

**‘TAKING JOKES SERIOUSLY’: ESTABLISHING A NORMATIVE PLACE FOR
SATIRE WITHIN THE FREEDOM OF EXPRESSION ANALYSIS OF THE
EUROPEAN COURT OF HUMAN RIGHTS**

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Abstract: Satire is a form of expression which tackles complex, contemporary issues in a nuanced, jesting spirit. Vitality, it does so through humour and provocation. However, satire is in danger of under-protection within the European Convention on Human Rights framework. There are two principal reasons for this. Firstly, satire has not yet been sufficiently defined at the European Court level in order to ensure that it is treated as a distinct category worthy of higher protection, as it should be. Secondly, national authorities are often granted a wide margin of appreciation, which they are likely to abuse in order to restrict satirical expression. The solution to these problems entails three steps. This article argues firstly identifies a clear framework for the definition of satire, in order to allow the Court to identify satire, in addition to exploring the philosophy which justifies granting it higher protection. Secondly, it argues that the margin of appreciation should be removed in order to place the analysis of satire in the hands of the European Court in Strasbourg. Finally, it explains how to balance the protection of satire against the rights of others, to provide limited, well-reasoned exceptions.

A. INTRODUCTION

Satire performs a crucial role in modern, democratic society. It is an influential form of communication in discourse, which ‘... searches what seems genuine to unearth hidden depravities from it’.¹ Uniquely, satire packages scrutiny of serious and controversial topics within a ‘humorous discourse’,² deploying specific, effective tactics to criticise an ‘object of ridicule’.³ Yet, the protection of satire is no laughing matter. Due to the subjectivity of offence, satirists are at risk of having their work restricted by overzealous national authorities. This could lead to satirists modifying or suppressing their ideas, either to ensure publication or to avoid sanctions. Therefore, it is necessary to shift the balance back in favour of satirists by providing a strong basis for protection in accordance with the right to freedom of expression,

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¹ Sophie Duval and Marc Martinez, *La Satire (littératures française et anglaise)* (Armand Colin 2001) [Original: ‘la satire ... fouille le réel pour en exhumer les turpitudes cachées’].

² Paul Simpson, *On the Discourse of Satire: Towards a stylistic model of satirical humour* (John Benjamins Publishing Company 2003) 1.

³ Keith Cameron, *Humour and History* (Intellect Ltd 1993) 7.

enshrined in Article 10 of the European Convention on Human Rights. The European Court of Human Rights (hereafter the ‘ECtHR’ or the ‘(European) Court’) famously and justifiably stated that:

... satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist’s right to such expression must be examined with particular care.⁴

This statement demonstrates that the European Court appreciates that interferences with satire should be prudently assessed and amounts in the author’s view to treating satire as a particular mode of expression – one which should be granted stronger precedence over other interests, akin to that of political expression.⁵ Political expression is generally afforded better protection through a reduction in the margin of appreciation offered to states which interfere with it. Moreover, the European Court has interpreted expression worthy of protection to include ‘... “information” or “ideas” ... that *offend, shock or disturb* ...’,⁶ which uncompromising satire often does. Accordingly, limits on satire require strong justification. The above statement from the case of *Vereinigung Bildender Künstler* (hereafter “VBK”) is pivotal in explaining why satire is a unique form of commentary worthy of special protection. It provides a stepping stone to greater protection at the European Court level, and by extension in the Contracting States. Yet, in laying the foundations of this path, the European Court neglected to take the next step.⁷ VBK can be regarded as the flagship case for defining satire in the European Court, given that it has repeatedly been invoked when deciding how to balance an individual’s Article 10 right against the rights of others.⁸ Accordingly, this paper uses that definition as a starting point to propose a meaningful change in the law with regard to protecting satirical expression. The repeated use of the margin of appreciation when the Court is confronted by ‘contested expressions’⁹ has created a lacuna in the Court’s analysis of controversial expressions, thus satire as a category of expression remains under-investigated,

⁴ *Vereinigung Bildender Künstler (VBK) v Austria* (2008) 47 EHRR 5, para 33.

⁵ *Lingens v Austria* (1986) 8 EHRR 407, para 42.

⁶ *Handyside v United Kingdom* (1979-80) 1 EHRR 737, para 49 [Emphasis added].

⁷ The Court has, however, very recently made a step in the right direction by noting the contribution of satire to public debate, and considering the importance of context in deciding to protect an applicant’s right to express ‘political satire’ – see *Patrício Monteiro Telo De Abreu v Portugal*, App no 42713/15 (ECHR, 7 June 2022), paras 40-44. While this is a promising start, the account set out herein provides a deeper analysis of the features of satire, in order to facilitate its identification and protection.

⁸ For a recent application of the VBK definition of satire, see: *Dickinson v Turkey*, App no 25200/11 (ECHR, 31 May 2021) para 54.

⁹ Michiel Bot, ‘The Right to Offend? Contested Speech Acts and Critical Democratic Practice’ (2012) 24(2) *Law and Literature* 232.

if not unaccounted for. This article seeks to fill that lacuna by demonstrating why and how satire should be a genre of expression worthy of protection in its own right. There does not currently exist a clear framework for identifying satire from a legal point of view. The author will therefore propose a new model for the Court to use in scrutinising expressions deemed 'satirical'.

This analysis shall proceed in three parts. Section B will explain the key features which comprise the philosophy underpinning satire, particularly in its most controversial forms. This exploration of satire will serve two purposes: firstly, to clarify its definition as a category of speech, thus allowing for easier identification leading to removal of the margin of appreciation; secondly, to demonstrate how to assess these features, to determine whether judges should afford them higher protection under the new framework. Section C will identify the key obstacle to greater ECtHR protection for satire, namely the overreliance on a broad margin of appreciation. This has allowed national authorities to restrict satirical expression on the basis of mere offence to feelings. The limited ECtHR case-law treating satirical expressions will be critiqued, with a view to redesigning the Court's understanding and definition of satire. In this way, the margin of appreciation will be removed for such cases, so that it falls to the Court to assess restrictions. Therefore, Section D will integrate the reasoning of the previous two sections, providing guidance for the European Court to balance the expressive rights of the satirist against the rights of others, in light of the removed margin. In reaching that balance, five main considerations should feature in the Court's analysis: *intention, medium, context, target* and *harm*.

A. THE KEY FEATURES OF SATIRE WHICH CONTRIBUTE TO PUBLIC DEBATE

The concept of satire is ubiquitous in daily life. Commentators praise its ubiquity in that '... while satire may be relatively complexly ordered and structured, that complexity does not place it beyond the ken of ordinary participants in discourse'.¹⁰ Satire provides a 'humorous'¹¹ way of framing contemporary issues, yet pinning down a coherent definition of satire – or, '... an irreducible core ...'¹² – has oft been treated as elusive. For the purposes of this paper, it is necessary to establish the contours of satire and its role in public debate. This will allow us (and European judges) to spot satire, while providing an indication as to the factors rendering

¹⁰ Simpson (n 2) 4.

¹¹ *ibid* 1.

¹² John T. Gilmore, *Satire* (Routledge 2018) 4.

it worthy of higher protection vis-à-vis other forms of expression. Elkin notes the ambiguity in defining satire in the seventeenth and eighteenth centuries, wherein the aim of satire could transform dependent on context, from ‘... light-hearted mockery ...[to] a vengeful, personal attack ...’.¹³ Indeed, Griffin notes that consensus regarding satire’s purpose has shifted from regarding satire as ‘... designed to attack vice or folly’.¹⁴ Hence, Griffin believes that this perception of satire as seeking ‘... to persuade an audience that something or someone is reprehensible or ridiculous ...’¹⁵ must be updated to account for the vast variety of satires. Nonetheless, the employment of ‘ridicule’ and ‘attack’ is still constitutive of modern satire, in evoking shocking, offensive means to convey a message. The European Court requires a clearer conception of which factors constitute satire, and how these factors assist in producing a social commentary. This section shall elucidate factors comprising such satire, to facilitate clearer identification. The ‘social commentary’ element is imperative in order to identify meaningful satire worthy of protection, rather than – say – speech inciting violence or a mere joke.

1. Satire as Ridicule

The starting point for elucidating a comprehensive communicational theory of satire is to reveal why the *pursuit* of satire is worthy of protection. The practice of satire functions as ‘... a means of discrediting those in authority’.¹⁶ Satire can be forthright in placing any matter it deems worthy of scrutiny in its crosshairs, from public figures to policies to ideologies. It does this by creating an ‘object of ridicule’,¹⁷ at whose expense an audience may laugh, while simultaneously promoting a ‘... natural tendency to be a little wary of ... [said object]’.¹⁸ Remorseless in its effort to cast a critical light on contemporary issues, satire utilises diverse means such as ‘... a pamphlet, novel, poem, caricature or film ...’.¹⁹ Dworkin has suggested that ridiculing someone or something is a unique form of scrutiny requiring protection under freedom of expression in democracies.²⁰ Satire is used to ridicule that of which it disapproves or with which it disagrees.

Successful ridicule is humour-dependent. According to Simpson, two assumptions must underlie satirical practice as conveying humour: Firstly, a natural link must be assumed

¹³ Peter Kingsley Elkin, *The Augustan Defence of Satire* (OUP 1973) 11.

¹⁴ Dustin Griffin, *Satire: A Critical Reintroduction* (The University Press of Kentucky 1994) 1.

¹⁵ *ibid.*

¹⁶ Cameron (n 3) 6.

¹⁷ *ibid.* 7.

¹⁸ *ibid.*

¹⁹ *ibid.* 6.

²⁰ Ronald Dworkin, ‘Even Bigots and Holocaust Deniers Must Have Their Say’ (*The Guardian*, 2006) <<https://www.theguardian.com/world/2006/feb/14/muhammadcartoons.comment>> accessed 21 May 2022.

between satire's subject matter and its use of humour, and secondly it must be assumed '... that humour is basically a good thing'.²¹ Humour performs several roles, including displays of 'courage in adversity'²² and as 'a coping mechanism'.²³ Humour served the latter purpose even under the horrifying conditions imposed by the authoritarian Nazi Germany regime. The creation of discriminatory and anti-Semitic Nuremberg Laws was met with '... a flood of cutting satirical comments and jokes'.²⁴ Employing humorous satire therefore unified citizens against an oppressive administration. Nonetheless, in legal discourse the focus tends to fall on 'darker' aspects of satire. One example is the so-called 'Nazi Pug'. Mark Meechan was found guilty of sending a 'grossly offensive'²⁵ message by sharing a YouTube video depicting his dog raising a paw in response to commands such as 'Sieg Heil' and 'Gas the Jews'.²⁶ Though not strictly 'satirical' according to the definition offered by this article (ie offering a commentary), notably Meechan's defence that he intended to portray this act as a 'joke', therefore nullifying its apparent anti-Semitism, was rejected.²⁷ Although the act was supposedly couched in irony, the target actually being Nazism,²⁸ many neo-Nazis spread their ideology under cover of humour, hiding '... in plain sight, or at least behind the veneer of laughter'.²⁹ Therefore, a more robust definition of satire's features will help the European Court to distinguish satire which performs societal functions from unacceptable forms which victimise minorities.

The humorous element of satire is sharpened when considering the disregard that satirists generally hold for any kind of *politesse*. In the 'democratic society' envisioned by the ECtHR, '... "information" or "ideas" ... that offend, shock or disturb ...'³⁰ are protected, but not those '... which spread, incite, promote or justify hatred based on intolerance ...'.³¹ By allowing individuals to assert their '... democratic citizen prerogative of expression ...',³² satire places no ideology on a pedestal, and anti-Nazi jokes are a potent example of this, owing

²¹ Simpson (n 2) 1.

²² *ibid* 2.

²³ *ibid*.

²⁴ Fritz Karl Michael Hillenbrand, *Underground Humour in Nazi Germany 1933-1945* (Routledge 1995) Introduction, xvi.

²⁵ Communications Act 2003, s 127(1)(a).

²⁶ 'Opinion of the Court – Petition by Mark Meechan', <<https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019hcjac13.pdf?sfvrsn=0>>, accessed 1 June 2022.

²⁷ *ibid*, 12.

²⁸ David Baddiel, 'Free Speech And Nazi Dogs | David Baddiel On The Case Of Count Dankula' (*TheTLS*, 2018) <<https://www.the-tls.co.uk/articles/public/count-dankula-nazi-dog-baddiel/>> accessed 14 July 2018.

²⁹ *ibid*.

³⁰ *Handyside* (n 6), para 49.

³¹ *Erbakan v Turkey* App no 59405/00 (ECHR, 6 July 2006).

³² Eric Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016) 9.

to the obvious dangers of speaking out under an overbearing dictatorship. This distinctive mode of being direct and insulting in their opprobrium ‘... is why cartoons and other forms of ridicule have for centuries, even when illegal, been among the most important weapons of both noble and wicked political movements’.³³ In the Elizabethan era, the Bishops’ Ban of 1599 censored various satirical works because the authors’ ‘... comments upon the state of society came too close to the truth for comfort’.³⁴ Such suppression by ecclesiastical figures demonstrates that satire can be ‘weaponised’ in its pursuit of creating a humorous, biting reproaches.

2. *Satire as Social Commentary in the Public Debate*

Satire tackles complex, contemporary issues in a nuanced, jesting spirit. But which features allow satire to constitute a social commentary? The most significant themes are reductive communication, distortion and exaggeration, criticism of high status, truth-seeking and question-begging, and irony.³⁵

Satire is a particularly reductive form of expression, though this does not merit a reductive understanding of satire from a legal point of view. Satire acts quickly, particularly in pictorial formats, encapsulating a ‘... complex idea in one striking and memorable image ...’.³⁶ Focusing on caricature as a pictorial representation of satire,³⁷ Streicher emphasises the uniqueness of satire contrasted with other art forms, aimed not at a pensive audience, instead ‘... at passionate, stand-taking, mass reading publics’.³⁸ Seemingly, the simpler the better, as such pieces are supposed to influence the ‘man on the run’,³⁹ who has limited contemplation time and must be reached quickly so that they can engage with a commentary. Satire is often ephemeral; it is difficult to understand the significance of a historical caricature which is divorced from its circumstances and time-period, because ‘... that which appears to us to be utterly insignificant was perhaps, in its own brief hour, pregnant with meaning’.⁴⁰ Therefore, the satirist often hastily addresses trending subjects before commentary will lose its potency. Satirists fire quickly, and the rapidity with which communication occurs means that their works

³³ Dworkin (n 20).

³⁴ Richard McCabe, ‘Elizabethan Satire and the Bishops’ Ban of 1599’ (1981) 11 *The Yearbook of English Studies* 192.

³⁵ On irony, *see*: Section D.5.

³⁶ Ernst Hans Gombrich, ‘The Cartoonist’s Armoury’, in *Meditations on a Hobby Horse and Other Essays on the Theory of Art* (Phaidon Press 1963) 130.

³⁷ Lawrence H. Streicher, ‘On a Theory of Political Caricature’ (1967) 9(4) *Comparative Studies in Society and History* 431.

³⁸ *ibid*, 433.

³⁹ *ibid*, 434.

⁴⁰ William A. Coupe, ‘Observations on a Theory of Political Caricature’ (1969) 11(1) *Comparative Studies in Society and History* 83.

are rendered accessible to readers through '... skillful manipulation of imagery ...',⁴¹ with which a reader may easily identify.

Furthermore, satire might employ caricature, or 'distortion',⁴² to hastily communicate a clear message.⁴³ The use of exaggeration involves choosing features of the satirist's object to place centre-stage. This is effective as commentary communication because, '[t]he caricaturist ... defines or chooses as an enemy whatever is relevant to timely problems and attacks that enemy by ridicule'.⁴⁴ This assault upon the satirist or caricaturist's subject-matter utilises exaggeration specifically to critically evaluate its object, such as delving beneath a public figure's carefully curated image, exposing buried faults.⁴⁵ An element of truth-seeking is inherent in distorting an image, because satirists – particularly those concerned with caricature – search for some veracity from within a pool of current affairs saturation.⁴⁶ The satirist's ability to step back from the fray of divergent and dichotomic standpoints, holding matters up to a critical light, suggests that, '[a] caricaturist may sometimes represent the only informed critic of propaganda ...',⁴⁷ casting aspersions upon figures and ideologies, venerating nothing as sacred.

Satire also functions through 'Inquiry and Provocation'.⁴⁸ Inquiry may link with elements of 'prestige deflation'⁴⁹ in criticising those in high places such as politicians, or subjects traditionally deemed worthy of respect such as religion. By casting in an unforgiving light a phenomenon of which they disapprove, the satirist calls into question aspects of that subject-matter. The satirist is not simply aiming to enforce their viewpoint on an audience, but to open a dialogue on topics of their choosing.⁵⁰ While satirists may – and often do – have an answer or bias in their reasoning, the practice itself is designed '... to discover, to explore, to survey, to attempt to clarify.'⁵¹ The satirist may use this device of searching out truths to construct their own narrative, but they are ultimately arousing a response from the audience, so that the audience may reflect on their opinions on the subject-matter. Satire aims to '...

⁴¹ Streicher (n 37) 438.

⁴² *ibid* 435.

⁴³ *See: Figures A and B, Section D.*

⁴⁴ Streicher (n 37) 440.

⁴⁵ Coupe (n 40) 88.

⁴⁶ Streicher (n 37) 440.

⁴⁷ *ibid* 434.

⁴⁸ Griffin (n 14) 35.

⁴⁹ Streicher (n 37) 433.

⁵⁰ Griffin (n 14) 35-39.

⁵¹ *ibid* 39.

provoke by challenging received opinion ...’,⁵² creating a space for debate on public interest matters.

3. *Satire and Offence*

In satiric discourse, there exists a near-perennial relationship between satirical communication and the giving or taking of offence. Satire naturally treads this territory, because uses of humour frequently tread and transcend morally and socially constructed boundaries of societal good taste.⁵³ The European Court has implicitly noted this relationship when stating that satire aspires to ‘... provoke and agitate’.⁵⁴ But does the power of the satirist to be callous in their commentary imply a duty to be responsible? The short answer is no. Dworkin has stated that, ‘[r]idicule is a distinct kind of expression; its substance cannot be repackaged in a less offensive rhetorical form without expressing something very different from what was intended’.⁵⁵ Therefore, ridiculing satirists must accept the close proximity of their subject-matter and communication method to courting controversy and offence. Some may even relish it.

Moreover, satire involves a careful communication through a specific relationship structure. It presupposes a ‘triad’⁵⁶ relationship between ‘... the *satirist* (the producer of the text), the *satiree* (an addressee ...) and the *satirised* (the target attacked or critiqued in the satirical discourse)’.⁵⁷ This relationship strikes at the heart of satire’s main aim, which is to convey a criticism of the satirised ‘target’ (be it an event or individual), which has been isolated from the satirist and the satiree.⁵⁸ Hence this form of interaction relies to an extent on the ‘othering’ and exclusion of the target, allowing the first two participants to share in the joke. The importance of ‘satirical uptake’⁵⁹ becomes indispensable. Characteristically, the aim in creating successful satire is to foster greater proximity between the first two parties,⁶⁰ as in the case of the anti-Nazi humour Hillenbrand described.⁶¹ Contrarily, ‘... “misfired” satire tends to destabilise and reshape the relationships in the triad ...’⁶² by having the adverse effect. Instead, the satirist isolates themselves, while the satiree and satirised are joined in their condemnation of the satirist’s work.⁶³ This might alienate the audience from the satirist and

⁵² *ibid* 60.

⁵³ Giselinde Kuipers, *Good Humor, Bad Taste: A Sociology of the Joke* (De Gruyter Mouton, 2015) 10.

⁵⁴ *VBK* (n 4).

⁵⁵ Dworkin (n 20).

⁵⁶ Simpson (n 2) 8.

⁵⁷ *ibid*.

⁵⁸ *ibid*.

⁵⁹ *ibid* 153.

⁶⁰ *ibid* 8.

⁶¹ Section B.1.

⁶² Simpson (n 2) 8.

⁶³ *ibid*.

thus 'misfire',⁶⁴ if the relationship between satirist and target is one of propinquity, resulting in a failed uptake of satirical commentary.⁶⁵ This possibility that the audience may become the target is why the European Court's new proposed model for assessing satire will not accept mere offended feelings as constituting a sufficient consequential justification for restricting satire,⁶⁶ preferring to limit satire based on a more serious conception of harm.⁶⁷ Satirists must be free to take this risk.

Ergo, satire seeks to calibrate its functions and structure with some care: if it does not balance those functions, it ceases to be satire, and if the target is missed in its structure, a cogent communication of its message has not taken hold, rendering it null.⁶⁸ The satirist's eagerness for taboo and controversial topics stems from the social fact of humour generally being enjoyed when partaking '... in the short-lived, playful, lighthearted overstepping of a social boundary'.⁶⁹ Therefore, we should be loath to allow the audience to dictate those boundaries, given that the art of satire requires the satirist to define these boundaries while trying to keep the audience 'on side'. Satire can be delineated from other humorous practices such as a joke, because it aspires cogently to convey a 'social commentary'.⁷⁰

4. Satire at the limit of Public Debate

Though the foregoing analysis has defined the features of satire and how they characterise its contribution to public debate, the protection of satire must reach a limit. The value of this paper lies in answering the difficult question of how judges should define that limit when faced with borderline cases. In that regard, the analysis in Section D will provide factors for the assessment of potentially controversial satire, while noting the careful relationship between these factors and the identifying features set out in Section B. Firstly, however, it is necessary to explain why satire should reach a limit, beyond which it falls outside of the scope of public debate.

The notion of a 'public discourse' or 'debate' equates to a domain incorporating '... speech concerning the organization and culture of society'.⁷¹ Heinze imagines a domain which is '... non-viewpoint-punitive ... [in that] it entails no penalty for the expression, within public discourse, of some contrary viewpoint'.⁷² This sphere permits debate on all topics with

⁶⁴ *ibid.*

⁶⁵ *ibid* 157; Original study: Kerry L. Pfaff and Raymond W. Gibbs, 'Authorial Intentions in Understanding Satirical Texts' (1997) 25(1) *Poetics* 45.

⁶⁶ *See*: Section C.2.

⁶⁷ *See*: Sections B.4 and D.2-D.5.

⁶⁸ Simpson (n 2) 3, 154-7.

⁶⁹ Kuipers (n 53) 124.

⁷⁰ VBK (n 4).

⁷¹ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 189.

⁷² Heinze (n 32) 21-22.

impunity,⁷³ and rejects bans on ‘hate speech’.⁷⁴ Thus, while there may be legitimate restrictions on expression, such as classic ‘time, manner, and place restrictions’,⁷⁵ this provides no justification for regulating the *content* of expression, no matter how nefarious a viewpoint is.⁷⁶ The characterisation of expression as a ‘*prerogative*’⁷⁷ aspect of citizenship rather than as a liberty is significant – liberties are often set one against another, whereas it is not logically possible to limit ‘... one individual’s citizenship in order to assure some other individual’s citizenship ...’.⁷⁸ However, the European Court recognises that there must be limits to freedom of expression in its conception of the ‘democratic society’, per Article 10(2). These exceptions ‘... must be narrowly interpreted and the necessity for any restrictions must be convincingly established’.⁷⁹ Nonetheless, restrictions can be *established*, and the recognised restriction upon speech causing ‘hatred’⁸⁰ must continue to apply even to satirical expression under the new model proposed here. A deontological standpoint protecting all opinions in public debate is purely aspirational. This is because of the consequences of hateful expression: the creation of a ‘... slow-acting poison ...’⁸¹ that pollutes society, destroying assurances to minority groups that they will not ‘... face hostility, violence, discrimination, or exclusion by others’.⁸² Waldron’s consequentialist critique – in conjunction with Parekh⁸³ – is levelled at the reduction in dignity which targets suffer through seeing or hearing such expression.⁸⁴ Hate speech ‘... lowers the tone of public discourse ...’,⁸⁵ and thus must be prohibited.⁸⁶ The European Court should indeed focus on protecting satire which advances a social commentary rather than protecting counterproductive viewpoints. The reality of hate speech is that some viewpoints (such as racist ones) are no longer contested, deemed to have ‘lost’ the debate and with it their right to continue speaking on a matter.⁸⁷ The best way to protect satire is thus not giving satirists *carte blanche*. Instead, there must be a clearer model for identifying pertinent factors to be

⁷³ *ibid* 22.

⁷⁴ *ibid* 41.

⁷⁵ *ibid* 45.

⁷⁶ *ibid* 45.

⁷⁷ *ibid* 9.

⁷⁸ *ibid* 50.

⁷⁹ *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153, para 59.

⁸⁰ *Erbakan* (n31).

⁸¹ Jeremy Waldron, *The Harm in Hate Speech (Oliver Wendell Holmes Lectures)* (Harvard University Press 2014) 97.

⁸² *ibid* 4.

⁸³ Bhikhu Parekh, ‘Is There a Case for Banning Hate Speech?’ in M Herz, P Molnar eds., *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (CUP 2012) 37-56.

⁸⁴ Waldron (n 81) 5.

⁸⁵ Parekh (n 83) 54.

⁸⁶ *ibid* 46-54.

⁸⁷ Waldron (n 81) 336-7.

balanced in assessing satire claims under Article 10, with specific emphasis on protecting vulnerable, minority, and victimised groups from harm.⁸⁸

B. SATIRE AND CONTROVERSIAL EXPRESSION IN THE EUROPEAN COURT'S 'DEMOCRATIC SOCIETY'

The European Court suffers a dearth in its reasoning when balancing the right to controversial expression against the rights of others. In assessing Article 10 restrictions, '... the Court has spilled much more ink on this last step ...'⁸⁹ which is whether an interference was 'necessary in a democratic society'.⁹⁰ This assessment implies establishing a 'pressing social need' to restrict expression,⁹¹ before asking whether this restriction is *proportionate* to the legitimate interest identified. If both questions are answered in the positive, it is more likely that the Court will grant a wide margin of appreciation to Contracting States. The margin of appreciation is not only flawed conceptually, but also over-relied upon because the Court 'fetishizes'⁹² its use to the detriment of rigorous, suitable scrutiny of potential Article 10 violations. This creates unfavourable trends, such as the creation of an 'obligation not to offend'⁹³ in the European Court's jurisprudence – an unnecessary burden on satirists whose message is rendered effective by imparting potentially offensive material and opinions.⁹⁴ This is also inconsistent with the right in a *democratic society* to impart '...“information” or “ideas”... that offend, shock or disturb the State or any sector of the population.'⁹⁵ Accordingly, this article advocates for the removal of the margin of appreciation when analysing state interferences with satirical expression, and a reframing of the analysis in *VBK*, to create explicit protection for satire.

1. Problems with the Margin of Appreciation and Proportionality

The margin of appreciation doctrine can apply as a '*substantive*'⁹⁶ or a '*structural* concept'.⁹⁷ The latter views the doctrine as an assessment regarding whether to endorse a national court's

⁸⁸ See: Section D, particularly Sections D.2 and D.5.

⁸⁹ Alain Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of 'Democratic Society' (2016) 5(1) Global Constitutionalism 23.

⁹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 10.

⁹¹ *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, para 59.

⁹² Marko Milanovic, 'EJIL: Talk! – Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment In *E.S. v Austria*' (*Ejiltalk.org*, 2018) <<https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/#more-16590>> accessed 10 June 2022.

⁹³ Bot (n 9) 244.

⁹⁴ Section B.3.

⁹⁵ *Handyside* (n 6), [49].

⁹⁶ George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 80.

⁹⁷ *ibid* 81.

decision to restrict a Convention right; the former pertains to the balancing of ‘... individual freedoms and collective goals’.⁹⁸ The ‘*substantive*’ approach is an application of the proportionality assessment, therefore judgments stating that a margin has been overstepped essentially reflect the European Court’s disapproval of a national authority’s interference.⁹⁹ Singh states that the margin is nothing more than a ‘... conclusory label which only serves to obscure the true basis on which a reviewing court decides whether or not intervention ... is justifiable’.¹⁰⁰ Critically, such absence in reasoning may generate an ‘assault on human rights’¹⁰¹ wherein the proportionality assessment allows ‘illicit justifications’¹⁰² to be considered against the right. Tsakyrakis suggests that this occurred in *Otto-Preminger-Institut v. Austria*,¹⁰³ where the feelings of a majority religious population overrode the applicant’s right to show an irreverent film, caricaturing Christianity.¹⁰⁴ Instead of utilising the slightly vacuous and potentially perplexing margin of appreciation, Letsas suggests that interference with rights must be decided by arguments pertaining to ‘political morality’.¹⁰⁵

The ‘*structural*’ concept, is much more relevant to this analysis, in so far as acknowledgement of a member state’s margin of appreciation in upholding interferences reflects deference based on ‘*consensus*’.¹⁰⁶ Whether a restriction was necessary in a democratic society may be left to a Contracting State where ‘... it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals’.¹⁰⁷ In *Handyside*, the national authority could decide when interference amounted to violation, regarding the applicant’s publication of a book about ‘Sex’ intended for distribution to schoolchildren.¹⁰⁸ Allowing member states to set limits on expression due to their insight into the moral reasoning of the state population facilitates majoritarian reasoning.¹⁰⁹ Nonetheless consensus reasoning may be defensible to recognise cultural differences regarding freedom of expression between states. Polymenopoulou alludes to this diversity of approaches, highlighting Turkey’s greater propensity to restrict speech compared with other Contracting

⁹⁸ *ibid* 80-1.

⁹⁹ *ibid* 84-90.

¹⁰⁰ Rabinder Singh et al, ‘Is there a role for the “Margin of Appreciation” in national law after the Human Rights Act?’ (1999) 1 European Human Rights Law Review 20.

¹⁰¹ Stavros Tsakyrakis, ‘Proportionality: An assault on human rights?’ (2009) 7(3) International Journal of Constitutional Law 468-93.

¹⁰² *ibid* 488.

¹⁰³ (1995) 19 EHRR 34.

¹⁰⁴ Tsakyrakis (n 101) 479-82.

¹⁰⁵ Letsas (n 96) 84, 90.

¹⁰⁶ *ibid* 90-1.

¹⁰⁷ *Handyside* (n 6), [48].

¹⁰⁸ *ibid*, [20-21].

¹⁰⁹ Letsas (n 96) 120-3.

States.¹¹⁰ The member states are not homogenous in approach to free expression, therefore treating each one as a 'longstanding, stable, and prosperous democracy (LSPD)',¹¹¹ overgeneralises – consequently, consensus reasoning appears intuitive. Yet, the problem with this 'structural' approach is the perverse outcomes that may befall proportionality analysis, such as the protection of 'religious convictions' from offence by a blasphemous film in *Wingrove v United Kingdom*.¹¹² Proportionality goes awry when balancers attempt inclusivity by choosing 'public interests' to compete against a right, and these interests are not correctly scrutinised to remove the ones which are 'illicit justifications';¹¹³ this results in a superficial proportionality assessment, rather than a 'rational' one.¹¹⁴ In broad agreement with Letsas,¹¹⁵ this implies that morality is a key part of adjudicating human rights, enacted through identifying the inviolable 'core' of a right which cannot be transgressed before entering into the balancing process.¹¹⁶ One particular justification which should be excluded from proportionality analyses concerning satire is the 'obligation not to offend'.¹¹⁷

2. The Right Not to be Offended

Overreliance on the margin of appreciation has created an 'obligation not to offend'¹¹⁸ through '... psychologization of the performativity of contested speech acts'.¹¹⁹ This is a short-sighted interpretation of speech which emphasises the impact of an expression upon a person who may be offended.¹²⁰ This dangerous trend means that the Court defers to national authorities, based on hurt feelings. While people are entitled to be offended by satirical expressions, the law cannot prescribe '... a right not to be ... offended'.¹²¹ Simply put, '... a right to express and receive only inoffensive opinions would hardly be worth having'.¹²² The recent ECtHR trend of protecting feelings detracts public discourse and satire's place within it by disregarding the utility of offence in effective satiric communication.

¹¹⁰ Eleni Polymenopoulou, 'Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights' (2016) 16 Human Rights Law Review 516-9.

¹¹¹ Heinze (n 32) 70.

¹¹² (1997) 24 EHRR 1, [58].

¹¹³ Tsakyrakis (n 101) 488.

¹¹⁴ *ibid* 482-8.

¹¹⁵ Letsas (n 96) 84.

¹¹⁶ Tsakyrakis (n 101) 491-3.

¹¹⁷ Bot (n 9) 244.

¹¹⁸ *ibid*.

¹¹⁹ *ibid*.

¹²⁰ *ibid*.

¹²¹ Dworkin (n 20).

¹²² Eric Barendt, 'Religious Hatred Laws: Protecting Groups or Belief?' (2011) 17(1) Res Publica 44.

Placing feelings centre-stage deters interlocutors from expressing themselves freely. From a democratic standpoint, this may detriment participation in public debate, given that ‘... often the speech we find most offensive will be made in relation to issues of public concern’.¹²³ Many advancements creating greater parity for discriminated groups, such as sexual and ethnic minorities, have been a result of the opportunity to question orthodoxy through unhindered expression.¹²⁴ The idea of maximising public discourse is poignant in relation to views held by a minority, or on taboo subject areas. Protecting ‘dominant views’¹²⁵ is therefore not at issue. The wisdom elaborated in *Handyside*¹²⁶ recognises the subjectivity of feeling offended, accepting that ‘... it is better to protect all offensive, shocking or disturbing expressions to avoid a chilling effect on otherwise important and valuable expressions’.¹²⁷ The approach taken in *Otto-Preminger-Institut*, to protect a religious population’s feelings, upholding the national authority’s restriction ignores the Court’s previous reasoning, that:

... a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society ... To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto.¹²⁸

Allowing the audience to ‘heckle’ and shout down an expression is an unacceptable incursion on the right to satirise, which should include taboos and controversial arguments. The proclivities of an audience should not determine topics worthy of discussion. This ‘chilling effect’¹²⁹ could create a tendency for irreverent satirists to self-censor, to the detriment of citizens’ ability to debate matters of public interest.

In contributing to public discourse, offensive speech and worthwhile debate are not necessarily at odds. The suggestion that offensive speech cannot contribute to debate places satire in a difficult place, because in advancing a social commentary, it is often not simply causing offence, but *seeking* it.¹³⁰ Parekh suggests that unfettered expression is the ‘lifeblood

¹²³ Aoife O’Reilly, ‘In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights’ (2016) 19 *Trinity College Law Review* 239.

¹²⁴ Mick Hume, *Trigger Warning: Is the Fear of Being Offensive Killing Free Speech?* (2nd edn (abridged) William Collins 2016) 21.

¹²⁵ Niraj Nathwani, ‘Religious cartoons and human rights - a critical legal analysis of the case law of the European Court of Human Rights on the protection of religious feelings and its implications in the Danish affair concerning cartoons of the Prophet Muhammad’ (2008) 4 *European Human Rights Law Review* 490.

¹²⁶ *Handyside* (n 6), [49].

¹²⁷ Nathwani (n 125) 491.

¹²⁸ *Vajnai v Hungary* (2010) 50 *EHRR* 44, [57].

¹²⁹ Nathwani (n 125) 490.

¹³⁰ Section B.3.

of democracy',¹³¹ only when expression '... advances reasoned arguments, subjects ideas and opinions to critical public scrutiny, exposes falsehoods ...'.¹³² While this paper seeks to restrict satire amounting to 'hate speech', Parekh's argument should not be manipulated to limit controversial satirical speech which does not propagate hate. Satire which otherwise contributes to public interest, should not be banned because it is too upsetting to audiences. This is seen in Cox's arguments regarding the satirical Charlie Hebdo cartoons mocking various religions, particularly the dangers of linking a world religion with terrorism that exists when publishing certain cartoons.¹³³ The correlation of offensiveness of speech with a resulting inability to contribute to public debates was sharply expressed in *Otto-Preminger-Institut*.¹³⁴ Attempting to insulate the feelings of a majority of the Tyrolese population from offence, the Court qualified the established right to impart shocking information with an:

... obligation to avoid as far as possible expressions that are *gratuitously offensive* to others and thus an infringement of their rights and which *therefore do not contribute to any form of public debate* capable of furthering progress in human affairs.¹³⁵

This may seem *prima facie* a sensible restriction, however the wording is deeply problematic. The 'causal chain'¹³⁶ suggests that the fact that the offending film causes '*gratuitous offence*' is '*therefore*' why it '... has nothing to do with public debate'.¹³⁷ The result is unlimited potential for offence to feelings to ground restrictions to expression. Cram notes that '*gratuitous offence*' may be split into two categories: speech encapsulating 'groundless' offence which lacks objective reasoning to arrive at a conclusion, and that which is 'needless', ie offence-giving was unnecessary to achieve the aim of the expression.¹³⁸ Given the proximity of effective satire to offence, the latter should be dismissed at hand as a justification for restriction. Even if a satire can be expressed otherwise, '... offensive language may in reality be the best communicative style available ...',¹³⁹ to provoke reaction and debate from audiences. The margin of appreciation was over-relied upon in *E.S. v Austria*,¹⁴⁰ where

¹³¹ Parekh (n 83) 47.

¹³² *ibid.*

¹³³ Neville Cox, 'The Freedom to Publish "Irreligious" Cartoons' (2016) 16 Human Rights Law Review 220.

¹³⁴ Bot (n 9) 248.

¹³⁵ *Otto-Preminger-Institut* (n 103), [49] [emphasis added].

¹³⁶ Bot (n 9) 248.

¹³⁷ *ibid.*

¹³⁸ Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Ivan Hare, James Weinstein eds., *Extreme Speech and Democracy* (OUP 2009) 325-7.

¹³⁹ O'Reilly (n 123) 241-2.

¹⁴⁰ App no 38450/12 (ECHR, 25 October 2018), [58].

irreverent speech suggesting that the Prophet Muhammad was a paedophile was restricted. The Court's perfunctory approval of cases limiting offensive expression reflected a careless proportionality assessment acting '... as a broad-brush balancing exercise accompanied by ritualistic invocations of the margin of appreciation'.¹⁴¹ Using lack of member state consensus to justify a broad margin,¹⁴² the judgment surpasses¹⁴³ *Otto-Preminger-Institut*, by attempting to distinguish its decision from upholding blasphemy law *simpliciter*.¹⁴⁴ The Court adds the additional requirement that the expression induces '... justified indignation ...'¹⁴⁵ in the potential audience, in this case a minority Muslim population. The Court's silence regarding when indignation would be 'justified'¹⁴⁶ leaves the audience to decide. Furthermore, suggesting that 'provocative portrayals' of religion could be restricted to ensure toleration could mute provocative satire contributing to such discussions.¹⁴⁷ Milanovic highlights that '... every example of religious satire ever made [may] be suppressed, on this basis, by a state saying that the speaker should have been *less provocative* and could have conveyed their message in a less hurtful way ...'.¹⁴⁸ This reflects, again, weakness in proportionality assessments concerning grossly offensive speech – as Milanovic attests, justification for such strong restrictions is debatable, however they should not be '... walked into as blindly as the Court appears to have done ...'¹⁴⁹ through hastily applying a broad margin of appreciation.

Some restrictions on 'groundless' offensive expression are '... eminently sensible ...'¹⁵⁰ in that they cannot provide meaningful additions to public debates, such as Holocaust denial. Yet, satire's tongue-in-cheek transgression of acceptable boundaries requires regard to '... the specificity of the speech acts ... being performed ...'.¹⁵¹ This will ensure that limits placed on controversial expression are a result of reflective, sustained analysis – contrary to *E.S.* Therefore, we must remove Letsas' 'structural' margin of appreciation for satire cases to ensure restrictions are correctly decided with reference to 'political morality'.¹⁵²

3. Hopes Dashed: Guiding VBK towards Protection of Satire

¹⁴¹ Milanovic (n 92).

¹⁴² *E.S.* (n 140), [50].

¹⁴³ Milanovic (n 92).

¹⁴⁴ *E.S.* (n 140), [52].

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*; Milanovic (n 92).

¹⁴⁷ *E.S.* (n 140), [15].

¹⁴⁸ Milanovic (n 92).

¹⁴⁹ *ibid.*

¹⁵⁰ Cram (n 138) 325.

¹⁵¹ Bot (n 9) 234.

¹⁵² Letsas (n 96) 84.

The European Court's limited case law on satire reflects a marked ambiguity regarding how and whether satire should be analysed as a genre in its own right. In *VBK v Austria*, an injunction upon artwork which depicted a politician (Mr Meischberger) in sexual positions with members of his party and figures of religious veneration was a disproportionate interference which amounted to a violation of Article 10.¹⁵³ *VBK* had the potential to protect satire as a distinct form of expression, but failed to provide clear, robust parameters for that protection.

The judgment in *VBK* attempted to elucidate why satire is a unique mode of expression. Key features were the relationship between allegory and reality in satire,¹⁵⁴ and the significance of 'exaggeration' and 'caricature' in conveying satirical commentaries.¹⁵⁵ Exaggerating elements formed a central aspect of protecting satire as commentary, with the Court noting that '... the painting obviously did not aim to reflect or even to suggest reality'.¹⁵⁶ This element has been particularly explored,¹⁵⁷ however the judgment does not elucidate further factors that comprise satire. The dissenting opinion highlights a dearth in reasoning from the majority.¹⁵⁸ The majority did not elucidate any link between a message being conveyed and the '... disgusting combination of lewd images [which] ... debase, insult and ridicule ... every person portrayed'.¹⁵⁹ This paper suggests that the Court's famous assertion that satire '... naturally aims to provoke and agitate ...'¹⁶⁰ implies that Mr Meischberger had no right to be offended by the painting that could outweigh the applicant's artistic rights. Contrary to *Otto-Preminger-Institut* and *E.S.*, protection of feelings could not form the basis of restricting satirical expression. Given the indecorous nature of the images in *VBK*, the majority should have explained precisely how such images offer a commentary and why audience disgust should not restrict satire. Moreover, Judge Loucaides' dissent demonstrates that the majority sought to label the art as satire, based on *intent*.¹⁶¹ The judge disapprovingly noted that the painting's meaning was established based on '... what the painter purported to convey ...'¹⁶² when satirical meaning should rather be judged according to the '... effect of the visible image on

¹⁵³ *VBK* (n 4).

¹⁵⁴ *ibid*, [24].

¹⁵⁵ *ibid*, [33].

¹⁵⁶ *ibid*.

¹⁵⁷ *See*: Sections B.2, D.1-D.2, D.5.

¹⁵⁸ *VBK* (n 4) (*Dissenting Opinion of Judge Loucaides*).

¹⁵⁹ *ibid*.

¹⁶⁰ *Ibid*, [33].

¹⁶¹ *ibid* (*Dissenting Opinion of Judge Loucaides*).

¹⁶² *ibid*.

the observer'.¹⁶³ However, in subsequent satire cases the Court has given more weight to audience impact¹⁶⁴ rather than intent,¹⁶⁵ in line with Loucaides' criticisms. This is evident in *Nikowitz and Verlagsgruppe News GmbH v Austria*,¹⁶⁶ where the Court correctly rejected domestic court reasoning that satire should be restricted because comprehending it required 'concentration' from a reader.¹⁶⁷ While seemingly protective of satire as a category, this did allow the 'average reader'¹⁶⁸ to act as a measure for determining satire's scope. This is dissatisfactory in light of the previous analysis elucidating the proximity of satire to offence.¹⁶⁹ If the audience or 'reader' is the default heuristic determining restrictions on satire, this could easily result in 'illicit justifications'¹⁷⁰ grounding its restriction, thus contradicting what the judges in *VBK* set out to achieve.

Polymenopoulou advocates for explicit consideration of satire as a 'defence', so that proportionality evaluations protect such work in instances where a wide margin of appreciation is unavoidably applied, owing to absence of member state consensus.¹⁷¹ Disregarding straightforward cases where satire will be protected,¹⁷² the approach to satire is less clear in difficult cases involving '... humour destined to mock complex or controversial situations and events, such as the rise of extremism, terrorism and extreme-right wing speech ...'.¹⁷³ The majority in *VBK* treated satire as worthy of the higher level of protection, noting the piece analysed an element of Mr Meischberger's party policy in their criticism of the applicant's work,¹⁷⁴ alluding to the reduced margin of appreciation for speech targeting a politician who must accept a higher level of scrutiny given the nature of their profession.¹⁷⁵ The question, then, is to what extent did the Court establish a novel *genre* of expression for protection, rather than simply applying existing established practices for protecting 'political' speech? This problem surfaced in *Ziembinski v Poland (No 2)*¹⁷⁶ where the applicant's conviction for the offence of 'insult' under Polish law violated Article 10, because his insulting descriptions of

¹⁶³ *ibid.*

¹⁶⁴ *Leroy v France* App no 36109/03 (ECHR, 2 October 2008), discussed more thoroughly: Section D.4.

¹⁶⁵ Section D.2.

¹⁶⁶ (2007) App no 5266/03 (ECHR, 22 February 2007).

¹⁶⁷ *ibid.*, [25] and [9]–[11].

¹⁶⁸ *ibid.*, [25].

¹⁶⁹ Section B.3.

¹⁷⁰ *Tsakyrakis* (n101) 488.

¹⁷¹ *Polymenopoulou* (n 110) 511-39.

¹⁷² *ibid* 530-1, referencing *Kuliś and Różycki v Poland* App no 27209/03 (ECHR, 6 October 2009).

¹⁷³ *ibid* 531.

¹⁷⁴ *VBK* (n 4), [34].

¹⁷⁵ *Lingens* (n 5), [42].

¹⁷⁶ App no 1799/07 (ECHR, 5 July 2016).

government officials were ironic and satirical.¹⁷⁷ While correctly decided in the author's view, Judges Wojtyczek and Kūris are correct to question the hastiness with which the majority justify protection based on 'context' and 'genre'.¹⁷⁸ The minority disagreed that the satirical nature of the piece could function '... as though it were *in itself* a legitimate excuse for *all* the words and phrases used in the publication'.¹⁷⁹ They further stressed¹⁸⁰ the *VBK* stipulation that satirical expressions must be '... examined with particular care'.¹⁸¹ However, subsequent prudent examination would only be possible, if the Court in *VBK* had clearly set out their reasoning. The following alternative analysis, proposed by this author, would have been more appropriate.

VBK recognised the widening contours of public debate. Koltay notes that an expression concerned with 'political debate'¹⁸² can be '... interpreted widely as speech including all public matters ...'.¹⁸³ Speech which is 'political' in nature receives more robust proportionality analysis at the ECtHR level, through removing a state's margin of appreciation. The starting point is thus higher protection. Bakircioglu notes that '... the Court has still not given a reasonable rationale for affording more protection to political expression than to the artistic expression'.¹⁸⁴ The Court has failed to *explain* the relationship between art and social commentary in satire. This leads to the bizarre scenario where '... while artistic expression might also well contribute to a public debate, Contracting States have a wider margin of appreciation in its restriction'.¹⁸⁵ This worry is well warranted given the decision in *Müller v Switzerland*¹⁸⁶ to uphold the interference of the respondent state in relation to confiscating 'obscene' paintings.¹⁸⁷ This is despite the Commission's reflection that, '[t]hrough his creative work the artist expresses not only a personal vision of the world but also his view of the society in which he lives'.¹⁸⁸ Satire transcends the boundary between artistic and political expression, through the device of social commentary. In essence, '[c]aricature and satire are forced into

¹⁷⁷ Ibid, [44]-[45].

¹⁷⁸ *ibid* (*Joint Dissenting Opinion of Judges Wojtyczek and Kūris*), [6]-[7].

¹⁷⁹ *ibid*.

¹⁸⁰ *ibid*, [10].

¹⁸¹ *VBK* (n 4), [33].

¹⁸² András Koltay, *Freedom of Speech: The Unreachable Mirage* (CompLex Publisher Ltd 2013) 9.

¹⁸³ *ibid*.

¹⁸⁴ Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8(7) *German Law Journal* 730.

¹⁸⁵ *ibid*.

¹⁸⁶ (1991) 13 EHRR 212.

¹⁸⁷ Bakircioglu (n 184), 730.

¹⁸⁸ Lord Lester of Herne Hill, 'Universality versus subsidiarity: a reply' (1998) 1 *European Human Rights Law Review* 77.

partiality by their very nature'.¹⁸⁹ Caricature '... moulds the individual perception of politically and socially relevant events into a generalised ... insight that its audience can empathise with'.¹⁹⁰ Through the use of devices of '... distortion, disguise, grotesque ...'¹⁹¹ and other means, both operate '... provocatively to discover the true nature, to expose weaknesses and to plunge their readers into taking a stance'.¹⁹² Caricature is a pictorial format of satire, wherein the link between satire and important commentary is evident. Therefore, the Court should have modified their definition of satire to: 'artistic expression *which creates* a social commentary'. There is an inherent link between satire's artistic means and its commentary-creating ends, rendering it a unique mode of discourse. The Commission's logic was that '... art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day'.¹⁹³ Through performing this function, satire is an art form that deserves unique recognition, akin to that afforded to political speech.¹⁹⁴

The dissent in *Ziembinski* emphasised that judges must prudently assess satire following *VBK*.¹⁹⁵ This requires identification of worthwhile satire, while understanding its limits. Recognising the uniqueness of satire based on this alternative analysis will reduce the margin of appreciation, facilitating a robust proportionality assessment of satire, the limits of which will be determined in Section D.

C. PROTECTING SATIRE WITHIN CONTEXT: 'THE RIGHTS OF OTHERS IN A DEMOCRATIC SOCIETY'

The ambition of this article is the creation of a standard of analysis for satire at the European Court level which is robust and diligent. The minority reasoning in *Ziembinski* evokes a confused jurisprudence regarding how we should investigate interferences with satirical commentary '... with particular care'.¹⁹⁶ Recourse to the '*genre*' (being satire) may protect an irreverent expression provided that the assessment is vigorous.¹⁹⁷ Per Article 10(2), expression must be balanced against the rights of others in a democratic society, therefore this section shall

¹⁸⁹ Hannes Rösler, 'Caricatures and satires in art law: The German approach in comparison with the United States, England and the Human Convention on Human Rights' (2008) 4 *European Human Rights Law Review* 465.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*, 466.

¹⁹² *ibid.*

¹⁹³ Lord Lester (n 188) 77.

¹⁹⁴ The Court may reach this conclusion easier following the recent case of *Patrício Monteiro Telo De Abreu v Portugal* (n 7). The definition in this paper provides a clear link between satire and social commentary, which the Court should adopt to strengthen protection of satire as a category of expression.

¹⁹⁵ *Ziembinski* (n 176) (*Dissenting*), [10] and [16].

¹⁹⁶ *VBK* (n 4) para 33.

¹⁹⁷ *Ziembinski* (n 176) (*Dissenting* para 16).

clarify how this analysis should unfold when the European Court and the Contracting States' courts are faced with a satirical expression, in light of the removed margin. The current approaches to controversial and satirical expression overemphasise audience reaction in determining restrictions;¹⁹⁸ this section will introduce more appropriate factors for consideration in balancing the rights of satirists with others, specifically regarding satirical intent, medium, context and harm viz. targeting and vulnerability.

1. Identifying Satire at the European Court Level

When an expression seems *prima facie* satirical, both the ECtHR and national authorities should consider the unique features which comprise a 'true' satire (ie creating a social commentary). These are: reductive communication, criticism of high status, distortion and exaggeration, truth-seeking and question-begging, and irony.¹⁹⁹



Figure A: Christian Adams, '#BrexitBritain Cartoon' (Twitter, 29 August 2018) <<https://twitter.com/adamstoon1/status/769903683219881984>> accessed 25 May 2022.

Figure A is a political cartoon utilising satirical method to create social commentary. The communication is reductive, as it captures '... a complex idea in one striking and

¹⁹⁸ Otto-Preminger-Institut (n 103), Nikowitz (n 166), E.S. (n 140).

¹⁹⁹ Section B.2.

memorable image ...'.²⁰⁰ The picture simplifies the charge levelled²⁰¹ at Theresa May in July 2016, after she became Prime Minister declaring that 'Brexit means Brexit',²⁰² that her reliance on this tautological, vague statement reflected an inability to convey what Britain's vote to leave the European Union (EU), ie 'Brexit', would mean concretely. 'Political caricature ... includes debunking and downgrading prestige deflation ...'.²⁰³ Hence, in depicting May as unable to comprehend the meaning of one of, if not the key issue, facing her government, utilising various dictionaries, thesauruses and making a note to 'ASK CABINET' on her calendar in *Figure A*, May's status as a top-ranking politician is criticised.²⁰⁴ Central to satire is exaggeration, or in the case of satire through caricature, 'distortion'²⁰⁵ which is conveyed in *Figure A* through May's exaggerated facial features and expression, and the exaggeration that the (then) head of the UK government would consult a dictionary to attempt to solve an issue encompassing vast social, economic, and political ramifications. In portraying a potentially ludicrous reality, this cartoon begs the question of whether '... distorted imagery as ridiculous ... [as this is] ... perhaps nearer to the "truth" than the ... real thing'.²⁰⁶ These elements are couched in a sense of irony through the counterproductive means of consulting dictionaries and thesauruses – an answer will not be found therein. The placement of a cuckoo-clock subtly confirms that this task is futile, given the often informal association of the word 'cuckoo' with deranged behaviour. Though this is not explicitly stated, this is a clue which allows the audience to 'join the dots'. The placement of the clock is provocative, and when taken with the overall mood of the piece, it serves '... by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate'.²⁰⁷

2. *Satirical Intent*

In discussing whether 'intent to harm'²⁰⁸ should play a role in developing restrictions to satire, Rösler acknowledges that this underpins much of satire's aim.²⁰⁹ Accordingly, any balancing test should favour the satirist where their purpose is to '... make use of the common elements

²⁰⁰ Gombrich (n 36) 130.

²⁰¹ This is distorted, reductive communication of a clear message, key features noted in Section B.2.

²⁰² Ashley Cowburn, 'Theresa May Says "Brexit Means Brexit" And There Will Be No Attempt To Remain Inside EU' (*The Independent*, 2016) <<https://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html>> accessed 7 January 2019.

²⁰³ Streicher (n 37) 433.

²⁰⁴ On criticism of high status and question-begging (eg of high-ranking individuals), *see*: Section B.2 and B.3.

²⁰⁵ Streicher (n 37) 435.

²⁰⁶ *ibid.*

²⁰⁷ *VBK* (n 4), [33].

²⁰⁸ Rösler (n 189) 484.

²⁰⁹ *ibid.*

'Taking Jokes Seriously': Establishing a Normative Place for Satire within the Freedom of Expression Analysis of the European Court of Human Rights

of this genre to criticise a matter of general relevance'.²¹⁰ The converse outcome should apply '... when it is clear that just the degradation of the object of criticism is intended'.²¹¹ While satire treads a precarious path in searching out '... the line between offence, insult and incitement of hatred ...',²¹² the European Court should only lower its protection for satire where it is truly 'gratuitously offensive', ie satire is created '... with the sole purpose of causing offence to certain people without serving any further purpose'.²¹³ A picture or verse which satirises to mock the life of a religious prophet might be done without reason other than to upset believers. This type of satire seeks to degrade the personal convictions of others, instead of meaningfully criticising or contributing to debate. Therefore, it would not be worthy of protection. Satire uses provocation effectively in conveying a commentary, sometimes excessively. Indeed '... the harsher the event satirised, the more biting the cartoon tends to be'.²¹⁴ But satire backfires when harming its victim overshadows positive purposes of enhancing dialogue in democracy. The Court should bear this in mind when analysing satire, as satire can easily be used to advance a hateful expression.²¹⁵

²¹⁰ *ibid* 485.

²¹¹ *ibid*.

²¹² Peter Noorlander, 'In Fear of Cartoons' (2015) 2 *European Human Rights Law Review* 115.

²¹³ Erica Howard, 'Gratuitously Offensive Speech and the Political Debate' (2016) 6 *European Human Rights Law Review* 640.

²¹⁴ Noorlander (n 212), 115.

²¹⁵ Sections B.1, B.4.



Figure B: Laurent “Riss” Sourisseau (*Charlie Hebdo*) ‘What would little Aylan have become if he had grown up? A groper in Germany’ [Author’s translation] (*Portail Catholique Suisse*, 15 January 2016) <<https://www.cath.ch/blogsf/aylan-2/>> accessed 25 May 2022.

Figure B demonstrates a conundrum for the Court, dependent on which message is dominant. The image is provocative and shocking because it makes a link between an infamous photo of a child refugee who died trying to reach Europe during a refugee crisis, and a spate of sexual assaults that occurred by refugees in Germany at the time. The drawing is callous in depicting the boy, albeit that the picture could be interpreted as highlighting the wider irony of the media which reported sympathetically about the young boy, while also promoting a narrative critical of refugees following the assaults. Alternatively, the intent could be to lampoon refugees and migrants. The problem is that ‘... the drawing shows two lascivious pig-like men with their tongues hanging out ...’,²¹⁶ and is rendered inflammatory by the heading: ‘MIGRANTS’. The target may be interpreted as the migrants, thus leading to a breakdown in the aforementioned relationship between satirist, target and audience.²¹⁷ This cartoon may

²¹⁶ Amanda Meade, ‘Charlie Hebdo Cartoon Depicting Drowned Child Alan Kurdi Sparks Racism Debate’ (*The Guardian*, 2016) <<https://www.theguardian.com/media/2016/jan/14/charlie-hebdo-cartoon-depicting-drowned-child-alan-kurdi-sparks-racism-debate>> accessed 7 January 2019.

²¹⁷ Simpson (n 2) 8; See: Section B.3.

conjure in the reader's mind a link between migrants and sexual assault. Thus, while this satirical cartoon performs the function of giving offence, it does so to the detriment of a true social commentary because the message focuses on ridiculing these men on distorted racial characteristics – not media hypocrisy. This cartoon demonstrates how the features that compose satire which might contribute to public debate can allow judges to identify satire, and thus to remove the margin of appreciation, in order to perform their own proportionality assessment, and balance against the rights of others. The cartoon distorts and exaggerates certain features of the men,²¹⁸ and through ridiculing its target,²¹⁹ aims to create a striking, offensive commentary. Despite possessing the features of satire, it fails in its function by: (i) isolating the audience by misfiring in way that racially targets migrants as an object of opprobrium;²²⁰ (ii) using offence in a way which is 'groundless' rather than 'needless'.²²¹ The Court should treat this as incitement to racial hatred and restrict this piece of satire.

3. Medium

The limit of protection-worthy satire can also be defined based on its format. Expressions pertaining to matters reported by the press, eg in magazines and newspapers, hold great import. The European Court prominently held that an injunction against a newspaper which commented on an ongoing case, relating to liability for child birth defects caused by a pregnancy drug, was a violation of Article 10.²²² Although journalists' freedom of expression had to be balanced against the potential compromising of the 'authority of the judiciary', Article 10 rights were given precedence as a matter of public interest in sharing information with the public.²²³ There cannot be a '*pressing social need*' to limit newspaper reporting, especially where through articulating certain elements, '... the article might have served as a brake on speculative and unenlightened discussion'.²²⁴ Satire in newspapers and journals ensures communication of vital information and should be worthy of higher protection. In *Jersild v Denmark*,²²⁵ this duty was extended from '... print media ... to the audiovisual media ...'²²⁶ so that the media could play a 'public watchdog' role.²²⁷ In *Jersild*, the Court protected

²¹⁸ Section B.2.

²¹⁹ Section B.1.

²²⁰ Simpson (n 2) 8; Section B.3.

²²¹ Cram (n 138) 325-7; Section C2.

²²² *Sunday Times* (n 91).

²²³ *ibid* [65].

²²⁴ *ibid* [66].

²²⁵ (1995) 19 EHRR 1.

²²⁶ *ibid*, [31].

²²⁷ *ibid*.

the right of a television programme presenter to host guests with extremist racist views on their show, to provide commentary.²²⁸

While the press performs an important function, particularly conspicuous modes of communicating satire, such as posters in a town-hall or a street sign, demonstrate the need for safeguards. Lack of safeguards upon a contested satire will weigh against its protection. As the Court elucidated in *Müller v Switzerland*,²²⁹ which concerned display of sexually explicit paintings, lack of safeguards limiting access to offensive expressions could justify interferences as ‘*necessary in a democratic society*’ where ‘... the organisers had not imposed any admission charge or any age-limit ...’²³⁰ and a young girl was acutely perturbed by the imagery.²³¹ Though confiscation of the pictures was deemed disproportionate due to its ‘Draconian’²³² nature, the case demonstrates the importance of protecting the public from wanton offence. The ability to express an offensive opinion does imply an obligation for others to perceive it. Removing protection for harmed feelings in the ECtHR approach to satire only logically functions if exposure is voluntary. Tsakyrakis notes this in relation to *Otto-Preminger-Institut* where the restriction upon expression was illogical, because the use of ticketing and age restrictions upon viewing the film removed the ‘... danger of anyone’s being exposed against his will to material he would find offensive’.²³³ Analogously, Noorlander’s example of the failed claim at the Paris ‘Tribunal de Grande Instance’ that the Danish *Jyllands-Posten* cartoons of the Prophet Muhammad amounted to incitation to hatred demonstrates the importance of medium.²³⁴ The key point was the contrast between cartoons ‘... in a satirical magazine which the public had a choice not to buy ...’²³⁵ and the less justifiable hypothetical situation of cartoons ‘... on billboards by the side of the road which everyone would see’.²³⁶ The reasoning of the European Court in potentially restricting satire should follow this. Ostentatious expressions of satire which force themselves upon a reader in plain sight may merit restriction, whereas those formatted in traditional press outlets, with sufficient safeguards, should not merit interference. This sits in contrast to the contemporary approach where the Court fined an

²²⁸ *ibid.*

²²⁹ *Müller* (n 186).

²³⁰ *ibid.*, [36].

²³¹ *ibid.*, [12].

²³² *ibid.*, [40].

²³³ Tsakyrakis (n 101) 478.

²³⁴ Noorlander (n 212) 116-7.

²³⁵ *ibid.* 117.

²³⁶ *ibid.*

applicant who gave offensive seminars, placing minimal emphasis on the fact that '... only thirty people attended on average'.²³⁷

4. The Context of the Specific Debate

The European Court and national authorities must analyse satire within specific, ongoing debates. Contextually, protection can and should be granted to expressions which might otherwise be inadmissible outside of the nature of the specific debate, if the expression meaningfully contributes to the debate. Both Lemmens and Noorlander comment on this in relation to the legal proceedings French satirical magazine *Charlie Hebdo* faced between 2006 and 2008 regarding their republication of the *Jyllands-Posten* 'Danish Cartoons'. These cartoons sparked controversy, for portraying the Prophet Muhammad whose depiction is forbidden in modern Islamic doctrine, and reactions from the Muslim community to the original publication revealed strong feelings of offence. The first two cartoons showed Muhammad in a satirical light, and the French court decided that what the artist '... had been deriding was Islamic fundamentalism, not Islam generally'.²³⁸ However, the third cartoon – depicting '... Mohammed with a bomb in his turban ...'²³⁹ proved '... problematic precisely because it established a link between terrorism and Islam as such. Taken out of context, it could therefore be seen as an insult to Muslims'.²⁴⁰ The court decided within the specific context, the republication of this depiction was admissible.²⁴¹ *Charlie Hebdo* published the cartoons '... as an act of solidarity as well as to ... contribute to this [international] debate'.²⁴² This saga demonstrates the value of communicating opinions on current debates through republication. Lower protection should conversely be afforded to applicants who satirise a figure (eg the Prophet Muhammad) when this provocation is not appropriate in the context of a matter of public debate. This is akin to what Cox refers to as 'defamation of religion'.²⁴³ The European Court has previously restricted satire where the '... reaction had been to stir up debate (the desired function of exercising the right to freedom of expression)'.²⁴⁴ This article argues that context should instead allow the ECtHR to lean in favour of protecting provocative satirical portrayals which have such an aim. Nonetheless, context captures why case-by-case analysis

²³⁷ *E.S.* (n 140), para 51.

²³⁸ Koen Lemmens, "'Irreligious" Cartoons and Freedom of Expression: A Critical Reassessment' (2018) 18 *Human Rights Law Review* 93.

²³⁹ *ibid.*

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² Noorlander (n 212) 117.

²⁴³ Cox (n 133) 199.

²⁴⁴ Noorlander (n 212) 122, discussing *Leroy* (n 164).

is important in treating the nuances of each matter of controversial satirical expression. As aforementioned, an unbridled arena for public debate is purely aspirational, and thus a strong focus on context will assist in more accurately mapping the limits of public debate.²⁴⁵

Timing can also play an important role in this. When a debate is contemporary, this should translate to greater protection for expressions relating to that debate, because the satirist is essentially ‘striking while the iron is hot’. For instance, in *Leroy v France*,²⁴⁶ a cartoonist was convicted for producing a cartoon released two days after the 9/11 terror attacks depicting the event, accompanied with text parodying a Sony advertisement. Disregarding the offensive substance of the cartoon momentarily, and the fact that the conviction was for sympathising with terrorists,²⁴⁷ the judgment erred specifically in relation to timing. In analysing the necessity of the interference, the Court emphasised the ‘temporal aspect’²⁴⁸ of the cartoon being published so closely to the devastating attacks. The Court should be more reflective in its analysis, taking into account the knee-jerk nature of satire, which responds quickly and potently to events. Notwithstanding the fact that the intention of the satirist was satirical rather than to glorify terrorism,²⁴⁹ which should weigh in the applicant’s favour,²⁵⁰ it would hardly be more justifiable to restrict the cartoon if it were published two months or two years after the events, by which point its ability to engage provocatively with affairs will surely be less convincing. Accordingly, a violation should be found in a case like this. This is particularly so where offence is operationalised in order to make the message more shocking and thus to provoke reaction and public debate.²⁵¹ Such ‘... overstepping of a social boundary ...’²⁵² can be striking if deployed in a timely way, meriting greater – not lesser – protection.

5. Targeting and Harm

Perhaps the most significant factor that the European Court should take into account when assessing the necessity of restricting satirical expression is targeting – particularly for vulnerable groups who may be the object of satire. Acknowledging minority views has been an important theme in restricting expression in ECtHR jurisprudence.²⁵³ Considering impact on vulnerable groups is significant, as the new model seeks to protect satire up to the point of,

²⁴⁵ Section B.4.

²⁴⁶ n 164.

²⁴⁷ *ibid* [9]; Note, the Court did not mention that this might be ironic satire, in spite of submissions at [10] that it actually targeted USA foreign policy.

²⁴⁸ *ibid* [45] [‘Cette dimension temporelle ...’].

²⁴⁹ *ibid* [42].

²⁵⁰ Section D.2.

²⁵¹ *See*: Section B.3.

²⁵² *Kuipers* (n 53) 124.

²⁵³ *Bot* (n 9) 244.

yet not comprising, incitation to hatred and violence. This is a particularly difficult line to draw given that, as aforementioned, two of the main features comprising both the structure and social function of satire are the use of ridicule and offence.²⁵⁴ Acknowledging the views of vulnerable groups in relation to satires, such as the Danish cartoons affair, requires '... abandoning the term "claims of offence to feelings"...and replacing it with *claims from integrity of cultural identity*'.²⁵⁵ This considers the robustness of a minority identity, and focuses on responses specific to those groups.²⁵⁶ Harm is a complex notion, but focusing on majorities compared with minorities,²⁵⁷ might not improve current dissatisfactory ECtHR practices used to protect both.²⁵⁸ This is especially problematic because '... who is the majority and who the minority might be difficult to establish in a global affair like the Danish cartoon affair'.²⁵⁹ However, the European Court should continue, as it does, to account for vulnerable factions in society as a developing concept, while minimising defects such as 'paternalism'.²⁶⁰

The Court should not be reductionist in considering the factors which contribute to a satire as social commentary. For instance, where satire is focused on criticising someone's status, a useful heuristic may be examining which way satire 'punches'. This is because: 'As a rule of thumb, satire that punches up is more commendable than satire that punches down'.²⁶¹ The question for the Court is: who is being targeted? The European Convention has been interpreted to grant '... less protection to the politicians and other main public figures than to average citizens when they are targeted as a result of ... the right to freedom of expression'.²⁶² This suggests a general trend that: 'To attack the powerful is noble; to mock the weak is ignominious'.²⁶³ It is important to note that vulnerable members of society exist in a weaker position to dominant voices.²⁶⁴ This is particularly dangerous given that majority voices in society may use satire to dehumanise vulnerable people.²⁶⁵

²⁵⁴ See: Sections B.1 and B.2.

²⁵⁵ Meital Pinto, 'What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era' (2010) 30(4) Oxford Journal of Legal Studies 704.

²⁵⁶ *ibid* 704-5, 710, 717-23.

²⁵⁷ *ibid* 700-11.

²⁵⁸ Notably, a minority in *E.S.* and a majority in *Otto-Preminger-Institut* (Section C.2).

²⁵⁹ Nathwani (n 125) 506.

²⁶⁰ Lourdes Peroni, Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) International Journal of Constitutional Law 1056 [emphasis added].

²⁶¹ Jeet Heer, 'France's Deep-Seated Tradition Of Subversive Satire' (The Globe and Mail, 2018) <<https://www.theglobeandmail.com/opinion/frances-deep-seated-tradition-of-subversive-satire/article22389678/>> accessed 26 May 2022.

²⁶² Bakircioglu (n 184) 723-4.

²⁶³ Heer (n 261).

²⁶⁴ Pinto (n 255) 704-6.

²⁶⁵ Satire creates valuable social commentary insofar as it criticises high status (*see*: Section B.2), reaching its limit at hate speech (*see*: Section B.4).



Figure C: Stanley “Mac” McMurtry, ‘MAC ON ... Europe's Open Borders’ (*Mail Online*, 2019) <<https://www.dailymail.co.uk/news/article-3321431/MAC-Europe-s-open-borders.html>> accessed 1 June 2022.

Figure C demonstrates satire which punches downwards, as it might imply that refugees are likened to rats,²⁶⁶ and thus harms by dehumanising vulnerable people. This is even more problematic given its resemblance to cartoons produced to incite hatred in Nazi Germany likening Jewish people to rodents.²⁶⁷ This is another cartoon with the features of satire, thus allowing for easy identification.²⁶⁸ However, on balance, these features ‘misfire’ to target refugees as an object of opprobrium,²⁶⁹ and could be seen thusly as a ‘... slow-acting poison ...’²⁷⁰ that pollutes societal views. This would be afforded lower protection and consequently restricted under the new model.

²⁶⁶ Ryan Grenoble, This Daily Mail Anti-Refugee Cartoon Is Straight Out Of Nazi Germany’ (*Huffington Post UK*, 2015) <https://www.huffingtonpost.co.uk/entry/daily-mail-nazi-refugee-rat-cartoon_us_564b526ee4b06037734ae115> accessed 8 June 2022.

²⁶⁷ *ibid.*

²⁶⁸ The cartoon is reductive, conveying one message – distorting people crossing borders to appear as rats, begging the question of open borders (*see*: Section B.2); it ridicules the plight of those crossing borders, creating a wariness of them (*see*: Section B.1).

²⁶⁹ Simpson (n 2) 8; *see*: Section B.3.

²⁷⁰ Waldron (n 81) 97; *also*: Section B.4.

This links to the importance of irony in demarcating satire from hate speech,²⁷¹ which is unworthy of protection. Noorlander notes that the Danish cartoons of Muhammad ‘... have been appropriated by right-wing politicians ... [who] probably don’t appreciate the irony that the cartoons themselves satirised the appropriation of Islam for extremist political purposes ...’.²⁷² Irony may be used as a tool to veil hate-filled views ‘... under the guise of art and humour. “I was only joking”, says the racist or sexist’.²⁷³ Yet, the quick-fire nature of satire – particularly in pictorial forms – implies that a well-meaning commentary could easily be mistaken for hateful expression. The European Court must ensure to protect satirical expression which adopts reprehensible views ironically,²⁷⁴ in order to ridicule and parody. This is particularly poignant when satire appears to target vulnerable groups, but is in fact portraying this ‘punching down’ in order to highlight an unfair position in society.



Figure D: Unknown, ‘The Jew: Warmonger, War prolonger’ [Translation] (*HERB: Resources for Teachers*) <<https://herb.ashp.cuny.edu/items/show/1200>> accessed 25 February 2019.

²⁷¹ For an explanation of why the limit of satire in public debate stops at hate speech, *see*: Section B.4.

²⁷² Noorlander (n 212) 119.

²⁷³ Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (Atlantic Books, 2016) 243.

²⁷⁴ *See*: Section D.4. on *Leroy* (n 164).

To contrast *Figure C* with an expression where the lack of irony is evident, *Figure D* demonstrates an expression which uses means of exaggeration to ridicule²⁷⁵ (of the features of the Jewish man depicted) which aims to create hateful commentary. The lack of irony is clear already without the context of this being Nazi propaganda. The picture could be used to incite racial hatred, and is thus not a worthy form of satirical expression.



Figure E: Stéphane “Charb” Charbonnier, ‘But Who Wants the English in Europe?’ [Author’s translation] (*Charlie Hebdo Le Blog*, 13 December 2011) <<https://charliehebdo.wordpress.com/2011/12/13/mais-qui-veut-des-anglais-dans-leurope/>> accessed 1 June 2022.

The cartoon in *Figure E* lampoons two contrasting individuals in the author’s view, both wanting Britain to leave the EU. It offensively²⁷⁶ targets British people specifically – the female on the left is mocked as uncouth (displaying a potentially xenophobic tattoo), and the

²⁷⁵ See: Section B.1 on ridicule, and Section B.2 on distortion and exaggeration.

²⁷⁶ This is the ‘risk’ which is taken in order to provide a fruitful commentary (see: Section B.3).

male as old-fashioned. The joke challenges the idea of Britain or England benefitting by renouncing Union membership,²⁷⁷ suggesting that English people are not wanted anyhow, owing to a derogatory view of English culture as lacking. Charb confrontationally highlights the irony of those who believe leaving the Union would be a victory, despite (then) deriving travel and other benefits from the EU. This offers a provocative social commentary on an important contemporary issue and thus should be protected under the new model.

6. Concluding Remarks on 'The Rights of Others'

Charb's provocative drawing in *Figure E* provides apposite reflection upon the arguments advanced in this article. In understanding the circumstances of '*content*' and '*context*'²⁷⁸ with regard to satire as a unique form of commentary, a new reflective standard should appear in the jurisprudence of the European Court of Human Rights – hopefully one which will trickle down to the national authorities. It is especially important to consider satire's relationship to ridicule,²⁷⁹ because '[r]idicule ... cannot be repackaged in a less offensive rhetorical form without expressing something very different from what was intended'.²⁸⁰ The analysis offered here has articulated how satire can be more successfully incorporated in the Strasbourg Court's jurisprudence, providing sufficient regard to safeguards vis-à-vis *intent*, *medium*, *harm* and *vulnerability*. The limits of toleration have reached as far as wanton offence, stopping short at incitement to violence and hatred. Through a more nuanced consideration of satire and its proper potential restrictions, it is hoped that satirists will no longer suffer the ignominy of having to 'repackage' their work.

D. CONCLUSION

The European Court of Human Rights differs in approach to Article 10 cases, dependent upon which *genres* of expression are reviewed.²⁸¹ The mechanism determining intensity of review is the margin of appreciation, which the Court uses to '... impose higher standards of human rights by narrowing the margin of Contracting States'.²⁸² The pivotal factor ensuring rights protection is to remove this margin, facilitating more robust analysis of restrictions upon an expression at the European level. This article started by highlighting a specific type of expression which has not received enough attention from the Court: satire. Section B explained

²⁷⁷ On question-begging, *see*: Section B.2.

²⁷⁸ *Ziembinski* (n 176).

²⁷⁹ Section B.1.

²⁸⁰ Dworkin (n 20).

²⁸¹ *Bakircioglu* (n 184) 723-31.

²⁸² *ibid* 727.

the key features of satire, in order to facilitate its identification and to justify higher protection by defining it as a distinct category of expression. This distinct category would benefit from a narrowed margin of appreciation when satire effectively performs a social commentary which contributes to public debate (ie stopping short of hate speech). Section C critiqued the case-law on Article 10 which tends to increase the margin for contested, offensive expressions, allowing national authorities too much scope to restrict.²⁸³ Incorporating the alternative reasoning offered in relation to *VBK*²⁸⁴ will entrust analysis to the European Court, ensuring better protection of satire. Section D demonstrated how the Court would identify satire in practice, making use of the features outlined in Section B in order to identify satire, as well as proposing five concrete factors to use in its appraisal. The recent case of *Patrício Monteiro Telo De Abreu v Portugal* demonstrates a renewed willingness on the part of the European Court to give greater weight to context when assessing restrictions on satirical cartoons.²⁸⁵ This paper has gone further, elucidating additional factors (among them *satirical intent, medium, and harm through targeting and vulnerability*), for use in the Court's analysis. This new model will balance significant interests, such as minority rights (through the *rights of others in a democratic society* per Article 10(2)), in deciding where proportionality analysis will favour protection or restriction. Therefore, this article has offered both a redefinition and a reconstruction of the Strasbourg Court's approach to satire. This account should serve as a guide to taking satire seriously.

²⁸³ *Handyside* (n 6) [48], [57].

²⁸⁴ Section C.3.

²⁸⁵ *Patrício* (n 7); see further: Lewis Reed, 'Op-Ed: "Drawing on Context: Assessing Political Cartoons Following *Patrício Monteiro Telo De Abreu v Portugal*"' (EU Law Live, 20 June 2022), <<https://eulawlive.com/op-ed-drawing-on-context-assessing-political-cartoons-following-patricio-monteiro-telo-de-abreu-v-portugal-by-lewis-reed/>> accessed 12 August 2022.