
Freedoms of Belief, Religion and Conscience under the Georgian Constitution¹

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1. Protected Sphere

Freedoms of belief, religion and conscience play a significant role among the rights and freedoms guaranteed by the Georgian Constitution. Several provisions of the Constitution are devoted to these freedoms. Firstly, Article 19 of the Constitution states:

- "1. Everyone has the right to freedom of speech, thought, conscience, religion and belief.
2. The persecution of an individual for his speech, thought, belief or religion is prohibited as is also the compulsion to express opinions about them.
3. These rights may not be restricted unless their manifestation infringes others' rights".

Article 9 of the Constitution provides an important provision under which the State declares the complete freedom of belief and religion and recognises the special significance of the Georgian Orthodox Church in Georgian history and its independence from the State.

In addition the Constitution of Georgia stipulates a non-discrimination provision according to which everyone is equal before the law without distinction on the basis of, *inter alia*, religion, political or other opinions.² Article 26 concerning freedom of association prohibits the establishment and activity of an association that advocates religious hatred.³

The constitutional provisions ensure freedoms of belief, religion and conscience. They include a person's right to freedom to manifest any religion or belief or not manifest any at all, freely choose, hold and impart religious or other (ideological) belief and act in its observance either alone or in community with others. Freedoms of belief, religion and conscience means that a person may not be subject to treatment that to change their way of thinking. Freedoms of belief, religion and conscience mean a person's right to follow or not a religion.

The sphere protected under Article 19 of the Constitution covers a person's inner religious and ideological belief (inner freedom), as well as freedom to manifest a religious and ideological belief (outer freedom). In other words, this Article guarantees a person's

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² Article 14; also Article 38.1 of the Constitution.

³ Para. 3.

right to determine independently his/her own religious and ideological opinions (belief) on the one hand, and publicly manifest and impart them, on the other hand. The latter includes performance of rituals, religious processions, religious teaching, and the observance of religious holidays.

Freedom of belief guarantees both the person's right to have and manifest his/her own religious or ideological belief and the right to refuse them or not manifest own opinion about his/her religious or ideological belief. Article 19.2 of the Georgian Constitution explicitly stipulates this and states that a person's compulsion to express opinions about his/her belief and religion is prohibited.

Although Article 19.1 of the Constitution states that everyone has the right to, *inter alia*, freedoms of conscience, religion and belief, para. 2 of this Article stipulates that no one shall be persecuted for his/her religion or belief (but not conscience) nor be forced to express an opinion about them. Thus, Article 19.2 omits "conscience" from the grounds upon which a person's persecution is prohibited. However, this can be solved through legal interpretation in compliance with the object and purpose of the protected right.

Unlike Article 19.2 of the Constitution concerning prohibition of person's persecution for belief or religion but not for conscience, Article 156 of the Criminal Code includes "conscience" and stipulates a criminal liability for persecution of a person on such a ground. However, the Criminal Code does not stipulate criminal liability for forcing a person to express his/her own opinion about conscience, religion or belief as prescribed by Article 19.2 of the Georgian Constitution.

Article 19 of the Constitution protects belief and religion not only of persons who are followers of traditional religion, but its scope also applies to all religious confessions. Thus, constitutional guarantees cover both traditional and non-traditional religions and their followers are equally protected no matter to which religious confessions they belong.

Freedoms under Article 19 of the Constitution apply to anyone and not only Georgian citizens. So, freedoms of belief, religion and conscience are protected for anyone regardless of his/her citizenship as confirmed by Articles 14 and 38.1 of the Constitution. A person is entitled to exercise freedoms of belief and religion both alone and in community with others. This freedom can be exercised in community with others in the form of, *inter alia*, a legal entity, religious or ideological entity.

The draft-law prepared by the Ministry of Justice of Georgia on Freedom of Conscience and Religious Entities aims to organise the legal status of religious entities.⁴ The draft states that a religious entity shall be a voluntary entity of full age citizens or stateless persons permanently residing on the territory of Georgia, and holding the same religious

⁴ Specific legislative framework already exists with regard to the legal status of religious entities. Pursuant to Article 1509.1.e of the Georgian Civil Code "non-governmental organizations established on the basis of legislation for achievement of public goals (political parties, religious entities etc.) shall be deemed as legal entities of public law under the Civil Code".

beliefs. The entity shall be formed by not less than fifty individuals with the view of common professing and disseminating religion and shall be registered in accordance with the procedure prescribed by law.⁵

Freedoms of belief and religion in community with others can be exercised by religious and ideological preaching and teaching, by performing rituals, etc.⁶

Constitutionally-guaranteed freedoms cover not only religious, but also non-religious beliefs. Apart from religious belief a person may choose, hold and impart ideological belief and act in their observance. Pacifism is an example of ideological belief.⁷

Freedoms of belief, religion and conscience impose both negative and positive obligations upon the State. The state should ensure not only non-interference of state authorities and their representatives in the exercise of constitutionally-guaranteed freedoms, but also restriction of freedoms of belief and religion of followers of one belief by the persons or groups of another one. The Judgment of the European Human Rights Court with regard to freedom of religion (Article 9 of the European Convention on Human Rights) is illustrative in this regard. The European Court of Human Rights in the case *Otto-Preminger Institut v. Austria*) stated that: "Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them".⁸

The right to conscientious objection is a fundamental aspect of freedoms of belief and conscience enshrined in Article 19 of the Georgian Constitution.⁹ The exercise of the right to conscientious objection has been an ongoing concern of the Council of Europe for over

⁵ Article 9.1.

⁶ In this regard the Decision of the Supreme Court of Georgia should be mentioned. It states: "As for the freedom of speech, thought, conscience, religion and belief under Article 19 of the Georgian Constitution, in terms of its contents it is the fundamental human right and can be enjoyed by the members of associations and not by a legal entity". See: Ruling of the Chamber for Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, case No. 3k/599, 22 February 2001.

⁷ See: Report of the European Commission of Human Rights, *Arrowsmith v. the United Kingdom*, 10 October 1978, para. 69.

⁸ 20 September 1994, Series A No. 295-A, para. 47.

⁹ Para. 2, Recommendation 1518 (2001) on "Exercise of the Rights of Conscientious Objections to Military Service in Council of Europe Member States".

thirty years.¹⁰ Most Council of Europe Member States have introduced the right to conscientious objection into their legislation.¹¹

The Committee of Ministers of the Council of Europe in its recommendation adopted in 1987 pointed out that: “anyone liable to conscription for military service who for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligations to perform such service, on the conditions set out. Such persons may be liable to perform alternative service”.¹²

Conscientious objection does not entitle a person to be released from civilian service. A person may be imposed to perform such service as a substitute for military service. Thus, States may substitute civilian service and impose sanctions for those who refuse to perform such service. Like other European States, Georgian legislation recognises the right to conscientious objection.¹³ The legal status of conscientious objectors is regulated by legal and sub-legal acts. A special Law on Non-military Alternative Labour Service regulates the legal relations related to non-military (alternative) form of military service.

The Law defines non-military, alternative labour service as a publicly useful civil service that substitutes military service and is based on compelling reasons to refuse to perform military service on the basis of thought, conscience or religion.¹⁴ Conscription to non-military (alternative) service is made by the State Commission on Non-Military, Alternative Service.¹⁵

A citizen of Georgia subject to military service (i.e. a person from 18 to 27 of age) who refuses to perform military service for the reasons of thought, conscience or religion will be conscripted to non-military (alternative) service.¹⁶ Persons performing non-military (alternative) service will be involved in activities relating to emergency and rescue, ecology, fire-prevention, construction, agriculture, health, municipal service.¹⁷

¹⁰ Para. 1, Recommendation 1518 (2001) on “Exercise of the Rights of Conscientious Objections to Military Service in Council of Europe Member States”.

¹¹ Para. 3, Recommendation 1518 (2001) on “Exercise of the Rights of Conscientious Objections to Military Service in Council of Europe Member States”.

¹² Recommendation No. R(87)8. See also Resolution No. 337 1967(of the Parliamentary Assembly of the Council of Europe and Recommendation 1518 (2001) on “Exercise of the Rights of Conscientious Objections to Military Service in Council of Europe Member States”.

¹³ Law on Non-Military, Alternative Labour Service of Georgia (28 December 1997), The Regulation on Performance of Non-Military, Alternative Labour Service (1 May 2001); The Regulation of the State Commission on Non-Military , Alternative Labour Service (10 December 2001); The Regulation of the Department of Non-Military, Alternative Labour Service of the Ministry of Labour, Healthcare and Social Security adopted by the Minister of Labour, Healthcare and Social Security (2 April 2002).

¹⁴ Article 3.1.

¹⁵ Article 3.1.

¹⁶ Article 3.

¹⁷ Article 5.1.

It is important to note that Georgian legislation does not distinguish between the various categories of conscientious objectors who may be released from military service and perform non-military (alternative) service. An approach taken in some countries that only Jehovah's Witnesses are exempt from military service has not been shared by Georgian legislation. Thus, every citizen of Georgia who refuses to perform military service for the reasons of thought, conscience or religion (and not only Jehovah's Witnesses) will be exempt from military service and perform non-military (alternative) service.

Under the Law the length of non-military (alternative) labour service is 18 months for persons with higher education and 24 months for persons without higher education.¹⁸ It should be noted that under the Law on Military Service and Obligations the term for military service is 12 months for persons with higher education and 24 months for persons without higher education.¹⁹

The Law regulates the rules, procedures and terms for applying for non-military (alternative) service and consideration of applications for exemption from military service.²⁰ A person requesting non-military (alternative) service has the right to attend the session of the Commission that decides the issue and to substantiate his view.²¹ A decision to refuse to perform non-military (alternative) service is made by an order of the minister of Labour, Healthcare and Social Security of Georgia upon conclusion of the State Commission on Non-military (alternative) Service. The decision may be appealed before a court within 10 days. The court is to make a decision on annulment of the order of the Minister or on upholding it within next 10 days.²²

Georgian legislation provides legal sanctions for missing or avoiding non-military, alternative service. The Law provides that the number of days missed in the performance of non-military (alternative) service will be doubled.²³ The Criminal Code of Georgia also provides criminal liability for avoiding the performance of alternative labour service.²⁴

It is worth noting that at present there is no special law that would comprehensively regulate the matters related with protection of freedoms of belief and religion. However, as already mentioned, the Ministry of Justice has prepared a draft-law on Freedom of Conscience and Religious Entities aiming at comprehensive regulation of freedoms of conscience, belief and religion.²⁵ The draft-law aims at safeguarding constitutionally-guaranteed freedoms of conscience, belief and religion and regulates the legal status of religious entities and relations related with their activity.²⁶

¹⁸ Article 6.1.

¹⁹ Article 32.1.

²⁰ There are about 200 applications to the State Commission requesting the granting of non-military (alternative) service.

²¹ Articles 7-10.

²² Article 11.

²³ Article 16.1.

²⁴ Article 356.2.

²⁵ Draft-law on Freedom of Conscience and Religious Entities of Georgia and Explanatory Note, Strasbourg, 27 November 2003, CDL (2003) 90.

²⁶ Article 1.

The draft-law provides key principles that ensure everyone's freedom of thought, conscience and religion. These principles are: equality of citizens regardless of their attitude towards religion, independence of religious entities from the state and equality of religious entities before the law.²⁷

The draft-law provides for fundamental human right to conscience, religion and belief. Article 4 of the draft-law states that "Freedom of conscience, religion and belief shall be safeguarded in Georgia. Each legally capable citizen from the age of 14 shall be free in choice of religion and shall have the right to profess his/her religion either alone or in community with others or not to profess any of the religions, change his/her religion or refuse to profess, manifest freely his/her religion and act in accordance with it."²⁸ Moreover to force an individual to express his/her opinion about his/her attitude towards religion, his/her activities in religious entities shall be impermissible save in the cases prescribed by law.²⁹

The draft envisages that foreign nationals and stateless persons enjoy freedoms of conscience, belief and religion in the same manner as Georgian nationals.³⁰ Any advantage, restriction, persecution or discrimination in any other manner on grounds of religious belief is prohibited.³¹

Criminal legislation of Georgia also regulates the questions concerning freedoms of belief, religion and conscience. The Criminal Code provides for legal guarantees for the protection of freedom of thought, conscience and religion. Article 155 of the Code stipulates that the illegal prevention of performance of worship or other religious rule or custom by way of violence or threat of violence or if it is accompanied by insulting of religious dignity of a believer or clergymen is punishable with a fine or correctional work for one year or deprivation of liberty for two years (para. 1). The same action committed by abuse of an official status is punishable with a fine or deprivation of liberty for 1 to 5 years, deprivation of position or working right for up to three years or without it (para. 2).

Article 156 of the Criminal Code provides for punishment with a fine or confinement of liberty for up to two years or deprivation of liberty for the same period, if a person is persecuted on grounds of thought, speech, conscience, religion, belief or religious activity (Para. 1). Article 156.2 prescribes an even graver punishment if the action under Para. 1 of this Article is committed by abuse of official status.

In addition Article 142 of the Criminal Code stipulates criminal liability for violation of equality of people on grounds of their religious attitude or belief.

²⁷ Article 3.

²⁸ Para. 1.

²⁹ Article 4.4.

³⁰ Article 4.2. see also Article 5.1 of the draft-law.

³¹ Article 5.3.

2. Interference in the Protected Sphere

Article 19 of the Georgian Constitution provides that in certain circumstances a State may interfere in the exercise of freedoms under the conditions prescribed by this Article. Such interference means that a state takes measures prohibiting or restricting a person to exercise constitutionally-safeguarded freedoms.

Article 19.3 of the Constitution in general prohibits restriction of freedoms, but makes an exception with regard to such prohibitions. According to this provision freedoms prescribed by Article 19 may be restricted *if their manifestation infringes others' rights*.

Since the scope of Article 19 of the Constitution covers both inner freedom of person's religious and ideological belief as well as freedom to manifest belief (outer freedom), it is clear that Article 19.3 allows for a restriction of freedom only with regard to manifestation of guaranteed freedom (e.g. performance of rituals, religious processions, religious teaching, conduction of religious or other holidays).

Thus, a restriction on inner freedom is prohibited in any situation. As for outer freedom i.e. manifestation of the freedom under Article 19, the Constitution allows for its restriction. The approach of the Constitution is compatible with the international human rights instruments, including the European Convention on Human Rights.³²

The Constitution of Georgia allows for restriction of freedom guaranteed by Article 19.3 only on one ground – if manifestation of freedom infringes others' rights. The ground for limiting freedom (others' rights) under Article 19 is very restricted compared to international instruments. For instance, Article 9.2 of the European Convention on Human Rights provides several grounds due to which the freedom of belief and religion may be restricted. Namely, under Article 9.2 of the European Convention freedom of belief and religion is subjected to limitations such as the interests of public safety, for the protection of public order, health or morals, together with protection of others' rights and freedoms.

Since Article 19.3 of the Georgian Constitution stipulates only one ground for restriction of the freedom of belief and religion, this freedom may be limited only for the protection of others' rights although European Convention (to which Georgia is a party) provides for other grounds. In terms of Article 19.3 of the Constitution freedoms of belief and religion may not be restricted for any other grounds (e.g. interests of public safety, public order).

Nevertheless, Article 4.3 of the draft-law on Freedom of Conscience and Religious Entities states that "Freedom of conscience, religion and belief shall be subject only to such limitations as are prescribed by the Constitution and law and are necessary for the protec-

³² Article 9 of the European Convention of Human Rights. See also Judgment of the European Court of Human Rights on the case of *Kokkinakis v. Greece*, 25 May 1993, Series A No. 260-A, para. 33.

tion of constitutional structure, public safety and order, equality, life and health and the rights and freedoms and legitimate interests of the citizens of Georgia and other persons".³³

It is obvious that unlike the Georgian Constitution stipulating only one ground (others' rights) for limitation of belief and religion the draft-law provides for several grounds (e.g. constitutional structure, public safety and order). This is incompatible with the Constitution.

Similar problems exist in the draft-law on Freedom of Conscience and Religious Entities concerning a restriction of formation and activities of religious entities. Under Article 9.3 the formation and activities of religious entities shall be subject only to such limitations as are prescribed by law and are necessary in the interests of public safety, for the prevention of disorder or crime, for the protection of health or morals, or the rights and freedoms of others.³⁴

Since Article 19.3 of the Georgian Constitution stipulates only one ground for restriction of the freedom of belief and religion, the provisions of the draft-law prescribing other grounds for limitation of these freedoms, are incompatible with the State's Constitution.

As for the compatibility with Article 19.2 of the Georgian Constitution other provisions of the draft-law also deserve attention. As mentioned the Constitution prohibits a person's compulsion to express his/her opinion about religion or belief. Pursuant to this provision limitation of inner freedom is prohibited. However, Article 4.4 of the draft-law states that "to force an individual to express his/her opinion about his/her attitude towards religion... shall be impermissible save in cases prescribed by law".

It derives from Article 19.3 of the Constitution that only the manifestation of freedom of belief and religion, i.e. outer and not inner freedom, may be limited, the draft-law allows to force someone to declare his/her opinion about attitude towards religion save in cases prescribed by law.³⁵

3. Constitutional-Legal Justification of Interference in the Protected Sphere

As mentioned, Article 19.3 of the Georgian Constitution stipulates that freedoms of belief, religion and conscience may not be restricted unless their manifestation infringes others' rights. However, according to this provision the state is entitled to restrict freedoms of belief, religion and conscience and it should justify any such restriction. The state should

³³ See Draft Law on the Freedom of Conscience and Religious Entities of Georgia and Explanatory Note, Strasbourg, 27 November 2003, CDL (2003) 90.

³⁴ Article 9.1.

³⁵ See Opinion of the Draft Law on Freedom of Conscience and Religious Entities of Georgia, the Venice Commission for Democracy Through Law, 57th Plenary Session, 12-13 December 2003, CDL-AD (2003) 20, N 262/2003, 16 December 2003, para. 10.

compare and weigh up the rights and interests that in a particular situation contradict each other. On the basis of such a comparison, the state should determine which party's rights and interests deserve more protection in a particular situation.

Restriction of freedoms of belief, religion and conscience is justified if manifestation of freedoms infringes others' rights. Pursuant to Article 19.3 of the Constitution, freedom under this article may be restricted only legitimately. It is obvious that if the guaranteed right is restricted more than necessary for the protection of others' rights, such limitation shall be deemed as illegitimate.

Freedom of belief includes a person's right to make any decision in accordance with religious rules and inner belief and act in accordance with them. This question is particularly interesting in terms of medical treatment. In this regard freedom of belief should be interpreted so that a person has the right to decide whether or not to use medical services. Georgian legislation regulates this issue. According to Article 9 of the Law of Georgia on Healthcare, a patient with capacity to act has the right to refuse *any* medical intervention, although the law stipulates an exception in case of implementation of therapeutic, preventive and quarantine measures for citizens bearing high risk of particularly dangerous contagious diseases.³⁶

Article 146 of the Law stipulates that even in a critical situation and/or terminal stage a patient has the right to refuse medical intervention.

The Law keeps a reasonable balance between the parties' rights and interests – between a person's right to act in accordance with his/her religious or unreligious belief, on the one hand, and other persons' interests to have their health protected, on the other hand. Restriction of a person's right to act in accordance with his/her belief should be deemed reasonable only if other persons' health is threatened whereas a person's right will be unreasonably restricted if others' health is not threatened.

³⁶ See also Article 15 of the Law on the Patient's Rights.