

Ruling

-

the Landgericht Hamburg – Civil Chamber 24 – rules through the Presiding Judge at the Landgericht ..., the Judge at the Landgericht ... and the Judge at the Landgericht ... on 17 May 2016:

I. By way of interlocutory injunction under threat of an administrative fine, which shall amount to up to EUR 250,000 for each case of infringement and be determined by the court -- and, in the event that this cannot be collected, administrative detention of up to six months (administrative fine no more than EUR 250,000 in each instance,--; administrative detention no more than two years in total), the defendant is

prohibited

from uttering or having uttered, in reference to the claimant:

...

“His junk reeks of doner kebab,
even a pig’s fart smells nicer.

...

He mostly enjoys fucking goats,

...

whilst watching child porn.

And come evening, too, instead of sleep,
fellatio with a hundred sheep.

Yes, Erdoğan is fully and completely,
a president with a small cock.

...

You hear every Turk warble,
that stupid sod has shrivelled balls.

From Ankara to Istanbul,
everyone knows that man is gay,
perverted, crawling with lice and zoophilic

Recep Fritzl Priklopil.

His head as empty as his balls,
the star of every gang-bang party.

Until his cock hurts when he pees,
that is Recep Erdoğan, the Turkish President.”

as occurred in the programme “Neo Magazin Royale” on 31 March 2016.

II. The further claim is rejected.

III. Of the costs of the proceedings, the claimant must pay one-fifth and the defendant four-fifths.

IV. The value in dispute is set at € 100,000.

Reasons:

The claimant is entitled to the asserted claim for injunctive relief to the extent apparent from the operative provisions in accordance with Sect. 823, 1004 BGB (German Civil Code) analogously in conjunction with Art. 1 and 2 GG (Basic Law) and Art. 8 ECHR. Otherwise, the claim must be rejected.

a) The claimant is the president of Turkey. The defendant is a radio and television presenter. In the late-night talk show hosted by him, "Neo Magazin Royale", which aired on 31 March 2016, he performed a poem about the claimant entitled "Schmähkritik" ("Abusive criticism"). Before the defendant read out this poem, he pointed out that the German ambassador in Turkey had been summoned due to a feature shown in the satirical programme "extra 3". From a procedural perspective it can be assumed that the summoning of the ambassador by all means occurred with the agreement of the claimant.

The defendant performed the poem in German. He interrupted his performance several times by talking with his sidekick ... The poem was translated into Turkish using on-screen subtitles, while the defendant's conversation with ... was not.

b) The contested poem is undoubtedly a satire; it conveys a distorted image of the reality which the defendant has used the poem to address. Satire can be, but is not necessarily, art within the meaning of Art. 5 para. 3 GG. According to the definition of art formulated by the Federal Constitutional Court, the essence of artistic creation lies in free creative design, in which the artist's impressions and experiences are rendered perceptible in a particular form (see BVerfGE 30, 173). In this respect, it is prohibited to control the level of art, for example by distinguishing between high and low art or good and bad art. In this case the assumption of art is supported by the defendant's examination of the claimant, part of which is the poem. This would, however, also be the case for an expression of opinion. Something which could argue against this being art is the fact that the defendant – and his interview, which is known to the court, in the periodical "ZEIT" dated 4 May 2016 refers to this – read out a poem that had already been circulating in its entirety on the internet, which means the required artistic examination could be questionable. However, since this is not certain, and furthermore a very generous standard applies to the affirmation of art and the defendant not only read out the poem, but framed it with a particular context, such as the background music, the presentation of the Turkish flag, and the talks with his sidekick, the Chamber assumes that this was art.

Consequently, it is necessary to weigh the boundlessly protected artistic freedom pursuant to Art. 5 para. 3 GG and the freedom of expression as protected by Art. 5 para. 1 GG and Art. 10 ECHR, which the defendant can invoke, against the claimant's general personal rights, which are protected by Art. 1 and 2 GG and Art. 8 ECHR.

This weighing up must not take into consideration the poem alone, but instead consider the specific presentation. Furthermore, the context into which the poem was put is decisive, i.e. the prior events with the broadcast of "extra 3" and the summoning of the German ambassador, since these were the reason for the defendant's feature.

The use of satire to express an opinion and criticise the behaviour of others has its limits when straight calumnies or formal insults are involved, or when human dignity is violated.

Satire, of which exaggerations and distortions are characteristic, requires specific consideration in this case. According to established case law, any assessment of legality must separate the actual message from the satirical garb, or outfitting, chosen by the author; in such cases, a less strict standard regularly applies to the outfitting (see BVerfG, NJW 1987, 2661).

It is therefore necessary to distinguish between the actual message and the outfitting:

The actual message is not so hurtful to the claimant that this would justify the claim for injunctive relief. It is improbable that the recipient would assume that the content of the poem is truthful (overall). This is so obvious that no further explanation is required. In the programme, the defendant satirically addresses the fact that a feature like the one from “extra 3” was used, with the agreement of the claimant, as a reason to summon the German ambassador. The defendant uses the poem to satirically make fun of this and criticises the way in which the claimant has dealt with freedom of expression in Turkey.

In addition, as a head of state the claimant must put up with stronger criticism because of his public role. Indeed freedom of expression arose precisely from the special necessity of criticising power (see BVerfG, AfP 1996, 50). This principle must also be taken as a basis for the claimant as a foreign head of state (see also ECHR, AfP 2016, 137). This is not otherwise contradicted by the criminal standard of Sect. 103 StGB (German Criminal Code), since this, unlike Sect. 185 ff StGB, only provides for higher penalties in the case of a foreign head of state (see Schönke/Schröder, StGB-Kommentar, 29. Auflage, § 103, Rn 6; Nomos, Kommentar zum Strafgesetzbuch, § 103, Rn 1). However, the outfitting results in the (partial) affirmation of the claim for injunctive relief. Although as mentioned above a less strict standard applies here, this does not permit the complete disregard of the claimant’s rights. The remarks in the poem are undoubtedly abusive and defamatory. The present case is not about a question of taste which has no bearing on the legal assessment. Instead, the lines in question raise prejudices which often exist towards Turks in particular and which are usually considered racist. This is further complicated by the fact that, in the knowledge that pigs are regarded as “unclean” animals in Islam – it can be assumed that the defendant is aware of such –, a “pig’s fart” is mentioned. Furthermore, almost all of the lines contain sexual references. Also taking into account the strict criterion laid down by the Federal Constitutional Court for the assessment of the legality of the outfitting and the specific presentation, the lines in question exceed the level which the claimant can be expected to tolerate.

c) As a result of the foregoing considerations, the further claim must however be rejected. The non-prohibited sections of the poem were used, in a permissible manner, to express harsh criticism of the policies of the claimant. This is not a vilification which the claimant can no longer tolerate, but rather an exaggerated means of dealing with events which can, from a procedural perspective, be assumed to be real. These are essentially shown in the feature from “extra 3”, to which the defendant refers with the poem, and include in particular the beating of women demonstrators on “International Women’s Day” by police wearing helmets and protective clothing, the violent actions against other demonstrators who do not agree with the policies of the claimant, and against minorities such as Kurds. It is also known to the court that there are clashes between Christians and Muslims in Turkey and that the role of the state or the government is the subject of debate in this regard.

As the head of state, the claimant bears the political responsibility for these events. Precisely because of his prominent political position, he must, as stated above, put up with stronger criticism.

With the non-prohibited sections of the poem, the defendant has, in a permissible manner, satirically made fun of the way in which the claimant has dealt with freedom of expression.

d) The decision on costs results from Sect. 92 ZPO (Code of Civil Procedure).

e) Since the poem is not to be regarded as an indissoluble entity, the dissemination of the whole poem is – like otherwise in the case of other artworks such as books or films – not to be prohibited, but only the passages which were disseminated unlawfully by the defendant to the extent apparent from the operative provisions.

The omissions which must therefore be made are marked by "...". This also applies to the interruption of the reading aloud by the defendant's talks with The Chamber has in this respect availed itself of Section 938 ZPO.