European Court of Human Rights: Perinçek v. Switzerland

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On 17 December 2013 the Second Section of European Court of Human Rights (ECtHR) 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, for publicly denying the existence of the genocide against the Armenian people (IRIS 2014-2/1 and IRIS 2014-7/2). After referral, on 15 October 2015 the Grand Chamber confirmed by ten votes to seven the finding of a violation of Article 10 of the European Convention on Human Rights (ECHR). In several public speeches, Perinçek had described the Armenian genocide as "an international lie". The Swiss courts found that Perinçek's denial that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years, was in breach with Article 261bis § 4 of the Swiss Criminal Code. This article punishes inter alia the denial, gross minimisation or attempt of justification of a genocide or crimes against humanity. According to the Swiss courts, the Armenian genocide, like the Jewish genocide, is a proven historical fact. Relying on Article 10 ECHR, Perinçek complained before the European Court that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had breached his right to freedom of expression.

The Grand Chamber, in a 128-page judgment, is of the opinion that the Swiss authorities only had a limited margin of appreciation to interfere with the right to freedom of expression, and it takes a set of criteria into consideration when assessing whether Perinçek's conviction can be considered as "necessary in a democratic society". Therefore the Court looks at the nature of Perinçek's statements; the context in which they were interfered with; the extent to which they affected the Armenians' rights; whether there is a consensus among the High Contracting Parties on the need to resort to criminal law sanctions in respect of such statements; the existence of any international law rules bearing on this issue; the method employed by the Swiss courts to justify the applicant's conviction; and the severity of the interference.

The European Court considers Perinçek's statements as a part of a heated debate of public concern, touching upon a long standing controversy, not only in Armenia and Turkey, but also in the international arena. His statements were certainly virulent, but were not to be perceived as a form of incitement to hatred, violence

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or intolerance. The Grand Chamber emphasises that it is “aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years are to be regarded as genocide, and of that community’s acute sensitivity to any statements bearing on that point. However, it cannot accept that the applicant’s statements at issue in this case were so wounding to the dignity of the Armenians who suffered and perished in these events and to the dignity and identity of their descendants as to require criminal law measures in Switzerland”.

After analysing the relevant criteria and case-specific elements, and after balancing the conflicting rights at issue (freedom of expression under Article 10 versus the right of reputation and (ethnic) dignity under Article 8), the majority of the Grand Chamber concludes that Perinçek’s right to freedom of expression has been violated by the Swiss authorities. The Grand Chamber summarises its finding as follows: “Taking into account all the elements analysed above - that the applicant’s statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction - the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case”. On these grounds, ten of the 17 judges come to the conclusion that the Swiss authorities have breached Article 10 of the Convention. The Grand Chamber majority also confirms that Article 17 (abuse clause) can only be applied on an exceptional basis and in extreme cases, where it is “immediately clear” that freedom of expression is employed for ends manifestly contrary to the values of the Convention. As the decisive issue whether Perinçek had effectively sought to stir up hatred or violence and was aiming at the destruction of the rights under the Convention was not “immediately clear” and overlapped with the question whether the interference with his right to freedom of expression was necessary in a democratic society, the Grand Chamber decided that the question whether Article 17 was applicable had to be joined with the examination of the merits of the case under Article 10 of the Convention. As the Court found that there has been a breach of Article 10 of the Convention, there were no grounds to apply Article 17 of the Convention.

Seven judges however, including the president of the Court, argued that the conviction of Perinçek in Switzerland did not amount to a breach of his right to freedom of expression. Four of them also argued that Article 17 (abuse clause)

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should have been applied in this case. The dissenting judges emphasise “that the massacres and deportations suffered by the Armenian people constituted genocide is self-evident. The Armenian genocide is a clearly established fact. To deny it is to deny the obvious”, immediately admitting however that this is not the (relevant) question in the case at issue. According to the dissenting judges the real issue at stake is “whether it is possible for a State, without overstepping its margin of appreciation, to make it a criminal offence to insult the memory of a people that has suffered genocide”. They confirm that, in their view, this is indeed possible.

Judgment by the European Court of Human Rights (Grand Chamber), Perinçek v. Switzerland, Application no. 27510/08 of 15 October 2015

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