

Irina Batiashvili*

Article 16 of the Constitution of Georgia in the Continuum of National Legislation and the European Convention

According to the Constitution of Georgia, every person has the right to believe in God, to choose and profess any religion, belief or worldview, to share his views, to live and to act in accordance with them. Man, as a unique being, who is the whole spectrum of his own possibilities, is the subject of the philosophy of existence. In this philosophy, conscience is an existential characteristic of human existence and it is a fundamental moral category.¹

It is essential that the forms of expression of faith and expression of confession be compatible with the fundamental principles of human dignity and inviolability.

States have a certain degree of margin of flexibility during protection of human rights, which is based on the limitations imposed by international law. Existence of such flexibility will not lead to violations of fundamental rights by the state if the state's discretion, restriction of fundamental rights and the “margin of authority” exercised by it are based on the case law of the European Court of Human Rights.

It is interesting to note that the list of legitimate aims of the restriction in the Constitution of Georgia is much narrower than in the European Convention, to which the Georgian state is a party, and according to which cases are heard and decisions are made by the European Court of Human Rights. The European Convention version is an additional shield for protection this important fundamental right, which if the state fails to overcome, its action will be perceived as a violation of the right. In accordance with this paper it is possible to see importance of vital harmony between the balance of justice of competing interests and international practice.

According to Freedom of Thought, Conscience and Religion Article 9 of the European Convention on Human Rights, States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety.² Also, in some cases, the state has the right to take preventive measures to protect the fundamental rights of others.

* Doctoral Student of Caucasus University School of Law; Researcher at the European University Institute of Law; Member of Mediation and Arbitration Committee of Georgian Bar Association 2019-2021; Lecturer of Law and International Relations Faculty of Georgian Technical University.

¹ *Heidegger M., Sein und Zeit, Tevzadze G. (trans.), Tbilisi, 2019 (in Georgian).*

² *Council of Europe, the European Court of Human Rights, Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights, University of Georgia Publishing House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).*

Therefore, in defining fundamental rights and in exercising the restriction of rights by the state, it is best to adhere unequivocally to the standard of the European Convention.

Keywords: *freedoms of belief, religion (confession), and conscience, their limitation purposes, and legitimate forms of intervention.*

1. Introduction

According to the Constitution of Georgia, every person has the right to believe in God, to choose, change and profess any religion, faith or worldview, to share his views, to live and to act in accordance with them. A person can manifest his religion or belief in worship, teaching, preaching, performing rules or rituals, either alone or in community with others and in public or private. This includes the right to be an atheist, also not to profess any religion.

The first paragraph of Article 16 of the Constitution of Georgia distinguishes three important paradigms that differ from each other: faith, religion (confession), conscience.

In 1995, the Constitution of Georgia strengthened the list of fundamental rights and freedoms as a directly applicable law, which restricts the people and the state. The European Convention entered into force in Georgia in 1999, as a result of which the process of harmonization of Georgian legislation and normative documents with the Convention for the Protection of Human Rights and Fundamental Freedoms began.³ The aim of this process was to avoid a conflict between the Constitution of Georgia and the international agreement.

At present, international agreements of Georgia are an integral part of the state's legislation, which have normative force. Individuals and legal entities are allowed to protect their rights and apply to the European Court of Human Rights under an international treaty such as the European Convention. According to the Organic Law of Georgia on Normative Acts, after the Constitution and the Constitutional Agreement, the international agreements and treaties of Georgia have a higher hierarchical place than other normative acts of Georgia.⁴

The different wording of legitimate aims of the restriction recognized in Article 16 of the Constitution of Georgia from the European Convention may lead to problems of proper understanding and exercising these freedoms. Essential to see importance of vital harmony between the balance of justice of competing interests and international practice.

Notably, that rights and freedoms are two interrelated concepts. According to Georg Jellinek, limiting government power in the field of legislation is manifested not only by the establishment of a legislative procedure, but, first of all, by the recognition of the guaranteed rights of the individual.⁵ A basic set of rights has existed in the law of all cultural peoples, and now to a greater extent it subsists over which the power of the legislature is powerless. Human rights are originated from the historical evolution of the people.⁶ A number of philosophers include debates about human rights in their

³ Demetrashvili A., Gogiashvili G., Constitutional Law, Tbilisi, 2016, 97 (in Georgian).

⁴ Korkeila K., Application of the European Convention on Human Rights in Georgia, Institute of State and Law of the Georgian Academy of Sciences, Tbilisi, 2004, 63 (in Georgian).

⁵ Sajó A., Limiting Government: An Introduction to Constitutionalism, Tbilisi, 2003, 3 (in Georgian).

⁶ Ibid, 2-4.

philosophical reflections, such as John Locke's Two Treatises of Government, John Sturat Mill's On Liberty and The United States Declaration of Independence by Thomas Jefferson. The notion of fundamental human rights is also linked to the constitutional principle of the rule of law — the necessary restrictions imposed on the exercise of absolute power by a sovereign or parliament.⁷ There are two main theories: the freedom-based theory, which is common in the countries of the common law system, and the continental law-based theory, which is based on rights.⁸ Both theories are based on the relationship between the individual and the state, and both endeavor to regulate interference by the state in a person's private life.⁹ Basically, theories of freedom require that a person be free from arbitrary interference by the state, while theories of rights are based on the inalienable human rights that the state must respect.¹⁰ Rights, by their very nature, imply that an individual has a moral or legal right to do something. Whereas, the primary provision of freedom implies the absence of coercion or restriction by the state in human choice and action. In general, basic human rights ensure and protect human freedom from unlawful intervention by the state. Rights and freedoms are always indivisible in this regard.¹¹

During restrictions of fundamental human rights should be satisfied the requirements of the Constitution. Therefore for the justification of interference with right, the restriction must not only serve to achieve a legitimate aim, but must also be a useful, appropriate, necessary and proportionate in relation to the aims pursued. In defining the principle of proportionality, in the view of the Constitutional Court of Georgia, the principle of proportionality also requires that proportionality be observed in a narrow sense, which implies the need for the state to strike a fair balance in the development of a restrictive measure in such a way that the protected right and the interest in its protection outweigh the interest in the protection of the limited right.¹²

States reserve the right to limit human rights when they consider it inevitable and required. This authority comes from recognizing that rights are not absolute and may be limited to the extent that it depends on state policy, security, morals or health status.¹³

2. Definition of Freedoms of Belief, Religion (Confession) and Conscience

Religious discrimination and intolerance is one of the main causes of international conflict and unrest, a clear example of this is Israeli / Palestinian conflict, as well the fact of creating a threat to

⁷ *Smith R.*, Textbook on International Human Rights, Oxford University Press, New York (2005), Georgian Public Defender Library, *Kobiashvili M. (trans.)*, Tbilisi, 2006, 44 (in Georgian).

⁸ *Ibid.*, 45.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ For example, the right to vote entitles all citizens the right to to vote and the right to take a part in elections (to stand for election). This right automatically gives you the freedom to vote—to choose a candidate and a party at your own discretion.

¹² Decision of December 14, 2018 № 3/1/752 on the case: “(NNLE) “Green Alternative” v. Parliament of Georgia” of Constitutional Court of Georgia, II-28.

¹³ *Smith R.*, Textbook on International Human Rights, Oxford University Press, New York (2005), Georgian Public Defender Library, *Kobiashvili M. (trans.)*, Tbilisi, 2006, 252 (in Georgian).

security on religious grounds is well seen in the case of the Balkans.¹⁴ According to a UN study, there are two stages in the manifestation of religious intolerance: unfavorable attitude towards people of different religions or beliefs and the practical manifestation of such attitude.¹⁵ On November 25, 1981, the UN General Assembly adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, on the basis of which it strengthened the idea of respect for freedom of religion and belief.¹⁶ Everyone, without exception, enjoys the rights and freedoms declared in the declaration. Article 6 of the Declaration provides an incomplete list of rights related to freedom of thought, conscience, religion and belief. Some of them can be cited as an example: a) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; b) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; d) to solicit and receive voluntary financial and other contributions from individuals and institutions; e) to write, issue and disseminate relevant publications in these areas; etc.

However, the elimination of discrimination and intolerance does not imply absolute freedom of belief, religion (confession) and conscience. Full and unrestricted exercise of these rights may lead to the violation of other human rights. In the case of *Karnel Singh Bhinder v. Canada*, the UN Human Rights Committee gave priority not to the protection of religious rights but to the need for safety and health care. According to the fact-based materials of the case, Mr. Karnel Singh Bhinder was employed by the Canadian National Railway Company (CNR) as a maintenance electrician, he wore a turban in his daily life and refused to wear safety headgear (hard hat) during his work. This resulted the termination of his labour contract. The UN Human Rights Committee stated in its decision, that the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the International Covenant on Civil and Political Rights.¹⁷

Before explaining the phenomenon of faith and conscience in the legal-philosophical context, it should be noted that freedom to manifest (freedom of confession) is common to freedom of belief and conscience, because it is the public declaration of one's faith, conscience and actions taken on this basis. In this context, it is important to focus on the manifestation of religion (confession of religion) and to use the existing official guide to Article 9 of the European Convention for its definition.¹⁸

¹⁴ Ibid, 280.

¹⁵ *United Nations*, Economic and Social Council, Commission on Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Thirty-Ninth Session, E/CN.4/Sub.2/1987/42, 23/11/1987, 119, Para.15.

¹⁶ *General Assembly*, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Resolution 36/55, 25/11/1981, <<https://www.ohchr.org/en/professionalinterest/pages/religionorbelief.aspx>> [12.10.2021].

¹⁷ *Karnel Singh Bhinder v. Canada*, Human Rights Committee, (1989) Thirty-Seventh Session, Communication nos. 208/1986, U.N. Doc. CCPR/C/37/D/208/1986, <<http://hrlibrary.umn.edu/undocs/session37/208-1986.html>> [12.10.2021].

¹⁸ *Council of Europe*, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04/11/1950, <https://www.echr.coe.int/documents/convention_kat.pdf> [12.10.2021].

Freedom of confession, according to logical reasoning, even implies to manifest one religion or another. If a state recognizes this or that belief as an official “religion” and registers it, it will automatically gain protection under Article 9 of the European Convention and the Constitution of Georgia. The right enshrined in Article 9 of the European Convention will lose its meaning and effectiveness if states abuse the discretion of the definition of rights.¹⁹ Explaining / interpreting the concept of religious denomination in a restrictive way deprives other religious minorities of both the opportunity and the possibility to enjoy this freedom. Also there would be a risk of breaching the principle of State secularism by upsetting the balance to be struck between religious and legislative rule-making and by restricting the exercise of the right to freedom of religion.²⁰

Religious beliefs are not limited to “basic” religions. However, the probable religion must still be identifiable. In the event that there is an unjustified interference by the State with the applicant's beliefs, which the applicant refers to as a religion, the matter may be settled in court in favor of the applicant. Religion – “It is viewed as a “natural” phenomenon, on the basis of which it would be unjust to discriminate when recognising rights and freedoms”.²¹

In limiting the expression of a person’s beliefs by the state, a margin of appreciation and fair balance must be maintained since the dimension of religion is one of the most vital elements that determines the identity of believers and their conception of life. The judgment of the European Court of Human Rights in the case of *Eweida and Others v. The United Kingdom* is an example of a fair balance in how the legitimate aim of the restriction and the right recognized in Article 9 can be compared. In particular: On one side of the scales was Ms. Eweida’s desire to express her religious beliefs (Pluralism and diversity are essential for a healthy democratic society. society needs to be tolerant to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others). On the other side of the scales was the employer’s wish to project a certain corporate image. European Court of Human Rights considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. Besides, there was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways’ brand or image. The European Court of Human Rights has therefore concluded that in these circumstances where there is no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to

¹⁹ *Council of Europe, the European Court of Human Rights, Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights*, University of Georgia Publishing House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).

²⁰ *Izzettin Dogan and others v. Turkey*, [26/04/2016] ECHR (Grand Chamber), Application no. 62649/10, <https://www.legislationline.org/download/id/6659/file/ECHR_Izzettin%20Dogan%20and%20Others%20v.%20Turkey_2016_en.pdf> [12.10.2021].

²¹ *Dickson B.*, *The United Nations and Freedom of Religion*, *International and Comparative law Quarterly*, Cambridge University Press, Vol. 44, № 2, 1995, 332.

protect the first applicant's (Eweida) right to manifest her religion, in breach of the positive obligation under Article 9 of European Convention.²²

In the above context, it is important to analyze the freedoms of belief and conscience.

Belief refers to a person's belief in the truth or falseness of something relied on relevant arguments.²³ It is subjective in its essence. Belief includes both religious and non-religious foundations.²⁴ Belief also includes a wide range of philosophical views such as pacifism, veganism, etc. The manifestation of faith is in itself linked to freedom of religion.²⁵ In order for a faith to be protected under a European Convention, it needs to have degree of certainty (solidity), credibility (cogency) and determination of importance. Human has the opportunity to enjoy this freedom both individually and collectively. Freedom of religion also protects the means of practicing religion: liturgy, prayer, processions, church meetings, worships and more. Freedom of belief would be unrealizable, ineffective and dysfunctional if people would not be able to use it fully. The inability to lead a life according to faith in itself deprives essence of recognizing this right.²⁶

As for personal belief or ideology, it is more than just an opinion. These are views that attain a certain level of cogency, seriousness, cohesion and importance.²⁷ They should also have identifiable formal content.

Another right protected by Article 16 of the Constitution of Georgia is freedom of conscience, which can be interpreted as follows: it is the right of a person to make decisions, to live and to act in accordance with his/her conscience. It derives from the human ability to think with moral categories: "Good", "Right", "Bad", "False". Freedom of conscience gives a person the right to have his or her own life credo. The phenomenon of conscience comes from God. Man, as a unique being, who is the whole spectrum of his own possibilities, is the subject of the philosophy of existence.²⁸ In this philosophy, conscience is an existential characteristic of human existence and it is a fundamental moral category. According to Heidegger, "the call of conscience can never be intended, prepared, or carried out self-consciously (arbitrarily) by us. There is a call against expectation and will. On the other hand the call undoubtedly does not come from anyone else who is in the world with me. The call comes from me and still about me".²⁹ Some philosophers believe that the formation of the phenomenon of conscience, as well as morality in general, occurs in humans as a result of the

²² Eweida and others v. The United Kingdom, [15.01.2013] ECHR (Fourth Section), Applications nos. 48420/10, 59842/10, 51671/10, 36516/10, <[https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-115881%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-115881%22])> [12.10.2021].

²³ *Kublashvili K.*, Human Rights, Tbilisi, 2003, 138 (in Georgian).

²⁴ *Tughushi T., Burjanadze G., Mshvenieridze G., Gociridze G., Menabde V.*, Human Rights and Practice of Litigation the Constitutional Court of Georgia, Georgian Young Lawyers Association, Tbilisi, 2013, 184 (in Georgian).

²⁵ *Ibid*, 168.

²⁶ Decision of December 22, 2011 № 1/1/477 of Constitutional Court of Georgia.

²⁷ Eweida and others v. The United Kingdom, [15.01.2013] ECHR (Fourth Section), Applications nos. 48420/10, 59842/10, 51671/10, 36516/10, <[https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-115881%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-115881%22])> [12.10.2021].

²⁸ *Heidegger M.*, *Sein und Zeit*, *Tevezadze G. (trans.)*, Tbilisi, 2019 (in Georgian).

²⁹ *Ibid*, 413.

influence of socio-economic factors, for example Karl Marx's book "German Ideology". Among them we can imply that the beginnings of conscience come from the stereotypes, stigmas formed in the society and the ethical dogmas adopted at this or that stage of human development in general. According to materialists and empiricists, conscience is formed as a result of the influence of social factors. As an example, parallels can be drawn with habits and reflexes. For Friedrich Nietzsche, conscience is a chimera caused by human self-suffering (self-punishment) and the influence of social processes.³⁰ Perhaps that is why moral categories and imperatives have changed throughout history and in different civilizations.

3. Specifics of Restriction of Freedoms Protected by Article 16 of the Constitution of Georgia

States have a certain degree of margin of flexibility during protection of human rights, which is based on the limitations established by international law. Although given words express the level of flexibility: necessary, state security, protection of the rights of others and state of emergency, the state should always respond proportionately and minimize the threat of violation of fundamental rights. By establishing the margin of authority, the European Convention allowed states to become its Contracting Parties and in this way respected the sovereignty of states, observance of morals and national standards in the state.³¹

When discussing freedoms of conscience, religion (confession) and belief, it is necessary to divide them into two dimensions, internal (*forum internum*) and external (*forum externum*).³²

Internal dimension: what a person thinks in his mind, the inner world of each of us, the faith within us, the unspoken thoughts, and the conscience. The state has no right to restrict the internal dimension and it is subject to absolute protection. This right is not subject to restriction or regulation, as it forms the basis of an individual's identity, autonomy.³³

It is noteworthy that the state has no right to oblige a priest to give information obtained during confession, or to request the transfer of ecclesiastical mysteries to state. The above example can be considered as an indicator of high protection of the internal dimension.

External dimension: A form of declaration of human religion, for example: When a person preaches, how he/she preaches or what rituals he/she performs in public. In this case, the state may restrict the external dimension in accordance with the Constitution and the standards of the European Convention.³⁴

³⁰ *Nietzsche F.*, On the Genealogy of Morality, Writings in two volumes, Vol. 2, Publishing House "Thought", Moscow, 1990 (in Russian).

³¹ *Smith R.*, Textbook on International Human Rights, Oxford University Press, New York (2005), Georgian Public Defender Library, *Kobiashvili M. (trans.)*, Tbilisi, 2006, 252-253 (in Georgian).

³² *Kublashvili K.*, Human Rights, Tbilisi, 2003, 137 (in Georgian).

³³ Decision of April 8, 2011 № 2/482, 483, 487, 502 on the case: "Citizens' Political Union "Movement for United Georgia", Citizens' Political Union "Georgian Conservative Party", Citizens of Georgia – Zviad Dzidziguri and Kakha Kukava, Young Georgian Lawyers' Association, Citizens Dachi Tsaguria and Jaba Jishkariani, Public Defender of Georgia v. Parliament of Georgia" of Constitutional Court of Georgia, II-4.

³⁴ *Ibid.*

Therefore, it is clear that the manifestation of rights protected by Article 16 of the Constitution of Georgia is not subject to absolute protection and in certain situations may be limited by the state.³⁵ An exhaustive list of these restrictions is provided by the Constitution of Georgia, however, it is advisable to rely on the European Convention and its guidelines for the definition of these restrictions (limitations).

It is essential that the expression of belief (faith) and the form of manifestation of religion be compatible with the fundamental principles of human dignity and inviolability. During manifestation of their faith people should be ready for “remuneration”, because they coexist in a society where other people want self-realization, which would be impossible without respect for their rights, dignity and autonomy.³⁶

It is interesting to note that the list of legitimate aims of the restriction in the Constitution of Georgia is much narrower than in the European Convention, to which the Georgian state is a party, and according to which cases are heard and decisions are made by the European Court of Human Rights. According to the Constitution of Georgia: “These rights may be restricted only in accordance with law in a democratic society for ensuring necessary public safety, or for protecting health or the rights of others”.³⁷

According to the European Convention, “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”.³⁸

Restriction of rights given in Article 16 of the Constitution of Georgia in accordance with the European Convention is possible for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. One of the aim of the restriction under Georgian legislation – “Ensuring the necessary public safety in a democratic society”, It is formulated in the European Convention as a necessary condition for the constitutional-legal justification of the restriction of the right (Necessary in a democratic society for the interests of public safety). The European Convention version is an additional shield to protect this important fundamental right, which if the state fails to overcome, its action will be perceived as a violation of the right.

The list of restrictions in the European Convention: public order, health or morals, or for the protection of the rights and freedoms of others is broader than in the Constitution of Georgia. The reality reflected in the continuum of time and the development of mankind, has shown to the legislature to some extent the forms of restrictions that the state needs to function normally.

³⁵ *Council of Europe, the European Court of Human Rights, Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights*, University of Georgia Publishing House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).

³⁶ *Tughushi T., Burjanadze G., Mshvenieridze G., Gociridze G., Menabde V.*, *Human Rights and Practice of Litigation the Constitutional Court of Georgia*, Georgian Young Lawyers Association, Tbilisi, 2013, 176 (in Georgian).

³⁷ Article 16, Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995, 786.

³⁸ *Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 04/11/1950, Article 9, <https://www.echr.coe.int/documents/convention_kat.pdf> [12.10.2021].

However, it should be noted that the existence of one of these restrictions does not automatically give the effect of justifying the action of the state.

In the presence of the above restriction, in order for a state to justify interference with freedom of religion and not to qualify it as a violation of a right, it is necessary to exist a number of cumulative conditions.

Interference with a fundamental human right by a State (under the European Convention) is admissible (legitimate) if it:

*Is prescribed by law, pursued a legitimate aim for the purposes of that provision, is necessary in a democratic society and proportionate in relation to the aim pursued.*³⁹

Also, in 2004, the Constitutional Court of Georgia established a three-step test of constitutional review of the restriction of fundamental rights by the state.⁴⁰

It is advisable to explain (interpret) the above criteria one by one:

a) *prescribed by law* (In Article 16 of the Constitution of Georgia we find the entry: only in accordance with the law) – Interference should be prescribed by national law, relevant normative act. At the same time, the law should be “adequately accessible”, predictable and should be formulated with appropriate precision (not vague) so that people can regulate their actions based on it. The law under which a fundamental right is restricted should be sufficiently foreseeable and should not give the executive power large (boundless) freedom of interpretation and arbitrary action.⁴¹

b) *A legitimate aim* – Interference is justified only for the protection of public safety and order, health, morals and the rights and freedoms of others. According to Article 9 of the European Convention, “the rights of others” may include the rights of persons whose interests in relation to the protection of safety, health and morals have been violated or a person has been endangered as a result of another person’s manifestation of religion or belief. For example, In the case of *Handyside v. United Kingdom*, concerning a book ban under the UK Obscene Publications Act, European Court of Human Rights notes, that: “...In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.⁴² In this case, international organisations act only as supervisors.

c) *necessary in a democratic society (general principles)* – When interfering with the freedom of religion, the state must assess whether the interference is necessary to achieve the legitimate aim pursued and whether the interference measure is proportionate to that aim. The state should balance competing interests, assess the individual rate of necessity for each particular interference, and not

³⁹ Metropolitan Church of Bessarabia and Others v. Moldova, [13/12/2001] ECHR, Application no. 45701/99.

⁴⁰ Decision of March 11, 2004 № 2/1/241 of Constitutional Court of Georgia.

⁴¹ *Kublashvili K.*, Human Rights, Tbilisi, 2003, 78-79 (in Georgian).

⁴² *Handyside v United Kingdom*, [07/12/1976] ECHR, Application no. 5493/72.

allow intensive, unjustified, and excessive interference with freedom of religion. In priori state should have a vision and try to apply less restrictive measures, which can be concerned as main principle in democratic society. Therefore, it should be clarified whether the restriction established by the disputed norms is wider than it is necessary to achieve a legitimate aim and is there any other less restrictive measure by which it will be possible to achieve the purpose.⁴³

d) proportionate in relation to the aim pursued – When analyzing interference in the field of fundamental rights, we consider the principle of proportionality. This means (indicates) that:

1. The interference must serve a legitimate aim – The legitimate purpose of the restrictive measure should be ascertained, because any interference with human rights in the absence of a legitimate aim is arbitrary and therefore the restriction of the right is unconstitutional.⁴⁴

2. The interference should be effective and admissible to achieve the legitimate aim pursued – This condition is met when the purpose can be achieved even theoretically. There should be a rational connection between the restrictive measures stated in the norms and the legitimate aim.⁴⁵

3. The form and intensity of the intervention should be necessary to achieve a legitimate aim – Interference is justified only if there is no relatively soft measures that would give same effective result to achieve the aim. The need to use a minimum restriction measure, will not justify the use of a larger limitation.⁴⁶

4. The intervention should be relevant (proportionate) to the legitimate aim – In determining the compliance (appropriateness) of an intervention, a comparison is made between the interests (rights) limited and protected by the intervention.⁴⁷ Therefore, the appreciation of the proportionality of the intervention when comparing limited and protected interests always depends on the individual characteristics of the case.

In determining the legitimacy of a fundamental right restriction and in ascertaining a balance of interests, it is important to conduct a test of proportionality, which includes the appreciation of the criteria of relevance, necessity and proportionality in each particular case.⁴⁸

Can be cited as an example specific areas that may be restricted: improper proselytism (the practice of proselytizing⁴⁹; an active policy of inviting⁵⁰), wearing religious clothing, and more.

⁴³ Decision of May 1, 2020 № 1/4/693,857 on the case: “NNLE “Media Development Fund” and NNLE “Institute for Development of Freedom of Information” against the Parliament of Georgia” of Constitutional Court of Georgia I Panel, <<https://constcourt.ge/ka/judicial-acts?legal=1268>> [12.01.2022].

⁴⁴ Decision of November 5, 2013 № 3/1/531 on the case: “Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. Parliament of Georgia” of Constitutional Court of Georgia, II-15.

⁴⁵ Decision of May 1, 2020 № 1/4/693,857 on the case: “NNLE “Media Development Fund” and NNLE “Institute for Development of Freedom of Information” against the Parliament of Georgia” of Constitutional Court of Georgia I Panel, <<https://constcourt.ge/ka/judicial-acts?legal=1268>> [12.01.2022].

⁴⁶ Decision of June 26, 2012 № 3/1/512 on the case: “Danish citizen Heike Kronkvist v. Parliament of Georgia” of Constitutional Court of Georgia, II-60.

⁴⁷ *Demetrashvili A., Gogiashvili G.*, Constitutional Law, Tbilisi, 2016, 102-103 (in Georgian).

⁴⁸ Ibid, 103.

⁴⁹ Proselytism (n.d.), Dictionary of the English Language, 5th ed., American Heritage, 2011, <<https://www.thefreedictionary.com/proselytism>> [27.01.2022].

⁵⁰ Proselytism (n.d.), Ologies & Isms, 2008, <<https://www.thefreedictionary.com/proselytism>> [27.01.2022].

In general, the practice of the European Court of Human Rights in wearing religious clothes until 2014 was absolutely different, for example: *Leyla Şahin v. Turkey*, Where the European Court shared the applicant's view that wearing an Islamic headscarf was a manifestation of religion.⁵¹ Although in 2014, the European Court of Human Rights held judgment in favor of France over the removal of the hijab and determined that there has been no violation of Article 9 of the Convention.⁵² The decision of the European Court of Human Rights is noteworthy, which should be considered for Georgia as well. Precisely the key point for this particular case was respect for the minimum set of values of an open democratic society (living together), public safety and protection of the rights and freedoms of others. On the basis of these three values the European Court of Human Rights did not consider France's action to be a violation.

This decision has become an important part of case law regarding the form of expression of faith and its legitimate limitations. It is unfortunate that today such important decisions are made only for countries with politically solid positions.

Freedom of religion and belief implies their manifestation, although there are forms that are unacceptable to a democratic society and subject to restrictions. This can be considered as – inappropriate (improper) proselytism. The proclamation of religion and belief is manifested through the performance of worship, participation in worship, preaching and spreading of religious knowledge (Including an active policy of inviting people to religion or belief), participation in religious meetings and celebrations of religious holidays, performance of religious rites, rituals (Including observance of fasting, confession, communion, participation in worship), religious attire, wearing symbols or jewelry of religious affiliation, having ascetic and isolated lifestyle and in a variety of ways. Freedom of religion and belief is protected by the Constitution of Georgia, regardless of whether it is exercised individually or in collectively, by agreement or on its own initiative, publicly or privately. Freedom of religion is also a right of religious associations. “religious associations” can be interpreted as legal entities whose purpose is to preach their religion, belief or worldview among its members, as well as to spread that preaching.

At this point the individual or organization must strike a balance between the spread of faith and improper proselytism. The spread of religion, the act of converting other people to faith should not turn into inappropriate proselytizing as rough interference with human religious beliefs by unacceptable forms: Through violence, bribery, abuse of trust and lack of human knowledge. In this case, the state has a positive obligation to prohibit such influence on members of a democratic society and to protect their personal space from the rough interference of others.

In accordance with Case-Law Guide on Article 9 of European Convention on human rights, Freedom of Thought and Religion, each that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety.⁵³ Also, in some cases, the state has the right to take preventive measures

⁵¹ *Leyla Şahin v. Turkey*, [10/11/2005] ECHR, Application no. 44774/98, <[⁵² *S.A.S. v. France*, \[01/07/2014\] ECHR, Application no. 43835/11.](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-70956%22]}> [12.01.2021].</p></div><div data-bbox=)

⁵³ *Council of Europe, the European Court of Human Rights, Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights*, University of Georgia Publishing

to protect the fundamental rights of others. In the case of *Leela Förderkreis e.V. and Others v. Germany* It is clear from the position of the European Court that in accordance with the high public interest the state has the right to provide information to the public and to draw their attention to the dangers posed by sects. In this case intervention serves the legitimate purposes of Article 9 Paragraph 2 of the European Convention, in particular the protection of public safety and public order, as well as the rights and freedoms of others. "...Such a power of preventive intervention on the State's part is also consistent with the Contracting Parties' positive obligation under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction".⁵⁴

It should be noted that paragraph 3 of Article 16 of the Constitution of Georgia differs from the record referred to in paragraph 2 of the same article. Paragraph 3 places under absolute protection one specific record and one specific condition: No one shall be persecuted because of his/her belief, religion or conscience, or be coerced into expressing his/her opinion thereon.

If there is obvious persecution and coercion of a person on the basis of conscience and belief by the state, in this case, the action of the state has no constitutional-legal justification and it qualifies as a violation of basic human rights. The state has no legitimate leverage (support) and no grounds to interfere with this right by the forms of restriction. Simply said, paragraph 3 forbids coercing person into expressing his or her own religion and his or her views on conscience, belief. It is also unlawful (proscribed) to persecute a person on the basis of his or her beliefs. There are various forms of "persecution" that clearly show the harassment and violation of human rights. An example is the fact when a person is in person at risk of such attacks or is a member of this vulnerable or endangered group and is therefore in a precarious (dangerous) situation, which is a serious violation of Article 9 of the Convention. In assessing harassment and ill-treatment, the European Court of Human Rights appreciates, according to case law, whether State had reasonable and objective justification of its action.⁵⁵ Simply said, there should be no "political persecution" motivated by his/her religious beliefs. The positive obligation of the state is to create a pluralistic environment (society) for people to express their beliefs while respecting the rights of others. This does not always mean the issue of monetary compensation in a positive form.

4. Conclusion

An overview of the above issues presented the scope and characteristics of restrictions on the freedoms of belief, religion (confession) and conscience. When restricting human rights, the state should not violate the principle of proportionality and the aim of the restriction should be to protect the public interest,⁵⁶ so as not to despotize private or public interests.⁵⁷ In determining the legitimacy of a

House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).

⁵⁴ *Leela Förderkreis e.V. and Others v. Germany*, [06/02/2008] ECHR (Fifth Section), Application no. 58911/00, <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-89420%22%5D%7D>> [12.10.2021].

⁵⁵ *Gavrila Baci v. Romania*, [17/9/2013] ECHR (Third Section), Application no. 76146/12.

⁵⁶ Decision of December 22, 2011 № 1/1/477 of Constitutional Court of Georgia, Indicated – *Institute for Development of Freedom of Information*, Freedom of Information Guide, 1st ed., Tbilisi, 2012, 7 (in Georgian).

fundamental right restriction and in ascertaining a balance of interests, it is important to conduct a test of proportionality, which includes the appreciation of the criteria of relevance, necessity and proportionality in each particular case. In limiting the expression of a person's beliefs by the state, a margin of appreciation and fair balance must be maintained.

Constitutional norms should be in accordance with international human rights treaties/covenants, of which the European Convention on Human Rights is noteworthy.⁵⁸

However, due to the content of freedoms of belief, religion (confession) and conscience, it is impossible and unjustified to exhaustively identify the scope of the protected area (right), as each specific case requires an individual approach and appreciation.⁵⁹ Based on the concept of a democratic state, in some cases, when intervention serves to protect the fundamental rights of others, state is obliged to use it.⁶⁰ The complexity of the conflict of values is clear, as both sides have the right and the expectation of protection of this right, this sensitive situation can be managed by achieving a fair balance between competing interests and harmonizing these values in the society.⁶¹ in accordance with the high public interest the state has the right to provide information to the public and to draw their attention to the dangers posed by religious organizations. In this case intervention serves the legitimate purposes of Article 9 Paragraph 2 of the European Convention.

Research has shown that in defining restrictions imposed by state on freedom of religion, belief and conscience, it is best to rely on the standards set out in the official case-law guide of Council of Europe and the European Court of Human Rights, in accordance with the European Convention. However, it should be noted that international agreements, including the European Convention, are in the third place in hierarchy of the legislative acts of Georgia, hence Constitution of Georgia takes precedence over international agreements.⁶² The fact is that the purpose of the hierarchical ratio of the current normative acts is one: Not only to determine their legal force, but also to make a decision easily during a legal conflict and contradiction of normative acts. However, the discrepancy (difference) between international treaty and national law may raise some question marks and difficulties both in case law and in its theoretical explanation (interpretation). It is a fact that in the event of a alleged violation of fundamental rights the final stage for appealing against decisions made by national courts for citizens of countries that had ratified the European Convention is the European Court of Human Rights. Therefore, it is better to unequivocally adhere to the standard of the European Convention for the definition of fundamental rights and during imposing restrictions on the exercise of freedoms by the state.

⁵⁷ Sajó A., *Limiting Government: An Introduction to Constitutionalism*, Tbilisi, 2003, 248 (in Georgian).

⁵⁸ Case of Kokkinakis v. Greece, [25/05/1993] ECHR, Application no. 14307/88, References: *Korkelia K., Izoria L., Kublashvili K., Khubua G.*, Comments on the Constitution of Georgia, Basic Human Rights and Freedoms, Tbilisi, 2005, 117 (in Georgian).

⁵⁹ Decision of December 22, 2011 № 1/1/477 of Constitutional Court of Georgia, II.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² *Korkelia K.*, Application of the European Convention on Human Rights in Georgia, Institute of State and Law of the Georgian Academy of Sciences, Tbilisi, 2004, 63 (in Georgian).

States' certain degree of margin of flexibility during shielding of human rights won't cause violations of fundamental rights by the state if the state's discretion, limitation of fundamental rights and the "margin of authority" are based upon the case law of the European Court of Human Rights.

Finally, the prohibition of persecution on the basis of one's belief, religion or conscience and the prohibition of coercing a person to express his or her opinion are subject to absolute protection, however, the factual circumstances surrounding these prohibitions should not be illusory.

Bibliography:

1. Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995.
2. *Council of Europe*, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04/11/1950, <https://www.echr.coe.int/documents/convention_kat.pdf> [12.10.2021].
3. *United Nations*, Economic and Social Council, Commission on Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Thirty-Ninth Session, E/CN.4/Sub.2/1987/42, 23/11/1987.
4. *General Assembly*, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, resolution 36/55, 25/11/1981, <<https://www.ohchr.org/en/professionalinterest/pages/religionorbelief.aspx>> [12.10.2021].
5. *Council of Europe, the European Court of Human Rights*, Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights, University of Georgia Publishing House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).
6. *Demetrashvili A., Gogiashvili G.*, Constitutional Law, Tbilisi, 2016, 97, 102-103 (in Georgian).
7. *Dickson B.*, The United Nations and Freedom of Religion, International and Comparative law Quarterly, Cambridge University Press, Vol. 44, № 2, 1995, 332.
8. *Heidegger M.*, Sein und Zeit, *Tevzadze G. (trans.)*, Tbilisi, 2019, 1-917, 413 (in Georgian).
9. *Institute for Development of Freedom of Information*, Freedom of Information Guide, 1st ed., Tbilisi, 2012, 7 (in Georgian).
10. *Korkelia K.*, Application of the European Convention on Human Rights in Georgia, Institute of State and Law of the Georgian Academy of Sciences, Tbilisi, 2004, 63 (in Georgian).
11. *Korkelia K., Izoria L., Kublashvili K., Khubua G.*, Comments on the Constitution of Georgia, Basic Human Rights and Freedoms, Tbilisi, 2005, 117 (in Georgian).
12. *Kublashvili K.*, Human Rights, Tbilisi, 2003, 78-79, 137-138 (in Georgian).
13. *Nietzsche F.*, On the Genealogy of Morality, Writings in two volumes, Vol. 2, Publishing House "Thought", Moscow, 1990 (in Russian).
14. *Smith R.*, Textbook on International Human Rights, Oxford University Press, New York (2005), Georgian Public Defender Library, *Kobiashvili M. (trans.)*, Tbilisi, 2006, 44-45, 252, 280 (in Georgian).
15. *Sajó A.*, Limiting Government: An Introduction to Constitutionalism, Tbilisi, 2003, 2-4, 248 (in Georgian).
16. *Tughushi T., Burjanadze G., Mshvenieridze G., Gociridze G., Menabde V.*, Human Rights and Practice of Litigation the Constitutional Court of Georgia, Georgian Young Lawyers Association, Tbilisi, 2013, 168, 176, 184 (in Georgian).

