ECHR PERİNÇEK v. SWITZERLAND JUDGEMENT PRESS RELEASE

(AİHM PERİNÇEK - İSVİÇRE KARARI BASIN BİLDİRGESİ)

ECHR 370 (2013) 17.12.2013

Criminal conviction for denial that the atrocities perpetrated against the Armenian people in 1915 and years after constituted genocide was unjustified

In today's Chamber judgment in the case of Perinçek v. Switzerland (application no. 27510/08), which is not final1, 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 Mr Perinçek for publicly challenging the existence of the Armenian genocide.

The Court found that Mr Perinçek, who during various conferences in Switzerland, had described the Armenian genocide as an "international lie", 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 also pointed out that it was not called upon to rule on the legal characterisation

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

of the Armenian genocide. The existence of a "genocide", which was a precisely defined legal concept, was not easy to prove. The Court doubted that there could be a general consensus as to events such as those at issue, given that historical research was 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. Lastly, the Court observed that those States which had officially recognised the Armenian genocide had not found it necessary to enact laws imposing criminal sanctions on individuals questioning the official view, being mindful that one of the main goals of freedom of expression was to protect minority views capable of contributing to a debate on questions of general interest which were not fully settled.

Principal facts

The applicant, Doğu Perinçek, is a Turkish national who was born in 1942 and lives in Ankara (Turkey). Being a doctor of laws and the Chairman of the Turkish Workers' Party, Mr Perinçek participated in various conferences in Switzerland in May, July and September 2005, during which he publicly denied that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years. He described the idea of an Armenian genocide as an "international lie".

The association "Switzerland-Armenia" filed a criminal complaint against him on 15 July 2005. On 9 March 2007 the Lausanne Police Court found Mr Perinçek guilty of racial discrimination within the meaning of the Swiss Criminal Code, finding that his motives were of a racist tendency and did not contribute to the historical debate.

Mr Perinçek lodged an appeal that was dismissed by the Criminal Cassation Division of the Vaud Cantonal Court. In that court's view, the Armenian genocide, like the Jewish genocide, was a proven historical fact, recognised by the Swiss legislature on the date of the adoption of Article 261bis of the Criminal Code. The courts did not therefore need to refer to the work of historians in order to accept its existence. The Cassation Division emphasised that Mr Perinçek had only denied the characterisation as genocide without calling into question the existence of the massacres and deportations of Armenians.

The Federal Court dismissed a further appeal by Mr Perinçek in a judgment of 12 December 2007.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), Mr Perinçek complained that the Swiss courts had breached his freedom of expression. He argued, in particular, that Article 261bis, paragraph 4, of the Swiss Criminal Code was not sufficiently foreseeable in its effect, that his conviction had not been justified by the pursuit of a legitimate aim and that the alleged breach of his freedom of expression had not been "necessary in a democratic society".

The application was lodged with the European Court of Human Rights on 10 June 2008. The Turkish Government submitted written comments as a third party.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido Raimondi (Italy), President, Peer Lorenzen (Denmark), Dragoljub Popović (Serbia), András Sajó (Hungary), Nebojša Vučinić (Montenegro), Paulo Pinto de Albuquerque (Portugal), Helen Keller (Switzerland),

and also Stanley Naismith, Section Registrar.

Decision of the Court

Article 17

The Court, in first examining whether Mr Perinçek's comments were to be excluded from the protection of freedom of expression on the basis of Article 17 (prohibition of abuse of rights), reiterated that ideas which offended, shocked or disturbed were also protected by Article 10. The Court found it necessary to point out that Mr Perinçek had never questioned the massacres and deportations perpetrated during the years in question but had denied the characterisation of those events as "genocide".

The limit beyond which comments may engage Article 17 lay in the question whether the aim of the speech was to incite hatred or violence. The rejection of the legal characterisation as "genocide" of the 1915 events was not such as to incite hatred against the Armenian people. Mr Perinçek had never in fact been prosecuted or convicted for inciting hatred. Nor had he expressed contempt for the victims of the events. The Court therefore found that Mr Perinçek had not abused his right to openly discuss such questions, however sensitive and controversial they might be, and had not used his right to freedom of expression for ends which were contrary to the text and spirit of the Convention.

Article 10

The Court took the view that the term "genocide" as used in the relevant Article of the Swiss Criminal Code was likely to raise doubts as to the precision required by Article 10 § 2 of the Convention. The Court nevertheless agreed with the Federal Court that Mr Perinçek could not have been unaware that by describing the Armenian genocide as an "international lie", he was exposing himself on Swiss territory to a criminal sanction "prescribed by law".

The Court found that the aim of the measure in issue was to protect the rights of others, namely the honour of the relatives of victims of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards. However, it regarded as insufficiently substantiated the Government's argument that Mr Perinçek's comments posed a serious risk to public order.

The Court pointed out that it was not called upon to address either the veracity of the massacres and deportations perpetrated against the Armenian people by the Ottoman Empire from 1915 onwards, or the appropriateness of legally characterising those acts as "genocide", within the meaning of the relevant Article of the Criminal Code. The Court had to weigh up, on the one hand, the requirements of protecting the rights of third parties, namely the honour of the relatives of the Armenian victims, and on the other, Mr Perinçek's freedom of expression.

The question whether the events of 1915 and thereafter could be characterised as "genocide" was of great interest to the general public. The Court took the view that Mr Perinçek had engaged in speech of a historical, legal and political nature which was part of a heated debate. On account of the public interest of his comments, the Court found that the authorities' margin of appreciation was limited.

The essential ground for Mr Perinçek's conviction by the Swiss courts was the apparent existence of a general consensus, especially in the academic community, concerning the legal characterisation of the events in question. However, the Federal Court itself admitted that there was no unanimity in the community as a whole concerning the legal characterisation in question. According to Mr Perinçek and the Turkish Government, a third-party intervener in the case, it would be very difficult to identify a general consensus. The Court shared that opinion, pointing out that there were differing views among the Swiss political organs themselves. It appeared, moreover, that only about twenty States out of the 190 in the world had officially recognised the Armenian genocide. Such recognition had not necessarily come from the governments of those States – as was the case in Switzerland – but from Parliament or one of its chambers.

Agreeing with Mr Perinçek, the Court took the view that the notion of "genocide" was a precisely defined legal concept. According to the case-law of the International Court of Justice and the International Criminal Tribunal for Rwanda, for the crime of genocide to be made out, the acts must have been perpetrated with intent to destroy not only certain members of a particular group but all or part of the group itself. Genocide was a very narrow legal concept that was, moreover, difficult to substantiate. The Court was not convinced that the general consensus to which the courts referred in convicting Mr Perinçek could relate to such very specific points of law.

The Court thus doubted that there could be a general consensus as to events such as those in issue here, given that historical research was 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. In those cases, the applicants had denied the historical facts even though they were sometimes very concrete, such as the existence of the gas chambers. They had denied the crimes perpetrated by the Nazi regime for which there had been a clear legal basis. Lastly, the acts that they had called into question had been found by an international court to be clearly established.

The Court 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.

Two developments also had to be taken into account. Firstly, the Spanish Constitutional Court, in November 2007, had found unconstitutional the offence of negation and had taken the view that the mere negation of a crime of genocide did not constitute direct incitement to violence. Secondly, in February 2012, the French Constitutional Council had declared unconstitutional a law which made it a criminal offence to deny the existence of the genocides recognised by the law, finding it to be incompatible with freedom of expression and freedom of research. In the Court's view, the decision of the French Constitutional Council showed that there was in principle no contradiction between the official recognition of certain events as genocide and the conclusion that it would be unconstitutional to impose criminal sanctions on persons who questioned the official view.

Lastly, the Court pointed out that the United Nations Human Rights Committee

had expressed its conviction[2] that "[l]aws that penalize[d] the expression of opinions about historical facts [were] incompatible with the obligations that the Covenant [on Civil and Political Rights] impose[d] on States parties ..." and that the "Covenant [did] not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events".

In conclusion, the Court doubted that Mr Perinçek's conviction had been dictated by a "pressing social need". The Court pointed out that it had to ensure that the sanction did not constitute a kind of censorship which would lead people to refrain from expressing criticism. In a debate of general interest, such a sanction might dissuade contributions to the public discussion of questions which were of interest for the life of the community.

The Court found that the grounds given by the national authorities in order to justify Mr Perinçek's conviction were insufficient. The domestic authorities had therefore overstepped the narrow margin of appreciation in this case in respect of a matter of debate of undeniable public interest.

There had accordingly been a violation of Article 10.

Just satisfaction (Article 41)

The Court held that the finding of a violation of Article 10 constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by Mr Perinçek.

Separate opinions

Judges Sajó and Raimondi expressed a joint concurring opinion and Judges Vučinić and Pinto de Albuquerque expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

2 General comment No. 34, given in 2011, on freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights.