

Law & Critique: Law of Denial: The Armenian Genocide at the European Court of Human Rights

by Basak Ertur | 1 May 2019



On 24 April 2019, France held its first official Armenian Genocide Commemoration Day, marking the 104th anniversary of the 1915 genocide. The national day of

commemoration fulfilled an election pledge by President Emmanuel Macron, and drew the predictable angry *tu quoque* from Ankara, with Turkey's President Erdoğan accusing France of hypocrisy and of trying to teach lessons to others when it has failed to face its own bloody past. France's decision to instate a national day of commemoration was also the subject of a protest by diaspora Turks in Strasbourg, held in front of the European Court of Human Rights (ECtHR), and organised by members of the so-called Talât Pasha Committee, an ultranationalist denialist group named after the Ottoman statesman who is widely deemed to be the architect of the genocide. The protesters opened a banner that read "*Macron STOP! Respecte la loi!*"

And what "law" was it that Macron is supposed to respect? Apparently it is the 2015 European Court of Human Rights (ECHR) judgment in the case of *Perinçek v. Switzerland*. In their press statement, the protesters claimed that this case had "finished the very notion of an Armenian genocide". Whether inadvertently or intentionally, this language of "finishing" evokes and affirms the sense in which the denial of a genocide is its very perpetuation. Indeed, the ECHR's judgment in *Perinçek* has been celebrated as a victory by denialists who claim that the case "put an end to the hundred-year-old genocide lie". The assertion that the ECHR delivered a "final solution" to the Armenian genocide "question" is, of course, a lie. The *Perinçek* case was never meant to, and did not result in a judgment about the facticity of the Armenian genocide. It merely decided whether Switzerland's imposition of criminal sanctions on a

visiting Turkish politician constituted a breach of his right to freedom of expression.

The politician in question was Doğu Perinçek, an ex-Maoist turned ultranationalist, the leader of the Vatan (Homeland) Party, and one of the founders of this Talât Pasha Committee. He and his allies had travelled to Switzerland in 2005, repeatedly denying the Armenian genocide in public speeches delivered in various cities, precisely in order to test Switzerland's memory laws. Switzerland bit the bait, Perinçek was convicted under a law that forbids the denial of "a genocide", and his conviction was upheld through two appeals in Switzerland. So Perinçek was rewarded with his dearest wish: he got to go to Strasbourg.

Having the ECHR involved in their "case" was a bonanza for this small group of genocide denialists who seek strange pleasure and political capital in mythologising histories of systematised cruelty. There were two separate judgments at the ECHR and both were in Perinçek's favour: the chamber judgment in December 2013 was referred to the Grand Chamber upon Switzerland's request. Perinçek and his allies claimed in bold media campaigns that this would be the case that decides whether or not there was a genocide. Again, a lie, but an effective one: the Grand Chamber hearing received extensive media coverage in Turkey mostly in this vein. The court made its final ruling in October 2015, concluding that Switzerland had indeed breached Perinçek's right to freedom of expression by criminalising his utterances. The Grand Chamber

judgment neither said “there was no genocide”, nor did it say “the deportations and massacres of Ottoman Armenians during World War I cannot be legally categorised as a ‘genocide’;” it merely said that criminalising Perinçek’s utterances was not necessary in a democratic society, nor proportionate vis-a-vis the threat these utterances posed in Switzerland’s domestic context. But in this so-called “post-truth” era, these kinds of details are, as we know, negligible. In the end, what stood was the doctored image: the ECHR had been spectacularly instrumentalised in a denialist agenda in the centenary of the Armenian genocide, and Perinçek and his party got to claim “We put an end to the genocide lie”.

Then again, there is more to the *Perinçek* case and its political life than just lies, distortions and post-truth politics. Look closely at the ECHR judgments, and you will notice a painful struggle with the question of law’s relationship to history and historiography. Indeed, although both the chamber judgment and the Grand Chamber judgment ruled in favour of the applicant, they had very different lines of reasoning and notably different conceptions of the relationship between law and history. When we trace the shifting status of “history” and “historians” in these two judgments, and pay attention to the deferrals, disclaimers and ellipses that structure law’s relation to history and historiography, we may begin to understand how legal judgment becomes inadvertently complicit with denialist politics. In [my article “Law of Denial”](#) published in the latest issue of *Law & Critique*, I explain this complicity



as an effect of law's own denials that are produced by what remains unresolved in law's understanding of history, including its own historicity, and by its conflicted interpretation of its own role vis-à-vis the task of historiography.

For example, we see the chamber judgment wrestling with a riddle that it is ultimately unable to solve: Who decides the facticity of "historical fact"? Is it the judge (i.e. a competent court), the historian (i.e. a general scholarly consensus over genocide as fact), or the politician (i.e. a statement of recognition of the genocide by a political body)? What is noteworthy is that the chamber judgment, in its inability to alter the terms of the question or to properly suspend it, falls into the trap of this self-inflicted riddle, producing a series of denials of its own, which in turn bind it to the denialist agenda on which it was meant to deliver judgment. We also see in both judgments, the effects of what may be understood as a form of Holocaust exceptionalism in the ECHR's jurisprudence. Currently, the majority of European memory laws are justified on the basis of a political history that is begun from the World War II and the Holocaust. But in its interminable drive for universalisable principles, law must forget its particular history. In this first ECHR case concerning the denial of a genocide other than the Holocaust, we can discern the specific challenge that memory laws pose to law's necessary forgetfulness. The law's failure to forget its own particular history results in a failure to remember histories other than those that serve itself.

When we read it closely, The *Perinçek* case shows us how denial contaminates, conditions, and operates through legal judgment, especially when judgment is provoked and rendered necessary by a denialist agenda. Memory laws are based on the presumption that law can master past political violence and provide a form of closure. What this presumption forgets, however, is that law rarely effects closure as such, instead constantly opening up new areas of strife, new lines of contestation, if not new wounds. Such “openings” may in fact be more characteristic of law as a body of methods than the “closure” it is understood to promise. As I argue in my [longer article](#), memory laws thus risk the reversal of that presumed relationship of mastery of law over past political violence, instead rendering legal judgments subservient to the political violence of a past that is never dead, nor even past.

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Image: Denial writ large: Snapshot of skywriting campaign by Armenian genocide denialists, New York City, April 2016.

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