

**Genocide denial and freedom of expression in the *Perinçek* Case:
A European overruling or a new approach to
negationism?**

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1. *Criminalization of negationism v freedom of expression in the Perinçek case and in the jurisprudence of the European Court of Human Rights*

The Grand Chamber of the European Court of Human Rights has been called to rule about the legitimacy of a criminal conviction of a Turkish citizen, Mr Dogu Perinçek, for his statements denying the Armenian genocide. In particular, during several conferences, the applicant had described the Armenian genocide as an ‘international lie’, invented by the European imperialists to divide the Ottoman empire during the First World War, repeatedly asserting that ‘the events of 1915 and the following years did not constitute genocide’. For these statements he was found guilty on the grounds of Article 261*bis*(4) of the Swiss criminal code that punishes ‘any person who (...) denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity’.¹

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¹ The Swiss disposition, introduced in 1994 in the Swiss criminal code, after a referendum, punishes the denial or justification of the Holocaust within the crime of ‘racial discrimination’. Several European countries (Austria, France, Germany, Spain and Portugal) have modified their criminal legislation, by the introduction of the crime of denialism. Four states (ex-Soviet Bloc) punish, in the same manner, the denial of crimes committed both by the Nazi and the communist regimes. See J Luther, ‘L’antinegazionismo nell’esperienza giuridica tedesca e comparata’, Working paper no 121, *POLIS Working Papers* (2008) <www.polis.unipmn.it>; L Cajani, ‘Diritto penale e libertà dello storico’, in G Resta, V Zeno Zencovich (eds), *Riparare, risarcire, ricordare. Un dialogo tra storici e giuristi*, (Edizioni scientifiche, 2012) 370, 373-379. Conversely,



After the exercise of all the domestic remedies, the Turkish politician made an application to the European Court of Human Rights against the Swiss Confederation, alleging that his criminal conviction had been in breach of his right of freedom of expression and of his right not to be punished without law. The application was first decided by the Second section of the Court² and, after a request made by the Swiss Government, the case was referred to the Grand Chamber.

The decision of the Grand Chamber finds itself as one in a line of European judgements directed to solve the contrast between the criminalization of genocide denial and the freedom of expression, protected by domestic constitutions and by the European Convention of Human Rights (ECHR).³

All these decisions are focused on the boundaries of freedom of expression and on the relevance of its limitations.⁴ As is well known, Article 10 ECHR states that everyone has a right to hold opinions and receive information ‘without interference by public authority and regardless of frontiers’. The second paragraph of the disposition imposes several limitations on the exercise of this freedom that 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

other states do not expressly criminalize the denialism (United Kingdom, Greece, Ireland, the Netherlands, Finland, Sweden, Norway). Italy is coming to the end of the Parliamentary process for the introduction of the negationism as an aggravating circumstance of the crime of racial discrimination.

² *Perinçek v Switzerland* App no 27510/08 (ECtHR, 17 December 2013). The Court judged the application partly inadmissible and partly admissible, finding a violation of art 10 ECHR. For observations to the decision see P Lobba, ‘Un arresto della tendenza repressiva europea sul negazionismo. Punire la contestazione del genocidio armeno viola l’art. 10 CEDU’ (2014) available at <www.penalecontemporaneo.it>.

³ *Perinçek v Switzerland* App no 27510/08 (ECtHR, Grand Chamber, 15 October 2015). For an overview on the debate on the relationship between Holocaust denial and freedom of speech see E Fronza, ‘The Punishment of Negationism: The Difficult Dialogue between Law and Memory’ (2006) 30 Vermont L Rev 609 and P Bloch, ‘Response to Professor Fronza’s the Punishment of Negationism’ (2006) 30 Vermont L Rev 627.

⁴ For an overview see P Lobba, ‘Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime’ (2006) 26 Eur J Intl L 237; CM Cascione, ‘Negare le ingiustizie del passato: libertà o divieto?’ in G Resta, V Zeno Zencovich (eds), *Riparare, risarcire, ricordare. Un dialogo tra storici e giuristi*, (Edizioni scientifiche, 2012) 447, 456-461.



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’.

The traditional interpretation of Article 10, given by the European Court, was quite rigid in relation to the definition and the application of the mentioned limitations, considered the fundamental role of the freedom of expression in a democratic society and the exceptional character that the limitations must assume.⁵

Despite this general trend – which is highly protective of freedom of speech – the Court showed a different approach in the decisions concerning Holocaust denial, in which the limitations to the right protected by Article 10 were justified through the need to protect other fundamental values, such as justice and peace,⁶ honour and reputation.⁷ In fact, the Court found the criminal convictions issued by national courts against negationists or revisionists to be consistent with the Convention, on the ground that no fundamental right can be invoked to commit an act destined to destroy rights and freedoms protected by the Convention.

Holocaust denial has been considered by the Court as a phenomenon deeply destructive of the social fabric, dangerous for public order and for cohesion among groups. The Court considered it contrasting with justice and peace – both values protected by the convention – and therefore not worthy of any protection.⁸

These principles have been clearly stated in certain decisions con-

⁵ *Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979); *Vogt v Germany* App no 1785/91 (ECtHR, 2 September 1976).

⁶ *T v Belgium* App no 9777/82 (Commission Decision, 14 July 1983): the limitations to freedom of expression were justified by the need to protect public order.

⁷ *X v Federal Republic of Germany* App no 9235/81 (Commission Decision, 16 July 1982).

⁸ *H, W, P and K v Austria*, App no 12774/87 (Commission Decision, 12 October 1989); *Walendy v Germany* App no 21128/92 (Commission Decision, 7 January 1992); *P v Germany* App no 19459/92 (Commission Decision, 20 March 1993); *Otto EFA Remer v Germany* App no 25096/94 (Commission Decision, 6 September 1995); *Gert Honsik v Austria* App no 25062/94 (Commission Decision, 18 October 1995); *DI v Germany* App no 26551/95 (Commission Decision, 26 June 1996). For an analysis of these decisions see M Imbleau, *La négation du Génocide Nazi, Liberté d’expression ou crime raciste?, Le négationnisme de la Shoah en droit International et comparé* (L’Harmattan, 2003) 84.



cerning some French historians, found guilty by the French criminal courts, on the ground of the French disposition introduced by the *loi Gassot* that punishes the denial of genocide and other crimes against humanity.⁹

In particular, in the case *Marais v France*, the contestation of the existence of crimes against humanity was judged to be an attempt to erase the memory of the victims of Nazism and injurious of others' reputation.¹⁰ These statements acquired a complete definition in the case *Garaudy v France* in which the Court went further uttering that 'denying crimes against humanity is one of the most serious forms of racial defamation of Jews and of incitement of hatred of them'. The freedom of expression cannot be exercised in connection to historical events, proved and established as the Holocaust. Therefore 'Holocaust denial can't be considered as the product of scientific research, because it has the aim of restoring the Nazi regime, accusing the victims of the Holocaust of misrepresentation. It contrasts with democracy, human rights and fundamental freedoms protected by the Convention'.¹¹

More recently, the same principles have been reaffirmed in a case concerning a satirical performance during which anti-Semitic statements were made. The Court stated that freedom of expression does not offer protection for statements denying the Holocaust, despite the fact that they are made in a satirical or provocative way.¹²

⁹ Art 24bis of Law 29.6.1881 (on freedom of press), introduced by art 9 of Law no 90-615 of 13.7.1991 (*Loi Gassot*). On the *lois mémorielles* see R D'Orazio, 'La memoria doverosa. L'esperienza francese delle lois mémorielles', in G Resta, V Zeno Zencovich (eds), *Riparare, risarcire, ricordare. Un dialogo tra storici e giuristi*, (Edizioni scientifiche, 2012) 411.

¹⁰ *Marais v France* App no 31159/96 (Commission Decision, 24 June 1996).

¹¹ *Garaudy v France* App no 65831/01 (ECtHR, 24 June 2003): 'the main content and general tenor of the applicant's book and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention'.

¹² *Dieudonné M'bala M'bala v France* App no 25239/13 (ECtHR, 20 October 2015). See G Puglisi, 'La "satira" negazionista al vaglio dei giudici di Strasburgo: alcune considerazioni in «rime sparse» sulla negazione dell'Olocausto' (2016) available at <www.penalecontemporaneo.it>.



This brief overview demonstrates clearly the approach that the Court has adopted over time, when faced with cases concerning negationism. The freedom of expression has been considered capable of limitation because in this field – according to Articles 17 and 10(2) of ECHR – there is a preeminent need to protect other interests and values¹³.

At once, the Court has reinforced the protection of the freedom of speech for those who challenge the opinions of negationists or revisionists. In fact, statements that criticise the activity of revisionism – that amount to a value judgement supported by a factual basis – deserve the high level of protection warranted by Article 10 of the Convention.¹⁴

Given this background, the decision in *Perinçek* case appears peculiar for many reasons, introducing a new approach to negationism and a new method to operate the balance between the protection of freedom of speech and the safeguard of other values embodied in the Convention.

2. *The decision of the Grand Chamber of ECHR: The legitimacy of an interference with freedom of expression*

The Grand Chamber, in deciding the case, did not move from aprioristic assertions but analysed – with specific regard to the concrete situation – if the applicant’s criminal conviction represented an interference with the exercise of his freedom of expression. In doing so, it examined whether or not such interference satisfies the requirements and conditions provided by the second paragraph of Article 10 ECHR.

The first condition for an interference to be justified is that it is *prescribed by the law*. In the present case, the question of the lawfulness of the interference was not whether Article 261*bis*(4) of the Swiss criminal

¹³ On the application of art 17 to questions related to freedom of speech see H Cannie, D Voorhoof, ‘The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?’ (2011) 29 Netherlands Quarterly of Human Rights 54, and the decision *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998), according to which the negation of Holocaust should be removed from the protection of art 10 by art 17 (para 47).

¹⁴ *Karsai v Hungary* App no 5380/07 (ECtHR, 1 December 2009).

code was foreseeable in its application, but whether – in making the statements in respect of which he was convicted ‘the applicant knew or ought to have known that these statements could render him criminally liable under this provision’. Therefore, the Court argued that the applicant (who is a lawyer) had surely known that the Swiss National Council had recognized the events of 1915 as a genocide; so could reasonably have foreseen that his statements might have resulted in criminal liability.

The second requirement that has to be met for a limitation of the freedom of expression to be effective is the *legitimate aim*. In this case, the question was to verify whether the interference could be justified on the ground of the protection of the right of others. In this perspective, the Court asserted that the interference was intended to protect the dignity of the deceased and surviving victims of the massacre and the dignity of the present day Armenians as their descendants. In fact, many of the descendants of the victims constructed their identity around the perception that their community has been victim of a genocide.

Lastly, the Grand Chamber evaluated whether such interference was *necessary in a democratic society*. This is one of the most crucial points of the decision; therefore it is useful to also analyse the conclusions reached by the second section of the Court in this regard and the submissions made by the parties.

The Court had already noted that there was no indication that the applicant’s statements had been likely to stir up hatred or violence, underlining that there is a great difference between incitement to violence and statements merely denying a genocide, because they do not have the same implications and the same repercussions. For this reason, the Court stated that the criminal conviction did not seem ‘necessary in a democratic society’.¹⁵

The applicant – to justify his conduct – argued that his statements had provoked debates not only about the events of 1915 and the following years but also about the opportunity of the criminalization of diverging opinions on controversial historical events. The imposition of a criminal sanction on the basis of his statements was thought to be antithetical to open debate and freedom of inquiry, necessary in a democratic society. Moreover, he marked a distinction between his declara-

¹⁵ *Perinçek* (n 2) paras 96-129.



tions (in which he did not deny the events as such, but only their qualification as genocide) and the statements denying the Holocaust (that has been clearly established by an International Court on the basis of clear legal rules, such that the primary facts and their legal characterization became indistinguishable). Finally, he pointed out that his statements did not undermine the identity of the Armenians: he did not express himself in a way inciting to hatred or promoting racial discrimination.

On the other hand, the Swiss government argued that the present question could not be faced as ordinary political speech, in order to evaluate the degree of protection warranted: the applicant could not be placed on an equal footing with a person expressing him or herself in a domestic political debate.

The Grand Chamber – before ruling about the presence of a justification for an interference, based on the ‘necessity in a democratic society’ – recalled some principles stated by the Court’s case-law, that could be used as guidelines for the decision:

- Freedom of expression does not only refer to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.
- To justify a limitation of freedom of speech there is the need of the existence of a pressing social need.
- The legitimacy of the interference must be examined considering the case as a whole, in order to determine whether it was proportionate to the legitimate aim pursued.
- There is a little scope under Article 10(2) for restrictions of political expressions or on debate on questions of public interest.¹⁶

3. Freedom of expression v right to respect for private life

In order to decide the case, the Grand Chamber introduced a new perspective by which it considered the legitimacy of the criminalization of negationism: the balance between freedom of expression and the right to respect for private life. The legal framework of this complicated relationship has been defined by a number of decisions in which the Court has broadened the boundaries of the right to privacy to the ex-

¹⁶ *Perinçek (Grand Chamber)* (n 3) paras 196-197.



tent of including the protection of the identity of ethnic groups or the reputation of ancestors.¹⁷ By consequence, also the right of the Armenians to respect their and their ancestors' dignity could be engaged by Article 8 of the Convention.

Therefore, the aim of the Court was to strike a balance between the two Convention rights, through the examination of their comparative importance and the analysis of several factors.¹⁸

a) *The applicant's statement*

The core problem was to determine if Perinçek's statements could be characterized as the type of expressions entitled to heightened or reduced protection under Article 10. First of all, it was to be clarified if they were of a historical, legal and political nature: he spoke as a politician, not as a historical or legal scholar.

Second of all, they were not perceived by the Court as a form of incitement to hatred or to violence: the applicant did not express contempt for the victims of the events of 1915 and the following years and did not use offensive terms with respect to them. The Court drew a clear-cut distinction between the mere statements and those alleged to stir up or justify violence, hatred or intolerance. For the latter it is more difficult to justify that the interference with freedom of expression is 'necessary in a democratic society' and there is the need to consider a number of factors (for instance, it must be analysed as to whether the statement could be seen as a direct or indirect call for violence or a justification for violence, hatred or intolerance or if it is capable of leading to harmful consequences).

Therefore, it was up to the Court to determine whether the applicant's statements could have been seen as a form of incitement to violence, on the account of the applicant's position and the wider context in which they were made. In making this analysis, the Grand Chamber

¹⁷ *Aksu v Turkey* App no 4149/04 and 41029/04 (ECtHR, 15 March 2012); *Putistin v Ukraine* App no 16882/13 (ECtHR, 21 November 2013).

¹⁸ These factors are considered by the Grand Chamber in paras 229-273 of the decision (*Perinçek (Grand Chamber)* (n 3)). For an analysis 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, 186-188.

abolished any automatic presumption and scrutinized the immediate and wider context of the statements and their modalities, concluding that, read as a whole, they could not be seen as a call for hatred, violence or intolerance towards the Armenians.

b) *The geographical and historical context*

Secondly, the Grand Chamber considered the distance – both spatial and temporal – between the applicant’s statement and the events to which he referred.

With regard to Holocaust denial, the case law has stated that it is especially dangerous in those States that have directly experienced the Nazi horror and which have a special moral responsibility to distance themselves from the atrocity they have perpetrated or abetted. By contrast, there was not a direct link between Switzerland and the events that took place in the Ottoman Empire. Moreover, a considerable lapse of time occurred between the criminalized statements and the massacre of the Armenians.

c) *Rights of the members of the Armenian community*

The third question was to determine whether the applicant’s statements had affected the rights of the Armenian community and, in particular, whether they had been so wounding to the dignity of the Armenians who perished and to the identity of their descendants as to require a criminal sanction. Answering this question, the Grand Chamber considered that the statements were directed at the Imperialists (regarded as responsible for the atrocities) and not to the victims and they could not have direct effect on the Armenians’ identity as a group.

d) *The criminalization of genocide denial in a comparative perspective: diverging solutions*

In a comparative perspective, there is a large spectrum of solutions adopted by the national legislators for what concerns the criminalization of the denial of historical events.¹⁹ Nevertheless, the Grand Cham-

¹⁹ See above (n 1).

ber did not consider the comparative law position a weighty and useful argument to help them reach their decision.

e) *International law obligations*

For what concerns the international obligations, it was highlighted that there were a lack of international treaties in force with respect to Switzerland that required in clear and specific language the imposition of criminal penalties for genocide denial (and it was not compelled to do so under customary international law).

f) *Method used by the Swiss Court to justify the criminal convictions*

The Grand Chamber considered that - in concluding that the events of 1915 and the following years had constituted 'a genocide' - the Swiss courts did not analyse the point by reference to the rules of Swiss or international law that define that term; they merely referred to a number of acts of official recognition by Swiss, foreign and international bodies, expert reports, legal treatises and textbooks. Despite this method (according to which it was unclear whether the applicant was penalised for disagreeing with the legal qualification ascribed to the events of 1915 and the following years or with the prevailing views in Swiss society), the applicant's conviction had to be seen as inimical to the possibility, in a 'democratic society', to express opinions that diverge from those the authorities or any sector of the population.

g) *Severity of interference*

Lastly, the Grand Chamber noticed that the sanction took the serious form of a criminal conviction and that it was not proportionate to the interference.

Having considered the factors explained above, the Grand Chamber concluded 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; therefore there had been a breach of Article 10.



4. *A new approach to negationism?*

As has already been mentioned, the decision of the Court in the *Perinçek* case appears to be rather peculiar, especially if it is compared with the other judgements regarding Holocaust denial, in which the Court has demonstrated an attitude directed at justifying the criminalization of negationism.²⁰

The peculiarity does not only reside in the conclusions of the Grand Chamber (that has found a breach of Article 10), but also in the way in which these conclusions have been reached.

First of all, the Court demonstrates that it does not adhere to an aprioristic position, but rather it evaluates the extent of the limitations applicable to freedom of expression by a concrete balance of interests. This balance is not warranted through abstract statements, but through the analysis of the specific context. This pragmatic approach may lead to different solutions in similar cases which, considered in their particular context, can show significant elements of distinction.²¹

This method of analysis recalls the approach used in Canadian jurisprudence, when faced with the problem of the punishment of the Holocaust denial whereby: the Supreme Court have assumed conflicting positions, due to the analysis of the extent and the relevance of the interests involved in the specific situations.²²

Secondly, the Court adds a new element to the topic of the criminalization of negationism: the idea that – for a criminal sanction to be justified – that the statement must be associated with an incitement to hatred or violence. This assertion is absolutely relevant for many reasons. It is an answer to the critics of the crime of negationism, who argue that it could not be considered injurious.²³ Moreover, it links the decision of the European Court to other domestic judgments, regarding ‘hate speech’.

²⁰ See above, section 1.

²¹ For remarks see CD Leotta, ‘Limiti penalistici alla libertà di espressione: il caso del negazionismo del genocidio armeno’ (2016) <www.archiviopenale.it>.

²² See the different solutions reached by the Canadian Supreme Court in *R v Keegstra* 3 S.C.R. 687 (1990) and *R v Zundel* 2 S.C.R. 731 (1992) and, for remarks, see M Rosenfeld, ‘Hate Speech in Constitutional Jurisprudence’ (2002-2003) 24 *Cardozo LJ* 1523

²³ A Di Giovine, ‘Il passato che non passa: “Eichmann di carta” e repressione penale’ (2006) 8 *Diritto Pubblico Comparato ed Europeo* 14.

More precisely, a few years ago, the Spanish *Tribunal Constitucional*, ruling on the constitutionality of Article 607(2) of Spanish criminal code, made a distinction between two different aspects: a) the denial of determined historical events; b) their justification.²⁴ The simple denial of genocide as a historical fact without adding any subjective value judgment is speech protected by the Constitution; it does not represent an expression of hate speech, because it is not characterized by an incitement to violence and it is protected by the freedom of historical and scientific research. By contrast, the justification of some events – such as genocide – can be considered an expression of a judgment that can be easily translated into an incitement to perform those aspects. Positive value judgments, denials of the wrongfulness of the deed (that is, publication of ideas or doctrines that praise the wrong or extol the wrongdoer), or imminent incitement giving support to its correctness may be criminally punished.

At a second level, the method used by the Court in the *Perinçek* case, brings the European jurisprudence closer to the American judgments regarding hate speech. Traditionally, the positions taken by European and American legislators and judges in this field were thought to be incomparable, due to the different level of protection that is warranted in relation to freedom of speech in the two legal systems. While in Europe there was a clear trend favourable to the repression of negationism²⁵, the American Supreme Court stated that ‘there is no place in a Constitutional democracy for laws that seek to compel individuals to adopt a particular way of thinking and talking about matters that concern them, to affirm belief in things they do not believe in, or to adopt a particular aptitude toward something the State considers important’.²⁶

²⁴ Trib Const (SP), 7.11.2007, no 235. See I Spigno, ‘Un dibattito ancora attuale: l’Olocausto e la sua negazione’ (2008) 10 *Diritto Pubblico Comparato ed Europeo* 1921 and G Della Morte, ‘L’introduzione del reato di negazionismo in Italia. Una prospettiva critica alla luce dell’ordinamento internazionale’ (2014) 16 *Diritto Pubblico Comparato ed Europeo* 1181, 1196.

²⁵ See above (n 1) and the EU Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

²⁶ *West Virginia State Board of Education v Barnette* 319 US 624, 626-29. See also *Wooley v Maynard*, 430 US 705, 707: by measures that compel citizens to adhere to some ideologies, the State ‘invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control’.



By consequence, American courts have always been reluctant to punish someone for his ideas or expressions, requiring that the speech – to justify a criminal sanction has to be ‘directed to inciting or producing imminent lawless actions and was likely to produce such actions’²⁷ or has to be translated into an ‘incitement to violence’.²⁸

The recent decision of the European Court seems to reduce the distance between the two sides of the Atlantic, inaugurating a new approach to the debated issue of negationism in Europe.

Lastly, a final suggestion derives from the remark – made by the Court – according to which the criminal conviction was a sanction too severe for the considered conduct, ‘having regard of other means of intervention and rebuttal, particularly through civil remedies’. This observation highlights another profile: insofar as criminal sanctions should be an *extrema ratio*, the punishment of denialism could be moved from the level of criminal law to the private law area, thereby reinforcing the civil protection of the victims. This perspective creates the problem of identifying the awardable damages and the instruments to quantify them and also to ascertain who the subjects are that are entitled to obtain compensation.

Many scholars have already denied the need for the intervention of the criminal legislator in this field, in which preventive measures of information, administrative sanctions and civil protection should be enough.²⁹ Only a few courts, in domestic litigations, have awarded liquidated damages (for non pecuniary loss) suffered by the victims of the genocides or by their heirs,³⁰ but these cases offer some relevant cues. The victims of a genocide (or their heirs) have the legitimate claim – by virtue of their personality rights – that the persecution suffered is recognized. So the denial of the Holocaust or of other genocides is a defamation against all of them, that deserves compensation. The right of freedom of expression has to be balanced against the potential injury to the right to protection of their honour.

Emblematically, the conclusions reached in *Perinçek* case can be matched with a French judgement likewise concerning the Armenian

²⁷ *Brandenburg v Ohio* 359 US 444.

²⁸ *National Socialist Party of America v Village of Skokie* 432 US 43.

²⁹ E Fronza, ‘Profili penalistici del negazionismo’ (1999) 3 *Rivista Italiana di Diritto e Procedura Penale* 1034.

³⁰ Trib Cost (SP), 11.11.1991, no 214; BGHZ 75, 160, NJW 1994, 1779.

genocide (the ‘Lewis Affaire’).³¹ The facts are very similar: a historian publicly stated that the massacre of the Armenians was not technically a genocide, because it was not part of a plan directed to the extermination of the Armenian population. He was not found guilty for the crime provided by the *loi Gassot*, but the Paris Court of Appeal – invested by a civil action on the ground of Article 1382 c.c. – fined the defendant, ordering him to pay one franc to the association representative of the interests of the Armenian people, because he had ‘unfairly rekindled the pain of the Armenian community’. The court ruled that, while Lewis had the right to his views, they did damage to a third party; he had failed in his duties of objectivity and prudence by offering unqualified opinions on such a sensitive subject; his remarks were judged tortious and justified compensation.

The recourse to civil remedies could be a useful measure to punish the denial of genocide, without invading the strict boundaries of criminal liability, which requires some specific elements that are presumed to be missing in the conducts of negationism.³²

³¹ TGI Paris, 21.6.1995, PA, 29.9.1995, no 117, 17.

³² G Resta, ‘Il contrasto al negazionismo e i limiti del diritto’ (2013) 1 *Il diritto dell’informazione e dell’informatica* 791, 795.

