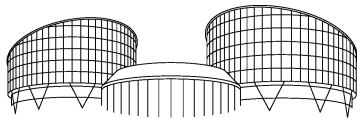

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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ECHR 325 (2015)
15.10.2015

The Court delivers its Grand Chamber judgment in the case of Perinçek v. Switzerland

In today's **Grand Chamber** judgment[1] in the case of **Perinçek v. Switzerland** (application no. 27510/08) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the criminal conviction of a Turkish politician for publicly expressing the view, in Switzerland, that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide.

Being aware of the great importance attributed by the Armenian community to the question whether those mass deportations and massacres were to be regarded as genocide, the European Court of Human Rights held that the dignity of the victims and the dignity and identity of modern-day Armenians were protected by Article 8 (right to respect for private life) of the Convention. The Court therefore had to strike a balance between two Convention rights – the right to freedom of expression and the right to respect for private life –, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved.

The Court concluded that it had not been necessary, in a democratic society, to subject Mr Perinçek to a criminal penalty in order to protect the rights of the Armenian community at stake in the case.

In particular, the Court took into account the following elements: Mr Perinçek's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance; the context in which they were made had not been marked by heightened tensions or special historical overtones in Switzerland; the statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland; there was no international law obligation for Switzerland to criminalise such statements; the Swiss courts appeared to have censured Mr Perinçek simply for voicing an opinion that diverged from the established ones in Switzerland; and the interference with his right to freedom of expression had taken the serious form of a criminal conviction.

Principal facts

The applicant, Doğu Perinçek, is a Turkish national who was born in 1942 and lives in Ankara (Turkey). He is a doctor of laws and chairman of the Turkish Workers' Party.

In 2005 Mr Perinçek participated in three public events in Switzerland, in the course of which he expressed the view that the mass deportations and massacres suffered by the Armenians living in the Ottoman Empire from 1915 onwards had not amounted to genocide.

At a press conference held in May 2005 in Lausanne (Canton of Vaud), Mr Perinçek stated that "the allegations of the 'Armenian genocide' are an international lie". According to him, "imperialists from the West and from Tsarist Russia were responsible for the situation boiling over between Muslims

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

and Armenians. The Great Powers, which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence.”

At a conference held in July 2005 in Opfikon (Canton of Zürich) to commemorate the peace treaty concluding the First World War with respect to Turkey, after holding a speech in which he stated that “the Armenian problem ... did not even exist”, Mr Perinçek handed out copies of a tract written by him in which he denied that the events of 1915 and the following years had constituted genocide.

Finally, at a rally of the Turkish Workers’ Party held in Köniz (Canton of Bern) in September 2005, Mr Perinçek stated that “the Soviet archives confirm that at the time there were occurrences of ethnic conflict, slaughter and massacres between Armenians and Muslims. But Turkey was on the side of those defending their homeland and the Armenians were on the side of the imperialist powers and their instruments ...” He then went on to state again that “there was no genocide of the Armenians in 1915.”

The Switzerland-Armenia Association lodged a criminal complaint against Mr Perinçek on account of the statement made at the first event. The investigation was later expanded to cover the two other oral statements as well. On 9 March 2007 the Lausanne District Police Court found him guilty of the offence under Article 261 *bis* § 4 of the Swiss Criminal Code, holding in particular that his motives appeared to be racist and nationalistic and that his statements did not contribute to the historical debate. The court ordered him to pay 90 day-fines of 100 Swiss francs each, suspended for two years, a fine of 3,000 Swiss francs, which could be replaced by 30 days’ imprisonment, and 1,000 Swiss francs in compensation to the Switzerland-Armenia Association for non-pecuniary damage.

Mr Perinçek appealed against the judgment, seeking to have it set aside and additional investigative measures taken to establish the state of research and the positions of historians on the events of 1915 and the following years. The Criminal Cassation Division of the Vaud Cantonal Court dismissed the appeal on 13 June 2007. The Federal Court dismissed a further appeal by Mr Perinçek in a judgment of 12 December 2007.

Complaints, procedure and composition of the Court

Mr Perinçek complained that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had been in breach of his right to freedom of expression under Article 10. He also complained, relying on Article 7 (no punishment without law), that the wording of Article 261 *bis* § 4 of the Swiss Criminal Code was too vague.

The application was lodged with the European Court of Human Rights on 10 June 2008. In a judgment of 17 December 2013 a Chamber of the Court held, by five votes to two, that there had been a violation of Article 10 of the Convention. The Swiss Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber), and on 2 June 2014 the panel of the Grand Chamber accepted that request. A Grand Chamber hearing was held on 28 January 2015.

In the Grand Chamber proceedings, third-party comments were received from the Turkish Government, who had exercised their right to intervene in the case (Article 36 § 1 of the Convention). Third-party comments were also received from the Armenian and French Governments, who had been given leave to intervene in the written procedure (Article 36 § 2). The Armenian Government were in addition given leave to take part in the hearing. Furthermore, third-party comments were received from the following non-governmental organisations and persons, which had likewise been granted leave to intervene in the written procedure: (a) the Switzerland-Armenia Association; (b) the Federation of the Turkish Associations of French-speaking Switzerland; (c) the Coordinating Council of the Armenian Organisations in France (“CCAF”); (d) the Turkish Human Rights Association, the Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies; (e) the International Federation for Human Rights (“FIDH”);

(f) the International League against Racism and Anti-Semitism (“LICRA”); (g) the Centre for International Protection; and (h) a group of French and Belgian academics.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Josep **Casadevall** (Andorra),
Mark **Villiger** (Liechtenstein),
Isabelle **Berro** (Monaco),
Işıl **Karakaş** (Turkey),
Ján **Šikuta** (Slovakia),
Päivi **Hirvelä** (Finland),
Vincent A. **de Gaetano** (Malta),
Angelika **Nußberger** (Germany),
Linos-Alexandre **Sicilianos** (Greece),
Helen **Keller** (Switzerland),
André **Potocki** (France),
Helena **Jäderblom** (Sweden),
Aleš **Pejchal** (the Czech Republic),
Johannes **Silvis** (the Netherlands),
Faris **Vehabović** (Bosnia and Herzegovina),
Egidijus **Kūris** (Lithuania),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

As regards the scope of the case, the Court underlined that it was not required to determine whether the massacres and mass deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards could be characterised as genocide within the meaning of that term under international law; unlike the international criminal courts, it had no authority to make legally binding pronouncements on this point.

Article 10

It was undisputed that Mr Perinçek’s conviction and punishment, together with the order to pay compensation to the Switzerland-Armenia Association, had constituted an interference with the exercise of his right to freedom of expression under Article 10. The Court did not find, as was argued by the Swiss Government, that the interference could be justified under Article 16 of the Convention, which provides that nothing in Article 10 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens. Article 16 had never been applied by the Court. It had to be borne in mind that clauses that permitted interference with Convention rights had to be interpreted restrictively. The Court found that Article 16 should be interpreted as only capable of authorising restrictions on activities which directly affected the political process, which had not been the case here.

The Grand Chamber of the Court agreed with the Chamber that the interference with Mr Perinçek’s right to freedom of expression had been prescribed by law within the meaning of Article 10 § 2. The Court found in particular that – despite his submissions to the contrary – he could reasonably have foreseen that his statements might result in criminal liability under Swiss law.

As regards the question whether the interference had pursued a legitimate aim, the Court was not satisfied that it had been necessary for the “prevention of disorder”. However, like the Chamber, the Grand Chamber of the Court found that the interference could be regarded as having been intended

“for the protection of the ... rights of others” within the meaning of Article 10 § 2. It noted that many of the descendants of the victims of the events of 1915 and the following years, especially in the Armenian diaspora, constructed their identity around the perception that their community had been the victim of genocide. The Court thus accepted that the interference with Mr Perinçek’s rights had been intended to protect that identity and thus the dignity of present-day Armenians.

Concerning the question whether the interference had been “necessary in a democratic society” within the meaning of Article 10 § 2, the Court underlined that it was not required to determine whether the criminalisation of the denial of genocide or other historical facts might in principle be justified. It was only in a position to review whether or not the application of Article 261 *bis* § 4 of the Swiss Criminal Code in Mr Perinçek’s case had been in conformity with Article 10. In the light of the Court’s case-law, the dignity of Armenians was protected under Article 8 of the Convention. The Court was thus faced with the need to strike a balance between two Convention rights, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved.

In examining the nature of Mr Perinçek’s statements, the Court did not seek to establish whether they could properly be characterised as genocide denial or justification for the purposes of the Swiss Criminal Code. That question was for the Swiss courts to determine.

Mr Perinçek, speaking at public events to like-minded supporters, had made his statements as a politician, taking part in a long-standing controversy which the Court had, in a number of cases against Turkey, already accepted as relating to an issue of public concern. He had not expressed contempt or hatred for the victims of the events of 1915 and the following years, noting that Turks and Armenians had lived in peace for centuries. He had not called the Armenians liars, used abusive terms with respect to them, or attempted to stereotype them. His strongly worded allegations had been directed against the “imperialists” and their allegedly insidious designs with respect to the Ottoman Empire and Turkey.

While in cases concerning statements in relation to the Holocaust, the Court had – for historical and contextual reasons – invariably presumed that they could be seen as a form of incitement to racial hatred, it did not consider that the same could be done in this case. The context did not require automatically to presume that Mr Perinçek’s statements relating to the 1915 events promoted a racist and antidemocratic agenda, and there was not enough evidence that this had been the case. The Swiss courts had referred to the fact that he was a self-professed follower of Talaat Pasha, who was historically the initiator of the massacres of 1915. However, the Swiss courts had not elaborated on this point, and there was no evidence that Mr Perinçek’s membership in the so-called Talaat Pasha Committee had been driven by a wish to vilify the Armenians.

In the Court’s opinion, Mr Perinçek’s statements, read as a whole and taken in their immediate and wider context, could not be seen as a call for hatred, violence or intolerance towards the Armenians. It followed that his statements, which concerned a matter of public interest, were entitled to heightened protection under Article 10, and that the Swiss authorities had only had a limited room for manoeuvre (“margin of appreciation”) to interfere with them.

Taking into account the historical experience of a Convention State concerned by a complaint under Article 10 was particularly relevant with regard to the Holocaust. For the Court, the justification for making its denial a criminal offence lay in the fact that such denial, in the historical context of the States concerned, even if dressed up as impartial historical research, had to be considered as implying anti-democratic ideology and anti-Semitism. The Article 10 cases concerning Holocaust denial examined by the Court had been brought against Austria, Belgium, Germany and France. The Court considered that Holocaust denial was especially dangerous in States which had experienced the Nazi horrors and which could be regarded as having a special moral responsibility to distance themselves from the mass atrocities that they had perpetrated or abetted, by, among other things, outlawing their denial. By contrast, it had not been argued that there was a direct link between

Switzerland and the events that took place in the Ottoman Empire in 1915 and the following years. There was moreover no evidence that at the time when Mr Perinçek had made his statements the atmosphere in Switzerland had been tense and could have resulted in serious friction between Turks and Armenians there.

The Court did not consider that Mr Perinçek's criminal conviction in Switzerland could be justified by the situation in Turkey, whose Armenian minority was alleged to suffer from hostility and discrimination. When convicting him, the Swiss courts had not referred to the Turkish context. While the hostility of some ultranationalist circles in Turkey towards the Armenians in that country could not be denied, in particular in view of the assassination of the Turkish-Armenian writer and journalist Hrant Dink in January 2007, possibly on account of his views about the events of 1915 and the following years, this could hardly be regarded as a result of Mr Perinçek's statements in Switzerland.

While the Court was aware of the immense importance attributed by the Armenian community to the question whether the tragic events of 1915 and the following years were to be regarded as genocide, it could not accept that Mr Perinçek's statements at issue had been so wounding to the dignity of the Armenians as to require criminal law measures in Switzerland. He had referred to Armenians as "instruments" of the "imperialist powers", which could be seen as offensive. However, as could be seen from the overall tenor of his remarks, he did not draw from that conclusion that they had deserved to be subjected to atrocities or annihilation. Coupled with the amount of time that had elapsed since the events, this led the Court to the conclusion that his statements could not be seen as having the significantly upsetting effect sought to be attributed to them.

The Court observed that there was a wide spectrum of positions among the member States as regards legislation on the denial of historical events, from those States which did not criminalise such denial at all to those which only criminalised denial of the Holocaust or the denial of Nazi and communist crimes, and those which criminalised the denial of any genocide.[2] The Court, acknowledging this diversity, did not consider that the comparative law perspective should play a significant part in its assessment, given that there were other factors with a significant bearing on the breadth of the applicable room for manoeuvre. It was nevertheless clear that Switzerland, with its criminalisation of the denial of any genocide, without the requirement that it be carried out in a manner likely to incite violence or hatred, stood at one end of the comparative spectrum.

Moreover, there were no international treaties in force with respect to Switzerland that required in clear and explicit language the imposition of criminal penalties on genocide denial as such. It was true that Article 261 *bis* § 4 of the Swiss Criminal Code had been enacted in connection with Switzerland's accession to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). However, there was no indication that the clause which had served as the basis for Mr Perinçek's conviction was specifically required under the CERD, or under other international law rules, whether treaty-based or customary.

Furthermore, the Court noted that in other cases under Article 10 the interference had consisted of, for instance, a restriction on the dissemination of a publication. The very fact that Mr Perinçek had been criminally convicted was significant in that it was one of the most serious forms of interference with the right to freedom of expression.

Based on all of the above factors, the Court concluded that it had not been necessary, in a democratic society, to subject Mr Perinçek to a criminal penalty in order to protect the rights of the Armenian community at stake in this case. There had accordingly been a breach of Article 10 of the Convention.

2. See paragraphs 255-57 of the judgment.

Other articles

The Court joined, by a majority, the question whether to apply Article 17 of the Convention (prohibition of abuse of rights) to its examination of the merits of the complaint under Article 10. Under Article 17, the Court can declare an application inadmissible if it considers that the applicant has relied on the provisions of the Convention to engage in an abuse of rights. It followed from the Court's finding under Article 10 that there were no grounds to apply Article 17.

Furthermore, the Court found, by a majority, that the complaint under Article 7 amounted to a restatement of the claims under Article 10. There was therefore no need for a separate examination of that complaint.

Article 41 (just satisfaction)

The Court held, by a majority, that the finding of a violation of Article 10 constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered by Mr Perinçek. The Court further dismissed, unanimously, the remainder of his claim for just satisfaction.

Separate opinions

Judge Nußberger expressed a partly concurring and partly dissenting opinion. Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kūris expressed a joint dissenting opinion. Judge Silvis, joined by Judges Casadevall, Berro and Kūris expressed an additional dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.