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Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime

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Abstract

Litigation concerning domestic restrictions on Holocaust denial has produced a 30-year-long jurisprudence of the European Court and European Commission of Human Rights. In spite of solemnly declared principles on free speech, the Strasbourg organs have progressively developed an exceptional regime in this regard based on the 'abuse clause' envisaged under Article 17. Had this detrimental treatment remained confined to its original sphere, it could have perhaps been considered as a negligible issue. However, the scope of the abuse clause was extended to encompass a growing class of utterances, including the denial of historical facts other than the Nazi genocide. This piece begins by examining the Strasbourg case law on Holocaust denial, with a view to enucleating the effects, scope and conditions of applicability of the special regime based upon Article 17. Once the shortcomings implied by this detrimental discipline have been exposed, it shall be argued that all expressions should be dealt with under the ordinary necessity test, in which the abuse clause ought to operate as an interpretative principle. In the alternative, and as a minimum, the Court should pay due regard to the political and social context of the country where restrictions on free speech were enforced, setting aside the uniquely harsh treatment reserved for Holocaust denial.

1 Introduction

More than 60 years after its establishment, the European Court of Human Rights (ECtHR)[1] has become a reference point in a considerable number of legal fields. Some

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1 When the indication of a paragraph number alone is not sufficiently precise, pinpoint references refer also to the page of the Microsoft Word or Adobe PDF document in which ECtHR decisions may be downloaded from http://hudoc.echr.coe.int/ (last visited 30 January 2015).

of the principles it has developed have set universally acknowledged standards, which are quoted, adopted and applied by many domestic and supranational judicial organs worldwide. In contrast to such celebrated principles of liberalism, however, some grey areas tarnish the Court's legacy, having been subjected to a detrimental regime.

One of these areas is Holocaust denial. Unlike a couple of decades ago, when criminal prohibitions against the negation of the Nazi genocide made their first appearance in Europe, present-day academic research cannot but adopt a more comprehensive point of view, addressing a complex phenomenon termed here 'denialism'. This concept does not revolve around the Holocaust only but, rather, encompasses a wider set of conduct ranging from the denial, gross trivialization and justification of genocides at large to that of most or all core international crimes.

The question of whether expressions of denialism ought to be criminalized finds divergent legal responses. In the field of international law, scholars discuss whether this radical form of historical revisionism may constitute an international crime in and of itself.[2] Controversy was similarly sparked by the debate about the need to adopt legislative measures at the domestic level.[3] In Europe, provisions criminalizing denialism – especially Holocaust denial – have spread since the early 1990s and are now in force in the majority of domestic legal systems.[4] Conversely, other states do not consider the gravity of this kind of utterance alone to be such as to warrant criminal punishment.[5]

[2] In particular, the issue arose as to whether Iran's former President Mahmoud Ahmadinejad's statements – including expressions denying, justifying and trivializing the Holocaust – qualify as incitement to genocide or as hate speech. See, e.g., Gordon, 'From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework', 98 *Journal of Criminal Law and Criminology (J Criminal L & Criminology)* (2008) 853; Weiner, 'Referral of Iranian President Mahmoud Ahmadinejad and the Member State of the Islamic Republic of Iran to the United Nations, Including Its Main Bodies, Judicial Organs and Specialized Agencies on the Charge of Incitement to Commit Genocide and Other Charges', 3 *International Journal of Punishment and Sentencing (Int'l J Punishment & Sentencing)* (2007) 1. But see Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide', 48 *Virginia Journal of International Law (Virg J Int'l L)* (2008) 485, at 490–491; Davies, 'How the Rome Statute Weakens the International Prohibition on Incitement to Genocide', 22 *Harvard Human Rights Journal (Harv Hum Rts J)* (2009) 245, at 257–260.

[3] Notable contributions to this debate include T. Hochmann, *Le négationnisme face aux limites de la liberté d'expression: Etude de droit comparé* (2013); E. Fronza, *Il negazionismo come reato* (2012); L. Hennebel and T. Hochmann (eds), *Genocide Denials and the Law* (2011); R. Kahn, *Holocaust Denial and the Law: A Comparative Study* (2004); Brugger, 'Ban On or Protection of Hate Speech? Some Observations Based on German and American Law', 17 *Tulane European and Civil Law Forum (Tul Eur & Civ L F)* (2002) 1; T. Wandres, *Die Strafbarkeit des Auschwitz-Leugnens* (2000); Beisel, 'Die Strafbarkeit der Auschwitzlüge', 48 *Neue Juristische Wochenschrift* (*NJW*) (1995) 997; G. Werle and T. Wandres, *Auschwitz vor Gericht: Völkermord und bundesdeutsche Strafjustiz; mit einer Dokumentation des Auschwitz-Urteils* (1995); Werle, 'Der Holocaust als Gegenstand der bundesdeutschen Strafjustiz', 45 *NJW* (1992) 2529.

[4] By way of illustration, states punishing only the denial of the Holocaust include: Germany, France, Austria and Belgium; states banning denial of a wider class of crimes include: Spain, Luxembourg, Liechtenstein, Switzerland, Slovenia, Latvia and Malta. Furthermore, a number of (ex-Soviet Bloc) countries additionally prohibit denial of crimes committed by former communist regimes: see e.g. Czech Republic, Poland, Hungary, Slovakia and Lithuania.

[5] For instance, the United Kingdom, Greece, Ireland, Italy, Denmark, Finland, the Netherlands, Sweden and Norway. Despite the lack of express criminalization in these countries, denialism might still be punished in so far as it falls within existing laws against hate speech.

For its part, the European Union has sought to reconcile these two rival positions by introducing the Framework Decision 2008/913/JHA.[6] Whereas the declared goal of this Framework Decision was to harmonize criminal measures against racism and xenophobia, such European intervention in effect broadened the original reach of the crime of denialism to embrace also the negation of nearly all core international crimes.[7] Although anti-denialism legislation seems presently still far from uniform, a tendency to either introduce or expand the scope of the crime of denialism in domestic legal systems has gained momentum following the adoption of the Framework Decision.

The present article shall focus on the other European actor exercising its authoritative influence at the regional scale, namely, the ECtHR. The Strasbourg judges have dealt frequently with restrictions on the right to freedom of expression resulting from legislation against Holocaust denial, developing a jurisprudence that appears to be applicable to denialism as a whole. The key factor is that, as mentioned, the Court significantly departs from the general principles on free speech. The denial of the Holocaust triggers the application of Article 17 of the European Convention on Human Rights (ECHR)[8] – also known as the abuse clause – which causes through its 'guillotine effect'[9] the categorical exclusion of a given expression from the protection of the Convention. In other words, when faced with a conduct of this sort, the Court need not proceed to examine the merits of the complaint but, rather, declares it inadmissible on a *prima facie* assessment.

This conclusion is but the culmination of a 30-year-long development of the ECtHR's case law on Holocaust denial. Three main phases are identified based on the different roles assigned to the abuse clause, which have influenced, in turn, the balancing test conducted under Article 10. In any event, it must be emphasized that, notwithstanding these variations in approach throughout the years, the outcome has remained unchanged. All applications about Holocaust denial have been invariably (and unanimously) dismissed as inadmissible.

This article shall examine the case law on Holocaust denial, shedding light on the dangers of its most recent developments, which exclude an increasing number of expressions from the strict scrutiny usually applied by the Strasbourg judges to restrictions on free speech. In this regard, it will be useful to delve into the scope and effects of

[6] Council Framework Decision 2008/913/JHA of 28 November 2008, OJ L 328/55. For some comments thereon, see Pech, 'The Law of Holocaust Denial in Europe: Towards a (Qualified) EU-Wide Criminal Prohibition', in Hennebel and Hochmann, *supra* note 3, 185; Lobba, 'Punishing Denialism beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends', 5(1) *New Journal of European Criminal Law (N J European Crim L)* (2014) 58; Renauld, 'La décision-cadre 2008/913/JAI du Conseil de l'Union Européenne', 81 *Revue trimestrielle des droits de l'homme* (*RTDH*) (2010) 119; Garman, 'The European Union Combats Racism and Xenophobia by Forbidding Expression', 39 *University of Toledo Law Review* (2008) 843.

[7] Framework Decision, *supra* note 6, Art. 1(1)(c) and (d).

[8] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 221.

[9] Expression authored by Cohen-Jonathan, 'Le droit de l'homme à la non-discrimination raciale', 46 *RTDH* (2001) 665.

the abuse clause, assessing its present suitability in the fight against threats to democracy. It will be argued that, while safeguarding public peace and human dignity is of paramount importance, this goal might better be achieved through ordinary means – that is, by the balancing test envisaged under Article 10.

2 Holocaust Denial before the Strasbourg Organs

A *First Stage: Application of General Principles on Freedom of Expression*

The first phase of case law on Holocaust denial involves a small number of cases, heard by the former European Commission of Human Rights during the 1980s.[10] The distinguishing feature of this stage is that Article 17 never comes into play. Its application remained confined to two early cases, in which it excluded, by virtue of its guillotine effect, anti-democratic activities[11] and racist expressions[12] from the protection of the ECHR. In contrast, the judicial analysis of Holocaust denial applications is conducted pursuant to the *ius commune* of Article 10, meaning that the cases are assessed in light of all of their circumstances and that the respondent state is required to demonstrate that the interference with the right to free speech is necessary and proportionate in a democratic society.

The restricted scope of the application of Article 17 in this initial stage also clearly emerges in *Lowes v. United Kingdom*.[13] Despite the fact that the case concerned anti-Semitic activities, involving also conduct akin to denialism, this provision was ignored. The application was instead dismissed pursuant to Article 10(2), suggesting that only racist conduct – not even anti-Semitism – could justify the application of the abuse clause.[14]

B *Second Stage: Application of Article 17 as Principle of Interpretation*

The second phase sees the abuse clause being applied by the Commission not as a case-killer provision – through its guillotine effect – but, rather, as an interpretative aid within reasoning that is still articulated under the framework of Article 10.[15] *Kühnen*

[10] ECtHR, *X. v. Federal Republic of Germany*, Appl. no. 9235/81, Decision of 16 July 1982; ECtHR, *T. v. Belgium*, Appl. no. 9777/82, Decision of 14 July 1983.

[11] ECtHR, *Parti Communiste d'Allemagne c Allemagne*, Appl. no. 250/57, Decision of 20 July 1957.

[12] ECtHR, *Glimmerveen and Hagenbeek v. the Netherlands*, Appl. nos 8348/78 and 8406/78, Decision of 11 October 1979.

[13] ECtHR, *Lowes v. United Kingdom*, Appl. no. 13214/87, Decision of 9 December 1988.

[14] See van Drooghenbroeck, 'L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?', 46 *RTDH* (2001) 541, at 552–553 (noting the unwillingness of the Commission in this early stage to apply Article 17). See also, as part of this restrictive approach, ECtHR, *Lawless v. Ireland (3)*, Appl. no. 332/57, Judgment of 1 July 1961, § 7 ('The Law').

[15] Cohen-Jonathan, *supra* note 9, at 667–668. Compare van Drooghenbroeck, *supra* note 14, at 553–555 (considering Article 17 an '*arrière-fond interprétatif superflu*'); Cannie and Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?', 29 *Netherlands Quarterly of Human Rights (Netherlands Quart Hum Rts J)* (2011) 54, at 67–68 (considering only theoretical the application of Article 10 during this phase, since its necessity test is deeply modified by the simultaneous reference to Article 17).

v. Germany, regarding neo-Nazi propaganda, is the seminal case in this approach.[16] From this moment, Article 17 will be a constant presence when the reality of the Holocaust is cast into doubt and – as we shall see – in many other instances.

The Commission makes a second, significant change to its previous interpretation of the abuse clause, broadening its scope of application. Whereas the text of Article 17 targets conduct 'aimed at the destruction of the rights and freedoms set forth' in the ECHR, the Commission extends its reach to activities that run counter to the 'basic values underlying the Convention' – that is, to 'the text and the spirit' thereof.[17]

Together with other cases concerning Nazi-related activities,[18] *Kühnen* has shaped the conceptual basis that would later be adopted in Holocaust denial cases falling under this second phase.[19] In general, in relation to all such cases, European judges demonstrate an unusual deference to the assessments undertaken at the domestic level that they – quite uncritically – adopt in their reasoning.[20] Moreover, the Commission seems to presumptively incorporate denialism into the wider class of Nazi activities, without ascertaining on a case-by-case basis whether there are elements that warrant a different treatment for the case at hand.[21] This overlapping is confirmed by decisions involving hard-core Nazi activities, in which the judges' reasoning – descending from *Kühnen* – is identical to that characterizing the Holocaust denial cases of the second stage.[22]

C *Third Stage: Article 17 as the Categorical Exclusion of Holocaust Denial from the Protection of Article 10*

1 *At the Origins of the Category: The* Lehideux *Case*

In the third phase, the Court reverts to the 'guillotine effect' of the abuse clause, which implies the categorical exclusion of a class of speech – in this case, Holocaust denial

[16] ECtHR, *Kühnen v. Federal Republic of Germany*, Appl. no. 12194/86, Decision of 12 May 1988.

[17] *Ibid.*, § 1 at 6 ('The Law').

[18] ECtHR, *B.H., M.W., H.P. and G.K. v. Austria*, Appl. no. 12774/87, Decision of 12 October 1989; ECtHR, *Ochensberger v. Austria*, Appl. no. 21318/93, Decision of 2 September 1994.

[19] ECtHR, *E.P. v. Germany*, Appl. no. 19459/92, Decision of 29 March 1993; ECtHR, *Walendy v. Germany*, Appl. no. 21128/92, Decision of 11 January 1995; ECtHR, *Remer v. Germany*, Appl. no. 25096/94, Decision of 6 September 1995; ECtHR, *Honsik v. Austria*, Appl. no. 25062/94, Decision of 18 October 1995; ECtHR, *Nationaldemokratische Partei Deutschlands v. Germany*, Appl. no. 25992/94, Decision of 29 November 1995; ECtHR, *Rebhandl v. Austria*, Appl. no. 24398/94, Decision of 16 January 1996; ECtHR, *Pierre Marais v. France*, Appl. no. 31159/96, Decision of 24 June 1996; ECtHR, *D.I. v. Germany*, Appl. no. 26551/95, Decision of 26 June 1996; ECtHR, *Hennicke v. Germany*, Appl. no. 34889/97, Decision of 21 May 1997; ECtHR, *Nachtmann v. Austria*, Appl. no. 36773/97, Decision of 9 September 1998; ECtHR, *Witzsch v. Germany (1)*, Appl. no. 41448/98, Decision of 20 April 1999. For an account of many of these decisions, see Cohen-Jonathan, 'Négationnisme et droits de l'homme', 32 *RTDH* (1997) 571, at 573–585.

[20] See, e.g., *Walendy*, *supra* note 19, at 6 ('The Law'), and *Nachtmann*, *supra* note 19, § 2, at 5–6 ('The Law') (in which the findings of domestic courts are adopted simply noting that they 'do not disclose any arbitrariness').

[21] See, e.g., *Nachtmann*, *supra* note 19, § 2, at 5–6 ('The Law') (in which the Commission justifies the application of the abuse clause by making reference to Nazism, even though the reported facts disclose a case of plain Holocaust denial).

[22] See, e.g., ECtHR, *Schimanek v. Austria*, Appl. no. 32307/96, Decision of 1 February 2000.

– from the protective umbrella of Article 10. The shift in the interpretation of Article 17 dates back to a dictum contained in the landmark case of *Lehideux and Isorni v. France*.[23] The case originated in a conviction for public defence of the crimes of collaboration with the enemy entered against the authors of an advertisement seeking to rehabilitate the memory of Marshal Pétain – head of state of Nazi-driven Vichy France – who was sentenced to death in 1945 for collusion with Germany. The government argued that the sanction was justified because, by lending credence to the 'double-game' theory – allegedly refuted by all historians – the publication aimed to distort the real meaning of Pétain's behaviour by presenting it in a favourable light.[24]

It is with regard to this issue, the historical dispute about the double-game theory, that the Grand Chamber put forward the new approach to Article 17, ruling as follows:

> The Court considers that it is not its task to settle this point, which is part of an *ongoing debate* among historians about the events in question and their interpretation. As such, it does not belong to the 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.[25]

The Grand Chamber thus revives the guillotine effect of the abuse clause, suggesting that its application would entail the content-based exclusion of a certain set of expressions from the scope of the free speech principle. As highlighted in a notable study, this interpretation of Article 17 entails a number of major 'undesirable consequences'.[26] Among others, the dismissal of the application occurs with no, or only superficial, examination of the context nor is the proportionality of state interference strictly scrutinized. Most problematic, states are relieved from the onus of convincingly justifying the restrictive measure and are thus legitimized in their repressive practices.

2 *Lehideux Principles in Practice: The Garaudy and Witzsch Cases*

While Article 17's new role was only announced in *Lehideux* but not applied, two subsequent cases on Holocaust denial demonstrated its potential. The first case ensued from the conviction of Roger Garaudy based on certain passages in his book that were considered by French courts to constitute the crimes of Holocaust denial, racial defamation and incitement to racial hatred.[27] The Court recalls with approval the precedent of *Lehideux* and goes on as follows:

> [D]enying the reality of clearly established historical facts, such as the Holocaust … undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human

[23] ECtHR, *Lehideux and Isorni v. France*, Grand Chamber (GC), Appl. no. 24662/94, Judgment of 23 September 1998. For some critical remarks, see Cohen-Jonathan, 'L'apologie de Pétain devant la Cour européenne des droits de l'homme', 38 *RTDH* (1999) 366.

[24] *Lehideux*, *supra* note 23, § 42.

[25] *Ibid.*, § 47 (emphasis added).

[26] Cannie and Voorhoof, *supra* note 15, at 68–72.

[27] ECtHR, *Garaudy c France*, Appl. no. 65831/01, Decision of 24 June 2003. For some comments thereon, see Levinet, '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', 59 *RTDH* (2004) 653.

> rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.[28]

Since the applicant's 'real purpose' was to rehabilitate the Nazi regime and the main content of his book was 'markedly revisionist,' the judges considered his expressions to run counter to the fundamental values of justice and peace.[29] Accordingly, they applied the abuse clause and rejected this part of the application as being incompatible *ratione materiae* with the ECHR.[30] It may be argued that the judgment in *Garaudy* implicitly restricts the scope of Article 17, its application seemingly requiring a racist or anti-Semitic intent, or the goal of rehabilitating the Nazi regime, in addition to the plain denial of established historical facts. The validity of this (moderately reassuring) thesis, however, is put into question by subsequent decisions.

Witzsch v. Germany (2) concerned a private letter that contained statements casting doubt on Hitler's and his party's responsibility for the extermination of Jews, the existence and magnitude of which was not questioned.[31] Since neither the existence of the Holocaust per se nor that of the gas chambers was contested, *Witzsch* cannot be considered to be a 'classic' case of Holocaust denial. That is why, in order to dismiss the case pursuant to the abuse clause, the Court had to expand the *Lehideux* principle, holding that not only the denial of the Holocaust, but also that of its 'equally significant and established circumstances', falls within the scope of Article 17.[32] It is interesting to observe that this case does not present any indicia of racism, nor do the judges uncover a pro-Nazi purpose underlying the expressions. Rather, the application of the abuse clause appears linked to 'the applicant's disdain towards the victims of the Holocaust'.[33]

This finding puts into question the earlier-envisioned hypothesis according to which Article 17 is invoked in connection with racist or Nazi-related activities. Our doubt is reinforced by the fact that, conversely, some cases concerning patently racist expressions have been dismissed pursuant to Article 10 only.[34] Hence, the categorical exclusion of Article 17 is seen to attach to Holocaust denial as such and is divorced from a finding of racism. A brief analysis of the circumstances in which Article 17 has been applied is therefore required in order to elucidate the provision's actual reach and to understand whether the ECtHR is extending it to the denial of historical facts other than the Holocaust.

3 The Scope of the Abuse Clause

This section aims to expose the subject matter of Article 17, namely, to identify the various activities that are considered to run counter to the values underlying the Convention.

[28] *Garaudy*, *supra* note 27, § 1(i), at 29 ('En Droit') (English translation of the decision's extracts available on the Court's website).

[29] *Ibid.*

[30] *Ibid.*

[31] ECtHR, *Witzsch v. Germany (2)*, Appl. no. 7485/03, Decision of 13 December 2005.

[32] *Ibid.*, § 2, at 8 ('The Law').

[33] *Ibid.*

[34] See section 3.B in this article.

A *Protection of the Democratic System*

Having in mind the collapse of democratic systems in pre-World War II Europe, the drafters of the ECHR decided to introduce a mechanism enabling democracy to defend itself – that is, the abuse clause – a provision indebted to the constitutional law concept of 'militant democracy'.[35] Thus, Article 17 was initially conceived as an additional safeguard against the threats posed by groups or individuals pursuing totalitarian aims.[36] In this early stage, its application proved to be infrequent, being the abuse clause invoked mainly in relation to expressions of Holocaust denial.[37] It was not until the new millennium that its scope of applicability was expanded, so much so that still in 2001 a distinguished scholar regretted its '*trés large sous-utilisation jurisprudentielle*'.[38] However, some principles of interpretation may be inferred from a group of cases (mostly arising from Turkey) concerning the dissolution of political parties deemed by domestic authorities to pursue anti-democratic goals.[39]

In such instances, the Court took the opportunity to emphasize that, in light of modern European history, it cannot be ruled out that the Convention's rights are relied upon 'in order to weaken or destroy the ideals and values of a democratic society'.[40] This is the *raison d'être* of Article 17[41] – a provision that accordingly confers legitimacy to the efforts undertaken by domestic authorities to ensure 'the greater stability of the country as a whole' by limiting some of the individuals' rights.[42] Hence, *wehrhafte Demokratie* (that is, militant democracy) is a political model compatible with the Convention, provided that a reasonable compromise between individuals' freedoms and limitations, enforced to defend the democratic system, is achieved.[43]

Faced with restrictive measures adopted to protect democracy, the ECtHR evaluated each case by giving utmost importance to its circumstances, notably to the historical

[35] The concept has been articulated by German philosopher Karl Loewenstein. Loewenstein, 'Militant Democracy and Fundamental Rights', 31 *American Political Science Review (Am Polit Sci Rev)* (1937) 417, 638. See also K. Mannheim, *Diagnosis of Our Time: Wartime Essays of a Sociologist* (1943); M. Lerner, *It Is Later Than You Think: The Need for a Militant Democracy* (1938; republished 1989).

[36] Le Mire, '*sub* Art. 17', in L.-E. Pettiti, E. Decaux and P.-H. Imbert (eds), *La Convention européenne des droits de l'homme* (2nd edn, 1999) 509, at 510–512.

[37] See section 2.B in this article.

[38] van Drooghenbroeck, *supra* note 14, at 543. See also Spielmann, 'La Convention européenne des droits de l'homme et l'abus de droit', in *Mèlanges Louis Edmond Pettiti* (1998) 673, at 674.

[39] ECtHR, *United Communist Party of Turkey and Others v. Turkey*, GC, Appl. no. 19392/92, Judgment of 30 January 1998; ECtHR, *Socialist Party and Others v. Turkey*, GC, Appl. no. 21237/93, Judgment of 25 May 1998; ECtHR, *Freedom and Democracy Party (Özdep) v. Turkey*, GC, Appl. no. 23885/94, Judgment of 8 December 1999; ECtHR, *Yazar and Others v. Turkey*, Appl. nos 22723/93, 22724/93 and 22725/93, Judgment of 9 April 2002; ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey*, GC, Appl. nos 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of 13 February 2003; ECtHR, *Parti Socialiste de Turquie (STP) et autres c Turquie*, Appl. no. 26482/95, Judgment of 12 November 2003.

[40] *Refah Partisi*, *supra* note 39, § 99.

[41] ECtHR, *Ždanoka v. Latvia*, GC, Appl. no. 58278/00, Judgment of 16 March 2006, § 99.

[42] *Refah Partisi*, *supra* note 39, § 99.

[43] *Ždanoka*, *supra* note 41, § 100.

and political context characterizing the concerned country[44] and to the imminence of the risk posed to democracy.[45] In this regard, it was suggested that measures directed to defend the democratic system from totalitarian activities cannot be draconian where they are taken within 'stable democrac[ies]' fully integrated into the European institutions and values.[46]

B *Racism and Other Forms of Hate Speech*

Another field in which the Court has declared the relevance of the principles embodied in Article 17 is the fight of democracies against intolerance. Until the beginning of the 21st century, Article 17 was brought into play in this field solely in connection to strictly *racist speech*,[47] whereas expressions more broadly qualified as *hate speech* were dealt with pursuant to Article 10,[48] even where they are deemed capable of inciting violence.[49]

A broader approach to Article 17 was inaugurated in 2003, when the Court held 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'.[50]

Since then, activities constituting hate speech have constantly been declared to fall outside the protection guaranteed by the ECHR. In parallel with this expansive tendency, the notion of hate speech has been likewise widened so as to comprise also expressions that do not call for unlawful conduct or acts of violence.[51] However, the abuse clause has been effectively applied only to certain categories of hate speech – that is, expressions inciting ethnic hatred[52] or motivated by anti-Semitic[53] or Islamophobic[54] purposes. In any event, the Court has failed to set out coherent guidelines on such a 'new course' for Article 17. Indeed, it has sometimes conducted its examination in accordance with the

44 See, e.g., *Refah Partisi*, *supra* note 39, §§ 105, 124–125; *Ždanoka*, *supra* note 41, §§ 121, 133; ECtHR, *Vogt v. Germany*, GC, Appl. no. 17851/91, Judgment of 26 September 1995, § 59 (ECtHR, *Kosiek v. Germany*, Appl. no. 9704/82, Judgment of 28 August 1986, §§ 26, 28–29, 33 (compare partly dissenting opinion of Judge Spielmann)); ECtHR, *Rekvénki v. Hungary*, Appl. no. 25390/94, Judgment of 20 May 1999, §§ 41, 46, 48.

45 See, e.g., *Refah Partisi*, *supra* note 39, §§ 102, 104, 108–110.

46 ECtHR, *Vajnai v. Hungary*, Appl. no. 33629/06, Judgment of 8 July 2008, § 49.

47 *Glimmerveen and Hagenbeek*, *supra* note 12; *B.H., M.W., H.P. and G.K.*, *supra* note 18; ECtHR, *Jersild v. Denmark*, GC, Appl. no. 15890/89, Judgment of 23 September 1994, § 35.

48 See, e.g., ECtHR, *Zana v. Turkey*, GC, Appl. no. 18954/91, Judgment of 25 November 1997, § 60; ECtHR, *Sürek v. Turkey (3)*, GC, Appl. no. 24735/94, Judgment of 8 July 1999, § 40; ECtHR, *Sürek and Özdemir v. Turkey*, GC, Appl. nos 23927/94 and 24277/94, Judgment of 8 July 1999, § 61; ECtHR, *Erdogdu and Ince v. Turkey*, GC, Appl. nos 25067/94 and 25068/94, Judgment of 8 July 1999, § 52.

49 ECtHR, *Sürek v. Turkey (1)*, GC, Appl. no. 26682/95, Judgment of 8 July 1999, § 62; *Sürek (3)*, *supra* note 48, § 40; ECtHR, *Osmani and Others v. 'The former Yugoslav Republic of Macedonia'*, Appl. no. 50841/99, Decision of 11 October 2001.

50 ECtHR, *Gündüz v. Turkey*, Appl. no. 35071/97, Judgment of 4 December 2003, § 41.

51 ECtHR, *Féret c Belgique*, Appl. no. 15615/07, Judgment of 16 July 2009, § 73; ECtHR, *Vejdeland and Others v. Sweden*, Appl. no. 1813/07, Judgment of 9 February 2012, § 55.

52 ECtHR, *Molnar c Roumanie*, Appl. no. 16637/06, Decision of 23 October 2012, § 23.

53 ECtHR, *W.P. and Others v. Poland*, Appl. no. 42264/98, Decision of 2 September 2004, § 2(b)(iii), at 11 ('The Law'); ECtHR, *Pavel Ivanov v. Russia*, Appl. no. 35222/04, Decision of 20 February 2007, § 1, at 4 ('The Law'). See also ECtHR, *Hizb Ut-Tahrir and Others v. Germany*, Appl. no. 31098/08, Decision of 12 June 2012.

54 ECtHR, *Norwood v. United Kingdom*, Appl. no. 23131/03, Decision of 16 November 2004, at 4 ('The Law').

ordinary test envisaged in Article 10, in spite of the fact that the speech under scrutiny belonged to one of the categories previously declared to fall outside the protection of the Convention. For example, Article 10 has been applied to expressions of anti-Semitism[55] and Islamophobia,[56] and even used in regard to racist speech,[57] which may be considered to stand at the furthest distance from the values underlying the Convention.

C *Protection of Victims' Dignity*

We have seen that the issues raised by the ECtHR's case law on Holocaust denial cannot be disposed of by simplistically arguing that such statements are penalized due to their racist or totalitarian nature. In fact, Article 17 has been applied to expressions of Holocaust denial independent of any finding of their racist tendency, while speech that is clearly racist has not always triggered the abuse clause.

The key to understanding the reasons behind the Court's tough rejection of Holocaust denial (echoed in its recent approach to other types of denialism) lies in the next category that falls within the scope of Article 17. In a number of cases, the abuse clause was construed as applying to conduct that is contemptuous of victims of serious violations of fundamental rights, with special regard to acts intended to humiliate or debase their dignity through attacks on their memory.[58]

This jurisprudence is useful to clarify the evolution concerning the application of Article 17 to Holocaust denial. While the Court's approach to the latter was initially connected to the rejection of Nazi policies, it assumes nowadays a further meaning focused on the special regard paid by the Court to the victims of serious human rights' violations. It is in this light that the application of the abuse clause to the denial of clearly established historical facts must be read. Thus, the Strasbourg institution is condemning not so much totalitarian doctrines as a disrespectful attitude towards human rights. This is confirmed by recent dicta in which the judges have foreshadowed the application of Article 17 to other types of denial, which are not limited to that of Nazi crimes.[59]

4 A Gravity Threshold in the Application of the Abuse Clause

As mentioned, Article 17 is now being interpreted as a legal instrument capable of exempting the ECtHR from examining the merits of application. This *modus*

[55] ECtHR, *Balsytė-Lideikienė v. Lithuania*, Appl. no. 72596/01, Judgment of 4 November 2008.

[56] ECtHR, *Le Pen c France*, Appl. no. 18788/09, Decision of 20 April 2010, § 1, at 7 ('En Droit') (in which the applicant described in negative terms the Muslim community as a whole).

[57] ECtHR, *Seurot c France*, Appl. no. 57383/00, Decision of 18 May 2004, at 9 ('En Droit') (in which the Court found it unnecessary to determine the applicability of Article 17, given that the case could be likewise rejected as inadmissible pursuant to Article 10(2)).

[58] See, e.g., ECtHR, *Fatullayev v. Azerbaijan*, Appl. no. 40984/07, Judgment of 22 April 2010, §§ 81, 98; ECtHR, *Fáber v. Hungary*, Appl. no. 40721/08, Judgment of 24 July 2012, § 58; *Witzsch (2)*, *supra* note 31, § 2, at 8 ('The Law'); ECtHR, *Leroy c France*, Appl. no. 36109/03, Judgment of 2 October 2008, §§ 27, 43; *Vajnai, supra* note 46, § 25, 57; see also *Lehideux and Isorni*, *supra* note 23, §§ 43, 55; ECtHR, *Orban et autres c France*, Appl. no. 20985/05, Judgment of 15 January 2005, § 52.

[59] See section 6 in this article.

iudicandi closely resembles the logic underlying content-based restrictions in the US legal system. The cases described earlier, however, demonstrate that the circumstances of the case still play a role, given that the Court has often subjected the application of the abuse clause to a threshold of gravity. For example, whereas Article 17 in *Pavel Ivanov v. Russia* and in *Garaudy* was applied on account of the 'markedly' anti-Semitic or revisionist character of the publications,[60] the Court refused in other instances to apply it because the expressions at issue were not sufficiently serious to warrant their categorical exclusion from the protection of the Convention.[61]

Considerations of gravity are also likely to have inspired implicitly other cases in which the judges centred their analysis on whether the purpose underlying the conduct was *univocally* directed at the destruction of the ECHR's rights.[62] On some other occasions, the Court's decision not to invoke the abuse clause was similarly motivated, as indicated by the judges' reference to the *indirect* character of the conduct in question.[63]

Another relevant factor in the application of Article 17 might be identified in the presence of countervailing interests that prevent the expressions from being considered as manifestly abusive. These opposing interests presumably inspired the decision to rely on the ordinary test under Article 10 in relation to political discourse[64] – a type of speech whose restrictions are normally subject to strict scrutiny.[65] They also came to light where the Court gave weight to the fact that the applicant's conduct was capable of contributing to an ongoing debate over a matter of public interest.[66]

In conclusion, if the Court has recently widened the classes of speech to which Article 17 is in principle applicable, it has also introduced a series of gravity-based criteria, thereby seeking to confine the abuse clause to exceptional circumstances.[67]

[60] *Pavel Ivanov*, *supra* note 53, § 1, at 4 ('The Law'); *Garaudy*, *supra* note 27, § 1(i), at 29 ('En Droit').

[61] See, e.g., ECtHR, *Soulas et autres c France*, Appl. no. 15948/03, Judgment of 10 July 2008, §§ 23, 48; *Féret*, *supra* note 51, §§ 52, 82. See also ECtHR, *Bingöl c Turquie*, Appl. no. 36141/04, Judgment of 22 June 2010, §§ 32, 39.

[62] *Leroy*, *supra* note 58, § 27; *Orban et autres*, *supra* note 58, § 35; *Vajnai*, *supra* note 46, §§ 25, 51–53.

[63] *Lehideux and Isorni*, *supra* note 23, § 6 (joint dissenting opinion of Judges Foighel, Loizou and Sir John Freeland, noting that the expressions were 'too indirect or remote' to disable the applicants from relying on Article 10); *Vejdeland and Others*, *supra* note 51, § 54 (and its attached concurring opinion of Judge Yudkivska joined by Judge Villiger), § 5 (suggesting that Article 17 was not applied since the statements under scrutiny 'did not *directly* recommend individuals to commit hateful acts') (emphasis added).

[64] *Le Pen*, *supra* note 56.

[65] See, e.g., ECtHR, *Wingrove v. United Kingdom*, Appl. no. 17419/90, Judgment of 25 November 1996, § 58.

[66] *Orban et autres*, *supra* note 58, §§ 49, 54; ECtHR, *Giniewski v. France*, Appl. no. 64016/00, Judgment of 31 January 2006, § 50 (observing that the applicant made a contribution to an ongoing debate 'without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought').

[67] ECtHR, *Paksas v. Lithuania*, Appl. no. 34932/04, Judgment of 6 January 2011, § 87; *De Becker c Belgique*, Appl. no. 214/56, Rapport de la Commission of 22 January 1960, § 279, p. 165.

5 Holocaust Denial *vis-à-vis* the Case Law on Article 17: Exception to an Exceptional Regime

The denial of the Holocaust – as mentioned – was initially subsumed under Article 17 due to its affiliation with the repression of Nazi-related activities, for which the abuse clause had been initially conceived. This association of Holocaust denial with Nazism, however, has never been assessed *in concreto* by European judges but only considered as an intrinsic feature of the former.[68] The Court grounded this inference on a seemingly unrebuttable presumption, often relying upon the findings of domestic courts, which were never questioned – in sharp contrast to the autonomous evaluation of the factual circumstances of the case undertaken in other free speech decisions.[69]

It is true that such a summary adjudication characterizes most Article 17-based cases. Nonetheless, we argue that the principles applied to Holocaust denial constitute as a whole an exception to the already exceptional regime envisaged under the abuse clause. Even in relation to racism and anti-Semitism – which might be placed immediately after Nazism, in a virtual ranking of activities and values at odds with Convention ideals – the ECtHR appears to have stood by gravity-based, context-sensitive criteria to limit the application of the abuse clause to extreme cases.[70]

In contrast, in Holocaust denial cases, the European judges have never verified the univocal nature of the aim of a given expression, the context in which such expression was uttered or the relevance of other opposing interests.[71] Nor have they carefully assessed whether democracy has truly been exposed to threat as a result of the applicant's conduct.[72] In addition, when the Court acknowledged the need to protect the victims' human dignity, it has held at the same time that this factor cannot alone set the limits of free speech but that it is appropriate to proceed to a balancing exercise[73] – a course of action that has never been followed in Holocaust denial cases.

In short, when it comes to Holocaust denial, the Court invariably tips the balance against freedom of expression, privileging the stability of the system and the demands of victims. Were this special regime limited to the denial of the Holocaust, it could perhaps be considered to be a minor issue, unworthy of much attention by scholars. Recalling the logic behind the *wehrhafte Demokratie*, one could even accept that a negligible area of opinion would be removed from the protection of free speech principles, provided that the abuse clause be subjected to strict conditions of applicability. However, expressions included under the notion of denialism are on the rise, encompassing the denial of a wide range of events other than the Holocaust.[74] Indeed,

[68] Temperman, 'Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech', *Brigham Young University Law Review (Brigh Young Univ Law Rev)* (2011) 729, at 729.

[69] Cannie and Voorhoof, *supra* note 15, at 82.

[70] See, e.g., *Seurot*, *supra* note 57; *Balsytė-Lideikienė*, *supra* note 55; *Jersild*, *supra* note 47.

[71] Compare section 4 in this article. On the need to guarantee the public debate on questions of historical interest, compare also *Lehideux and Isorni*, *supra* note 23, § 55; *Orban et autres*, *supra* note 58, § 52; ECtHR, *Monnat v. Switzerland*, Appl. no. 73604/01, Judgment of 21 September 2006, §§ 58, 64.

[72] Compare section 3.A in this article.

[73] *Orban et autres*, *supra* note 58, § 52; *Vajnai, supra* note 46, § 57; *Leroy*, *supra* note 58, § 27.

[74] See note 4 in this article.

Strasbourg case law provides for Article 17 to cover not only the denial of the Nazi crimes but also that of a much broader set of historical facts, once they are considered 'clearly established.'[75]

The problems raised by the Court's development in this field, therefore, are far from being unimportant or peripheral. It is not a pardonable sort of 'original sin' that we are now discussing. Rather, there is a need to reveal the dangers of case law that is potentially capable of expanding the scope of validity of criminal restrictions on freedom of expression in an area – the formation and preservation of a shared memory on a country's founding past events – that is critical to the contemporaneous demands of identity building.[76]

6 Article 17 to Cover All International Crimes? Towards a Fourth Stage in the Strasbourg Case Law

Recall that in *Lehideux* Article 17 was interpreted as covering the denial of 'clearly established historical facts.' A modification of this position surfaced already in *Garaudy* when the ECtHR made reference to the denial of 'crimes against humanity,' although in this case this different language was aimed at the same set of historical facts, namely, the Holocaust.[77] A clearer signal of the change in progress came from *Orban c France*, in which the Court declared that conduct consisting in '*justifier des crimes de guerre tels que la torture ou des exécutions sommaires*' be removed from the reach of Article 10.[78] However, it is the judgment in *Janowiec v. Russia* that appears to sanction this shift in the Court's case law on denialism: '[T]he Court reiterates its constant position that a denial of *crimes against humanity*, such as the Holocaust, runs counter to the fundamental values of the Convention and of democracy, namely justice and peace (see *Lehideux* ... and *Garaudy*).'[79] Even though the dictum is disguised as the Court's 'constant position', it confirms that the principle set forth in *Lehideux* is being abandoned through a redefinition of the scope of Article 17, which now tends to cover the denial, justification and glorification of most of the core international crimes.[80]

The applicability range of the abuse clause in relation to denialism has been recently clarified in *Perinçek c Suisse*, the first case concerning the denial of facts other than the Holocaust, notably expressions disputing the legal characterization of the Armenian

[75] See section 2.C.1 and section 6 in this article.

[76] See Nora, 'Between Memory and History: Les Lieux de Mémoire', 26 *Representations* (1989) 7; Fronza, *supra* note 3, at 7, 19. See also the articles included in the special issue 'Confronting Memories', 6(2) *German Law Journal* (2005).

[77] *Garaudy*, *supra* note 27, § 1(i), at 29 ('En Droit').

[78] *Orban et autres*, *supra* note 58, § 35, whose dictum was upheld in *Paksas*, *supra* note 67, § 88.

[79] ECtHR, *Janowiec and Others v. Russia*, Appl. nos 55508/07 and 29520/09, Judgment of 16 April 2012, § 165 (emphasis added). This finding was not questioned by the subsequent Grand Chamber's ruling of 21 October 2013.

[80] *Fáber*, *supra* note 58, § 58.

'genocide'.[81] This pronouncement marks the beginning of a reconsideration of the current state of art. Whereas the ECtHR left untouched the ad hoc regime relating to Holocaust denial, it pointed out that restrictive measures against other types of denialism cannot automatically attract the guillotine effect of Article 17, which remains confined to conduct intended to incite hatred or violence.[82]

The import of *Perinçek*, however, should not be overstated.[83] In so far as the judgment suggests that the abuse clause would still apply to expressions of contempt towards victims,[84] it aligns to earlier-described case law.[85] A case law that appears to be further confirmed in *Janowiec*. In this case, the Court deduced from the ECHR an obligation for states to exhibit an attitude of respect towards, and recognition of, grave crimes' victims, which implies, *inter alia,* a duty to assist such victims 'in obtaining information and uncovering relevant facts.'[86] Indeed, it transpires from *Janowiec* that failure to comply with this obligation amounts to activity incompatible with the Convention's underlying values, thereby falling under Article 17.[87]

This finding discloses a radical turn in the explanatory paradigm ultimately behind the ECtHR's outlook on denialism. While the veto on Holocaust denial derived from historical reasons linked to the rejection of Nazi atrocities, the present trend to marginalize the denial of a wider (and potentially infinite) range of serious past crimes relies upon a different rationale. The Court is endorsing the need – emerging from social contexts becoming increasingly heterogeneous – to erect a European identity grounded upon shared values. Among such basic ideals, a primary role is assigned to the respect for fundamental rights. It is in this light that expressing disdain towards the victims, disputing the reality of their past sufferings, is tantamount to disowning human rights as such and, accordingly, strikes at the heart of this set of values.

The perturbing nature of denialism, therefore, does not lie so much (anymore) in its capacity to erode European states' anti-totalitarian post-war foundations. Rather, it undermines the current process of re-foundation based on the values of tolerance and respect for human rights – a process that is underway, in our continent, in systems experiencing a decline of the social bonds traditionally ensured by the concept of 'nation'.

7 Abuse Clause: An Interpretative Proposal

The proposal that we are advancing does not overlook the significant role played by Article 17 in putting forward the need to safeguard the peaceful coexistence of the population within a given country – an interest typically underlying the cases in

[81] ECtHR, *Perinçek c Suisse*, Appl. no. 27510/08, Judgment of 17 December 2013 (case referred to the GC, hence not final at the time of research). See Lobba, 'A European Halt to Laws against Genocide Denial?', 4(1) *European Criminal Law Review (Eur Crim L Rev)* (2014) 59.

[82] *Perinçek*, *supra* note 81, § 52.

[83] For a more in-depth analysis on this point, see Lobba, *supra* note 81, at 67ff.

[84] *Perinçek*, *supra* note 81, § 52.

[85] See especially section 3.C in this article.

[86] *Janowiec and Others*, *supra* note 79, §§ 162–164.

[87] *Ibid.*, §§ 162, 164–166.

which the abuse clause was applied.[88] We argue that the ECtHR ought to take inspiration from the scheme adopted in the group of cases earlier subsumed under the 'second phase' of the jurisprudence on Holocaust denial.[89] The decisions would follow the ordinary necessity test envisaged by Article 10, which would be enriched by the interest of peaceful coexistence, the enhanced influence of which would be ensured by Article 17. This clause would return thus to act as an interpretative principle, notably as a medium through which certain interests linked to democratic stability penetrate the balancing test conducted pursuant to Article 10.

In this way, the framework of Article 10 would impose a thorough examination of the case as a whole, avoiding the flaws flowing from the guillotine effect, whereas the abuse clause would guarantee that states' demands are given due consideration and that an eventual rejection of the application would convey the desired 'clear message' against intolerant speech. Moreover, the ECtHR would be in a position to take into account another crucial factor, namely, the historical, social and political context in which the expression was disseminated.[90] In this regard, the denial of the Holocaust would most likely justify more room for restrictions other than forms of denialism, due to its incomparable bequest of sufferings and its occurrence in the heart of Europe. Yet – and here is the major benefit of this approach – the scope of acceptable restrictions would differ from state to state and vary according to the event that is subject to denial, the impact of the expression being dependent upon historical and social conditions specific to the country at hand.

Realistically, the proposed solution is unlikely to be adopted by the Strasbourg organ, given that it requires a *revirement* in its current case law. An alternative option – less desirable but more coherent with the Court's present stance – would endorse the interpretation according to which Article 17 should apply only to 'extreme cases,' as already admitted by the Court.[91] To do so, it is essential to rely – in all instances, not just sporadically – on the earlier-delineated selective criteria of gravity, univocal aim and countervailing interests.[92]

8 Conclusion

This article has revealed the dangers flowing from the ample interpretation given to the abuse clause by the ECtHR, especially in cases concerning Holocaust denial. It has emerged that the Strasbourg judges have envisaged that free speech could be subject to limitations not only where an expression is likely to disturb the population's physical conditions of safety and security but also where the values underlying such an expression run counter to those implied by the ECHR. In doing so, however, the Court must

[88] See, e.g., *Remer*, *supra* note 19, § 1, at 5 ('The Law'). Other similar decisions are, e.g., *Nationaldemokratische Partei Deutschlands*, *supra* note 19, at 4–5 ('The Law'); *D.I.*, *supra* note 19, § 2 ('The Law'); *Hennicke*, *supra* note 19, at 3 ('The Law').

[89] See section 2.B in this article.

[90] See *supra* notes 44–46 and accompanying text.

[91] See note 67 in this article.

[92] See section 4 in this article.

be cautious not to embark on an alarming trend of restricting speech that – though it might be disquieting for a considerable part of the audience – does not expose any tangible symptom of harm. Apart from the contradiction with the principles solemnly put forth in the landmark case of *Handyside v. United Kingdom*,[93] the risk inherent in this development is set out in a noteworthy dissenting opinion:

> *La possibilité de réglementer un discours du fait de son seul contenu et les restrictions ainsi apportées à ce discours reposent sur l'idée que certains propos vont à l'encontre de l'esprit de la Convention. Mais un 'esprit' ne propose pas des standards clairs et ouvre la porte aux abus. Les êtres humains, y compris les juges, tendent à qualifier les opinions qui ne leur conviennent pas de proprement inadmissibles et, partant, à les exclure de la sphère de l'expression protégée.*[94]

Arguing that Article 17 is in fact unnecessary in the protection of democracy and human rights, some authors have encouraged the Court 'to treat all (alleged) hate speech cases equally under the speech-protective framework provided by Article 10'.[95] From a theoretical and academic viewpoint, this clear-cut solution is undoubtedly to be shared. At the same time, however, it is indisputable that Holocaust denial, especially in certain countries, has been perceived as conduct indissolubly linked to Nazi ideology – of which it would constitute a subtle form of exaltation – and as a façade camouflaging anti-Semitic purposes. In such contexts, the unambiguous statement of incompatibility with the ECHR serves as a 'seal' of the special obligation towards the Jewish community to which states such as Germany feel bound.[96]

Nevertheless, this holds true – and perhaps renders understandable an exceptional Article 17-based reaction – only with respect to the Holocaust and only in relation to certain countries. The real danger, however, is that the scope of the abuse clause has been identified through the excessively broad and vague notion of 'activities in contrast with the Convention's values'. Such a potentially vast latitude of Article 17 risks legitimizing a wide-ranging set of restrictions on free speech in the name of an ill-defined '*morale démocratique*'.[97]

The most concerning aspect of the case law, therefore, does not lie in the categorical rejection of Holocaust denial, absent any appraisal of the context, the applicant's intent or the competing interests – which yet remains regrettable. Our critical remarks focus above all on the escalating circulation of the questionable *modus iudicandi* developed under Article 17, which was extended to a wide range of opinions that do not pose threats comparable to those raised by the primal targets of the abuse clause.

93 ECtHR, *Handyside v. United Kingdom*, Appl. no. 5493/72, Judgment of 7 December 1976, § 49.

94 *Féret*, *supra* note 51, at 26 (opinion dissidente du Juge Andràs Sajó a laquelle déclarent se rallier les Juges Vladimiro Zagrebelsky et Nona Tsotsoria).

95 Cannie and Voorhoof, *supra* note 15, at 83.

96 ECtHR, *Peta Deutschland v. Germany*, Appl. no. 43481/09, Judgment of 8 November 2012, § 49 (acknowledging Germany's special responsibility towards Jews and therefore accepting a wider latitude for restrictions on free speech); ECtHR, *Hoffer and Annen v. Germany*, Appl. nos 397/07 and 2322/07, Judgment of 13 January 2011, § 48 (according weight to the 'specific context of the German past' in evaluating the meaning of the Holocaust, a tragedy to which the modern practice of abortion had been compared).

97 The quoted expression is inspired by Wachsmann, 'Liberté d'expression et négationnisme', 46 *RTDH* (2001) 585, at 593.

It remains to be addressed, lastly, whether a unique regime is still acceptable in relation to Holocaust denial. Should the ECtHR adopt one of our interpretative proposals about Article 17,[98] the question would become moot, as Holocaust denial would be subject to a moderately exceptional regime along with other expressions falling under the scope of the abuse clause. No issue of patent disparity would thus arise, while an enhanced protection of democratic systems would continue to be guaranteed.

As for current case law, applying a unique set of rules to Holocaust denial appears to be excessively distant from the (already special) principles elaborated under Article 17.[99] It is difficult to accept that ordinary rules dealing with hate speech are not considered to be apt to confront this class of expression nearly 70 years after the Holocaust occurred[100] and in countries that have amply demonstrated their full integration among stable democracies.[101] This seems to be all the more true given that Article 10 has so far measured up to the challenges posed by insidious speech such as calls for violent action and terrorism – statements that may hardly be considered less dangerous than Holocaust denial.[102] However, if the Court truly considers that the time is not ripe to abandon its current position on Holocaust denial, it should at least refrain from making general declarations that legitimize such a unique legal regime in much broader contexts. The risk otherwise is to turn all of Europe into a *wehrhafte Demokratie*.

98 See section 7 in this article.

99 See section 5 in this article.

100 See, e.g., *mutatis mutandis*, *Lehideux and Isorni*, *supra* note 23, § 55.

101 See ECtHR, *Kosiek v. Germany*, Appl. no. 9704/82, Judgment of 28 August 1986, § 33 (partly dissenting opinion of Judge Spielmann). See also Oberndörfer, 'Germany's "Militant Democracy": An Attempt to Fight Incitement against Democracy', in D. Kretzmer and F.K. Hazan (eds), *Freedom of Speech and Incitement against Democracy* (2000) 237, at 241–242 (noting that according to modern historiography it is well established that the Weimar Republic's collapse was primarily due to complex economic and political factors, rather than weakness of constitutional rules. Symmetrically, the stability of present-day Germany has little to do with its adherence to the political model of *streitbare Demokratie*).

102 Cannie and Voorhoof, *supra* note 15, at 74–75.