

The Abuse Clause in International Human Rights Law: an Expedient Remedy against Abuse of Power or an Instrument of Abuse Itself?

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Abstract

The Strasbourg organs of the European Convention on Human Rights and Fundamental Freedoms (ECHR) have developed a tradition of applying Article 17 ECHR, the so-called abuse clause, with regard to any activity or remark directed against the Convention's underlying values. The abuse clause's main rationale is related to the prevention of abuse of power: this clause especially aims to prevent totalitarian regimes from exploiting in their own interests the principles enunciated in the Convention, which would contribute to the destruction of fundamental human rights. However, as time went by, the application of the abuse clause has become connected to the broad sphere of racial and religious discrimination, particularly Holocaust denial. As a consequence, applicants are *a priori* deprived of the protection of the treaty right(s) they rely upon. This way of working contrasts sharply with the *normal* judicial treatment by the European Court of Human Rights, which implies an examination in the light of the case as a whole, taking into account all its factual elements. The aim of this paper is to show that the abuse clause's actual application has exceeded its prime objective, is undesirable, and even risks to turn this clause into an *instrument of abuse* itself.

Key Words: Abuse clause, abuse of rights, anti-Semitism, Article 17 ECHR, democracy, discrimination, European Court of Human Rights, freedom of expression, Holocaust denial, (racist) hate speech.

1. Arise and Rationale of the Abuse Clause

The idea of an abuse clause in international human rights law for the first time originated after World War II. Simultaneously with the international concern, the basic laws of some of the protagonist Western-European war states, which had been dramatically confronted with Nazism and fascism, expressed the very concern to combat the *enemies of democracy*.¹ At the international level, the abuse clause came to life with Article 30 of the Universal Declaration of Human Rights (UDHR), and has

dictatorship, which would lead to the destruction of numerous rights enshrined in the Convention. 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 societies”.⁷ Twenty years later, in *Glimmerveen and Hagenbeek v. the Netherlands* (a case in which possession, with intention to spread, of racist pamphlets was envisaged), the Commission recalled the “general purpose” of the abuse clause, which is “to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention”.⁸

Before considering some developments in the case law of the Strasbourg organs as to the abuse clause’s application, we need to establish an understanding of the main difference due to this application, compared to the *normal* judicial treatment (this understanding will be useful for discussing the expediency of the abuse clause in chapter 4). Given that the bulk of the abuse clause’s applications is related to contested utterances, we will clarify this difference from the perspective of the right to freedom of expression (Article 10 ECHR).⁹

2. Applying the Abuse Clause v. Normal Judicial Treatment

Article 10 ECHR protects the right to freedom of expression and information. This right however is not absolute, governmental restrictions are allowed under the threefold condition that these are *prescribed by law*, pursue a *legitimate aim*, and finally, are *necessary in a democratic society* (Article 10,2 ECHR). This *necessity* must be judged “in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them”.¹⁰ This examination generally consists of a *balancing of rights*, which is the *normal* way of working of the Strasbourg organs in order to judge the necessity of a given governmental interference in the exercise of the right to freedom of expression. This balancing procedure takes into account all factual elements of the present case.¹¹

Previous studies have consistently marked two ways in which the abuse clause has been applied so far.¹² On the one hand, directly and independently, *a priori* depriving the applicant of the protection of Article 10 (*guillotine* effect). Such decision is purely content-based (no further contextual examination), and on many occasions even *prima facie* (at first sight, in admissibility decisions), hereby leaving a very broad *margin of appreciation* to the member states. This is the way the Commission applied Article 17 in the above mentioned *KPD* and *Glimmerveen* cases (for further examples, see *infra*). On the other hand, the abuse clause is regularly applied indirectly, as an interpretative aid when judging the necessity of the governmental interference under Article 10,2 ECHR. This is the way Article 17 has consistently been present in the Commission’s admissibility decisions concerning Holocaust denial (see *infra*). It occurs to us, however, that, even

the clear necessity in a democratic society of the government's actions.¹⁷ In some of these cases, the Commission explicitly qualified Holocaust denial as a type of racial discrimination against Jews.¹⁸ The European Court emphasised in *Lehideux and Isorni v. France* 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". This case however concerned statements "which are part of a continuing debate between historians", and the governmental restriction thereof was finally judged not necessary in a democratic society.¹⁹ This formulation has however been repeated in the Court's admissibility decision in *Garaudy v. France*. Garaudy wrote a book, *The Founding Myths of Israeli Politics*, which contained a chapter entitled *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 are capable of seriously troubling the public order. The Court hereby explicitly associates the fight against racism and anti-Semitism with the fundamental values protected by the Convention.²⁰ As a consequence, Holocaust denial, or doubting the crimes against humanity committed by the Nazis on the Jewish community, entails the direct application (*guillotine effect*) of Article 17.²¹ Moreover, the abuse clause has been applied similarly in some cases in which the applicant was judged to have incited hatred against the Jewish people, although no Holocaust denial occurred.²²

Next to Holocaust denial, the Court recently seemed to authorize direct and independent application of the abuse clause also with regard to other types of racism, especially Islamophobia.²³ In *Leroy v. France* (apology of terrorism), the Court implicitly held that Article 17 should be applied as a *guillotine* in cases of racism, anti-Semitism and Islamophobia.²⁴ In *Norwood v. the United Kingdom*, the applicant had displayed in the window of his first-floor flat a large poster with a photograph of the Twin Towers in flame, the words "Islam out of Britain - Protect the British People" and a symbol of a crescent and star in a prohibition sign. The Court referred to Article 17 while stating as follows:

the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such 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.²⁵

One could argue that it makes no real difference whether hate speech is treated under Article 10 or under Article 17 ECHR. Nearly all instances of state interference with racist or hate speech are deemed *necessary in a democratic society* under Article 10,2 ECHR.³¹ Hence, if not *a priori* declared intolerable via Article 17, this kind of speech would in no way withstand the threefold test under Article 10,2. In both situations, the practical consequences are tantamount: the applicant cannot rely on his right to freedom of expression. However in practice correct in almost all cases, we believe this view is legally and pragmatically deficient.

Let us consider the case of *Jersild v. Denmark*. During an interview, which was conducted by the Danish journalist Jersild, three so-called *Greenjackets* made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. The Danish courts convicted Jersild for aiding and abetting the three youngsters in making racist comments amounting to incitement to hatred by broadcasting their views, irrespective of the fact that the programme was in the context of a serious discussion on anti-immigration movements in Denmark.³² Although the Strasbourg Court implicitly seems to refer to Article 17 as to the content of the remarks (“There 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”), the case was judged under Article 10,2 ECHR: a “significant feature” of the case was that Jersild “did not make the objectionable statements himself, but assisted in their dissemination in his capacity of television journalist”. The programme’s purpose could not be said to be the propagation of racist views and ideas, hence the governmental interference was found not to be necessary in a democratic society.³³ Imagine what the outcome, and the inevitable influence thereof on the press, would have been if, according to Article 17, only the content of the speech had been taken into account:

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.³⁴

In other words, application of the abuse clause takes away the democratic guarantee from applicants to see their utterances placed and judged in their specific contexts, taking into account all factual elements of the case. More specifically towards Holocaust denial, one can question whether application of the abuse clause provides sufficient safeguards to protect historians that approach the Holocaust in a scrupulous, even critical

society. Therefore, both cases have been thoroughly examined under Article 10,2 ECHR, which in both cases has led to the judgment that the governmental interferences had not infringed Article 10 ECHR.³⁹ It is remarkable that the factual context in the *Féret* case resembles very much that in the *Glimmerveen* case (see *supra*). In the latter case, direct application of the abuse clause *a priori* deprived the applicants of the protection of Article 10 ECHR.

5. Conclusion

Although we do not approve of hate speech in any way, we strongly believe in the democratic guarantees described above, as safety mechanisms in order for European supervision not to derail. Therefore, we hold it is preferable to treat all hate speech cases equally under the *necessity* test of Article 10,2 ECHR. The European Court of Human Rights has in some recent judgments to some extent advanced to this idea, thereby again tying up with its traditional judicial approach, which consists in treating (racist) hate speech (that does not amount to Holocaust denial) under Article 10,2 ECHR. The Court however is not expected to lower its higher standard of protection against Holocaust denial and related questioning of the historical facts of World War II, which it will remain to attack directly under Article 17. Such activities are generally conceived of as so firmly contravening the spirit and values of the European Convention that no protection at all should be offered to them.⁴⁰

Undoubtedly, this particular judicial protection against Holocaust denial at the Strasbourg level 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*). This fear is reflected in the vision of some authors as is Holocaust denial part of a genocidal project itself⁴¹: history, including the Holocaust, will repeat itself, unless this project is radically stopped, amongst others through use of the abuse clause. There are, given our common Western-European past, good reasons to approach this crime with a particular respect. Moreover, we can still see the actual relevance of the original motivations underlying the abuse clause mirrored in the regaining of power by far right political wings, and therefore we acknowledge that the need to defend democracy has not diminished in any way over the years⁴². Yet, at the same time, the democratic reflections developed in this paper urge us to disapprove of a defence, and accordingly a fight against Holocaust denial, that is organised in a *blind panic* kind of way, immediately ruling out those who at first sight undermine the pillars of democracy.

Notes

¹ France, 19 April 1946; Italy, 27 December 1947; Germany, 23 May 1949. See P. Le Mire, 'Article 17', in *La Convention européenne des droits de l'homme. Commentaire article par article*, L.-E. Pettiti, E. Decaux and P. H. Imbert (eds), Economica, Paris, 1995, pp. 509-510. Fighting the *enemies of democracy* however is an idea with historical roots that even go back to the French Revolution; see also H. Dumont, P. Mandoux and A. Strowel (eds), *Pas de liberté pour les ennemis de la liberté? Groupements liberticides et droit*, Bruylant, Brussels, 2000, 508 p.

² Article 30 of the Universal Declaration of Human Rights (UDHR, 10 December 1948); see also 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); Article 54 of the Charter of Fundamental Rights of the European Union (2000).

³ For example the interventions of the Greek (Maccas), British (Maxwell-Fyfe) and Turkish (Düsünsel) representatives, see P. Le Mire, *op. cit.*, pp. 510-511.

⁴ See P. Le Mire, *op. cit.*, pp. 511-512. See also S. Van Drooghenbroeck, 'L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?', *Revue trimestrielle des droits de l'homme*, 2001, pp. 542-543.

⁵ See K. Vasak, *La Convention européenne des droits de l'homme*, Pedone, Paris, 1964, p. 71, nr. 134. As Vasak reminds us, one must not forget that Article 17 is the revelation of the political climate that governed Europe at the time of elaboration of the Convention and constitutes the European democracy's defence response to the fascist danger that had hardly been adjured and the communist threat, which was terribly present. See also J. A. Frowein, 'Incitement against Democracy as a Limitation of Freedom of Speech', in *Freedom of Speech and Incitement against Democracy*, D. Kretzmer and F. K. Hazan (eds), Kluwer Law International, The Hague, 2000, p. 36 and A. Spielmann, 'La Convention européenne des droits de l'homme et l'abus de droit', in *Mélanges en hommage à L.-E. Pettiti*, Bruylant, Brussels, 1998, p. 682.

⁶ From 1954 to the entry into force of Protocol 11 of the ECHR, individuals did not have direct access to the European Court. They had to apply to the Commission, which, if it found the case to be well-founded, would launch a case in the Court on the individual's behalf. Protocol 11, which came into force in 1998, abolished the Commission, enlarged the Court, and allowed individuals to take cases directly to it.

⁷ ECommHR, 20 July 1957, Case No. 250/57.

⁸ ECommHR, 11 October 1979, Case Nos. 8348/78 and 8406/78; see also A. Weber, *Manuel sur le discours de haine*, Council of Europe, Martinus Nijhoff Publishers, Leiden, 2009, p. 22.

⁹ Application of the abuse clause is however not restricted to Article 10 ECHR, see also ECtHR, *Lawless v. Ireland*, 11 July 1961.

¹⁰ ECtHR, *Zana v. Turkey*, 25 November 1997. See also ECtHR, *Handyside v. The United Kingdom*, 7 December 1976; ECtHR, *Lingens v. Austria*, 8 July 1986; ECtHR, *Barfod v. Denmark*, 22 February 1989 and ECtHR, *Jersild v. Denmark*, 23 September 1994.

¹¹ See also D. Voorhoof, 'Artikel 10', in *Handboek EVRM*, J. Vande Lanotte and Y. Haeck (eds), Intersentia, Antwerp, 2004-2005.

¹² See S. Van Drooghenbroeck, *op. cit.*, pp. 550-560; J. Flauss, 'L'abus de droit dans le cadre de la Convention européenne des droits de l'homme', *Revue Universelle des Droits de l'Homme*, vol. 4, 1992, pp. 462-465; Y. Haeck, 'Artikel 17', in *Handboek EVRM*, J. Vande Lanotte and Y. Haeck (eds), Intersentia, Antwerp, 2004-2005, pp. 249-258.

¹³ The Commission's way of working in cases concerning Holocaust denial is systematically the same. It strongly leans on the findings of the national courts, in some cases explicitly on the findings "as to the contents" of the applicant's publications, in order to invoke Article 17, without itself thoroughly examining all factual elements (content nor context) of the case; see for example ECommHR, 6 September 1995, Case No. 25096/94, *Otto E.F.A. Remer v. Germany*; ECommHR, 24 June 1996, Case No. 31159/96, *P. Marais v. France* and ECommHR, 21 May 1997, Case No. 34889/97, *Karl-August Henniscke v. Germany*. On occasions, also the European Court's way of working in some admissibility decisions strongly resembles that of the Commission described above, the weighty intervention of Article 17 firmly leading to the judgment of necessity in a democratic society; see for example ECtHR (Decision), 20 April 1999, Case No. 41448/98, *Witzsch v. Germany* and ECtHR (Decision), 1 February 2000, Case No. 32307/96, *Schimanek v. Austria*.

¹⁴ ECommHR, 12 October 1989, Case No. 12774/87, *B.H., M.W., H.P. and G.K. v. Austria*; ECommHR, 9 September 1998, Case No. 36773/97, *Herwig Nachtmann v. Austria*; ECtHR (decision), 1 February 2000, Case No. 32307/96, *Schimanek v. Austria*.

¹⁵ ECommHR, 12 May 1988, Case No. 12194/86.

¹⁶ For example ECtHR (decision), 18 May 2004, Case No. 57383/00, *Seurot v. France*: "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".

¹⁷ ECommHR, 29 March 1993, Case No. 19459/92, *F.P. v. Germany*; ECommHR, 11 January 1995, Case No. 21128/92, *Udo Walendy v. Germany*; ECommHR, 6 September 1995, Case No. 25096/94, *Otto E.F.A. Remer v. Germany*; ECommHR, 18 October 1995, Case No. 25062/94, *Honsik v. Austria*; ECommHR, 29 November 1995, Case No. 25992/94, *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v. Germany*; ECommHR, 24 June 1996, Case No. 31159/96, *P. Marais v. France*; ECommHR, 26 June 1996, Case No. 26551/95, *D.I. v. Germany* and

ECommHR, 9 September 1998, Case No. 36773/97, *Herwig Nachtmann v. Austria*.

¹⁸ ECommHR, 29 March 1993, Case No. 19459/92, *F.P. v. Germany*; ECommHR, 11 January 1995, Case No. 21128/92, *Udo Walendy v. Germany*; ECommHR, 6 September 1995, Case No. 25096/94, *Otto E.F.A. Remer v. Germany*; ECommHR, 18 October 1995, Case No. 25062/94, *Honsik v. Austria*.

¹⁹ ECtHR, *Lehideux and Isorni v. France*, 23 September 1998; see also ECtHR, *Chauvy v. France*, 29 June 2004 and ECtHR (decision), 20 April 1999, Case No. 41448/98, *Witzsch v. Germany*.

²⁰ ECtHR (Decision), 24 June 2003, Case No. 12194/86. For a thorough examination of this case, see M. 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*', *Revue trimestrielle des droits de l'homme*, vol. 59, 2004, pp. 653-662.

²¹ See also D. Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights', *Netherlands Quarterly of Human Rights*, vol. 25/4, 2007, pp. 647-651.

²² ECommHR, 21 May 1997, Case No. 34889/97, *Karl-August Henniscke v. Germany*; ECtHR (decision), 2 September 2004, Case No. 42264/98, *W.P. and Others v. Poland*; ECtHR (decision), 20 February 2007, Case No. 35222/04, *Ivanov v. Russia*.

²³ See also the early admissibility decision of the Commission in the *Glimmerveen* case, footnote 8.

²⁴ ECtHR, 2 October 2008: "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".

²⁵ ECtHR (decision), 16 November 2004, Case No. 23131/03.

²⁶ See also D. Keane, *op. cit.*, p. 656.

²⁷ ECtHR (decision), 16 November 2004, Case No. 23131/03, *Norwood v. The United Kingdom* and ECtHR (decision), 20 February 2007, Case No. 35222/04, *Ivanov v. Russia*.

²⁸ Under the notion *abusive use*, we understand every use for a different goal than that for which the abuse clause was authorised, see also G. Palombella, 'The Abuse of Rights and the Rule of Law', in *Abuse: the Dark Side of Fundamental Rights*, A. Sajó (ed), Eleven International Publishing, Utrecht, 2006, p. 19.

²⁹ See also D. Keane, *op. cit.*, p. 656.

³⁰ The *rule of law* is commonly understood in terms of avoiding arbitrary exercise of power, see M. Krygier, 'The Rule of Law: An Abuser's Guide', in *Abuse: the Dark Side of Fundamental Rights*, A. Sajó (ed), Eleven International Publishing, Utrecht, 2006, p. 133.

³¹ See also D. Keane, *op. cit.*, p. 661.

³² See also D. Keane, *op. cit.*, p. 652 and G. Cohen-Jonathan, '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*', *Revue Universelle des Droits de l'Homme*, vol. 7, March 1995, pp. 1-8.

³³ ECtHR, *Jersild v. Denmark*, 23 September 1994. See also D. Keane, *op. cit.*, p. 654.

³⁴ D. Keane, *op. cit.*, p. 661.

³⁵ ECtHR, *Zana v. Turkey*, 25 November 1997. See also ECtHR, *Handyside v. The United Kingdom*, 7 December 1976; ECtHR, *Lingens v. Austria*, 8 July 1986; ECtHR, *Barfod v. Denmark*, 22 February 1989 and ECtHR, *Jersild v. Denmark*, 23 September 1994.

³⁶ ECommHR, 12 May 1988, Case No. 12194/86, *Kühnen v. Germany*.

³⁷ See for example ECtHR, *Mehmet Cevher Ilhan v. Turkey*, 13 January 2009; see also ECtHR, *Soulas and Others v. France*, 10 July 2008, in which the Court deduces the proportionality of the interference out of the fact that only a fine had been imposed, and not an imprisonment sentence.

³⁸ ECtHR, 4 November 2008.

³⁹ ECtHR, *Soulas and Others v. France*, 10 July 2008 and ECtHR, *Féret v. Belgium*, 16 July 2009.

⁴⁰ See also D. Keane, *op. cit.*, p. 642.

⁴¹ See P. Wachsmann, 'Liberté d'expression et négationnisme', *Revue trimestrielle des droits de l'homme*, 2001, p. 585: "Cela atteste que la négation du génocide perpétré par les nazis et leurs complices à l'encontre des Juifs fait partie du projet génocidaire lui-même [...]"; M. Levinet, *op. cit.*, p. 653.

⁴² See also S. Van Drooghenbroeck, *op. cit.*, p. 563.

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