Irreverence Intended? Destabilizing 'Intent' as Determinative in Discourse around Satire at the ECtHR

Hatim Hussain

BCL Candidate, University of Oxford

Sanskriti Sanghi

Assistant Professor of Law, Jindal Global Law School, O.P. Jindal Global University

Humour is undeniably a controversial topic. While principally entertaining, its obscurity and elusiveness have long been at the forefront of juridical challenges at the European Court of Human Rights (ECtHR). Loosely termed as a form of artistic expression with a 'moral edge' to humour, satire ensues a critical complexity for courts to deconstruct due to the perceivable absence of a consistent criteria to adjudicate such cases. More importantly, analyzing satirical intent and its markers has enormously challenged the Court due to the inherent subjectivity prevalent in its interpretation. This article argues the need for the ECtHR to destabilize 'intent' in juridical encounters with satire, while cautioning us against alternatives which replicate the very same shortcomings. By interpreting legal discourse around satire at the ECtHR and interrogating the suitability of prevalent tests and defences pertaining to satirical expressions, we advocate for the emergence of a shared framework within humour regimes to facilitate a relatively better communal understanding of satire and its permissible limits. We also explore the possibility of a transition to the criterion of 'harm' as a relatively operational approach to examining such satirical devices. In cases such as satire where lack of consensus unavoidably leads the Court to open-ended, unsystematic and subjective interpretations, confronting the need for the destabilization of 'intent' will offer crucial lessons in the legal discourse on humour studies, as well as facilitate a relatively more consistent approach to regulating humorous expressions at the ECtHR in the future.

Keywords: Satire; ECtHR; Freedom of Expression; Humour.

1. Introduction

In 2006, when the cultural editor of the Danish newspaper *Jyllands-Posten* commissioned a series of satirical cartoons on Prophet Muhammad,[1] a heated public debate ensued,[2] in both courts and

[1] Giselinde Kuipers, *The Politics of Humour in the Public Sphere: Cartoons, Power and Modernity in the First Transnational Humour Scandal*, European Journal of Cultural Studies, Vol. 14, No. 1, 2011, p. 63.

[2] Asma T. Uddin, *Provocative Speech in French Law: A Closer Look at Charlie Hebdo*, FIU Law Review, Vol. 11,

outside, on the contours of humour as a form of artistic expression as well as the distinctions between its lawful and unlawful usage in regulating freedom of expression. At the European Court of Human Rights ("ECtHR"), corrective humour such as satire has been quite topical in recent times on account of the continuing difficulties of adopting a consistent approach to the interpretation of satirical texts.[3] A prominent metric in the ECtHR's adjudication has been the use of 'intent' as a determinative criterion to assess liability on the basis of Article 10 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")—in such cases, the Court has found it cumbersome to analyze varied subjective elements ordinarily coloring satirical expressions.

This article aims to analyze the prevalence of 'intent' as a criterion in juridical challenges around satire, particularly at the ECtHR which has failed to approach regulation of artistic freedom that embraces satire or political humour consistently. By arguing for an emphasis on fostering an understanding of humour within a shared community as opposed to in the context of the dialectic of expressor's or recipients' intent, this article discusses ways forward for legal scholarship in this field.

The article has been structured in the following manner. It begins initially with a primer on definitional concepts and legal elements of 'satire', and thereafter investigates the existing legal literature on satirical expressions. Subsequently, the article explores the use of intent as a seminal yardstick in the ECtHR's assessment of satirical cases, identifying the fallacies and inadequacies in the dicta of the ECtHR and the false dichotomy in its use of intention as a criterion. Finally, the article concludes with an exploration of the shifts which need to be marked by the ECtHR from contemporary judicial practice in order to bridge the chasms between the expressor(s), recipients, and the Court.

2. Interpreting Discourse around 'Satire' at the ECtHR

While satire has been in use as a common means of expression since times immemorial, defining it has invariably been a complex challenge. Despite numerous differing notions, theorists widely agree on the conception of humour as a product of incongruity (i.e., something out of context, exaggerated, illogical, or unreasonable).[4] Unlike irony, wherein a more complex meaning lurks underneath the surface of the expression,[5] or parody, in which existing works are manipulated for comic effect,[6] which are both forms of humour involving ridicule as a central feature, satire has a 'sharper' edge. The central characteristic of satire, instead, is critique – and the endeavor in employing it as a form of expression is often to denounce a shortcoming in society or an individual by combining

2015, p. 189. See also Roger J. Kreuz, *Charlie Hebdo Shootings Served as an Extreme Example of the History of Attacks on Satirists*, The Conversation, 15 September 2020. https://theconversation.com/charlie-hebdo-shootings-served-as-an-extreme-example-of-the-history-of-attacks-on-satirists-145527 (22 May 2022); *Charlie Hebdo: Magazine Republishes Controversial Mohammed Cartoons*, BBC News, 1 September 2020. https://www.bbc.com/news/world-europe-53985407 (22 May 2022); Niaz A. Shah, *Charlie Hebdo: Testing the Limits of Freedom of Expression*, Muslim World Journal of Human Rights, Vol. 14, 2017, p. 83.

[3] Alberto Godioli, *Cartoon Controversies at the European Court of Human Rights: Towards Forensic Humor Studies*, Open Library of Humanities, Vol. 6, No. 1, 2020, p. 22.

[4] Henry W. Cetola, *Toward a Cognitive-Appraisal Model of Humor Appreciation*, De Gruyter Mouton, Vol. 1, 1988, p. 245.

[5] Daniel Chandler & Rod Munday, *Irony, A Dictionary of Media and Communication,* Oxford University Press, 2011. https://www.oxfordreference.com/view/10.1093/acref/9780199568758.001.0001/acref-9780199568758-e-1446 (22 May 2022).

[6] Conal Condren, Jessica Milner Davis, Sally McCausland, & Robert Phiddian, *Defining Parody and Satire: Australian Copyright Law and its New Exception*, Media and Arts Law Review, Vol. 13, No. 3, 2008. pp. 273-292.

ironic humour with criticism.[7] As a result, not all satirical expressions may incite laughter as humour is merely used as a conduit to expose a prevailing immorality or lacuna in a social or political context,[8] and such expressions may often be viewed as irreverent. Legally, ECtHR jurisprudence has defined satire as a "form of artistic expression and social commentary (which), by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate".[9]

Notably, extensive jurisprudence on the lawfulness of satirical expressions exists at the ECtHR. Under the ECHR, satirical expressions are regulated under Article 10 of the Convention,[10] which grants a broad spectrum of protection to information or ideas that are not only received favourably but also those which tend to "shock, offend, or disturb any section of the population".[11] Article 10, however, enlists a threefold criteria to enforce restraints on the fundamental right to expression, whereby a restriction is (a) required to be lawful, (b) must pursue a legitimate aim[12] and (c) be necessary in a democratic society. As indicated in *Bladet Tromso and Stensaas v. Norvège*, to assess the necessity of the restriction, the interference is required to be proportionate to the legitimate aim pursued,[13] respond to a 'pressing social need', and be 'relevant and sufficient' to justify the restriction.[14] The ECtHR usually allows a certain margin of appreciation to national authorities in identifying actions to be adopted to limit freedom of expression, especially in cases involving artistic representations which have a higher propensity for contextual determinations.[15]

In analysing satirical expressions, the ECtHR primarily employs 'intent' as a governing criterion to

---

[7] Margaret A. Rose, *Pictorial Irony, Parody, and Pastiche. Comic Interpictoriality in the Arts of the 19th and 20th Centuries*, 1st edn., Bielefeld Aisthesis Verlag, 2020, pp. 27-55.

[8] *Satire: Oxford English Dictionary* https://www.oed.com/viewdictionaryentry/Entry/171207 (22 May 2022).

[9] *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 33.

[10] Art. 10 ECHR "*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*"

[11] See, for instance, *Handyside v. The United Kingdom* (App. No. 5493/72) ECtHR (1976); UN Human Rights Committee, 'General Comment No. 34, Article 19: Freedom of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34.

[12] These elements, listed under Art. 10 para. 2 include: national security and territorial integrity, public safety and the prevention of disorder or crime, the protection of health, the protection of morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. See, for instance, Toby Mendel, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, Centre for Law and Democracy. https://rm.coe.int/16806f5bb3 (22 May 2022).

[13] This requires a determination as to whether the aim of interference was proportionate to the means used. See, for instance, *Thoma v. Luxembourg* (App. No. 38432/97) ECtHR (2001) para. 48.

[14] Notably, the reasons for interference must be convincing. See, for instance, *Cumpana and Mazare v. Romania* (App. No. 33348/962004) ECtHR (2004) para. 90. See, for instance, *Bladet Tromso A/S and Stensaas v. Norway* (App. No. 21980/93) ECtHR (1999) para. 29; *Sunday Times v. United Kingdom* (App. No. 6538/74) ECtHR (1979) para. 62; *Feret v. Belgium* (App. No. 15615/07) ECtHR (2009). See also Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: Handbook for Legal Practitioners*, CoE, 2017. https://edoc.coe.int/en/fundamental-freedoms/7425-protecting-the-right-to-freedom-of-expression-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners.html (22 May 2022).

[15] 'Margin of appreciation' allows a degree of discretion to the State, specifically in areas where the ECHR secures national guarantees of human rights. See, for instance, *Müller and Others v. Switzerland* (App. No. 10737/84) ECtHR (1988) (where the Court declared that where a conflict arises between two fundamental rights under ECHR, a wide margin of appreciation is available to the states to enjoy as regards the protection of morals).

determine whether a restriction is necessary in a democratic society. While the final decision of the Court is subject to a range of factors which are common to all cases before the ECtHR, including those governed by 'humour regimes', the distinctive nature of humorous expressions complicates how these factors are handled by the judges. While we shall delve into this in greater detail in the forthcoming segments of the article, it is imperative for us to provide an overview of the journey a satirical expression traverses through the ECtHR.

First, all forms of speech, regardless of the medium or content, are permissible under the ECHR, as detailed in *Handyside v. UK.*[16] This includes cultural, political, and social ideas, opinions, value judgments, critiques and other statements which are not necessarily based on truth. Given satire's inherent features of exaggeration or distortion of reality,[17] a greater latitude is afforded in cases pertaining to satire to accord a higher level of protection to these expressions.[18] However, this has also led the Courts to evolve a highly subjective criteria within the jurisprudence of Article 10. Remarkably, the ECtHR has also not specified the manner or the instances in which satirical expressions might fulfil these criteria, invoking complexities for the Court in respect of conceptualizing and enforcing uncertain and unforeseeable standards to deal with such instances.[19] On other fronts, the court then examines if the interference pursues a legitimate aim designed to protect other fundamental rights or serious public offences. Finally, a major emphasis is placed on the 'necessity test' outlined above—to identify if the interference with the rights protected is no greater than is necessary to address a pressing social need.

Typically, an application of the principle of *stare decisis* would require the ECtHR to adopt a consistent approach to the determination of cases pertaining to satire.[20] However, a failure on the part of the Court to identify the particularities of humorous expressions, to develop a common understanding of the application of certain criteria, and to recognize its inconsistencies has led to such expressions witnessing a rather mercurial attitude by the Court—often oscillating on polarizing fronts with respect to their interpretation under Article 10. This is clearly evidenced by the ECtHR's practice. For instance, while the Court in *Vereinigung Bildender Künstler v. Austria* reaffirmed the value of pluralism and the exchange of opinions and ideas[21] in democratic societies and contributed

[16] *Handyside v. The United Kingdom* (App. No. 5493/72) ECtHR (1976).

[17] With respect to this, we can find variations of satirical expressions in the case law of ECtHR, for instance a painting in *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 33; a sign with a political message in *Eon v. France* (App. No. 26118/10) ECtHR (2013) para. 53; an advertisement in *Bohlen v. Germany* (App. No. 53495/09) ECtHR (2015) para. 50; a fictitious interview in *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007) para. 18; a caricature in *Leroy v. France* (App. No. 36109/03) ECtHR (2009); and a press article in a local newspaper in *Ziembiński v. Poland (no. 2)* (App. No. 1799/07) ECtHR (2016) para. 45.

[18] For example, in the case of *Nikowitz,* the Court had declared that despite the article written in a satirical style and conveyed as a humorous commentary, it nevertheless sought to make a crucial contribution to an issue of general interest (in this case being a society's attitude towards a sports star). In another case of Klein, the article criticized the Archbishop of the Roman Catholic and the fact that it was framed as an intellectual joke weighted favourably in a decision acquitting the journalist. See, for instance, *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007).

[19] Alix de Bergeyck de Bergeyck, *Freedom of Artistic Expression, but at What Cost?: Where does the ECtHR draw the line between satire and offensive speech?* (idEU, 14 October 2020); Aoife O'Reilly, *In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights*, Trinity College Law Review, Vol. 19, 2016, p. 234.

[20] Patricio A. Fernández & Giacomo A. M. Ponzetto, *Stare Decisis: Rhetoric and Substance*, The Journal of Law, Economics, and Organization, Vol. 28, 2012, p. 313; Paula Feldmane, *Restrictions on Satire, Parody and Caricature in the Case Law of the European Court of Human Rights*, Riga Graduate School of Law Thesis, 2019. https://dspace.lu.lv/dspace/bitstream/handle/7/50064/Feldmane_Paula.pdf?sequence=1&isAllowed=y (22 May 2022).

[21] See, for instance, *Otto-Preminger-Institut v. Austria* (App. No. 13470/87) ECtHR (1994); *Handyside v. The United Kingdom* (App. No. 5493/72) ECtHR (1976).

to the development of jurisprudence on the defences available to expressors in legal challenges to works of satire, it has been more inconsistent in certain subsequent cases and hesitant to repeat its findings where a particularly challenging contest arises in interpreting satire.

Numerous precedents at the ECtHR evidence this inconsistency. For instance, in *Leroy v. France*, the Court declared a cartoonist's depiction of a drawing on the 9/11 twin-tower attacks with the caption "we have all dreamt of it… Hamas did it" as justifying the 'use of terrorism'.[22] In *Ehrmann and SCI VHI v. France*, an artistic expression of placing a mural in the proximity of a historical monument was held by the Court as violative of heritage protection rules and the restriction was justified to preserve the 'distinctive characteristic' of the historical area.[23] Finally, in *Karttunen v. Finland*, a prohibition on an artist's display at a public art gallery of photographs of young women in sexual poses was upheld as a legitimate restriction on artistic freedom under Article 10 by the ECtHR.[24]

While the irregularity in the aforementioned cases has been detrimental to the development of explicit protections against satirical expressions, the ECtHR has inevitably also moved to the usage of *contextual* defences that allow a higher scope for subjectivity—thus, making the determination even more arbitrary. A wide count of dissenting opinions in most cases on satire also reflects the lack of nuance in an understanding of satirical works as well as the preconceived notion deployed by the Court that all satire is naturally offensive and ridiculous,[25] without elaborately detailing in depth on the markers of satire or the applicable defence in such cases.

3. Deconstructing 'Satirical Intention' under Article 10 of the ECHR

In cases which investigate satirical expressions, intention seems to have a significant influence on the reasoning of the ECtHR and may perhaps be regarded as the only consistent criteria in distinguishing a statement of fact from a value judgment.[26] An expression which is marked by clear indicators of satirical intent is thus afforded a higher degree of protection as against expressions wherein such intention is absent. Furthermore, the presence of intent is also a crucial indicator of other parameters—such as the aim of the expression, as to whether the statement is in public interest or a gratuitous offence, and its intended effects, as to whether it is a threat to public peace or damages the reputation of the individual.

While the presence of clear intention to produce a satirical work influences decision-making at the ECtHR, determination of the satirical character as well as its intended meaning is highly subjective and often contradictory.[27] From a juridical standpoint, it is highly problematic for the Court to re-

[22] *Leroy v. France* (App. No. 36109/03) ECtHR (2009) para. 42.

[23] *Ehrmann and SCI VHI v. France* (App. No. 2777/10) ECtHR (2011).

[24] *Karttunen v Finland* (App. No. 1685/10) ECtHR (2011).

[25] Feldmane 2019, p. 21.

[26] Godioli 2020, pp. 10-12. See, for instance, *Kuliś and Różycki v. Poland* (App. No. 27209/03) ECtHR (2010) para. 38; *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 33; *Palomo Sánchez and Others v. Spain* App. Nos. 28955/06, 28957/06, 28959/06, and 28964/06) ECtHR (2011) Joint Dissenting Opinion of Judges Tulkens, Björgvinsson, Jočienė, Popović, and Vučinić para. 11; *Leroy v. France*, (App. No. 36109/03) ECtHR (2009) para. 43.

[27] See, for instance, Godioli 2020, pp. 10-12. As Godioli indicates, direct interpretation of the 'intention' in a satirical text usually leads to disagreements between the majority opinion and minority dissent, especially where presence of a clear humorous intent could not be perceived or reconstruction of the purpose or specific message of the text is unclear. With respect to first, for instance, the majority opinion in *Vereinigung Bildender Künstler* and the dissenting opinion

construct an interpretation in cases where the expressor intended for a satirical work to have a *specific* connotation, and especially in circumstances where a high degree of implicitness is involved. A corollary concern which arises is that of the ascription of a particular intent to the expressor by the Court, more often so in relation to satirical expressions which have effects such as the incitement of violence or the promotion of hate speech, which may not have been intended at all. The Court has accompanied the test pertaining to the expressor's intent with the test of the 'reasonable/ average' recipient(s), [28] a test which entails the determination of who the audience is as well as a reconstruction of their perception of the satire.

Due to the subjectivity in the reception and appreciation of humour, there is an inevitable margin of it which trickles into the ECtHR's determination of such cases. Adjudication on the basis of a reconstruction of the expressor's intent or that of the perception of the recipients presents certain pitfalls in the ideation of the tests as well as in their implementation. It also allows for the creation of a false dichotomy between the expressor's and the recipients' intent, which detracts from the assessment of the permissibility of the satirical expression. This segment, thus, highlights the tensions involved in the use of 'intent' as an interpretative criterion and the ways in which it renders the task of deconstructing satire more cumbersome, at least on three levels: (i) the message the author intended to convey through the expression, (ii) the successful signaling of such intention by the text, and, (iii) the use of differing lenses of interpretations by the audience in the determination of liability.

4. Interrogating 'Intent' as a Criterion to Adjudicate upon Satirical Expressions

4.1. Interrogating the Pitfalls Inherent in the Formulation and Use of a Criterion such as 'Intent'

As might increasingly be evident from our discussion, the adjudication of satirical expressions at the ECtHR has recurringly been a site of intellectual contestations. One of the reasons for this is the departure marked by humorous expressions from the "rules of 'serious' discourse",[29] as a result of which the relationship between the expression and truth is significantly altered[30] in juridical encounters with humour in juxtaposition to in 'serious' discourse. This specificity of 'humour regimes' complicates[31] how the criteria used by the ECtHR as adjudicatory practice are handled in discourse around satire. These criteria, among others, include an emphasis on the expressor's intent as conveyed by the presence of certain clear markers within the text.[32] The ascertainment of

---

of Judge Loucaides disagreed on the satirical intent of the object in question (i.e., a painting). See also *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) Dissenting Opinion of Judge Loucaides para. 33.

[28] *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007).

[29] Kuipers 2011, p. 69. "*Humour regimes can be seen as specific discursive regimes governing a non-serious and irreverent communicative mode that does not always obey the rules of 'serious' discourse. The relation of humorous utterances to truth differs from normal discourse: they do not have to describe 'real' beliefs or intentions. As a result, things said or done in jest can be more insulting and degrading than normal communication*."

[30] Michael Joseph Mulkay, *On Humour: Its Nature and Place in Modern Society*, Polity Press, 1988.

[31] Godioli 2020, p. 18.

[32] Ibid. See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 33; *Leroy v. France* (App. No. 36109/03) ECtHR (2009) para. 43; *Kuliś and Różycki v. Poland* (App. No. 27209/03) ECtHR (2010) para. 38; *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015) paras. 54, 49; *Ziembiński v. Poland (no. 2)* (App. No. 1799/07) ECtHR (2016) para. 44; *Dickinson v. Turkey* (App. No. 25200/11) ECtHR (2021)

the 'intent' or 'goal' of the expressor is consequently influential for the decision of the Court on the aims and nature of the expression.

The use of the expressor's intent as a criterion is, however, erroneous given that satire is characterized by an incongruity which produces "a conflict between what we perceive and our expectations".[33] Moreover, the message contained within satire is often latent or covert, as opposed to explicit and clear,[34] which renders the expression open to a multiplicity of interpretations of the 'intent' of the expressor.[35] Some scholars have extended this argument to emphasize that no one, including the expressor, can conclusively decide what the 'real' intention of a satirical construction is as the non-serious nature of its engagement with its audience provides the possibility of deniability of certain interpretations as well as the affirmation of others[36]—considerations which may or may not have actually played a part in the process of formulation/creation.

The use of 'intent' as a criterion to adjudicate upon satirical expressions despite these lacunae has paved the path for a more worrying phenomenon. While the ECtHR guarantees that the freedom of expression extends to ideas which 'shock, offend, and disturb',[37] the influential charge exerted by the 'intent' of the expressor on the determination of the aims and nature of the expression[38] has resulted in the form-fitting of permissible 'shocking' ideas. This is because higher protection is conferred by the Court on expressions which are marked by clear indicators of satirical intention,[39] jurisprudence which is problematic due to such indicators being a rarity in satire due to its characteristics of latency and incongruency. Moreover, the failure to showcase such 'intent' has urged the Court to classify the expression as gratuitously offensive and to justify its curtailment due to its incapability to contribute to democratic debate.[40]

Such *dicta* showcases how the use of 'intent' as a criterion in the adjudication of satire can have a resounding impact on the ideas which are ascribed value as contributory towards democratic de-

---

para. 52.

[33] John Morreall, *Funny Ha-Ha, Funny Strange, and Other Reactions to Incongruity* in John Morreall (Ed.), *The Philosophy of Laughter and Humor*, SUNY Series in Philosophy, 1986; Laura E. Little, *Just a Joke: Defamatory Humor and Incongruity's Promise,* Southern California Interdisciplinary Law Journal, Vol. 21, 2011, p. 103.

[34] Godioli 2020, pp. 22-23; Little 2011, p. 105.

[35] Godioli 2020.

[36] Kuipers 2011, p. 71.

[37] *Handyside v. The United Kingdom* (App. No. 493/72) ECtHR (1976) para. 49; *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 26; *Palomo Sánchez and Others v. Spain* (App. Nos. 28955/06, 28957/06, 28959/06, and 28964/06) ECtHR (2011) Joint Dissenting Opinion of Judges Tulkens, Björgvinsson, Jočienė, Popović, and Vučinić paras. 10-11. "*At no point does the Court examine in concreto whether the cartoon and articles overstepped the bounds of remarks that "shock, offend and disturb" and that are protected by Article 10 of the Convention as an expression of pluralism, tolerance and broadmindedness, without which there is no democratic society. It is precisely when ideas shock and offend that freedom of expression is most precious. 11. As regards the cartoon on the newsletter's cover, it is a caricature, which, while being vulgar and tasteless in nature, should be taken for what it is – a satirical representation*."; Aistė Marija Macaitė, *Finding Humour in Human Rights*, KU Leuven European Master's Degree in Human Rights and Democratisation, 2017. https://repository.gchumanrights.org/bitstream/handle/20.500.11825/529/Macaite.pdf?sequence=1&isAllowed=y (22 May 2022).

[38] Godioli 2020, pp. 11-12.

[39] Ibid.

[40] O'Reilly 2016, p. 241; Godioli 2020, pp. 11-12.

bate as well as self-development and the search for truth,[41] and their instrumentalist orientation.[42] By extension, it acts as the doorway which permits entry to certain notions of 'progress',[43] notions which cannot be divorced from the predilections of judges who are a product of their class and culture,[44] while relegating others to the "imaginary waiting room of history".[45] Furthermore, the imbrication between the criterion of 'intent' and that of the classification of the aims and nature of the expression lends itself to an implicit right 'not to be offended',[46] which is to be balanced against the exercise of free speech and expression, through the lens of 'subjective emotional impact' as opposed to 'objective damage' caused by the expression.[47]

In conjunction to the criterion of the 'expressor's intent', the ECtHR has also relied upon the doctrine of the 'reasonable/average' recipient of the expression[48] in cases pertaining to satire. The use of this test by the Court has oscillated between two ends of a spectrum. Either the recipient is postulated[49] as an 'all-understanding ideal' whose perception of the 'intent' underlying the expression mirrors that of the expressor's as determined by the Court, or she's characterized as an irrational, ill-equipped, or unfocused recipient[50] for whom the 'satirical intention' of the expressor can be confused for the truth. Both these constructions of the recipient, in their intersection with the 'explicitness' of the 'intent' of the expressor,[51] results in her distinctiveness being subsumed into a seemingly objective legal standard. This transpires, additionally, without an explanation from the Court of the manner in which it ascertained the 'audience' for the expression. Moreover, in the latter of the two constructions, a dialectic is also produced by the Court between the expressor's intent and the decipherability of such intent by the recipient.

---

[41] O'Reilly 2016, p, 241; Tom Lewis, *At the Deep End of the Pool: Religious Offence, Debate Speech and the Margin of Appreciation before the European Court of Human Rights* in Jeroen Temperman and András Koltay (Eds.), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge University Press, 2017; Alberto Godioli, *Irony in Court: Marina v. Romania*. Strasbourg Observers, 17 August 2020. https://strasbourgobservers.com/2020/08/17/irony-in-court-marina-v-romania/ (22 May 2022).

[42] Lewis 2017.

[43] *Otto-Preminger-Institut v. Austria* (App. No. 13470/87) ECtHR (1994) Joint Dissenting Opinion of Judges Palm, Pekkanen, and Makarczyk para. 3.

[44] Lennard J. Davis, *Bending over Backwards: Disability, Narcissism, and the Law*, Berkeley Journal of Employment & Labor Law, Vol. 21, 2000, p. 194.

[45] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, Princeton University Press, 2000.

[46] Helen Fenwick & Gavin Phillipson, *Media Freedom under the Human Rights Act*, Oxford University Press, 2006, p. 552; O'Reilly 2016, p. 245.

[47] Lewis 2017; Godioli 2020, p. 20; Bergeyck 2020; *Otto-Preminger-Institut v. Austria* (App. No. 13470/87) ECtHR (1994) Joint Dissenting Opinion of Judges Palm, Pekkanen, and Makarczyk para. 6.

[48] Godioli 2020, pp. 20-21. See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) Dissenting Opinion of Judge Loucaides; *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007); *Féret v. Belgium* (App. No. 15615/07) ECtHR (2009); *Sousa Goucha v. Portugal* (App. No. 70434/12) ECtHR (2016).

[49] Wolf Schmid, *Implied Reader,* The Living Handbook of Narratology, 27 January 2013. https://www.lhn.uni-hamburg.de/node/59.html (22 May 2022). See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) Dissenting Opinion of Judge Loucaides; *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007); *Kuliś and Różycki v. Poland* (App. No. 27209/03) ECtHR (2010); *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015); *Dickinson v. Turkey* (App. No. 25200/11) ECtHR (2021).

[50] See, for instance, *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007); *Féret v. Belgium* (App. No. 15615/07) ECtHR (2009); *Marina v. Romania* (App. No. 50469/14) ECtHR (2020). See also Godioli, *Irony in Court: Marina v. Romania*, Strasbourg Observers, 17 August 2020. https://strasbourgobservers.com/2020/08/17/irony-in-court-marina-v-romania/ (22 May 2022).

[51] Feldmane 2019.

Pivotally, the employment of the test negates both, the concerns with a conclusive ascertainment of the intent of the expressor as well as the subjectivities[52] inherent in the perception and appreciation of satire. While the former has been delved into in the foregoing paragraphs, the latter is due to the interpretative difficulties[53] faced by a recipient encountering the incongruous features of satire which require her to find and replace the superficial message with an underlying message from among a host of possibilities. The reliance on this standard also acts as an impediment to the realization that humour is context-dependent,[54] and that reasonability is a concept which is culturally-determined[55]—which increase the latitude for multiple and differing interpretations among readers, and the possibility of the misalignment of these interpretations with the 'expressor's intent' as determined by the Court. In a digitally globalized space, this is even more critical as the absence of boundaries may blur the distinction between satire and offensive speech in the absence of commonly understood norms or a general consensus on its markers.

It also highlights the risks[56] that such a standard carries in the exercise of balancing the freedom of expression of the expressor with the rights claimed to be infringed by the recipients, when it is difficult to fathom how the Court can possibly foresee and account for which expressions can be (mis) interpreted as offensive regardless of the intention of the expressor. This is all the more pertinent to consider given that the threshold of sensitivity of certain individuals may differ as a result of factors pertaining to religion, sexuality, politics, economics, social norms, convictions and beliefs, etc. Thus, given the multiple ways in which the reconstruction of the expressor's intent and/or that of the perception of certain recipients of the expression negate the complexities of definitive ascertainments in humorous expressions, it can be argued that decision-making grounded in the use of these tests needs to be reassessed.

4.2. Interrogating the Unsystematic and Inconsistent Application of the Criterion of 'Intent'

It is interesting to note that despite the plethora of concerns about 'clear markers' of 'satirical intent' being used as a criterion to adjudicate disputes and balance competing interests, it is one of the most frequently used criterion at the ECtHR.[57] As we note earlier, it is also considered to exert significant influence on the reasoning of the ECtHR as well as the domestic courts over which the ECtHR sits as a supra-national court in supervision.[58] However, the unsystematic and inconsistent ways[59] in which the criterion has been applied consistently points towards a troubling paradox, and

[52] Little 2011, p. 129; Bergeyck 2020.

[53] Little 2011, p. 104.

[54] Tony Veale, *Figure-Ground Duality in Humour: A Multi-Modal Perspective*, Lodz Papers in Pragmatics, Vol. 4, No. 1, 2008, p. 73; Little 2011, pp. 127, 107; Will Self, *A Point of View: What's the point of satire?*, BBC News, 13 February 2015. https://www.bbc.com/news/magazine-31442441 (22 May 2022); Bergeyck 2020.

[55] Kuipers 2011, p. 68; Godioli 2020, p. 21.

[56] Where two fundamental rights under ECHR are required to be balanced, for instance the right of the applicant to present his (controversial) views and the freedom of thought, religion or conscience of the other, and where neither has an authority over the other, there is usually a wider margin of appreciation afforded to national authorities. This may result in more scope for subjectivity in national contexts in the EU. See, for instance, *Müller and Others v. Switzerland* (App. No. 10737/84) ECtHR (1988).

[57] Godioli 2020, pp. 10-12; Bergeyck 2020.

[58] Bergeyck 2020.

[59] Godioli 2020, p. 4; Anna Zaltsman, *Five Categories Defined, No Consistency Found: ECHR Convention and Case Law on Freedom of Artistic Expression,* CEU eTD Collection. http://www.etd.ceu.edu/2019/zaltsman_anna.pdf (22 May 2022); Bergeyck 2020.

has resulted in the imposition of 'uncertain and unforeseeable standards'[60] on the parties to a dispute before it through the vehicle of objective legal doctrines. Importantly, the uncertainty is not limited to the parties to the dispute, and pervades the reasoning of the Court as well.[61] This manifests in certain ways which consistently recur across the corpus of cases pertaining to satire at the ECtHR.

The first of these ways is the disagreement between judges at the ECtHR, as reflected by the divide between the majority and the minority, particularly on the detectability of clear markers of 'intent' as well as the aim/message of the impugned expression.[62] It has been found that such disagreements are significantly more frequent in cases pertaining to humour at the ECtHR[63] than in other cases. This trend has been exemplified by numerous decisions[64] in which the dissent has distinguished itself from the 'satirical intent' identified by the majority. For instance, in *Ernst August von Hannover v. Germany,*[65] while the majority held that the 'Lucky Strike' advertisement was intended to be satirical and was also capable of contributing to public interest,[66] the dissent found the advertisement to be commercial in its purpose and intended to mock Hannover and assert that he was violent.[67]

The second of these ways is the controversy around and contestations between national courts and the ECtHR about the presence of 'satirical intent' in the expression. This has been exemplified by numerous cases[68] as well, with the recurring theme in each of them being the differing interpretations of the 'intent' underlying the expression from court to court, and as a consequence of the influence of this interpretation upon the aims and nature of the expression, on its classification. For instance, in *Vereinigung Bildender Künstler v. Austria,*[69] while the Vienna Court of Appeal held that the painting was "not intended to be a parable or even an exaggerated criticism conveying a basic message",[70] the ECtHR held that the "portrayal amounted to a caricature of the persons concerned using satirical elements".[71] Similarly, in *Eon v. France,*[72] in stark opposition to the determination by the domestic courts of the use of the phrase *'casse toi pov'con'* as intended to cause offense, the ECtHR held that the applicant's intention was to "level public criticism of a political nature at the

[60] O'Reilly 2016, p. 240.

[61] Feldmane 2019.

[62] Godioli 2020, pp. 18-19.

[63] Ibid. "*The particularly problematic nature of humor-related cases is confirmed by the simple observation that, out of the 10 rulings under examination, seven feature separate opinions by one or more judges* (*six dissenting and one concurring*)*; and although the corpus is not statistically representative in the broader context of Article 10 rulings, this quantitative finding is remarkable in itself, as it suggests a significantly higher frequency of separate opinions in humor-related cases compared to the ECtHR average of 53%* (*Franck, 2019; an advanced search via the HUDOC database in January 2020 yielded a similar result, with 2317 separate opinions out of 4129 cases*)."

[64] See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007); *Leroy v. France* (App. No. 36109/03) ECtHR (2009); *Palomo Sánchez and Others v. Spain* (App. Nos. 28955/06, 28957/06, 28959/06, and 28964/06) ECtHR (2011); *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015).

[65] *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015).

[66] Ibid. paras. 54, 49.

[67] *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015) Dissenting Opinion of Judge Zupančič.

[68] See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007); *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007); *Eon v. France* (App. No. 26118/10) ECtHR (2013); *Mladina D.D. Ljubljana v. Slovenia* (App. No. 20981/10) ECtHR (2014); *Ziembiński v. Poland (no. 2)* (App. No. 1799/07) ECtHR (2016).

[69] *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007).

[70] Ibid. para. 16.

[71] Ibid. para. 33.

[72] *Eon v. France* (App. No. 26118/10) ECtHR (2013).

head of State".[73] In *Leroy v. France,*[74] while the domestic courts failed to take the expressor's intent into account, the ECtHR interpreted his intent to be that of support for the violent destruction of the US as opposed to as asserted by him—that of communicating the decline of anti-Americanism through satire.

The third way is the Court's supplementation of 'intent' as a criterion with other highly subjective values to determine whether the restriction on the freedom of expression can be justified under Article 10(2).[75] Given that it has been recognized that satire is inherently offensive,[76] the employment of tests such as that of 'gratuitous offense' or 'incitement to hatred and violence', without a clear definition of their threshold and in the absence of consistent and systematic practice, reinforces the juridical standpoint as being that of 'subjective emotional impact' as opposed to 'objective damage' or 'harm'.[77] This is a worry which is only amplified by the realization that judges continue to perform the task of decision-making in cases pertaining to satire under a garb of authority which belies the absence of a communal understanding of the factors which constitute these subjective expressions.

The fourth way in which the Court has been inconsistent and unsystematic when it comes to the application of 'intent' as a criterion is in its hesitancy to repeat its more expansive understanding of free speech and expression in cases which it finds novel or challenging.[78] While the ECtHR seems to be more comfortable in recognizing expressions as bearing a satirical intention when they are aimed at public figures[79] or accepted 'public values' of importance[80] or can be considered to be 'artistic',[81] it finds expressions aimed at controversial issues or events,[82] at social and moral norms in society,[83] or in labour relations[84] more complex and is cautious in approaching and categorizing these expressions. The subjectivities replete in the process facilitate each of these varied rationalizations, as does the absence of the recognition of specific defences such as that of 'satire'.[85]

5. Destabilizing 'Intent' as a Determinative Criterion in Juridical Encounters with Satire

So far, our interrogation of the use of 'intent' as a determinative criterion in the adjudication of satire has revealed the need for its destabilization, as well as for certain shifts to be marked from

[73] Ibid. para. 58.

[74] *Leroy v. France* (App. No. 36109/03) ECtHR (2009).

[75] Bergeyck 2020.

[76] Feldmane 2019.

[77] Bergeyck 2020; Godioli 2020, p. 20.

[78] Eleni Polymenopoulou, *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights,* Human Rights Law Review, Vol. 16, No. 3, 2016, p. 511.

[79] Polymenopoulou 2016, p. 531.

[80] See, for instance, *Kuliś and Różycki v. Poland* (App. No. 27209/03) ECtHR (2010).

[81] See, for instance, *Alves da Silva v. Portugal* (App. No. 41665/07) ECtHR (2010); *Tatár and Fáber v. Hungary* (App. Nos. 26005/08 and 26160/08) ECtHR (2012).

[82] See, for instance, *Leroy v. France* (App. No. 36109/03) ECtHR (2009); *Féret v. Belgium* (App. No. 15615/07) ECtHR (2009).

[83] See, for instance, *Marina v. Romania* (App. No. 50469/14) ECtHR (2020).

[84] See, for instance, *Palomo Sánchez and Others v. Spain* (App. Nos. 28955/06, 28957/06, 28959/06, and 28964/06) ECtHR (2011).

[85] Polymenopoulou 2016.

contemporary judicial practice. The first of these shifts requires concerted efforts on the part of the judges at the ECtHR to develop a shared understanding of humorous expressions and the particularities of the various modes and forms these expressions can take. Such a shift should, ideally, entail interdisciplinarity between law, linguistics, and humour studies, and encourage insights from humour studies and linguistics as potentially informative for the law. Moreover, such a dialogue between disciplines should have as one of its endeavours the goal of equipping and educating judges with a framework which offers them 'an adequate terminology that is grounded in theory'.[86]

The emergence of a shared framework, rooted in theory which can be drawn upon by the judges and parties alike to some extent, shall ensure that theory shall influence the character of the legal standards pertaining to satire due to its capacity to participate in the life of the object.[87] Furthermore, the sites of tension which have been teased out, deliberated upon, and explicated by scholars can provide a starting-point for some of the issues within 'humour regimes', and satire in particular, which can benefit from the application of this shared framework. Most importantly, perhaps, given that the law in any community is considered to be guiding for its members,[88] the shift from the inconsistent and unsystematic practice of the ECtHR to a shared framework shall facilitate a relatively better communal understanding of satire and its permissible limits.

A second shift which is necessitated is that of a movement from the use of a subjective criterion such as 'satirical intent' and, as a corollary, 'offense', to a relatively more objective criterion such as 'harm'. This is imperative for satire, in particular, which due to its characteristics of critique and morality,[89] produces divergent reactions—such that, "no single kind of satire, no matter how prêt-a-porter, can fit all".[90] The reliance on the notion of 'harm' shall facilitate a journey towards curtailment of satirical expressions which seriously undermine "the target's assurance as to a status of equal worth in the community, having regard to the target's knowledge, the speaker's power, and the forum of the expression, at the time it is made".[91]

In traversing to this notion, it is hoped that the ECtHR shall emphasize on whether expressions undermine the dignity of an individual as opposed to the "subjective aspects of feeling, including hurt, shock, and anger",[92] as well as the impact the satirical expression shall have on the reputation of an individual.[93] While the notion of 'harm' is unlikely to be entirely objective, it is fraught with relatively fewer subjectivities. Some of the concerns posed by the 'harm' test include the difficulties

---

[86] Jeff Todd, *Satire in Defamation Law: Toward a Critical Understanding*, The Review of Litigation, Vol. 35, 2016, p. 69; Godioli 2020, p. 3.

[87] Margaret Davies, *Ethics and Methodology in Legal Theory a (Personal) Research Anti-Manifesto*, Law Text Culture, Vol. 6, No. 7, 2002, p. 23.

[88] Timothy Endicott, *Law and Language,* Stanford Encyclopedia of Philosophy, 15 April 2016. https://plato.stanford.edu/entries/law-language/ (22 May 2022).

[89] Bergeyck 2020.

[90] Self 2015.

[91] Philippe Yves Kuhn, *Reforming the Approach to Racial and Religious Hate Speech Under Article 10 of the European Convention on Human Rights*, Human Rights Law Review, Vol. 19, No. 1, 2019, p. 119.

[92] Jeremy Waldron, *The Harm in Hate Speech*, Harvard University Press, 2012; Kuhn 2019, p. 129.

[93] Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, American University International Law Review, Vol. 26, No. 1, 2010, p. 212; *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007) para. 26. "*The Court notes that the impugned statement speculates on Mr. Eberharter's true feelings about his competitor's accident and suggests, firstly, that he was pleased because he expected to benefit from this incident and, secondly, that he hoped his competitor would be further weakened. The Court acknowledges that such feelings, if actually expressed, would seriously affect and damage any sportsman's good image. However, the Court does not find that the same can be said about this humorous passage, which clearly mentions that Mr. Eberharter made no such statement*."

involved in defining 'harm' as well as the varied interpretations such a term can give rise to. Even more worrying is the possibility for the test to result in the conflation of 'harm' with 'offense',[94] and the failure of the Court to recognize the possibility of hostile messages being conveyed via a subtext[95] which entails a certain degree of subjective interpretation.

While each of these concerns seemingly echoes worries associated with the criterion of 'intent' as well, it is hoped that the communal understanding produced by reference to and reliance upon a shared framework shall be critical in bridging the chasms. Moreover, it is hoped that a transition to the test of 'harm' shall allow for the determination of the aims and nature of the expression (e.g., whether the expression is capable of contributing to democratic debate, whether the expression is governed by the 'humour regime' etc.) to be divorced from and dependent on the 'intent' of the expressor. This shall allow the Court's 'unconditional phrasing'[96] about the imbrication between the two to come unravelled, paving the path for a reconsideration of the worth and place of certain ideas in society.

A third shift which needs to be marked by the ECtHR is that of a movement from contextual defences to the recognition of specific defences for humorous expressions, such as the defence of 'satire'. While Article 10 of the ECHR does not explicitly recognize any defences, the Court has developed jurisprudence on and applied certain defences across its corpus of cases. At present, due to the erratic manner of its use,[97] satire cannot be considered to have crystallized into an acceptable defence.[98] That being said, the plethora of judgments cited in this article as well as the dissenting opinions submitted across several decisions reflect, particularly in the period post 2005, that there is the potential for the Court to recognize specific defences and to operationally benefit from such recognition. Such recognition could be crucial for the Court while undertaking the balancing exercise between competing rights as well as for the kind of margin enjoyed by the States.

Vitally, it also bears attention that there is not a lot to be gained from scholarship, whether developed in the past or emerging at present, which attempts to tailor satirical expressions to a particular format or which by consequence allows for only certain kinds of satirical expressions on certain themes to be permitted into society. Given that "[W]ithout a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy"[99] has been considered to be an undeniable proposition, any scholarship or jurisprudential development which encroaches on or constrains the space for the guarantee must be critically questioned and potentially reconsidered. It is hoped that the proposals for destabilizing and journeying from 'intent' as a criterion put forth in this article will urge a realization of this nature.

6. Concluding Remarks on (the) Irreverence 'Intended'

Our endeavour, in this article, has been to interrogate the suitability of the 'expressor's intent' as a criterion in adjudication pertaining to satirical expressions. An analysis of the conceptualization of the criterion as well as its application to satire, which is a constitutive element of the distinctive 'humour regime', has revealed its several shortcomings. In many ways, the numerous nodes of

[94] Macaitė 2017.

[95] Kuhn 2019, p. 128.

[96] Godioli 2020; Lewis 2017. See, for instance, *Marina v. Romania* (App. No. 50469/14) ECtHR (2020).

[97] *Leroy v. France* (App. No. 36109/03) ECtHR (2009); *Feret v. Belgium* (App No. 15615/07) ECtHR (2009).

[98] Polymenopoulou 2016, p. 531.

[99] Bychawska-Siniarska 2017, p. 11.

subjectivity inherent in or relational to 'intent' have brought forth the realization that perhaps one may only definitively assert that a satirist intends irreverence by "[endeavouring] to hold open the site of judgment, the transitivity of deciding, and [by suggesting] that certainty is not necessarily the most valuable of values".[100]

In paving the path for this realization, satire fulfils its purpose of initiating conversation and inviting deliberation even as it provokes and agitates in the space of the courtroom, which is styled as an authoritative decision-maker due to its reflection of the society as a microcosm of it. It also urges us to confront the need for the destabilization of 'intent' as a determinative criterion in juridical encounters with satire, while cautioning us against alternatives which replicate the very same shortcomings. It is, thus, essential for the ECtHR to make a transition to the relatively objective standard of 'harm', while journeying towards a communal understanding of the specificities of humour.

[100] Peter Goodrich, *Satirical Legal Studies: From the Legists to the Lizard*, Michigan Law Review, Vol. 103, No. 3, 2004, p. 512.