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# Humor and free speech:


## A comparative analysis of Global Case Law

Global Freedom of Expression
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# Humor and Free Speech: A Comparative Analysis of Global Case Law

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# I. Introduction and Overview

Humor is a pervasive element of human communication and a fundamental ingredient of democratic life. Throughout history, it has been used as a vehicle to poke at the powerful, engage in socio-political commentary, or collectively negotiate social boundaries and norms (Kuipers 2009). As a consequence, courts from all over the world have often stressed the importance of protecting humorous speech, while also acknowledging its elusive and multi-faceted nature. In linguistics, humor is typically defined as a form of "non-bona-fide communication" – as opposed to straightforward, merely information-conveying modes of expression –, entirely or partly geared towards mirth or amusement (Attardo 2017). Humorous communication can adopt different strategies (such as exaggeration, understatement, ironic reversal or metaphor; see Simpson 2003), combine different forms (from parodic imitation of a previous work to slapstick comedy), and manifest itself across different media (from verbal jokes to memes and cartoons). Moreover, humor can serve a broad range of purposes, spanning from mere entertainment to satire (i.e. using humorous techniques to convey social or political criticism, see Quintero 2007).

The essential role of humor – and satire in particular – in public life is recognized in several landmark cases from widely different contexts. Within U.S. jurisprudence, the most influential defense of satirical discourse is probably the one put forth by the Supreme Court in *Hustler v. Falwell* (485 U.S. 46, 24 February 1988), with particular regard to political cartooning: "Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. […] From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them" (53-55). Similarly, the European Court of Human Rights (ECtHR) highlighted the importance of satire in a frequently quoted paragraph of *Vereinigung Bildender Künstler v. Austria* (No. 8354/01, 25 January 2007): "Satire is 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. Accordingly, any interference with the right of an artist – or anyone else – to use this means of expression should be examined with particular care" (33). Moving from Europe to Africa, this definition is echoed in the important case *Peta v. Minister of Law, Constitutional Affairs and Human Rights* (CC 11/2016, 18 May 2018), where the Constitutional Court of Lesotho ruled that the domestic provisions criminalizing defamation were unconstitutional: "Satire as a form of artistic expression is protected by section 14 of the Constitution. In its robust interrogation of the topical issues the press is allowed latitude to employ some measure of exaggeration or provocation. It can rightfully be sarcastic, ironic, humorous and satirical in its commentary. This can be best illustrated by the case of *Vereinigung Bildender Künstler v. Austria*" (9).

The idea of satire as a form of "exaggeration and distortion" of reality is further reprised by the Argentinian Supreme Court in *Pando de Mercado v. Gente Grossa SRL* (63667/2012/CS1, 22 December 2020), which also draws explicitly on the *Hustler* ruling: "It should be remembered that satire as a form of critical discourse is characterized by sharply exaggerating and distorting reality in a mocking way. […] This type of literary genre constitutes one of the communication tools for criticism, opinions and value judgments on public affairs; an instrument of denunciation and social criticism that is expressed in the form of a 'hidden' message behind laughter, jocularity or irony. As the Attorney General rightly recalls in his opinion, it has a strong tradition in our country" (14-15). A similar point is made by the Supreme Court of India in *Indibility Creative Pvt Ltd v. Govt of West Bengal* (Writ Petition (Civil) No. 306, 11 April 2019), stressing that "satire is a literary genre where 'topical issues' are 'held up to scorn by means of ridicule or irony.' It is one of the most effective art forms revealing the absurdities, hypocrisies and contradictions in so much of life. It has the unique ability to quickly and clearly make a point and facilitate understanding in ways that other forms of communication and expression often do not" (13).

To conclude this brief sampling, an interesting variation is offered by Canada's Supreme Court in *WIC Radio Ltd. v. Simpson* (2 S.C.R. 420, 27 June 2008): "the law must accommodate commentators such as the satirist or the cartoonist […]. Their function is not so much to advance public debate as it is

to exercise a democratic right to poke fun at those who huff and puff in the public arena" (48). By deviating from the usual emphasis on satire's contribution to public interest debates, this remark is actually more aligned with humanities-based perspectives on this discursive mode – e.g., as argued by literary scholar Robert Phiddian, the fundamental social function of satire is not really to speak truth to power or contribute to debates of public interest, but rather to serve as a collective pressure valve by "licensing public expression of harsh emotions" such as anger, contempt or disgust (Phiddian 2019: iii). This does not mean, of course, that humorous or satirical expressions of contempt should never be restricted, for example, when they amount to defamation or incitement to violence, hatred or discrimination; it does imply, though, that the "public interest" standard is not always the most effective one when examining humor in court. As pointed out by João Paulo Capelotti: "The concept of public or social interest is broad enough to encompass humorous speech about a very wide range of issues. However, it is clear—if not to the general public, then at least to humour scholars—that while humour may have broader purposes (political, for instance), these are incidental rather than necessary. One principal purpose of humour is to provoke laughter, and laughter does not always go hand in hand with an issue of social interest" (Capelotti 2018, 268).

The judicial treatment of different kinds of humorous expression, based on their varying relation to public interest, will be discussed in detail in this paper. For now, suffice it to mention that, within free speech jurisprudence, one would be hard-pressed to find any established tests or soft-law instruments specifically focusing on humor, whether satirical or not. Contested jokes are typically evaluated in light of general free speech provisions existing on a domestic level, following international standards such as those laid out by Article 19 of the Universal Declaration of Human Rights and its regional counterparts in the European Convention on Human Rights (Article 10), the American Convention on Human Rights (Art. 13) and the African Charter on Human and Peoples' Rights (Art. 9). Notably, as stressed by the ECtHR, freedom of expression – including humor and satire – should apply "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population" (*Handyside v. United Kingdom*, No. 5493/72, 7 December 1976, 49). The same concept was reiterated by the Inter-American Court of Human Rights in *Kimel v. Argentina*: "[i]n the arena of debate on issues of high public interest, not only is the issuance of expressions that are inoffensive or well received by public opinion protected, but also that of those that shock, irritate or disturb public officials or any sector of the population" (Series C No. 177, 2 May 2008, 88).

On a more informal level, however, it is possible to detect international trends specifically concerning humorous expression, based on the particular issues evoked by the disputed jokes. To this end, our paper will discuss a corpus of 81 cases from across the globe, organized around five key – and sometimes intersecting – themes: (1) Satire, defamation and other individual dignitary harms; (2) Disparaging humor and hate speech; (3) Humor, violence and public unrest; (4) Parody, copyright and trademarks; (5) Humor and "public morals." The corpus was assembled, first, by means of combined keyword searches through the Columbia Global Freedom of Expression (GFoE) database. More cases were subsequently added by cross-checking the results with the database of ForHum: Forum for Humor and the Law (an international platform created by Alberto Godioli and Laura Little in 2022), and in consultation with several members of the ForHum network.

Drawing on the "Decision Direction" paragraph featured in the GFoE database, each of the five central sections (or each sub-theme within a section) indicatively starts by discussing judgments which expand freedom of expression, and then moves on to relevant cases where expression is contracted. In addition to the information and comments provided in the GFoE database, our analyses also rely on insights from interdisciplinary scholarship on humor and freedom of expression (see in particular Adriaensen, Bricker, Godioli and Laros 2022; Godioli, Young and Fiori 2022; Jacques 2019; Little 2019; Milner Davis and Roach Anleu 2018; Todd 2016 and Capelotti 2016). This growing body of scholarly

work illustrates how a closer dialogue with humanities-based humor research might assist courts when addressing some of the issues posed by the elusiveness and subjectivity of humor, as well as possibly setting the basis for a more consistent approach to humorous expression in free speech jurisprudence. We hope that the present Special Collection paper can constitute a further step in this direction, while also serving as a useful tool for judges, lawyers, academics and other key actors by providing comparative material for judicial practice and future discussions of humor-related case law.

# II. Global case law on humor and freedom of expression

### *II.1 Satire, defamation, and other dignitary harms*

In democratic states there is a hierarchy of protection afforded to different types of expression (Rowbottom 2012). At the top of this hierarchy is political expression and speech which enhances debate around areas in the public interest. In this hierarchy of protected speech, artistic expression is also provided with a high level of protection from state interference but not always as high as it warrants (Djajić and Lazić 2021). In cases of humor, the genre of satire, especially political satire, should therefore be robustly protected by the courts recognising its importance both as a form of political critique and artistic expression. Such humorous expressions may target public figures, and political figures in particular. Due to the high level of protection afforded to political expression in an artistic form, in general these public figures are afforded a lower level of protection, regarding their rights to reputation, privacy and dignity, than a "private" person. In this section we consider court cases which involve the laws on defamation and other types of individual dignitary harm. First, we shall discuss cases in which the humorous expression targets a political figure, public official or public institution, and freedom of expression is expanded. We will then consider cases in which expression is restricted. Finally we turn to cases which concern humor targeting other kinds of public figures (such as artists and celebrities), or people who would not generally be in the public eye.

With regard to contentious jokes concerning a political figure, one of the most (in)famous cases in the United States is *Hustler v. Falwell* (485 U.S. 46, 24 February 1988). The Reverend Jerry Falwell, a high-profile televangelist and political commentator, sued the *Hustler* magazine for libel, invasion of privacy, and intentional infliction of emotional distress after it published a parody Campari advertisement featuring Falwell. He was depicted explaining how his first sexual experience took place with his mother in an outhouse. The ad was listed in the magazine as "Fiction; Ad and Personality Parody." Initially Falwell lost on his privacy and defamation claims, but won damages for the tort of intentional infliction of emotional distress. This was upheld by the appellate court, but *Hustler*'s publisher appealed. The Supreme Court reversed the Court of Appeals, on the grounds that the First and Fourteenth Amendments prohibited a public figure from recovering damages for intentional infliction of emotional distress, without showing in addition that the publication contained a false statement of fact made with actual malice (the latter concept being defined as knowledge of falsity or reckless disregard for whether a statement is true). By stressing that the parody in the case could not have reasonably been interpreted as asserting "actual facts about [Falwell] or actual events in which he participated," the Court convincingly relied on humorous incongruity as a criterion to shield the contested expression from liability (see Little 2011 on the role of incongruity in defamation cases).

If we turn to the European Court of Human Rights, this hierarchy of protection is reflected in the key case of *Lingens v. Austria* (No. 9815/82, 8 July 1986) – which, whilst not a humor case, established the protections afforded to the speaker where the targets are high profile, especially political. Like *Hustler*, *Lingens* emphasizes the important differences between factual statements and value judgements, thus building a solid defense used in later ECtHR cases regarding political satire. One example is the landmark judgment *Vereinigung Bildender Künstler v. Austria* (No. 68354/01, 25 January 2007) which qualifies satire as both "artistic expression and social commentary" and stresses that "any interference with an artist's right to such expression must be examined with particular care" (33). This case involved a painting of several public figures, portrayed as naked and in sexual positions. The subjects included the former general secretary of the Austrian Freedom Party Mr. Meischberger, alongside a Cardinal, and Mother Theresa. An injunction was issued in the context of judicial proceedings brought by Meischberger against the applicant's association, prohibiting the further display of the painting. However, the ECtHR considered that as a political figure Meischberger should have a higher tolerance of criticism, and the artistic and satirical nature of the work

should have been taken into account at national level. The ECtHR decided the injunction violated the applicants' rights to freedom of expression, under Article 10 of the European Convention on Human Rights (ECHR).

Similarly, *Telo de Abreu v. Portugal* (No. 42713/15, 7 June 2021) focused on a series of cartoons depicting local politicians as animals. In particular, a female municipal councilor was portrayed as a be-stockinged sow with blonde hair and bare breasts surrounded by naked pigs. The blogger who had published the cartoons was found guilty of aggravated defamation by the Elvas District Court and sentenced to pay a fine as well as damages for the moral prejudice he had caused the municipal councilor. After the fine was upheld by the Court of Appeal, the blogger took his case to the ECtHR, which found that his right to freedom of expression had been violated. The ECtHR concluded the national courts did not consider the context of the cartoons or the Court's case-law on political satire. It also highlighted that criminal prosecutions for defamation of politicians are particularly damaging due to the chilling effect on political expression. Whilst acknowledging the importance of the satirical context, Judge Motoc's concurring opinion emphasized the harm that "symbolic violence" – such as sexist stereotyping – can do to women working in politics (see Balzaretti 2022 for further discussion). As detailed in the next section, a later ECtHR decision (*Canal 8 v. France*) highlights the Court's lower level of protection towards "symbolic violence" against women, when the expression is not deemed to contribute to debates in the public interest.

Other ECtHR cases further illustrate how a satirical context can help speech protection. For instance, in *Alves Da Silva v. Portugal* (No. 41665/07, 20 Oct 2009), the ECtHR recognised that the combination of satire and a carnival setting meant that the applicant's conduct – driving in a van displaying a puppet and broadcasting a message implicating the mayor in unlawful financial dealings – was not to be taken as a serious attack on the mayor's reputation. Similarly, in *Ziembinski v. Poland (no 2)* (No. 1799/07, 5 July 2016) the ECtHR decided that the domestic courts had given insufficient weight to the satirical nature of an article published in a local newspaper, which mocked the credibility of a mayor's plans to solve rural unemployment (although the two dissenting judges were critical, stressing how the severity of the disputed insults can get lost in translation). *Instytut Ekonomichnykh Reform TOV v. Ukraine* (No. 61561/08, 2 June 2016) concerned defamation proceedings brought by a member of parliament, regarding an article alleging he had taken bribes and received housing from the government. The ECtHR found that the article was political satire discussing a matter of public interest, which should have been given protection by the domestic courts. Likewise in *Eon v. France* (No. 26118/10, 14 March 2013) the applicant held a placard reading "Casse toi pov'con" [Get lost you sad prick] targeting the President of France during an official visit in 2008. The ECtHR considered that the phrase (which repeated an insult uttered by the President himself on a previous public appearance) was a legitimate form of satirical criticism, and therefore the conviction violated Eon's rights as it had not targeted the President's private life or honor.

Another president was targeted in *Dickinson v. Turkey* (No. 25200/11, 2 Feb 2021). Dickinson was a university teacher and artist working in Turkey who made a collage of President Recep Tayyip Erdoğan's head on the body of a dog to criticize the President's political support for the occupation of Iraq. He was detained pre-trial for three days before being convicted for the offense of insult and fined. In line with its general stance on political satire, the ECtHR found a violation of Article 10. *Mac TV v. Slovakia* (No. 13466/12, 28 Nov 2017), instead, concerns sarcastic and ironic television commentary about the death of Poland's President Lech Kaczynski in a plane crash ("I am sorry, but I do not pity the Poles. I envy them"). Mac TV was fined 5,000 euro, but the ECtHR found this sanction violated the broadcaster's rights as the commentary did not constitute an unlawful personal attack on the late President's dignity.

Leaving the supranational ECtHR but turning to another politician, *Zachia v. Center of Professors of the State of Rio Grande do Sul* (Supreme Court of Brazil, 719.618, 7 November 2012) features a Brazilian politician's claim for injury to his honor after protesters displayed a dummy of him and called for his arrest for alleged misconduct. The Supreme Court dismissed his appeal as the protest was an issue of public interest and, reflecting ECtHR jurisprudence, decided that as a public figure Zachia should have a greater

tolerance for criticism. Similarly in Argentina, political critique through satire is given a high level of protection as seen in *Pando de Mercado v. Gente Grossa SRL* (63667/2012/CS1, 22 December 2020). The Supreme Court of Argentina concluded that María Cecilia Pando de Mercado (the wife of an officer who had been convicted for crimes against humanity) did not have her right to honor violated following the publication in a magazine of a photomontage of her head on a naked woman's body. Pando de Mercado was a controversial political figure in her own right, who had organized several protests and often appeared in the media to defend military officers who had committed human rights violations during the last military dictatorship in Argentina. Comparably to the ECtHR in *Telo de Abreu*, the Court held that the disputed image did not constitute "gender-based violence" (24), but was rather an instance of political criticism in the form of satire, protected under the Argentinian constitutional right to freedom of expression. The decision references regional and international standards, including Articles 11 and 13.2.a of the American Convention on Human Rights, Articles 17 and 19.3.a of the International Covenant on Civil and Political Rights, Articles V and XXIX of the American Declaration of the Rights and Duties of Man, and Article 12 of the Universal Declaration of Human Rights. International treaties have been part of the Argentine constitutional hierarchy since the 1994 constitutional reform

In *Attorney General v. Clarke* (2008 ZR 38, 24 Jan 2008), a British journalist in Zambia – who had likened the Government to animals in a satirical article – had his deportation order nullified when the Supreme Court of Zambia ruled it disproportionate. However, the Court did not accept that the article was protected by freedom of expression under the Constitution. Another African case, *Peta v. Minister of Law, Constitutional Affairs and Human Rights* (Constitutional Court of Lesotho, CC 11/2016, 18 May 2018), concerns a satirical article about the then-Commander of the Defence Force having excessive influence over the government. In its judgment, the Constitutional Court highlighted the importance of freedom of expression, including freedom of the press and satire, holding that sections of the Penal Code created a "chilling effect" on freedom of expression and concluding criminal defamation was "not reasonable and demonstrably justifiable in a free and democratic society." The Court stated that criminal defamation should be struck down, referring to *Lingens* and ECtHR jurisprudence on satirical content. Similarly, in *Mansour v. Al-Youm Al-Sabea Website* (Court of Administrative Judiciary, Chamber of Economical and Investment Disputes, No. 73228, Judicial year 67, 15 February 2014) an Egyptian politician brought an application to suspend a website's media license after it published satirical articles about him. However, the Court underlined that prior restraint and disproportionate sanctions should not be used to limit press freedoms. Doing so would violate Egypt's constitutional prohibition of media censorship.

Yet, as already suggested by the mixed outcome of *Attorney General v. Clarke*, not all cases follow this pattern, and expression which targets politicians is not always considered to be in the public interest. In the following cases, the courts considered that other factors outweighed freedom of expression. A high-profile Australian case concerned rightwing populist politician Pauline Hanson, who had been targeted by comedian Simon Hunt. In his parody song "Backdoor Man," performed under his drag queen name Pauline Pantsdown, Hunt sampled the politician's voice and mixed her words, so it appeared she was singing about being a proud homosexual man and a prostitute, involved in unnatural sexual practices and associated with the Ku Klux Klan. Hanson brought her case against the Australian broadcaster (ABC). In *Hanson v. Australian Broadcasting Corporation* (HC B40/1998, 24 July 1999), the High Court of Australia denied ABC leave to appeal, after the Court of Appeal had granted an interlocutory injunction stopping the song being played. Using the test of "an ordinary, sensible listener, not avid for scandal," the Court of Appeal had decided that the song was "patently defamatory." By imposing and upholding the injunction, the Australian courts did not seem to pay adequate attention to the humorous nature of the content, which could be usefully compared to *Hustler* and *VBK* in its use of "carnivalesque reversal" – namely a type of satirical profanation which typically does not aim to defame specific individuals, but to "criticize or relativize a hegemonic ideology or power structure" (Godioli and Little 2022; see also Davis and Handsley 2001 for a critical assessment of this judgment).

Moving back to Europe, in *McAlpine v. Bercow* (High Court of England and Wales, [2013] EWHC

1342, 24 May 2013), Sally Bercow – a high profile public figure and wife to the then-Speaker of the House of Commons – had tweeted "Why is Lord McAlpine trending? *Innocent face*." This was in connection with serious allegations of child sexual abuse which had been levied against an unnamed politician. It was decided that the meanings of words for the purposes of defamation are of two kinds, a natural and ordinary meaning and an innuendo meaning. The Court found that the words were defamatory, given that the expression "*innocent face*" would imply that the question was "insincere and ironical" (84). It should be noted that the victim of abuse had made a mistake in identifying his abuser and it was not Lord McAlpine.

In Germany, an archaic law dating from 1871 was evoked in another case involving Turkey's President Erdoğan. *Erdoğan v. Böhmermann* (Higher Regional Court of Hamburg, 7 U 34/17, 15 May 2018) concerns the comedian Jan Böhmermann who performed a satirical poem on his television show. In yet another (particularly extreme) example of carnivalesque reversal, the poem associated Erdoğan with sexual deviancy, including bestiality, and viewing images of child abuse. Erdoğan brought a charge for insult against Böhmermann, employing a rarely used provision prohibiting the insult of foreign heads of state (Section 103 of the German Criminal Code). This required consent from the German Government to prosecute and whilst permission was given, the Government stated the relevant law would be repealed following Erdoğan's action. Böhmermann argued that the work was protected by freedom of artistic expression, and the poem's purpose was to demonstrate the limits of permissible satire whilst informing the viewer about the scope of freedom of satire in Germany and Turkey. The Hamburg Higher Regional Court widely confirmed the lower court findings that the verses contained *gratuitously* insulting material, which was not protected by the right to artistic freedom or freedom of expression. In addition, the poem unlawfully relied on disparaging and insulting stereotypes targeting Turkish people and Muslims especially. On 26 January 2022, the German Federal Constitutional Court refused to accept a constitutional complaint by Jan Böhmermann relating to the poem. Commentators have stressed how Section 103 does not align with international standards concerning freedom of expression (Thienel 2017); however, the fact that the law has now been repealed might give a greater freedom to satirical speech in Germany, at least in the specific case in which foreign heads of state are targeted. Staying with Erdoğan but moving from Germany to Turkey, the case of Merve Buyuksarac (Istanbul Court of First Instance, 31 May 2016) was brought against the former Miss Turkey. She shared a satirical adaptation of the Turkish national anthem referring to a high-level corruption scandal involving Erdoğan's family, but without mentioning his name. She was given a custodial sentence, which was suspended on condition that she would not reoffend for the next five years.

The database also features more instances of authoritarian countries penalizing citizens for ridiculing the government. In Myanmar a case was brought against Chaw Sandi Htun, a member of the National League for Democracy (Maubin Township Court, 28 December 2015). After posting a satirical photo collage on Facebook depicting a male soldier in women's clothing, she was charged with defamation and breaching Myanmar's broad Telecommunications Law, which is punishable by a maximum of three years imprisonment and/or fine. While the defamation charges were dropped, Chaw Sandi Htun was still sentenced to six months in prison under Section 66(d) of the Telecommunications Law. Thailand's defamation laws protecting their Royal Family are also very restrictive, as illustrated by *Thailand v. Thanet Nonthakot* (Criminal Court of Bangkok, 25 June 2015), where the defendant was arrested for lèse majesté and sentenced to three years and four months in jail. He had sent an email with a link to satirical stories about the Thai Royal Family to a British national who ran the blog "Stop Lèse Majesté" (for a critical discussion of Thailand's lèse majesté law, see NuDelman 2018).

Moving from politics to other kinds of public figures, the case of *Camargo v. Bastos* (Superior Court of Justice, 1.487.089/SP, 23 June 2015) was brought in Brazil by singer-songwriter Wanessa Godoi Camargo Buaiz. When her pregnancy was announced on a satirical comedy show, the host commented "I would eat her and her baby" (with the verb "eat" being used as a clear sexual innuendo). The Court found that the dignity of the singer and her family was harmed and issued a financial sanction of BRL 150,000 (equivalent to approximately 30,000 USD). According to Capelotti (2022, 293-304 and 2018, 258-266), while the joke

is arguably vulgar and in bad taste, the *Camargo* decision is problematic in its overly literal interpretation of the joke (neglecting the comedic context in which it was uttered), and in its use of subjective criteria – such as taste and offensiveness – to determine the limits of protected expression.

A different outcome was reached in another high-profile case involving a celebrity, namely *John v. Guardian News and Media Ltd* (High Court of England and Wales, [2008] EWHC 3066 (QB), 12 December 2008), which was hailed as a "victory for irony" by the British press (Ponsford 2008). The singer Sir Elton John sued the newspaper *The Guardian* for libel after it published an article in its "Weekend" supplement in July 2008. The article was titled "A Peek at the Diary of Sir Elton John" and was a parody diary entry written as if penned by John himself. At the end of the article were the words "as seen by Marina Hyde" (a satirical columnist at the *Guardian*). The entries first satirized John's appearance at Nelson Mandela's birthday party, describing the occasion as specially organized to provide white celebrities with a chance to be photographed cuddling him. Next, the article lampooned a charity event organized by John and attended by high profile celebrities to raise funds for his AIDS foundation. John sued for libel on the grounds that the article suggested his commitment to his charity was insincere, and that he dishonestly claimed all the money raised actually went to the charity. In striking out John's claim for damages, the Judge placed particular emphasis on the context of publication, stressing that the article appeared in the "Weekend" section of the newspaper; if such a serious allegation were being made, a reasonable reader would expect it to be done without humor, and in the main news section. While agreeing with the outcome on a "pragmatic" level, literary scholar Peter McDonald (2016) criticized the judgment for its insufficient attention to the context of the online version of the article, and for bypassing the difficulties posed by the notion of the reasonable reader: "[Judge Tugendhat] focussed on the 'reasonable reader' of the Saturday *Guardian* rather than reasonable readers in general," which might have "particularly fraught implications in contemporary inter- or multicultural societies" (187).

The challenges inherent to the reasonableness test will be further discussed (with special regard to humor) in the Conclusion of this paper. Similarly to *John v. Guardian News and Media Ltd*, however, the ECtHR also relied on the reasonable reader in another defamation case brought by a celebrity – namely *Nikowitz and Verlagsgruppe News GMBH v. Austria* (No. 5266/03, 22 February 2007), concerning a satirical newspaper article about the reaction of Austrians and the media to skiing champion Hermann Maier breaking his leg. Rival skier Stefan Eberharter initiated a private prosecution for defamation, arguing that the fake commentary attributed to him ("Great, now I'll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too") suggested he was overly competitive and disdainful. The ECtHR believed the majority of the newspaper's readership would recognize the humorous tone of the article, and found Austria in breach of its obligation to protect freedom of expression. As acknowledged in a third party intervention within the later ECtHR case of *Sousa Goucha v. Portugal* (No. 70434/12, 22 March 2016), in *Nikowitz* the Court "cemented its case-law employing the standard of a reasonable reader when approaching satirical material, refusing to interfere with freedom of expression for the sake of protecting the reputation of others as relates to unfocussed readership" (37).

In *Sousa Goucha*, the applicant was an openly gay TV host, who lodged a criminal complaint for defamation and insult after he was described in a television comedy show as "The best Portuguese female TV host." He alleged his reputation and dignity had been damaged, and that his complaint had been dismissed in the national courts because of discrimination based on his homosexuality. For the purposes of our analysis, the main issue was whether the State had achieved a fair balance between the applicant's right to protection of his reputation (Article 8) and the media's right to freedom of expression (Article 10). The ECtHR unanimously found no violation of Article 8, considering several elements including the way in which a "reasonable spectator" of the show in question would have perceived the impugned joke (55). In light of "the playful and irreverent style of the television comedy show and its usual humour," the Court agreed with the domestic authorities that "the defendants had not intended to criticise the applicant's sexual orientation" (53-54). Borrowing the terminology proposed by humor scholar Marta Dynel (2021), it can be argued that both the domestic courts and the ECtHR interpreted the contested remark as a "jocular insult" (orientated towards collective humor experience) rather than a "genuine insult" (geared towards offending

– and potentially harming – the target). As argued by Tomlinson (2016), the judgment's outcome was "unsurprising," although the Court's reasoning would have benefitted from also considering the disputed joke from the perspective of homophobic hate speech (see Section II.2).

On a general note, courts usually – and understandably – adopt a more restrictive approach when private figures are targeted, as illustrated by *Le Roux v. Dey* (Constitutional Court of South Africa, CCT 45/10, 8 March 2011). This case concerned a crude photoshopped picture of Head of School Dr. Dey, who was depicted in a sexually suggestive pose with the male school principal. After it was circulated by former pupils, Dey sued for defamation and the trial court found in his favor, imposing a financial sanction of R45,000 (approximately 2,300 USD) which was subsequently upheld by the Supreme Court of Appeal. The Constitutional Court agreed with the lower courts' decision, despite reducing the fine from R45,000 to R25,000. The Court rejected the notion that a joke, caricature, or cartoon can never be defamatory, holding that all three could be if they damaged the subject's reputation, undermined his authority, and caused him to be the object of contempt. On the other hand, satirical distortion targeting private figures is also protected in other cases, when the degree of humorous incongruity is evident enough to avert a defamatory interpretation of the contested expression – see for example the U.S. case *Hamilton v. Prewett* (Court of Appeals of Indiana, No. 14A01-0601-CV-32, 6 February 2007), concerning a married couple who set up a parody website about a fictional man with a very similar last name and same occupation as the plaintiff ("Paul Hamilten-The World's Smartest Man"). The court held it was clearly a parody, and that "defamation is, by its nature, mutually exclusive of parody."

Lastly, a satirical cartoon portraying non-public figures is at the center of a 12-5 split decision by the Grand Chamber of the ECtHR, namely *Palomo Sánchez and Others v. Spain* (Nos. 28955/06, 28957/06, 28959/06, and 28964/06, 12 September 2011). The applicants were trade-union members, who had been dismissed by their employer after publishing two articles and a cartoon in a newsletter which depicted the Human Resources manager being sexually gratified by two recognizable employees. This was meant as a satirical criticism of said employees, who had spoken in defense of the company during proceedings brought by the applicants' trade union. The Court held, by twelve votes to five, that there had been no violation of Article 10 of the Convention (freedom of expression) read in light of Article 11 (freedom of association). The majority found that the applicants' dismissal was not disproportionate, as the cartoon and the article had overstepped the limits of criticism admissible in labor relations and caused damage to the reputation of the applicants' colleagues by using grossly insulting or offensive expressions. Such an attack on the respectability of individuals in the professional environment was deemed a particularly serious form of misconduct capable of justifying harsh sanctions. As argued by Godioli and Little (2022), the majority's assessment of the reputational harm caused by the cartoon does not seem to fully acknowledge the metaphoric nature of the contested drawing, which can hardly be seen as a defamatory allegation on the employees' private lives. This point was also stressed by Judges Tulkens, Björgvinsson, Jočienė, Popović and Vučinić in their dissenting opinion: "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. [...] The harsh criticism did not relate to the intimacy of the individuals or to other rights pertaining to their private lives. It was directed exclusively at the role of certain colleagues in the industrial dispute" (Dissenting, 11-12). As mentioned by the dissenting judges, "in other cases the Court has recognised the satirical nature of an expression, publication or caricature"; however, the *Palomo Sánchez* decision suggests that the ECtHR might be less sensitive to the metaphorical or non-literal quality of satire when the target is not a public figure, especially in the context of labor relations.

### *II.2 Disparaging Humor and Hate Speech*

Whilst there is no shared definition of hate speech (Mchangama and Alkiviadou 2021), for the purposes of this paper we will use this term to designate any form of expression that is deemed – by a given court

or recipient – to incite to hatred or discrimination based on protected characteristics such as race, ethnicity, religion, disability, gender, or sexual orientation. As outlined in the United Nations' Rabat Plan of Action, this may include "(a) forms of expression that should constitute a criminal offence; (b) forms of expression that are not criminally punishable, but may justify a civil suit; and (c) forms of expression that do not give rise to criminal or civil sanctions, but still raise concerns in terms of tolerance, civility and respect for the convictions of others" (Art. 12). This working definition serves as a common thread underlying all the cases discussed in the present section, regardless of varying approaches – from speech-protective to restrictive – across different national and supranational systems. In this last respect, legal scholarship has long established an indicative opposition between the United States' liberal approach on the one hand (whereby hate speech tends to be protected as free speech), and more restrictive approaches on the other – with Europe standing out as a "centre of gravity" for liberal democracies adopting various forms of hate speech provisions (Heinze 2016, 181), whose compatibility with the standards of the European Convention of Human Rights is ensured by the ECtHR.

With this in mind, it is not particularly surprising that the intersection of disparaging humor and hate speech is relatively underrepresented in U.S. jurisprudence. A significant exception is *The Koala v. Khosla* (17-55380, 24 July 2019), where the Court of Appeals for the ninth circuit found that a student newspaper's First Amendment rights were violated when its funding was revoked by the University of California, San Diego (UCSD), allegedly in retaliation for a satirical article it published. The article, which was published in 2015, satirized "safe spaces" and trigger warnings on U.S. campuses, and caused several complaints and an official condemnation by the University due to its employment of derogatory stereotypes and racial epithets. The Court of Appeals argued that the disputed text "was clearly protected speech," without providing a more detailed analysis of the potentially disparaging aspects of the article. As will be shown below, this approach differs from the closer scrutiny usually imposed on purportedly discriminatory jokes in other judicial systems.

Even in the specific case of trademark registration (see also Section II.4), First Amendment protection for derogatory language is reinstated in *Matal v. Tam* (582 U.S. ____, 19 June 2017), where the U.S. Supreme Court ruled that a provision in 15 U.S.C. § 1052(a) of the Lanham Act – denying registration for trademarks that "may disparage any persons" – was unconstitutional under the First Amendment. The U.S. Patent and Trademark Office (PTO) had refused to register the name of an Asian-American rock band ('The Slants') as a trademark. The Trademark Trial and Appeal Board (Board) affirmed the PTO's decision on grounds that the name constituted "a highly disparaging reference to people of Asian descent," although the applicant (Simon Shiao Tam) submitted that the band had chosen this moniker precisely to reclaim and take ownership of a racial epithet, using "wry humor to make it a badge of pride" (Kennedy, J., Conc. Opinion, 3). Tam then took the case to federal court, where an *en banc* Federal Circuit ultimately found the Lanham Act disparagement clause constituted viewpoint discrimination and was therefore facially unconstitutional. This decision was eventually upheld by the Supreme Court.

In brief, both the *Koala* and *Matal* cases epitomize the United States' high threshold of tolerance towards disparaging expression under First Amendment law. That being said, in some cases European courts also seem reluctant to restrict derogatory speech when it is presented in a humorous form. The ECtHR case of *Sousa Goucha v. Portugal* is a fitting example, although (as discussed in the previous Section) the contested joke was not examined by the Court from the perspective of homophobic hate speech. In *Telo de Abreu v. Portugal*, instead, Judge Motoc's concurring opinion explicitly stigmatized the use of "despicable stereotypes concerning women in power" in the disputed cartoons and stressed the importance of recognizing the harm caused by "symbolic violence" against women. However, as detailed in Section II.1, the Court found that the cartoons – when placed in their original context – amounted to a legitimate form of satirical criticism. A similar approach to the use of disparaging stereotypes in political satire can also be found in national case law from Europe, as shown by the French case regarding a *Charlie Hebdo* cartoon employing ableist tropes (Court of Cassation, 18-80.405, 19 February 2019). In October 2015, the French satirical magazine had published a cartoon depicting rightwing politician Nadine Morano as the "hidden Down

syndrome daughter" of General De Gaulle, arguably relying on a stereotypical and grotesque representation of children with Down syndrome. The association Collective Against Handiphobia filed criminal charges against *Charlie Hebdo* on grounds of "public insult [*injure publique*] towards a person or a group of people because of their gender, their sexual orientation or their disability and provoking hatred or violence against a person or a group of people because of their gender, sexual orientation or disability." However, the Court of Cassation concluded that "while it is regrettable that the incriminated drawing could have shocked and bruised people with Trisomy 21 [...], this drawing and its title do not target people with this disability, [...] and the impugned publication does not contain any precise incitement to adopt a behavior of rejection with regard to people with Trisomy 21 on account of their handicap."

On the topic of ableist humor, but moving to a different region, a similar outcome was reached by the Supreme Court of Canada in *Ward v. Quebec* (2021 SCC 43, 29 October 2021), concerning several jokes by professional comedian Mike Ward targeting Jérémy Gabriel – a young man with Treacher Collins Syndrome (a genetic condition which causes facial deformities and often hearing loss), who had become famous by singing for well-known public figures. In a series of video clips posted in 2007 (when Gabriel was 10 years old), Ward repeatedly mocked Gabriel's disability by impersonating him and uttering statements such as "I'm stuck with this little speaker on my head" and "a mouth that won't shut" (122). Years later, in his show *Mike Ward's eXpose*, the comedian mocked several prominent people who he referred to as "sacred cows" that could not be made fun of for various reasons. The only disabled person mocked in the show was Gabriel, who was between 13 and 16 years old at the time. Ward made the following remarks about him: "Five years later… he's still not dead! [...] I saw him with his mother at a Club Piscine. I tried to drown him… couldn't do it, couldn't do it, he's unkillable. I went online to see what his illness was. You know what's wrong with him? He's ugly!" (123). Gabriel's parents initially filed a complaint with the Commission des droits de la personne et des droits de la jeunesse (CDPDJ) for discrimination. The CDPDJ took Mr. Ward to the Quebec Human Rights Tribunal, which found Ward had infringed Gabriel's right to dignity because of his disability. After an unsuccessful appeal at the Quebec Court of Appeal, Ward further appealed that decision to the Supreme Court of Canada, "arguing that the Tribunal and the majority of the Court of Appeal erred [...] and that the elements of discrimination cannot be examined in isolation without considering freedom of expression, which limits the right to the safeguard of dignity" (31). The Supreme Court found that a "reasonable person" would not view the comments about Gabriel as inciting others to detest or vilify his humanity, or as likely to lead to discriminatory treatment of Gabriel. As a result, the majority concluded that the comments, "exploited, rightly or wrongly, a feeling of discomfort in order to entertain, but they did little more than that" (112). This decision had a significant impact for ongoing and future applications with the CDPDJ, as it determined that – in order to be the subject of a complaint to the Commission – discriminatory comments must also result in discriminatory treatment or clearly lead to incite others to discriminate on similar grounds.

Regardless of what one might think of the final outcome, some aspects of the Supreme Court's reasoning could have been further problematized, as pointed out by Judges Abella and Kasirer in their dissenting opinion. In particular: 1) The claim that "Mr. Gabriel had been targeted by Mr. Ward's comments because of his fame and not because of his disability" (100) seems to rely on a false dichotomy, as the comedian actually "targeted aspects of Mr. Gabriel's public personality which were inextricable from his disability" (Dissenting, 148); 2) The idea that Ward's comments "were not likely to have a spillover effect" in terms of further discrimination (112) is undermined by the fact that the comedian's joke inspired severe bullying and mocking on the part of Gabriel's classmates, which resulted in Gabriel developing suicidal thoughts (Dissenting, 193); 3) The "reasonable person" standard adopted by the majority seems overly abstract, considering that "childhood and early adolescence is a formative stage of life during which time an individual's desire to belong can of course be deeply felt," and "a reasonable young person in Jérémy Gabriel's shoes would be particularly susceptible to the harms associated with dehumanizing comments" (Dissenting, 174); 4) Lastly, the majority's notion that Gabriel was not discriminated against because he was treated by Ward like any other celebrity "reflects a discredited conception of discrimination," as "uniform treatment which fails to accommodate differences may constitute a prohibited distinction" (Dissenting, 149). Incidentally,

this last reflection also ties in with the notion of *equaliberty* proposed by French philosopher Étienne Balibar (2014) – meaning that debates concerning free speech should take into account the fact that the public arena is not a level playing field, and therefore true freedom of expression cannot be conceived of separately from social equality. In addition to the critical points raised by the dissenting judges, and with particular regard to the humorous nature of Ward's comments, it is worth noting that the Court's majority appears to rely on the questionable assumption that humor and discriminatory harm tend to be mutually exclusive: "Expression that attacks or ridicules people [...] generally does not encourage the denial of their humanity or their marginalization in the eyes of the majority. [...] Humour, whether in good or in bad taste, rarely has 'the spillover effect needed to give rise to an attitude of hatred and discrimination among third parties' (Rainville, at p. 68)" (88-89). In recent years, critical humor scholars have actually provided ample historical and empirical evidence regarding the substantial role that disparaging humor often plays in inciting hatred and discrimination (see Pérez 2022, Topinka 2018 and Ford 2015 among others).

Expanding our comparative scope to Australia, another divisive case eventually resulting in the protection of potentially disparaging humor is *Bropho v. Human Rights and Equal Opportunity Commission and West Australian Newspapers Ltd* (FCAFC 16, 6 February 2004). In its decision, the Federal Court of Australia (FCA) held by a majority that a cartoon entitled "Alas Poor Yagan" published by Western Australian Newspapers Ltd, satirizing conflicts within Noongar Aboriginal communities, was protected by freedom of expression. In April 2001, the Australian Human Rights and Equal Opportunity Commission had found that, although "Alas Poor Yagan" was offensive on the basis of race, color, or ethnicity under section 18C of the Racial Discrimination Act, it fell within the exceptions in section 18D which exempted the respondent from liability. According to the Commission, the cartoon amounted to an artistic work published in good faith and in a reasonable manner, reflecting a matter of public interest. The FCA eventually upheld the Commission's decision, although Judge Lee's dissenting opinion contested the majority's assessment of the "artistic work" exemption. In Judge Lee's view, the question of whether the publication was done in good faith "must be assessed, in part, having regard to the subjective purpose of the publisher, but in general it is an objective determination as to whether the act can be said to have been done in good faith, having due regard to the degree of harm likely to be caused" (Dissenting, 141); with this in mind, the disputed cartoon should not have benefitted from the exemption, as it constituted a "serious slur" and was "at the most serious end of the spectrum" of conduct covered by the Racial Discrimination Act. On a general level, however, it should be noted that the phrasing employed in the Racial Discrimination Act – referring to conduct that is "reasonably likely [...] to offend, insult, humiliate or intimidate a person or group [...] because of their race" – has been widely debated; in particular, some commentators argued that section 18C might set the standard for liability too low (Meagher 2004), although courts have clarified that the section "applies only to conduct causing 'profound and serious effects, not to be likened to mere slights'" (Swannie 2020; see also Gelber and McNamara 2016 for a nuanced discussion of anti-vilification laws in Australia).

While the cases discussed so far point to a generally permissive approach to forms of humor that may be construed as disparaging, other decisions from the database – especially from European jurisprudence – illustrate a more restrictive stance, depending on the specific features or targets of the contested expression. A recent example from the ECtHR is *Canal 8 v. France* (No. 58951/18 and 1308/19, 9 February 2023), in which the Court found no violation of Article 10 in respect of considerable financial sanctions imposed by the French audiovisual regulator (Conseil Supérieur de l'Audiovisuel, CSA) on the applicant company and confirmed by the Council of State (Conseil d'État). The sanctions concerned two segments broadcast by the applicant company in an entertainment TV show. In the first segment, the programme's male host is shown playing a 'behind-the-scenes' game with a female pundit, in which the woman's hands were placed on different parts of the host's body including his crotch, with no evidence that the woman knew this was to happen. The second clip consists of a series of telephone pranks where the same host speaks to men who were replying to a fake, sexually suggestive ad that he had placed under a false name on a dating website, pretending to be a bisexual person. In these conversations, the host speaks "with a high-pitched and mannered voice, adopting an effeminate physical posture" while encouraging his interlocutors to "make remarks with a sexual connotation" and inviting them to provide information which could potentially allow

their acquaintances to identify them (26). Unlike *Telo de Abreu v. Portugal*, the *Canal 8* decision denies Article 10 protection to "symbolic violence" due to a series of context- and content- related factors – including the fact that the contested humorous material directly trivializes literal violence (in the first segment) or targets non-public individuals to the point of violating their right to a private life (second segment).

Symbolic violence is also sanctioned in another subset of ECtHR decisions, in which the disputed humor had targeted vulnerable ethnic or religious groups – see Table 1 below:

| **Title** | **Type of expression** | **Outcome of domestic proceedings** | **ECtHR Finding** |
|---|---|---|---|
| *Féret v. Belgium* (No. 15615/07, 16 July 2009) | Islamophobic slogans and jokes distributed by far-right party National Front. | 250 hours of community service, 10-month suspended prison sentence and 10-year political ban for the applicant. | No violation of Article 10 (4 votes to 3). |
| *M'Bala M'Bala v. France* (No. 25239/13, 20 October 2015) | Comedy sketch in which a prize was awarded to a renowned Holocaust denier. | €10,000 fine. | Inadmissible under Article 17 (prohibition of abuse of rights). |
| *Le Pen v. France* (No. 45416/16, 28 February 2017) | Anti-Roma joke told by far-right politician Jean-Marie Le Pen in a campaign speech. | Criminal fine of €5,000 + further financial sanctions. | Inadmissible under Art. 10, as the interference with the applicant's freedom of expression was necessary in a democratic society. |
| *Bonnet v. France* (No. 35364/19, 25 January 2022) | Holocaust-denialist parody of a *Charlie Hebdo* front page. | €10,000 fine. | Inadmissible under Art. 10 (with reference to Art. 17), as the interference with the applicant's freedom of expression was necessary in a democratic society. |

**Table 1:** ECtHR cases on disparaging humor targeting vulnerable ethnic or religious minorities

These cases epitomize the ECtHR's more restrictive stance towards disparaging humor when the speaker is an influential political figure, as in *Féret* and *Le Pen*, or when Holocaust denial is involved, as in *M'Bala M'Bala* and *Bonnet* (in the former case the Court resorted directly to Art. 17, thus refusing to examine the case under Art. 10). While the other three decisions were unanimous, *Féret v. Belgium* stands out as a particularly divisive case. In particular, the Court's majority found it necessary to consider not only the allegedly reasonable interpretation of the applicant's jokes and slogans, but also the "irrational" response they were likely to trigger among people more prone to xenophobia (73); on the other hand, this deviation from the usual reasonability standard was harshly criticized by the three dissenting judges (see Godioli, Young and Fiori 2022 for further discussion).

On a domestic level, some European countries also adopt a strict approach towards disparaging or discriminatory humor. In the United Kingdom, for example, this type of expression can fall under the remit of Section 127 of the Communications Act 2003, which makes it an offense to send a message that is "grossly offensive or of an indecent, obscene or menacing character" over a public electronic communications network. That was the case, for instance, with a controversial video posted by Scottish YouTuber Mark Meechan, in which he showed how he had taught his girlfriend's dog to respond to statements such as "gas the Jews" and "Sieg Heil" by raising its paw. After being fined £800 for contravening the Communications Act, Meechan filed for leave to appeal to the UK Supreme Court, claiming that the video was only meant as a joke to annoy his girlfriend; however, Scotland's High Court of Justiciary Appeal denied him the leave to appeal, on the grounds that his petition was "both incompetent and irrelevant" (*Petition to the Nobile Officium by Mark Meechan*, [2019] HCJAC 13, 22 January 2019). Section 127 of the Communications Act is also invoked in other cases involving dark humor, such as *Chambers v. Director of Public Prosecutions* (to be discussed in the next section) and *Director of Public Prosecutions v. Bussetti* ([2021] EWHC 2140, 30 July 2021). This latter case revolves around a video making fun of the 2017 Grenfell tower fire (in which 72 people had died), which was recorded by Bussetti during a bonfire party and later circulated via WhatsApp and YouTube (although some doubts remain as to whether the YouTube video was actually the one taken by Bussetti). In 2021, the DPP appealed the magistrates' decision to acquit the respondent; the appeal was allowed by the England and Wales Divisional Court, and the case was remitted to the magistrates' court for a new trial before a differently constituted court. Regardless of varying opinions on the merits of each of these cases, commentators have persuasively argued that the "grossly offensive" standard adopted in the Communications Act might be overly subjective and set the bar too low when it comes to restricting controversial material (Famouri 2020).

Moving to different geographical and political contexts, the GFoE database also features three Russian cases concerning purportedly discriminatory humor targeting different ethnic groups – namely *Prosecutor of Saint-Petersburg v. Snob.Ru* (Pushkinsky District Court of St. Petersburg, 2-3346/2015, 5 May 2015), the *Yevgeniy Kort case* (Zelenograd District Court of Moscow, 01-0354/2016, 3 November 2016) and the *Idrak Mirzalizade case* (Supreme Court of Russia, 5-AD22-2-K2, 14 February 2022). The relevant legal provisions are Article 29 of the Constitution (prohibiting "propaganda or campaigning inciting social, racial, national or religious hatred and strife") and Article 282.1 of the Russian Criminal Code, which penalizes actions aimed at inciting hatred or hostility and denigrating human dignity on the basis of "sex, race, nationality, language, origins, religious beliefs, or belonging to a social group." Hate speech was partly decriminalized through Article 20.3.1 of the Administrative Code, titled "Incitement of Hatred or Enmity, as well as Humiliation of Human Dignity," which was put into effect in December 2018. The three cases listed above are problematic, first of all, for the apparent lack of proportionality in the sanctions imposed by the respective courts – in particular, Yevgeniy Kort was sentenced to one year in prison (subsequently reduced to a fine of 200,000 rubles) over posting a cartoon featuring a racist slur on a social media site, while Idrak Mirzalizade was put on administrative arrest for ten days before being permanently banned from Russia (PEN 2021). Moreover, in both the Snob.ru and the Mirzalizade decisions, the relevant courts did not seem to pay sufficient attention to context, as in both cases the disputed expression actually amounted to satirical criticism of racism and xenophobia. The Snob.ru article actually listed negative stereotypes regarding migrants to expose the racist views purportedly held by Moscow residents; similarly, stand-up comedian Idrak Mirzalizade told a joke about "Russians and feces" in order to reverse widespread racist tropes targeting ethnic minorities, and simultaneously ridicule any form of racism or xenophobia. Notably, in this latter case, the Prosecutor's Office had not even examined the full original version of Mirzalizade's show, but only inspected a decontextualized fragment posted in a group on the social network VKontakte. Using the terminology proposed in Godioli, Young and Fiori (2022), both the Snob.Ru and the Mirzalizade judgments seem to erroneously interpret "sarcastic disparagement" (e.g., ironic use of racist tropes as counter-speech to satirize racism) as an instance of genuinely disparaging humor.

Lastly, it is worth mentioning two cases of derogatory humor examined by the Meta Oversight Board. In *Decision 2021-02*, the Board upheld Facebook's decision to take down a video in which an adult imper-

sonated the traditional Dutch character of Zwarte Piet [Black Pete], noting that the company's Community Standards prohibited "designated dehumanizing comparisons, generalizations, or behavioral statements [including] caricatures of Black people in the form of blackface." The Board analyzed whether the removal of the video was in line with Article 19 of the International Covenant on Civil and Political Rights (which also extends to expression that may be considered "deeply offensive," as clarified by the UNHRC in its General Comment No. 34) while also stressing the relevance of Article 15 of International Covenant on Economic, Social and Cultural Rights (right to participate in cultural life). After emphasizing that the rights to freedom of expression and participation in cultural life should be enjoyed without discrimination based on race or ethnicity, the Board proceeded to apply the three-part test to assess whether the removal was a) prescribed by law, (b) pursuing a legitimate aim, and (c) necessary and proportionate in a democratic society. While the majority stressed that the Zwarte Piet character is "inextricably linked to negative and racist stereotypes" feeding into "systemic racism in the Netherlands," a minority of the Board saw insufficient evidence to "directly link this piece of content to the harm supposedly being reduced by removing it." In Decision 2022-01 (or "Knin cartoon case"), instead, the Board overturned Meta's initial decision to leave a cartoon on Facebook which depicted ethnic Serbs as rats, stressing that the Hate Speech Community Standards should also apply to "implicit [e.g. metaphoric] references to protected groups [...] when the reference would be reasonably understood." While acknowledging in the Knin decision that "such prohibitions would raise concerns if imposed by a government at a broader level," the Board relied on the guidelines provided by the UN Special Rapporteur on freedom of opinion and freedom of expression, who acknowledged that "the scale and complexity of addressing hateful expression presents long-term challenges and may lead companies to restrict such expression even if it is not clearly linked to adverse outcomes (as hateful advocacy is connected to incitement in article 20 of the International Covenant on Civil and Political Rights)" (A/HRC/38/35, par. 28; see Barata 2022 for a more extensive assessment).

### *II.3 Humor, violence and public unrest*

While the previous section focused on incitement to hatred or discrimination, in the present one we turn to the multi-faceted intersection between humor, free speech and legal provisions concerning the advocacy of violence or public unrest. Particular attention will be paid to glorification of terrorism, but we will also touch upon other distinct (albeit partly overlapping) categories, such as direct threats, incitement to violence or sedition, and political protest. While the cases discussed in the following paragraphs are considerably diverse, it is still possible to identify some recurring trends and interpretive issues.

#### *1. Glorification of terrorism*

The gray area between dark humor and apology for terrorism is particularly well represented in European case law. This is clearly linked to the fact that, especially over the last twenty years, "laws criminalising offences such as 'encouragement of terrorism' and 'extremist activities' as well as offences of 'praising', 'glorifying', or 'justifying' terrorism have proliferated in Council of Europe member states" (Council of Europe 2018). One of the most significant examples is Spain, where Article 578 of the Criminal Code establishes penalties for "glorifying terrorism" or "humiliating the victims of terrorism or their relatives;" this provision was further broadened in 2015, leading to higher sanctions when such behavior takes place online. According to Amnesty International, between 2015 and 2017 84 people were convicted under Article 578, as opposed to only 23 between 2011 and 2013 (Amnistía Internacional España 2018, 7). Within this framework, it is worth mentioning at least two heavily debated cases involving controversial humor and satire – namely *The State v. Cassandra Vera* (Supreme Court of Spain, STC 493/2018, 26 February 2018) and the César Strawberry case (Constitutional Court, STC 2476/2017, 25 February 2020). The former case revolves around a series of old jokes posted by Vera (then an 18-year-old student) concerning the 1973 bomb attack by the Basque armed group ETA ("Euskadi Ta Askatasuna", or Basque Homeland and Liberty) on Luis Carrero Blanco, Prime Minister during Francisco Franco's dictatorship. Carrero Blanco had died

in the attack, together with his driver and bodyguard. Under Article 578, the Audiencia Nacional (Spain's highest criminal court) convicted the student with a one-year suspended prison sentence and a seven-year ban from publicly funded jobs. However, on appeal, the Supreme Court acquitted Vera on the grounds that the tweets were satirical, that the assassination occurred a long time ago and that the posts could no longer pose a threat to national security.

The latter case, instead, focuses on several darkly humorous tweets by Spanish metal singer César Montaña Lehman (also known as César Strawberry) between November 2013 and January 2014; the contested expression included jokes about the terrorist groups ETA and Grapo and talking about bombing the monarch ("It's nearly the king's birthday. How exciting! I'm going to give him a cake-bomb"). This time the Supreme Court sentenced the singer to one year's imprisonment, arguing that "affirmations such as those disseminated in the network by César Montaña feed hate speech, legitimize terrorism as means of resolving social conflicts and, more importantly, force the victims to remember the lacerating experience of the threat, the kidnapping or the murder of a close relative" (22). However, following Montaña Lehman's appeal, the Constitutional Court reversed the Supreme Court's ruling, after determining that the lower court's decision was disproportionate and did not sufficiently consider the sarcastic and metaphorical nature of the disputed expression.

While terrorist-themed jokes were eventually considered protected speech in the Vera and Strawberry cases, the opposite outcome was reached in a series of judgments from French courts. In France, "apology for terrorism" is currently criminalized under the counter-terrorism law of 2014, whereby the offense is punishable by up to five years in prison and a fine of up to 75.000 Euros (to be increased to seven-year imprisonment and fines up to 100.000 Euros if the offense is made online). In this case too, the number of people sentenced for apology for terrorism has risen exponentially in the last decade, with 2015 (the year of the terrorist attack against *Charlie Hebdo*) as a clear watershed – from 3 persons in 2014 to 230 in 2015 and 306 in 2016, with a one-year prison sentence on average (Council of Europe 2018). A humor-related decision directly tied to the *Charlie Hebdo* shooting is the one issued by the Tribunal de Grande Instance de Paris on 18 March 2015, concerning the following Facebook post published by stand-up comedian Dieudonné M'Bala M'Bala on 11 January 2015 (four days after the terrorist attack): "After this historic march, what do I say…? Legendary. Instant magic equal to the Big Bang that created the universe [...] Tonight as far as I'm concerned I feel like Charlie Coulibaly." M'Bala M'Bala's parody of the *je suis Charlie* slogan explicitly praised Amedy Coulibaly, who was a close friend of the *Charlie Hebdo* gunmen and killed five people himself in subsequent shootings on January 8th and 9th. M'Bala M'Bala stated that, by writing "tonight I feel like Charlie Coulibaly," he meant that he felt he was "a comedian treated like a terrorist," referring to the fact that the French authorities had allegedly prevented him from joining a free speech demonstration held in Paris on January 11th. However, the court found the comedian's explanations "confusing" and argued that the post could not qualify as protected satirical expression, as it was published at a time when public opinion was still very fraught and upset by the attacks (see, for contrast, the *Vera* decision above). On these grounds, M'Bala M'Bala was handed a two-month suspended prison sentence.

In two other French cases, the authors of controversial, terrorism-related jokes appealed to the European Court of Human Rights, which eventually upheld the outcome of the domestic proceedings. The first case is *Leroy v. France* (ECtHR, No. 36109/03, 2 October 2008), where the applicant was a cartoonist working for a French Basque weekly magazine. On the day of the attack on the Twin Towers, he had submitted a drawing of the attack with the caption "We had all dreamed of it… Hamas did it," parodying a Sony advertising slogan. Leroy stated that his intention was to represent the destruction of the American empire and highlight double standards in media representation ("What makes their [: US victims and their families] pain so much more media-worthy than that of the Iraqis bombed every month by American and British aircraft?", 10). However, the ECtHR unanimously upheld the outcome of the national proceedings (€1500 fine for glorification of terrorism), arguing that the national court had adequately considered how the cartoon constituted a threat to public order in a region sensitive to terrorism (such as the French Basque Country). Moreover, as was the case with the M'Bala M'Bala judgment discussed above, the lack of chronological

distance was deemed an aggravating factor: "the cartoon was published on September 13th [2001], when the whole world was still shocked by the news" (*Leroy*, 45).

Thirteen years after *Leroy*, another French case focusing on 9/11-related humor reached the Strasbourg court and met a similar outcome. *Z.B. v. France* (ECtHR, No. 46883/15, 2 September 2021) focuses on a joke printed on a T-shirt, which the applicant gave as a birthday gift to his three-year-old nephew in September 2012. The T-shirt bore the words "Jihad, born on 9/11" and "I am a bomb." The child was in fact called Jihad (which is a common name in the Arab world) and was born on September 11th, 2009. Crucially, the term 'bomb' can also mean 'good looking' in French. The T-shirt was worn only once at preschool and was only seen by adults when the preschool's director and one of the employees helped Jihad change his clothing in the bathroom. In the domestic proceedings, the applicant and his sister (Jihad's mother) were charged with glorification of terrorism. The applicant received a two-month suspended prison sentence and a fine of EUR 4,000, while Jihad's mother received a one-month suspended sentence and a fine of EUR 2,000. The ECHR unanimously upheld the domestic ruling, thereby essentially confirming the interpretation put forward on a national level by the Nîmes Court of Appeal: "Certain attributes of the child (his first name, day and month of birth) and the use of the term 'bomb,' which cannot reasonably be claimed to refer to the beauty of the child, [...] in reality serve as a pretext to valorize unequivocally willful attacks on life" (*Z.B.*, 11).

As discussed in Godioli, Young and Fiori (2022), the perspective adopted by the Nîmes Court of Appeal and the ECtHR in *Z.B.* does not seem entirely convincing and would have benefited from a closer examination of the specific textual and contextual features of the contested joke. In particular:

> 1) The idea that the French term *bombe* "cannot reasonably be claimed to refer to the beauty of the boy" seems flawed from a rhetorical perspective, as "I am a bomb" is in fact a rather conventional metaphor which is well established in the French language; and more generally, the T-shirt's allusions to the 9/11 attacks are part of a metaphoric construction ultimately referring to the child, while of course playing with the fact that a child named Jihad was born on 9/11. In this sense, the *Z.B.* joke is structurally different from the *Leroy* cartoon (which is repeatedly evoked in the proceedings as a significant precedent), as the cartoon featured a direct and explicit statement about the Twin Towers attacks.
>
> 2) Although the first instance court of Avignon ascertained that the T-shirt was only worn "on one occasion" which was "limited in time (the afternoon of September 25th) and space (the nursery class)," and "only two people had been able to see the words on the T-shirt while dressing the child," these aspects (which are a key part of what Tsakona 2020 defines as the "specific communication setting" of a joke) were not extensively considered by the Court of Appeal and the ECtHR.
>
> 3) According to the ECtHR, "the fact that the applicant has no ties with any terrorist movement whatsoever, or has not subscribed to a terrorist ideology, cannot attenuate the scope of the disputed message" (60); yet, one could argue that the speaker's history and ideological profile – or, in literary-theoretical terms, their "prior ethos" (Korthals Altes 2014) – does seem particularly relevant when it comes to criminal charges like glorification of terrorism, even more so when the disputed text is a rather ambiguous joke.
>
> 4) Lastly, another important contextual (or intertextual) factor is *genre*, namely the discursive tradition to which the contested joke can be reasonably ascribed. In this sense, *Z.B.*'s T-shirt could be usefully placed in dialogue with a sub-genre of dark humor often used by comedians from a Muslim background post 9/11, relying on the ironic use of Islamophobic tropes such as 'all Muslims are terrorists.' Shortly after 9/11, for example, British stand-up comedian Shazia Mirza famously opened her set with the line "My name is Shazia Mirza, or at least that's what it says on my pilot's license" – which rather than being a glorification or trivialization of terrorism, was meant as a sarcastic critique of mounting Islamophobia after the attacks (Aidi 2021). Similarly, the disputed

> T-shirt can also be construed as an attempt (however awkward) to make fun of the Islamophobic cliché casting Muslims as Jihadists until proven otherwise – let alone a family where a child is named Jihad.

Certainly, the ECtHR judgment also presented some valid reasons to uphold the domestic ruling – including the importance of acknowledging a significant margin of appreciation to national courts, which are often better positioned to assess the impact of a disputed expression within its specific socio-cultural context. However, a more systematic engagement with the aspects listed above would have been desirable (see also Nugraha 2021 for another critical reflection on this decision).

*2. Direct threats and incitement to violence or sedition*

At least on a thematic level, *Z.B. v. France* can be usefully contrasted with *Chambers v. Director of Public Prosecutions* (High Court of England and Wales, EWHC 2157, 27 July 2012) – although this latter case does not exactly focus on the glorification of terrorism, but rather explores the gray area between dark humor and what U.S. doctrine would define as true threat. In 2010 the appellant had posted the following tweet regarding the temporary closure of the Robin Hood airport near Sheffield (UK), where he was supposed to travel from within a couple of weeks: "Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!" Five days later the airport's security manager reported it to the police, and Mr Chambers was initially convicted for sending a public electronic message of a "menacing character" (Communications Act 2003). However, upon second appeal, the High Court quashed the conviction based on the following reasons:

> The Crown Court was understandably concerned that this message was sent at a time when, as we all know, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. […] In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. […] The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or to be taken as a serious warning. [...] Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to image a serious threat in which warning of it is given to a large number of tweet "followers" in ample time for the threat to be reported and extinguished. (*Chambers*, 31)

In a similar way, one could argue that many signs point to the 9/11 joke from *Z.B. v. France* not being meant as serious Jihadist propaganda – for example the fact that it was printed on a child's T-shirt in a clearly childish font, or that (as ascertained by the first instance court) it was not meant to reach a wide audience of adult readers. Despite the differences between the two cases, the opposite outcomes of *Z.B.* and *Chambers* highlights a certain degree of inconsistency in international judicial approaches to terrorist-themed jokes.

Moving from Europe to Asia, a different kind of threatening joke is at the center of *HKSAR v. Chan Johnny Sek Ming* (Hong Kong District Court, Criminal Case No. 196, 20 September 2006). The defendant, Chan Johnny Sek Ming, had posted messages on a website in which he had described in detail his plan to organize a gang-rape. Following criticism from several members of the forum, he reaffirmed his intention to organize the rape and taunted the police to come and get him – which they did. Based on the testimony of one witness who vouched for the defendant's good character and claimed the post was likely a "joke" as per the "culture of the website," the Court found there was insufficient evidence to prove intent to commit the offense, or even to incite others to engage in such behavior. However, the Court held that the messages were "in substance a public invitation to others to indulge in such sexual perversion," and the nature of the internet as a public forum made it all the more likely for the message to inspire others to commit such an

act, with or without the defendant. On these grounds, the court concluded that the message met all the conditions of an outrage to public decency, in light of paras. 21-298 to 21-304 of *Archbold Hong Kong 2005*. Interestingly, in this case the issue of incitement seems to be completely dependent on the assessment of the defendant's subjective intent, rather than on a more objective "reasonable speaker" standard. By contrast, other systems explicitly favor the latter criterion in public incitement cases; e.g., see Mthiyane and Ntuli (2021) on incitement provisions in South Africa, and Sardo (2022) for a broader discussion of the reasonable speaker standard. This being said, the objective component is still reflected in the legal test for outrage to public decency (regarding humor and public morals from a comparative perspective, see also Section II.5).

On a general level, it should be noted that *HKSAR* taps into an increasingly urgent topic – namely the effects of misogynistic humor and rape jokes on online fora (e.g. incel communities), and the role of this type of "symbolic violence" (see previous section) in normalizing or promoting actual violence against women (Regehr 2022). On this subject, the *HKSAR* case can be partly compared with the French case of Pascal Aurélien X. (OrelSan) (15/02687, 16 February 2016), where the Versailles Court of Appeal upheld a lower court ruling acquitting the French rapper OrelSan of incitement to hatred and violence against women. In his song lyrics, *inter alia*, OrelSan invoked the murder of actress Marie Trintignant at the hands of her boyfriend ("shut your mouth or you'll be Marie-Trintignized"), which he defined as "black humor." The Court found that the lyrics must be assessed in light of the "style" characterizing the musical genre they belong to and taking into account the social context in which the song's fictional characters are immersed. From this standpoint, the Court held that the singer himself did not endorse the views of his imaginary characters, and it was sufficiently clear to his audience that the lyrics should not be construed as actual incitement to violence. Notably, in this case the issue of genre clearly plays an important role in the court's reasoning (cf., by contrast, our discussion of *Z.B. v. France* above).

Another potential intersection between humor and incitement involves politically motivated violence or sedition. This theme is addressed, for example, in *Marathe v. The State of Maharashtra* (Bombay High Court, Cri.PIL 3-2015, 17 March 2015), concerning a political cartoonist who had been charged with the offense of sedition (under Section 124A of the Indian Penal Code) over a series of cartoons that allegedly defamed India's Parliament and the Constitution, and spread hatred towards the government. In quashing the charges, the Court issued a set of guidelines to be followed in applying Section 124A, pointing out that – in order to qualify as seditious – a given expression must not only bring the government "into hatred or contempt," but "must also be an incitement to violence or must be intended or tend to create public disorder or a reasonable apprehension of public disorder" (17). A similar stance was taken in *Indibility Creative Pvt Ltd v. Govt of West Bengal* (Writ Petition (Civil) No. 306, 11 April 2019), where the Supreme Court of India found that the unofficial "shadow ban" imposed by the West Bengal Government on a satirical film was unconstitutional. The ban targeted a Bengali satirical film titled *Bhobishyoter Bhoot* ['Future Ghosts'], which had been duly certified for public exhibition, based on intelligence reports claiming that the film could cause "political law and order issues." According to the Supreme Court, the State had misused police powers to obstruct the screening of the film, and therefore violated the Petitioners' right to freedom of expression under Article 19(1)(a) of the Constitution.

Moving from India to the Russian Federation, a more restrictive approach was followed in the case of Dmitry Semenov (High Court of the Republic of Chuvashia, 22-2559/2015, 29 October 2015). In March 2014, Semenov – a journalist for Open Russia as well as a human rights advocate and activist – reposted a link to an article on VKontakte, Russia's largest social media network. The repost was accompanied by an image featuring a caricature of then-prime minister Dmitry Medvedev wearing a traditional Caucasus hat, with a caption reading "Death to Russian vermin." In January 2015, the Federal Committee on National Security searched Semenov's residence, and presented him with charges for public incitement of extremist activities under the Russian Criminal Code (Art. 280, para. 1). Semenov argued that VKontakte automatically tagged the photo in his post; he had no control over the tag, and had no intention of reposting the photo. Nevertheless, the Lenin regional court of first instance found Semenov guilty of public incitement of extremism and fined him RUB 150,000 (equivalent to 2,336 USD at the time); following the defendant's

appeal, the High Court of the Republic of Chuvashia upheld the guilty verdict but granted Semenov amnesty, thus forgiving the fine and striking the conviction from Semenov's record. Amnesty was available to all first-time offenders per the order of President Putin to commemorate the anniversary of the end of World War II.

Another comparable case is the one concerning Muhammud Ruhul Amin Khandaker (Additional Chief Metropolitan Magistrate Court, Dhaka, 11 August 2015). The defendant, a lecturer at the Jahangirnagar University in Bangladesh, had written the following Facebook post, commenting on a road traffic accident in which five persons – including an acclaimed filmmaker and a renowned national news anchor – had died: "Consequences of driving licenses without inspection, five persons including Tareque and Mishuk Munir died: Everybody dies, why not Hasina? [: Sheikh Hasina, Prime Minister of Bangladesh]." After a pro-government newspaper published the post, Khandaker was charged and convicted for sedition under Section 124-A of the Bangladesh Penal Code, resulting in a three-year rigorous prison sentence and a fine of 10,000 Bangladesh Taka. In failing to distinguish between a sarcastic, hyperbolic remark (however distasteful) and actual incitement to violence, this decision represents a worrying instance of speech contraction and is bound to create a chilling effect on freedom of expression in Bangladesh. For comparison, a dark – and arguably more aggressive – joke evoking the death of a head of state was eventually protected under free speech provisions in the case of César Strawberry (see above); a similar topic is also addressed in *MAC TV v. Slovakia* (ECtHR, No. 13466/12, 28 November 2017), although in this latter case the joke concerned an event that had actually happened, namely the death of Polish President Lech Kaczynski in a plane crash.

*3. Political protest*

We conclude this section with a smaller group of judgments regarding humorous forms of political protest (on the importance of humor in political activism, see in particular Sørensen 2016 and Lionis 2023). All three cases discussed below were adjudicated by the European Court of Human Rights and originated in Eastern Europe – which is not surprising, considering how former Eastern Bloc countries have retained particularly strict provisions regarding "petty hooliganism" and disruption of public order. An indicative example is *Handzhiyski v. Bulgaria* (ECtHR, No. 10783/14, 6 April 2021). The applicant was a local politician who had placed a red Santa Claus cap and a red sack (with the word "resignation" on it) on an already-vandalized statue of former political leader Dimitar Blagoev, founder of the main party in the government coalition. This incident was part of a wave of demonstrations which had erupted in June 2013 against the newly-elected government of Bulgaria. After being arrested and detained for 24 hours, Handzhiyzki was charged under Article 1(2) of the 1963 Decree on Combating Minor Hooliganism, which defines the offense as, inter alia, "indecent statements, made in a public place in front of many people," or "[showing an] offensive attitude towards citizens, public authorities or society," which breach public order and quietness but, owing to their lower degree of seriousness, do not amount to the criminal offense of hooliganism laid down in Article 325(1). Despite the politician's claim that that his actions only amounted to a "good political joke" (14), the first instance court found him guilty and imposed a fine BGN 100 (the equivalent of EUR 51) – the "lowest possible fine" because of the absence of aggression, lack of criminal record and unemployment status. After an unsuccessful appeal, Handzhiyzki lodged an application with the ECtHR, which found a violation of Article 10 with a majority of six judges to one.

The ECtHR also took a speech-protective stance in another case regarding a different form of satirical protest, namely *Magyar Kétfarkú Kutya Párt [MKKP] v. Hungary* (No. 201/17, 20 January 2020), where the Court found that Hungary violated Art. 10 by imposing a fine on political party MKKP for creating a "cast-an-invalid-vote" app that allowed users to anonymously share a photograph of their paper referendum ballots. Notably, the applicant party's political stance "is largely conveyed through satire directed at the political elite [...], through its website (which includes much humorous content), through purported 'campaigns' for clearly absurd causes, and through street art and performances" (7). The Government maintained that the sanctions against MKKP were necessary in order to "protect the public interest in ensuring the orderly conduct of the voting procedure" (78). In response, the ECtHR emphasized the importance of political plurality in democracies and stated that restrictions on political parties' freedom of expression

has to undergo "rigorous supervision" (100). In an unexpected twist, ruling party Fidesz later built on the ECtHR decision to propose an electoral law amendment allowing photographing ballots for personal use. The amendment was subsequently approved, raising concerns regarding potential blackmailing and threats to vote secrecy (Hungary Today 2020; see Gyöngyi 2020 for a nuanced discussion of the case).

In contrast to both cases discussed above, the ECtHR followed a more restrictive approach in *Sinkova v. Ukraine* (No. 39496/11, 27 February 2018), where a majority of four judges to three found no violation of Article 10 in the imposition of a three-year suspended sentence for a satirical performance involving a war memorial. The case concerned the arrest, detention and conviction of Anna Sinkova – a member of an artistic group called St. Luke Brotherhood, who fried eggs on the flame of the Tomb of the Unknown Soldier in Kyiv as a protest against the waste of natural gas, and later posted the video on the internet on behalf of the Brotherhood. She was arrested and detained for three months pending criminal proceedings on suspicion of hooliganism, and eventually convicted under Article 297 of the Criminal Code ("Desecration of a tomb or other burial place"). In its finding of no violation, the majority argued inter alia that the applicant could have found "more suitable ways to express her views or participate in protests about the State's use of natural gas [...], without breaking the criminal law or insulting the memory of soldiers who had given their lives defending their country" (110). As pointed out by several commentators, this claim seems to disregard the importance of provocation and exaggeration in satirical criticism – which is especially relevant "in the age of social media, where such provocative videos tend to 'go viral' and reach a mass audience, thus sparking debate about the issue" (Mishra 2022, 49). Although the scope of *Sinkova* was later limited through the *Handzhiyski* judgment among others, this specific case seems to suggest that the protection granted by the ECtHR to peaceful satirical protest is partly "inconsistent with its position on political expression more generally" (Mishra 2022, 30; see also Ó Fathaigh and Voorhoof 2019).

### *II.4 Parody, copyright and trademarks*

Focusing now on forms of expression which, in some cases, deal with commercial themes, we consider the issues that can occur in the interplay between humor and ownership rights. Copyright is a form of intellectual property (IP) law applying to creative works. Whilst there is no international IP law *per se,* international treaties have established obligations which member states must adhere to and incorporate into national laws. The World Intellectual Property Organization (WIPO), an agency of the United Nations, is responsible for the administration of the Berne Convention (1886) for the Protection of Literary and Artistic Works. The Convention establishes minimum standards of international copyright protection, as well as binding countries who are members of the Agreement on Trade Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty (Rallabhandi 2023). The WIPO Copyright Treaty (1996) recognized the need to introduce new international rules and clarify existing rules to address issues raised by economic, social, cultural and technological developments.

IP law grants exclusive rights to the copyright holder to control the use and distribution of their work. These rights are protected for a limited time period and are subject to additional limitations (including parody), which can take the form of fair use, fair dealing or a specific exception. Although definitions may vary significantly across different systems, parody must typically "borrow elements from an existing work" (or from an established format), whilst being "noticeably different from it" and humorously commenting on its original model or on any other subject (Murray 2019: 54 and Jacques 2019: 7). Parody has been defined as the "paradigmatic form of fair use" (Victor 2021: 105), and as a form of artistic expression it can fulfill important democratic functions including social and political critique. It is often associated with neighboring notions such as caricature and pastiche – although it is not clear whether these may designate three separate exceptions in copyright law, or rather constitute different nuances of the same exception (Jacques 2019). For the purposes of this paper, however, we will subsume caricature and pastiche under the notion of parody, considering that this latter term is the predominant one in cases concerning humor and copyright, and

that all three "intend to signal a reproduction of copyright-protected works without constituting a substitute for the original" (Jacques 2023).

In this section we will discuss a selection of cases focusing on parody and copyright, while also extending our scope to trademark law. The trademark is one of the oldest forms of IP protections. One can use a trademark or trademarked product, service or brand legally in parodic works as long as the parody comments on the original work without confusing the consumer as to the origin of the product, service or brand, and without gaining unfair advantage from the repute of the trademark. The intersection of parody and IP law – both copyright and trademark – has been the subject of a growing corpus of legal and interdisciplinary scholarship, and extensive comparative analyses of relevant case law from different regions are available (see, inter alia, Jacques 2023 and 2019 and Lai 2019). For the purposes of our paper, we will limit ourselves to addressing some significant examples from the Global Freedom of Expression database, starting with cases where the humorous nature of the disputed work has tipped the scale in favor of creative expression (as opposed to protecting the rights of the copyright or trademark owner).

An influential parody and copyright case from the U.S. is *Leibovitz v. Paramount Pictures Corporation* (137 F.3d 109, 19 February 1998), where Paramount Pictures were sued by the photographer Annie Leibovitz after they parodied her *Vanity Fair* cover featuring a pregnant Demi Moore posing naked. Paramount's version had superimposed the head of the actor Leslie Nielsen onto the body of a naked, pregnant woman. This parody was used to advertise the release of their film *Naked Gun: The Final Insult 33 ⅓*. Paramount argued fair use, and both the lower court and the Court of Appeals for the Second Circuit found in their favor – agreeing that, whilst there *was* copyright infringement, the balance favored Paramount's fair use defense. The Court considered the factors in *Campbell v. Acuff-Rose Music Inc.* (510 U.S. 569, 7 March 1994) concluding, *inter alia,* that Paramount's advertisement "adds something new and qualifies as a 'transformative' work" (5).

*Campbell v. Acuff-Rose Music Inc.* was a case from 1994 in which the copyright holders of Roy Orbison's rock ballad "Oh, Pretty Woman" claimed copyright infringement against the members of the rap music group 2 Live Crew and their record company. 2 Live Crew had substituted Orbison's lyrics with ones such as "Big Hairy Woman," to illustrate "how bland and banal the Orbison song seems to them" (754 F. Supp., at 1155). 2 Live Crew had identified the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose on their albums and compact discs. The District Court decided that 2 Live Crew's song was a parody which made fair use of the original song under the Copyright Act of 1976, 17 U.S.C. § 107. The Court of Appeals reversed and remanded the judgment on the grounds that the commercial nature of the parody rendered it presumptively unfair under § 107, considering that 2 Live Crew had used the "heart" of the original work and made it the "heart" of a new work, therefore taking too much from the original and using it for commercial purposes. However, the Supreme Court decided that the finding of no fair use on account of the commercial nature of 2 Live Crew's song was in error, as the purpose of 2 Live Crew's song was to parody Orbison's song. This swung the balance back towards a finding of fair use, also considering that 2 Live Crew's song would minimally impact on the market for Orbison's original song as the two works would serve different market functions (571). Consequently, the Court held that the Sixth Circuit erred and 2 Live Crew's commercial parody constituted fair use.

A decision which shares various elements with the above cases is *Yankee Publishing Inc. v. News America Publishing Inc.* (No. 90 Civ 8120(PNL), 17 December 1992). News America Publishing Inc. had taken prominent elements of Yankee Publishing's registered traditional magazine cover design for the *Old Farmer's Almanac*, a wholesome, 'folksy' magazine, and parodied this by suggesting a thrift theme for their readers which was intended to be satirical in nature. Yankee sued for trademark infringement and false designation of origin, as well as unfair competition, unjust enrichment and trademark dilution. However, the Court found merit in News America Publishing's use of the design for humorous commentary, considering the expression to be constitutionally protected and unlikely to cause confusion or damage Yankee's trademark. The Court decided that the cover of the magazine was clearly a joke, could be recognized as

socio-economic commentary, and readers would be sophisticated enough to differentiate between the two magazines. In addition, the Court found that the defendant's right of free speech, using comic commentary, outweighed any injury that may have been caused to Yankee's trademark rights.

For European courts, the leading judgment on parody and copyright infringement is *Deckmyn v. Vandersteen* (Court of Justice of the European Union, C-201/13, 3 September 2014). The case started when the five heirs of Willy Vandersteen, the creator of the Belgian comic series *Suske en Wiske*, brought a copyright infringement action against Johan Deckmyn, a member of a far-right Belgian political party that produced and distributed calendars with a drawing that resembled the cover of a *Suske en Wiske* issue titled "The Wild Benefactor." In the parody version, the mayor of Ghent was depicted as one of the comic book characters, strewing gold coins to immigrants. The plaintiff argued that the drawing conveyed a discriminatory message and created an association between the original drawing and said message. Notably, Willy Vendersteen had demanded in his will that his comics never be used for political purposes. The tribunal of first instance of Brussels held that the calendars amounted to copyright infringement, and that the parody exception did not apply. Subsequently, the Brussels Court of Appeal considered that a definition of parody had not yet been provided by the Court of Justice of the European Union (CJEU), and decided to stay proceedings while waiting for the CJEU to answer the following questions: (1) Is the concept of "parody" an independent concept in European Union law? (2) If so, which characteristics of parody must be met to determine if a work is a parody? (3) Are there additional requirements? In their decision, the CJEU established parody as an "autonomous concept of EU law," and determined two requirements that works must meet to qualify as a parody. These requirements are that a parody must "evoke an existing work while being noticeably different from it," and must "constitute an expression of humour or mockery" (20). While the *Deckmyn* decision is largely compatible with previous definitions of parody offered by literary scholars, a more systematic interdisciplinary dialogue could help courts better clarify parody's relation to caricature and pastiche, as well as the full range of intents characterizing these forms of expression – spanning from playful imitation to sarcastic criticism (Breemen and Breemen 2022).

The extent to which dark or shocking humor qualifies as lawful parodic intent is at the center of the Dutch case *Mercis c.s. v. Punt.nl* (Court of Appeal of Amsterdam, LJN: BS7825, 13 September 2011), concerning seven cartoon parodies of Miffy the Rabbit or (in Dutch) Nijntje – a popular character from the children's picture books series created by Dick Bruna. The right holders brought a copyright and trademark infringement action against Punt.nl regarding the online publication of the contested cartoons, which (*inter alia*) portrayed Miffy as a drug user and a terrorist involved in the 9/11 attacks. Punt.nl, the hosting provider of the websites that published the images, invoked the parody exception as a defense. While the first instance court only accepted the parody exception in relation to five cartoons, the Court of Appeal argued that all seven cartoons were lawful, as the distance from the original and the humorous nature of the parody are sufficiently clear. In particular, the court remarked that "it is not necessary for everyone to be able to laugh about it" for a parody to fulfill the requirement of humorous intent (4.13).

A specific set of problems arises when a well-known copyrighted character is parodied for commercial purposes, such as in an advertising campaign. A fitting example is *CO.GE.DI. International v. Zorro Productions Inc.* (Supreme Court of Cassation, No. 38165, 30 December 2022), in which Italy's Supreme Court jruled over an advertisement featuring an actor dressed up as Zorro without authorization from the character's copyright and trademark holders. While the first instance tribunal initially found that the advertisement was a copyright and trademark infringement, the Rome Court of Appeal later overturned the lower court's decision, on the grounds that Zorro had fallen into the public domain. However, as found by the Supreme Court in 2017, Zorro was still protected by copyright under the seventy-year term after the death date of the author. After being asked by the Supreme Court to review its decision, the Court of Appeal ruled that the contested advertisement amounted to copyright and trademark infringement, in light of the following: (1) The parody exception requires a creative re-elaboration of an earlier work; (2) Italy did not transpose into its legal system Article 5(3)(k) of the Information Society Directive, which provides for caricature, parody or pastiche as an exception to copyright. In response to that, the Supreme Court noted that – despite its "un-

avoidable parasitic character" – a parody is an autonomous work characterized by a "conceptual reversal" of the original; therefore, unlike other types of derivative works, it does not need to be a "creative re-elaboration" of the protected work. Moreover, the Court stressed that being a type of "quotation for the purpose of criticism or review," parody is actually protected by Article 70(1) of the Italian Copyright Act. Therefore, the Court of Appeal was mistaken in its assessment of the advertisement as copyright infringement. On the other hand, regarding trademark, the Supreme Court held that there might be a risk for the parody to cause an unfair exploitation of the trademark's reputation; on this basis, it asked the Court of Appeal to issue a new judgment specifically concerning the potential trademark infringement.

Broadening the scope to South Africa, *Laugh It Off Promotions v. South African Breweries* (Constitutional Court of South Africa, CCT42/04, 27 May 2005) also centers on the interaction of trademark law and parody. Laugh It Off Promotions CC is a company which parodies brands by altering the images and words on trademarks and printing them onto T-shirts – both for profit and to engage in social commentary. In this case, T-shirts had been printed with a parody of the well-known Carling Black Label trademark, which subsequently brought the action. The Cape High Court noted the difference was only in the wording: "Black Label" was replaced with "Black Labour," while "Carling Beer" was replaced with "White Guilt," and "America's lusty lively beer […] Enjoyed by men around the world," was replaced with "Africa's lusty lively exploitation since 1652 […] No regard given worldwide." The High Court considered that the message on the shirts carried a likelihood of material detriment to the distinctive character or repute of the marks, and the applicant could not raise the defense of free expression as the marks had been exploited for gain. The court found the use of the marks was not just parody poking fun at the trademarks, but rather bordered on hate speech by invoking race. The Supreme Court of Appeal confirmed the restraint order which had been granted against Laugh it Off for infringement of the respondent's trademark. The applicant then took the case to the Constitutional Court, which overturned the Supreme Court of Appeal's decision as South African Breweries had failed to establish the "likelihood of taking advantage of, or being detrimental to, the distinctive character or repute of the marks." Remarkably, the Constitutional Court's decision was solely based on technical grounds in light of the Trademarks Act, as the Court expressly declined to examine whether the satirical or parodic message was protected by freedom of expression. In his concurring opinion, Judge Sachs contended that the judgment should have ruled on the latter question as well and stressed that humorous expression is not only permissible but necessary to the health of constitutional democracy.

A speech-protective approach is also followed in the Indian case *Tata Sons Limited v. Greenpeace International* (High Court of Delhi, 178 (2011) DLT 705, 28 January 2011). The company Tata Sons Ltd had sought a permanent injunction and damages against a game produced by Greenpeace International, on the grounds of unauthorized use of its trademark and loss of reputation for the company. While the lawsuit was pending, Tata Sons also applied for a temporary injunction. Greenpeace claimed that Tata Son's industrial activities had an adverse impact on the breeding of Sea Turtles. To create awareness of the issue, Greenpeace had launched a game which was based on Pacman, titled "Turtles v. Tata," where the turtles are portrayed as escaping the Tata logo. The Court held that the representation of the Tatas in the game is clearly "hyperbolic and parodic," and that a temporary injunction should not be issued as there was no proof of defamation.

In other cases, however, the right-holder's interests have been favored over the parodist's freedom of expression. A recent, widely debated case from the United States is *Jack Daniel's Properties, Inc. v. VIP Products LLC* (599 U.S. ___, 8 June 2023), which began in 2013 when VIP Products created and marketed a dog toy shaped like a Jack Daniel's bottle. The toy was named "Bad Spaniels," and the label bore the image of a spaniel over the name of the product. The toy label also reads "the Old No. 2, on your Tennessee Carpet," which parodied the words "Old No. 7 Brand Tennessee Sour Mash Whiskey" from Jack Daniel's bottles. Notably, the toy had a tag attached, explaining that the product was not affiliated with Jack Daniel's. Nevertheless, Jack Daniel's filed suit against VIP Products, presenting two legal issues – the first concerned the likelihood of consumers being confused that the toy "Bad Spaniels" was in fact a Jack Daniel's product (15 U.S.C. §1125(1)), while the second concerned "Bad Spaniels" tarnishing the Jack Daniel's trademark

(Id. §1125(c)(2)(C)). Reversing the previous decision by the District Court of Arizona, the Court of Appeal for the Ninth Circuit qualified the parodic nature of the toy as protected expression through the *Rogers* test from the landmark case *Rogers v. Grimaldi*. Based on this test, an infringement claim should be dismissed at the outset unless the complainant can show that the contested use of a trademark "has no artistic relevance to the underlying work," or "explicitly misleads as to the source or the content of the work" (see also Duvall 2022). The Ninth Circuit therefore remanded for the District Court to assess whether either requirement of the *Rogers* test was satisfied; moreover, it overturned the lower court's finding of trademark tarnishment, invoking the Trademark Dilution Revision Act's exception for "noncommercial use of a mark." In June 2023, however, following the trademark owner's petition for review, the Supreme Court dismissed the Ninth Circuit's decision on the grounds that neither the *Rogers* test (with regard to infringement) nor the noncommercial exclusion (with regard to dilution by tarnishment) apply "when the challenged use of a mark is as a mark" (20), as is the case with VIP using "Bad Spaniels" as a trademark for its own product. As a consequence, the Supreme Court remanded for the lower courts to conduct a likelihood-of-confusion and dilution analysis, which had been sidestepped by applying the *Rogers* test and the noncommercial exception respectively. Writing for a unanimous Court, Justice Kagan acknowledged that the *Jack Daniel's* opinion has "narrow" scope, as it focuses on technical details of trademark law rather than engaging with broader reflections on humor, parody and freedom of expression (see also Little and Rosen 2023).

Another recent decision siding with IP rights owners is *Shazam Productions Ltd v. Only Fools The Dining Experience Ltd & Others* (High Court of England and Wales, [2022] EWHC 1379, 8 June 2022), which set an important precedent in English and Welsh law by recognizing that a fictional character can be copyright-protected as an independent work. The case was brought by the company Shazam Productions Ltd owned by the family of John Sullivan, who wrote the popular British situation comedy show *Only Fools and Horses*. Sullivan's family held the rights to this work. The defendants had developed an interactive dining experience named *Only Fools: The (Cushty) Dining Experience*, based on and featuring the characters, location, and catchphrases from the television series – 'cushty' being a word often used by Sullivan's main character 'Del Boy.' Shazam contended it owned the copyright to the sitcom's scripts and characters, alleging the defendants' show amounted to copyright infringement and passing off. The defendants denied any copyright infringement, relying on the defense of fair dealing under the parody exception established by s.30A of the Copyright, Designs and Patents Act 1988.

The Court decided in favor of Shazam, and the claims for copyright infringement and passing off succeeded. In his judgment, John Kimbell KC built on *Deckmyn* to clarify that parody should provide a humorous commentary on the original work or another subject, while defining pastiche as an "imitation of the style of pre-existing works, and the utilization or assemblage of pre-existing works in new works." On these grounds, he decided that the use of the characters, their backstories, jokes and catchphrases had not been pursued by the Dining Experience for parodic purposes; and whilst the script was humorous, this element came from the borrowed material. The Dining Experience's script did not evoke the situation comedy to mock it or critically engage with it (194); additionally, the judge noted that the "wholesale transposition of the characters, language, jokes and backstories from OFAH into the setting of an imaginary pub quiz […] is closer in form to reproduction by adaptation than parody" (194). This is the first time the domestic Court recognized a fictional character as an independent copyright work; moreover, the case illustrates how a certain degree of humorous distance and conceptual alteration is needed for a work to qualify as parody. As pointed out by Jacques (2023), the *Shazam* decision is also significant because of its submission that pastiche might constitute a separate defense to parody, which paves the way for a possible departure from the EU's *Deckmyn* standard.

Lastly, a comparable decision regarding the revisitation of a fictional character stemmed from the Tintin sculptures case (Court of Appeal of Aix-en-Provence, RG no. 22/04302, 24 November 2022). In 2017, an artist manufactured sculptures inspired by Tintin and a rocket as portrayed in the original comic book *The Adventures of Tintin: Destination Moon* (1953). The artist was sued for infringement of the moral rights of the author, but claimed the works were original under the parody exception granted by Art. L122-5 4° of

the Intellectual Property Code. The court eventually concluded that the sculpture did not differ sufficiently to be qualified as parody, since there was no specific intellectual contribution and/or questioning, nor touch of humor or even derision within the works. Therefore, the work was deemed an infringement of copyright and damages were awarded to the rights holders. Similar to the *Shazam* decision, the Tintin judgment understood parody as transformative imitation for humorous or satirical purposes; in this case too, the lack of a clear transformative element prompted the court to rule in favor of the copyright owner. Once again, the approach followed by both courts is substantially in line with widely accepted definitions of parody in the humanities, although literary theorists do not always place the same emphasis on the humorous component. In her influential *A Theory of Parody* (1985), for example, Linda Hutcheon argued that while parody may well be humorous, its scope is potentially broader and can be defined more neutrally as "repetition with critical distance, which marks difference rather than similarity" (6). As suggested above and exemplified by recent studies such as Breemen and Breemen (2022), Jacques (2019) and Lai (2019), a closer dialogue between legal practice and theoretical work on the topic could allow for more precise definitions and a further harmonization of international standards on parody and IP law.

### *II.5 Humor and "public morals"*

To conclude our collection of cases, in this section we consider how humor might affect the courts when they balance the right to freedom of expression with the right to freedom of religion and the nebulous concept of "public morals." Several countries worldwide have revoked their laws regarding blasphemy, and there is a broad consensus that courts should not be the arbiters of public morals (Temperman and Koltay 2017; Gegenava 2022). Nevertheless, recent ECtHR jurisprudence shows that allegedly injurious or indecent expression can still undergo religious or moral censure by national European courts, although the outcome of the domestic proceedings is usually overturned by the Strasbourg Court. For example, *Gachechiladze v. Georgia* (ECtHR, No. 2591/19, 22 July 2021) concerned condom packaging which used satirical images found by the domestic court as insulting to the religious and national dignity of the population, breaching "public morals," and therefore amounting to "unethical advertising." The ECtHR considered that the designs contributed to public debate on matters of general interest, which warranted a lower margin of appreciation.

In *Sekmadienis v. Lithuania* (ECtHR, No. 69317/14, 30 January 2018), instead, an advertising agency had been fined for breaching Lithuania's advertising law by violating public morals. The agency's campaign for a clothing line included images of actors bearing similar physical traits to religious figures and using terms such as "Jesus, what trousers!". The applicant argued they were creating a comic effect using common emotional interjections as word play. The national courts did not address the comical aspect and found that the interference was in accordance with the law (which had been changed during the national proceedings to prohibit advertisers from expressing contempt for religious symbols). The ECtHR found the advertisements were neither gratuitously offensive nor incited hatred on the grounds of religious belief, concluding that the domestic courts had not struck a fair balance between the protection of public morals and the rights of religious people on the one hand, and the advertising company's right to freedom of expression on the other. Additionally, the ECtHR considered the domestic courts had shown insufficient reasoning as to why the advertisements were judged contrary to public morals. Insufficient reasoning was also cited when a Polish court indicted the popular singer Doda, in *Rabczewska v. Poland* (No. 8257/13, 15 September 2022). The applicant had been fined for offending the religious feelings of others through publicly insulting the Bible, when she said that it was written by drunk people high on weed. She claimed she was being humorous and using metaphorical language. The ECtHR concluded this "did not amount to an improper or abusive attack on an object of religious veneration, likely to incite religious intolerance or violating the spirit of tolerance" (64), and therefore Poland had overstepped its margin of appreciation.

A year before the common law offenses of blasphemy and blasphemous libel were abolished in En-

gland and Wales, a member of a Christian group sought to bring a private prosecution against the producer of the satirical musical *Jerry Springer: The Opera* and the Director General of the BBC for broadcasting the same show, see *Green, R (on the application of) v. City of Westminster Magistrates' Court & Ors* (High Court of England and Wales, [2007] EWHC 2785, 5 December 2007). After the District Judge's refusal to issue the summons, Mr Green had applied for a judicial review of the District Judge's decision; yet, the High Court refused him leave to appeal, agreeing with the lower court's conclusion that "no jury, correctly directed as to the law, could properly convict," given that to qualify for the offense of blasphemous libel "the publication must be such as tends to endanger society as a whole, by endangering the peace, depraving public morality, shaking the fabric of society or tending to cause civil strife" (11). Although the second half of the show was set in Hell and contained religious irreverence and profanity, the court recognized the target of the satire was the *Jerry Springer Show* rather than the Christian faith.

Blasphemy aside, foul language as such can also become the object of court action. In *Constantin Film Produktion v. EUIPO* (C-240/18 P, 27 February 2020), the appellant company took their case to the Court of Justice of the European Union after the European Union Intellectual Property Office refused to grant EU trademark protection to the phrase *"Fack Ju Göhte"* (translated in English as "Fuck You Goethe"), on the grounds it infringed accepted principles of morality. Constantin Film contested that the phrase should be perceived as a joke and the decision was annulled. An analogous case from the United States is *Iancu v. Brunetti* (588 U.S. __, 24 June 2019), where – similarly to *Matal v. Tam* discussed in section II.1 – the Supreme Court upheld an appeals court's ruling that the prohibition of "immoral" or "scandalous" trademarks under the Lanham Act amounted to unconstitutional viewpoint discrimination. This case in particular revolved around the trademark FUCT ("equivalent of the past participle form of a well-known word of profanity"), which fashion designer Erik Brunetti had sought to register for his clothing brand.

Remaining in the U.S. and on the subject of obscene language, it is also important to mention the landmark "Seven dirty words" case, which confirmed the state's ability to prohibit obscene language from being broadcast on the radio or TV during certain times of the day in order to protect children. In *FCC v. Pacifica* (U.S. Supreme Court, 438 U.S. 726 1978), an American radio station had received a letter of reprimand by the Federal Communications Commission (FCC) after broadcasting comedian George Carlin's swear-filled monologue as part of a discussion on societal attitudes towards language. The letter made clear that the agency would fine Pacifica if it received other complaints. Carlin's monologue was broadcast at 2pm and a member of the group Morality in Media complained this was inappropriate, given children would be available to hear the broadcast, as he purported his own child had. The question the Court had to consider was if the FCC's power to sanction a broadcaster was consistent with the First Amendment. The Court narrowly upheld the FCC's authority to restrict such broadcasts and considered a lower level of First Amendment protection should apply to broadcasting, as children should be safeguarded from "indecent" speech and not come across such programming unawares during the daytime (for a critical assessment of the impact of *Pacifica* on broadcast journalism, see Punnett and Russomanno 2018).

With the exception of *FCC v. Pacifica*, all of the decisions mentioned above ultimately adopt a speech-protective stance. The following three cases, instead, resulted in the curtailing of allegedly blasphemous or indecent content. Turning first to protecting religious sensitivities, the ECtHR was unusually restrictive in its early approach. This is apparent in the controversial judgment *Otto Preminger-Institut v. Austria* (No. 13470/87, 20 September 1994), involving a cultural institute which ran a cinema and promoted the arts. The case concerns the seizure and destruction of a satirical film set in Heaven (*Das Liebeskonzil*), where leading figures from Christianity, Judaism and Islam – including God and Mary – are depicted as infirm, simple-minded and unprincipled. Following complaints from the Roman Catholic Church, the manager was charged with "disparaging religious doctrines." The Austrian courts considered the film an abusive attack on the religion of most of the Tyrolean public. The merit of the film as a piece of art or its value as a contribution to public debate was deemed insufficient to outweigh the potential offense, with the ECtHR judging the national authorities better placed to appreciate this. The film was seized before it could be shown, and the high protection warranted by satirical artistic expression (which, as later stated in *VBK*,

"naturally aims to provoke and agitate") was not considered as important as the protection of religious feelings guaranteed by Article 9 of the European Convention on Human Rights. Additionally, the ECtHR considered the seizing was necessary to protect public order and preserve religious peace, a highly unlikely reaction to a film which people could choose not to see (see also Lewis 2017).

Keeping with the theme of religious peace but turning to more recent Russian jurisprudence, a popular video blogger was convicted of offending religious feelings and inciting hatred toward a social group through the publication of YouTube videos in the Ruslan Sokolovsky case (Supreme Court of Russia, 1-131/2017, 14 February 2018). In one video he was seen playing Pokémon Go in a church whilst questioning the existence of Jesus and the Prophet Muhammed. He claimed the video was a response to the law prohibiting playing the game in places of worship. In the video, he made "offensive statements" in the form of a church hymn and ridiculed the foundations of Christianity. He was arrested and charged for incitement of hatred and insulting the feelings of religious believers, sentenced to a suspended term of three and a half years and banned from participating in public events. The Court ordered the videos to be removed from the internet. On appeal, the court upheld the conviction of incitement to hatred and offense of religious feelings but reduced his suspended sentence.

Lastly, the Indian Supreme Court Court case *Tuljapurkar v. State of Maharashtra* (6 SCC 1, 14 May 2015) focused on the poem "I met Gandhi," published by a magazine in 1994, which the appellant described as a satirical and bold critique on those who do not follow the Gandhian ways of life. Rebutting the appellant's references to freedom of expression under Article 19 of the Indian Constitution and Article 10 of the European Convention on Human Rights, the Court held that the poem falls within the realm of the offense of obscenity. As argued in Mr Nariman's amicus curiae, the poem would not have been obscene had it referred to an ordinary man, but its mentions of Mahatma Gandhi enhance the perception of obscenity. However, the publisher's apology and the passage of time (20 years) meant the appellant was discharged. This case illustrates how the passing of time can mitigate material which may have been considered extremely offensive nearer the time of Gandhi's death.

## III. Conclusion

Despite touching upon several different themes and legal frameworks, the judgments discussed in Section II point toward some recurring international trends concerning humor and free speech, especially within liberal democratic contexts.

- First, particular attention is usually placed on humorous **incongruity** (Little 2011) – namely the implausibility of the ideas evoked by the contested joke, which would prevent a reasonable audience from interpreting said joke as a factual defamatory statement (see *Hustler v. Falwell* or *Nikowitz v. Austria*), as an actual threat (*Chambers v. DPP*) or as an unfair use of intellectual property (*Mercis c.s. v. Punt.nl*). By contrast, the level of incongruity can also be deemed insufficient to reasonably exclude a harmful interpretation (*Le Roux v. Dey*). According to the General Theory of Verbal Humor – later also extended to various forms of non-verbal humor –, incongruity can also be conceived of as the distance or contrast between the "scripts" (i.e., concepts or scenarios) that are humorously conjured within a given joke (Attardo 2017).

- While incongruity may undermine or even reverse the (potentially harmful) literal interpretation of a contested joke, the **elusiveness** of humor can also be used to convey a harmful message in an implicit way, thus prompting courts to read between the lines. This is the case, for example, in *McAlpine v. Bercow*, revolving around the "innuendo meaning" of the expression "*innocent face*" (an instance of what Simpson 2003 calls satirical attenuation or "undercoding," as opposed to exaggeration). In *M'Bala M'Bala v. France*, the ECtHR's analysis of the disputed comedy sketch concluded that "the taking of a hateful and anti-Semitic position, hidden under the guise of an artistic production, is as dangerous as a frontal and abrupt attack" (40); likewise, in its Knin cartoon decision, the Meta Oversight Board stressed that hate speech standards also apply to "implicit [e.g. metaphoric] references to protected groups [...] when the reference would be reasonably understood."

- Another recurring point concerns the importance of **context** in the interpretation of humor – with reference to the political, socio-cultural and historical circumstances in which the disputed expression was uttered or circulated. An indicative case in this respect is *Leroy v. France*, where the ECtHR upheld the conviction against the applicant because the cartoon was published "on September 13th [2001], when the whole world was still shocked by the news" and "in a politically sensitive region [: the French Basque Country]" (45). With special regard to context in a chronological sense, another example of a joke apparently uttered *too soon* is the "Charlie Coulibaly" quip at the center of Tribunal de Grande Instance decision from 18 March 2015, which – as stressed by the Court – was posted "at a time when public opinion was still deeply upset by the attacks committed shortly before and when the victims were not yet buried" (see, by contrast, *The State v. Cassandra Vera*, where the Supreme Court of Spain overturned the conviction also in light of the historical distance between the joke and the event it refers to).

- When assessing a joke's status as protected speech, a widely accepted principle is that courts should refrain from restricting humorous expression that is merely offensive on a subjective level but should only do so when the joke is likely to inflict an **objective harm** on its target. This is particularly evident in hate speech cases, where distasteful or disparaging jokes were ultimately considered as protected expression as they were not deemed to amount to incitement to hatred (e.g. *Ward v. Quebec*, the Nadine Morano case, or *Bropho v. Human Rights and Equal Opportunity Commission*). This being said, some provisions deviate from this general distinction between

(lawful) offense and (unlawful) harm, as exemplified by material deemed unlawful because of its "grossly offensive" nature as imposed by the Communications Act 2003 in the United Kingdom.

- With respect to dignitary harm in particular, special attention is often paid to the **target's status**, as public figures are typically expected to display a higher level of tolerance towards ridicule. Relevant examples include, inter alia, *Dickinson v. Turkey*, *Telo de Abreu v. Portugal*, *Zachia v. Center of Professors* and *Pando de Mercado v. Gente Grossa SRL* (all of which concern satirical criticism of political figures), as well as *Sousa Goucha v. Portugal* and *Ward v. Quebec* (where the disputed jokes are aimed at other kinds of public figures). In contrast to that, a lower threshold of protection usually applies to humor targeting non-public figures (in defamation cases such as *Le Roux v. Dey*) and vulnerable minority groups (as in the hate speech cases discussed in section II.2).

- Lastly, and following up on the previous point, courts tend to grant special protection to humor when it is deemed to contribute to **public interest** debates. This criterion is often used convincingly by courts – see, for instance, *Instytut Ekonomichnykh Reform, TOV v. Ukraine* (where the "public interest" standard plays an important role in the ECtHR's finding of Article 10 violation) or *Canal 8 v. France* (where, on the contrary, the lack of any contribution to public debates is considered an aggravating factor). However, from a humor studies perspective, distinguishing too rigidly between publicly relevant and "gratuitous" forms of humor is problematic – first of all, the line between these two categories is often arbitrary and context-dependent; moreover, such an approach could penalize forms of humor that might still be legitimate, despite arguably lacking an explicit socio-political message (see Capelotti 2018: 268, or Nugraha 2021 with particular reference to *Z.B. v. France*).

While the trends listed above suggest a certain level of coherence in humor-related jurisprudence from different regions, some key aspects of humorous communication are often treated inconsistently – even within the same given judicial system. In particular, in Godioli, Young and Fiori (2022) we stressed the importance of reaching a more systematic approach towards the following dimensions: (1) The rhetorical or semiotic mechanisms underlying the contested verbal, visual or multimodal jokes; (2) Intertextuality, namely the dialogue between the contested expression and previous texts by means of allusion, commentary or parody; (3) The role played by a broad range of contextual factors, including *inter alia* the conventions of a given humorous genre, the prior conduct of the speaker, as well as the specific socio-political circumstances in which humor is produced and circulated; (4) Mapping out the possible outcomes of the interpretive process, e.g., the possibility of construing the same joke as disparaging or non-disparaging; (5) The actual or presumed reception of the disputed expression within a given audience. The examples below briefly illustrate in what ways each of those dimensions is not always paid sufficient attention:

*(1) Rhetorical or semiotic mechanisms*: Courts often conceive humor in terms of exaggeration or hyperbole – in some cases, these latter terms are even used as synonyms of humor at large ("I use parody, satire, humor, caricature, *rhetorical hyperbole*, and other references to 'humorous' statements synonymously," *Hamilton v. Prewett*, concurring opinion by J. Najam, our emphasis; see also Todd 2016: 56-63). However, not all humor necessarily *exaggerates* reality – it can also resort to subtle allusion through satirical undercoding (as with *innocent face* in *McAlpine v. Bercow*), combine incongruous ideas by means of metaphor, or create a mirror opposite of reality through irony or carnivalesque reversal. These alternative mechanisms are not always assessed in a satisfactory way in humor jurisprudence, as shown for instance by *Hanson v. Australian Broadcasting Corporation* (where the parody song was interpreted as "patently defamatory" rather than a codified form of carnivalesque degradation), *Palomo Sánchez v. Spain* (in which the metaphoric nature of the disputed cartoon was not properly acknowledged by the Grand Chamber's majority), or *Z.B. v. France* (where the claim that the words "I am a bomb" cannot "reasonably refer to the beauty of the child" seems to neglect the metaphoric sense of the expression).

*(2) Intertextuality*: In *Eon v. France*, the national courts had questionably interpreted the offensive words "Casse toi pov'con" in the first degree, i.e. as though they were supposed to be taken at face value, thus denying the importance of the intertextual dimension – namely the fact that the words had first been uttered by the President himself on a previous public appearance. However, the ECtHR convincingly argued that the "repetition of the phrase previously uttered by the President cannot be said [...] to have amounted to a gratuitous personal attack against him" (57). Particularly, Linda Hutcheon's (1985) definition of parody as "repetition with critical distance" seems particularly relevant in this respect.

*(3) Context*: As argued in Section II.3, the *Z.B. v. France* judgment does not seem to fully engage with some crucial contextual factors – namely the specific communication setting (the fact that the T-shirt was only worn once and only seen by two adults working in a nursery school), the speaker's prior ethos (i.e., the applicant's lack of ties with any terrorist movement or ideology), and the genre that the joke can be ascribed to (post-9/11 humor by comedians from a Muslim background, often characterized by the ironic use of Islamophobic tropes).

*(4) Possible outcomes of the interpretive process*: With particular regard to the intersection of humor and dignitary harm, Godioli, Young and Fiori (2022) outlined a distinction between three main outcomes – *disparaging humor* (aiming to insult and vilify the first-degree target of the joke), *sarcastic disparagement* (e.g. using racist or sexist tropes in the second degree, as a way to denounce someone else's racism or sexism) and *taboo-breaking humor* (where the offensive component is supposedly not meant to disparage its first-degree target, but rather to question or disrupt the perceived taboo status of a given topic, as is often the case with disaster jokes). This typology can be further complemented through the notion of *jocular insults*, i.e. playful insults geared towards collective humorous experience rather than offending the target, as with comedy roast battles (Dynel 2021). Some of the decisions summarized in Section II implicitly opt for one univocal interpretation of the disputed joke, without problematizing the preferred interpretation or comparing it with other plausible outcomes. For example, the jokes at the center of *Z.B. v. France* as well as the Russian cases of Idrak Mirzalizade and Snob.Ru were classified as disparaging humor, but could also be seen as instances of sarcastic disparagement (this is all the more glaring in the Russian cases); in *Sinkova v. Ukraine*, the taboo-breaking angle – questioning the sacred status of a national monument to provoke a political discussion – was neglected in favor of a disparaging interpretation; contrastingly, the majority in *Ward v. Quebec* privileged the taboo-breaking reading of the comedian's ableist joke, thus sidelining its disparaging aspects. Certainly, the lines between these categories are inherently blurred, and humor interpretation is always bound to retain a subjective component. Yet, a closer engagement with the different interpretive options afforded by a given joke (possibly in light of a shared terminology such as the one sketched above) could set the basis for a more consistent approach to the subjectivity of humor.

*(5) Actual or presumed reception*: When assessing liability for the effects of a disputed expression, courts usually set out to reconstruct how said expression could be received by a "reasonable" audience. However, "deciding who the 'right-thinking' or 'reasonable'" members of society might be is often "far from obvious" (McDonald 2016: 187); and in particular, the elusive (and often emotionally charged) nature of humorous communication might make it all the more necessary to problematize the scope and limitations of the reasonableness standard. In *Ward v. Quebec*, for instance, the majority concluded that "a reasonable person aware of the relevant circumstances would not view [Ward's jokes] as inciting others to vilify [Gabriel] or to detest his humanity on the basis of a prohibited ground of discrimination;" moreover, in their view, "a reasonable person could not view the comments made by W., considered in their context, as likely to lead to discriminatory treatment of G." Yet, as highlighted by the dissenting judges, the majority's use of the reasonableness crite-

> rion is too abstract in this case, as it fails to consider the age of the target: "Childhood and early adolescence is a formative stage of life during which time an individual's desire to belong can of course be deeply felt. A reasonable young person in Jérémy Gabriel's shoes would be particularly susceptible to the harms associated with dehumanizing comments" (174). Additionally, the majority does not seem to place sufficient weight on the *actual* reception of Ward's jokes, including how it inspired further mocking by Gabriel's schoolmates: "Because of their broad dissemination, these harms were magnified when Jérémy Gabriel's classmates repeated Mr. Ward's jokes, teasing him and mocking him repeatedly at school" (196). From a literary-theoretical standpoint, the dissenting judges decided not to focus exclusively on a generic reasonable audience, but rather on the "presumed addressee" (Schmid 2013) – namely the public among whom the author could reasonably expect their work to be circulated, including Gabriel himself and his schoolmates. Irrespective of differing opinions on the case, the majority's reasoning would have benefitted from a more nuanced application of the reasonableness standard.

Each of the dimensions outlined above comes with specific challenges, as well as presenting new challenges specifically related to the evolution of humorous communication in the digital – or "post-digital" (Fielitz and Thurston 2018) – age. For example, how can courts deal with the complex intertextuality of internet memes, where the same template could take on different cultural or political meanings depending on the forum in which it circulates (Shifman 2014, Greene 2019)? How is it possible to distinguish between disparaging humor and sarcastic disparagement, within digital environments dominated by "comic confusion" and "ironic ambiguity" (Holm 2021)? Who is the reasonable reader or the presumed addressee, in a time of viral circulation and growing fragmentation between "irony-laden subcultures" (Nagle 2017)? While none of these questions is likely to yield definitive answers, some useful insights might result from a closer interaction between legal scholarship and practice on the one hand, and humor research on the other. We hope that the present paper – in addition to identifying general trends and recurring issues in humor jurisprudence – has suggested some of the potential benefits of such cross-disciplinary encounters.

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