HISTORIES, TRADITIONS AND CONTEXTS IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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1. THE PROBLEM OF THE USE OF HISTORY IN STRASBOURG'S JURISPRUDENCE

The past, its public representation, and its shared memory are the foundations upon which peoples forge their identities. They are thus a matter of a public "use" and debate that raises inevitable conflicts[1]. It cannot come as a surprise that this debate has also ended up conditioning the catalogues of human rights, especially in less established democracies.

In dealing with disputes that involve questioning the past and traditions, the European Court of Human Rights is often forced to sit in judgment over the history of peoples and nations[2]. Nevertheless, it is the Convention's own text – through such general clauses as "common heritage of political traditions [and] ideals," the "general principles of law recognised by civilised nations," the notion of "necessary in a democratic society," the "protection of public order […] or morals," "public emergency threatening the life of the nation," "religious and philosophical convictions," and the "free expression of the opinion of the people" – that encourages a historical and contextual interpretation[3].

But dealing with the history of European peoples poses specific difficulties for the Court, determined by its "distance" from national experiences. First among these is the information gap, which the Court seeks to bridge through the analyses by such support and study bodies as the Venice Commission, accompanied by the cultural and information resources deriving from the dialectics between the parties and the *amici curiae*[4]. But certainly, the Court's lying outside the national public debate aggravates the perception that its historical judgments are arbitrary.

Thus, the problem of assessing and using history in juridical reasoning – which involves the activity of every judge, Constitutional Court, or international tribunal[5] – acquires a marked specificity in the Strasbourg Court, as demonstrated by the very attention that the Court has had to give to reflecting upon the "historical method" that characterises its own jurisprudence.

In this work, I shall attempt to reconstruct the approach the Strasbourg Court has taken towards history, memory, and national historic traditions, and the use of historical and contextual analysis in its jurisprudence. I shall first analyze the various strands of jurisprudence in which national history becomes an element for resolving disputes, and I will then go on to more specifically examine the jurisprudence accumulated in cases of historical denial, in which the historical method guiding the Court becomes more explicit.

Therefore, in this study's chosen outlook, reference to historical argument does not coincide with the notion of "historical interpretation" in the manner of Savigny, or with the problem of originalism, also discussed with regard to appealing to the intentions of the parties to the Rome Convention, which has marked some of the European Court's motivations[6]. Rather, with the notion of "historical argument," I am referring to a "practise of contextual interpretation"[7] that makes use of historical references in reconstructing cases and in providing motivations for judicial decisions.

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[1] On which see the contributions by E. Nolte and J. Habermas on the so-called *Historikerstreit* collected in G.E. RUSCONI (ed.) *Germania: un passato che non passa. I crimini nazisti e l'identità tedesca*, Einaudi, Turin 1987.

[2] J.L. FLAUSS, 'L'Histoire dans la jurisprudence de la Cour européenne des droits de l'homme', (2006) 65 *Revue trimestrielle de droits de l'homme* 5 ss.

[3] L. BEGIN, 'L'internationalisation de droits de l'homme et le défi de la «contextualisation»' (2004) 53 *Revue interdisciplinaire d'études juridiques* 64-66.

[4] A. PECORARIO, 'Argomenti comparativi e giurisprudenza Cedu: il ruolo della Commissione di Venezia in materia di diritto elettorale', in <*www.dirittocomparati.it*> (Nov. 2010).

[5] R. UITZ, *Constitutions, Courts and History. Historical Narratives in Constitutional Adjudication*, Ceu Press, Budapest-New York 2005, pp. 5-14, which among other things reconstructs the debate over and the criticism of "law-office history" in the United States (*ibid*, pp. 17 and following).

[6] B. RANDAZZO, 'Il giudizio dinanzi alla Corte europea dei diritti: un nuovo processo costituzionale' (2011) 4 *Rivista dell'Associazione italiana dei costituzionalisti* 1, 29-30, which insists on the marginality of reliance on historical interpretation in Strasbourg's jurisprudence. F. OST, 'The Original Canons of Interpretation of the European Court of Human Rights' in M. DELMAS-MARTY (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions*, Martinus Nijhoff, Dordrecht 1992.

[7] In the sense proposed by L. BÉGIN, supra n. 2, p. 64 (n. 1), pp. 76 and following.

2. HISTORICAL ARGUMENT IN STRASBOURG'S JURISPRUDENCE

2.1. HISTORICAL CONTEXTUALISATION AND CONSTITUTIONAL TOLERANCE

Historical argument can normally be found to take on highly significant prominence in the judgments most contaminated with political struggle. Thus is the case with the current of jurisprudence on the so-called "anti-system parties"[8]: in the extremely well-known *Refah Partisi (the Welfare Party) and Others v. Turkey* (2003), the Grand Chamber confirmed the Section's judgment finding that the measure dissolving *Refah* had not violated Art. 11 of the Convention, given the party's programme and its action aimed at affirming *Sharia* law. To strengthen the Section's argument and justify a measure that, in many other cases, was found to violate the rights protected by the Convention, the judges reconstructed the historical path of the building of the Turkish national state, which – as is known – was marked by having radically overcome the theocratic conception of public power and of statehood (§ 124-125).

But the influence of historical context in the Court's decisions is even clearer in the jurisprudence on election law in the Contracting States, which arose in certain Commission decisions[9] in the 1970s: in rejecting arguments that England's majoritarian electoral system violated the Convention, the Commission observed that this system was part of the "common heritage of political traditions referred to in the Preamble" (*X v. the United Kingdom*, 1976, my transl.). Even more evident is the appeal to national historical tradition in the judgment *W, X, Y, and Z v. Belgium* (1975): under discussion here was the legitimacy of the constitutional rule under which the claimant to the throne was automatically entitled to a seat in the Senate – a seat acquired at eighteen years of age, as against the threshold of forty years prescribed for general candidates. Here as well, the Commission rejected the petitions, finding "a tradition of Belgian constitutional monarchy" in the challenged regulation. When in 1982 an English citizen residing on the Island of Jersey petitioned the Strasbourg Court to complain of being barred from taking part in elections for the House of Commons, the Commission answered that the Convention's principles were not such as to undermine "exceptional constitutional ties based upon historical reasons preceding the Convention" (*X v. the United Kingdom*, 1982). And there is more: in 1984, it was the "historical tradition of the Commonwealth" that upheld the United Kingdom against the petition by a Northern Irish deputy who had been barred from standing for election in the Parliaments of other Commonwealth countries (*M v. the United Kingdom*, 1984).

In *Mathieu-Mohin and Clerfayt v. Belgium*, (1987), it was the Grand Chamber that reconstructed the historical background of the gradual "federal pattern of organisation" in the Belgian constitutional system, basing upon the country's specific political conditions the legitimacy of electoral rules that set aside certain elective offices for members of the cultural communities:

> 'Any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another (§ 54)'.

These are merely the initial episodes in a considerable body of jurisprudence, recently reproduced following largely similar patterns. In *Yumak and Sadak v. Turkey* (2008), the clause requiring the threshold of 10% in national political elections was found not to violate the Convention, despite the conclusions to the contrary in all the documents of the Council of Europe and the Venice Commission, in light of the dangers that political instability held for the stability of democracy: to demonstrate this, the Court retraced the events in Turkish political history starting from the elections of the 1950s (§ 44).

Whether called upon to rule on recognising the rights to vote or stand for office, or assessing the electoral system, how elections are organised, or how electoral challenges are dealt with, the Court legitimises a wide margin of appreciation for the States in moulding the electoral process to the specific context[10]. If we go on to search for "recurring themes" in electoral jurisprudence, we may isolate three steps of major importance: a first one, according to which any electoral legislation "must be assessed in the light of the political evolution of the country concerned"[11]; then, establishing that "there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision"[12]; lastly, the conclusion by which "features unacceptable in the context of one system may be justified in the context of another"[13].

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[8] On which see P. RIDOLA, 'Commentary on Art. 11' in S. BARTOLE, B. CONFORTI, G. RAIMONDI (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Cedam, Padua 2001, 359-363.

[9] F. BOUCHON, 'L'influence de cadre historique et politique dans la jurisprudence électorale de la Cour européenne des droits de l'homme' (2001) 85 *Revue trimestrielle de droits de l'homme* 153, 155.

[10] F. BOUCHON, supra n. 8, pp. 164-5, especially nt. 34-39, with further indications of jurisprudence.

[11] As with, first of all, the already cited judgment *Mathieu-Mohin and Clerfayt v. Belgium* (1987).

[12] Starting with *Hirst v the United Kingdom* (2004).

[13] See, again, *Mathieu-Mohin and Clerfayt v. Belgium* (1987).

The last of these statements is confirmed in the recent judgment *Grosaru v. Romania* (2010), in which the Court ruled that the system of electoral challenge in Romania, which was entirely entrusted to parliamentary verification of powers, was incompatible with the Convention. The Court – after affirming, in line with the opinions from the Venice Commission, that this parliamentary oversight over the validity of elections lacked impartiality – wondered whether this judgment should also be extended to the other Contracting States that adopted a similar system (Italy, Belgium, and Luxembourg): the negative response is based on the following argument: "These three States benefit from a long democratic tradition which would seem to dispel doubts on the legitimacy of such a practice" (§ 28).

2.2. THE INSUFFICIENCY OF HISTORICAL ARGUMENT (SEJDIĆ AND FINCI V. BOSNIA-HERZEGOVINA)

Specific national features and reconstruction of the historical background do not always end up sparing state regulations[14]: in *Matthews v. the United Kingdom* (1999), the Court, distancing itself from the aforementioned precedent of 1982 rendered in the case of the island of Jersey, ruled against the State for barring a resident of Gibraltar from voting for the European Parliament. In 2004, "blind and passive adherence to a historical tradition" did not exempt the United Kingdom from a ruling against it for its law disenfranchising convicted prisoners, always and under any circumstance (*Hirst v. the United Kingdom*, 2004)[15]. Also: when called upon to rule on the conditions for the right to vote for Cyprus's Turkish population (which had been essentially prevented from voting by the separation regime imposed by the Cypriot constitution and by the Turkish military occupation of the northern part of the island), the Court ruled against Cyprus, while however finding that its own criteria of judgment may vary according to the historical and political factors peculiar to each State (*Aziz v. Cyprus*, 2004, § 28).

More recently, the Court then ruled against Moldova on a law that allowed only those with Moldovan citizenship to stand for election (*Tânase v. Moldova*, 2010): in *Tânase*, the Court stressed that "particular historical and political considerations may justify more restrictive measures" (§ 172), and dwelt on "Moldova's special situation", reconstructing its national history from the Middle Ages (§ 173), but concluded that art. 3 of the Protocol had been violated, "notwithstanding Moldova's special historical and political context" (§ 180)[16].

But the most important case – to exemplify how appreciation of the historical context does not always orient the Court's decision towards tolerance of state restrictions of fundamental rights – was *Sejdić and Finci v. Bosnia-Herzegovina* (2009), a case with an extraordinary impact on international public opinion: the applicants were two Bosnian citizens complaining of their ineligibility to stand for election to parliament and the national presidency on the grounds of their respective Roma and Jewish origins. Now, the Bosnian constitution is an attachment to the Peace Treaty dating back to the Dayton Agreements of 1995, which had put an end to the Yugoslavian conflict: it introduced a state organisation founded upon a rigorous partition of functions between the Bosnian, Serbian, and Croatian ethnic groups, attributing veto powers exercisable by the representatives of the constituent peoples and a collective presidency. Because of this rigid partition, only those who declared their membership in one of the three constituent communities could acquire the right to stand for election.

Although the Court was not unaware of this special model of constitutionally guaranteed ethnic integration (§ 6-7) or of the events in the difficult coexistence between the three peoples (§ 45), it considered the critical moment of the Constitution's genesis to have passed (§ 46), concluding that it was discriminatory to bar from a fundamental right those who, in belonging to a different community, do not intend to declare their membership in any of the three constituent peoples.

But dissenting opinions struck at the heart of the Court's reasoning, contesting the shortcomings in the reconstruction of the historical background, and the little importance given it: according to the judges Mijović and Hajiyev, the Court "has failed to analyze both the historical background and the circumstances in which the Bosnia and Herzegovina Constitution was imposed"; according to the judge Bonello, the Court shoved "history out of its front door" and thus "divorced Bosnia and Herzegovina from the realities of its own recent past":

> 'With all due respect to the Court, the judgment seems to me an exercise in star-struck mirage-building which neglects to factor in the rivers of blood that fertilised the Dayton Constitution. It prefers to embrace its own sanitised state of denial, rather than open its door to the scruffy world outside. Perhaps that explains why, in the recital of the facts, the judgment declined to refer even summarily to the tragedies which preceded Dayton and which ended exclusively on account of Dayton. *The Court, deliberately or otherwise, has excluded from its vision not the peel, but the core of Balkan history* (My emphasis).'

[14] F. BOUHON, supra n. 8, p. 166.

[15] "… the Court does not consider that a Contracting State may rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition" (§ 41).

[16] F.R. DAU, 'Il diritto a elezioni libere tra attivismo della Corte EDU e argomenti storici: in merito alle pronunce *Tanase c. Moldavia* e *Aliyev c. Azerbaijan*', in <www.*diritticomparati.it*> (May 2011).

And with reference to the question central to the Court's decision – whether the critical postwar moment, which had justified adopting the contested measures, had truly passed, Mijović and Hajiyev opposed the majority's analysis, while Bonello criticised not only the analysis, but the Court's very legitimacy to judge the historic transition:

> 'I also question the Court's finding that the situation in Bosnia and Herzegovina has now changed and that the previous delicate tri-partite equilibrium need no longer prevail. That may well be so, and I just hope it is. *In my view, however, a judicial institution so remote from the focus of dissention can hardly be the best judge of this. In traumatic revolutionary events, it is not for the Court to establish, by a process of divination, when the transitional period is over, or when a state of national emergency is past and everything is now business as usual. I doubt that the Court is better placed than the national authorities to assess the point in time when previous fractures consolidate, when historical resentments quell and when generational discords harmonise* (My emphasis).'

2.3. THE FLIGHT FROM THE COMMUNIST PAST

Despite the importance of these pronouncements, the cases in which the Court overcame historic specifics are still in the minority in comparison with the tendency to safeguard a wide margin of appreciation enjoyed by the state in electoral matters. We see this more clearly in the jurisprudence regarding the political transition processes in the countries belonging to the old Communist Bloc, where reliance on historical argument has become central and disputed to the point that the Court has been forced to set out a full-blown "doctrine" on the use of history in its own jurisprudence.

Rekvényi v. Hungary (1999) debated whether the Convention was violated by the constitutional law introduced in 1994, prohibiting police officers from engaging in political life, on the ground of the police corps being compromised with the past Communist regime. According to the Court, the "particular history of some Contracting States" may justify these kinds of restrictions on political freedoms, in order to consolidate and safeguard democracy (§ 46). In the case in point, the state measures were oriented "against this historical background" and thus answered a pressing social need (§ 48).

In *Ždanoka v. Latvia* (2006), the Grand Chamber held that the Convention was not violated by the Latvian law prohibiting those who had been members of the Communist Party before 1991 from standing for election – a restriction that, as the Court stated, was to be assessed "with due regard to this very special historico-political context", thus giving rise to a wide margin of appreciation for the state (§ 121, 133). In the case in point, however, it is the very interpretation of the historical context that is subject to debate: the applicant in fact called upon the Court to judge the interpretation, provided by the national authorities, of the events of the spring of 1991, characterised by the Soviet attempt to repress Lithuanian independence and the Lithuanian Communist Party's responsibilities in these affairs. Background is no longer – as it was in *Rekvényi* – the reassuring objective element, removed from contestations, that offers jurisprudence a solid rhetorical foothold for solving a dispute. To the contrary, it becomes the ground for the dispute. This gives rise to setting out an initial, swift doctrine on the use of history:

> 'Furthermore, the Court will abstain, as far as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction; however, it may accept certain well-known historical truths and base its reasoning on them (§ 96).'

By endorsing the interpretation of the historical facts supplied by the national jurisdictional authorities, and justifying the restrictive state measures, the Grand Chamber deviated from the section's judgment (*Ždanoka v. Latvia*, 2004), in which the restriction on standing for election had been deemed justified in the very first years after Latvian independence, but out of proportion once many years had passed.

Just two years later, the *Âdamsons v. Latvia* (2008) judgment returned to the point, circumscribing the value of *Ždanoka*. In *Âdamsons*, analysis of the historical context is highly thorough and takes on the utmost importance, but does not result in justifying a measure of general restriction on standing for election against those who were KGB agents during the Soviet regime. The restriction of the political rights of KGB agents provided for by the Latvian law was "defined too generically" (§ 125, my transl.), and may find application solely with reference to persons for whom, on a case-by-case basis, a role of active threat to the democratic system is proved. Here, the historical background is traced to its ambivalence and its problematic nature: it does not condemn and it does not absolve, but invites appreciation of the concrete case.

Another step towards reducing the weight of history in the democratic transitions in the former Communist countries may be seen in *Linkov v. the Czech Republic* (2006). The judgment was born from the application by a leader of a liberal political party that had been refused registration on the ground of its pursued goals of rejecting

Communism and breaking the state's continuity with the Communist period. In particular, the party's statute cast doubt on the content of the Czech legislation adopted in the aftermath of the democratic transition, aimed at safeguarding the state's continuity with the Communist period[17], and proposed retroactive criminal measures with the purpose of punishing the behaviour by the leaders of the previous regime, that would otherwise be covered by impunity.
Upholding the party's application, the Court ruled out that an arrangement of pacification based upon the irretroactivity of criminal law for Communist crimes could rise to being an asset to protect and remove from the exercise of the freedoms of communication. While recognising in two passages that its decision must "take into account the historical and political context of the question" (§§ 37 and 42), the Court ruled out having to pronounce on "facts taking place in the territory of Czechoslovakia between 1948 and 1989" (§ 42). But, also through the aid of the Convention's preparatory proceedings, it stressed that the admissible exceptions to the principle of retroactivity of criminal law respond, among other things, to the need to check areas of criminal immunity to crimes against humanity, thus deeming legitimate a project aimed at calling past guilt back into discussion.
In so doing, the *Linkov* judgment stands in continuity with the previous one in the case of *Streletz, Kessler and Krenz v. Germany* (2001), regarding the legitimacy of the convictions handed down by German courts after reunification, against the leaders of the Socialist Party of the dissolved German Democratic Republic. Accused of having incited military personnel to assassinate those who attempted to flee the country and cross the minefields at the Berlin Wall, the applicants claimed application of the law in force at the time of the facts, and therefore also of the laws on national security, to justify their conduct. The Court resolved the dramatic affair by recognising the right "for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime" (§ 81). According to the Court, these states, "having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law" (§ 81)[18].
Therefore, the *Âdamsons* and *Linkov* judgments show a clear detachment from the reasoning used in *Rekvényi* and *Ždanoka*, where the transition context justified state restrictions of rights: as the years passed, the legislation adopted after the transitions, the result of delicate legitimising balances, ceased to be afforded absolute protection[19].

2.4. PRINCIPLE OF SECULARISM AND HISTORICAL TRADITIONS

Another area in which historical argument takes on enormous importance is that of disputes between religious freedom, freedom of conscience, and the principle of secularism. Here, deeper analysis of the historical framework starts from a dual line of argument: on the one hand, the need to contextualise the dispute in a specific culture, depending on the particular features of each national experience in articulating the relationship between religion and the public sphere; on the other hand, and more strategically, the emphasis on the specific historical context opens the way to recognising a wide margin of appreciation for the state – and therefore for operations justifying measures restricting the fundamental freedoms[20].
As early as *Dogru v. France* (2008), the premise of the judgment's motivation lay in the French conception of the principle of secularism – "arising out of a long French tradition" and a founding principle of the Republic, rooted in the *Déclaration* of 1789 (§ 17-18). And the same function in support of and confirming the indissoluble link between the principle of secularism and the national historical tradition is found in the pronouncements on the prohibition against displaying religious symbols in Turkey: in the most well-known one, *Leyla Şahin v. Turkey* (2005), the Grand Chamber reconstructed the role of the principle of secularism at the origins of building the Turkish national state, leading it to state that in the Turkish context, secularism was guarantor of democratic values (§ 30).
But the national tradition is also appreciated and protected when it establishes preferential positions for given religions in the public sphere, at the sacrifice of freedom of conscience and of the principle of nondiscrimination. In *Folgerø and Others v. Norway* (2007), the Court, while upholding the application of some parents

[17] In the same vein was the law on irretroactivity in criminal law during the Hungarian transition (on which: J. ELSTER, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, Cambridge 2004). For a general overview of the problem, in addition to J. Elster's already cited volume, cf. also R.G. TEITEL, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal*, 69, 78 and following; A. LOLLINI, *Costituzionalismo e giustizia di transizione*, Il Mulino, Bologna 2005, pp. 161 and following, especially pp. 201-5.
[18] The problem of the applicable law in cases of justice of transition is discussed in the fundamental work of G. VASSALLI, *Formula di Radbruch e diritto penale*, Giuffrè, Milan 2001, pp. 68 and following, especially pp. 85 and following.
[19] On the importance of "the passage of time" for the Strasbourg Court's jurisprudence cf. – in a different context – the judgment *Éditions Plon v. France* (2004), § 53.
[20] In this sense, reference must be made to the ruling *Otto Preminger Institute v. Austria* (1994). But see also a decisive rethinking – also referring to the Austrian context – in *Vereinigung Bildender Künstler v. Austria* (2007). The different effects of "cultural contextualization" in the Strasbourg Court's jurisprudence are discussed by F. Hoffmann – J. Ringelheim, 'Par delà l'universalisme et le relativisme: la Court européenne des droits de l'homme et le dilemme de la diversité culturelle' (2004) 52 *Rev. interdisc. d'etudes jur.* 109, 119 and following.

complaining of the compulsory nature of Lutheran religious instruction in the schools, did not fail to formulate a general principle based upon "the place occupied by Christianity in the national history and tradition of the respondent State" (§ 89)[21]. Then, in the well-known *Lautsi v. Italy* (2011), the Grand Chamber, starting from the assumption that Europe "is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development," stated that "the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State[22]." Also, in the case *F. v. Switzerland* (1987), a law under the civil code was disputed, which authorised a three-year prohibition against remarrying for a divorced, adulterous wife. Despite the vast European consensus, the Court refused to resort to homogenising treatment of adultery, since the matter of marriage is "closely bound up with the cultural and historical traditions of each society" (§ 33), although concluding that the right had been violated due to the seriousness of the fault.

2.5. THE USE OF HISTORICAL ARGUMENT: OPEN QUESTIONS

Therefore, in these currents of jurisprudence, contextual analysis extends to a consideration of national history, placing within historic processes the reasons for given laws or state measures, as well as the reasons for the needs, claims, and behaviours of groups and of individuals. At times, history is presented in the guise of long-standing tradition that deserves to be understood and respected; at times, on the other hand, it takes on the dimension of recent political history, of a transition process yet to be entirely consolidated, which contextualises and justifies delays and contradictions in current legislation. Historical argument often ends up determining the sense of the decision of the concrete case. In most cases, it justifies and legitimates state measures restricting fundamental rights, by identifying through historical reconstruction "contextual" reasons prevailing over the objective affirmation of universally held principles.

But when the court summarises in a few lines of motivation a complex and often disputed historical experience, obtaining from it a purportedly objective reflection on a system's fundamental traits, what type of historical research has it done? And how thoroughly? What sources did it prefer in reconstructing national history? And what space did it grant to other histories, the histories of the defeated, the alternative histories? In particular, with reference to cases involving transitions to "recent" or "fragile" democracies, is the risk not run of objectivising, behind the label of historical tradition, disputed, still-open questions as to the interpretation of the past and of collective memory? And is the risk not run, then, of removing from public debate ideological premises that are not entirely shared in memory? Do the Strasbourg judges not end up then selecting, by way of assessment, a "single" tradition over the "other" ones? And in so doing, are they not contributing towards consolidating a historical memory that is not necessarily affirmed and shared, thus conditioning a nation's future even more than its past?[23]

But above all: what idea of Europe descends from the argument's reliance on national histories and traditions? It is certainly clear that historical traditions – which first in the jurisprudence of the Union's Court of Justice, and later in the writing of the Treaties, played a fundamental role in integration and in building a common heritage of values[24] – establish, in the outlook of the Strasbourg Court, culturally defined identities and carve the fracture lines in European civilisation[25].

3. DENYING HISTORICAL TRUTH: AN ABUSE OF LAW

These are questions that re-emerge if we analyze the Strasbourg Court's jurisprudence on cases of historical denial, which in many ways makes explicit options that have remained in the background in the use of historical argument.

When having to assess the compatibility with the Convention of these state criminal-law measures aimed at suppressing the formulation of opinions expressing Holocaust denial, the Court avoided treating these issues in accordance with the perspective of art. 10 of the Convention, shifting the dispute onto the ground of prohibiting abuse of law[26]. Although this canon is recessive in European jurisprudence[27], it all the same re-emerges as an

[21] For a critique of this passage of the judgment, see the contribution of A. VESPAZIANI in this *Volume* at p. ... .
[22] *Lautsi v. Italy* (2011) § 68.
[23] On valuing historical traditions, reference must be made to E.J. HOBSBAWM and T. RANGER, *The Invention of Tradition*, Cambridge University Press, Cambridge 1983. But see also E.J. HOBSBAWM, *Nations and Nationalism since 1870. Program, Myth, Reality*, Cambridge University Press, Cambridge 1990], and T. TODOROV, *Les abus de la mémoire*, Arlea, Paris 1995.
[24] See P. RIDOLA, *Diritto comparato e diritto costituzionale europeo*, Giappichelli, Turin 2010, pp. 52 and following, 171-5, 233-40.
[25] It is true, however, as a partial correction of this view, that elsewhere the court has stated that "diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts" are the basis of the principle of pluralism (*Gorzelik and Others v. Poland* (2004), § 56). On this point, it is essential to refer to F. HOFFMANN and J. RINGELHEIM, supra n. 19, p. 135.
[26] The line of argument is well described by E. STRADELLA, *La libertà di espressione politico-simbolica e i suoi limiti: tra teorie e "prassi"*, Giappichelli, Turin 2008, pp. 126 and following.
[27] C. PINELLI, 'Commentary on Art. 17', in BARTOLE, CONFORTI, RAIMONDI (eds.), supra n. 7, pp. 455 and following.

exceptional technique in treating these cases, with the purpose of removing the Court from operations of balancing freedom of expression, and ruling out any need to contextualise denialist opinions in a public debate, while measuring them against the objective canon of historical facts that are definitively clear and no longer the object of historical investigation.
While in *X v. Federal Republic of Germany* (1982) the Commission had already held Holocaust denial to be counter to notorious historical facts, established with certainty by damning evidence of all kinds, in *Marais v. France* (1996), the denial of definitively clear historic facts is no longer merely apt to cause harm to others' rights, but "runs counter to basic ideas of the Convention, as established in its preamble, namely peace and justice … and would contribute to the destruction of the rights and freedoms guaranteed by the Convention". Then, even more explicitly, *Lehideux and Isorni v. France* (1998) states that:

> 'the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10 […]. (There is a) category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17 (§§ 53 and 47).'

In *Garaudy v. France* (2003), the Court rendered a judgment that the *Loi Gayssot-Fabius*, which criminalised Holocaust denial, was fully compatible with the Convention – integrating it through the conduct of disputing the Nuremberg Court's ruling, which was thus raised to objective canon of historical truth[28]:

> 'There could be no doubt that disputing the existence of clearly established historical events, such as the Holocaust, did not constitute historical research akin to a quest for the truth.'

As may be seen, in this thread of jurisprudence, the Court's reasoning starts from an extremely rudimentary conception of historical investigation: by parsing the categories of certainty and falsehood for statements through which it expresses its own results, it appears to ignore the very assumptions of historical research[29]. It is a now long-standing (in historiographical research) methodological given that historical truth is nothing more than a continuous recasting into discussion of truths taken as acquired. In fact, even when one wants to consider the material content of an event that is the object of historical investigation to be definitively ascertained, despite this, the mere change in the viewer's perspective, in his or her personal inclinations, in how he or she interrogates the documentary material, and in the cultural context being worked in, can only result in a different "historical knowledge[30]."
When it does not go into cases of denial of the Jewish Holocaust, the Court abandons the canon of abuse of law and re-expands the area of application of art. 10 of the Convention: thus, it has a way to appreciate the irreducible relativity of historical research. In the already cited *Lehideux* judgment – having as its object writings aimed at rehabilitating the figure of Marshall Pétain – the Grand Chamber recognises that

> 'the events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately (§ 55).'

Upon consideration, it is not a matter of rethinking the technique of judgment with respect to denialism: in *Lehidueux*, the Court held it was dealing with an issue that did not involve opinions of this kind, a page in French history open to historical criticism. This line of argument was also reproduced in *Chauvy and Others v. France* (2004), which regarded a dispute over the historical revision of facts related to the French Resistance during the Second World War. It reads:

> 'It is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation (§ 69).'

Furthermore, in Hungary in 2004, some right-wing newspapers promoted building a statue to honour Pál Teleki, the country's Prime Minister in the 1940s. The initiative – aimed at rehabilitating a figure held responsible for

[28] P. WACHSMANN, 'Libertà di espressione e negazionismo' (1999) 12 *Ragion Pratica* 57, 58. On the *Garaudy* judgment, more broadly, see my own A. BURATTI, 'L'affaire *Garaudy* di fronte alla Corte di Strasburgo: verità storica, principio di neutralità etica e protezione dei «miti fondatori» del regime democratico' (2005) 157 *Giurisprudenza italiana* 2243, 2247.
[29] H.I. MARROU, *De la connaissance historique*, Seuil, Paris, 1954.
[30] M. BLOCH, *Historian's Craft*, Manchester University Press, Manchester 1954; P. RICOEUR, *Histoire et vérité*, Seuil, Paris 1955, pp. 23 and following; H.I. MARROU, supra n. 28, p. 54; R. ARON, *Leçons sur l'histoire*, Fallois, Paris 1989]; ID., *Paix et guerre entre les nations*, Calmann-Lévy, Paris 1962] .

anti-Semitic legislation, and more generally for having led Hungary into the Second World War – raised enormous and heated debate, which the historian Karsai joined by opposing the proposal and bringing up Teleki's crimes and offences. Convicted of defamation by the national courts, Karsai petitioned the European Court of Human Rights which, in 2009, ruled in his favour. According to the Court,

> 'the applicant – a historian who had published extensively on the Holocaust – wrote the impugned article in the course of a debate concerning the intentions of a country, with episodes of totalitarianism in its history, to come to terms with its past. The debate was thus of utmost public interest (*Karsai v. Hungary*, 2009, § 35).'

Highly interesting in this same direction is the more recent *Fatullayev v. Azerbaijan* (2010): the petitioner was an Azerbaijani journalist convicted by the national authorities for having, in various articles, cast doubt upon the traditionally accredited historical version of the Khojaly massacre perpetrated in 1992 by Armenian and Russian troops against the Azerbaijani population, one of the foundational events in the national historical memory. The Court was aware that in this matter, historic events are not definitively ascertained truth, but a subject for debate and the object of legitimate dispute: "This judgment is not to be understood as containing any factual or legal assessment of the Khojaly events or any arbitration of historical claims relating to those events" (§ 76). The Court, therefore, could not resolve the case by espousing one version of the historic events or the other, but had to act within criteria upholding application of art. 10 – first and foremost respect for pluralism:

> 'Owing to the fact that the Nagorno-Karabakh war was a fairly recent historical event which resulted in significant loss of human life and created considerable tension in the region and that, despite the ceasefire, the conflict is still ongoing, the Court is aware of the very sensitive nature of the issues discussed in the applicant's article. The Court is aware that, especially, the memory of the Khojaly victims is cherished in Azerbaijani society and that the loss of hundreds of innocent civilian lives during the Khojaly events is a source of deep national grief and is generally considered within that society to be one of the most tragic moments in the history of the nation.
> In such circumstances, it is understandable that the statements made by the applicant may have been considered shocking or disturbing by the public. However, the Court reiterates that, subject to paragraph 2 of Article 10, *the freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"* (§ 86, my emphasis).'

Democracy, which in the perspective of art. 17 is an asset to be protected against historical denial, in that of art. 10 is the foundation for the freedom of historical research (§ 81).
Having been returned to the field of application of art. 10, historical discourse may be appreciated with respect to the content, the state of public debate on the point, and the journalist's intentions, establishing a scrutiny of proportionality. In this way, the Court reappropriates a capacity for mediation between conflicting rights and values, treating historical revisionism as a discourse that, although perhaps unpleasant – and at times repugnant, like any work that excavates historical memory, like any exhumation of an experience that has yet to see reconciliation – is intimately connected to the exercise of communicative freedoms.

4. TOWARDS A CONCLUSION: PROTECTION OF HISTORICAL TRADITIONS OR CRITICAL HISTORICAL METHOD?

There is a profound ambiguity in the treatment that the European Court reserves for the history of nations and peoples and for its memory: in all the cases examined, historical events break into jurisdictional disputes as foundations that are not unanimously shared and stipulated to, as a disputed memory, and the Court addresses these conflicts with ambivalent attitudes.
In most cases, the Court's argument tends to absolutise a historical narrative in a historical tradition, if not in an objective, definitively stable and clearly established history. Whether it is the history of the horrors of the Second World War, or the history of the liberation from religious fundamentalism, or the history of transition from Communist regimes, the Court protects certain selected historical narratives as traditions and foundations of the democratic order. In the Court's vision, history is often a private place for the exercise of public freedoms – in some cases even sacred ground that cannot be trodden upon, criticism of which becomes abuse. Far from being the result of a thorough investigation open to multiple interpretations, historical narrative is most of the time

used strategically by a Court in search of a rhetorical legitimacy resting upon apparently objective and factual arguments[31].
Therefore, it comes as no surprise that the use of historical argument raises so much perplexity within the Court. As the judge Garlicki, in his opinion concurring with the *Âdamson* judgment, writes:

> 'We are experts in law and legality, but not in politics and history, and we must not venture into these territories unless in cases of absolute need (my transl.).'

I personally do not share this concern, which is founded upon a simplistic acceptation of juridical interpretation[32]: the Strasbourg Court, due to the specific features that are the hallmarks of its jurisdiction, is inevitably called upon – even more than constitutional judges – to grapple with national histories and traditions that are complex and often disputed; many of the general clauses present in the Convention's text impose historical and contextual analyses. To evade this confrontation would simply mean clouding the underpinnings of the Court's decisions.
But narrating history is the same as writing it: although one cannot require the Court to work out a scientifically rigorous historical method, it is still necessary to be aware of the extraordinary delicateness of these passages of argument, to submit them to heated and open public criticism, within the Court as well as in public opinion, and to proceed towards argument practises capable of refining the method of historical research and balancing the weight of history with the needs to protect fundamental rights.

[31] R. UITZ, supra n. 5, pp. 5 and following, especially p. 9.
[32] On the importance of historical, contextual, and cultural elements in juridical interpretation, the literature is boundless: for the profile considered here, see above all H.G. GADAMER, *Truth and Method*, Continuum, New York 2004], and thus, at least, P. HÄBERLE, *Per una dottrina della costituzione come scienza della cultura*, (1982), Carocci, Rome 2001, pp. 21 and following, but also pp. 46-47, 52, 75 and following) and A.A. CERVATI, *Per uno studio comparativo del diritto costituzionale*, Giappichelli, Torino 2009, especially pp. 1-6, 237 and following.