Responsibility and Freedom of Speech under Article 10*

Freedom of speech is such a fundamental aspect of a free society that it is often used as a measure by which a society or State can be considered 'free.' However, untrammelled freedom of speech can impact directly on the rights and freedoms of others, for example, by protecting hate speech and undermining the rights and freedoms of those who belong to minority groups. Article 10, as a qualified right, can be limited, but it is also the only article which mentions the concept of responsibility. This work examines the concept of responsibility under article 10, arguing that a greater focus on responsibility would enhance the coherence of the Court's freedom of speech jurisprudence, which currently lacks clarity. The jurisprudence relating to article 10 is examined, as well as the silencing provisions of Article 17 of the Convention, which prevent the exercise of rights to defeat the ends of the Convention itself.

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I. Introduction

Freedom of speech is such a fundamental part of a free society that it is often used as a key measure to assess the extent to which a State could be considered 'free.'[1] Indeed, authors such as Dworkin characterise freedom of speech as so critical to a free, democratic society that it should be an absolute right: his compelling argument is that political decisions could lack legitimacy should anyone be deprived of 'a vote and a voice.'[2] Following Dworkin's line of argument, any restrictions on freedom of expression are automatically undemocratic, and limit one's franchise within the democratic system. This perspective characterises freedom of speech as a right without responsibility; an entitlement without limits. However, with absolutism of this nature, hateful speech without any responsibility attached generates complex problems for a free and democratic society,[3] and specifically for minority groups within populations.[4] Thus, issues arise with unlimited freedom of speech, when that freedom is used to express oneself in a hateful manner, [5] particularly when such speech causes 'factual harm'[6] to the rights and freedoms of others. Recognising the damage that such unlimited freedom could do to the system of human rights, as well as to the rights of individuals, the drafters of the European Convention on Human Rights enshrined the individual right to freedom of expression[7] broadly and attached certain limitations. The right allows everyone to hold opinions and ideas, and to freely receive information and convey information, without any interference.[8] Although drafted broadly, to protect the holding, expression, communication and broadcast of ideas, there are limitations presented within the article itself, allowing domestic authorities to restrict freedom of speech in cases where the right is being abused, or where the rights and freedoms of others are threatened:

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1 See the Human Freedom Index 2019, published by the Cato Foundation, World Press Freedom Index, published by Reporters without Borders, and the annual reports published by Freedom House.

2 J. Weinstein, 'Hate Speech Bans, Democracy, and Political Legitimacy' (2017) 32 Const. Comm. 527, 529.

3 See E. Heinze, Viewpoint Absolutism and Hate Speech' (2006) 69 M.L.R. 543.

4 M. Cheema and A. Kamran, 'The Fundamentalism of Liberal Rights: Decoding the Freedom of Expression under the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2014) 11 LU. Ch. I.L.R. 79, 101.

5 A. Stilz, 'On democratic persuasion' (2017) 82 Jurisprudence 342-351 and Erica Howard, 'Freedom of Speech versus Freedom of Religion? The Case of Dutch Politician Geert Wilders' (2017) 17 H.R.L.R. 313, 337.

E. Howard, 'Freedom of Speech versus Freedom of Religion? The Case of Dutch Politician Geert Wilders' (2017) 17 H.R.L.R. 313, 337.

7 Article 10(1), European Convention on Human Rights 1950.

8 Article 10(1), European Convention on Human Rights 1950.

> *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society."*[9]

Article 10 remains the only article in the Convention to reference the idea of the 'responsibility' that those who wish to exercise freedom of expression must carry. The notion of what this responsibility may entail is, as shall be discussed below, dealt with to an even lesser degree, with very limited examples, of cases which reference the idea of responsibility in the context of freedom of speech. Buyse describes the right to free speech as a 'flexible membrane' which can protect certain speech depending on the context and argues that balancing exercises are a necessary part of that freedom.[10] These balancing exercises, however, have produced an interesting approach in the Court's jurisprudence, from which few clear ideas can be drawn. Greater reference to the idea of responsibility could create a degree of coherence in the Court's jurisprudence. The necessity of permitting speech which may 'shock, offend or disturb'[11] is balanced against the State's power to restrict speech only where there is a 'pressing social need'[12] to do so. As demonstrated below, the responsibility of the individual claiming the right, however, has not been engaged greatly by the Court, and instead the focus remains on the contribution the speech or expression makes to the public debate and the 'pressing social need' for any restrictions.

This work examines the concept of responsibility under article 10 and argues that a greater focus on responsibility would offer a degree of coherence in the Court's jurisprudence, which currently lacks clarity. As will be demonstrated below, although the Court is certain as to when violations of article 10 have (and have not) been committed, its reasoning is sometimes vague and lacking justification. This work looks at the jurisprudence of article 10 and then the key criteria of incitement to violence and contribution to the public debate, which are key determinants when considering a potential breach of article 10, as well as how responsibility may help to clarify the Court's approach. The silencing provisions of article 17, which prevents the exercise of any rights in order to defeat the ends of the Convention, and their use in cases concerning genocide denial, will also be explored to appreciate how responsibility may help to clarify the law in this area.

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9 Article 10(2), European Convention on Human Rights 1950.

10 A. Buyse, 'Words of Violence: Fear Speech, or How Violent Conflict Escalation Relates to the Freedom of Expression' (2014) 36 H.R.Q. 779, 795.

11 *Handyside v UK* (1976) 1 E.H.R.R. 737.

12 *Sunday Times v UK* (1979) 2 E.H.R.R. 245.

II. Freedom of speech under Article 10

The restrictions on publication in the *Sunday Times* cases,[13] for example, were deemed to be violations of article 10[14] because the facts of the stories were already in the public domain. The first case, in 1979, concerned the settlements offered for children who were born with disabilities because their mothers had been prescribed thalidomide during pregnancy. The argument against publication was rejected on the grounds that the scandal was a significant issue of public concern, the facts of which were already known by the public, meaning that there was no 'pressing social need' to restrain publication. The second case involved the publication of the Spycatcher novels, which concern previously secret MI5 information. As the material was already in circulation in other countries, an injunction to prevent publication was deemed ineffectual, as the information was no longer confidential. In both cases, the Court acknowledged the responsibility on the newspaper to highlight and discuss issues of public concern in a responsible way: in the first case, the balanced nature of the reporting was commended. In the second, the material was no longer secret, as it had been published in other jurisdictions. Publication in the UK was therefore not considered irresponsible.[15]

The equally significant *Handyside*[16] judgment held that article 10 protected the right to 'shock and disturb' through the dissemination of information, although rejected the idea that it would also extend to information considered by the Director of Public Prosecutions in that case to be pornographic, noting that there could be a pressing social need for such restriction. Further detail on the concept of a pressing social need was offered by the case of *Otto-Preminger-Institut v Austria*[17] in which government intervention was justified to protect from shock and offence its population, the majority of whom it considered to be offended by the circulation of a film which aimed to horrify Roman Catholics. Thus, restriction based on a 'pressing social need' must go beyond the merely offensive. These seminal cases demonstrate the basis for restrictions under article 10, but it must also be noted that the Convention, as a living instrument, may be interpreted differently over time. More recent case law, *Pryanishnikov,*[18] considered the compatibility of State restrictions on audio-visual licences for a producer of both pornographic and non-pornographic films, without which no film could be produced or distributed. The Court held such restrictions to be a violation of article 10, because of the effect such a restriction would have on the non-pornographic aspect of his business.[19] Interestingly, in this case, the Court determined that the measure had been disproportionate,

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13 *Sunday Times v UK* (1979) 2 E.H.R.R. 245 and *Sunday Times v UK* (1992) 14 E.H.R.R. 123, for example.

14 *Sunday Times v UK* (1992) 14 E.H.R.R. 123.

15 *Sunday Times v UK* (1992) 14 E.H.R.R. 123, para 66-68.

16 *Handyside v UK* (1976) 1 E.H.R.R. 737.

17 (1994) 19 E.H.R.R. 34.

18 *Pryanishnikov v Russia* (App. No. 25047/05), judgment of 10th September 2017.

19 *Pryanishnikov v Russia* (App. No. 25047/05), judgment of 10th September 2017.

without engaging with the lack of contribution such expression makes to any public debate. Its reasoning was, instead, based on the extrapolated right to express oneself artistically:

> *"The Court further reiterates that freedom of expression includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression."*[20]

Thus, the right to express oneself artistically is part of the right to freedom of expression. The case law on public debate is still relevant to the points made in these cases, in that there exists a right to shock and disturb with the dissemination of information and ideas, including when one is engaged in artistic expression.

The shocking nature of certain expression remains protected in other areas, where the nature of the expression may have a connection to historic and current prejudices. In particular, the Court has held that an action taken against a journalist for the defamation of a politician, based on the journalist's criticism of the politician's accommodation of Nazis within Austrian politics, was censorious and a breach of article 10.[21] In the context of Austrian politics, the discussion of such ideas and even the politicians themselves was held to be in the public interest, and necessary for the stimulation of public debate. Indeed, specific matters relevant to domestic issues in each country may render the expression specifically protected because of the way in which it facilitates 'open discussion of matters of public concern,'[22] particularly where this relates to political debate. In *Thorgeirson*,[23] although the Court held that suppressing a journalist's discussion of police brutality was not necessarily political discussion,[24] a conviction for defamation was held to have violated article 10 because of the importance of the expression to the public debate in general. Interestingly, the Court also noted that the concept of 'responsibility' could not be used as a justification for restriction, unless the basis for the restriction could be found within article 10(2) of the Convention.[25] The Court accepts that speech which shocks, with the potential to defame an individual's reputation, should also

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20 *Pryanishnikov v Russia* (App. No. 25047/05), judgment of 10th September 2017.

21 *Lingens v Austria* (1986) E.H.R.R. 407.

22 *Thorgeir Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 483.

23 *Thorgeir Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 483.

24 *Thorgeir Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 483, para 61.

25 *Thorgeir Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 483, para 64.

be protected by article 10 where there was a requirement of open and public debate on the matter.[26]

There appear to be no common standards regarding the acceptability of restrictions across Europe, largely because of domestic context within which the restrictions have been evaluated. This has led to a degree of asymmetry across Europe, particularly where countries are treated differently with the margin of appreciation which each is afforded by the Court.[27] However, it would also appear that different contexts are distinguished , and that the content of the speech is critical. A demonstration of the evolving context in which remarks are viewed is provided by *Gunduz*,[28] in which the Court heard two separate claims regarding largely similar remarks from different periods in time. The first case concerned a newspaper article written in 1994, in which Gunduz had made remarks about moderate Islamic intellectuals in Turkey, noting that they were so hollow that 'All that is needed now is for one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet to show just how empty they are.'[29] He argued that his conviction under the Criminal Code for incitement to violence was a violation of article 10, but the Court declared his claim to be inadmissible,[30] on the basis that restrictions on speech which 'amount(ed) to hate speech or to glorification of or incitement to violence…cannot be regarded as compatible with the notion of tolerance' in a plural society.[31]

Gunduz's second conviction was for inciting hostility and hatred against non-Muslims during a televised interview in 1995. Although the tone of the remarks was decidedly less violent than his articles, he remained constant in his support of an oppressive form of Sharia law, arguing that secularism was 'hypocritical' (although not really explaining why), agreeing with the violence against individuals who were openly secular at public institutions, and that children born of civil marriages would be considered illegitimate under Islamic law.[32] He, again, raised a claim before the European Court of Human Rights, arguing that his conviction was in breach

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26 *Thorgeir Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 483, para 56.

27 O. M. Arnardottir, 'Res interpretata, erga omnes effect and the role of the margin of appreciation in giving domestic effect to the judgments of the European Court of Human Rights' (2017) 28 E.J.I.L. 819.

28 *Gunduz v Turkey* (App. No. 59745/00) Decision on admissibility of 13 November 2003; *Gunduz v Turkey* (2005) 41 E.H.R.R. 5.

Gunduz v Turkey (App. No. 59745/00) Decision on admissibility of 13 November 2003, circumstances of the case.

30 *Gunduz v Turkey* (App. No. 59745/00) Decision on admissibility of 13 November 2003.

31 *Gunduz v Turkey* (App. No. 59745/00) Decision on admissibility of 13 November 2003, 1.

32 *Gunduz v Turkey* (2005) 41 E.H.R.R. 5, 11.

of article 10. The Court's judgment echoed that of *Otto-Preminger*,[33] noting that the exercise of article 10 was limited by the rights and freedoms of others, meaning that those exercising freedom of speech had 'an obligation to avoid as far as possible expressions that are gratuitously offensive to others…and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.' [34] More recently, the Court has rejected the right of individuals to make comments which constitute 'an improper of even abusive attack on an object of religious veneration.'[35] However, the Court concluded that this conviction constituted a violation of article 10. The judgment noted that gratuitously offensive speech should be avoided but stated that the nature of the programme was to present his views as a significant part of the relevant and topical public debate in Turkey at that time.

In this context, it is evident that racist and sectarian forms of hate speech are not quite as restricted as one might assume in a system which seeks to balance the rights of freedoms of others against freedom of speech: the key question is the contribution such speech makes to the public debate, rather than the nature of the speech itself, and the likelihood of the speech inciting violence. The criteria must be balanced against one another: the importance of the public debate against the likelihood of the remarks sparking violence in their wake. Although only mentioned in some cases, the question of responsibility is an inherent part of the test of incitement to violence. The next part will assess the extent to which responsibility is considered by the Court, and the impact this has on the outcome of such cases.

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33 *Otto-Preminger-Institut v Austria: (*1995) 19 E.H.R.R. 34.

34 *Otto-Preminger-Institut v Austria: (*1995) 19 E.H.R.R. 34, 49.

35 *E.S. v Austria* (App. No. 38450/12), Judgment of 25 October 2018, para 43.

III. The public debate, incitement to violence and responsibility

The issue of responsibility is tied to both the issue of public debate and the effect of the speech or expression on wider society, particularly that which relates to any incitement to violence. The contribution one makes to the debate must be balanced against the likelihood of incitement to violence, and thus the two tests - contribution to the debate and incitement to violence, - should be examined together to identify when article 10 may be justifiably restricted. Although there is a connection between hate speech and incitement to violence, the restrictions on the former are outweighed by the focus on the latter, as shall be demonstrated here.

The likelihood of incitement to violence under article 10 is a key concern for the Court, which attempts to balance the idea of a varied, plural debate against the likelihood of the speech inciting violence. Interestingly, there is little reference to responsibility when determining whether the actions are likely to incite violence: in *Erbakan*,[36] the Court considered a ban on speech which was likely to generate a 'present risk' or 'imminent risk' of inciting violence. The role of the individuals who were speaking was key, as well as the time lapse between speech and prosecution. Politicians, in this case, were held to have to exercise greater responsibility than others when making comments which could lead to religious division. Lobba argues that the approach to incitement by the Court can be view as a 'multi-faceted test'[37] and argues that the case law on incitement is a good example of a more developed aspect of the Court's article 10 jurisprudence. Arguably, however, it has developed in volume rather than clarity. A greater focus on responsibility, as a key determinant, would aid developing a clearer approach, because of the way in which it links each of the criteria of pressing social need, likelihood of incitement to violence and the value of the contribution to the public debate.

The question of the line between offensive speech and hate speech is a good example of the law developing in volume rather than clarity; yet the distinction between hateful and offensive speech has not really been made clearly by the Court. For example, in *Leroy v France*,[38] an offensive cartoon which pictured the destruction of the twin towers captioned with a paraphrased Sony slogan ('We all dreamt of it…Hamas did it') was the subject of an article 10 claim after the cartoonist was fined. The Court did not find a violation of article 10, as the fine was viewed as a reasonable restriction, despite there being no territorial link to the US nor any links to terrorism generally. Instead, the Court relied upon the criterion of disruption to the public, democratic order. Such a case undermines the clarity of the Court's approach: if it is a contribution to the debate, albeit a tasteless contribution, which the Court acknowledges will

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36 *Erbakan v Turkey* (App. No. 59405/00), judgment of 6 July 2006.

37 P. Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 E.J.I.L. 237.

38 *Leroy v France* (App. No. 36109/03), judgment of 2 October 2008.

not incite violence, then why should a fine be permitted? The question of responsibility may have offered some clarity to the Court's approach: the skilful drawing of a cartoon which could be rapidly shared around the world and potentially used in terrorist propaganda was unquestionably irresponsible, but arguably had little impact on the democratic order in France. A focus on responsibility would offer a degree of consistency: with Leroy, the Court appeared unable to articulate, in a justifiable fashion, why this form of expression ought to be limited. Noorlander notes that censure of certain anti-Islamic cartoons is problematic when considering freedom of speech,[39] although he does not interrogate the role of cartoons in inciting violence, and there is no consideration in his work of responsibility regarding freedom of expression. Free expression, however, should include the rights of artists to produce the art they choose, as the appeal sometimes lies, as Rosler notes, in the appalling. [40]

Other cases raised against the French government demonstrate its firmer approach to offensive and hateful speech, one which is not always supported by the Court. In *Giniewski v France,*[41] a journalist who had researched the connection between Roman Catholic doctrine and justifications for the Holocaust was convicted of hate speech. The Court held that any restrictions on publication in this instance would be a violation of article 10, primarily because the ideas were open to discussion. The Court also added another dimension to the question of responsibility, by holding that there was no gratuitous controversy created by the work, meaning that there was no 'pressing social need' to restrict such discussion.[42] There is support for this approach in the literature, in that criticism of the State or other powerful organisations should not be restricted by article 10 unless there is a call to violence, whether veiled or obvious. [43] Moreover, if 'doublespeak' is being used, to disguise the intended message in the words, the State must demonstrate the intended meaning of the speech and prove the incitement to violence within.[44] In a similar vein, in *Lehideux and Isorni v France*,[45] the applicants complained of a breach of article 10 after they were convicted of publicly defending the crimes of an enemy State. The conviction was based on an advert they placed in a national newspaper

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39 P. Noorlander, 'In fear of cartoons' (2015) 2 E.H.R.L.R. 115, 116.

40 H. Rosler, 'Caricatures and satires in art law: the German approach in comparison with the United States, England and the Human Convention on Human Rights' (2008) 4 E.H.R.L.R. 463, 487.

41 *Giniewski v France* (2007) 45 E.H.R.R. 23.

42 *Giniewski v France* (2007) 45 E.H.R.R. 23, 50-51.

43 H. Davis, 'Lessons from Turkey: anti-terrorism legislation and the protection of free speech' (2005) 1 E.H.R.L.R. 75, 82.

44 H. Davis, 'Lessons from Turkey: anti-terrorism legislation and the protection of free speech' (2005) 1 E.H.R.L.R. 75, 82.

45 (2000) 30 E.H.R.R. 665.

to stimulate debate regarding the actions of Pétain during the Second World War. The Court considered whether it was necessary in a democratic society, using the test of a 'pressing social need' to determine whether their convictions were a necessary State intervention. One of the key considerations was that they did not deny the facts of the Holocaust, nor was there any justifications of pro-Nazi policies, both of which would have been considered 'remarks directed at the Convention's underlying values,'[46] and therefore unprotected by Article 10. Critically, the timing at which the debate took place affected the nature of the remarks, making it 'inappropriate to deal with such remarks 40 years on, with the same severity as 10 or 20 years previously.'[47] Indeed, it supported the debate of a country's history 'openly and dispassionately'[48] and reiterated that article 10 protected both acceptable and palatable ideas, as well as those found shocking, disturbing and offensive.[49] Although perhaps offensive, such speech was determined as lacking the hatefulness or incitement to violence required for a legitimate restriction under article 10. In both cases, France's approach to expression connected to the Holocaust was viewed as overly restrictive, where no direct incitement to hatred could be found.

Belavusau relies on the work of Sadurski to draw a distinction between incitement to hatred and incitement to violence, in that the former is the 'emotional preparation' for the latter,[50] referring to the repression of hate speech in Central and Eastern European countries as 'militant democracy.'[51] There is clearly a distinction between incitement to violence and incitement to hate, as the former is used by the Court as a test to determine whether speech has been justifiably restricted. French restrictions, as shown above, tend to be among the strictest in Europe and any hint of discriminatory discussion is often censored. Indeed, Bob Dylan was able to emerge unscathed from an anti-hate action in France purely on a technicality: he had not authorised the publication of his remarks in France.[52] During an interview with a magazine, he was questioned about the lasting effects of racism in the United States, and gave the following response:

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46 (2000) 30 E.H.R.R. 665, para 53.

47 (2000) 30 E.H.R.R. 665, para 55.

48 (2000) 30 E.H.R.R. 665, para 55.

49 (2000) 30 E.H.R.R. 665, para 55.

50 U. Belavusau, 'Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant (Czech Republic, Hungary and Poland)' (2014) 27 I.L.R. 27, 45.

51 U. Belavusau, 'Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant (Czech Republic, Hungary and Poland)' (2014) 27 I.L.R. 27, 61.

I. Landauro and N. Bisserbc, 'France Drops 'Hate Speech' Case Against Bob Dylan' (15 April 2014) *Wall Street Journal* https://www.wsj.com/articles/france-drops-hate-speech-case-against-bob-dylan-1397592733 [Accessed 5 July 2019].

> *'[i]f you got a slave master or Klan in your blood, blacks can sense that. That stuff lingers to this day. Just like Jews can sense Nazi blood and the Serbs can sense Croatian blood.'*[53]

Although an unquestionably unorthodox and unscientific point, his opinion did not really speak of any hate towards a particular group of individuals. The French domestic court disagreed and raised an action against him for the dissemination of racist and hateful views. When it emerged that he had not authorised the publication in France, they continued to pursue his publisher, Michel Birnbaum. The nature of hate speech, as noted by Kiska,[54] is that it may relate to intention, sometimes, and to effect, at others, depending on the jurisdiction in question. Customary international law provides little guidance: the unsettled nature of insulting or 'mere hate speech' in custom was noted by Meron in passing judgment before the International Criminal Tribunal for Rwanda, as cited by Clooney and Webb.[55] Oetheimer notes that the media role is key, as they can become promoters of hate and violence very easily.[56] He argues that there is an inner consistency to the Court's work,[57] although does not expound on what this may be. If there is a degree of consistency in its approach to hate speech, it is questionable as to where or when this is visible. Fines for certain offensive expressions which could incite are permitted, as in *Leroy*, whilst expression which does not directly incite violence, as in Molnar, but contextually could is held to be an unacceptable exercise of article 10, but restrictions in other situations, such as *Gunduz*, are considered violations of article 10 despite the clearly hateful nature of the discussion. *Gunduz* is particularly striking because of the extra context provided by the earlier, inadmissible case: the views of the interviewee were well-known, and his intentions, in making certain statements, were not motivated by peace and tolerance.

Cannie and Voorhoof cite Keane and note that he has exposed a two-tier approach in respect of hate speech: hate speech involving denial of the Holocaust or the Second World War is

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53 J. Weinstein, 'Hate Speech Bans, Democracy, and Political Legitimacy' (2017) 32 Const. Comm. 527, 544.

54 R. Kiska, 'Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence' (2012) 25 Regent U.L.R. 107, 110.

55 *Nahimana et al. v The Prosecutor* Partly Dissenting Opinion of Judge Meron, ICTR-99-52-A, 5 (JCTR Appeals Chamber Nov. 28, 2007) in A. Clooney and P. Webb, 'The Right to Insult in International Law' (2017) 48 C.H.R.L.R. 1, 21.

56 M. Oetheimer, 'Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law' (2009) 17 C.J.I.C.L. 427, 441.

57 M. Oetheimer, 'Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law' (2009) 17 C.J.I.C.L. 427, 443.

usually restricted, as article 10 is rendered inaccessible through the application of article 17. [58] However, there is little evidence to support this point. Although both forms of historical revisionism are usually restricted, the Commission previously justified restriction of Holocaust denial on the basis of the prevention of crime and disorder.[59] In *Refah Partisi*, other restrictions were permitted because the applicants' vision of plurality was too much in conflict with fundamental democratic principles.[60] Cannie and Voorhoof make the point that the examination undertaken in *Refah Partisi* was based entirely on article 10, to determine whether there was a pressing social need to restrict their expression, which they note is not often the case in situations of Holocaust denial. They argue for a clearer formulation of the Court's principles to explain when article 17 ought to be used and when there is a pressing social need for the expression to be restricted.[61] This indicates that the articulation of a clearer approach is necessary, and that the discussion of responsibility is key: both cases demonstrate irresponsible exercise of freedom of speech, in contexts where the situation have previously or may currently become tense. When determining whether the individual has the right to exercise freedom of speech, responsibility is an incredibly useful measure which could allow the Court to clarify their tests, rather than relying on different tests in different contexts, further restricting freedom of speech beyond set parameters.

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58 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' (2011) 29 N.Q.H.R. 54, 55.

59 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' (2011) 29 N.Q.H.R. 54, 68.

60 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' (2011) 29 N.Q.H.R. 54, 75.

61 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' (2011) 29 N.Q.H.R. 54, 83.

IV. Article 17 and hate speech

Although genocide denial is criminalised in a significant number of countries,[62] because of the way in which it is often used to resurrect Nazism, [63] the Court has a specific focus on genocide denial relating to the Shoah, the Jewish Holocaust. Whine argues that this is because denial of the Shoah links to a wider problem of incitement to hatred against Jews, which often leads to violence against Jewish individuals and institutions, undermining 'fundamental concepts of civil liberty and fundamental rights.'[64] Whine's point is that Holocaust denial is intrinsically connected to a rejection of the system on which the modern system of human rights was founded. As such, there is a strong justification for restricting free speech where Holocaust denial is concerned, and explains the Court's specific concerns regarding the Shoah: its inception is so closely linked to the Second World War and the atrocities committed by the Nazi government that a particularly strong line is taken regarding this sort of genocide denial or revisionism. As such, it would be blatantly irresponsible to allow similar atrocities to be committed by ignoring the connection between hate speech, historical revisionism, genocide denial, and the eventual genocide of the Jewish people during the Second World War.

Kahn characterises any Holocaust denial in countries with 'direct experience of Nazi rule, a form of hate speech'[65] because of the way in which it seeks to separate survivors and their descendants from the rest of society. In the same volume, Pech notes the importance of article 17[66] as a method of precluding the exercise of any rights and freedoms under the Convention, including article 10, but notes that the Commission have often relied on the restrictions within article 10 to determine whether the speech ought to receive protection. Pech does not call for the denial of free speech across the board to those who reject established historical facts, nor does he note that these denials could be linked to incitement of hatred. This speaks to a general recognition, although not enunciated, of the importance of responsibility when exercising freedom of speech, and of the fact that exercising one's freedom of expression in the medium

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62 P. Behrens, N. Terry and O. Jensen (eds), *Holocaust and Genocide Denial: A Contextual Perspective* (Abingdon: Routledge, 2017) and M. Whine, 'Expanding holocaust denial and legislation against it' (2008) 13 Comms. L. 86, 88.

63 M. Whine, 'Expanding holocaust denial and legislation against it' (2008) 13 Comms. L. 86, 88.

64 M. Whine, 'Expanding holocaust denial and legislation against it' (2008) 13 Comms. L. 86, 88.

65 R. Kahn, 'Holocaust denial and hate speech' pp.77-108 in L. Hennebel and T. Hochmann (eds), *Genocide denials and the law* (Oxford: OUP, 2011), p.78.

66 L. Pech, 'The law of holocaust denial in Europe: Towards a (qualified) EU-wide criminal prohibition' pp.185-234 in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide denials and the law* (Oxford: OUP, 2011), p.215.

of hate speech, particularly in contexts of great historical suffering during the Second World War, could be completely irresponsible. The limited reach of the law is noted by Marshall and Williams, who argue that it is difficult to regulate holocaust denial because of the necessary impact such regulation has on freedom of speech.[67] Their argument holds that the law is of limited value in this area, and that behavioural adjustments are required, such as education programme to change behaviour and attitudes. Such methods may increase personal responsibility in respect of making such statements in public, but they disregard the notion that the exercise of freedom of speech obligates the individual to act responsibly. Should the individual fail to do so, they may not exercise their freedom in that way without penalty or other repercussions

Lobba does acknowledge that there is protection for the Court's values and cites *Janowiec*[68] as evidence of the Court's 'constant position' that Holocaust denial, in particular, is not protected by article 10.[69] However, there is little support in the jurisprudence for his notion that article 17 is used to prevent the denial of international crimes. Indeed, some forms of hate speech are considered more problematic than others, with the Court taking measures to ensure that its values are protected from what it views as the greatest threats to democracy and human rights. Despite Williams and Cooper[70] arguing that Holocaust denial is difficult to regulate, the Court has not struggled to deny article 10 rights to those who are convicted or found legally responsible through domestic civil prosecutions or similar proceedings. In *X v Germany*[71] and *T v Belgium*,[72] the parties were denied the protection of article 10 where they sought to deny the existence of the Holocaust. Thus, a violation of article 10 is less likely to be found by the Court where the individual authored the work on Holocaust denial, rather than simply engaged with those who deny or question the historical facts. *X v Federal Republic of Germany*[73] concerned a member of a right-wing organisation who displayed pamphlets declaring the Holocaust a 'Zionistic swindle' and stating that the death of six million Jews during the Second World War had been a 'lie.' The Commission acknowledged the restriction on freedom of expression, but

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67 A.M. Williams and J. Cooper, 'Hate speech, holocaust denial and international human rights law' (1999) 6 E.H.R.L.R 593, 593.

68 *Janowiec v. Russia* (2014) 58 E.H.R.R. 30.

69 P. Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 E.J.I.L. 237.

70 A.M. Williams and J. Cooper, 'Hate speech, holocaust denial and international human rights law' (1999) 6 E.H.R.L.R 593.

71 *X v Federal Republic of Germany* (App. No. 9235/81), Decision of 16 July 1982.

72 (App. no. 9777/82), Decision of 14 July 1983.

73 *X v Federal Republic of Germany* (App. No. 9235/81), Decision of 16 July 1982.

considered it justified on the basis that the reputation of others required protection against clearly defamatory statements. [74] It was thus appropriate to restrict freedom of speech under national law and the application was held to be manifestly ill-founded. Again, the question of responsibility is key: spreading untruths regarding an accepted, documented historical event does not contribute to debate and may not even incite violence, but it is not responsible behaviour in a country which previously experienced genocide, and which has not fully resolved its issues with anti-Semitism.[75]

Similarly, editing and attempting to profit from 'work' on Holocaust denial was held to have been legitimately restricted in *T v Belgium.*[76] The Commission noted that no benefit should be derived from such work, and that it was a proportionate interference with article 10 to restrain publication. Clooney and Webb note that the European Court is not alone in its decree that such restrictions are in keeping with the proper exercise of freedom of speech, as the UN Human Rights Committee is supportive of restrictions which prevent historical revisionism.[77] They note, accurately, that there is a flexible standard applied to hate speech, with a violation of dignity being the threshold in some cases, and incitement to violence in others.[78] It could be argued that, in specific situations, the threshold for incitement to violence is lower, but the case law cited does not indicate that certain words are more likely to incite violence than others. Indeed, one particular case of restricted Holocaust denial was not considered a breach of article 10 because the individual had insulted 'the dignity of the deceased.'[79] Their main concern is the use of article 17, which prevents the use of any Convention right to destroy the rights and freedoms of others under the Convention, as a concerning medium for the restriction of rights. Molnar[80] provides justification for noting that certain complaints can be declared instantly inadmissible, without full analysis article 10.[81] However, the Court still investigated the nature of the expression, holding:

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74 *X v Federal Republic of Germany* (App. No. 9235/81), Decision of 16 July 1982, 199.

75 James Angelos, *The New German Anti-Semitism* (21 May 2019), *The New York Times,* *https://www.nytimes.com/2019/05/21/magazine/anti-semitism-germany.html* [Accessed 4 July 2019].

76 (App. No. 9777/82) Commission decision of 14 July 1983, 158.

77 A. Clooney and P. Webb, 'The Right to Insult in International Law' (2017) 48 C.H.R.L.R. 1, 46. See also *Robert Faurisson v France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

78 A. Clooney and P. Webb, 'The Right to Insult in International Law' (2017) 48 C.H.R.L.R. 1, 35.

79 A. Clooney and P. Webb, 'The Right to Insult in International Law' (2017) 48 C.H.R.L.R. 1, 46 in *Witzsch v. Germany* (App. No. 7485/03), judgment of 13 December 2005.

80 *Molnar v. Romania* (App. No. 16637/06), judgment of 23 October 2012, 54.

81 A. Clooney and P. Webb, 'The Right to Insult in International Law' (2017) 48 C.H.R.L.R. 1, 54.

'Par leur contenu, ces messages visaient à instiguer à la haine contre ces minorités, étaient de nature à troubler gravement l'ordre public et allaient à l'encontre des valeurs fondamentales de la Convention et d'une société démocratique. Portant atteinte aux droits d'autrui, de tels actes sont incompatibles avec la démocratie et les droits de l'homme de sorte qu'en vertu des dispositions de l'article 17 de la Convention, le requérant ne puisse pas se prévaloir des dispositions de l'article 10 de la Convention.'[82]

Authorship rather than dissemination of the views tends to be a deciding factor: in the *Jersild* case,[83] a conviction concerning the broadcasting of Holocaust denial rather than the expounding of such views personally, was a violation of article 10 because of the connected press freedom issues. The Court held that punishing a journalist for broadcasting statements made by another during an interview would "seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."[84]

In cases concerning Holocaust denial, article 17 is key in supporting the restriction of dissemination or broadcast of such ideas. However, it is notable that there is little engagement with the concept of responsibility in article 10, given that holocaust denial and racist ideas, held up by their proponents as 'the truth,' are all dangerous and inappropriate exercises of article 10. Keane makes the point that Holocaust denial and general Second World War revisionism is dangerous to democracy.[85] He also argues that the *Lehideux* case refers to events and their facts which are not part of a historical record the revision of which would destroy rights. [86] There is little if any evidence to support this point, as the approach by the Court to revisionism, as demonstrated here, is less than clear. Keane also supports the application of article 17 in situations where the acts aim to 'spread violence or hatred, to resort to illegal or democratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.' [87] Arguably this is exactly the problem generated by a lack of

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82 *Molnar v. Romania* (App. No. 16637/06), judgment of 23 October 2012, 54.

83 *Jersild v Denmark* (1995) 19 E.H.R.R. 1.

84 *Jersild v Denmark* (1995) 19 E.H.R.R. 1, para 35.

85 D. Keane, 'Attacking hate speech under Article 17 of the European Convention on human rights' (2007) 25 N.Q.H.R. 641, 648.

86 D. Keane, 'Attacking hate speech under Article 17 of the European Convention on human rights' (2007) 25 N.Q.H.R. 641, 661.

87 D. Keane, 'Attacking hate speech under Article 17 of the European Convention on human rights' (2007) 25

explicit focus on the idea of responsibility: it would be sufficient to examine responsibility under article 10 when determining whether freedom of expression should be exercised. In *Molnar*, the link between the posters which held that Romania should 'not become a country of Roma' and the consequent likelihood of inflaming tensions and violence meant that the individual did not behave responsibly in wishing to express himself freely. Rather than discussing responsibility, the Court characterised such behaviour as incompatible with the rights and freedoms of others.[88]

In *Glimmerveen*, the Commission held that article 17 existed to prevent totalitarian groups from exploiting the Convention for their own ends.[89] It further commented that Holocaust denial was a special kind of hate speech, which could cause specific and unparalleled damage to European democracy.[90] Consequently, article 17 is particularly relevant to article 10, as it prevents any act which aims to destroy Convention rights or to limit them in any way not envisaged by the Convention. In other words, Article 17 is the ultimate protector against the abuse of rights under the Convention. This has been interpreted by the Court and domestic authorities as, among other things, preventing hate speech. In the comparative study of hate speech laws undertaken by McGoldrick and O'Donnell, there was ample evidence shown of the wide variety of acceptable restrictions on genocide denial and the criminalisation of hate speech across multiple jurisdictions.[91] Centrally, they argue, the use of article 17 has been limited to restrictions which were necessary in democratic society,[92] and that future restrictions should be proportionate.[93]

This does not mean, however, that article 17 has been restricted in its application. Indeed, it was upheld in *Norwood*,[94] in which the defendant attempted 'wordplay with the older *Handyside* judgment…contend(ing) that free speech should also be protected if it was 'irritating,

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N.Q.H.R. 641, 661.

88 *Molnar v. Romania* (App. No. 16637/06), judgment of 23 October 2012, 26-7.

89 *Glimmerveen and Hagenbeek v The Netherlands* [1982] E.H.R.R. 260.

90 *Glimmerveen and Hagenbeek v The Netherlands* [1982] E.H.R.R. 260, 90. See D. Keane, 'Attacking hate speech under Article 17 of the European Convention on human rights' (2007) 25 N.Q.H.R. 641, 661.

91 D. McGoldrick and T. O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law' (1998) 18 L.S. 453, 457.

92 D. McGoldrick and T. O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law' (1998) 18 L.S. 453, 466.

93 D. McGoldrick and T. O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law' (1998) 18 L.S. 453, 485.

94 *Norwood v UK* [2004] 11 WLUK 444.

contentious, eccentric, heretical, unwelcome and provocative.'[95] However, the acts of the accused - involving the display of a racist poster declaring 'Islam out of Britain Protect the British People' - were held to be in direct conflict with the Convention, despite his argument that his expression did not incite violence. Buyse's argument that that there is a trend towards using the balancing exercises within article 10, rather than relying on article 17 to declare the court inadmissible,[96] is cogent, but only in the case of Holocaust denial and Second World War revisionism. As demonstrated above, there is a tendency for the Court to examine a Holocaust denial case under article 10, rather than relying on article 17 to declare it inadmissible. This did not ring true in *Norwood*, where the complaint appeared to be dismissed under article 17.

Lobba notes that the Court has already agreed, in Gunduz, that racist or hate speech cannot be protected by article 10,[97] and that Janowiec makes the point that any denial of crimes against humanity is in direct contravention of the values of the Convention.[98] Despite a brief hiatus in *Lehideux*, he posits, article 17 is increasingly used to prevent any such denial, which he argues against as it undermines freedom of speech in order to preserve an 'ill-defined' moral order.[99] The point is compelling, and well-made, but it disregards the fact that the Court will examine the case under article 10 in situations of Holocaust denial rather than rely on article 17. A notable case which was declared inadmissible, *Remer v Germany*,[100] still examined the complaint under article 10, concluding that crime and disorder[101] was another reason to prevent Holocaust denial, given the anger and disorder that it could provoke. Instead, situations relating to racial hatred tend to be more likely to be refused under article 17. Regardless, the approach remains inconsistent, and the lack of focus on responsibility is a significant problem. The missing link, despite being quoted directly as part of the text in article 10, is a discussion of responsibility, and the extent to which such behaviour is responsible. Such discussion would

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95 A. Buyse, 'Dangerous Expressions; the ECHR, Violence and Free Speech' (2014) 63 I.C.L.Q. 491, 495.

96 A. Buyse, 'Dangerous Expressions; the ECHR, Violence and Free Speech' (2014) 63 I.C.L.Q. 491, 502.

97 P. Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 E.J.I.L. 237, 245.

98 P. Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 E.J.I.L. 237, 249.

99 P. Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 E.J.I.L. 237, 252.

100 (App. No. 25096/94), Judgment of 6 September 1995.

101 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' (2011) 29 N.Q.H.R. 54, 68.

prevent the use of article 17, which may appear authoritarian in application and scope when used.

V. Genocide denial and the concept of responsibility

Let us now examine the question of responsibility in the context of the Court's jurisprudence regarding freedom of expression and genocide denial. In *Janowiec v Russia,*[102] the Court stressed that any denial of crimes against humanity would conflict with article 17. This is slightly different from the view taken in *Lehideux and Isorni v France*, which focused instead on whether the discussion was necessary in a democratic society. Similarly, in *Perincek v Switzerland*,[103] the notion of whether the restriction was necessary in a democratic society was again prioritised, meaning that the denial of the Armenian genocide as a genocide was accepted. In this way, hate speech in respect of the Holocaust has been taken enormously seriously, while restrictions on the denial of other war crimes or genocide have generally been considered violations of article 10. This view has been reinforced in *M'bala M'bala v France*[104], where it was held that Holocaust denial of the Shoah was an 'ideology which goes against the fundamental values of the Convention.'[105] The hard line drawn by France and Central and Eastern European States in respect of Holocaust denial has been respected by the Court, which has permitted further restrictions on freedom of speech where the speech is connected to denial of the Holocaust. This makes it harder to draw a definite line with the idea of contributing to the public debate. Janowiec demonstrates how the Court sees itself, by supporting the restriction of Holocaust denial while cloaking it in a wider rejection of free speech as a justification for the denial of any war crimes, crimes against humanity and genocide. Lobba argues that this represents the 'redefinition' of Article 1, 'which now tends to cover the denial, justification and glorification of most of the core international crimes.'[106] However, this is countered relatively easily by a brief examination of *Perince*k;[107] the Court simply did not view genocides outside Europe as serious threats to democracy in the way that denying the Shoah was considered a direct aim at the heart of the system.

Pegorier notes that there are few issues with limiting free speech where the speech concerns genocide denial, as this is such a grave denial that any attempt to do so should be criminalised.[108] However, she acknowledges that there is a tendency in Europe to focus on the Holocaust as the most serious kind of hate crime denial, which has created an inconsistent

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102 *Janowiec v. Russia* (2014) 58 E.H.R.R. 30.

103 (2016) 63 E.H.R.R. 6.

104 (App No. 25239/13), Judgment of 20 October 2015.

105 (App No. 25239/13), Judgment of 20 October 2015, para 39.

106 P. Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 E.J.I.L. 237.

107 *Perincek v Switzerland* (2016) 63 E.H.R.R. 6.

108 C. Pegrorier, 'Speech and harm: genocide denial' (2018) 18 I.C.L.R. 97, 101-104.

approach, citing Perincek and M'bala as evidence of this trend. Indeed, she argues that to broaden out the rejection of free speech in respect of other forms of Holocaust denial would not be to create an 'equivalence,' but rather to develop a more consistent approach to hate speech under freedom of speech law in Europe.[109] Sottiaux states that the incitement standard is a 'multi-faceted test'[110] which means that the Court can survey a wide range of issues, including what was said, if there were any consequences and what the individual intended. This is a much clearer framework, in his eyes, than the previous democratic necessity approach. Nieuwenhuis argues against the restrictions on religious political parties,[111] on the basis that moral values area not automatically contrary to the Convention. He also holds that pluralism is also clearly defined by the Court, by now,[112] despite a lack of evidence for this point.

The case law in this area demonstrates the Court's approach to any attempts to counter the truth of the Holocaust. However, this approach is not, contrary to the view of Lobba,[113] which represents a general response to the denial of any war crimes and crimes against humanity. The recent case of *Perincek v Switzerland*[114] demonstrates the disparity of approaches depending on subject of denial, and the way in which the denial is expressed. *Perincek* concerned the expression of the Armenian genocide as an 'international lie' established by the 'Great Powers' to secure their own position.[115] The Court did not consider such statements to incite hatred and held that any restriction on the expression of these ideas was to be considered a (prima facie) violation of article 10. Specifically, it noted the Swiss government's limited margin of appreciation to interfere with such rights, and that the lack of a link between Switzerland and Turkey was sufficient to allow *Perincek* 'heightened protection' as an expounder of political views under article 10.[116] The Court precipitated its conclusions, which were not supported by a number of judges, by indicating that previous Holocaust denial cases had been decided upon based on their specific contexts, rather than on the basis of a generally accepted principle.

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109 C. Pegrorier, 'Speech and harm: genocide denial' (2018) 18 I.C.L.R. 97, 124.

110 S. Sottiaux, 'Leroy v France: apology of terrorism and the malaise of the European Court of Human Rights' free speech jurisprudence' (2009) 3 E.H.R.L.R. 415, 420.

111 A. Nieuwenhuis, 'The concept of pluralism in the case-law of the European Court of Human Rights' (2007) 3 E.C.L.R. 367, 376.

112 A. Nieuwenhuis, 'The concept of pluralism in the case-law of the European Court of Human Rights' (2007) 3 ECLR 367, 384.

113 P. Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 E.J.I.L. 237, 245.

114 (2016) 63 E.H.R.R. 6.

115 (2016) 63 E.H.R.R. 6.

116 (2016) 63 E.H.R.R. 6.

In 2016, it was noted, that the Court's approach to Holocaust denial was inconsistent.[117] The comment on the *Perincek* case noted that the Court failed to agree that genocide denial, in general, should automatically permit restrictions on freedom of speech. Given the special consideration it gave to denials of the Shoah, to consider other forms of genocide denial less destructive or damaging, particularly where there was no geographical or cultural link between the country and the place of the genocide, was considered 'questionable.'[118] On the one hand, it can be seen that the Court is attempting to permit free speech unless there are significant reasons for curtailing it. On the other, to consider historical revisionism of any genocide acceptable is problematic, particularly when information can be disseminated quickly and broadly across the world.

The Court's response in this instance, and in particular its exclusion of article 17 as a reason for restricting article 10, demonstrates its approach to perceived threats to its existence. Although the Armenian genocide was accepted as historical fact by the Court, it did not generate the same reaction as the denial of the Holocaust would. Rather than a conspiratorial effort, it demonstrates the rejection of any support for State-sanctioned violence. Moreover, the historical roots of the European Court indicate that it is much more likely to take seriously threats to its existence which have been demonstrated by its history. Although the Armenian genocide is accepted as fact, it did not happen as part of a devastating European war and was not accompanied by a fascism which sought to destroy democracy in Europe. The Court's view that certain forms of fascism ought to be more tightly controlled than others privileges the rights of certain deniers over others and ignores the dangerous common ground that such denials can create for those who reject human rights more broadly.

The issue, therefore, of responsibility, is key at this juncture. To assume that the previous serious threats to democracy remain the current threats is to disregard the changing context in Europe and European politics. Instead of relying on article 17, the concept of responsibility offers a more nuanced approach to the question of restricting freedom of speech. It may also have help to prevent genocide denial in general, and more consistently, by acknowledging that all forms of historical revisionism are problematic for democratic societies in general.

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117 Case Comment, 'Freedom of expression: hate speech - Holocaust denial' (2016) 1 E.H.R.L.R. 101, 108.

118 Case Comment, 'Freedom of expression: hate speech - Holocaust denial' (2016) 1 E.H.R.L.R. 101, 108.

VI. Conclusion

As shown above, both articles 10 and 17 of the Convention can be used to regulate hateful and offensive speech, particularly that of a racist nature. However, the issue of freedom of speech becomes more contentious, rather than less, because of the revival of right-wing political views across Europe and the associated revitalisation of Holocaust denial. While the roots of the Holocaust demonstrate the vulnerability of democracy and rights in Europe, it should not be assumed that this is the only threat to stable European societies: crimes against humanity and war crimes begin as ideas, and the dissemination of any racist and discriminatory views should be regarded as a threat. The European Court's attempt to identify tests for freedom of speech, primarily the idea that only restrictions which meet a pressing social need because of the likelihood that they incite violence, is problematic because of the associated requirement of public debate. The current climate requires the engagement with extreme right-wing views, specifically because they are of such interest to many. However, it is not necessary to feed into complaints of intolerance of views alternative to a liberal, rights-based discourse by continually reverting to article 17 to silence such hate. A fuller conceptualisation of what is meant by responsibility within article 10 would address these issues, while providing a timely reminder that democracy requires of all its adherents responsible engagement.