits, however, the converse danger of the spread of false doctrine by allowing expression of potential falsities.²¹

This problem is also a very current and topical issue as on domestic and international levels the fight against disinformation is on every agenda of security, international relations and other affairs in large states as well as smaller.^{22, 23}

¹⁹ Emerson, Thomas I. *The system of freedom of expression*. New York: Vintage Books, 1971, pages 6-7

²⁰ Ingber, Stanley. *The Marketplace of Ideas: A Legitimizing Myth*. Duke Law Journal, Vol. 1984, No. 1, 1984, p. 1

²¹ Ibid., p. 7

Another problematic moment presents itself if one looks at the form or the “packaging” of ideas. It is possible to convey a thought or opinion in a multitude of different ways, some of them – very insulting, offensive, and even hateful. Many ideas often can carry very little meaning and value, but can have a grave impact on a group or individual member of society.²⁴ This corresponds with yet another of today’s issues – the necessity to regulate hate speech (also set out in article 19 of the Convention) and protection of individual’s privacy and dignity.²⁵

Therefore, the right to freedom of expression is not absolute. Some level of regulation and accountability is detrimental. The Council of Europe has differentiated qualified rights and unqualified rights. The former means all those fundamental rights, which “may be interfered with in order to protect the rights of another or the wider public interest, e.g. the right to private and family life”²⁶. This includes the right to freedom of expression. Unqualified rights are, thus, rights that cannot be balanced against someone else’s needs, such as the freedom from torture.

In order not to infringe a State’s sovereignty and take into account various legal systems, historical aspects, specific political and economic atmosphere as well as cultural baggage, human rights documents, including the Convention, have only provided a minimum set of standards to safeguard freedom of expression.²⁷ As the focus of this research is an analysis of the case law of the European Court of Human Rights (the Court), therefore this paper focuses on the analysis of the case law of the European Court of Human Rights, the author will focus on the analysis of the approaches used in them .

²² Butcher, Paul. *Disinformation and democracy: The home front in the information war*. European Policy Center, Discussion Paper, 2019, p. 4

²³ Priest, Dana. *Lessons from Europe’s Fight Against Russian Disinformation*. The New Yorker , 2017. Accessed on: <https://www.newyorker.com/news/news-desk/lessons-from-europes-fight-against-russian-disinformation>

²⁴ Ingber, Stanley. *The Marketplace of Ideas: A Legitimizing Myth*. Duke Law Journal, Vol. 1984, No. 1, 1984, p. 32-35

²⁵ Rauch, Jonathan. *Who Will Regulate Hate Speech?* Cato Unbound, A Journal of Debate, 2018. Accessed on: <https://www.cato-unbound.org/2018/06/21/jonathan-rauch/who-will-regulate-hate-speech>

²⁶ Council of Europe. *Some definitions*. Accessed on: <https://www.coe.int/en/web/echr-toolkit/definitions>

²⁷ Mendel, Toby. *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Council of Europe Centre for Law and Democracy, p. 40-43. Accessed on: <https://rm.coe.int/16806f5bb3>

First of all, the limitations to article 10, just as for the other articles of the Convention, are set out in article 17. Cases where not even *prima facie* protection is granted for expressions are where the following applies:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.²⁸

This provision in relation to article 10 has been mainly used towards expressions undermining core values of the Convention like tolerance and non-discrimination. For example, in *Norwood v. the United Kingdom* in 2004 a poster of the Twin Towers stating “Islam out of Britain – protect the British people” was not regarded as protected speech as it was attacking towards Muslims in the United Kingdom, therefore against the values of the Convention – tolerance, social peace and non-discrimination.²⁹

Besides the limitations set out in article 17, the text of article 10 itself provides clear indications of when it is allowed to interfere and put restrictions on the right to freedom of expression. Respectively, the person who chooses to exercise their right to this freedom, “since it carries with it duties and responsibilities”, also agrees that there can be conditions or consequences, if it is **necessary in a democratic society** for the protection of one of these goals - (1) in the interest of national security, territorial integrity or public safety, (2) to prevent disorder or crime, (3) to protect the health or morals of society, (5) to protect the reputation or rights of others, (5) to prevent the disclosure of information received in confidence or (6) to maintain the authority and impartiality of the judiciary.³⁰

²⁸ *Prohibition of Abuse of Rights*. Article 17. Council of Europe, European Convention on Human Rights, 1950. Accessed on: https://www.echr.coe.int/Documents/Convention_ENG.pdf

²⁹ Mendel, Toby. *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Council of Europe Centre for Law and Democracy, p. 9-11. Accessed on: <https://rm.coe.int/16806f5bb3>

³⁰ *Freedom of Expression*. Article 10. Council of Europe, European Convention on Human Rights, 1950. Accessed on: https://www.echr.coe.int/Documents/Convention_ENG.pdf

In order to determine the necessity of restrictions in a democratic society, the Court has developed a three part test³¹ based on the second part of article 10.

The first part of the test is determination of whether the interference has been **lawful**.³² This means, there have to be domestic laws present, which are accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct”.³³

Secondly, there has to be a **legitimate aim**³⁴ for restriction. Essentially always this is one of the aims in the second part of article 10 or another article of the Convention.

The third part of the test is determining the **necessity of the restriction**³⁵. Necessary in this case means, first of all, that there is a **pressing social need**³⁶. Secondly, the reasons for the restriction must be **relevant and sufficient**³⁷, which means that the principle of proportionality needs to be kept in mind.³⁸ Only if all requirements of the test are met, can an interference with the right to freedom of expression be considered justifiable.

The Court itself has noted that any restrictions on freedom of expression have to be carried out very careful and very conclusively: “Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”³⁹

³¹ Callamard, Agnes. *Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence*. Geneva, UN HCHR Expert meeting on the links between articles 19 and 20 of the ICCPR, 2008, p. 5

³² *Groppera Radio AG and others v. Switzerland*, 1990. Application no. 10890/84, para. 68

³³ *The Sunday Times v. United Kingdom* 1979. Application No. 6538/74, para. 49

³⁴ Mendel, Toby. *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Council of Europe Centre for Law and Democracy, p. 38. Accessed on: <https://rm.coe.int/16806f5bb3>

³⁵ *Observer and Guardian v. the United Kingdom*, 1991. Application no. 13166/87, para. 59

³⁶ *The Sunday Times v. United Kingdom* 1979. Application No. 6538/74, para 59

³⁷ *Cumpănă and Mazăre v. Romania*, 2004. Application no. 33348/96, para. 90

³⁸ *Lingens v. Austria*, 1986, Application No. 9815/82

³⁹ *Thorgeirson v. Iceland*, 1992. Application No. 13778/88, para. 63

1.3. A margin of appreciation

Despite numerous rules and thought-through approaches for the best ways of monitoring and being able to regulate free speech in the least damaging and most appropriate ways, the Court considers that the domestic level and its particular setting is best known to the domestic courts.⁴⁰ That is why on certain topics it has given a “wide margin of appreciation” to the domestic courts. This doctrine means that the Court recognizes the fact that states can have historical, political and cultural differences as well as different legal systems and approaches. Because of that reason states may have some peculiar and distinct disparities when it comes to interpreting and arguing the “legitimate aims” set out in the second part of article 10.⁴¹

This does not mean, however, that states may disregard the aims and purpose of the Convention. On the contrary – it demands that they should act in accordance with their individual situation while aligning with the Convention and other international human rights documents.⁴² This may in reality be even more complicated than “transplanting” the Convention directly and literally.

A wider margin of appreciation is typically applied to issues that concern the protection of morals, including and especially religious sensitivities:

[A] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.⁴³

The same goes for commercial matters, especially in regards to unfair competition and other instances in which the domestic courts have a significantly better understanding of the internal situation than the Court.⁴⁴

⁴⁰ George Letsas. *Two Concepts of the Margin of Appreciation*. Oxford Journal of Legal Studies 26, no. 4, 2006, p. 706

⁴¹ Mendel, Toby. *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Council of Europe Centre for Law and Democracy, p. 40-43. Accessed on: <https://rm.coe.int/16806f5bb3>

⁴² *Sunday Times (No. 1) v. the United Kingdom*, 1979. Case no. 6538/74, para. 59.

⁴³ *Wingrove v. the United Kingdom*, 1996. Application no. 17419/90, para. 58. and *Otto-Preminger-Institut v. Austria*, 1994. Application no. 13470/87

⁴⁴ *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 1989. Application no. 10572/83, para. 33.

At the same time the Court has put an emphasis on the importance of free circulation of information, ideas and opinions that are important to society and public discourse:

[T]he Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely.⁴⁵

These aspects and their importance are best understood on the domestic level. Therefore, this margin of appreciation also puts a certain responsibility on the Court to provide substantiation for determining the domestic court's decision invalid.⁴⁶

It is necessary to note that criticism has often been expressed in regards to this “doctrine” as it is not present in the text of the Convention, but moreover because there is no “uniform or coherent application” in the case law of the Court.^{47, 48} An independent observation of this assertion will be made during the course of this research. Meanwhile, to analyze the problems of the given topic through an interdisciplinary approach, it is imperative to gain a deeper understanding of the particular subject matter. The next chapter will shortly look into the concepts of satire, parody and caricature from a legal, philological and linguistic angle.

1.4. Satire, parody and caricature

With satire parody and caricature one can say – similarly as about art generally – that it is “defined differently depending on the purpose for which it is being defined”.⁴⁹ In case law these are mostly referred to as styles, not types of art *per se*. And truly, not always can one say that satire, parody or caricature is art. As eloquently

⁴⁵ *Giniewski v. France*, 2006. Application no. 64016/00, para. 51

⁴⁶ Mendel, Toby. *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Council of Europe Centre for Law and Democracy, p. 40-43. Accessed on: <https://rm.coe.int/16806f5bb3>

⁴⁷ George Letsas. *Two Concepts of the Margin of Appreciation*. Oxford Journal of Legal Studies 26, no. 4, 2006, p. 705 – 706

⁴⁸ Greer, Steven. *The Margin Of Appreciation: Interpretation And Discretion Under The European Conventionon Human Rights*. Council of Europe Publishing, Human Rights Files no. 17, 2000, p. 32 – 43

⁴⁹ Lazerow, Herbert I. *Mastering Art Law*. Durham, NC: Carolina Academic Press, 2015, p. 3-4

put in the German case *Herr K. v. von Sachsen* – “satire can be art, but not all satire is art”.⁵⁰

All three of these artistic expressions go hand in hand as all of them are a form of ridicule. From the philological point of view the main characteristic of satire is that it combines criticism and ironic humor, wit.⁵¹

Meanwhile, parody also intends to ridicule the subject it portrays, but doing so by imitation. Caricature is not always visual, it can also be written. Its main component distinguishing it from satire and parody is that it exaggerates the qualities and characteristics of the subject being ridiculed. Satire is the broadest of these types of ridicule, and, while both parody and caricature can be satirical, they do not always have to be, because satire applies more to the content while caricature and parody are more or less the form of the work or creation.⁵²

An example of earlier works of satire is Jonathan Swift’s essay “A Modest Proposal” challenging the Irish system of landowning.⁵³ The intention is to ultimately reach the government and to affect people’s perception of the problems mentioned in the writing. What, nevertheless, is not the aim of it – offending the subject of discussion. Offence may be merely a byproduct of the creation, but the goal is to challenge the subject, whether it is a person or a phenomena or even object. Similarly with parody and caricature – the broader goal and the core intention of such styles of expression is to serve as a catalyst for discussion and improvement.⁵⁴ Humor softens the “blow” of the criticism, but still allows provoking emotions and social response that leads to either manifestation of an existing ideal or view, or towards change.⁵⁵

The spirit of the satiric style is to “ridicule the failing rather than the individual, and to limit its ridicule to corrigible faults, excluding those for which a person is not

⁵⁰ *Strauß-Karikatur*, 1987. Case no. BVerfGE 75, 369 1 BvR 313/85, German Constitutional Court, Order of the First Senate

⁵¹ Rose, Margaret A. *Pictorial Irony, Parody, and Pastiche*. Aisthesis Verlag Bielefeld, 2011, p. 3-4

⁵² *Ibid*, p. 78-86

⁵³ Swift, Jonathan. *A Modest Proposal*. 1729

http://www.readwritethink.org/files/resources/30827_modestproposal.pdf

⁵⁴ *Satire Definition*. Literary Devices, Definition and Examples of Literary Terms. Accessed on: <https://literarydevices.net/satire/>

⁵⁵ Bridgman, Richard. *Satire’s Changing Target*. College Composition and Communication, Vol. 16, No. 2, Critical Theory and the Teaching of Composition, Satire, Autobiography, 1965, p. 85-89

responsible”.⁵⁶ The target of criticism is the quality or action, or characteristic itself, not the subject it is attributed to. While comedy aims to provoke laughter as a goal, satire uses this reaction to point out what might be wrong with society. Its aim is to better society and to point out the flaws and characteristics in society, which the creator of the satirical work believes are threatening to said society.⁵⁷ Therefore, by default and functionality satire comes with good intentions, even when it may seem that it is a directed attack towards an individual. Satire’s function is not to ridicule something or someone *per se*, but to serve as a warning regarding a pressing issue, and a catalyst that would promote change.⁵⁸ That is precisely why satirical expressions as well as parody and caricature are detrimental to a democratic society.

Undoubtedly, this also means that satire can be used as the exact thing it by definition *should not* be – a weapon for attacking individuals or groups personally. This was also pointed out by journalist and novelist Will Self, who argued that because there is no common international view on what the “right life” and the “proper” set of standards is, the same type of satire will not be effective and purposeful in different societies. As we live in an era of a globalized information space, but a more or less national moral space, satire may not perform its functions, but instead “afflict the already afflicted”.⁵⁹ This leads to the test Self uses to determine whether a work truly is satiric. He poses the question – whom does the work in front of him comfort, and whom does it afflict?⁶⁰ This method, as easy as it seems, could, quite reasonably, be a determining criteria when examining whether a work can be considered satire – if it does not serve its true purpose, but merely offends an already vulnerable group, then it may be something else disguised as satire.

To summarize, satire, parody and caricature are somewhat similar as they are used for similar purposes. All three are types of ridicule, which – as styles – serve the purpose of promoting certain change or at least provoke thought and evaluation. The

⁵⁶ Ed. Abrams, M.H. Wadsworth, Thomson. *A Glossary of Literary Terms, 9th Edition*..

<http://www.sjsu.edu/faculty/harris/GothicNovel/Handouts/SatireParody.pdf>

⁵⁷ *Satire Definition*. Literary Devices, Definition and Examples of Literary Terms. Accessed on: <https://literarydevices.net/satire/>

⁵⁸ *Ibid*.

⁵⁹ Self, Will. *A Point of View: What's the point of satire?* BBC News online, 2015. Accessed on: <https://www.bbc.com/news/magazine-31442441>. The phrase “comfort the afflicted and afflict the comforted” was created by the comedian Finley Peter Dunne, who used this to describe journalism.

⁶⁰ *Ibid*.

creator of authentic satire is driven by the intention not to hurt a person or group as such, but to attack the underlying values or lack of them as general phenomena. The creator of such work does so as a reaction to events in society, which he or she deems questionable or unacceptable. Thus, satires' goal is to provide that society does not accept morally or otherwise questionable happenings quietly and that the questionable action would not become a tendency, which ultimately would corrupt said society. The person creating a work of satirical nature deems it to be detriment to society and wants betterment of society. These are some of the points to take into account before moving on to the examination of the Court's approach and considerations regarding artistic expression and satire, parody and caricature.

2. RESTRICTIONS ON ART IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The Court's case law on the restrictions on satire, parody and caricature is relatively extensive in numbers. The cases where satire has been mentioned by name date back to the 90's while freedom of expression was deemed applicable also to "offensive, disturbing or shocking"⁶¹ content two decades earlier. Considering the quantity and time frame, it would be reasonable to expect a consistent approach and solid understanding of satirical work, which corresponds to the actual occupational and creative field in which these works are created.

This chapter will, first of all, consider the most common issue dealt with in the selected cases – the possible interference with freedom of expression for the protection of the rights of others, specifically, their private and family life. After an overall review of the main principles emerging from said cases, a number of subchapters will consider ideas that occur repeatedly and indicate a certain degree of coherence.

After the analysis of the issue covered most extensively by case law, the cases dealing with other reasons for interference will be covered. These are – protection of morals, maintenance of the authority and impartiality of the judiciary, right to association, and right to freedom of religion.

2.1. Restrictions necessary for the protection of the rights of others

Already in 1976 the Court defended unfavorable and shocking content for the sake of **information pluralism and exchange of opinion and ideas**⁶², even though it did not differentiate art from other expressions yet. What the Court had established, though, was that "**not only the substance of the ideas and information expressed, but also the form in which they are conveyed**", was protected by article 10⁶³. This

⁶¹ *Handyside v. the United Kingdom*, 1976. Application no. 5493/72

⁶² *Otto-Preminger-Institut v. Austria*, 1994. Application no. 13470/87; *Handyside v. the United Kingdom*, 1976. Application no. 5493/72

⁶³ *Jersild v Denmark*, 1994. Application no. 15890/89

has been true in cases where expressions have been articulated orally⁶⁴, in print⁶⁵ and leaflets⁶⁶, via symbols⁶⁷, films⁶⁸, demonstrations⁶⁹, broadcasting⁷⁰, paintings⁷¹ and other mediums.

The most common reason given for possible restrictions of the right to freedom of expression has been where it is necessary for the protection of the rights of others. Consequently, there are certain criteria and tests that have emerged over the course of time to provide tools for weighing the rights of the parties or sides involved.

2.1.1. Freedom of expression v. Respect for private and family life

When thinking about how to balance the right of the author's freedom of expression against the rights of others, who are impacted by a piece of artistic work, the Court has set out different principles and approaches over time. In several cases the Court has repeatedly referred to criteria that help properly balance the right to protection of privacy guaranteed in the article 8 of the Convention and the right to freedom of expression.

In some of the first cases in which satire was balanced against privacy, like *Cumpana and Mazare v. Romania*⁷² and *Karhuvaara and Iltalehti v. Finland*⁷³, both in 2004⁷⁴, the three part test was applied, but the case law was still not as broad. Therefore a somewhat superficial reasoning can be seen.

In Romania's case the issue at stake was an article accompanied by a caricature of two public figures that were allegedly involved in a public procurement fraud

⁶⁴ *Schöpfer v. Switzerland*, 1998. Case no. 56/1997/840/1046

⁶⁵ *Handyside v. the United Kingdom*, 1976. Application no. 5493/72

⁶⁶ *Chorherr v. Austria*, 1993. Application no. 13308/87

⁶⁷ *Fáber v. Hungary*, 2012. Application no. 40721/08

⁶⁸ *Otto-Preminger Institut v. Austria*, 1994. Application no. 13470/87

⁶⁹ *Piermont v. France*, 1995. Series A No. 314

⁷⁰ *Groppera Radio AG and others v. Switzerland*, 1990. Series A no. 173

⁷¹ *Müller and Others v. Switzerland*, 1988. Application no. 10737/84

⁷² *Cumpana And Mazare v. Romania*, 2004. Application no. 33348/96

⁷³ *Karhuvaara And Iltalehti v. Finland*, 2004. Application no. 53678/00

⁷⁴ The term „satire” was mentioned and used to argue why free speech should not be restricted in *Standard Verlags GmbH v. Austria*, 2006 (application no. 13071/03), but it was not viewed as a style or medium for artistic expression, but in the light of political speech. Focus still remained on journalistic freedom.

case.⁷⁵ Court overlooked the argument of one of the parties pointing out that the national courts may not have met the threshold for “pressing social need” to justify interference. The party argued that, first of all, the content and topic was important to public debate, and, secondly, the form was in no way attacking to the claimant on a personal level, but a satirical writing with an obviously humorous caricature. The Court argued that the aim of the state to interfere with the free expression was legitimate, but there was a violation of article 10 only because of the disproportionate measures – a prison sentence for the author.

In Finland’s case the wife of a public figure had become “collateral damage” to her husband’s trial, and claimed that her privacy was invaded. The broadcast in question was clearly identified as a satirical programme, but never inspected as such as the focus was set on the argument that the affected party – the wife of a public figure in politics – cannot expect the same level of privacy as an average person. Although her husband was publically known, she in fact had remained outside the public spotlight, but with her husband’s trial, she had already been featured in the news several times. This ultimately made her a public figure as well, and inevitably comes with the positive aspects as well as the negative ones. That was also the main argument for deciding that there was a violation of article 10.

What is interesting is that in both cases the Court determined a violation without inspecting in depth the aspect of the satirical nature of the expression in question. It may be that the Court did not see these arguments as essential to the issue at stake, but it undermines the principle that it has the responsibility to give the domestic courts a wide margin of appreciation. Meaning, the Court should give an elaborate and in-depth analysis and argumentation of all aspects when deeming a domestic court decision invalid.

What more, although the facts of Finland’s case specify that the broadcast programme was political satire, the claimant did not use this fact for their argumentation. They relied solely on the fact that the affected party had been discussed publically before, thus, had become a public figure already. This could

⁷⁵ The caricature showed both individuals that were accused of fraud, walking hand in hand with bags full of banknotes. The caption of the caricature said: „ – Hey, Revi [R.M.], you’ve done a good job there! When I was deputy mayor we made quite a bit, enough to go to America... – Dănuțule [D.M.], if you become a lawyer, I’ll become a judge and we’ll have enough to travel round the world...”

indicate either a lack of understanding on the claimants or their attorney's side of the special position and nature of satire, or a strong belief that their one argument would suffice to win their case. Meanwhile, in Romania's case the claimants did in fact stress the satirical nature of the expression in their arguments, which the Court disregarded entirely. These cases were decided in 2004, making it somewhat understandable that a lack of elaborate and in-depth case law to rely on results on a superficial approach to the specifics of a particular case.

At the same time – *stare decisis* provides that there has to be a first step taken towards the creation of such case law. On the one hand the Court is obliged to follow precedent, but on the other hand it is empowered to gradually evolve its case law.⁷⁶ The author believes that in these cases the Court failed to take this step forward, even more – it failed to uphold consistency where it has the material and even certain precedent.⁷⁷

A case in 2007, however, shows that the Court recognizes its past decisions for cases regarding artistic, satirical expressions. In *Vereinigung Bildender Künstler v. Austria*⁷⁸ an artist's paintings were not allowed to be further exhibited as they contained collages of prominent members of society, including politicians portrayed in sexual poses and activities with one another. There the Court 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”**⁷⁹. It argued that such expressions are necessary for a democratic society – they further plurality of opinion and exchange of ideas. This in turn, has been noted in several other cases before, where it was emphasized that a democratic society needs not only favorable and inoffensive opinions and ideas, but also ones that are regarded as **“shock, offend or disturb the State or any other sector of the population”**⁸⁰.

⁷⁶ Fernandez, Patricio A., and Giacomo A. M. Ponzetto. *Stare Decisis: Rhetoric and Substance*. Journal of Law, Economics, & Organization 28, no. 2, 2012, p. 313-314

⁷⁷ *Otto-Preminger-Institut v. Austria* in 1994, mentioned at the beginning of this chapter.

⁷⁸ *Vereinigung Bildender Künstler v. Austria*, 2007. Application no. 68354/01

⁷⁹ *Ibid.*, para. 33

⁸⁰ *Otto-Preminger-Institut v. Austria*, 1994. Application no. 13470/87; *Handyside v. the United Kingdom*, 1976. Application no. 5493/72

This reasoning goes in hand with the purpose of advancing discovery of truth⁸¹ by challenging existing social paradigms⁸².

Later on the criteria for weighing right to freedom of expression against the right to respect for private life were set out in *Axel Springer AG*.⁸³ The principles were as follows: (1) contribution to a debate of general interest; (2) how well known the person concerned is; (3) the subject of the report; (4) the prior conduct of the person concerned; (5) the content, form and consequences of the publication. These criteria apply also to cases concerning satire and other artistic expression when there is a claim regarding interference of the privacy of public figures. Considering the often political nature of satirical works, this may be applicable quite often.

In the case *Bohlen v Germany*⁸⁴, the first instances of the domestic courts ruled in favor of the applicant, because the primary aim of the advertisement was commercial gain. The Federal Court of Justice claimed that the applicant's wish not to be named in the advertisement without consent carried less weight than the company's right to free expression. Therefore, the Federal court did not see the need to even examine whether the type of expression falls under artistic expression.

When applying the aforementioned Axel Springer criteria to this case, the Court recognized, first of all, that a debate of general interest did in fact exist. The advertisement in question referred to the applicant's book that he had published recently. After publication of said book, the company created a humorous advert, which further brought up public debate to some extent. Because of the humorous execution, the Court held that it accepts this advert in the relevant context as satire, which is **“recognized in its case law as a form of artistic expression and social commentary”**⁸⁵, referring to the above mentioned *Vereinigung Bildender Künstler v. Austria*. Thus, the first criterion applied is favorable to the defendant, the creator of the content.

⁸¹ Emerson, Thomas I. *The system of freedom of expression*. New York: Vintage Books, 1971, p. 6-7

⁸² Shaheed, Farida. *Report of the Special Rapporteur in the Field of Cultural Rights: the right to freedom of artistic expression and creativity*. Geneva: United Nations, 2013, p. 3

⁸³ *Axel Springer AG v. Germany*, 2012. Application no. 39954/08

⁸⁴ *Bohlen v. Germany*, 2012. Application no. 53495/09. The case at hand referred to Dieter Bohlen and his book „Backstage”, after the publication of which, an advertising company created an ad promoting a cigarette brand with the slogan „Look, dear Dieter, how easy it is to write super books.”; the words „dear”, „easy” and „super” were blacked out, but still readable; the advert referred to Bohlen's book and court proceedings because of which he had to redact certain passages of the book.

⁸⁵ *Vereinigung Bildender Künstler v. Austria*, 2007. Application no. 68354/01

The second criterion in *Bohlen* is decisive in whether a person belongs to the group of public figures, people that are recognizable by the public and because of that may not claim the same level of privacy and, thus, protection of it, as private individuals may. Thirdly, the Court evaluated the content of the advertisement, which clearly only referred to the applicant's book, the publication of which was a public event. The Court also stressed that the advert did not even mention those private details, which the applicant had revealed in said book himself. Thus, the subject of the debate did not overstep any boundaries of privacy. The conduct of the applicant indicated strongly that he himself was aiming for wider recognition through the book, which is why the Court argued that Bohlen himself had lowered his "legitimate expectations" in regards to privacy.

Finally, the content and its form as well as the further consequences, as already established by the domestic courts, were not degrading to the applicant or caused any negative effect to his reputation. The Court held that the domestic Federal court had ruled correctly, regard was given to the artistic nature of expression, because of the humorous element. This form of expression was being recognized as a combination of art and discourse.

However, a completely different approach than so far, was taken in *Lindon, Otchakovsky-Laurens and July v. France*⁸⁶, where the dissenting opinion criticized that the Court had not analyzed this case by the usual criteria properly, but by paraphrasing the arguments of the domestic courts. The work in question was a novel, partly based on true events, which described the life and conduct of Jean-Marie Le Pen. The dissenting opinion argued that there was no proper weighing of the different interests and rights against each other in order to find the right balance. Nor had there been a coherent logic in regards to which passages were considered defamatory and which were not, giving the impression that special protection is given to public figures.

The precedent in these kinds of cases usually provides the opposite logic – public figures have less expectation to privacy and shielding from public criticism. What was an evident difference, though, is the absence of the humor element insofar as can be concluded from the analysis of the Court. The dissenting opinion made a

⁸⁶ *Lindon, Otchakovsky-Laurens and July v. France*, 2007. Application no. 21279/02 and 36448/02

harsh conclusion – the result of this case may be that European supervision is lacking, and the Court is taking a “significant departure from its case law in matters of criticism of politicians”. Thus, it is not entirely clear whether this work falls into the category of satire, parody and caricature and the Court has ignored this aspect, or if the dissenting judge has merely raised an issue not quite relevant to this case. Regardless of that, there is an indication that the Court is departing from its case law in this instance.

This, again, indicates a disregard for the doctrine of precedent, which, as described by the Latin “*stare decisis et non quieta movere*”, makes the past judgments rendered by the Court, binding for it⁸⁷ to a certain degree.⁸⁸ If the Court decided to uphold the new approach, thus, creating new precedent, it would, first of all, need to justify such determination. The function of precedent should not merely be looked at from an onward going perspective. Meaning, courts should not only view past decisions as material to apply to today’s situation, but also, when creating precedent, do that while bearing in mind the possible needs of possible tomorrow’s cases.⁸⁹ Obviously, the Court did not suddenly change its approach to protection of the privacy of public figures, as the following cases will support.

In a later case in *Eon v. France* in 2013⁹⁰, the Court proved to be protective of criticism towards politicians after all. The issue at stake was a plaque held up by a political activist, which stated (in French) “Get lost, you sad prick”. This was aimed at the president who was visiting Laval at that time. The phrase referred to what the head of state himself had previously expressed during an agricultural show towards a farmer who refused to shake his hand.

The similarity of this and the previously discussed case is mainly that both *Le Pen* as a character and the offensive phrase uttered by the president were discussed widely on a public level. Somewhat different, though, are the volumes of these pieces of “social commentary” as in the *Le Pen* case a whole book was written about his life and alleged crimes he had committed. In *Eon* merely one plaque with one sentence

⁸⁷ Entchev, Ivo. *A Response-Dependent Theory of Precedent*. *Law and Philosophy* 30, no. 3, 2011, p. 273-274

⁸⁸ *Ibid*, p. 274-275. Because legal science in itself is an interpretative field, also precedents are subject to interpretation, thus, their „legal pull” also varies.

⁸⁹ Schauer, Frederick. *Precedent*. *Stanford Law Review* 39, no. 3, 1987, p.572-573

⁹⁰ *Eon v. France*, 2013. Application no. 26118/10

was used. What one also needs to keep in mind is the reach of each expression – each copy of a book, which is sold, is read by at least one person. A book is also available for sale over years, not merely for one day. The commentary on the plaque could have been directly seen only by the people present at the venue during the president’s visit. What more, the novel was an original creation while the text on the plaque was an appropriation.

In both cases the domestic courts deemed the expressions to be defamatory. The courts seemed to protect politically controversial characters of high status or their actions more extensively than a valid debate. Meanwhile the Court took a different stance in each case. In *Eon v. France* the Court did not even conduct a full three part test; it merely referred to existing notions in case law, and found that enough to determine a violation of article 10. While that seems positive from the perspective of the creators and “expressers”, this, again, is a shallow, superficial approach. If there is a test existent, it should be applied in all cases to which it is applicable. Also, if the Court renders a judgment that contradicts the domestic court, the reasons need to be elaborate. That is the idea behind the margin of appreciation.⁹¹

Despite certain similarities, these cases differ enough for one to expect and not be surprised by different outcomes. This does not, however, lessen the questionability of the Court’s approach in *Lindon, Otchakovsky-Laurens and July v. France*, as it seems to indicate that the Court undermined artistic expression for the sake of protecting a widely criticized high standing political figure.

Ultimately, when thinking about the general role of courts and principles of adjudication, it is imperative to note two aspects of law itself - the need for legal certainty and the need for individual justice. For one, society needs to be certain that rules, their effect and outcomes are reliable, clear and easy to understand. On the other part, specific issues or conflicts have distinct circumstances, thus, the need to be evaluated separately.⁹² What has been observed so far from the European Court of Human Rights is that its approach, although evolving, does not provide strong certainty. It often seems to disregard the existing precedent, which is small as it is.

⁹¹ Mendel, Toby. *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Council of Europe Centre for Law and Democracy, p. 40-43. Accessed on: <https://rm.coe.int/16806f5bb3>

⁹² Neuhaus, Paul Heinrich. *Legal Certainty versus Equity in the Conflict of Laws*. Law and Contemporary Problems 28, no. 4 1963, p. 795-797

Furthermore, the Court does not yet give evidence that it has evolved gradually, but presents a pattern of fluctuating between two approaches. Either it is in-depth analysis and high regard for a wide outlook on the peculiarities of artistic expression or a general appreciation of the right to free expression without immersing itself in any particular aspects. What also raises some questions is the disregard of parties' arguments in few instances. This goes against the principle of intelligibility.⁹³ The lack of depth also constitutes a lack of clarity and comprehension of what the Court's chain of reasoning was and why the outcome is what it is.

Regardless of the lack of consistency and clarity, there are common elements in regards to the restriction of freedom of expression in satire, parody and caricature for the necessity to protect the private and family life of others. The main one is the recognition that satire as an important part of discourse has a right to be offensive to some extent as such content promotes plurality of information. Other than that, the approach does not differ much from other general cases concerning the weighing of the right to freedom of expression and the right to protection of privacy.

Style and context matter

When searching further for the unifying elements in the approach of the Court, a few cases stood out that indicated a similar pattern of ideas. As satire was already recognized as expression that can naturally be offensive and agitating, the following cases continue this idea by arguing that the expression needs to be viewed within context. Also, the overall style needs to be assessed.

In a fairly recent case in 2014 – *Mladina D.D. Ljubljana v. Slovenia*⁹⁴ – the applicant claiming interference with their freedom of expression argued that the written piece was satirical social commentary. Nevertheless, the domestic court did not view these arguments or refer to case law or principles that protect artistic expressions, especially satire.

The Court did not go into an in depth examination of the written work in question as it did in previous cases, but it relied on the three part test while bearing in

⁹³ Bayles, Michael. *Principles for Legal Procedure*. Law and Philosophy 5, no. 1, 1986, p. 48-53

⁹⁴ *Mladina D.D. Ljubljana v. Slovenia*, 2014. Application no. 20981/10

mind to give the domestic courts a large enough margin of appreciation. The third part, the determination of the necessity of such interference in a democratic society revealed that the restriction was not convincingly supported by a pressing social need.

In regards to the work as an artistic piece, the Court brought forth two main arguments, one of which was the opinion that a work should be viewed as a whole, and the offending passage – within the context of the work. The second notion was that it is very important to take into account the overall style of an expression. It argued that even words or phrases that may seem vulgar or offend, have to be protected, when they are “serving merely stylistic purposes”⁹⁵.

In *Sousa Goucha v. Portugal*⁹⁶, two issues were claimed to be at stake, but when examining satire, parody and other artistic forms of expression, article 8 and the protection of privacy was given most regard to by the Court. The same criteria as in *Bohlen v Germany* were taken into account, but the Court went further. It recognized, just as in *Bohlen*, that satire is indeed a form of artistic expression and social commentary, but it continued to argue that the **characteristics of satire include exaggeration and distortion of reality, and that it also “naturally aims to provoke and agitate”**⁹⁷. Therefore, it is not enough to conclude that a work that causes feelings of offence is prohibited expression. If it is part of an intentional, coherent style, it may very well be protected expression, if the intention to harm is lacking.

In *Vereinigung Bildender Künstler v. Austria* the Court had set the above mentioned idea out alongside with the notion that satirical art obviously does not aim to be literal and portray reality or truth in any way. Because of these reasons, the Court noted that it is very important to examine an artist’s right to this kind of expression very carefully. The line between offence and defamation as well as abstract, pictorial criticism can be very fine. In the instance of *Sousa Goucha* the Court agreed with the ruling of the domestic courts that it had assessed the situation

⁹⁵ *Mladina D.D. Ljubljana v. Slovenia*, 2014. Application no. 20981/10, para. 45

⁹⁶ *Sousa Goucha v. Portugal*, 2016. Application no. 70434/12. the applicant was a TV host, who is a well-known public figure and had openly admitted to being homosexual a year before the start of these proceedings. The incident causing the applicant to sue was a broadcast of an evening talk show, where the guests of that evening had to take a quiz. The host had asked which the best Portuguese female TV host is. As an answer to this question the host offered four possibilities, the first one was herself, the second and third were two other well-known TV hosts, and the fourth, which was later declared as the right answer, was the applicant – a male homosexual TV host.

⁹⁷ First set out in *Vereinigung Bildender Künstler v. Austria*, 2007. Application no. 68354/01

properly by taking into account the context – the playful style and overall consistent humorous nature of the TV show, also the fact that the claimant was a public figure. One of the differences that comes up in this case is the due regard given to the intent of the defendant, more precisely, lack thereof – the Court took into account that there was nothing indicating intent to attack the applicant’s reputation, and consequently noted that the joke should be viewed in way that “any reasonable spectator of the comedy show” would.

The given cases indicate that the Court has given some consideration to the nature of satire and the importance of the setting in which it has been produced and communicated. What more, it has also noted that the intention of the expresser plays a role. Nevertheless, the explanation lacked depth and focused on the general aspects of freedom of expression. Thus, although recognizing certain elements of satire, it has not set out a specific way to identify satire and therefore has not given special consideration for it, merely a broad understanding that there is such type of creative expression.

The reasonable person

The argument of a “reasonable spectator” in *Sousa Goucha* (above) brings forth the case the Court was referring to in that incident – *Nikowitz and Verlagsgruppe News GMBH v. Austria*. It is the case that set out precedent for the **criterion of the reasonable reader** specifically in regards to issues of materials of satirical nature. Here, the issue at stake was a journalist’s satirical article on nationally well-known athletes.⁹⁸ In the domestic proceedings the first instance court applied the “standard of a hasty and unfocused reader”, which was upheld by the appellate court. They took the view that any reader would assume the article to have at least some factual background and not be entirely exaggerated fiction, which portrayed a respected athlete in a negative light. The courts decided that the claimants’ personal interests

⁹⁸ *Nikowitz and Verlagsgruppe News GMBH v. Austria*, 2007. Application no. 5266/03. This case revolves around the article „Ouch” in the weekly periodical „Profil”, where a journalist had published his satirical piece of work about a well-known athlete. This athlete had injured his leg few weeks prior. The article also mentioned his competitor by attributing to him the words: „Great, now I'll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too”.

outweigh the artistic freedom of the author. This kind of approach shows a disregard towards one of the most prominent characteristics of art – its fictional nature.

The Court, although leaving a wide margin of appreciation to the domestic courts, still conducted its own test to determine whether there is necessity for such interference in a democratic society. The third part of this test is a determining if the interference in question resolves a “pressing social need”. After analyzing and establishing whether the justification of the domestic courts was “relevant and sufficient”, and whether the measures taken were “proportionate to the legitimate aims pursued”, the Court expressed doubts about the justifications of the domestic courts for interfering with the author’s right to freedom of expression.

It argued that **a reasonable person would, in fact, understand the satirical style and fiction** in the text, and even more – that there was an obvious humorous element in it. Although the commonality throughout many of the examined cases so far is the obvious a noticeable element of humor, it is not that obvious what one should view as *apparently* funny. It can be concluded from the wording of the court in these instances – the intent of what the artist is trying to communicate matters to a great extent.

When thinking about the criterion of the reasonable reader, it is a person able to distinguish fact from fiction, an offensive attack from figurative, creative criticism. In this context some interesting ideas regarding fictionality and the extent of damage come to mind. In the German Constitutional Court’s case *Esra* from 2007 the issue at stake was a novel by Maxim Biller where he had described in detail the relationship between him and his former lover – a nationally well-known actress. Although this case does not discuss satire or any of the types or styles of ridicule in art and although the court decided to interfere with the right to freedom of expression, it is relevant because of an inverted proportionality principle formulated in it. What the court argued was that **the greater the level of fictionality in a work, the lesser the possible intrusion or attack on one’s privacy**. The same would be true to the opposite – the less fictional the work as a whole is, the more it is likely to be intrusive to the private and family life of a person.^{99, 100}

⁹⁹ *Esra*, 2007. Case no. 1 BvR 1783/05 - Rn. (1-151). German Constitutional Court, Order of the First Senate

This principle from the German court does not occur in the cases examined in this research. Nevertheless, it would not always be applicable to works of satire, parody and caricature anyways. This approach would serve better if applied to artistic expressions in general. If combined with the “reasonable reader” criterion, this could take away the focus currently set on the person claiming moral damage and intrusion of privacy. Instead, this approach could balance out the evaluation by shifting some of this focus towards the creator’s actual intentions and message, which should matter as much as the interpretation by the affected party.

Although it might seem welcome to see arguments such as the “obviousness” of satirical style and humor, it is a bold assumption to declare what would be obvious to the average reader, if the Court itself does not quite understand the core objective by which to identify satire. Although the outcome in *Nikowitz and Verlagsgruppe News GMBH v. Austria* may very well be the same, a more precise assessment would have been to merely weigh humor as an additional element. Instead the aim in terms of intention and direction should have been viewed – whether the author’s aim was to criticize or ridicule the specific athlete himself or the general idea of rivalry and nastiness of people in competition; if the author intended to cause harm to a person or to warn society of how ugly the aspiration for success can make people. The depth of consideration and argumentation should be more extensive especially in situations when contrasting the domestic court’s opinion.

The work as a whole

As can be observed, in *Bohlen* there was no real insult or criticism present, and in *Sousa Goucha* it was the lack of intent that made the comment inoffensive in the view of the Court. Nevertheless, even in a case where feelings of insult could be considered natural and reasonable, it was still regarded as not enough to justify restriction or punishment, as according to *Grebneva and Alisimchik v. Russia*¹⁰¹. Although most arguments were related to defense of press freedom, special regard

¹⁰⁰ Miller, Russel A. *Literature as Human Dignity: The Constitutional Court’s Misguided Ban of the Novel Esra*. Verfassungsblog. On Matters Constitutional, 2017. Accessed on: <https://verfassungsblog.de/literature-as-human-dignity-the-constitutional-courts-misguided-ban-of-the-novel-esra/>

¹⁰¹ *Grebneva and Alisimchik v. Russia*, 2016. Application no. 8918/05

was given to the form of expression by arguing that even when parts or expressions in a work may sound or seem like personal attacks, the **work has to be viewed and analyzed as a whole.**

In this case the Court concluded that the work in question – a written piece criticizing publically known prosecutors by using offensive slang and language and attributing immoral sexual behavior or attitudes to them – was, first of all, an allegory for their actions and responsibilities before the state, not a literal attack on their private lives. And, secondly, the article was part of a series of written parodies and caricatures contributing to discourse on matters important to the public. Thus, implicitly the court brought forth two new possible criteria for differentiating satirical expressions, parody and caricature from aimed personal attacks – **recurrent works that can be identified as part of a series and a recognizable link between reality and the expression used to create the metaphor or allegory.**

Another fairly recent case, also in 2016, shows that the Court indeed may have been paying more attention to the specific characteristics and purposes of satire, caricature and parody. In *Ziemiński v. Poland (no. 2)*¹⁰² the Court presented an approach where the intent of the author’s work was at the focus of the examination instead of how the affected party perceived the – in this case – written work of satire. The reasoning was that the national court should not have forgotten to assess the necessity of interference within the context and the aim of the author’s work.

The Court argued that the style of the article as a whole should have been taken into account, not just detached phrases, because then the satirical nature and ironic, sarcastic tone would have been apparent. What more, individuals participating in a public debate of general interest should, of course keep in mind the reputation and right of others, but are nevertheless allowed to exaggerate and even provoke – “**a degree of immoderation is allowed**”. A reference to *Vereinigung Bildender Künstler v. Austria* was made, and the assessment was that the author had not overstepped the limits of exaggeration that were allowed.

This judgment was not unanimous, though, as the dissenting opinion of two judges now claimed that the phrases that were used in the piece were obviously

¹⁰² *Ziemiński v. Poland (No. 2)*, 2016 Application no. 1799/07

attacking, vulgar and aimed to insult, therefore not remotely within the limits of acceptable criticism. The translation to the English language had taken away from the emotional load that these words have in the original version. The judges noted that these explanations of Polish semantics were added to the case transcript by the national court, but not taken into account by the Court. Instead of examining the **meaning of the words accompanied by the context**, the Court had replaced the former by the latter. The Court had derogated from the national court's findings without a thorough enough analysis and argumentation, according to the dissenting opinions.

The first case viewed shows a higher regard for satire or, more precisely, artistic expressions. Rightfully, the Court has taken into account one of the purposes of satirical works – the aim to question characteristics, types or values, not to attack individuals as such. In *Ziemiński v. Poland (no. 2)* the Court has broadened its allowance in regards to offensive expressions. However, the dissenting opinions seem to indicate that at the same time it has done so without creating a proper framework for approaching these delicate situations. The dissenting judges identified language that indicates an attack on a person as such, which is not at all the purpose of satire.

2.1.2. Restrictions necessary for the protection of morals

Restrictions on freedom of expression may occur also due to other reasons besides the protection of an individual's private life. Another less often appearing reason for restriction is where it is necessary for the protection of morals. On a certain level these justifications for restriction may seem similar as the focus is set on the protection of individuals. The difference lies mainly in the fact that the protection of morals applies to more than one person. It applies to the more intangible area of morals and values as such.

A case in which the actions did not affect a specific group or group of people and, thus, the issue at stake was primarily the protection of morals, was the very controversial *Sinkova v. Ukraine*¹⁰³ in 2018. First of all, it is controversial as the artist

¹⁰³ *Sinkova v. Ukraine*, 2018. Application no. 39496/11. In this case, the artist together with other members of the artistic group had performed in front of the Eternal Glory Memorial set up for the remembrance of the soldiers, who lost their lives during World War II. The performance was them

claiming their right to expression to be violated did not merely receive a fine or was forced to remove her artwork from a public space – she received a suspended prison sentence and was detained for a period of time.

The artwork in question was a performance by an artistic group at a memorial for soldiers who died during the Second World War who had been known for creating very provocative and shocking art to raise debate on controversial social matters or issues. The national courts considered the artistic performance equivalent to the desecration of a burial place, which was criminally punishable. The Court, interestingly enough, did recognize that the national courts had only taken into consideration the conduct at the burial place without looking at the performance as a whole, including a video and the intentions behind it. Nevertheless, it ignored this approach and argued that eternal flames are an ancient and long standing symbol in many cultures for the remembrance of the deceased or nationally important days in history. Therefore, the artist’s choice of expression was not proper. It notes that “there were many suitable opportunities for the applicant to express her views or participate in genuine protests” and that the message could have been expressed without breaking national criminal law and without insulting the veterans she claimed to defend.

What more, the Court relies on the fact that the national courts convicted the artist for the act of frying eggs over the Eternal Flame, not for the performance as a whole, including the video. In this case there was a dissenting opinion as well – all arguing that the entire judgment had been flawed as it absolutely disregarded the context and form of the artwork, and the fact that art is allowed to offend (as could be observed in the previously mentioned case law as well). What more, the dissenting opinion noted that the majorities’ view about the reasons for the conviction was incorrect, based on what the facts of the case provide.

The local police officers did not pursue the artistic group until after the publication of the video, although they had given them a warning upon discovering them during the performance. This case illustrates the problematic nature and importance of understanding artistic expressions, seeing as the distinction between an

cooking eggs on a frying pan over the eternal flame of the memorial site in front of an unknown soldier’s tomb. The performance was filmed, and published online with text that was added afterwards. The aim was to raise awareness of the wasteful upkeep of a pompous memorial site while not contributing nearly enough to support the surviving veterans.

insult, which is aimed to offend, and a peculiar style of humorous expression is very hard to draw. What it also clearly shows is that separating the tools, styles or mediums used for the creation of an artistic expression from the intent and context of the idea is quite dangerous.

Similarly to the other cases examined so far, a pattern occurs – reflections on the meaning, extent or effect of “offence” are made quite often. However, the Court has not specified what it means by “offensive”. When looking at what the dictionary offers, two relevant options are presented. It can refer to something that is “making attack”, meaning – actively aggressive. What it also can mean is “causing displeasure or resentment”.¹⁰⁴

The “offensiveness” that is referred to and allowed in *Otto-Preminger-Institut v. Austria*¹⁰⁵, is the second type. Merely feeling resentful, upset or annoyed should never be sufficient to justify restriction. Nevertheless, an actively aggressive attack – the first type – on someone’s moral space could be reason for interference. Here, the intentions of the artist come into play.

If one looks at how expression functions, at the process within a person when expressing themselves, one thing is to be noted. As Milton and others have stated – a person needs to express themselves.¹⁰⁶ The focus is on an intellectual and emotional process with a direction – from within the person, directed outwards. Sometimes it is aimed towards a person or a group, sometimes its goal is just to be communicated to the unspecified “outside”.

When the core aim is the reach and impact of a subject at the other end of the expression, the essence of expression is lost. Although the expresser may want to be understood, it is not imperative. What is detrimental to the expresser is, for one, the format of the expression – so that the creator knows that the idea or feeling is

¹⁰⁴ *offensive*. Merriam-Webster online dictionary. Accessed on: <https://www.merriam-webster.com/dictionary/offensive#learn-more>

¹⁰⁵ *Otto-Preminger-Institut v. Austria*, 1994. Application no. 13470/87; *Handyside v. the United Kingdom*, 1976. Application no. 5493/72

¹⁰⁶ Coase, R. H. *Advertising and Free Speech*. The Journal of Legal Studies 6, no. 1, 1977, page 3

“dressed” in the way they are experiencing it. Secondly – the shift from inside to outside^{107, 108}

Therefore, what is lost in the Court’s approach is the delicacy of the human experience. It is natural that people have different levels of strength and tolerance of criticism.¹⁰⁹ Nevertheless, that should not be the responsibility of the creator of valid expression, unless the intention to harm another was present.

2.2. Restrictions necessary to maintain the authority and impartiality of the judiciary

Protection of judicial authority has also been a reason for limiting the right to freedom of expression in satire. The judgment rendered in *Prager and Oberschlick v. Austria* in 1995¹¹⁰ shows that special regard was given to the status of judges. The domestic courts argued that the satirical article in question was defamatory as judges hold a special position in society. This gives them a higher level of responsibility and therefore asks for an untouched reputation. The author of the article had criticized a number of judges, but only one raised the issue to the court level.

Although this case could have been argued through the angle of the necessity to maintain judicial authority which is also enshrined in the second part of article 10, the Court did not do this. Instead it viewed this case in light of protection of the personal rights of others. That may be due to the reason that principles and tests for determining the necessity to protect the personal rights of others have been established through a higher number of case law. These were still applicable in the following case, which is also one of the earlier cases within the scope of this research, thus, the case law was not as developed yet. Also, the protection of individual’s right

¹⁰⁷ 1996, Case 1 BvR 2000/96, Constitutional Court, Order of the First Senate,. In this German case an entertainer was arguing that his performances were artistic expressions. The court did not agree as it found that the primary aim of expression is not the transmission of a message, but the movement of an idea or intellectual creation to the outside. Thus, the main aim should not be to reach a communicative goal between the expresser and a receiver.

¹⁰⁸ *expression*. Merriam-Webster online dictionary. Accessed on: <https://www.merriam-webster.com/dictionary/expression#h1>

¹⁰⁹ Chaturvedi M, Chander R. *Development of emotional stability scale*. Ind Psychiatry J., 2010. „Threshold represents the sensitivity of emotional response, i.e., whether or not the individual experiences chaotic emotions (e.g., upset, anxiety, panic) easily. From the perspective of evolutionary aspect, affect is an indicator attracting intentions on the adaptiveness of behaviors.”

¹¹⁰ *Prager and Oberschlick v. Austria*, 1995. Application no. 15974/90

is at the core of the purpose of the Convention as such, possibly making it a stronger basis for argumentation.

Key ideas to ensure a proper balance of free expression in a democratic society had been established already, however, it had not been argued often yet, whether satire and similar forms of artistic expressions could be considered privileged. As a result, the Court was not unanimous in its decision - it was in favor of protecting the judge's reputation merely by five votes to four.

The dissenting opinion argued that the court's approach was incomplete and the test for determining defamation – unacceptably superficial. Assessing “malicious intent” by merely looking at the wording of the expression and by inspecting separate parts of an expression without context could not be enough to provide a proper balancing of rights. In order to do that, not only the impact on the affected has to be assessed, but also the intent and purpose of the author's conduct. The dissenting opinion indicates another explanation for the Court's approach, of which it has been accused in another case analyzed in this research¹¹¹ - the paraphrasing of the domestic court's arguments. As the domestic court's approach was to argue defamation, the Court may have simply taken the same line of evaluation.

The motif of the author's intention and the expression within context is reoccurring, which indicates the consistent elements in the Court's case law. Nevertheless, already in this somewhat early case, a dissenting opinion accuses the Court of a superficial analysis.

2.3. Article 10 and the right to association

Often intertwined with or set in the background of the right to freedom of expression other provisions and fundamental rights come forth. For example, in *Palomo Sánchez and Others v. Spain*¹¹² the issue at stake was still the damaged reputation and honor of another person, with the difference that it happened in the context of employment relationships in a trade union. Thus, the Court claimed to examine the right to freedom of expression in light of article 11.

¹¹¹ *Lindon, Otchakovsky-Laurens and July v. France*, 2007. Application no. 21279/02 and 36448/02

¹¹² *Palomo Sánchez and Others v. Spain*, 2018. Application no. 28955/06 28957/06 28959/06

In itself the case was similar to the previously examined as there was the usual determination of whether the expressions remained in the limits of what was acceptable as criticism or would be classified as offensive and attacking. What the court did not take into account was the fact that this social commentary regarding an employer was a cartoon, and an ironic one at that. What more, the Court examined the expression merely in the context of labor relations, but not in light of freedom of assembly and association, as the dissenting opinion from four judges stated.

They proposed that freedom of expression in the context of trade unions should also be approached similarly as media freedom, because „a function similar to the “watchdog” role of the press is performed by a trade union, which acts on behalf of the company’s workers to protect their occupational and employment-related interests”, thus, the special status extended to media should also be afforded to trade unions, similarly as in *Vides Aizsardzības Klubs v. Latvia* in 2004.

The dissenting judges also emphasized that the court did not even take notice of the fact that the cartoon on the cover of the trade union’s newsletter was, although tactless and offensive, still obviously satirical, thus, artistic material. By ignoring this, the Court gave an impression that it grants freedom of expression in trade unions a lower protection than in cases of artistic expression in general. In this case, the right to freedom of expression via art did not have to be weighed against other rights, but viewed in light or together with the right to association, in that way, possibly, creating a wider scope of permission. This case indicates that artistic expression today is viewed differently as in the cases from the 90’s. While the concepts and reasoning in regards to art are becoming wider and more often applied, they are also becoming more complex.

2.4. Article 10 and freedom of religion

On the aspect of religion, it is necessary to establish the two types of cases. Instances like *Murphy v. Ireland* or *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria* regarding the refusal of broadcasting license or advertising band on religious radio stations establish the link between article 10 and article 9, which protects freedom of religion. In these cases the Court reviewed the circumstances and

arguments in light of article 10 only as it is the *lex specialis* in relation to the safeguards in article 9. In *Balsytė-Lideikienė v. Lithuania* or *Ibragim Ibragimov and others v. Russia* the Court viewed both the right to freedom of expression and the right to freedom of religion in correlation of one another.¹¹³ These situations present the same safeguards applied through two separate measures. Thus, the right to freedom of religion in itself contains the right to freedom of expression.

On the other hand, there is the possibility that restriction might be deemed necessary *because* of religious reasons. Thus, the second scenario is the interference with freedom of expression in order to protect religiously rooted rights.

In this research previously the case *Vereinigung Bildender Künstler v. Austria*¹¹⁴ has been mentioned. The subject matter of this case was a collection of visual art, where public figures had been portrayed in sexual poses, described as “grotesque and vulgar”¹¹⁵ by the dissenting opinion. The dissenting judges argued that this kind of expression oversteps the line of what is acceptable under article 10. Among the affected sides in this instance were also religious figures – among many political figures were also personalities such as Mother Teresa, for example. Nevertheless, the Court identified the work to be clearly satirical of nature and held that there was a violation of article 10.

The complete opposite decision was made in the widely discussed controversial case of *E.S. v. Austria*¹¹⁶ where the claimant had uttered public commentary about the Prophet Muhammad¹¹⁷ calling his marital relations pedophilic. This instance is not

¹¹³ *Guide on Article 9 of the European Convention on Human Rights*. Council of Europe, Directorate of the Jurisconsult, 2018, p. 20. Accessed on: https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf

¹¹⁴ *Vereinigung Bildender Künstler v. Austria*, 2007. Application no. 68354/01

¹¹⁵ Ibid. The artwork, as described by the dissenting opinion: „It showed a number of unrelated personalities (some political, some religious) in a vulgar and grotesque presentation and context of senseless, disgusting images of erect and ejaculating penises and of naked figures adopting repulsive sexual poses, some even involving violence, with coloured and disproportionately large genitals or breasts. The figures included religious personalities such as the Austrian Cardinal Hermann Groer and Mother Teresa, the latter portrayed with protruding bare breasts praying between two men - one of whom was the Cardinal - with erect penises ejaculating on her! Mr Meischberger was shown gripping the ejaculating penis of Mr Haider while at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa!”

¹¹⁶ *E.S. v Austria*, 2018. Application no. 38450/12

¹¹⁷ Ibid. Excerpt from the Court’s information note on its case law: „The applicant held seminars with the title “Basic information on Islam” at the right-wing Freedom Party Education Institute. At one such seminar, referring to a marriage which Muhammad had concluded with Aisha, a six-year old, and consummated when she had been nine, she stated inter alia “[Muhammad] liked to do it with children”,

about artistic expressions. Consequently, the reasoning also does not look at this case as satirical expression. The outcome of this case was that the court found no violation of article 10. One might think this gives reason to believe that the court does differentiate and assume more protection for artistic expressions.

The case *Otto-Preminger-Institut v. Austria*¹¹⁸ makes this question very hard to answer. Although many of the principles and arguments mentioned in this research so far has originated from or been based on this particular case, in the end the Court did hold that the domestic courts were right to interfere and seize the film in question. Similarly, in *Wingrove v. United Kingdom*¹¹⁹ the Court extended a wider margin of appreciation to the domestic courts, because of religious sensitivities – sexual and even erotic scenes portraying a sexual relationship between Jesus and Mother Teresa.¹²⁰ Could this be due to the highly influential nature of cinematographic works? After all, protection of morality is one of the legitimate aims set out in article 10.

Some substantive and important arguments can also be found in cases that were never admitted to the Court. Such is the decision in *M'Bala M'Bala v. France*, 2015.¹²¹ In this instance the issue at stake was the conviction of a comedian with the stage name “Dieudonné”.

M'Bala M'Bala was known for his tendency to disguise political activities as comedy in order to direct controversial, if not scandalous public insults towards individuals or groups. This was especially true for insulting people of Jewish origin.

“the thing with Aisha and child sex” and “a 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?”.

¹¹⁸ *Otto-Preminger-Institut v. Austria*, 1994. Application no. 13470/87

¹¹⁹ *Wingrove v. the United Kingdom*, 1996. Application no. 17419/90

¹²⁰ Scenes of the film, as described in the case: [St. Teresa], dressed loosely in a black habit, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing. [...] The second part shows St Teresa dressed in a white habit standing with her arms held above her head by a white cord which is suspended from above and tied around her wrists. The near-naked form of a second female, said to represent St Teresa’s psyche, slowly crawls her way along the ground towards her. Upon reaching St Teresa’s feet, the psyche begins to caress her feet and legs, then her midriff, then her breasts, and finally exchanges passionate kisses with her. Throughout this sequence, St Teresa appears to be writhing in exquisite erotic sensation. This sequence is intercut at frequent intervals with a second sequence in which one sees the body of Christ, fastened to the cross which is lying upon the ground. St Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side. Then she sits astride him, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal, and kisses his lips. For a few seconds, it appears that he responds to her kisses.

¹²¹ *M'Bala M'Bala v. France*, 2015. Application no. 25239/13

At the end of one of his shows the comedian had invited a French academic, who has been convicted for his “negationist and revisionist opinions, mainly his denial of the existence of gas chambers in concentration camps”. During this part of the show he presented him with a make-belief prize, which was given to him by an actor playing the role of a Jew in a concentration camp – a person wearing striped pajamas with a yellow star and the writing “Jew” on them.

After the comedian was charged under the domestic law, he submitted an application to the Court. In turn, it refused to admit this case by arguing that the conduct of the applicant had clearly been an attack on European values:

In the Court’s view, this was not a performance which, even if satirical or provocative, fell within the protection of Article 10 (freedom of expression) of the [Convention], but was in reality, in the circumstances of the case, a demonstration of hatred and anti-Semitism and support for Holocaust denial. Disguised as an artistic production, it was in fact as dangerous as a head-on and sudden attack, and provided a platform for an ideology which ran counter to the values of the European Convention.¹²²

The Court relied on article 17 and noted that the comedian’s aim was to use the right to freedom of expression to undermine fundamental values and ideals of the Convention. It went even further by arguing that even as much as the admission of such case would encourage the *destruction* of the rights and freedoms set out in the Convention.

What one can conclude from these instances is that religious matters have indeed been a sensitive topic for the Court. The reasoning being that the place of religion in each state has historical roots and, thus, the domestic courts should receive a wider margin of appreciation in regards to interference with these cases. Undoubtedly, in cases such as *M’Bala M’Bala* anyone can empathize – the expression on behalf of the comedian is obviously an intentional attack, meant to harm the morality of not only a minority group, but a scarred one at that. Nevertheless, the overall logic seems to also indicate that non-repressed religious groups receive “special treatment” where it might not be necessary.

¹²² *M’Bala M’Bala v. France*, 2015. Application no. 25239/13

Francesca Klug has argued that “freedom of expression must include the license to offend”¹²³, which should be in accordance with what the Court itself has said about shocking content. If a reasonable person would understand the concept of satire and sharp, humorous criticism, then why can religious members of society not? Undoubtedly, it is imperative to allow them exercise their freedom to practice and express their religious beliefs.

In *Mariya Alekhina And Others v. Russia* the scandalous group “Pussy Riot” attempted to perform from the altar in a church their musical piece “Punk Prayer – Virgin Mary, Drive Putin Away”.¹²⁴ Considering Russia’s political behavior and well-known regard for human rights (or lack thereof), the domestic authorities convicted members of this group to a prison sentence of up to two years. The Court found this treatment unjustified as the domestic courts argued the motivation behind the performance as religious hatred. However, in this instance the title of the performance indicated a response to political processes within the country, and there were no indications that there was any intentional offence towards the Orthodox Church. At most, it could be classified as negligent behavior because of the use of religious objects and symbols that are sacred for members of this religion.

The reasoning indicates that the Court protects artistic expressions where they are political and where the restrictions imposed from the domestic authorities have been self-evidently disproportionate. However, this excludes the option for individuals to express criticism towards the church and religious institutions as such, as they are “sensitive” and may be “offended”.

¹²³ Klug, Francesca. *A magna carta for all humanity: homing in on human rights*. London: Routledge, 2015, chapter 6

¹²⁴ *Mariya Alekhina And Others v. Russia*, 2018. Application no. 38004/12

CONCLUSIONS

This research has presented both reoccurring ideas and principles, which indicate certain coherence in the approach of the Court, and a disregard of its own precedent and previous reasoning.

The purpose of freedom of expression has different levels. On the primary, individual level, it is the need for self-fulfillment. It is followed by the search for truth and consequential development, and ultimately – the promotion of democracy and societal participation. At the same time moderate and carefully evaluated restrictions are necessary.

Within the given cases these purposes were, although paraphrased, still considered. The Court has emphasized numerous times that a democratic society needs different opinions and ideas, even when they may be offensive or unfavorable to some. Nevertheless, the most frequent reason for deciding to restrict freedom of expression in the selected cases is precisely because the expression was deemed offensive towards someone. Thus, interference is justified for the protection of private and family life of another.

The Court's three part test is applied to all issues where it is necessary to determine whether the interference with the right to freedom of expression is justifiable. The test is incorporated visibly in the Court's judgments. Nevertheless, there is no indication of any special regard given to satire, parody and caricature.

The doctrine of the margin of appreciation often used by the Court has been rightfully criticized as its application in the analyzed cases is inconsistent and not justified substantially enough.

The Court's approach to satire, parody and caricature is superficial and not nuanced enough. It also indicates that deeper understanding of the particularities of satirical work is lacking. The Court missed the aim of the artwork in most cases, or did not even contemplate it. This was also indicated by several dissenting opinions, which expressed strong opposition and constituted almost half of the votes.

Another reoccurring aspect is the recognition that satire is naturally offensive and ridicules its subjects, but this idea has not been elaborated in depth. Similarly the

aspect of humor was several times presented when supporting the argument that a work is satirical. This should not be a determining characteristic, however, as the main goal of satire is to aim at vices and faults in society and encourage contemplation, promote change. Humor is only the desirable supplement, which helps soften the reaction.

When it comes to religious rights, it is necessary to protect repressed minorities or groups carrying historical “scars”. Nevertheless, the overall logic of the Court seems to provide a special regard for the protection of any religious group, where it may not be necessary. As long as the members of a religious group are allowed to practice their religion without interference, the same should apply to artistic expression. Feelings of offence alone should not be sufficient for restrictions on satire, parody and caricature.

The case law of the Court has expanded over time. There is a pattern of inconsistency as the Court often disregards its precedent. The recognition and allowance of artistic expression has become broader, but not more specific or better grounded, which confirms the hypothesis.

Continuance of this research would be desirable as the work has indicated numerous aspects suitable for a deeper analysis, such as the appreciation of humor or consideration of self-fulfillment in cases regarding freedom of expression. It would also ensure that the limitations of this work because of the restrictions of capacity are overcome. This research may be a valuable point of reference in future investigations of the functioning and efficiency of the Court as well as research on the aspects of artistic freedom.

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