CHAPTER 35
PROHIBITION OF THE ABUSE OF RIGHTS (Article 17)

Antoine Buyse[1]

CONTENTS

35.1 TEXT OF ARTICLE 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

35.2 INTRODUCTION – THE PARADOXES OF ARTICLE 17

Article 17 is the Convention's clause on the abuse of human rights. As its content reflects, the provision is a microcosm for particular situations of what the European Convention is more generally aiming for: protecting human rights and democracy and preventing totalitarianism. The wording of Article 17 has its roots in Article 30 of the Universal Declaration of Human Rights. Comparable abuse of rights clauses can be found in many global and regional human rights treaties.[2]

The prohibition of the abuse of rights is one of the most paradoxical provisions of the Convention. It reflects two paradoxes, one of function and one of interpretation. First, Article 17 functionally reflects the concept of a democracy that should be able to defend itself against its enemies, a so-called *wehrhafte* or *streitbare Demokratie*. The Court has recognized this concept as a legitimate aim of policies that restrict human rights. The underlying idea is that too much liberty may facilitate the actions of those who aim to destroy democracy and fundamental rights. Thus a democracy risks handing the tools of its own destruction to totalitarian or anti-democratic groups. However, too many restrictions on rights in turn endanger the core of those rights. In respect of the freedom of expression, for example, the Court has indicated that the free exercise of that right is one of its fundamental aspects and distinguishes a democratic, tolerant and pluralist democracy from a totalitarian or dictatorial regime.[3]

[1] This chapter builds on the author's earlier work 'Contested contours: the limits of freedom of expression from an abuse of rights perspective: Articles 10 and 17 ECHR, in E. Brems and J. Gerards, eds., *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge, Cambridge University Press 2014) pp. 183-208.

[2] E.g. Article 5(1) ICCPR; Article 5(1) ICESCR; Article 29(1) American Convention on Human Rights.

[3] *Perinçek v. Switzerland*, ECtHR 17 December 2013, appl. no. 27510/08, para. 52.

Abuse of rights clauses like Article 17 try to wed these two aims – protection of rights for all and protection of democracy against its enemies – into an uneasy marriage.

Secondly, there is a paradox of interpretation. Facts or actions which are deemed to fall within the scope of Article 17 fall outside the protective scope of substantive articles of the Convention, such as the freedom of assembly or the freedom of expression. Those who try to destroy democracy can expect the state to use harsher methods than in ordinary situations. If the Court holds that Article 17 applies, the application at hand is declared inadmissible by that very fact, excluding an assessment on the merits. This reflects a categorical approach of adjudicating. By contrast, an assessment on the merits under one of the other Convention articles would enable an explicit balancing approach, evaluating for example whether an interference was proportionate. The paradox is that some kind of implicit balancing assumedly must be undertaken by the Court – testing whether the state's action was not grossly disproportionate – before applying Article 17. One cannot imagine, for example, that a sentence of thirty years of imprisonment for denying the Holocaust once would be proportionate.

These two paradoxes have led to difficult dilemmas for the Court on whether and when to apply Article 17. As a result, the use of Article 17 has been both inconsistent and contested. The Court has applied the provision both directly and indirectly. In the latter cases, the abuse clause played a role in the assessment under one of the substantive articles of the Convention.

35.3 THE CHARACTER AND MEANING OF ARTICLE 17

The general aim of the abuse clause is to "prevent totalitarian groups from exploiting in their own interests the principles" of the ECHR.[4] To that purpose, Article 17 addresses states on the one hand and groups and individuals on the other hand. In that sense it stands out in a human rights treaty that mostly focuses on limits to state actions. Therefore, the provision has been called a special limitation clause.[5] In addressing the state, Article 17 seems largely redundant. If, as the text of the provision states, no greater limitations to rights are allowed than provided under the Convention, then any added value of Article 17 seems absent. The usual grounds of limitation under the substantive rights of the Convention simply apply. The practice of the European Court reflects this: if an interference with a Convention right is justified under a substantive right, then supplementary review of the same situation under Article 17 is unnecessary.[6] When applicants do invoke Article 17 against the state, this is "essentially an allegation of bad faith against the state"[7] for which it would be extremely difficult to adduce proof. The Court has thus far never sustained such a claim.[8]

The second aspect of the provision relates to groups and individuals. Whereas the first aspect protects against state abuse, this second aspect rather enables the state to restrict the rights of people more than under the substantive Convention articles. As indicated, this does not mean the state can act without any limitations: an implicit

[4] *W.P. and others v. Poland*, ECtHR 2 September 2004 (dec.), appl. no. 42264/98, page 10.
[5] J.A. Frowein and W. Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar* (Kehl am Rhein, Engel Verlag 2009), 3rd Ed., p. 430.
[6] E.g. *Refah Partisi v. Turkey*, ECtHR (GC) 13 February 200,3 appl. nos. 41340/98 a.o., para. 137.
[7] D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2009), 2nd Ed., p. 652.
[8] See e.g. *Seurot v. France*, ECtHR 18 May 2004 (dec.), appl. no. 57383/00; and *Şimşek and others v. Turkey*, ECtHR 26 July 2005 (dec.), appl.nos. 35072/97 and 37194/97.

principle of proportionality must be assumed to be part of the application of Article 17.[9] Otherwise it would give states a dangerous *carte blanche* which would undermine rather than defend human rights and democracy. A proportionality analysis has for the most part remained implicit in the Court's case law. Whenever potentially disproportionate state interference with a fundamental right is at stake, the Court has seemed to opt for an assessment on the merits under one of the substantive articles of the Convention.

The dual purpose of Article 17 entails that it can be invoked by both the state and the applicant before the European Court. Notably, the provision enables states to protect democracy but it does not require them to do so. It does not impose positive obligations.[10] Such positive obligations to combat racism, for example, may of course flow from other legal sources.[11]

Article 17 does not figure very prominently in the Court's jurisprudence. This may be explained both by its paradoxical character but also by its contested nature. The provision can be used as a clause to be applied directly. But the abuse of rights clause can also be regarded as a general principle of the Convention, or even as a mere symbolic declaration[12], in the light of which the rest of the ECHR can be interpreted. In practice, the Court has used the clause in both ways, depending on the case at hand.

35.4 WHICH SUBSTANTIVE RIGHTS ARE AFFECTED BY ARTICLE 17?

Article 17 addresses specific situations in which the destruction of rights or freedoms is at stake. This distinguishes the provision from single or structural violations of substantive Convention rights, but also from the more severe emergency threats which fall under Article 15 ECHR. Under the latter, derogations from a number of Conventions rights are possible in situations of war or other public emergencies. The abuse clause, by contrast does not provide state parties to the ECHR a justification to derogate. The state's arms are still to a certain degree bound, which again points to an implicit proportionality assessment.

The wording of the abuse clause reflects that a violation of Article 17 is necessarily connected to one or several of the rights and freedoms in the Convention itself. However, the Court's case-law shows that it does not relate to all substantive Convention rights. More procedure-oriented rights such as the key rights to liberty and to a fair trial cannot be encroached upon by invoking Article 17. In its very first case, *Lawless v. Ireland*, the Court ruled that Article 17 "which is negative in scope cannot be construed a contrario as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 of the Convention."[13] The same holds for the rights from which one cannot derogate in times of public emergency – exceptions referred to under Article 15(2): the right to life, the prohibitions of torture

[9] See in this sense the decision of the former European Commission of Human Rights: *De Becker v. Belgium*, EComHR 8 January 1960 (report), app. no. 214/56, para. 279.
[10] Harris a.o., *supra* n. 7, at p. 652.
[11] E.g. the United Nations Convention on the Elimination of Racial Discrimination.
[12] H. Cannie and D. Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?', 29-1 *Netherlands Quarterly of Human Rights* (2011) pp. 54-83, at p. 83.
[13] *Lawless v. Ireland* (No. 3), ECtHR 1 July 1961, appl. no. 332/57, para. 7. This is a continuous line in the Court's jurisprudence, e.g. the much more recent judgment in *Varela Geis v. Spain*, ECtHR 5 March 2013, appl. no. 61005/09, para. 40.

and slavery and the rule of no punishment without law.[14] By inference, the less serious situations to which Article 17 applies cannot be used to take away the protective scope of those rights. The rights to which Article 17 seems to be most relevant are the right to respect for private life, the freedom of religion, the freedom of expression, the freedom of association, the prohibition of discrimination, and the right to free elections.[15] Of these, most cases in Strasbourg so far have related to the freedom of expression and to a lesser extent to the right to peaceful assembly and association.

35.5 DIRECT APPLICATION OF ARTICLE 17

Article 17 is not often invoked by parties in Strasbourg proceedings and the Court's application of the provision has been even rarer, although it can apply the provision *ex officio*.[16] The Court has applied the abuse clause in two different ways: directly and indirectly. The direct approach is considered as the most problematic, as it excludes the possibility to explicitly balance the different interests at stake under the substantive right at stake. Directly applying the abuse clause effectively kills an application, since it enables the Court to declare a complaint inadmissible. Thus, in the Court's own view, this approach should be used only in exceptional circumstances in extreme situations.[17]

In the first few decades of the Convention's existence, until 1998, the European Commission on Human Rights decided on admissibility issues. In the two only instances in which the Commission applied Article 17 directly this meant that the application did not reach the Court. The first decision came as early as 1957 in the case of the *German Communist Party*. The Commission dismissed the complaint about the dissolution and prohibition of that party by holding that Article 17 aimed to safeguard the rights and freedoms of the Convention "by protecting the free operation of democratic institutions."[18] The Committee held that recourse to a dictatorship (in this case a dictatorship of the proletariat) ran contrary to the ECHR. The second time the Commission directly applied the abuse clause was more than twenty years later, in 1979, in a situation at the other end of the political spectre. In *Glimmerveen and Hagenbeek* adherents of an extreme-right Dutch Party complained about their conviction for the possession of racist leaflets which they had wanted to spread. The Commission held that the leaflets, with references to "our Dutch, white people" and calls for the removal of all foreigners, went against the spirit of the ECHR and could contribute to the destruction of rights. In both decisions, the intentions rather than real or possible consequences seem to have been key in the assessment.[19]

After 1998, with the reforms of Protocol 11 ECHR, the Court itself dealt with all incoming applications. Since then it has held Article 17 to be directly applicable in four types of situations: (1) persons or groups espousing totalitarian movements or aims; (2) the denial or (historical) revisionism of Nazi and fascist crimes from World War II; (3) open instances of racism, anti-Semitism, Islamophobia and expressions of hatred against other minorities; (4) and direct calls for violence. Put differently,

[14] Articles 2, 3, 4 and 7 ECHR respectively.
[15] Articles 8-11 and 14 ECHR and Article 3 of the first Additional Protocol to the ECHR.
[16] *Perinçek v. Switzerland*, *supra* n. 3.
[17] *Paksas v. Lithuania*, ECtHR (GC) 6 January 2011, appl. no. 34932/04, para. 87.
[18] *German Communist Party v. Germany*, EComHR 20 July 1957 (dec.), appl. no. 250/57, p. 4.
[19] *Glimmerveen and Hagenbeek v. the Netherlands*, EComHR 11 October 1979 (dec.), appl. nos. 8348/78 and 8406/79.

Article 17 may apply to incitement to hatred or violence, both of which run counter to the underlying values of the Convention.[20] All of these situations are problematic in different ways: does one assess intentions or actual actions? In addition, they pose questions of proof. Furthermore, open racism and calls for totalitarianism have become increasingly rare. Modern forms of these are less open and more implicit. These factors taken together may explain that the Court's direct application of Article 17 has remained inconsistent and sparse. It also reflects a changing consensus in Europe on what is considered dangerous or out of bounds. Communism has faded as a public concern, but the awareness of other dangers has increased.

On the first category of situations, the espousal of totalitarianism, the Court held already in 1998 that "the justification of a pro-Nazi policy" would not fall under the protection of the freedom of expression.[21] In 2013, in the case of *Vona v. Hungary* – about the dissolution of a movement that organised threatening paramilitary marches through Roma villages – the Court further clarified that Article 17 would apply directly only if there was *prima facie* an act aimed at the destruction of Convention rights or an intention to "publicly defend of or disseminate propaganda in support of totalitarian views".[22] In other cases, the applicability of the abuse clause would be decided upon "in the light of all the circumstances of the case" when reviewing the substantive Convention article concerned.[23] Article 17 may also directly apply to situations of expressed contempt for victims of totalitarianism[24] although the mere and unintended effects on such victims, by contrast, cannot by themselves set the limits of freedom of expression.[25]

The second strand of instances concerns forms of denial or historical revisionism of war crimes. Statements which clearly seek to justify war crimes such as torture or summary executions would deflect Article 10 of its aim and thus call for direct application of Article 17.[26] But statements that deny or give unorthodox views on crimes are less easily categorised. The Court has taken the position that it is not its function to adjudicate on what is the correct historical interpretation of the past.[27] Slightly revisionist views on historical massacres without denying the killings as such or seeking to completely exonerate the perpetrators is not sufficient to trigger direct application of the abuse clause, the Court found in a case about the Azeri-Armenian war of the early 1990s.[28] Typically, it would thus leave the qualification of historical facts to historians. But in the case of the Holocaust, the Court has held in *Garaudy* – an author who claimed the massacre of Jews in World War II was a myth – that denial of "the reality of clearly established historical facts, such as the Holocaust" has nothing to do with historical research and calls for direct application of Article 17.[29] It has never become clear to what extent other war crimes from the past would trigger the abuse clause directly. In the case of *Perinçek*, about a Swiss conviction of a

[20] See e.g. *Delfi AS v. Estonia*, ECtHR (GC) 16 June 2015, appl.no. 64569/09, para. 136. In the judgment, the Court indicated (para. 140) that online comments inciting to violence do not enjoy the protection of Article 10.
[21] *Lehideux and Isorni v. France*, ECtHR 23 September 1998, appl. no. 24662/94, para. 53.
[22] *Vona v. Hungary*, ECtHR 9 July 2013, appl. no. 35943/10, para. 38, building on two earlier cases: *Sidiropoulos v. Greece*, ECtHR 10 July 1998, appl. no. 26695/95, and *Vajnai v. Hungary*, ECtHR 8 July 2008, appl. no. 33629/06.
[23] *Ibid.*
[24] *Fáber v. Hungary*, ECtHR 24 July 2012, appl. no. 40721/08, para. 58.
[25] *Vajnai*, *supra* n. 21, para. 57.
[26] *Orban and others v. France*, ECtHR 15 January 2009, appl. no. 20985, para. 35.
[27] *Chauvy and others v. France*, ECtHR 29 June 2004, appl. no. 64915/01, para. 69.
[28] *Fatullayev v. Azerbaijan*, ECtHR 22 April 2010, appl. no. 40984/07, para. 81.
[29] *Garaudy v. France*, ECtHR 24 June 2003 (dec.), appl. no. 65831/01.

Turkish political leader who had called the idea of an Armenian genocide an international lie, the Court explicitly refused to apply Article 17 directly. It argued that Perinçek had not denied the fact that massacres and deportations had taken place, but only the legal qualification of these as genocide. Such a denial of the precise label was not of a nature to incite hatred against Armenians in the Court's view nor aimed at denigrating the victims.[30]

Closely connected are the third type of situations, the most heinous expressions of hatred against particular groups. This foremost includes anti-Semitism, but it is not limited to that, as the Court has gradually although not consistently expanded this category. In *Ivanov* the Court applied Article 17 directly to a newspaper editor who had depicted Jews as the cause of evil in Russia.[31] It did the same in *W.P. and others*, which concerned a Polish association that alleged that the Jewish minority in Poland had persecuted the Polish majority – a clear sign of reviving anti-Semitism according to the Court.[32] In *Norwood* the Court extended the abuse clause's reach to Islamophobia by directly applying it to the case of public display of an anti-islamic poster which called for "Islam out of Britain" shortly after the 9/11 terror attacks. The connection of an entire religious group to terrorism was found to be contrary the Convention's values of "tolerance, social peace and non-discrimination."[33] As no violence or social tension had ostensibly resulted from the display of the poster, intentions rather than effects seem to have been decisive for the Court's assessment. In *Molnar v. Romania*, a case about right-wing nationalist propaganda posters, the Court further extended this to messages of open hatred towards Roma and homosexual minorities, emphasizing the particular national context in which these messages could gravely hurt public order and went against the fundamental values of the Convention.[34]

A rare exception to the Court's general approach only to apply Article 17 directly to *explicit* espousal of hatred was the case of *M'Bala M'Bala*. In his show, a politically active comedian staged a scene in which a famous Holocaust denier was invited on stage and publicly lauded and handed an award by someone dressed up in concentration camp clothing. The Court found that "the blatant display of a hateful and anti-Semitic position disguised as an artistic production" was a political act rather than a form of satire.[35] Although the Holocaust had not explicitly been denied on stage, the Court found that the acts on stage, in content, tone and aim were markedly negationist and anti-Semitic and thus applied Article 17 directly.

The fourth and final type of situations relates to open calls for, or espousal of, violence. Such calls run counter to the underlying values of the ECHR including peacefully settling international disputes and the sanctity of life itself, as the Court held in *Hizb Ut-Tahrir*, a case about an association in Germany which had advocated the violent destruction of Israel and its inhabitants and had defended suicide attacks.[36] It applied the same logic of direct Article 17 application in a case concerning two members of the same organisation convicted in Russia.[37] A similar line of argumentation applies to political parties. When their leaders incite to violence or put forward non-democratic policies aimed to destroy democracy itself, such parties lose

[30] *Perinçek, supra* n. 3, paras 49-54.
[31] *Ivanov v. Russia*, ECtHR 20 February 2007 (dec.), appl. no. 35222/04.
[32] *W.P. and others v. Poland*, ECtHR 2 September 2004 (dec.), appl. no. 42264/98
[33] *Norwood v. the United Kingdom*, ECtHR 16 November 2004 (dec.), appl. no. 23131/03.
[34] *Molnar v. Romania*, ECtHR 23 October 2012, appl. no. 16637/06 (dec.), para. 23.
[35] *M'Bala M'Bala v. France*, ECtHR 10 November 2015 (dec.), appl.no. 25239/13, para. 40.
[36] *Hizb Ut-Tahrir and others v. Germany*, ECtHR 12 June 2012 (dec.), appl.no. 31098/08.
[37] *Kasymakhunov and Saybatalov v. Russia*, ECtHR 14 March 2013, appl. nos. 26261/05 and 26377/06.

the protection of the Convention.[38] The Court thus explicitly links the destruction of human rights and of democracy.

35.6 INDIRECT APPLICATION OF ARTICLE 17

The indirect approach is more often used in the Court's jurisprudence. It entails that Article 17 considerations are integrated in the third prong of the test of limitations of rights, for example under Articles 9, 10 and 11 ECHR: was the interference necessary in a democratic society? Applying the indirect approach, the situation under review does not at first sight reflect an abuse of rights but rather requires a substantive, more in-depth assessment. In that assessment, abuse of rights considerations can play a part in the balancing under the necessity test, pointing towards non-violation of the substantive article concerned. The applicant may thus end up with the same result as in a direct application of Article 17, with the key difference that a balancing exercise allows for an assessment of the proportionality of the state interference with the applicant's rights. However, there is no full consistency in this, as an in-depth assessment may also lead to the conclusion that a situation does reflect an abuse of rights after all. The latter happened in *Kaptan*, in which the Court eventually held that that certain publications advocated and glorified violence and thus fell outside the substantive scope of Article 10. It concluded this, however, as part of the necessity test of Article 10.[39] In *Schimanek*, a case about an active promoter of National Socialism who had been convicted, the Court likewise concluded under the necessity test that this was an ideology with the aim of destroying fundamental rights and that the conviction had thus been necessary.[40]

In other freedom of expression cases, a proportionality analysis is explicitly applied. *Lehideux and Isorni* was a case about a book trying to positively revise the role of Pétain, the head of the Vichy regime, that had collaborated with the Nazis.[41] The Court held that the criminal conviction which had been imposed on the applicants was disproportionate. As the applicants had not sought to deny or revise Nazi atrocities, but rather discussed a specific version of the role of Pétain in the policies of the Vichy regime, Article 17 did not come into play for the Court as the defining factor. But even Holocaust denial cases as such have at times been assessed by way of a balancing exercise in Strasbourg.[42] The same goes for instances of Islamophobic political speech[43] and racist or xenophobic political utterances.[44]

Article 17 can also be applied indirectly to cases of political parties. In the Grand Chamber judgment of *Refah Partisi and others v. Turkey*, the Court ruled on the dissolution of that country's main Islamic party at that time. In holding that a compromise between defending democracy and upholding individual rights is necessary, the Court dismissed a categorical, direct application of Article 17 and rather went into the merits under the freedom of association (Article 11 ECHR). This shows that the old position of the European Commission of Human Rights of direct application of Article 17 to dissolution of political parties cases has been abandoned.

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[38] *Yazar and others v. Turkey*, ECtHR 9 April 2002, appl. nos. 22723 and others, para. 49.
[39] *Kaptan v. Switzerland*, ECtHR 12 April 2001 (dec.), appl. no. 55641/00.
[40] *Schimanek v. Austria*, ECtHR 1 February 2000 (dec.), appl. no. 32307/96.
[41] *Lehideux and Isorni v. France*, ECtHR 23 September 1998, appl. no. 24662/94.
[42] *Witzsch v. Germany*, ECtHR 20 April 1999 (dec.), appl. no. 41448/98.
[43] In *Le Pen v. France*, ECtHR 20 April 2010 (dec.), appl. no. 18788/09, the Court dismissed the complaint of a French politician in an admissibility decision which included a necessity test but which did not explicitly mention Article 17.
[44] *Féret v. Belgium*, ECtHR 16 July 2009, appl. no. 15615/07.

Under the substantive Article 11 assessment the Court then went on to develop a strict necessity test which included criteria related to imminent threats to democracy and ideas which were incompatible with a democratic society. As the Court noted, it was "not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history."[45] This thus relates both to intentions and consequences and can be seen as an implicit elaboration of an indirect Article 17 assessment. Whereas in *Refah Partisi* no violation was found eventually, in a range of similar party dissolution cases the Court did conclude that Article 11 had been violated. Turkey had argued for application of Article 17 in vain, as the Court found nothing in the parties' programmes or actions which aimed at the destruction of rights or called for recourse to violence.[46]

[45] *Refah Partisi and others v. Turkey*, ECtHR (GC) 13 February 2003, appl.nos. 41340/98 and others, para. 99.
[46] E.g. *United Communist Party of Turkey and others v. Turkey*, ECtHR 30 January 1998, appl. no. 19392/92.