Factsheet
Humor and Satire Case Law

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This Factsheet is meant to complement our Special Collection paper *Humor and Free Speech: A Comparative Analysis of Global Case Law.*

What is humor?

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 challenge social boundaries and norms. 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), 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).

Protecting Humorous Expression

While there are no established tests or soft-law instruments specifically focusing on this mode of expression, humor is typically evaluated in light of general free speech provisions existing at 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 (Art. 10), the American Convention on Human Rights (Art. 13) and the African Charter on Human and Peoples' Rights (Art. 9). As stressed by the ECtHR and reiterated by courts from across the globe, 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 highlighted by the Inter-American Court of Human Rights in Kimel v. Argentina (Series C 177, 2 May 2008, 88).

Within this framework, 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 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).

Comparable defenses of satire as a form of "exaggeration and distortion" of reality are pronounced, among others, by the Constitutional Court of Lesotho in the landmark case Peta v. Minister of Law, Constitutional Affairs and Human Rights (CC 11/2016, 18 May 2018, 9), by the Argentinian Supreme Court in Pando de Mercado v. Gente Grossa SRL (63667/2012/CS1, 22 December 2020, 14-15), and by the Supreme Court of India in Indibility Creative Pvt Ltd v. Govt of West Bengal (Writ Petition (Civil) No. 306, 11 April 2019, 13). 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 – whereby the fundamental social function of satire is not necessarily to speak truth to power or provide new insights on topical subjects, 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; it does imply, though, that the "public interest" standard should not end up penalizing forms of humor that (while being potentially legitimate) do not bring an explicit contribution to public debates.

General Trends and Standards in Humor Jurisprudence

Humor-related cases may touch upon a broad range of themes and legal issues – including, for instance, defamation and other forms of dignitary harm; incitement to hatred, discrimination or violence; threat to public peace; and copyright or trademark violation. However, it is possible to

identify some overarching trends concerning humor and free speech, especially within democratic contexts generally complying with international human rights standards. The following trends, of course, should be thought of in combination with other standards and practices widely adopted in free speech jurisprudence at large (such as the three-part test, the 'reasonable/ordinary public' test, etc.).

- 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 [US] or Nikowitz v. Austria [ECtHR]), as an actual threat (Chambers v. DPP [England & Wales]) or as an unfair use of intellectual property (Mercis c.s. v. Punt.nl [Netherlands]). By contrast, the level of incongruity can also be deemed insufficient to reasonably exclude a harmful interpretation (Le Roux v. Dey [South Africa]). According to humor research, 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 [England & Wales], revolving around the "innuendo meaning" of the expression "*innocent face*." 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).

- Another recurring point concerns the importance of context in the interpretation of humor – with reference to the political and socio-cultural circumstances (as well as the medium) in which the disputed expression was uttered or circulated. An indicative case in this respect is Leroy v. France, where the ECtHR upheld the applicant's conviction for glorification of terrorism because the disputed 9/11 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). 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 outright incitement to hatred (e.g. Ward v. Quebec [Canada], or Bropho v. Human Rights and Equal Opportunity Commission [Australia]). Similarly, the lack of objective harm can prove instrumental in protecting religiously offensive or obscene humor, as shown in ECtHR decisions such as Gachechiladze v. Georgia, Sekmadienis v. Lithuania and Rabczewska v. Poland.

- 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 and Telo de Abreu v. Portugal [ECtHR], Zachia v. Center of Professors [Brazil] and Pando de Mercado v. Gente Grossa SRL [Argentina] (all of which concern satirical criticism of political figures), as well as Sousa Goucha v. Portugal [ECtHR] and Ward v. Quebec [Canada] (where the disputed jokes are aimed at other kinds of public figures). There are, however, some notable (and arguably problematic) deviations from this standard – see for instance Hanson v. Australian Broadcasting Corporation [Australia] (where a parody song mocking a politician was deemed "patently defamatory") and Camargo v. Bastos [Brazil] (where a financial sanction was issued over a vulgar joke targeting a well-known singer-songwriter). In general, a lower threshold of protection usually applies to humor targeting non-public figures (Le Roux v. Dey) and vulnerable minority groups (e.g. Féret v. Belgium or M'Bala M'Bala v. France [ECtHR]).

- Lastly, as mentioned above, 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, the ECtHR decisions Instytut Ekonomichnykh Reform, TOV v. Ukraine (where the "public interest" standard plays an important role in the Court's finding of Article 10 violation) and Canal 8 v. France (where, on the contrary, the lack of any contribution to public interest debates is considered an aggravating factor). However, distinguishing too rigidly between publicly relevant and gratuitous forms of humor may become problematic in some cases (see discussion of Z.B. v. France below).

Problem Areas

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 sometimes treated inconsistently – even within comparable judicial systems in democratic contexts. The two decisions presented below will be used to highlight some aspects where the courts' approach could have been more nuanced or consistent.

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 born on September 11th, 2009, and was in fact called Jihad (which is a common Arabic name meaning ‘effort’ or ‘strive,’ not necessarily ‘holy war’). 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 ECtHR 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).

The perspective adopted by the Nîmes Court of Appeal and the ECtHR in Z.B. is not 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. 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.

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) – should be particularly relevant when it comes to criminal charges like glorification of terrorism.

4) Lastly, another important contextual 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 distasteful) to make fun of the Islamophobic cliché casting Muslims as Jihadists until proven otherwise – let alone a family where a child is named Jihad. This would also undermine the courts' assumption that the joke does not contribute in any way to public interest debates, thus exemplifying the arbitrary and subjective boundaries of this latter notion.

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 and consistent with previous ECtHR jurisprudence.

Moving from Europe to Canada, Ward v. Quebec (2021 SCC 43, 29 October 2021) concerns 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. 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 targeted 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, which 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).

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).

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" (88). In recent years, critical humor scholars have actually provided ample historical and empirical evidence regarding the substantial role that disparaging humor can play in inciting hatred and discrimination (see Pérez 2022 and Ford 2015 among others).

Irrespective of differing opinions on the final outcome of both cases, both Z.B. and Ward illustrate how some crucial aspects of humorous communication could be examined more systematically by courts – from the rhetorical (e.g., metaphorical) functioning of a disputed joke to the definition of the 'reasonable audience' in a given situation, or the different contextual aspects that should be taken into account (such as the specific communication setting, the speaker's 'prior ethos,' or the genre that the joke can be ascribed to). In all these respects, some useful insights might result from a closer dialogue between legal scholarship and practice on the one hand, and humor research from the humanities and social sciences on the other.