European Court of Human Rights: Perinçek v. Switzerland

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On 17 December 2013, the European Court of Human Rights ruled by five votes to two, that Switzerland violated the right to freedom of expression by convicting Doğu Perinçek, chairman of the Turkish Workers' Party, of publicly denying the existence of the genocide against the Armenian people. On several occasions, Perinçek had described the Armenian genocide as "an international lie". The Swiss Courts found Perinçek guilty of racial discrimination within the meaning of Article 261bis of the Swiss Criminal Code. This Article punishes inter alia the denial, gross minimisation or attempt at justification of a genocide or crimes against humanity, publicly expressed with the aim of lowering or discriminating against a person or a group of persons by reference to race, ethnic background or religion in a way that affects the human dignity of the person or group of persons concerned. According to the Swiss Courts, the Armenian genocide, like the Jewish genocide, was a proven historical fact, recognised by the Swiss Parliament, while Perinçek's motives in denying this historical fact were of a racist tendency and did not contribute to the historical debate. Relying on Article 10 of the European Convention, Perinçek complained before the Strasbourg Court that the Swiss authorities had breached his right to freedom of expression.

First the European Court found that Perinçek had not committed an abuse of his rights within the meaning of Article 17 of the Convention. The Court underlined that the free exercise of the right to openly discuss questions of a sensitive and controversial nature was one of the fundamental aspects of freedom of expression and distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime. The Court emphasized that the limit beyond which comments may engage Article 17 lay in the question of whether the aim of the speech was to incite hatred or violence, aiming at the destruction of the rights of others. The rejection of the legal characterisation as "genocide" of the events of 1915 was not such as to incite hatred against the Armenian people.

Next, from the perspective of Article 10 of the Convention, the Court agreed with the Swiss courts that Perinçek could not have been unaware that by describing the Armenian genocide as an "international lie", he was exposing himself, being on Swiss territory, to a criminal sanction "prescribed by law". The Court also found that the aim of the application of Article 261bis of the Swiss Criminal Code was to protect the rights of others, namely the honour of the relatives of victims

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of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards.

The crucial question was whether the prosecution and conviction of Perinçek was "necessary in a democratic society". The Court was of the opinion that the discussion about the Armenian "genocide" was of great interest to the general public and that Perinçek had engaged in speech of a historical, legal and political nature which was part of a heated debate. Accordingly, this limited the margin of appreciation of the Swiss authorities in deciding whether the interference with Perinçek's freedom of expression was justified and necessary in a democratic society. Essential for the Court is that it is still very difficult to identify a general consensus about the qualification of the Armenian "genocide". Only about 20 States out of the 190 in the world have officially recognised the Armenian genocide. Furthermore the notion of "genocide" is a precisely defined and narrow legal concept, difficult to substantiate. Historical research is by definition open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths. In this connection, the Court clearly distinguished the present case from those concerning the negation of the crimes of the Holocaust, committed by the Nazi regime. The Court therefore took the view that Switzerland had failed to show how there was a social need in that country to punish an individual for racial discrimination on the basis of declarations challenging the legal characterisation as "genocide" of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. The European Court also referred to the General Comment nr. 34 of the United Nations Human Rights Committee on Article 19 ICCPR, opposing "general prohibitions on expression of historical views". According to the UN HRC "laws that penalise the promulgation of specific views about past events, so called "memory-laws", must be reviewed to ensure they violate neither freedom of opinion nor expression".

In conclusion, the Court expressed its doubt that Perinçek's conviction had been dictated by a "pressing social need". It pointed out that it had to ensure that the sanction did not constitute a kind of censorship that would lead people to refrain from expressing criticism as part of a debate of general interest, because such a sanction might dissuade persons from contributing to the public discussion of questions that are of interest for the life of the community. The Court found that the grounds given by the national authorities in order to justify Perinçek's conviction were insufficient and that the domestic authorities had overstepped their narrow margin of appreciation in this case in respect of a matter of debate of undeniable public interest. The Court considered the criminal conviction of Perinçek, for denial that the atrocities perpetrated against the Armenian people in 1915 and following years constituted genocide, was unjustified. Accordingly there has been a violation of Article 10.

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Arrêt de la Cour européenne des droits de l'homme (deuxième section), affaire Perinçek c. Suisse, requête n° 27510/08 du 17 décembre 2013

Judgment by the European Court of Human Rights (Second Section), case of Perinçek v. Switzerland, Appl. No. 27510/08 of 17 December 2013

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