

**Brief remarks on the balancing method ‘truly’ adopted by
the ECtHR Grand Chamber in *Perinçek c Switzerland***

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According to the Grand Chamber, in *Perinçek*, the historical memory of a group is protected by Article 8 of the ECHR, which provides the right to respect for private and family life. This amounts to a ‘legitimate aim’ under Article 10(2) of the ECHR, which allows interferences and restrictions on freedom of expression, if they are necessary in a democratic society, *inter alia*, for the protection of the reputation or rights of others.¹

Interpreting the concept of ‘rights of others’ within the meaning of Article 10(2) of the ECHR, the Court explains that: ‘these [the rights of others] were the rights of Armenians to respect for their and their ancestors’ dignity, including their right to respect for their identity constructed around the understanding that their community has suffered genocide’.² In this sense, it is clarified that the right to respect for private and family life includes the protection of their ancestors’ dignity and the respect for group identity, prohibiting offences to the group’s sense of identity and to its members’ feelings of self-worth and self-confidence.³

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¹ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) para 157.

² *ibid* 227, 252.

³ *ibid* 200-201; *Aksu v Turkey* App no 4149/04 and 41029/04 (ECtHR, 15 March 2012) paras 58-61, 81; *Putistin v Ukraine* App no 16882/03 (ECtHR, 21 November 2013) paras 33, 36-41; *Jelševar and Others v Slovenia* App no. 47318/07 (ECtHR, 11 March 2014) paras 29-40 and *Dzbugashvili v Russia* App no 41123/10 (ECtHR, 9 December 2014) paras 26-35.

Even if Article 8 of the ECHR is interpreted by the Court as including the respect for group's identity, it seems that the Court itself does not deduce coherent consequences from this premise and that it finally holds that, in *Perinçek*, there has been a violation of Article 10 of the ECHR, simply because it concluded that the Turkish politician's discourse did not tend to promote intolerance, hate and violence.

This is not the common approach if a statement concerns an individual's history and dignity: in this case, the protection of the right to respect for private life is immediate and direct and does not require a social perspective for the offence (i.e. incitement for hate and violence). However, the application of Article 8 for individuals is not 'monolithic' and it cannot ignore who the offended person is: for example, the descendant of a public personality cannot invoke Article 8 of the ECHR to prohibit every critic of his ancestor.⁴ Differently, the right to private life obtains a wider application if the ancestor was not a public personality, because his reputation is strictly connected with his descendant's one.⁵

The analysis of *Perinçek* shows, instead, that, according to the Grand Chamber, if there is the risk that a public discourse (a negationist one, for example) will offend a group's identity and dignity, the balancing of Article 10 and Article 8 of the ECHR has to consider not only the contents of the statement itself, but also (and, in a certain sense, primarily) if it can incite hate, violence and intolerance, that is to say if the assertion can be characterised as 'hate speech'. In fact, the Court finally holds that an offence to a human group's dignity is appreciable under Article 8 only if it incites hate.

Applying, for example, the first of the seven balancing criteria ('nature of applicant's statements'), it is hereby declared, in the Judgment, that 'taking into account the overall thrust of his statements, [it] does not perceive them as a form of incitement to hatred or intolerance'⁶ and that 'the applicant's statements, read as a whole and taken in their immediate and wider context, cannot be seen as a call for hatred, violence or intolerance towards the Armenians'.⁷ The same approach is used ap-

⁴ *Dzbugashvili v Russia* App no 41123/10 (ECtHR, 9 December 2014).

⁵ *Putistin v Ukraine* App no 16882/03 (ECtHR, 21 November 2013).

⁶ *Perinçek v Switzerland* (n 1) para 233.

⁷ *ibid* 239.

plying the second criteria ('the context of the interference'). Here, the Grand Chamber concludes, affirming that 'there is moreover no evidence that the applicant's statements have in themselves provoked hatred towards the Armenians in Turkey'.⁸

The solution to the case of the Armenian Genocide's negationism reveals that the Court, in spite of the premises, balances freedom of expression not with the victim group's dignity itself, but principally with the social security and peaceful coexistence among different groups and communities. These, however, are different interests from the group's dignity, that is, *per se*, an inviolable right, linked with group members' feelings of self-worth (*internal feeling*) and with the feelings of the group's value in society (*external feeling*). In other words, genocide denial offends a human group's dignity because, even when it does not incite hate and violence, the author of a negationist discourse, through a historical mystification, despises the group's sense of identity and its members' feelings of self-confidence, constructed around the remembrance that the community has suffered genocide. For this reason, denying genocide means denying not only a historical fact, but, above all, the group's identity and its will to exist as a community.

Nevertheless, the Grand Chamber did not seem to be seriously concerned with considering whether Perinçek's discourse had offended the dignity of Armenians living in Switzerland and all over the world. Indeed, it unbelievably held that Perinçek's discourse is not an attempt to justify the Armenian genocide⁹ and affirms that it is not directed towards the Armenians themselves, but toward imperialist States: 'He [Perinçek] did not draw from this the conclusion that they [Armenians] had deserved to be subjected to atrocities or annihilation; he rather accused the 'imperialist' of stirring up violence between Turks and Armenians'.¹⁰

Some critical remarks also arise from the consideration of the 'time factor': the Court considers that the lapse of time between the applicant's statements and the genocide was considerably long and that, at the time when he made his affirmations, there were very few survivors

⁸ *ibid* 246. The evaluation is similar in the application of the fourth balancing criteria ('the existence or lack of consensus among the High Contracting Parties'). *Ibid.* 255-257.

⁹ *ibid* 240.

¹⁰ *ibid* 252.

of the genocide. Also for this reason, in balancing Article 8 and Article 10 of the ECHR, the right to freedom of expression has to prevail against the Armenians' right to respect for their private life.

Sed contra, a balancing method based on the 'time factor', as with the one adopted in *Perinçek*, does not 'work' in evaluating negationism's real effects on a human group's dignity. Negationism, in fact, does not essentially offend the victims of a genocide who are dead or have directly suffered, but the group itself and the people who are alive and belonging to it. Contrary to the approach taken by the Court, it could be argued that if the genocide took place many years ago and today the survivors are dead, the group's right to conserve its identity requires a stronger protection because the memory of the past is now weaker.

Last, but not the least, if Strasbourg's judges had really balanced the group's right of dignity and the individual right to freedom of expression, the distinction among victim groups would appear inadmissible. In particular, the affirmation according to which the Holocaust denial 'must invariably be seen as connoting an antidemocratic ideology and anti-Semitism'¹¹ would appear to be gravely discriminatory because it would imply that, in a democratic society, some groups' dignity is worth more than that of other groups.

¹¹ *ibid* 253.