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**TO WHICH EXTENT FREEDOM OF EXPRESSION CAN BE  
LIMITED BY USING ABUSE OF RIGHTS?**

Bachelors's thesis

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## **ABSTRACT**

The aim of this bachelor's thesis is to examine when the abuse of rights can be applied directly with the cost of freedom of expression. The hypothesis is: that freedom of expression can be limited by using abuse of rights. Research questions are what kind of forms of freedom of expression can be limited by using the abuse of rights and how broadly abuse of rights can be applied so that it does not undermine freedom of expression as a base of democracy. The author aims to examine the contradiction between abuse of rights and freedom of expression and as well the importance of these for the democracy. In addition, can abuse of rights restrict freedom of expression according to the case law of European Court of Human Rights? The main result was that scope of abuse of rights should be narrow. It can be applied if the expressions incite to violence or hatred, and whether the statements have aimed to the destruction of the rights and freedoms laid down in the European Convention on Human Rights.

The methods that are used are doctrinal research method, legal analysis, literature review and case study.

Keywords: Freedom of expression, Abuse of Rights, Democracy

## **LIST OF ABBREVIATIONS**

EU	European Union
ECHR	European Convention on Human Rights
CFR	Charter of Fundamental Rights of the European Union
CCPR	International Covenant on Civil and Political Rights
ECtHR	European Court of Human Rights

## INTRODUCTION

” Every aspect contains a piece of truth.” This is a quote by John Stuart Mill and his views are still affecting to our society regarding the importance of freedom of expression.<sup>1</sup> However, freedom of expression is not an absolute right anymore.<sup>2</sup> Freedom of expression contains restrictions and in certain forms just as hate speech it can be even considered as abuse of rights. In that form certain expressions would be considered as human rights violations that could not be accepted under any circumstances.<sup>3</sup> The paradox of these two articles is reflected in the premise of the abuse of rights. The abuse clause was developed specifically to protect a democratic society.<sup>4</sup> In practice, the application of abuse of rights is highly related to the freedom of expression and these principles collide with each other’s with their history, purpose and requirement. States has the duty to ensure the realization of fundamental and human rights and if necessary, to protect those rights and both these articles fall within that scope.

The main aim of this bachelor’s thesis is to examine when the abuse of rights can be applied directly with the cost of freedom of expression. The hypothesis is: that freedom of expression can be limited by using abuse of rights. Research questions are what kind of forms of freedom of expression can be limited by using the abuse of rights and how broadly abuse of rights can be applied so that it does not undermine freedom of expression as a base of democracy. The methods that are used in this thesis project are doctrinal research method, legal analysis, literature review and case study. This thesis project takes into account several case studies from several states including countries from Europe in general and Finland as a separately representing a Nordic view on the subject. The literature review from different academic books, articles, and commentaries was an integral part of this thesis because it allowed a broad perspective from several different angles.

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<sup>1</sup> Neuvonen, R. (2005). *Sananvapaus, joukkoviestintä ja sääntely*. Helsinki, Finland: Talentum. p 44–45

<sup>2</sup> Pöyhtäri, R., Haara, P., Raittila, P. (2013). *Vihapuhe sananvapautta kaventamassa*. Tampere, Finland: Tampere University Press. p 56

<sup>3</sup> Hyttinen, T., Tapani, J. (2018). *Rikoksen ja rangaistuksen äärellä*. Helsinki, Finland: Unigrafia p.34

<sup>4</sup> Cannie, H., Voorhoof, D. (2011). *The abuse clause and freedom of expression in the European Human Rights Convention: an added value for democracy and human rights protection*. The Netherlands: Netherlands Institute of Human Right. p 58

The first chapter introduces freedom of expression in general and its importance for the democratic society. What kind of expressions the right allows and how is it restricted? Freedom of expression is examined from different perspectives such as European Union (EU) perspective, International conventions and Finnish regulation.

Chapter two introduces abuse of rights in general. How it has been established after WW II and how its scope has modified during the centuries. In addition, focus is paid into the meaning of abuse of rights and how Finland has had a different perspective considering the abuse of rights and two different forms how it can be applied. In chapter three, I chose to examine briefly hate speech as one of the most common forms of freedom of expression violations due to its broad definition. Most of the case studies had elements of the hate speech so it lays the groundwork for the next chapter.<sup>5</sup> In addition, I briefly open the importance of history to the hate speech legislations nowadays.

Chapter four includes four different cases. These cases are examined in the light when the abuse of rights can be applied directly and when it is not applicable. In addition, the I conclude the case studies in chapter 4.5 to get an overview of the cases and present few contradictions between those cases. In the last chapter I have concluded two different views to the question does the abuse of rights provide an added value for democracy and human rights. The first view is favourable opinion including its importance to our human rights, democracy and clarification to the case law of the European Court of Justice (ECtHR). The second view is dissenting opinion and there are problems that would cause from the application of abuse of rights such as passivation of freedom of expression and case examination through light scope.

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<sup>5</sup> Knuutila, A., Kosonen, H., Saresma, T., Haara, P., Pöyhtäri, R. (2019). *Viha vallassa: Vihapuheen vaikutukset yhteiskunnalliseen päätöksentekoon*. Valtioneuvoston selvitys ja tutkimus toiminta.

Retrieved from:

[https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161812/57\\_19\\_Viha%20vallassa\\_Vihapuheen%20vaikutukset%20\\_Netti%20.pdf](https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161812/57_19_Viha%20vallassa_Vihapuheen%20vaikutukset%20_Netti%20.pdf), 20 April 2021

## 1. FREEDOM OF EXPRESSION IN GENERAL

The most significant declaration of freedom of expression is considered to be the writing of the philosopher John Stuart Mill on “On Liberty” in 1859. Mill defines the freedom of expression as one of the most important freedoms. He states that everyone must have the right to express their opinion, because open and free discussion is a prerequisite for the intellectual development of humanity, because every aspect contains a piece of truth.<sup>6</sup> Mill drove as unrestricted freedom of expression as possible with the idealistic idea of a society where the best argument would always win over the worse arguments.<sup>7</sup> In addition, Mill stated that truth requires open discussion of facts and judgments despite their truthfulness.<sup>8</sup> Mill’s arguments for freedom of expression caused that it was raised as a universal human right as well as a necessity in a functioning society and it is still currently the prevailing trend in Western countries.<sup>9</sup>

Freedom of expression is an important human right.<sup>10</sup> Freedom of expression is accustomed to being seen first and foremost as a fundamental political and human right and thus an integral part of a democratic society.<sup>11</sup> Freedom of expression may even be considered as a condition to fulfill civic duties.<sup>12</sup> However, it is considered to protect all forms of communication, regardless of the purpose for which the information or opinion is presented or the content of the communication. It contains even irritating, contentious, eccentric, heretical, unwelcome and provocative expressions. The starting point for interpretation is that no particular form of expression should be excluded in advance from the provision of freedom of expression.<sup>13</sup> Despite the wide scale of protection, it is in the nature of fundamental rights that they contain a so-called core area that is

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<sup>6</sup> Neuvonen, R. (2005). *supra* nota 1, p 44–45

<sup>7</sup> Gray, J. (1996). *Mill on Liberty: A Defence*, London. United Kingdom: Routledge. p 10

<sup>8</sup> Barendt, E. (2005). *Freedom of Speech*. 2nd edition. Oxford, United Kingdom: Oxford University Press. p 9

<sup>9</sup> Neuvonen, R. (2005). *supra* nota 2, p 44–45

<sup>10</sup> Häkkinen, T. (2014). Sananvapaus mielenosoituksessa. *Oikeus* 24, 43(4), 414–424

<sup>11</sup> Neuvonen, R. (2015). *Vihapuhe Suomessa*. Helsinki, Finland: Edita. p 25

<sup>12</sup> Grimm, D. (2009). *Freedom of Speech in Globalized World*. Oxford, United Kingdom: Oxford University Press. p

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<sup>13</sup> Manninen, S. (2011). *Sananvapaus ja julkisuus (PL 12§), teoksessa Perusoikeudet (2nd ed.)*. Helsinki, Finland: WSOY pro. p 462



extremely protected. Political and social debate has traditionally been seen as a core area of freedom of expression.<sup>14</sup>

Freedom of expression has a strong international background as it is guaranteed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (CCPR). At EU level by Charter of Fundamental Rights of the European Union (CFR) and European Convention on Human Rights (ECHR).<sup>15</sup> In Europe, restrictions on freedom of expression are clearly more permissive for example if compared to the USA. Recent case law of the ECtHR leads to the conclusion that in the 2010s the restrictions for freedom of expression were treated more favorably in general than at the beginning of the millennium. The same doctrinal change can also be seen in Finland as there has also been an understanding of criminal convictions that restrict freedom of expression without emphasizing freedom of expression.<sup>16</sup> It may therefore be that other rights, such as the need to safeguard the rights of minorities, the protection of honor and privacy or national security, have also been most strongly emphasized alongside freedom of expression. Most legal systems do not recognize unrestricted freedom of expression. Only in its extreme form, does freedom of expression mean the right to express anything.<sup>17</sup>

## 1.1 National regulation in Finland

The basis of Finnish freedom of expression is defined in the Finnish Constitution. The Section 12 of the Constitution states that freedom of expression includes the right to express, publish and receive information, opinions and other communications without prior hindrance. As a fundamental right, freedom of expression belongs to every citizen, regardless of age and population group.” ECHR can be considered as the most important Convention for Finland as its articles are complemented by the extensive case law of the ECtHR as it assists in the interpretation of human rights in practice.<sup>18</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> Neuvonen R (2015). supra nota 1, p 24

<sup>16</sup> Hyttinen, T., Tapani, J. (2018). supra nota 1, p 28–29

<sup>17</sup> Neuvonen, R. (2018). *Sananvapauden historia suomessa*. Helsinki, Finland: Gaudeamus. p 9

<sup>18</sup> Neuvonen, R. (2015). supra nota 1, p 25

## 1.2 European Convention on Human Rights

Article 10 of the ECHR states that: “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of freedom of expression 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”<sup>19</sup>

The first paragraph of the article corresponds with the Finnish Constitution. The second paragraph deals with the situations and grounds on which the freedom of expression may be restricted. The article guarantees special protection for the individual's right to an opinion, as this right cannot be restricted even on the basis of the criteria set out in the first paragraph. However, Article 10 of the ECHR also takes a position on the obligations relating to the exercise of freedom of expression and the responsibility of the individual. As a result, it has been considered acceptable under the article that persons who have breached the Article 10 have been held criminally liable under the restrictive criteria in the second paragraph of the article. For the interference to be considered justified it must fulfil three conditions. Firstly, it must be prescribed by law, intended for at least one legitimate aim and be necessary in a democratic society to achieve that aim. However, the discretion is not limited to the restrictions, but it generally affects to the whole interpretation of the ECtHR.<sup>20</sup> In addition, in certain situations, it is possible in to invoke Article of 17 of the ECHR, which deals with the abuse of rights guaranteed by the same convention.

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<sup>19</sup> European Convention on Human Rights. (1950). Article 10

<sup>20</sup> Letsas, G. (2007). *A Theory of Interpretation of the European Convention on Human Rights*. Oxford, United Kingdom: Oxford University Press. p 85

### 1.3 European Union Perspective

Article 11 of CFR does not contain any restrictions to the freedom of expression. However, the meaning and scope of this right are the same as those guaranteed by the ECHR and therefore the limitations are provided in the Article 52 of CFR.<sup>21</sup> This kind of general regulation is justified due to the slightly different moral perceptions and cultures of the Member States, the more precise regulation of restrictions on freedom of expression within the framework of the requirements set by the ECHR have been left to the discretion of the Member States. The freedom of expression is part of the constitutional tradition that is common to the Member States of the Union, which ensures that the Member States are committed to respecting the principles of freedom of expression, even in the context of restrictions.<sup>22</sup>

European legislation has generally been largely based on the premise that the exercise of freedom of expression in society is best safeguarded by the protection of universal human rights and the community. Based on this view, restrictions have been created on the exercise of freedom of expression, for example with regard to hate speech. At the same time, however, freedom of expression remains a fundamental right, the exercise of which must not be prevented in advance. In other words, in democratic societies built on a tradition of social responsibility, freedom of expression is weighed against other rights and is generally seen as proportional rather than absolute right. Such an understanding of freedom of expression is common in Europe and also in Finland.<sup>23</sup>

The reason why fundamental rights of the ECHR are legally binding in EU is that The Lisbon Treaty includes Article 6(3), and it states that “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” The protection of fundamental rights has developed in the European Union in the 1990s as the European Economic Community has moved towards the EU.<sup>24</sup> During the European Economic Community era the accession to the European Convention on Human Rights has been on the agenda since the 1970s but the final accession has

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<sup>21</sup> Charter of Fundamental Rights of the European Union (2012). Article 11

<sup>22</sup> Ollila, R. (2001b). *Sananvapaus ja tiedonvälityksen vapaus. Teoksessa: Perusoikeudet EU:ssa*. Helsinki, Finland: Lakimiesliiton Kustannus. p 327–328

<sup>23</sup> Pöyhtäri, R., Haara, P., Raittila, P. (2013). *supra nota 1*, p 56

<sup>24</sup> Raitio, J. (2017). *Euroopan Unionin oikeuden periaatteet ja perusvapaudet*. Helsinki, Finland: Unigrafia Oy. p 89

not yet taken place. However, the accession is likely to happen in the future as the Article 6(2) states that “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.”<sup>25</sup> Even though EU is not part of the ECHR by itself, all the Member States are and therefore it is legally binding for the Member States.

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<sup>25</sup> *Ibid.*, p 92–93

## 2. ABUSE OF RIGHTS

It is probably impossible to describe indisputably what is the abuse of rights. What is important is what formally makes the correct exercise of justice so reprehensible that it does not provide legal protection. Abuse of rights is therefore a procedure that is formally permissible exercise of a human or fundamental right, but which is not acceptable in specific case because it does not take sufficiently into account the rights of others or the fundamental values of the society.<sup>26</sup> Abuse of rights or abuse clause has been applied in two different ways, directly and indirectly. Especially the direct application has been widely criticized in the international legal literature.<sup>27</sup> When abuse clause is used indirectly, it is considered as an interpretative aid with Article 10(2) of the ECHR, for example when considering whether the States interference for the expressions made by individuals are necessary.<sup>28</sup> However, the ECtHR has sought to keep the scope of abuse of rights narrow.<sup>29</sup>

### 2.1 Background of abuse of rights

Abuse of rights might not be the most familiar article in the ECHR, so it is natural to start with its history. The abuse of rights clause has been long distinguished in the Western and European legal tradition. Therefore, the prohibition of abuse of rights, in its various forms, is a very general provision in many European constitutions. For example, in Germany the abuse clause is frequently related to the protection of democracy and human dignity. Through that prohibition extreme hate speech has been excluded from the protection of freedom of expression.<sup>30</sup> After World War II, some of the Western-European States had expressed their concerns about the

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<sup>26</sup> Linna, T. (2004). Oikeuden väärinkäytön kielto ja sen sovelluksia. *Lakimies* 2004, 4, 623 – 638

<sup>27</sup> Hare, I., Weinstein, J. (2009). *Extreme Speech Under International and Regional Human Rights Standards*. Oxford, United Kingdom: Oxford University Press. p 78

<sup>28</sup> Cannie, H., Voorhoof, D. (2011). *supra* nota 1, p 58

<sup>29</sup> Rainey, B., Wicks, E., Ovey, C. (2009). *Jacobs, White, and Ovey: The European Convention on Human Rights*. Oxford, United Kingdom: Oxford University Press. p 125

<sup>30</sup> Neuvonen, R. Oikeuden väärinkäytön kielto ja KKO 2020:68. Perustuslakiblogi [Blog post]. Retrieved from <https://perustuslakiblogi.wordpress.com/2020/09/23/riku-neuvonen-oikeuden-vaarinkayton-kielto-ja-kko-202068/>, 14 February 2021

enemies of democracy such as Nazism, fascism and communism. Western European States wanted abuse clause to be an element that constructs a democratic community that is able to defend itself from such totalitarian regimes. The abuse clause was firstly declared by Article 30 of the Universal Declaration of Human Rights (UDHR) and couple years later into Article 17 of ECHR.<sup>31</sup> Article 17 states that “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.”<sup>32</sup> Majorly similar provision is included into Article 54 of the CFR. Both prohibit the exercise of rights protected by this Convention in a way that aims to nullify or substantially impair the rights protected by the same Convention.<sup>33</sup> These articles give a statement that certain types of expressions such as hate speech could be considered as a severe violation of fundamental and human rights that cannot be accepted in any scenarios.

## **2.2 The scope of abuse of rights**

Term Strasbourg organs refer to the starting point of abuse of rights and its scope at the beginning. As it was earlier mentioned abuse of rights was firstly intended to protect the democratic society and prevent the repeat of history by totalitarian regimes.<sup>34</sup> During the centuries, the Strasbourg organs have modified. In the case law of ECtHR, national socialistic movements were included into the scope of abuse clause. For example, in case *Lehideux and Isorni v. France* (24662/94, 23 September 1998) the court had stated that, national socialism as the totalitarian doctrine is incompatible with democracy and human rights and therefore its aims are exactly those addressed in the Article 17 of the ECHR. Later on, the Convention organs have stretched its scope even broader. In case, *Kühnen v. Germany* the European Commission had stated that the scope of Article 17 extends to any act that is incompatible with the Convention’s underlying values.<sup>35</sup> These values include for example, protection of human dignity, fight against racism and anti-Semitism.<sup>36</sup> For example, in 1980’s holocaust denial did not trigger the abuse

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<sup>31</sup> Cannie, H., Voorhoof, D. (2011). *supra* nota 1, p 56

<sup>32</sup> European Convention on Human Rights (1950). Article 17

<sup>33</sup> The Charter of Fundamental Rights of the European Union Article 54

<sup>34</sup> Cannie, H., Voorhoof, D. *supra* nota 2, p 58

<sup>35</sup> *Ibid.*, p 58 -60

<sup>36</sup> *Ibid.*, p 61

clause but after the *Kühnen v. Germany* case, it was considered as racial and discriminative speech against Jews and therefore contrary to the text and spirit of the Convention.<sup>37</sup>

### 2.3 Abuse of rights in Finland

However, in Finland and other Nordic countries, the rule is not actually formulated in the constitution, but nevertheless influences to many laws of these countries. For example, the abuse of rights clause influences into Finnish law through Article 17 of the ECHR and Article 54 of the CFR.

In Finland, the prohibition of abuse of rights has mainly remained in a side role for two reasons. Actually, abuse of rights has never been applied in Finland. Firstly, before the 1995 fundamental rights reform in Finland, it was relatively easy to restrict of fundamental right. Therefore, there was no need for a separate provision. Secondly, Finland's current system of fundamental rights emphasizes prior control of laws, in which case the on Constitutional Law Committee draws limits during the legislative stage. Therefore, expressions that may have been considered for example as hate speech has been taken into account in advance.<sup>38</sup>

However, Supreme Court of Finland has given a judgment in case *2020:68* that contains many elements from the Article 17 of the ECHR. In that case, the Finnish police demanded an unregistered association to be declared abolished because the activities of them were abuse of freedom of expression. The association had published anti-Semitism writings against Jews that were considered as hate speech. The Article 17 was used indirectly as an interpretative aid with Article 10(2) of the ECHR, but Supreme Court of Finland held that the activities by the association were considered as the abuse of freedom of expression and justification for the verdict contained ECtHR cases where the Article 17 was applied as the *ratio decidendi*.<sup>39</sup> It is interesting to see whether the Supreme Court of Finland will intend to bring the abuse of rights as the more common clause to Finnish jurisdictions in the same way as it has been applied in the Europe before.

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<sup>37</sup> *Ibid.*, p 60

<sup>38</sup> Neuvonen, R. (2020). Blog post. *supra nota* 1

<sup>39</sup> Korkein oikeus, KKO: 2020:68, 22.9.2020.

Accessible: <https://korkeinoikeus.fi/fi/index/ennakkopaatokset/kko202068.html>

### 3. HATE SPEECH

There has been a wide-ranging debate about hate speech during the last few decades. Reasons for the debate could be that the hate speech has emerged in a new way, for example through the internet or that hate crimes have increased over the last decade. However, according to the Finnish police the hate crimes has not increased during the last decade compared to the previous decades.<sup>40</sup> Internet has become an integral part of our everyday lives and it might be assumed that it has just provided a new more visible platform for the hate speech. Despite the recent conversations regarding hate speech in the society, hate speech is not a new concept. Perhaps the most famous example of the hate speech is Adolf Hitler's persecution of the Jews and its culmination in the genocide of the Jews. In fact, Adolf Hitler used hate speech laws to protect his own use of power from criticism.<sup>41</sup>

Hate speech and its meaning are tied to history. For example, in Germany, Austria, Norway and United Kingdom the hate speech legislation is focused on to protect public order. In addition, in Germany and Austria the hate speech legislation is focused on against the denial of Holocaust. In Italy, attention is paid to eradicating anti-Semitism. This reflects the fact that the hate speech legislation in Central European countries regulated after World War II and its effects towards these countries are still visible nowadays. However, in Finland there has not existed a same kind of history as in these countries, in fact, Finland joined the international agreements on racism relatively late and at that time the emphasis on human dignity had already taken its toll on public order. For example, in the former Eastern Bloc countries such as Bulgaria where the hate speech legislation has been regulated in 1990s. The base of the hate speech legislations in these countries are human dignity and anti-discrimination.<sup>42</sup>

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<sup>40</sup> Hyttinen, T., Tapani, J. (2018). *supra nota 2*, p 12-13

<sup>41</sup> Strossen, N. (2018). *Hate: Why We Should Resist It with Free Speech, Not Censorship*. Oxford, United Kingdom: Oxford University Press. p 135 - 136

<sup>42</sup> Neuvonen, R. (2015). *supra nota 1*, p 277 - 278



### 3.1 Definition of hate speech

There does not exist universally agreed definition for the term hate speech and it is neither defined in the Finnish legislation.<sup>43</sup> Despite hate speech is not defined in the Finnish legislation it is still mentioned in the verdicts of Supreme Court Finland (KKO 2012:58 and KKO 2020:68.). The Recommendation of the Committee of Ministers of the Council of Europe defines hate speech as follows: “hate speech shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”<sup>44</sup> Especially, the part where aggressive nationalism should be understood as hate speech is a significant statement as political freedom of expression is considered as the core element of the freedom of expression and democracy.<sup>45</sup> It has been even stated that one of the characteristics of hate speech is that it seeks to silence the subject of hate speech by causing mental harm and discrimination.<sup>46</sup> Despite the fact that Finnish legislation does not contain hate speech, the Criminal Code of Finland contains definition for the ethnic agitation that can be considered as the most typical hate speech crime.<sup>47</sup> According to Chapter 11(10), “A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced for ethnic agitation.”<sup>48</sup> In addition, The Ministry of Justice has defined that ethnic agitation is punishable hate speech.<sup>49</sup> In next chapter, under examination is when abuse of rights is applicable to the cases where most of the expressions are considered as hate speech.

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<sup>43</sup> Neuvonen, R. (2015). supra nota 2, p 19

<sup>44</sup> Council of Europe Committee of Ministers, Recommendation No. R (97) 20

<sup>45</sup> Hyttinen, T., Tapani, J. (2018). supra nota 3, p 23

<sup>46</sup> Maitra, I., McGowan, M. (Eds.) (2012). *Speech and harm: controversies over free speech*. Oxford, United Kingdom: Oxford University Press. p 53

<sup>47</sup> Hyttinen, T., Tapani, J. (2018). supra nota 4, p 23

<sup>48</sup> Rikoslaki 19.12.1889/39.

Accessible: <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>

<sup>49</sup> Henriksson, AM. (2014). *Järjestäytyneitä rikollisryhmiä koskevaa rikoslain sääntelyä aiotaan yhtenäistää. Oikeusministeriö*. Retrieved from: <https://oikeusministerio.fi/-/strafflagens-bestammelser-om-organiserade-kriminella-sammanslutningar>, 19 January 2021

## 4. CASE LAW

As it was earlier mentioned it is legitimate to invoke Article 17 of the ECHR to the hate speech cases. Case law of ECtHR though contains examples how hate speech could be seen as an abuse of freedom of expression depending on the nature of the hate speech.<sup>50</sup>

### 4.1 *Norwood v. United Kingdom*

In this case, the applicant was a Member of the British National Party and displayed in the window a large poster stating, “Islam out of Britain – Protect the British People”. The poster also included USA’s World Trade Center towers in flames and symbols of a crescent and star inside the prohibition sign. British police removed the poster and applicant appealed to the ECtHR claiming a violation of Article 10 of the ECHR. The applicant stated that freedom of expression contains irritating, contentious, eccentric, heretical, unwelcome and provocative speech if it does not tend to violence. The court held that applicant has been found guilty of discrimination, intolerance and the actions were considered as inciting to violence against Muslim’s religion group. Therefore, as the applicant had violated the Muslim’s fundamental and human rights the freedom of expression that is guaranteed in Article 10 may not be invoked in a sense contrary to Article 17 of the ECHR.<sup>51</sup>

### 4.2 *Garaudy v. France*

In this case, the applicant had disputed the existence of the Holocaust in his book *The Founding Myths of Modern Israel*. The ECtHR held that this kind of act does not represent the fight against racism and anti-Semitism. In addition, by disputing the existence of the clearly established events in the history it was considered as an effort to rehabilitate the Nazi regime and was a

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<sup>50</sup> Hyttinen, T., Tapani, J. (2018). *supra nota* 5, p 34-45

<sup>51</sup> *Norwood v. United Kingdom*, no. 23131/03, ECHR 2004-II

severe form of racial defamation and of incitement to violence against Jews. As a result, the action was incompatible with democracy and human rights it cannot be protected under Article 10 of the ECHR and fell into the framework of Article 17 of the ECHR.<sup>52</sup>

### **4.3 Feret v. Belgium**

Applicant was a member of a political party “Front National” and had distributed leaflets and posters during the election campaigns with statement, “save our people from the risk posed by Islam, the conqueror.” The applicant was sentenced to 250 hours of community service and declared ineligible for election for ten years. Applicant appealed to the ECtHR, stating that his conviction violated his right to freedom of expression. The court held that, political parties and their representatives must have broad freedom of expression to be able to attract as many voters as possible. However, applicant had used the freedom of expression in a way which undermined the dignity and safety of other people. Therefore, the conviction of applicant was necessary in the democratic society and did not violate Article 10(2) of the ECHR.<sup>53</sup>

### **4.4 Perinçek v. Switzerland**

In this case, applicant was an ultranationalist political activist who had publicly denied the existence the Armenian genocide. Swiss court had sentenced applicant to 90 days imprisonment and fined 3000 Swiss francs. Applicant appealed to ECtHR by stating that Switzerland had violated the freedom of expression guaranteed by Article 10 of the ECHR and by stating that “I have not denied genocide because there was no genocide.” The Lower Court of the ECtHR held that, applicant had not abused freedom of expression within the meaning of Article 17 of the ECHR. In addition, Chamber stated that “the applicant has not abused his right to engage in open discussion of matters including those which are sensitive and likely to cause offence. The free exercise of this right is one of the fundamental aspects of freedom of expression and distinguishes a democratic, tolerant and pluralist society from a totalitarian or dictatorial regime” Therefore, Switzerland had violated freedom of expression guaranteed by Article 10 of the ECHR. Switzerland appealed the lower court's ruling to Grand Chamber.

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<sup>52</sup> *Garaudy v. France*, no. 64496/17, ECHR 2003-II

<sup>53</sup> *Feret v. Belgium*, no. 15615/07, ECHR 2009

The Grand Chamber held that, Armenian Genocide was a clearly established historical fact but that is not the question here. Decisive point in the application of the Article 17 is whether applicant's statements sought to stir up hatred or violence, and whether the statements have aimed to the destruction of the rights and freedoms laid down in the ECHR. Therefore, Article 10 is applied to this case. The Swiss authorities' interference to be considered justified, it must have been prescribed by law, intended for one or more of the legitimate aims, and be necessary in a democratic society. The Grand Chamber concluded that the interference to applicant's freedom of expression was not necessary in the democratic society because applicant had stated his views as a politician, and it was a matter for public interest as it had been publicly debated in Switzerland, whether the Armenian genocide had existed. Therefore, the outcome was a violation of Article 10.<sup>54</sup>

#### **4.5 When abuse of rights can be applied directly?**

In the cases, *Norwood v. United Kingdom* and *Garaudy v. France*, the ECtHR had held that the applicant's actions had been inciting to violence against two religious' groups, Muslims and Jews. The actions were considered as contrary to the democracy and were considered either racial or discriminative expressions. Therefore, the case law of the ECtHR supports the statement that freedom of expression, for example in the form of hate speech may be considered as abuse of rights if it incites to violence or hatred. However, it is ambiguous whether Article 17 of ECHR is applicable to the expressions that can be considered as slandering or insulting. In *Feret v. Belgium* case the applicants' expressions were considered as undermining the dignity and safety of other people. These are the values that the European Commission had stated to protect in the *Kühnen v. Germany* case. A similar kind of trend was followed in the case 2020:68 judged by the Supreme Court of Finland. But as the ECtHR did not consider these expressions to be inciting to violence, the Article 10 of ECHR was applied even though if we are literally reading the Article 17 it could have been applied for example on the base of everyone's right to religion.<sup>55</sup> However, the ECtHR has stated that abuse of rights should be applied cautiously and primarily indirectly.<sup>56</sup>

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<sup>54</sup> *Perincek v. Switzerland* [GC], no. 27510/08, ECHR 2015

<sup>55</sup> European Convention on Human Rights (1950). Article 9

<sup>56</sup> Hyttinen, T., Tapani, J. (2018). *supra nota* 6, p 34

The last case *Perinçek v. Switzerland* is the most complex one. The facts of the case were similar to the *Garaudy v. France* case. In these cases, both applicants denied the existence of clear historical events. The differences are that they had denied the existence of two different genocides and one being an author and the other a politician. When the *Garaudy v. France* case ended up in the application of Article 17, the *Perinçek v. Switzerland* case ended up to the outcome where Switzerland had violated applicant's right to the freedom of expression. This judgment caused a lot of criticism, for example is the denial of Holocaust considered as more severe violation than the denial of Armenian genocide. The Grand Chamber should have considered applicant's speech as an accuse to the Armenians history and that the severity of the genocide denial rests on the temporal and geographic proximity of the occurrence.<sup>57</sup> In addition, critique for the evaluation of public interest and the manner how the statements had been phrased from the politician and how the outcome would have been different if the Grand Chamber would have followed previous case law.<sup>58</sup> This verdict leaves to wonder whether the politicians have special protection from the application of Article 17. To conclude, the Article 17 is applicable if the expressions are sought to stir up hatred or violence, and whether the statements have aimed to the destruction of the rights and freedoms laid down in the ECHR.

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<sup>57</sup> Nashalian, S. (2018). *A critique of Perincek v. Switzerland: incorporating an international and historical context is the more prudent approach to genocide denial cases*. Los Angeles, USA: Southwestern Law School. p 170-171

<sup>58</sup> P-O. de Broux, D. Staes. (2018). *History Watch by the European Court of Human Rights*. London, United Kingdom: Palgrave Macmillan UK. p 104-105

## **5. ARTICLE 17: AN ADDED VALUE FOR DEMOCRACY AND HUMAN RIGHTS PROTECTION?**

It does look like that the ECtHR is divided when it comes to freedom of expression issues. There even exists disagreements with the expressions which may lead to violence or expressions that incite hatred. If we follow consequentialist approach to freedom of expression, then we are paying attention to the potential of violence from the expression.<sup>59</sup> This approach still has many disadvantages such as whether the expression is made by a comedian or politician. For example, in *Feret v. Belgium* case the court held that the political parties and their representatives must have broad freedom of expression because otherwise they would not be unable to attract as many voters as possible. Comedian's jokes often contain contradictions and can even be horrible if it is taken out of context but still it does not create the atmosphere of fear.<sup>60</sup> In addition, the consequentialist approach is not suitable with causation and guilt probabilities may not be the strongest arguments in the court.<sup>61</sup> In addition, the link between the violent act and hate speech has never been established and is therefore only hypothetical.<sup>62</sup> That leads us to the one of the main questions, how could such expressions be legitimately and effectively restricted?

### **5.1 Favourable opinion**

First of all, by using the hate speech as the form of freedom of expression it narrows our fundamental and human rights such as right to live safely without discrimination, racism or fear for our sexual orientation, religion or race. As the relevant part of hate speech is not the expression but the emotions that it causes such as do not perceive certain groups of people as equal representatives of the society.<sup>63</sup> For example, religious liberty is one of the core values of any just society and it should not offer possibility for discrimination just as in the *Feret v.*

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<sup>59</sup> Buyse, T. (2014). *Dangerous expressions: The ECHR, violence and free speech*. The International and Comparative Law Quarterly, 63(2), 491 - 503

<sup>60</sup> Sturges, P. (2010). Comedy as freedom of expression. *Journal of Documentation*. 66(2), 279 - 293

<sup>61</sup> Buyse, T. (2014). *supra nota* 1

<sup>62</sup> Lipsic, D. (2014). Freedom of expression. *Ave Maria International Law Journal*, 3(1), 139 - 148

<sup>63</sup> Waldron, J. (2012). *The Harm in Hate Speech*. Cambridge, United States: Harvard University Press. p 8

Belgium case.<sup>64</sup> Through the application of Article 17 of the ECHR it is possible to send a moral message that certain violations of others fundamental and human rights is not acceptable.<sup>65</sup> Secondly, if expressions containing death threats are examined in the light of the restrictions to the freedom of expression in Article 10(2) of the ECHR, has the emphasis of freedom of expression gone too far?<sup>66</sup> States have the duty to ensure the realization of fundamental and human rights and if necessary, to protect those rights.<sup>67</sup>

Thirdly, the application of Article 17, would not mean that for example individual would lose right to all the fundamental and human rights. The application would only be targeted to the right that has been expressed wrongfully.<sup>68</sup> By the application of Article 17 of it can be determined how to exercise freedom of speech properly. Public debate can be considered as a competition where different groups are trying to shape the meaning of different concepts to reflect their own view of society.<sup>69</sup> If the application of Article 17 of would gain a foothold in the society it could be possible to update the meaning of freedom of expression to the modern society. Lastly, as it has been mentioned before freedom of expression is an integral part of a democratic society. One of the key elements of democracy are the possibility to stand as a candidate and possibility to express their views as an equal.<sup>70</sup> The different forms of hate speech have caused a situation in Finland where politicians do not dare to stand for elections or express their own opinions in the fear of hate speech.<sup>71</sup> Is it democratic anymore when freedom of expression restricts the same freedom of expression of others in situations where they do not like the views of others? Direct application of Article 17 of would for example, remove all the expressions that cause threatening atmosphere or are even inciting to violence automatically outside of the scope of Article 10.

By using direct application of abuse of rights, it draws a line to the human rights protection where can be seen which expressions fall within the scope of freedom of expression and which specific cases are not covered by the protection of fundamental rights. Through the application of

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<sup>64</sup> Corvino, J., Anderson, R., Girgis, S. (2017). *Debating Religious Liberty and Discrimination*. Oxford, United Kingdom: Oxford University Press. p 103

<sup>65</sup> Hyttinen, T., Tapani, J. (2018). supra nota 7, p 34

<sup>66</sup> *Ibid.*, p 29

<sup>67</sup> Sormunen, M. (2020). *Positiiviset toimintavelvoitteet – valtion velvollisuus turvata perus- ja ihmisoikeuksien toteutuminen aktiivisin toimin*. Perustuslakiblogi [Blog post]. Retrieved from: <https://perustuslakiblogi.wordpress.com/2020/01/24/milka-sormunen-positiiviset-toimintavelvoitteet-valtion-velvollisuus-turvata-perus-ja-ihmisoikeuksien-toteutuminen-aktiivisin-toimin/>, 24 February 2021

<sup>68</sup> Hyttinen, T., Tapani, J. (2018). supra nota 8, p 33

<sup>69</sup> *Ibid.* p 17

<sup>70</sup> Dahl, R (2015). *On Democracy*. New Haven, United States of America: Yale University. p 35-36

<sup>71</sup> *Heikentäkö vihapuhe demokratiaa?*, YLE Poliitikkaradio. Pelkonen, L. Radio interview. 10 October 2019

Article 17 it approaches the fundamental right from within. Then we can consider whether certain type of expressions have freedom of expression protected by the Constitution at all. In other words, is it freedom of expression at all if it violates another person's fundamental rights?<sup>72</sup> Abuse of rights as a legal principle has in addition an integral role in the international society. As the society is constantly changing rapidly there will always be unregulated areas in our legislation which have not been taken into account. The general principles such as abuse of rights help to fill these gaps because of its wider scope than a general regulation.<sup>73</sup>

## 5.2 Dissenting opinion

The application of Article 17 of ECHR causes a threat to democracy because it would likely lead to the absence of an open debate on issues that are important to the development of the society. In that situation, representatives of different point of views would not be free to justify or even express their views.<sup>74</sup> People would naturally take a distance from the views that are considered politically incorrect and at the end there would be only one correct opinion and all other views would be considered morally wrong. Even if the Article 17 is applied narrowly, the threat of social exclusion would make them reluctant to express their opinions honestly, sincerely and justifiably because of the damage to reputation and social image.<sup>75</sup> In the passivation of freedom of expression, institutions requiring democratic deliberation would not function optimally.<sup>76</sup> In order to function best, such institutions need to be complemented by a widespread ethic of sincerity, which creates an obligation to publicly express one's political beliefs about both self-respect and interest in well-being.<sup>77</sup> When opinions would not be sincere it would likely lead to low-effort decisions in the society due to people's distorted values and knowledge of the relevant issues.<sup>78</sup>

Cases would be examined through the light scope. People would be condemned on the base of content alone. Due to importance of freedom of expression in the democratic society all the

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<sup>72</sup> Linna, T. (2004). *supra* nota 1

<sup>73</sup> Byers, M. (2002). Abuse of Rights: An Old Principle, A New Age. *47 McGill Law Journal*, 47(2), 389 – 434

<sup>74</sup> Puolimatka, T. (2020). *Sananvapaus ja vihapuhe*. Helsinki, Finland: Liekkikustannus. p 67

<sup>75</sup> *Ibid.*, p 68

<sup>76</sup> *Ibid.*

<sup>77</sup> Kuran, T. (1998). Insincere Deliberation and Democratic Failure. *A Journal of Politics and Society*, 1(4), 529 - 544

<sup>78</sup> Puolimatka, T. (2020). *supra* nota 1, p 69



factual and relevant legal elements of the case should be taken into an account. Direct application of Article 17 would mean that cases are not examined at the required level and would lead to imprudent judgments, for example in the absence of proportionality.<sup>79</sup> If proportionality is disregarded in such cases, it would cause a contradiction with the case law of the ECtHR. The importance of this criterion is even more highlighted by illustrating the fact that proportionality is the one and only factor that leads to the finding of a violation of Article 10 of the ECHR.<sup>80</sup> For example, in Mehmet Cevher Ilhan vs Turkey case, the court held that applicant's expressions were considered as inciting to hatred and discriminative. If Article 17 would have been directly applied, it would have likely caused outcome where there would not have been a breach of Article 10 because the expression was not inciting to violence.<sup>81</sup> Another way to interpret this question is that dangerous expressions such as hate speech should be assessed on the basis of the principle of legality. In this approach, the principle of legality would prevent the broader interpretation of the Article 10(2). The principle of legality presupposes that an interpretation which goes beyond the wording of the law must not be interpreted as prejudicial to the defendant.<sup>82</sup> In addition, the case law of the ECtHR is also reflected to the Member States of EU.<sup>83</sup>

As the ECtHR has a subsidiary role in the adjudication and enforcement of human rights when the responsibility is primarily at the Member States level to ensure the realization of human rights and if necessary, to protect those rights. The abuse clause affects to the national and constitutional identities of the States. Cultural and historical differences between these states would not be taken into account and might even disappear during the time. Just as it was mentioned in the sub-chapter 2.3, the more precise regulation of restrictions on freedom of expression have been left to the discretion of the Member States. Therefore, the national authorities should have power to apply Article 17 taking into account the characteristics of their own state.<sup>84</sup>

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<sup>79</sup> Nashalian, S. (2018). *supra* nota 1, p 64–65

<sup>80</sup> *Ibid.*, p 70

<sup>81</sup> *Ibid.*, p 70-71

<sup>82</sup> Ollila, R. (2013). KKO 2013:50 - laiton uhkaus ja vihapuheet. *Lakimies 2013*, 6, 1128 - 1135

<sup>83</sup> Keller, H., Sweet, A. (2008). *A Europe of Rights – The Impact of the ECHR on National Legal Systems*. Oxford, United Kingdom: Oxford University Press. p 704

<sup>84</sup> Nashalian, S. (2018). *supra* nota 2, p 71-72

## 6. CONCLUSION

The application of abuse of rights has differed from the European trend. Not in the way that it would have been applied more frequently but because it has never been applied directly in Finland. After the case 2020:68 it is interesting to see the conditions which it may or may not be applied. In addition, as there has been a lot of discussion about the possible hate speech legislation in Finland, would still one of the emphasis be public order or would Finland follow the Eastern Bloc countries trend to highlight the human identity, or could Finland even represent new social media era legislation?

Abuse clause is applicable directly in expressions that incites to violence or hatred, and whether the statements have aimed to the destruction of the rights and freedoms laid down in the ECHR for example in form of anti-Semitism cases such as Holocaust denial. In addition, if the applicant is politician the freedom of expression seems to be broader than in other cases and denial of Holocaust is considered as more severe than the denial of Armenian Genocide. If the expressions are insulting or slandering, then the abuse clause is not applicable. In my opinion, abuse clause should be applicable directly in the situations where expressions are considered as inciting to violence or hatred. Otherwise, there is a danger that these kind of expressions causes fear amongst the individuals in different groups on the base of for example, religion, race or sexual orientation. More importantly through that application it is possible to send a message that expressions that incite to violence against others are never acceptable in the democratic society. This view is also mostly supported by the case law of the ECtHR. Considering expressions such as slandering and insulting the abuse clause should not be applicable. Through the threefold necessity test in the Article 10(2) of the ECHR provides that limitations to the other forms of expressions are examined with a broad scope and taking account all the essential elements of the case and by paying attention to the proportionality principle. In addition, by the application of Article 10(2) to other forms of expressions people would have courage to express their opinions, deviate from the general perception and public debates would lead to more comprehensively assessed outcomes, that is necessary in the democratic society.

The Strasbourg organs have developed from the prevention of the totalitarian regimes into the protection of human dignity, fight against racism and anti-Semitism. As the case examples prove the ECtHR does not have a general guideline how freedom of expression can be limited by using abuse of rights. For example, the contradiction between Holocaust and Armenian genocide or whether the expression is made by author or politician. From legal certainty perspective that means the confidence that legal decisions can be assessed in advance and in the current situation the legal certainty does not exist at a full potential. By the accession of the EU to the ECHR it could make it possible to avoid inconsistencies what could cause if two parallel courts interpret and apply human rights standards differently. This despite the fact that human rights are identical in both, but their interpretation could still vary.<sup>85</sup> The cultural and historical differences between the Member States are constantly vulnerable to globalization and thereby those differences decrease all the time. Through the accession it could be possible to uniform interpretation to achieve a general application of abuse of rights. I consider that as an important aspect because nowadays social media has become an integral part of our everyday lives and therefore the legislation has to update as well because in social media anyone can post anything, and it can reach millions and millions of people. Abuse of rights could be seen as a reading guide on the dimension of protection of fundamental and human rights. However, it must not lead to an unjustified compromise on the protection of fundamental rights and therefore it should not be applied into the expressions that are insulting or slandering.

As both abuse of rights and freedom of expression are both highly related to the democracy there should not exist contradictions between these two principles. Both principles have developed during the centuries and hopefully the development will continue in the direction where abuse of rights is applied systematically to all the expressions that incites to violence or hatred. However, without, leading to an unjustified restriction of freedom of expression. In an ideal situation, freedom of expression allows criticism, the free presentation of arguments and counterarguments, which take the public debate forward and helps the democratic society to function optimally. However, it does not take into account the fact that it limits the fairness of the social debate for example in the form of minorities. The minorities have difficulties to gain approval and to get their views taken into account. Therefore, the absolutist interpretation of freedom of expression fails to resolve the structural inequalities in the society.

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<sup>85</sup> Rämä, P. (2020). *supra nota* 1

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