

ZOOM IN

The question:

When is a criminal prohibition of genocide denial justified? The *Perinçek* Case and the risk of a double standard

Introduced by Gabriele Della Morte

*‘La memoria no es lo que recordamos, sino lo que nos recuerda’**
(Octavio Paz)

During the same period that the commemoration of the 100 years from the *Medz Yeghern* (literally: the ‘Great Crime’), it is apt that the Grand Chamber of the European Court of Human Rights delivered a milestone judgement on the topic (*Perinçek v Switzerland* App no 27510/08, 15 October 2015). The pronouncement is important, not only for what the Strasbourg judges expressly affirm, but also for what they implicitly uphold (for a more structured appraisal, see G Della Morte, ‘Bilanciamento tra libertà di espressione e tutela della dignità del popolo armeno nella sentenza *Perinçek c. Svizzera* della Corte europea dei diritti umani’ (2016) 99 *Rivista di diritto internazionale* 183 ff).

In the *Perinçek* case, Dogu Perinçek, a doctor in law and the chairman of the Turkish worker’s party, had been convicted by the Swiss judges because of his declaration at several public events that the ‘Armenian genocide’ was an invention established by the Imperialists against the Ottoman Empire. On this basis, Perinçek, who had already pleaded in two cases against Turkey before the European Court of Human Rights, had been accused of the crime of denial of genocide under the Swiss criminal code (which covers a wide range of conduct that could be considered criminal, *see* Article 261*bis*(4), that punishes ‘any person who (...) denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity’).

* “Memory is not what we remember, but that which remember us”.

In fact, the pronouncement by the Grand Chamber, confirming the approach of the first judgement (see *Perinçek v Switzerland* App no 27510/08, 17 December 2013), represents a significant shift in relation to the established jurisprudence of the European Court of Human Rights. When Strasbourg judges have dealt with issues related to the Holocaust for example, they have held that the denial represents *per se* an attack on the working of a democratic society. In the *Perinçek* case, which did not relate to the Holocaust, they in fact decided the contrary.

The general problem is identified by Article 10(2) of the European Convention on Human Rights, which refers to the limits of the principle of freedom of expression, which is nowadays strongly influenced by the EU Council Framework Decision 2008/913/JHA of 28 November 2008. It is worth mentioning that Switzerland, not being part of the European Union, is not bound by this instrument.

The limits defined by Article 10(2) of the Convention concern three different conditions: *a*) the lawfulness of the interference; *b*) the legitimate aim; and *c*) the necessity of the interference in a democratic society.

It is in particular the latter condition that has caused major difficulty in interpretation. On the one hand, the applicant did not express himself in a way that incited hatred; on the other hand, the right to freedom of expression not only covers inoffensive ideas, but also those that offend, shock or disturb.

By proceeding in this examination, the Grand Chamber chose not to use Article 17 of the Convention, dedicated to the 'Prohibition of abuse of rights' (according to which: 'Nothing in [the] Convention may be interpreted as implying ... any act aimed at the destruction of any of the rights and freedoms set forth herein'). Instead, the judges opted to operate a delicate balancing act between two articles of the Convention, respectively Article 10 ('Freedom of expression') and Article 8 ('Right to respect for private and family life'). They conclude, by a narrow majority of ten votes to seven, that Article 10 is to prevail.

This last approach is founded on seven different criteria, which are mentioned in the article written by CM Cascione. The Strasbourg Court was not required to determine whether the punishment of the denial of a genocide or other historical facts could in principle be justified. Nevertheless, these criteria will plausibly provide some influence in future similar cases.



At the same time it is worth mentioning that less than one month after the last Judgement on *Perinçek*, in a case concerning the condemnation of a French comedian who ridiculed the Holocaust, the Strasbourg Court held that the Convention did not offer protection for this kind of statement. Consequently the Court dismissed the application under Article 17 (see the *Décision* in *M'Bala M'Bala c France* App no 25239/13, 10 November 2015).

As is clearly stated in the contribution of A Macaya, if the Grand Chamber Judgement sees merit in putting some distance between the terms, '*denial*' and '*opinion*', the need to refer continuously to the difference between the *Shoah* and the *Medz Yeghern* gives the impression that only the former is truly protected under the European Convention of Human Rights. This was implicitly affirmed by the Strasbourg Judges when they held that the denial of the Holocaust 'even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism' (*Perinçek*, para 243).

Lastly, as C Leotta underlines, in a short, enlightening consideration dedicated to the balancing method 'truly' adopted by the Grand Chamber, 'the Court, in spite of the premises, balances freedom of expression not with the victim group's dignity, but principally with the social security and peaceful coexistence among different groups and communities'.

The debate on the opportunity of criminalization of the denial of any genocide is far from exhausted.