

THE ABUSE CLAUSE AND FREEDOM OF EXPRESSION IN THE EUROPEAN HUMAN RIGHTS CONVENTION: AN ADDED VALUE FOR DEMOCRACY AND HUMAN RIGHTS PROTECTION?

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Abstract

With regard to certain types of hate speech, the European Court of Human Rights and the former Commission have developed a tradition of applying Article 17 ECHR; the so-called abuse clause. This application leads to categorical exclusion from protection of the right to freedom of expression (Article 10), an approach that contrasts sharply with the Court's general attitude toward accepting and even creating a broad scope of protection under this right. It also contrasts with the Court's usual examination of interferences with freedom of expression in the light of the case as a whole, all its factual and legally relevant elements being taken into consideration. The aim of this article is to show that the abuse clause's application is undesirable, since it tends, even in its indirect variant, to set aside substantial principles and safeguards that are characteristic of the European speech-protective framework. The application of Article 17 is also unnecessary, as it in no way generates an added value for democracy or for human rights protection. We therefore strongly encourage the European Court to consider all forms of hate speech from the perspective of Article 10, without affording a decisive impact, directly nor indirectly, from Article 17 of the Convention.

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1. INTRODUCTION

In December 2007 this periodical published an article by David Keane, entitled 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights', in which the judicial application of Article 17 of the European Convention on Human Rights (ECHR), the so-called abuse clause, was explored. The analysis of David Keane revealed the existence of a two-tiered approach being displayed towards hate speech. The European Court of Human Rights and the former Commission consider statements or opinions containing Holocaust denial and related questioning of the historical facts of World War II under Article 17, hence categorically excluding applicants' claims from the protection provided by Article 10 ECHR (the right to freedom of expression and information). In contrast, other forms of (racist) hate speech are not *as such* restrained from the scope of Article 10, as Article 17 is not applied in these cases. Finding this dual stance in the Strasbourg organs' jurisprudence, Keane wonders whether all hate speech should be treated equally, under Article 10, or under Article 17, yet he himself leaves this open-ended.¹

In this article, we argue that there are convincing arguments and pertinent legal justifications for the European Court *not* to exclude *any* type of speech *categorically* from the protection of Article 10 ECHR. These arguments and justifications are supported by the results of an inductive analysis of the Court's and the Commission's case law in which the abuse clause was applied, referred to, or disregarded.² First, the abuse clause is historically situated, to elucidate the initial reasons for its existence (section 2.1). We then examine its application by the Strasbourg organs, not only in terms of its material scope, but also in view of its practical impact in specific cases (section 2.2). Section 3 contains a thorough evaluation of the necessity and desirability of the abuse clause within democracy. This will cast serious doubts on the perceived added value of its application in view of maintenance of democracy and human rights protection. Finally, we question the expediency of affording a special status to certain types of hate speech, especially Holocaust denial. We conclude by arguing that the European Court should consider all forms of hate speech from the perspective of Article 10, without affording a decisive impact, directly nor indirectly, from Article 17 of the Convention.

¹ Keane, David, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights', *Netherlands Quarterly of Human Rights*, Vol. 25, No. 4, 2007, pp. 641–663.

² The analysis of the Strasbourg case law encompasses both judgments and decisions of the Court (and the former Commission), since application of the abuse clause most often leads to the finding of inadmissibility of the complaint. All case law referred to in this article can be consulted via the Strasbourg Court's HUDOC database, at: www.echr.coe.int/ECHR/EN/hudoc. The analysis of the Court's case law is updated until January 2011.

2. ASSESSMENT BY THE STRASBOURG ORGANS

2.1. CREATION AND RATIONALE OF THE ABUSE CLAUSE

The idea of an abuse clause in international human rights law originated shortly after World War II. Simultaneously with a growing concern at the international level, the basic laws of some Western-European States that had been dramatically confronted with Nazism and fascism expressed the very concern of combating the *enemies of democracy*.³ At the international level, the abuse clause came to life with Article 30 of the Universal Declaration of Human Rights (UDHR) and has since, in similar wordings, been inserted in various regional and international human rights instruments.⁴ Article 30 UDHR was the direct inspiration for the provision enshrined in Article 17 of the ECHR a few years later, stipulating that

[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.⁵

Very little explanation accompanied the introduction of this clause. The European Movement projects (February and July 1949) which prepared the Convention, do not contain any trace whatsoever of a disposition of this kind. Only during the discussions in the Parliamentary Assembly did some interventions aim at the integration of an abuse clause. These interventions explicitly referred to contemporary experiences, in particular Nazism, fascism and communism, and presented an abuse clause as a vehicle in order to construct a democratic community able to defend itself.⁶ In the

³ France (Article 4 of the 1958 Constitution), Italy (Article 18 of the 1947 Constitution) and Germany (Articles 9, 18 and 21 of the 1949 Constitution); see Le Mire, P., 'Article 17', in: Pettiti, L.E., Decaux, E. and Imbert, P.H. (eds), *La Convention européenne des droits de l'homme. Commentaire article par article* [The European Convention on Human Rights. Article-based commentary], Economica, Paris, 1995, pp. 509–522, at pp. 509–510. Fighting the *enemies of democracy* is an idea with historical roots that goes back to the French Revolution; see Dumont, H., Mandoux, P. and Strowel, A. (eds), *Pas de liberté pour les ennemis de la liberté? Groupements liberticides et droit* [No freedom for the enemies of freedom? Liberticidal movements and the law], Bruylant, Brussels, 2000.

⁴ Article 5 of the International Covenant on Civil and Political Rights (ICCPR, 16 December 1966), Article 5 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 16 December 1966), Article 29 of the American Convention on Human Rights (ACHR, 22 November 1969) and Article 54 of the Charter of Fundamental Rights of the European Union (2000) *juncto* Article 6 of the EU Treaty (2009).

⁵ In theory, Article 17 is directed to States, groups and persons, as its wordings reveal. However, the use of this clause as a legal tool against State practices has not proven to be of any practical significance; see Haeck, Y., 'Artikel 17' [Article 17], in: Vande Lanotte, J. and Haeck, Y. (eds), *Handboek EVRM* [Handbook ECHR], Intersentia, Antwerp, 2004, pp. 241–272, at pp. 263–266. This perspective is therefore disregarded in this article.

⁶ See the *Travaux Préparatoires* (1949, 1st session, pp. 1235, 1237 and 1239): 'Il s'agit d'empêcher que les courants totalitaires puissent exploiter en leur faveur les principes posés par la Convention, c'est-

end, the Assembly accepted incorporating the present Article 17 into the final text of the Convention, without further thorough debate or motivation.⁷

As Vasak reminds us, Article 17 is the revelation of the political climate that governed Europe at the time of elaboration of the Convention and constitutes the European democracies' defence response to fascist and communist threats, a tool in other words against the enemies of freedom, *les ennemis de la liberté*.⁸ The prime reason for its existence is thus to give democracy the legal weapons necessary to prevent the repeat of history, in particular the atrocities committed in the past by totalitarian regimes of national-socialist, fascist or communist persuasion. This initial inspiration is clearly mirrored in an early admissibility decision of the former European Commission of Human Rights, the first decision ever in which Article 17 was applied. In *Kommunistische Partei Deutschlands vs Germany (KPD Case)*, the Commission approved of the banning of the Communist Party in the Federal Republic of Germany.⁹ It relied on the fact that the Communist Party, according to its own declarations, proclaimed the goal of proletarian revolution and the dictatorship of the proletariat. At this stage Article 17 came into play, precisely aiming 'to protect the rights enshrined in the Convention by safeguarding the free functioning of democratic institutions'. The application of this clause prevented the Communist Party from relying on those Convention articles that guarantee freedom of opinion, expression and association. In subsequent decisions regarding incitement to racial discrimination and anti-Semitism the Commission and the Court repeatedly recalled the 'general purpose' of the abuse clause 'to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention'.¹⁰

à-dire invoquer les droits de liberté pour supprimer les Droits de l'Homme.' See also Le Mire, *loc.cit.* (note 3), at pp. 510–511.

⁷ *Ibidem*, at pp. 511–512; and Van Drooghenbroeck, Sébastien, 'L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?' [Is Article 17 of the ECHR indispensable?], *Revue trimestrielle des droits de l'homme*, 2001, pp. 541–566, at pp. 542–543.

⁸ Vasak, K., *La Convention européenne des droits de l'homme* [The European Convention on Human Rights], Pedone, Paris, 1964, p. 71. See in the same sense Frowein, Jochen Abr., 'How to Save Democracy from Itself?', *Israel Yearbook on Human Rights*, Vol. 26, 1997, pp. 201–217, at pp. 202–203; and Spielmann, Alphonse, 'La Convention européenne des droits de l'homme et l'abus de droit' [The European Convention on Human Rights and the abuse of rights], in: Pettiti, L.E. (ed.), *Mélanges en hommage à Louis Edmond Pettiti*, Bruylant, Brussels, 1998, pp. 673–686, at p. 682.

⁹ European Commission on Human Rights (ECommHR), *Kommunistische Partei Deutschlands vs Germany*, 20 July 1957, Application No. 250/57.

¹⁰ For example, ECommHR, *Glimmerveen and Hagenbeek vs the Netherlands*, 11 October 1979, Application Nos 8348/78 and 8406/78; and European Court of Human Rights (ECtHR), *W.P. and Others vs Poland*, 2 September 2004, Application No. 42264/98 (decision). See also Weber, A., *Manuel sur le discours de haine* [Manual on Hate Speech], Council of Europe, Martinus Nijhoff Publishers, Leiden, 2009, p. 22.

2.2. MATERIAL SCOPE OF THE ABUSE CLAUSE

For a solid understanding, it should be underlined that the abuse clause cannot be invoked independently. Its application is always linked to a Convention right that is deemed to be *abused*, that is, in the wordings of Article 17, used with the intention to destroy other rights and freedoms enshrined in the Convention. In practice, the bulk of the abuse clause's applications are linked to the right to freedom of expression and information (Article 10 ECHR), on occasions in relation also to freedom of peaceful assembly and association (Article 11 ECHR).¹¹ Previous studies consistently marked two ways in which the abuse clause has been applied so far.¹² On the one hand, it has been applied in a direct way (for example the above-mentioned *KPD Case*), categorically excluding certain expressions from the protection of Article 10 (*guillotine effect*). In such cases the applicants' statements are simply not considered under the protective scope of Article 10. Such decisions are mostly taken *prima facie* and are strongly content-based, with little to no attention being paid to contextual factors. On the other hand, the abuse clause has regularly been applied indirectly, as an interpretative aid when assessing the necessity of State interference under Article 10(2) ECHR. Most authors prefer this indirect application. In the words of Frowein, '(i)t would seem that the use of Article 17 within the restrictive clause of Article 10(2) is a proper method to avoid some of the dangers which Article 17 could otherwise raise.'¹³ It occurs to us, however, that, even when the abuse clause is believed to be used solely as an interpretation clause, the practical effects of its application are very similar to those that appear when Article 17 is applied directly (see *infra* section 3.1.2).

In pursuance of the *KPD Case*, the Strasbourg organs have applied the abuse clause when confronted with totalitarian doctrines, particularly (even almost exclusively) in cases in which the revival of national-socialistic movements was advocated or

¹¹ Other rights of which it is generally accepted that they can be abused with view on destroying rights of others are the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), prohibition of discrimination (Article 14), and right to free elections (Article 3 first Protocol). Rights that cannot be abused are, for example, the right to life (Article 2), prohibition of torture (Article 3), prohibition of slavery and forced labour (Article 4), no punishment without law (Article 7), and the procedural rights guaranteed by Articles 5 and 6 of the Convention; see ECtHR, *Lawless (no. 3) vs Ireland*, 1 July 1961, Application No. 332/57; and Haecck, *loc.cit.* (note 5), at pp. 258–262.

¹² See, e.g., Van Drooghenbroeck, *loc.cit.* (note 7), at pp. 550–560; Flauss, Jean-François, 'L'abus de droit dans le cadre de la Convention européenne des droits de l'homme' [Abuse of rights in the framework of the European Convention on Human Rights], *Revue Universelle des Droits de l'Homme*, Vol. 4, No. 12, 1992, pp. 461–468, at pp. 462–465; and Haecck, *loc.cit.* (note 5), at pp. 249–258.

¹³ Frowein, Jochen Abr., 'Incitement against Democracy as a Limitation of Freedom of Speech', in: Kretzmer, D. and Hazan, F.K. (eds), *Freedom of Speech and Incitement against Democracy*, Kluwer Law International, The Hague, 2000, pp. 33–40, at p. 36. The author remains silent about what these dangers might amount to, an issue that will be addressed more thoroughly further in this article. See also Lemmens, K., *La presse et la protection juridique de l'individu. Attention aux chiens de garde!* [The press and the legal protection of the individual. Beware of the watchdogs!], Larcier, Brussels, 2004, pp. 170–177; and Flauss, *loc.cit.* (note 12), at p. 464.

supported,¹⁴ or in which right-wing (political) organisations performed activities inspired by national-socialistic ideas.¹⁵ In several cases against Austria, the Strasbourg organs held that

[t]he prohibition against activities involving expression of National Socialist ideas is both lawful in Austria and, in view of the historical past forming the immediate background of the Convention itself, can be justified as being necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime.¹⁶

The Commission and the Court repeatedly emphasised that ‘National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in Article 17 of the Convention.’ This argumentation directly led to the conclusion that the State interferences at issue were necessary in a democratic society, within the meaning of Article 10(2).¹⁷ In *Kühnen vs Germany*, a case in which revival of the NSDAP was advocated, the Commission stated as follows:

As regards the circumstances of the present case the Commission again notes the detailed findings of the Frankfurt Regional Court according to which the publications at issue, by advocating national socialism, aimed at impairing the basic order of freedom and democracy (...) The Commission accordingly considered that the applicant’s policy clearly contains elements of racial and religious discrimination (...) As a result, the Commission finds that the applicant is essentially seeking to use the freedom of information enshrined in Article 10 of the Convention as a basis for activities which are, as shown above, contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention.¹⁸

Although this case still demonstrates a very clear link with totalitarianism, the Commission seems to broaden the scope of the abuse clause to every activity

¹⁴ ECommHR, *Kühnen vs Germany*, 12 May 1988, Application No. 12194/86.

¹⁵ ECommHR, *B.H., M.W., H.P. and G.K. vs Austria*, 12 October 1989, Application No. 12774/87. An exception in this regard is ECtHR, *Kosiek vs Germany* (28 August 1986, Application No. 9704/82), in which the Court did not refer to Article 17, yet accepted easily enough the thesis of the German Government that the dismissal of a civil servant, who was a prominent official of the *Nationaldemokratische Partei Deutschlands* (NPD), was necessary in a democratic society, given that the applicant ‘had approved of NPD aims which were inimical to the Constitution’.

¹⁶ *B.H., M.W., H.P. and G.K. vs Austria*, *supra* note 15; ECommHR, *Ochensberger vs Austria*, 2 September 1994, Application No. 21318/93; ECommHR, *Herwig Nachtmann vs Austria*, 9 September 1998, Application No. 36773/97; and ECtHR, *Schimanek vs Austria*, 1 February 2000, Application No. 32307/96 (decision).

¹⁷ *Idem*. See also the Court’s *obiter dictum* in *Lehideux and Isorni vs France* (23 September 1998, Application No. 24662/94), para. 53: ‘There is no doubt that, like any other remark directed against the Convention’s underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10.’

¹⁸ *Kühnen vs Germany*, *supra* note 14. See also *Ochensberger vs Austria*, *supra* note 16.

‘contrary to the text and spirit of the Convention’. Notwithstanding the vagueness of this formulation, it leaves no doubt in its later decisions that Holocaust denial and trivialisation are most prominently viewed in terms of this broader scope. Until the late 1980s, Holocaust denial did not trigger explicit invocation of the abuse clause. On various occasions the Commission judged restrictions on negationist statements to be justified in order to safeguard the rights of others (Article 10(2)), without referring to Article 17.¹⁹ From *Kühnen* onwards, however, Article 17 has continuously been present in the Commission’s case law on Holocaust denial, which was consistently labelled as ‘contrary to the text and spirit of the Convention’. This type of speech has been judged to be ‘discriminatory against Jewish people’,²⁰ a form of racial and religious discrimination,²¹ ‘a continuation of the former discrimination against the Jewish people’,²² and even ‘incitement to hatred against Jews’.²³ Moreover, Holocaust denial has been considered to be ‘an insult to the Jewish people’,²⁴ ‘reproaching them with lying and extortion and thus portraying them as particularly abominable’,²⁵ hence injuring their reputation and rights.²⁶ The decisions in these cases consistently declared the applications based on the right to freedom of expression manifestly ill-founded, given the clear necessity of the domestic restrictions in a democratic society (*indirect* application of Article 17).²⁷

After the abolition of the Commission (Protocol 11, in force since 1 November 1998), the European Court continued to emphasise the particular status of Holocaust denial and revisionist speech. In its judgment in *Lehideux and Isorni vs France*, the Court refers to the existence of a ‘category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17’.²⁸ In this case, however, the applicants had only been

¹⁹ ECommHR, *X. vs Federal Republic of Germany*, 16 July 1982, Application No. 9235/81; and ECommHR, *T. vs Belgium*, 14 July 1983, Application No. 9777/82.

²⁰ ECommHR, *F.P. vs Germany*, 29 March 1993, Application No. 19459/92.

²¹ ECommHR, *Otto E.F.A. Remer vs Germany*, 6 September 1995, Application No. 25096/94; ECommHR, *Honsik vs Austria*, 18 October 1995, Application No. 25062/94; ECommHR, *Rebhandl vs Austria*, 16 January 1996, Application No. 24398/94; and ECommHR, *D.I. vs Germany*, 26 June 1996, Application No. 26551/95.

²² ECommHR, *Udo Walendy vs Germany*, 11 January 1995, Application No. 21128/92.

²³ *Otto E.F.A. Remer vs Germany*, *supra* note 21.

²⁴ *Udo Walendy vs Germany*, *supra* note 22; and *D.I. vs Germany*, *supra* note 21.

²⁵ *Otto E.F.A. Remer vs Germany*, *supra* note 21.

²⁶ *Idem*; ECommHR, *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern vs Germany*, 29 November 1995, Application No. 25992/94; and *D.I. vs Germany*, *supra* note 21.

²⁷ See also ECommHR, *P. Marais vs France*, 24 June 1996, Application No. 31159/96; and *Herwig Nachtmann vs Austria*, *supra* note 16.

²⁸ *Lehideux and Isorni vs France*, *supra* note 17, para. 47. This ruling was confirmed in *Chauvy and Others vs France* (29 June 2004, Application No. 64915/01), in which the Court in similar wordings stressed the boundary between the offending material and material which might engage Article 17. In this case the issue (book about the Resistance movements in Lyon) ‘does not belong to the category of clearly established historical facts – such as the Holocaust...’ and was therefore in principle

supporting one of the conflicting theories in the debate about the role of the head of the pro-German Vichy Government, Philippe Pétain, during World War II (the so-called double game theory). Contrary to the Holocaust, these theories ‘are part of a continuing debate between historians’. The fact that the applicants ‘purely and simply omitted to mention historical facts which were a matter of common knowledge’ was admittedly judged ‘morally reprehensible’, yet could in itself not justify the interference by public authorities as necessary in a democratic society. In *Witzsch vs Germany*, a clear case of Holocaust denial, the *Lehideux* approach led to indirect application of Article 17 as an interpretative aid while examining the case, and accordingly judging the interference to be necessary, under Article 10(2).²⁹ Another approach characterised the Court’s admissibility decision in *Garaudy vs France*. This case concerns a book written by Roger Garaudy entitled *The Founding Myths of Israeli Politics*, which contains a chapter headed ‘The Myth of the Holocaust’. Citing its judgment in *Lehideux*, the Court pointed out that negation or revision of clearly established historical facts of this type undermines the Convention’s underlying values that support the fight against racism and anti-Semitism, and is capable of seriously troubling the public order (it is worth noticing that the fight against racism and anti-Semitism here is explicitly associated with the fundamental values protected by the Convention). As a consequence, Holocaust denial and denying the crimes against humanity committed by the Nazis on the Jewish community entailed the direct application (*guillotine effect*) of Article 17. The Court considered

that the main content and general tenor of the applicant’s book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention. Accordingly, the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity.³⁰

protected under Article 10. However, the interference was judged necessary in a democratic society because of public defamation of members of a recognised resistance movement.

²⁹ ECtHR, *Witzsch vs Germany*, 20 April 1999, Application No. 41448/98 (decision).

³⁰ ECtHR, *Garaudy vs France*, 24 June 2003, Application No. 12194/86 (decision). With regard to some passages which contained racial insults and incitement to racial hatred, yet no clear revisionist statements, the Court referred to Article 17, but ultimately judged these under Article 10(2). For a thorough examination of this case, see Levinet, Michel, ‘La fermeté bienvenue de la Cour européenne des droits de l’homme face au négationnisme. Obs. s/ la décision du 24 juin 2003, *Garaudy c. France*’ [The most welcome determination of the ECtHR with regard to Holocaust denial. Observations on *Garaudy vs France*], *Revue trimestrielle des droits de l’homme*, Vol. 59, 2004, pp. 653–662. See also Keane, *loc.cit.* (note 1), at pp. 647–651; and Weber, *op.cit.* (note 10), p. 25.

The European Court was, on occasions, willing to afford an even broader material scope to the abuse clause. Firstly, the clause was given a direct and categorical application in admissibility decisions in which the applicants, given the markedly anti-Semitic tenor of their views, had been convicted for incitement to hatred against the Jewish people, although no Holocaust denial or negationist statements occurred.³¹ In one of these cases, *Ivanov vs Russia*, the applicant accused the Jewish people of plotting a conspiracy against the Russian people and ascribed fascist ideology to the Jewish leadership. The Court held that '(s)uch a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination'.³² Secondly, the Court has also authorised the direct application of the abuse clause distinctly outside of the broad sphere of anti-Semitism. In *Norwood vs the United Kingdom*, a member of the British National Party (BNP) had displayed a large poster with a photograph of the Twin Towers in flames, accompanied by the words 'Islam out of Britain – Protect the British People' and a symbol of a crescent and a star in a prohibition sign in the window of his first-floor flat. The Court found that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom, and therefore held, similarly as in *Ivanov*, that

[s]uch a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.³³

For that reason the Court came to the conclusion that '(t)he applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14'.

2.3. INTERMEDIATE CONCLUSION

The analysis of the jurisprudence regarding the application of Article 17 in cases of freedom of expression shows that the Strasbourg organs have somehow detached the abuse clause's application from its original purpose, which strictly confined the abuse clause to those situations threatening the democratic system of the State itself: Article 17 was meant to protect democracy against new emerging totalitarian regimes (see *supra* section 2.1). However, the Convention organs have stretched its material scope to any act that is incompatible with the Convention's underlying values

³¹ *W.P. and Others vs Poland*, *supra* note 10; and ECtHR, *Ivanov vs Russia*, 20 February 2007, Application No. 35222/04 (decision). Compare with ECommHR, *Karl-August Henricke vs Germany*, 21 May 1997, Application No. 34889/97, in which Article 17 was applied indirectly, in line with the Commission's case law on Holocaust denial (see *supra*).

³² *Ivanov vs Russia*, *supra* note 31.

³³ ECtHR, *Norwood vs the United Kingdom*, 16 November 2004, Application No. 23131/03 (decision).

(or ‘contrary to the text and spirit of the Convention’).³⁴ In this regard, the Court has explicitly associated the fight against anti-Semitism and racism *as such* with the fundamental values protected by the Convention. Moreover, in a recent case of condoning terrorism, *Leroy vs France*, the Court’s reasoning implied that Article 17 is applicable in cases of racism, anti-Semitism and Islamophobia.³⁵ This widening of the abuse clause’s scope of application to the broad sphere of racial and religious discrimination, which is also suggested by the Court’s *Norwood* decision (see *supra* section 2.2) is far removed from the original rationale and general purpose of the abuse clause.

Admittedly, this finding needs a two-fold refinement. First of all, it must be acknowledged that racist, anti-Semitic and discriminatory doctrines are often at the origin of totalitarian groups or regimes, the development of which the abuse clause aims to oppose. Hence, it is to a certain extent understandable that the Strasbourg organs address the root causes in order to prevent the evil from coming into being. Secondly, the Court’s *obiter dicta*, which are formulated in a general (theoretical) way, should be differentiated from the specific applications of the abuse clause in practice. We then find that the Strasbourg organs, although on occasions referring to *all* activities and remarks directed against the Convention’s underlying values and to the fight against racism *as such*, have so far consistently made effective use of the abuse clause only to respond to activities or statements related to National Socialism, or inspired by this ideology, in particular regarding Holocaust denial, revisionist speech and (other types of) anti-Semitism.³⁶

³⁴ See *Ivanov vs Russia*, *supra* note 31; and *Norwood vs the United Kingdom*, *supra* note 33. See also ECtHR, *Seurot vs France* (18 May 2004, Application No. 57383/00 (decision)): ‘il ne fait aucun doute que tout propos dirigé contre les valeurs qui sous-tendent la Convention se verrait soustrait par l’article 17 à la protection de l’article 10’.

³⁵ ECtHR, *Leroy vs France*, 2 October 2008, Application No. 36109/03, para. 27: ‘La Cour est d’avis que l’expression litigieuse ne rentre pas dans le champ d’application des publications qui se verraient soustraites par l’article 17 de la Convention à la protection de l’article 10. (...) le message de fond visé par le requérant – la destruction de l’impérialisme américain – ne vise pas la négation de droits fondamentaux et n’a pas d’égal avec des propos dirigés contre les valeurs qui sous-tendent la Convention tels que le racisme, l’antisémitisme ou l’islamophobie.’ See also *Glimmerveen and Hagenbeek vs the Netherlands*, *supra* note 10; and *Norwood vs the United Kingdom*, *supra* note 33.

³⁶ See also McGonagle, T.E., *Minority Rights and Freedom of Expression: a Dynamic Interface*, (unpublished) doctoral dissertation, University of Amsterdam, Faculty of Law, 2008, p. 290. A double reservation should be made at this point. Firstly, in the *KPD* case, which goes all the way back to 1957, the abuse clause was applied in relation to communism (see *supra* section 2.1). Secondly, in its fairly recent *Norwood* decision, the Court applied this clause directly because of a vehement attack against Muslims as a religious group, in this way suggesting a widening of the abuse clause’s use to encompass the broad sphere of racial and religious discrimination.

3. EVALUATION OF THE ABUSE CLAUSE'S APPLICATION

After having explored and clarified the abuse clause's application by the Strasbourg organs, the key question is whether this application exerts a desirable impact on democracy. Are there reasons to believe that the application of Article 17 in the field of freedom of expression (and/or association) generates an added value with view on defending and maintaining the organisational democratic structure, and/or for protecting and promoting respect for the core democratic values of human dignity and equality? We hold, and our arguments in this regard are developed below, that this added value is non-existent. Moreover, we argue that the abuse clause's actual application entails various undesirable consequences.

3.1. UNDESIRABLE CONSEQUENCES

3.1.1. *Hate Speech and the Speech-Protective Framework of Article 10 ECHR*

Beginning with the *Handyside* Case, the European Court of Human Rights has continuously underscored the particular importance of freedom of expression in a democratic society: 'Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.'³⁷ That is why the Court's firm case law holds that this freedom

is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.³⁸

In short, this right can be restricted only when the three conditions of the limitation clause (Article 10(2)) are met: restrictions or sanctions are allowed when these are *prescribed by law*, pursue a *legitimate aim*, and finally and most decisively, are *necessary in a democratic society*. The European Court has consistently set out some guiding principles in approaching this necessity test:

In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the

³⁷ ECtHR, *Handyside vs the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

³⁸ See ECtHR, *Sunday Times (no. 1) vs the United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65; ECtHR, *Open Door and Dublin Well Woman vs Ireland*, 29 October 1992, Application Nos 14234/88 and 14235/88, para. 71; and ECtHR, *Vogt vs Germany*, 26 September 1995, Application No. 17851/91 (Grand Chamber), para. 52. More recently, see also ECtHR, *Bodrožić and Vuijn vs Serbia*, 23 June 2009, Application No. 38435/05, para. 28; ECtHR, *Aleksandr Krutov vs Russia*, 3 December 2009, Application No. 15469/04, para. 24; ECtHR, *Taffin et Contribuables Associés vs France*, 8 February 2010, Application No. 42396/04, para. 51; and ECtHR, *Saaristo a.o. vs Finland*, 12 October 2010, Application No. 184/06, para. 54.

applicant and the context in which he made them. In particular, it must determine whether the interference in issue was ‘proportionate to the legitimate aims pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’.³⁹

In this regard, the Court also controls whether it has been demonstrated that effective and adequate safeguards and procedural guarantees, such as judicial review, were available in order to enhance the right to freedom of expression and information.⁴⁰ The necessity test is firmly based on an *ad hoc* balancing of competing interests, from the perspective of the vigorous importance of freedom of expression in a democratic society, all factual and legally relevant elements of the present case being taken into account. Also a strict scrutiny of the proportionality of an interference is of utmost importance in this respect,⁴¹ while the interference complained of shall in itself not be based on a too broad, imprecise or vague legal provision leaving room for arbitrary application. The requirement that any interference with freedom of expression must be ‘prescribed by law’ indeed implies that ‘the scope of the discretion and manner of its exercise are indicated with sufficient clarity to give adequate protection against arbitrariness’.⁴²

The scope of protection afforded to hate speech in Strasbourg’s case law is however very restricted.⁴³ Within the broader European human rights framework, the core values of human dignity and equality have been translated into a firm right of non-discrimination that has expanded, and is still expanding, into a wide range of fields,

³⁹ See, for example, *Handyside vs the United Kingdom*, *supra* note 37, para. 50; ECtHR, *Lingens vs Austria*, 8 July 1986, Application No. 9815/82, para. 40; ECtHR, *Barfod vs Denmark*, 22 February 1989, Application No. 11508/85, para. 28; ECtHR, *Jersild vs Denmark*, 23 September 1994, Application No. 15890/89, para. 31; ECtHR, *Zana vs Turkey*, 25 November 1997, Application No. 18954/91, para. 51; ECtHR, *Stoll vs Switzerland*, 10 December 2007, Application No. 69698/01 (Grand Chamber), para. 101; and ECtHR, *Sanoma Uitgevers BV vs the Netherlands*, 14 September 2010, Application No. 38224/03 (Grand Chamber), para. 81.

⁴⁰ See, e.g., ECtHR, *Steel and Morris vs the United Kingdom*, 15 February 2005, Application No. 68416/01; and ECtHR, *Manole and Others vs Moldova*, 17 September 2009, Application No. 13936/02.

⁴¹ See also Voorhoof, D., ‘Artikel 10’ [Article 10], in: Vande Lanotte, J. and Haeck, Y. (eds), *Handboek EVRM* [Handbook ECHR], Intersentia, Antwerp, 2004, pp. 837–1060, at pp. 982–1050. For a critical comment, see Sajó, A., ‘Abuse of Fundamental Rights or the Difficulties of Purposiveness’, in: Sajó, A. (ed.), *Abuse: the Dark Side of Fundamental Rights*, Eleven International Publishing, Utrecht, 2006, pp. 29–98, at p. 30.

⁴² ECtHR, *Dzhavadov vs Russia*, 27 September 2007, Application No. 30160/04, para. 36. See also similar reasonings of the Court in: ECtHR, *Gaweda vs Poland*, 14 March 2002, Application No. 26229/95; ECtHR, *Goussev and Marenk vs Finland*, 17 January 2006, Application No. 35083/97; ECtHR, *Soini a.o. vs Finland*, 17 January 2006, Application No. 36404/97; ECtHR, *Meltex Ltd. and Mesrup Movsesyan vs Armenia*, 17 June 2008, Application No. 32283/04; and *Sanoma Uitgevers BV vs the Netherlands*, *supra* note 39.

⁴³ See Voorhoof, Dirk, ‘Freedom of Expression under the European Human Rights System. From *Sunday Times* (no. 1) v. UK (1979) to *Hachette Filipacchi Associés (“Ici Paris”) v. France* (2009)’, *Inter-American and European Human Rights Journal*, Vol. 2, No. 1–2, 2009, pp. 3–48, at pp. 34–40.

curtailing hate speech or incitement to discrimination.⁴⁴ Numerous documents that have originated within the hands of the United Nations, the Council of Europe and the European Union prove that the striving for equality and non-discrimination has always been a prime concern of the international human rights movement.⁴⁵ This same concern is also the very cornerstone of the European Convention on Human Rights and the judicial supervision by the Court, which

would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance).⁴⁶

Racial discrimination and intolerance based on racial grounds are undeniably considered the worst evil (apart from incitement to acts of violence). The Court has previously showed itself to be ‘particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations.’⁴⁷ Moreover, as mentioned before, the Court in its *Garaudy* decision expressly associated the fight against racism and anti-Semitism with the fundamental values protected by the Convention (hence justifying, in theory, [direct] application of the abuse clause (see *supra* section 2.2)). Its statement as would Article 17 be applicable in cases of racism, anti-Semitism and Islamophobia (see *Leroy*, *supra* section 2.3) perfectly confirms this approach.

From the same perspective, the Court has considered that ‘there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention’.⁴⁸ However, this does not mean that restrictions imposed should not meet the conditions

⁴⁴ See Hare, I., ‘Extreme Speech Under International and Regional Human Rights Standards’, in: Hare, I. and Weinstein, J. (eds), *Extreme Speech and Democracy*, Oxford University Press, Oxford, 2009, pp. 62–81, at pp. 76–77.

⁴⁵ For an enumeration and brief explanation of these documents, see Weber, *op.cit.* (note 10), at pp. 7–18.

⁴⁶ ECtHR, *Gündüz vs Turkey*, 4 December 2003, Application No. 35071/97, para. 40; and ECtHR, *Erbakan vs Turkey*, 6 July 2006, Application No. 59405/00, para. 56. The Court’s *definition* of hate speech is based on Recommendation (97)20 of the Committee of Ministers (Council of Europe) to member States on ‘Hate Speech’ (30 October 1997): ‘the term “hate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin’.

⁴⁷ *Jersild vs Denmark*, *supra* note 39, para. 30. See also similar reasonings in: ECtHR, *Seurot vs France*, *supra* note 34 and ECtHR, *Nachova a.o. vs Bulgaria*, 6 July 2005, Application Nos 43577/98 and 43579/98; and the Court’s motivations in *Ivanov*, cited *supra* note 31 and *Norwood*, cited *supra* note 33.

⁴⁸ *Gündüz vs Turkey*, *supra* note 46, para. 41; and *Jersild vs Denmark*, *supra* note 39, para. 35.

formulated in Article 10(2) ECHR, as interpreted by the Strasbourg Court.⁴⁹ Indeed, even with regard to hate speech the Court acknowledges that interferences are only justified if they are ‘prescribed by law’ and ‘provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued’.⁵⁰ Application of the abuse clause is bluntly problematic in this respect.

3.1.2. *Direct versus Indirect Application of the Abuse Clause*

Before addressing the undesirable consequences of the abuse clause’s application, we will demonstrate that, regarding these effects, it makes no significant difference whether the abuse clause is applied *directly* or *indirectly*. It is obvious that in cases in which Article 17 is applied directly the balancing procedure described above is completely absent. As the decision strongly relies on the national authorities’ assessment and is exclusively based on a (superficial) content examination, the statements are simply not considered under the speech-protective scope of Article 10 ECHR. As a consequence, the applicant is categorically refused any protection under his or her right to freedom of expression.⁵¹ The radicalism of this approach provokes most authors to embrace the indirect variant of the abuse clause’s application, to which is ascribed the benefit of avoiding some dangers Article 17 could otherwise bring into being (see *supra* section 2.2). However, even when applied indirectly as an interpretative aid, Article 17 has been afforded a similar impact, generating similar undesirable effects.

In the Commission’s admissibility decisions considered above, the abuse clause was applied in an indirect way while assessing the necessity of State interferences under Article 10(2) ECHR. Some of the Court’s admissibility decisions also applied Article 17 in this way.⁵² The judicial approach in such cases should thus reflect an examination of this necessity in compliance with the principles underlying the Strasbourg case law on Article 10, while a strict scrutiny by the Court is expected in cases related to public debate or political speech.⁵³

It is, however, striking how heavily the Strasbourg organs lean on the findings of the national courts (in some cases explicitly on the findings ‘as to the contents’ of

⁴⁹ See also Weber, *op.cit.* (note 10), pp. 13–14.

⁵⁰ See, e.g., *Gündüz vs Turkey*, *supra* note 46, para. 40; and *Erbakan vs Turkey*, *supra* note 46, para. 56.

⁵¹ This approach resembles the US Supreme Court’s *Chaplinsky* categorical exclusion approach, which is discredited and largely abandoned today; see Schauer, Frederick, ‘Categories and the First Amendment: A Play in Three Acts’, *Vanderbilt Law Review*, Vol. 34, 1981, pp. 265–307, at pp. 267–282; and Weinstein, J., *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, Westview Press, Colorado-Oxford, 1999, pp. 29–30.

⁵² See *Schimanek vs Austria*, *supra* note 16; and *Witzsch vs Germany*, *supra* note 29.

⁵³ As the Court reiterated on many occasions, there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest; see, for example, ECtHR, *United Communist Party of Turkey a.o. vs Turkey*, 30 January 1998, Application No. 19392/92 (Grand Chamber); ECtHR, *Sürek (no. 1) vs Turkey*, 8 July 1999, Application No. 26682/95; and ECtHR, *TV Vest & Rogaland Pensjonistparti vs Norway*, 11 December 2008, Application No. 21132/05.

the applicant's publications)⁵⁴ and how easily this triggers a weighty application of the abuse clause. This almost systematically leads to the finding that the impugned interference was necessary in a democratic society, without adequately balancing the case as to the conflicting rights and interests involved, nor situating it in its specific context, all factual and legally relevant elements being taken into consideration. The generally formulated standing motivations remain, to a great extent, silent as to the specifications of the case. For example, in *Remer vs Germany*, the Commission considered that

(t)he public interests in the prevention of crime and disorder in the German population due to incitement to hatred against Jews, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews in the concentration camps under the Nazi regime, and the allegations of extortion.⁵⁵

Such a statement might have a true and symbolic value in itself, but its systematic and abstract application is not sufficiently based on, and therefore not sufficiently adapted to the very specificities of particular claims regarding alleged violations of the right to freedom of expression. As a consequence, this way of reasoning resembles very much that of direct application (*guillotine effect*) of Article 17: once considered at the domestic level to be Holocaust denial or another activity or statement related to National Socialism, the protection of Article 10 (and/or 11) is categorically denied, without a thorough examination 'in the light of the case as a whole'.⁵⁶ In other words, these forms of hate speech are in these circumstances only *formally* considered under the scope of Article 10, the strict requirements of proof under Article 10(2) being made redundant by way of the abuse clause's (indirect) application.

3.1.3. *The Abuse Clause's Undesirable Effects*

It could be assumed that it makes no real difference whether hate speech is treated under Article 10 or under Article 17 ECHR. Admittedly, the outcomes in cases in which Article 17 was applied seem correct to the extent that a pressing social need actually justified the interference with the right to freedom of expression. Hence, the

⁵⁴ *Otto E.F.A. Remer vs Germany*, *supra* note 21; *P. Marais vs France*, *supra* note 27; and *Karl-August Henricke vs Germany*, *supra* note 31.

⁵⁵ *Otto E.F.A. Remer vs Germany*, *supra* note 21. See also *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern vs Germany*, *supra* note 26; *D.I. vs Germany*, *supra* note 21; *Karl-August Henricke vs Germany*, *supra* note 31; and *Witzsch vs Germany*, *supra* note 29.

⁵⁶ The Strasbourg organs are not really attempting to balance the free speech interest involved against any State interest in restricting the speech, yet are rather carving out a category of expression that is deprived of Convention protection. This approach resembles the method of *subcategorisation* in American free speech doctrine; see Farber, Daniel A., 'The Categorical Approach to Protecting Speech in American Constitutional Law', *Indiana Law Journal*, Vol. 84, 2009, pp. 917–938, at pp. 917–918 and 922.

argument would go, if the statements are not *a priori* declared intolerable via Article 17, the impugned interference by the authorities would (most probably) withstand the necessity test under Article 10(2) ECHR. The practical consequences are tantamount: in both cases the applicant cannot rely on his right to freedom of expression and/or association. However, applying the abuse clause to resolve free speech disputes is undesirable for several reasons. Some of these are directly related to the adjudication procedure in specific cases, while others reflect structural dangers provoked by the Court's established practice of applying this clause.

(i) No or Superficial Context Examination

First of all, by sidelining or denying the necessity test, application of the abuse clause tends to remove the applicant's privilege to see his or her utterances placed and judged in their specific contexts at the Strasbourg level, all factual and legally relevant elements of the case being taken into account (see *supra* section 3.1.2). Keane points at the *Jersild* Case to highlight the practical significance hereof. This case concerned the conviction in Denmark of a Danish journalist for aiding and abetting some youngsters (the so-called *Greenjackets*) in making abusive and derogatory remarks and racist comments amounting to incitement to hatred, by broadcasting their views. This was irrespective of the fact that the programme was in the context of a serious discussion on anti-immigration movements in Denmark. Although the Strasbourg Court implicitly seemed to refer to Article 17 as to the content of the remarks,⁵⁷ the case was considered under Article 10(2) ECHR. As a consequence, a 'significant feature' of the case became obvious, namely that Jersild 'did not make the objectionable statements himself, but assisted in their dissemination in his capacity of television journalist'.⁵⁸ The programme's purpose could not be said to be the propagation of racist views and ideas, hence the impugned interference was found by the Court to be not necessary in a democratic society. Keane's reflection on this case with regard to the Article 10/Article 17 dichotomy goes as follows:

The 'balancing process' and analysis of the element of proportionality would have been removed if the case had been examined under Article 17; indeed *Jersild* would not have passed the admissibility stage, and based on content alone, the Danish State would have been justified in prosecuting the journalist, irrespective of the context of the news piece.⁵⁹

⁵⁷ See in this regard the Court's statement that '(t)here can be no doubt that the remarks (...) were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10', *Jersild vs Denmark*, *supra* note 39, para. 35.

⁵⁸ *Jersild vs Denmark*, *supra* note 39, para. 31. See also Cohen-Jonathan, Gérard, 'Discrimination raciale et liberté d'expression. A propos de l'arrêt de la Cour européenne des droits de l'homme du 23 septembre 1994, *Jersild contre Danemark*' [Racial discrimination and freedom of expression. Comments on the Court's *Jersild* Case], *Revue Universelle des Droits de l'Homme*, Vol. 7, No. 1-3, 1995, pp. 1-8.

⁵⁹ Keane, *loc.cit.* (note 1), at p. 661.

As demonstrated above, the contextual examination in cases that are judged (at national level) to express elements of Nazi ideology, particularly Holocaust denial, is absent or rather marginal, with little attention being paid to the specific circumstances of the case.⁶⁰

(ii) Disregarding Proportionality

There is a second *direct* undesirable effect, also resulting from disregarding the necessity test, as the application of the abuse clause tends to remove the particular protection afforded to applicants against disproportionate interferences with their right to freedom of expression. In the Strasbourg case law the proportionality of the measure is rarely considered when the abuse clause is applied, even if this application is indirect.⁶¹ In various cases the restriction or interference at issue consisted of a sentence of imprisonment. The proportionality test, however, in each of these cases being completely ignored.⁶² In *Kühnen*, the sentence ascended to three years and four months effective imprisonment. Given its severity, this sentence undoubtedly needed European supervision, even when the interference *as such* had been judged as legitimate.⁶³ Disregarding the proportionality of the interference in such cases sharply contrasts with the Court's case law, which generally considers contingent disproportionality to be an important argument in concluding to a breach of Article 10.⁶⁴ The striking importance of this criterion is even more illustrated by the fact that disproportionality of interference has also served as the one and only factor leading to the finding of a violation of Article 10. In several cases, the Court held that the interference reflected a pressing social need, sometimes even because of incitement to hatred, yet given the severe nature of the sanction (the too high amount of an award

⁶⁰ Other cases show that the historic-political context was taken into consideration when assessing whether interferences were legitimate. In *Giniewski vs France* (31 January 2006, Application No. 64016/00), for example, the Court took into consideration that 'le texte litigieux participait donc à la réflexion sur les diverses causes possibles de l'extermination des Juifs en Europe, question relevant incontestablement de l'intérêt général dans une société démocratique. Dans ce domaine, les restrictions à la liberté d'expression appellent une interprétation étroite (...) A cet égard, la Cour considère qu'il est primordial dans une société démocratique que le débat engagé, relatif à l'origine de faits d'une particulière gravité constituant des crimes contre l'humanité, puisse se dérouler librement' (para. 51).

⁶¹ See also Arai, Y., 'Article 17', in: Van Dijk, P. and Van Hoof, L. (eds), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Antwerp, 2006, pp. 1083–1092, at p. 1086.

⁶² *Otto E.F.A. Remer vs Germany*, *supra* note 21; *Honsik vs Austria*, *supra* note 21; *Herwig Nachtmann vs Austria*, *supra* note 16; and *Witzsch vs Germany*, *supra* note 29.

⁶³ *Kühnen vs Germany*, *supra* note 14.

⁶⁴ *Zana vs Turkey*, *supra* note 39. See also *Handyside vs the United Kingdom*, *supra* note 37; *Lingens vs Austria*, *supra* note 39; *Barfod vs Denmark*, *supra* note 39; and *Jersild vs Denmark*, *supra* note 39. See also the Court's judgment in *Vogt vs Germany* (Grand Chamber, *supra* note 38) in which it noted 'at the outset' that there were several reasons for considering dismissal of a secondary-school teacher, who was a member of the German Communist Party, by way of disciplinary sanction for breach of duty to be a very severe measure. Examination of the measure's proportionality did receive a very prominent attention in this case, and the sanction was eventually deemed disproportionate.

of damages⁶⁵ or a sentence of imprisonment⁶⁶), it still found a violation of Article 10 ECHR. In *Mehmet Cevher Ilhan vs Turkey*, for instance, the Court considered the applicant's publication to be incitement to hatred and discrimination. Although the interference with the applicant's freedom of expression was thus legitimate and responded to a pressing social need, the Court found the sentence to imprisonment of more than two years a disproportionate sanction, in breach of Article 10.⁶⁷ Application of the abuse clause in these cases would have led to the conclusion that there was no violation of (Article 10 of) the Convention.

(iii) Structural Dangers

It should be emphasised that the European Court is not another court of appeal substituting its views for that of national courts. It rather plays a subsidiary role in human rights adjudication and enforcement, with respect for the distinct constitutional identities of the member States. Consequently, in the words of Sottiaux and Van der Schyff, 'a decision that categorically denies free speech protection to the denial of certain historical facts (...) would then hinder the preservation and further development of distinct constitutional identities'.⁶⁸ For this reason, some deference should be owed to national and constitutional identities. At the same time, however, this deference must not go too far. In this regard, the idea behind the *margin of appreciation* doctrine is that domestic decision-makers are better placed to interpret the Convention so as to adapt its reading to the specificities (cultural, historical, and so on) of their own countries. National authorities thus have the power of discretion 'in fashioning their application of the Convention'.⁶⁹ Although, according to standing jurisprudence of the Court, the member States enjoy a broader margin of appreciation in assessing whether and to what extent an interference is necessary in cases of hate speech,⁷⁰ this margin is never unlimited and is always accompanied by European

⁶⁵ ECtHR, *Tolstoy Miloslavsky vs the United Kingdom*, 13 July 1995, Application No. 18139/91.

⁶⁶ ECtHR, *Skalka vs Poland*, 27 May 2003, Application No. 43425/98; ECtHR, *Saday vs Turkey*, 30 March 2006, Application No. 32458/96; ECtHR, *Lyashko vs Ukraine*, 10 August 2006, Application No. 21040/02; ECtHR, *Artun and Güvener vs Turkey*, 26 June 2007, Application No. 75510/01; ECtHR, *Mahmudov and Agazade vs Azerbaijan*, 18 December 2008, Application No. 35877/04; and ECtHR, *Marchenko vs Ukraine*, 19 February 2009, Application No. 4063/04.

⁶⁷ ECtHR, *Mehmet Cevher Ilhan vs Turkey*, 13 January 2009, Application No. 15719/03, para. 42.

⁶⁸ Sottiaux, Stefan and Van Der Schyff, Gerhard, 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights', *Hastings International & Comparative Law Review*, Vol. 31, No. 1, 2008, pp. 115–156, at pp. 116 and 128–129. They consider application of the abuse clause to be highly problematic in the context of international human rights adjudication, 'as it trades subsidiarity and respect for domestic constitutional identities for the principles of certainty and efficiency' (p. 152).

⁶⁹ *Ibidem*, at p. 134.

⁷⁰ See, e.g., ECtHR, *Lindon, Otchakovsky-Laurens and July vs France*, 22 October 2007, Application Nos 21279/02 and 36448/02 (Grand Chamber); ECtHR, *Sürek (nos 1 and 3) vs Turkey*, 8 July 1999, Application Nos 26682/95 and 24735/94; and ECtHR, *Balsytė-Lideikienė vs Lithuania*, 4 November 2008, Application No. 72596/01.

supervision,⁷¹ especially in relation to a political speech context.⁷² In this respect, application of the abuse clause removes the need for member States to pertinently and sufficiently justify interferences and drastically reduces the Court's role in ensuring that limitations are narrowly construed and convincingly established.⁷³ In a next phase, this approach could even be stretched to other *liberticides* (activities or acts aimed at the destruction of any of the rights and freedoms set forth in the Convention; see the text of Article 17), which would leave the door open for member States to act at their own discretion in labelling (other) activities they do not approve of as *liberticidal*.⁷⁴ This is reflected in the attempts of State parties, involved in a procedure before the European Court, to bring acts that are not related to Holocaust denial or National Socialism within the broadly and vaguely defined category of activities that are contrary to the Convention's underlying values.⁷⁵ According to Hare, this 'creates a serious risk that the state will (especially in times of particular religious or cultural sensitivity) be able to restrict or prohibit with impunity the expression of unpopular views by those who do not espouse mainstream liberal positions'.⁷⁶

Finally, notwithstanding its subsidiary role, the European Court is in a position to give guidance to national decision-makers. In this regard, concerns rise about the abuse clause example given to member States. As *supra*- and international instruments and the judicial interpretation thereof, as 'higher' norms, can afford considerable legitimisation for national practices, the Court's approach suggests that certain restrictions are so clearly permitted by European human rights standards that these need not to be justified by any threshold of proof at national level. This could provoke a decreasing impact of European free speech guarantees at the domestic level.⁷⁷

⁷¹ For example *Handyside vs the United Kingdom*, *supra* note 37, para. 49.

⁷² See *supra* note 53.

⁷³ See also Hare, *loc.cit.* (note 44), at p. 78.

⁷⁴ See also Lemmens, *op.cit.* (note 13), at p. 177.

⁷⁵ See, for example, the recent case of *Fatullayev vs Azerbaijan* (22 April 2010, Application No. 40984/07), in which this State attempted to set statements that ran counter to the 'overwhelming evidence' related to the historical fact of the Khojaly massacre on an equal footing with the 'negation or revision of clearly established historical facts such as the Holocaust' (see paras 67–68 and 81).

⁷⁶ Hare, *loc.cit.* (note 44), at p. 79.

⁷⁷ See, for example, the recent Article 11 case of *HADEP and Demir vs Turkey* (14 December 2010, Application No. 28003/03), in which the Turkish Constitutional Court had referred to Article 17 of the ECHR to support the dissolution of HADEP (People's Democracy Party) 'which has become a centre of illegal activities against the indivisible unity of the State with its nation and which has aided and harboured the PKK terrorist organisation' (para. 16). Before the Strasbourg Court, however, the Turkish Government did not rely on Article 17 anymore, and in the end the Court found a violation of Article 11.

3.2. UNNECESSARY FOR DEMOCRACY AND HUMAN RIGHTS PROTECTION

As has become clear, application of the abuse clause entails some direct and structural undesirable consequences. On top of this, an examination of cases regarding (racist) hate speech and incitement to violence/terrorism in which the abuse clause was disregarded or approached in a more deliberate way will show that the goals underlying this clause are likewise achieved under the speech-protective framework of Article 10.

3.2.1. *Protection of the Democratic System*

Application of the abuse clause seems justified in responding to activities or statements related to National Socialism, or inspired by this ideology, particularly Holocaust denial. The Strasbourg organs refer to the fact that such activities are contrary to the Convention's underlying values, and thus constitute a danger to democracy itself. If this is true merely for Holocaust denial, then it can simply not be denied that this should be all the more true with regard to expressions that (are believed to) incite violence or terrorism, as these activities undermine the pillars and values of democracy as well, and are far more likely to place citizens in physical danger, dramatically destroying their enjoyment of their rights and freedoms and finally their right to human dignity that lies at the basis of the Convention. These kinds of expression are, however, consistently treated under Article 10(2) ECHR, without reference to Article 17, which enables the Court to take all factual elements into consideration. Some case law examples related to incitement to violence/terrorism on the one hand, and to the introduction of *Sharia* on the other, will illustrate this.

Numerous cases before the Court concern statements related to the Kurdish question, made by alleged supporters of the Workers' Party of Kurdistan (PKK) that, since approximately 1985, has been involved in serious disturbances in the south-east of Turkey. The PKK is continuously labelled as a terrorist organisation by the Turkish authorities (a label that is adopted by the European Court), that uses violence against the Turkish security forces and calls for violent action in order to bring about the secession of part of Turkey's territory and the establishment of the independent State of Kurdistan. One of the first cases is *Zana vs Turkey*, in which the former mayor of 'the most important city of south-east Turkey', in openly supporting the PKK, was convicted for having 'defended an act punishable by law as a serious crime' and 'endangering public safety'.⁷⁸ As the abuse clause was not invoked, the Court took notice of the potential impact of the speech, and emphasised that the statement could not be looked at in isolation. After it had taken the relevant factual elements into

⁷⁸ *Zana vs Turkey*, *supra* note 39, para. 26. Other examples of similar cases against Turkey in which the Court judged that the pro-PKK speech amounted to incitement to violence or terrorism are *Sürekl (no. 1) vs Turkey*, *supra* note 53; ECtHR, *Hocaoğullari vs Turkey*, 7 March 2006, Application No. 77109/01; and ECtHR, *Halis Doğan (no. 3) vs Turkey*, 10 October 2006, Application No. 4119/02.

consideration (amongst others that the interview coincided with murderous attacks carried out by the PKK on civilians) the Court concluded that Article 10 was not violated. More importantly, in many cases against Turkey the Court found that the national convictions or sanctions for separatist propaganda or incitement to hatred or hostility did violate Article 10, as the impugned statements, speeches, publications or programmes did, in the Court's view, not act to incite violence or terrorism.⁷⁹ The high frequency of such judgments underlines the fundamental importance of examining the case in the light of all its factual and legally relevant elements, instead of relying too much on the content of the expressions and the assessment by the national authorities.⁸⁰ In addition, also cases of approval or glorification of terrorist acts have been adjudicated within the speech-protective framework of Article 10, without the abuse clause being brought into play.⁸¹ If the abuse clause is not necessary to defend democracy against alleged calls for violent action and terrorism, then neither is this clause necessary to defend democracy against (speech that is believed to be) Holocaust denial. It is hard to believe that this kind of speech would have a more dangerous impact on the democratic system than calls for terrorist action.

Other relevant case law of the Court is related to the introduction of *Sharia* law in society. The most famous case concerns the Turkish Welfare Party (*Refah Partisi*), which had been dissolved by the Turkish Constitutional Court because some of its (more important) members openly declared the aim of setting up a regime based on *Sharia* law. This dissolution led to a complaint at the Strasbourg level because of an alleged breach of the right to freedom of association, guaranteed by Article 11 of the Convention.⁸² On the basis of these public statements the Court decided that

⁷⁹ See, for example, ECtHR, *Incal vs Turkey*, 9 June 1998, Application No. 22678/93; ECtHR, *Erdogdu and Ince vs Turkey*, 8 July 1999, Application Nos 25067/94 and 25068/94; ECtHR, *Karatas vs Turkey*, 8 July 1999, Application No. 23168/94; ECtHR, *E.K. vs Turkey*, 7 February 2002, Application No. 28496/95; ECtHR, *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. (no. 1) vs Turkey*, 30 March 2006, Application Nos 64178/00, 64179/00 and 64181/00; ECtHR, *Alinak a.o. vs Turkey*, 4 May 2006, Application No. 34520/97; ECtHR, *Halis Doğan (no. 2) vs Turkey*, 25 July 2006, Application No. 71984/01; and ECtHR, *Bahçeci and Turan vs Turkey*, 16 June 2009, Application No. 33340/03.

⁸⁰ See also the judgment of the Court in *Gül a.o. vs Turkey* (8 June 2010, Application No. 4870/02) concerning the applicants' affiliation with another 'illegal' organisation in Turkey, labelled as 'terrorist', namely the Turkish Marxist-Leninist Party, and alleged incitement to violence and terrorism on their behalf. The Court concluded to a violation of Article 10: although the slogans shouted had a violent tone, given the context and their limited potential impact 'they cannot be interpreted as a call for violence or an uprising' (para. 41); see similarly *Gözel and Özer vs Turkey*, 6 July 2010, Application Nos 43453/04 and 31098/05.

⁸¹ See, for example, the Court's admissibility decision in *Kern vs Germany* (29 May 2007, Application No. 26870/04), in which it attached great interest to the fact that Kern, the local chairman of the right-wing extremist collaboration *Bündnis Rechts*, in a press release approved of the 9/11 terrorist attacks and that he assumed the existence of a 'Zionist oligarchy', as well as to the impact of those statements on the civil service. See also *Leroy vs France*, *supra* note 35, with regard to a cartoon of the collapsing twin towers, accompanied by the text 'What we all dreamt of... Hamas did it'.

⁸² ECtHR, *Refah Partisi (the Welfare Party) a.o. vs Turkey*, 13 February 2003, Application Nos 41340/98, 41342/98, 41343/98 and 41344/98 (Grand Chamber). See also ECtHR, *Karatepe vs Turkey*, 31 July 2007, Application No. 41551/98.

Refah Partisi wished to set up a plurality of legal systems leading to discrimination, including the introduction of *Sharia* law, and held that these plans were contradictory to ‘fundamental democratic principles’, namely secularism, equality and democracy itself. Given its previous case law, one could have expected invocation of the abuse clause at this point. However, the Court firmly stated that

any intervention by the authorities must be in accordance with paragraph 2 of Article 11 (...) Only when that review is complete will the Court be in a position to decide, in the light of all the circumstances of the case, whether Article 17 of the Convention should be applied.⁸³

Although the Court was firm in its rejection of a plurality of legal systems based on discrimination and *Sharia* as incompatible with democracy,⁸⁴ in its examination it did pay particular attention to the question as to ‘whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent’. This question receives no attention whatsoever in cases of (alleged) Holocaust denial or other activities or statements related to National Socialism. In the end the Court judged, without turning further to Article 17, that there had been a pressing social need for dissolving this party.⁸⁵ In *Gündüz vs Turkey*, the Court rejected justifying a criminal conviction for inciting hatred and hostility. In this case, the applicant had, in his capacity as the leader of an Islamic sect, during a TV-debate, demonstrated a profound dissatisfaction with contemporary, democratic and secular institutions in Turkey by describing them as ‘impious’. During the programme he also openly called for the introduction of *Sharia*. The Court observed that the applicant was invited to participate in the programme to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was the subject of widespread debate in the Turkish media and concerned an issue of general interest. The Court underlined that merely defending *Sharia*, without calling for the use of violence to establish it, cannot be regarded as hate speech.⁸⁶ The Court’s lack of consistency as to the application of

⁸³ *Ibidem*, para. 96. See also *United Communist Party of Turkey a.o. vs Turkey*, *supra* note 53, para. 32.

⁸⁴ For an elaborated vision on the Court’s approach in *Refah Partisi*, see Meerschaut, K. and Gutwirth, S., ‘Legal Pluralism and Islam in the Scales of the European Court of Human Rights: the Limits of Categorical Balancing’, in: Brems, E. (ed.), *Conflicts between Fundamental Rights*, Intersentia, Antwerp, 2008, pp. 431–465, at pp. 435–451. See also Sottiaux, Stefan, ‘Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication’, *Netherlands Quarterly of Human Rights*, Vol. 22, No. 4, 2004, pp. 585–599.

⁸⁵ Given the electoral situation in Turkey, it considered that at the time of its dissolution, *Refah Partisi* had the real potential to seize political power without being restricted by the compromises inherent in a coalition.

⁸⁶ *Gündüz vs Turkey*, *supra* note 46. See also ECtHR, *Giniewski vs France*, 31 January 2006, Application No. 64016/00; ECtHR, *Aydin Tatlav vs Turkey*, 2 May 2006, Application No. 50692/99; and *Erbakan vs Turkey*, *supra* note 46. In *Stankov and the United Macedonian Organisation Ilinden vs Bulgaria* (2 October 2001, Application Nos 29221/95 and 29225/95), the Court emphasised that

the abuse clause has become obvious. Although *Sharia* is labelled by the Court as a doctrine incompatible with certain fundamental democratic values, statements or activities related to this doctrine are consistently approached under Article 10 and/or 11 of the Convention. Why then can this approach under the speech-protective framework of Article 10 not be stretched to statements or activities related to other undemocratic doctrines?

3.2.2. *Protection of Human Dignity and Equality*

As emphasised above, the Court acknowledges that even with regard to racist hate speech, State interferences are only justified if they are ‘prescribed by law’ and ‘provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued’. Does this mean that the speech-protective framework of Article 10 is applicable (in principle) even in cases regarding (alleged) racist hate speech? The bulk of the Court’s case law on this matter firmly suggests it should be.

The Court previously even afforded protection under Article 10 to clear racist expressions (see *Jersild*, *supra* section 3.1.3.1) or statements that could, at first sight, be interpreted as supporting or apologising the former Nazi regime (see *Lehideux and Isorni*, *supra* section 2.2), given that the statements were related to a broader discussion on matters of public interest, and that the applicants did not intend to propagate racist ideas. A brief look at some recent case law of the Court reveals that a contextual examination is inevitable to assess whether there actually was (racist) hate speech in the first place. Some of the elements that are granted particular attention in this regard are (racist) intent of the applicant and impact of the speech itself,⁸⁷ even in

‘(i)n a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means’ (para. 97). Given that ‘there was no real foreseeable risk of violent action or of incitement to violence or any other form of rejection of democratic principles’ (para. 111), the Court found that the measures banning the applicants from holding commemorative meetings were not necessary in a democratic society, within the meaning of Article 11 of the Convention. In *Vajnai vs Hungary* (8 July 2008, Application No. 33629/06), the Court considered the ‘real and present danger of any political movement or party restoring the Communist dictatorship’ (para. 49) as an important factor when assessing the necessity to restrict the right to freedom of expression of a member of a registered left-wing political party, who in public wore the five-pointed red star, which the Hungarian Government appointed to as a totalitarian symbol.

⁸⁷ See, for example, *Seurot vs France*, *supra* note 34 (inciting hatred against persons of Maghreb origin); ECtHR, *Orban a.o. vs France*, 15 January 2009, Application No. 20985/05 (alleged glorification of war crimes, the Court eventually found a violation of Article 10); and the Court’s recent admissibility decision in *Le Pen vs France*, 20 April 2010, Application No. 18788/09 (confirming the conviction of Le Pen for incitement to discrimination against Muslims, as not being in breach with Article 10). As to this last case, it should be mentioned that there was no analysis of whether there was any actual hatred or violence as a consequence of the speech. The Court accepted the reasoning that the domestic courts had given without any independent analysis.

cases of anti-Semitic speech,⁸⁸ elements that can obviously not be judged at first sight (when the abuse clause is applied). In some very recent cases, the Court has explicitly demonstrated a deliberate, remote attitude as to the application of Article 17. In *Soulas and Others vs France* and *Féret vs Belgium*, it envisaged speech that was believed, by the national authorities, to be incitement to racism, discrimination and xenophobia.⁸⁹ The Court held that the arguments developed by the respective national authorities in order to apply Article 17 were so strongly related to the merits of both cases, that it decided to examine the necessity of the restrictions along with the legal question as to whether Article 17 should or should not be applied. In both cases, after a thorough examination under the conditions of Article 10(2) ECHR, the Court concluded that the content of the statements at issue could not justify application of the abuse clause. Still, both interferences complained of were considered necessary in a democratic society. In other words, before being able to decide whether or not the abuse clause applies, the complaint should be examined on its merits. In some other recent judgments (for example *Bingöl vs Turkey* and *Fatullayev vs Azerbaijan*) the Court immediately rejected the claims of the State parties as to the application of Article 17, referring to the category of negation or revision of clearly established historical facts, which (other than the statements in question) is contrary to Convention values, and is therefore excluded from the speech-protective framework via direct application of Article 17.⁹⁰ Although these judgments show a remote attitude from the side of the Court, they at the same time suggest that it is still willing to apply the abuse clause in a direct and categorical way.

As the Court does usually not rely on the abuse clause in cases of, even racist, hate speech (and on occasions even in cases of clear anti-Semitic statements; see *supra* note 88), it becomes clear that applying the abuse clause is not necessary in order to protect or promote respect for the core values of human dignity and equality. Hence, also from this perspective, the abuse clause generates no added value. In its *Norwood* decision (see *supra* section 2.2, a case of Islamophobic speech), in which the Court at least gave the impression that it was widening the abuse clause's use to include the larger domain of racial and religious discrimination, its approach is clearly inconsistent,

⁸⁸ For example *Balsytė-Lideikiėnė vs Lithuania*, *supra* note 70 (inciting hatred against Poles and Jews). The Court held that the publication of a calendar containing various statements linked to Lithuanian extreme nationalism was incitement to hatred, and concluded that the sanctions were not a violation of Article 10.

⁸⁹ ECtHR, *Féret vs Belgium*, 16 July 2009, Application No. 15615/07; and ECtHR, *Soulas and Others vs France*, 10 July 2008, Application No. 15948/03. In *Féret*, the Court again emphasised the importance of the impact factor, as it held that the impact of racist and xenophobic discourse is magnified in an electoral context. This judgment was contested by three dissenters who held that only a possible impact on the rights of others is not sufficient to restrict the fundamental right to freedom of expression. See also *Le Pen vs France*, *supra* note 87.

⁹⁰ ECtHR, *Bingöl vs Turkey*, 22 June 2010, Application No. 36141/04; and *Fatullayev vs Azerbaijan*, *supra* note 75.

for there was, given its previous and later case law, no justification for a direct and categorical application of Article 17.⁹¹

It is important to notice that the Court's reasoning displayed in these recent judgments suggests that if there can be discussion about the content, context and impact of an expression, it is preferable to examine this expression on its merits, hence, in the light of the case as a whole.⁹² In this regard, Arai holds that

[i]t is desirable that in case Article 17 is invoked by a respondent State to justify restrictive measures, the Committee of three judges at the admissibility stage, if it does not hold the applicability of Article 17 as manifestly ill founded, joins its examination to the merits, and a full-fledged review of the merits is conducted by a Chamber of the Court.⁹³

Admittedly, the Court in most cases seems to take, informally or implicitly, some characteristics of the case into consideration before deciding whether or not it will apply the abuse clause. But still, the approach described above by Arai should be widened to encompass all expressions, even if their unallowable content at first sight seems apparent. In this respect, Oetheimer holds that the Court will judge cases under Article 10 if it finds that the impugned expression could *a priori* be integrated into a public interest debate.⁹⁴ We believe, however, that it is difficult, if not impossible, to decide *a priori* whether or not an expression is related to any public interest. In *Norwood*, for example, the litigious expression (which also contained a critique/attack on the Islam) was categorically excluded from any free speech protection. However, a message expressing a protest against terrorism and containing a hostile statement toward Islam can also be considered as belonging to the *core* public speech.⁹⁵ Hence, it is hard to understand why it was decided *a priori* that this statement was not related to public debate. Moreover, even if the Court takes informally or implicitly, but in any way *a priori*, some characteristics of the case into consideration, this does not restore the applicant's protection against disproportionate interferences or other guarantees under Article 10. For these reasons, we strongly encourage the Court to explicitly formulate its motivations and considerations that support the final finding of the necessity of restricting the statements or speech at issue, as to the specificities of each separate case.

⁹¹ See on this case before the UK judiciaries, Weinstein, J., 'Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*', in: Hare and Weinstein (eds), *op.cit.* (note 44), pp. 23–62, at pp. 44–52.

⁹² See also Oetheimer, Mario, 'Protecting Freedom of Expression: the Challenge of Hate Speech in the European Court of Human Rights Case Law', *Cardozo Journal of International & Comparative Law*, Vol. 17, 2009, pp. 427–443, at p. 429.

⁹³ Arai, *loc.cit.* (note 61), at p. 1086.

⁹⁴ Oetheimer, *loc.cit.* (note 92), at p. 433.

⁹⁵ See, for example, Weinstein, *loc.cit.* (note 91), at pp. 44–52.

3.2.3. *Categorical Exclusion and the UN Human Rights Committee*

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides a similar speech-protective framework as Article 10 ECHR, likewise relying on a similar threefold necessity test.⁹⁶ Moreover, also the ICCPR in its Article 5(1) contains an abuse clause which is (almost) identical to the European one, and is also inspired by the same fear of democracy being overthrown (again) by totalitarian movements.⁹⁷ Contrary to the Strasbourg organs, the UN Human Rights Committee (HRC, which supervises the compliance of the Treaty States' actions with the Covenant) only applied this clause once and it shows a very reluctant attitude in using it. In *M.A. vs Italy*, the author of the individual communication had been convicted for reorganising the dissolved fascist party. The HRC sufficed by stating that his actions were 'of a kind which are removed from the protection of the Covenant by article 5 thereof', and declared the communication incompatible *ratione materiae* with the Covenant,⁹⁸ the author hence being categorically refused any free speech protection. However, in contrast to Article 17 ECHR, Article 5(1) ICCPR has not been interpreted as being applicable to activities or statements that are deemed to run counter to the Covenant's purposes and general spirit.⁹⁹ This is very well illustrated by the HRC's decision in *Faurisson vs France*, a well-known case of Holocaust denial (the kind of speech that is most vigorously attacked by the European abuse clause). Notwithstanding the clear revisionist content of Faurisson's written statements the Committee refused to apply the abuse clause in the admissibility stage. Instead, it decided the case under Article 19(3), eventually approving of Faurisson's conviction after having examined the complaint on its merits.¹⁰⁰ This again suggests that this type of speech can be safely dealt with within the confines of the speech-protective framework.

⁹⁶ Although the relevant criterion for evaluating the necessity of interference under the ICCPR is not the principle of democracy (as under the ECHR), yet achievement of the purpose being sought, the restriction must similarly be proportional in severity and intensity to that purpose, see the most recent draft of General Comment No. 34, UN Doc. CCPR/C/GC/34/CRP.5, 25 November 2010, paras 34–35.

⁹⁷ Nowak, M., *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel, Kehl am Rhein, 2005, pp. 112 and 115.

⁹⁸ HRC, *M.A. vs Italy*, 10 April 1984, Communication No. 117/1981. The authors in this case did not specify which articles of the Covenant had allegedly been violated. In any way, the Committee held that 'the acts of which M.A. was convicted (...) were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18(3), 19(3), 22(2) and 25 of the Covenant' (para. 13.3).

⁹⁹ In this regard, Nowak previously noted that '[w]hereas Art. 17 of the ECHR has occasionally been raised as a militant defence of the liberal-democratic philosophy of human rights in the ECHR, it does not seem appropriate to attribute such an interpretation to Art. 5(1) in view of the universal character of the Covenant'; see Nowak, *op.cit.* (note 97), pp. 116–117.

¹⁰⁰ HRC, *Faurisson vs France*, 16 December 1996, Communication No. 550/1993. It should be mentioned, however, that, although the abuse clause was not applied, the application of the necessity test in this case seems rather superficial. Although the HRC gives the impression that it examined the complaint on its merits, by stating that 'the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings' (para. 9.6), the question of

Moreover, the evolutionary practice of the HRC provides another strong argument for eliminating categorical exclusion approaches in resolving free speech disputes. In a case of anti-Semitic speech, *J.R.T. and the W.G. Party vs Canada*, the prohibition of inciting hatred in Article 20(2) ICCPR was interpreted by the Committee as a stand-alone provision able to cut off certain expressions from the speech-protective framework provided by Article 19.¹⁰¹ As a result, the author was categorically refused any protection.¹⁰² However, in its most recent hate speech decision, the HRC firmly restored the primacy of that speech-protective framework. In *Ross vs Canada*, the author of the communication, who was a teacher, had been transferred to a non-teaching position because of his anti-Jewish views and publications. In the admissibility stage the Committee considered that ‘restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible’.¹⁰³ Moreover, this view is now also reflected in the draft of a new general comment on Article 19 ICCPR.¹⁰⁴ As a consequence, there is a strong presumption that the approach under Article 19(3) is the leading (and even exclusive) approach in resolving hate speech conflicts under the ICCPR.

3.3. THE PARTICULAR STATUS OF NATIONAL-SOCIALIST IDEOLOGY AND HOLOCAUST DENIAL

The particular protection against revisionist speech and Holocaust denial and trivialisation undeniably stems from the historical past of some Western-European (present-day) democracies, and is principally grounded in the fear of history repeating itself (see *supra* section 2.1). This fear is reflected in the vision of some authors considering Holocaust denial as part of a genocidal project itself.¹⁰⁵ Indeed,

necessity of the interference was approached rather passively: ‘In the absence in the material before it of any argument undermining the validity of the State party’s position as to the necessity of the restriction, the Committee is satisfied that the restriction of Mr. Faurisson’s freedom of expression was necessary within the meaning of article 19, paragraph 3, of the Covenant’ (para. 9.7). This flaw is also implicitly pointed out in some concurring opinions (like that of Evatt and Kretzmer), in which the question of proportionality of the sanction appeared for the first time.

¹⁰¹ This article reads as follows: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.

¹⁰² The HRC sufficed with arguing that ‘the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit’ (para. 8b), and simply declared the communication incompatible *ratione materiae* with the provisions of the Covenant; see HRC, *J.R.T. and the W.G. Party vs Canada*, 6 April 1983, Communication No. 104/1981. See on this case Möller, J.Th. and De Zayas, A., *United Nations Human Rights Committee Case Law 1977–2008. A Handbook*, N.P. Engel, Kehl am Rhein, 2009, pp. 366 and 377.

¹⁰³ HRC, *Ross vs Canada*, 26 October 2000, Communication No. 736/1997.

¹⁰⁴ Human Rights Committee, Draft General Comment No. 34, *supra* note 96, para. 52.

¹⁰⁵ Wachsmann, Patrick, ‘Liberté d’expression et négationnisme’ [Freedom of expression and Holocaust denial], *Revue trimestrielle des droits de l’homme*, 2001, pp. 585–599, at p. 585; Levinet, *loc.cit.*

history provides convincing reasons to approach the national-socialist ideology with a particular fear, and the human suffering caused by the Holocaust with a particular respect. Moreover, the actual relevance of the original motivations underlying the abuse clause is mirrored in the regaining of power by far right-wing political parties, and for that reason we acknowledge that the need to defend democracy has not diminished over the years.¹⁰⁶ But is such particular, distinct protection, organised by means of the abuse clause, still desirable today, more than 60 years *post dato*? The European Court has previously considered that, when the field of defamation and certainly that of (social) pain or distress in pursuance of a dramatic event is entered,¹⁰⁷ the temporal aspect should also be taken into account.¹⁰⁸ For example, in *Monnat vs Switzerland*, a case concerning a documentary on the role of Switzerland's officials during the Second World War, the Court noted that

the historical events discussed in the programme in issue had occurred more than fifty years previously. Even though remarks such as those by the applicant are always likely to reopen the controversy among the public, the lapse of time makes it inappropriate to deal with such remarks, fifty years on, with the same severity as ten or twenty years before. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.¹⁰⁹

The effects of Holocaust denial in terms of pain and distress from the perspective of victims, survivors and relatives may not have diminished over time; therefore, this crime is viewed as having been too extreme and too grotesque. On the other hand, its effects in terms of really endangering the fundamentals of our present-day legal and democratic system should be looked at in a sober and realistic, and not an emotional,

(note 30), at p. 653. These authors not only emphasise the specificity of the Holocaust, but also point at the specificity of the denialist enterprise itself, see Cohen-Jonathan, Gérard, 'Négationnisme et droits de l'homme' [Holocaust denial and human rights], *Revue trimestrielle des droits de l'homme*, 1997, pp. 572–597, at p. 595; and Wachsmann, *loc.cit.* (note 105), at p. 591.

¹⁰⁶ See also Van Drooghenbroeck, *loc.cit.* (note 7), at p. 563.

¹⁰⁷ The Strasbourg organs have considered Holocaust denial to be 'an insult to the Jewish people', 'reproaching them with lying and extortion and thus portraying them as particularly abominable' (see *supra* section 2.2). It further amounts to 'disparaging the dignity of the deceased'; see *Witzsch vs Germany*, *supra* note 29.

¹⁰⁸ See, for example, *Leroy vs France* (*supra* note 35) in which the cartoon of the collapsing Twin Towers was published only two days after the dramatic 9/11 attacks. See also *Orban a.o. vs France* (*supra* note 87), in which the Court considered that although the applicant's statements concerning war crimes in which he himself had been involved, are still capable of reviving pain and distress, it is not appropriate to judge them with the same degree of severity that could have been justified 10 or 20 years before.

¹⁰⁹ ECtHR, *Monnat vs Switzerland*, 21 September 2006, Application No. 73604/01, para. 64. See also ECtHR, *Editions Plon vs France* (18 May 2004, Application No. 58148/00), in which the Court reiterated the principle that the passage of time must be taken into account in assessing whether a measure such as banning a book is compatible with freedom of expression. Compare with ECommHR, *De Becker vs Belgium* (9 June 1958, Application No. 214/56), also including a 'time'-aspect as to the necessity to restrict freedom of expression in a post war period.

way.¹¹⁰ In the present-day context of our highly developed democracies, it is no longer tolerable that overestimating these effects leads to justified application of the abuse clause's exceptional (undemocratic) regime.¹¹¹ If Europe wants to be the genuine democracy it says it stands for, then it should no longer overprotect democracy against Holocaust denial in order to save democracy, since such an approach precisely risks harming the democratic project itself and its crucial values. In other words, just as the European Court does not as such accept the judgments of the Turkish authorities that punishable separatist propaganda took place, although at first sight the impugned statements seemed to contain incitement to discrimination and hate speech (see *supra* section 3.2.1), it should not accept the judgments of the German, French, Dutch, Belgian or Austrian authorities that punishable Holocaust denial or incitement to hatred against Jews occurred, only on the basis of isolated statements or quotations. Instead, the general approach of the European Court, which essentially focuses on the questions whether certain speech in its context is considered to be inciting to hatred or violence and whether the interference complained of is responding in a proportionate way to a pressing social need, deserves support.

4. CONCLUSION

The reflections from a democratic and human rights perspective developed in this article, and the analysis of the Strasbourg case law, demonstrate that applying the abuse clause in order to deal with and legitimise the criminalisation of the *worst* kinds of speech is not a desirable project for the future development of democracy in Europe. Such an approach eliminates substantial (procedural) guarantees for applicants seeking to safeguard their right to freedom of expression (and/or association) at the Strasbourg level, leaving a too broad discretionary margin for member States, and removing the applicants' particular protection against disproportionate interferences. In addition, it risks to provoke some structural dangers related to the Court's guidance function on the one hand, and its subsidiary role on the other. Moreover, this Strasbourg approach has not proven to generate an added value for democracy in terms of defending and maintaining the organisational democratic structure, or of protecting and promoting respect for the core values of human dignity and equality. Also the judicial practice of the UN Human Rights Committee supports this finding. Finally, we doubt whether the particular fear for National Socialism and the revival

¹¹⁰ See also Raes, K., 'Vrijheid van meningsuiting en de revisionistische geschiedvervalsing' [Freedom of expression and the revisionist falsification of history], in: Schuijt, G.A.I. and Voorhoof, D. (eds), *Vrijheid van meningsuiting. Racisme en Revisionisme* [Freedom of expression. Racism and revisionism], Academia Press, Gent, 1995, pp. 31–77, at pp. 69–77.

¹¹¹ See also the dissenting opinion of Judge Spielmann in *Kosiek vs Germany* (see *supra* note 15): 'Looking at the matter generally, I wonder whether in 1986 – nearly sixty years after the Weimar Republic and more than forty years after the end of the Second World War – the impugned practice of the Federal Republic of Germany really is necessary in order to safeguard democracy' (para. 33).

of totalitarian regimes today, in Europe, still justifies such particular, distinct and far-reaching mechanism in terms of upholding the (application of the) abuse clause.

The abuse clause is in fact no more, but also no less, than the expression of the particular fear that, again, totalitarian regimes would gain power and subsequently overthrow democracy, with all the inhuman consequences that may be related to this. This clause should be seen as a symbolic declaration in the light of which the whole Convention should be read and interpreted; as a firm ‘no’ to activities or statements that are incompatible with fundamental democratic values. However, before one can conclude with (relative) certainty that such activities took or will take place, all factual and legally relevant elements of the specific case, such as content, context, intention, impact and the proportionality of the interference, should be taken into consideration. If not, the common European fear, reflected in the abuse clause, risks working over-inclusively and creating an undesirable chilling effect in a democratic society.¹¹²

It is preferable, not only from a democratic, but also from a human rights perspective, to treat all (alleged) hate speech equally under the speech-protective framework provided by Article 10 ECHR (with emphasis on the necessity test of Article 10(2)), without conferring to the abuse clause any decisive impact. Therefore, we strongly encourage the Court to explicitly formulate its motivations and considerations that support the final finding of necessity of restricting the statements at issue, as to the specificities of each separate case. This approach is much more adapted to substantial guarantees within the European democratic and human rights system, especially regarding the right to freedom of expression and information. From this perspective, we also firmly support the Court’s recent judgments in which it denied the arguments of the respondent State invoking Article 17 in order to justify interferences with the applicants’ freedom of expression, while the Court finally found the impugned interferences in breach with Article 10 of the Convention.¹¹³

¹¹² See in the same sense, regarding the identical abuse clause in ICCPR, Fox, Gregory H. and Nolte, Georg, ‘Intolerant Democracies’, *Harvard International Law Journal*, Vol. 36, No. 1, 1995, pp. 1–70, at p. 43: ‘Article 5 of the Political Covenant and its regional equivalents stand in the larger context of the entire instruments, and they must not be given interpretations which would frustrate the essence of the rights guaranteed. It necessarily follows that states cannot enjoy unlimited powers to exclude political actors under abuse clauses such as Article 5.’

¹¹³ See, for example, *Fatullayev vs Azerbaijan* (*supra* note 75), in which ‘the Court considers that the statements that gave rise to the applicant’s conviction did not amount to any activity infringing the essence of the values underlying the Convention or calculated to destroy or restrict the rights and freedoms guaranteed by it. It follows that, in the present case, the applicant’s freedom of expression cannot be removed from the protection of Article 10 by virtue of Article 17 of the Convention’ (para. 81). See also *Orban a.o. vs France*, *supra* note 87. Also in the very recent case of *Paksas vs Lithuania* (6 January 2011, Application No. 34932/04), the Grand Chamber emphasised that Article 17 ‘is applicable only on an exceptional basis and in extreme cases’ (para. 87). This case concerned the applicant’s right to stand for elections as part of Article 3 of Protocol No. 1. *In casu* no such exceptional basis existed, and the Court decided that the applicant ‘relied legitimately on Article 3 of Protocol No. 1 to challenge his disqualification from elected office’ (para. 89). In the end the Court even found a violation of this article.