

FREEDOM OF EXPRESSION AS AN INSTRUMENT OF PEACE-BUILDING¹

LIBERDADE DE EXPRESSÃO COMO INSTRUMENTO DE CONSTRUÇÃO DA PAZ

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RESUMO

Nesse estudo será conceituado como a liberdade de expressão serve a análise das tragédias e conflitos históricos e quais são os limites aceitáveis da livre discussão sobre os eventos histórica ou politicamente sensíveis. Meu principal objetivo é demonstrar a função de construção da paz na liberdade de expressão: dentro de quais circunstâncias pode a discussão política ilimitada suportar a compreensão de pós-conflitos, e quando a liberdade de expressão somente causa grave dano moral e até dano físico a determinadas pessoas. Meu estudo será baseado em duas principais correntes de fontes: a jurisprudência nacional e internacional de órgãos judiciais; as contribuições acadêmicas fundamentais no campo da liberdade de expressão durante os períodos de conflito e pós-conflito. Como conclusão da minha pesquisa, um padrão global mínimo deve ser proposto para resolver os conflitos da livre expressão política e o interesse de se proteger a ordem e coesão social, o que pode ser um relevante ponto de referência para órgãos legislativos nacionais e internacionais. Essa pesquisa irá abrir novas perspectivas no campo da liberdade de expressão, que pode esperançosamente contribuir para a devida interpretação da livre discussão sobre matérias historicamente sensíveis de interesse público. De outro lado, a principal conclusão é que maiores e mais profundas discussões profissionais são necessárias para reconsiderar a importância da liberdade de expressão como um instrumento fundamental de construção da paz.

PALAVRAS-CHAVE: Liberdade de expressão; livre expressão política; construção da paz; tolerância; diversidade

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ABSTRACT

In this study, it would be conceptualized, how freedom of expression serves the social analysis of historical tragedies and conflicts, and what are the acceptable limits of free discussion on historically or politically sensitive events. My main purpose is to deliver the peace builder function of freedom of expression: within which circumstances could unlimited political discussion support the processing of post conflicts, and when the free expression of certain views just targets to cause severe moral and or even physical harm to particular people. My study will be based on two main strands of sources: the jurisprudence of national and international judicial bodies; and outstanding academic contributions from the field of freedom of expression during conflict post-conflict periods.³ As the outcome of my research, a global minimum standard would be proposed to resolve the conflicts of free political speech and the interest to protect the social order and cohesion, which may be a relevant point of reference for national and international judicial and legislative bodies. This research will open up new perspectives in the field of freedom of expression, which may hopefully contribute to the proper interpretation of free discussion on historically sensitive matters of public interest. However, the main statement is, that further deep and professional discussion is needed to reconsider the importance of freedom of expression, as a crucial tool of peace building.

KEY WORDS: freedom of expression; free political speech; peace-building; tolerance; diversity

SUMMARY

Introduction. 1 The peace-builder function of freedom of expression. 2 Europe. 3 North America. 4 Does freedom of expression really contribute to peace-building processes?

INTRODUCTION

This study would analyse, whether freedom of expression could play a decisive role to further peace-building processes in the most important legal cultures of the world.⁴ Several, even disastrous conflicts has generated remarkable tensions in almost all societies of the

3 For instance, BARENDT, Eric. **Freedom of Speech**. 2. ed. Oxford: OxfordUniversity Press, 2005, p 39-73; NICOL, Andrew; MILLAR, Gavin; SHARLAND, Andrew. **Media Law and Human Rights**. 2. Ed. Oxford: OUP. p. 13-34, 2009.

4 BARENDT, Eric. **Freedom of Speech**. 2. ed. Oxford: OxfordUniversity Press, 2005, p. 1-38

world, which remains with the people after the end of the particular triggering events.⁵ To set some evident examples, holocaust, or the Armenian genocide shall be discussed on the long-term scientifically, politically, or even in ordinary conversations.⁶ All expressions of views shall be covered by the right to free speech, nevertheless, this freedom shall not be interpreted as an unlimited freedom all form of expression shall meet with a minimum level of tolerance, and shall contribute to the democratic discussion on matters of public interest.⁷ Bearing this in mind, it shall be highlighted, that freedom of expression plays a crucial role to elaborate societal responses to the challenges of collective memory, but this freedom could not only serve, but also hinder such tendencies.⁸ Freedom of expression may not only be a tool to strengthen mutual tolerance and confidence, but it may be also a channel to spread hate speech, or to express offensive opinions.⁹ On this basis, the jurisprudence shall constitute a clear distinction: all expression of views shall be protected, which target the effective discussion of former, or existing societal conflicts, but such speech could be legitimately prohibited or sanctioned, which aims just to cause physical or mental harm for the victims.¹⁰ This border is not, and could not be an objective system of criteria each case shall be interpreted independently, in the light of the actual circumstances. Moreover, the approach of post-conflict societal discussion differs remarkably in the main regions of the world therefore a broad range of constitutional systems shall be taken into consideration to provide an overarching, global picture from this issue. My hypothesis is that freedom of expression shall be treated as a two-faced concept: it is a crucial instrument of peace-building, but it may provide a tool also for the popularisation of violent attitudes, which

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- 5 CONNERTON, Paul. **How Societies Remember**. Cambridge: Cambridge University Press, 1989, p. 37.
- 6 WINTER, Jay; SIVAN, Emmanuel. (eds.) **War and Remembrance in the Twentieth Century**. Cambridge: Cambridge University Press, 1999, p. 11.
- 7 For example: EUROPEAN COURT OF HUMAN RIGHTS. **Handyside v. UK. 1976**, application no. 5493/72, § 49; EUROPEAN COURT OF HUMAN RIGHTS. **Lingens v. Austria. 1986**, application no. 9815/82, § 42-47; EUROPEAN COURT OF HUMAN RIGHTS. **Baka v. Hungary. 2016**, application no. 20261/12.
- 8 MARGALIT, Avishai. **The Ethics of Memory**. Cambridge, MA: Harvard University Press, 2002, p. 58.
- 9 WEINSTEIN, James. An Overview of American Free Speech Doctrine and its Application to Extreme Speech. In: HARE, Ivan; WEINSTEIN, James. (eds.): **Extreme Speech and Democracy**. Oxford: Oxford University Press, 2009, p. 81-91.
- 10 STRAUSS, David A. Persuasion, Autonomy, and Freedom of Expression. **Columbia Law Review**. vol. 91, n° 2. p. 334, 1991.

could undermine the societal peace on the long-term. On the centre of my analysis, there will be the peace-builder function, so I would treat peace-building as a crucial, but not absolute value, which may prevail over the right to free speech, but only within rational bounds.¹¹ It would be conceptualised, how the jurisprudence of the European Court of Human Rights (hereinafter: ECHR), and the US Supreme Court considers the peace-builder function of freedom of expression, and whether these judicial bodies have supported the long-term discussion of former societal conflicts. Nevertheless, the highlight of the peace-builder function shall not mean the absolute priority of this aspect: so it shall be assessed, whether the judicial bodies interpret the peace-builder function of free speech with proper weight. On the basis of this analysis, some points would be put forward concerning the forthcoming cases, in which the peace-builder function of freedom of expression would be involved.

The primary purpose of this study is to highlight the significance of the peace-builder function, and to point out such elements of the jurisprudence, which consider this aspect as essential. As a final outcome, certain alternative arguments will be proposed for judicial and legislative bodies to conceptualise further this aspect of freedom of expression.

1 THE PEACE-BUILDER FUNCTION OF FREEDOM OF EXPRESSION

As a preliminary consideration, it should be highlighted, that freedom of expression has by general terms an inherent function of peace-building. The free expression of views could replace several violent conflicts, as the stakeholders have the opportunity to share their opinion with others, and to seek acceptable solutions via consultative methods. In the light of this consideration, freedom of expression, by its mere existence serves remarkably the societal cohesion and cooperation. Although the fact, that a particular view is neglected, it is always easier to bear, when it is at least expressed regularly.

Within this concept, when the societal treatment of historically entrenched conflicts is concerned, it does freedom shall be defined, what kind of conflicts shall be regarded as such, which could influence considerably the protected scope of freedom of expression. The history of the last two decades might be understood as a series of huge societal tensions, severe and even bloody conflicts, industrial and nature-induced disasters. Obviously, the

11 FREDERICK, Danny. Freedom: Positive, Negative, Expressive. **Reason Papers**. vol. 38, n° 2, p.39-63, 2016.

societal responses to these tragedies have not been terminated with the end of the insulting events several reactions are published continuously from armed conflicts, and other kinds of societal disasters. For the purpose of the present study, such conflicts are considered, which lead to the victimisation of broader societal layers on political, racial, ethnic, religious, gender or regional basis, and which cause objectively justifiable sensitivity for the members of certain vulnerable communities. Just by simplified terms, the issue would be, whether particular forms of free expression could contribute to the substantive discussion of a shocking event, or it aims just to offend the direct, or indirect victims physically or mentally.

Before detailing the regional approaches, the general theoretic framework of the peace-builder function shall be outlined.¹²The broad notion of freedom of expression creates the framework for a community to reveal the objective evaluation of a historical event, to express the competing interpretations, scientific theories, political views from a particular historical period. Consequently, this study would only rely on democratic political structures, the special circumstances of for instance China or North Korea will not be conceptualised here. In my view, one may distinguish three levels of public discussion, which help to treat post-traumatic sensitivities and conflicts: the scientific, the political, and the ordinary discussion.

- a) Firstly, freedom of science, and the free expression of scientific views constitutes a necessary precondition of the effective societal conversion of historical conflicts.¹³Although the fact, that the victims shall be prevented from all forms of unjustifiable harassment or intervention concerning their former grievances. Nevertheless, this protection shall not exclude the scientific research of historical conflicts, such as the crimes of the totalitarian regimes. Anyone might discuss the details of these crimes: who are responsible for them; what was the real extent of the concerned activities; what were the reasons, which lead to the disastrous consequences; whether the particular events are interpreted properly by the post-conflict society, or science. The education constitutes also a special subcategory within this concept: even offensive and degradatory views may be displayed

12 SIMPSON, Robert Mark. De ining ,Speech’: Subtraction, Addition, and Division”. **Canadian Journal of Law and Jurisprudence**. Vol. 29, nº 2, p. 457-494, 2016.

13 KLEIN, E. R. WhitherAcademicFreedom? **International Journal of Applied Philosophy**. Vol 16, nº 1, p. 41-53, 2002.

publicly to introduce these opinions for students with educational purposes.¹⁴ Within the scientific and educational context, the level of expected tolerance shall be extremely broad: the free discussion of former societal conflicts may be limited only in a very narrow circle. The reliable communication of scientific researches for the society may ease considerably the treatment of post-traumatic sensitivities: people always show more willingness to tolerate such events, which are, or at least deemed to be deeply researched, and acknowledged. A clear example of this is the treatment of the former communist agents in Central- and East Europe after the democratic transition.¹⁵ In those countries, where the relevant documents have been available for scientific purposes, and the society could get access to the relevant sources, these conflicts generated remarkably less tensions. By contrast, when the totalitarian agents were not identified transparently, and the former political activities of each individual had not been clarified, this issue remained crucial for decades, as several allegations were rumoured concerning the former political activities of certain public figures.

- b) The second level of the societal discussion of past conflicts shall be referred to the political arena.¹⁶ The public figures, especially the politicians tend to form and orient the political discussion on matters of public interest consequently the inherent function of politics is to generate a deep and inclusive discussion from public matters, to involve a great number of people in these processes.¹⁷ Apart from the scientific discussion, the politicians interpret also continuously the historically entrenched conflicts, since the political attitude of the voters is highly

14 ARCHARD, David. *Insults, Free Speech and Offensiveness*. **Journal of Applied Philosophy**. Vol 31, nº 2, p. 127-141, 2014.

15 MCDONAGH, Maeve. *The Right to Information in International Human Rights Law*. **Human Rights Law Review**. p. 1-31, 2013.

16 SULLIVAN, Kathleen M.. *Political Money and Freedom of Speech*. **30 UC Davis Law Review**, p.667-673, 1997.

17 RANDAL, Marlin. *Propaganda and the Ethics of Persuasion*. **Broadview Press**. 2002, p. 226-229.

influenced by their past grievances, or harmful or advantageous experiences.¹⁸ The political discussion of historical conflicts means a relatively broad margin of movement for the participants to elaborate and share their own views from these incidents, but even the political communication shall tolerate the human dignity, and the acceptable sensitivity of the direct, and indirect victims. The political sphere represents always collective approaches: a view, which is expressed by a politician, is always deemed to be shared with a broader circle of individuals.¹⁹ What is more, a political expression may be spread via multiple sources on an organised way therefore the expected impact would be larger, even if that view is supported only by a tiny minority of the society.²⁰ The political field produces often symbolic compromises or apologies²¹, such steps could also reduce the tensions at the society on the long-term.²²

c) Thirdly, there is always an on-going societal discussion on historical conflicts, wars, totalitarian crimes, etc. This aspect covers all forms of individual expression, which is manifested publicly. To set certain examples, one may create posts, or comments at the social media,²³ one may write pamphlets, leaflets, which transmit a particular interpretation of historical conflicts.²⁴ At this level, it shall be taken into account,

18 MÄLKSOO, Maria. The MemoryPolitics of Becoming European: The East European Subalterns and the Collective Memory of Europe. **European Journal of International Relations**. Vol. 15, n° 4, p.656, 2009.

19 EUROPEAN COURT OF HUMAN RIGHTS. **Sunday Times v. UK**. 1979, application no. 6538/74, § 65.

20 BERGER, Fred R. The Right of Free Expression. **International Journal of AppliedPhilosophy**. Vol. 3, n° 2, 1986, p. 1-10.

21 OLICK, Jeffrey K. **The Politics of Regret: On Collective Memory and Historical Responsibility**. New York: Routledge, 2007, p. 137.

22 STANLEY, Jason. **How Propaganda Works**. Princeton. NJ: Princeton University Press, 2015, p. 376.

23 EUROPEAN COURT OF HUMAN RIGHTS. **Delfi AS v.Estonia**, 2015, application no. 64569/09.

24 STANLEY, Jason. **How Propaganda Works**. Princeton. NJ: Princeton University Press, 2015, p. 377.

that this form of communication may have less credibility for other individuals, and such expressions might be accessible to a narrower group of people, than a scientific or a political opinion. Consequently, a mere private expression of a view could reach only under exceptional circumstances to such level, when an other fundamental right or an inherent constitutional value shall prevail over free expression.

If we would imagine these levels in a scale, it could be stated, that theoretically, the scientific level represents the most objective field of discussion, when the views shall be proved by explicit evidences. At the political stage, the main purpose is to convince as many people, as possible, so this form of communication tends to neglect human dignity, or right to privacy. Obviously, the private sphere represents an extremely broad range of expressions, but only a little number of these opinions would be perceptible for the wider public opinion, therefore, this level has less weight in this regard.

The peace-builder function of freedom of expression shall be interpreted in the light of this three-level system, but it shall be also kept in mind, that freedom of expression could serve as an instrument of peace-building, but may be also the channel of offensive contents. The free expression creates a tool for all participants of past tragedies to discuss their role, the reasons, the harmful consequences, and also to regret their former activities,²⁵ or to provide compensation for the participants.²⁶ The continuous moderated commemoration of past tragedies and the due respect of victims could support on the long-term the societal elaboration of peaceful transitions and solutions.²⁷ However, freedom of expression opens always up the possibility to misuse this right, when the communication targets to insult others rather than to generate further discussion on certain matters of public interest.²⁸ The jurisprudence shall recognise this ambiguity: each opinion could contribute to the societal treatment of historically entrenched conflicts, unless it do not meet with a minimum

25 TOTH, Mano Gabor. The Myth of the Politics of Regret. **Millennium – Journal of International Studies**. Vol. 43, n° 2, 2015, p. 551–566.

26 FEINDTETAL, Gregor. Entangled Memory: Toward a Third Wave in Memory Studies. **History and Theory**, 2014. Vol. 53, n°1, p. 40.

27 SEWELL, William H. **Logics of History: Social Theory and Social Transformation**. Chicago: University of Chicago Press, 2005, p. 159.

28 BULL, Anna Cento; HANSEN, Hans Lauge. On Agonistic Memory. **Memory Studies**. Vol. 9, n° 4, 2016, p. 390–404.

requirement of mutual tolerance and peace-building.²⁹The jurisprudence shall protect the first category of speeches broadly, but shall also limit merely offensive speech, which exclusively intends to generate tensions instead of reduce them. On this theoretic basis, the comparative analysis would clarify further, where this border is outlined in the different jurisdictions, or where it would have been outlined?

2 EUROPE

In Europe, the most important historically entrenched conflict, which are relevant in almost all European countries, is the holocaust, which is discussed even nowadays by several researchers, politicians, and ordinary people.³⁰ Nevertheless, other topics are also crucial: the crimes of totalitarian regimes, the Armenian genocide during the First World War, or the terrorist attack of 11 September 2001.³¹The relevant European jurisprudence will be assessed on the basis of the caselaw of the ECtHR.³²Article 10. Of the European Convention on Human Rights (hereinafter: ECHR) protects freedom of expression, and the ECtHR has delivered several judgements, which focused partly or totally on the societal treatment of historically entrenched conflicts.³³ Concerning the holocaust, the first case, which shall be mentioned is *Lingens v Austria*.³⁴ In this judgement, the ECtHR held, that the press shall not be prevented from publishing such value judgements during a post-electoral period, which rumours even the indirect nazi engagement of the Austrian chancellor.³⁵ The factual basis of this case was

29 FREDERICK, Danny. Freedom: Positive, Negative, Expressive. **Reason Papers**. vol. 38, n° 2, p.39-63, 2016.

30 LENGBEYER, Lawrence. Rhetoric and Anti-Semitism. **Academic Questions**. Vol. 17, n° 2, p. 22-32, 2004.

31 SOFFIAUX, Stefan. *Leroy v France*: apology of terrorism and the malaise of the European Court of Human Rights free speech jurisprudence. **European Human Rights Law Review**. 2009, p. 415-427; EUROPEAN COURT OF HUMAN RIGHTS. **Leroy v France**. 2008, application no. 36109/03.

32 For further details, please see: DIJK, Pieter van; HOOF, Fried van; RIJN, Arjen van; ZWAAK, Leo Zwaak (ed.). **Theory and practice of the European Convention on Human Rights**. 4. Ed. Antwerpen:Oxford, 2009.

33 WILDHABER, Luzius. The European Court of Human Rights in Action' 21. **Ritsumeikan Law Review**. p. 83-84, 2004.

34 EUROPEAN COURT OF HUMAN RIGHTS. **Lingens v. Austria. 1986**, application no. 9815/82, § 42-47.

35 SULLIVAN, Kathleen M.. Political Money and Freedom of Speech. **30 UC Davis Law Review**, p.667-673, 1997.

a post-electoral coalitional negotiation, when the chancellor intended to form a coalition with such a person, who allegedly took part in nazi crimes during the Second World War. This case represents well the different levels of post-traumatic discussion: at the political level, even fierce criticism shall be tolerated even in post-conflict context.³⁶ The ECTHR has delivered in several judgements, that the private sphere of public figures shall be protected in a remarkably narrower circle, as regard private persons.³⁷ Nevertheless, there are some concerns about this decision. Firstly, in particular cases, it could be very dubious, who shall be counted as public figure, and who is a private person, Secondly, where is the exact bound between criticism with a public and a private character, thirdly, what are the limitations of this wider standard of acceptable criticism?³⁸ Fourthly, and now most importantly, does this approach is in harmony with the peace-builder function of freedom of expression? I will focus now on this fourth aspect. The ECTHR in this case took into account the actual political context (ex. the characteristics of the post-electoral period), but the societal elaboration of holocaust, or further nazi crimes had not been interpreted in the judgement, as historically entrenched conflicts.³⁹ This case provides also a proper example to show, that historical conflicts appear in the public discussion often as an argumentation in actual controversies.⁴⁰ It is relatively unusual, that a politician would express directly a view merely from greater societal conflicts of the last century, it is more obvious, that he/she would analyse current issues, or would accuse a political opponent with totalitarian past, or at least sympathy.⁴¹ It seems that the ECTHR gave particular weight to the unlimited discussion on matters of public interest, which highlights a new approach of the peace-builder function. Freedom

36 ZERUBAVEL, Eviatar. Social Memories: Steps to a Sociology of the Past. **Qualitative Sociology**. vol. 19, n° 3, 1996, p. 290.

37 EUROPEAN COURT OF HUMAN RIGHTS. **Oberschlick v. Austria**. 1991, application no. 11662/85; EUROPEAN COURT OF HUMAN RIGHTS. **Von Hannover kontra Németország**. 2004, application no. 40660/08 and 60641/08.

38 MILLAR, Gavin. Whither the spirit of Lingens. **European Human Rights Law Review**. p.277-288, 2009.

39 PASSERINI, Louisa. Memories of Resistance, Resistances of Memory. In: BURDETT, Charles; GORRARA, Claire. (ed.) **European Memories of the Second World War: New Perspectives on Postwar Literature**. New York: Berghahn Books, 1999, p. 296.

40 J WINTER, Jay. **Remembering War: The Great War Between Memory and History in the Twentieth Century**. New Haven: Yale University Press, 2006, p. 9.

41 NICOL, Andrew; MILLAR, Gavin; SHARLAND, Andrew. **Media Law and Human Rights**. 2. Ed. Oxford: OUP, p. 13-34, 2009

of expression by general terms promotes stability rather than peace. The free expression of diverse views always lead to continuous controversies between competing interpretations and argumentations, but freedom of expression gives also the opportunity to discuss all issues democratically, and elaborate a compromise-based decision-making process, which could secure the stable political and societal order on the long term.⁴² It is also obvious from the argumentation of the ECtHR that the societal interest of free discussion on matters of public interest shall prevail over the private claims of the plaintiff. However, one may argue, that the unproven, or uncertain allegation of totalitarian sympathy or activity may constitute such an intensive and degradatory intervention to the private sphere, which shall not be protected by freedom of expression. Depending on the context, this point may be worth-considering for the ECtHR in similar cases. It is widely accepted even in European and national level, that public figures shall tolerate a broader scale of fierce criticism, as private persons, but does it in conformity with the peace-builder function of freedom of expression, if in ordinary political discussions, historical conflicts are often used as mere political instruments? This issue is relevant even in the current context, when sharp political statements are often manifested especially during electoral campaigns. Such approach is not completely alien from the ECtHR jurisprudence: for instance in *Lindon v France*, the ECtHR revised its former deferential approach as regard the level of acceptable criticism.⁴³ The wide circulation of the defamatory contents as a circumstance may also be relevant for the protection from even indirect totalitarian accusations.

In the *Lingens* case, the individual participation or attitude of a public figure was assessed towards a historically entrenched conflict. By contrast, in the *Garaudy v France* case, an expression of an individual view from Holocaust was contested.⁴⁴ *Garaudy* was fined due to the publication of a book, which contained several virulent and racist statements against the Jewish community, and debated the existence, or at least the size of Holocaust. The application was dismissed without the assessment of the merits, since the ECtHR. From a peace-building perspective, the main novelty of this decision was the identification of the fundamental values of the ECHR, such as peace, justice and democracy. According to the

42 GREENE, Amanda Greene; SIMPSON, Robert Mark. Tolerating Hate in the Name of Democracy. *Modern Law Review*. Vol. 80, n° 4. p. 746-765, 2017.

43 EUROPEAN COURT OF HUMAN RIGHTS. *Lindon and others v. France*. 2007, application no. 21279/02 and 36448/02.

44 EUROPEAN COURT OF HUMAN RIGHTS. *Garaudy v. France*. 2003, application no. 65831/01

ECTHR jurisprudence, each application, which is in conflict with these basic values, are incompatible with the ECTHR, and they shall not be reviewed in substance. This approach leads to the conclusion, that the ECTHR has recognised and invoked the peace-builder function of freedom of expression, and on this basis, certain opinions shall not be protected due to their content. This approach may be problematic from the logic of freedom of expression, as some views are eliminated from the public discussion just on the basis of their content. However, from the other side, it seems that the ECTHR has implemented to its jurisprudence the collective aspect of the peace-builder function, as regard individuals. While the ECTHR had not considered the historical context of an individual nazi accusation, it – in my view correctly took into account in the Garaudy case the special sensibilities and historical prejudices, which are attached to holocaust. According to this approach, there is a narrow circle of such shocking historical tragedies, which shall not be neglected or relativized as part of the public discussion without an extremely high level of carefulness. The size and the existence of these events could be only subject to an objective professional discussion, which is based on evidences, rather than insulting value-judgements. In this field, the value-judgements shall meet with a heightened level of minimum standard, than otherwise. This judgement is an excellent example to demonstrate an argumentation, which is based on the alleged peace-builder function of freedom of expression. Nevertheless, it may be dubious, whether long-term stability and societal peace would be served better, when such insulting speech would be also reviewed in merit by the ECTHR, and it would be exempted from the protection of the ECHR on the ground of substantial arguments. It would be always doubtful, which events of the European history shall be classified as such virulent and sensitive, whose societal elaboration justifies this heightened level of protection. Although the fact, that holocaust shall be undoubtedly regarded as such a historical event, it is, and it would be always contestable, whether other historical events might have the same weight. This kind of controversies could not advance the peace-builder function of freedom of expression.

It has been already mentioned, that the special historical attitudes towards certain past conflicts are almost neglected by the ECTHR. In the *Vajnai v Hungary* case, the applicant, from the Workers' Party speaker at demo in Budapest; wore a five pointed red star (symbol of workers' movement); so police called on him to remove it, which he did.⁴⁵ The applicant

45 EUROPEAN COURT OF HUMAN RIGHTS. *Vajnai v. Hungary*. 2007, application no. 33629/06.

was convicted for offence by using totalitarian symbol. The ECTHR outlawed the sanction, as it amounted to a violation of art. 10. of the ECTHR. The ECTHR rejected the point of the government, that red star is identified with communism in Hungary, and generate huge fears and tensions for several people, especially, for the survivor victims of the totalitarian regimes, and their descendants. The ECTHR stated, that always twenty years after the democratic transition, the display of an allegedly communist symbol, which is also linked to other left wing movements shall not be considered as an intimidating message, which might be threatening for certain people.⁴⁶ This judgement was contested heavily in Hungary and elsewhere in Central-Europe, as certain politicians and experts held, that the ECTHR failed to reconstruct the surrounding of post-communist societies, where the totalitarian past still in alive for those, who, or whose closest relatives were affected directly by the crimes of the communist system.

The concept of peace-building within the European context is highly dubious, and probably will be always an unresolved issue, which generates more questions, than responses. These characteristics are especially perceptible in the *Perincek v Switzerland* case, when the Armenian genocide during the First World War was concerned.⁴⁷ The ECTHR in a grand chamber judgement, confirmed, that it amounted to a violation of art. 10. of the ECHR, that Perincek, the leader of the Turkish Worker's Party was convicted due to his statements from the Armenian genocide. During his public speeches, Perincek challenged the legal characterisation of the Armenian massacre, which shall not be classified according to his opinion as genocide under international law. This case outlines the crucial difficulties during a peace-building advocacy process. Firstly, in this case, the applicant was not a private person, but a public figure, who had political and scientific background also. At this level, the member states shall dispose over a very limited margin of appreciation, however, it was not considered, that these form of speeches may entail severe consequences, as more people could be influenced by the seemingly reliable view of a public person.⁴⁸ On this ground, from a peace-builder perspective, the offensive public speech shall be evaluated more strictly,

46 WYDRA, Harald. The Power of Symbols: Communism and Beyond. *International Journal of Politics, Culture, and Society*. Vol. 25, n°1-3, 2011, p. 66.

47 EUROPEAN COURT OF HUMAN RIGHTS. *Perincek v. Switzerland*. 2015, Application no. 27510/08.

48 JANIS, Mark W.; KAY, Richard S.; BRADLEY, Anthony W.; *European Human Rights Law*. 3. ed., Oxford, Oxford University Press, 2008, p. 206-209.

than recently, as these tools of communication may increase easily the tensions within the society due to the different evaluation of certain historical events.⁴⁹In this point, the ECtHR considered similar to *Lingens* the actual circumstances of the communication, rather than the historical context, the special reactions, which might be attached to the outstanding significance of certain historical experience. A further element is the fact, that the ECtHR assessed the content of a speech, instead of outlining the expected consequences of the communication. It is quite problematic to make distinction between the values of diverse speeches, such concept would be the source of endless debates from the followable standards, and from the particular classifications. The peace-builder function of freedom of expression could prevail more effectively through the consequence-based examination: not the content, but the alleged consequences of a speech could undermine the societal cohesion or peace. Evidently, my proposal shall not exclude the substantial discussion of historically sensitive matters, but put forward a stricter standard for these kind of speeches. It is reasonably expectable, that those, who talks publicly about such matters, which could easily violate the objective sensibility of others, and which could often generate severe tensions between the people, shall express their view with special diligence. This framework could not be obviously absolutely objective, but might emphasise the better consideration of peace-building in freedom of expression cases. Any judicial body might distinguish between speeches only on the ground of their supposed consequences, and as part of the assessment, it should be worthy for consideration, whether the particular speech is objectively able to undermine unjustifiably the societal peace and cohesion. In my view, such a coherent standard could strengthen the evaluation of the peace-builder function of freedom of expression within the ECtHR jurisprudence.

Freedom of expression as an instrument of peace-building was also considered in two Scandinavian judgements of the ECtHR in certain respects. In *Vejdeland v Sweden*, the ECtHR examined hate-speech in the context of homosexuality.⁵⁰In that case, some students were fined due to spreading leaflets on homosexuality in the secondary school. The argumentation of the ECtHR highlighted, that the extent of the peace-builder function depends strongly on the actual circumstances. In the *Vejdeland* case, the ECtHR hold – in

49 ARCHARD, David. *Insults, Free Speech and Offensiveness*. *Journal of Applied Philosophy*. Vol 31, n° 2, p. 127-141, 2014.

50 EUROPEAN COURT OF HUMAN RIGHTS. *Vejdeland and Others v. Sweden*. 2012, application no. 1813/07.

my view rightly – that amongst young people, where sensitive matters may easier produce sharp communications or physical conflicts than amongst adults, and where the impact of these expressions is less controllable, the acceptable limits of hate speech are broader, than generally. This case demonstrates well also, that the ECtHR has recognised peace as a fundamental value of the Convention however, it has failed to give a coherent interpretation of this notion as regard freedom of expression. Nevertheless, as far as I am concerned, the ECtHR made a proper balance between the right to freedom of expression and the public interest of societal peace. The *Vejdeland* judgement showed again, that it is almost impossible to create a content-neutral, consequence-based line between pluralist discussion on matters of public interest and hate speech, which could undermine peace between reasonably sensitive people.⁵¹

The other case from Northern-Europe was delivered at the *Jersild v Denmark* case, where the spread of three TV interviews with racist young men was concerned.⁵² The journalist, the editor, and the three men were all convicted for fines due to spreading offensive and degradatory contents. The ECtHR examined the application of the journalist, and held that the mere advocacy of racist contents, which targets just to inform the community from certain views, rather than promoting racist and virulent contents shall be covered by the protection of article 10. of the ECtHR. Interviews are essential for the democratic discussion on matters of public interest, especially when the interviewer is clearly distinguishable from the offensive views. Evidently, these interviews shall not amount to direct hatred on violence, but the mere assessment of a particular view represented by certain layers of the society shall be protected by freedom of expression.

This brief analysis of the relevant ECtHR case law gives some sense from that rich jurisprudence, which has interpreted the peace-builder function of freedom of expression. The current European experience of this approach will be detailed later, however it is worth-contemplating, that the ECtHR jurisprudence has recognised the function of freedom of expression as an instrument of peace-building, but a coherent concept has not been elaborated. In my view, the ECtHR could improve this approach of freedom of expression consciously, which may would, support societal peace and cohesion on the long-term. In the next chapter,

51 GELBER, Katharine. Freedom of Political Speech, Hate Speech and the Argument From Democracy: The Transformative Contribution of Capabilities Theory. **Contemporary Political Theory**. Vol. 9, nº 3, p. 304-324, 2010.

52 EUROPEAN COURT OF HUMAN RIGHTS. **Jersild v. Denmark**. 1994, application no. 15890/89.

the American interpretation of peace-building will be conceptualised, and finally, a brief comparison will be provided between the two frameworks, as well as the perspectives of the peace-builder function will be examined.

3 NORTH AMERICA

The US Supreme Court considers freedom of expression as a key element of democracy, which shall be only subject to exceptional limitations. The ECTHR has narrowed recently the protection under article 10. of the ECHR for the benefit of other rights, but the American attitude is different: it gives particular highlight to freedom of expression, as an inherent value of the democratic society.⁵³The peace-builder function shall be assessed in the light of this basis, and it will be clear, that the American system protects freedom of expression within a broader circle even concerning historically entrenched societal conflicts.⁵⁴

Regarding the concrete caselaw of the United States Supreme Court, I would concentrate firstly on the *Gertz v. Robert Welch* case.⁵⁵In this controversy, a police officer killed a young man, and during his trial, he published an article from Gertz, from the defendant of the family of the young murdered man. In this publication, the police officer alleged the active criminal record and andcommunist past of Gertz. The first instance Court judged damages for Gertz, but in the second instance, the appellation of the respondent was accepted, and damages were annulled. The Supreme Court upheld the second instance judgement, and made two two essential statements in this judgement. On the one hand, the Supreme Court confirmed, that public figures shall tolerate a broader circle of acceptable criticism, than private persons, this approach is similar to the ECTHR jurisprudence. However, on the other hand, it was argued, that a relatively strict standard shall be applied for private persons also to avoid self-censorship: only direct damages may be compensated, and just in case of knowingly false publications.⁵⁶This interpretation showed less sensitivity to take into account the peace-builder function: the rumour of former communist activities was not a

53 WEINSTEIN, Allen; RUBEL, David. **The Story of America: Freedom and Crisis from Settlement to Superpower.** DK Publishing, Inc.: New York, N.Y. p. 58-63, 2002.

54 STONE, Geoffrey. Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century. **Pepperdine Law Review.** p. 273-299, 2009.

55 UNITED STATES. Supreme Court. **Gertz v. Robert Welch.** 1974, 418 U.S. 323

56 COOK, Philip; HEILMANN, Conrad Heilmann. Two Types of Self-Censorship: Public and Private. **Political Studies.** Vol. 61, n°1. p. 178-196, 2013.

relevant point for the Supreme Court, and the dignity of private persons shall be protected more narrowly, than in Europe.⁵⁷For peace-building, it shall be noted, that the publication of supposed totalitarian engagement is not linked to such sharp reactions in America, than in Europe. The background of this phenomenon is probably the less shocking direct experience of the North-American society concerning totalitarian systems.⁵⁸ In the United States, the most important historically entrenched conflict is the race-based tension between the white and the black population, not the elaboration of the totalitarian incidents.⁵⁹Therefore, the following cases will mainly focus on the assessment of racial controversies, instead of political unrest. However, this case demonstrates well, that in the United States, freedom of expression lessly considered as a primary tool of peace-building, than in Europe.

In the *R.A.V. v. City of St. Paul* case, after allegedly burning a cross on a black family's lawn petitioner, a teenager was charged under a local ordinance the burning of swastika, or other symbol that one knows or has reason to know "arouses anger, alarm of resentment in others" on the basis of race, colour, creed, religion, or gender.⁶⁰ The Minnesota Supreme Court upheld the ordinance, and rejected the application. The US Supreme Court found, that the ordinance was unconstitutional, since it established content-based limitations on freedom of expression. This outcome gave us several points for consideration as regard peace-building. Firstly, it shall be noted, that the American approach, similarly to the European interpretation, highlighted the prohibition of content-based limitations on freedom of expression, and the circle of acceptable restrictions are construed more tightly, than under the ECTHR jurisprudence. Secondly, it came from the first point, that the peace-builder function is again neglected in the United States. The US Supreme Court argued, that the particular ordinance banned hatred only on certain grounds therefore it made difference between contents, and have not constituted a content-neutral limitation on freedom of expression. This logic rejects completely the sensitivity towards peace-building, as outlaws certain clearly legitim restrictions on free expression, which could prevent a great number of offensive communications. It may be also contestable, whether this differentiation has not any objective

57 LOVELAND, Ian. *Sullivan v. The New York Times*. (chapter 5). In: **Loveland, Political Libels: A Comparative Study**. Oxford: Hart, 2000, p. 65-85.

58 LEWIS, Anthony. *Defining Freedom*(chapter 4) In: LEWIS, Anthony. **Freedom for the Thought That We Hate: A Biography of the First Amendment**. New York: Basic Books, 2008, p. 39-58.

59 HALBWACHS, Maurice. **On Collective Memory**. Chicago: University of Chicago Press, 1992, p. 182.

60 UNITED STATES. Supreme Court. **R.A.V. v. City of St. Paul**. 1992, 505 U.S. 377

ground, as the American caselaw established a hierarchy between fields of discrimination, and each mentioned grounds in the Minnesota decree fall within the scope of strict or at least intermediate scrutiny.⁶¹ Moreover, the American concept varies between high-value, and low-value speeches, the decree might be compatible with this ambiguity. In comparison with the practical advantages of stabilisation and peace-building, it is questionable, whether the dogmatic borderline between content based, and consequence-based prohibitions shall prevail over the peace-builder function of freedom of expression. In this point, it shall be decided, whether the European approach is too sensitive, or the American interpretation is severely insensitive? The response depends strongly on individual attitudes, however, in my view, the European caselaw conceptualised more coherently (although still contestably) the peace-builder function of freedom of expression. In the light of the above, we may conclude, that the American approach gives less weight not only for the protection of private sphere in the field of freedom of expression, but also the promotion of peace-building through diverse forms of free expression.

The Virginia v Black case completed with some new elements the relevant American jurisprudence.⁶² Regarding the factual background, three men were convicted on the ground of an act banning cross burning on public place with “an intent to intimidate a person or group of persons” All three burning had an extremely racist and offensive context). The Virginia Supreme Court strucked down the statute as unconstitutional, this was upheld also by the US Supreme Court. The particular law provided a general ban on cross-burning regardless the broader circumstances of the incident. The US Supreme Court argued, that this concept did not consider the real consequences of the expression, just prohibits an activity, without taking into account the entailed impact.

Brandenburg v. Ohio is an often-cited judgement of the US Supreme Court it is also relevant from the perspective of peace-building.⁶³ A Qu-Klux-Klan leader participated and spoke in a KKK-Rally, and referred to the possibility to a revenge against „niggers” and „jews”, as well as the dominance of the whites „caucasian race”. A film was made by a journalist invited by the applicant from his speech, with a number of further racial scenes. The applicant was convicted to imprisonment on the ground of Ohio Criminal Sindicalism Act.

61 SULLIVAN, Kathleen M. Two Concepts of Freedom of Speech. **124 Harvard Law Review**. p. 143-177, 2010.

62 UNITED STATES. Supreme Court. **Virginia v. Black**. 2003, 538 U.S. 343

63 UNITED STATES. Supreme Court. **Brandenburg v. Ohio**. 1969, 395 U.S. 444

The US Supreme court held that this conviction was again unconstitutional, as the offensive expressions amounted only to advocacy, but did not meet with the standard of incitement to imminent and lawless action. This framework means for us not only the wide protection of hate speech, but in parallel with this phenomena, the less developed consideration of the peace-builder function.⁶⁴ As the American framework shows less sensitivity to the historically entrenched vulnerability or fear, in the United States, freedom of expression as an inherent precondition of democratic discussion outweighs in most cases the public interest of stable, and peaceful public space. Although the fact, that the line between these two dimensions will never be objectively determined, it is worth-contemplating, that the US Supreme Court has not referred directly to the peace-builder function of, as a factor to bound the permitted scope of freedom of expression. Although the fact, that there are multiple classes of speeches,⁶⁵ and a hierarchy exists also between the different grounds of discrimination in America, the historical events are rarely considered in depth, and their virulence influences the jurisprudence of the Supreme Court just exceptionally. This may exclude unjustified differentiation between historically entrenched conflicts, and as the highlight is given to the consequences, the actual case might be really irrelevant. This logic may be more objective and foreseeable, than the European concept, however, in the reality, it functions rigidly and insensitively. As the protection of the private sphere from offensive expressions is generally too tight in the United States, practically this means that historically entrenched conflicts are not calculated as crucial aspects in freedom of expression cases. On the basis of *Brandenburg v Ohio*, and the respective case law, one may conclude, that the American approach to the peace-builder function might be more coherent on the one hand, than its European counterpart, but on the other hand, it fails to react with sufficient sensitivity to the societal demands to stability, and peace.

Nevertheless, one may be aware of the fact, that the American protection of hatespeech is not unlimited, and especially, the *Beauharnais v Illinois* case provides a proper example to bear in mind, that the societal elaboration of historically entrenched conflicts were identified as an exceptional ground of limitation on hate speech.⁶⁶ The president of the White Circle

64 DELGADO, Richard; STEFANCIC, Jean. Four Observations about Hate Speech. **44 Wake Forest Law Review**. p. 353-370, 2009.

65 RICHARDS, David. Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment. **University of Philadelphia Law Review**. p. 70-91, 1974.

66 UNITED STATES. Supreme Court. **Beauharnais v. Illinois**.1952, 343 U.S. 250

League distributed a leaflet which called on the major to act against the “negroes”, against the harrassments and invasion of white persons, properties and neighbourhoods by the blacks. The president was convicted on the ground of an Illinois statute: there was a prohibition for any person to distribute any publication that “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, colour, creed or religion. The outcome of the analysis was the constitutionality of the conviction, and the main argument behind the decision was the special historical circumstances in Illinois. As in this state, the tensions were extremely strong between the white and the black race, the US Supreme Court found it reasonable to consider these particular conflicts, and allowed for the Illinois legislation to adopt ban constitutionally on racial hatred, which constitutes to direct recall on violence.⁶⁷In the light of this decision, it seems, that the US Supreme Court showed capacity even to overstep the historical sensitivity of the ECTHR, as apart from the actual circumstances, the historical attitudes of the particular member state was also concerned. In spite of the fact, that the peace-builder function was not mentioned directly in this decision, probably this judgement is one of the best examples of stabilising a society through the instruments of free expression with excluding the publication of libellous contents. Furthermore, the American logic has the necessary theoretic framework for evaluating peace-building with proper significance the greater issue from this perspective is the traditional American approach, which eliminates most privacy aspects from the analysis. If the neutral treatment of historically entrenched conflicts would be supported by a relatively sensitiver approach, the peace-builder function of freedom of expression might be understood more effectively within the jurisprudence of the US Supreme Court.⁶⁸

As for conclusion of this section, it shall be stressed again, that the American concept approaches facially neutrally historically entrenched conflicts, which emphasises a more transparent and coherent standard for the consideration of peace-building during freedom of expression cases. Nevertheless, since the US Supreme Court allows only a very narrow circle of restrictions on freedom of expression, there is inherently less space for evaluating the peace-builder aspect of this fundamental right. Although the fact, that by general terms,

67 BODNEY, David J. Extreme Speech and American Press Freedoms. *In*: HARE, Ivan; WEINSTEIN, James Weinstein (eds). **Extreme Speech and Democracy**. Oxford: Oxford University Press, 2009, p. 598-607

68 WHITE, Hayden. **The Content of the Form: Narrative Discourse and Historical Representation**. Baltimore: Johns Hopkins University Press, 1990, p. 44.

the US Supreme Court has turned with a relatively insensitive approach towards historically entrenched conflicts, it acknowledged the particular characteristics of traditionally established societal tensions in *Beauharnais v Illinois*. In the next chapter, it will be assessed, which elements of the ECTHR and the US Supreme Court jurisprudence might be relevant to elaborate a standard of peace-building in freedom of expression cases, which might be a global point of reference for legislative and judicial bodies.

4 DOES FREEDOM OF EXPRESSION REALLY CONTRIBUTE TO PEACE-BUILDING PROCESSES?

After having detailed some relevant European and American cases, now we shall raise the question: whether freedom of expression could really promote stability and peace within a society? I have outlined the structural background of this issue elsewhere now the main task is to elaborate such a standard, which might be applicable for a broad range of legislative and judicial bodies. In my view, the different elements of the European and American approach shall be merged to create an effective framework for the treatment of this issue. Obviously, this proposal shall not be assessed as a final and absolute orientation for courts, my aim is just to highlight the role of peace-building in freedom of expression cases and to suggest such solutions, which may prove, that it is possible to include a factor of stabilisation in this set of cases. Furthermore, it falls beyond the borders of the present study to consider reasonably the continental, and regional differences, these details, as well as several minor aspects of the whole picture are subject to further research.

Regarding the concrete standard, one may borrow the relatively broader protection of privacy from the ECTHR jurisprudence.⁶⁹ Although the fact, that the proper consideration of the peace-builder function does not simply correlate directly with the accepted scope of privacy vis a vis freedom of expression, it gives more opportunity to serve peace-building through freedom of expression cases. There are a great number of competing interest sin these controversies, and the analysis is much more complex, than simply prioritising privacy over freedom of expression, or peace-building over both values. In the reality, the legislative and judicial bodies shall assess all circumstances of the case with a heightened level of carefulness. Peace-building is one amongst several factors, but is such a factor, which has

69 JANIS, Mark W.; KAY, Richard S.; BRADLEY, Anthony W.; **European Human Rights Law**. 3. ed., Oxford, Oxford University Press. p. 206-209, 2008.

been systematically underestimated, therefore broad space for privacy considerations itself may open up new perspectives for peace-building also in freedom of expression cases.

From the American side, the strict requirement of content-neutrality might be acceptable. The ECHR constitutes particular hierarchy between historically entrenched societal conflicts, but the European jurisprudence often fails to assess properly the sensitivities, which are generated by the post-traumatic effects of these incidents.⁷⁰ The American approach in this respect, which allows only the consideration of the actual societal context instead of the supposed values of historical tragedies, might serve better long-term stability, and the self-protection of the society against really offensive, and destructive expressions.⁷¹

On the basis of the aforementioned elements, I suggest the examination of peace-building in all cases concerning freedom of expression. By practical terms, it means, that certain criterion shall be evaluated by the judicial bodies during handing over their decisions. Firstly, it shall be assessed, whether the contested form of expression could undermine objectively societal peace and stability. During this stage, the primary aspect is the justifiable sensitivities of direct or indirect victims: if they consider reasonably the expression of a view as a threatening and intimidating content, which could at least relativize their human dignity this, shall be evaluated as a strong argument for the limitation of freedom of expression.⁷² Secondly, the aspect of the publisher shall be analysed: whether his/her aim was the substantive (scientific or political) discussion on a matter of public interest, or the well-founded reinterpretation of some details of the events, rather than merely insulting and attacking others, especially people from vulnerable groups.⁷³ Thirdly, it shall be checked, whether the ban on expression on the ground of peace-builder function would not prevent open and moderate discussion on even ultrasensitive matters, as these events forms part of the historical societal experience, and the ban on changing ideas from these incidents would be

70 FEUCHTWANG, Stephan. Memorials to Injustice. In: BELL, Duncan. **Memory, Trauma and World Politics. Reflections on the Relationship Between Past and Present**. Basingstoke: PalgraveMacmillan, 2007, p. 177.

71 FINLAYSON, Alan. Rhetoric and Radical Democratic Political Theory. In: LITTLE, Adrian; LLOYD, Moya. **The Politics of Radical Democracy**. Edinburgh: Edinburgh University Press, 2008, p. 13–32.

72 JACOBY, Tami Amanda. A Theory of Victimhood: Politics, Conflict and the Construction of Victim-Based Identity. **Millennium – Journal of International Studies**. Vol. 43, nº 2. p. 527, 2015.

73 KLEIN, E. R. Whither Academic Freedom? **International Journal of Applied Philosophy**. Vol 16, nº 1. p. 41-53, 2002.

the greatest source of hidden tensions, and potential instability within the society.⁷⁴ Whoever would like to express his/her views from a historical tragedy of the XX. Century it shall be permitted, but the minimum level of moderate public discussion shall be undoubtedly higher in these cases as generally, since the conceptualisation of these matters requires additional prudence from those, who participate in these discussions.⁷⁵

On the ground of these three requirements, I put forward a special construction for adapting to the freedom of expression jurisprudence more effectively to the special characteristics of historically entrenched societal conflicts. It is well-established even in Europe and America, that public figures shall tolerate a broader circle of fierce criticism, than other individuals accordingly the protected scope of freedom of expression is wider in these cases. Similarly to this distinction, the jurisprudence may launch a limited scope of free discussion on those controversies, when the long-term societal elaboration of historically entrenched conflicts are concerned. This approach would not be alien from the existing jurisprudence, since it has been already acknowledged, that certain circumstances may influence remarkably the respected coverage of freedom of expression.⁷⁶ The most virulent conflicts of the closest history might be classified as historically entrenched societal conflicts, and these events might be treated with a particular prudence.⁷⁷ Obviously, it would never be uncontestable, which events of the human history falls within the notion of „historically entrenched societal conflicts”, in my view, instead of legal sciences, this is essentially the task of post-conflict studies to analyse, on the basis of which criterion could we distinct „historically entrenched societal conflicts” from other tragic events.⁷⁸ All in all, the definition would produce considerable legal impact, as it would strongly influence the acceptable restrictions on freedom of expression. Legal sciences might provide certain orientations

74 STONE, Dan. **Good bye to All That ?** The Story of Europe Since 1945. Oxford: Oxford University Press, 2014, p. 285.

75 ALEXANDER, Larry. Is There a Right of Freedom of Expression? **Law and Philosophy**. Vol. 27, n°1, p. 97-104, 2008.

76 ROSTBØLL, Christian F. Freedom of Expression, Deliberation, Autonomy and Respect. **European Journal of Political Theory**. Vol. 10, n° 1, p. 5-21, 2011.

77 JUDT, Tony; SNYDER, Timothy. **Thinking the Twentieth Century**. New York: William Heinemann, 2012, p. 278.

78 ROUSSO, Henry. The History of Memory: Brief Reflections on an Overload ed Field. In: BLAIVE, Muriel; GERBEL, Christian; LINDENBERGER, Thomas. **Clashes in European Memory: The Case of Communist Repression and the Holocaust**. Innsbruck: Studienverlag, 2011, p. 232.

for this concept, which would amount to legal significance. It should be clear, that the classification of particular events shall not essentially subject to their real magnitude, the primary aspect is their societal elaboration: whether extra-ordinary sensitivities are attached to a genocide, which justifies the elimination of certain, otherwise acceptable contents from the public arena.

In the light of this special standard, one may see, that the peace-builder function would partly enbroaden, and partly restrict freedom of expression on the basis of a legitimate public interest for the safe public space, where the human dignity, and justifiable sensitivities of individuals are taken into consideration. In the meantime, the significance of this special function shall not be overestimated: noone shall be prevented from expressing diverse well-founded and carefully tailored opinions.

As far as I am concerned, this new standard could contribute considerably to rule out unjustified totalitarian references from public discussion, as the level of political speech has been strongly undermined by referring too often ill-foundedly the totalitarian engagement or past of certain public figures. This simplified and actualised interpretation of historically entrenched societal conflicts would not disappear evidently, however, it would serve also indirectly peace-building, if these superfluous allegations would be at least partly eliminated from the political, or even ordinary discussion.⁷⁹ Apart from this, the overall level of public discussion would be enhanced, as several sharp, but substantially contentless phrases would be impermissible under the new standard. Accordingly, societal stability and peace might be promoted, if the special function and capacity of freedom of expression would be recognised consciously, and the dogmatic and practical elements of this concept would be identified. Obviously, one may not expect any „miracle” from including peace-building structurally during the evaluation of freedom of expression cases, but the instruments of argumentation would be undoubtedly richer, and the outcome might serve better the interests of various stakeholders, if peace-building would be a predictable part of this discussion. To fulfil this goal, a system of criteria shall be elaborated to identify historically entrenched societal conflicts, and to outline, that the historical circumstances of the post-traumatic surrounding shall be assessed instead of the impugning event itself. As a result, concerning the field of historically entrenched societal conflicts, the acceptable limits of freedom of expression shall

79 HERZ, Michael; MOLNAREDS, Peter. **The Content and Context of Hate Speech: Rethinking Regulation and Responses**. Cambridge: Cambridge University Press, 2012.

be reasonably narrower, than under the general standards. This structure might be applicable even in Europe, North-America, and in other continents of the world also.

CONCLUSIONS

In this study, I have suggested a partly new approach of some freedom of expression cases: with proper weight of the peace-builder function. I am aware of the fact, that this logic has not been unknown, and the idea to give greater importance to the peace-builder function is not a revolutionary idea. The issue, on which I would like to reflect, is the incoherent, unconscious and marginalised consideration of freedom of expression as a peace-builder instrument. I am convinced, that with the expression of diverse, even sharp and possibly intimidating opinions, the primary purpose is not to create an insulting surrounding, but to analyse matters of public interest through free, democratic and tolerant discussion.⁸⁰ I totally agree with that American interpretation, that each limitation shall be always consequence-based the value of the content itself could not be a proper basis of any restriction. My logic would not entail an inherently new caselaw, just add a further point to the existing framework. It should be noted again, that my aim was not to establish an absolute and exclusive interpretation of the peace-builder function, I targeted to open up new perspectives in this field, and to generate further deep professional discussion. The mission of this study was to point out, that some elements of the freedom of expression case law concerning historically entrenched societal conflicts might be reasonably subject to reconsideration. Neither peace-building, nor freedom of expression are inherent values for themselves, the purpose is always to balance all competing interests during the consideration of each controversy. We should keep this always in mind therefore, we should not criticise a judicial body just for narrowing the protection of freedom of expression, or neglecting the consideration of peace-building. The greater weight of peace-building should prevail in a highly complex and changing surrounding, where several other arguments are also valid. Despite these uncertainties, it seems well-founded, that a coherent and globally applicable standard would be useful for examining the peace-builder function of freedom of expression. On the long term, this standard may diminish the tensions generated by post-traumatic attitudes, and the whole society, even the victims might treat their shocking past experience at least a little bit easier.

80 EUROPEAN COURT OF HUMAN RIGHTS. **Flux v. Moldova**, 2009, application no. 25367/05

My contribution put forward concrete criterion and framework to reinterpret the peace-builder function of freedom of expression, as well as the proper consideration of certain aspects of historically entrenched societal conflicts. Several details, including regional differences, and the point of view of other scientific paradigms⁸¹ are subject to further research, which may lead to a more peaceful and tolerant public space on the long term. Hopefully, this study was a modest contribution to this process.

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EUROPEAN COURT OF HUMAN RIGHTS. **Flux v. Moldova**, 2009, application no. 25367/05

EUROPEAN COURT OF HUMAN RIGHTS. **Fratanolo v. Hungary**. 2011, application no. 29459/10.

EUROPEAN COURT OF HUMAN RIGHTS. **Garaudy v. France**. 2003, application no. 65831/01

EUROPEAN COURT OF HUMAN RIGHTS. **Handyside v. UK**. 1976, application no. 5493/72, § 49.

EUROPEAN COURT OF HUMAN RIGHTS. **Jersild v. Denmark**. 1994, application no. 15890/89.

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