
Freedom of Thought, Conscience and Religion under the European Convention on Human Rights and the Georgian Legislation

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1. Introduction

The right to freedom of thought, conscience and religion has become one of the topical issues which has brought about public debate in recent years in Georgia. On the one hand, it is said that the right to freedom of religion is not duly protected due to the lack of a relevant legal framework. On the other hand, it is pointed out that the Georgian legislation provides sufficiently effective legal framework, but there are flaws in practical implementation of the legislation.

The purpose of the present article is to discuss the Georgian legislation governing the right to freedom of religion in terms of its compliance with the standards of the European Convention on Human Rights. It will examine whether the existing legal framework provides appropriate guarantees in protecting the right to freedom of religion and whether further improvement is necessary to bring the Georgian legislation and practice in line with the European Convention on Human Rights and the case-law of the European Court of Human Rights.

2. The European Convention and its Interpretation

The starting point of analysis of the standards set under the European Convention on Human Rights is Article 9 of the Convention which reads as follows:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance;

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.

The right to freedom of thought, conscience and religion belongs to fundamental human rights without which a democratic state under the rule of law may not exist. Article 9 of the European Convention consists of two paragraphs. Paragraph 1 guarantees the right to freedom of thought, conscience and religion. Paragraph 2 provides certain limitations to this right. These limitations must be prescribed by law, necessary in a democratic society and they may be imposed only to achieve one of the legitimate aims (the interests of public

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safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others).¹ This paragraph strikes a balance between the right of a person to freedom of thought, conscience and religion and the interests of society in cases when they come into conflict.

The Convention guarantees the right to freedom of thought, conscience and religion without qualification. The only possible restriction to this right relates to its external expression.² Paragraph 2 of Article 9 only allows restrictions with regard to the manifestation of religion and other beliefs. In the case of *Kokkinakis v. Greece* the European Court held:

“The fundamental nature of the rights guaranteed in Article 9, para. 1 is also reflected in the wording of the paragraph providing limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11 which cover all the rights mentioned in the first paragraphs of those Articles, that of Article 9 refers only to “freedom to manifest one’s religion or belief”. In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.”³

Thus, the power of the State to interfere under Article 9(2) with the exercise of Article 9(1) right is confined to manifestations of religion or belief. Therefore, the right to freedom of thought, conscience and religion, including freedom to change or abandon one’s religion or belief may not be restricted by the State.

It is significant to note that unlike similarly structured Articles 8, 10 and 11 of the Convention, Article 9 is the only one that does not permit the state to invoke “national security” in order to justify limitations to the protected right.

The right to freedom of thought, conscience and religion means that a person cannot be subjected to treatment intended to change his way of thinking. It means that a person has the right not only to reveal his religion or conviction, but also to abstain from disclosing it. The right to freedom of thought, conscience or religion entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.⁴

One of the most important cases under Article 9 is the case of *Kokkinakis v. Greece*.⁵ In this case, Mr. Kokkinakis and his wife who were Jehovah’s Witnesses called at the home of Mrs. Kyriakaki, an Orthodox Christian and engaged in a discussion with her. Mrs. Kyriakaki’s husband called the police who arrested Mr. and Mrs. Kokkinakis. Both were charged with the offence of proselytism under Greek Law 1363/1938. This states that: “Anyone engaging in proselytism shall be liable to imprisonment and a fine ... By proselytism is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a

¹ *Wingrove v. the United Kingdom*, 25 November 1996, 24 EHRR 1, 1996-V, para. 53.

² *P. van Dijk & G.J.H. van Hoof*, Theory and Practice of the European Convention on Human Rights, 1998, 541.

³ 25 May 1993, Series A no. 260-A, para. 33.

⁴ *Buscarini v. San Marino*, 18 February 1999, 30 EHRR 208, para. 34.

⁵ 25 May 1993, Series A no. 260-A.

person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety”.

Mr. and Mrs. Kokkinakis were fined and sentenced to imprisonment. On their appeal, Mrs. Kokkinakis was acquitted, but her husband’s conviction was maintained. In this case, the European Court held: “a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others”.⁶

As the national court had not specified in what way the applicant had used improper means during his discussion on religious belief, it failed to establish a pressing social need demanding the conviction of Mr. Kokkinakis. In the opinion of the European Court, it was therefore not proportionate to the legitimate aim pursued.⁷

The European Court took a similar approach in the case of *Larissis and Others v. Greece* by distinguishing legal and illegal proselytism.⁸ It noted that: “Article 9 does not ... protect every act motivated or inspired by a religion or belief. It does not, for example, protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church”.⁹

In the case of *Manoussakis and Others v. Greece*, the European Court dealt with the conviction of Jehovah’s Witnesses for having set up and operated a place of worship without the authorisation of the Minister of Education and Religious Affairs.¹⁰ The Court held that the right to freedom of religion excluded any discretion on the part of the State to determine whether religious beliefs or means used to express such beliefs are legitimate. The Court concluded that although the States are entitled to verify whether a movement or association carries on activities which are harmful to the population,¹¹ it made clear that the right to freedom of religion “excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.¹²

⁶ Para. 48.

⁷ Para. 49.

⁸ 24 February 1998, 1998-1, 362.

⁹ Para. 45.

¹⁰ 26 September 1996.

¹¹ Para. 40.

¹² Para. 47.

Article 9 of the Convention protects not only religious, but also non-religious beliefs. Pacifism has been recognised as a belief falling within the protection of Article 9. In the case of *Arrowsmith v. the United Kingdom* the European Commission of Human Rights pointed out that: "...pacifism as a philosophy ...falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief ('conviction') protected by Article 9(1)".¹³

The freedom to manifest religion or belief is not an exclusively individual right. It may be exercised collectively as recognised in Article 9 through the words "in community with others".

Article 9 of the European Convention places upon States not only negative, but also positive obligations to ensure protection of the right to freedom of thought, conscience and religion. The state has an obligation to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of religious beliefs. In the case of *Otto-Preminger-Institut v. Austria* the European Court held: "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 (art. 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".¹⁴

The right to conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the European Convention on Human Rights.¹⁵ The exercise of the right to conscientious objection to military service has been an ongoing concern of the Council of Europe for over thirty years.¹⁶ Most Council of Europe member States have introduced the right to conscientious objection into their constitutions or legislation.¹⁷

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 hereafter. Such persons may be liable to perform alternative service".¹⁸

¹³ Report of the Commission, 10 October 1978, para. 69. Before the reform of the European Convention's supervisory system (1998) the admissibility of the application was examined by the European Commission of Human Rights.

¹⁴ 20 September 1994, Series A no. 295-A, para. 47.

¹⁵ Para. 2, Recommendation 1518 (2001) on "Exercise of the Rights of Consciences Objections to Military Service in Council Europe Member States".

¹⁶ Para. 1, Recommendation 1518 (2001) on "Exercise of the Rights of Consciences Objections to Military Service in Council Europe Member States".

¹⁷ Para. 3, Recommendation 1518 (2001) on "Exercise of the Rights of Consciences Objections to Military Service in Council Europe Member States".

¹⁸ 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 Consciences Objections to Military Service in Council Europe Member States".

The European Commission of Human Rights has taken the view that the Convention does not place an obligation on the States to exempt conscientious objections from compulsory military service. In this regard the European Commission referred to the words of Article 4(3)(b): "conscientious objectors in countries where they are recognised". The European Commission has found no violation of Article 9 in a case in which Switzerland imposed a criminal sentence on a man who refused military service.¹⁹

However, objections of conscience do not entitle a person to exemption from civilian service. This may be imposed on conscientious objectors as a substitute for military service. Thus, States may substitute civilian service and impose sanctions for those who refuse to perform such service.

The difference in duration between military and substitute service is sometimes challenged. It is argued that a longer period for substitute service compared with military service is unjustified.²⁰ However, the European Commission of Human Rights has not been supportive of such a view. Even service twice as long as military service was not regarded by the Commission as a violation of the Convention.²¹

3. Georgian Legislation

3.1 The Right to Freedom of Thought, Conscience and Religion

A number of provisions of the Constitution of Georgia govern the right to freedom of thought, conscience and religion. Article 19 of the Constitution provides:

1. Every person has the right to freedom of speech, thought, conscience, religion and belief.
2. The persecution of a person for his speech, thought, religion or belief is prohibited as is compulsion to express opinions about them.
3. The freedoms provided for in this Article may not be restricted unless the exercise of these rights infringes on the rights of others".

Apart from this, an important provision has been laid down in Article 9 of the Constitution that reads as follows:

1. The State declares complete freedom of belief and religion. At the same time, it recognises the special role of the Georgian Apostolic Autocephalous Orthodox Church in the history of Georgia and its independence from the State.

2. Relations between the Georgian State and the Georgian Apostolic Autocephalous Orthodox Church are determined by constitutional agreement. The constitutional agreement must fully comply with the universally recognised principles and norms of international law, namely, in the field of human rights and fundamental freedoms".²²

¹⁹ N7705/76, 5 June 1977.

²⁰ Concluding Observations of the Human Rights Committee on the Second Report of Georgia under the ICCPR, 19 May 2002, para. 18.

²¹ *Autio v. Finland*, 6 December 1991, N17086/90.

²² It should be pointed out that Article 9 of the Constitution of Georgia has been amended on 30 March 2001. The previous version of Article 9 read as follows: "The state recognises the special role of the Georgian Orthodox Church in the Georgian history and simultaneously declares complete freedom of belief and religion and the independence of the church from the state".

The Constitution lays down a general non-discrimination clause under which everyone is equal before the law regardless of, *inter alia*, religion, political and other beliefs.²³

In addition, Article 26 of the Constitution which deals with the freedom of association prohibits the creation and operation of entities whose goal is, *inter alia*, to induce religious strife.²⁴ A decision to suspend or prohibit the activities of such entities may be made only by a decision of a court.²⁵

The Constitution of Georgia determines the rights of persons that may be restricted in time of war or other public emergency. Although Article 15 of the European Convention allows the restriction of the rights to freedom of thought, conscience and religion in time of war or other public emergency, Article 46 of the Constitution does not permit restriction of this right even in time of war or other public emergency. Thus, the Constitution of Georgia offers a higher standard of protection of this right than the European Convention.

The Constitutional Agreement between the Georgian State and the Georgian Apostolic Autocephalous Orthodox Church was signed on 14 October 2002.²⁶ The Constitutional Agreement determines the status of the Orthodox Church in Georgia.

It has been argued that by conclusion of the Constitutional Agreement the Orthodox religion has been given certain privileges compared to other religions and therefore, it has been treated differently from other religions. For example, Article 4 of the Constitutional Agreement provides that ecclesiastics are free from military conscription. Based on Article 14 of the European Convention which prohibits discrimination, if the ecclesiastics of the Georgian Orthodox Church are exempt from military conscription then similar exemptions should apply to ecclesiastics of other religions.²⁷ However, the Law on Military Service and Obligations provides that conscription to military service will be postponed for ecclesiastics.²⁸ The Law does not specify that this apply only to ecclesiastics of the Georgian Orthodox Church. This may suggest that it is applicable to ecclesiastics of all religions. Thus, although under the Constitutional Agreement the ecclesiastics of the Georgian Orthodox Church are free from military conscription, under the Law military conscription is only postponed.

There are other examples of different treatment for the Georgian Orthodox Church and other religions in the Constitutional Agreement. Article 3 of the Constitutional Agreement provides that "the State recognises marriages performed by the Church under the rules determined by the legislation...." If the State gives status to marriages performed by the

²³ Article 14. See also Article 38(1) of the Constitution.

²⁴ Para. 3.

²⁵ Para. 6, Article 26.

²⁶ The Agreement was approved by the Parliament of Georgia on 22 December 2002. See also *Tsatsanashvili, State and Religion*, Tbilisi, 2001, 67-80.

²⁷ See also Protocol 12 to the European Convention ratified by Georgia, but not yet entered into force. Article 1(1) of Protocol 12 states that "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as... religion...".

²⁸ Article 30(1)(l).

Georgian Orthodox Church, under Article 14 of the Convention it should treat marriages conducted under other religions in an identical way.

Article 6 of the Constitutional Agreement regulates property issues. The property of the Georgian Orthodox Church, which is not used for economic activities, and land are exempted from taxes (para. 5). In accordance with the requirement of Article 14 of the European Convention, privileges granted to the Georgian Orthodox Church should also be extended to other religions.²⁹

It is clear from the Convention and the case-law of Strasbourg institutions that all religions, traditional or not, are to be treated in an identical way.

At the level of ordinary legislation, at present there is no special law that comprehensively governs the rights protected under Article 9 of the Convention. However, a draft law on the freedom of conscience and religious entities which aims at regulating comprehensively the freedom of conscience, religion and belief has been prepared by the Ministry of Justice of Georgia. The draft aims at regulating the protection of the right to freedom of conscience, religion and belief recognised by the Constitution and determines the legal status of religious entities and legal relations linked to it.³⁰

The draft law lays down basic principles to be guaranteed to everyone in enjoying the right to freedom of conscience, religion and belief. These are equality of all citizens despite their religion, independence of religious entities from the state and the equality of religious entities before the law.³¹

The draft law determines the fundamental right of a person with respect to the freedom of conscience, religion and belief. Article 4 of the draft law stipulates that: "freedom of conscience, religion and belief is guaranteed in Georgia. Everyone who has reached the age of 14 is free to choose his religious belief, has the right alone or in community with others to recognise any religion or not to recognise any religion, change his religious belief or refuse religious belief, freely express his religious belief and act in accordance with it".³² At the same time, it is prohibited to force somebody to express his opinion on religion and on his participation in religious entities, except as prescribed by law.³³

The draft provides that foreign citizens, persons without citizenship and citizens of Georgia enjoy equal rights to freedom of conscience, religion and belief.³⁴ Granting advantage, restriction of rights, persecution or application of other form of discrimination is

²⁹ It is also argued that the different treatment is provided in the other articles of the Constitutional Agreement, in particular Articles 2, 4(2) and 5(2). R. Lawson, Legal Expertise of the Draft Constitutional Agreement Between the State of Georgia and the Autonomous Apostolic Orthodox Church of Georgia, HRCAD(2001)3, 28 May 2001 [Since the legal expertise was made to the *draft* Constitutional Agreement the references to the various articles differ from the final version of the Agreement. However, the expert's opinions on the essence of the articles remain valid].

³⁰ Article 1.

³¹ Article 3.

³² Para. 1.

³³ Para. 4, Article 4.

³⁴ Para. 2, Article 4. See also Article 5(1) of the draft law.

prohibited on the basis of a person's religious belief.³⁵ It also lays down the conditions for restricting the right to freedom of conscience, religion and belief. Paragraph 3 of Article 4 states that: "freedom of conscience, religion and belief shall be subject only to such restrictions which are prescribed by the Constitution and the law and are necessary in the interests of State defence, the constitutional system, public safety and order, for the protection of equality, life and health of citizens and other persons, as well as for the protection of their rights, freedoms and legitimate interests".

The draft law also regulates the status of religious entities. Such entities are independent from the state and the latter may not interfere in the activities of religious entities unless their activities do not meet the requirements of the legislation.³⁶ The draft provides positive obligations for the State in promoting religious and ideological tolerance among persons of different beliefs and among religious entities, protects the rights and interests of such entities, and establishes tax and other advantages, etc.³⁷

Under the draft law a religious entity (organisation) is a voluntary union of the same religion of citizens of Georgia and permanent residents in the territory of Georgia of full age established by not less than 50 persons for the purpose of dissemination of their religion and conscience and is registered under the rules of this law.³⁸

The draft also regulates the conditions for prohibition of creation and operation of religious entities. Under para. 3 of Article 9 creation and operation of the religious entities may not be restricted, unless prescribed by law and necessary in the interests of national security or public safety, for the prevention of violation of public order or of commission of a crime, for the protection of health, morals or the rights and freedoms of others.³⁹

Under Article 9(4) of the draft, a registered religious entity is a legal person of public law. Such a registration is performed by the Ministry of Justice of Georgia under the procedure prescribed by law.⁴⁰

The draft sets forth the list of data (information) and materials to be enclosed in the application for registration submitted to the Ministry of Justice. The application is considered within a month from the moment of submission of the complete application. However, the draft law provides that the Ministry may extend the length of consideration up to three months in order to make a state religious assessment.⁴¹ If no decision is made within that time, a religious entity is deemed registered.

The draft also regulates the basis for a refusal of registration. Such an entity may be refused registration if, *inter alia*, applicants do not submit data (information) and materi-

³⁵ Para. 3, Article 5.

³⁶ Paras. 1 and 3, Article 6.

³⁷ Para. 4, Article 6.

³⁸ Para. 1, Article 9.

³⁹ Para. 3, Article 9.

⁴⁰ Article 11.

⁴¹ Para. 5, Article 11.

als required by law, its purpose and activity contradict the Constitution or other legislative acts or if as a result of a State religious assessment it has been established that the entity is not religious.⁴²

In case of the refusal of registration the applicant shall be forwarded a motivated notification in written form within a month from the moment of application. The refusal to registration of religious entity may be appealed to a court.⁴³

The draft law also provides for the termination of the operation of religious entities by an order of a court. These cases are, *inter alia*, as follows:

- a) grave or systematic breach of state security and public order;
- b) inducement to religious strife;
- c) violation of the rights and freedoms of persons;
- d) injury to the health of an individual in connection with religious activities committed by debauched or other illegal actions, under narcotic or psychotropic means or in a state of hypnotism;
- e) calling for suicide or on the basis of religion the refusal of medical assistance to a person in a state of danger for his/her life and health;
- f) improper proselytism.⁴⁴

The explanatory memorandum attached to the draft law states that the adoption of the law brings about amendments and modifications in the legislation of Georgia, including criminal legislation. The memorandum provides that the Criminal Code of Georgia will be amended in three articles, including on improper proselytism.

The Criminal Code provides legal guarantees for the protection of the right to freedom of thought, conscience and religion. Article 155 of the Code stipulates the penalties in the form of a fine, correctional labour for a period up to a year or deprivation of liberty for a period up to two years for unlawfully disturbing religious services or the performance of any other religious rites by violence or the threat thereof, or for insulting the religious feelings of believers or ministers of religion (para. 1). The same action performed in an official capacity is criminally punishable by a fine or deprivation of liberty for a period up to 5 years, with or without the dismissal from an official position or the deprivation of the right to such activity for up to three years (para. 2).

Article 156 of the Criminal Code sets forth penalties in the form of a fine, restriction of freedom for a period up to two years or deprivation of liberty for the same period for persecution on the grounds of, *inter alia*, speech, thought, conscience, religion, belief or religious activity (para. 1). Para. 2, Article 156 provides a heavier criminal sanction if the action referred to in para. 1 is performed in an official capacity.

⁴² Para. 1, Article 13.

⁴³ Para. 3, Article 13.

⁴⁴ Para. 2, Article 15. Although the draft law does not expressly define "improper proselitism", it may be assumed that its definition is given in Article 4, para. 7 which states: "it is prohibited to offer material or social advantages on the condition of entry into any confession or to make an influence of psycho-ideological nature on a person for the purpose of changing conscience without his clearly expressed consent given in advance."

In addition, Article 142 of the Criminal Code stipulates the criminal responsibility for violation of the equality of individuals on the basis of religion or religious belief.

It is clear from the wording of the provisions of the Criminal Code that they apply not only to state authorities, but also to third parties whose action may also interfere in the right to freedom of thought, conscience and religion.

A number of conclusions may be drawn on the basis of the analysis of Georgian legislation from the point of view of its compatibility with the standards of the Convention. The provisions of the Constitution guaranteeing the right to freedom of thought, conscience and religion are mainly in compliance with the standards of the European Convention.

As already pointed out, although Article 9 of the Convention guarantees the right to freedom of thought, conscience and religion, it allows restrictions of this right only with regard to the *manifestation* of one's religion and belief i.e. its external expression.⁴⁵ However, unlike Article 9 of the Convention, Article 19(3) of the Constitution does not specify that only the manifestation of one's religion and belief may be restricted, but it takes a general approach making it possible to restrict the right to freedom of thought, conscience and religion.

Another problem that may possibly arise relates to para. 2 of Article 19 of the Constitution. Although under para. 1 of Article 19 of the Constitution every person has the right to freedom of speech, thought, conscience, religion and belief, para. 2 of the same Article only provides that the persecution of a person for his speech, thought, religion or belief (but not conscience) is prohibited as is compulsion to express opinions about them. Thus, para. 2 of Article 19 leaves out 'conscience' as a ground for which the persecution is prohibited. However, this problem may be solved by legal interpretation in compliance with the object and purpose of the right concerned.

In general, it may be noted that the Constitution provides higher legal standards for the protection of the right to freedom of thought, conscience and religion than the European Convention. Firstly, unlike Article 15 of the European Convention that allows a restriction of the rights to freedom of thought, conscience and religion in time of war or other public emergency, Article 46 of the Constitution prohibits such a restriction.

Secondly, Article 19(3) of the Constitution lays down only one legitimate aim (the rights of others) for which the right to freedom of thought, conscience and religion may be restricted, while Article 9 of the Convention states a much more extensive list.⁴⁶

The conclusion of the Constitutional Agreement with the Georgian Orthodox Church in itself should not be considered as discrimination against other religions. As rightly pointed out by the Constitutional Court of Georgia in the case of *Zurab Aroshvili v. the Parliament of Georgia*: "...conclusion of the Constitutional Agreement only with the Georgian Apostolic Autocephalous

⁴⁵ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A, para. 33.

⁴⁶ Interests of public safety, the protection of public order, health or morals, the protection of the rights and freedoms of others.

Orthodox Church does not exclude the existence of various religious organisations in Georgia and in no way does it mean the restriction of their activities and moreover, their prohibition ...”⁴⁷

The conclusion of this Agreement with the Georgian Orthodox Church that played a special role in the country’s history may be justified from the historical point of view. However, the Agreement which gives certain privileges to the Georgian Orthodox Church will only meet the standards of the European Convention if the other religions are not treated in a discriminatory way. Other religions should have similar privileges. Such privileges may be reflected in the draft law prepared by the Ministry of Justice. If under the law the State gives the same privileges to other religions as those given to the Georgian Orthodox Church under the Constitutional Agreement, identical (non-discriminatory) treatment of Georgian Orthodox Church and other religions will be duly secured.

Therefore, it may be concluded that based on the principle of non-discrimination the other religions should be given the same privileges as those provided to the Georgian Orthodox Church under the Constitutional Agreement.

The adoption of the draft law on the freedom of conscience and religious entities should be accelerated in order to set forth the legal framework for the comprehensive regulation of the right to freedom of conscience, religion and belief in Georgia.⁴⁸ The majority of the provisions of the draft reflect the provisions of the European Convention offering adequate legal guarantees for enjoying the right concerned on a non-discriminatory basis.

However, there are several inconsistencies between the draft law and the Convention. The draft law provides for certain restrictions in the exercise of the right to freedom of thought, conscience and religion. Unlike Article 9(2) of the Convention which permits the restriction of the right only with regard to the manifestation of one’s religion or beliefs, Article 4(3) of the draft law takes a more general approach by allowing restriction of the right to freedom of thought, conscience and religion and not only their manifestation.

Article 4(3) of the draft law also provides for the much more extensive legitimate aims for which the right to freedom of thought, conscience and religion may be restricted. No legitimate aim such as interests of ‘state defence’ and ‘constitutional system’ are contained in Article 9(2) of the Convention. Thus, Article 4(3) of the draft law contradicts Article 9(2) of the Convention. It should also be noted that such an extensive list of legitimate aims also contradicts Article 19(3) of the Constitution that only refers to the rights of others as the only legitimate aim for which the right to freedom of thought, conscience and religion may be restricted.

The draft law prescribes the rules and procedures for registration of religious entities and for refusal of registration. Among other reasons the draft law provides that the religious entities may be refused registration if “as a result of a State religious assessment it has been established that the entity is not religious” (para. 1, Article 13). This provision is

⁴⁷ Decision of 22 November 2002, N2/18/206.

⁴⁸ Second Periodic Report of Georgia Under ICCPR, CCPR/C/GEO/2002/2, 27 February 2001, para. 440.

arguably in contradiction to Article 9 of the Convention. In the case of *Manoussakis and Others v. Greece*, the European Court made it clear that although the States are entitled to verify whether a movement or association carries on activities that are harmful to the population, the right to freedom of religion “excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.⁴⁹

With regard to the criminal legislation it is important to note that unlike para. 2 of Article 19 of the Constitution that prohibits the persecution of a person for his ‘speech’, ‘thought’, ‘religion’ or ‘belief’, but not for ‘conscience’, Article 156 of the Criminal Code also covers ‘conscience’ and lays down criminal sanction. However, the Criminal Code does not lay down criminal sanctions for the compulsion to express opinions about his speech, thought, conscience, religion or belief as provided in Article 19(2) of the Constitution of Georgia.

3.2 Conscientious Objectors

The legislation of Georgia recognises conscientious objectors to military service. The legal status of conscientious objectors is governed by laws and sub-laws.⁵⁰ The special Law on Non-military, Alternative Labour Service of Georgia regulates legal relations relating to non-military (alternative) form of military service.

The Law defines non-military, alternative labour service as 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.⁵¹ Conscripted to non-military (alternative) service is made by the State Commission on Non-Military, Alternative Service.⁵²

A citizen of Georgia subject to military service (i.e. a person between 18 and 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.⁵³ Persons performing their non-military (alternative) service will be involved in activities relating to emergency and rescue, ecology, fire-prevention, construction, agriculture, health, municipal service.⁵⁴

⁴⁹ Para. 47.

⁵⁰ 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 (1 May 2001); The Decree of the President of Georgia on the Composition 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, Health and Social Protection adopted by the Minister of Labour, Health and Social Protection (2 April 2002).

⁵¹ Para. 1, Article 3.

⁵² Para. 3, Article 3.

⁵³ Article 4.

⁵⁴ Para. 1, Article 5.

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) service is 18 months for persons with higher education and 24 months for persons without higher education.⁵⁵ It should be noted here 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.⁵⁶

The Law regulates in detail the rules, procedures and terms for applying for non-military (alternative) service and consideration of applications for exemption from military service.⁵⁷ 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.⁵⁸ A decision to refuse to perform non-military (alternative) service is made by an order of the Minister of Labour, Health and Social Protection of Georgia upon the 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 leaving it in force within next 10 days.⁵⁹

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.⁶⁰ The Criminal Code of Georgia also provides criminal liability for avoiding the performance of alternative labour service.⁶¹

It may be concluded that Georgian legislation governing the status of conscientious objectors fully meets the standards established by Article 9 of the European Convention and the case-law of the Strasbourg institutions.

Although the legislation of Georgia regulating the status of conscientious objectors is in line with the Convention standards, it has been established that there are practical obstacles in implementing the legislation concerned (non-appearance of conscientious objectors before the relevant authorities, insufficient labour positions, etc). It may only be underlined here that the State is under an obligation not only to set adequate legal standards, but also to secure the protection of the rights concerned in practice.

⁵⁵ Para. 1, Article 6.

⁵⁶ Para. 1, Article 32.

⁵⁷ There are about two hundred applications to the State Commission requesting the granting of non-military (alternative) service.

⁵⁸ Articles 7-10.

⁵⁹ Article 11.

⁶⁰ Para. 1, Article 16.

⁶¹ Para. 2, Article 356.

4. The Practice

Georgia is a country with centuries-old traditions of respect for freedom of religion and religious tolerance. Anti-semitism, religious strife or religious hatred have never been known in Georgia. The old part of Tbilisi where Georgian, Armenian, Russian and Catholic churches as well as a synagogue, and mosque are in close proximity, is a good example of the tradition of religious tolerance. Along with the Georgian Orthodox religion which has played a special role in the history of Georgia, traditional religions such as Islam, Judaism, Catholicism and Gregorianism were respected.⁶²

However, by the time of the restoration of Georgian independence, a number of non-traditional religious organisations started to operate in the country. Their activities provoked different reactions among the public. This frequently caused physical and moral confrontation among various groups. It may be assumed that the lack of an effective legal framework which should have adequately regulated the right to freedom of thought, conscience and religion has contributed to such developments. Activities of such religious organisations and/or their members have become the subject of judicial consideration in a number of cases and caused deep concern of international and national organisations, including human rights organisations and the general public.⁶³ Such concerns relate to the increase in the number of acts of religious intolerance and harassment of religious minorities, particularly Jehovah's Witnesses.⁶⁴ The European Commission Against Racism and Intolerance of the Council of Europe pointed out in this regard that:

"ECRI is deeply concerned at widespread reports of repeated manifestations of violence and harassment against members of minority religions in Georgia. ...Violent attacks and harassment of members of minority religions are mostly carried out by extremist elements of the Georgian Orthodox community. However, ECRI is seriously concerned not only by the presence of these extremist elements in Georgian society and their activities, but also by the inadequate response of the public authorities to such activities and by the widespread societal tolerance apparently afforded to these extremist elements. ...[D]espite numerous reports of illegal behaviour committed by the

⁶² Second Periodic Report of Georgia Under ICCPR, CCPR/C/GEO/2002/2, 27 February 2001, paras. 437 and 438.

⁶³ Among others, see the Decision of the Supreme Court of Georgia, 24 March 2000, N3k/413; the Decision of the Supreme Court of Georgia, 22 February 2001, N3k/599; the Decision of the Supreme Court of Georgia, 11 October 2001, N79; the Decision of Marneuli District Court, 13 May 2002, N3/9-2002. Two complaints have been lodged before the European Court of Human Rights (*Gldani Congregation of Jehovah's Witnesses v. Georgia*, application number 71156/01 and *Union of Jehovah's Witnesses, The Watchtower Bible, Tract Society of Pennsylvania in Georgia v. Georgia*, application number 72874/01) which were subsequently merged.

⁶⁴ Among others, see Resolution 1257(2001) on "Honouring of Obligations and Commitments by Georgia" of the Parliamentary Assembly of the Council of Europe, paras. 11(iii) and 12; Concluding Observations of the Human Rights Committee on the Second Report of Georgia under the ICCPR, 19 May 2002, para. 17; the reports of the Public Defender of Georgia for, *inter alia*, the periods covered: January-November 2000, 20, 35-39; January-June 2001, 34-42; July-August 2001, 37-43; Monthly Bulletin of the non-governmental organisation "Human Rights in Georgia", January, 2003, N1(47), 3; Country Reports on Human Rights Practices (2002): Georgia, released by the Bureau of Democracy, Human Rights and Labour of the US Department of State, 31 March 2003, Section 2, para. c.

extremist elements of the Georgian Orthodox community, very few prosecutions have so far been carried out with success".⁶⁵

It is clear that the state authorities are well aware of the situation. Certain measures have been taken to improve the situation with regard to protection of the right to freedom of thought, conscience and religion. Amongst the measures aimed at guaranteeing the right to freedom of thought, conscience and religion is the adoption of a decree by the Parliament of Georgia on religious extremism (30 March 2001). It calls for the guarantee of the right to freedom of thought, conscience and religion and condemns persecution of persons for their religion. It also calls upon the law enforcement bodies to protect human rights and prevent any manifestation of religious extremism and instructed the legal and human rights protection committees of the Parliament to prepare legislative proposals for legal regulation of activities of various religious confessions.

More recently, on 4 March 2003 the President of Georgia adopted a decree on the Approval of the Plan of Action for Strengthening Human Rights and Freedoms of Various Groups of Population for the years of 2003-2005. The Plan of Action provides that complex measures shall be taken to fight religious extremism and intolerance (para. 4). Such measures include elimination of religious extremism and promotion of culture of tolerance, propaganda of religious tolerance by mass media, condemnation of any manifestation of religious discrimination. The Plan of Action also stipulates the need for adoption of the law on religious entities.

As evidenced from the above the authorities have taken certain measures to protect the right to freedom of thought, conscience and religion. However, it is clear that measures that are more effective have to be taken to provide adequate protection of the right to freedom of thought, conscience and religion in Georgia.

There is no doubt that the States which are parties of the European Convention have not only a negative obligation not to interfere in the rights protected under the Convention, but also positive obligation to take measures to ensure that the right to freedom of thought, conscience and religion are not violated by the third parties. The Georgian authorities should conduct proper investigation of cases of harassment against religious minorities and prosecute those responsible for such offences.

5. Conclusion

A number of conclusions may be drawn from the analysis of Georgian legislation with regard to its compliance with the standards of the European Convention on Human Rights. Georgian legislation mainly meets the legal standards of the European Convention on the protection of the right to freedom of thought, conscience and religion. However, several inconsistencies between the standards of Georgian legislation and of the Convention have been identified:

⁶⁵ See paras. 49-51 of the first report on Georgia, CRI(2002)2, adopted on 22 June 2001 and made public on 23 April 2002.

a) In general, the standards provided for in the Constitution meet those of the European Convention. The Constitution even provides higher legal standards than the European Convention by prohibiting the restriction of the rights concerned in time of war or other public emergency. Apart from that Article 19(3) of the Constitution stipulates only one legitimate aim (the rights of others) for which the right to freedom of thought, conscience and religion may be restricted, while Article 9 of the Convention lays down much more extensive list.⁶⁶ Yet, two problems have been discovered with regard to the Constitution.

Firstly, unlike Article 9 of the Convention, Article 19(3) of the Constitution does not specify that only the manifestation of one's religion and belief may be restricted, but takes a general approach making it possible to restrict the right to freedom of thought, conscience and religion.

Secondly, although under para. 1 of Article 19 of the Constitution every person has the right to freedom of speech, thought, conscience, religion and belief, para. 2 of the same Article only provides that the persecution of a person for his speech, thought, religion or belief (but not conscience) is prohibited as is the compulsion to express opinions about them. Thus, para. 2 of Article 19 leaves out 'conscience' for which the persecution will be prohibited;

b) The conclusion of the Constitutional Agreement with the Georgian Orthodox Church in itself should not be understood as discrimination of other religions. The conclusion of such Agreement with the Georgian Orthodox Church which played the special role in the history of Georgia may be justified from a historical point of view. However, the Agreement which gives certain privileges to the Georgian Orthodox Church will meet the standards of the European Convention only if other religions are not discriminated. Other religions should be given similar privileges. If under the law on the freedom of conscience and religious entities the State gives the same privileges to other religions as those given to the Georgian Orthodox Church under the Constitutional Agreement, identical (non-discriminatory) treatment of Georgian Orthodox Church and other religion will be duly secured;

c) As regard the draft law on the freedom of conscience and religious entities its adoption should be accelerated in order to set forth the legal framework for comprehensive regulations of the right to freedom of conscience, religion and belief in Georgia. The majority of the provisions of the draft law duly reflect the provisions of the European Convention offering adequate legal guarantees to enjoy the right concerned on a non-discriminative basis. However, there are several inconsistencies.

Unlike Article 9(2) of the Convention which permits a restriction of rights only with regard to the manifestation of one's religion or beliefs, Article 4(3) takes a more general approach by allowing a restriction of the right to freedom of thought, conscience and religion and not only their manifestation.

⁶⁶ Interests of public safety, the protection of public order, health or morals, the protection of the rights and freedoms of others.

Apart from that, Article 4(3) of the draft law provides more extensive legitimate aims for which the right to freedom of thought, conscience and religion may be restricted. No legitimate aim such as the interests of 'state defence' and 'constitutional system' are contained in Article 9(2) of the Convention. Thus, Article 4(3) of the draft law contradicts Article 9(2) of the Convention. In a similar vein, unlike Article 9(2) of the Convention, Article 9(3) of the draft law provides for more extensive legitimate aims for the restriction of the right concerned.

The provision of the draft law that religious entities may be refused registration if "as a result of a State religious assessment it has been established that the entity is not religious" (para. 1, Article 13) is in contradiction with the case-law of the European Court;

d) As regards conscientious objectors, although the legislation of Georgia governing the status of conscientious objectors are in line with Convention standards, the State should take effective measures to eliminate practical obstacles in securing the protection of the rights concerned;

e) Despite a long tradition of religious tolerance, it is clear that at present the practice of protection of thought, conscience and religion is not satisfactory. Although the State authorities take certain measures to protect the right to freedom of thought, conscience and religion, measures that are far more effective need to be taken to provide adequate protection of the right concerned. Such measures should include the proper investigation of cases of harassment against religious minorities and the prosecution of those responsible for such offences.