

Jokes – Legally Speaking (Part one)

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ABSTRACT: The article was written with the purpose of shedding some legal light on the juridical implications that might arise with expressing jokes and satire. The analysis first tried to create a general overview of what constitutes satire or a joke, how they are created and to what purpose. After identifying the social construct – that is “jokes” – the author, recognizing the principles of freedom of speech, searches for breaches as noted in the case-law of the European Court of Human Rights in correlation to the right to privacy and protection of one’s honor. The author concluded that satire is a powerful tool for social commentary and an imperative tool in a democratic society; a tool, just like any other, might be misused thus courts have to intervene and level the plain field.

KEYWORDS: jokes, pranks, memes, code of conduct, freedom of expression

Of satire and jokes - philosophically

The ancient Greeks were the first to encapsulate human nature in recreations of life through the art of theater. Later, the Romans perfected it – *ars simiae nature (art resembles life)*. The theater offers us one of the greatest psychological dichotomies of the human mind: tragedy and comedy; the coming together of which creates life as all of us live it. Tragedy and comedy, just like good and evil, in order to both exist, must cohabitate. We cannot have one without the other, as they involve opposition and conflict (Amir 2019, 72).

According to Hegel (1975, 1199), laughter and comedy are not to be confused. Any difference between something genuine and how it seems, between a goal and the means, may be something risible but in order for something to be comical, Hegel suggests there should be something deeper. Satire, even though it produces the same laughing effect, provides us with evidence of this, and the more crudely it depicts the contrast between the real world and what morally upright people should be, the more tediously it illustrates the point (Hegel 1975, 1200).

A pertinent question does arise relating to the provenance of laughter: why do people laugh and why is laughing so subjective? The items that people laugh at tend to have the most paradox overall. On one side of the spectrum, we are capable of laughing at the most banal platitudes, but on the other hand, we also frequently do so even when discussing deep issues if we discover only one utterly trivial discrepancy that goes against our perception of the world. Laughter may also come from a place of mockery and disdain.

A great Romanian philosopher and poet, Lucian Blaga (1919, 44-45), in his poem “Heaven’s light” writes “[...] *But would so much laughter bear fruit in my field without the warmth of evil? [...] Like a heretic I think and wonder: where does Heaven get its light? - I know: Hell, lights it up with its flames!*” The author uses the oxymoron “the warmth of evil” to express the influence sin has over man and also to weaken evil’s negative stigma. Moving forward, the poem’s final lines serve as an illustration of the philosophical idea that good and evil materialize in the world in equal measure and with equal forces, acting in opposition to one another to keep the universe stable and in balance.

Laughter, throughout history, was subjected to a lot of analysis. For example, Aristotle (2001, 69) considered humankind to be the only one capable of laughing; but when going in depth in his work *Nicomachean Ethics*, he asks himself what defines a person who jokes well: he who says what is not inappropriate for a liberal human being, or he who does not cause

pain to the listener? A person's honor was a virtue of great importance ever since those times, so Aristotle suggested equating slander with joking about certain things because the buffoon, as opposed to a witty person, will do anything and everything for a joke (Aristotle 2011, 87-88). Stoics saw laughing as something permissible but would recommend "*not to allow your laughter be much, nor on many occasions, nor profuse*" (Epictetus 1865, 627).

An interesting strict correlation has been made between the comic and human experience. Henri Bergson (2005, 2) observed that "*the comic does not exist outside the pale of what is strictly human.*" He further holds that nature can be anything but laughable: it can be serene, beautiful, pristine etc. This does not mean that comedy cannot be found in animate or in inanimate things, but the reason for this will always be the projection onto them of the human conceptualizations or their use for him. In his opinion, human seems to be the only animal that is laughed at (Bergson 2005, 2), a view to which we must give legal connotations and implications.

According to Thomas Hobbes, the grimace of laughter is associated with sudden glory. He sees it as coming from either pleasure or a place of arrogance or superiority: "[laughter is caused] *by the apprehension of some deformed thing in another, by comparison whereof they suddenly applaud themselves. And it is incident most to them that are conscious of the fewest abilities in themselves; who are forced to keep themselves in their own favor by observing the imperfections of other men. And therefore, much laughter at the defects of others is a sign of pusillanimity. For of great minds one of the proper works is to help and free others from scorn and compare themselves only with the most able*" (Hobbes 1651, 36).

Satire employs humor to mock or denigrate social groups or social constructs and while speaking of parody, the most distinctive features of another author's work are purposefully imitated and warped in order to produce sarcastic or humorous effects. These acts may easily fall outside the protection of the law, being sanctioned by civil law or criminal law in different ways (e.g., nullity of a contract, civil tort liability, criminal charges); their authors must give due consideration to their jokes and their legal complications because, quoting Balzac (2012, 379), "*I see too much of the law not to know that it is well to have nothing to do with it.*"

Satire, jokes and the European Court of Human Rights (ECHR)

Globalization is the most important driving force for economic cooperation and peace, but unity also comes from maintenance and further realization of common sets of rights and values, like Human Rights and Fundamental Freedoms.

Freedom of expression, be it verbally or through actions, artistically or non-artistically, is one of the most important pillars of democracy, set out in a number of national, European and international documents, like the Universal Declaration of Human Rights or the European Convention on Human Rights. According to art. 10 of the European Convention on Human Rights, everyone has the right to freedom of expression. This freedom includes the ability to express ideas freely across national boundaries, without intervention from the government, and to hold opinions. Furthermore, the licensing of radio, television, or movie theater businesses is not prohibited by this article.

Notwithstanding, paragraph 2 imposes some limitations, making it a non-absolute right. Since exercising these freedoms entails duties and responsibilities, exercising them may be subject to the formalities, conditions, restrictions, or punishments that are required by law and essential to a democratic society in order to protect national security, territorial integrity, or public safety, to prevent disorder or crime, to protect one's health or morals, to protect one's reputation or other people's rights, to prevent the disclosure of information, or for other reasons.

In *Handyside v. the United Kingdom*, the ECHR held that “*freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [referring to legitimate restrictions] it is applicable not only to “information” or “ideas” that are favorably 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. Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no “democratic society”. This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.*” (§ 49)

ECHR has a 3-point test that it uses to assess the interference with art. 10: a) it must be prescribed by law; b) pursuance of a legitimate aim (national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary); and c) necessity in a democratic society, meaning that there must be “pressing social need” for it (Callamard 2013, 26).

In *Simić v. Bosnia and Herzegovina*, ECHR defended the plaintiff’s joke made in an appeal for which he was found in contempt of court because, criticizing the application of rules of evidence in his client’s case, he compared the court to a professor who expected his students to provide the names, and not only the number, of the victims of the bombing of Hiroshima, and stated that the second-instance court had treated him like the professor treated his students in that joke. Even though the Government tried to evoke the joke was a gratuitous personal attack with the sole intent to insult a court or members of a court, the ECHR did not agree.

The ECHR found in favor of the appellant, concluding that the interference with the applicant’s right to freedom of expression was not “necessary in a democratic society”.

Another interesting case-law of ECHR (*Cumpănă and Mazăre v. Romania*. Application 33348/96), presented itself after the conviction of two journalists for an article entitled “Former Deputy Mayor [D.M.] and serving judge [R.M.] responsible for series of offenses in Vinalex scam” accompanied by a cartoon depicting the two holding bags of money, saying to each other:

- “*Hey, [R.] [diminutive form of Mrs. R.M.’s first name], you’ve done a good job there! When I was deputy mayor we made quite a bit, enough to go to America ...*”

- “*[D.] [diminutive form of the former deputy mayor’s first name], if you become a lawyer, I’ll become a judge and we’ll have enough to travel round the world ...*”.

Applying the 3-point test, ECHR ruled that i) concerning the existence of interference: it was undeniable that the applicants’ conviction, even with the sentence suspended, interfered with their right to freedom of expression; ii) concerning the justifiability of the interference: while the interference was indeed prescribed by law, art. 205 and 206 of the former Criminal Code, and while indeed it was legitimate in the interest of protecting the rights of others, the nature and severity of the sanctions are to be taken into account when assessing the interference with art. 10.

It was observed (Feldmane 2019, 25-26) that even though the appellants stressed the satirical nature of their expression in their defense, the court did not inspect this aspect in depth. The correlation between satire and humor or jokes is not one of confusion because satire has more depth; it uncovers the many faces of society’s faults and makes us think. Satire is helped by humor to ease itself into one’s conscience (Feldmane 2019, 48).

In a different case (*Sousa Goucha v. Portugal*, application 70434/12), ECHR was asked to give a decision where national courts would not prosecute in a criminal case for insult and thus having to establish if the state has achieved a fair balance between the applicant’s right to

protection of his reputation, under Article 8, and the other parties' right to freedom of expression, under Article 10. Goucha lodged a defamation and insult complaint with local authorities against public television company RTP because, during a live talk show, the host asked his guests: "Who is the best Portuguese female TV host?"; there were three female possible answers and Goucha, his being the "correct" one. The local investigating judge dismissed the case having regarded all the facts, including the defendants' statements that they did not mean to insult his honor, and the special status of the appellant – a well-known television host in Portugal, with a publicly declared homosexual orientation, with behavior that is attributed to the female gender, such as his way of expressing himself, his colorful and feminine clothes, and the fact that he has always lived in a world of women.

ECHR found to be no violation of article 8 in this case. Having to balance the rights guaranteed in articles 8 and 10, it kept in mind that no hierarchical relationship exists between the rights guaranteed by both articles (*Timciuc v. Romania*, application 28999/03 §144).

Conclusions

Jokes and satire are a serious matter. Both are powerful tools for social commentary and imperative tools in a democratic society, but a tool, just like any other, might be misused, thus courts have to intervene and level the plain field. The European Court of Human Rights, when discussing satire and jokes through the analysis of article 10 (freedom of expression), made great achievements in advancing human rights for the whole world (*Mendel n.d. 2*). Further analysis is needed and will follow on the matter of jokes, pertaining to civil and criminal law.

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