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Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?

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ABSTRACT

In *Handyside v. The United Kingdom*, the European Court of Human Rights (ECHR) held that the right to freedom of expression, as provided for in Article 10 of the European Convention on Human Rights protects not only expressions that are favorably received but also those that 'offend, shock or disturb'.[1] Yet, the Court has since developed a substantial body of inconsistent case-law allowing restrictions on 'hate speech' that severely questions the degree to which offensive, shocking and disturbing speech is truly protected by the ECHR. Against a qualitative and quantitative backdrop, the authors argue that the Court and previously the Commission, have adopted an overly restrictive approach to hate speech, which fails to provide adequate protection to political speech on controversial issues, including criticism of public officials and government institutions and has created an inconsistent and even arbitrary body of case law. Instead, jurisdictions that recognize a need to balance the freedom of expression with limits on hate speech have adopted more convincing approaches of hate speech, providing a robust protection of free speech while leaving room for the State to curtail the most extreme forms of non-violent hate speech.

KEYWORDS: freedom of expression, hate speech, social media, European Court of Human Rights

1. INTRODUCTION

In the seminal judgment of *Handyside v The United Kingdom*, the European Court of Human Rights (the ECtHR/the Court) held that the right to freedom of expression, as provided for in Article 10 of the European Convention on Human Rights (ECHR)[2] protects not only expressions that are favourably received but also those that 'offend,

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1 Application No. 5493/72 (ECHR 7 December 1976) at para 49.
2 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950)

shock or disturb'.[3] Yet, the Court has since developed a substantial body of inconsistent case-law allowing restrictions on 'hate speech' that severely questions the degree to which offensive, shocking and disturbing speech is truly protected by the ECHR. The point at which free speech ends and hate speech begins has become a burning issue in an age of social media, where billions of people have direct and immediate access to share instantaneous content on global fora. This has raised concerns over an epidemic of hate speech, with privately owned platforms looking to human rights law for inspiration and legitimization of their own community standards and terms of service, which typically prohibit hate speech, although definitions vary widely. The concerns have also led both the European Union (EU) and European democracies to adopt a variety of measures to counter this phenomenon. Indicative of this are, for example, the EU's Code of Conduct on Illegal Hate Speech, which requires companies to remove hate speech within 24 hours of them being reported and the 2017 German Network Enforcement Act, which places pressure on social media companies to remove hate speech at risk of 50 million Euro fines. It must be underlined that the latter has been replicated globally by authoritarian States.[4] Further, we are increasingly witnessing the scope creep of hate speech standards in democracies, as demonstrated in the low threshold adopted by the Scottish Hate Crime Bill, which is proposing, *inter alia,* the aggravation of offences by 'prejudice'.[5] The scope issue is also manifested on a social media platform level, with a plethora of community guidelines/standards having being embellished over time, adopting a less speech protective approach, whilst the number of protected characteristics therein is growing, resulting, at times, in the targeting of groups[6] that hate speech bans were supposed to protect.[7]

Accordingly, there is a pressing need for conceptual clarity and reasonably foreseeable minimum standards when it comes to defining the limits between free speech and hate speech under the ECHR. In this realm, the article is based on an analysis of the ECtHR's and the European Commission of Human Rights' (EComHR/the

3 Application No. 5493/72, Merits, 7 December 1976 at para 49.

4 Mchangama and Fiss, Justitia, '*Analysis: The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship*' (2019), available at: http://justitia-int.org/en/the-digital-berlin-wall-how-germany-created-a-prototype-for-global-online-censorship/ [last accessed 13 August 2020].

5 Mchangama and Alkiviadou, 'Hate Crime and Public Order (Scotland) Bill' (21 August 2020) *Rights!* Available at:https://rightsblog.net/2020/08/21/hate-crime-and-public-order-scotland-bill/ [last accessed 26 August 2020].

6 For a discussion on this see, *inter alia,* Hannes Grassegge, 'Facebook's Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children' (28 June 2017) *ProPublica*, available at: https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms [last accessed 26 August 2020]; Burns, 'Report: Facebook's Content Rules 'Favor Elites And Government' Over Activists, People Of Color' *Forbes* (28 June 2017), available at: https://www.forbes.com/sites/janetwburns/2017/06/28/report-facebooks-content-rules-favor-elites-and-government-over-activists-people-of-color/#b23678e6b291 [last accessed 26 August 2020.

7 For example, in Facebook's first (traceable) Terms of Service, reference was made to the review and deletion of content, which '*might be offensive, illegal, or that might violate the rights, harm, or threaten the safety of Members*'. It was also prohibited to use the service to '*harass, abuse, or harm another person*'. Today, Facebook defines hate speech a direct attack on people based on their protected characteristics (ranging from age to national origin to serious disease), whilst attack is not only a violent one but also, for example, a statement of inferiority.

Commission) approach to hate speech in a total of 60 identified cases,[8] which were decided between 1979 and 2020.[9] 57 of those cases were brought by the speakers of the speech and 3 by the targets/victims. Our analysis reveals that *62 per cent of cases brought by the speakers resulted in the applicant's loss* through a finding of non-violation of Article 10 (21 per cent), incompatible *ratione materiae* (9 per cent) or manifestly ill-founded (32 per cent). Only 38 per cent of cases brought by the speakers on the grounds of an Article 10 violation have resulted in a finding in favour of the applicant. Thus, on average, free speech restrictions have been upheld in just over one out of three hate speech cases. Motivated by these statistics, we will take a closer look at various categories of hate speech cases decided by the EComHR and now the ECtHR, to discern where the line is being drawn by Europe's top human rights court. Our qualitative and quantitative analysis demonstrates an overly-restrictive approach in the institutions' approach to hate speech, which fails to provide adequate protection to political speech on controversial issues, including criticism of public officials and government institutions. This has created an inconsistent and even arbitrary body of case law, which leaves European citizens and States at a loss on how to properly delineate the limits of hate speech. We will also demonstrate that the approach of the ECtHR is at odds with the *Travaux Préparatoires* of the ECHR and the position of most Council of Europe (CoE) States Parties during deliberations on hate speech provisions under the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR), during which European democracies were skeptical about accepting particularly wide limits on free speech, even when countering harmful hate speech. Finally, we will argue that jurisdictions that sincerely recognize a need to balance the freedom of expression with limits on hate speech have adopted narrower, clearer and more convincing definitions of hate speech, providing a robust protection of free speech while leaving room for the State to curtail the most extreme forms of non-violent hate speech.

2. TRAVAUX PREPARATOIRES: AN INTERNATIONAL PERSPECTIVE

The T*ravaux Préparatoires (Travaux)*[10] of the ECHR have served as an important supplementary source of legal clarity in guiding the Court's interpretation of rights under the Convention in several cases.[11] The Holocaust and the experience of

8 European Commission of Human Rights—7 cases and European Court of Human Rights—53 cases. The database was created in the framework of the Future of Free Speech project, a collaboration between Danish think tank Justitia, the University of Aarhus and the University of Columbia, available at: https://futurefreespeech.com/hate-speech-case-database/ [last accessed 6 December 2020].

9 We consider this to be an exhaustive list of cases that deal with speech that targets protected characteristics and/or which promotes violence or glorifies terrorism and/or which involves the promotion of totalitarianism and this is directly or indirectly related by States or the Court to be a risk to minorities and/or the State. The cases chosen are those which involve Article 10 claims or, in the case of victims, Article 8–14 cases.

10 For a comprehensive evaluation of the historical role of the Travaux Préparatoires as relied on by the Court and the Commission, see Forowicz, '*The Reception of International Law in the European Court of Human Rights*' (2010) at 58–68.

11 *Johnston and Others. v Ireland* Application No 969782, Merits and Just Satisfaction, 18 December 1986; *Witold Litwa v Poland* Application No. 26629/95, Merits and Just Satisfaction, 4 April 2000; *Sørensen and Rasmussen v Denmark* Application Nos. 52,562/99 and 52,620/99, Merits and Just Satisfaction, 11 January 2006.

totalitarian Communism in the 20th century played a pivotal role in the adoption of the International Bill of Human Rights[12] and the ECHR.[13] Unlike the provisions in the ICCPR[14] and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD),[15] which require the specific prohibition of hate speech, the ECHR does not contain such a proscription. Certain proposals were made during the drafting of what would become Article 10 ECHR, which sought to restrict (rather than prohibit) the scope of freedom of expression. For example, Turkey proposed that freedom of expression should only be permissible to the extent reconcilable with the principles set forth in the preamble to the statute of the Council of Europe.[16] The impetus of the proposal stemmed from a Turkish law that prohibited the spread of extremist propaganda.[17] The amendment was rejected on the grounds that it was 'too extensive' a restriction.[18] Greece proposed the introduction of 'special measures to deal with those who, under the pretext of expressing their opinion, have resorted to violence or else try to provoke it.[19] It was decided that such a situation was already covered by the anti-abuse provision of what would become Article 17.[20] In this regard, a prohibition on the incitement to violence as appears to have been envisaged by the Greek proposal was consciously rejected, thus leaving it to the discretion of the States themselves whether or not such expression should be proscribed by national law.

On a UN level, although the ICCPR was not officially adopted until 1966, the first draft was complete by 1949 and it was this early draft that focused on civil rights and freedoms[21] that came to influence the text before the CoE.[22] Like the ECHR, the UDHR does not contain an express provision for the prohibition of hate speech. The

12 The International Bill of Human Rights is comprised of the Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A(III), the International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, UNTS 171) and its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, UNTS 993).

13 Bates, '*The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*' (2010) at 6–8.

14 Art. 20 ICCPR provides: '1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

15 ICERD, Art. 4.

16 European Commission of Human Rights, Preparatory Work on Article 10 of the European Convention on Human Rights, Information document, Strasbourg 17 August 1956 at 9.

17 Ibid.

18 Ibid.

19 Statement of Mr. Callias, Eur. Consult. Ass. Deb. 1st Sess. 208 (September 1949) in I Collected Edition of the Travaux *Préparatoires* of the European Convention on Human Rights (1975), as cited in Farrior, 'Molding the Matrix: The Theoretical and Historical Foundations of International Law and Practice concerning Hate Speech' (1996) 14 *Berkley Journal of International Law* 1 at 65.

20 Ibid.

21 The original draft did not incorporate economic and social rights but rather focused on 'some of the fundamental rights of the individual and . . . certain essential civil freedoms' UNGA 'Draft International Covenant on Human Rights' UN Doc. A/2929, published 1 July 1955 at para 15.

22 For a concise historical oversight of the drafting of the International Bill of Human Rights, see OHCHR 'Fact Sheet No. 2 (Rev.1) The International Bill of Human Rights', available at: http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf [last accessed 15 July 2020]; UN General Assembly, Draft International Covenant on Human rights and measures of implementation: future work of the Commission on Human Rights, 4 December 1950, A/RES/421, available at: http://www.refworld.org/docid/3b00f07b58.html [last accessed 15 July 2020].

CoE States and the US had been locked in discussions with the Soviet Union and its allies, the latter of whom were insisting that the UDHR should not only protect freedom of expression but should also include specific obligations to prohibit 'fascism'.[23] Notwithstanding several renewed attempts by the Soviet delegation to have free speech restricted, no explicit proscription of hate speech was adopted. This does not mean that the European States were free speech absolutists. Instead, they were open to limits on rights such as that to freedom of expression but considered that an outright ban on what we now refer to as hate speech under international human rights law was open to abuse. This was particularly so since the proposal was coming from the Soviet Bloc and, for the West, such proposals were an effort by the former to legitimize the extensive censorship occurring at the material time in that geopolitical region rather than promoting equality and non-discrimination. Instead of an outright ban, Articles 29(2) and 30 UDHR, which can be seen to correspond to Article 10(2) and 17 ECHR respectively, were deemed to be sufficient safeguards against the abuse of freedom of expression.[24]

The text of Article 20 ICCPR proscribes the propaganda of war[25] and 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[26] When Article 20(2) was put to a vote, not a single member of the CoE States at the time voted in favour of its adoption[27] and no other Western democracy voted with the majority.[28] Several concerns were advanced regarding the free speech implications of Article 20 in its entirety. The Norwegian representative, speaking on behalf of the Scandinavian delegations, argued that freedom of expression had already been 'endangered' by the wording of Article 19 ICCPR, and that the text of Article 20[29] further jeopardized that right.[30] Not only were the delegates apprehensive about the conflicting interpretations of what might amount to war propaganda, but they also stated that 'advocacy to national hatred that constitutes incitement to hostility was so easy to misconstrue that those whom the provision was supposedly designed to protect might very well find themselves its victim'.[31] However, the concerns did not dissuade the majority as the text of Article 20(2) ICCPR was nonetheless adopted by 50 votes to 18, with 15 abstentions. [32]

23 Mchangama, 'The Sordid Origin of Hate-Speech Laws' (2011) *Policy Review* No. 170, available at: http://www.hoover.org/publications/policy-review/article/100866 [last accessed 18 July 2020].

24 Farrior, supra n 19 at 20 citing Verdoodt, '*Naissance et Signification de la Declaration Universelle des Droits de L'Homme*', (1964).

25 Article 20(1) ICCPR.

26 Article 20(2) ICCPR. See detailed discussion of the drafting history by Farrior at 21–42.

27 Against: Belgium, Denmark, The Netherlands, Sweden, UK, Iceland, Ireland, Turkey. Abstained: France, Italy, Greece, Cyprus, Austria.

28 UN General Assembly, 16th Session, Third Committee, Agenda Item 35, 5 December 1961, A/5000, p. 16, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N61/295/95/PDF/N6129595.pdf?OpenElement [last accessed 22 July 2020].

29 Originally Article 26.

30 Comments of Mr. Leiro to UN General Assembly, 16th Session, Third Committee, 26 October 1961, UN Doc. A/C.3/SR.1084, para 4, available at: https://undocs.org/A/C.3/SR.1084 [last accessed 22 July 2020]

31 Ibid. at para 5.

32 UN General Assembly, 16th Session, Third Committee, Agenda Item 35, 5 December 1961, A/5000, p. 16, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N61/295/95/PDF/N6129595.pdf?OpenElement [last accessed 22 July 2020].

The adoption of the ICERD [33] in 1965 represents the broadest international treaty basis for the prohibition of hate speech, where such speech is based on racial discrimination.[34] The drafting of the ICERD exposes a sharp political divide between Eastern and Western States with regard to the implications the Convention would have on the freedom of expression. This dichotomy of opinion was most evident in the debate over Article 4 ICERD, which was 'one of the most difficult and controversial [provisions] of the Convention'.[35] The article criminalizes, *inter alia,* the dissemination of racist ideas and the incitement to racial violence.[36] Communist States including Czechoslovakia and Poland were instrumental in advocating for the extensive criminalization of racist ideas per se, under Article 4(a), rather than having actual incitement to violence as a precondition.[37] However, several Western and South American States were concerned about the scope of Article 4 as proposed, given its potential to restrict severely free speech.[38] For example, the British delegate was adamant that freedom of expression was so fundamental in nature that it could only ever be limited to the extent that it incited violence.[39] It was on this basis that the so-called 'due regard' clause was introduced, that would see Article 4 ICERD being applied 'with due regard to the principles embodied in the [UDHR] and the rights expressly set forth in Article 5 of [the] Convention'.[40] Several Western states opted to issue declarative statements/reservations on the extent to which they were willing to enact measures for the proscription of the racist activities covered in the provision. Established democratic countries, such as France, Italy, Ireland, Switzerland and the UK were only willing to introduce criminal measures to the extent that such were necessary and insofar as they did not jeopardize freedom of expression and association.[41]

The most far-reaching provision available under the ECHR for restricting, amongst other phenomena, hate speech is Article 17, which can deny, *ab initio,* certain forms of expression. The *Travaux* illustrate the extent to which Article 30 UDHR and Article 5 ICCPR influenced its adoption, as evidenced by the numerous references made to both texts by the consultative assembly of the CoE.[42] During the preliminary debate of the article, the Greek representative argued that 'Human freedom, just because it is sacred, must not become an armoury in which the enemies of freedom can find

33 See Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination* (2006).

34 The International Convention for the Elimination of All Forms of Racial Discrimination was adopted by the UN General Assembly on 21 December 1995 in UNGA Resolution 2106 (XX), UN Doc. A/RES/2106(XX)[A-B].

35 Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (1980) at 43.

36 ICERD, article 4 (a) and 4(b) respectively.

37 Three separate proposals were introduced by the delegates with regards to Article 4: A/C.3/L.1208 (Ukraine); A/C.3/L.1220 (Czechoslovakia); A/C .3/L.1210 (Poland); Learner, supra n 35 at 46.

38 Ibid.

39 UN General Assembly, 20th Session, Third Committee, Agenda Item 58, 22 October 1965, A/C.3/SR.1315 at para 1 and 2.

40 Articles 5 (d)(vii) and 5d(viii) explicitly protect the rights of freedom of expression and assembly respectively.

41 For a full list of reservations and declarations see, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec [last accessed 17 July 2020].

42 Council of Europe, Preparatory work on Article 17 of the European Convention of Human Rights, 23 April 1957.

weapons that they can later use unhindered to destroy this freedom.'[43] He suggested that the Convention should be constructed in a way not only to prevent the tyrannical acts of those who misuse power, but also against those who misuse freedom.'[44] Similar fears were shared by the French and Italian representatives during the drafting stage of the provision, with the latter warning of the necessity to 'prevent totalitarian currents from exploiting . . . the rights of freedom in order to suppress Human Rights'.[45] Article 17 ECHR was modelled on the same rationale as the equivalent provision in the ICCPR, namely Article 5(1), which was adopted on the premise of hindering 'the growth of nascent Nazi, fascist or other totalitarian ideologies'.[46] These articles are an embodiment of the doctrine of militant democracy, initially developed by Karl Loewenstein in 1937. He argued that 'democracy and democratic tolerance have been used for their own destruction'.[47] Loewenstein held that 'every possible effort must be made to rescue [democracy], even at risk and cost of violating fundamental principles'.[48] The 'potentially expansive reach'[49] and the fact that 'a militant democracy can easily become and illiberal democracy'[50] must be borne in mind when assessing Article 17 and its impact.

In light of the *Travaux* of Articles 10 and 17 and to some extent Article 11 (freedom of association),[51] it appears that the drafters envisaged freedom of expression (and association) to be legitimately denied to movements and political parties that sought to replace democracy with totalitarian ideas, notably communism, nazism and fascism. However, there was little express support for supposition that, *individuals* whose viewpoints are offensive, bigoted or even racist should be categorically restricted under the ECHR even if several states parties had adopted various forms of laws against incitement to hatred at the time.[52] Thus, the Court's refusal to extend the protection of the ECHR to genuine totalitarian movements and parties does appear to have support in the *Travaux.* However, a substantial amount of the Court's contemporary case-law denies free speech when such speech is, for example, insulting towards groups defined by certain characteristics. This seems much more difficult to reconcile with the *Travaux*. So while the Court's well known 'dynamic' interpretation has strengthened many of the convention rights compared to their original scope, it has arguably weakened the protection of freedom of expression when it comes to 'hate speech', a concept which it has not even properly defined.

43 Comments made by Mr. Maccas (Greece) during the First Session of the Consultative Assembly of the Council of Europe, 19 August 1949, Ibid. at 2.

44 Ibid.

45 Ibid. at 6, comments made by Mr. Benvenuti during the Assembly debate, 8 September 1949.

46 UN General Assembly, Tenth Session, 1 July 1955. Un Doc. A/2929 at para 55.

47 Loewenstein, 'Militant Democracy and Fundamental Rights I' (1937) 31 *The American Political Science Review* 3 at 423.

48 Ibid. at 432.

49 Sajó, 'Militant Democracy and Emotional Politics' (2012) 19(4) *Constellations* 562at 565.

50 Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (1991) at 217.

51 The Travaux of Article 11 ECHR emphasizes the extent to which it was influenced by the drafting of the equivalent provisions in the ICCPR- Article 21 and 22 (originally Article 20 and 21). The drafting history of these articles, as annexed verbatim in the Travaux of Article 11 ECHR, exposes the conflicting proposals on whether or not fascist organizations per se should have been prohibited. See Council of Europe, Preparatory Work on Article 11 (ECHR), Strasbourg, 16 August 1956, at 13–15.

52 Lowenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31 *The American Political Science Review* 638 at 651.

3. HATE SPEECH: SEMANTICAL AND THEORETICAL OVERVIEW

A. Hate Speech: Semantics and Notions

Although there is no universally accepted definition of hate speech[53] and the ECtHR has not defined this term per se, our study revealed that the ECtHR mentioned the term 'hate speech' in 21 out of the 60 examined cases. The first case in which this term was used was that of *Sürek v Turkey* (1999). However, the Court has yet to provide any substantial definitions of hate speech. One of the Court's references to hate speech, short of any actual definition was made in *Gündüz v Turkey* (2004):

> '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'.[54]

The Court refers to the low threshold of 'insulting', which raises concerns in relation to freedom of expression. It must be noted that the Court's relationship with 'insults' has not been too clear. For example, in *Ibragim Ibragimov and Others v Russia* (2018), which involved the banning of Muslim scholar Said Nrusi's book, due to it allegedly constituting extremist literature, the Court found that, since the book depicted a moderate, non-violent, understanding of Islam, the restriction to speech was not legitimate. Importantly, it noted that:

> 'merely because a remark may be perceived as offensive or insulting by particular individuals or groups does not mean that it constitutes "hate speech." Whilst such sentiments are understandable, they alone cannot set the limits of freedom of expression. The key issue in the present case is thus whether the statements in question, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance'.[55]

In *Atamanchuk v Russia* (2020), which involved an application made by a journalist/politician after he was convicted of making statements against non-Russians, referring to them as criminals (without making any calls for violence), the Court found that:

> 'inciting hatred does not necessarily involve an explicit call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner'. [56]

53 General Recommendation No. 32 on The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination (2009) CERD/C/GC/32 at para 9.

54 Application No. 35071/97, Merits and Just Satisfaction, 14 June 2004.

55 Application Nos. 1413/08 and 28,621/11, Merits and Just Satisfaction, 4 February 2019 at para 115.

56 Application No. 4493/11, Merits and Just Satisfaction, 11 February 2020 at para 52.

Thus, in the former case, mere insult was not sufficient to prohibit speech, whereas in the latter, not only could insult be prohibited, but it was also incorporated in the framework of inciting hatred, without the nexus between insult and hatred being defined by the Court. The differential element of the cases was that in the latter, speech was directed against a particular group characterized by a particular characteristic (ethnicity). As is demonstrated in the above comparison but also in the rest of the article's analysis, this makes the Court more prone to lowering thresholds of speech protection.

In *Gündüz v Turkey*, the Court expanded on its reference to hate speech by noting 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 that spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities," "conditions," "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued'.[57]

The threshold provided for in the above paragraph is rather broad since it incorporates even the mere justification of hatred and not only its incitement as is set out in the 'hate speech clause' of the international level and namely Article 20(2) of ICCPR, which prohibits advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. At the same time, however, and given the incongruence, which exists at the international level in terms of thresholds, when it comes to racial discrimination, the above approach is in line with Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. This provides that States Parties should condemn 'propaganda . . . which attempt to justify . . . racial hatred and discrimination in any form'. Although the Court notes that it may be considered necessary in certain democratic societies to limit some forms of expression, it has yet to provide a coherent legal and/or normative extrapolation of when/where/how these limitations can or should occur. This has resulted in certain anomalies vis-à-vis the treatment of similar cases as will be demonstrated in this article.

Beyond the element of insult, which remains a contested concept, even within the jurisprudence of the Court, the above references made to hate speech are generic, offering no substantial definition of this form of speech. The closest we have come to a conceptual understanding of hate speech has been *Lilliendahl v Iceland* (2000). This case involved comments made under an online article by a citizen regarding a proposal to strengthen education and counselling in schools on matters concerning those who identify themselves as lesbian, gay, bisexual or transgender. He stated, amongst others, that:

> 'We . . . have no interest in any [expletive] explanation of this *kynvilla* [derogatory word for homosexuality, literally "sexual deviation"] . . . This is disgusting. To

57 Application No. 35071/97, Merits and Just Satisfaction, 14 June 2004 at para 40.

> indoctrinate children with how *kynvillingar* [literally "sexual deviants"] *eðla sig* ['copulate'], primarily used for animals] in bed . . . . How disgusting'.

He was subsequently charged under Article 233 (a) of the General Penal Code, which provides for a fine or imprisonment of a person who 'publicly mocks, defames, denigrates or threatens a person or group of persons' due to his/her/their protected characteristic(s), which include sexual orientation. This case was the first time that the Court posed the direct question of whether the speech amounted to hate speech within the meaning of the Court's case-law. To answer this, the Court set out an explanation of hate speech based on its previous jurisprudence, adopting a hierarchal categorization, rather than assessing the substance of what can actually fall within the framework of hate speech. The fact that no previous case had actually provided a definition of hate speech did not help the Court in this exercise. It found that hate speech falls into two categories. The first is the 'gravest forms of hate speech'[58] that are excluded from any protection through Article 17 (with no definition of what constitutes the 'gravest forms of hate speech'). The second is the 'less grave forms of hate speech',[59] which do not fall outside Article 10 but which the Court 'has considered permissible for the Contracting States to restrict'.[60] Here, the Court incorporated not only calls for violence or other criminal acts but also insults, ridicule and slander in order to combat 'prejudicial speech within the context of permitted restrictions on freedom of expression'.[61] It makes no further elaboration of what this context of permitted restriction may be, something which would have been expected given the fundamental nature of free speech in addition to the very low threshold attached to phenomena such as insult or ridicule. The Court found no violation of the applicant's freedom of expression after he had been punished for the 'serious, severely hurtful and prejudicial' statements made. Despite the fact that the term 'hate speech' is included over 20 of the cases examined, with some being form the end of the 90's beginning of the millennium, the Court waited until 2020 to set out this overview of tiers and explanation of the term (albeit without too much nuance). This 2020 positioning demonstrates that the threshold of the ECtHR is in fact low since insults can be prohibited, whilst the reference to 'prejudicial' speech is also indicative of this. Further, the Court held that determining whether speech constitutes hate speech is based on an assessment of the content of the expression and the manner of its delivery.[62] As is reflected in the jurisprudential analysis, the Court often uses these ambits to suit the State's decision in relation to protected and unprotected speech, all within a wide margin of appreciation.

(i) Hate speech: brief theoretical backdrop

Tsesis argues that hate speech 'initiates, perpetuates and aggravates socially accepted misrepresentation about outgroups'.[63] Kubler notes that victims may suffer 'emotional

58 Application No. 29297/18, Decision 12 May 2020 at para 34.
59 Ibid. at para 35.
60 Ibid.
61 Ibid. at para 36.
62 Ibid.
63 Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (2002) at 138.

pain, distress'[64] whilst Abel discusses the link between hate speech and 'humiliation, isolation and dignitary affront'.[65] A number of studies suggest that online hate speech may cause harms in terms of fear, psychological trauma and self-censorship, disproportionately affecting minorities.[66] Others look at causal links between Facebook and Twitter usage and anti-refugee and anti-Muslim hate crimes respectively, offering 'preliminary evidence that social media can act as a propagation mechanism between online hate speech and offline violent crime'.[67] Even if these studies suggest that speech may sometimes lead to real life harm, it does not necessarily follow that restrictions on free speech is an efficient remedy.[68] In a 2017 study, Ravndal demonstrated that the rise of far-right extremism in Western Europe emanates from a combination of high immigration, low electoral support for radical right political parties and the 'extensive public repression of radical right actors and opinions'.[69] Although he underlined that such repression may constitute a discouragement for persons joining extreme groups, it may also push others to follow more violent paths.[70] Several studies have shown that far-right extremists and white supremacists migrate to alternative platforms when purged from main stream social media platforms for violating hate speech rules. This includes using encrypted messaging services like Telegram, where extremists may re-connect and network with minimal publicity.[71] This may not only defeat the efforts of law enforcement but also hinder targeted counter speech, which some studies have shown to be effective in reducing hate speech.[72] The complex question is thus how to tackle hate speech and whether the restriction of the fundamental freedom of expression is the answer. There are conflicting opinions on this. Waldron's position is that the regulation of hate speech is needed in order to preserve the dignity of those who could fall victims

64 Kubler, 'How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of HumanRights' (1998) 27 *Hofstra Law Review* 366.

65 The link between dignity and hate speech has been made by authors such as Abel in *Speaking Respect, Respecting Speech* (1998).

66 Siegel, 'Online Hate Speech' in Persily and Tucker (eds), *Social Media and Democracy: The State of the Field, Prospects for Reform'* (2020) at 68.

67 Ibid. at 71

68 As discussed by scholars such as Heinze, 'Hate Speech and the Normative Foundations of Regulation' 9 *International Journal of Law in Context* 599; Bleich, 'Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany, and France' (2007) 51 *American Behavioral Scientist* 149; Van Spanje and Van Der Brug, 'The Party as Pariah: The Exclusion of Anti-Immigration Parties and its Effect on their Ideological Positions' (2007) 30 *Western European Politics* 1022. For an overview of several positions regarding harms of repression see Mchangama, 'How censorship crosses borders' (2018) *Cato: A Journal of Debate*, available at: https://www.cato-unbound.org/2018/06/11/jacob-mchangama/how-censorship-crosses-borders [last accessed 12 August 2020].

69 Aasland Ravndal, 'Explaining right-wing terrorism and violence in Western Europe: Grievances, opportunities, and polarization' (2017) *European Journal of Political Research*, available at: https://www.duo.uio.no/bitstream/handle/10852/59875/Article%2bIII%2bEJPR.pdf?sequence=1&isAllowed=y [last accessed 12 August 2020].

70 Ibid.

71 Supra note 64 and Urman and Katz (2020) 'What they do in the shadows: examining the far-right networks on Telegram' *Information, Communication and Society*, DOI: 10.1080/1369118X.2020.1803946.

72 Ibid. at 74

to such speech.[73] Critical race theorists such as Matsuda, Lawrence and Delgado also argue in favour of hate speech restrictions.[74]

We maintain that the establishment of a just and pluralist society that is free from hatred should be an objective for all; civil society, states, institutions and scholars. However, we are doubtful as to whether restriction is in fact an effective remedy, endorsing Heinze's argument that this path has 'overwhelmingly been one of repression of minority and dissenting voices'.[75] We also adhere to Weinsten's position in that allowing the restriction of hate speech and, therefore, of viewpoints, could mean that speech is 'free to the extent compatible with the state's view'[76] Moreover, recent empirical evidence suggests that while the visibility of hate speech may have been heightened, the prevalence of online hate speech is drastically exaggerated by many politicians, commentators and media reports. In 2016, Jeffrey Goldberg, the editor of the Atlantic, referred to Twitter as a 'cesspool for anti-Semites, homophobes, and racists'.[77] In his speech at the 2018 Internet Governance Forum French President Emmanuel Macron stated that 'today, when I look at our democracies, the Internet is much better used by those on the extremes. It is used more for hate speech or dissemination of terrorist content than by many others. This is the reality and we must face up to it' and warned against 'the torrents of hate coming over the Internet'.[78] However, a 2020 study concluded that 'only a fraction of a percentage of tweets in the American Twittersphere contain hate speech'.[79] A more limited study of Ethiopia showed a similarly low prevalence of hate speech on Facebook.[80] As such, when devising an approach to hate speech, the possibility and actuality of exaggeration due to enhanced visibility must be taken into account when looking at online fora whilst simultaneously having regard for the harm that hate speech can in fact cause, particularly to minorities. At the same time however, the harms that its restrictions can bring about which, as noted by Ravndal, can also include real life violence should not be disregarded. To this end, care must be taken in terms of when and why hate speech is restricted whilst, at the same time, other measures such as counter-narratives must be considered.

73 Kohl, 'Islamophobia, "Gross Offensiveness" and the Internet' 27 *Information and Communications Technology Law* 115.

74 Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (1993) at 1.

75 Heinze, 'Hate Speech and the Normative Foundations of Regulation' 9 *International Journal of Law in Context* 595.

76 Weinstein, 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech', in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (2009) 82–83.

77 The New Yorker, Ryan Lizza, 'Twitter's Anti-Semitism Problem' (19 October 2016), available at: https://www.newyorker.com/news/news-desk/twitters-anti-semitism-problem [last accessed 4 September 2020].

78 IGF 2018 Speech by French President Emmanuel Macron, available at https://www.intgovforum.org/multilingual/content/igf-2018-speech-by-french-president-emmanuel-macron [last accessed 9 September 2020].

79 Siegel, 'Online Hate Speech' in Nathaniel Persily and Joshua A. Tucker (eds) '*Social Media and Democracy: The State of the Field, Prospects for Reform*' (2020) at 66.

80 Ibid.

4. HATE SPEECH: A JURISPRUDENTIAL ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Article 10 ECHR guarantees everyone the right to freedom of expression. This right is subject to limitations, including the protection of the reputation or rights of others. While Article 10 provides States the *right* to limit freedom of expression subject to certain conditions, it does not include an explicit *obligation* to do so, though *Aksu v Turkey* (2012) and *Beizaras and Levickas v Lithuania* (2020) discussed below seem to have altered this. So, the ECHR differs from legal instruments such as Article 4 ICERD or Article 20 ICCPR as it does not include any express obligation to prohibit or criminalize speech. However, this has not prevented the old Commission and the Court from allowing the prohibition of what States have deemed to constitute hate speech.

A. Holocaust Denial and Anti-Semitism

The Commission and the Court's blanket refusal to offer any Convention protection to ideas related to National Socialism also manifests itself in the Court's case-law on Holocaust Denial. During our consideration of hate speech jurisprudence before the EComHR and the ECtHR, we found that Article 17 was used in 15 of the 60 cases.[81] The heightened use of the article when it comes to the ambit of Nazism, either in the form of genocide denial or anti-Semitism is evident from the below chart is indicative of a certain hierarchy of protection developed by the Court.

When it comes to Holocaust revisionism or negationism, numerous applications have been declared manifestly ill-founded or incompatible *rationae materiae* with the Convention. In a series of cases in the 1990s[82] before the EComHR, the applications were excluded on Article 17 grounds. Within the ECtHR, some cases have been dealt with by Article 17 and others by Article 10. In the illustrative case of *Garaudy v France* (2003),[83] the applicant published a book that rejected the Holocaust, claiming it to be 'a myth dressed up as history and the political mileage gained from it'.[84] Garaudy's domestic convictions for denying crimes against humanity, racial defamation and incitement to racial hatred were held not to have been a breach of his freedom of expression as the underlying content was removed from protection under Article 17. The Court noted that there is 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'.[85] The Court made the link between Holocaust Denial and hatred by holding that 'the real purpose being to rehabilitate the National Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them'.[86]

81 Seven were decided for by the EComHR and eight by the ECtHR.

82 *Remer v Germany* Application No. 25096/94, Admissibility decision (EComHR) 6 September 1995; *Nachtman v Austria* Application No. 36773/97, Admissibility decision (EComHR) 9 September 1998; *Marais v France* Application;No. 31159/96, Admissibility Decision (EComHR) 24 June 1996); *Honsik v Austria* Application No. 25062/94, Admissibility Decision (18 October 1995).

83 Application No. 65831/01, Merits 24 June 2003.

84 Ibid.

85 Ibid.

86 Ibid. at para 23

As originally enunciated in the earlier case of *Lehideux and Isorni v France* (1998), historically revisionist commentary on the existence of the Holocaust is systematically precluded from Convention protection.[87] However, jurisprudence involving Holocaust denial or negation is difficult to reconcile with the Court's insistence in other types of cases that 'it is an integral part of freedom of expression to seek historical truth',[88] and that 'it is not its role to arbitrate the underlying historical issues',[89] In *M'Bala M'Bala v France* (2015), the applicant, a comedian, put on a performance during which he invited an academic, who had received a number of convictions in France for his negationist and revisionist opinions to join him on stage at the end of the show. The applicant called up an actor wearing a pair of striped pyjamas with a yellow star bearing the word 'Jew'—to award the academic a 'prize for unfrequentability and insolence'. The applicant was charged and found guilty of public insults directed at a person or group of persons on account of their origin or of their belonging, or not belonging, to a given ethnic community, nation, race or religion. The Court found that the performance was highly anti-Semitic, supported Holocaust denial and that the offending scene could not be regarded as entertainment but, rather, as a political engagement. The Court noted that art or humour did not provide any more protection to Holocaust denial than regular expression.[90] Through the use of Article 17, the Court found the application incompatible *ratione materiae*. As with other Holocaust denial cases, there was no substantial examination of the alleged harm in the expression, with a disregard for issues such as the impact on the audience and the probability that they chose to watch the particular comedian.

Perhaps the most far-reaching decision on Holocaust denial is *Witzsch v Germany*.[91] Here the Court found that the applicant's freedom of expression had not been violated when he was prosecuted for having, in the context of a *private* letter, denied the responsibility of Hitler and the Nazi party in the Holocaust, though he did not deny the occurrence of the Holocaust itself. In upholding the national court's determination that such sentiment 'disparaged the dignity of the deceased' and in so doing exposed 'the applicant's disdain towards the victims', the Court held that the expression was not protected by virtue of Article 17 ECHR.[92] Without proffering any explanation, the Court simply declared 'irrelevant' the fact that the comments had been confined exclusively to a private letter. One would duly imagine that the limited audience the (alleged) sentiment reached i.e. the letter's individual recipient, would mitigate the risk of widespread harm. The expression was made as an individual assertion, as opposed to it being part of the propaganda of a National Socialist movement as envisaged in the drafting of Article 17. It thus appears difficult to positively correlate the assertions made in a private letter from one person to another about a historical event with the purpose of Article 17. In more recent cases, such as *Williamson v Germany* (2019) and *Pastörs v Germany (2020)*, the applicants had denied the Holocaust during an interview

87 Ibid.at para 47

88 *Giniewski v France* Application No. 64016/00, Merits and Just Satisfaction, 31 January 2006 at para 51, quoting *Chauvy and Others v France* Application No. 64915/01, Merits 29 September 2004 at para 69.

89 Ibid.

90 Application No. 25239/13, Merits 20 October 2015 at para 39.

91 Application No. 7485/03, Admissibility 13 December 2005.

92 Ibid. at para 3.

and a (political) speech respectively. Both applications were found to be manifestly ill-founded, with only the latter conducting some form of assessment under Article 10 but also incorporating the relevance of Article 17 in a blended manner. No clarity exists on the variation in approaches between the two similar cases.

One may be tempted to make sense of the decision in Holocaust denial cases as a misplaced yet well-meaning paternalistic attempt by the Court to protect the memory of victims and plight of the survivors of the Holocaust. Unfortunately, the Court's stance with regard to other genocides suggests an arbitrary and inconsistent standard when determining the accuracy of historical events and the protection to be afforded to victims. A prime example of this is *Perinçek v Switzerland*, where the applicant's prosecution for publicly describing the Armenian genocide as 'an international lie' was found to be in violation of Article 10.[93] The Court was influenced by the lack of legal consensus within Europe as to whether the denial of the Armenian genocide was punishable by national law. The applicant had not denied the massacre of the Armenian population between 1915 and 1919 as such, but rather refuted its status as genocide. In recognizing that a discussion of the events was a matter of public interest, the Court highlighted that the determination should be made by 'historical research, [which] is by definition controversial and debatable and does not lend itself to definitive conclusions or objective and absolute truths'.[94] This approach was never followed in regard to the Holocaust. The Court was willing to distinguish its rulings that had upheld restrictions on Holocaust denial because, according to it such denial was the main cause of Anti-Semitism.[95] In terms of the speech uttered in the Swiss case, the Court provided that:

> 'taking into account the overall thrust of his statements, [the Court] does not perceive them as a form of incitement to hatred or intolerance. The applicant did not express contempt or hatred for the victims of the events of 1915 . . . He did not call the Armenians liars, use abusive terms with respect to them, or attempt to stereotype'.

Nowhere in cases related to the Holocaust is such a nexus looked for, namely whether the speech does constitute incitement to hatred or intolerance.[96] In fact, the Court recognized that in relation to the Holocaust, 'for historical and contextual reasons', the link between Holocaust denial and hatred or intolerance has 'invariably been presumed'.[97] Although it did not adequately extrapolate on why and how this is so and why it is not so in terms of the Armenian genocide, it did do something else. It spoke in temporal and spatial terms, namely that the events had taken place about 90 years previously. It also stated that such hatred or intolerance could not arise given that the applicant was speaking in Switzerland about something that had happened in the Ottoman Empire. Such contextual distinctions and investigations are lacking when it comes to case-law

93 Application No. 27510/08, Merits and Just Satisfaction, 15 October 2015.
94 Ibid. at para 117.
95 Ibid. at para 119.
96 Ibid. at para 233.
97 Ibid. at para 235.

related to National Socialism and Holocaust denial. The authors are of the opinion that this sharp contrast in standards indirectly disparages the memory of the victims of the Armenian Genocide in comparison to the victims of the Holocaust. This was also the opinion of Judges Vučinić and Pinto de Albuquerque, who maintained, in their joint partly dissenting opinion that 'the sufferings of an Armenian because of the genocidal policy of the Ottoman Empire are not worth less than those of a Jew under the Nazi genocidal policy. And the denial of Hayots Tseghaspanutyun . . . or Meds Yeghern . . . is not less dangerous than Holocaust denial'.[98]

While no serious historian would question the historical truth of the Holocaust, the Court's refusal to protect Holocaust denial or trivialization undermines the very foundation on which the documentation of the crimes of the Holocaust is based, namely, academic freedom. While the Court has not gone as far as to identify the criminalization of Holocaust denial as a positive obligation, as things stand, the Court's doctrine creates a double standard according to which the Holocaust alone is protected from denial or trivialization. The dangers of this unprincipled and arbitrary approach is highlighted by the tendency of illiberal regimes like Russia or weak democracies like Ukraine to adopt memorial laws protecting specific nationalist version of historical truth.[99]

The Court has also dealt with anti-Semitism as a standalone issue and, as with many of the denial cases, relied on Article 17. In *Ivanov v Russia* (2007), the applicant, a newspaper editor, was convicted for a series of publications in his newspaper, which called for the exclusion of Jews from social life, alleging the existence of a causal link between social, economic and political discomfort and the activities of Jews. The Court followed *Norwood,* discussed below, finding that the speech constituted a 'general and vehement attack on one ethnic group' and that, since this is against the 'underlying values of the convention,' the Court ousted the application through Article 17. In *Balsytė-Lideikienė v Lithuania* (2009), the targets were both Jews and Poles. This case involved an application by an owner of a publishing company, which published the 'Lithuanian Calendar'. The applicant complained that her right to freedom of expression had been violated after she received an administrative warning and her calendar was confiscated and its distribution banned. Statements in the calendar included: 'Through the blood of our ancestors to the worldwide community of the Jews', '... executions against the Lithuanians and the Lithuanian nation, carrying out pro-Jewish politics'. The ECtHR endorsed the position of the national courts noting that: 'the courts agreed with the conclusion of the experts that a biased and one-sided portrayal of relations among nations hindered the consolidation of civil society and promoted national hatred'.[100] The Court found no violation of Article 10 since it considered the passages to incite hatred against Poles and Jews. It made no explanation of why it endorsed the above position and what the nexus between the statements and the alleged harm actually was or what, for example, 'the consolidation of civil society' means. It is unclear why

98 Ibid. joint partly dissenting opinions of Judges Vučinić and Pinto de Albuquerque, at para 22.

99 Mchangama, 'First They Came for the Holocaust Deniers, and I Did Not Speak Out' *Foreign Policy* (2 October 2016), available at: https://foreignpolicy.com/2016/10/02/first-they-came-for-the-holocaust-deniers-and-i-did-not-speak-out/ [last accessed 9 September 2020].

100 *Balsytė-Lideikienė v Lithunia* Application No. 72596/01, Merits and Just Satisfaction 2 February 2009 at para 80.

there is a discrepancy between the choice of articles between the above two cases, with one possibility being that the Court did not find the statements in the calendar to constitute 'a general vehement attack'. However, this is just a supposition as the Court has never actually elucidated the meaning of this statement that has been used to trigger Article 17.

When discussing anti-Semitism and Holocaust denial, it is also significant to view cases involving Nazism as an ideology for purposes of ascertaining a well-rounded view of the Commission and Court's position vis-à-vis speech related to Hitler's atrocities and comparing that position with other atrocities and totalitarian ideologies. Nazism, and its incompatibility with the values of the ECHR has been dealt with in a number of Commission cases. In *B.H., M.W., H.P and G.K v Austria* (1989), the applicants had been convicted for performing activities inspired by National Socialist ideas, including the preparation and promotion of pamphlets suggesting that the killing of six million Jews by the Nazis was a lie. The Commission relied on Article 17, finding the application manifestly ill-founded on the grounds that prohibiting the expression of National Socialist ideas is lawful not only due to Austria's historical past but also the 'immediate background of the Convention'.[101] Prohibiting such speech was deemed necessary in 'interests of national security and territorial integrity as well as for the prevention of crime'.[102] The Commission did not extrapolate on the link between the impugned speech and the pursued aims such as the preservation of national security, nor did it make a legal or normative correlation between the history of the Convention and the decision.

Turning to the Court, it appears to have followed the position of the Commission. In *Schimanek v Austria* (2000), the applicant had been arrested on the suspicion of having performed activities inspired by National Socialist ideas. He was sentenced to eight years' imprisonment. Here, the Court relied on Article 17, holding 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'. Once again, the real and actual risk and/or harm of the applicant's activities were not examined (either contextually, legally or practically). To consider the Court's position further, three cases involving totalitarian symbols will be looked at.

In *Vajnai v Hungary* (2008), the applicant had been convicted for wearing a five-pointed red star, which, according to the Government, symbolized a one-party dictatorship. The applicant contended, *inter alia,* that the star was a symbol of the international workers' movement, and that, in any case the promotion of communism, unlike fascist propaganda, had not been outlawed by international law (Hungary was the only CoE state to prohibit communist symbols). In finding a violation of the applicant's freedom of expression, the Court was influenced by the fact that two decades had passed since the fall of communism in Hungary, and that the country had transitioned to a stable democracy. In agreeing with the applicant that the red star was capable of having multiple meanings, the Court did not find that the blanket prohibition of the symbol

101 *B.H., M.W., H.P and G.K v Austria* Application No. 12774/87, Admissibility decision (EComHR) 12 October 1989.

102 Ibid.

represented the pressing social need required to restrict political speech.[103] The Court chose to highlight 'the right to offend, shock or disturb',[104] whereby any restriction of freedom of expression 'must be narrowly interpreted'[105] and 'the necessity for any restrictions must be convincingly established'.[106] The contextualized approach of the Court in relation to Hungary's history whilst nevertheless reiterating the significance of freedom of expression merits particular attention:

> 'The Court is of course aware that the systematic terror applied to consolidate communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe . . . It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression . . . To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto'.[107]

In *Fáber v Hungary* (2012), the Court dealt with a complaint following the fining of an individual for displaying the striped Árpád flag,[108] which has controversial historical connotations, less than 100 metres away from a demonstration against racism and hatred. The Court found that, since the applicant had not behaved violently or abusively and had not posed a threat to public order, he should not have been sanctioned for merely displaying the Árpád flag. The Court built on the above case involving the display of the red star and reiterated its *Vajnai* findings. It noted that:

> 'even assuming that some demonstrators may have considered the flag as offensive, shocking, or even "fascist," for the Court, its mere display was not capable of disturbing public order or hampering the exercise of the demonstrators' right to assemble as it was neither intimidating, nor capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons. The Court stresses that ill feelings or even outrage, in the absence of intimidation, cannot represent a pressing social need for the purposes of Article 10(2), especially in view of the fact that the flag in question has never been outlawed'.[109]

This case maintained a comparatively high protection of freedom of expression given that the applicant was standing at the steps leading to the Danube embankment, the location where in 1944/1945, during the Arrow Cross regime, Jews were exterminated in large numbers. That he was standing at that particular location holding a flag could be deemed to reject democratic principles. As noted in the dissenting opinion of Judge Keller, if one takes into account the fact that in previous cases involving Holocaust

103 Application No. 33629/06 Merits and Just Satisfaction, 8 October 2008 at paras 51–54.
104 Ibid. at para 46.
105 Ibid.
106 Ibid.
107 Ibid. at para 57.
108 The flags' roots go back more than 800 years to a medieval dynasty. However, the flag was expropriated by the notorious Hungarian Arrow Cross Party, whose Nazi-installed puppet regime in late 1944 began murdering thousands of Jews. This is not an illegal symbol in Hungary.
109 Application No. 40721/08, Merits and Just Satisfaction, 24 July 2012 at para 56.

denial and related issues, the Court and the Commission have repeatedly found that such speech should not be afforded Convention protection, the rationale behind allowing this flag is striking.[110] The Court did recognize that where an applicant expresses contempt for victims of totalitarian regimes, this may call for an application of Article 17, but it declared that 'it is satisfied that in the instant case no such abusive element can be identified'.[111] Unfortunately the Court did not actually substantiate on how it reached its findings in relation to this whilst there is no explanation of why a symbol was treated differently to other forms of expression that are linked to Nazism such as revisionist or negationist speech in relation to the Holocaust.

The two cases demonstrate that freedom of expression, as manifested in the use of what can be perceived as totalitarian symbols, can only fall outside the scope of Article 10 if they cause intimidation. This is a much higher threshold of protection in comparison to other forms of speech. However, this approach was not followed in the more recent case of *Nix v Germany* (2018). The applicant had a blog on which he wrote about certain matters concerning economics, politics and society. In 2014, he published a series of blog posts about the interaction between the employment office and his daughter. He was arguing that his child was unduly pushed towards vocational training by the employment office. He wrote a post under the heading '[Name of the staff member] offers "customised" integration into the low-wage [economy]'. He placed a picture Heinrich Himmler, showing him in SS uniform, with the badge of the Nazi party (including a swastika) on his front pocket, and wearing a swastika armband. He was convicted for using symbols of unconstitutional organisations. The Court accepted that the applicant did not seek to spread totalitarian propaganda, to incite violence, to utter hate speech or to intimidate.[112] Nevertheless, in finding his application was manifestly ill-founded, the ECtHR noted that:

> 'In the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis. The Court considers that the legislature's choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace (also taking into account the perception of foreign observers), and to prevent the revival of Nazism must be seen against this background'.[113]

The Court strayed away from the threshold of intimidation and disregarded its previous positioning in terms of subjecting the freedom of expression to the heckler's veto. What makes the Court's difference in treatment more perplexing is the distinction between the manner in which Nix used the Nazi symbols (in comparison to their use in Fáber). He was using his blog to record the experience of his daughter with the Employment Office, wanting to contribute to a debate of public interest. In these specific circumstances, Germany's use of the relevant law essentially operated as a

110 Ibid. Dissenting Opinion of Judge Keller.
111 Application No. 40721/08, Merits and Just Satisfaction, 24 July 2012 at para 58.
112 Ibid. at para 51.
113 Ibid. at para 47.

form of 'sedition' law, criminalizing vehement and hyperbolic criticism of government officials. Another significant issue is the manner in which context was approached. In *Vajnai,* the Court recognised the 'terror' and 'scar' left by communist regimes in countries such as Hungary but also recognised that these emotions were not sufficient to limit Article 10. This reasoning was not extended to the emotional impact of Nazism in *Nix*. Instead, a particular reference was made by the Court to the right of countries such as Germany to blanket ban all manifestations linked to that particular regime because of the horrors they experienced under it.

Apart from *Fáber,* which can, at least indirectly, be linked to Nazism, in the rest of the abovementioned decisions regarding National Socialism, the Commission and the Court have refrained from any scrutiny of the national authorities' categorization of the applicants' views. Rather, both bodies endorse a rhetorical approach with little coherent analysis of the actual harm in the impugned speech, the practical link between the expression and the actual ideology and the danger that this speech may cause to the democratic order. The discussion conducted, for example, by the Court in *Vajnai* in relation to the temporal framework of Communism and particularly the fact that 20 years had passed since that regime finds no equivalent in cases involving Nazism. Whilst this is not a quantitative or qualitative comparison of totalitarian regimes, such analyses would be necessary throughout the board of cases for purposes of maintaining a certain fundamentality to the freedom of expression. As Mendel duly points out:

> '[i]n those cases in which the European Commission or Court has approved of a hate speech conviction, they often spend very little time analyzing the impugned speech itself, providing little legal analysis for their holding. It sometimes appears that the decision hinges primarily on whether the content and intent of the speech in question *appears* to be of a racist character, rather than the application of a legal test . . . .'[114]

Whilst this rings true of hate speech cases before the CoE bodies, it is particularly apt in case-law involving National Socialism, most probably due to the very background and history of the Convention itself. This argument, vis-à-vis a certain rhetorical approach in relation to National Socialism, is strengthened when considering case-law involving Holocaust denial. Another interesting point in this realm is the differential dealing of Communism and Nazism. So, for example, although in 1959 the EComHR used Article 17 to oust the application of the Communist Party of Germany[115] from Convention protection, by 2008 and in *Vajnai*, the Court made an interesting observation when discussing the law banning totalitarian symbols:

> 'Hungary has become a member State of the European Union, after its full integration into the value system of the Council of Europe and the Convention.

114 Mendel, 'Does International Law Provide for Consistent Rules on Hate Speech?' in Michael Herz and Peter Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Response* (2012) at 422.

115 *Communist Party of Germany v The Federal Republic of Germany* Application No. 250/57, Admissibility decision, 20 July 1957.

> Moreover, there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the communist dictatorship'.[116]

Despite the harrowing effect of communist dictatorships, with over 20 million victims in the European region alone,[117] the Court contextualized and appraised the risk of the danger in the restoration of a communist dictatorship. This is something which it has not done in relation to cases involving National Socialism. As such, speech related to Nazism, the denial of its atrocities and anti-Semitism have experienced the most use of Article 17, demonstrating a hierarchy of significance granted by the ECtHR to perceived or actual victims of hatred.

(i) Ethnic and religious hate

In the early case of *Glimmerveen and Hagenbeek v The Netherlands*,[118] a Dutch politician distributed a leaflet that included statements such as: 'as soon as the Nederlandse Volks Unie will have gained political power in our country, it will put order into business and, to begin with will remove all Surinamers, Turks and other so-called guest workers from the Netherlands . . '. [119] The EComHR held that the speech contained elements of racial discrimination, which is prohibited by the ECHR and international agreements. It found this ground to be sufficient to render the application manifestly ill-founded under Article 17. The EComHR referred to Article 14 in its judgment, an approach that neither it nor the Court has followed in later cases involving racist speech.

In *Šimunić v Croatia* (2019), the applicant was a football player who addressed the spectators at a match by shouting 'For Home' and when the spectators had replied 'Ready' the applicant repeated the same three more times. The national courts held that the said expression, irrespective of its original Croatian literary and poetic meaning, had been also used as an official greeting of the fascist Ustashe movement and totalitarian regime of the Independent State of Croatia. The national courts also held that the Ustashe movement had originated from fascism, based, *inter alia*, on racism, and thus symbolized hatred towards people of a different religious or ethnic identity and the manifestation of racist ideology. The applicant received a fine of about EUR 3300. Here the ECtHR noted that:

> 'the nature of the fine imposed on the applicant and the context in which the applicant shouted the impugned phrase, struck a fair balance between the applicant's interest in free speech, on the one hand, and the society's interests in promoting tolerance and mutual respect at sports events as well as combating discrimination through sport on the other hand, thus acting within their margin of appreciation'.[120]

116 Application No. 33629/06 Merits and Just Satisfaction, 8 October 2008 at para 49.
117 Courtois et al, *Le Livre Noir du Communisme: Crimes, Terreur, Répression* (1997).
118 Applications nos. 8348/78 and 8406/78, Admissibility Decision, 11 October 1979.
119 Ibid.
120 Application No. 20373/17, Decision 22 January 2019 at para 45.

The Court dealt with the real and actual impact of the speech in a narrative manner, not explaining how the balancing exercise was conducted or how the restriction actually reflected a pressing social need, beyond reiterating what the national courts found and adding some rhetoric, in this case, the need to fight racism in sport.

The Court has been faced with a number of cases of speech targeted towards Muslims. This form of hatred, unlike anti-Semitism has habitually been dealt with under Article 10, apart from one exception. Since the majority of relevant cases involved elements of political speech, a couple of pointers must be put forth regarding the protection, which this form of speech enjoys. The ECtHR's jurisprudence demonstrates a particularly high value granted to political speech. In *Lingens v Austria*, the Court found that freedom of political debate 'is at the very core of the concept of a democratic society',[121] with *Wingrove v The United Kingdom* noting that there is little scope under Article 10(2) to restrict political speech or issues of public interest.[122] The Court reminds us that the right to hyperbolic and provocative language and speech is a central part of political speech and, in this light, polemical,[123] sarcastic[124] and satirical[125] language is permitted.

With the above in mind, we proceed with the cases involving Islamophobic hate speech. *Norwood v the United Kingdom* (2004) concerned a regional organizer of the far-right British National Party, who was fined for putting up a poster of the Twin Towers in flames, with the words 'Islam out of Britain – Protect the British People' and a symbol of a crescent and star in a prohibition sign in the window of his home shortly after 9/11. In finding the case inadmissible, the Court held that the expression was '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',[126] The complaint was deemed to amount to an abuse of the ECHR under Article 17 and thus did not enjoy the protection of Article 10. Though possible, it is by no means clear that the words 'Islam out of Britain' entailed an attack on all Muslims rather than an attack on Islam as a religion, as was contended by the applicant. In any event, the Court spent no time in explaining that the facts actually met the intended threshold of Article 17. This is the only case involving Islamophobia in which the Court has invoked Article 17. Whilst the hierarchy created by the use of this article for anti-Semitism as discussed above is by no means satisfactory, its use in *Norwood* enhances the chilling effect on speech since no analysis under Article 10 took place. It is therefore submitted that the actions of the applicant ought to at least have been assessed under Article 10(2), to determine

121 Case-law includes, amongst others: *Lingens v Austria* Application no. 9815/82, Merits and Just Satisfaction 8 July 1986 at para 42; *Özgurluk v Dayanisma Partisi v Turkey* (ÖDP v Turkey) Application No. 7819/04, Merits and Just Satisfaction, 10 May 2012 at para 28; *Mouvementr Raelien Suisse v Switzerland* Application No. 16354/06, Merits and Just Satisfaction,13 July 2012 at para 46.

122 Application No. 17419/90, Merits and Just Satisfaction, 25 November 1996 at para 58; *Surek v Turkey no. 1* Application No. 26682/95, Merits and Just Satisfaction 8 July 1999 at para 6; *Mouvement Raelien Suisse v Switzerland* Application No. 16354/06, Merits and Just Satisfaction 13 July 2012 at para 61.

123 *Lopes Gomes da Silva v Portugal* Application No. 37698/97, Merits and Just Satisfaction, 28 September 2000 at para 35.

124 *Katrami v Greece* Application No. 19331/05, Merits and Just Satisfaction, 6 December 2007.

125 *Eon v France* Application No. 26118/10, Merits and Just Satisfaction, 14 June 2013 at para 61.

126 Application No. 23131/03, Admissibility Decision, 16 November 2004.

whether his conviction of aggravated hostility towards a religious group satisfied the test for legitimate restriction, including whether such was necessary in a democratic society. The applicant's argument that 'criticism of religion is not to be equated with an attack upon its followers' was not even considered by the Court, which instead deferred to the conclusion of the British courts that the expression was rather 'an attack on all Muslims in [the UK]'. The Court's judgment suggests that religious sensitivities, as so defined by the respondent State, should be prioritized at the cost of free speech.

The context of the impugned expression at issue in *Norwood*, namely the proximity to the attacks of 9/11, could reasonably have been expected to spark significant public debate, both constructive and hostile, with regard to the threat of terrorism. However, rather than recognizing the importance of allowing free debate on an issue of great public interest, the courts, both national and European, chose to adopt a disproportionate and highly restrictive approach, using ill-reasoned paternalism as a *carte blanche* for restriction. The temporal proximity between this case and the attacks on the twin towers may also have led to the different outcome in *Norwood* and similar cases. This is unacceptable given that the legitimacy of restricting the fundamental right of free speech should be governed by legal certainty rather than *ad hoc* contextual sensitivity.

Féret v Belgium (2009) involved the leader of a nationalist Belgian party who was banned from political office for 10 years for writing and disseminating publications that included statements such as 'stop the Islamization of Belgium' and 'save our people from the risk posed by Islam, the conqueror', The Court found that there was no violation of Article 10 but rejected the Belgian government's request for the enforcement of Article 17 (without any explanation of the differentiation between this case and *Norwood*). It held that the statements were 'inevitably of such a nature as to arouse, particularly among the less informed members of the public, feelings of distrust, rejection or hatred towards foreigners'.[127] In the dissenting opinion of Judge Sajó, joined by Judges Zagrebelsky and Tsotsoria, it was argued that the Court's majority viewed humans as 'nitwits ... incapable of replying to arguments and counter-arguments, due to the irresistible drive of their irrational emotions'.[128] The ECtHR also noted that that 'to recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions'.[129] The actual nexus between the speech and the grave impact of undermining trust in democratic institutions (whatever that means) is unclear. Another concerning element of this case is that the Court took a very broad outlook of what can constitute hate speech by noting that incitement to hatred:

> 'did not necessarily require the calling of a specific act of violence or another criminal act. Attacks on persons committed through insults, ridicule or defamation aimed at specific population groups or incitation to discrimination, as in this case, sufficed for the authorities to give priority to fighting hate speech when

127 Application No. 15615/07, Merits, 16 July 2009 at para 69.
128 Application No. 15615/07, Merits, 16 July 2009.
129 Ibid. at para 77.

> confronted by the irresponsible use of freedom of expression, which undermined people's dignity, or even their safety'.[130]

The threshold thus falls to speech, which, amongst others, ridicules or insults, forgetting *Handyside's* scope of shock, offence or disturbance. It waters down protection given to political speech by arguing that although political parties should have a broad freedom of expression during an electoral campaign, 'the impact of racist and xenophobic discourse then becomes greater and more damaging'.[131] However, it is far from clear when and where lines are drawn. The determination of limits to speech is dependent on subjective points of view rather than objective criteria. As such, the Court is essentially recognizing expression for political commentary, which is endorsing what States (and thus the Court as a result of a wide margin of appreciation) consider to be acceptable. In the above mentioned dissenting opinion, the judges could not reconcile the approach of the majority given the paramount protection to be afforded to political discourse, such being the cornerstone of a free and democratic society.

In 2010, the Court declared a complaint from the controversial far-right French politician Jean-Marie Le Pen inadmissible under Article 10 rather than Article 17. Le Pen was fined 10,000 Euros for his purportedly disparaging remarks about Muslims, including alleging that, 'the day there are no longer 5 million but 25 million Muslims in France, they will be in charge'. The Court found that the comments 'presented the Muslim community as a whole in a disturbing light likely to give rise to feelings of rejection and hostility'. As in *Féret*, the impugned remarks did not include incitement to violence or unlawfulness, with the difference being that no violation was found in the Belgian case whereas the French case was found to be manifestly ill-founded. No explanation of this difference is provided.[132] Just as the right to offend, shock and disturb is difficult to reconcile with the Court's leniency towards hate speech laws in general, the Court's allegiance to a robust protection of freedom of expression for politicians is difficult to reconcile with the decisions in *Féret* and *Le Pen*.

Beyond the political spectrum, in *Soulas and Others v France* (2008), the authors of a book discussing the alleged incompatibilities between European and Islamic cultures complained of an interference of their Article 10 right due to their conviction by the national court for inciting hate propaganda. In reaching its judgment, the ECtHR found that phrases such as 'it is only if an ethnic civil war breaks out that the solution can be found' could potentially incite aggression against a particular group[133] and is, thus, unacceptable speech under Article 10 (but was deemed not serious enough to fall within the framework of Article 17).[134] Once again, the nexus between the alleged incitement of aggression and the expression was unsubstantiated. Importantly, the ECtHR noted that the book itself was easy to read and addressed to a wide audience, thereby enhancing its potential harm. This demonstrates a pattern in the manner in which the Court contextualizes each case. Interestingly, in *Karatas v Turkey,* which involved poems rather than a book, the ECtHR noted that the medium used by the

130 Ibid. at para 73.
131 Ibid. at para 76.
132 *Le Pen v France* Application No. 18788/09, Admissibility 20 April 2010.
133 Application No. 15948/03, Merits and Just Satisfaction, 10 July 2008 at para 43.
134 Ibid. at para 48.

applicant to discuss the Kurdish issue, although including some aggressive passages, was 'poetry, a form of artistic expression that appeals to only a minority of readers'.[135] Thus the outreach of the output and the size of its readership were important for both *Soulas* and *Karatas.* However, for *Lilliendahl* discussed below, these factors, namely of the extent of the comments' readership were irrelevant to the Court. In *Féret*, for example, the Court looked at the particular context of the electoral campaign period and the assumed dangers attached thereto. It almost seems to be the case that the Court is ready and willing to contextualise the alleged danger on a case by case basis rather than developing and conforming to legal tests and does so all within a wide margin of appreciation granted to States to prohibit speech. Whilst a case to case sensitivity and contextual understanding is a must, this should all take place within the backdrop of stringent legal tests rather than through what sometimes appears as 'subjective ad-hockery'. [136]

(ii) Sexual orientation

The ECtHR has ruled that hate speech targeting persons on the basis of sexual orientation can prompt the legitimate restriction of Article 10. The first pronouncement of the Court in this regard arose in the unanimously decided case of *Vejdeland and Others. v Sweden* (2012), which concerned the promotion of anti-gay sentiments through leaflets deposited in pupils' lockers in a high school. The applicants maintained that they were drawing attention to the lack of objectivity in Swedish schools regarding LGBT issues. The content of the leaflets made various disparaging, homophobic allegations including that the 'deviant' and 'promiscuous' lifestyle of homosexuals was the cause of HIV and AIDS and that homosexuals sought to downplay pedophilia. In this case, the Court held that 'discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour'.[137] The Court highlighted that incitement to hatred need not necessarily advocate for violence or call for criminal acts, as was established in *Féret.*[138] In his concurring opinion, Judge Zupančič expressed a reluctance in the holding of the majority, but again was ultimately swayed on account of the specific facts of the case. The Judge indicated that although the approach of the US towards the freedom of expression can be seen to be somewhat 'insensitive,' the Swedish counterpart borders on the oversensitive, the distinction arising from a so-called 'culturally predetermined debate'. He ultimately suggested that the Court may '[have gone] too far in the present case . . . in limiting freedom of speech by over-estimating the importance of what is being said'.

In *Beizaras and Levickas v Lithuania (2020),*[139] the Court found that the applicants had been denied an effective remedy and that their right to private life in combination with the principle of non-discrimination had been violated since the authorities refused to open criminal proceedings against homophobic comments accompanying a picture of the two men kissing on Facebook. Here, a link to a 2012 case must be made where

135 Application No.23168/94, Merits and Just Satisfaction, 8 July 1999 at para 49.

136 Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (2020).

137 Application No.1813/07, Merits and Just Satisfaction, 9 May 2012 at para 55.

138 Ibid.

139 Application No. 41288/15, Merits and Just Satisfaction, 14 January 2020.

the Grand Chamber took the step of identifying a positive obligation in Article 8 to combat 'negative stereotypes'[140] (in this case against the Roma). This is the only case we have whereby speech directed at protected characteristics is deemed to find protection under the Convention and it is interesting that this is one brought by an individual who claimed to be a victim of this speech, rather than the speaker, demonstrating the broadness of the margin of appreciation granted to States in dealing with expression. However, this case planted the seeds of creating an *ex officio* duty to limit freedom of expression under the ECHR, which was further ripened in *Beizaras and Levickas*.

Lilliendahl v Iceland (2020) discussed in the ECtHR section followed *Vejdeland,* finding that the applicant's comments (for example references to sexual deviants) were 'serious, severely hurtful and prejudicial'.[141] It did not make any difference to the Court that his comments were not likely to reach a wide audience.

5. MAIN JURISPRUDENTIAL FINDINGS, ARTICLE 11 AND OTHER POSSIBLE ROUTES

A. Main Jurisprudential Findings

A substantial normative limitation to the Court's approach is the fact that it has not defined the 'underlying values' of the Convention but has instead made references to terms such as peace, tolerance, democracy and non-discrimination, concepts that are so broad and open-ended as to be rendered almost meaningless. To the extent that the 'underlying values' of the ECHR are understood in a narrow but illiberal sense and underpin the efforts to restrict rather than protect the freedoms in the Convention, there is an inherent danger that ultimately the Court itself becomes an instrument of intolerance much more dangerous than the intolerance of private citizens and marginal movements. This is so since the Court authoritatively determines the ultimate limits of freedom of opinion, expression and association for the 800 million people in the 47 member states of the CoE. The very nature of the freedom of expression is that it is fundamental and, should therefore not be dependent on the 'underlying values' of the Convention, as interpreted, but not substantially defined, by the Court (or the Commission). This undermines one of the quintessential elements of freedom of expression, namely the individual's right to dissent, even if such dissent is conflicting with the norms of the majority. Further, freedom of expression subjects the public to a number of ideas, which will be perceived very differently by different people, but nonetheless allows citizens to form their opinions (and cast their votes) on an informed basis.

In certain cases, the Court seems to have acknowledged the danger in prohibiting speech based on the controversial content alone. Thus, while the Court has explicitly stated that a call for violence is not necessary to ban hate speech, it has contradicted its own stance on this issue in other cases. In *Erbakan v Turkey* (2006), a politician had been convicted of, *inter alia*, dividing the population into 'believers' and 'non-believers' and attacking 'infidels' and 'Christians'.[142] The Court found that the comments did

140 *Aksu v Turkey*, Applications Nos. 4149/04 and 41,029/04, Merits and Just Satisfaction, 15 March 2012 at para 75.

141 Application No, 29297/18, Merits and Just Satisfaction, 12 May 2020 at para 38.

142 Application No. 59405/00, Merits and Just Satisfaction, ECHR 6 July 2006.

not give rise to a 'present risk' or an 'imminent danger' and that the comments were protected by Article 10.[143] In *Gündüz v Turkey* (2004), the Court considered 'that the mere fact of defending Sharia, without calling for violence to establish it, cannot be regarded as 'hate speech',[144] seemingly suggesting that the categorization of hate speech depends on incitement to violence. This would be a radical departure from its otherwise established case-law, where the non-violent advocacy of National Socialism has been declared incompatible with the values of the ECHR under Article 17. It is noteworthy that in *Gündüz*, the Court attached weight to the fact that the applicant was taking part in a live program, where his well-known extremist views were subject to rebuttals. It is not clear why the views of Holocaust deniers, those critical of Islam, immigration or supporters of National Socialist parties should not also be subject to rebuttal and criticism in the public debate.

In a number of cases, the Court has held that hate speech and the advocacy of totalitarian ideologies may be banned even without any demonstrable danger of violence or other criminal actions. In others, as reflected in the Turkish cases above, the Court has found that the lack of any imminent danger or incitement to violence means that the speech is protected under Article 10. Accordingly, it is very difficult for Europeans to know the degree to which their right to freedom of expression is protected on controversial issues such as immigration, integration and religion. The Court's approach allows States a wide margin of appreciation to determine this question with no discernible test to guide or restrict states' efforts to prohibit hate speech. This lack of foreseeability creates a worrying level of arbitrariness, which is prone to abuse by States and conflicts with the Court's own insistence that any law that restricts the rights enshrined in the ECHR must be clear and foreseeable.[145] The Court's case-law also has ramifications for equality before the law. For example, while Holocaust denial is per se outside the scope of protection of freedom of expression, the denial of the Armenian genocide is protected speech and whilst speech targeting Muslims is given an examination under Article 10 in all cases minus *Norwood,* there are a plethora of cases involving speech that denies the Holocaust (and is thus perceived anti-Semitic) and are removed from consideration through Article 17.

Rather than having strict legal tests and an adequate definitional framework, which is subsequently enforced through a contextual lens, the Court has undertaken an, at times, arbitrary case by case assessment with no red line or coherence visible throughout relevant cases. This has led to a variety of issues such as the hierarchal approach to different sub-categories of speech, the arbitrary choice of enforcing Article 17 in *Norwood* and not in *Féret or Le Pen* and the conflicting approaches to the role and significance of political speech in, for example, *Erbakan* in comparison to *Féret* or *Le Pen*. Further, despite a rhetorical mention of the significance of freedom of expression, the threshold of the ECtHR has fallen so low as to allow for the prohibition of speech, which is far from a call for violence or hatred when such expression is targeting protected characteristics such as ethnicity, religion or sexual orientation. For purposes of a brief

143 Ibid, at, para 68.

144 Application No. 35071/97, Merits and Just Satisfaction, ECHR 14 June 2004 at para 51.

145 See *Sunday Times v The United Kingdom (no. 1)* Application No 6538/74, Merits 26 April 1979 at para 49; *Rekvenyi v Hungary*, Application No. 25390/94, Admissibility decision (EComHR) 20 May 1999 at para 34.

comparative illustration, we refer to *Stomakhin v Russia* (2018), which concerned the applicant's conviction and sentencing to five years in jail for articles he had written on the armed conflict in Chechnya. The national courts held that these articles had justified terrorism and violence and incited hatred. The ECtHR found that there was a violation of Article 10 since there was no overall pressing social need to interfere with his rights, despite some of his statements amounting to calls for violence and justification of terrorism. The Court noted that 'particular caution is called for on the part of the national authorities when consideration is being given to the publication of opinions that advocate recourse to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence'.[146]

This reminds us of the Court's approach to the electoral campaign context in *Féret,* which was one of the reasons that contributed to its finding of no violation, given that such a context could fuel racism and xenophobia. Although in *Stomakhin*, the Court did look at context and even though that context constituted a violent conflict and despite the Court's finding that some of the applicant's statements had justified terrorism and incited hatred and enmity, it continued to find a violation of Article 10. It underlined that a fair balance should be struck between free speech and the protection against terrorism, finding that Russia had not conducted such a balance. Such a nuanced approach to the balancing exercise between freedom of expression and hate speech is not evident in any of the cases involving the targeting of protected characteristics.

The current approach has resulted in a large number of cases in which the Court finds a violation of Article 10 in the framework of hate speech, having involved the use of law to punish dissent, for example in relation to the Kurdish issue[147] and Armenian issue[148] in Turkey and the discussion of Chechnya.[149] However, the Court has never really effectively examined the dangers of misusing restrictions in the realm of cases involving the direct targeting of protected characteristics. Considering that the ECtHR is the ultimate guardian of a human rights protection system that only covers States formally committed to liberal democracy and the rule of law, (the majority of which also abide by this system of governance), the Court's approach to hate speech seems difficult to understand. Moreover, its jurisprudence constitutes a lost opportunity of contributing to a more rigorous definition of hate speech under international human rights law in a world where hate speech provisions are increasingly being used to silence criticism and punish dissent in authoritarian states such as Russia and Turkey.[150]

146 *Stomakhin v Russia*, Application No 52273/07, Merits and Just Satisfaction 8 October 2018 at para 96.

147 See, for example: *Erdal Taş v Turkey Application No. 77650/01, Merits and Just Satisfaction, 19 December 2006; Erdoğdu v Turkey* Application No. 25723/95, Merits and Just Satisfaction 15 June 2006; *Temel v Turkey* Application No 1685/03, Merits and Just Satisfaction, 1 February 2011; *Gerger v Turkey* Application No. 24919/94, Merits and Just Satisfaction 8 July 1999; Karataş v Turkey Application No. 63315/00, 5 January 2010; *Gündem v Turkey*, Application No. 23144/93, Merits and Just Satisfaction 16 March 2000.

148 *Dink v Turkey*, Application Nos. 2668/07, 6102/08, 30,079/08, Merits and Just Satisfaction, 14 September 2010.

149 *Stomakhin v Russia*, Application No 52273/07, Merits and Just Satisfaction 8 October 2018.

150 See, *inter alia,* the case of Anton Nossik, the incorporation of VKontakte as part of Mail.ru, the imprisonment of Andrey Bubeev for reposting a picture on VKontakte which showed tooth paste with the caption 'Squeeze Russia Out of Yourself,' the imprisonment of Boris Stomakhin who called for Crimea to be returned to the Ukraine.

B. Article 11

Although it is beyond the scope of this article to consider relevant Article 11 cases, a brief note will be made on the general trends of the Court's approach to the freedom of association and assembly in relation to hate. When it comes to political parties and associations, the Court held that 'the incidental advocacy of anti-democratic ideas is not enough, per se, for banning a political party in the sense of compelling necessity and even less so in the case of an association'.[151] In *Refah Partisi and Others v Turkey* (2003), which involved the dissolution of a political party, which called for the reinstatement of the Sharia, the Court noted that although the leadership of this party did not directly call for violence by holding that 'they did not take prompt practical steps to distance themselves from those members of [Refah] who had publicly referred with approval to the possibility of using force against politicians who opposed them'.[152]

In *W.P and Others v Poland* (2004),[153] the ECtHR found legitimate the refusal of Polish authorities to allow for the creation of an association with a Constitution that included anti-Semitic statements such as 'Taking action aimed at improving the living conditions of Polish victims of Bolshevism/Bolsheviks and Zionism/Zionists'. The Court relied on Article 17 for this purpose. It did not adopt this pattern in *Refah* above or *Vona* below. In *Vona v Hungary* (2013), which involved the banning of an association conducting anti-Roma demonstrations in Roma villages, the Court highlighted violence as a necessary pre-requisite for the ban but noted that this did not actually mean physical violence but that it could also incorporate the intimidation felt by the persons, which the demonstrations targeted.[154] The Court found that the bans of the two above entities did not constitute a violation of Article 11. Although strictly speaking an Article 10 case, it must be noted that in *Fáber v Hungary* the Court read Article 10 in light of Article 11. Here, the issue of violence and particularly non-violence was of central significance for the Court's finding of a violation of the applicant's freedom of expression.

> Beyond the realm of violence, the Court has dealt with two other cases. The first involved a trade union (ASLEF), which decided to cease membership of a person due to the fact that he belonged to the British National Party (BNP). The Court found that this was not a violation of the (former) member's Article 11, on the grounds that a trade union has the discretion to choose its members.[155] In its judgment, the Court made no reference to the BNP's mandate or ideology. In *Redfearn v The United Kingdom* (2013), the Court dealt with the dismissal of an employee due to his candidature with the BNP. Here, the Court, in finding a violation of the applicant's freedom of association, held that 'a legal system which allows dismissal from employment solely on account of the employee's

151 *Vona v Hungary* Application No, 35943/10, Merits and Just Satisfaction, 9 July 2013 at para 69.
152 Application Nos. 41,340/98, 41,342/98, 41,344/98, Merits 3 February 2003 at para 131.
153 *W.P and Others v Poland* Application No. 42264/98, Merits, 2 September 2004.
154 Application No, 35943/10, Merits and Just Satisfaction, 9 July 2013 at para 61.
155 *Associated Society of Locomotive Engineers and Firemen (ASLEF) v The United Kingdom* Application No. 11002/05, Merits and Just Satisfaction, 27 February 2007 at para 39.

membership of a political party carries with it the potential for abuse'.[156] It proceeded to find a violation of Article 11. As with *ASLEF*, the Court made no extrapolation on the BNPs' mandate or ideology.

Thus, violence (broadly interpreted) is a central part of the Court's discussion of Article 11 whilst Article 17 has only been relied on in a case involving an anti-Semitic association. In the other two cases of membership to a trade union and employment, the Court reached its judgments without any analysis of the BNPs context. Instead, it followed a clear-cut approach vis-à-vis the rights of trade unions in relation to *ASLEF* and the lack of statutory protection for employees in *Redfearn.* This robust and un-contextualised approach does not find its counterpart in Article 10 cases and could be looked at by the ECtHR as a template (or at least a partial one) to incorporate when dealing with expression so as to avoid the current situation of arbitrariness.

(i) Other routes? The Rabat Plan of Action and the South African approach

The ECtHR's interpretation of the relationship between hate speech and freedom of expression affords a considerably lower protection to freedom of expression than that envisaged in the United Nation's Rabat Plan of Action (RPA).[157] This has sought to clarify the standards and thresholds linked to Article 20 ICCPR, the UN'S 'hate speech clause'. This extrapolation can be used and applied in a variety of frameworks, ranging from content regulation online to the approach of national and international Courts. The RPA states that there must be a high threshold when applying Article 20 of the ICCPR.[158] This is also noted in the 2012 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 'the threshold of the types of expression that would fall under the provisions of Article 20(2) should be high and solid'.[159] The RPA underlines that restrictions to the freedom of expression are to be clearly defined without an overly broad scope, must respond to a pressing social need, must be the least intrusive measures available and be proportional to their goal.[160] It notes that 'criminal sanctions related to unlawful forms of expression should be seen as last resort measures'.[161] Here, it must be noted that General Recommendation 15 of the European Commission against Racism and Intolerance (ECRI), underlined that criminal law should be used as a method of last resort.[162] To achieve the protection of speech, the RPA puts forth a six-part threshold test for the application of Article 20(2), which incorporates:

156 *Redfearn v The United Kingdom* Application No. 47335/06, Merits and Just Satisfaction, 6 February 2013 at para 55.

157 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' 5 October 2012, available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf [Accessed 18 July 2020]

158 Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para 22.

159 Ibid. at para 45.

160 Ibid. at para 18.

161 Ibid. at para 22.

162 ECRI, General Recommendation No. 15, available at: https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01 [last accessed 26 August 2020].

(1) the social and political *context*
(2) status of the *speaker*
(3) *intent* to incite the audience against a target group
(4) *content* and form of the speech
(5) *extent* of its dissemination and
(6) *likelihood* of harm, including imminence.

By following the route of the RBA, the possibility of avoiding the misuse of hate speech restrictions is enhanced. Such misuse leads to the deterioration of free speech, the silencing of minorities and the criticism of, *inter alia,* politics or religion.

Another plausible route for avoiding misuses of hate speech laws and a dire impact on freedom of expression is the template provided for by the South African Supreme Court of Appeal. Before analysing the case, it must be noted that this country's constitution has a provision on hate speech, which is reflective of Article 20(2) of the ICCPR. Article 16 therein on freedom of expression states that this freedom does not extend to propaganda for war, incitement of imminent violence and advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. The threshold attached to prohibited speech is high, with the Constitution qualifying the imminence of violence and relating the advocacy of hatred with incitement to harm. This high threshold was subsequently reflected in the case of *Qwelane v the South African Human Rights Commission and Another* (2019),[163] involving homophobic speech. Mr Qwelane was appointed South Africa's High Commissioner in Kampala, Uganda. His term of office ended in 2013. Mr Qwelane wrote the article as a columnist for the Sunday Sun. The article was captioned 'Call me names – but gay is NOT okay. . . Statements included: "at this rate, how soon before some idiot demands to "marry" an animal, and argues that this constitution "allows" it?" This was accompanied by a cartoon of a man on his knees alongside a goat, appearing in front of a priest to be married. The caption above the man and the goat reads: 'When human rights meet animal rights'.

Section 10 of the Promotion of Equality and Unfair Discrimination Act No.4 of 2000 provided that:

> '. . . no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred'.

The Court held that this provision extended beyond Article 16 of the Constitution, finding the provision unconstitutional.[164] In discussing the overbroad nature of the

163 Case 686/2018 [2019] ZASCA 167.

164 Under Section 172(2) (a) of the South African Constitution provides that when declaring a statutory provision to be unconstitutional, the decision must be referred to the Constitutional Court for confirmation. The hearing was set for the 22 September 2020. Judgment is still pending.

above section, it referred to the thresholds attached to Article 16 and referred to two other cases (heard together),[165] noting that:

> 'The overbreadth of the definition with which we are here concerned can scarcely be described as marginal. It is not as if we are confronted merely with a peripheral excess in scope, surrounding an identifiable proscriptive core that targets constitutionally unprotected material. Rather, the virtually unlimited range of unconstitutional potential application of the Act overwhelms whatever permissible proscription might be identified'.

As a result of the above, the provision was temporarily substituted by the Court in the following terms: '*No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm*'.

The decision is reflective of its previous positions that '*no one is entitled to be insulated from opinions and ideas that they do not like, even if those ideas are expressed in ways that place them in fear*'[166] and that *'the fact that a particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection*'.[167] The South African court demonstrates a clear dedication to the freedom of expression whilst simultaneously avoiding the absolutism that marks U.S. jurisprudence (which would not bode well in a European setting). In the South African Court's proposed definition, it removes references of hurtful content and content which per se promoted hatred. Instead, it prohibits the advocacy for hatred based on certain protected characteristics, an advocacy which is not an end in itself but, which constitutes incitement for an actual result, namely the causing of harm. It steers clear of permitting the prohibition of lower thresholds of impact such as hurtful content (let alone offensive as is the case of the ECtHR).

It could be argued that the South African approach and the nature of Article 16 of the Constitution is party affected by the country's history. Censorship was a fundamental part of Apartheid. In the words of the Nobel Prize winning South African writer Nadine Gordimer, 'No society in which a tiny minority must govern without consent over a vast majority can afford to submit any part of control of communication . . . '[168] The censorship didn't only serve to protect the regime, but also to guard an ideological trinity of Calvinism, white supremacy and capitalism.[169]

165 Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security and Others (CCT20/95, CCT21/95) [1996].

166 *Moyo v Minister of Justice and Constitutional Development and Others*; *Sonti v Minister of Justice and Correctional Services and Others* (387/2017; 386/2017) [2018] ZASCA 100; 2018 (8) BCLR 972 (SCA); [2018] 3 All SA 342 (SCA); 2018 (2) SACR 313 (SCA) (20 June 2018).

167 *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies* (1062/2017) [2018] ZASCA 180; 2019 (2) SA 194 (SCA); [2019] 1 All SA 608 (SCA) (4 December 2018).

168 Quote by Nadine Gordimer in Merrett, 'Political Censorship in South Africa: Aims and Consequences' (1982) 14 *Reality* 3; Gordimer, 'A Writer's Freedom' (1976) 5 *Index on Censorship* 53.

169 (2018): 'Importantly, the apartheid state, by forming strategic alliances in its multifaceted struggle to maintain its hegemony founded on capitalism, racism, and Calvinism, by necessity used censorship processes to silence all messages that fell outside of the dominant discourse.' Drewet, 'Popular Music Censorship during Apartheid' in Hall (ed), *The Oxford Handbook of Music* Censorship (2017) at 594.

Whatever the reasons and origins, the above position is a long way away from its ECtHR counterpart, which, as demonstrated above, has adopted an ambiguous and speech-disregarding approach. In terms of other jurisdictions, noteworthy is also a Norwegian hate speech case in which the country's Supreme Court underlined the significance of the burden of proof in such cases, noting that one cannot *assume* that was is said is, in fact, hateful. As noted by the majority opinion:

> '. . . The rule of law, and especially the consideration of foreseeability, dictates restraint when it comes to an expansive interpretation based on context. When it comes to punishable expressions the point must be that you can only be punished for what you have said, not what could possibly have said. From this it follows, in my opinion, that in the interest of freedom expression no one should risk criminal liability through attributing to a statement viewpoint which has not been expressly made and which cannot with a reasonably high degree of certainty be inferred from the context'. [170]

With the above comparators, it becomes more emphatic that the ECtHR seems to disregard issues such as foreseeability and contextualization. In antithesis with the above Norwegian court, the ECtHR has repeatedly inferred harm and hate from certain expressions, without substantive or substantial extrapolation on its findings.

6. CONCLUSION

It is not disputed that hatred and related manifestations such as racism, anti-Semitism and homophobia must be tackled by liberal democracies committed to equality and dignity of all regardless of characteristics such as race, religion, sexual orientation or gender identity. At the same time, a central requirement for the very existence of such a society is that the pursuit of its cultivation is not conducted at the burden of the fundamental freedom of expression. As such, it is difficult to accept that a human rights convention should allow States to ban even provocative expressions as hate speech without, at least, being required to either justify such measures or submit proof of the intent to spread hatred or destroy the rights of others and the probability of this happening. Although the restrictive approach arises from the good intentions of the ECtHR to protect groups they perceive to be vulnerable to hatred, the manner in which this protection has been handled is disappointing. It is also dangerous to the status of freedom of expression as a fundamental right and can have ramifications on the groups that it is actually seeking to protect. To add to the complexity of the matter is the use of Article 17 in speech cases. The Court has insisted that it is applicable 'only on an exceptional basis and in extreme cases, as indeed is illustrated by the Court's case law'.[171] Referring to *Norwood* as an example, this statement does seem questionable. It is confounding that every single case involving hatred (even in the form of insults or ridicule) targeted against protected characteristics have been found to constitute unprotected speech (apart from *Aksu*, which was brought by the speech's victim), whereas in other cases such as *Gündem* and

170 Høyesterett HR- 2001-01428—Rt-2002-1618, (Saks nr. 361–2002) 17 December 2002 (our interpretation from Norwegian).

171 Ibid. at para 87

Gündüz, the incitement for violence was a necessary pre-requisite for the legitimacy of the State's restriction. Even in a case that actually involved statements justifying terrorism and inciting hatred (*Stomakhin*), the Court found a violation of Article 10. In this realm, the Court's approach to the broad theme of hate speech and the lack of conceptual clarity that characterises its jurisprudence (see for example the varying approaches to insults at the ECtHR), runs counter to the Court's requirement on States to have accessible laws whose consequences must be foreseeable.[172] This begs the question of whether the Court is, in fact, meeting its own requirement regarding the accessibility and transparency of law. Through our analysis, we see no real balance test of hate speech (and its impact) on the one hand and freedom of expression on the other. There is no real conceptualization of harm and, importantly, no coherent examination of another route to tackling hate speech. The Court has never required that States demonstrate that the prohibition of hate speech is the most efficient instrument towards securing tolerant societies and countering hatred and social cohesion. The necessity of hate speech laws, even with their often draconian implications for public debate, is simply assumed, which is an unsatisfactory basis for restricting so basic a right as freedom of expression. This approach, with little coherent substance and nuance has led to the freedom of expression losing its fundamentality in the face of speech targeted at protected characteristics. Beyond the inherent issues of the Court's approach to the freedom of expression of the applicants, its reliance on the contextual, case-by-case analysis has serious ramifications on other frameworks, particularly the regulation of social media content. The Court is a suitable setting through which robust guidelines on when and how to regulate online hate speech can be developed. These could be relied on by, for example, social media staff responsible for content moderation. On social media, context can change so easily since these are global platforms, whilst an online debate has no designated and well defined audience; the reader could be anyone. The Court's approach is not only irrelevant for such platforms but could constitute a dangerous template if relied upon by social media companies. Moreover, one must not forget that populist and aggressive nationalists have found fertile ground upon which a wolf can cry out censorship, leading to worse situations such as the martyrdom of the 'silenced' system-fighters. The ECtHR has good frameworks to look at if it wishes to revert the current situation vis-à-vis free speech and hate speech. These include, for example, the elaboration and positioning of the South African Constitutional Court in terms of threshold, the significance attached to foreseeability and dangers of inferring harm in speech as set out by the Norwegian court, whilst the extrapolations set out by the UN's RPA can also be of use. At the same time, developments such as the French Constitutional Council's decision on the Avia Law are significant. There, the Council noted the unconstitutionality of the law based, *inter alia,* on the lack of transparency afforded to the process of hate speech removals from social media. This case is a reinforcement of digital rights and free speech and must be borne in mind by all relevant stakeholders, including the ECtHR. The message is that the notion of 'hate speech'

172 See, *inter alia, Dink v Turkey* Application Nos. 2668/07, 6102/08, 30,079/08, 7072/09 and 7124/09, Merits and Just Satisfaction, 14 December 2010; *Müller and others v Switzerland*, Application No. 10737/84, Merits 24 May 1998; *Ezelin v France,* Application No.11800/85, Merits and Just Satisfaction, 26 April 1991; *Margareta and Roger Andersson v Sweden*, Application No. 12963/87, Admissibility Decision (EComHR) 3 October 1990.

is not a trump card for legitimizing principles that run counter to the functioning of democracies, such as transparency of process. To this, we add that this trump card has been relied on by the ECtHR with disregard for the counter-effects on the groups it seeks to protect. In terms of the ECtHR, the major challenge is to convert the current rhetoric, which marks the Court's approach, even in relation to merely offensive speech. The institution must be prompted to re-imagine its stagnant and unworkable stance and realize the knock-on effect this can have on repressive rules and laws on the online and offline world.