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Genocide Denial and Freedom of Expression in the *Perinçek v Switzerland* (Grand Chamber) Judgment of the European Court of Human Rights

INTRODUCTION: A JURISPRUDENTIAL LANDMARK?

In the long and animated debate about content and limits on the freedom of expression, as protected by Art. 10 of the European Convention on Human Rights (ECHR or 'the Convention'),[1] the recent European Court of Human Rights's (ECtHR or 'the Court') Judgment in the *Perinçek v. Switzerland* case[2] seems destined to be viewed as a landmark in Strasbourg's jurisprudence on the matter. In particular, the decision is crucial in order to understand the potential collisions between the freedom of expression and the legislation of different European states criminalizing, to different extents, the 'denial' of mass atrocities – or 'denialism',[3] as widely used to designate conduct ranging from the mere negation of genocide, to the "justification, approval or gross minimisation"[4] of core international crimes[5] (out of the scope of this definition, instead, remains the phenomenon of 'revisionism'[6]).

The Grand Chamber of the ECtHR rendered its judgment in *Perinçek* on 15 October 2015. In so doing, the Court both acknowledged and expanded many of the arguments previously developed by the Court's second Section.[7] The Court concluded that the applicant's conviction for having denied the *legal* characterisation of the Armenian massacre of 1915 as genocide, had violated his right to freedom of expression, as guaranteed by Art. 10 of the ECHR. In considering the specific elements of the case, the Chamber found that the criminal conviction was not "necessary in a democratic society".[8]

As a preliminary matter of fundamental importance, it must be noted that the term 'genocide' in international criminal law assumes a very specific meaning, in which the constitutive element and distinctive feature of the offence – itself the object of endless scholarly debates – is its *dolus specialis*, which is constituted by the "intent to destroy,

[1] Article 10 of the ECHR states: "1. 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. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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" (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 UNTS 221).

[2] ECtHR, *Perinçek v. Switzerland* [GC], Appl. No. 27510/08, Judgment of 15 October 2015.

[3] See L. Hennebel and T. Hochmann (eds), *Genocide Denials and the Law* (Oxford: OUP, 2011); R. Kahn, *Holocaust Denial and the Law: A Comparative Study* (New York: Palgrave-Macmillan, 2004); E. Fronza, *Il negazionismo come reato* (Giuffrè 2012); P. Behrens, 'Genocide Denial and the Law: A Critical Appraisal' (2014) 21, *Buff. Hum. Rts. L. Rev.* 27; G. Lewy, *Outlawing Genocide Denial: The Dilemmas of Official Historical Truth* (University of Utah Press 2014).

[4] Qualifications of relevant conducts of denialism vary from document to document. *Inter alia*, see Article 1 of the Framework Decision 2008/913/JHA of 28 November 2008 of the Council of the European Union on "combating certain forms and expressions of racism and xenophobia by means of criminal law" (OJ L 328/55, 6 December 2000) and Article 6 of the Additional Protocol to the Convention on Cybercrime "concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems" (European Treaty Series No. 189, 2466 UNTS 205).

[5] The term 'core crimes' is employed in the meaning attributed to it by the International Criminal Law scholarship, to designate Genocide, Crimes Against Humanity, War Crimes and the Crime of Aggression as defined (or, for the last, to be defined) in the Rome Statute of the International Criminal Court. See A. Cassese, *International Criminal Law* (Oxford OUP 2013); Bassiouni M. Cherif, *International criminal law. Vol. 1, Sources, subjects, and contents* (M. Nijhoff Pub 2008); G. Werle and F. Jessberger. *Principles of international criminal law* (OUP Oxford 2014).

[6] See D. Lipstadt, *Denying the Holocaust: The growing assault on truth and memory*. (Simon and Schuster, 2012) and M. Shermer and A. Grobman, *Denying history: who says the Holocaust never happened and why do they say it?* (Univ of California Press 2009).

[7] ECtHR, *Perinçek c Suisse*, Appl. no. 27510/08, 17 December 2013.

[8] ECtHR, *Perinçek v. Switzerland* [GC], App no 27510/08, 15 October 2015, § 280.

in whole or in part, a national, ethnical, racial or religious group, *as such*" [emphasis added].[9] For the first time in the ECtHR's history, however, the Court deals with the criminalisation of the denial or gross minimisation of a genocide other than the *Shoah*. Further, in contrast with its previous case law on Holocaust denial, the Court disentangles the conflict between the criminal protection of the dignity of victims and the freedom of expression of the applicant striking the balance in favour of the second.

Before considering whether the judgment in *Perinçek* constitutes a turning point in ECtHR jurisprudence, and before analysing the elements and rationales of the judgment, it is necessary to put the facts of the case under closer scrutiny.

THE FACTS: PERINÇEK'S STATEMENTS ABOUT THE ARMENIAN 'GENOCIDE' AND HIS CONVICTION IN SWITZERLAND.

The case originated from statements made in 2005 by Mr. Doğu Perinçek, a Turkish citizen, doctor of laws and chairman of the Turkish Workers' Party. Mr. Perinçek, at public political events in Switzerland, expressed the view that atrocities inflicted against the Armenian minority by the Ottoman Empire during the years from 1915 had not amounted to genocide.

More precisely – since the nature of the statements is crucial for the judgment – Perinçek, during a press conference in Lausanne, made the following assertion:

> Let me say to European public opinion from Bern and Lausanne: the allegations of the 'Armenian genocide' are an *international lie* [emphasis added]. Can an international lie exist? Yes, once Hitler was the master of such lies; now it's the imperialists of the USA and EU! [. . .] The documents show that imperialists from the West and from Tsarist Russia were responsible for the situation boiling over between Muslims and Armenians. The Great Powers, which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence. The Turks and Kurds defended their homeland from these attacks.[10]

Subsequently, at a conference in Opfikon (in the Canton of Zürich), Perinçek added that, prior to the societal tensions of 1915, the Kurdish and the Armenian problems "above all, did not even exist".[11] Finally, at a rally in Köniz, he claimed, in pertinent part, the following:

> In secret reports the Soviet leaders said – this is very important – and the Soviet archives confirm that at that time there were occurrences of ethnic conflict, slaughter and massacres between Armenians and Muslims. But Turkey was on the side of those defending their homeland and the Armenians were on the side of the imperialist powers and their instruments [. . .] there was no genocide of the Armenians in 1915. It was a battle between peoples and we suffered many casualties . . . the Russian officers at the time were very disappointed because the Armenian troops carried out massacres of the Turks and Muslims".[12]

For having made these declarations, the Switzlerland-Armenia Association lodged a criminal complaint against Mr. Perinçek in July 2005. In March 2007, the Lausanne

[9] Article 6, Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/9,17 July 1998. See, *ex multis*, K .Ambos, 'What does 'intent to destroy' in genocide mean?' in *Intl. Rev. of the Red Cross*, *91*(876) 2009, 833–858; P. Akhavan, *Reducing genocide to law: definition, meaning, and the ultimate crime* (Cambridge University Press, 2012); P. Behrens and R. Henham (eds.), *The criminal law of genocide: international, comparative and contextual aspects* (Ashgate, 2007); W. Schabas, *Genocide in International Law: the Crimes of Crimes* (Cambridge University Press, 2000).

[10] *Ibid*., § 3.

[11] *Ibid*., § 14.

[12] *Ibid*., § 16.

District Police Court convicted the applicant of "racial discrimination" pursuant to Art. 261 *bis* § 4 of the Swiss Criminal Code, which provides, as follows:

> "Any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivialises or seeks justification for genocide or other crimes against humanity [. . .] is liable to a custodial sentence not exceeding three years or to a monetary penalty".

Perinçek was ordered to pay a fine of 12.000 CHF, or, in the alternative, to serve a jail term of thirty days imprisonment. Subsequently, Mr. Perinçek lodged an appeal with the Criminal Cassation Division of the Vaud Cantonal Court, but that was dismissed. The same outcome followed a second appeal before the Federal Court, in December 2007.[13]

In the appeal, the applicant submitted that his statements were not motivated by racist sentiments, that there was no consensus on the causes of the events of 1915, and that he only negated their *legal* characterisation as genocide. In addition, he insisted that there had been no definitive judgment from any international court or specialist commission acknowledging this legal characterisation.[14]

In response, the Federal Court found, on the contrary, that there was sufficient political recognition, scientific agreement and "broad consensus within the community" on the qualification of the events as "genocide". According to the Court, the appellant's declarations were not intended to contribute to the historical debate, as was shown by the fact that, during the hearings, Perinçek affirmed that he would never have considered changing or altering his views on the events in questions, even had a neutral panel of experts have come to the opposite conclusion, by qualifying those events as genocide.[15] Furthermore, the Swiss court agreed with the Police Court's conclusion that the appellant's motives were indeed of a racist and nationalistic character, since he depicted the Armenians as "aggressors", and sided with Taalat Pasha (one of the central figures of the events of 1915, who promoted arrests and deportations of the Armenian minority, and who was widely considered the main perpetrator of crimes against them).[16]

Finally, grappling with an issue extensively discussed even in the ECtHR's judgment in late 2015, the Federal Court also dwelt on the centrality of Holocaust denial in the drafting of Art. 261 *bis* of the Swiss Criminal Code. The Court indicates, in a seemingly methodological analogy, that the legal basis for the criminalisation of Holocaust denial dictates the reasoning that the courts must adopt when considering the denial of other genocides.[17] Indeed, whilst it recognised that the desire to combat negationist and revisionist opinions in relation to the Holocaust was a central factor in the drafting of Article 261 bis § 4, the Federal Court affirmed that the Article applies to *any* genocide and crime against humanity about which there is "general agreement" in respect of the facts and their legal characterisation, when such agreement be "comparable" to that regarding the Holocaust, that is, an "*indisputable*" (emphasis added) historical fact.[18]

[13] *Tribunal fédéral*, 12 December 2007, ATF 6B_398/2007, av. at http://www.bger.ch.
[14] *Ibid*., § 4.3.
[15] *Ibid*., § 5.1.
[16] *Ibid*., § 5.2.
[17] *Ibid*., § 3.4.3.
[18] *Ibid*., § 3.4.1.

JUDGMENT OF THE GRAND CHAMBER

Perinçek lodged his application with the ECtHR in June 2008, complaining that his criminal conviction had breached his individual right to freedom of expression. On 13 December 2013, judges of the second Section of the Court held that there had been a violation of Article 10 of the Convention. After this first decision, the Swiss Government requested the case be referred to the Grand Chamber. The request was accepted, and the Grand Chamber's judgment was delivered on 15 October 2015.

The Judgment directs different, and incisive, argumentation to the attention of the reader. The Strasbourg judges analyse, firstly, the issue of the applicability of art. 17 ECHR, also known as the 'abuse clause', frequently employed to dismiss applications related to genocide denial. Secondly, the Court dwells on the three requirements which must be respected in order to hold State interferences with freedom of expression to be compliant with the ECHR. These requirements are: lawfulness, pursuit of a legitimate aim, and necessity in a democratic society. The ECtHR then explains the hermeneutical parameters which should be followed in making this evaluation.

Finally, the judgment seems to underline the special regime surrounding Holocaust denial, seen as a *unicuum* that, for political and institutional reasons, attracts a more restrictive approach, and a lesser protection afforded the right to expression.

RESTRICTION OF THE SCOPE OF APPLICATION OF THE 'ABUSE CLAUSE'

Article 17 ECHR states as follows: "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".

Clearly, article 17 aims to exclude from protection by the Convention the exercise of the freedoms established therein, when the activity under scrutiny is aimed to destroy any of the rights set forth in the Convention itself. The provision is reminiscent of the *vexata quaestio*, long debated in legal and penal theory, which concerns a 'democracy capable of defending itself' from totalitarian activities (of Weimarian memory),[19] as well as of the old concept of 'militant democracy'[20] (about which, see further below, as the last part of this analysis).

Actions falling under Article 17, are, at the same time, beyond the scope of the ECHR's subject-matter. The important procedural implication of the application of article 17 therefore is that, when a complaint is based on conduct which expresses these 'anti-Conventional' aims, it does not get to the stage of examination on the merits, and, in cases of denialism, it is not assessed under Article 10 §2 ECHR (restriction to the freedom of expression). On the contrary, a complaint made in such cases is declared inadmissible after a *prima facie* review (the so-called 'guillotine effect').[21]

The ECtHR has uniformly applied article 17 in order to acknowledge the legality of criminal sanctions against opinions which run "counter to the basic values underlying the Convention".[22] In this category the Court has included a number of prohibited

[19] See H. Heller, *Staatslhere* (J.C.B. Mohr, 1983); Kelsen, *On the essence and value of democracy* (N. Urbinati and C. Invernizzi Accetti eds., Rowman & Littlefield Pub., 2000); C. Schmitt, *Constitutional theory* (J. Seizer tr., Duke Uni. Press, 2008); ID., *The crisis of parliamentary democracy,* (E. Kennedy tr., Mit Press, 1988); D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford, OUP 1999).

[20] K. Loewenstein, 'Militant Democracy and Fundamental Rights', in *Am. Polit. Sci. Rev.*, 31 3 (1937): 417–432.

[21] G. Cohen-Jonathan, 'Le droit de l'homme à la non-discrimination raciale', 46 *RTDH* (2001) 665.

[22] European Commission of Human Rights, *Kühnen v. Federal Republic of Germany*, 12194/86, 12 May 1988, § 1.

expressions, ranging from the negation of "clearly established" historical facts or crimes against humanity, to the "justification of war crimes" such as torture or summary executions, or the "glorification of war crimes, crimes against humanity or genocide".[23]

In the growth of racist discourses in contemporary Europe, expressions of this kind are unfortunately all-too-frequent. However, most of the cases in which the Court has applied Article 17 have had one aspect in common: they all related to one specific type of denialism, that is, the denial of the Holocaust.[24]

To better understand the implications of the *Periçnek* decision, and following a scheme proposed by the most accurate literature on the matter,[25] the interpretative orientations by the Court of Article 17 can be divided in different stages. Characteristic of the first phase is that Article 17 never comes into play, except for two early cases in the former European Commission of Human Rights;[26] even cases of anti-Semitic activities are dismissed after an Article 10 merits examination.[27] In the second stage, the abuse clause is used as an interpretative instrument in support of reasoning articulated under the framework of Article 10, on the one hand, while, on the other, the same clause is construed as applicable not only to activities aimed at the "destruction of the freedoms set forth in the Convention", but also – using a far broader concept – to those running counter to its "basic values" and "spirit".[28]

In the third stage, the Court increases consistently its use of Article 17, giving rise to the previously-mentioned 'guillotine effect' in many cases. In addition, the exclusion of evaluations under the Conventional dispositions concerning the freedom of expression seems to be attached to Holocaust denial, as such, and "divorced from a finding of racism".[29]

In the *Perincek* judgment, the Grand Chamber thus expounds important arguments on the applicability of the abuse clause. Firstly, the Chamber underlines that Article 17 is only applicable "on an exceptional basis and in extreme cases".[30] According to the judges, when freedom of expression is at stake, resort to the clause is legitimate only if it is "immediately clear" that the applicant sought to employ his right to freedom of expression for ends undoubtedly contrary to the values of the Convention. Therefore, in the Court's view, the decisive point under Article 17 is whether the applicant's statements "sought to stir up hatred or violence", and whether, by doing so, he attempted "to rely on the Convention to engage in activities aimed at the destruction of the rights and freedoms laid down in it", deflecting and capsizing the function of these rights. [31] On their merits, the Court finds that the applicant's statements were not motivated in order to incite hatred of the Armenian people, and that he had not expressed contempt towards the victims of the events of 1915. On this basis, the Chamber concludes that the

[23] See, inter alia, ECtHR *Lehideux and Isorni v. France*, [GC] App No 24662/94, 23 September 1998, § 47; *Janowiec and Others v. Russia*, App No 29520/09, 16 April 2012, § 165; *Garaudy c. France*, App. No 65831/01, 24 June 2003, § 1; *Orban and others v. France*, App No 20985/05, 15 January 2005, § 35; *Fáber v. Hungary*, App No 40721/08, 24 July 2012, § 58.

[24] See, inter alia, ECtHR, *F. P. v. Germany*, App No 19459/92, 29 March 1993; *Walendy v. Germany*, App No 21128/92 , 11 January 1995; *Remer v. Germany*, App No 25096/94, 6 September 1995; *Nationaldemokratische Partei Deutschlands v. Germany*, App No 25992/94 , 29 November 1995; *Rebhandl v. Austria*, App No 24398/94, 16 January 1996; *D. I. v. Germany*, App No 26551/95 , 26 June 1996; *Hennicke v. Germany*, App No 34889/97, 21 May 1997; *Nachtmann v. Austria*, App No 36773/97, 9 September 1998.

[25] P. Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' in *EJIL,* 26.1 (2015), 237–253.

[26] ECtHR, *Parti Communiste d'Allemagne c Allemagne*, Appl No 250/57, 20 July 1957; *Glimmerveen and Hagenbeek v. the Netherlands*, Appl Nos 8348/78 and 8406/78, 11 October 1979.

[27] ECtHR, *Lowes v. United Kingdom*, Appl. No. 13214/87, Decision of 9 December 1988.

[28] ECtHR, *Kühnen v. Federal Republic of Germany*, *supra* note 19.

[29] P. Lobba, 'Holocaust Denial', *supra* [22], [241].

[30] ECtHR, *Perinçek v. Switzerland* [GC], *supra* [2], § 114.

[31] *Ibid*., § 115.

applicant had not used his freedom of expression for ends contrary to the text and spirit of the Convention and, in consequence, that there is no reason to reject his application under Article 17.[32]

Thus, apparently, the applicability of the abuse clause (in opposition to what has been seen in the third of the interpretative stages analysed here) returns to be framed as a mechanism of *extrema ratio*, as conditioned by a finding of incitement to hatred, or violence on the basis of racist motivations, or contempt toward victims of mass atrocities.

LIMITATIONS OF THE FREEDOM OF EXPRESSION: LAWFULNESS AND PURSUIT OF A LEGITIMATE AIM

After excluding the applicability of Article 17, the Grand Chamber proceeds to analyse the merits of the case pursuant to Article 10 ECHR. As happens with other rights set forth in the Convention, regarding which there can be a number of exceptions, even the freedom of expression can be limited, and its exercise subjected to derogations. In particular, under Article 10 § 2, and according to the previous jurisprudence of the Court,[33] a State's interference with an individual's freedom of expression – even via penal sanctions targeting expressions – does not breach the ECHR system of protection if it satisfies a threefold test: in order to comply with the ECHR, an interference must: a) be prescribed by the law, b) pursue a legitimate aim, and c) be necessary in a democratic society.

As to the first point of this threefold test, the Chamber considers that, in case of penal norms, the lawfulness of the interference is not assured by the mere existence of a legal prescription. A norm, in fact, cannot be regarded as "law" unless it is formulated with sufficient precision to guarantee, to the person concerned, both accessibility and foreseeability as to the criminal consequences of her or his actions. The judges, thus, recognise that the disposition of Article 261§4 of the Swiss Criminal Code, with its use of the term 'genocide' to refer to actions and events that had never been adjudicated by an international criminal tribunal, can give rise to doubts. However, the Grand Chamber takes into account that the Swiss National Council had previously recognised the Armenian genocide and, despite the few precedents in the case law, concludes that the applicant, lawyer and a well-informed politician, could have suspected that uttering his statements in Switzerland would have resulted in criminal liability.[34] The first tier of the test, hence, for the judges is satisfied.

With reference to the second requirement – the pursuit of a 'legitimate aim', the Grand Chamber analyses the alignment of the Swiss conviction with the two exceptions which potentially justify the State's interference with the freedom of expression: the 'protection of the rights of the others' and the 'prevention of disorder'.

For the first – the rights of others, the Grand Chamber draws a distinction between protection of the dignity of the deceased and surviving victims of the events of 1915, on the one hand, and on the other, of the dignity, "including the identity",[35] of present-day Armenians, this latter identity being profoundly based on their view of those events as

[32] *Ibid*., § 104.

[33] See J. F. Flauss, 'The European Court of Human Rights and the Freedom of Expression', *Ind. L. J.*, 84 (2009), 809; H. Cannie and D. Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' *Neth. Q. Hum. Rts.,* 29 (2011), 54.

[34] ECtHR, *Perinçek v. Switzerland* [GC], *supra* [2], § 140.

[35] *Ibid*. § 155.

a genocide. The Court thus maintains that, by disputing a legal qualification of events, the applicant did not seek to cast the victims in a negative light or diminish their dignity or humanity. At the same time, the Chamber finds that the State's interference with the applicant's statements was intended to protect identity, and thus – in the reasoning of the Court – the dignity of present-day Armenians.[36]

More problematic was the Swiss allegation that the applicant's conviction was aimed at the prevention of disorder. In the Convention, the wording related to the concept of public order differs: some articles contain the phrase the 'prevention of disorder',[37] while others speak of 'interests', 'protection', and 'maintenance of public order'.[38] The Court reflects on this differentiation, recalling two different and underlying *notions*[39] of public order: a material concept, substantially denoting the prevention of riots and public disturbances, and an 'ideal' concept, encompassing control over the body of "political, economical and *moral* principles necessary to the maintenance of the social structure" [emphasis added].[40] On this matter, the Court states that, in cases of interference with rights protected by the Convention, the notion of 'order' must be interpreted restrictively, that is, according to the first, material concept. Consequently, the Court concludes that in the Swiss judgments there is no evidence supporting the concern that, in the time and context of the public events at which the applicant made his statements, they could have led to public disturbances, unleashed serious tensions or given rise to clashes.[41] The Court, consequently, is not satisfied with the second element of the compliance test.

THE REQUIREMENT OF 'NECESSITY IN A DEMOCRATIC SOCIETY'.

The last and most problematic requirement under examination is the necessity of the State's interference in a democratic society. The assessment of the Grand Chamber is explicitly meant to find a balance between two polarities: the exigencies of the protection of groups whose identity and dignity is sensitively connected to past events of mass victimization (indirectly ascribable to the protections of Article 8 of the Convention), on one hand,[42] and on the other the freedom of expression of the applicant (directly protected by Article 10).

The Grand Chamber makes clear that the freedom of expression is an essential foundation of a democratic society, of which pluralism and tolerance are constitutive elements. Hence, this freedom applies not only to expression of opinions that are positively received or regarded as inoffensive, but also to those that "offend, shock or disturb".[43] In this light, the key to the balancing operation is the presence, or lack, of a "pressing social need" in favour of the State's interference.

The judges, in recalling the case law of the ECtHR and applying it to the specificities of the case at hand, subsequently expose several parameters with which to evaluate

[36] *Ibid*. § 157.

[37] See Articles 10 § 2, 8 § 2 and 11 § 2 ECHR.

[38] See Articles 9 § 2 of the Convention, 1 § 2 of Protocol No. 7 and 2 § 3 of Protocol No. 4.

[39] On the controversial interpretation of the notion of 'public order' in Criminal Law, see J. Feinberg, *Harmless wrongdoing: The moral limits of the criminal law* (OUP New York; Oxford, 1990); M. S. McDougal and H. D. Lasswell, 'The identification and appraisal of diverse systems of public order', in *AJIL, 53* 1 (1959), 1–29; S. Moccia, (entry) 'Disposizioni a tutela dell'ordine pubblico' in *Enc. Giur*., XXII, Roma, 1990.

[40] ECtHR, *Perinçek v. Switzerland* [GC], § 147.

[41] *Ibid*., § 153.

[42] Article 8, "Right to respect for private and family life", European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* [1].

[43] ECtHR, *Perinçek v. Switzerland* [GC], § 196 (i).

whether or not, and if so, to what extent, the 'democratic' necessity of the State's interference, as made sustainable by the likelihood of the recurrence of a pressing social need, can prevail over what otherwise would be the imperative of the freedom of expression. Among these parameters, some results are decisive.

Firstly, the Chamber looks at the characteristics of the applicant's statements. The decisive point is whether the statements he made belonged to a type of expression entitled to a particularly high protection under Article 10 of the Convention. Expressions on matters of public interest, such as historical controversies – provided they do not amount to a call for violence, hatred or intolerance – fall within this category. The Grand Chamber found that Mr. Perinçek's statements, even if he did not adopt a 'scholarly' methodology, but instead a political approach, had been characterized by this element of public interest, and that they were of a historical, legal and political nature.[44]

Secondly, the judges assess the offensiveness of the expressions, that is, whether they could have been viewed as a justification of violence or as a call to hatred or intolerance, or if they cast in a negative light entire ethnic groups, and, ultimately, their capacity – even indirect – to lead to harmful consequences. The Court, therefore, finds that Mr. Perinçek did not express contempt or hatred for the victims of the events of 1915, since he noted that Turks and Armenians had lived in peace for centuries, before falling victim of "imperialist" manoeuvring. In the declarations under scrutiny, there is no sign of abusive terms with respect to Armenians, or attempts to stereotype them negatively.[45] These arguments are particularly relevant, since they seem to indicate the necessity of some incitement to hatred or a justification of violence, at least indirect, to make such expressions punishable. On the other hand, it is sufficient to note the fact that the applicant also depicted both Turks and Muslims as victims of massacres carried out by the Armenians,[46] to give an example of how controversial and discretional the interpretation of the concept of 'justification' can be.

Thirdly, the Court analyses the geographical and temporal contexts of the interference. This assessment is crucial in order to review the existence of the above-mentioned 'pressing social need' of the State's interference. In this evaluation, the Grand Chamber makes clear that a State's historical experience can carry significant weight and, considering in particular the cases of Holocaust denial, the first factor grounding the criminalization of negationist opinions is not the defence of the historical truth, but rather the intrinsic 'dangerousness' of the denial in respect of the national and regional contexts in which it is expressed. In this respect, the Court finds that, whilst the controversy sparked by the applicant was external to Swiss political life, the national courts had made no reference to the Turkish context, in which the Armenian minority claims to have suffered hostility and discrimination. For the judges, therefore, although the protection of human rights implies a universal aspiration, the demand of proportionality inherent in the phrase "necessary in a democratic society" requires a "rational connection between the measures taken by the authorities, and the aim they sought to result through these measures". Similarly, this approach applies to the temporal distance between the incriminated expressions, and the events objected to: the Court considers this lapse of time a relevant criterion of assessment, suggesting that the need for a heightened regulation of the statements contesting tragic and traumatic events "is bound to recede with the passage of time".[47]

[44] *Ibid*. §§ 206 ss.
[45] *Ibid*. §§ 230 ss.
[46] *Ibid*. § 16.
[47] *Ibid*. § 250.

Finally, in recalling only a brief part of the corresponding reasoning on the point made by the Second Section, the Grand Chamber problematizes the assertion of the Swiss courts concerning the existence of a 'general consensus' as regards the relevant events, the object of the statements and their legal qualification. Through a comparative analysis, it concludes that only a minority of States in the Council of Europe have officially recognised the Armenian genocide, and only some of those have opted for the criminalization of any particular genocide denial. The Court also adds that, in the comparative spectrum, Switzerland stands at one end, since it is the only State that chosen to criminalize the denial of any genocide or crime against humanity, without even requiring such denial to be made in a manner likely to incite to violence or hatred.[48]

Taking into account all these elements, the Court concludes that "it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case", in breach of Article 10 of the Convention.[49]

CRITICAL REMARKS

After this brief overview and analysis, it is possible to assert that this judgment, even if not constituting a milestone, represents a breakthrough in Strasbourg jurisprudence.

Primarily, the Court's restriction of the scope of application of the abuse clause constitutes a positive note, at least because during the phases of expansive interpretation of Article 17, the 'guillotine effect' "beheaded" not only the scrutiny of many cases, but also the progressive refinement of the hermeneutical parameters used by the Court to balance the rights at stake. Something similar can be said for what concerns the demand of a 'qualified' manifestation of denialism, that is the presence of elements of incitement or offensiveness to the dignity of the victims or their descendants, in order to acknowledge its punishment.

On the other hand, the Court carefully and repeatedly distinguishes the case under examination from the cases on Holocaust denial and, far from outlining a comprehensive approach to the principles to be applied, leaves untouched the exceptional regime surrounding those cases, that assume the contours of a *sui generis* denialism, in which the existence of international criminal judgments, the 'sensitive' national and regional environments in the States in which Nazism and Fascism have left their scars, along with the importance of the Holocaust for the identity of contemporary Europe, justify several presumptions. The detrimental effect of these presumptions is to eclipse the tests of concrete offensiveness and harm that should always ground the use of criminal law in every democratic legal order. As an example, it suffices to look at the *Witzsch v. Germany* [No.2] case, to register that the Court even used the abuse clause to approve a conviction based on an opinion contained in private correspondence destined to a scholar; opinion, in addition, not aimed to object to the existence of extermination of the Jews, but the role of historical figures in the planning of the techniques for the mass killings.[50]

While considerations about the uniqueness of the Holocaust in modern history entirely match the historical and political points of view of this comment, what appears problematic in the mentioned case is the transposition of these considerations into the legal sphere, in particular, for what concerns the goals of criminal law.

[48] *Ibid*. § 257.

[49] *Ibid*. § 280.

[50] ECtHR, Witzsch v. Germany (2), Appl. No. 7485/03, 13 December 2005.

In addition, the attempts to contextualize the denial offence in time and space, to qualify it for its offensiveness or elements of incitement, and the endeavour to attach special significance to the presence or lack of a judgment by an international tribunal, seem more oriented to the reiteration of the mentioned distinctions between different 'denialisms', than aimed to establish firm parameters with general validity. Some questions on this point arise naturally, e.g., if the time lapse between the events and the incriminated assertion becomes a decisive criterion, should one suppose that punishment for denial of the Holocaust will be one day outlawed? Further, if the geo-political environment of the statements is determinant, is it admissible to deny the Rwandan genocide if the accused speaks in Northern Europe? And, finally, given the controversies on the special intent of the crime of genocide, did Perincek's statements not negate at least crimes against humanity? Clearly, once the path to the admissibility of opinion-criminalization is chosen, every related parameter becomes equally controversial and questionable.

Today, therefore, the reasons that contrast with the admissibility of these sorts of uses of the criminal law are of a different nature: technical, empirical and axiological.

Firstly, criminal law is only one of the possible instruments with which to intervene to prevent or deter racism, xenophobia, anti-Semitism and 'hate speech'. Before other instruments, such as respect for civil and political mobilizations, cultural commitments, historical education, collective memory and public debate, criminal law only represents a 'shortcut'.[51] Moreover, the criminal law constitutes a legal instrument that differs from any other, since it protects 'juridical goods' through the lesion of the most important juridical good,[52] that is personal freedom, apex of the hierarchy of protected interests in every legal order based on the rule of law. This is the reason why, since the 18th Century, the illuminist-liberal doctrine of criminal law has underlined the utmost importance of the principle of materiality and offensiveness of the crime.[53] When an activity is limited *sic et simpliciter* to the expression of an (eventually despicable) opinion, without such elements as incitement to discrimination, hatred or violence, it is hardly possible to qualify it as 'conduct' in the relevant meaning demanded by the mentioned principle, so as to require the lesion of a legally appreciable juridical good, as testified by the secular adage: *cogitationis poenam nemo patitur* (no one can be punished for her or his thinking).

Secondly, notwithstanding the intentions of legislators, efficiency via criminal provisions targeting mere denials is more than doubtful. The criminal law 'shortcut' is probably the least efficient. The risk, in fact, is to elevate the deniers to the role of defenders of the freedom of expression, thereby increasing their audience and nurturing their claims of legitimacy, according to which institutions want to censor their dangerous 'truths'. In addition, the attempt to establish an official, indisputable historical truth contrasts with academic freedom, as well as with the epistemological methodology of science that always advances through progressive unveilings of previously undisputed assumption. In other words, history never becomes *res iudicata*.[54]

Finally, separation of law and morals and democratic pluralism should push states to abstain from entrusting the criminal law with ethical prescription. When public (or private) statements simply seek to deny tragic and proven historical facts, without

[51] See E. Fronza, 'The Punishment of Negationism: The Difficult Dialogue between Law and Memory', in *Vermont L. Rev.* 30 (2005), 609.

[52] See F. Von Liszt, Die deterministischen Gegner der Zweckstrafe [Deterministic Opponents of Purposive Punishment], in *Die gesamte Strafrechtswissenschaft*, 13, (1893), p. 357; tr. by Iain L. Fraser, *JICJ*, 5 (2007), p. 1009.

[53] See See L. Ferraioli, *Law and Reason. The Theory of Penal Guarantees* (Laterza, 2011).

[54] See E. Fronza and G. Gamberini, Le ragioni che contrastano l'introduzione del negazionismo come reato, in *Diritto Penale Contemporaneo,* av. at. http://www.penalecontemporaneo.it, 29 October 2013 (last accessed 10 Februry 2015)

elements of incitement to or glorification of mass atrocities, what can or does criminal law actually protect? Is it the dignity and identity of ethnical or religious groups at stake, or rather the identity or integrity of an institutional order? Ironically enough, the techniques of criminal legislation posing the 'personality of the State' at the top of the hierarchy of juridical goods deemed worthy of penal protection, are precisely the techniques utilised by authoritarian regimes. The pretension to make of democracy a 'self-defending' apparatus, in other words, unveils a flawed mandate, by entrusting to the criminal law what civil society should defend. As a consequence, such an approach produces the risk that any legal devices so conceived will be seized by ruling classes with authoritarian tendencies or preferences, and used to rid themselves of 'disturbing' oppositions.

On the contrary, facing the complexities and ethical differentiations of contemporary society, human rights justice should embrace the notion of 'gentle law',[55] that is, a legal order that does not impose universal and immutable truths on its consociates by protecting them with the 'sword' of the criminal law, but, rather, safeguards the conditions for the peaceful coexistence of the differences, and the democratic dialectics out of their conflicts.

Enhancing the axiological coherence of the European criminal systems depends therefore on an apparent paradox: to make democracy indisputable, democracy must allow itself to be disputed.

Only the future will show whether this 'radical' (in opposition to 'militant')[56] conception of democracy can find a glimmer in ECtHR jurisprudence, and whether the ECHR protection system can interact with it to prevent a sinister combination of growing hate discourses in the society and the adoption of new authoritarian tendencies in the European criminal policies. After all, borrowing the warning from George Santayana,[57] also the criminal law that cannot remember the past is condemned to reproduce it.

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[55] G. Zagrebelsky, *Il Diritto Mite* (Einaudi, 1992).

[56] See K. Loewenstein, 'Militant Democracy', *supra* [20].

[57] "Those who cannot remember the past are condemned to repeat it" (G. Santayana, *The Life of the Reason*, Vol. 1, Charles Scribner's Pub., New York 1905, 284).

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