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Satire and the law: an interview with German lawyer Gabriele Rittig

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Gabriele Rittig (1955) is a Frankfurt-based lawyer with decades of experience in cases concerning freedom of expression, especially in regard to satire. She has been legal counsel for TITANIC – Das endgültige Satiremagazin (TITANIC – The definitive satire magazine) since the 1980s.

EDITORS: “We understand that you have a lot of experience with cases involving humor and satire. Could you please give a short account of the (main) humor-related cases you have been involved in?”

G.R.: “I’ve been doing this since the 1980s, and in the early days, Titanic and other satirical periodicals faced a lot more problems than they do today. Not so much because case law has changed so dramatically, but because the reception of these texts or caricatures was a bit different in society at that time. A large part of it had to do with religious insults, which in Germany is § 166 of the German Penal Code (StGB) (Beschimpfung von Bekenntnissen). It says: ‘Whoever publicly or by disseminating content (§ 11(3)) insults the content of the religious or ideological confession of others in a manner likely to disturb public peace shall be punished with imprisonment for up to three years or with a fine.’”¹ This paragraph is to a certain extent also a consequence of National Socialism, because naturally this

¹ “Wer öffentlich oder durch Verbreiten eines Inhalts (§ 11 Absatz 3) den Inhalt des religiösen oder weltanschaulichen Bekenntnisses anderer in einer Weise beschimpft, die geeignet ist, den

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The article was aimed at preventing Jews and other ethnic groups from religious persecution, which might give them the impression that they were no longer able to practice their religion in this country without the risk of being attacked or offended by anti-Semites. Nowadays there is discussion about abolishing this article, but I really don’t think it would be wise to do it as long as parties like the AfD\(^2\) or other extreme-right movements exist. Anyway, many have been affected by these regulations. One can trace that back to the Weimar period and even longer back, not those for whom these regulations were actually intended, but others – as a rule, certainly also satirists – because religion is a subject that is very well suited, I’m not going to say, to make jokes about, but suited to satire, and we had a lot [of cases] in that area.

I think it started when Hans Traxler\(^3\) was drawing some caricatures of Pope Paul VI because of the encyclical on [birth-control] pills. Nothing happened at first, but then Pope Paul VI died shortly thereafter. Then came Pope John Paul I, who was only Pope for 30 days or so, about whom [Traxler] also did some cartoons – and then [the Pope] was dead. He was followed by John Paul II and Hans Traxler thought: I’m not going to do any caricatures about this Pope anymore, because otherwise he’ll drop dead right away. Fortunately, this did not happen, but then Pope John Paul II visited Germany, and there were various cover images to *Titanic* that immediately led to a complaint.

Because Catholicism or anything else that is in decline, this also applies to politicians, is a very dangerous subject for satire – whoever is in a really untouchable position won’t sue a satirist. The CDU\(^4\) and parties like that never sued *Titanic* – but the SPD\(^5\) did. And then there were various things, but of a criminal-legal nature, which didn’t really lead to any punishments.

There was another case where the Archbishop of Fulda filed a complaint for insult, which went through three [levels of the judicial system] and ended with a dismissal, because Hans Zippert, who was editor in chief at that time, became tired of years of trials and appeals. The main problem with satirizing the Catholic Church

\(^{484}\) öffentlichen Frieden zu stören, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.”

2 *Alternative für Deutschland* (Alternative for Germany), a far-right, populist party in Germany.
3 Hans Traxler (1929) is a German painter, cartoonist, illustrator and author of children’s books. Together with Robert Gernhardt, F. K. Waechter, Peter Knorr, and Chlodwig Poth he founded the satirical magazine *Titanic* in 1979.
4 *Christlich Demokratische Union Deutschlands* (Christian Democratic Union of Germany): a center-right Christian-democratic political party; one of the major parties in contemporary Germany.
5 *Sozialdemokratische Partei Deutschlands* (Social Democratic Party of Germany): a center-left social democratic political party; one of the major parties in contemporary Germany.
and their representatives is that religion itself works with irrationality and uses pictures and ideas which, if caricatured, have to get even more irrational and weird, so that people who believe in all this feel offended. But, of course irrational feelings of offense should never be a basis to build a decision on.

The peak of my career later was when Pope Benedict sued us. Nothing can come after that. So the beginning and the latest period of my work for Titanic were more or less related to a religious phenomenon. In between there were some politicians (mainly from the SPD) and actors. But, as I said, as a rule, often in cases where you wouldn’t have thought anything would happen, you think: Oh, he won’t sue; he must have a sense of humor or something. And then you are very much mistaken. But I would still say that religion was the central issue followed by parodies of advertisements.

[Parodies of advertisements] are a problem that’s not so prominent nowadays because case law has changed. But in the past, there was always a whole series of advertising parodies in Titanic, because advertising is suitable for that and the satirical principle is based a bit on tracing pretense and hypocrisy and so on. Advertising is also a good indicator for that, and in the past it was very dangerous, because if, for example, you had an opponent like McDonald’s or a big movie company – I think we did something with Jurassic Park once – then you knew immediately that when the letter from their lawyer was coming through the fax you would say: Yes, okay, okay, we won’t do it again. You would always know that, theoretically, you could win the case; the simple reason for not fighting it would always be that, if you lost, it would be so expensive that you might need to shut down the magazine. [Complainants back then] had it easy because of trademark law, that is, because the use of a symbol, a logo, or slogan protected by trademark law was basically forbidden in satire. So simply using it was already an infringement, where you couldn’t say: But it was meant satirically, as you would now.

In the meantime, copyright law concerning art (Kunsturheberrecht) and trademark law have changed. There have also been a few decisions by the German Federal Court of Justice that have said: Well, that’s not a use under competition law. It’s not used to lure away a customer; it’s more or less an artistic use, which is not quite so bad. At the beginning this was really problematic, but that’s over now. But it’s still difficult in cases where, for example, the message of the satire affects the image of a firm, because it can become very, very expensive.

The last ‘advertising problem’ we had was when in Nice a lorry had been used as a weapon and had been driven along the promenade and killed and injured people. It was a rental car, and the company Sixt was itself very well known for having done very alternative, very humorous advertising, with Ms. Merkel and with everyone else. Then Titanic published, not on the cover but inside, a mock-advertisement. The slogan of Sixt was: ‘We move people’ (‘Wir bewegen
Menschen’) – and then [Titanic] had a photo of that rental lorry in Nice using this line also, and Sixt was not amused at all and wanted us to sign the usual cease and desist letter. So we agreed to that because nothing is as old as yesterday’s newspaper, and you just say: We won’t do it again. But actually that cartoon was not meant as an assertion that Sixt was somehow to blame for this lorry crashing into this crowd of people; it just shows how quickly a slogan can become obsolete because it is overtaken by reality. It does not matter which company rented out this lorry, it just says: this attacker happened to rent the lorry from Sixt, and because of this, this slogan gets stuck in your throat. That’s all it was saying. We would probably still have lost.”

EDITORS: “Yes, that’s interesting, because we read that you once said in an interview that you actually lost most of your cases and that it was also a major task for you at Titanic to do pre-censorship. Is that really so?”

G.R.: “Yes, that is indeed the case. But that was also really a question of money. There are a lot of cases, for example the one I just described, where one would rather go through with it. So in many cases we have not lost in court, but we have not even let it get that far, because the risk is simply far too high. We did appeal the first restraining order by the Regional Court of Hamburg in the Pope Benedict case because this piece really had been a perfect satire and it was worth fighting for. That piece had everything a perfect satire needs: it had a cause, the subject was of public interest, it had wordplay, Vatileaks: Father is leaking. The pope was an old man, Vatileaks was all over the press, and the opinion was circulating that Benedict was losing power in the Vatican. Everything. The title was perfect from a satirical-theoretical point of view, one of the best satires ever made by Titanic – and we would have lost that one too. The Pope then withdrew his complaint the day before the trial, because it was an absolute publicity disaster for him and the Vatican. But I remember I probably wrote the best brief of my life – with a lot of support by other lawyers – and then it seemed all in vain. We went to court the next day to say hello to the judges and let them know that we felt sorry not to be able to have an interesting discussion during the trial. The chairwoman said: But the matter was clear anyway! This is the same panel that did Böhmermann,6 and in the case of Böhmermann, the German Constitutional Court recently came to the conclusion that there is nothing in the decision of the lower court that could be objected to in any way – it’s a scandal. From a literary and hermeneutical and whatever point of view, this is a scandal.”

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6 In 2016, German satirist, journalist and television host Jan Böhmermann faced criminal charges and a civil lawsuit for airing a poem entitled “Schmähkritik” (“Defamatory Criticism”) in a mid-March 2016 episode of his satirical television show Neo Magazin Royale. The crass poem was about Turkish president Recep Tayyip Erdoğan.
The cover of Titanic issue number 7, July 2012: “Halleluja im Vatikan: Die undichte Stelle ist gefunden!” (“Hallelujah in the Vatican: The Leak Has Been Found!”).

EDITORS: “When it comes to adjudicating literary expression (whether or not in humorous or satirical form), factors such as the context in which an incriminating passage occurs, the (target) audience of the text in question, the status of literature as a ‘public good,’ and the opinion of expert witnesses can play an important role. What are currently the main criteria/tests for adjudicating humor/satire in Germany? How have these criteria/tests evolved since your first cases involving humor/satire? What does this say about judicial/societal attitudes towards humor/satire in Germany?”
G.R.: “That is difficult to say, really. Because the main criteria would normally be: How does the recipient, and indeed someone who knows what humor, etc., is, understand this text? Does he have a point of reference? Satire is usually an exaggeration, a grotesque form, and with humor, too, the recipient must have a certain knowledge in order to be able to understand it. That means that, in order for the recipient to be the standard, he or she must also be the one considered competent by the court. That’s why Mr. Böhmermann needs to be up at one in the morning, because only the intellectual is up that late and the normal citizen is supposedly a bit dumb, and if you just throw it out to the dumb crowd, you have to be much more careful with your phrasing. I’ve never understood why misunderstanding is used as a yardstick, but that’s how it is in many cases: is it recognizable to the recipient that something else is actually meant than what is formally written there? Since the Reichsgericht (Imperial Court of Justice), recognizeability is still the criterion. But that is still the problem when the judge says: It is recognizable, but it is still defamatory criticism.

Then we have this other, essential point: ‘Goat fucker’ is still defamatory criticism. In the opinion of the court, there was no reason for using this expression because there was no obvious relation between Erdoğan and goats. Of course this is nonsense because the panel did not take Böhmermann’s ‘poem’ as a piece of literature or art, but cut it into pieces. By doing this you’re prescribing to the author which words he’s allowed to use and which ones he’s not. We’ve been farther ahead in this before, and even in the jurisprudence it was accepted that you cannot interfere with the expression of art. But art in this sense had no content, no actual meaning. If we are talking about Van Gogh’s Sunflowers we have no problem, but George Grosz was a different matter. The problem is that there is no real criterion. Actually, it’s about understanding the text and I can’t force anyone to understand it. If you don’t get the joke, you just don’t get it.”

EDITORS: “Exactly, but there are things like medium, the time that the show airs, etc. that play a role.”

G.R.: “Yes, and the ones taking offense, which is what they usually ask. There are now things on television where I sometimes think: Man, they can do that? They’re allowed to do that? We had problems for lesser ‘insults’. But in fact comedy is rather harmless compared to satire and faces little danger of being prosecuted. And then people seem to be used to certain forms of humor on TV and the audience finds it normal. Without people who feel offended and feel the urge to write to the

7 The supreme civil and criminal court in the German Reich from 1879 to 1945.
8 One of the verses in Böhmermann’s poem suggests that Erdoğan loves to “fuck goats.”
9 George Grosz (1893-1959) was a German avant-garde artist who was known especially for his caricatural drawings and paintings of Berlin life in the 1920s.
police, no case exists, and the typical crowd that used to attack Titanic because of their ideas of justice is dying out – especially the Catholics.

There is a new one that is not quite as far along, ‘cancel culture,’ for example. But to come back to Böhmermann: when I saw that I thought: my oh my … Because if I had seen or read it prior to publication, like I always do with Titanic, I would have said: Pooh. Not because I don’t think it’s absolutely permissible and funny, but because it was clear to me that it would cause trouble. Because, above all, it was dealing with sacrosanct opponents. It is always dangerous to insult a politician, even if nobody likes him. That’s what always happened to Titanic: You don’t stand a chance. Even if it’s a perfect satire, however classic. Nowadays, it is almost impossible to find a judge with enough courage to let some satirist win against a president or the Pope.”

EDITORS: “In cases regarding humor and the limits of free speech, courts often distinguish between forms of humor that contribute to public debate (and therefore deserve a higher degree of protection), and forms of humor that are considered ‘gratuitous’ (and therefore less deserving of protection). A recent example is the European Court of Human Rights (ECtHR) case ZB v. France. In what ways is this a valid or invalid criterion, and why?”

G.R.: “I looked at that. In Germany it would probably be a bit different. Importance to public debate is also a point in German law, that is, the assurance of legitimate interests. But the question is not: Are funny or humorous or comical or satirical things treated differently from other things? Because even with humor and satire, you have to break it down to what is being said. Here, too, ‘Je suis une bombe’ – that was a criminal law decision apparently, wasn’t it? I don’t know, but it would probably have been irrelevant in terms of criminal law in Germany, because then you could say: Well, he wanted to make a joke with his child. That this joke is in bad taste and highly problematic [is clear], especially in a country that continuously suffers from such attacks (so this case would probably have been less conspicuous in Germany than in France). I would also say, in bad taste is the least you can say about it. But whether it is an incitement to [violent] jihad would need to be proven first, and [the satirist] would say: My God, I was only joking.

On 25 September 2012, in Sorgues, in Southeastern France, a three-year old child was sent to preschool with a T-shirt reading “je suis une bombe!” (I am a bomb!) on one side, and “Jihad, né le 11 septembre” (Jihad, born on September 11th) on the other. The T-shirt played on the child’s actual name (Jihad, which is common in the Arab world) and date of birth (which was actually September 11th). Jihad’s mother and uncle – the latter had given the T-shirt to his nephew as a birthday present – were charged with glorification of terrorism (or “apologie de crimes d’atteintes volontaires à la vie” (apology for crimes of willful attacks on life)). See the introduction to this special issue for a discussion of this case.
In my opinion, he would have been acquitted in Germany, but I don’t see where this T-shirt could be a contribution to the public debate at all. But here you simply have to say: What is he trying to say? Is it permissible in the same way as instances of calling for terror during public peace, or insulting the Jews, or whatever. It is conceivable. But in the public debate, at least in Germany, it is like that, in a certain way also with Böhmermann, which is what the court tried to justify. So they said: Okay, he’s allowed to say that Erdoğan sleeps with a hundred virgins, because it’s part of the public debate to say: How are women’s rights being trampled on in Turkey? Whereas with the ‘goat fucker’ you don’t find a ground because the rights of goats are not trampled on there, or at least nobody cares. It’s always the case that I first need to find something in an allegation that would in principle be punishable or illegal if it wasn’t part of the public discussion. That is an argument that is always a bit limp. But it fits in with a similar argument, like when a politician is very much present in public space, normally now perhaps with corona or compulsory vaccination, I might possibly use expressions about Mr. Lauterbach, which otherwise would not be so permissible. If they are taken up as defamatory or insulting in the heat of the moment, they still can be legal, namely as a contribution to public opinion, which is after all the basis of democracy. So if an item can be considered to be so well known by the majority of people that this majority is able to see on which basis the author expresses him- or herself, it must not be restricted in such a way that everyone now has to be afraid if he or she overshoots the mark a little.

But still, the difficulty is how and according to which criterion do you want to measure it? Where is the objective starting point to say which text is permissible and which is not? That is why [Kurt] Tucholsky said, when it came to criticism of the Church, the judiciary should not decide for one side or the other, but acknowledge that different opinions exist. Courtrooms and judges and the legal system are not quite the right medium for judging texts and language. That [standard would be] hard to bear, and Americans are further ahead than we are; there you can do things that would be punishable here, for one reason or another. Yes, you have to put up with the fact that people are allowed to say things that you find disgusting and what not, but it’s actually consistent. Because there is no truly just criterion for judgement.

EDITORS: “Which recent humor-related cases do you consider particularly meaningful, on a national and/or international level? In what ways do

11 Karl Lauterbach (SPD) has served as Federal Minister of Health since 8 December 2021. His name became well-known in Germany during the COVID-19 pandemic.
12 Kurt Tucholsky (1890-1935) was a German journalist, satirist, and writer. He was one of the most prominent journalists of the Weimar Republic.
these cases suggest broader trends in the juridical handling of humor? You have indicated that this would be the Böhmermann case.\textsuperscript{13} You did not do this case did you?"

G.R.: "No."

EDITORS: "We saw, and we think that maybe it’s no coincidence with such a surname, that Böhmermann chose Christian Scherz\textsuperscript{14} to defend him in court."

G.R.: "He used to make a lot of jokes about him in his shows."

EDITORS: "Really?"

G.R.: "Yes, Scherz is one of those celebrity lawyers. He’s the one who used to represent the celebrities against the newspapers. Böhmermann always cited Scherz on TV as someone who has no idea what humor is, in spite of his name, but then, when he was attacked, he hired Mr. Scherz, although he was not famous for defending satirists or freedom of speech. He actually comes from the opposite side, representing those who felt they were treated badly by the press. But there, too, one could say that probably that case could not have been won either. I was so appalled by the German Constitutional Court’s ruling. Well, it is not a ruling; they did not even accept it for decision. The Court did not use this case to discuss the implications of text being formally considered a work of art: that you cannot take a poem and break it down to any single line and forget the context and the composition itself. One can do that with a ‘serious’ text which obviously is reporting something, claiming to be the truth. Here you can prove that the content is correct. If I seriously write an article about Mr. Erdoğan and claim in it that he had sex with virgins last night, then that can easily be resolved legally, because then it is a factual claim. But if I, in a satirical poem or in a satirical program – even if I consider this poem a bad or tasteless one – take a completely grotesque text for a statement of facts, to me this is legally absurd. But in the end it also has to do with what judges consider bad taste. That’s why you’re not allowed to put a wee-wee stain on the Pope’s cassock because that’s gross and fucking goats is absolutely gross.

Strangely enough, the court considered it legal to say that Erdoğan is doing it with underage virgins, which is actually more realistic than fucking goats, if you see it that way, and then justify it by saying: Well, that’s a critique of the treatment of women in Turkey. Okay, fine, but that’s nonsense. That is what we’ve always failed at when we’ve gone to court. With Eckhard Henscheid,\textsuperscript{15} who always liked to pursue a case all the way through, we had a well-known expert giving his opinion about the literary character of Henscheid’s text, and then the judge said: So what?

\textsuperscript{13} Cf. footnote 6.

\textsuperscript{14} “Scherz” means joke in German.

\textsuperscript{15} Eckhard Henscheid (1941) is a German writer and satirist who is a regular contributor of Titanic.
The answer lies in the problem of reception: Who is the appropriate standard-bearer of judgement? That is, in fact, the judge. If he can’t understand it, then he just doesn’t understand it.

In this respect, and this is one of the other points, the Reichsgericht in 1924, I think, already had better jurisprudence and a better understanding of what satire is: that one may only take as a standard those who actually know what satire is and who also recognize the whole thing as an art form. They were further ahead than we are today. That still applies, purely theoretically. It is still the same basic jurisprudence. That the standard of reception is really the one who understands what we are talking about. Therefore, a text published on television is much more dangerous for the author than one you can read in Titanic. With Titanic, you always have the argument: Okay, whoever reads Titanic knows what’s in it. Unless it’s on the cover.”

EDITORS: “In Germany you have artistic freedom versus freedom of speech? These are two different concepts?”

G.R.: “Yes, but relying on the argument of art was a trap because it never worked. The German concept of art – that is, the idea that art is free and that satire is allowed to do anything – is still based on a belief that art is completely free of any opinions. I attempted to research that once; it almost drove me crazy, these very old-fashioned aesthetic theories. The most classic example of the fact, that a piece of art cannot be forbidden, and also the biggest misunderstanding in reception, was the judgement against Klaus Mann for Mephisto [1936]. They indeed tried to use the concept of artistic freedom in the Mann case, which I thought was wrong, because at that time case law was: yes, art is free, as long as you do not talk about a fact, as long as you stay in merely heavenly spheres. But you may not hide under the cloak of art or satire to provide illegal, reprehensible content. So referring to art as a defense does not work. Even if the judges don’t say ‘This is not art at all’ – apart from the fact that Mephisto is a badly written novel because of its style, but that doesn’t matter – it was a roman à clef in a way. Then the argument of freedom of art does not help at all, if the readers find out that Mann was talking about Gustaf Gründgens.16 During the process, nobody talked about the fact that Mann actually protected Gründgens in a way. Gründgens was gay, everyone knew that, but you couldn’t say that publicly. His wife was a lesbian. Then Mann invented this Black woman,17 which was in principle much more harmless than saying: Gustaf Gründgens was gay. And in a trial in which one had said: Okay, we’ll now

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16 Gustaf Gründgens (1899-1963) was a very influential German actor who was married to Erika Mann, sister of Klaus Mann, between 1926 and 1929. The main character of the novel was based on him.

17 As the sexual interest of the novel’s main character.
concentrate on the content and forget about art, one could have taken evidence and said: What is being said here is less insulting than the whole truth. As a result, you could say this is an appropriate portrayal of reality and we have properly portrayed the circumstances of actors in the Third Reich and those who landed on their feet afterwards, and then one probably would find this content relevant for public debate and protected by article 5 of the Constitution. But if you say that this is art and the concept of art is such that art should not have any real reference, then artistic freedom becomes a trap. Mephisto could not be published, but the decision by the Supreme Court was celebrated at the time as the breakthrough of artistic freedom and I thought, how can that be? They banned it after all. How can that be the breakthrough of artistic freedom? It’s grotesque. No one has used the idea of artistic freedom [in court] for a long time, because in the meantime it has become clear through case law that even art is not without limits. It does not help to refer to freedom of art if you want to win in court. Article 5 of the Constitution is merely a protection against classical censorship.

EDITORS: “But in this Böhmermann case, the German Higher Regional Court said that this poem can’t be called art.”

G.R.: “Yes. But who judges that? Why is it not possible? Of course it is possible. That’s why I say that art will lead nowhere as long as you keep attaching such ancient, outdated aesthetic theories to it and say: Nothing rhymes, or at least rhymes correctly, so it can’t be art.”

EDITORS: “Don’t they bring in experts then?”

G.R.: “I don’t know if Mr. Scherz brought in an expert. It was just my experience that experts are never heard because the court says: The expert is me. It is about a text. It’s about the reception of a text, not by some specialist, but by the normal viewer, at night on television. And no one has to tell me how he understands that. I think that’s wrong, because if you argue that it’s not art, then you have to bring in an expert or at least listen to the expert if one of the parties wants to present one.”

EDITORS: “We find what you are saying very interesting. You are actually saying that the Reichsgericht had a better criterion and actually that corresponds to what you see in Anglo-American jurisprudence as well. Because there a difference is being made between ‘possible reader’ and ‘probable – or: ‘likely’ – reader’, exactly that distinction.”

G.R.: “That is exactly what happens in criminal law. In this respect, all criminal charges against Titanic or Mr. Böhmermann are off the table, because, in criminal law, in dubio pro reo applies and it says: OK, if I have several possible interpretations and one of them is legal or a piece of art and therefore has a different

18 Article 5 of the German Constitution protects inter alia freedom of speech, artistic freedom, and academic freedom.
meaning, then I have to take that one and not the other. That's why it's not a problem in criminal law. But in civil law, it doesn't apply. They have to find the 'objective recipient' as the only criterion. And that's it.”

EDITORS: “What do you think about the fact that the German Federal Constitutional Court rejected the appeal by Böhmermann?”

G.R.: “They obviously did not find a mistake in the way the court handled the meaning of article 5 of the Constitution, concerning the interpretation of a text. What they thereby approved is that one is allowed to tear up texts into parts and neither the context nor the artistic form is of relevance any longer. If one accepts [this procedure] as correct, then the [original] decision of the German Regional Court is fine, because they took the trouble to look at every single sentence and ask: Is this offensive? Can one still say that in public discussion? Did Erdoğan give a reason for that? All this is classic press law, which is not really adjusted to artistic forms. Like when I write about the rabbit breeders' association in Wanne-Eickel,19 that one male rabbit now has longer ears than the other. It is easy to prove or to determine whether I was talking about the wrong rabbit. But art always has a unique textual quality and form. The German Federal Constitutional Court officially said goodbye to textual understanding as something that has to be kept in mind – that a special form is a guideline for interpretation and cannot be ignored. That is simply devastating. It was different before: they were further ahead in the 1970s. There was a decision on the Anachronistic Train,20 which I remember as having been quite well-known in those days. Franz Josef Strauß21 was not particularly popular in German left-wing circles, and there were a lot of caricatures, etc. He rarely did anything about it, but this one had certain allusions to fascism. Strauß was shown in an open carriage with a swastika on his arm. This was reported to the police and the German Federal Court of Justice dismissed the claim, saying that this is artistic freedom, which includes the use of forms and expressions that would not be permissible in a serious context. That was a groundbreaking ruling at the time, and in the meantime we've moved to a more conservative approach in case law again.”

EDITORS: “In reaction to the appeal by Böhmermann, the Federal Court of Justice said: 'The case is neither of fundamental importance nor does the further development of the law or the safeguarding of uniform case law require a decision by the court of review (§ 543 (2) sentence 1 ZPO).’ However,
this is about freedom of expression, which is a fundamental right and essential for the basic democratic order.”

G.R.: “This is related to German cassation law. The legal remedies have been limited very much in recent years. The appeal needs to be sustained, though it used to be automatic. If they say that the debate about artistic freedom has been pretty much brought to an end, then there is nothing new to say, and we don’t have two different OLG\(^{22}\) opinions between which we would have to mediate.”

EDITORS: “And does it perhaps also have to do with the fact that this article of the law has been removed and the political discussion about it had begun? Does that perhaps have something to do with it?”

G.R.: “What had been removed? Article 103?”

EDITORS: “The lèse-majesté, how do you say it in German?”

G.R.: “Majestätsbeleidigung, Article 103. That’s right, they deleted it. But, no, Böhmermann was a purely civil matter and lèse-majesté is criminal law, so that has nothing to do with the new decision. He had also been investigated for Majestätsbeleidigung, because the article did still exist then, but as I said before, all criminal cases were dismissed.”

EDITORS: “Do you think Böhmermann has more of a chance at the European Court of Human Rights than in Germany?”

G.R.: “I think so. Even if it’s only because these national sensitivities are not so important [at the ECtHR]. There have already been decisions there that I thought would not have been possible in Germany. Whether they are all right is another question. But that’s the problem: How is it possible that some things are legal in France, where Charlie Hebdo had caricatures which remind me of a light Stürmer\(^{23}\) style? I think it is problematic. I actually found those Mohammed cartoons terrible – really, really disdainful (menschenvorachtend) and very ugly – and suddenly everyone stood up and said: artistic freedom! Why? Because it’s against the supposedly ‘stupid Muslim.’ But if it’s against the Pope … Yes, it’s all hypocrisy at its best. That’s what makes the whole thing so difficult. The goal is to draw a clear, legally reliable line, but I don’t think that’s possible at all.”

EDITORS: “Would you have wanted to defend those Danish cartoons?”

G.R.: “I don’t know what the legal situation is in Denmark. I basically defend everything that is freedom of expression, but I personally probably wouldn’t have done it because I didn’t like them and because I find it hard to defend something that I feel actually has a racist undertone. I’m against any kind of religion, but in

\(^{22}\) Oberlandesgericht (Higher Regional Court).

\(^{23}\) The German weekly newspaper Der Stürmer was an anti-Semitic periodical published by Nazi leader Julius Streicher between 1923 and 1945. It is known for its inflammatory rhetoric and graphic images and caricatures.
my opinion those cartoons were racist. Even though I would probably say, there you see, that’s where it starts. I sometimes also say: No, you can’t really do that. But whether I want it to be legally prohibited because of all these imponderables, I don’t know.

There is always the question: Can there be right-wing satire at all? I’m always asked this question. If you take the normal definition of satire as a starting point, I would say no, because the basis of satire is a certain basic ethical consensus. And this can’t be radically right wing, because [the far right] despises certain kinds of people. But whether it can be done formally, that is, whether one can fulfill the formal criteria of a satire, even though the content is racist, homophobic or whatever… Who am I to judge? Yes, that’s difficult.”

EDITORS: “Our world has become ever more globalized and our societies ever more multicultural due to all kinds of developments taking place since World War II. How has the ever-increasing globalization of the world/multiculturalization of German society affected the way humor is handled in German courts? From what you have said, we gather that not much has changed there, has it?”

G.R.: “Exactly, on the contrary. I sometimes have the impression, but I may be wrong, that very often the German courts struggle with reception, even when there are decisions made by the European Court of Justice or the Human Rights Court. Sometimes these decisions even have hardly been adopted into German law. We always think we are the best. In my opinion, the German judiciary is still relatively conservative, so sometimes it is a bit contrarian. You might notice during the last maybe 40 years that when the [societal] mood was very conservative, the German Constitutional Court made surprisingly open decisions, almost revolutionary ones; but when there was a more revolutionary mood among the people, then [the court] went the other way. But that is just an impression.

I don’t know if you can prove it empirically, and lately I have the feeling that, as elsewhere, a kind of class justice is breaking through again, because today’s generation of judges is again the same as in the past in the Empire, when dad was a lawyer and grandpa was a judge, and in my generation it was different. We were much more open. Many of us came from the second level of education, or from a working-class family, for example. In those days at university we did sociology of law and philosophy of law, and we wanted to improve the world and the legal system. But now I sometimes go to court, for example in criminal law cases, and I have the feeling that I’m a fossil.

Böhmermann is again a sign that we are not in a progressive phase. Perhaps because it has all become so confusing, because we are now overloaded with content on the Internet and all these things that also overwhelm the judiciary. There are some things, as we have already discussed, where I think: Yikes!
Theoretically, with all these shitstorms and this hate speech, we would have to crush everything and say that it’s all legally subterranean. But you can’t get a grip on that. The judiciary certainly can’t get a grip on it. So they retreat back to more or less familiar territory and say: We’re not doing anything new now. Where will we end up? There is a tendency to remain a bit more conservative and to say: We did it like that 20 years ago, and it worked quite well, so we are not going to say now, while everything around us is collapsing, that they are allowed to say all that just because it rhymes. We have to keep a back door open, it seems to me. But that is a very individualistic opinion.”

EDITORS: “Well, you have more experience than we do in German courtrooms.”

G.R.: “Yes, but not so much lately. That’s why Böhmermann shocks me so much, because I would have thought, my God, something must have developed in the last few years and then this. You can certainly justify for example a sentence about a satirical text and avoid digging deeper into its meaning and context and the political implications. It’s always easier to reject it than to accept the freedom of a satirical work and defend your reasons. The Federal Supreme Court as well as the Constitutional Court have no legal obligation to explain why they don’t accept a case. If they want to, then they will find a reason to hand down a judgment on it; if they don’t want to, then they will find a reason not to.”

EDITORS: “That’s also a bit peculiar.”

G.R.: “Yes, indeed. That’s really bad. It is discussed time and again that one actually needs a justification, but if there is no higher court above it anyway, for whom should they do it? It would be nice for those subject to the law to understand why. But that’s too much work. I’ve won cases at the Federal Supreme Court where I thought: Huh? Just because they felt like saying something about it. I’ve lost cases where the judgement was teeming with errors. That’s the so-called scumbag theory (Drecksack-Theorie) of the Federal Supreme Court.”

EDITORS: “In your view, what are the main challenges posed by humor in the context of free speech adjudication, as opposed to other (‘serious’) modes of communication?”

G.R.: “Yes, there are two. One is what I already said: that humorous or ironic or non-referential texts always pose the problem that they may not be understood by the judiciary. It seems that new developments, not in the judiciary but in society in

24 The “scumbag theory” is a theory that advances that the Federal Supreme Court can sometimes be shown to uphold a decision of a lower court even if it judges that the lower court in question erred in the application of the law. The FSC can do this as long as the decision of the lower court is acceptable for other reasons than those mentioned by the latter court. This kind of decision of the FSC mainly occurs in criminal cases.
general, which were originally well intentioned, are now leading to a kind of censorship like cancel culture and wokeness and linguistic bans. These create the same basic problem as satire – do I or don’t I understand irony? – but are now even more rigid, and even overlap with bans on thinking. When I not only start to take sentences out of context, as with Böhmermann, but when I actually set language guidelines – You’re not allowed to do this, and not allowed to do that; this word must be deleted, etc., even as quotation or as historical context – that’s horrible. That’s the basic problem: which jokes are allowed and which are not. For example, am I still allowed to make a joke about ‘a Black man’? Even if he has given me cause? Even if he is the president of whatever state and has provided a classic satirical setting? Am I allowed to do that? Or am I only allowed to do that if I am Black myself? Am I allowed to make a joke about him then?

For example, Yasmina Reza. Her latest book Serge is about a Jewish family in Auschwitz. I think it’s great, it’s also very funny in parts, but someone who misunderstands it could also say: Whoa! And if she didn’t have Jewish roots herself, would one then not say: How can you say that about the Jews? They can do that very well themselves. I sometimes feel like that myself when I want to write a book review for our homepage or our newsletter, and I start writing and think: Gosh, am I allowed to do that now? Yes, because I’m an old white woman and I speak differently and I’m not going to go along with this gender madness. Immediately you are in a shitstorm. I hope this is a phase, because young people are allowed to be revolutionary every once in a while and it will pass. But if you imagine that, then you can forget any non-referential language, any meta-level, any satirical, ironic or whatever literary form, because someone has now taken possession of the truth and the language. And that’s scary. There’s some small resistance against it, but I read the other day that some university offers a trigger warning about Charles Dickens’ books.”

EDITORS: “We know about a Dutch university where they no longer want to use the book Heart of Darkness by Joseph Conrad as required reading because it is racist and colonialist, etc.”

G.R.: “But that was the reality. How can you learn about it if you don’t read it? Yes, my God, mankind has done many terrible things, but we can’t pretend that it hasn’t happened. I think it’s horrible. This sensitivity – you could make a wonderful satire about it. That you now need to be obese, lesbian, Black and Jewish at the same time, then you can insult everybody. There are endless examples. But we’re actually talking about freedom of expression. It’s hard enough to defend it at all, and then the new fashion is to restrict it, to shrink it. I think we all should have the courage to be able to live with differing opinions, even if we don’t like it at all.”
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