MEMORY LAWS & FREEDOM OF SPEECH IN EUROPE: ANALYSIS OF *PERİNÇEK V. SWITZERLAND* CASE

(AVRUPA'DA HAFIZA YASALARI VE İFADE ÖZGÜRLÜĞÜ PERİNÇEK-İSVİÇRE DAVASI ANALİZİ)

Çağatay YILDIRIM

Diplomat at the Ministry of Foreign Affairs of Republic of Turkey. This paper is submitted in accordance with the requirements for the degree of Master of Laws (LL.M.) in International Human Rights and Criminal Justice at Utrecht University. All views expressed in this paper solely belong to the author only and are not official views of Ministry of Foreign Affairs of Republic of Turkey.

Abstract: *This paper asks whether the current trend of the adoption of new memory laws in Europe is compatible with the existing international, regional and national human rights norms on the freedom of expression. The paper will also try to find answers for the following sub-questions: i) What is the current situation in terms of memory laws in the leading EU states, namely Germany, France and Spain? What are the striking points of the relevant decisions of the Constitutional Courts in these countries? ii) Should there be a joint combat against negationism in Europe? Is the Framework Decision successful, so far, to meet the expectations in this regard? iii) How do the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) approach to the balance the penalization of negationism and the protection of freedom of speech? Is there any evolution in their methods? iv) Context-based or content-based limitations, which one should be invoked on the issue of negationism? v) Did the Perinçek judgment bring any novelty for the ECtHR jurisprudence? This research presents a theoretical legal study aiming to analyze the current trend of the criminalization of the negationism in Europe in the light of the relevant international, regional and national provisions. Due to its limited scope, the research will only cover the anti-negationist laws in Europe. In this regard, among several international and regional bodies, the HRC and the ECtHR are at the hearth of the analysis since both of them have a binding power on all European countries with regard to the freedom of expression.*

Keywords: *European Court of Human Rights, Human Rights Committee, Perinçek case, Negationism, Freedom of Expression*

Öz: *Bu makale, Avrupa'daki mevcut güncel tartışmalar arasında yer alan ve son yıllarda sayıları giderek artmakta olan hafıza yasalarının, ifade*

özgürlüğü konusundaki mevcut uluslararası, bölgesel ve ulusal insan hakları standartlarına aykırılık teşkil edip etmediğini sorgulamaktadır. Ayrıca şu sorulara cevap aramaktadır: i) Almanya, Fransa ve İspanya'nın da aralarında yer aldığı başlıca AB ülkelerindeki hafıza yasalarına ilişkin güncel durum nedir? Bu ülkelerin anayasa mahkemelerinin konuyla ilgili olarak son dönemde aldıkları kararlarda dikkat çeken noktalar nelerdir? ii) Avrupa'da inkârcılığa karşı ortak bir mücadele benimsenmesi mümkün müdür? Gelinen aşamada AB Çerçeve Kararı'nın beklentileri karşılayabildiği söylenebilir mi? iii) İnsan Hakları Komitesi ve Avrupa İnsan Hakları Mahkemesi (AİHM), inkârcılığın cezalandırılması ve ifade özgürlüğünün korunması arasındaki hassas dengeye ilişkin nasıl bir yaklaşım benimsemektedir? Geçen süre zarfında sözkonusu organların yaklaşımlarında herhangi bir değişim yaşanmış mıdır? iv) İnkârcılık konusunda bağlam-odaklı ve/veya içerik-odaklı kısıtlamalardan hangisine başvurulmalı? v) Perinçek kararı, AİHM içtihatlarına herhangi bir yenilik getirdi mi?

Teorik ve hukuki nitelikteki bu araştırma, Avrupa'daki inkârcılığın cezalandırılması yönündeki mevcut eğilimin, ilgili uluslararası, bölgesel ve ulusal hükümler ışığında analizini yapmaktadır. Araştırma, bölge olarak sadece Avrupa'daki inkârcılık-karşıtı yasalar ile sınırlandırılmaktadır. Bu bağlamda, uluslararası ve bölgesel organlar arasından, ifade özgürlüğü bakımından bütün Avrupa ülkeleri için bağlayıcı etkiye sahip olan İnsan Hakları Konseyi ve AİHM bu analizin merkezinde yer almaktadır.

Anahtar Kelimeler: *Avrupa İnsan Hakları Mahkemesi, İnsan Hakları Komitesi, Perinçek davası, İnkârcılık, İfade Özgürlüğü*

I. INTRODUCTION

With the adoption of the EU *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law* in 2008,[1] which aims, among other things, to harmonize the national criminal laws against the negationism of the historical facts including Holocaust, "memory laws" have become more widespread in Europe. The possible chilling effects of memory laws on freedom expression have constituted as a source of concern especially for historians.

The paper asks whether the current trend of the adoption of new memory laws in Europe is compatible with the existing international, regional and national human rights norms on the freedom of expression.

Furthermore, in their recent speech-protective decisions, the Spanish and French Constitutional Courts found the laws, which made it a criminal offence to deny the existence of the genocides, unconstitutional on the grounds that these laws are incompatible with freedom of expression.[2] These judgments stoked the debate on the delicate balance between the penalization of negationism and the protection of freedom of expression, which was dating back to the Nazi atrocities during the World War II.

With regard to penalization of negationism, two main relevant treaties, namely the International Covenant on Civil and Political Rights (ICCPR)[3] and the European Convention on Human Rights (ECHR),[4] foresee some restrictions on the scope of the freedom of expression for certain situations. As the monitoring bodies of these two treaties, the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) have an evolving approach for the restriction of hate speech.

In the recent case of *Perinçek v. Switzerland* concerning the criminal conviction of Mr. Perinçek, Chairman of the Turkish Workers' Party, as a consequence of publicly denying the legal categorization of the alleged massacres and deportations had occurred in the territory of the former Ottoman Empire in 1915 as "genocide"; the Chamber of the ECtHR ruled that

1 Council of the European Union Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2008/913/JHA, 28 November 2008.

2 Spanish Constitutional Court's Judgment, 7 November 2007, No. 235/2007; French Constitutional Council's Judgment, 28 February 2012, No. 2012-647 DC.

3 International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

4 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, Europ. T.S. No. 5; 213 U.N.T.S. 221.

the Swiss authorities had breached of Article 10 on freedom of expression of the ECHR.[5] This judgment is not final since the case was referred to the Grand Chamber of the Court at the request of the Swiss authorities. On the other hand, as the first case on the denial of genocide other than Holocaust before the ECtHR, *Perinçek* judgment is important to understand the Court's evolving approach to extend the criminalization of negationism to the historical atrocities other than the Nazi crimes.

The paper asks whether the current trend of the adoption of new memory laws in Europe is compatible with the existing international, regional and national human rights norms on the freedom of expression. The paper will also try to find answers for the following sub-questions:

i) What is the current situation in terms of memory laws in the leading EU states, namely Germany, France and Spain? What are the striking points of the relevant decisions of the Constitutional Courts in these countries?

ii) Should there be a joint combat against negationism in Europe? Is the Framework Decision successful, so far, to meet the expectations in this regard?

iii) How do the HRC and the ECtHR approach to the balance the penalization of negationism and the protection of freedom of speech? Is there any evolution in their methods?

iv) Context-based or content-based limitations, which one should be invoked on the issue of negationism?

v) Did the *Perinçek* judgment bring any novelty for the ECtHR jurisprudence?

This research presents a theoretical legal study aiming to analyze the current trend of the criminalization of the negationism in Europe in the light of the relevant international, regional and national provisions. The main research question is evaluative, whereas the sub-questions are descriptive, evaluative and normative in nature.

Relevant and reliable primary and secondary sources were consulted during the research process to find answers for the main research question and other sub-questions. In this regard, international, regional and national legal

5 ECtHR, *Perinçek v. Switzerland,* 17 December 2013, (Appl. no. 27510/08).

documents, first and foremost the rulings of ICCPR, the ECHR and the Framework Decision was used as primary sources. Additionally, the jurisprudences of the HRC and the ECtHR and the case-law of domestic judicial organs, in particular the German, French and Spanish Constitutional Courts' relevant judgments were also invoked as primary sources. These sources were selected on the basis of their relevancy and binding nature. The paper also refers to legal academic literature, such as books, journal articles, fact sheets, reports and background papers of expert seminars, as secondary sources. The secondary sources were also selected with regard to their relevance, trustworthiness, updated nature and availability. All consulted sources were cited in accordance with the determined citation method and were listed at the bibliography section.

Due to its limited scope, the research will only cover the anti-negationist laws in Europe. In this regard, among several international and regional bodies, the HRC and the ECtHR are at the hearth of the analysis since both of them have a binding power on all European countries with regard to the freedom of expression. As another limitation on the scope, only the German, French and Spanish laws will be elaborated in the national legislations and case-law section. These three countries have been chosen not randomly, but due to several underlying reasons. Firstly, all three of them are members of both the Council of Europe and the European Union (EU). Furthermore, their domestic legal authorities have ruled important decisions on memory laws, which constitute the key elements of the European jurisprudence on this issue. Moreover, their national provisions were used as base during the drafting procedure of the Framework Decision. Additionally, as the perpetrator of Holocaust, Germany is the pioneering state in the criminalization of genocide denial with its comprehensive legislation and jurisprudence. As for France and Spain, in the *Perinçek* judgment, the ECtHR made references to the recent striking decisions of their Constitutional Courts, which outlawed the criminalization of the negation.

Section II of this paper will examine the national anti-negationist legislations of Germany, France and Spain, respectively. This section will specifically elaborate the relevant rulings of the Constitutional Courts of these three countries. Section III will look at the initiatives to form a unified European approach against negationism under the Framework Decision. After that, the evolving approaches of the HRC and the ECtHR on the restriction of freedom of expression will be analyzed in Section IV. Then, Section V of the paper will focus on the recent *Perinçek* judgment of the ECtHR to determine whether it brought any novelty to the Court's approach. Lastly, Section VI concludes the paper by summarizing the findings of this research.

II. NATIONAL APPROACHES ON MEMORY LAWS

In this section, the German, French and Spanish national legislations and case-laws on the criminalization of the negationism will be elaborated. As already mentioned in Section I, these states have not been selected randomly. They have an important impact on the penalization trend in Europe.

A. Germany

As the "perpetrator-state" of Holocaust, Germany has one of the most comprehensive legislations against the negationism in Europe. These relevant German laws also constitute the basis of similar ones in the other European countries. Therefore, in order to understand the background of the anti-denialism in the region, the German system should be analyzed.

The approach of Germany on the issue of the penalization of the negationism was shaped by the effects of the dark history of the Third Reich and its constitutional conception of freedom expression which is based on the fundamental values such as human dignity and the constitutional interests namely honor and personality.[6]

There are several provisions dealing with the issue of the "Auschwitz lie" (*Auschwitzlüge*) under the German Penal Code (*Strafgesetzbuch*).[7] In 1985, Section 130 of the Code was adopted to criminalize incitement to hatred against segments of the population and attack on the human dignity.[8] The first regulation explicitly referring the criminalization of the Holocaust denial was inserted as Section 130(3) in 1994. This provision foresees the imprisonment for people who "publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism … in a manner capable of disturbing the public peace".[9] Additionally, in 2005, Section 130(4) was introduced to make stronger the combat against Auschwitz

6 Rosenfeld, M., "Hate speech in constitutional jurisprudence: a comparative analysis." *Cardozo Law Review,* Vol:24, 2002, pp. 1523-1567, at p. 1548.

7 The so-called concept of "Auschwitz lie" (*Auschwitzlüge*) refers to the negationism in Germany, which is based on the denial of the existence of gas chambers in Auschwitz camps.

8 Section 130 of the German Criminal Code states that: "Whoever, in a manner that is capable of disturbing the public peace: 1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years." (German Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I, p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I, p. 3214).

9 *Ibidem,* Section 130(3).

lie: "Whoever, publicly or at a meeting, disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment of not more than three years or a fine."[10]

These provisions only cover the Nazi crimes and not mention the other genocides or grave crimes. Furthermore, in addition to the denial of crimes, these laws also prohibit their approval, glorification or justification. As seen from the above-mentioned legislations, the denial or trivialization of the Nazi crimes can only be punished under the condition that these conducts are carried out "in a manner capable of disturbing the public peace".[11]

On the other hand, Article 5 of the Basic Law *(Grundgesetz)* provides broadened protection for the freedom of expression, whereas it states that this right is not absolute.[12] In this regard, according to Article 5(2), the limitations on freedom of expression are set out "in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honour".[13]

The delicate relation between the freedom of expression and the denial of Holocaust was elaborated by the German Constitutional Court in the *Auschwitz Lie* case in 1994.[14] A far right political party had invited David Irving, a well-known revisionist British historian, to address that the persecution of Jews during the Third Reich is a big lie.[15] The government had permitted the meeting on the condition that Irving would not give a denialist speech.[16] Claiming the violation of freedom of speech, the far right party took judicial action against this governmental decision. After the rejection of this application by the trial court, the party submitted a complaint to the Constitutional Court.[17]

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10 *Ibidem,* Section 130(4).

11 *Ibidem,* Section 130(3).

12 Article 5(1) of the Basic Law states that: "Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship (German Basic Law, 23 May 1949, BGBl. I,Federal Law Gazette Part III, as amended through Dec. 20, 1993, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944).

13 *Ibidem,* Article 5(2).

14 German Constitutional Court, *Auschwitzluge (Holocaust Lie) Case*, 13 April 1994, No. BVerfGE 90, 241.

15 *Ibidem,* at para. A(I)(1).

16 *Ibidem,* at para. A(I)(2).

17 *Ibidem,* at paras. A(I)(4) and (II)(1).

The Constitutional Court shared the views of trial court.[18] In the merits of the judgment, the Court made a distinction between statement of facts and opinion. Accordingly, opinions are marked by it subjective relationship to its content.[19] They are personal assessments of a matter or value judgments, whereas factual assertions are characterized by an objective relationship between the utterance and reality.[20] Thus, the protective scope of Article 5 of the Basic Law covers freedom of opinions, but not factual statements that are indisputably untrue.[21] The Court is of the opinion that Holocaust denial is assessed under the latter category, thus not protected by Article 5(1).[22] According to Pech, the Court's interpretation is not completely persuasive, since the distinction between opinions and factual statements is of subjective nature.[23] He asserted that this distinction confronts a long-established understanding of the concept of opinion and the Court's recommendations for the ordinary courts to approach touchy expressions, as much as possible, in a non-punishable manner.[24]

B. France

In 1990, the French Parliament adopted the so-called *loi Gayssot* (Gayssot Law), which was added as Article 24*bis* into the 1881 Freedom of the Press law.[25] This law makes it punishable to "contest" the existence of crimes against humanity as defined in the Statute of the Nuremberg Tribunal.[26] Article 24*bis* covers only the Nazi crimes with a *ratione temporis* between 1939 and 1945. The term "contester" (to contest), which was used instead of "nier" (to deny) in this Article, broadened the restriction on freedom of expression.[27] Thus, this wider language has paved the way for greater discretion of the legal authorities.

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18 *Ibidem,* at para. B(II)(2).

19 *Ibidem,* at para. B(II)(1).

20 *Idem.*

21 *Idem.*

22 *Idem.*

23 Pech, L. "The law of Holocaust denial in Europe: towards a (qualified) EU-wide criminal prohibition." *Jean Monnet Working Paper* Vol. 10/09, 2009, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536078, at p. 13.

24 *Idem.*

25 Article 24*bis* of the French Freedom of the Press Law, 29 July 1881 as amended by Law No. 90-615, 13 July 1990.

26 *Idem*.

27 Pech, at p.16.

Furthermore, according to the Gayssot Law, the simple conduct of contestation of established facts can be prosecuted without any additional requirement, such as incitement to hatred or violence, or a manner set out under Article 1(2) of the Framework Decision: namely likely to disturb public order or which is threatening, abusive or insulting. Thus, the Gayssot Law provides a power for a pure "content-based" restriction on freedom of expression.[28] According to the French courts, there are several legal justifications behind this content-based restrictions: the deniers with an anti-Semitic intent may harm the reputation and honor of the Jews as well as pose a real and present danger to the French constitutional order.[29]

In line with the decision of the major political parties in the Parliament, the Gayssot Law was not reviewed by the French Constitutional Council *(Conseil Constitutionnel)* before its ratification. Nevertheless, the national courts as well as the HRC and the ECtHR have examined the legality and compatibility of this Law with the ICCPR and the ECHR, respectively. Among these analyses, which will be elaborated *infra*, the decision of the HRC concerning the well-known Holocaust denier Faurisson is one of the most comprehensive and guiding ones.[30] In several separate opinions attached to this decision, the potential threats of the widest language of the Gayssot Law were elaborated.[31]

On the other hand, the criticisms concerning the limited scope of this Law, which only deals with the Nazi crimes, paved the way for the initiatives to extend it to other historical facts. In this regard, in 2001, France approved a law recognizing the "Armenian genocide" without any reference to the punishment for its denial.[32] In the same year, another law *(loi Taubira)* was passed to acknowledge the slave trade as a crime against humanity.[33] The adoption of the controversial "*loi Mekachera*" in 2005, which required school courses to promote "the positive aspects of the French presence overseas especially in North Africa",[34] sparked public reaction against the "*lois*

28 *Ibidem*, at p.17.

29 *Ibidem,* at pp.21-22.

30 HRC, *Faurisson v. France,* 16 December 1996, No. CCPR/C/58/D/ 550/1993.

31 *Ibidem,* Individual opinion by Nisuke Ando, para. 1; Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, at para. 9; Individual opinion by Rajsoomer Lallah, at paras. 6-7; Individual opinion by Cecilia Medina Quiroga, at para. 2.

32 French Law No. 2001-70 concerning the recognition of the Armenian genocide of 1915, 29 January 2001.

33 French Law No. 2001-434 concerning the recognition slave trade and slavery as crimes against humanity, 21 May 2001.

34 Article 4 of the French Law No. 2005-158 of concerning the gratitude of the Nation and the national contribution for the benefit of repatriated French citizens, 23 February 2005.

35 French Law No. 2006-160, Loi Mekachera, 15 February 2006.

mémorielles" (memory laws) in France. Thus, in 2006, the Constitutional Council repealed this part of *loi Mekachera*.[35] Furthermore, in the same year the National Assembly adopted another bill which foresees the imprisonment for the denial of the Armenian genocide.[36] However, after a long waiting-period it was rejected by the French Senate on 4 May 2011.[37]

Finally, within the framework of the attempts to extend the Gayssot Law to the Armenian genocide, the "Law to punish the denial of the existence of genocides recognized by the law" (*loi Boyer*) was approved by both Chambers of the Parliament in 2012.[38] By amending Article 24*bis,* this law aimed to penalize "the denial or grossly trivialization" of several genocides (including the Armenian genocide) acknowledged as such under French law.[39] However, on 28 February 2012 the Constitutional Council declared this law unconstitutional.[40] In its decision, even though the Council admitted that the Parliament is free to adopt necessary regulations on the freedom of expression, including criminalization option, it also reminded that the exercise of this freedom is a "precondition for democracy and one of the guarantees of respect for other rights and freedoms; that the restrictions imposed on the exercise of this freedom must be necessary, appropriate and proportional having regard to the objective pursued."[41]

Furthermore, as one of the most striking and controversial parts of the decision, the Council ruled that a provision aiming to recognize a crime of genocide is not of "normative" nature.[42] In other words, even though such provisions are formally adopted by the legislative organs, as carrying political values, they do not have normative character like laws. In this context, the Council decided that the penalization of the denial of the existence of crimes recognized by the legislative organs constitutes an unconstitutional restriction on the freedom of expression; thus, *loi Boyer* was found unconstitutional.[43] As one of the cornerstones for memory laws in France, the decision implicitly closed the doors for the adoption of new laws aiming to punish the negation of genocide, which is recognized by the Parliament.

36 French National Assembly, Bill No. 1021 adopted on 12 October 2006.

37 French Senate, Motion No. 1, presented by Jean-Jacques Hyest on behalf of the Committee on Laws, designed to oppose the motion to dismiss the bill punishing the denial of the Armenian Genocide, Vote No.200, 4 May 2011.

38 French Law on the punishment of denials of the existence of genocides recognised by law, 31 January 2012.

39 *Ibidem,* Article 1.

40 French Constitutional Council's Judgment, 28 February 2012, No. 2012-647 DC

41 *Ibidem,* at para. 5.

42 *Ibidem*, at para. 6.

43 *Idem*.

C. Spain

With an amendment adopted in 1995, a provision on negationism was incorporated to the Spanish Penal Code.[44] According to Article 607(2) of the Code, the dissemination through any means of ideas or doctrines that "deny" or "justify" the genocide crimes or that aim to reinstate regimes or institutions that shelter practices contributive of those crimes is punished with a sentence of imprisonment from one to two years.[45]

This provision was first applied in a case against Pedro Varela Geiss, a neo-Nazi activist and owner of a bookshop, which sold, among other things, Holocaust denial publications.[46] In 1998, Geis was convicted under Article 607(2) of the Penal Code for the denial and justification of genocide as well as under Article 510(1) for the incitement to racial hatred and received a prison sentence and a fine.[47] He appealed the ruling before the Barcelona Provincial Court of Appeal, which referred it to the Spanish Constitutional Court in 2000 to seek as to whether his sentence might run counter to one of the fundamental rights guaranteed by the Constitution, namely freedom of expression.[48] In an extensive and contested judgment dated 7 November 2007, the Constitutional Court declared unconstitutional the genocide "denial" offence referred in Article 607(2) of the Code.[49]

In the merits of the judgment, the Court clarified the Spanish constitutional system, which is based on the broadest assurance of the fundamental rights, and distinguished it from the militant democracies.[50] According to the Court, the value of pluralism and the necessity of the free exchange of ideas as the cornerstone of the representative democratic system prevent any activity of the public powers aiming to "control, select, or seriously determine the mere dissemination of ideas or doctrines".[51] Thus, the freedom of expression cannot be restricted on the grounds that it serves for the diffusion of ideas or opinions contrary to the Constitution unless these effectively harm the rights of constitutional relevance.[52] In its judgment, the Court also referred the

44 Spanish Criminal Code, Organic Act 10/1995, 24 November 1995.

45 *Ibidem,* Article 607(2).

46 ECtHR, *Varela Geis v. Spain*, Press Release issued by the Registrar of the Court, ECHR 067 (2013), 05 March 2013, at p.1.

47 *Idem.*

48 *Idem*.

49 *Spanish Constitutional Court's Judgment, 7 November 2007, No. 235/2007,* at para. 9.

50 *Ibidem,* at para. 4.

51 *Idem*.

52 *Idem*.

jurisprudence of the ECtHR on the restriction of the freedom of expression and underlined that in the Spanish constitutional system there is no provision similar to Article 17 ECHR.[53]

Furthermore, in the merits, the Constitutional Court made a clear distinction between the concepts of *denial* and *justification* of genocide. According to the Court, the *denial* is "the mere expression of a point of view on specific acts, sustaining that they either did not occur or were not perpetrated in a manner which could categorize them as genocide"; whereas the *justification* "does not imply total denial of the existence of the specific crime of genocide, but relativises it or denies its unlawfulness, based on certain identification with the authors".[54]

In conclusion, the Spanish Constitutional Court ruled that mere denial of genocide, including Holocaust, cannot be criminalized since the dissemination of ideas or opinions, even they are contrary to the essence of the Constitution, are protected by the freedom of expression provisions of the Constitution.

The Court also rejected the Public Prosecutor's views that the denial of genocide objectively pursues the creation of a social climate of hostility against the genocide victims, in this case the Jewish community.[55] According to the judgment, the mere denial does not suppose direct incitement to violence and not constitute a potential danger for the legal rights protected by the regulation in question.[56] Furthermore, it clarified that simple spreading views regarding the (in)existence of specific facts, without any value judgment, falls within the scope of scientific freedom under Article 20(1)(b) of the Constitution.[57] This freedom enjoyed greater protection in the Constitution than the freedom of expression and information.[58] Thus, the inclusion of the concept "denial of genocide" to the text assumes violation of the right to freedom of expression under Article 20(1) of the Constitution.[59]

On the other hand, the Court asserted that the justification of genocide poses a special threat to the society.[60] Furthermore, the justification operates as an

53 *Ibidem,* at para. 5.

54 *Ibidem,* at para. 7.

55 *Ibidem,* at para. 8.

56 *Idem.*

57 *Idem.*

58 *Idem.*

59 *Idem.*

60 *Ibidem,* at para 9.

indirect incitement to the perpetration; thus, it can be criminalized.[61] According to the dissenting judges, this judgment is in contradiction with the European initiatives, in particular the Framework Decision.[62] These judges also criticized the Court's approach, which made a distinction between the denial and justification of genocide.

In conclusion, the Spanish Constitutional Court ruled that mere denial of genocide, including Holocaust, cannot be criminalized since the dissemination of ideas or opinions, even they are contrary to the essence of the Constitution, are protected by the freedom of expression provisions of the Constitution. Even though the judgment clarified the Court's previous opinions on the freedom of expression concerning the historical facts, it constitutes one of the surprising recent decisions on negationism in Europe with a striking timing. The Court decriminalized the denial of genocide in a period when the European countries were trying to approximate their criminal laws with regard to the penalization of these conducts. That is why some judges touched upon the inconsistency of this judgment with the EU Framework Decision in their dissenting opinions. The Court's reasons behind this judgment is also noteworthy, since it compared the Spanish legal system with the militant democracies and elaborated why the restrictions like under Article 17 ECHR cannot be applied in Spain. Last but not least, the fact that the ECtHR has already referred this judgment in its decisions on the negationism cases[63] also indicates how it is an important development for the freedom of expression.

III. ATTEMPTS FOR A UNIFIED COMBAT AGAINST NEGATIONISM

The European institutions, including the EU and the Council of Europe, have adopted several legislations to harmonize the national anti-negationism laws. This Section firstly will touch upon the previous attempts in Europe in this regard, namely the *EU Joint Action to Combat Racism and Xenophobia*,[64] and *Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems*.[65] After that, the EU Framework Decision will be at the hearth of the analysis on a unified approach against negationism within the EU.

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61 *Idem.*

62 *Ibidem,* Dissenting vote lodged by Senior Judge Jorge Rodríguez-Zapata Pérez, at para. 2.

63 ECtHR, *Perinçek v. Switzerland.*

64 EU Council, Joint Action to combat racism and xenophobia, No. 96/443/JHA, 15 July 1996.

65 Council of Europe, Additional Protocol to the Convention on Cybercrime, ETS No. 189, 28 January 2003.

A. Earlier Attempts for the Harmonization

a. Joint Action to Combat Racism and Xenophobia

Within the framework of the initiatives of the European institutions to establish an effective judicial cooperation between the EU Member States in order to combat racism and xenophobia, a *Joint Action* was adopted in 1996. This non-binding document contains the provisions of the criminalization of, among other conducts, the denialism.[66] In this context, the Joint Action constitutes the first step of the EU in the harmonization of the penalization of the negationism.

With regard to the historical facts, the document consists of two criminal acts, namely "condoning" and "denial". The former is intended for all crimes against humanity and human rights violations; whereas the latter one is only for the crimes established in the Nuremberg Tribunal Charter.[67] In other words, the Joint Action distinguished the Nazi crimes with the other historical facts by penalizing the denialism only for Holocaust.

On the other hand, the text narrowed the scope of these offences with additional requirements. In this context, the Joint Action set forth the punishment for condoning of crimes against humanity and human rights violations only in case such act is committed "for a racist or xenophobic purpose".[68] However, as regards to the denial of the Nazi crimes, the punishment can only be possible when this act "includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin".[69] Thus, according to the

66 The relevant part of the Joint Action stipulates that

"TITLE I - ***A.*** *In the interest of combating racism and xenophobia, each Member State shall undertake, in accordance with the procedure laid down in Title II, to ensure effective judicial cooperation in respect of offences based on the following types of behaviour, and, if necessary for the purposes of that cooperation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviour:*

…

(b) *public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;*

(c) *public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;".*

67 *Ibidem,* paras. Title I (A)(a) and (b).

68 *Ibidem,* para. Title I (A)(a).

69 *Ibidem,* para. Title I (A)(b).

text, mere condoning or denial does not constitute an offence. Even though the text seems to limit the borders of these offences, it provides discretionary power to Member States in deciding these additional requirements.

b. Additional Protocol to the Convention on Cybercrime

In addition to the EU attempts, the Council of Europe also started an initiative in combating against racism, xenophobia and denialism in 2008 by adopting the *Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems*. The Additional Protocol deals with, among other issues, the negationism in Article 6 which foresees the punishment of the distribution of material, through a computer system, consisting the denial, gross minimization, approval or justification of genocide or crimes against humanity as defined by international law and recognized by the Nuremberg Tribunal or of any other international court.[70] In this regard, it is a unique treaty which specifically requires the criminalization of the act of denying Holocaust or any other genocide or crimes against humanity.[71] Furthermore, this Article brought a novelty to the international human rights treaty law by for the first time extending the scope of the offence to genocides other than Holocaust.[72]

According to the Additional Protocol, the State Parties can enjoy an enlarged discretion to punish mere criminal conducts or limit the scope of the

70 Article 6 of the Additional Protocol states that:

"1. Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

2. A Party may either

a. require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise

b. reserve the right not to apply, in whole or in part, paragraph 1 of this article."

71 Pech, L., at p.40.

72 McGonagle T., "International and European Legal Standards for Combating Racist Expression: Selected Current Conundrums," in The European Commission against Racism and Intolerance (ECRI), *Expert Seminar: Combating Racism While Respecting Freedom of Expression*, Strasbourg, 16-17 November 2006, 2007, pp. 42-44, at p. 86.

criminalization of the conducts committed with the intent to incite hatred, discrimination or violence, or otherwise to reserve the right not to apply, in whole or in part, Article 6(1).[73] Thus, a State Party has an opportunity to totally ignore this Article. Despite these wide-range options with regard to the application of this provision, the ratification of the Additional Protocol is still at low-level.[74] This situation is a clear indication for the extent of the disagreement between countries and difficulty in the joint struggle against the negationism.

B. Council Framework Decision on combating racism and xenophobia

Within the context of the harmonization of the criminal law on Holocaust denial, in 2001 the European Commission proposed a draft for a *Council Framework Decision on combating racism and xenophobia,* with an objective to replace the Joint Action.[75] After a long negotiation process, the agreement between Member States could be realized in 2007 and the Framework Decision was adopted on 28 November 2008. This seven-year period indicated once again the extent of the controversy in the issue of denialism. The content of the Decision goes beyond of the scope of this paper, thus only its relevant parts concerning the negationism will be elaborated *infra*.

With the adoption of the Framework Decision, the list of offences referred in the Joint Action was expanded. According to Article 1(1) of the Decision, Member State shall take the necessary measures to ensure that the acts of publicly condoning, denying or grossly trivializing following intentional conducts are punishable: *(i)* genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court,[76] *(ii)* the crimes defined in the Charter of the Nuremberg Tribunal.[77] In the first draft submitted by the Commission, the penalization of the denial or grossly trivialization only covered the Nazi crimes.[78] During the negotiation process, this situation

73 Article 6 (2) of the Additional Protocol.

74 As of 10 July 2014, only 20 members of the Council of Europe (total number 47) have ratified the Protocol including eight states put declarations or reservations on Article 6

(Source: Council of Europe Treaty Office, available at: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=189&CM=8&DF=27/06/2014&CL=ENG).

75 Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia, at 2, COM (2001) 664 final (Nov. 29, 2001) [hereinafter Commission Proposal], available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0664:FIN:EN:PDF

76 Article 1(1)(c) of the Framework Decision.

77 *Ibidem*, Article 1(1)(d).

78 Article 4(1)(d) of the Commission Proposal.

was highly criticized by the Baltic States which propose to include publicly condoning, denying or grossly trivializing the crimes committed by Communist regime to the Framework Decision and to provide an equal treatment both for the Nazi and Communist crimes.[79] However, the Baltic States were not successful to put a direct reference of the Communist crimes to the final text, in which the scope of the crimes was broadened to all grave international crimes defined by the Rome Statute,[80] while a "special" provision was reserved for Holocaust.[81] On the other hand, the attempts of the Baltic States could only bring about the statement of the EU Council regarding its regret on the crimes of all totalitarian regimes in the declaration attached to the Framework Decision.[82]

On the other hand, the broadened scope of the crimes set out under Article 1(1)(c) and (d) was the other main reason for the years-long delay of the adoption of the Framework Decision. Some countries did not agree on the draft text due to their concerns regarding its impacts on the freedom of expression.[83] In order to resolve this impasse, several concessions on the punishment of negationism were accepted. In this context, Articles 1(1)(c) and (d) require some restrictions for the penalization of the public condoning, denial or trivialization of above-mentioned crimes. Accordingly, these conducts can only be criminalized when they are "directed against a group persons or a member of a such group defined by reference to race, colour, religion, descent or national or ethnic origin" and "carried out in a manner likely to incite to violence or hatred".[84]

In addition to this requirement, several optional limitations are presented under Article 1. In this regard, the Member States are free to rule out these options to their national legal systems. Accordingly, Article 1(2) makes possible to punish simple conduct, which *(i)* is carried out in a manner likely to disturb public order or *(ii)* is threatening, abusive or insulting.[85] The former

79 Council of the European Union, Brussels, 26 November 2008, 16351/1/08 REV 1 DROIPEN 94, Annex, Statements to be entered in the minutes of the Council at the time of adoption of the Framework Decision.

80 Article 1(1)(c) of the Framework Decision.

81 Pech, L. at p.46.

82 Annex, Statements to be entered in the minutes of the Council at the time of adoption of the Framework Decision.

83 Knechtle, J.C., "Holocaust denial and the concept of dignity in the European Union." *Florida State University Law Review, Vol.* 36, 2008, at pp 52-56, at p.44

84 Articles 1(1)(c) and (d) of the Framework Decision.

85 *Ibidem*, Article 1(2).

condition was inspired by the German legal system,[86] whereas the latter one by the British system.[87] According to Pech, the first condition was not inserted into the text in favor of the Member States, which are unwilling to prosecute the denialism, on the contrary, it facilitated "militant democracies" to maintain the penalization of the negationism when harms collective interests instead of individual interests.[88] Furthermore, the terms "likely" and "public order" are not clearly defined in the text; thus, the Member States are permitted to decide when a negation becomes "likely to disturb public order".[89]

As regards to another optional restriction, Member States can make punishable the denial or grossly trivialization of the crimes referred in paragraph (1)(c) and (d) only if they have been established by a final decision of a national or/and an international court.[90] This optional restriction does not cover the act of condoning. This provision, drawn from the French system,[91] was not found both in the first draft and in the Joint Action. Pech deemed this provision as a positive development, since it makes possible that the national or international courts, rather than the legislative bodies, can determine whether a conduct is legally described as genocide.[92] On the other hand, this clause is also criticized on the grounds that it brings about unequal treatment towards different victim-groups.[93] For instance, even though the Nazi crimes, established by the Nuremberg Tribunal, were included in the scope of the clause, the negationism on the Armenian issue is excluded on the grounds that it has never been judged by a court.[94] Furthermore, by accepting the final decisions of the national courts, this provision also paved the way for distinctive categorizations of an event in different countries.

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86 According to the statement by Germany in the minutes of Council: "Germany assumes in particular that, for the purposes of implementation, the term "offentliche Friede" as used in the relevant corresponding provisions of German criminal law is covered by the term "public order" as employed in Article 1 paragraph 2 of the Framework Decision" (Council of the European Union, Interinstitutional File: 2001/0270 (CNS), 15699/1/08 REV 1 DROIPEN 91, Brussels, 25 Nov 2008, 5). Explanatory Memorandum, p.8.

87 Article 18(1) of Public Order Act of 1986 stipulates that "a person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby."

88 Pech, L. at p.47.

89 *Idem*.

90 Article 1(4) of the Framework Decision.

91 Article 9 of the Gayssot Law.

92 Pech, L., at p. 47.

93 Lobba, P., "Punishing Denialism Beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends", *New Journal of European Criminal Law*, Vol:5.1, 2014, pp. 58-78, at p. 67.

94 *Idem.*

In addition to these restrictions and options, a specific provision on the constitutional rules and fundamental principles was inserted into the Framework Decision during the negotiation process in order to further secure the freedom of expression.[95] In this regard, Article 7 ensures that the Framework Decision respects the fundamental rights, as enshrined in the EU Treaty, which result from the constitutional traditions or rules of the Member States.[96] Some scholars found the first paragraph of this Article legally unnecessary on the grounds that as hierarchically subordinate, the framework decisions never prevail over the European constitutive treaties.[97]

Commentary on the Framework Decision

Even though it has been six years after the adoption of the Framework Decision, the necessity of the harmonization of the criminal laws on negationism is still a matter of debate due to the several reasons.

Even though it has been six years after the adoption of the Framework Decision, the necessity of the harmonization of the criminal laws on negationism is still a matter of debate due to the several reasons. Firstly, the wider language of the text can cause arbitrary and chilling effects on freedom of expression. In this regard, the concepts of "condoning" and "grossly trivializing" have very ambiguous limits that make possible for States to adopt relevant criminal laws in line with their national priorities. The relevant EU institutions should clearly determine the scope of these terms with a speech-protective manner in order to prevent hazardous interpretations targeting free speech in different Member States.

Furthermore, this Decision encourages the States to extend the criminalization beyond the Holocaust denial to other grave crimes. The "slippery slope effect" of the Decision has paved the way for new memory laws concerning the still-debated historical atrocities, such as the Armenian massacre and the Ukrainian famine.[98] These memory laws impose additional restrictions on the freedom of expression of historians, thus negatively affect them to make academic researches on these contentious historical claims.

As another problem, some scholars criticize the prohibition of the Holocaust denial in different countries which Nazism does not have indigenous

95 Article 7 of the Framework Decision.

96 *Idem.*

97 Lobba, P., at p. 67; Pech, L., at p. 49.

98 Pech, L., at p. 50.

background.[99] According to these scholars, provisions similar to the Framework Decision are more effective and result-oriented when adopted on the national level rather than within the international or regional framework.[100] For instance, the anti-negationist punishments for Holocaust should be applied in countries, which are responsible for these sufferings, such as Germany.

In conclusion, the wider language and above-mentioned optional provisions of the Decision have resulted in diverse national implementations rather than a joint approach within the EU. These findings are also proven by the implementation report of the Framework Decision submitted by the European Commission.[101] All in all, even though the original aim, namely the harmonization of criminal acts, has not been realized, the Framework decision has served for memory laws to become widespread in all EU Member States and increased the concerns for the future of the freedom of speech in the region.

IV. INTERNATIONAL AND REGIONAL APPROACHES ON MEMORY LAWS

With regard to the European countries, the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) are two main international organizations, monitoring the restrictions on the freedom of expression. Both organizations have important legislations and rulings concerning the issue of hate speech, in particular negationism, which provide an insight on the memory laws and their impacts on the free speech in Europe. In this framework, this chapter will elaborate the approaches of the HRC and the ECtHR, respectively, on the justifiability of the interferences of national authorities on freedom of expression especially in the denialism cases. In the ECtHR part, *Perinçek v. Switzerland* case will be analyzed in the light of the jurisprudence of the Court.

A. The Approach of the Human Rights Committee

Article 19(2) of the ICCPR guarantees each person's right to freedom of expression in its various types, by stating that: "[e]veryone shall have the right

99 Knechtle, J.C., at p.1.

100 *Idem.*

101 European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, 27 January, 2014 COM(2014) 27 final.

to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[102]

According to the Covenant, the exercise of the right to freedom of expression carries along with it special duties and responsibilities; thus, this right is not absolute and can be restricted under Article 19(3). However, any restriction on the freedom of expression must meet three criteria: the restrictions "shall only be such as are *(1)* provided by law and are *(2)* necessary; *(3)* [and for one of the following purposes] *(i)* for respect of the rights or reputations of others; *(ii)* for the protection of national security or *(iii)* of public order (ordre public), or *(iv)* of public health or *(v)* morals."[103]

The Human Rights Committee further established that the restrictions "must conform to the strict tests of necessity and proportionality ... Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".[104] Furthermore, limitations must be interpreted strictly in a way that would not endanger the essence of the right itself.[105] Moreover, the relations between rights and restrictions and between norms and exceptions must not be reversed.[106]

Article 19 should be read with Article 20 which is accepted by some scholars as practically the fourth paragraph to Article 19.[107] Article 20 does not provide a specific right but additional restrictions on other rights, in particular the right to freedom of expression, by stipulating that *i)* any propaganda for war and *ii)* any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence can be prohibited by law.[108]

According to the *travaux préparatoires*, Article 20(2) was drafted as a

102 Article 19 (2) of the ICCPR.

103 *Ibidem,* Article 19 (3)

104 HRC, *General comment no. 34 on Article 19, Freedoms of opinion and expression, 12 September 2011, No. CCPR/C/GC/34.* at para 22.

105 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), Principle 3; Human Rights Committee, *General Comment No. 34*, note 4, para 21.

106 HRC, *General Comment No. 34*, at para 21.

107 Partsch, K.J., 'Freedom of Conscience and Expression, and Political Freedoms', in Henkin L. (eds.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York, 1981. pp. 209-245, at p. 227.

108 Article 20(2) of the ICCPR.

response to the horror of the Nazi racial hatred campaigns.[109] During the drafting procedure, several issues were at the forefront and the chief among them was the wording of the terms "incitement", "hostility" and "hatred as well as the potential governmental abuse of the restrictions on the freedom of expression.[110] Accordingly, some delegations argued for the need for an additional article since the limitation clause in Article 19(3) was deemed insufficient for the prevention of incitement to racial hatred.[111] Furthermore, the issue of whether to condemn only incitement to violence or incitement to hatred as well was also extensively debated.[112] The proposal that the phrase "hatred or violence" be used instead of "hatred and violence" was yet another controversial agenda item of the drafting procedure.[113]

Even though the ambiguous character of Article 20(2) was criticized by the scholars,[114] the Committee failed to clarify the phrase "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" in its General Comment No.11 on Article 20.[115] On the other hand, the HRC asserted in this General Comment that the prohibitions required under the Article "are fully compatible with the right to freedom of expression as contained in Article 19, the exercise of which carries with it special duties and responsibilities".[116]

Moreover, the General Comment No.34 on Article 19 also elaborated the relationship between Article 19 and Article 20.[117] According to the Comment, the acts covered by Article 20 are subject to restriction pursuant to Article 19(3); in other words, a limitation that is justified on the basis of Article 20 must also comply with Article 19(3).[118] This rule was based on *Ross v. Canada* decision.[119] Which is related to a former teacher, who was appointed to a non-

109 Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, N.P. Engel Publisher*, Kehl,* 2005, at p. 475.

110 Farrior, S., "Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech", *Berkeley Journal of International Law,* Vol:14, 1996, pp. 1-98, at. pp. 25-27.

111 *Ibidem,* at p. 470.

112 *Ibidem,* at p. 25.

113 *Ibidem,* at p. 26.

114 Nowak, at p. 475.

115 HRC, *General Comment no. 11 on Article 20, Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred,* 29 July 1983, No. HRI/GEN/1/Rev.9 (Vol. I).

116 *Idem.*

117 HRC, General Comment No. 34, at para. 50-52.

118 *Ibidem,* at para. 50.

119 *Ross v. Canada*, 18 October 2000, Communication No. 736/1997 (UN Human Rights Committee) para 10.6.

teaching position since in his spare time he published books and pamphlets, and made public statements with anti-Semitic views. In this case, the Committee adopted an integrated approach by invoking Article 20 as an additional argument in the interpretation of the limitation clause in Article 19(3).[120] Furthermore, the General Comment makes a distinction between the acts addressed in Article 20 and Article 19(3). In this regard, the acts addressed in the former indicate the specific response required from the state, namely the prohibition by law.[121] Thus, only in this respect, Article 20 may be deemed as *lex specialis* with regard to Article 19.[122]

With regard to Holocaust denial, the *Faurisson v. France* case constitutes the cornerstone case in the jurisprudence of the HRC.[123] In addition to the decision of the Committee, the individual concurring opinions attached to this decision are also significant in order to understand the approach of the Committee on the issue of the restriction on the freedom of expression. Robert Faurisson was a former professor of literature at the Sorbonne University.[124] In one of his interviews published in a French magazine, even though he did not contest the use of gas for purposes of disinfection, he doubted the existence of gas chambers for extermination purposes in Nazi concentration camps.[125] Faurisson also argued that the Gayssot Law promoted the Nuremberg trial and judgment to the status of dogma by imposing penalization.[126] After the publication of the interview, he was convicted of the crime of contestation of the existence of the crimes against humanity on the basis of the Gayssot Law.[127]

In his petition submitted to HRC, Faurisson argued that the Gayssot Law infringed his right to freedom of expression and academic freedom in general, and constituted unacceptable censorship, obstructing and penalizing historical research.[128] As a response to this petition, the French government put forward that it merely fulfilled its international obligations by punishing the denial of crimes against humanity.[129] In the beginning of the examination of merits, the HRC strikingly conceded that the application of the Gayssot Law may lead

120 Nowak 478.

121 HRC, General Comment No. 34, at para. 51.

122 *Idem*.

123 HRC, *Faurisson v. France,* 16 December 1996, No. CCPR/C/58/D/ 550/1993.

124 *Ibidem,* at para. 2.1.

125 *Idem.*

126 *Ibidem*, at para. 2.2.

127 *Ibidem*, at para. 2.6.

128 *Ibidem*, at para. 3.1.

129 *Ibidem*, at para. 7.7.

to decisions or measures incompatible with the ICCPR.[130] However, contrary to the expectations, the Committee also noted that it cannot criticize the abstract laws enacted by States parties and its mere task is to establish whether the requirements for the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it as such.[131] On the other hand, during the examination of merits, the HRC took into account the public debates in France and other European countries concerning the anti-negationism legislations.[132]

The Committee applied a three-part test for the analysis of the restrictions on his right to freedom of expression. As regards to the first criteria, the HRC found that the restriction had been indeed provided by law. The Committee also expressed its satisfaction that the Gayssot Law, which was applied to this case, was in compliance with the Covenant.[133] Secondly, with regard to the purpose condition, the Committee held that the restriction was permissible under Article 19(3)(a) on the grounds that the statements of Faurisson triggered the anti-semitic feelings.[134] Finally, in terms of the necessity of the interference, the HRC shared the views of the French authorities contending that the Gayssot Law serves for the combat against racism and anti-semitism since the denial of Holocaust is the principal vehicle for anti-Semitism.[135] Considering all these findings, the Committee concluded that the restriction was necessary; thus, it found no violation of his right freedom of expression.[136]

On the other hand, this decision should be read with the individual concurring opinions to understand its background and the motivations of the Committee members in holding this decision. In these opinions issued by seven Committee members, the potential threats of the broad scope of the Gayssot Law were emphasized.[137] In one of the noteworthy opinions by Elizabeth Evatt and David Kretzmer which was co-signed by Eckart Klein, it was asserted that the Gayssot Law was "phrased in the widest language and would seem to prohibit publication of *bona fide* research" regarding the matters decided by the Nuremberg Tribunal.[138] According to them, the restrictions on the basis

130 *Ibidem*, at para. 9.3.

131 *Idem.*

132 *Ibidem*, at para. 9.2.

133 *Ibidem*, at para. 9.5.

134 *Ibidem*, at para. 9.6.

135 *Ibidem*, at para. 9.7.

136 *Ibidem*, at para. 10.

137 *Ibidem*, Individual opinion by Nisuke Ando, at para.1; Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, at para.9; Individual opinion by Rajsoomer Lallah, at paras. 6-7; Individual opinion by Cecilia Medina Quiroga, at para.2.

138 *Ibidem*, Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, at paras. 7-8.

of the Gayssot Law did not meet the proportionality test. Furthermore, the causality could not be proved between the liability and the intent of the author as well as the tendency of the publication to incite to anti-Semitism.[139] Lastly, the above-mention members also argued that a less drastic provision could realize the legitimate aim of this law without turning historical facts into a legislative dogma.[140]

On the contrary to the concurring opinions, the Committee did not clearly criticize the implications the Gayssot Law on the freedom of expression in *Faurisson v. France* decision. Furthermore, according to some scholars, although this decision was clearly persuasive, it did not provide a clear doctrinal basis for the examination of the compliance of the Holocaust denial laws with freedom of expression guarantees.[141] In response to these criticisms, the HRC elaborated its views concerning such laws in the General Comment No.34 by stating that: "[l]aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events".[142] This decision was based on the concluding observations on Hungary, in which the Committee expressed its concerns that the evolution of the memory laws in this country would pave the way for the punishment of a wide range of views on the post-World War II history.[143] Thus, the Committee recommended Hungary to review its memory laws in compliance with Articles 19 and 20.[144]

In conclusion, the Committee elaborated its views regarding the interference on freedom of speech in a unique complaint by Faurisson. Even though the HRC provided a clue on the incompatibility of the Gayssot Law, it missed an important chance to establish an international legal framework for the justifiability of memory laws. Such an obligatory framework given by one of the most comprehensive international bodies would have served to prevent the abusive and hazardous applications of memory laws criminalizing especially the historical and scientific statements. Nevertheless, the adoption of the General Comment No.34 can be considered as an important

139 *Ibidem*, at para. 9.

140 *Idem.*

141 Williams, A.M. & Cooper, J., "Hate speech, holocaust denial and international human rights law", *European Human Rights Law Review,* Vol:6, 1999, pp. 593-613, at p.608.

142 HRC, General Comment No. 34, at para. 49.

143 HRC, Concluding observations on Hungary, 16 November 2010, No. CCPR/C/HUN/CO/5, at para. 19.

144 *Idem.*

development in this regard. With this comment, the Committee indicated its support for the case-by-case analysis of the statements instead of the general prohibition of them, in particular the denialist ones. As another note-worthy aspect of the approach of the HRC, unlike the abusive clause of the ECtHR, which will be shown *infra*, Article 20 does not provide content-based limitations, but foresees the examination of the necessity of interference by taking into account the contextual elements. Finally, it was also a positive development that the Committee touched upon the Hungarian memory laws in its concluding observations. In this context, it is of crucial importance for the freedom of expression that this approach should be standardized and applied to all memory laws in different countries' concluding observations.

According to the Court, "[f]reedom of expression constitutes one of the basic conditions for the progress of democratic societies and for the development of each individual. It is applicable not only 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

B. The Approach of the European Court of Human Rights

As a regional monitoring body, the European Court of Human Rights, with its comprehensive binding case-law, is an important key actor in Europe to balance the freedom of expression and hate speech. According to the Court, "[f]reedom of expression constitutes one of the basic conditions for the progress of democratic societies and for the development of each individual. It is applicable not only 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[145] These statements are of significance in terms of indicating how greatly the Court values the protection of the right to freedom of expression. The European Convention on Human Rights (ECHR) reserves its Article 10 for the protection of freedom of expression.

On the other hand, the European Convention has not come up with a precise definition for the hate speech. However, the jurisprudence of the Court has established certain parameters making it possible to define characteristics of

145 ECtHR, *Handyside v. United Kingdom,* 7 December 1976, (Appl. no. 5493/72), at para. 49.

hate speech and to exclude it from the protection of the freedom of expression.[146] In this regard, the Court has only referred to "[a]ll forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)".[147] The Court deems the negationism, in particular Holocaust denial, as a specific form of hate speech, since it constitutes a denial of crimes against humanity, which is one of the most serious forms of racial defamation (of Jews), and of incitement to hatred.[148] On the other hand, hate speech is an "autonomous" concept, which makes the ECtHR unbound by the national courts' interpretations.[149] Thus, the ECtHR may rebut classifications adopted by domestic courts, or find certain statements as hate speech when national authorities ruled out this classification.[150]

In analyzing the justifiability of such limitations on the freedom of expression, the ECtHR pursues two different approaches either by applying the restrictions set out in the second paragraph of Article 10 or by invoking Article 17 concerning the prohibition of the abuse of the Convention rights. The Court provides broader protection under Article 17 against expressions amounting the denial of the Holocaust and other historical atrocities during World War II, whereas other types of hate speech are assessed under Article 10. In the following sections, the Court's approaches to the restrictions under Articles 10 and 17 will be elaborated respectively.

a. Restrictions under Article 10 of the Convention

As stipulated in Article 10(2), right to freedom of expression is not absolute: "[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for

146 ECtHR, Fact Sheet on Hate Speech, July 2013, at p.1. Available at: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

147 ECtHR, *Gunduz v. Turkey*, 4 December 2003, (Appl. no. 35071/97), at para. 40; ECtHR, *Erbakan v. Turkey,* 6 July 2006, (Appl. no. 59405/00), at para. 56.

148 ECtHR, *Garaudy v. France*, 24 June 2003, (Appl. no. 65831/01), at p. 22.

149 Weber, A., "The case law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance." In The European Commission against Racism and Intolerance (ECRI), *Expert Seminar: Combating Racism While Respecting Freedom of Expression,* Strasbourg, 16–17 November 2006, 2007, at p. 11. Tulkens, at p. 98.

150 *Idem*. See also ECtHR, *Gunduz v. Turkey* at para. 43; ECtHR, *Sürek v. Turkey,* 8 July 1999, (Appl. no. 24122/94): partly dissenting opinion of Judge Palm.

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".[151] According to this provision, the domestic interference on an expression can be justified on the basis of three conditions; *i)* whether it is prescribed by law, *ii)* if it pursues a legitimate aim and *iii)* whether it is necessary in a democratic society.[152]

As regards to the criteria of the "*prescribed by law*", the law must be adequately accessible and formulated in a manner which is foreseeable, but not necessary to be absolutely precise.[153] In other words, this condition requires that "the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give adequate protection against arbitrariness."[154] As the second condition, the interference must pursue at least one of nine "*legitimate aims*" listed under Article 10 (2): *i)* the protection of national security, *ii)* the protection of territorial integrity, *iii)* the protection of public safety, *iv)* the prevention of disorder or crime, *v)* the protection of health, *vi)* the protection of morals, vii) the protection of the reputation or rights of others, *viii)* the prevention the disclosure of information received in confidence, or *ix)* the maintenance of the authority and impartiality of the judiciary.[155] As for the issue of the negationism, the interests of national security or public safety, the prevention of disorder or crime and the protection of the reputations and rights of others are the most relevant legitimate aims.

Finally, according to the case-law, the "*necessary*" nature of the public interference in a democratic society is at the key criteria for the Court when assessing the compatibility with the ECHR. The jurisprudence indicates that the adjective "necessary" implies the existence of a "pressing social need".[156] In the context of the guiding principles for the necessity test established by the ECtHR, the national authorities' interference must be assessed as a whole, including the content of the remarks held against the applicants and the context in which they made them.[157] In particular, the Court must determine whether the interference was "proportionate to the legitimate aims pursued" and whether the reasons put forward by the national authorities for justification were "relevant and sufficient".[158] In doing so, the Court has to

151 Article 10(2) of the ECHR.

152 *Idem.*

153 ECtHR, *The Sunday Times v. United Kingdom*, 26 April 1979, (Appl. no. 6538/74), at para. 49.

154 ECtHR, *Dzhavadov* v. *Russia*, 27 September 2007, (Appl. no. 30160/04), at para. 36.

155 Article 10(2) of the ECHR.

156 ECtHR, *Lehideux and Isorni vs France,* 23 September 1998, (Appl. no. 24662/94), at para. 51.

157 *Idem.*

158 *Idem.*

assure whether the national authorities applied standards in conformity with the principles set out under Article 10 as well as whether they based themselves on an acceptable assessment of the relevant facts.[159] On the other hand, the Court also takes into account that the States enjoy a certain margin of appreciation as to the manner in which they would implement the ECHR.[160] However, the discretionary power of the States is not unlimited and subject to a European supervision.[161]

In the light of the case-law of the ECtHR, it can be inferred that there is no established element for the limits of the margin of appreciation.[162] However, the intensity of the scrutiny of the Court is adjusted depending on the nature of the speech.[163] For instance, when a political speech is at stake or when the press is involved, the interference of the domestic authorities is strictly examined, which paves the way for the *de facto* removal of the margin of appreciation.[164] However, for more sensitive speeches, such as racist or blasphemous, the Court normally assumes that national authorities are in a better position to precisely determine the appropriate scope of the freedom of expression, since the limits may change from country to country as well as even within a single country.[165]

b. Restrictions under Article 17 of the Convention

The Court can also apply Article 17 of the Convention (abuse clause) in its examination of the legitimacy of the interference on the freedom expression. Article 17 provides that: "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."[166]

The *travaux préparatoires* of the ECHR indicates that Article 17 was

159 *Idem.*

160 *Idem.*

161 ECtHR, *Handyside v. United Kingdom,* at para. 49.

162 Weber, A., "The case law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance." In The European Commission against Racism and Intolerance (ECRI), *Expert Seminar: Combating Racism While Respecting Freedom of Expression,* Strasbourg, 16–17 November 2006, 2007, at p.100.

163 Pech, L. at p. 28.

164 *Idem.*

165 *Idem.*

166 Article 17 of the ECHR.

incorporated to the Convention as a response to threats against democracy by the totalitarian regimes of Nazism, fascism and communism.[167] The jurisprudence of the Court and the underlying ideas of the Convention indicates that Article 17 was aimed to serve as a "render of last resort" in cases where the restriction clauses could no longer be applied or might be deemed insufficient.[168] Notwithstanding, the abuse clause cannot be invoked independently; hence, its application is always linked to another Conventional right which is considered to be abused.[169] In practice, the abuse clause has been mostly applied in cases dealing with the right to freedom of expression.[170]

On the other hand, the ECtHR and formerly European Commission of Human Rights (hereafter "Commission") have applied the abuse clause either directly or indirectly.[171] In its direct application, certain expressions are removed from the protection of Article 10 with a *guillotine effect*; whereas in its indirect application, Article 17 provides as an interpretative aid when assessing the necessity of State interference under Article 10(2).[172] In the cases of direct application of law, Article 17 eliminates the need for a "balancing process" under Article 10,[173] thus decisions are mostly taken *prima facie* and are content-based, without focusing on contextual factors.[174] In other words, by applying Article 17, the national authorities can justify the restriction based merely on the content of the speech. Furthermore, even though the burden of proof for any restriction under Article 10 is on the State, the content-based limitations with the invocation of the abuse clause can shift away this burden on to what it is intervening against.[175] This shift paves the way for a loss of proportionality; thus, the State does not require to prove a pressing social need.[176]

As regards to the cases concerning the criminalization of the negationism, the

167 Cannie, H., and Voorhoof, D., "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?", *Netherlands Quarterly of Human Rights,* Vol. 29/1, 2011, at p.56; See also the *Travaux Preparatoires* (1949, 1st session, pp. 1235, 1237 and 1239):

168 Gliszczyńska-Grabias, A., "Penalizing Holocaust Denial: A View from Europe", *Global Antisemitism: A Crisis of Modernity,* Vol.3, 2013, at p.59.

169 Cannie & Voorhoof, at p.58;

170 *Idem.*

171 *Ibidem,* at p.67.

172 *Idem.*

173 Keane, D., 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights', *Netherlands Quarterly of Human Rights*, Vol. 25, No. 4, 2007, at p.643.

174 Cannie & Voorhoof, at p.67.

175 Keane, D., at p. 656.

176 *Idem.*

Court and the former Commission have examined the interference of national authorities on the right to freedom of expression with an evolving approach which is categorized with three main phases.[177] During the first stage of 1980s, in a limited number of cases brought before the Commission, it found the restrictions justifiable by only applying Article 10(2).[178] In these cases, the Commission did not invoke Article 17. In *X. v. Germany* case, which is one of the main cases in the first phase, the applicant had displayed pamphlets on a notice board located at his garden fence describing Holocaust as a "mere invention", "unacceptable lie" and a "Zionist swindle".[179] His neighbor of Jewish origin, whose grandfather had died in Auschwitz, filed a civil lawsuit against the applicant.[180] The German legal authorities had punished these acts of Mr. X.[181] The Commission also upheld this conviction and found the application of Mr. X inadmissible on the grounds that the prohibition was necessary in a democratic society for the protection of the reputation of others within the meaning of Article 10(2).[182]

With regard to the second stage, *Kühnen v. Federal Republic of Germany* constitutes one of the building blocks of the Strasbourg case-law on Holocaust denial.[183] Kühnen was a leader in an organization that attempted to reinstitute the prohibited Nazi Party in Germany.[184] He had advocated fight for an independent, socialist Greater Germany, therefore, prepared and disseminated various publications in this context.[185] After the criminal proceedings instituted against him, Kühnen was convicted of the dissemination of propaganda directed against basic order of democracy and freedom and the notion of the mutual understanding among peoples.[186] The Commission held that the application is manifestly ill-founded on the grounds that the interference was "necessary in a democratic society".[187] With this judgment, the Commission entered a new stage and started to indirectly invoke Article 17 as an

177 See Cannie & Voorhoof, at p.60; Lobba, P., Holocaust Denial Before the European Court of Human Rights: Evolution of an Exceptional Regime, *European Journal of International Law,* Forthcoming, 2014, at p. 4. Available at SSRN: http://ssrn.com/abstract=2428650.

178 ECommHR, *X. v. Federal Republic of Germany*, 16 July 1982, (Appl. no. 9235/81); ECommHR, *T. v. Belgium*, 14 July 1983, (Appl. no. 9777/82).

179 ECommHR, *X. v. Federal Republic of Germany,* at pp.194-195.

180 *Ibidem,* at p.195.

181 *Ibidem,* at p.196.

182 *Ibidem,* at p.198.

183 ECommHR, *Kuhnen* v. *Federal Republic of Germany*, 12 May 1988, (Appl. no. 12194/86).

184 *Ibidem,* at p.1.

185 *Idem.*

186 *Ibidem,* at p.2.

187 *Ibidem,* at p.6.

"interpretative aid" in the analysis of the necessity of State interference under Article 10(2).[188] As an additional breakthrough of this case, the Commission extended the scope of the abuse clause to every activity, which is "contrary to the text and spirit of the Convention".[189]

Finally, with the judgment in *Lehideux and Isorni v. France* case, the Strasbourg case-law has evolved into a new stage. In this judgment, the ECtHR established the conditions of the direct application of the abuse clause in the negationism cases.[190] The applicants gave a political advertisement in *Le Monde* calling the French people to rehabilitate the memory of the head of the pro-German Vichy Government, Philippe Pétain, and to have the judgment sentencing him to death and to forfeiture of his civic rights overturned.[191] The two applicants were convicted of publicly defending war crimes and crimes of collaboration with the enemy.[192] The ECtHR found that although the text could be regarded as polemical, the applicants had not attempted to deny or revise what they themselves had referred to in their publication as "Nazi atrocities and persecutions" or "German omnipotence and barbarism".[193] As one of the most striking point of this judgment, the Court ruled that the negation or revision of "clearly established historical facts" including Holocaust is removed from the protection of Article 10 by Article 17.[194] As such, the case in hand did not belong this category of clearly established historical facts.[195] Furthermore, the interference by public authorities could not be justified as necessary in a democratic society.[196] Thus, the ECtHR rejected the respondent State's request for the application of Article 17 and held that there had been a violation of Article 10 ECHR.[197] On the other hand, taking into consideration the forty-year period between the events in dispute and the publication, the Court also noted that "the lapse of time [made] it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously".[198]

As another point worth mentioning for this case is Judge Jambrek's concurring

188 Cannie & Voorhoof, at p.60.

189 ECommHR, *Kuhnen v. Federal Republic of Germany,* at p. 5.

190 ECtHR, *Lehideux and Isorni* vs *France,* 23 September 1998, (Appl. no. 24662/94).

191 *Ibidem,* at paras.9-12.

192 *Ibidem,* at para.22.

193 *Ibidem,* at para.52.

194 *Ibidem*, at para. 47.

195 *Idem*.

196 *Ibidem,* at para.58.

197 *Idem.*

198 *Ibidem,* at para. 55.

opinion which clarified the application of Article 17 which requires that "[t]he aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others".[199] The Judge also confirmed that "[t]he requirements of Article 17 are strictly scrutinized, and rightly so".[200]

The principles on negationism established in *Lehideux and Isorni* were firstly applied in *Garaudy v. France* case, concerning a book entitled "The Founding Myths of Modern Israel" which resulted in the criminal conviction of former politician Garaudy for the offences of disputing the existence of crimes against humanity, defamation in public of a group of persons (the Jewish community) and incitement to racial hatred.[201] The ECtHR found the application incompatible *ratione materiae* with regard to Article 17 on the grounds that the content of his remarks had amounted to the Holocaust denial.[202] In the merits of the judgment, the Court pointed out that disputing the existence of clearly established historical events do not constitute a "historical research akin to a quest for the truth"; on the contrary, the real purpose was to rehabilitate the National Socialist regime and accuse the victims for the falsification of history.[203] That is the reason why the Court referred the denial of the crimes against humanity as "one of the most serious forms of racial defamation of Jews and of incitement to hatred".[204] In this regard, the Court deemed the conducts at the issue manifestly incompatible with the fundamental values of the Convention; thus, directly applied Article 17 with a "guillotine effect" and held that the applicant was not entitled to rely on Article 10.[205] On the other hand, according to Lobba, this judgment implicitly

The principles on negationism established in Lehideux and Isorni were firstly applied in Garaudy v. France case, concerning a book entitled "The Founding Myths of Modern Israel" which resulted in the criminal conviction of former politician Garaudy for the offences of disputing the existence of crimes against humanity, defamation in public of a group of persons (the Jewish community) and incitement to racial hatred.

199 *Ibidem*, Concurring opinion of Judge Jambrek, at para. 2.

200 *Idem.*

201 ECtHR, *Garaudy v. France,* 24 June 2003, (Appl. no. 65831/01).

202 *Ibidem,* at pp. 23-29.

203 *Ibidem*, at p. 22.

204 *Idem.*

205 *Idem.*

restricted the scope of Article 17 with a requirement of a racist or anti-Semitic intent, or an aim of reinstitution of the Nazi regime, in addition to the existence of the denial of established historical facts.[206]

c. Commentary of the ECtHR's approach

In its judgments, the Court has applied Article 10 or Article 17 (abuse clause) to analyze the legitimacy of the interferences on freedom of expression. Although it has been rarely invoked, the abuse clause is considered as a threat on freedom of expression with chilling effect, since it excludes the protection of Article 10. By applying a content-based approach on the basis of Article 17, the interventionist States do not need to justify the necessity and proportionality of the restriction. This results in the loss of the Court's control for the examination of the limitations.

On the other hand, according to the jurisprudence of the Court, the abuse clause has been applied to the convictions on the denial of "clearly established historical facts", amounting the incitement to hatred, such as denial of the existence of genocide, crime against humanity and other atrocities. Despite this framework drawn by the case-law, the ambiguity still exists for the scope of "clearly established facts". This paves the way for the questions which evidence is enough for the Court to decide when historical facts are clearly established and who decides for this categorization of the historical facts. Furthermore, in line with this categorization, the ECtHR makes a distinction between the Nazi crimes and other atrocities. This distinction also results in another problem, namely inequality between the victims of different historical atrocities.

In order to prevent the States from abusive applications of Article 17 and the unfairness between the sufferings of the victims, it is important for the Court to equally assess all cases under Article 10(2) rather than the two-tiered approach regardless of their categories. In this regard, the ECtHR should analyze all relevant factors regarding the speech in dispute and measures, such as content, intent, context, impact and the proportionality of the limitations. It may be preferable if the Court will adopt a method, similar to the European Commission's, namely the examination of all cases on the basis of Article 10 with an interpretive aid of Article 17.

206 Lobba, P., Holocaust Denial Before the European Court of Human Rights: Evolution of an Exceptional Regime, at p.8.

Additionally, the vagueness in the scope of margin of appreciation of the States may pave the way for the arbitrary applications. According to the case law, discretionary powers of States can change with regard to the content and sensitivity of speech, such as political, historical, legal, racial or blasphemous. Thus, the Court should establish the concrete standards for the categorization of speeches in terms of their content and sensitivity.

V. ANALYSIS ON JUDGMENT OF *PERİNÇEK V. SWITZERLAND*

In order to examine whether the Court has been consistent with its approach in its latest rulings regarding freedom of speech, this part will specifically center around the judgment delivered on 17 December 2013 in the case of *Perinçek v. Switzerland.*[207] The case constitutes one of the key turning points of the anti-denialist case-law of the Court, since it is the first case concerning the negation of a historical claim other than Holocaust. In its judgment, the Chamber of the ECtHR held, by five votes to two, that Switzerland had violated the right to freedom of expression of Perinçek. The judgment of the Chamber is comprehensive with 80 pages, including 26 pages of separate opinions.[208] It is worth mentioning that as per today, this judgment is not final, since the Swiss government referred the case to the Grand Chamber on 17 March 2014 under Article 43 of the Convention. Finally, the Grand Chamber panel of five judges accepted the referral on 2 June 2014.[209]

A. Principal facts

The applicant, Doğu Perinçek, is a Turkish national and the Chairman of the Turkish Workers' Party. In his speeches during various conferences in different cities of Switzerland in 2005, Perinçek publicly denied that the Ottoman Empire had perpetrated the crime of "genocide" against the Armenian people in 1915 and the following years.[210] Furthermore, he had described the idea of the Armenian genocide as an "international lie".[211] On the basis of a criminal complaint against him filed by the "Switzerland-Armenia" association, the Lausanne Police Court found Perinçek guilty of genocide denial with a racist

207 ECtHR, *Perincek v. Switzerland,* Appl. no. 27510/08, 17 December 2013.

208 The judment is only available in French, however unoffical English translation is available at: http://www.avim.org.tr/uploads/raporlar/Perin%C3%A7ekEng_1.pdf

209 ECtHR, Press Release issued by the Registrar of the Court, Grand Chamber Panel's decisions, ECHR 158 (2014), 03 June 2014.

210 ECtHR, *Perincek v. Switzerland,* at para. 7.

211 *Idem.*

and nationalistic motivation in 2005.[212] The Vaud Cantonal Court and the Federal Tribunal respectively rejected Perinçek's appeal and confirmed the verdict of the court of the first instance in 2007.[213] In the Swiss courts' views, the Armenian genocide, similar to Holocaust, was a proven historical fact, set out under Article 261*bis* of the Swiss Criminal Code.[214]After exhausting domestic remedies, Perinçek brought the case before the ECtHR by alleging that the Swiss authorities had violated his right to freedom of speech. On the other hand, the Turkish Government also submitted written comments as a third-party intervener in the case.[215]

B. Judgment

The Court firstly examined the admissibility of the application by assessing whether Perinçek's statements had abused the rights in the Convention and, therefore, could be excluded from the protection of freedom of expression on the basis of Article 17, even though the Swiss government did not have any request from the Court on this direction. In its submission, the Turkish government argued that the application could not be found inadmissible on the grounds of the abuse of rights.[216]

In this part, the Court firstly reminded that the principle, which the acts of upsetting, shocking or disturbing ideas are also protected by Article 10, is applied in cases involving, as with the case under scrutiny, historical debate in a domain in which certainty is unlikely and the controversy still remains.[217] In this regard, although the ECtHR acknowledged that some of the statements of Perinçek were provocative, it noted that he had never discussed the existence of the massacres and deportations during the years in question but only denied the legal categorization of these events as "genocide".[218] Referring its case-law, the ECtHR reiterated that the boundaries for the invocation of the abuse clause are related to the issue whether the purpose of the statements amount to the incitement to hatred or violence.[219] The Court made clear that in the case in hand the dismissal of a legal categorization as "genocide" did

212 *Ibidem,* at para. 8.

213 *Ibidem,* at para. 11.

214 *Ibidem,* at para. 12.

215 *Ibidem,* at para. 5.

216 *Ibidem,* at para. 50.

217 *Ibidem,* at para. 51. See, ECtHR, *Lehideux and Isorni*, at para. 55.

218 *Idem*.

219 *Ibidem,* at para. 52.

not imply *per se* the incitement to hatred against the Armenian people.[220] Considering that Perinçek did not abuse his right to openly discuss such sensitive issues and not use his right to freedom of expression for the purposes contrary to the text and spirit of the Convention, the ECtHR found the case admissible; thus, it did not need to apply Article 17 and decided to examine the case under Article 10.[221]

In the merits section, the Court applied the three-step test to determine whether Perinçek's conviction, which was regarded as an interference on his freedom of expression, could be legally justifiable under Article 10(2). As regards whether the interference was *"prescribed by law",* the Court considered that the term "genocide", as used in the Swiss Criminal Code, might be incompatible with the precision requirement of Article 10(2).[222] However, taking into account his background, as a doctor of laws and a well-informed political figure, the ECtHR found that the penalization was foreseeable by Perinçek.[223] Thus, the first condition was met.

With regard to the second criteria, the respondent State put forward the protection of order as well as the protection of the reputation and the rights of others as the "*legitimate aims"* for the conviction of Perinçek.[224] According to the ECtHR, although the Swiss authorities could not sufficiently prove that Perinçek's statements threatened the public order, the impugned measure was seemed to aim at protecting the rights of others, namely the dignity of the families and friends of Armenian victims.[225]

As the last but not the least step, the Court examined whether the interference was "*necessary in a democratic society"*, i.e. whether it was justified by a "*pressing social need*". Before analyzing this condition, the Court underlined that it is not incumbent to arbitrate contentious historical questions or decide on legal categorization of the massacres and deportations perpetrated against the Armenian people; however it can only examine whether the precautions were proportional to the pursued goals.[226] For the case in hand, the ECtHR tried to balance between the protection of the honour of the relatives of the

220 *Idem*.

221 *Ibidem,* at para. 54-55.

222 *Ibidem,* at para. 71.

223 *Idem*.

224 *Ibidem,* at para. 74.

225 *Ibidem,* at para. 75.

226 *Ibidem,* at para. 111. See, ECtHR, *Chauvy and others v France,* 29 June 2004, (Appl. no. 64915/01) at para. 69, and ECtHR, *Lehideux and Isorni*, at para. 47; ECtHR, *Monnat v Switzerland,* 21 September 2006, (Appl. no. 73604/01), at para. 57.

Armenian victims and Perinçek's right to freedom of expression.[227] In assessing the necessity of the interference, the Court first decided the state's margin of appreciation. In this regard, taking into account that the issue of the characterization of the events as "genocide" was a matter of the public interest and that Perinçek's statements was historical, legal and political in nature; the ECtHR noted that the Swiss authorities' margin of appreciation was limited.[228]

Under the necessity condition, the Court examined the "general consensus" method adopted by the Swiss authorities to justify the conviction of Perinçek. According to this method, there was a consensus among the public, in particular among the scientific community, on the categorization of the 1915 events as genocide.[229] The Court noted that there are different views on this issue even among the Swiss organs themselves; and moreover, only about twenty nations (of more than 190 in the world) officially recognized the "Armenian genocide".[230] Furthermore, referring the jurisprudence of the International Court of Justice (ICJ) and International Criminal Tribunal of Rwanda (ICTR), the ECtHR underlined that the term of genocide is a very strict legal concept and requires a high threshold to prove particularly the special intent *(dolus specialis*).[231] Thus, the Court was not convinced that this general consensus method for his conviction could relate to such very specific points of law.[232]

Additionally, given that historical research is open to discussion and hardly results in objective and absolute truths, the Court found difficult to reach a "general consensus" on this issue.[233] In order to strengthen this view, the ECtHR distinguished the case in hand from the cases concerning the denial of Holocaust.[234] Accordingly, in the Holocaust cases: *i)* not the legal categorization of the crimes, but the very concrete historical facts had been rejected; *ii)* the applicants had denied the Nazi crimes which had been sentenced with a clear legal basis provided by the Statute of the Nuremberg Tribunal; and *iii)* the negated historical acts had been judged to be clearly established by an international court.[235] In the light of these findings, the Court

227 *Idem.*

228 *Ibidem,* at para. 112-113.

229 *Ibidem,* at para. 114.

230 *Ibidem,* at para. 115.

231 *Ibidem,* at para. 116.

232 *Idem*.

233 *Ibidem,* at para. 115.

234 *Ibidem,* at para. 117.

235 *Idem*.

asserted that there is a clear distinction between this case and the Holocaust denial cases; thus, deemed the method of "general consensus" adopted by the Swiss authorities to justify the conviction of Perinçek as questionable.[236]

Within the context of the necessity condition, the Court also examined whether there was a pressing social need for the restriction. In this regard, the Court once again highlighted that Perinçek's speeches did not incite hatred or violence.[237] Furthermore, it upheld the Turkish Government's arguments that Holocaust denial is the driving force of anti-Semitism (hatred of Jews) and the rejection of the description of the 1915 events as "genocide" does not have the same repercussions.[238] On the other hand, in its judgment the Court also made reference to the comparative study on the memorial laws in Europe prepared by the "Swiss Comparative Law Institute" in 2006. In this regard, the ECtHR noted that the genocide denial was criminalized, without limiting its scope to Holocaust, only in Luxemburg and Spain among the sixteen countries analyzed.[239] Other than these two countries apparently there was not required a "pressing social need" for such a legislation.[240] The Court considered that the Swiss government had failed to prove how there was a stronger pressing social need than in other countries for the conviction of racial discrimination on the basis of speech denying the legal description of the 1915 events as "genocide".[241] Two developments after this comparative study were also taken into consideration to support its judgment.[242] Firstly, in 2007, the Spanish Constitutional Court had found unconstitutional the national law provision criminalizing the denial of genocide.[243] Secondly, in 2012, the French Constitutional Council had held that the law aiming to punish the contesting the existence of the genocides recognized by the law violates the

In the light of these findings and the case-law, the Court expressed its doubts that Perinçek's conviction had been required by a "pressing social need". Thus, it decided that the Swiss authorities had failed to meet the third condition which was the necessity in a democratic society to protect the honor of the descendants of the Armenian victims.

236 *Ibidem*, at para. 118.

237 *Ibidem*, at para. 119.

238 *Idem*.

239 *Ibidem,* at para. 120.

240 *Idem*.

241 *Idem*.

242 *Ibidem,* at para. 121.

243 *Idem*. See also: Spanish Constitutional Court's Judgment, 7 November 2007, No. 235/2007.

Constitution.[244] Furthermore, the Court also referred to the General Comment no. 34 of the HRC in its judgment to indicate that the criminalization of opinions about historical facts that do not incite to violence or racial hatred cannot be justified.[245]

In the light of these findings and the case-law, the Court expressed its doubts that Perinçek's conviction had been required by a "pressing social need". Thus, it decided that the Swiss authorities had failed to meet the third condition which was the necessity in a democratic society to protect the honor of the descendants of the Armenian victims.[246] The ECtHR, therefore, considered that the national authorities had exceeded their narrow margin of appreciation in the current case.[247] In conclusion, the Chamber of the Court held violation of freedom of expression within the meaning of Article 10.[248]

The judgment on such a controversial issue concerning the denial of the Armenian genocide could not be delivered with unanimity. It was annexed with 26 pages of separate opinions. In a joint concurring opinion, Judges Sajó (Hungary) and Raimondi (Italy) elaborated some of their legal arguments and considerations in this judgment.[249] In this regard, they put forward that a narrow definition of genocide must be properly determined for the legal certainty in the context of freedom of expression.[250] However, the Swiss authorities had not formed such a definition for the 1915 events.[251] Furthermore, according to these two judges, disrespectful and even outrageous remarks cannot be punishable unless they incite hatred and violence and they represent a real danger in light of the history and social conditions prevalent in a given society.[252] But none of these elements existed as far as the case in hand is concerned.[253] Moreover, for this case the Swiss courts had pursued the legal approach that the negation of the legal characterization attributed to the destruction of a people was racist or racially discriminatory.[254] Sajó and Raimondi argued that such an unconditional incrimination disabled to review the aspects of the speech that are protected by freedom of speech.[255]

244 *Idem*. See also: French Constitutional Council's Judgment, 28 February 2012, No. 2012-647 DC.

245 *Ibidem,* at para. 124; See also: HRC, General comment No. 34*,* at para. 49.

246 *Ibidem,* at para. 129.

247 *Idem*.

248 *Ibidem,* at para. 130.

249 *Ibidem,* Joint concurring opinion by Judges Sajó and Raimondi, at pp. 56-63.

250 *Ibidem*, at p. 57.

251 *Idem*.

252 *Ibidem,* at p. 59.

253 *Idem*.

254 *Ibidem,* at pp. 59-60.

255 *Idem*.

On the other hand, Judges Vučinić (Montenegro) and Pinto de Albuquerque (Portugal) expressed a joint partly dissenting opinion in which they rejected that the conviction of Perinçek was a violation of his freedom of expression.[256] These judges asserted that the case in hand is too complicated to require a ruling to be issued by the Grand Chamber since the case raised two fundamental questions that the ECtHR had never addressed: *i)* the international recognition of the "Armenian genocide" and *ii)* the criminalization of the denial of this genocide.[257] Claiming that the international community and even the Turkish state itself had previously recognized the "Armenian genocide", the dissenting judges considered that the intervention by the Swiss authorities with regard to Perinçek's freedom of expression was in accordance with the law, since the criminal nature of the act of denying the existence of the Armenian genocide had already been sufficiently established in the Swiss legal system, and the relevant legal provisions had been defined in a manner that was neither too broad nor too vague.[258] Furthermore, they asserted that the tragic historical events constitute a relevant topic that can justify the restriction of the freedom of expression; thereby enlarge the State's margin of appreciation.[259]

C. Commentary on the Judgment

The length of the judgment in *Perinçek v. Switzerland*, which is 80 pages including 26 pages of separate opinions, may indeed indicate how the case is comprehensive and controversial. Such cases concerning the denial or trivialization of historical facts are not frequently brought before the Court. Additionally, since most of the relevant judgments have merely been related to the criminalization of the denial of Holocaust and the case in hand constitutes the first one regarding the Armenian question, this judgment is of importance for the issue of the negation of the historical facts other than Nazi crimes.

In the admissibility part, the Court examined whether there was an incitement to hatred or violence in the applicant's statements for the invocation of the abuse clause. In that part of the judgment, the Court made a clear distinction between the denial of a legal categorization as "genocide" and denial the facts of the historical acts, in this case the Armenian deportations and massacre.

256 *Ibidem,* Joint partly dissenting opinion by Judges Vucinić and Pinto de Albuquerque, at pp. 63-85.

257 *Ibidem,* at para. 1.

258 *Ibidem,* at paras. 3-11.

259 *Ibidem,* at para. 15.

According to the Court, the merely denying the legal categorization of the acts did not mean the incitement to hatred, thus required the contextual analysis on the basis of Article 10 rather than Article 17. The method of the Chamber of the Court, with holding the application admissible and carrying out a specific contextual analysis, rather than pursuing a *guillotine effect* approach of banning the speech, can be deemed as a positive development for the freedom of expression of the historians. With this judgment the application of the abuse clause kept its exceptional status. On the other hand, these results may also imply that the prospective cases brought before the Court regarding the denial of historical facts which amount the incitement to hatred or violence, such as the denial of the existence of genocide, crime against humanity and other atrocities, would still remain to be exposed the sword of Damocles, namely Article 17. Thus, even this judgment seems to limit the application of the abuse clause by providing an additional condition, it failed to remove the doubts on the threats of broad application of the Article 17.

The emphasis of the Court on the principle that it is not the Court's role to arbitrate historical debates, indeed, is in accordance with its case-law and seems to be an encouraging result in particular for historians. Furthermore, the Court rightly recalled that the principle, in which the ideas are protected under Article 10, even they are upsetting, shocking or disturbing, is also applicable for the controversial historical debates.

On the other hand, the ECtHR pursued an appropriate approach by only dealing with the justification of the interference on Perinçek's freedom of speech, rather than deciding on legal categorization of the massacres and deportations perpetrated against the Armenian people in Ottoman Empire. The emphasis of the Court on the principle that it is not the Court's role to arbitrate historical debates, indeed, is in accordance with its case-law and seems to be an encouraging result in particular for historians. Furthermore, the Court rightly recalled that the principle, in which the ideas are protected under Article 10, even they are upsetting, shocking or disturbing, is also applicable for the controversial historical debates.

Additionally, this judgment could not bring a solution for the problems of the margin of appreciation of States for the interference on freedom of expression. In the present case, the Chamber reduced the margin of appreciation of the Swiss authorities since Perinçek's statements were of legal, historical and political nature. The dissenting judges criticized this decision and, on the contrary, they argued that the margin of appreciation should be broadened in the tragic events. This judgment may pave the way for the views that the Court

should determine the precise borders for the margin of appreciation in the context on the interference on the freedom of expression in order to prevent the arbitrary applications.

As regard to the negationism cases, after this judgment the highly controversial and unanswered questions still exist, in particular which evidence is enough for the Court to decide when historical facts are clearly established and who decides for this categorization of the historical facts. The *Perinçek* judgment will probably deepen these discussions. The Court clearly distinguished the case in hand and the cases regarding Holocaust denial and decided that the denial of Holocaust is the main driving force of anti-Semitism, whereas the rejection of the legal status of the "Armenian genocide" might not have the same repercussions."[260] The lack of general consensus on "Armenian genocide" was also effective for the Court to make this distinction with Holocaust. With this judgment, the ECtHR underlined the importance of "reducing genocide to law" by referring to the case-law of the international courts and the strict legal definition of genocide.[261] These findings have been criticized in several occasions, including the extensive joint partly dissenting opinion of Judges Vučinić and Pinto de Albuquerque who emphasized the inspirations of Raphael Lemkin from the Armenian tragedy in constructing the term of genocide.[262] Furthermore, according to several criticisms, the comparison with Holocaust resulted in the establishment of a hierarchy among the tragic events which meant an ignorance of the sufferings of different groups especially Armenians.[263]

Finally, in its judgment, the Court extensively referred to the comparative law including the case-law and legislations of the Human Rights Committee and the recent relevant decisions of the Spanish and French Constitutional Courts. Considering that these legislations and judgments had a strong stance against the criminalization of negationism, one may deduce from the *Perinçek* judgment that the Court affirmatively showed the value it attaches for the protection of freedom of expression against the abusive approaches of the memory laws.

Under these discussions, such complicated case was referred to the Grand Chamber in accordance with the pro-referral views. According to these views,

260 ECtHR, *Perincek v. Switzerland,* at para. 119.

261 *Ibidem,* at para. 116.

262 *Ibidem,* Joint partly dissenting opinion of Judges Vucinić and Pinto de Albuquerque, at para. 29.

263 Belavusau, U., "Armenian Genocide v. Holocaust in Strasbourg: Trivialisation in Comparison", *VerfBlog*, 13 February 2014*,* at p. 3, available at: *http://www.verfassungsblog.de/en/armenian-genocide-v-holocaust-in-strasbourg-trivialisation-in-comparison/*; Tanzarella P., "Negazionismo: aggiornamenti da Strasburgo", Consulta Online, 2014, at p.4, available at: http://docenti.unicam.it/tmp/3742.pdf

the general practice pursued by the Panel of the Grand Chamber requires the case, which has already attracted exceptional media attention, to be deemed as a high profile at the center of a sensitive national and European debate with its historical aspect.[264] Furthermore, the views underline that the present case covers a new issue, the first conviction of the negation of the historical facts other than Holocaust.

VII. CONCLUSION

The wider and ambiguous language of the EU Framework Decision has, once again, raised the concerns on the unjustifiable and arbitrary restrictions on freedom expression. The "slippery slope effect" of the Decision has paved the way for the adoption of new memory laws which aggravates the potential repercussions of such regulations on freedom of expression. All in all, given the existing diverse national implementations rather than a joint approach, it is safe to argue that the Decision failed to harmonize the criminal laws have within the EU. This paper suggests that the most effective and result-oriented approaches to prevent hate speech for the protection of the rights of victims, public order and democracy can be realized with the national level initiatives rather than through the international or regional frameworks or regulations. It would be wise to suggest each country to adopt her own legislation in a way to minimize hate speech and incitement to hatred on the one hand and to allow open and free expression of ideas on the other.

In contrast to the Framework Decision, memory laws have been criticized and deemed unconstitutional by the national judicial authorities in Europe. In this regard, the Spanish and French Constitutional Court have pursued a speech-protective approach in their examination of the anti-denialist laws. The relevant decisions of these Courts have constituted as a strong barrier against the slippery slope effect of the memory laws in Spain and France.

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264 ECtHR, The general practice followed by the Panel of the Grand Chamber when deciding on request for referral in accordance with Article 43 of the Convention, October 2011, available at: http://www.echr.coe.int/Documents/Note_GC_ENG.pdf

In addition to the national judgments, the criminalization of the negationism has been analyzed by the international and regional monitoring bodies. In this regard, the Human Rights Committee has an evolutionary approach on the interference on freedom of speech. In its recent statements, the Committee has expressed its concerns on memory laws and preferred a case-by-case analysis of speeches instead of a general prohibition. The HRC, rightly, opposes the content-based limitations, but supports the examination of the necessity of interference by taking into account the contextual elements.

As the binding regional monitoring body in Europe, the European Court of Human Rights has a two-tiered approach on the limitation of freedom of expression. In this regard, the Court invokes Article 10 or Article 17 ECHR (abuse clause) in its examinations. By applying a content-based restriction and removing the protection of Article 10, the abuse clause poses a threat on free speech. Furthermore, the condition of "clearly established historical facts" required on the basis of Article 17 creates vagueness which results in arbitrariness and chilling out effects. In the light of these findings, the paper suggests that all anti-negationism cases should be dealt with under Article 10(2) by taking into account of all relevant factors, including both content and context, with an interpretive aid of Article 17, rather than direct invocation of the abuse clause.

On the other hand, in its recent speech-protective judgment in *Perinçek v. Switzerland*, the Court applied the contextual analysis under Article 10 instead of the abusive clause. By distinguishing Holocaust from other atrocities and requiring additional conditions, this judgment implicitly indicated the ECtHR's opposition to the underlying aim of memory laws, which is to extend the criminalization of negationism to the historical atrocities other than Holocaust.

All in all, the current national trends in Europe to adopt new memory laws and to harmonize criminal laws within the context of the EU go against the evolutionary rulings of the international, regional and national authorities, in which the necessity and proportionality are required for the restriction on freedom of expression.

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