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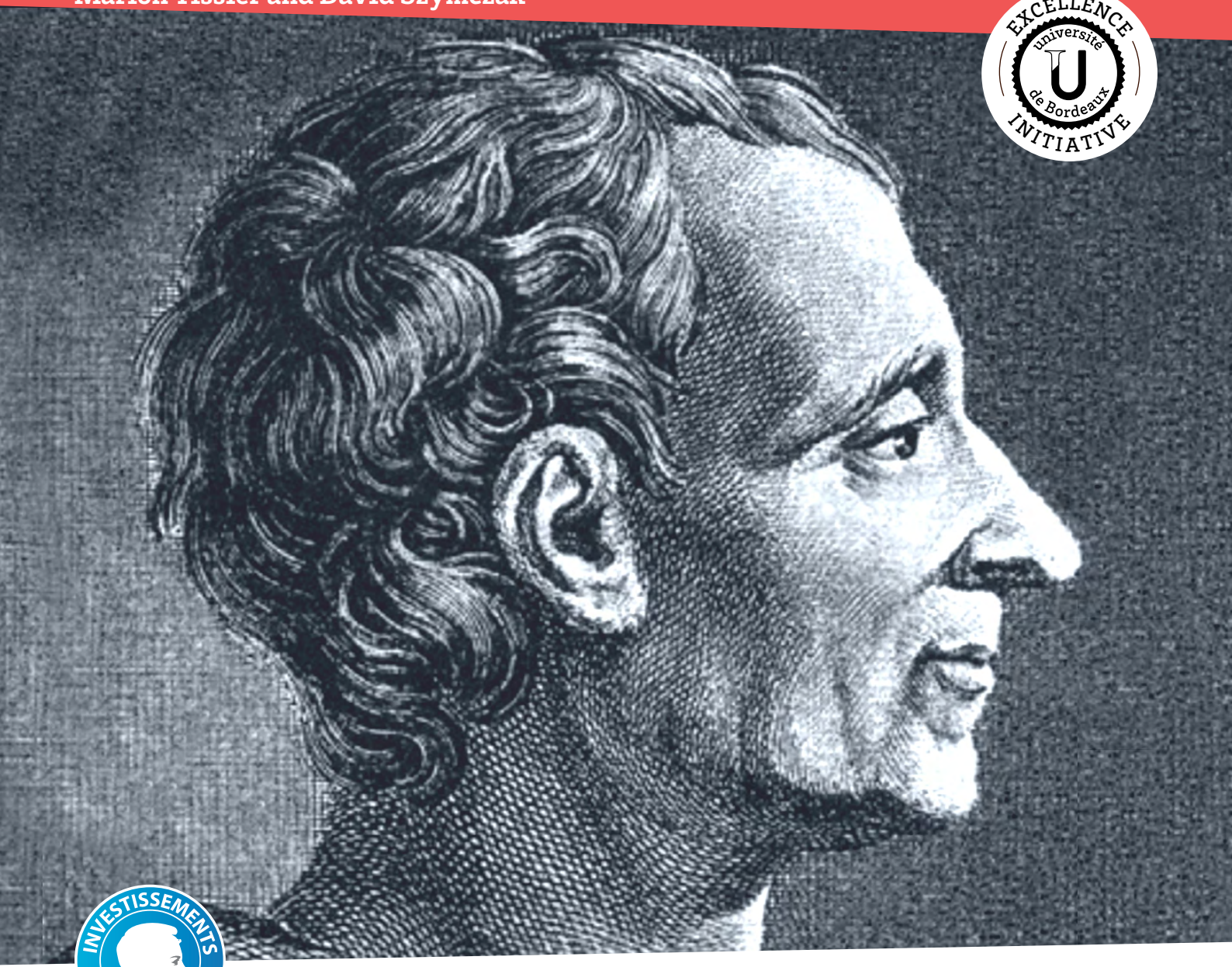

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European Law (CEDH):

The delicate issue of criminalising revisionism in a democratic, pluralistic society

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In its decision of 15 October 2015, the Grand Chamber of the ECHR ruled on the thorny question of the lawfulness of criminal sanctions imposed in Switzerland on Doğu Perinçek for denial of the Armenian Genocide (1). Three months later, on 8 January 2016, the French Constitutional Council heard a *question prioritaire de constitutionnalité* (referral for a priority preliminary ruling on constitutionality) on the constitutionality of offences of denial of crimes against humanity committed during the Second World War, introduced in 1990 by the *loi Gayssot* – the Gayssot Law (2). The issue of the lawfulness of criminal prosecutions for denial or revisionism – i.e. the lawfulness of the interference with freedom of expression in a democratic and pluralistic society – is still hotly debated and highly controversial. In this paper, therefore, we will highlight the normative interactions and discrepancies between the case law of the French Constitutional Council and that of the ECHR, as held in each court's reasoning and arguments.

First, it should be noted that the approach taken by the Swiss legislature approach is not comparable to that of its French counterpart. Indeed, Article 261 *bis*, paragraph 4 of the Swiss Criminal Code punishes statements that deny genocide or other crimes against humanity, without referring to any specific historical event. By opting for this open wording, the Swiss legislature avoids setting itself up as an historian, as it does not limit the scope of Article 261 to a given chapter in history (3). However, it does not specify whether judges must themselves decide whether a particular historical event qualifies as genocide, and if so, on what basis (4). In contrast to the Swiss model, the French legislature has opted for the technique of *lois mémorielles* or historical memory laws. This expression refers retrospectively to four pieces of legislation (5) (including the *loi Gayssot*) which are part of a long tradition of commemoration and seem to be driven by the same desire: *"to recount history, or to redefine it through the use of contemporary legal concepts such as genocide or crimes against humanity in order, one way or another, to give justice through the recognition of past suffering*" (6). The term "historical memory laws" conceals a motley collection of laws. In fact, since February 2012, when the French Constitutional Council censured the law of 31 January 2012 (7) on suppressing genocide denial by law, which referred exclusively to the legislative recognition of the 1915 Armenian Genocide (8), only the *loi Gayssot* is provides for criminal penalties. In other words, Holocaust denial is criminalised in France.

The offence of denying crimes committed during the Second World War has never ceased to fan the flames of controversy. As a symptomatic example of the limitations of *a priori* referrals to the Constitutional Council, which were once the preserve of political bodies before the constitutional reform of 2008 (9), the *loi Gayssot* had never been subject to constitutional review. Far from achieving consensus, the parliamentary opposition had not been prepared to take the political risk of deferring legislation that was part of the fight against racism and anti-Semitism. It took the introduction of the *question prioritaire de constitutionnalité* and four referrals to be made for the Court of Cassation finally to recognise its seriousness (10) and refer the matter of the Law's constitutionality to the Constitutional Council. The latter was thus able to review that Law in its

QPC decision in *Vincent A.* It performed the traditional checks that the Law did not infringe freedom of expression; but the referral made also invited the Council to check that it does not violate the principle of equality before the law punishing Holocaust denial only, to the exclusion of any other statement denying the existence of other crimes against humanity, including the Armenian Genocide.

In both cases, while the reviews conducted by the European Court of Human Rights and the Constitutional Council are not identical – the former falling within the remit of a specific review, the latter an abstract, objective review – the legal questions raised are related.

Indeed, the first question was whether any and all statements denying genocide may be prohibited without infringing freedom of expression. This initial question referred to the controversial distinction between simple and qualified denial: the former is the denial of the existence of the crime without targeting a group of people, while the latter is the denial of a crime and a discriminatory attack on a group of people (11). Next, the matter of identifying the historical events discussed by revisionists which can legally be the subject of a criminal sanction. This second point raised questions as to the legal basis of such criminalisation, i.e. on the formal foundations of the crime of genocide and, specifically, on the assessment of revisionist discourse, particularly those denying the Holocaust and the Armenian genocide. As evidenced by third-party interventions, while the criminalisation of Holocaust denial punctuated the arguments advanced by the judges of the ECHR Grand Chamber, it was the shadow cast by the criminalisation of the denial of the Armenian Genocide that was omnipresent in the Constitutional Council's decision.

However, the solutions developed in these two cases demonstrate the reciprocal influences between the two courts and, without it being contradictory, the specificity of the French constitutional argument (12). First, the legal grounds developed in the Constitutional Council decision of 2012, partly reiterated in *Vincent R.*, received attention from the European Court: first to uphold (2nd sect.) then to criticise them. Moreover and conversely, it is indisputable that, in holding that the *loi Gayssot* was indeed constitutional, the Council was directly inspired by the methodology and the arguments developed by the Grand Chamber, without abandoning the specific arguments developed in its 2012 case law.

On the merits, both courts have commonly enshrined a broad interpretation of freedom of expression, which interpretation also restricts the abuse of a right limited to qualified denial (I). However, while the Constitutional Council (like the Grand Chamber) reaffirmed the specificity of remarks denying the Holocaust, it also enshrined a divergent assessment of the lawfulness of criminalising denial of the Armenian Genocide (II).

I. A broad interpretation of freedom of expression and limiting the abuse of limited right to cases of qualified Holocaust denial

While the fundamental value of freedom of expression in a democratic society was jointly and solemnly restated (A), both the Grand Chamber and the Constitutional Council recognised that it could exceptionally be restricted when the words used amounted to qualified denial (B).

A. The original long-term and protective scope of freedom of expression in a democratic and pluralistic society

In *Perinçek*, the European Court relied on the principles restated since *Handyside*, i.e. "[f]*reedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment*" (para. 196). This applies "*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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society*" (para. 196). Under these established principles, the Court considered in particular that political and historical expression, relating as it does to matters of public interest, must be the subject of enhanced protection (para. 196).

In *Vincent R.*, the Constitutional Council also revisited the protective scope of freedom of expression which, by its reference to democracy, is reminiscent of *Handyside*. Based on Article 11 of the Declaration of the Rights of Man and Citizen, the Council reiterated that freedom of expression *"is all the more valuable in that its exercise is a prerequisite for democracy and one of the guarantees of the rights and freedoms*" (recital 5). It is considered a condition of freedom of thought and individual autonomy, a guarantee of pluralism and an essential element of the democratic process.

While freedom of expression is understood broadly, it does however encounter restrictions in terms of the destruction of the values of a democratic society.

B. A restrictive view of the abuse of rights and restrictions brought to freedom of expression

Freedom of expression is neither absolute nor unlimited. Articles 10 (2) and 17 of the ECHR, like Article 11 of the Declaration of the Rights of Man and of the Citizen on which the French Constitutional Council relied, all admit the existence of restrictions on freedom of expression. The issue raised in both cases was then whether simple denial could be part of those legal interferences or whether qualified denial could exclusively justify an infringement of freedom of expression, bearing in mind that to impose a criminal penalty in itself constitutes one of the most serious infringements of freedom of expression. This sensitive issue was decided by the courts through a narrow review and restrictive interpretation of the permitted restrictions.

First, both courts considered that the notion of abuse of rights was to be defined restrictively and applied only to expressions that could clearly be interpreted as hate speech. In ECHR case law, Article 17 is "*only applicable on an exceptional basis and in extreme cases*", and "*it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention*" (para. 114). In other words, the reference to more or less protected categories of speech, depending on whether they relate to a matter of public interest, becomes inoperable when the words used can be directly interpreted as hate speech. Similarly, the Constitutional Council considered that the *loi Gayssot* was intended to punish an abuse of freedom of expression (recital 7) because it concerns not only the suppression of the expression of an opinion, but an act of incitement to hatred falling within the remit of anti-democratic and racist propaganda (13). In other words, according to the case law of both courts, the concept of abuse of freedom of expression is defined narrowly as the expression of anti-democratic hate speech, i.e. falling into the category of qualified denial.

In *Perinçek*, the Grand Chamber did not follow the example set by the Second Section, which had considered *ex officio* whether it was appropriate to exclude the applicant's remarks from the scope of Article 10 pursuant to Article 17. It concluded that the punishable remarks were ambiguous and not "*immediately clear*" (para. 115). That is why the Grand Chamber chose to conduct a combined examination of Article 17 and Article 10, a methodological choice needed to rule directly on the necessity of the interference with freedom of expression.

Conventionally, the Grand Chamber then checked whether the restriction imposed in this case met the three cumulative requirements of compliance with the Convention: that the interference is prescribed by law, pursues a legitimate aim and, above all, is necessary in a democratic society. As often happens, the case did not turn on the assessment based the first two criteria, but rather on the third, i.e. on whether the restriction met a pressing social need. For this, the Court relied on two main criteria, a material criterion relating to the nature of the words used; and a contextual criterion relating to their scope based on geographic and temporal factors. In this case, the majority of the Court considered that the nature of the remarks, interpreted in the light of Switzerland's current and historic context, was limited to challenging the "genocide" qualifier in relation to the events of 1915 without showing hatred of or contempt for Armenians. The judges then held that a restriction on the free expression of a simple denial, by means of a criminal sanction, was disproportionate. In other words, according to the Grand Chamber, the criminalisation of remarks made by Perinçek was excessive because they did not fall within the remit of qualified denial.

In *Vincent R.*, the Constitutional Council also based its examination on an assessment of the nature of the remarks concerned. In fact, having considered that the *loi Gayssot* covered the repression of abuse of rights, the Council checked whether the interference was "*necessary, appropriate and proportionate*" (recital 8). It then considered that the *loi Gayssot* was fit for purpose as it was intended to combat racism; this was considered necessary because, as the ECHR's Grand Chamber held, the law strives to punish statements or words threatening the protection of public order and the right of third parties (14); and, lastly, proportionate because punishment is strictly confined only to words or statements constituting an abuse of freedom of expression without *"purpose or effect of prohibiting historical debate".* Relying (as the Grand Chamber did) on a material criterion, the Constitutional Council therefore enshrined the constitutionality of the punishment of qualified denial. This analysis is to be welcomed because, in its 2012 decision, the Constitutional Council had merely stated, in a terse phrase, that "*the legislature has committed an unconstitutional infringement of that freedom* [of expression]", clarifying neither the procedures for review nor the specific defect in the law under review.

However this decision, so heavily criticised in French jurisprudence, has not yet been set aside as the Constitutional Council made direct reference to it in relation to the formal foundations of the criminalisation at issue. The Council considered in fact that the punishment of statements denying the crimes covered by the *loi Gayssot* was not disproportionate because "*the legislature has only intended to punish the challenge to a judicial order. It is not a matter of establishing an official truth, as has been the case for historical memory laws, but rather of reviewing statements on facts that have been established by judicial decisions*" (15). Any infringement of freedom of expression would be justified therefore not only because of the hate-filled nature of the remarks at issue, but also because they deny historical facts described as genocide by an international court; i.e. owing to its formal basis. This would mean that the challenge would be legal on the grounds that it relied

on a degree of certainty (16), contrary to the attempt on the part of the French legislature seeking to make itself historian by criminalising the denial of what the legislature itself had qualified as genocide. In *Perinçek*, the Second Section also justified the specificity of Holocaust denial on the basis that the condemnation of the disputed crimes had a *"clear legal basis"* by making explicit reference to the 2012 case law of the French Constitutional Council (17). However, the Grand Chamber did not follow this line of reasoning and added that the punishment of the denial of crimes committed during the Second World War *"is not justified as because it is a clear historical fact"* (para. 243).

It is therefore clear that, without abandoning the arguments in its previous case law, the French Constitutional Court has partly developed a legal method and grounds inspired by the European Court.

In accordance with this case law, it is now a matter of identifying what the historical facts or disputed crimes are, which can legally be the subject of criminal punishment, which brings us to the heart of the controversy over the comparative assessment of remarks disputing the Holocaust and the Armenian genocide.

II. The common specificity recognised to Holocaust denial vs. differences of interpretation concerning the denial of Armenian genocide

In both cases, the controversies concerned the difference in treatment between the punishment of statements denying the Holocaust and those denying the Armenian genocide and, implicitly, the existence of any incomprehensible potential hierarchy of crimes and the suffering of victims. Now, be it in France or Switzerland, lawmakers had rightly attempted to address this controversy, the former in wanting to expand the scheme established under the *loi Gayssot* to the Armenian genocide, and the latter criminalising any denial of genocide without reference to any historical fact.

In both cases, the courts commonly recognized the specificity of Holocaust denial, on the grounds that it falls within the remit of qualified denial. However, they assessed the denial of the Armenian genocide differently: while the Grand Chamber did not question the expediency of punishing such remarks where these can actually be interpreted qualified denial, the Constitutional Council recalled its 2012 case law censuring the punishment of the denial of the Armenian genocide.

A. Holocaust denial: the systematic expression of qualified denial

In *Perinçek*, the European Court, in line with its earlier case law, reaffirmed that Holocaust denial should invariably be defined as a qualified denial because, owing to its nature and the national context in which it is expressed, *"even if dressed up as impartial historical research",* it *" must invariably be seen as connoting an antidemocratic ideology and anti-Semitism"* (para. 243). According to the Court, states that have experienced the horrors of Nazism "*may be regarded as having a special moral responsibility* [...]".

In *Vincent* R., it is undeniable that the Constitutional Council echoed the arguments of the Grand Chamber to enshrine in turn the specificity of statements denying the Holocaust and therefore the compliance of the exclusive criminalisation of Holocaust denial in light of the principle of equality before the criminal law. Indeed, it considered that "*the denial of crimes against humanity committed during the Second World War, in part on national territory, is in itself racist and anti-*

Semitic in scope " (recital 10). The Council thus based its decision on a material criterion, being that of the specific and inherently racist and anti-democratic nature of the remarks punished, but also on the consideration of geographical and historical factors considered by the Grand Chamber, in interpreting the nature of the comments in the light of France's own historical context. This line of argument is more persuasive than that adopted in 2012 and bolsters the decisive political significance of a decision which, 25 years on, is likely to settle the debate on the constitutionality of the *loi Gayssot*.

B. Differences of opinion on the punishment of statements denying the Armenian Genocide

Lastly, it is not so much the punishment of Holocaust denial that was controversial – European case law and the compliance of the *loi Gayssot* with international conventions being so deeply entrenched – than the denial of the Armenian genocide. It sets those who believe that genocide denial is itself hate speech (as maintained by the French or Armenian governments) against those for whom only the denial of genocide accompanied by explicit hate speech can be punished (as maintained and enshrined by the Grand Chamber) and against those for whom only the denial of a genocide described as such by an international court and accompanied by hate speech, can be punished, as required by the French Constitutional Council.

Indeed, by refusing to interpret Mr Perinçek's statements as hate speech and describing the criminal punishment thereof as a disproportionate interference with freedom of expression, the majority of the Court declined to interpret the denial *per se* of genocide as hate speech; in this particular case, they described Mr Perinçek's statements as the expression of a simple denial. One may not agree with the interpretation of Mr Perinçek's ambiguous statements, as argued by the minority for whom those statements went *"beyond mere denial of the Armenian genocide* [...]*"* and contained *"*[...] *an intent (animus) to insult a whole people*" (18), but we must recognise that the Court focused solely on the only relevant question of law: that of the nature and scope of what was said. Above all, by refusing to refer to the legal qualification of the facts by an international court, at least the European Court did not cast doubt on the veracity of historical fact.

Rather, in its decision in *Vincent R.*, the Constitutional Council included its 2016 decision in the same vein as that of 2012, explaining that *"the denial of offences of crimes against humanity by a decision of a French court, or by an international court recognised by France, differs from the denial of offences of crimes against humanity by another court or by law*" (recital 10). This would serve as a basis to assume the constitutionality of the *loi Gayssot*. However, recalling the 2012 decision mainly contributed to the Constitutional Council reaffirming its opposition in principle to the fact that the legislature attached criminal sanctions to the historical memory laws where historical facts are not qualified as genocide by an international court; this is tantamount to opposing the criminalisation of the denial of the Armenian genocide. While the current French government has never questioned its desire to find a legal means for punishing the denial of the Armenian genocide, and even if it would appear from the *Perinçek* decision that the punishment of statements denying the Armenian genocide may be in line with the Convention where it covers statements that constitute explicit qualified denial, it would seem that such a route may be difficult to find given Constitutional Council case law.

Notes:

(1) ECHR, *Perinçek v Switzerland* [GC], Application no. 275510, 15 October 2015.

(2) Article 24a of the Law on the Press 29 July 1881, introduced by Law No. 90-615 of 13 July 1990 on the punishment of all racist, anti-Semitic or xenophobic acts. Cons. const., 8 January 2016, 015-512 QPC (M. Vincent R.), (available at www.conseil-constitutionnel.fr).

(3) Giannopoulos (Christos L.), « La Grande Chambre en quête d'un nouveau modus operandi ? », *La Revue des droits de l'Homme*, 25 November 2015, (available at https://revdh.revues.org).

(4) *Perinçek*, cited above, partly concurring and partly dissenting opinion of Judge Nussberger.

(5) Law No. 90-615 of 13 July 1990 on the punishment of all racist, anti-Semitic or xenophobic acts; Law No. 2001-70 of 29 January 2001 on the recognition of the Armenian genocide of 1915; Law No. 2001-434 of 21 May 2001 on the recognition of human trafficking and slavery as crimes against humanity; Law No. 2005-158 of 23 February 2005 recognising the nation and national contribution of repatriated French nationals. On historical memory laws: Frangi (Marc), « "Les loi mémorielles ": de l'expression de la volonté générale au législateur historien », *RDP*, n°1, janvier 2005, p. 241 et s.; Foirry (Anne-Chloé), « Loi mémorielles, normativité et liberté d'expression dans la jurisprudence du conseil constitutionnel – un équilibre complexe et des évolutions possibles », *revue Pouvoirs*, n°143, 2012, p. 143-156.

(6) Assemblée nationale, *Rapport d'information au nom de la mission d'information sur les lois mémorielles, n°1262,* 18 November 2008, (disponible sur http://www.assemblee-nationale.fr/13/rap-info/i1262.asp).

(7) Cons. const., 28 February 2012, *Loi visant à réprimer la contestation de l'existence des génocides reconnus par la loi*, décision 2012-647 DC, (available at www.conseil-constitutionnel.fr). For a discussion of this decision: Droin (Nathalie), « L'avenir des lois mémorielles à la lumière de la décision du conseil constitutionnel du 28 février 2012 relative à la loi visant à réprimer la contestation de l'existence des génocides reconnus par la loi », *RFDC*, n°95, 2013/3, p. 589-610.

(8) Law No. 2001-70 of 29 January 2001 recognising the Armenian genocide of 1915.

(9) *Loi constitutionnelle n°2008-724 du 23 juillet 2008 de modernisation des institutions de la Vème République*, Article 29.

(10) Cass. crim., 7 May 2010, n°09-80.774; Cass. crim., 5 December 2012, n°12-86.382; Cass. crim., 6 May 2014, n°14-90.010; Cass. crim., 6 October 2015, n°15-84-335.

(11) Hoffmann (Thomas), « Négationnisme du génocide arménien : défauts et qualités de l'arrêt Perinçek contre Suisse », *Revue des droits et libertés fondamentales*, 2015, chronique n°27 (online publication available at: www.revuedlf.com).

(12) Droin (Nathalie), « La conformité de l'article 24bis de la loi sur la presse du 29 juillet 1881 à la Constitution, fin de partie ? », *RFDC*, 2016/2, n°106, p. 501; Hochmann (Thomas), « Négationnisme : le conseil constitutionnel entre ange et démon », *Revue des droits et libertés fondamentales*, 2016, chronique n°03 (online publication available at: www.revuedlf.com).

(13) Troper (Michel), « La loi Gayssot et la Constitution », in *Annales. Histoires, sciences sociales*, vol. 54, n°6, 1999, p. 1239-1255.

(14) Regarding the legitimate aim, the Grand Chamber did not accept the protection of public order in this case because the applicant had not been prosecuted on request of the Swiss authorities, which does not preclude this objective being upheld in another case (para. 153-154). It did, however, acknowledge that the measure was likely to target the protection of the rights of others (para. 157).

(15) Cons. const., Commentaire de la Décision n°2015-512 QPC du 8 janvier 2016, M. Vincent R. (available at www.conseil-constitutionnel.fr).

(16) *Perinçek*, cited above, partly concurring and partly dissenting opinion of Judge Nussberger.

(17) ECHR, *Perinçek v Switzerland* (2nd section), Application No. 27508/10, 17 December 2013 para. 117.

(18) *Perinçek*, cited above, joint dissenting opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kuris.