The application of Swiss anti-racism-legislation: Victory of negationnism

November 7, 2002 was a black day for the Armenian question and for the fight against racial-discrimination in Switzerland. The Federal Court confirmed the ruling on the exclusion of private plaintiffs in the case on denial of the Armenian genocide.
Overall, the proceedings cause bitterness, especially for the partial and incoherent approach by the juridical authorities of the Canton of Berne.
With its judgment, the Federal Court makes it more difficult for other denials of genocide to be condemned. Furthermore, the logic behind the acquittal of the accused discriminates between denials that have state-support (which would be excusable) and those who have no state in their back (more easy to judge). This constitutes an alarming deviation of the application of the law.

Association Switzerland – Armenia, originator of the plaint that lead to the Court case, would like to inform extensively. We publish a text by Rupen Boyadjian, coordinator of the working group for the lawsuit. He explains the reasoning of the Court that lead to the acquittal of 12 Turkish representatives and follows up on that logic to show where it really leads to. Follows a summary of the text:

The Swiss Federal Court has rejected the complaints of the private plaintiffs of Armenian origin, who had challenged the acquittal of 12 deniers of the Armenian genocide. The upper Court of the canton of Berne denied them the status of „private plaintiff". So they could not appeal the judgment of the first instance, which treated the denial of the Armenian genocide in substance – and who cleared the accused representatives of Turkish associations from the indictment of racial discrimination according to the Swiss anti-racism-legislation. The law includes a paragraph forbidding the denial of genocide, without specifying which genocides. With this ruling the combat against denial of genocide becomes more difficult in general.

The manner in which the case was treated leaves a very bitter taste for the Armenian community of Switzerland and other organizations that are engaged in the fight against racial discrimination.

The authorities of the canton of Berne have proved their partiality and incoherence. They have never appeared to be willing to apply the article 261bis of the Swiss penal code according to the legislator's wish. Two examples: The judge did not take into account the documents deposited by the private plaintiffs, amongst them a newspaper-article in which some of the accused were more explicit about their discriminatory motivations. He also did not mention the decisions by the two chambers of parliament, who in March 2001, had implicit recognized the genocide with their response to a petition of the opponents of genocide, a Turkish club which supports the recognition. The Court has based its evaluation of the political facts mainly on the Government's position to conclude that Switzerland did not officially recognize the genocide.

The upper Court of the canton of Berne was incoherent in its treatment of the protected good of this law. During a preliminary procedure in 1999, the Court had rejected the Association Switzerland – Armenia (ASA) as a private plaintiff, putting forward a decision by the Federal Court by which "human dignity" was defined the primary protected good by this law. But then associations (like ASA) could not take part in the case, because only individuals can possess human dignity. This lead to the admission of two individuals as private plaintiffs in the first instance. In its judgment of 2002, the upper Court of the Canton does not shy from contradicting itself by admitting "public peace" as protected good by this legal norm. Thus no

individual (and no organization, but only the state prosecutor) can be damaged by an infraction of the law and appeal to a judgment.

This decision has negative consequences for the application of the law. In it's 4th paragraph it forbids the denial, justification or gross reduction of genocide or other crime against humanity. If the "public peace" is admitted as the protected good, it will become practically impossible to pursue and condemn any other denial as Holocaust-denial. The authorities could easily assume that only those can be a danger to "public peace".

There is worse: The first instance had attributed the motivation of the denial to "stubborn nationalism", instead of "discrimination". This opens new alleys for Holocaust deniers to escape conviction. The Court has stated that it could not be expected from representatives of Turkish clubs to have sufficient knowledge of history. Thereby they had presumably acted in a patriotic reflex to protect the honor of their fatherland. In the same vein, a young neo-nazi, who had denied the existence of gas chambers, could defend himself by saying that he reads only denier-literature and that he let himself be animated by others.

If one follows up the reasoning of the first instance's judgment, serious doubt arise regarding the independence of the Swiss judiciary. By admitting "stubborn nationalism" as an excuse for denial, the judiciary not only takes into account the psychological aspect of the identity of deniers. It also picks up the "political" aspect of the question. The deniers did only want to present "their point of view". By doing so, the authorities also sanction the policy of minority-discrimination as a possible alternative; they show understanding when it comes along in the disguise of "patriotism".

This judgment casts a shadow for future cases. It leads to assume that going forward, we will see judgments based on political considerations. Only the cases that are not supposed to cause problems with foreign governments could be considered for condemnation. The ultimate decision would be taken upon the international situation. This means also that: it would not be decisive whether there were gas-chambers or not, but the fact that the Allies had won the war, and that Germany had no chance but to admit to its crimes, would lead to the conviction of the deniers of the Holocaust. Such can hardly be the will of the Swiss judiciary, but this is where the conduct of the Bernese authorities leads to.

Such contradictory effects are the result of the application of the law in the case of the denial of the Armenian genocide and not, as the authorities of Berne want to make believe, the fault of a bad wording of the law. The article 261bis of the Swiss penal code is one of the most progressive laws in the sphere of anti-racism. A change of course is now necessary to apply this law effectively, and not according to respect of foreign regimes, or the foreign relations of Switzerland.

The Association Switzerland – Armenia will continue its struggle against the denial of the Armenian genocide. An indebt discussion is now necessary on the growing discrepancy between the wording of the law and its application.

ASA hopes that the National Council (lower chamber of parliament) will send a strong signal and accept with great majority, the "Postulate" (bill) Vaudroz, probably in March 2003.