A VERDICT OF THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS IMPLICATIONS

(AVRUPA İNSAN HAKLARI MAHKEMESİ'NİN BİR KARARI VE BU KARARIN YANSIMALARI)

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Abstract: *This article analyses the verdict of the European Court of Human Rights regarding the Perinçek v. Switzerland case. It firstly outlines why the case was filed, what Perinçek stated in his defense, and also what Switzerland based its accusations on regarding Perinçek. It also lists some ECtHR cases that bear resemblance to the Perinçek v. Switzerland case. It indicates that the Perinçek v. Switzerland case, and also any legal case that is related to the Armenian genocide claims, are carried out in the absence of a competent tribunal that came to a verdict on the nature of the events of 1915. As such, any attempt to persecute individuals who reject Armenian genocide claims are done so without the legal backing of such an authoritative tribunal verdict. The article concludes by indicating that ECtHR's verdict does mean that the court rejects Armenian genocide claims, it simply removes itself from such discussions and focuses solely on whether the curtailment of Perinçek's freedom of expression was justified or not. Based on this reasoning, the article states that the ECtHR found Switzerland's argument for convicting Perinçek to be insufficient and unjustified.*

Keywords: *European Court of Human Rights, (ECtHR), European Convention on Human Rights, (ECnHR), Perinçek v. Switzerland, genocide, freedom of expression, Switzerland, Turkey*

Öz: *Bu makalede Avrupa İnsan Hakları Mahkemesi'nin Perinçek v. İsviçre Karşı davası hakkında verdiği kararı incelemektedir. Makale ilk olarak davanın neden açıldığını, Perinçek'in savunmasında neler ifade ettiğini ve aynı zamanda İsviçre'nin Perinçek'i mahkûm etmede kullandığı suçlamalara değinmektedir. Makale aynı zamanda Perinçek İsviçre'ye Karşı davasına benzerlik taşıyan diğer bazı AİHM kararlarını sıralamaktadır. Perinçek İsviçre'ye Karşı davasının ve aynı zamanda Ermeni soykırımı iddialarıyla bağlantılı diğer başka davaların, 1915 olaylarının niteliğine ilişkin karar vermiş bir uzman mahkemenin yokluğunda ilerletildiğini belirtilmektedir. Bu sebeple, Ermeni soykırımı*

iddialarını reddeden herhangi bir şahsı yargılama çabası yetkili bir mahkeme kararının yasal desteğinden yoksun bir şekilde yapılmaktadır. Makale, AİHM kararının Mahkeme'nin Ermeni soykırım iddialarını reddetmediğini, aslında sadece kendisini bu tür tartışmalardan uzak tuttuğunu ve Perinçek'in ifade özgürlüğünün kısıtlanmasının haklı gerekçelere dayanıp dayanmadığına odaklandığı sonucuna varmaktadır. Makale, AİHM'in bu muhakemeden yola çıkarak İsviçre'nin Perinçek'i mahkûm etmesindeki savının yetersiz ve haksız olduğu kanaatine vardığını ifade etmektedir.

Anahtar kelimeler: *Avrupa İnsan Hakları Mahkemesi, (AİHM), Avrupa İnsan Hakları Sözleşmesi, (AİHS), Perinçek İsviçre'ye Karşı, soykırım, ifade özgürlüğü, İsviçre, Türkiye*

The European Court of Human Rights (ECtHR) brought in on 17 December 2013 a milestone verdict on the denial of the so-called Armenian genocide. The present article is an attempt to analyse this verdict.

The ECtHR's verdict is made on a law suit filed by the Turkish Politician Doğu Perinçek against Switzerland[1]. In various public statements made on 7 May, 22 July and 18 September 2005 in Lausanne, Opfikon and Könitz respectively, Perinçek said: *"The claim that the Ottoman authorities perpetrated the crime of genocide against the Armenians was an international lie"*. A Swiss civil society organization by the name of *Association Suisse-Arménie* took this statement to the Local Court of Minor Offences of Lausanne. The Court decided on 9 March 2007 that Perinçek committed the offence of racial discrimination according to the Article 261/4 of the Swiss Penal Code. In its justification for the decision the court pointed out that *"the Armenian genocide is, according to the Swiss public opinion as well as more generally, a proven fact"*. To prove its reasoning, the court referred to various parliamentary acts, to the juridical publication as well as to the statements made by various federal and cantonal political authorities. The court referred also to the recognition of this genocide by various international bodies such as the Council of Europe[2] and the European Parliament.

Perinçek took the case to the Penal Court of Cassation of the Vaud Canton. This Court rejected Perinçek's demand. The cantonal Court of Cassation pointed out in its justification that, *"like the Jewish Holocaust, the Armenian genocide was a historical fact recognized as such by the Swiss legislation"*. Therefore the Court did not need the opinion of historians in order to admit its existence. It further pointed out that Perinçek stopped short of referring at all to the massacres and deportations of Armenians after he denied the Armenian genocide (*implying that a person who denies the Armenian genocide is also expected to refer to the massacres and deportations of Armenians*).

Perinçek took this time the decision of the Cantonal Court of Cassation to the Federal Court, which rejected the demand on the grounds that the Swiss Penal Code did not make any distinction among the genocides when it provides for the repression of their denial.

After having exhausted the internal recourse procedures, Perinçek filed a lawsuit at the ECtHR against this decision and the Court decided that Switzerland had violated Perinçek's freedom of expression contained in the Article 10 of the European Convention of Human Rights (ECnHR).

1 *Affaire Perinçek c. Suisse*, Requête no 27510/08, Judgements of the European Court of Human Rights

2 The ECtHR points out that there is no decision adopted on this subject by the Council of Europe. It was only the personal opinion of a member of the Parliamentary Assembly of the Council of Europe that he expressed during his address to the Assembly.

An earlier case of denial of the Armenian genocide

In a similar case, earlier on 14 September 2001, 11 Turkish citizens were taken to the local court of Bern-Laupen on the accusation of having committed the offence of the denial of the Armenian genocide. They were acquitted by the local court on the grounds that the defendants did not have the intention of discrimination contained in the Article 260 bis of the Swiss Penal Code. The plaintiffs appealed both the Court of Appeals of Bern and the Federal Court, but they both reconfirmed that the acquittal of 11 Turks were right.

Perinçek referred to this file in his petition to the ECtHR and questioned why the Swiss Federal Court reconfirmed his sentence while it acted differently in the case of 11 Turks.

On the admissibility of the Perinçek's case

The ECtHR discussed first the question of the admissibility of Perinçek's demand. After considering similar or comparable cases, it tried to find out whether the statement made by Perinçek was aimed at inciting hatred or violence. It was led to the conclusion that *"rejecting the legal characterization of the events of 1915 was not an incitement to hatred against the Armenian people. Neither was he prosecuted for having incited to hatred. He did not express any contempt for the victims of the events of 1915. Therefore he did not misuse his right to publicly debate subjects that may be sensitive and even unpleasant. The free exercise of this right is one of the fundamental aspects of the freedom of expression and this is what distinguishes a democratic, tolerant and pluralistic society from a totalitarian and dictatorial regime"*.

On these grounds, Perinçek's request was found admissible.

Two points are important in this decision on admissibility.

a) Rejection of the legal characterization of the events of 1915 as genocide is not regarded by the ECtHR as an incitement to hatred against the Armenian people.

b) The ECtHR has persistently avoided the reference to the 1915 events as genocide. We will see further below that the ECtHR rejected, in the past, the appeal of a plaintiff who was punished because of his denial of the holocaust (since the holocaust is characterized as genocide by the Nurnberg Court).

On the substance of the demand

Neither the plaintiff nor the defendant questioned that there was interference in the exercise of Perinçek's freedom of expression. They both agree that there is interference in Perinçek's exercise of his right of expression. The subject matter of the complaint is whether this interference is justified or not.

Such inference is a violation of the Article 10 of the European Convention on Human Rights (ECnHR) except in case it falls within the purview of the paragraph 2 of the said Article. The Article 10 of the ECnHR reads as follows:

Article 10

Freedom of Expression

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and import information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are described by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

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The ECtHR had therefore to see:

a) whether such interference was "*provided by the Swiss law*",

b) whether the Swiss law was trying to fulfil one or several legitimate goals contained in the paragraph 2, and

c) whether such interference was "*necessary in a democratic society*" to achieve these goals.

Other texts of international legislation on this subject

There is a *UN International Pact on Civil and Political Rights* adopted on 16 December 1966. Switzerland ratified it in 1992. Articles 19 and 20 of the said Pact contain provisions on the freedom of opinion and expression. The UN Human Rights Commission adopted in its 102nd session in 2011 a *General Observation no.34*, which sheds light more specifically on the penal sanctions regarding the expression of opinion on the historical facts. Its relevant paragraph reads as follows:

(Paragraph 49 of the General Observation no. 34 of the UN Human Rights Commission)

> *The laws that criminalize the expression of opinion regarding historical facts are incompatible with the obligations that the Pact imposes on the States party concerning the respect for the freedom of opinion and freedom of expression.* ***The Pact does not allow general interdictions on the expression of a wrong opinion or an incorrect interpretation of the past events.*** *Restrictions should never be imposed on the freedom of opinion and, regarding the freedom of expression, should not go beyond what is allowed by the paragraph 3 or required by the Article 20.*

The said paragraph 3 and Article 20 read as follows:

Paragraph 3 (of the Article 19 of the General Observation no. 34 of the UN Human Rights Commission)

3. *The exercise of the freedoms contained in the paragraph 2 of the present Article* (Everyone has the right of freedom of expression; this right includes the right to research, to receive and propagate all sorts of information and ideas, without consideration of frontiers, orally, written, printed or artistic, or by any other means of his choice) *comprises special duties and responsibilities. Therefore it may be subjected to certain restrictions that should however be identified expressively by law and that are necessary:*

   a) *For the respect of rights and reputation of others;*

   b) *For the preservation of the national security, of the public order, public morality and health;*

Article 20 (of the General Observation no. 34 of the UN Human Rights Commission

1. *All types of propaganda in favour of war are forbidden by law.*

2. *All types of call to national, racial or religious hatred that constitute an incitement to discrimination, hostility or to violence are forbidden by law.*

The first legitimate ground for a government to impose a restriction on the exercise of the freedom of expression is the right and reputation of others. For instance the State may introduce restriction to the freedom of expression in order to protect the right to vote regulated by the Article 25 of the Pact. These restrictions have to be interpreted with caution. It is legitimate to protect the voters against the intimidation or coercion to vote in favour of a person or political party however these restrictions should not prevent holding a political debate even invitation to boycott the elections that is not compulsory.

The Claims of the Parties

The claims of the parties to the case were as follows:

Perinçek referred, in this claim, to the Article 10 of the ECnHR and said that, the Swiss court, by condemning him for having stated publicly that there has never been Armenian genocide, violated his freedom of expression. He added that Article 260 bis/4 of the Swiss Penal Code is not predictable enough and that his condemnation was not motivated by a legitimate aim and that the violation of his freedom of expression was *"not necessary in a democratic society"*.

Perinçek further claimed that, because the Swiss courts acquitted 11 Turks for the same type of offence in the past, he thought that such behaviour will not be considered as an offence. Furthermore he said that a former Justice Minister of Switzerland criticized the contested Article during his visit to Turkey.

The Swiss government pointed out that Perinçek was condemned under the paragraph 4 of the Article 261 bis of the Swiss Penal Code, which reads as follows:

(Paragraph 4 of the Article 261 bis of the Swiss Penal Code)

Whoever ... denies, grossly trivializes or tries try to justify genocide or other crimes against humanity... will be punished to a prison sentence of maximum 3 years or will be fined.

The Swiss government further said that initially the draft law submitted by the Swiss government to the parliament was criminalizing only the holocaust, but the parliament amended the draft to cover all genocides. Therefore the criminalization of the Armenian genocide is in line with the wish of the lawmakers. The rapporteur of the Commission was on the record to point out that the amendment covered also the Armenian genocide.

The Swiss government elaborated also on the decision of the Federal Court that confirmed Perinçek's punishment. The federal Court thought that the judge of the Minor Offences Court of Lausanne did not need determine whether the paragraph 4 of the Article 261 bis of the Swiss Penal Code Article 4 covered only the holocaust or it also covered the Armenian genocide. The Courts do not need, according to the Swiss Federal Court, to turn to the work of historians on this particular issue. If the judge has to penalize the denial of holocaust because it is recognized as genocide, he should use the same criteria in penalizing the other genocides. In this case what is to be clarified is whether there is similar consensus on whether the 1915 events that are denied by Perinçek are also genocide. Here the judge should look at the general assessment of the public and the community of historians, rather than on the question whether or not the massacres and the deportations that took place in the Ottoman Empire should be qualified as genocide. This is how the decision of the Lausanne Court of Minor Offences should be assessed, which pointed out in its decision that it was not its duty to make history and that its duty was to see whether this genocide was "*known, recognised and even confirmed"*.

Perinçek challenged exactly this point, in the defence of his attitude, pointing out that he did not deny any genocide since there has never been Armenian genocide.

The Swiss government pointed out as well that at the time of the ratification of the *International Pact on Civil and Political Rights*, it put a reservation by which it reserved the right of adopting a penal provision that will take care of the Article 20/2 of the Pact (see above) which provides that "*all types of calls to national, racial and religious hatred that constitutes an incitement to the discrimination, to hostility or to violence is prohibited by law"*. With the entry into force of the Article 261 bis, this reservation has been withdrawn.

The Swiss government referred also to the Recommendation (97)20 adopted on 30 October 1997 by the Ministerial Council of the Council of Europe on hatred speech. This Recommendation condemns all types of expression that incite racial hate, xenophobia, anti-Semitism and all forms of intolerance.

The Swiss government mentioned also that over 20 national parliaments recognised that the deportations and massacres that took place between 1915 and 1917 constitute genocide in the sense of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). Furthermore the European Parliament invited Turkey on 15 November 2000 to publicly recognize the Armenian genocide perpetrated during the First World War.

The Swiss government said that in light of this international background and in view of the Article 261/4 of the Swiss Penal Code, Perinçek should know that his statements would expose him to a penal sanction under the Swiss law. It further added that Perinçek declared in his speech on 20 September 2005 that he did not deny the Armenian genocide since there was no genocide and that he was fighting against an international lie.

The Turkish government also took part in the law suit as a third party and pointed out that the penal sanction of the Switzerland was not clear and that therefore the interference in the Perinçeks's freedom of expression does not stand on a sufficient legal basis.

The Verdict of the ECtHR

In light of these arguments the ECtHR decided that:

- the reasons put forward by the Swiss authorities to justify the punishment were not all pertinent.
- Overall, these reasons were insufficient.
- The Swiss authorities could not demonstrate that the Perinçek's condemnation was responding a '*pressing social requirement',* neither that it was necessary in a democratic society for the protection of the honour and the sentiments of the descendants of the atrocities of 1915.
- The Swiss authorities thus trespassed the restricted margin of assessment that they were benefiting from in the present case.

Five of seven judges voted in favour of the decision that Article 10 of the ECnHR was violated.

Five other judges out of seven voted in favour of the decision that no compensation was needed to be paid to Perinçek since the ECtHR verdict was a sufficient satisfaction for him.

Other decisions of the ECtHR on the Freedom of Expression

There are other decisions made by the ECtHR on the freedom of expression. I will pick three cases that are relevant to our subject:

- *Garaudy vs France* case (Application no: 65831/01, Decision on admissibility of 24 June 2003),

- *Lebideux and Isorni vs France* case (Application no: 24662/1998, Judgement of 23 September 1998),

- *Chauvy vs France* case (Application no: 64915/01, Judgement of 29 June 2004).

The first two of these three cases were brought to the court by the prosecution under a law that is called in France *Loi Gayssot* (Law no: 90-615 of 13 July 1990). The ECtHR decided in the first case that the applicant Garaudy was guilty under *Loi Gayssot*, for having denied a fact that was established by the Nürnberg court. However the same court, decided in the second case that Lebideux was innocent, under the same *Loi Gayssot*, for having published an advertisement to call for the rehabilitation of the Marshal Pétain. In the third case the Court points out the inappropriateness for a penal court to arbitrate historical issues.

A closer examination of these three cases will shed more light on the approach of the ECtHR to the question of the freedom of expression:

a) The *Garaudy vs France* case

The French public prosecutor took action against Garaudy who published a book that questioned various historical truths about the persecution of Jews during the Second World War and he was convicted for this act. Garaudy took the case to the ECHR. The ECHR reasoned that the application of Garaudy was inadmissible on the following grounds:

"There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to the quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the Nationalist-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is

therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to the public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

Accordingly the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity".

b) The *Lebideux and Isorni vs. France* case

Lebideux and Isorni published an advertisement in the French daily *Le Monde* calling for the rehabilitation of Marshal Pétain (who cooperated with the German occupation forces in France between 1940 and 1944). The French public prosecutor took action against them and the French court convicted them. Lebideux and Isorni took the case to the ECHR who acquitted them on the following grounds:

"*The applicants did not call into question the category of clearly established historical facts (by the Nürnberg Court) –such as holocaust- whose negation or revision would be removed from the protection of Article 10 by Article 17 (of the European Convention of Human Rights).*

55. "… The Court further notes that the events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it disproportionate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately. The court reiterates in that connection that, subject to paragraph 2 of the Article 10, freedom of expression is applicable 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 as the demands of that pluralism and broadmindedness without which there is no "democratic society".

Important points in these verdicts

One of the important points of these two verdicts of the ECtHR is that, in the *Garaudy vs France* case, the Court makes a distinction between the denial of a fact that is established by an authorized international court

and other cases of debatable nature. It reconfirms the punishment of Garaudy because Garaudy had denied holocaust that was recognized as genocide by the Nürnberg Court.

The second important point is that, in the *Lebideux and Isorni vs. France* case, the ECtHR thought that the call for the rehabilitation of Marshal Pétain would not hurt the feelings and the memory of the French people who did not like what he has done to France in 1940s, because these events had occurred 40 years ago (at the time when the call for the rehabilitation was published in 1980s). It commented that "*the lapse of time makes it disproportionate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously".* Lebideux and Isorni were challenging events that occurred 40 years ago and the ECtHR believes that they are too old to be remembered. Perinçek challenges the events that occurred 100 years ago.

c) *Chauvy vs France* case

The third case is more relevant to this essay because in this particular case the ECtHR emphasizes the importance of the freedom of expression for a genuine historical research. The relevant part of the court's opinion is as follows:

> *"60. The Court considers that it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shape opinion as to the events which took place and their interpretation. As such, and regardless of the doubts one might have as to the probative value or otherwise of the document known as "Barbie's written submission" or the "Barbie testament", the issue does not belong to the category of clearly established historical facts -such as the holocaust- whose negation or revision is removed from the protection of Article 10 by Article 17 of the Convention".*

ECtHR Verdict and an EU Framework Decision

There is an EU Framework decision that covers partly the field of the freedom of expression vs. the offence of the denial of a crime. The full title of the Decision is the *Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law*[3].

3 The full text of the Framework Decision could be reached in the following link: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008F0913:EN:NOT

The Framework Decision was enacted for the purpose of combating racism and xenophobia and standardizing among the EU Member States the criminalization of the offences committed by denying a crime of genocide or a crime against the humanity.

The title of the first article of the Framework Decision is *"Offences concerning racism and xenophobia".* The offenses to be made punishable are enumerated in the first paragraph of this article, which reads as follows:

Article 1

Offences concerning racism and xenophobia

1. *Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:*

   a) *publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;*

   b) *the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;*

The Framework Decision was enacted for the purpose of combating racism and xenophobia and standardizing among the EU Member States the criminalization of the offences committed by denying a crime of genocide or a crime against the humanity.

   c) ***publicly condoning, denying or grossly trivialising crimes of genocide,*** *crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;*

   d) ***publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter*** *of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.*

2. *For the purpose of paragraph 1, Member States may choose to punish only*

conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

3. *For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.*

4. *Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c)and/or (d) only if the crimes referred to in these paragraphs* ***have been established by a final decision of a national court of this Member State and/or*** *an international court, or by a final decision of an international court only.*

The paragraph 1 (c) makes punishable the denial of genocide (which is among the crimes defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Count) as well as the denial of all other crimes against humanity. There is nothing questionable in incorporating the denial of such crimes within the scope of the punishable acts if there is a decision of an authorized body establishing that such an act is in fact committed. On the contrary it would be incomplete if such offenses were to be kept out of the scope of the punishable acts.

The controversial point in the Framework Decision is in the underlined phrase of Article 1 (4) above. This article authorizes the Member States to opt for either of the following two alternatives:

a) to punish the denial of crime only in case an act is characterized as genocide by an i**nternational** court;

or

b) to punish the denial of crime if such an act is characterized by the national court of the Member State in question.

Any Member State will be able to make a statement, on adoption of this Framework Decision or later, *"that it will make punishable the act of denying the crimes defined in the Rome Statute only if this crime has been* ***established by a final decision of a national court of this Member State".*** After having made such a statement it will have to pass a law that makes the denial of crime a punishable act.

This option made available to the EU Member States is in contradiction with

the provisions of the Genocide Convention[4], but this aspect of the question is outside the scope of the present article.

The ECtHR did not yet bring in any verdict to distinguish between the denial of a genocide characterized as such by an authorized international court and the denial of a genocide characterized as such by an unauthorized national court according the Genocide Convention. Therefore, it is difficult to tell whether the ECtHR will look at all in the future verdicts into this aspect of the question in the first place. It may or it may not.

Therefore the ECtHR verdict on Perinçek may only have an indirect implication on the EU Framework Decision that can be summarized as follows:

a) In case the ECtHR is of the opinion that the denial of a genocide that is not established by a court authorized by the Genocide Convention is not punishable, it may reject the admissibility of a case where the defendant is punished for the denial of such genocide. If this happens, one part of the Article 1 para. 4 of the EU Framework Decision will become devoid of a field of application. The Member States were called by this Article to make punishable the act of denying genocide *"only if this crime has been established:*

There is nothing questionable in incorporating the denial of such crimes within the scope of the punishable acts if there is a decision of an authorized body establishing that such an act is in fact committed. On the contrary it would be incomplete if such offenses were to be kept out of the scope of the punishable acts.

   1) *by a final decision of a national court of this Member State and/or an international court, or*

   2) *by a final decision of an international court only".*

The part that will become devoid of the field of application will be the case covered by the paragraph *a (1)* above, because the Genocide Convention does not authorise the courts of the EU Member States to establish whether the events of 1915 could be characterized as genocide. The Genocide Convention specifies which courts shall be authorized to establish whether genocide has taken place, in its Article 6, which reads as follows:

4 Yakış, Yaşar, "A European Union Framework Decision on the Offence of Denying a Crime", *Review of Armenian Studies*, No. 23, July 2011, pp. 63-92.

Article 6 (of the Genocide Convention)

> *Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*

According to this article the court that are authorized to determine whether genocide has taken place are the following:

- a competent tribunal of the State in the territory of which the act was committed *(in the case of the Armenian genocide it has to be Turkey),*

- such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

b) If the national courts of the EU Member States follow scrupulously the jurisdiction of the ECtHR, they would know that the ECtHR overrules their judgments punishing individuals for having denied the Armenian genocide.

The ECtHR verdict has no other direct implication on the EU Framework Decision.

This may look as a minute detail, but the problem faced by those who deny the "Armenian genocide" stems exactly from this minute detail. They are punished for having denied an act that is not characterized as genocide by a competent tribunal.

French experience of criminalizing the denial of "Armenian Genocide"

Another example of Armenian efforts to make the denial of genocide a punishable act is the initiative that they took in France. It started by passing a law in the French parliament that consisted of one single sentence, which reads as follows:

> *"France publicly recognizes the Armenian genocide of 1915."*

Since there is no sanction attached to it, which will be applied if it is violated, this text looks more like a political declaration than a law in due form. This harmless initiative was the first step of a bigger aspiration, namely the

criminalization of the denial of the "Armenian genocide". In fact, a law to achieve this goal was adopted by the lower chamber of the French parliament in 2006, but it was overturned by the upper chamber, the Senate. The Armenians did not give up. In 2012, a French deputy, Mme. Boyer, initiated another law with similar content. This time, the same Senate, contradicting what it had done six years ago, voted in favour of this law. But this time the French Constitutional Council disappointed the Armenians by overturning the Boyer's law.

President Sarkozy instructed his close associates to prepare another law to circumvent the obstacles identified by the Constitutional Council, but his term in office did not suffice to achieve this goal. His successor Mr. François Hollande voiced his resolve to achieve what his predecessor was not able to achieve. He repeated during his official visit to Turkey, that passing a law criminalizing the denial of genocide was an EU obligation for them.

In light of the verdict of the French Constitutional Council, it is difficult to tell how the French legislators will find a way both to satisfy the Armenian aspirations and to remain within the frame drawn by the Constitutional Council on the one hand and by the ECtHR verdict on the other.

Implications of the ECtHR Verdict

The ECtHR verdict has implications beyond recognizing the Perinçek's freedom of expression.

First, Turkey has so far been hesitant to go to international courts to challenge the Armenian claim of genocide because of fear of losing the case. Now, the verdict has eased Turkey's hand.

Second, the Swiss Armenian association hoped to teach Perinçek a lesson on what not to do on the Armenian genocide issue, but it inflicted serious damage to the Armenian efforts to criminalize the denial of genocide, because the verdict will now push several countries to think twice before they consider passing a law in their respective parliaments to recognize the Armenian genocide. True, the recognition of genocide and punishing its denial are two different subjects. But now that the denial has ceased to be a punishable act, passing a law to recognize the Armenian genocide will become an ineffective gesture to the Armenians at the cost of antagonizing Turkey unnecessarily. Turkey should try to explain to the member countries of the Council of Europe that passing such a law is a futile exercise that is devoid of a field of application.

Third, more Turks will feel free to voice their opinion loudly without fear of being prosecuted. Armenian initiatives to take such cases to the court will only serve to reconfirm the present case law.

Fourth, the ECtHR verdict invalidates one part of a provision contained in the Article 1(c) of the EU Framework Decision on Combating Racism and Xenophobia. Turkey should raise this issue with the EU at the meetings of the Turkey-EU Association Council.

Fifth, one may expect that the motherland and Diaspora Armenians must have understood that the European culture is consistently opposed to limit the freedom of expression. This is proven by the decision of the French Constitutional Council and it is now reconfirmed by the ECtHR verdict. The ECtHR verdict is of course more important because it constitutes jurisprudence for the national courts of the member countries of the Council of Europe.

Finally, if the wisdom prevails, the verdict may be used Turkey and Armenia as an opportunity to overcome their reciprocal prejudices and put an end to their centennial conflict.

Conclusion

There is no doubt that this is a milestone decision on the question of denying the so called Armenian genocide. However the scope of the ECtHR verdict has to be understood properly:

The ECtHR verdict does not deny that the Armenian genocide took place. It simply says that denying Armenian genocide is not an offence. It avoids entering the field of discussing whether it is genocide or not. It refers to these facts as "*the events of 1915"* or as "*Atrocities of 1915*".

There are further details in the verdict that are worth analysing: The ECtHR identifies that there is interference by the Swiss authorities in the exercise of Perinçek's freedom of expression. It even admits that the Swiss authorities have the right to interfere in the exercise of Perinçek's freedom of expression. The efforts of the ECtHR are therefore focused on whether this interference is justified under the criteria contained in the Article 10/2 of the ECnHR. In other words the ECtHR was led, out of hand, to the conclusion that there was interference, but that interference went beyond the point that was required by the national security, public safety or reputation or rights of others.

It will not be appropriate to attribute any other significance beyond that to the verdict.

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