## TABLE OF CONTENTS

Ack	cnowledgements	V		
List	of Abbreviations	XV		
Сн	APTER 1 INTRODUCTION			
1.1	Rights and wrongs under the ECHR	1		
1.2	Problem definition and research questions	3		
1.3	Research structure and methodology	4		
	1.3.1 The current interpretation of Article 17 ECHR	5		
	1.3.2 Exploring potential solutions to the current controversies	6		
	1.3.2.1 Other abuse clauses in human rights law	7		
	1.3.2.2 The concept of abuse of rights	7		
	1.3.2.3 The concept of militant democracy	8		
	1.3.3 Towards a more consistent approach to the interpretation of			
	Article 17 ECHR	9		
1.4	Legal research on Article 17 ECHR	10		
1.5	Focus on the ECHR	10		
1.6	Terminology	11		
1.7	Structure of this book	13		
Сн	APTER 2 THE CREATION OF THE EUROPEAN CONVENTION			
	ON HUMAN RIGHTS			
2.1	Introduction	15		
2.2	First steps by the European Movement			
	The work of the Consultative Assembly	17		
- II	Final decisions by the Committee of Ministers	20		
2.5	The signing of the Convention	20		
2.6	5 Conclusions			

## CHAPTER 3 THE STRASBOURG CASE LAW ON ARTICLE 17 ECHR

3.1	Introduction					
3.2	The so	cope of a	application of Article 17 ECHR	24		
	Article 17 ECHR invoked vis-à-vis a State Party					
	4 Article 17 ECHR applied vis-à-vis groups and individuals					
			nist speech	28		
		3.4.1.1	Early Commission cases regarding Holocaust denial	29		
			Garaudy v. France	31		
			Witzsch v. Germany	33		
			Broad interpretation of Article 17 ECHR with regard to			
			Holocaust denial	34		
		3.4.1.5	The Court's approach to other historical debates	36		
			Perinçek v. Switzerland	40		
		3.4.1.7	Restrictive application of Article 17 ECHR to other			
			historical debates	42		
	3.4.2	Promot	ion of totalitarian ideologies	42		
			Kühnen v. Germany	43		
		3.4.2.2	Fáber v. Hungary	44		
		3.4.2.3	Communist ideology	46		
	3.4.3	Hate sp	peech	48		
		3.4.3.1	Hate speech excluded from the protection of			
			the Convention	50		
		3.4.3.2	Hate speech dealt with under the scope of the right to			
			freedom of expression	52		
	3.4.4	3.4.4 Incitement to violence				
	3.4.5	Challer	nges to the notion of secularism	59		
			v. Lithuania	62		
3.5	Conc	lusions		63		
~		4 77	I Approx a 17 Egyp D			
CH	APTER		THE INTERPRETATION OF ARTICLE 17 ECHR IN			
		L	LEGAL DOCTRINE			
11	Intro	Justian		67		
			respons of Article 17 ECHR	67		
	1.1 Introduction 1.2 Different addressees of Article 17 ECHR 1.3 The relation between the two norms in Article 17 ECHR					
				70 71		
4.4	Does Article 17 ECHR impose a positive obligation on states? The relation between Article 17 ECHR and other provisions in the					
4.3		ention	detween Afficie 17 Derne and other provisions in the	73		
	COIIV	CHUOH		13		

	4.5.1	Which rights are eligible for the application of Article 17 ECHR?	75
		4.5.1.1 Rights and freedoms that can be abused	75
		4.5.1.2 Rights and freedoms that cannot be abused	79
	4.5.2	Derogations in time of emergency	80
		The prohibition of an abuse of the right to individual petition	82
4.6		ods of application of Article 17 ECHR	83
	4.6.1	(i) Direct application of Article 17 ECHR	84
	4.6.2	(ii) Indirect application of Article 17 ECHR	84
	4.6.3	(iii) Article 17 ECHR could have been, but was not applied	86
	4.6.4	(iv) The facts in the case were not sufficiently serious for Article 17	
		ECHR	87
4.7	Critic	ism of Article 17 ECHR	88
	4.7.1	Restrictions in the name of protecting fundamental rights and	
		democracy	88
	4.7.2	The inconsistent interpretation of Article 17 ECHR	89
	4.7.3	Marginal balancing exercise under the direct application of	
		Article 17 ECHR	91
	4.7.4	The broadening of the scope of Article 17 ECHR	94
4.8	Concl	usions	95
C	· POPEN	5 Owner Anger Crayens and Hungary Drowns I and	
Сн	APTER	5 OTHER ABUSE CLAUSES IN HUMAN RIGHTS LAW	
5 1	Introd	luction	99
		Universal Declaration of Human Rights	99
		nternational Covenants on Human Rights	103
3.5		The International Covenant on Civil and Political Rights	105
	5.5.1	5.3.1.1 Case law on the International Covenant on Civil and	103
		Political Rights	106
		International Covenant on Economic, Social and Cultural Rights	110
54		American Convention on Human Rights	112
		Individual petitions under the American Convention on	114
	8 6-7	Human Rights	113
	5.4.2	Case Law on Article 29(a) American Convention on Human Rights	114
5.5		Charter of Fundamental Rights of the EU	117
		The abuse clause in Article 54 EU Charter	117
		Case Law on Article 54 EU Charter	118
5.6		lusions	119

## CHAPTER 6 THE CONCEPT OF ABUSE OF RIGHTS

6.1	Introduction 12				
6.2	The h	istorical background of the prohibition of abuse of rights	122		
		Josserand: relativity and the social function of rights	123		
		Criticism of the concept of abuse of rights	126		
6.3		evelopment of the concept of abuse of rights in different legal			
	traditi		129		
	6.3.1	France as the cradle of the concept	129		
	6.3.2	Abuse of rights in Germany: reasonableness and fairness in			
		contract law	131		
	6.3.3	The absence of the concept of abuse of rights in common law	132		
6.4	The c	oncept of abuse of rights in public law	134		
	6.4.1	The prohibition of abuse of rights in public international law	134		
	6.4.2	The prohibition of abuse of rights in EU Law	135		
6.5	Provis	sional observations on the doctrine of abuse of rights	139		
6.6	The p	rohibition of abuse in human rights law	141		
6.7	Concl	usions	144		
	APTER	7 THE CONCEPT OF MILITANT DEMOCRACY	147		
7.1					
7.2		oncept of militant democracy	148		
7.3		ntroduction of the concept of militant democracy	149		
		ant democracy put into practice	153 157		
1.3		etions on the implementation of militant democracy  Procedural, substantive, tolerant and militant democracies	157		
	1.3.1	7.5.1.1 The procedural model of democracy	157		
		7.5.1.2 The substantive model of democracy	159		
		7.5.1.3 Tolerant and militant democracies	159		
	752	Militant democracy as a linear concept	161		
		Militant democracy as calculated risk aversion	163		
		Different paradigms for militant measures	164		
		7.5.4.1 Militant democracy as anti-extremism	165		
		7.5.4.2 Militant democracy as banning the former ruling party	166		
7.6	Criticism of the concept of a militant democracy				
		Complexities of intolerance and democracy	170		
		The risk of abusing militant measures	175		
		Stretching the focus of militant democracy?	177		
		7.6.3.1 Militant democracy as civic society	180		
		7.6.3.2 Decline of democracy and human rights protection?	182		

7.7	Conc	lusions		182
Сн	APTE	8 T	THE GERMAN 'WEHRHAFTE DEMOKRATIE'	
8.1	Intro	duction		185
8.2	The r	ole of A	rticle 17 ECHR in the German legal order	187
8.3	Milit	ant demo	ocracy in Germany: die wehrhafte Demokratie	187
	8.3.1	The dra	afting of a militant constitution	188
	8.3.2	Wehrho	afte Demokratie as adopted by the Federal Constitutional	
- 1		Court		191
8.4	Artic	le 18 Bas	sic Law as an instrument of the wehrhafte Demokratie	194
			er abuses	195
			(Missbrauch)	195
			sic rights liable for abuse	197
		To com		199
	8.4.5		e democratic basic order	200
		8.4.5.1	The free democratic basic order equals the elements in	
		0 4 5 0	Article 79(3) Basic Law	201
	0.16	8.4.5.2	The free democratic basic order as a liberal democracy	202
	8.4.6		are (Verwirkung)	203
			Which rights will be forfeited?	203
		8.4.6.2	Loss of the right itself or merely a loss of the right to	
		0.4.6.2	exercise it?	204
	0 47		Is forfeiture a criminal sanction?	207
	0.4./	I ne pro	cedure of Article 18 Basic Law	208
0 5	0.4.0 Autio1	Additio	nal sanctions based on section 39(2) LFCC	210
0.5	Q 5 1	The case	c Law proceedings before the Federal Constitutional Court	211
			e law on Article 18 Basic Law on elements	212
86				214
0.0	861	The nor	fte' elements in the German legal order	215
	862	The par	ty ban in Article 21(2) BL	216
	863	Non-cor	hibition of associations in Article 9(2) BL astitutional militant measures	217
	0.0.5			219
		8632	The German prohibition of Holocaust denial The Irving case	219
			Holocaust denial under the German Basic Law and the	220
			ECHR compared	222
8.7	Concl	usions	2011 Compared	222
				222

CHAPTER 9	MILITANT	DEMOCRACY IN THE	CONTEXT	OF THE	<b>ECHR</b>

9.1	Introd	luction		225
9.2	The n	nterpretation of the European Convention on Human Rights	227	
			t democracy during the early years of the Convention	228
		9.2.1.1	National Socialism	229
		9.2.1.2	Communism	230
	9.2.2	The Co	invention's militant democracy in the context of	
		democr	ratisation	232
		9.2.2.1	Militant democracy as a temporary instrument during	
			transition	233
		9.2.2.2	The continued justification of militant measures against	
			neo-Nazis	236
	9.2.3	Toward	ls a new militant paradigm?	238
9.3	Balan	cing the	protection of fundamental rights and democracy	241
			appreciation with regard to militant measures	243
9.5	Concl	usions		244
Сн	APTER	10 C	Conclusions	
		10 0	- Olic Bosions	
10.1	Intro	duction		247
10.2	Back	ground a	and interpretation of the abuse clause	249
10.3	In sea	arch of a	clarification of Article 17 ECHR	251
	10.3.	1 The so	cholarly interpretation of Article 17 ECHR	251
	10.3.	2 Abuse	clauses in other human rights documents	252
	10.3.	3 The co	oncept of abuse of rights	254
	10.3.	4 Article	e 17 ECHR and the concept of militant democracy	256
		10.3.4	.1 The concept militant democracy	256
		10.3.4	.2 The 'wehrhafte Demokratie' in Germany	257
		10.3.4	<ul><li>.3 Militant democracy and the ECHR</li></ul>	259
10.4	When	and ho	w can Article 17 ECHR be applied?	261
D				
	liograp			265
	le of C		1.0	281
		- '	ch Summary)	287
Cur	Curriculum Vitae 3			