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Marina Supac

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Restrictions of freedom of speech in the post-Soviet region: Belarus, Ukraine, Moldova

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Submitted by Marina Supac

Supervisor Vahan Bournazian

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Reviewed by_____J.V.Bournazian_____

Allowed for Defence

Centre Director

PhD in Law, Associate professor

A.Ghazinyan

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Introduction

Freedom of speech is a cornerstone of democracy yet there is a high level of concern over how governments regulate the realization of this right. The research paper will analyze the techniques the post-Soviet countries (Belarus, Ukraine and Moldova) developed to restrict free speech and sanction those expressing their dissident views.

The choice of the countries for analysis is justified by their geographical and historical closeness as well as by their inclusiveness in the Eastern Partnership Project run by the European Union in 2009 that aimed to bring the countries closer to the European standards of democracy. To make the comparative analysis of the state interference into the free speech area more narrow and detailed, priority is given to free speech in the media as to one of the primary criteria of democratic transition.

This research paper addresses whether state restrictions conform with permissible restrictions and the appropriate methods to address these democratically. C

To test the hypothesis, the paper approaches the restrictions from various perspectives and identifies the restrictions imposed by the post-Soviet States following a three-pronged approach:

- comparing the respective countries' free speech legislation as well as Constitutional free speech provisions in the complexity with the free speech norms prescribed by international human rights instruments;
- using human sources – i.e. interviewing and extrapolating information from the representatives of media, non-governmental organizations and journalist unions in the respective countries;

providing a review of pertinent literature – i.e. analyzing the Universal Periodic Review process as per Belarus, Ukraine and Moldova

Abstract

The hypothesis of the research is that the limiting of the state control over free speech in Belarus, Ukraine and Moldova is possible because there is no effective framework the key actors concerned about free speech issues can use for elaborating the common regulatory concept. Thus the necessity to establish a dialogue over free speech regulation

between the State and the civil society is highlightedalong with the misinterpretation of the international human rights instruments by the post-Soviet States and a system which could help the key actors to establish a legitimate and democratic framework for free speech regulation is receommended.

Recognizing the objective limits of the research, there is a lack of academic research on the topic because of the non-openness of the case-law of the countries. The research paper aims to foster discussion on those interested in post-Soviet free speech issues. This paper aims to draw attention and resolution to the issue, and aims to be useful to journalists, human rights activists, researchers, instructors and students in their quests.

CHAPTER 1.

The scope of freedom of speech in international instruments

Freedom of speech is one of the fundamental liberties protected by most of the world's written constitutions and bills of rights. The scope of protection of free speech by all possible legal means is to guarantee its realization in spite of a state's suppression or regulation which contradicts it. The next sub chapter analyzes the explanations and limitations of free speech norms in a variety of international instruments and contexts . The issue of state regulation and its contravention of free speech in post-Soviet states will be analyzed in detail in chapter two .

The first question is whether protection of free speech truly needs special protection. Public debate in Britain and other liberal democracies about free speech is concentrated on the scope of the freedom rather than on the issue whether the free speech should be protected.[1] What if we are talking about countries of a transitional democracy where society still has not come to a common belief that "democracy is the only game in

[1] Eric Barendt, "Freedom of speech"(Oxford University Press, 2007); ch.1

town?" Here the philosophical and legal justifications in favor of free speech should be presented in addition to an definition for free speech.

There is no common definition for free speech in the speech theory. The definitions given by prominent scholars usually emphasize its significance without giving a concrete explanation of the term: "freedom of speech is a political and constitutional principle for major importance that normally requires governments to provide very strong justifications for interfering with flows of communication. [2] Another approach of defining free speech is to present its core values and aims: "Protecting freedom of speech in the digital age means promoting core set of values in legislation, administrative regulation, and the design of technology. What are those values? They are interactivity, broad popular participation, equality of access to information and communication technology, promotion of democratic control in technological design, and the practical ability of the ordinary people to route around, glom on, and transform."[3]

Another method to explore the definition of free speech is to see its correlation with the right to freedom of expression under which free speech is also protected. Scanlon suggests: "The only class of acts I have mentioned so far is the class "acts of expression," which I mean to include any act that is intended by its agent to communicate to one or more persons some proposition or attitude."[4] Scanlon proposes to see the acts of speech not as a relevant subclass of acts of expression but as an integral part of expression. From his view point it is the case that "the theoretical bases of the doctrine of freedom of expression are multiple and diverse". If we agree with the argument that speech is incorporated in the broader notion of the expression then we must explore the definition of that term and apply it when necessary in the free speech discourse.

The right to freedom of expression is guaranteed by both Article 19 of the *Universal Declaration on Human Rights* (UDHR),1 a UN General Assembly resolution, and Article 19(2) of *International Covenant on Civil and Political Rights* (ICCPR),2 a formally binding legal treaty ratified by 165 States. The latter states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart

[2] E.Barendt, "Freedom of the Press", 2009.
[3] Thomas Gibbons, "Free speech in the new media", (Ashgade Publishing Limited, 2009).
[4] Thomas Scanlon, "A theory of freedom of expression", (Philosophy and Public Affairs, Vol. 1, No. 2. 1972),p.204-226.

information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice."[5]

It is crucial to mention that freedom of expression is a right of the greatest importance. At its very first session in 1946 the United Nations General Assembly declared: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[6] Regional courts and bodies have also reconfirmed this. The European Court of Human Rights has noted: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."[7]

The Inter-American Court of Human Rights has stated: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests."[8] The African Commission on Human and Peoples' Rights has indicated, in regard of Article 9 of the African Convention: "This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country."[9]

Because of international recognition of the importance of the right to free speech and belief that this research would assist the civil society sector of the respective countries in their day to day activities when confronting state free speech regulatory mechanisms, there is need to present the main arguments in favor of the free speech principle. They should be given a high level of attention in the post-Soviet States which are most likely to look forward establishing long-lasting cooperation with the countries of old democracies especially in Europe. Ronald Dworkin wrote: "Free speech is a basis for legitimate government".[10] Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be".[11] Right to freedom of speech is especially crucial for the countries in a democratic transition like

[5] UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.
[6] Resolution 59(1), 14 December 1946. The term freedom of information as used here was meant in its broadest sense as the overall free flow of information and ideas in society, or freedom of expression.
[7] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49.
[8] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.
[9] *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, para. 52.
[10] Ronald Dworkin, "The Right to Ridicule", (The New York Review of books, 2006), Vol. 53
[11] Ronald Dworkin, "The Right to Ridicule", (The New York Review of books, 2006), Vol. 53

Belarus, Moldova and Ukraine. The right to freedom of speech and expression is one of the seven institutions of polyarchy and is needed for establishing a democratic process.[12]

However, it is impossible to draw a sharp line between legal and philosophical arguments in the terms of free speech protection. It i's useless to stand for the literal approach to textual interpretation of the articles guaranteeing the protection of free speech because we need to understand the circumstances upon which they have been elaborated and adopted. Political and social circumstance have changed drastically since the adoption of post-Soviet state constitutions, for example, the ICCPR with its Article 19 where the most important and influential formulation of the freedom of expression is at the international level. That is why the arguments speaking in favor of freedoms change with the definition of freedom itself. The essences of freedom in 1949 when the ICCPR was adopted now possess some changes. The arguments given in favor of free speech should contain as philosophical background as well as legal, based on the case-law which is always contributed by new precedents.

Of course, there is a huge difference between the philosophical and legal arguments in regard to the free speech issue when dealing with court cases. Frederick Schauer, one of the most prominent US free speech theorists said: "… the task of the courts, in attempting to interpret the open-ended and morally loaded constitutional provision – freedom of speech and so on – is to develop a theory of these clauses, a theory that will be significantly philosophical, but will include a large dose of precedent".[13]

Now we can sum up the questions raised and compare the arguments chosen to justify freedom of speech. It is crucial to examine some arguments staying above the free speech principle if we wish to understand why freedom of speech is valued. Arguments in favor of free speech can be divided into two parts: consequentialist and non-consequentialist.

The consequentialists believe that free speech produces useful results thus it's worth to be protected Tomas Scanlon presents this argument in his "A Theory of Freedom of Expression": "This article suggests a different, more absolute, foundation for the restriction on content regulation also supported by the rule-consequentialist proposal outlined below in the text. While the latter supports this restriction because and in so far as the absence of such

[12] Robert A. Dahl, "On Democracy", (Yale University Press, 2000).
[13] Frederick Schauer, "Must speech be special?", (Northwestern University School of Law, 1983), p.1305.

a restriction would involve unacceptable consequences for fundamental human interests (being in this sense fact-sensitive), the nonconsequentialist theory takes the constraint of content regulation to derive directly from a more fundamental constraint, that is, a constraint on justifications of governmental authority to the effect that such justifications should be compatible with regarding citizens as autonomous beings. That is, it, so to say, builds into its first principles resistance against content regulation. "[14]

1.1 Searching for justifications: why to protect free speech?

Consequentialist arguments in favor of free speech

- ***Discovering the truth***

We've been talking recently about the time limits for the explanations of the freedom notions but when discussing about free speech it is impossible to skip the narratives of one of the most well-known thinkers of that topic – the British 19th-century Liberal, John Stuart Mill. In "On liberty" (1859) he argues that the starting point for justification of free speech is its ability to discover the truth. Mill's rational support in favor of free speech is based on the opinion that no one is infallible, we are all in error every now and again.[15]

Mill argues that free speech is a matter of common good when citizens while discussing will reach a point which will satisfy all the parties' needs. The consequentialist part of his logic is that it is not rational to silently agree on a certain set of opinions, it would deprive a society the possibility to learn and profit from others' opinions.

Truth can be treated as utilitarian good bringing development to the society as it is described above but it also can be treated as an autonomous good bringing value to the individual. One of Mill's arguments for presenting the search for truth as a justification for freedom of speech is that free speech creates the marketplace if ideas and non of the "products" which in fact is the opinion cannot be deprived from the right to be presented on that marketplace. This idea shares to some extent even the relativist approach to the issue.

[14] http://www.ucd.ie/norface/papers/aar_midtgaard.pdf [Accessed on 17 May 2014].
[15] Anine Kierulf & Helge Ronning, "Freedom of Speech abridged? Cultural, Legal and Philosophical Challenges", (NORDICOM, 2009), p. 26-28.

The development of the society –hat is on the top of Mill's interests. Ronald Dworking says: "…particular individuals are allowed to speak in order that the community they address may benefit in the long run".[16]

However, Mill's position is under high level of criticism. The problem with his argument is that he argues that freedom of discussion will bring the society to improved decision making. History states otherwise, as authoritarian and Nazi regimes have enjoyed the unregulated environments of sharing their ideas when they came to power. A certain circle of experts came out with the question whether that is what Mill was calling the truth benefiting its citizens. Of course not, but the issue consists in the following: Mill did not provide suggestions for balancing the freedom of speech and regulating it from evoking damaging elements.

Other criticism is related to Mill's undermining the regulatory mechanisms and is concerned about Mill's overvalue of the intellectual discussion. He argues that it would be wrong to prohibit even false speech, because if we would not have it the defense of truly valuable ideas would become problematic. This approach can be seen in the academic sphere where the prohibition of the particular researches for publication is hardly imagined because scientific issues are used to be debated. But what about random citizens and their worries related to inflammatory speech and its possible causes?

That is when the States come in and act. For instance in many countries anti-Semitic speech is prohibited by law but because hate speech infringes on the rights of others by denying the equality of other individuals based on some categorization of them in an attempt to dehumanize them. That is how somebody can make a conclusion that Mill's argument for free speech creates the suppression of speech and possibility to destroy the tolerance in society by giving privilege to its protection. It is unclear how unregulated free speech can lead to the truth. Perhaps it is the reason Mill's argument is usually presented as a classic of free speech theory rather than as a practical set of aspirations for those searching for grounds to promote that right.

"Mill in his argument for the truth is also very vague when speaking to which types of the speech his argument applies. Critics of his idea are concerned with the issue whether

[16] Ronald Dworkin, "A Matter of Principle", (Harvard University Press, 1985).

it is really important for the common good to discover the truth there were the speech is almost close to the absurd."[17]

Humans tend to seek greater understanding, greater truth. In science we constantly revise our understanding of the universe, coming to more concrete or exact truths. Even though we may say that truth is a value that we continually seek to strive for but may never reach fully, Mill's theory is difficult to apply to false propositions like "red wine is made from sea' stones". The same is about personal abuse, hard political speech which falls out of the set of the arguments constructed in Mill's theory. It does not imply that emotional speech should be prohibited by the State but do they truly have to take part in the process of discovering the truth which might be useful for the common good of society? Citizens should be entitled to unlimited free speech because they can never trust the authority, no matter how democratic, to decide truth.

Because one of the main ideas of the "truth-seeking theory" – assumption that free discussion leads in a democratic society to the revealing of the truth, has been too much criticized by the philosophers there is a need to introduce one more supportive argument. "Better decisions have more chances to come up in an unregulated discussion than from a process controlled by the State."[18]

- ***Self-government***

Alexander Meiklejohn, the American Constitutional scholar emphasizes the democratic background of the freedom of speech right,that free speech is essential in a democratic society and crucial for citizens of a democratic State to be permitted to criticize the decision-makers. Democratic argument is inspired by the citizen's ability to communicate about public policy issues the same as the truth argument was inspired by the constructivism of the people's discussions which should lead for discovering the truth. Meiklejon assumes people that if they are to be able to rule through the politicians they have voted for than they must be able to talk with them and not only.

Justification for freedom of speech is important for the new democracies and the countries of this research in particular (one would argue that Belarus can hardly be added to the list of democratic countries but anyway let's consider the argument as a whole). The self-governance argument is closely connected with the theory of patternalism which was

[17] Anine Kierulf & Helge Ronning, "Freedom of Speech abridged? Cultural, Legal and Philosophical Challenges", (NORDICOM, 2009).
[18] Eric Barendt, "Freedom of speech"(Oxford University Press, 2007); ch.1

widely spread in the countries of the former Soviet Union. "Paternalism can be defined as interfering with a person's freedom for his or her own good. The word calls to mind the image of a father ("pater" in Latin) who makes decisions for his children rather than letting them make their own decisions, on the grounds that "father knows best." The principle of paternalism underlies a wide range of laws, practices, and actions. Paternalism involves a conflict of two important values: 1) the value we place on the freedom of persons to make their own choices about how they will lead their lives, and 2) the value we place on promoting and protecting the well being of others". [19]

In young democracies like Ukraine and Moldova this approach to democracy is still being adopted and the Meiklejon approach could be quite relevant, even though it was elaborated n 1948. What is important to add to the Meiklejon viewpoint is that free speech empowers citizens in a democratic country to govern wisely thus making the democratic regime more effective.[20] This train of thought as well as Mill's are of a consequentialist nature.

Meiklejon a and Mill have been concerned with the issue of the common good. He stands on the position that the most important receiver of the free speech is society. Assuming that people are also benefiting from the free speech he still argues that by protecting the free speech people protect the democracy itself. Above all the mentioned freedom of speech, according to him shall protect: "… the common needs of the body politic. [The first Amendment] cares for the public need ".[21]

It is difficult to argue with the Meiklejohn approach because free speech is about ensuring democratic processes starting at the very basics – free and fair elections and continuing with the feedback between the governors and the society. The argument is attractive because of its easiness but what if we go deeper? Free speech has to serve democracy as to the Meiklejohn viewpoint but what about non-political speech or commercial speech being protected under this argument. That suggests the courts would use something other than pro-democratic arguments in order to cover non-political free speech discourse.

Non-consequalistic arguments in favor of free speech

[19] http://www.scu.edu/ethics/publications/iie/v4n2/owngood.html [Accessed on 20 May, 2014].
[20] Anine Kierulf & Helge Ronning, "Freedom of Speech abridged? Cultural, Legal and Philosophical Challenges", (NORDICOM, 2009), p.27-28
[21] Alexander Meiklejohn, "Free speech and its relation to self-government" (Harper&Brothers, 1948), p.63

- ***Personal autonomy***

The argument for personal autonomy as a justification for protection of the free speech principle has been used by the liberal theorists which include C.Edwin Baker, Ronald Dworkin, Charles Fried, Diana T. Meyers, Thomas Nigel, Martin Redish, Thomas Scanlon, and David Strauss. In this sub-chapter, we would mostly analyze the arguments given by Thomas Scanlon because they are considered to be ones of the most discussing in the academic free speech sphere. The philosopher puts forward two arguments in favor of free speech connected within them by the notion of personal autonomy. The first arguments starts with the assumption that all the people possess individual autonomy in terms of the rights to choose and act according to their beliefs, preferences, etc.

The State should treat individuals as autonomy individuals – that 'is Scalnon's shortest theory summary. This approach is rather non-consequentialistic than consequantialistic and more than any other theories discussed above stands closer to the right-basis argumentation -the individual has a right to make his/her own considerations in regard to the information received. Thus the interference by the State into this right of the citizen would mean that the State undermines the autonomy of the individual, even though the information the citizen is receiving can seem to be false or absurd. The only case Scalnon accepts the limits established by the state in the terms of the free speech is the time of extreme emergency. In all the other cases the power of the State to regulate the free speech should be limited. For the state to stand for the opinion "No, you cannot publically share this view" should mean a violation of the individual autonomy.

It is up to the State to present the strong arguments for such a prohibition to be acceptable, otherwise the notion of the governmental legitimacy would be in peril. How can a government be legitimate if the justification it uses for restricting some freedoms are not socially acceptable? Thus, the only rationale for limiting speech is to prevent speech which dehumanizes, which denies the equality of other individuals, which is in violation of the human rights/individual dignity framework. This is the rationale to stop Holocaust denial, because denial of this truth dehumanizes and creates hate and the foundation for discrimination.

Scalnon's theory correlates with the paternalistic theory which was widely applied over the regions of the Soviet Union. By depriving people of their autonomy, the State deprives them from the right to choose the information in a free and fair manner –a core

principle of democracy. Thus, we can make a conclusion that the argument for autonomy of the person is one of the most inclusive because it correlates with some of the arguments already explained above, for example with the democratic free speech argument defended by Alexander Meiklejohn. About the paternalistic attempts of the state to regulate the free speech, Scalnon explains: "There are clearly cases in which individuals have a right to the information necessary to make informed choices and can claim this right against government".[22]

The theory of personal autonomy is widely accepted because it is applicable for all types of the speech and expression. By causing harm to a person's autonomy the ability of the person to constructively gain, select and analyze the information he or she needs for different life aspects also suffers. It is not limited only to political speech as was the case with Meiklejohn, thus providing the society with information and opinion relevant to the formation of its own beliefs. It is also reflected in the case law of the ECHR which we will review in particular in the chapter three of this academic paper.

Here comes the turn for the second argument given by Scanlon in favor of autonomy's justification. If we have been discussing about the harm to the individual autonomy itself, than here the philosopher is mostly concerned about prerequisites to individuals' autonomy. He also sees the free speech value in creating a marketplace of ideas, knowledge and perspectives which would most probably constitute "a food for thought" for the growing autonomy of the individual. This diversity stimulates an individual's capacity to act rationally. That is how freedom of speech creates reliable process of communication which represents in fact the prerequisites to the people's ability to function as autonomy individuals.[23]

Interesting how the same argument in favor of free speech called "personal autonomy" can be both consequintalistic and non-consequintalistic. It describes the essence of the free speech notion, all of its controversial aspects. The prerequisites-related side of the personal autonomy issue is of a consequintalistic nature because it describes the possible consequences for a restrictive free speech policy conducted by the state. People's ability to contribute to the well-being of the society is in direct dependence of the sources the people

[22] Scanlon Thomas, "A Theory of Freedom of Expression", (Philosophy&Public affairs 1:2, 1972), p.223
[23] Anine Kierulf & Helge Ronning, "Freedom of Speech abridged? Cultural, Legal and Philosophical Challenges", (NORDICOM, 2009), p. 30-31

are empowered by and if some sources are strictly regulated than the people's capacity in decision-making is marginalized.

It is becoming indisputable that the notion of common good is involved in Scalnon's discourse as well. Scalnon introduces the term of the reliable communication process in the free speech justifying discourse which determines the setting of a collective agenda. The philosopher argues that it is not only our personal interest that a reliable communication process serves, but rather a common interest which empowers us to change society using political tools.[24] Thus Scalnon makes the connection between our readiness to influence society while preserving personal autonomy.

Nevertheless Scalnon's arguments are subject to criticism as well. To some extent it is because of the weakness of the term of personal autonomy. The only conclusion is that according to Scalnon's train of thought personal autonomy is an element of people's essential dignity which means that it is something most likely to be treated as socially constructed than real, something what people cannot actually exercise. Do autonomous people agree that sometimes it is difficult for them to effectively and responsively evaluate the amount of information and different sort of materials received per day? Do they admit and agree that the state regulation is to some extent even necessary in the terms of people's autonomy protection from, for example, exposure to false claims by commercial , racist or homophobi'c hate speech?

The philosopher's theory is weak here and does not provid answers or suggestions to contributing to organizing the well-balanced State regulation of free speech in regard to the sensitive issues. At the same time, he does not present any counter arguments to the point that the autonomy thesis does not really do justice to the interests of the speaker.

It is unfathomable that unpopular speech that does not bring a significant value to the common good would be protected in the context of the autonomy thesis. Yet, Scanlon's free speech argument is of significant importance because it brings attention to one of the reasons "why the suppression of speech is wrong: it prevents free people from enjoying access to ideas and information which they need to make up their own minds".[25]

The prerequisites argument by Scalnon follows the closely to the aspect of self-fulfillment. Even though it relies at the level of general philosophy it is supported my many

[24] Thomas Scalnon, "Freedom of expression and categories of expression", (University of Pitsburg Law Review, 1979)
[25] Eric Barendt, "Freedom of speech"(Oxford University Press, 2007); ch.1

scholars. Freedom of speech is a common good and contributes to the growth and development of self-fulfilled individuals. It is disputable whether the role of free speech in making an individual more developed is higher than the other fundamental values but there is probably something uniquely appreciable in intellectual self-development which make this argument worth mentioning. As each of the arguments presented the self-development justification stand for its own view on the restrictions imposed on free speech in different countries. Thus this argument is mainly concerned with copyright law and its double-faced consequences on the self-development of the individuals.[26]

Freedom of speech and other values

Major arguments we have reviewed are on the consequalistic side of the free speech dilemma and only one stays for the non- consequalistic side. What does this finding give to us? First, free speech represents a very inclusive norm interconnected with other core values important for the formation of an autonomous self-fulfilled individual, as well as for strengthening democrac revealing the truth. The argument for the self-fulfilled individual is clearly reflected in Amartya Sen's "Development as a freedom" (1999). Sen argues: "Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. Sen defines the major factors that limit freedom as 'poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over activity of repressive states. He argues for the removal of these major factors. Sen focuses on crucial instrumental freedoms: economic opportunities, political freedoms, social facilities, transparency guarantees and protective security". [27] In this context we can say that the right to freedom of speech could be named one of the social facilities needed for development.

It is not necessary for everyone to be the direct beneficiary of the free speech outcome or to be highly motivated in its realization in order to stand for its protection – it should be valued because free speech is a public good. There are plenty of beliefs why the public interest in protecting this right is likely to be on the top of the societies' concerns.

[26] Patricia Loughlan, "Copyright Law, Free Speech and Self-Fullfilment", http://www.austlii.edu.au/au/journals/SydLRev/2002/18.pdf [Accessed on 27 of May, 2014];
[27] http://developmenthannahclifton.wordpress.com/2013/04/03/amartya-sen-on-development/ [Accessed on 14 of May 2014].

The strongest argument in this regard is that by protecting free speech the individuals ensure protections of other fundamental values which contribute to the well-being of a democratic society: tolerance, pluralism, equality. The paper reviews all the linkages in the context of their importance for Ukraine, Belarus and Moldova.

The argument for free speech principle offered by the American legal scholar Lee C. Bollinger requires attention. The value of his argument for the region of the present research is of significance because the starting point of the scholar's analysis is tolerance. Tolerance has a special value in the societies divided by a variety of differences and ethics belonging to one of them. Ukraine, Moldova and Belarus are the countries of a very multinational population. According to the 2001 Ukrainian population Census, Ukraine is home to representatives of almost 130 nationalities (ethnic groups). Representatives of ethnic minorities in total comprise 22% of the Ukrainian population.[28] According to the last population census data, representatives of about 140 ethnicities permanently resided in the Republic of Belarus. During the population census, almost 84% of the country residents identified themselves as Belarusian (TV).[29] There are more than 50 nationalities in Moldova: ethnic Moldavians constitute about 64,5% of the local population. [30] That is why the issue of raising tolerance is an actual problem in this region, especially after events in Ukraine after the second Euromaidan. [31]

Bollinger's viewpoint is based on the assumption that people have a reflex-like tendency to dislike the views which are contradictory to their own. He argues that the wish to censor is a natural impulse to protect ourselves from the opposite views. That is why seeing in the free speech principle the potential and tendency to create a vibrant environment of a variety of means and ideas Bollinger says that "free speech can help us to overcome this natural impulse and to learn to tolerate contradictory opinions."[32]

The more freedom we give to free speech the higher the chances that marginalized ideas intervene in our comfort zone. That is the process during which we learn how to

[28] http://www.enri-east.net/wp-content/uploads/Bakirov_PresentationASN.pdf [Accessed on 24 of May, 2014].
[29] http://belstat.gov.by/homep/en/indicators/press/census.php [Accessed on 25 of May, 2014].
[30] http://www.worldofmoldova.com/en/moldova-general-information/people-of-moldova/ [Accessed on 25 of May, 2014].
[31] By saying "events in Ukraine after the second Euromaidan" I mean the bloody clashes between the representatives of pro-Russian and pro-nationalist groups of citizens happened in different regions of Ukraine during the spring of 2014.
[32] Lee Bollinger, "The tolerant society" (Oxford University Press: 1986).

tolerate and accept the views we disagree. The only problem with this argumentation is that even if it is socially oriented the responsibility of making the opposite views being tolerated still relies at the individual level. The whole idea of free speech as a tool to promote tolerance is dependant on each citizen's capacity for tolerance.

Legal scholar Joseph Raz highlights that freedom of speech is of value because it gives a chance to the different forms of life – life in a cultural community, as a transgendered person or someone involved in a particular hobby. These two free speech arguments: pluralism and tolerance, sum up a very useful principle of the free speech notion. This right is not one which exists in order to create peace and consensus in the society. This means that we might learn how to live in a variety of ideas and ways of thinking. This means that we might learn how to argue with those who are staying at the opposite part of the road and that we might enjoy the free environment which would let us hold the constructive dialogue. The free speech does not protect us from the clash of ideas but we have to protect it in order to ensure that we would have possibility to have these ideas expressed. That is why the notions of pluralism and tolerance cannot be separated from the free speech.

The links between free speech and other values create a dilemma where controversial conclusions can arise. If free speech is the source for support for other values of higher importance should it mean that the limitation of the free speech has to be introduced in order to foster another value? It is mostly seen in concrete situations, for example in the relationship between free speech and extremist hate speech: some of the countries imposed restrictions in order not to give a chance to the hate speech.

Cohesion between free speech and hate speech makes some people think over restricting hate speech and hard-core pornography, justifying such measures by importance of human dignity and equality – the core values which are under the danger of the ruining power of the hate speech. If earlier we have been talking about the positive obligations of the States in the context of free speech then now it's time to talk about the negative ones. From another side the principle of free speech and the pluralism are discriminated itself by imposing the restrictions. That means that the rights of the publishers of hate speech aren't treated with the equal respect and their contribution to the public discourse is undervalued.[33] Does it mean that hate speech laws surely go in controversy with the free speech notion? Of course, it does not. It means that it is already up to the court's responsibility to interpret

[33] Eric Barendt, "Freedom of speech"(Oxford University Press, 2007).

them in a balanced way. The correlation between free speech and right to life is much easier because the preference would be given in mostly of cases to the fundamental value – life. If we would come up with the example we could tell about those advertising drugs, for instance, who's right to free speech in the terms of propaganda of drugs might be restricted in most of the countries.

Sum up the arguments

The very reason for incorporating the theoretical justification for the principle of free speech in the research paper is the following: the texts of national legislative acts as well as of international treaties are unclear and rather vague in the terms of interpretation. That is why political philosophers are required to work out a true theory of a free speech so it can apply the broad words of the documents. We have reviewed different argumentations in favor of free speech protection but it is of a critical importance to understand that the political philosophy narrows are developing as fast as the legal theory so the variety of free speech justifications is much broader than the ones presented in the sub-chapter.

For more clarifications see the Table 1 attached below. Four of five arguments suggest that free speech is more important for the public good than for individual interests. This makes sense in the terms of the topicality of the present research whose main aim is to analyze the process of democratic transition in the post-Soviet space through the free speech indicator. From our way of thought the issue of interdependence of the notions *common good – free speech* arising from the current analysis of the political philosophy's justification of free speech should be treated as one of the core arguments in favor of the necessity of analysis on free speech in Post-Soviet countries.

After we know the rational justifications for free speech it is the time to see how they are incorporated into the international instruments and thus make the free speech regulation possible.

Table 1. The free speech justifications categorized in terms of four indicators.

Source of the table: Ronning, "Freedom of Speech abridged? Cultural, Legal and Philosophical Challenges", NORDICOM, 2009		**Social philosophical emphasis: the Common good** **Subject emphasis: Sender**	**Social philosophical emphasis: the Common good** **Subject emphasis: Receiver**	**Social philosophical emphasis: the Individual good** **Subject emphasis: Sender**	**Social philosophical emphasis: the Individual good** **Subject emphasis: Receiver**	**The TOP 8 key words in the terms of justification of free speech**
Normative line of argumentation	**Non-Cons equal istic**				1.Personal autonomy as right to make informed choices	• Democracy • Truth • Personal autonomy • Human dignity • Self-governmen • Pluralism • Tolerance • Common good Self fulfillment
	Cons equal istic		2. Discovering the truth 3. Self-government (democracy) 4. Personal autonomy in the terms of its prerequisites 5. Promoting tolerance			

1.2. Incorporating free speech into international human rights instruments

If previously we reviewed the justifications for free speech given by the most prominent political philosophers, then in this section we would see how these theoretical values have been incorporated into international treaties and conventions. Thus we would become able to analyze the scope of freedom of speech in the framework of international human rights instruments.

Freedom of speech is usually analyzed in the international human rights instruments in the context of freedom of expression. The right to freedom of expression is recognized by all the main international and regional human rights treaties and declarations. It was proclaimed as a right of a high importance under the Universal Declarations of Human Rights [34] adopted in 1948. Article 19 of the UNDHR stated the following: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[35]

All three regional human rights treaties in Africa, Europe and the Americas explicitally protect and promote the freedom of expression. To obtain a broader understanding of the value of free speech and expression in the international context, a brief table of the international treaties and documents is presented below. Only a few could be applied to Moldova, Ukraine and Belarus. These instruments are: ECHR, ICCPR and documents adopted by OSCE. The research does not undermine the value of other treaties and documents presented. For the research proposals which have special emphasis on the post-Soviet region we would rather put the attention during the further analysis on these instruments.

We cannot limit the number of the international instruments protecting free speech only by those presented in the table. There are various representatives of the intergovernmental bodies whose mandate was elaborated specifically for free speech values to be enforced. We can see the co-independence of the aims of these officials while reviewing the joint declarations they made to protect free media and expression. [36] The mandate of special rapporteur on free speech and expression is provided by OSCE, the UN,

[34] UN General Assembly Resolution 217A(III), 10 December 1948.
[35] http://www.un.org/en/documents/udhr/index.shtml#a19 [Accessed on 21st of May 2014]
[36] See the "Joint Declarations of the representatives of intergovernmental bodies to protect free media and expression ", (OSCE: 2012).

the Organization of American States and the African Commission on Human and People's rights. Bearing in mind that all the countries involved in this research are members of the OSCE a high level of attention would be given to the recommendations, declarations and findings address by the OSCE Representative on Freedom of Media. The Representative has a reputation of "a principled voice for bloggers, journalists and other activists who are harassed or imprisoned for their work to disseminate independent information that is essential for democratic development".[37] Thus the ones who try to identify the restrictions imposed by States in order to regulate free speech have to count the importance and influence of this international instrument over the region.

Because of the Soviet past and common difficulties in building up the independent States the countries of the former Soviet Union have created the Commonwealth of Independent States in 1991 – international regional organization aimed to regulate the relations among the former Soviet countries. The organization has been set up by the heads of Russian Soviet Socialist Republic and Belarusian, Ukrainian States. Moldova joined the organization in 1994. There is Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States among the documents adopted by the organization which states in its Article 11 the following:

"Every person has the right to freely express his opinion. This right includes the freedom to hold opinion, receive and disseminate information and ideas by all possible legal means without interference of the State and independent from the state borders.

Because usage of these freedoms imposes certain duties and responsibility,the right can be interconnected with several formalities, conditions and restrictions provided by law and necessary in a democratic society in the interests of the State or public security, public order or protection of the rights of others". [38]

Because CIS is mostly concerned over economic issues and places rather insignificant attention over human rights peculiarities we do not take in consideration the provisions of the CIS Convention when comparing the free speech restrictions imposed by the States and international instruments in the Chapter 3. As a CIS official said:

[37] http://iipdigital.usembassy.gov/st/english/texttrans/2012/09/20120925136547.html#axzz336rhofIh [Accessed on 24 May 2014].
[38] http://www.consultant.ru/document/cons_doc_LAW_6966/ [Accessed on 4 of May 2014].

"unfortunately there is nobody protecting people's rights and interests on the CIS platform".[39]

Table 2. Free speech in international treaties and documents

Relevant human rights treaties	Other relevant instruments and documents
Article 9 African Charter on Human Peoples' Rights	General Comment 10, adopted by the Human Rights Committee, Nineteenth session, 1983
Articles 13 and 14 American Convention on Human Rights	Resolution on the Confidentiality of Journalists' Sources, adopted by the European Parliament, 18 January 1994
Article 10 European Convention for the Protection of Human Rights and Fundamental Freedoms	Inter-American Declaration of Principles on Freedom of Expression, adopted by the Inter-American Commission of Human Rights, 108th regular session, 19 October 2000
Article 19 and 20 International Covenant on Civil and Political Rights	Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights, 32nd session, 17-23 October 2002
Article 13 Convention on the Rights of the Child	Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, adopted by the representatives of the participating states of the Conference on Security and Co-operation in Europe, 29 June 1999
Article 19 Universal Declaration on Human Rights	Declaration on Freedom of Communication on the Internet adopted by Council of Europe, 28 May 2003

[39] http://www.rg.ru/2014/03/14/prava-anons.html [Accessed on 4 of May 2014].

Article 4 American Declaration of the Rights and Duties of Man	Recommendation on Freedom of the Media and the Internet adopted by representatives of the participating states of the Conference on Security and Cooperation in Europe, 13-14 June 2003
Article 22 Cairo Declaration on Human Rights in Islam Article 11 Convention on Human Rights and Fundamental Freedoms of the Comm Commonwealth of Independent States	Resolution on Journalistic Freedoms and Human Rights, adopted at the Fourth European Ministerial Conference on Mass Media Policy, Prague, 8 December 1994

1.3.Freedom of expression under ICCPR

The right has been guaranteed by the International Covenant on Civic and Political Rights [40] which Belarus signed on March 19, 1968, and ratified on November 12, 1973 as Belorussian Soviet Socialist Republic, Moldova has ratified at January 26, 1993 and Ukraine has signed and ratified Ukrainian Soviet Socialist Republic at March 20, 1968 and November 12, 1973 respectively.[41] Moldova is the only State which made a reservation to the First optional protocol proclaimed that the treaty agreement permits private citizens to issue complaints to the UNCHR that their country has violated the particular provision of the ICCPR. Moldova's declaration concerns Transnistria region which is constantly a field of the frozen conflict.

Moldavian officials stated that: "Until the full re-establishment of the territorial integrity of the Republic of Moldova, the provisions of the [Protocol] will be applied only on the territory controlled effectively by the authorities of the Republic of Moldova. The Human Rights Committee shall not have competence to examine communications from individuals referring to violations of any of the rights set forth in the International Covenant on Civil and Political Rights committed until the date of the enter into force of

[40] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.
[41] http://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights [Accessed on 21st of May 2014].

the present Protocol for the Republic of Moldova."[42] In the present context it means that Moldova refuses to protect the free speech in Transnistrian region which is de-facto under its jurisdiction. What consequences can arise from this refusal? The State isolates the citizens of Transnistria from protection of ICCPR and thus makes it possible for the authorities of the region to use this gap for its purposes. In the case of the conflict escalation, there could be a danger of propaganda flow in the frozen conflict zone because the regulation of media by the unrecognized Transnistrian officials is not influenced by ICCPR provisions as Moldova stated. This refusal also has a negative impact in the context of five popular web sites that were shut down by Transnistria state officials on May 8, 2013. [43] The journalists of these online media did not have an opportunity to apply for remedy under the international legal instruments.

The Moldavian State also made a reservation concerning the other international means of remedy: "According to the Article 5 paragraph (2) letter a) of the Protocol: the Human Rights Committee shall not have competence to consider communications from an individual if the matter is has already been examined by another international specialized body." Perhaps Moldova did this because it is sadly among the post-Soviet countries at the forefront of violations committed under ECHR.

Each year the European Court releases statistical data. If the case in making the reservation to the First Optional Protocol by Moldova is that the country is already quite shamed and harmed by international instruments then two other questions arise. First, why does the state not take the appropriate measures to reform the juridical system if from year to year it pays a huge amount of money for compensation to the applicants of the ECHR? The second question is about Ukraine: why does this country - which ranks second after Russia among the post-Soviet countries in the terms of citizen's applicability to the ECHR - remain silent?[44]

It is surprising to see that Belarusdoesn't have any comments and reservations for the First Optional Protocol of the ICCPR. It is surprising not because of the fact that "the last European dictatorship", as Belarus is usually called in the international discourse, lets

[42] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en [Accessed on 11th of May 2014].

[43] http://www.humanrights.gov/wp-content/uploads/2014/04/MOLDOVA-RUS-FINAL.pdf [Accessed on 7 of May, 2014].

[44] http://www.hurriyetdailynews.com/russia-takes-echr-violations-championship-from-us.aspx?pageID=449&nID=62018&NewsCatID=428 [Accessed on 14 of May 2014].

citizens apply for the international human rights instruments, but because of the fact that Belarusians cannot enjoy the same rights under the jurisdiction of the European Court of Human Rights. "The court, which was set up in 1959 in the French city of Strasbourg, considers cases brought by individuals, organisations and states against the countries which are bound by the convention; namely, all European nations except Belarus."[45] Belarus did not sign the European Convention of Human Rights.

It means that in these circumstances the examination of the case-law of UNHRC on freedom of expression would be of a more practical use for Belarusian citizens and media in particular than the case-law of ECHR. This conclusion is relevant to the next chapters as we examine the conformity of the free speech restrictions imposed by Moldavian, Ukrainian and Belarusian States with the ones allowed under international legal instruments.

At the same time Belarus is mentioned among those countries from the post-Soviet space whose citizens have succeeded to win the case against it with the UNHRC. It is about Zalesskaya v Belarus(2011), where the committee ruled in favour of citizens who were fined heavily when they distributed two registered newspapers – *Tovarishch* ("Comrade") and *Narodnaya Volya* ("People's Will") – without having received previous approval.[46]

At the same time Ukrainian citizens did not bring any free speech related cases to the UN Human Rights Committee. The only Ukrainian case revised under UNHRC jurisdiction is *Tatiana Zheludkova v. Ukraine* and views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights.

Even though the freedom of expression is mentioned in UNDHR and ICCPR under the same number of article – 19, there are important differences between these two legal provisions. The International Covenant of Civil and Political Rights (ICCPR), adopted in 1966 states in its 19th Article the following: 'Everyone shall have the right to hold opinions without interference…'. This right also includes 'freedom to seek…information and ideas…regardless of frontiers…'. [47] In this regard it almost does

[45] http://news.bbc.co.uk/2/hi/europe/country_profiles/4789300.stm [Accessed on 29 of April 2014].
[46] http://freespeechdebate.com/en/discuss/article-19-freedom-of-expression-anchored-in-international-law/ [Accessed on 12 of May 2014].
[47] http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx [Accessed on 12 of May 2014]

not differ from the explanation of the right to freedom of expression given by the UDCHR within two decades earlier: *"*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[48]

But the deeper we go the more visible the differences become. ICCPR has not only provided a right for freedom of expression but it has also provided expressly for limitations upon the right to freedom of expression. As it is up to Article 19(3), the right to freedom of expression provided under paragraph 2 of article 19, also 'carries with it special duties and responsibilities' and therefore it may be subjected to restrictions as provided by article 19(3).

ICCPR is a vibrant instrument which tries to be in sync with changing social needs . Thus, on July 21, 2001, the new clarifications were made by the UN Human Rights Committee under legitimate restrictions upon the right to freedom of expression. It is included in the General Comment 34 on State party's obligations under the Article 19 and lists the following grounds for restriction:

- For respect of the rights or reputations of others;
- For the protection of national security or of public order, or of public health or morals.

These provisions as well as their further clarifications in the paragraph 35 and paragraph 23 of the General Comment 34 are of the high importance in the terms of our further analysis of the limitation techniques post-Soviet States developed and apply. The paragraph 23 encourages the States to be more active in incorporating "effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression".[49] This encouragement would be examined in the chapters 2 and 3 when the cases of the journalists being attacked in Ukraine, Moldova and Belarus are reviewed.

The paragraph 35 highlights another important aspect of State's free speech and expression regulation: "When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the

[48] http://www.un.org/en/documents/udhr/index.shtml#a19 [Accessed on 21st of May 2014]
[49] http://bangkok.ohchr.org/programme/documents/general-comment-34.aspx [Accessed on 24 of May 2014].

expression and the threat". As to the purposes to the research the question of state's justifications if any under the restrictions imposed would be analyzed at the end of the chapter 2.

1.4. Freedom of expression under ECHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the first regional human rights treaty entered into force, regulates freedom of expression in Article 10. Paragraph 1 states that it "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." [50] Even though Belarus is the only European State outside of the European Human Rights Court judicial system, I would place special attention to the case law and justifications in cases of free expression and speech violations. Belarus, as an applicant for the membership of the Council of Europe should still comply with the principles arising from the European Convention.

The European Court and Commission have interpreted the freedom of expression as a right which is "one of the basic conditions for its progress [of a democratic society] and for development of the every man", as expressed in the 1976 judgment Handayside v. UK. [51] It is recognized as the 'lifeblood of democracy'.[52] Article 10 of the ECHR highlights the duality of the freedom of expression because it promotes two concepts. First, freedom of expression is a social right which strengthens democracy and allows free debates in society, a free flow of information and ideas within opinion holders of different part of the society. Second, freedom of expression is an individual right which refers not only to the right to receive and spread ideas but also to hold opinions, thus it contributes to the intellectual development of the individual, to his autonomy and self-fulfillment.

Article 10 overlaps with several other rights of the European Convention, including the right to manifest one's beliefs (Article 9), the right to protest (Article 11), and the right to vote and stand for office (Protocol 1, Article 3). It also happens that a violation of Article 10 will occur with a violation of another Article, such as Article 11.

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[50] http://www.hri.org/docs/ECHR50.html#C.Art10 [Accessed on 21st of May 2014].

[51] Amaya Ubeda de Torres, "Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights" (Human Rights Brief, 2003) p. 6-9.

[52] Lord Steyn in *R. v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 126.

This legal provision can also go in contradictory with other rights like the right to a fair trial (Article 6), the right to privacy (Article 8), and the right to freedom of thought, conscience and religion (Article 9).

The freedom of expression under the ECHR covers not only ideas, opinions and information which tolerates and is close to the majority of the society's train of thought but to the ideas which might offend, disturb or even shock. The article protects the opinions and information in the mode they are conveyed[53], covering artistic, political and commercial speech too. To operate within these main free speech categories there is a need to interpret them correctly.

- *"Political speech* is the type which includes speech by politicians themselves as well as even robust comments on public figures made by citizens."[54] Article 10 provides considerable protection to those who criticize public officials and the government basing their expressions on facts or on opinions. The European Court has also clearly proclaimed that while freedom of expression is of crucial importance for everybody it is especially important for an elected representative.[55]

- *Artistic expression* reflects creative writing, visual art, music, literature. The Court says that these types of delivering ideas and information contribute 'to the exchange of ideas and opinions which is essential for a democratic society'.[56]

- *Commercial speech* is speech related to the advertising and business issues in general. Even though it enjoys the protection under the Article 10 of ECHR the courts have admitted that it is of a less significance than political or artistic expression. At the same time the Article didn't protect commercial interests of a newspaper, for example, save possibly where the State failed in its obligation to protect from excessive press concentrations.

What is worth to add about the types of speech and expression protected under the Article 10 is that 'freedom of the press plays a very special role in the terms of Article 10th jurisdiction. Media relation to this legal provision has been underlined for many times by the ECHR. That is how the European Court has expressed on the media's role in

[53] e.g. Oberschlick v. Austria(№1), May 23, 1991, Series A , №204, para. 57. See also Women on Waves v Portugal, February 3, 2009, para 30, where the abortion activists were deprived from entering national waters in their campaign boat, this was interference with their chosen form of conveying information , even though they could enter Portugal by another mean of transport.

[54] Human Rights Review 2012, "Article 10: Freedom of expression", p.330-376

[55] *Castells v. Spain* [1992] 14 EHRR 445, at para 42.

[56] *Vereinigung Bildender Künstler v. Austria* [2008] 47 EHRR 5. Para 26.

democratic developments: "'... not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog". [57] There are some aspects of the media freedom which is not covered by any special provisions under Art. 10 like broadcasting for example. The Court does not consider broadcasting to be mentioned in Art. 10 because it i's useless without specifying the content.[58]

Within the development of the case-law there has arisen a little scope for restriction of the right. Paragraph 2 of the Art. 10 consists the list of the interests which can justify limitation of freedom of expression: "The exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[59]

Restrictions over the freedom of expression are also prescribed under the Article 17 of the ECHR which prevents "abuse of rights". [60] Article 17 is very rarely implied. For example it failed to be applied by the French Government in *Lehideux and Isorni v France* where was an issue with the role of Petrain in the Nazi movement. The Court decided that there was no violation of the Article because his collaboration with the Nazi Party is still being discussed by historians and is not proven and publically recognized - unlike the Holocaust, whose denial or revision would be removed by the the protection of Article 10 by Article 17. An attack on ethnic or religious groups would be considered as acts undermining basic values of the Article: that is, tolerance, broadmindedness, pluralism. Article 17 furthermore has been applied to the court case of an applicant who displayed a poster about the supposed guilt of the Muslim community in mass terrorist attacks.[61]

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[57] *Thorgeirson v. Iceland* [1992]. Application No. 13778/88. Para 63.

[58] Karen Reid, "A practitioner`s guide to the European Convention of Human Rights ", 4th edition, (Sweet&Maxwell: 2012), p. 466-503

[59] European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf [Accessed on May 21st 2014]

[60] See, for example, *Le Pen v. France*. Application No. 18788/09, 20 April 2010; *Féret v. Belgium*. Application No. 15615/07, 16 July 2009. Judgments available in French only.

[61] Norwood v UK, November 16, 2004, ECHR 2004.

Coming from the assumption that an expression cannot be protected under the Article if it is incompatible with such values as pluralism, tolerance (for example the Article cannot protect the Holocaust denial views) we can distinguish two obligations of the State under the Convention:

- Positive obligations of the State to help individuals as well as media to exercise their right to freedom of expression. For example by providing adequate legal protection of journalists and ensure the effective investigation of the cases related to violence against journalists.
- Negative obligations mean that the State must refrain from unnecessary democratic means interference into the citizen's right to freedom of expression.

"The Court has held that although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be *positive* obligations inherent in an effect respect of the rights concerned. Genuine, effective exercise of certain freedoms does not depend merely on the State's duty *not* to interfere, but may require positive measures of protection even in the sphere of relations between individuals."[62]

Scholars also suggest that freedom of expression is the 'key to the development, dignity and fulfilment of every person'.[63] This duality means the very comprehensive nature of the freedom of expression and the fact that it covers both the development of an individual and common good of the society.[64] This finding is very important in the terms of the sum up we made in the previous sub-chapter. It leads us to the conclusion that while political philosophy is more concerned about the effects the free speech has over the common good, the legal systems and ECHR proclaim that a violation of the right to freedom of expression harms not only the rights of an individual but the community as a whole. It does not undermine the value of the arguments we have been examining, moreover it makes them stronger and brings them the boundary power.

1.5. Placing emphasis on the freedom of the press

[62] Research division of Council of Europe, "Positive obligations of member States under Article 10 to protect journalists and prevent impunity", (ECHR, December 2011).
[63] Description by Article 19, www.article19.org.
1. [64] Dworkin, R. (1985). *A Matter of Principle.* Harvard University Press.

We have reviewed and analyzed in the previous sub chapters the justifications in favor of free speech, the way the justifications are considered by the international instruments and incorporated into them as well as how Ukraine, Moldova and Belarus find themselves in this international free speech philosophic-legal framework. While searching for the free speech arguments and specifying the different aspects of the freedom of expression covered under the international instruments, the ambiguous conclusion has arisen: the scope of freedom of speech in the international instruments is too broad and vague to cover in all its aspects in this research paper.

Because of the hypothesis of the research which states that "the over limiting of the state control over free speech in Belarus, Ukraine and Moldova is possible because there's no effective framework, the key actors concerned about free speech issues can use for elaborating the common regulatory concept," we need a concrete indicator for measuring and comparing the State control over free speech. In this subchapter the idea of choosing the freedom of speech in media as the best indicator will be presented. For elaborating the methodology of identification, the free speech restrictions as per Moldova, Ukraine and Belarus we use media's free speech indicators: media regulation, censorship, violence against journalists, defamation laws and others which would be considered relevant for that region.

Why free speech in media and not, for example, artistic expression? The research is not undermining all forms of the freedom of speech but rather reinforces that idea that media's rights are considered fundamental values requiring special protection and attention. It is vital core for all democratic societies and this is recognized by the provisions of international instruments. For instance, the General Comment 10 on article 19 ICCPR adopted by Human Rights Treaty Bodies in 1994 in its paragraph 2 emphasizes that "little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for …". [65]

Media's free speech importance is recognized by international instruments. The UN Human Rights Committee has stated: "The free communication of information and ideas about public and political issues between citizens, candidates and elected

[65] http://www1.umn.edu/humanrts/gencomm/hrcom10.htm [Accessed on 26 May 2014].

representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion*".*[66]

The very special role of the media's free speech has been partly argued by the European Court of Human Rights which stated on media's mission in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'." [67] Regulation of the media by the government is a process of a consequentialist nature. Media is the basic source if information for many people who base their opinions on the arguments received through the media means. If the State overreaches its possibilities in regulating the media's speech as its prescribed by international instruments the fundamental values - pluralism, tolerance, self-fulfillment - would bee in jeopardy:.

If we go from the general to specific than it is worth to mention that media's free speech issue is an issuefor Ukraine, Belarus and Moldova. Being in the process of transition these countries still face obstacles in providing their citizens the necessary degree of freedom the press. While not providing 'freedom of the press the needed guarantees, the State makes free speech for other aspects of social life (eg. artists, filmmakers) even more difficult. By detecting the media's freedom restrictions which do not let the countries to develop into more intensive speed toward democratic standards, we can open the way to the other means of speech as well. The attitude of the government towards freedom of the press is the indicator of the country's commitment to establish the rule of law and promote transparency. It iscrucial in analyzing the process of the post-Soviet transition process as a whole.

The topicality of the freedom of the press for Ukraine, Moldova and Belarus is also proven by the statistics of different international media and Human Rights organizations. Thus, according to the Reporters without Borders 2013 World Press Index Ukraine lost its level within the 10 position and currently is on the 126 place. Belarus raised its level within 11 positions but still remains on the very end of the list – the 157 place. Moldova is on the most favorable position in the region – the 55th place but nevertheless it's within two places lower that the last year. [68]

[66] General Comment 25, issued 12 July 1996.
[67] Thorgeirson v. Iceland, 25 June 1992, Application No. 13778/88, para. 63.
[68] http://en.rsf.org/press-freedom-index-2013,1054.html [Accessed on 23 May 2014].

Constitutions of the countries under transition- Moldova, Ukraine and Belarus- are commited to a general concept of freedom of speech, but because of the weak positions the countries have in the world free press ranks, free speech norms are written but not implemented full. . As to the statistics elaborated by prominent international non-governmental organization Human Rights Watch Ukraine and Belarus are the countries having the status of "non free media" and Moldova having the status "partly free".[69]

Different aspects have been taken into consideration which let the Human Rights Watch arrange the countries in these particular categories: legal environment, political environment, economic environment, but it is evident that the more constructive the regulation of freedom of the press by the State is, the more responsive to the society's needs media becomes. Thus creating the process of exchanging the duties and responsibilities whichthe State as a regulatory machine, the media as a watchdog and the society as a filter of all the processes going around the country has.

The justifications in favor of free speech presented in the chapter convey that this right is of a high importance because free speech helps to discover the truth, develop personal autonomy, promote tolerance and strengthen democracy. The international documents and instruments offer a fertile ground for free speech protection and possible solution for the situation when the States are over limiting the restrictions imposed over free speech. Nevertheless because of the different surveys taken , we can conclude that Post-Soviet society still has that perception that free speech as well as any human right is a western concept, thus the need in independent media and free speech protection is not strong enough. This viewpoint may still have carried over from the Soviet Union era when the statements from the official sources could not be impugned not because they are right, but because they belonged to those in oversight, dominance and power. For instance the difference between the Belarusian citizen believing in respect to the independent and state media is very minimal: 32,8 and 25,7% respectively. [70]

This might be a signal that freedom of speech has lost its value in the people's perception. "It can happen that once you will wake up in the morning and find out that finally you possess the right to freedom of speech in all its fullness and face the problem

[69] http://www.freedomhouse.org/report-types/freedom-press#.U4dr-Pl_uQk [Accessed on 23 May 2014].
[70] http://n-europe.eu/article/2011/11/01/svoboda_slova_v_belarusi_ne_nakhodit_potrebitelya [Accessed on 6 of May 2014].

that no one besides you needs it in the country". [71] We can conclude that it is not enough to justify the need to protect free speech and incorporate it in the international legal instruments, therealso should be a will of civil society to promote the value and monitor the way the State regulates it. The last two points will be further detailed in the following chapter.

CHAPTER 2

Identifiable restrictions on freedom of speech as per Moldova, Belarus and Ukraine

It is crucial to analyze the region's free speech legal framework to compare the countries and find among them the patterns and differences which would help us later to see whether the techniques the post-Soviet States developed to restrict media's free speech are based on the interpretation of the international legal instruments. The review of the free speech legal framework of the respective countries would help find the patterns between the types of restrictions the States use and possible ways of facing the violations of that right. The analysis is primarily based on the review of the media legislation of the countries and the reports issued on this topic by prominent local and international non-governmental organizations. [72]

In this section, the main contribution of this paper is presented. In this chapter the assumption that the understanding of the free speech norms in the region of analysis varies from the stakeholder to the stakeholder thus it makes the free speech environment weak to

[71] Extract from the speech held by Tatyana Artimovich, journalist of the Belarusian magazine "Partizan" at the second edition of the International conference "Partnership of the free speech", (Kiev, 7-11 October 2011).

[72] Such organizations as ARTICLE 19, Index on censorship and others.

be defended. There is a need to minimize the gap between the understandings and making the parties of decision-making processes. Thus, the regulatory model of the multi-stakeholder approach to free speech is proposed. The concept of this model and the way it is expected to work is explained in the conclusion.

With the purpose of testing the hypothesis about the gap , we would review the free speech restriction policy of the countries under the multi-stakeholder's framework. It means that the "State – free speech regulation" relationship will be considered from the perspective of legal provisions, civil society and the international community. For instance, the legal provisions would be considered under analysis of the free speech related laws as per Moldova, Ukraine and Belarus; whereas the civil society's view on the way the State regulates free speech would be considered under the set of interviews conducted with representatives of journalistic unions and NGOs dealing with the free speech issues.

If investigating the state imposed restrictions over the free speech as a part of the whole set of challenges a country in transition goes through then we do not have to undervalue the international influence. In the research's frame of reference I would rather propose under international influence a "transformative engagement"[73] of the international organizations in the democratic changes. Upon reviewing mechanisms introduced by international inter-governmental actors , the author of the research came to the supposition that Universal Periodic Review could be one of the tools for identifying and analyzing the free speech restrictions imposed by Ukraine, Moldova and Belarus. To ensure that such a multilevel overview over free speech limitations is conducted on an independent basis the results of the study be presented.

But first we must clarify the indicators through which the review of the free speech legal framework would be examined. Among the indicators used for evaluation of the country's legislation the priority would be given to those media-related: defamation laws, the legal defenses available for the journalists, the level of costs in cases related to freedom of expression, licensing of media projects, crimes against media professionals, availability to the public record and others. Thus it is clear that the main issue in this chapter is the method in which freedom of speech is balanced by the legislation and measures are imposed by States.

2.1. Belarus at a glance

[73] Michael McFaul, Amichai Magen & Kathryn Stoner-Weiss, "Evaluating International Influences on Democratic Transitions:Concept Paper", (Freeman Spogli Institute for International Studies).

Constitutional provision for freedom of speech

Free speech is protected by the Constitution of Belarus where the principles of freedom of speech and opinion, as well as of receiving, keeping and delivering information are proclaimed. The Belarusian Constitution states that "everyone is entitled protection against unlawful interference with … his honor and dignity" (Article 28). By referring such matters to court, one can claim compensation for damages (Article 61(2)). Censorship is prohibited by the special provisions of the Constitution of the country, for instance by Article 33. The interpretation of the term censorship is given in the Press Law and says the following: "Censorship of the media means the demands to the editorial team from the part of the public authorities, organizations, public associations, its officials to endorse the information and articles before publishing as well as removal from printing or broadcasting the particular information". [74]

Despite these constitutional provisions Belarus hasone of the most hostile free speech and expression legislations in the world. More over the anti-censorship Constitutional provision doesn't safeguard the country from being placed by the Committee to Protect Journalists in the 10th place among the countries with the worst censorship situation in the world. [75] The researchers from the Committee to Protect Journalists argue that among the 'freedom of the press restrictions the State of Belarus has developed during the years of independence the most common are: "politicized prosecution of journalists; imprisonments; travel bans against critical reporters; debilitating raids on independent newsrooms; wholesale confiscation of newspapers and seizure of reporting equipment; and failure to investigate the murders of at least three journalists in the past 10 years".[76] The case of imprisonment of the journalists is also in the list: independent journalists Irina Khalip and Natalya Radina have been detained after presidential elections 2010.

Belarus is the only Post-Soviet State geographically based in Europe and is not a member of the European Council. Thus Belarus does n'ot recognize the jurisdiction of the ECHR and does not use its case law when managing issues of freedom of speech.

Even though Belarus has signed and ratified the ICCPR not all the provisions are respected in the country. For example, there are several laws adopted which are far from

[74] http://www.ehu.by/content/konstitutsionnoe-zakreplenie-svobody-slova [Accessed on 27 May, 2014].
[75] http://cpj.org/ru/2012/05/10-1.php#10 [Accessed on 27 May, 2014].
[76] http://cpj.org/ru/2012/05/10-1.php#10 [Accessed on May, 2014].

being called “necessary in a democratic society”. For example, “The law of mass-media” which came into force five years ago provides the permissible order of registration of the Belarusian media, usage of the accreditation mechanism for restricting the access of the journalists to information, discrimination of the freelance journalists, and the right to shut down media if the Ministry of Information sends a request.

Press Law of the Republic of Belarus prescribes the duties of the journalists in its article 40. In such a way the journalist is obliged to “truthfulness of the data received”, and provide “objective information for publication”. The term “objective” is not interpreted by the Belarusian legislation which gives a wide field for judicial interpretation and application. Some researchers say on a Belarusian court case-law that even a reader’s letters to a newspaper editor and interviews published have to pass the “objectivity test”, because the judges usually consider every statement made by a media outlet subject to the objectivity requirement.

The Ministry of Information is in charge of registration of the media (the provision does not yet apply to the Internet media). 105 of media companies have been refused from obtaining the registration during the 2010-2012 year. As reported by national stakeholders until now the situation has yet to change. After being registered the TV-radio companies have to get a broadcasting licence. Since 2014 it has been is realized in the licensing application. As the practice has shown, the license can be easily denied by the State As seen in the case of the popular radio station “Avto radio” which was without license in2011.

“The barriers in realizing the free speech in Belarus are created by other laws as well: “About state secrets”, “About state job”. The lack of transparency in the free speech legal framework of Belarus creates the atmosphere where the State can easily overuse its regulatory tools.”[77] Thus, the law about the state secrets does not provide with the necessary information about the list of information access which can be limited. Sixty state organizations have the right to make the information be belonged to the status “state secrets” and that means that state officials have privilege in being informed about legal provisions.

Belarus does not have any law about access to information. There was an attempt by Belarusian officials to adopt a progressive law named “Access to information about

[77] Europe&Eurasia Media Sustainability Index 2013, p.176-193.

activity of the state organs". The objective of the law has been published on the Belarusian parliament webpage but later instead of adopting the new provisions into the already existing law "About information, informatization and protection of information".

New provisions were added in 2013 to the media law which forbids freelance journalists from practicing journalism in the country. [78] To outlaw freelance journalism is clearly against the freedom of speech principles. This provision in the media law only recognizes the journalists officially employed for major media organizations in Belarus. Foreign journalists coming to Belarus on assignment should get a press accreditation in the Ministry of Foreign Affairs of Belarus, but that is not the case. Ricardo Gutiérrez, European Federation of Journalists general secretary, commented on the actions of Belarusian officials: "This is against European standards on freedom of expression and information. Every freelance journalist should have the same professional rights as employed journalists, including the rights to seek information, to protect sources and to uphold ethical standards." The respective media law provision does not only interfere into the media's free speech but also creates inequality among the journalistic community.

To date the preferred communications platform likely to be used by media without being supposed to any restrictive laws of Belarus is the Internet. Yet it seems that restrictive measures may be introduced in cyberspace as well. The Deputy Minister of Information of Belarus said at the end of 2013 year that the Ministry is working on changes on media law because they want its provisions to be applied on "the most popular internet sources" of the country.[79]

2013 was significant for free speech because of several legal provisions adopted in that regard. The Publishing law which came into force provides registration of the publishing houses and typographies in the Ministry of Information which means that the possibility of restricting the publishing by refusing the particular people in registration already exists. Comparing the Belarusian way of regulating the media with the European model, we could say that we are talking about two different worlds. For instance, providing the media a broad set of freedoms with a high and strict level of self-regulation from one

[78] http://www.nuj.org.uk/news/international-press-unions-tell-belarus-to-lift-ban-on/ [Accessed on 17 May, 2014].

[79] "Europe & eurasia MEDIA sustainability index 2013".

side as it is in Sweden, for example, and strict state administration with very low level of self-regulation from another.[80]

We would analyze the commitment of the national stakeholders of Belarus to increase the level of self-regulation and involvement into the dialogue with the state later as well as the curiosity of the fact that there are two separate journalistic unions in the country having two different ethic codes. What conclusions can we draw from that division? Why have so many media' free speech regulating laws been adopted in Belarus recently? Is this new flow of legal provisions more compliant with the international legal instruments - or not?

The law on "combating extremism" which took effect in 2007 has also opened new ways for restricting the freedom of the press. According to Reporters without Borders, "the charge of extremism has often been used in recent years with serious consequences for media and publishing houses". They also stated that "Organizing, preparing and carrying out activities that belittle the country's honour and dignity, and activities inciting hooliganism and vandalism for political or ideological motives, are all defined as "extremist" by article 1 of the law. Articles 11 and 12 empower the prosecutor general to suspend activities he regards as extremist and then ask the Supreme Court to recognize their extremist nature, ban them and close the offices of the organization responsible. Article 14 bans the media from disseminating extremist material and provides for its destruction."[81]

Defamation law

Criminal defamation in Belarus is still in force, it is more frequently used for providing special protection to the president. The peculiarity and danger of defamation law in Belarus is that it is incorporated in the Criminal code of the country and envisages set of sanctions which varies from imprisonment to the forced labor. Courts may also apply economic fines for recovering the non-pecuniary damage. Criminal defamation provisions are introduced into the Belarusian criminal Code under the articles 188 (defamation), 189 (insult), 367 (defamation of the president), 368 (insult of the president), 369 (insult of the official). Insult and defamation of the ordinary citizens is also prescribed – in the articles

[80] Olga Kovrigina, "Legal basics of the journalistic activity in Belarus and Sweden", Journalism Institute of Belarus, 2009

[81] http://en.rsf.org/belarus-law-on-extremism-criminalizes-14-11-2013,45453.html [Accessed on 24 of May, 2014].

189 and 188 respectively and can lead to the two years of imprisonment. Article 188 for instance stands against discrediting another person and article 189 prohibits "deliberate degradation of the honor and the dignity of a person expressed in indecent manner". Defamation of the president can be punished by imprisonment of up to maximum five years.

The defamation law in Belarus prescribed the special provision for defamation of the Republic of Belarus vis-à-vis foreign States and international organizations. It is introduced in the article 369(1) of the Amending Law which defines the notion of defamation of Republic of Belarus as "knowingly handing over false information concerning the Belarusian state or its organs."

Nevertheless the defamation law provisions are most likely to be used in regard to the ones provided by the Civil Code. The reason why is the evident one: there is no need to prove the falsehood of the impugned statement. For example the article 9(2) of the Civil Code of the Republic of Belarus refers to the defamation of the official and other national languages. The introduction of such a precaution is justified according to the State by the fact that it can lead to the nationalistic feud on the language basis. [82]

Defamation can be also the official cause of closing the media outlet. Article 5 of the civil code relates to the spreading information damaging the reputation of the president and high officials. Such an act can lead to a closer of the media outlet if it gained two warnings apropos of official's defamation. More over the electoral code of the Republic of Belarus has the provision on "insulting or defaming the honour and dignity of official persons, presidential and parliamentary candidates".

2.2. Ukraine at the glance

Constitutional provision for freedom of speech

Free speech in Ukraine is protected by the articles 15 and 34 of the Constitution. Article 34 in particular says that: "Everyone is guaranteed the right to free speech and opinion and right to freely express his believes or views. Everyone possesses the right to freely collect, keep, use and deliver the information by oral, written or another way according to his personal choice. " [83] The media's free speech in Ukraine is pretended to be

[82] http://abw.ru/forum/kodex_rb.html [Accessed on 28 of May, 2014].
[83] http://www.president.gov.ua/en/content/constitution.html [Accessed on 14 of May, 2014].

regulated by national stakeholders as well, for example by National Union of Journalists of Ukraine, Academy of Ukrainian Press, Institute of mass information and others.

Ukraine has ratified the European Convention on Human Rights and adopted the special law which talks about implementation of decisions and usage of practice of the ECHR in its national legal framework. This law provides the necessity for all the Ministries to assess the systematic control on how the administrative practice of Ukrainian officials complies with the provisions of the Convention and ECHR. It makes the present research become more practical in the terms of making reaching conclusions whether the techniques the State uses comply with international instruments or not.

Thus additional value could be added to the results of the research the because Ukraine has official obligation to respect the provisions of such international instruments as ECHR . As to the situation in Belarus which did not make part of Council of Europe and didn't recognize the power of the decisions of ECHR and were the efforts to motivate the State to recognize the international means of defense are needed the situation of free speech in Ukraine is rather more willing to democratic changes.

The basic normative acts protecting the free speech in Ukraine and regulating it are: the law "About information", "About access to public information", "About TV and radio broadcasting", "About National Council of Ukraine on the issues of TV and radio broadcasting", "About telecommunication", "About print media", "About informational agencies", "About state support to the media and social protection of the journalists". Ukraine is having one of the leading positions in the context of the media legislation but at the same time the country didn't adopt the laws it was obligated to according to its obligations for EU: the law about setting up a public TV and radio broadcaster, the law about transparency in the terms of media ownership, the law about denationalization of the media. About 20% of the overall amount of news in Ukraine still belongs to the State. [84]

Ukrainian media legislation does not demand from print media owners to get licenses from the state organs but it is necessary for the media company to be registered. The broadcasting activity can be realized only if the license from the State is obtained and it is worth mentioning that the license to the cable broadcasting is given without competition. Moreover, in 2013 the Supreme Council of Ukraine has registered the bill

[84] "Media freedom in Eastern Partnership Countries - 2013", (Kiev, 2014).

which would prohibit the licensing in the Internet space at all. It would mean that online media is fully protected from any interference from the State.

Even though the 2013 year was marked by the beginning of political crisis in Ukraine some progressive changes have been seen in regard to the media legislation. New legal provisions have been adopted in order to clarify the issue of media ownership besides all those already mentioned above. The provisions call for demanding the introduction of all the legal or individual entities connected with realizing control over the media during the registration process. It would help the audience to receive the information in a more critical way when knowing who is staying behind the media companies and spreading particular ideas. At the same time when talking about media ownership issues in Ukraine it is worth to mention that non-residents are prohibited to become owners or co-owners of TV or radio organizations. It is rather a non-justifiable point as from the side of equal opportunities as well from the side of foreign investments in the country.

Ukrainian media legislation also has provisions in regard to antimonopoly measures. Thus, the article 10 "Guarantees from monopolization of print media." The Law "About print media in Ukraine" declares the prohibition of the monopoly on the print media. Article 7 of the Law "About the TV and radio broadcasting" has a very clear name – "Antimonopoly restrictions", according to which none of the TV-radio organizations can have broadcasting on more than two TV channels and three radio channels. [85]

There are some contradictory facts in the Ukrainian legislation in the free speech framework. It is clear that the media's free speech is in direct dependence on the economical conditions. Thus the Law "About state support of media and social protection of the journalists" is rather conspicuous: according to it the state media are directly funded by the budget, which creates inequality among the different types of media and the journalists, because the ones working for the state media are considered officially to be public officers having the respective privileges.

Defamation law

Ukraine has proclaimed honor and dignity of a person as one of the fundamental values and it has been enshrined in the article 3 of the Ukrainian Constitution: "Person, his life, health, dignity, honor and security are recognized as the highest social value in Ukraine". Nevertheless before September, 2001 the Article 125 of the Criminal Code of

[85] http://www.unian.net/politics/870641-v-ukraine-uproschena-protsedura-registratsii-pechatnyih-smi.html [Accessed on 4 May, 2014];

Ukraine prescribed up to three years of imprisonment for defamation. Since the Criminal Code was reformed in September 1, 2001 the defamation provisions have been removed from it.

Some of the defamation provisions still remain to be incorporated into the civil code but the situation became less strict since the new Civil Code was adopted in 2004. It is worth to mention that in comparative to Moldova and Belarus the civil society of Ukraine was more active in pushing the State to harmonize the defamation provisions according to the international standards.[86] It is mostly because of the civil pressure the criminal provisions for defamation have been removed and the controversial Article 277 has been eliminated from the Civil Code. The experience of the Ukrainian civil society struggle for liberalization of the free speech legal framework is not researched decently but it could inspire into particular manner the civil society of Belarus to establish the dialogue with the State and work together on the free speech agenda.

The Article 277 prescribed that "the negative information disseminated about an individual is considered false". The peculiarity of this provision is in the interpretation of the term "negative information" which has not been given by the legislative and thus has been understood as any form of criticism. That was a huge obstacle for those whose right to free speech is of a special importance – journalists. The article 277 put under the danger the concept of journalistic investigation, which us usually dealing with the vital problems of the society. The officials are often involving in the business far from being called "transparent": corruption is one of them. The article 277 created by itself a serious breach.

In December 2005 the article was amended so we can read it as "negative information disseminated about an individual is false unless the person who disseminated it can prove the contrary". The legal provision guaranteeing that for a person who is disseminating information from an official source it is not necessary to verify it before the publication was introduced in the Civil Code of Ukraine as well as it was done in Moldova. When the issue is about the information coming not from the official resource the person disseminated it is responsible for its veracity.

Although the reform of the Civil Code and of the article 277 in particular is a very positive improvement, especially if comparing with Belarus where there is still no need to prove the falsehood of the impugned statement, new concerns have arisen. It is in

[86] "Media freedom in Eastern Partnership Countries - 2013", (Kiev, 2014).

particular related to the paragraph 2 of the Article 302 which obliged the person to verify the information before the disseminating. The concern from the journalistic community is expressed over obligatory character of the statement. We would analyze it in complexity with the explanations given by international legal instruments in the next chapter.

2.3. Moldova at the glance

Constitutional provision for freedom of speech

Free speech in Moldova as well as in Belarus and Ukraine is protected by the Constitution and incorporated into Article 32 "Freedom of opinions and expressions". The paragraphs 2 and 3 of this Article provides with the restrictions this right can be suppressed. In such a way "the freedom of expression does not have to cause damage to the honor, dignity and right of other persons to hold their opinions". Moreover it is said that "the denying and slandering the State and the people, demands toward an aggressive war, national racial or religious strife, incitement to discrimination, territorial separatism, violence and other actions infringing on the constitutional regime are prohibited".

In comparison with the legal provisions in Belarus the Moldavian legislation does not require journalists to be responsible for the dissemination of the information which does not correspond to the truth. It is prescribed by the Article 27 of the Press Law of Moldova and relates to the two types of information: received through official documents, statements of the officials and the one textually duplicated from the speech of an official person or its adequate summary. [87]

Moldova decriminalized libel and defamation later than Ukraine in 2004. At the same time the punishment for defamation is still provided by the Article 16 of the Civil Code "Protection of dignity and business reputation". The size of the fine for defamation should be corresponded to the harm. The concrete amount of the fine is n'ot indicated thus creating a way of building up the barricades toward a constructive dialogue when a sensitive topic is touched.

There are two newly added to the Criminal code articles: "Censorship" and "Willfull obstruction to the activity of the media or intimidation and criticism" which provide the following punishment for the persons committed such actions: fines,

[87] Press Law of Moldova http://www.advertology.ru/index.php?name=Subjects&pageid=314 [Accessed on 10 of May, 2014].

sometimes even with the depriving the right to be employed on the state positions during the next 2-5 years. Like Ukraine Moldova has the law "About access to information", which besides being called at the period of adoption in 2000 one of the most progressive in the region - already needs to be modified. For example it still has the secret provisions like "commercial secret" or "fiscal secret": that is, access to which is prohibited to journalists.

Print media, likein Ukraine does not need any license for conducting activities, it is enough to have the registration of the legal entity who is in charge of publishing the media product. In contradiction to Ukraine and Belarus Moldova has adopted a Law for denationalization of print media which came into force in 2013. For the cable broadcaster to start its activity in Moldova it needs to get the premise from the Coordination Council on TV and radio.

As compared with Belarus there are no provisions in the country requiring special registration procedures for foreign journalists. At the same time there are some restrictions for the local journalists in the Gagauz Autonomy. The members of the National Assembly of that territorial entity introduced in 2012 new rules of accreditation for online media journalists. To cover the meetings of the National Assembly and get the accreditation the media workers have to present a copy of the license. The problem is that the licensing of the online media is not provided by the Moldavian legislation so that decision can be treated as an attempt to restrict the free speech of online media.

Moldova did not follow the Ukrainian example and still did not adopt any legal provisions or laws in regard to the media ownership issues. Thus the society can recognize the owner of the respective media only by its editorial policy. Civil society elaborated in 2013 a bill which prescribes the necessity of indicating the owner and the final beneficiary of the economic results of the media company's activities. The bill has been publically presented and the first cycle of open hearings was organized but the bill has not yet gone to debate.

Moldova as well as Belarus have its public TV on the national level (Teleradio Moldova) and on the regional level (Teleradio- Gagauzia). According to the legislation the Supervisory Council is established which should independently monitor the activity of public TV. The members of the Council are appointed by the Coordination Council of TV and radio broadcasting, and thereafter a special parliamentary commission has to approve the candidates.

Another wrathful legal act is the law protecting children from dangerous information. TV channels should be more careful with displaying scenes with violence, drugs and sexual exploitation on the screen. An attempt to introduce the restrictions of another character was noticed in October 2013 from the side of General Prosecutor according to whom the internet providers should close the particular websites if needed upon a request from the State. The reason for introducing such a measure is the will to face cybercrimes but the criteria to which the selection of websites for removal have not been announced. This initiative was criticized by the public, national internet providers and the journalist community. And as a result the bill was removed from the agenda of discussion.

Defamation law

In comparison to Belarus Moldova has decriminalized defamation and libel in almost all the instances. More over in June 2000 the Supreme Code has proclaimed that international law and in the case of defamation and free speech issues it is the Article 10 of the European Convention of Human Rights that is applicable to all Moldavian courts. Besides the fact that it is of a compulsory character some of the judges from Moldova already referred to the case-law of the European Court of Human Rights. Interesting statistics saying that there have been 73 cases registered against Moldavian media and concerning the issues of defamation, libel and violation of reputation during 2005-2009 years. Eleven cases among the 165 complaints against Moldavian Government approved by the ECHR have been related to freedom of expression issues, with 15 being contesting the decisions of national procedures in regard to the defamation.

Until April 2004 the defamation provision has been incorporated into the criminal code and under the article 170 on defamation stated the following: “Slander, namely knowingly spreading lies that defame another person associated with accusation of commiting an exceptionally serious crime or heinous crime, shall be punished with the imprisonment up to five years”. The removal of this provision meant a great step forward guaranteeing the freedom of speech in the country. Nevertheless Moldavian legislation still contains defamation in its criminal code: Article 304, on “the libel of judges, criminal investigators and enforces of judges”, Article 347, prohibiting the “profanation of national and state symbols” and Article 366, prescribing the punishment for the “insulting of a military person”. Some of the public persons of Moldova even try to raise up the issue of

necessity of introducing the defamation into legal system of the country. [88] It goes in contradiction with the recommendation given in the joint declaration of the representatives of the intergovernmental bodies to protect free media and expression: "the State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions". [89]

The punishment for defamation legal notions has been reduced since 2003 and constitutes a fine of approximately 270 US dollars. In the terms of the comparative analysis of the three post-Soviet countries it is worth adding that Moldova and Ukraine have almost the same definition of defamation in the civil code and explanation of the procedure the defamation cases should be examined. For instance, Article 16 of the civil code of Moldova describes defamation as the dissemination of false and harmful information. The plaintiff has to prove that the information has disseminated and the defendant must to prove the truth of information. We would examine the legal provision for defamation in Ukraine in the next sections as well but nevertheless the mentioned is a very important detail of the defamation legal provision as to compare with Belarus where the plaintiff does not have anything to prove.

2.4. Restrictions identified: interviewing civil society

As far as it was mentioned the aim of the research is not just to identify the restrictions of free speech developed by the States. It is more about "how to identify" rather than "what to identify". In the previous sub chapter the author reviewed the main legal provisions that Belarus, Moldova and Ukraine have incorporated in their legislative framework for regulating free speech. No conclusions were reached in that regard but it was done for a purpose: to find the patterns among the provisions and international legal instruments in the chapter three to give voice to the civil society of the respective countries who have more competence for the free speech legal framework evaluation.

In order to get qualitative data a special questionnaire was elaborated. It contains a set of questions primarily addressed to the journalistic unions and media, free speech and expression related NGOs of the respective countries. Survey questions were elaborated to

[88] One of the recent examples is the statement of the head of the Supreme Court of Justice who said that he would do all his best for promotion of defamation enforcement into legal framework of Moldova, http://urls.by/2ibj [Accessed on 17 of May 14].

[89] Joint declaration of the representatives of the intergovernmental bodies to protect free media and expression (Vienna, 2013).

the purpose of the research and were of an open format so it could be possible to get to know not only the concerns and complains of the civil society but also the possible ways for changing the methods free speech is regulated in the country. We can not only sum up the restrictions identified and present the concept of a multi stakeholder approach as a model for creating the free regulatory system but also a list of free speech restrictions which should be primarily reviewed under that system.

The questionnaire of the same format has been proposed to the national stakeholders of Belarus, Ukraine and Moldova who are dealing with the media's free speech issues. The stakeholders have been identified and chosen according to their activeness in the international media researches[90] as well according to their visibility in the country's media and membership. Thus the Center of the Independent Press (Moldova), Press Council (Moldova), Hyde Park (Moldova), Union of Ukrainian Journalists, Academy of Ukrainian Press, Access info (Ukraine), Belarusian Association of Journalists, the Union of Journalists from Belarus have been contacted.

It analyzed the data collected from the stakeholders who expressed their willingness to contribute to the research and elaborated a table for presenting the summary of the results obtained.[91] The table №6 can be found in the Appendix. The survey has shown that all the States under analysis have the common pattern in the framework of the restrictions imposed: in some cases all of them are using the justifications provided by international instruments for restricting media's speech. It refers to the necessity of protection the morality and human dignity which in the cases of Moldova, Ukraine and Belarus is over limited.

It was expected to see among the most common measures the States use to suppress free speech more legal provisions than obtained as the end of the survey. The very pithiness and shortness of the stakeholder's comments on the section "The free speech national legal provisions you would recommend to eliminate/introduce" shows that even though the stakeholders face a huge level of free speech restriction from the state side they do not believe in the rule of law as in the tool which could solve the situation. This conclusion is proven by the stakeholder's answer for the section "Access to the national

[90] Some of the stakeholders have been identified through their contribution to such researches as "EaP Media Freedom Landscape" and "Europe and Asia Media Sustainability Index".
[91] Media organizations which took part in the survey: Academy of Ukrainian Press, Hyde Park Moldova, Belorussian Association of Journalists.

remedy". It also means that the States still use the methods of restrictions which are not based on the law.

If we try to think over how could the problem of excessiveness of the State imposed free speech restricted measures can be solved than another trouble arise. As to the stakeholder's opinion the level and effectiveness of the media's access to the international legal instruments is not quite scoring and optimistic: "Belarus is not a part of the Council of Europe, thus journalists cannot complain to the ECHR. Even if journalists apply to HRC its decisions are not implemented" or "They can and do apply to ECHR, but that court is too busy and selective, so Moldovan journalists can complain to the Council of Europe, other international or regional organizations, media forums, embassies." [92]

From the recommendations given by the national stakeholders about how could it be possible to influence the restrictions the State imposes over free speech in the country it is seen that there is a need of a framework, were constructive dialogue between media and the State would happen as per Moldova, Ukraine and Belarus. More efforts should be made for making the international instruments work in these countries.

2.5. Restrictions identified under UPR

As it is clear from the previous sub chapters, the main obstacle for the free speech regulation in the region is enforcement. Although the States have relatively good mechanisms to protect free speech, the gravity is rather not in the laws, but mostly in traditional lack of compliance with them. The laws, for example, could protect the editorial independency, but as we could see from the sub chapter related to the civil society way of thinking it does not work. The same can be said about the Laws on access to public information – it is guaranteed but not fully implemented.

For the purposes of the research the process of identifying the restrictions imposed by the States will include one more actor – the international community as a whole. Of course some may argue that the countries indeed collaborate with international community when dealing with international legal instruments but in the terms of the present research the author proposes to understand under "international community" not only the enforcement mechanisms, as international courts and HRC are, but also mechanisms promoting reciprocity among the States, making countries more engaged in the global

[92] See the table № 6 in Annex.

system of human rights protection. Because the human rights reviews reports are frequently accused by society and state institutions in being involved in political games, and because the research compares the free speech in media in three different countries and thus needs a common framework for comparison, the author of the research came to the conclusion that such an international mechanism has to correspond to several conditions. It must:

- be inclusive enough so that Moldova, Ukraine and Belarus may enjoy the equal level of attention;
- be impartial enough so the restrictions identified would be based not on political reasons but on their influence over the free speech situation in the given country;
- be flexible enough so if the restriction identified is reported to be improved by a given country the appropriate monitoring of the results be imposed.

Because of the explained above needs the following conclusion can be made: the Universal Periodic Review is a mechanism which may not be perfectly but still better than others to help identify the restrictions the post-Soviet states have developed in the terms of the free speech related issues. It is a newly established process which involves in review of the human rights records all the UN member states. [93]Even though it is a State-driven process it has been designed in the way that every country is treated equal in the terms of making comments and recommendations. What is important is that the UPR process is organized in a way we can evaluate the human rights records of a given country under the certain right. The complexity of the process makes UPR out to be very different from the reports the NGO's and inter-governmental organizations are periodically submitting on the human rights issues: it is a cooperative process which includes both the UN member countries' concerns and those of national stakeholders.

The paper uses the UPR recommendations for two purposes: to identify the recommendations made to Belarus, Moldova and Ukraine under the "freedom of opinion and expression" and "freedom of the press" sub-issues in order to see which of them could be directly applied to the state authority. That is to prove the assumption about the existence of a gap among States, civil society and the international community in understanding the free speech situation as per Belarus, Moldova and Ukraine. The research also compares the recommendations given by other countries and concerns from

[93] http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx [Accessed on 4 of May, 2014].

the stakeholder's reports with the findings obtained through the analysis of the free speech legal provisions of the respective countries. In this sub chapter we would go through the methodology of examining the UPR recommendations and would try to make conclusions based on the restrictions found.

Belarus passed through the first UPR cycle in 2011 and obtained 14 recommendations under the free press sub issue. Moldova passed through the first UPR cycle in the year 2011 as well and obtained only three recommendations under the free press sub-issue. Ukraine has already passed through the two cycles of UPR process - in 2008 and 2012. The country has received seven recommendations on the free press sub issue in general. All the countries except for Belarus which rejected three recommendations have accepted the critiques. It means that the States at least are willing to show the international community their worries and responsibility over the media's freedom of speech issues. What can we do with that? The restrictions identified under the UPR could contribute to our understanding of the free speech regulation in the countries of the region as well as to the comparative analysis of the free speech practice there. The results of the research on UPR mechanisms are provided in the three tables attached in Appendix.

Each of the tables represents the free speech regulation framework of a given country under the UPR process. The official websites of the UPR mechanism was used in order to select the media's free speech related recommendations given to the countries as well as the State's justifications and the stakeholder's comments. [94] The tables created help to compare the way the State regulates free speech as per Belarus, Ukraine, Moldova, and to find the patterns among the restrictive techniques. The tables have been composed according to a certain algorithm so the UPR influence on the free speech regulation framework could be considered in the complexity. The restrictions *inter alia* recommendations identified are divided into several sub-issues so we can find patterns among the dimensions of the state restriction policy as per Belarus, Moldova, Ukraine. The summaries of the national and international stakeholder's' reports are also presented in the column "Pre-Session StHdrs' Comments" in order to complete the list of identified restrictions. Because Ukraine is the only the country among the three which have passed the two cycles of the UPR process, the column "State reported implementation" was added

[94] http://www.upr-info.org/, http://www.ohchr.org/

only in the table № 5 "UPR in Ukraine". The column "State response" has not been incorporated in the table № 5 because Ukraine accepted all the recommendations without explanation.

To sum up the State imposed restrictions on the free speech identified under the UPR, it is necessary to look at the most common sub-issues for Belarus, Moldova and Ukraine. Even though it is clear that the countries have their own differences as we have already seen from the previous sub chapter while examining the legal framework regulating free speech in the countries, they have something in common as well. IActs of violence against journalists as well as delay in the determination of cases of violence against journalists remain the most dangerous restrictions of free speech for Ukraine and Belarus.

Imposing of defamation about the journalists is the restriction of a current interest for Moldova and Belarus. The UPR mechanism surprisingly found even more patterns between the mechanisms developed Moldova and Belarus for restricting the free speech, while during examining the legal framework of the countries in the previous sub chapter it could be hardly said that Moldova and Belarus have a lot in common in the terms of free speech regulation. That is what adds more credits to the UPR as to the deep and comprehensive mechanism which gives a chance to overview the human rights records at a glance. According to the UPR findings Belarus and Moldova have also refused international journalists to come into the country. In Belarus "all foreign journalists must obtain accreditation from government before being allowed to operate in the country and permission is often denied on subjective ground" while in Moldova it was about refusing international journalists to cover the parliamentary elections.

The UPR mechanism brought out the conclusion we made after examining the legal free speech provisions: some of the free speech guarantees are not qualitatively implemented. This is also seen from the comments like CoE-CM made to Moldova: "…the amount and quality [of the programs in minority languages] were reportedly insufficient and broadcasting time, as far as television was concerned, were not adequate."[95] State pressure on the independent media and broadcasting has been mentioned for all the countries, the only differences are the tools through which the States realize the control. As it comes from the UPR analysis, for Moldova it is about activity of the Broadcasting

[95] See the Table №6 in Annex.

Coordinating Council and state printing houses for publications, for Belarus it is about registration of independent media and access to the state printing and distribution system, for Ukraine it is about state organs which attempt to limit media and journalists. The negative side of using UPR as a mechanism for identifying the free speech restrictions is that the restrictions found are formulated by the recommending States and less by the stakeholders in a very broad way. It makes the findings to be difficult evaluated for compliance with the international legal instruments. Nevertheless the results of the UPR analysis are used to find out how the restrictions identified through this mechanism are reflected in the provisions of the ICCPR, European Convention, UDHR, case-law of ECHR and HCR.

The analysis 'has shown that there is a lack of attention from other States to the mechanisms the post-Soviet countries developed for restricting free speech. It is visible from the difference between the very broad recommendations given to Belarus, Ukraine and Moldova by the states and the specific, issue-based comments given to the respective countries by the national and international stakeholders. How can we benefit from the influence the international community has over the region as well as from the findings the stakeholders possess on the free speech restrictions occuring in the region? Incorporating them as well the States under analysis into the common egalitarian framework of regulation the free speech could be one of the alternatives. The multi-stakeholder approach for regulation of the the free speech issue is in the conclusions section and that section defines how the UPR could contribute to it.

CHAPTER 3.

Permissible or Impermissible Restrictions as per International Instruments

One may argue whether the comparison between the general restrictions under international instruments and the specific restrictions identified in Ukraine, Moldova and Belarus is justifiable in the terms of quality and legitimacy of the obtained results.This methodology of analyzing the State's free speech regulation might not be a perfect one but when the mentality of the population from the region does not still accept and recognize the power of the judicial organs it is considered to be of a comprehensive nature. How can we know whether the restrictive mechanisms the post-Soviet States developed are truly based on the interpretation of international instruments if still a few dozen citizens coming from Moldova, Ukraine and Belarus are applying for remedies under the national and international instruments protection? The comparative analysis is one of the options to resolve the dilemma.

To support the argument there is articulate consistency, a term created by prominent free speech scholars R. Dworkin and F. Shauer. This is the most suitable for explainingthe core free speech protection principle. By using the term of articulate consistency, we indeed highlight the point that free speech protection is about the consistency which suggests that when we justify a decision and base our justification argument on the certain principle we must apply the same principle to all same cases. If the court is making attempts to take its own statements seriously than it has satisfied the requirements of the articulate consistency.[96] Of course, the justification the court gives in the first case determines the extent to which the principle would be applied. Nevertheless the essence of articulate consistence provides opportunity to further compare the restrictions identified in Ukraine, Moldova and Belarus within the same cases from the international instruments case-law.

Frederick Shauer in his "Must speech be special?" draws the distinction between the abstract political theory and constitutional justification of the free speech notion. This is something we did in the second sub chapter and this is something we would continue to develop in regard to distinction between the obligations of the States under international treaties and the manner they regulate the free speech framework in the countries. Aaccording to constitutional provisions (Article 4) and to the decree of the Constitutional Court of Moldova №55 from 19 October 1999 "About interpretation of some of the provisions of the Article 4 of the Constitution" it follows that European Convention of

[96] Frederick Shauer, "Must Speech be special?", (Northwestern University Law review, 1984).

Human Rights is a component of the internal legal system and can be directly applied on a par with the national laws only with one difference: ECHR enjoys the priorities when it goes in contradiction with some of the national legal provisions. Ukraine has the same legal provisions as held in ECHR practice. Comparative researches like this are of the highestimportance because they would contribute to encouraging the civil society to use legal toolsin case of rights violation in a right way: following the already successful examples from the case-law of ECHR.

This argument can be supplemented with the remark made by plenum of the Supreme Court of Justice of Moldova from 19.06.2000. For the correct use of the European Convention it is of crucial importance to learn the jurisprudence of the ECHR and follow its justifications when applying it. If the national legislation does not provide the effective remedies when a particular right incorporated in the Constitution is violated the court's instance should accept the application and examine it within the direct adaptability of the provisions of the ECHR. [97] Further efforts should be applied in order to educate both representatives of the courtsand public representatives on how the ECHR treats the regulation of free speech and expression. Comparative analysis between what is done in the country as to the State's viewpoint and what should done as to ECHR's viewpoint could fill the existing gap between the guarantees provided by the Constitutions, international instruments and the reality realized by the State.

3.1. Restrictions under ICERD

International Convention on the Elimination of all forms of Racial Discrimination (ICERD) has been adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19. The Convention is monitored by the Committee on the Elimination of Racial Discrimination (CERD). All the countries under analysis: Moldova, Ukraine and Belarus are parties of that Convention, none of them made any reservations. For the purpose of the research our attention turns to the controversial Article 4 of the Convention which requires State parties to outlaw hate speech and criminalize membership in racist organizations. The article states that:

[97] http://urls.by/2iop [Accessed on 3 June 2014].

"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

Since the Convention has been adopted, many discussions on how the States should balance between necessity to protect freedom of speech and ban hate speech have come forward. The controversial nature of Article 4 can be proven by the fact that 20 States made reservations on interpretative statements of that legal provision. Almost all the States mentioned the importance of "due to regard" clause, the right to freedom of association and expression.

Prior to analyzing how the restrictions imposed by Moldova, Ukraine and Belarus to punish incitement to racial discrimination comply with the aims of the Convention, there is a need to present the official interpretation of this dilemma expressed in the General Recommendations № 35 by CERD as well as in the General Comments by HRC.

In General Recommendation №15 the Committee took a clear position on the compliance of the prohibition of all the ideas based upon racial superiority with the right to freedom of expression. Referring to the Articles 19 and 29 (2) of the UDHR and Article 20(2) ICCPR it stated it is compatible with the right to freedom of expression, lying on the fact that "citizens right to exercise of this right carries special duties and responsibilities,

[…] among which the obligation not to disseminate racist ideas is of particular importance". [98]

Comparing the legal provisions of Moldova, Ukraine and Belarus with respect to the free speech restrictions based on necessity to prevent discrimination as well as after analyzing the human rights reports, the most open and inclusive one is incorporated into Moldavian legislation and is called "Law on equal opportunities".[99] Although in Article 4 it prescribes that support discrimination through mass-media is one of the "worst forms of discrimination" it also protects media from being accused in discrimination only by a whimsy of a State official. The Law prescribes the foundation of a Council for Prevention and discrimination and equality which consists of five Human Rights activists appointed by the Parliament. Such a system not only raises awareness on discrimination among the society but also prevents the State to restrict freedom of speech on the basis of an international provision in the cases when there is no matter to do this.

3.2. Restrictions under ICCPR

Article 19(3) of the ICCPR permits limitations on the rights recognized in article 19(2), but those limitations must be:

(1) provided by law and

(2) necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals.

The HRC in its *General Comment 34* has highlighted that:

"when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself... the relation between right and restriction and between norm and exception must not be reversed."

The HRC further stated that:

"Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality...Restrictions must be applied only for those purposes for which they were

[98] General Recommendation №15 (49).
[99] http://www.lawyer-moldova.com/2012/10/law-on-equal.html [Accessed on 10 of June 2014].

prescribed and must be directly related to the specific need on which they are predicated."[100]

The conditions upon ICCPR to restrict free speech require a huge level of responsibility. The provisions of the article 19 (3) can be incorporated into so-called tests to which we could say whether the restrictions identified are legitimate under international instruments or not. The test is based on the interpretation given by the General Comment №34 on Article 19. The first stage of the test would prescribe a condition upon which the restriction should be based on law and not on the whim of a public official. Here we could name the restrictions we identified from interviewing civil society (Cf. Table 6 in Appendix). As the stakeholders stated there are restrictions imposed by the States which convey a de facto out of the legislative framework: administrative checks, physical intimidation, refusal by delivery companies to sell the independent print media and others. These restrictions surely do not comply with the norms of international legal instruments because they are not based on the law.

Moreover the precondition "provided by law" has more significant meaning than just a piece of a legislative framework. The law itself should be in complaints with certain criteria of clarity, empowering citizens to commensurate the consequences of their behavior. The legal provisions which are too vague and whose scope of application is unclear can be considered as illegitimate as restriction of freedom of expression. [101] As is the case of the Ukrainian Law "About state support of media and social protection of the journalists" , which does not specify the criteria which media is selected for being funded by the State as well as measure the State would undertake in order to let the discrimination among different kind of media happen.

The second section is to verify the restriction on availability of the legitimate aim criteria. The Article 19(3) of the ICCPR has the very specific list of the legitimate aims and none of the States is having a right to its modification: respect for the rights and reputations of others, and protection of national security, public order, public health or morals. It is impossible to justify the attempts to rescue a State official from criticism if talking about appliance of ICCPR. The defamation provisions of Belarus protecting the dignity of the President and State officials does not correspond to these criteria. The same can be said

[100] http://urls.by/2k7t [Accessed on 4 June 2014].

[101] "An Agenda for change: Right to freedom of expression in Nepal", 2008.

about the legislative free speech framework in Moldova, which contains Article 304, on "the libel of judges, criminal investigators and enforces of judges".

The third section of the test would examine the cases when the restriction is based on national law and serves the aim prescribed by the Article 19(2) of the ICCPR. The evident question can arise in such a situation: "What for is it necessary if the restriction fulfils all the necessary preconditions?". Well, in most cases where international human rights courts have ruled national laws to be impermissible on the right to freedom of expression, it was because the legislation in question was not deemed necessary. Necessary is the key word under this criteria. The last part of the test gives us opportunity to put question the necessity of the following legal acts: the Ukrainian "Law on public morality" and the Belarusian "Law on extremism" which give power to the State to persecute media under ambiguous motives. The establishment of the National Expert Commission for protection of public morality in Ukraine is not also necessary as to the stakeholder's opinion.

Independent Human Rights Organization "Article 19" and non-governmental organization "Freedom Forum" has interpreted "necessary" in the followingManner.[102] The State should introduce the restriction in response to a pressing social need and not because it would make the process of governance easier. Was there really a social demand upon the laws introduced in Belarus in 2013 and described in the previous sub chapter? Or upon the prosecution of independent television broadcasters as in the case of the TV channel NIT in 2012?[103] The answer might be evident.

The experts stand firm on the position that the chosen measure cannot be treated as "necessary" if an alternative one can be applied. For example closing down newspapers as it is reported in Ukraine and Belarus is excessive but warning with the modest fine if there is a case of a defamed person's reputation can be justified. The "An Agenda for change: Right to freedom of speech in Nepal" suggests that when applying this test the circumstances of the restriction imposed should be taken into account. Thus the restrictions based on national security can be justified in the period of civil conflict and would rather

[102] ARTICLE 19, "An agenda for change: the right to freedom of expression in Nepal, 2008

[103] NIT is a private Moldovan TV channel which was denied licensing by the Coordination Committee on TV and radio broadcasting in 2012. The owners and the journalists of the media institution applied to the ECHR. The case is still under review. The Moldovan Court of Appeal has postponed the hearings of this case more than nine times. http://pan.md/news/show/Delo-NIT-doshlo-do-ESPCh/38899/category/ , http://pan.md/news/Dela-ob-otzive-litsenzii-na-veshianie-budut-rassmatrivatisya-v-prioritetnom-poryadke/32916 [Accessed on 30 May, 2014].

be found “necessary” in times of peace. That could be related to the provision related to the national security of Belarus upon which journalists have been detained.

3.3. Restrictions under ECHR

The European Convention in its Article 10 provides the right to freedom of expression and information as well as subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". But what does the provision “necessary in a democratic society” actually mean and include in itself? “Democratic” appears to be over employed in the post-Soviet area thus becoming a buzz word in the vocabulary of politicians for justifying policy decisions citizens do not like or understand.

As summarized from the free speech case-law of the ECHR the reasons for restriction of speech under this term are limited. On the other hand the list of the issues representing the public concern and thus needed to be covered and discussed by media is becoming even wider. As to ECHR interpretation some of these are: expenditure of public funds, corruption in the state or private institutions, and political corruption.[104]

This chapter reviews the legal practice of the State when regulating the free speech issues in order to compare the methods with the ones proposed and recommended by international legal instruments. We would see which legal provisions harm the balance principle thus creating the danger for the media’s activity as a watchdog of democracy. As the Parliamentary Assembly of the Council of Europe stated in Recommendation 1589 (2003) on Freedom of Expression in the Media in Europe, “it is…unacceptable in a democracy that journalist should be sent to prison for their work.”[105]

3.4. International instruments about defamation laws

International bodies have a skeptical view of imprisonment as a sanction for defamation. The *ECtHR* has never justified such a strict measure for punishment in the case of defamation issues as imprisonment. Moreover in its 1994 annual report the *UNHRCm* criticised Iceland for maintaining the legal possibility of custodial sanctions for defamation. The critical note was expressed despite the fact that it had apparently not

[104] ”Flux” v Moldova № 4», parag. 33.
[105] http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta03/EREC1589.htm [Accessed on 6 of May, 2014].

been applied in practice. The *UNHRCm* made the same statements in relation to Norway and Jordan.

As it is seen from the case-law of the ECHR the following defamation provisions in the Belarusian Criminal Code: 367 (defamation of the president), 368 (insult of the president), 369 (insult of the official) do not correspond to the international legal instrument's interpretation of free speech. For instance in the Case of Lingens v. Austria the Court has explained that the boundaries for the criticism of the political figure are wider than for criticism of a random citizen. Unlike the ordinary citizen the political figure realizes that all his actions are under the public scrutiny, thus he or she should tolerate such an attitude from the society. For instance, there is the Austrian journalist and editor of the magazine Profil, who was found guilty of defamation by the Vienna Regional Court. The journalist had written articles about Mr. Friedrich Peter, the President of the Austrian Liberal Party, proclaiming that, because the politician has served in the first SS infantry brigade during the Second World War, 'his past nevertheless rendered him unacceptable as a politician in Austria'.

ECHR in its decision which found the accusation of the Australian journalist incompatible with the Article 10 highlighted criticism as one of the cornerstones of the democracy: "freedom of expression is applicable not only to information or ideas that are favourably received, or regarded as offensive or as a matter of indifference, but also to those that offend, shock and disturb**.** Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."[106]

The problems with the other two defamation articles: 188 and 189 is not in their existence in general but in the fact that they are included in the Criminal Code and not in the Civil one. It might indirectly cause self-censorship among journalists as well as put the free flow of information at risk. ECHR interpreted the legal provisions concerning punishment for critical expressions in the following way: "Punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not

[106] http://www.mlfoe.org/Article/Detail.aspx?ArticleUid=c68dc262-2a98-498b-91ca-60260f7de6f6 [Accessed on 13 of May, 2014].

reconcilable with the press' role of providing information on current events, opinions and ideas".[107]

The Amending Law providing fines for defamation of officials is most likely to be found correlating within the foundations of ICCPR because criminalizing defamation of the State as well as providing public officials with the special legal status is not under ICCPR principles. The fact that Belarusian courts do not accept defense for reasonable publications is also contravenes ICCPR standards. In Belarus's case many UN bodies have observed the systematic human rights violations which are not addressed by the State and the vast majority is related to the right to freedom of expression and freedom of opinion. [108]

The Special Rapporteur in his report worried that Belarus de facto refuses alleged victims of human rights violations the right to appeal decisions of the Supreme Court to the Human Rights Committee, even though Belarus has ratified the Optional Protocol to the International Covenant on Civil and Political Rights.[109] This statement refers to the victims of all the type of human rights violation, including the right to free speech.

The same can be said of defamation provisions in the criminal code of Moldova: Article 304, on "the libel of judges, criminal investigators and enforces of judges", Article 347, prohibiting the "profanation of national and State symbols" and Article 366, prescribing the punishment for the "insulting of a military person". A particular worry can be also expressed about defamation of State symbols as they do not have a reputation. Some may argue that the Article 3 of the Law on radio and television which prohibits expression which can damage another's honor, dignity and private life duplicates the general provision on the defamation of the civil code, thus sending a "double warning" to broadcasters. However the European Court has expressed interpretation on this matter in such a way proving again that the main principle in free speech protection is balance and none of the parties- be the state one or the media - should be a privilege. In the case

[107] http://www.article19.org/pages/en/defences-remedies.html [Accessed on 27 of May, 2014].
[108] *Malakhovsky and Pikul v. Belarus* (CCPR/C/84/D/1207/2003), *Korneenko v. Belarus* (CCPR/C/105/D/1226/2003), *Gryb v. Belarus* (CCPR/C/103/D/1316/2004), *Katsora v. Belarus* (CCPR/C/99/D/1377/2005), *Korneenko v. Belarus* (CCPR/C/95/D/1553/2007), *Zalesskaya v. Belarus* (CCPR/C/101/D/1604/2007), *Sudalenko v. Belarus* (CCPR/C/104/D/1750/2008), *Govsha et al. v. Belarus* (CCPR/C/105/D/1790/2008), *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), *Levinov v. Belarus* (CCPR/C/105/D/1867/2009, 1936, 1975, 1977-1981, 2010/2010)
[109] UN Special Rapporteur on the situation in Belarus.

"Busuioc against Moldova"[110] ECHR stated that provisions of the Moldavian Civil Code do not contradict the international demands on the quality of the law.

The Court also admitted that the provisions of the Civil Code of Moldova are not too vague and highlighted that the defamation laws with the special emphasis on the dignity and the honor are always of a broad character. [111] ECHR stated the broadness of the defamation law provisions in the Civil Code does not make itself incompatible with the principles of Article 10. It is up to national instances to adopt and interpret the national legislation. [112]

The case-law of the ECHR on the defamation provisions shows that even though the 'freedom of the press is considered to be one of the cornerstone principles of the democracy it has to be limited by the value of other principles as well, it demonstrates that the media's free speech is not true in the last instance. In the case of "Flux v Moldova,"[113] the Court found that the right to free speech does not give the journalists right to act irresponsibly and claim a person in causing the violations without having a good factual basis. [114] The Court did not find a violation of Article 10 because the journalists did not do their job properly,had not verified the information received through the third party, and did not afford the persons mentioned in the article the realization of their right to respond. Such explanations prove one more time that right to free speech is permanently connected with the imposing of duties on those realizing the right.

The paragraph 2 of the Article 302 of the Civil Code of Ukraine which obliged the person to verify the information before the disseminating and the case-law of ECHR, we can assume that provisions of an obligating character are not necessary in a democratic society. It is supposed that the journalists are conducted by an ethical code thus they would anyway verify the information before the dissemination. Of the law obliged them to do so it could lead to the self-censorship of the journalists or discourage timely reporting. "News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest" noted ECHR. [115] In such a way we can make a

[110] http://ijc.md/Publicatii/mlu/ECHR/busuiac.pdf [Accessed on 24 May, 2014].
[111] See the explanation of the Court in the Case of Rekvenyi v. Hungary, Number of the Case 25390/94.
[112] See the explanation of the Court in the Case of Otto-Preminger-Institut v. Austria, Number of the Case A № 295-A, p.17 &45.
[113] See the Case of Flux v Moldova (№6), Application number 22824/04.
[114] See also the Case of Bladet Tromsø and Stensaas, Application number 21980/93.
[115] Case of Observer and Guardian v. the United Kingdom, Application no. 13585/88.

conclusion that the paragraph 2 of the Article 302 of the Civil Code of Ukraine *inter alia* provokes self-censorship and possibility to delay the information of a high public concern.

3.5. International instruments about restrictions based on national safety

Matters of territorial integrity and national safety are among the most used reasons for imposing the restrictions on the free speech and Moldova, Ukraine, Belarus are not the exceptions. How do the States balance between these two values and how does the way they realize this policy comply with the international legal instruments? One is to research the case-law of the international courts and see the explanations on how national security matters should be protected in the terms of non-violation of the free speech norm.

One of the most prominent cases involving both the post-Soviet state and the matter of "national security – free speech" is the case of Kommersant Moldovy v. Moldova.[116] The newspaper was closed by the decision of the national court as a result of publication of the set of articles addressing critiques to the negotiation process between official Chisinau and the officials of the unrecognized Republic of Transnistria. Instances of courts have agreed with the Prosecutor's Office on the matter that this set of articles has supported the way of thinking of the unrecognized Republic of Transnistria, as it damaged the territorial integrity and public safety.

The newspaper applied for European Court of Human Rights which found a violation of Article 10 in the case of closing the newspaper. The Court stated that national instances have not brought enough justifications for explaining how these articles could damage the notion of national and public safety. The Court emphasized that making public the critique opinions about the negotiation process (in fact it was the case of bringing up the opinion of Russian and Transnistrian leaders) does not necessarily posea threat to territorial integrity and national security. It is the State who should bring the arguments in favor of such point when applied to the court.

This case suggests and reveals how the State is using the restriction mechanism in order to protect the national security and does not care to justify such a strict measure as closing the newspaper. The State pushed the media out from the free speech regulation framework and made decisions on what is more valuable on its own. It proves the assumption expressed at the beginning of the chapter: the gap between understanding of

[116] Kommersant Moldovy v. Moldova, Application no. 41827/02.

what free speech regulation is about is very wide in the societies of the region. At the same time the research does not stand for the position of throwing all the criticism on the State.

There is a need to understand the background of such decisions: national concerns have been on the top of agenda and priorities for the countries of the region for a long historical period. How can we make the State change this perception? Are the international instruments the only tool for changing that perception? If we assume that the enforcement mechanisms like courts are effective in the restoration of justice but are not so in establishing the process of reciprocity in the context of human rights then we have to reflect on new concepts about the relationship "the state – the stakeholders" should work on. That is why the concept of a multi stakeholder approach for free speech issues regulation is in the "Conclusions" part of the research.

Conclusions

Free speech needs to be protected. It should be provided special attention in the process of democratic transition in which Moldova, Ukraine and Belarus are still in, because freedom of speech reinforces a democracy , it encourages citizens to be engaged in setting the agenda, it creates the environment where ideas can be freely exchanged, thus contributing to self-development of the individual as well as to the public good.

Freedom of the press is one of the most crucial types of free speech because it plays a vital role of 'public watchdog" in all democracies. One of the main obstacles the media's free speech regulation meets in Ukraine, Belarus and Moldova is that the restrictive measures imposed by the States do not always correlate with the provisions of the international legal instruments. The defamation provisions still do not correspond to its main mission – protect the reputation as a value and not the image of the public persons and state official in particular. The proportionality rule is not' also strictly applied, it is seen in the punishment and fee provisions for defamation which lead to the self-censorship and quality of journalism law in the end. The States do not realize negative obligations under ECHR not to intervene into the media policy. The broadcasting institutions and institutions releasing the license remain politically affiliated or are corrupt. Thus, the free

speech regulatory system as per Moldova, Ukraine and Belarus needs to change. Positive obligations are also realized in a inappropriate manner and attacks on journalists continue.

What to change?

As the paper has been reviewing the methods the post-Soviet States have developed for restricting the free speech, these methods could be categorized into two parts: direct and indirectmethods. The research identified the direct methods in the first subchapter of the second chapter while reviewing the free speech and media related legal provisions. Thus, some of the legal provisions do not really correspond to the free speech principles proclaimed by international instruments. A set of recommendations for Moldova, Ukraine and Belarus can be made on this regard. The recommendations come from the civil society survey organized due to the present research (see the Table 6), the summary of the UPR process (see the Tables 3-5) as well as from human rights reviews analyzed due to the research.

• Article 79 of the Belarusian Constitution should be amended so that the president is not afforded special protection for his honour and dignity.

• Articles 5 and 32 of the Law on Press of Belarus should be amended so that the president and other high-ranking officials are not afforded special protection against defamation or criticism.

• The law should establish a defense of reasonable publication in Belarus. In Ukraine the awareness among journalists, civil society activists and judges on the existence of such provision should be raised. [117]

• The false news provision in Article 32 of Belarus should be deleted.

• Ukrainian Law on protection of public morality should be changed so not to restrict the critical media materials.

• Article 6.2.1 of the Presidential Order of 17 July 2001 "On the Confirmation of the Concept of National Security for the Republic of Belarus" should be deleted and restrictions on freedom of expression for reasons of national security should be imposed only as necessary to protect a genuine national security interest.

• When imposing sanctions for breach of a restriction on freedom of expression, courts of Moldova, Ukraine and Belarus should take into account the potential 'chilling effect' of the sanction, respecting the proportionality rule.

[117] The author of this research is not aware of any case in which the defense was applied.

• Moldova should elaborate legal provisions for revealing the real owner of the media in order to prevent the monopolization of the media sector.

Unfortunately the major part of the restrictions imposed by the particular post-Soviet States is of an indirect nature. They are outside of a legislative framework, making it impossible to analyze their compliance with the international legal instruments. Among the indirect methods the States use for restricting free speech are: delays in the determination of cases of violence against journalists, print media dependence on the state printing houses for publication, political dependence of the Broadcasting Coordinating Council,corruption , tolerating police violence on journalists reporting public events, pressure on the economic agents who are purchasing advertisement space in the independent media, and others. These restrictions have been identified through the interviewing civil society and the UPR mechanism. UPR led toward to one more important conclusion –the civil society's attitude toward the State's imposed restrictions also demands to change.

Civil society does not always adequately react to the restrictions imposed by the State and in some cases does not accept the restrictions at all. That undermines the whole principle of free speech which according to international instruments can be exposed to some restrictions if it is "necessary in a democratic society". On the other hand there is no reaction from the national stakeholders when reviewing the free speech issue under the Universal Periodic Review. The Union of Belarusian Journalists is the only civic institution engaged in the free speech monitoring under UPR. Are the other media NGO's aware of such a mechanism addressing human right violations, or are they just not willing to address them ? One can conclude that there is a gap between the State and civil society as per Moldova, Ukraine and Belarus in respect to the media' freedom of speech debate.

How to change?

When we analyze the possible solutions for eliminating all forms of free speech restrictions in Moldova, Ukraine and Belarus which do not correspond to the provisions of international legal instruments, we should analyze whether those restrictions are really typical only for that region. I recommend the reader read the extract from the statement the UN independent experts made on the 2014 World Press Freedom Day – "Free media

reinforces the post-2015 goals".[118] The experts highlighted a need "to work towards more inclusive political processes, genuine participation by all in all countries, ensuring freedom of the media to play its role, and guaranteeing the right of the public to have access to information". All the free speech restrictions identified in the present research as per Moldova, Ukraine and Belarus are reflected in the call on rights to freedom of expression and information the UN experts made upon the States. Thus, the restrictions identified in the post-Soviet region could be easily incorporated in the global context of free speech regulation. We have to look over the global solutions proposed for eliminating these problems and analyze which are more appropriate for our regional context and needs. From my viewpoint the multi-stakeholder approach is a solution for making the State imposed restrictions over free speech more balanced. This approach could change the State-ruled way of free speech regulation into a deliberative one, imparting the decision-making process among all those interested in free speech issues discourse.

The aim of the multi-stakeholder processes is to promote better decision making by ensuring that views about a particular decision are heard and integrated at all stages through dialogue and consensus building. The process states on the principle that everyone involved in the process has a valid view and necessary knowledge and experience to contribute to decision-making. The approach aims to create trust between the actors and solutions that provide mutual benefits and leads to a win-win situation. The approach is people-centered and everyone involved takes responsibility for the outcome which isdifferent than the institution-based approach which is still predominant on the post-Soviet regions.

Because of the inclusive and participatory approaches employed, stakeholders have a greater sense of ownership for decisions which is of high importance when, as we see the civil society of the particular countries does not feel engaged in the freedom of speech decision-making process. They are thus more likely to comply. Multi stakeholder initiatives (MSIs) which came to public attention around 1990 were a tool for filling "governance gaps" – exactly the issue studied in the present research. Justifiably, MSIs have been developed because of the failure of the previous structures and processes thus MSIs represent new ways of problem solving – through collective action. Of course there are hurdles those willing to promote the multi stakeholder approach for free speech

[118] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14558&LangID=E [Accessed on 8th of June, 2014].

regulation will face. These include norm setting, the selection process of the participants, initiative' credibility, accountability, establishment of trust, and, developing the procedures for reaching mutual consensus.[119] The last point would be the hardest to achieve because of the tradition of establishing the top-down hierarchical management system still prevalent in the region.

One may argue that a common approach to MSIs is to form norms at the global level and transfer them to the local ones. This is why so many global initiatives and international NGO's which would be called in the cold-war rhetoric "the Western" ones have been criticized. I propose to not wait until the global multi-stakeholders approach arises but rather start establishing local ones as per Moldova, Ukraine and Belarus. There is interest in the media from the business sector which is becoming active in sponsoring media initiatives, as well from the civil society which has recently started to engage in free speech public debate, and from the States which at the very minimum carried out the obligations to ensure free media under international treaties. The question remains as to whom would be the firstto initiate the dialogue and bring all stakeholders and actors to the table. The simplest method is to encourage the training programs founded by international institutions to use their established networks to promote on free speech protection not only to journalists but stakeholders in business and the government. A personal-based approach based on the egalitarian policy system should be established in the free speech regulation. The linkage between the media and good governance is crucial.

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APPENDIX

Tables 3, 4 and 5 concerning UPR process as per Belarus, Moldova and Ukraine

Sub-Issues	**Belarus 2010** (1st Cycle)	**Belarus 2010** (1st Cycle)	**Belarus 2010** (1st Cycle)
	Recommendations (summary of rec & proferring state)	**State Response / (accept/reject, justification)**	**Pre-Session StHdrs' Comments (summary & StHldr ID)**
Independent media	Take the necessary measures, namely in the legislative field, to ensure an independent, free and diversified press (Belgium)	*Implemented*. Belarusian legislation guarantees implementation of the principle of freedom of expression enshrined in the Constitution and an enabling environment for the operation of the media. Belarusian law contains no restrictions on the ability of the mass media to criticize government authority. Pluralism and diversity of views, opinions and assessments in the media are guaranteed. The opposition press enjoys unfettered access to the State printing and distribution system.	CIVICUS indicated that all foreign journalists must obtain accreditation from government before being allowed to operate in the country and permission is often denied on subjective grounds. CIVICUS noted that independent publications focusing on political and social issues have been denied access to the state run press distribution monopoly.The JS2 noted that the state monopolist of media distribution refuse to distribute practically a half of the registered, independent socio-political publications.

Retribution for criticizing the government	Develop an action plan to ensure that journalists are able to conduct their work freely and without fear of retribution (Canada)	*Accepted/Implemented.* The procedure for the registration of media outlets in Belarus is transparent and nondiscriminatory. It is clear and standard for all the mass media.	Belarusian Journalists' Union (BJU) mentioned that the Public Coordination Council has the right, inter alia, to provide an assessment if there is a violation of requirements of the Law on the Mass Media in mass media productions. BJU indicated that the efforts of Belarus directed at ensuring rights and freedoms of citizens to access to information should be considered as sufficient and feasible.
Foreign media	Ensure and apply transparent and non-discriminatory decision-making processes with regard to the registration of media outlets and the accreditation of foreign journalists (Canada)	*Accepted*	

Attacks on journalists	Adopt measures to prevent attacks, harassment, arbitrary detention of political activists and journalists (Chech Republic)	*Accepted*	
Independent investigation of the crimes against journalists	Ensure that these crimes against political activists and journalists are independently and impartially investigated and that their perpetrators are brought to justice (Chech Republic)	*Accepted*	
Media sector liberalization	Liberalize the media sector, and guarantee freedom of expression and of the media (France)	*Rejected*/The legislative framework was reviewed during the drafting of the 2009 Mass MediaAct, which took account of the views of a broad section of the professional public,international experience of the lawmaking process and law enforcement practice in respectof the media. On 1 June 2010, the State media register had accredited 1,300 printed media titles,of which 397 were State-owned and 903 were non-governmental. This testifies to the favourable environment for media activities	

		and freedom of expression in Belarus. Thus, national legislation on media freedom is consistent with the country's international obligations, including those under the International Covenant on Civil and Political Rights.	
Registration of independent media	Consider amendments to legislation to facilitate the registration of independent media and to guarantee its freedom (Ireland)	*Rejected*/ Belarus has a standard registration procedure for all media outlets, whether governmental or non-governmental. The new Mass Media Act that came into force in 2009 has significantly simplified the procedure for State registration. Specifically, it has abolished the requirement for agreement with the local executive and regulatory authorities on the location of media premises, discontinued the system of extending the time frame for consideration of an application for State registration, and shortened the list of grounds for refusal of State registration.	
State coordination over media	Continue the coordination among print and audio-visual media to raise awareness and deepen	*Accepted*	

	understanding of human rights principles (Libya)		
Registration of independent media	Protect all journalists from harassment, simplify registration and accreditation procedures (Lithuania)	*Accepted*	
Defamation legistlation	Bring its laws into line with European and international standards on press freedom, and abolish existing legislation on defamation (Netherlands)	*Accepted*	JS1 indicated that existing legislation on defamation and extremism creates an environment of self-censorship, limits press freedom and is not in line with European and international standards on press freedom. CIVICUS mentioned the issue of restrictive libel provisions impacting on freedom of expression. Recommended reforming the media related laws to bring media policy in line with international standards.

Attacks on journalists	That violations against human rights defenders, journalists and students are effectively investigated in order to bring those liable to justice (Norway)	*Accepted*	JS1 noted that Belarus tolerates violence by its police on journalists reporting public events. CoE PACE noted that cases of harassment against independent journalists are not a rare occurrence, with the result that many of them prefer to opt for self-censorship. ODVV expressed a concern about the way in which Belarus treats the press and journalists, exercises strict control and restrictions against the press and media.
Torture of journalists	Intensify its efforts to investigate, identify and, if applicable, punish alleged perpetrators of the harassment, arbitrary detention and torture of opponents of the Government, including journalists and human rights defenders (Spain)	*Rejected*/As a party to the Convention against Torture, Belarus has established, enshrined in legislation and brought into effect domestic remedies to protect individuals against torture,violence and other degrading treatment or punishment, and to guarantee the human rights of prisoners.	

Freedom of expression in media	Guarantee freedom of association and expression for all citizens, including the press, human rights defenders, political parties, civic organizations and trade unions (Switzerland)	*Accepted*	In 2006, the Special Representative of the Secretary-General on human rights defenders noted that despite the Belarusian Constitution guaranteeing the right to freedom of expression, the scope of this right is restricted by a number of defamation provisions of the Criminal Code, including articles on defamation, insult, defamation in relation to the President, insult to the President and insult to a government official. These articles foresee sentences of up to five years' imprisonment.108 In 2007 and 2008, as noted in the resolutions of the General Assembly, a concern was expressed about the continued harassment and detention of Belarusian journalists and the suspension and banning of independent media.

Sub-Issues	**Ukraine 2008** (1st Cycle)	**Ukraine 2008** (1st Cycle)	**Ukraine 2008** (1st Cycle)	**Ukraine 2012** (2nd Cycle)
	2 Recommendations, all accepted (summary of rec & proferring state)	**Pre-Session StHdrs' Comments (summary & StHldr ID)**	**State reported implementation**	**5 Recommendations, all accepted (summary of rec & proferring state)**
Acts of violence against journalists	Take all measures necessary to ensure that all acts of violence against journalists be investigated and that appropriate punishments are meted out. (France)	CAT and the HR Committee noted that violent attacks against journalists, as well as the harassment of journalists, still pose a persistent threat to the freedom of the press. Both committees requested Ukraine to protect freedom of opinion and expression, and to ensure prompt and impartial investigation and prosecution.	Ensuring freedom of the press requires not only the appropriate legal framework, but also the prohibition in practice of violations of this right.	Create an enabling environment for journalists and media professionals and ensure fully transparent and impartial investigation and prosecution in all cases of attacks against them (Austria)
Media for national minorities	Ensure full and effective compliance of national legislation and law enforcement practices, particularly in the areas of			

	education and mass media with the obligation of article 27 of the International Covenant on Civil and Political Rights. (Russia)			
Arrests, trials of journalists		A number of communications sent by the Special Rapporteur on the right to freedom of opinion and expression are related to allegations of violence, including fatal attacks, arrest and trial of journalists. In most of these cases, it was alleged that the journalists had been investigating cases of corruption. In all these cases, the Government provided detailed replies, noting in a number of cases that investigations were underway or had been finalised		Further develop measures to fully guarantee freedom of expression, particularly the protection of the integrity of persons working in the media in the exercise of that right (Chile

Delay in the determination of cases of violence against journalists		During his visit to Ukraine, the Special Rapporteur noted that there was undue delay in the determination of cases of violence against journalists and many of the perpetrators have not been brought to justice.	In the criminal case of the killing of the journalist Mr. Gongadze, the Office of the Procurator-General ascertained who was directly responsible for the premeditated murder (M.K. Protasov, A.V. Popovich and V.M. Kostenko). They were sentenced in 2008 to various terms of deprivation of liberty.	Ensure better protection of journalists and combat abuse and violence to which they are subject (France)
Media for national minorities		CERD noted that Crimean Tatars reportedly remain underrepresented in the public service of the Autonomous Republic of Crimea and called upon Ukraine to adopt measures to ensure their adequate representation, including at senior levels.		

Access to information			To ensure the effective realization of the right of everyone to freedom of speech and access to information and the right freely to collect, store, use and disseminate information orally, in writing or by other means, in 2011 the Access to Public Information Act and an act amending the Information Act (new version) were adopted.	
Independent broadcast under State''s pressure			The Government has initiated the process to establish public television and radio.	Further promote freedom and pluralism of the media as key elements for enabling the exercise of freedom of expression (Poland)
Measures against State organs restricting				Pursue measures against State organs which attempt to limit media and journalists (Germany)

media freedom				

Sub-Issues	**Moldova 2011** (1st Cycle)	**Moldova 2011** (1st Cycle)	**Moldova 2011** (1st Cycle)
	3 Recommendations (summary of rec & proferring state)	**State Response /all accepted (accept/reject, justification)**	**Pre-Session StHdrs' Comments (summary & StHldr ID)**
Guarantee of freedom of expression	Make efforts to fully guarantee freedom of expression and information, in accordance with Moldova's international obligations (Norway)	Accepted	
Critical media	Take steps to protect critical and independent media (Germany)	Accepted	
Media for national minorities	Ensure the freedom of the mass media, particularly of those media outlets that function in the language of the national minorities, including Russian (Russia)	Accepted/ in the process of implementation. : Since 2009 the Government undertook targeted actions to ensure the universal freedom of expression and avoid any limitations in journalist activities or interference within editorial policy. Local TV and radio stations broadcast programs in languages of	CoE-CM stated that the public TV and radio had continued to broadcast programmes in minority languages. However, the amount and quality were reportedly insufficient and broadcasting time, as far as television was concerned, were not adequate.

		national minorities, newspapers and magazines are disseminated also in minority languages.	
Lack of pluralism; restrictions upon access to websites			CoE-Commissioner referred to reported restrictions of the freedom of the media in the context of the post-electoral demonstrations and arrests, including the assault and detention of local and foreign journalists and restrictions upon access to internet services or websites
Political dependence and corruption of the Broadcasting regulatory body			JS3 reported on the political dependence of the Broadcasting Coordinating Council as well as the corruption of its members
State control over media; access of international journalists to the country			UNESCO stated that freedom of expression was limited. Print media depended on the State's printing houses for publication. The Organization also reported that following

			the elections in 2009, members of the press were attacked and international media were prevented from entering the country.
Prosecution of the independent broadcasters; Civil defamation laws against independent journalists			The HR Committee was concerned at reports of the use of civil defamation laws against independent journalists. It also noted with concern reports of the prosecution of independent television broadcasters.
Media restrictions in Transnistria			UNESCO stated that, in the Transnistrian region, the media environment was restrictive, that media outlets were controlled by the authorities and that journalists practiced self-censorship.

Table 6. Civil society survey results

	Stakeholders from Belarus	Stakeholders from Moldova	Stakeholders from Ukraine
The most common measures the State uses for the free speech restriction	*The obstacles are imposed as in the legislative level as well as in a more restrictive law enforcement. The level of media's free speech restriction is one of the highest in Europe. *Restrictions in regard to the media's registration. There is economic discrimination of the independent media (the State companies "Белпочта" and "Белсоюзпечать" which predominate on the print media market refuse to provide the delivering services; economical agents who are willing to post the advertisement in the independent media are pressured; there is direct funding of state media from the national budget and it is organized without any contest). Journalists are facing obstacles in obtaining the information, its most vividly	*It i's still difficult to obtain public interest information, state institutions avoid to give it written or spoken, public servants refer to press officers, and those are always busy or not informed. *When filming or documenting a story journalists can be assaulted, their equipment damaged, and nobody will be punished for that. *There are many court applications and police/criminal complaints against journalists made by politicians and businessmen on the ground of defamation.	*State establishes the useless institutions just free speech control, like National Expert Commission for protection of public morality. *Previously there were widely spread prosecutions, administrative checks. Presently, it involves physical intimidation and harm, including the closure of newspaper firm.

	expressed in the fact that all the journalists (international and Belarusian) should obtain accreditation from the Ministry of the Internal Affairs. Journalists freelancers who' collaborate with foreign media are persecuted. Media receives warning from Ministry of Information and journalists from KGB.		
The free speech national legal provisions you would recommend to eliminate/introduce	To eliminate "Law on mass media", "Law on State's secrets", "Law on state service in Republic of Belarus" (it restricts State officials from making statements in the media), Decree of the President "On improving the performance of government agencies and other public institutions with the media ". In general the whole system of Belarusian media regulation needs to be reformed.	There should be a provision to make transparent the name of media owners, now we have a dangerous concentration of most TV channels in the same political-oligarch pocket	To eliminate Law on protection of public morality
Cases the state interference in the free speech regulation could be justified	All the justifiable free speech restrictions are prescribed by ICCPR which is signed and ratified by Belarus.	The state should protect human rights, diversity and objective information. This implies: no hate speech, no propaganda, no harmful	No, it can be justified only in the case of war.

		commercials.	
State justification of introducing the free speech restrictions	Need to protect the interests of the State and the society. International legal human rights instruments are deliberately ignored. None of the decisions of the UNHRC has been implemented. The last time the State justified such a position in a way that the UNHRC is too politicized.	No justification	Currently it is martial law which is still in effect in Ukraine.
Access to the effective national remedy in case of journalist's right to free speech is violated	Almost no access. The courts in Belarus are not independent.	They can go to the courts of justice, inform police and prosecutors, CCA, national Council for equality, Press Council. Also journalists can protest in the street, make online or old style petitions, campaigning, etc.	No access
Recommendations on how could it be possible to influence the restrictions State imposes over free speech in the country.	It is impossible to change the media situation in Belarus if the political regime remains the same.	We need stronger media, NGOs, professional trade unions, periodical debates between politicians and public servants regarding media freedom and access to information, more independent economic media.	It is difficult to answer

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Supac, Marina

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