

TESTING THE “UNIQUENESS”: DENIAL OF THE HOLOCAUST VS DENIAL OF OTHER CRIMES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS^(*)

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Abstract. *Litigation concerning domestic restrictions on Holocaust denial has produced a 30-year long jurisprudence of the European Court and European Commission of Human Rights. In spite of solemnly-declared principles on free speech, the Strasbourg organs have progressively developed in this regard an exceptional regime based on the ‘abuse clause’ envisaged under Article 17 ECHR. This detrimental treatment has been extended to encompass a growing class of utterances, including the denial of historical facts other than the Nazi genocide. This concerning tendency appears to have reversed course in the recent case of *Perinçek v. Switzerland*, in which the Court adopted a more prudent approach. This chapter begins by examining the Strasbourg case law on Holocaust denial in its three stages of evolution. The aforesaid restrictive trend based on Article 17 is then tested against the principles established in *Perinçek*, in order to assess whether this recent case may truly be considered as a turning point in the European Court’s position on historical revisionism. In particular, the chapter attempts to evaluate if the denial of the Holocaust still deserves a unique judicial treatment. That is, whether Holocaust denial may in and of itself justify harsher limits to free speech than those allowed in respect of other disdainful attacks against a wider class of heinous crimes, such as the Armenian massacre, the Holodomor and the genocides in Rwanda and Srebrenica.*

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1. Introduction.

The European Court and European Commission of Human Rights (ECtHR or Court, and ECommHR or Commission, respectively) have long dealt with expressions denying the existence of the Holocaust. Invariably, they have found such statements not to merit the protection of the free speech principle encapsulated in Article 10 of the European Convention on Human Rights ('ECHR'). In so doing, the Strasbourg organs have progressively developed an *exceptional legal regime* which, relying upon the so-called 'abuse clause' under Article 17 ECHR, departed from the ordinary 'necessity test' envisaged under Article 10.

This exceptional regime was initially applied very sparingly and has thus remained largely unchallenged and poorly theorised until recently, when other forms of deplorable expressions regarding tragic events of the past raised the issue of its actual scope of applicability. Essentially, it was to be determined whether the strict approach adopted by the Court and Commission in relation to Holocaust denial extended to expressions disputing the reality of other historical facts. In other words, the question was whether, under Strasbourg jurisprudence, Holocaust denial remains *unique*, such that it may justify restrictions on free speech that the denial of other grave crimes may not.

The first opportunity to test the Court's jurisprudence against other forms of denialism emerged in the recent case of *Perinçek v. Switzerland*,¹ which stemmed from a conviction for having disputed the characterisation as genocide of the extermination and mass deportations suffered by the Armenians in 1915 and following years. At ten years from the statements, the case culminated in a Grand Chamber judgment crystallising some important principles about the criminalisation of negationism.

The judgment also provoked much controversy among politicians, victims and academics, reflecting the highly divisive and utterly political nature of the salient issue, namely the recognition of the Armenian genocide. Although the Grand Chamber prudently avoided pronouncing thereupon, its dictum cannot but exert an influence on the underlying debate, and risks being invoked instrumentally to further political aims. This wider significance of the present Strasbourg ruling should not be regarded as uncommon, as the Court is frequently confronted with the issues raised by the public representation of history and memory, its function in the erection of the identity of a social group, and the possible use, misuse and abuse connected with it.² Clearly,

¹ ECtHR, *Perinçek v. Switzerland* (27510/08), Judgment (Grand Chamber), 15 October 2015 (hereinafter *Perinçek* (2015)); ECtHR, *Perinçek v. Switzerland*, Judgment (Second Section), 17 December 2013 (hereinafter *Perinçek* (2013)).

² As illustrations of the interplay between historical and legal assessment, see e.g., ECtHR, *Fatullayev v. Azerbaijan* (40984/07), 22 April 2010; ECtHR, *Monnat v. Switzerland* (73604/01), 21 September 2006; ECtHR, *Ždanoka v. Latvia* (58278/00), 16 March 2006; ECtHR, *Chauvy and Others v. France* (64915/01), 29 June 2004, including *Concurring Opinion of Judge Thomassen*. On the associated issue of memory laws, see e.g. E. FRONZA, 'Negazionismo (diritto penale)', *Enciclopedia del Diritto. Annali* 8 (Milan: Giuffrè, 2015), 633-658; T. HOCHMANN, *Le négationnisme face aux limites de la liberté d'expression* (Paris: Pedone, 2013); L. CAJANI, 'Criminal Laws on History', *Historiein* 11 (2011), 19-48; P. NORA, 'Gedächtniskonjunktur', *Transit* -

inasmuch as the Court is called upon to evaluate restrictions on the possibility to debate aspects relating to collective memory, it may then find itself entangled in the awkward position of being arbiter of a people's history.

This focus of this piece, however, is limited to the *Perinçek* judgment's primarily legal, rather than historical and political, significance. In that realm, its major point of interest is twofold. On the one hand, the ruling adopts a liberal approach on free speech, suggesting that the denial of historical events may only be punished where it amounts to incitement to hatred or violence. On the other hand, though, it confirms that special treatment applies to Holocaust denial, whose insidious tenor does not require specific evidence, but automatically derives from the historical context of the states that were involved in the perpetration of the Nazi atrocities.

The question of whether the different treatment afforded to the denial of the Holocaust and that of other historical facts has been convincingly justified by the Court is the principal aim of the present chapter. The goal is to provide a viewpoint not so much on whether the Holocaust is a unique historical event, but as to whether it calls for a *unique legal regime against negationism*. In order to meaningfully do so, it is necessary to explore, at the outset, the particulars of the exceptional principles that the Commission and the Court applied to Holocaust denial, which evolved through a three-stage jurisprudence marked by the interaction between Article 10 and Article 17. The overview of those precedents exposes the functioning of the abuse clause and its scope of applicability, as well as how they were adapted to deal with denialism.

Next, this chapter turns to the examination of *Perinçek*, by describing and critically analysing the judgments handed down, in turn, by the Chamber and the Grand Chamber of the ECtHR. Two questions raised by this case are then addressed. Firstly, whether and to what extent *Perinçek* impacts on the Court's position on the scope of applicability and *modus operandi* of the abuse clause; particular regard is paid to the issue of whether denialism *as such* will still fall under Article 17 and, if so, to the attendant consequences. Secondly, whether the denial of the Holocaust remains subject to unique judicial treatment and, if so, whether this differentiation holds water in relation to the denial of other past tragedies, in particular the one inflicted upon Armenians by the Ottoman Empire.

2. Setting the Scene: The Interplay Between Article 10 and Article 17.

The judgments of the Court in *Perinçek* must be assessed against the tortuous path followed by the ECtHR jurisprudence on the denial of the Holocaust. Although the Court regularly rejected any application seeking protection for expressions of Holocaust denial, there have been variations in the legal basis and reasoning that supported such decisions. The analysis that follows purports to shed light on whether

Europäische Revue 22 (2001-2002), 18-31; A. GLISZCZYŃSKA-GRABIAS, 'Memory Laws or Memory Loss?', *Polish YB of Int'l L.* (2014), 155-180.

the denial of the Holocaust has been subjected by the Court to a *special* or a *unique* legal regime.

Denialism-related precedents are marked by the interaction between Article 10 and Article 17. A restriction on free speech is ordinarily addressed pursuant to Article 10, which enshrines the right to freedom of expression.³ According to well-established Strasbourg case law, state interference complies with Article 10 where the restrictive measure in question: (i) was prescribed by law; (ii) pursued a legitimate aim; and, (iii) was necessary in a democratic society and proportionate to the legitimate aim pursued. The key element of the test is its last step, in which the judges seek to strike a balance between the various interests at stake, deciding the case in the light of all its factual circumstances.

Article 17, in turn, removes from the protection of the Convention any activity aimed at destroying any of the rights set forth therein.⁴ Expressions considered to fall under this provision are categorically excluded from the subject-matter scope of the ECHR, in what has been styled as the «guillotine effect» of the abuse clause.⁵ In other cases, however, Article 17 was employed as a principle of interpretation within the framework of Article 10.

3. The Evolution of the Exceptional Regime Applied to Holocaust Denial.

Despite some internal ambiguity and inconsistency, three stages may be identified in the jurisprudence on the denial of the Holocaust, depending on the role assumed by the abuse clause in the judges' reasoning.

3.1. First Stage: Application of General Principles on Freedom of Expression.

The first phase of case law on Holocaust denial involves a small number of cases, heard by the (now abolished) Commission during the 1980s.⁶ The distinguishing feature of this stage is that Article 17 never comes into play. Its application had remained confined to two early cases, in which it excluded, by virtue of its guillotine

³ See generally D. VOORHOOF, 'The [ECHR]: The Right to Freedom of Expression [...]', *Human Rights* 7:2 (2015), available at <http://hdl.handle.net/1854/LU-6900860>, 1-40; J.-F. FLAUSS, 'The [ECtHR] and the Freedom of Expression', *Indiana Law Journal* 84:3 (2009), 809-849.

⁴ See generally H. CANNIE, D. VOORHOOF, 'The Abuse Clause and Freedom of Expression in the [ECHR]', *Netherlands Quarterly of Human Rights* 29:1 (2011) 54-83; D. KEANE, 'Attacking Hate Speech Under Article 17 of the [ECHR]', *Netherlands Quarterly of Human Rights* 25:4 (2007), 641-663; Y. ARAI, 'Prohibition of Abuse of the Rights [...]', in P. VAN DIJK *et al.* (eds.), *Theory and Practice of the [ECHR]* (Antwerpen: Intersentia, 4th ed., 2006), 1083-1092; S. VAN DROOGHENBROECK, 'L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?', *RTDH* 46 (2001) 541-566.

⁵ G. COHEN-JONATHAN, 'Le droit de l'homme à la non-discrimination raciale', 46 *RTDH* (2001) 665-688, at 665.

⁶ *EcommHR, X. v. Germany* (9235/81), 16 July 1982; *EcommHR, T. v. Belgium* (9777/82), 14 July 1983.

effect, antidemocratic activities⁷ and racist expressions⁸ from the protection of the Convention.

In contrast, the judicial analysis of Holocaust denial applications is conducted pursuant to the *ius commune* of Article 10, meaning that the cases are assessed in light of all their circumstances, and that the respondent state is required to demonstrate that the interference with the right to free speech is necessary and proportionate in a democratic society.

The restricted scope of application of Article 17 in this initial stage also clearly emerges in *Lowes v. United Kingdom*.⁹ Despite the fact that the case concerns anti-Semitic activities, including conduct akin to denialism, the application is dismissed pursuant to Article 10, suggesting that only blatantly racist conduct – not even anti-Semitism – justifies the application of the abuse clause.

3.2. Second Stage: Application of Article 17 as Principle of Interpretation.

Kühnen v. Germany,¹⁰ regarding neo-Nazi propaganda, marks the beginning of the middle phase, setting a precedent that would later be followed in Holocaust denial cases.¹¹ The abuse clause is applied here by the Commission not as a case-killer provision – that is, one generating a guillotine effect – but, rather, as an *interpretative aid*, affording guidance within the necessity test under Article 10.¹² In all cases falling under this second stage, the Commission shows an unusual deference to the assessments undertaken at the domestic level, which are ratified quite uncritically.¹³ Moreover, the specific circumstances of each case are neither examined in any detail nor on a case-by-case basis, with Holocaust denial being automatically presumed to be a typical Nazi-inspired activity.

⁷ EcommHR, *Parti Communiste d'Allemagne c. Allemagne* (250/57), 20 July 1957.

⁸ EcommHR, *Glimmerveen and Hagenbeek v. the Netherlands* (8348/78 & 8406/78), 11 October 1979.

⁹ EcommHR, *Lowes v. United Kingdom* (13214/87), 9 December 1988.

¹⁰ EcommHR, *Kühnen v. Germany* (12194/86), 12 May 1988. In the same vein, see EcommHR, *B.H., M.W., H.P. and G.K. v. Austria*, (12774/87), 12 October 1989; EcommHR, *Ochensberger v. Austria* (21318/93), 2 September 1994.

¹¹ EcommHR, *F. P. v. Germany* (19459/92), 29 March 1993; EcommHR, *Walendy v. Germany* (21128/92), 11 January 1995; EcommHR, *Remer v. Germany* (25096/94), 6 September 1995; EcommHR, *Honsik v. Austria* (25062/94), 18 October 1995; EcommHR, *Nationaldemokratische Partei Deutschlands v. Germany* (25992/94), 29 November 1995; EcommHR, *Rebhandl v. Austria* (24398/94), 16 January 1996; EcommHR, *Pierre Marais v. France* (31159/96), 24 June 1996; EcommHR, *D. I. v. Germany* (26551/95), 26 June 1996; EcommHR, *Hennicke v. Germany* (34889/97), 21 May 1997; EcommHR, *Nachtmann v. Austria* (36773/97), 9 September 1998; ECtHR, *Witzsch v. Germany* (1) (41448/98), 20 April 1999. See, for an account of many of these decisions, G. COHEN-JONATHAN, 'Négationnisme et droits de l'homme', 32 RTDH (1997) 571-597, at 573-585.

¹² G. COHEN-JONATHAN, 'Le droit de l'homme', at 667-668. Cf. S. van Drooghenbroeck, 'L'article 17', at 553-555 (considering Article 17 an 'arrière-fond interprétatif superflu').

¹³ See e.g. EcommHR, *Walendy v. Germany*, (the law), p. 6; EcommHR, *Nachtmann v. Austria*, (the law), para. 2, pp. 5-6.

In this case, the Commission makes a second, significant change to its previous interpretation of the abuse clause, broadening its *scope of application*. Whereas the text of Article 17 targets conduct «aimed at the destruction of the rights and freedoms set forth» in the ECHR, the Commission extends its reach to activities vaguely defined as those running counter to the «basic values underlying the Convention».¹⁴

3.3. Third Stage: Article 17 as the Categorical Exclusion of Holocaust Denial from the Protection of Article 10.

In the third phase, the Court reverts to the guillotine effect of the abuse clause, excluding Holocaust denial from the protective umbrella of Article 10 altogether. The shift dates back to the landmark *Lehideux* case, in which the Grand Chamber ruled that the negation of «clearly established historical facts – such as the Holocaust – [...] would be removed from the protection of Article 10 by Article 17».¹⁵

While the new role assigned to the abuse clause was only announced in *Lehideux* but not applied, two subsequent cases demonstrate its potential. In *Garaudy*, the Court recalled with approval the precedent of *Lehideux*, and explained that Holocaust denial falls under Article 17 because it «undermines the values on which the fight against racism and anti-Semitism are based» and, as such, is «incompatible with democracy and human rights».¹⁶

Arguably, the judgment in *Garaudy* implicitly restricts the scope of Article 17, requiring the showing of an *antidemocratic or anti-Semitic intent* underlying acts of denialism. The validity of this (moderately reassuring) thesis, however, appears to be challenged by subsequent decisions.

In *Witzsch v. Germany (2)*, the applicant did not contest the existence of the Holocaust *per se*, but the responsibility of Hitler and his party for the extermination of Jews.¹⁷ The case does not present any indicia of racism, nor do the judges uncover a pro-Nazi purpose underlying the expressions. The abuse clause is nonetheless applied, apparently on account of «the applicant's disdain towards the victims of the Holocaust»,¹⁸ a state of mind not grounded on a strong factual basis, but presumed by the Court.

This aspect weakens the above-envisioned hypothesis that Article 17 is in effect invoked upon a showing of racist or antidemocratic intent. Further doubts are raised by the fact that, conversely, some cases concerning patently racist or anti-Semitic expressions were dismissed pursuant to Article 10 alone.¹⁹ The conclusion is that

¹⁴ EcommHR, *Kühnen v. Germany*, (the law), para. 1, p. 6.

¹⁵ ECtHR, *Lehideux and Isorni v. France* (24662/94), 23 September 1998, para. 47.

¹⁶ ECtHR, *Garaudy v. France* (65831/01), 24 June 2003, (the law), para. 1(i), p. 29.

¹⁷ ECtHR, *Witzsch v. Germany (2)* (7485/03), 13 December 2005.

¹⁸ *Ibid.*, (the law), para. 2, p. 8.

¹⁹ See e.g. ECtHR, *Seurot c. France* (57383/00), 18 May 2004; ECtHR, *Balsytė-Lideikienė v. Lithuania* (72596/01), 4 November 2008; ECtHR, *Gollnisch c. France* (48135/08), 7 June 2011.

Article 17 attaches to Holocaust denial *as such* and its application is divorced from a finding of racist or antidemocratic intent, which the Court apparently *presumed* to permeate any statement of the kind. In contrast, the treatment of other racist or totalitarian conduct is not comparably uniform.

4. The *Perinçek* Case as the Litmus Test for the Court's Case Law on Denialism.

4.1. Background to the Case and Criminal Proceedings in Switzerland.

Doğu Perinçek ('the applicant') is a Turkish politician, holding the position of incumbent president of the Patriotic Party (formerly the Workers Party). Convicted in the so-called Ergenekon trials for directing a terrorist organisation seeking to overthrow the Turkish Government, he was released from prison in March 2014. Prior to the present case, the ECtHR had already ruled in his favour in two cases brought against Turkey.²⁰

At the root of Perinçek's instant application is his conviction by Swiss courts of racial discrimination pursuant to Article 261 bis(4) of the Penal Code,²¹ due to his public statements that the characterisation as genocide of the crimes perpetrated against Armenians is an «international lie». Importantly, he did not deny the *existence* of the massacre as such, but its *legal classification* as genocide.

The Swiss Federal Tribunal reasoned that Article 261 bis(4) applies to any genocide and crime against humanity – not only to the Holocaust – as long as there exists a comparable «general agreement» over the underlying facts and legal characterisations.²² This requirement was met in respect of the Armenian genocide, owing to the attendant «broad consensus of the community», notably among historians.²³ Consequently, it was established that the applicant had disputed the generally accepted legal characterisation of the Ottoman crimes, and that he did so for racist and nationalistic motives.²⁴

In Europe, the Swiss verdict against Perinçek represents the first (but not the only) criminal conviction for denial of the Armenian genocide.²⁵

²⁰ ECtHR, *Perinçek c. Turquie* (46669/99), 21 June 2005 (violation of Article 10); ECtHR, *Socialist Party and Others v. Turkey* (21237/93), 25 May 1998 (violation of Article 11).

²¹ «[A]ny person who on any of these grounds [i.e. race, ethnic origin or religion] denies, trivialises or seeks justification for genocide or other crimes against humanity».

²² Tribunal fédéral (Switzerland), ATF 6B_398/2007, 12 December 2007 (hereinafter Tribunal fédéral (2007)), para. 3.4 and sub-paragraphs.

²³ Tribunal fédéral (2007), para. 4 and sub-paragraphs.

²⁴ Tribunal fédéral (2007), paras. 5.2 and 7.

²⁵ See Tribunal federal (Switzerland), ATF 6B_297/2010, 16 September 2010 (so-called *Ali Mercan* case). Moreover, civil proceedings against Bernard Lewis were brought in France, resulting in an order to make (symbolic) reparation (see Tribunal de grande instance de Paris (France), judgment of 21 June 1995).

4.2. *The Judgment of the Grand Chamber.*

In his application before the Court, Perinçek submitted that the conviction entered in Switzerland violated the right to freedom of expression enshrined in Article 10 ECHR. The Grand Chamber, by 10 votes to 7, upholds the judgment of the Chamber (rendered, in turn, by a 5-2 majority), finding that the applicant's right was violated and that such finding constitutes in itself just satisfaction. Below is a concise summary of the Grand Chamber's argument.

4.2.1. Preliminary Issue: The Applicability of Article 17.

A preliminary issue is whether the application is admissible under Article 17 ECHR. As detailed above, Article 17 was declared to apply to activities that «run counter to the basic values underlying the Convention», including expressions denying clearly established historical facts and crimes against humanity.²⁶ In subsequent cases the Court added that Article 17 also covers statements aimed at «justifying war crimes such as torture or summary executions»²⁷ or at the «glorification of war crimes, crimes against humanity or genocide».²⁸ In practice, however, the abuse clause has thus far been applied only to one specific type of denialism, namely the denial of the Holocaust.

Although such precedents allowed for a summary dismissal of the application in *Perinçek*, the Court declines to do so, resolving instead to refine its jurisprudence on Article 17. The Grand Chamber rules that the «decisive point» under the abuse clause is whether the conduct sought to «stir up hatred or violence» and the applicant sought to rely on the Convention to engage in activities aimed at the destruction of the rights encapsulated therein.²⁹ In the present circumstances, such conditions of applicability are not «immediately clear». Therefore, their evaluation is joined to the analysis of the merits under Article 10, the two points being overlapping.³⁰ Of note is that the Grand Chamber departed from the approach taken by the Chamber, which discounted the relevance of Article 17 altogether.³¹

4.2.2. The Merits of the Application.

The thrust of the decision focuses on whether the interference was necessary in a democratic society. The Grand Chamber had to balance the right to freedom of

²⁶ See § 0, *supra*.

²⁷ ECtHR, *Orban et autres c. France* (20985/05), 15 January 2005, para. 35.

²⁸ ECtHR, *Fáber v. Hungary* (40721/08), 24 July 2012, para. 58.

²⁹ *Perinçek* (2015), para. 115.

³⁰ *Perinçek* (2015), para. 115.

³¹ *Perinçek* (2013), para. 54.

expression with the right to respect for private life, which is affected by statements undermining the identity, and thus the dignity, of Armenians.³² To strike such a balance, the judgment confronts two critical areas: the first revolving around the applicant's expressions, and the second relating to the international, European and Swiss normative frameworks.

(i) The Applicant's Statements.

The Grand Chamber's first point is that the applicant's statements fall within a class of expression entitled, in the Court's jurisprudence, to *heightened protection* under Article 10, since they (i) qualify as political speech and hinge on a matter of public interest,³³ and (ii) do not amount to a call for hatred or intolerance.³⁴

In particular, the Grand Chamber takes issue with the Swiss courts' finding that the applicant acted with a racist motive. The «overall thrust» of the statements, in its view, shows that they were directed against «imperialists», with no allegations hinting at a falsification of history concocted by Armenians.³⁵ Nor can any incitement to hatred or intolerance be inferred from the applicant's position and the «wider context» of the utterances. In this regard, the Grand Chamber distinguished the case from those regarding the denial of the Holocaust, in which, for «historical and contextual reasons», it had «invariably» presumed their inciting character.³⁶ The same «automatic presumption» is declared inapplicable to the present case, on the ground, apparently, of a *geographical and temporal hiatus* between the applicant's expressions in Switzerland and the Armenian events, which occurred in the Ottoman Empire approximately 90 years prior. That being the case, the Grand Chamber looks for concrete elements indicating a potential racist or antidemocratic agenda, finding none.

The judges then move on to scrutinise the existence of a pressing social need, going through geographical and historical factors, among others. The relevant section begins with yet another comparison between denial of the Armenian and the Jewish massacres.³⁷ The Grand Chamber points out that the inherent connection of Holocaust denial to antidemocratic and anti-Semitic ideologies is owed to the *historical context* of the states from which the relevant litigation arose, which were involved in the commission of the Nazi horrors.

In contrast, Switzerland lacked any such «direct link» with the events of 1915-1916.³⁸ Nor did its national context expose any indicia of a tense atmosphere that could lead to «serious frictions» between the Turks and Armenians residing within its territory. Turning to the situation in Turkey, the Grand Chamber finds that the measures taken against the applicant had no «rational connection» with the aim of

³² *Perinçek* (2015), para. 156, 198-203, 227.

³³ *Perinçek* (2015), para. 231.

³⁴ *Perinçek* (2015), paras. 232-241.

³⁵ *Perinçek* (2015), paras. 232-233.

³⁶ *Perinçek* (2015), para. 234.

³⁷ *Perinçek* (2015), paras. 242-248.

³⁸ *Perinçek* (2015), para. 244.

protecting the rights of the Armenians living in Turkey.³⁹ There was no indication that either the statements were the cause of hostility against them, or that a criminal conviction in Switzerland could make them feel any safer.

The analysis gauges, lastly, the extent to which Perinçek's speeches affected the rights of the Armenians.⁴⁰ The Grand Chamber reiterates that the statements can neither be regarded as «particularly upsetting» or «virulent», nor as having widespread dissemination.⁴¹ In sum, there is no specific evidence to support a finding of serious prejudice caused to the dignity of the Armenians.

(ii) *The Normative Framework.*

The Grand Chamber next examines the legal landscape in Europe regarding criminal law restrictions on denialism. The conclusion is that such legislation varies significantly and no discernible trend emerges; the Swiss provision, however, represents the most restrictive option.⁴²

The judges continue their analysis of the normative framework by observing that, under international law, Switzerland was not required to take the restrictive measure against the applicant.⁴³ This is because his utterances do not amount to incitement to hatred and international norms fall short of creating an obligation for genocide denial *as such* to be criminally punished.

The next aspect under consideration concerns the effect that the domestic courts' qualification as genocide of the events of 1915-1916 had on the applicant's rights.⁴⁴ The Grand Chamber emphasises that the Swiss judiciary relied on conflicting yardsticks to sanction the genocidal nature ascribed to the Ottoman conduct. In light of such discrepancies, it remains unclear, in its view, whether the criminal conviction resulted from a mere divergence between Perinçek's opinion and «the prevailing views in Swiss society».⁴⁵

4.2.3. Conclusion.

The reasoning culminates in a balancing exercise between the applicant's right to freedom of expression and the Armenians' right to protection of their dignity.⁴⁶ The Grand Chamber recapitulates all the factors it went through in its analysis, concluding

³⁹ *Perinçek* (2015), para. 246. Cf. *Perinçek* (2015), 'Joint Dissenting Opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kūris' (hereinafter *Perinçek* (2015), 'Joint Dissenting Opinion'), paras. 6-7 (harshly criticising the majority for watering down the principle of universal protection of human rights).

⁴⁰ *Perinçek* (2015), paras. 251-254.

⁴¹ *Perinçek* (2015), para. 253.

⁴² *Perinçek* (2015), para. 257.

⁴³ *Perinçek* (2015), paras. 258-268.

⁴⁴ *Perinçek* (2015), paras. 269-271.

⁴⁵ *Perinçek* (2015), para. 271.

⁴⁶ *Perinçek* (2015), paras. 274-281.

that: (i) the statements concern a matter of public interest and do not qualify as a call for hatred or intolerance, and thus merit a heightened protection; (ii) the context in which they were made is not characterised by special tension or historical overtones; (iii) the statements do not affect the dignity of the Armenians so far as to require a criminal law response in Switzerland; (iv) Switzerland was under no international obligation to criminalise such statements; (v) Swiss courts appear to have censured the applicant for having expressed an opinion that diverges from the established ones in Switzerland; and (vi) the interference materialises in a serious measure, a criminal conviction.

Hence, the Grand Chamber finds that the restriction on the applicant's right to freedom of expression was not necessary in a democratic society and that, accordingly, Article 10 was violated.⁴⁷ As a further consequence of this finding, the Grand Chamber declines to apply Article 17.

5. Another Episode in the On-going Saga on the Role of Article 17.

The *Perinçek* case presented itself as a timely opportunity for the ECtHR to review its case law on the exact function of Article 17. Two aspects remained to be settled: its scope of applicability, especially when it came to denialism, and its *modus operandi*, that is, the way it operates. As to the former, the Chamber and Grand Chamber judgments clarified that the abuse clause, despite previous open-ended dicta on the point, is not unconditionally applicable to the *unqualified denial* of any «clearly established historical facts». As regards the latter, the judges in Strasbourg opted for retaining a certain margin of manoeuvre, thus confirming that they regard Article 17 as the Court's 'wild card'.

5.1. The Scope of Applicability of the Abuse Clause.

We shall first substantiate the import of the Court's decisions in *Perinçek* on the scope of applicability of the abuse clause. It is worth recalling that Article 17 was conceived, in the wake of World War II, as an additional safeguard against the threats posed by groups or individuals pursuing *totalitarian aims*.⁴⁸ In this early stage, its application proved to be infrequent, being confined to two cases in which the Court applied it to antidemocratic or manifestly racist activities.⁴⁹

Starting in the 1980s and through the 1990s, the abuse clause came into play principally in respect of Holocaust denial litigation. As discussed above,⁵⁰ the

⁴⁷ *Perinçek* (2015), paras. 280-282.

⁴⁸ P. LE MIRE, 'Article 17', L.-E. Pettiti *et al.* (dir.), *La Convention européenne des droits de l'homme* (Paris: Economica, 2nd ed., 1999), 509-522, at 510-512.

⁴⁹ See footnotes 7-8, *supra*.

⁵⁰ See § 0, *supra*.

incorporation of Holocaust denial into the category of totalitarian activities was invariably presumed, including in cases wherein this element had not been established by domestic courts.

In its most recent developments, the Court *expanded the scope* of Article 17. It firstly declared the provision to be applicable to denialism as such, without explicitly requiring any further showing.⁵¹ Secondly, aside from these abstract declarations, it effectively applied Article 17 to a wide range of expressions with little connection to its original anti-totalitarian spirit.⁵²

In *Perinçek* the Court had perforce to engage with the far-reaching principles laid down in the precedents dealing with Holocaust denial because, on face value, they would have allowed a summary dismissal of the application pursuant to Article 17. Yet the Court decided to refine its case law, holding that the abuse clause may only apply to expressions that are directed to stir up hatred or violence.⁵³ This provision, therefore, may not be applied to denialism *as such*, absent a case-specific assessment on whether statements are intended to provoke hatred or violent action. The two benches, however, although concurring in the formulation of the principle in the abstract, took a different approach in its application to the case. While the Chamber decidedly excluded that the statements amounted to hate speech and hence unambiguously declined to invoke the abuse clause, the Grand Chamber's holding was much more nuanced. It did not rule that the statements did not constitute incitement, but that this point was not «immediately clear». As a consequence, it examined the application in light of Article 10 and Article 17 jointly.

In this way, the Grand Chamber did not entirely sanction the idea, transpiring from the Chamber's judgment, that disputing the legal classification – but not the existence – of a historical event could not, as such, be contemptuous to the victims. Indeed, in our opinion, drawing a distinction between the denial of the existence and that of the legal qualification of an event is, to an extent, artificial. For example, claiming that the Armenian massacres and mass deportations did not constitute genocide is paramount to denying *the reality of a factual element* of the Ottomans' criminal enterprise, that is, their intention to destroy, in whole or in part, the Armenian group as such; an element which is inferred, in turn, by a series of other equally significant factual circumstances.

In any event, it is noteworthy that the Court confirmed a limited scope for Article 17, thus standing by its pronouncement that this avenue may only be pursued

⁵¹ See § 0, *supra*.

⁵² See e.g. ECtHR, *W.P. and Others v. Poland* (42264/98), 2 September 2004 (anti-Semitism); ECtHR, *Norwood v. United Kingdom* (23131/03), 16 November 2004 (Islamophobia); ECtHR, *Pavel Ivanov v. Russia* (35222/04), 20 February 2007 (anti-Semitism); ECtHR, *Hizb Ut-Tahrir and Others v. Germany* (31098/08), 12 June 2012 (calls for violent destruction of Israel and killing of its inhabitants, and justification of suicide attacks); ECtHR, *Molnar c. Roumanie* (16637/06), 23 October 2012 (hate speech devoid of calls to violent or unlawful action).

⁵³ *Perinçek* (2015), para. 115; *Perinçek* (2013), para. 52.

in «extreme cases».⁵⁴ This clarification was much needed to set boundaries to what could be regarded as an expansive trend in the Court's reading and application of the abuse clause. A trend which, if continued, could undermine the right to free speech, in the sense of legitimising restrictions on expressions that, though disquieting, do not expose any tangible symptom of harm.

Nevertheless, the Court's present (commendable) dictum notwithstanding, Article 17 remains susceptible to *broad and discretionary application*. First, the 'novel' requirement of incitement to hatred or violence must be seen in relation to the Court's settled position on hate speech, which attracts into the scope of the abuse clause even expressions devoid of any calls for unlawful conduct or violent action.⁵⁵ Nor does the abuse clause target only «explicit and straightforward» statements, but extends to more subtle and allusive forms of expression.⁵⁶

Most importantly, the notion of 'incitement to hatred' is vague, and thus prone to oscillating interpretations. When it comes to denialism, it can hardly be questioned that most attempts to challenge the reality or magnitude of a traumatic event, no matter if well- or ill-intentioned, will almost certainly be seen by the victims as disquieting and insulting speech.⁵⁷ It follows that the gist of the Court's assessment is likely to fall on whether the conduct had a contemptuous aim and caused serious prejudice to the victims, which is bound to be a very subjective operation, open to a wide spectrum of diverging understandings, as attested for example by the Grand Chamber's bitter split in *Perinçek*.⁵⁸

This blurred frontier between licit and illicit speech may have a chilling effect on the voicing of opinions that «offend, shock or disturb the State or any sector of the population», which the Court has long proclaimed should be permitted.⁵⁹

5.2. The Modus Operandi of the Abuse Clause.

The precedents on antidemocratic activities reveal two fundamental ways in which Article 17 operates, that is, as either interpretative aid or 'case-killer' provision (through its guillotine effect). A notable study uncovered a wealth of «undesirable consequences» flowing from the guillotine effect.⁶⁰ Among others, the rejection of the application occurs with no, or only superficial examination of context, nor is the proportionality of state interference strictly scrutinised. Most problematic, states are

⁵⁴ ECtHR, *Paksas v. Lithuania* (34932/04), 6 January 2011, para. 87.

⁵⁵ See e.g. ECtHR, *Molnar c. Roumanie*, para. 23; ECtHR, *Vejdeland and Others v. Sweden* (1813/07), 9 February 2012, para. 55; ECtHR, *Féret c. Belgique* (15615/07), 16 July 2009, para. 73.

⁵⁶ ECtHR, *M'Bala M'Bala c. France* (25239/13), 20 October 2015, para. 40.

⁵⁷ See *Perinçek* (2015), para. 238.

⁵⁸ See *Perinçek* (2015), 'Joint Dissenting Opinion', para. 4; *Perinçek* (2015), 'Additional Dissenting Opinion of Judge Silvis, Joined by Judges Casadevall, Berro and Kūris' (hereinafter *Perinçek* (2015), 'Additional Dissenting Opinion'), para. 9.

⁵⁹ ECtHR, *Handyside v. United Kingdom* (5493/72), 7 December 1976, para. 49.

⁶⁰ H. CANNIE, D. VOORHOOF, 'The Abuse Clause', at 68-72.

relieved from the onus of convincingly justifying the restrictive measure, and are thus legitimised in their repressive practices.

The Court responded to this criticism through a number of recent decisions, including the Grand Chamber's judgment in *Perinçek*, in which the entrance of Article 17 did not fully obliterate proper legal analysis.⁶¹ The proportionality of the interference, though, continued to be disregarded. Moreover, Article 17 still allows for applications to be summarily declared inadmissible, in decisions where exhaustive reasoning is not required and to which judges are not entitled to annex separate opinions.⁶²

These pitfalls in Article 17's role as case-killer add to some ambiguities surrounding its procedural function, which has fluctuated between 'admissibility filter' for patently ill-founded applications and 'interpretative aid' at the stage of the merits. In *Perinçek*, the Grand Chamber confirmed this dual role, specifying that Article 17 may be resorted to at the stage of admissibility only where it is «immediately clear» that its requirements are met.⁶³

To borrow the language of a dissenting opinion, the Court has «kept its options open» regarding the functioning of the abuse clause.⁶⁴ One may query, though, what has thus far been the provision's *added value* in the necessity test. Indeed, there is no indication that it has somehow had an impact on the usual structure or outcome of the ordinary analysis under Article 10.

On the other hand, there is a risk that Article 17 ends up alleviating the pressure both *on states* to thoroughly justify the interference and *on Strasbourg judges* to deliver compellingly reasoned decisions. Therefore, it is argued that the Court should either articulate a set of narrow and measurable criteria that effectively ensure the application of Article 17 to only the most extreme cases,⁶⁵ or exclusively rely on the ordinary regime under Article 10, which has proved perfectly capable of addressing insidious speech.⁶⁶

⁶¹ ECtHR, *Kasymakhunov and Saybatalov v. Russia* (26261/05 & 26377/06), 14 March 2013; ECtHR, *M'Bala M'Bala c. France*.

⁶² See e.g. ECtHR, *Hizb Ut-Tahrir and Others v. Germany*; ECtHR, *Molnar c. Roumanie*.

⁶³ *Perinçek* (2015), paras 114-115.

⁶⁴ *Perinçek* (2015), 'Additional Dissenting Opinion', para. 8.

⁶⁵ See, for an interpretative proposal which relies on the selective criteria of gravity, univocal aim and existence of countervailing interests, P. LOBBA, 'Holocaust Denial Before the [ECtHR]: Evolution of an Exceptional Regime', *European Journal of International Law* 26:1 (2015), 237-253, at 250-251.

⁶⁶ See e.g. ECtHR, *Zana v. Turkey* (18954/91), 25 November 1997; ECtHR, *Sürek v. Turkey* (1) (26682/95), 8 July 1999; ECtHR, *Sürek v. Turkey* (3) (24735/94), 8 July 1999; ECtHR, *Osmani and Others v. the Former Yugoslav Republic of Macedonia* (50841/99), 11 October 2001; ECtHR, *Seurot c. France* (57383/00), 18 May 2004; ECtHR, *Balsytė-Lideikienė v. Lithuania* (72596/01), 4 November 2008; ECtHR, *Le Pen c. France* (18788/09), 20 April 2010; ECtHR, *Gollnisch c. France*.

6. Denial of the Holocaust: Special or Unique?

In *Perinçek*, the Court takes great pains to justify why the exceptional regime elaborated in respect of Holocaust denial is inapplicable to the denial of other historical facts, trying to avoid giving the impression that it was sanctioning a hierarchy between different, equally painful events.⁶⁷ This aspect proved to be the most controversial one to be determined, with the Grand Chamber's majority thinning to 9 judges and partially distancing itself from the Chamber's judgment.

The Chamber, back in 2013, had relied on two arguments to distinguish *Perinçek* from the cases involving Holocaust denial. In the first place, it appeared to infer a different *degree of consensus* as to the legal qualification of the events of 1915-1916 compared to that ascribed to the Nazi crimes.⁶⁸ In so ruling, the Chamber did, in effect, raise doubts as to the correctness of the genocidal nature ascribed to the Armenian events. Secondly, it noted a *different impact* of the two types of expression, which justified different responses.⁶⁹ Whereas Holocaust denial is the main vehicle of anti-Semitism and thus requires constant vigilance internationally, it held, denial targeting the Armenian massacre cannot be said to have the same repercussions.

The Grand Chamber carefully avoided engaging with the debate about the proper qualification of the Armenian massacre. In this regard, it made clear that legislation against Holocaust denial is justified not so much because the Holocaust is a clearly established historical fact, but because its negation «must invariably be seen as connoting an antidemocratic ideology and anti-Semitism».⁷⁰

Interestingly, whereas the majority trod lightly in its approach to the legal characterisation of the Ottoman crimes, seven dissenting judges straightforwardly proclaimed their genocidal nature to be «self-evident».⁷¹ Quite aside from the judges' dubious expertise in the field of contemporary history, such sweeping, conclusory assertion will hopefully remain an isolated exception in Strasbourg's consistent tendency not to get involved with live historical and political debates.

Shifting away, then, from matters of factual and legal qualification of past events, the Grand Chamber justified the automatic presumption of harm applied to Holocaust denial with its inherent association with racist and totalitarian ideologies, which derives from historical and contextual reasons.⁷² Despite a *prima facie*

⁶⁷ For a criticism of the distinction endorsed in *Perinçek* (2013) between the treatment of the denial of the Holocaust and that of other crimes, see U. Belavusau, 'Memory Laws and Freedom of Speech', in A. Koltay (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression* (Budapest: Wolters Kluwer, 2015), 537-558, at 548-550; see also P. LOBBA, 'A European Halt to Laws Against Genocide Denial?', *Eur. Crim. L. Rev.* 4:1 (2014), 59-77, at 68-69, 72-73.

⁶⁸ *Perinçek* (2013), para. 117.

⁶⁹ *Perinçek* (2013), para. 119.

⁷⁰ *Perinçek* (2015), para. 243. See also *Perinçek* (2015), para. 253.

⁷¹ *Perinçek* (2015), 'Joint Dissenting Opinion', para. 2.

⁷² *Perinçek* (2015), para. 234. See, for a similar approach, Conseil constitutionnel (France), 2015-512 QPC, 8 January 2016, para. 10.

resemblance with the first Chamber's logic, the Grand Chamber makes two novel points in this regard.

First, it reaffirmed that the principles applied to the negation of the Holocaust stand out as unique; all other types of denialism require specific evidence to attest their qualification as hate speech. In the latter area, the Court will likely subject the domestic courts' justifications to critical review, as it did in *Perinçek*.⁷³ This is consonant with an effective «European supervision» over national repression of disturbing speech, which may often be driven by political expediency, rather than genuine public order concerns.

This is not to say that the Court barred states from making denialism a crime.⁷⁴ Restrictions of the kind, however, have to be grounded on some *tangible symptoms of harm*, such as accusations that victims falsified history, justifications of crimes, or particularly virulent statements that are disseminated in a form that is impossible to ignore. In sum, states cannot impose a blanket ban on denialism, but are required to strike a reasonable balance between the protection of the victims' dignity and free speech. In this way, the Court intended to guard against unwarranted restrictions on freedom of expression, preventing the irrebuttable presumption that has been applied to Holocaust denial from spill over into other forms of denialism, regardless of whether the disputed events and legal classifications can be regarded as clearly established.⁷⁵

The second key point made by the Grand Chamber might be regarded as planting the seeds for erosion, or at least a careful delimitation, of the unique principles governing Holocaust denial. In upholding the presumption of harm applied to such expression, the Grand Chamber appeared to justify it only on account of the *historical experience* of the states from which the denialism cases before the Court arose, which had all perpetrated or abetted the commission of the Nazi crimes and could thus be seen as being under a special moral obligation to distance themselves from those atrocities.⁷⁶ Although this passage does not lend itself to a clear-cut interpretation, it might be read as a retrospective limitation upon the far-reaching principles regulating Holocaust denial. If taken seriously, this dictum could call for a context-sensitive analysis (in lieu of summary rejection) of complaints originating in countries that were not involved in the commission of the Nazi crimes. The automatic presumption triggering the guillotine effect would in this way be restricted to a narrowly defined group of states. Outside those particular contexts, restrictions on free speech would require the usual wealth of justifications on part of domestic authorities, in keeping with the principles laid down in respect of other forms of denialism.

⁷³ See e.g. *Perinçek* (2015), paras. 232-233.

⁷⁴ But see *Perinçek* (2015), 'Joint Dissenting Opinion', para. 2.

⁷⁵ Cf. *Perinçek* (2013), para. 117.

⁷⁶ *Perinçek* (2015), para. 243.

7. Conclusion.

As already cautioned, the Grand Chamber fell short of unequivocally adopting the interpretation outlined above. Yet its judgment paved the way for a future development of the Court's jurisprudence toward a position in which the principles applied to Holocaust denial do not substantially deviate from those applied to pernicious or inflammatory speech in general, including the negation of other traumatic historical events. Whether the uniform treatment we envisage is grounded on Article 10 alone, Article 10 interpreted in the light of Article 17, or Article 17 alone is, at this point, of diminished importance. What matters the most is that the Court's analysis not be relegated to a superficial content-based, case-independent assessment, but come with the typical in-depth evaluation of all relevant circumstances that, over the past decades, has earned the Court the authoritativeness it presently enjoys worldwide.

Should the Court follow our interpretation, the issue of patent disparity in treatment between denial of the Holocaust and denial of other crimes would be minimised – yet not entirely solved. It remains hardly acceptable that the Court, in processing applications of Holocaust denial, declines to rely on rules and approaches that have produced adequate results in other hate speech cases. It should be noted, further, that the *Perinçek* Grand Chamber put forward a *double presumption*: subject to presumption is not only the close association between Holocaust denial and anti-Semitism, but also the fact that a supposed «special moral responsibility» upon states that were involved in the Nazi crimes translates into a pressing social need to enforce a blanket criminal prohibition against denial, independent of its tendency to incite hatred or violence. This being the current case law, the Court should at a minimum allow such presumption(s) to be rebutted by applicants.

As we sought to demonstrate, the unique legal treatment reserved to Holocaust denial – upheld in *Perinçek* – is hard to justify and falls to be increasingly challenged by other groups of victims who feel that their dignity deserves equal protection. Future cases will tell if the Court continues to stand by this dichotomy or opts for progressive harmonisation of its principles on denialism.