Armenian Genocide v. Holocaust in Strasbourg: Trivialisation in Comparison

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At the end of 2013, the European Court of Human Rights delivered an impressively extensive judgement in the case *Perinçek v. Switzerland*. The condemnation of a Turkish politician for the denial of Armenian genocide by Swiss courts violated freedom of expression. Along with many human rights scholars, I would hardly shake hands with a Holocaust or an Armenian genocide denier. Yet I will be equally sceptical of courtrooms being appropriate sites to qualify historical truth. For a summary of that position, see my recent paper ("Historical Revisionism: Law, Politics, and Surrogate Mourning"). At first glance, the outcome of *Perinçek* is a victory for civil rights. Limiting historical discussion by criminal prosecution is clearly an anachronism in the 21st century. However, on a deeper reading, this decision reveals yet another judicial pitfall which substantially undermines its outcome for freedom of speech in Europe. This pitfall stems from a sort of legal hypocrisy embedded in the Court's distinction between the Holocaust and other mass atrocities of the 20th century.

The Matter

During his 2005 visit to Switzerland, a Turkish politician Dr. Doğu Perinçek gave several public speeches alleging conspiracies against Turks and an "international lie" about Armenian genocide. According to Perinçek, the scope and nature of atrocities against Armenians in the Ottoman Empire cannot be deemed genocide. Swiss courts found Perinçek guilty of the criminal offence of genocide denial.

Together with two concurring opinions, the judgment in Strasbourg (currently available exclusively in French) consists of 80 pages. It offers a useful flashback on the Court's engagement in multiple aspects of historical memory.

While finding the criminal measure legitimate and partially necessary, the Court fosters a lower margin of appreciation for Swiss authorities. The Court emphasises the particular social significance of historical discussion and the absence of consensus on this issue. It even doubts if such a "general consensus" is possible. Most importantly, the Court establishes several distinctions between Holocaust deniers and Dr. Perinçek. (1) The applicant contested only a legal qualification of certain events, supposedly not denying historical facts. (2) In case of Holocaust deniers, a conviction for the Nazi crimes was explicitly prescribed in the Charter of the Military Tribunal in Nuremberg (1945). (3) The Holocaust is a fact that has been clearly established by international jurisdiction. (4) Holocaust denial is a primary engine of the powerful Anti-Semitism movements. Meanwhile the rejection of the genocidal character of the 1915 events cannot cause comparable consequences. (5) The Court cites the 2006 research conducted by the Swiss Institute of Comparative Law. The study revealed that of the 16 countries analysed only 2 had a general provision on genocide denial (i.e. broader than just Holocaust denial). (6) Furthermore, the Court extensively quotes constitutional decisions in Spain (2007) and France (2012) to affirm that the recent national jurisprudence rejects the broad criminalisation of genocide denials. (7) Finally, the Court rules that Switzerland failed to demonstrate that a social need for this measure is stronger than in other countries. Thus, the Swiss authorities extended the permissible limits of the margin of appreciation in violation of Article 10 of the ECHR.

Three Fallacies

I cannot but agree with the Court on two central findings. First, drafting history is indeed an enterprise where consensus is hardly possible. Therefore, it is worth transferring disputes about historical events from courts to discussions amongst scholars and civil society. Second, it is hard to see how the issue of Armenian genocide addresses a sufficient social need for criminal prosecution in Switzerland. The outcome of the case is a plausible victory for the freedom of academic expression.

However, I equally doubt if this social need for state monopoly over historic discussion is higher in other liberal democracies. The Court creates a speculative distinction between the Holocaust and other 20th-century atrocities. There are three fundamental fallacies in this approach, which undermine judgement and provoke the stigmatization of Armenian communities worldwide.

1) The Court distinguishes Dr. Perinçek (who supposedly insists on an alternative qualification of the events) from Holocaust revisionists (who deny the substantial facts of the Shoah). It is hard to see how Perinçek could have constructed his denial argument without re-qualifying the malicious intent of the state, the number of victims (1-1.5 millions), the role of the Ottoman imperialism, and methods of annihilation used on the Armenian population. Moreover, legal practice shows that discussion of history (the role of Atatürk, repressions against Armenians, Kurds, Assyrians, etc.) remains substantially censored in Turkey. Attacks by the state and by individuals on dissidents with alternative historical viewpoints remain common. The case of the Turkish-Armenian journalist, Hrant Dink (who extensively commented on the Armenian genocide) is truly emblematic here. Prosecuted for the absurd crime of denigrating Turkishness, he was assassinated in 2007. Three years later, the ECtHR ruled that Turkey violated Dink's right to freedom of expression.

In contrast, "Holocaust deniers" are not exclusively people who blatantly refute the existence of Jewish victims. Holocaust revisionists include those who question the number of victims, the methods of annihilation, the role of perpetrators, and those who suggest (despite all the abundant historical evidence) that Nazi governments did not have intent of complete annihilation of the Jews. On a closer comparison, both issues (*Auschwitzlu¨ge* and the Armenian genocide) are a matter of qualification.

2) The Court suggests that unlike the Armenian genocide, the Holocaust is an internationally recognised crime. The Court forgets to mention that the Holocaust (unlike many other atrocities) ranks amongst the few endowed with specific "legal" recognition. Judges Vučinić & Pinto De Albuquerque end their powerful dissenting opinion by citing Raphael Lemkin, a lawyer who coined the term of genocide. It was, in fact, the Armenian tragedy that initially inspired Lemkin's ideas. He considered the League of Nation's ignorance of Armenian massacre truly shameful. The 1945 Nuremberg Statute (mentioned by the Court as clear grounds to prosecute Nazis) did not precede the crime of the Holocaust. Likewise, Lemkin's term "genocide" entered international vocabulary only by virtue of the 1948 Genocide Convention. Apart from the Holocaust, neither the Roma genocide (approximately 300,000 people), nor persecution of gays, nor any other mass annihilation conducted by the Nazis received a comparable legal acknowledgement. The Court ignores a simple fact that all genocides are a matter of contested recognition.

3) This judgement constructs the Holocaust as a mega-genocide to which all else pales by comparison. The Holocaust becomes a universal unit of measurement. It is unclear whether Armenian massacre stands as 0.5 or 0.8 of that unit. One can trace this meta-crime approach in the recent cases in Strasbourg. In *Hoffer & Annen v. Germany* [2011], applicants were prosecuted for anti-abortion leaflets comparing the "Babycaust" to the Holocaust. In *PETA v. Germany* [2012], the animals rights association was defending its artistic campaign ("the Holocaust on your plate"), where pictures of animals in stocks were contrasted with images of inmates in concentration camps. In both cases, the Court (rather erroneously) found no violation of freedom of expression, fostering an incredibly broad margin of appreciation for Germany. It

remains unclear how those two instances reflect a deep social need. In *Perinçek*, the Court even says that the denial of the Armenian genocide is incapable of producing effects similar to the danger of Anti-Semitism. With this statement the Court ignores extreme sensitivity to this issue on the part of both the Armenian communities in Diaspora (referring to the events as *Mets Yegherrn*, literally "Great Crime") and state propaganda in Turkey and Azerbaijan (after territorial conflict with Armenia). Placing Armenian genocide into the second class of "contested massacres", the Court overlooks the sufferings of hundreds of thousands of Armenian people murdered and tortured in the "death march" to the desert in Syria, deported, raped, poisoned and burned alive during and after World War I.

In this respect, the concurring opinion of Judges Raimondi & Sajó provides an extensive disclaimer for Armenians (explaining the difficult position of the Court). Yet the only true difficulty is the trap into which the Court had cornered itself in its previous Holocaust cases. While privileging the Shoah as a meta-crime, it is practically impossible to justify the difference with comparable atrocities. Meanwhile, the Holocaust distinction gives the Turkish government a green light for fostering xenophobic, Turkic-centric identity. It hardly makes reconciliation of Armenians with Turks any easier. It diminishes and degrades historical accounts of Western Armenians indispensable for the history of the Middle East and the Caucasus. Finally, it gives further impetus for the hysteria about a Jewish conspiracy by Anti-Semites of all kinds.

The decision to move the qualification of Armenian genocide away from state monopoly and leave it to historians and civil society should be wholeheartedly welcome. However, the Court's continuous misleading approach (distinguishing the Holocaust from other fairly comparable atrocities) substantially undermines the judgement in *Perinçek*. It essentially trivialises the sufferings of a million Armenians in the Ottoman Empire and projects a flimsy judicial iconography with the Holocaust rising over other "second-class" evils.At the end of 2013, the European Court of Human Rights delivered an impressively extensive judgement in the case *Perinçek v. Switzerland*. The condemnation of a Turkish politician for the denial of Armenian genocide by Swiss courts violated freedom of expression. Along with many human rights scholars, I would hardly shake hands with a Holocaust or an Armenian genocide denier. Yet I will be equally sceptical of courtrooms being appropriate sites to qualify historical truth. For a summary of that position, see my recent paper ("Historical Revisionism: Law, Politics, and Surrogate Mourning"). At first glance, the outcome of *Perinçek* is a victory for civil rights. Limiting historical discussion by criminal prosecution is clearly an anachronism in the 21st century. However, on a deeper reading, this decision reveals yet another judicial pitfall which substantially undermines its outcome for freedom of speech in Europe. This pitfall stems from a sort of legal hypocrisy embedded in the Court's distinction between the Holocaust and other mass atrocities of the 20th century.

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