Thematic factsheet[1]
Update: July 2018

'MEMORY LAWS' AND FREEDOM OF EXPRESSION

'Memory laws' enshrine state-approved interpretations of crucial historical events and promote certain narratives about the past, by banning, for example, the propagation of totalitarian ideologies or criminalising expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law. Because of the dangers such laws represent for freedom of speech, member states should ensure that the restrictions to the freedom of expression entailed by such a legal framework are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of expression must be reconciled with the respect for human dignity and the protection of the reputation or the rights of others. In such situations, the right to freedom of expression under Article 10 of the Convention has to be balanced against the right to respect for private life under Article 8 of the Convention. Neither the denial or revision of clearly established historical facts, such as the Holocaust, nor the containment of a mere speculative danger as a preventive measure supposed to protect democracy, fall under the protection of the European Convention of Human Rights, as illustrated by the case-law of the European Court of Human Rights cited below.

Legislative ban to use or exhibit symbols deemed "totalitarian" (red star):

Vajnai v. Hungary - 33629/06
Judgment 8.7.2008

Section 269/B of the Hungarian Criminal Code made it a criminal offence to use, disseminate, or exhibit in public certain symbols that were deemed "totalitarian". These included the red star. The constitutionality of that provision was upheld by the Constitutional Court in a decision in 2000 in which it noted that allowing the unrestricted, open and public use of such symbols would seriously offend all persons committed to democracy and in particular those who had been persecuted by Nazism and Communism. Accordingly, the historical experience of Hungary and the danger the symbols represented to its constitutional values convincingly, objectively and reasonably justified their prohibition and the use of the criminal law to combat them.

At the material time the applicant was the Vice-President of the Workers' Party (Munkáspárt), a registered left-wing political party. In 2003 he was convicted of using a totalitarian symbol by wearing a

[1] This document presents a non-exhaustive selection of the ECtHR relevant case law. Its aim is to improve the awareness of the acts or omissions of the national authorities likely to amount to a hindrance of the European Convention of Human Rights. This information is not a legal assessment of the alerts and should not be treated or used as such.

red star on his jacket at an authorised demonstration in the centre of Budapest, which he was attending as a speaker.

According to the European Court of Human Rights, the conviction of the amounted to interference with his right to freedom of expression that was "prescribed by law" and pursued the legitimate aims of preventing disorder and protecting the rights of others. When – as in the applicant's case – freedom of expression was exercised as political speech, limitations were only justified if there was a clear, pressing and specific social need. In view of the multiple meanings of the red star, a blanket ban was too broad as it was not exclusively associated with totalitarian ideas. Accordingly, as with offending words, a careful examination of the context in which it was used was required. The applicant had worn the symbol at a lawfully organised, peaceful demonstration in his capacity as the vice-president of a registered, left-wing, political party, with no known intention of defying the rule of law. The Government had not cited any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary.

The containment of a mere speculative danger as a preventive measure for the protection of democracy could not be seen as a "pressing social need" and various other offences existed in Hungarian law to prevent public disturbances. Moreover, the ban was indiscriminate. Merely wearing the red star could lead to a criminal sanction and no proof was required that its display amounted to totalitarian propaganda. While the Court accepted that the display of a symbol which had been ubiquitous during the reign of the Communist regimes might create unease among past victims and their relatives, such sentiments, however understandable, could not alone set the limits of freedom of expression. Almost two decades had gone by since the transition to pluralism in Hungary, which was now a Member State of the European Union and had proved itself to be a stable democracy. Accordingly, the applicant's conviction could not be considered to have responded to a "pressing social need".

Conclusion: violation of Article 10 of the Convention (freedom of expression)

Conviction of blogger for publishing post using unconstitutional (Nazi) symbol

Nix v. Germany - 35285/16
Decision 13.3.2018

The applicant is a blogger who produced a series of six posts complaining of what he considered to be the Employment Agency's racist and discriminatory interaction with his eighteen-year-old daughter (who was of German-Nepalese origin) regarding her professional development. His third post contained a statement accompanied by a picture of the former SS chief Heinrich Himmler, showing him in SS uniform, with the badge of the Nazi party (including a swastika) on his front pocket, and wearing a swastika armband. Next to the picture the applicant posted a quote of Himmler concerning the schooling of children in Eastern Europe during the occupation by Nazi Germany to the effect that parents who wanted to offer their children good education had to submit a request to the SS and the police leadership. Criminal proceedings were instituted against the applicant with the domestic court convicting him of the offences of libel and using symbols of unconstitutional organisations because of the picture displayed in the blog post. The applicant's appeals were dismissed. In the Convention proceedings, the applicant complained under Article 10 of the Convention about his criminal conviction for the blog post.

According to the European Court of Human Rights, the applicant's conviction amounted to an interference with his right to freedom of expression. The interference was prescribed by law and pursued the legitimate aim of preventing disorder. As to whether the interference had been necessary in a democratic society, in light of the historical context States which experienced the Nazi horrors could be regarded as having a special moral responsibility to distance themselves from the mass atrocities

perpetrated. The legislature's choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace and to prevent the revival of Nazism was seen against this background.No criminal liability arose where the use of such symbols was meant to serve civil education, to combat unconstitutional movements, to promote art or science, research or teaching, to report on current or historical events, or serve similar purposes. In addition, the exemption from criminal liability where opposition to the ideology embodied by the used symbols was "obvious and clear" constituted an important safeguard for the right to freedom of expression.The symbol used by the applicant could not be considered to have any other meaning than that of Nazi ideology.

The Court accepted that the applicant did not intend to spread totalitarian propaganda, to incite violence, or to utter hate speech, that his expression had not resulted in intimidation and he may have intended to contribute to a debate of public interest. However, in the absence of any reference or visible link to the applicant's earlier posts, it was not immediately understandable to readers that the impugned post was in fact part of a series concerning the interaction between the employment office and the applicant's daughter. Nor was there a single phrase referring to racism or discrimination. Therefore, the domestic courts could not be faulted for having considered only the specific utterance that was evident to the reader, that is the picture of Himmler in SS uniform with a swastika armband, the quoted statement, and the text written underneath, when assessing the applicant's criminal liability or for finding that there was no connection between the text and the policies which the Nazi symbols stood for. This gratuitous use of symbols was exactly what the provision sanctioning the use of symbols of unconstitutional organisations was intended to prevent, to pre-empt anyone becoming used to certain symbols by banning them from all means of communication.

The Court saw no reason to depart from the domestic courts' assessment that the applicant did not clearly and obviously reject Nazi ideology in his blog post. The domestic authorities had thus adduced relevant and sufficient reasons and had not overstepped their margin of appreciation. The interference had therefore been proportionate to the legitimate aim pursued and was thus "necessary in a democratic society".

Conclusion: inadmissible (manifestly ill-founded)

Alleged failure to secure the right to reputation of an applicant whose father was allegedly defamed by a publication suggesting he had collaborated with the Gestapo

Putistin v. Ukraine - 16882/03
Judgment 21.11.2013

The applicant is the son of Mikhail Putistin, now deceased, a former Dynamo Kyiv football player who took part in a game known as the "Death Match" in 1942. The game was played between a team which included professional players from Dynamo Kyiv and a team of German pilots, soldiers and technicians. Against the odds and despite allegations that the match was refereed unfairly by an SS officer, the German team was defeated 5-3. Allegedly as a result of their victory, the Dynamo Kyiv team suffered reprisals. A number of Ukrainian players were sent to a local concentration camp, where four of them were executed. In 2002 the Kyiv authorities commemorated the 60th anniversary of the match, which received wide media coverage. In 2001 the newspaper Komsomolska Pravda published an article entitled "The Truth about the Death Match". It included an interview with a director and producer who discussed the possibility of making a film about the game, and a picture of the match poster from 1942. The poster contained the names of the players (including Mikhail Putistin), but these were not legible in the newspaper. The article included a quotation from the producer, who stated that there were only four players who had been executed, and that other players had "collaborated with the Gestapo". Another part of the article listed the names of the players who had been executed, which did not include Mikhail Putistin. The applicant sued the newspaper and the journalist, seeking rectification of

the article. He claimed that it suggested that his father had collaborated with the Gestapo. He also provided evidence that the archives held no information indicating that his father had worked for the Nazis, and documents establishing that his father had been taken to a concentration camp. The domestic courts rejected his claim, finding that the applicant had not been directly affected by the publication: his father was not directly mentioned in the text, and it was not possible to read his name on the photograph of the match poster published with the article.

The European Court of Human Rights stated that it could accept that the reputation of a deceased member of a person's family might, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8. However, like the national courts, it found that the applicant had not been directly affected by the publication. Though a quotation in the article had suggested that some members of the Ukrainian team had collaborated with the Gestapo, none of the pictures or words referred to the applicant's father. In order to interpret the article as claiming that the applicant's father had collaborated with the Gestapo, it would be necessary for a reader to know that the applicant's father's name had appeared on the original poster of the match. The names appearing under the photograph of the poster as reproduced by the paper were illegible. The level of impact on the applicant had thus been quite remote.

Moreover, the Court noted that whilst the article did not purport to contribute directly to an historical debate, it nevertheless constituted a form of participation in the cultural life of Ukraine in that it informed the public of a proposed film on an historical subject. It was neither provocative nor sensationalist. Against the newspaper's right to freedom of expression, the remoteness of the interference with the applicant's Article 8 rights had to be weighed. In these circumstances, that is, where the applicant's Article 8 rights were marginally affected and only in an indirect manner by an article which reproduced statements by the maker of a proposed historical film, the Court considers that the domestic courts did not fail to strike an appropriate balance between the applicant's rights and those of the newspaper and the journalist.

Conclusion: no violation of Article 10 (freedom of expression)

Criminal conviction for Holocaust denial

Garaudy v. France 65831/01
24 June 2003 (decision on the admissibility)

The applicant, the author of a book entitled *The Founding Myths of Modern Israel*, was convicted of the offences of disputing the existence of crimes against humanity, defamation in public of a group of persons – in this case, the Jewish community – and incitement to racial hatred. He argued that his right to freedom of expression had been infringed. The European Court of Human Rights considered that the content of the applicant's remarks had amounted to Holocaust denial, and pointed out that denying crimes against humanity was one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. Disputing the existence of clearly established historical events did not constitute scientific or historical research; the real purpose was to rehabilitate the National Socialist regime and accuse the victims themselves of falsifying history. As such acts were manifestly incompatible with the fundamental values which the Convention sought to promote, the Court applied Article 17 (prohibition of abuse of rights) and held that the applicant was not entitled to rely on Article 10 (freedom of expression) of the Convention.

Conclusion: **Inadmissible**

Criminal conviction for promoting support for Holocaust denial disguised as an artistic production

M'Bala M'Bala v. France 25239/13
20 October 2015 (decision on the admissibility)

This case concerned the conviction of Dieudonné M'Bala M'Bala, a comedian engaged in political activities, for public insults directed at a person or group of persons on account of their origin or of belonging to a given ethnic community, nation, race or religion, specifically in this case persons of Jewish origin or faith. At the end of a show in December 2008 at the "Zénith" in Paris, the applicant invited Robert Faurisson, an academic who has received a number of convictions in France for his negationist and revisionist opinions, mainly his denial of the existence of gas chambers in concentration camps, to join him on stage to receive a "prize for unfrequentability and insolence". The prize, which took the form of a three-branched candlestick with an apple on each branch, was awarded to him by an actor wearing what was described as a "garment of light" – a pair of striped pyjamas with a stitched-on yellow star bearing the word "Jew" – who thus played the part of a Jewish deportee in a concentration camp.

The European Court of Human Rights found that, by virtue of Article 17 (prohibition of abuse of rights), the applicant, M. Dieudonné M'Bala M'Bala, was not entitled to the protection of Article 10 (freedom of expression). The Court considered in particular that during the offending scene the performance could no longer be seen as entertainment but rather resembled a political meeting, which, under the pretext of comedy, promoted negationism through the key position given to Robert Faurisson's appearance and the degrading portrayal of Jewish deportation victims in the presence of a man who denied their extermination. In the Court's view, this was not a performance which, even if satirical or provocative, fell within the protection of Article 10, but was in reality, in the circumstances of the case, a demonstration of hatred and anti-Semitism and support for Holocaust denial. Disguised as an artistic production, it was in fact as dangerous as a head-on and sudden attack, and provided a platform for an ideology which ran counter to the values of the European Convention. The Court thus concluded that the applicant had sought to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention and which, if admitted, would contribute to the destruction of Convention rights and freedoms.

Conclusion: **Inadmissible**

See also: ***Honsik v. Austria*** 25062/94 and ***Marais v. France***, 31159/96 decisions of the former European Commission for Human Rights concerning the conviction of the author of a publication whose real aim, under cover of a scientific demonstration, was to deny that the gas chambers had been used for mass human extermination

Criminal conviction for rejecting legal characterisation of atrocities committed by Ottoman Empire against the Armenian people from 1915 as "genocide"

Perinçek v. Switzerland- 27510/08
Judgment 15.10.2015

The applicant is a doctor of laws and chairman of the Turkish Workers' Party. In 2005 he took part in various conferences during which he publicly denied that there had been any genocide of the Armenian people by the Ottoman Empire in 1915 and subsequent years. In particular, he described the idea of an Armenian genocide as an "international lie". The Switzerland-Armenia Association lodged a criminal complaint against the applicant on account of his comments. The applicant was ordered to pay ninety day-fines of 100 Swiss francs (CHF), suspended for two years, a fine of CHF 3,000, which could be replaced by thirty days' imprisonment, and the sum of CHF 1,000 in compensation to the Switzerland-Armenia Association for non-pecuniary damage.

According to the European Court of Human Rights, the applicant's conviction and punishment, coupled with the order to pay damages to the Switzerland-Armenia Association, constituted an interference with the exercise of his right to freedom of expression. The applicant could reasonably have foreseen – if need be, with appropriate advice – that his statements in relation to the events of 1915 and the following years might result in criminal liability under Article 261 bis § 4 of the Swiss Criminal Code.

Bearing in mind that many of the descendants of the victims and survivors of the events in question – especially those in the Armenian diaspora – constructed their identity around the perception that their community had been the victim of genocide, the Court accepted that the interference with the statements in which the applicant had denied that the Armenians had suffered genocide had been intended to protect that identity, and thus the dignity of present-day Armenians.

The Court was thus faced with the need to strike a balance between two Convention rights: the right to freedom of expression under Article 10 and the right to respect for private life under Article 8. In doing so, it took into account the following elements:

a) Nature of the applicant's statements – The applicant's statements had touched upon historical and legal issues, but the context in which they had been made – at public events where the applicant was addressing like-minded supporters – showed that he had been speaking as a politician, not as a historical or legal scholar. He had taken part in a long-standing controversy relating to an issue of public concern and described as a "heated debate, not only within Turkey but also in the international arena".

Moreover, while being fully aware of the acute sensitivities attached by the Armenian community to the issue in relation to which the applicant had spoken, the Court, taking into account the overall thrust of his statements, did not perceive them as a form of incitement to hatred or intolerance. The applicant had not expressed contempt or hatred for the victims of the events in question, having noted that Turks and Armenians had lived in peace for centuries. He had not called the Armenians liars, used abusive terms with respect to them, or attempted to stereotype them. His strongly worded allegations had been directed against the "imperialists" and their allegedly insidious designs with respect to the Ottoman Empire and Turkey.

b) Could the statements in issue nevertheless be seen as a form of incitement to hatred or intolerance towards the Armenians on account of the applicant's position and the wider context in which they were made? In cases that had come before the former Commission and the Court concerning statements in relation to the Holocaust, this had, for historical and contextual reasons, invariably been presumed. However, the Court did not consider that the same could be done in this case, where the applicant had spoken in Switzerland about events which had taken place on the territory of the Ottoman Empire about 90 years previously. While it could not be ruled out that statements relating to those events could likewise promote a racist and anti-democratic agenda, and could do so through innuendo rather than directly, the context did not require this to be automatically presumed.

In the Court's view, the applicant's statements, read as a whole and taken in their immediate and wider context, could not be seen as a call for hatred, violence or intolerance towards the Armenians. They had admittedly been virulent and reflected an intransigent position on the applicant's part, but it should be recognised that they appeared to include an element of exaggeration as they had sought to attract

c) Geographical and historical factors. The Court's case-law showed that, in view of the historical context in the States concerned, Holocaust denial, even if dressed up as impartial historical research, invariably connoted an anti-democratic and anti-Semitic ideology.

By contrast, it had not been argued that there was a direct link between Switzerland and the events that had taken place in the Ottoman Empire in 1915 and the following years. The only such link could come from the presence of an Armenian community on Swiss soil, but it was a tenuous one. The controversy sparked by the applicant was external to Swiss political life, given that he was a foreigner and would return to his country. There was, moreover, no evidence that at the time when the applicant had made his statements the atmosphere in Switzerland was tense and could result in serious friction between Turks and Armenians there.

It is true that at present, especially with the use of electronic means of communication, no message could be regarded as purely local. It was also laudable, and consonant with the spirit of universal protection of human rights, for Switzerland to seek to defend the rights of victims of mass atrocities regardless of the place where they had taken place. However, the broader concept of proportionality inherent in the phrase "necessary in a democratic society" required a rational connection between the measures taken by the authorities and the aim they had sought to realise through these measures; in other words, the measures had to have been reasonably capable of producing the desired result. It could hardly be said that any hostility that existed towards the Armenian minority in Turkey was the product of the applicant's statements in Switzerland, or that the applicant's criminal conviction in Switzerland had protected that minority's rights in any real way or made it feel safer. There was, moreover, no evidence that the applicant's statements had in themselves provoked hatred towards the Armenians in Turkey, or that he had on other occasions attempted to instil hatred against Armenians there.

Lastly, there was no evidence that the applicant's statements had had a direct effect on the undeniable hostility of some ultranationalist circles in Turkey towards the Armenians in that country, or on other international contexts, such as France, which was home to the third-largest community in the Armenian diaspora.

d) The time factor. A considerable amount of time – about 90 years – had elapsed between the applicant's statements and the tragic events to which he had referred, and at the time when he had made the statements there had surely been very few survivors of these events. While this was still a live issue for many Armenians, especially those in the diaspora, the time element could not be disregarded. Whereas events of relatively recent vintage could be so traumatic as to warrant, for a period of time, an enhanced degree of regulation of statements relating to them, the need for such regulation was bound to recede with the passage of time.

e) Extent to which the applicant's statements affected the rights of the members of the Armenian community. The Court was aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years were to be regarded as genocide, and of that community's acute sensitivity to any statements bearing on that point. However, it could not accept that the applicant's statements at issue in this case had been so wounding to the dignity of the Armenians who had suffered and perished in these events and to the dignity and identity of their descendants as to require criminal-law measures in Switzerland. The sting of the applicant's statements had not been directed towards those persons but towards the "imperialists" whom he regarded as responsible for the atrocities. This, coupled with the amount of time that had elapsed since the events to which the applicant had been referring, led the Court to the conclusion that his statements could not be seen as having had the significantly upsetting effect sought to be attributed to them.

Nor was the Court persuaded that the applicant's statements – in which he had denied that the events of 1915 and the following years could be classified as genocide but had not disputed the actual occurrence of massacres and mass deportations – could have had a severe impact on the Armenians' identity as a group. Statements that contested, even in virulent terms, the significance of historical

events that carried a special sensitivity for a country and touched on its national identity could not in themselves be regarded as seriously affecting their addressees. The Court did not rule out that there might exist circumstances in which, in view of the particular context, statements relating to traumatic historical events could result in significant damage to the dignity of groups affected by such events, for instance if they were particularly virulent and disseminated in a form that was impossible to ignore. The only cases in which the former Commission and the Court had accepted the existence of such circumstances without specific evidence were those relating to Holocaust denial. However, this could be regarded as stemming from the very particular context in which those cases had unfolded. Lastly, the applicant's statements had been made at three public events. Their impact was thus bound to have been rather limited.

f) Existence or lack of consensus among the High Contracting Parties – In the past few years there had been fluctuating developments in this domain in the legal systems of the High Contracting Parties. Some High Contracting Parties did not criminalise the denial of historical events. Others, using various methods, criminalised only the denial of the Holocaust and Nazi crimes. A third group criminalised the denial of Nazi and communist crimes. A fourth group criminalised the denial of any genocide. At European Union level, the applicable provisions had a wide scope but at the same time linked the requirement to criminalise genocide denial to the need for it to be capable of having tangible negative consequences.

The Court acknowledged this diversity. It was nevertheless clear that, by criminalising the denial of any genocide, without the requirement for such denial to be likely to incite to violence or hatred, Switzerland stood at one end of the comparative spectrum. In those circumstances, and given that in the present case there were other factors which had a significant bearing on the breadth of the applicable margin of appreciation, the comparative-law position could not play a weighty part in the Court's conclusion with regard to this issue.

g) Could the interference be regarded as required under Switzerland's international law obligations? – Having established that the applicant's statements could not be seen as a form of incitement to hatred or discrimination, the Court needed only to determine whether Switzerland had been required under its international law obligations to criminalise genocide denial as such. There were no international treaties in force in respect of Switzerland that required in clear and explicit language the imposition of criminal penalties on genocide denial as such. Nor did this appear to be required under customary international law. It could not therefore be said that the interference with the applicant's right to freedom of expression had been required, let alone justified, by Switzerland's international obligations.

h) Severity of the interference – The form of interference at issue – a criminal conviction that could even result in a term of imprisonment – was a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. The same applied here: what mattered was not so much the severity of the applicant's sentence but the very fact that he had been criminally convicted, which was one of the most serious forms of interference with the right to freedom of expression.

Taking into account all the elements analysed above – that the applicant's statements had related to a matter of public interest and had not amounted to a call for hatred or intolerance, that the context in which they had been made had not been marked by heightened tensions or special historical overtones in Switzerland, that the statements could not be regarded as having affected the dignity of the members of the Armenian community to the point of requiring a criminal-law response in Switzerland, that there had been no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appeared to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference had taken the serious form of a criminal

conviction – the Court concluded that it had not been necessary in a democratic society to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case.

Conclusions: violation of Article 10 (freedom of expression)