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FREEDOM OF RELIGION – WHERE SHOULD WE LOOK FOR IT? ABOUT THE DEMARCATION BETWEEN ARTICLES 19 AND 24 OF THE CONSTITUTION OF GEORGIA

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1. INTRODUCTION

1.1. The Formulation of the problem

Good legislative practice excludes the need for protecting any particular right by two articles. Despite the number of reproaches leveled against them, the authors of the second chapter of the Constitution of Georgia must take the responsibility to ensure that they do not deviate from the principle mentioned in the previous sentence. Doing so would be similar to turning a blind eye to a problem instead of resolving it. The lawmakers should explore all possible means to ensure that the scope of all articles is clearly distinguished in their interpretation.

Articles 19 and 24 of the Constitution of Georgia have similar protected spheres. Both the provisions are concerned with freedom of expression. In the case law of the Constitutional Court the question of demarcation of the scope of these articles has been an unresolved issue for over ten years. During this period, the Constitutional Court either ignored the problem or suggested inconsistent approaches to address this issue. Recently, the Ombudsman[1] has applied to the Constitutional Court for a verdict on this subject and [2] now

[1] For more details about the argument see chapter 3.4 "The Ombudsman v. the Parliament"

[2] For more details about the argument see chapter 3.4 "The Ombudsman v. the parliament"

the Court is at the stage of delivering its final judgment. In the abovementioned case, the Court must explain which aspects of the freedom of religion are protected by article 19 of the Constitution of Georgia, *Forum Internum* (inner sphere) and *Forum Exsternum* (external sphere) of the freedom of religion[3], and the manner in which they are protected.

The aim of this article is to analyze the existing case-law of the Constitutional Court, suggest an approach to the demarcation between article 19 and 24 of the Constitution, and analyze the appeal of the Ombudsman and the possible outcomes of the judgment of the Court.

2. THE CONSTITUTIONAL PROVISIONS AND THEIR ANALYSIS

As it was mentioned earlier, this article will discuss the problematic issue that exists in the second chapter of the Constitution of Georgia, namely distinguishing the scopes of article 19 and 24 of the Constitution of Georgia.

The wording of article 19 as follows:

1. *All people have the right to freedom of speech, thought, conscience, religion and belief*
2. *A person must not be persecuted because of his/her speech, thought, religion or belief; a person must not be forced to express his/her opinion about them either*
3. *The rights listed in this article must not be restricted, if its manifestation does not violate others' rights;*

The wording of article 24:

1. *All people have the right to freely receive or impart information, to express or impart his/her opinion orally, in writing or by any other means.*
2. *Mass media shall be free. Censorship shall be impermissible.*
3. *Neither the state nor particular individuals have the right to monopolize the mass media or the means of dissemination of information*
4. *The exercise of the rights listed in the first and second paragraphs of this article can be allowed by law only under such conditions which are necessary in a democratic society in the interest of ensuring state security, territorial integrity and public safety, prevention of crime, protection of others' rights and dignity, prevention of disclosure*

[3] For more about the demarcation of the inner and outer scope of the freedom of religion see Vakhushti Menabde, "*Forum Internum* and the right of conscientious objection", Jr. "Solidaroba", 2009, #6(33)

of information recognized as confidential, and ensuring the independence and impartiality of judiciary.

The problem stems from the two words- Thought and Speech- which are common to the first paragraphs of both of these articles. If these words are identical, then what was the need of protecting a single right by two articles, especially when the grounds for their limitation are quite different? The answer to this question is, as has already been said above, that these articles defend different rights, or different aspects of the same right. The task of this essay is to answer the question: what is the difference between articles 19 and 24? As the literal understanding of these words is identical, it is necessary to clear up the teleology of each of these words, or the idea that forms "the soul of the Law" and in the light of which, explain each of the standards.

3. THE EARLIER CASES OF THE CONSTITUTIONAL COURT

3.1 Articles 19 and 24 of the Constitution in the admissibility decisions of the Constitutional Court

There have been a number of claims at the Constitutional Court regarding infringement of article 19 and 24 of the Constitution of Georgia, though only some of those claims passed the stage of admissibility. The proceedings of the rest of the cases have been suspended because of various reasons. Although the Court has not discussed the contents of these constitutional articles substantively, the views expressed by the plaintiffs(which are given in the descriptive part of the admissibility decision) are interesting.

One such case is *Citizen Giorgi Korganashvili v. the Parliament of Georgia*, wherein the plaintiff argued that certain provision of Article 19 of the Constitution was unconstitutional.

The plaintiff defended the interests of the Constitutional Democratic Party. Before the adoption of the impugned norm, the party had 180 members. The subject of the argument was the rule according to which the registration of the party was done after the Ministry of Justice was presented with the list of not less than 1000 members of the party (with identification and contact data).[4] It was pointed out in the claim that the impugned norm had restricted the freedom of speech, thought, conscience, religion and belief [5] which are rec-

[4] The Second Board of the Constitutional Court of Georgia, the judgment N2/94/1, September 27, 2000 in the case of the citizen Giorgi Korghanashvili v. the Parliament of Georgia.

[5] *Ibid*;

ognized in Article 9 of the Constitution of Georgia. Apart from this, any more information was not given about the justification of the claim in the admissibility decision of the Court. [6]

Another case which was also not admitted by the Court for examination on merits is the case of *Citizens Vakhtang Menabde and Irakli Butbaia v. the Parliament of Georgia.*

In this case, the plaintiffs argued against the law, according to which all the students[7],despite their religious belief, were obliged to do their military reserve service, and the conscientious objectors to military service were not given the right to substitute this obligation with a non-military alternative employment service.

The claimants believed that the impugned provision contradicted the freedom of the conscience and belief which are guaranteed by the first and third paragraphs of Article 19 of the Constitution of Georgia.[8] From the plaintiffs' point of view, the freedom of conscience means the individual's opinions about the concepts of "good" and "bad" with reference to the actions of a person. Also, for them, the freedom of belief includes the right of a person to be free to choose and have a religious or non-religious belief and act in accordance with it. The freedom of belief includes the right of a person not to be subordinated to a treatment that is clearly contrary to his/her thinking. In the plaintiffs' opinion, any action by which the state tries to force the individual to act contrary to his/her point of view should be considered to be an infringement of the freedom of conscience and belief of a person. The plaintiffs think that the rights protected by Article 19 of the Constitution of Georgia also include pacifism.[9]

The next was the case of *Citizen Avtandil Kakhniashvili v. the Parliament of Georgia and Georgian Central Election Commission.*

The subject of the argument in this case was the provision, according to which only political parties or blocs had the right to nominate the candidates to contest in elections for the membership of the Parliament. The plaintiff believed that this rule violated his right to take part in the elections independently. He asserted that the noted provision compelled him to collaborate with a particular political party/bloc and conduct the pre-election campaign as a member of such a party/bloc, which violated his rights and freedom under the 1st paragraph of Article 19, and the 1st paragraph of the Article 24 […] of the Constitution.[10]

[6] Exactly because of the fact that the claimant couldn't present the evidence that the claim was not groundless, the Court recognized the claim to be inadmissible.

[7] According to the Law, the age of doing the military reserve service for a student of a high educational institution was 23. The claimants were not of this age, and when they reached this age they would have graduated the bachelor stage, that's why having existing data they weren't and wouldn't be treated under the validity of the norm. The Court recognized the claim inadmissible.

[8] The Second Board of the Constitutional Court of Georgia, the Ruling N1/5/424, October 9, 2007 in the case of the citizens of Georgia-Vakhtang Menabde and Irakli Butbaia v. the Parliament of Georgia. para.1.3;

[9] *Ibid*, para.1.3;

[10] The Plenum of the Constitutional Court of Georgia, the Ruling N16/455, June 27, 2008, in the case of the citizen of Georgia Avtandil Kakhniashvili v. the Parliament of Georgia and Georgian Central Election Commission; para.1.4;

The aim of the constitutional claim was […] to have the Court recognize the parliamentary election of May 21, 2008 as unconstitutional by recognizing the impugned provisions to be unconstitutional.[11] However, the Court recognized the claim to be inadmissible.[12]

However, the noted admissibility decision is interesting because it is the first occasion[13] where the issue of constitutionality of the provision with respect to Article 19 and 24 arose at the same time.

The last case in which the Court passed a judgment involving Article 19 of the Constitution of Georgia is the case of *The Conservative Party of Georgia v. the Parliament of Georgia.*[14] The plaintiff demanded to recognize a law which prohibited recording and broadcasting a trial as unconstitutional. "According to the 1st and 3rd paragraphs of Article 19 of the Constitution of Georgia, any individual can publicly express his/her opinion related to any issue if its manifestation does not violate others' rights. […] It is not compulsory whether his/her opinions were derived from the correct assessment of facts or if they were shared by the largest part of the society".[15] From the point of view of the plaintiff, the restriction of the rights was against Article 19 of the Constitution. However, it should be noted that the Court considered that the plaintiff was essentially arguing over the issue regulated in the Article 85 of the Constitution.[16]

It appears that in the case law of the Constitutional Court, there are a total of four cases where the plaintiffs referred to Article 19 and 24 of the Constitution and the Court did not admit those cases on merits, without analyzing these articles in depth. The case law can be divided into three parts based on the content of the cases filed: (1) freedom of religion (2) right to election (3) the right to express opinion publicly. Among these, there is only one case where constitutionality of a provision is analyzed with respect to both Article19 and 24.However, the Court did not state which aspect of the impugned provision is in conflict with a particular constitutional provision.

[11] par. II.1.

[12] According to the Law, the President of Georgia and not less than one fifth of the members of the Parliament of Georgia have the right to apply to the Court in connection with the constitutionality of conducting the elections (The Law on the Constitutional Court of Georgia", the subparagraph "d" of the 1st paragraph of the 37th article of the Organic Law of Georgia)The motive of the Court while recognizing the claim as inadmissible was exactly that the plaintiff was not a proper subject for the noted argument.

[13] This is the first judgment. The first actual claim on the noted article was launched with the parallel appeal on the case of "citizen of Georgia Akaki Gogichaishvili v. the Parliament of Georgia, though this judgment will be discussed below.

[14] *Ibid*, I,para.7.;

[15] The Second Board of the Constitutional Court of Georgia, the judgment N2/5/492, December 28, 2010 in the case of "the Political union of citizens The Conservative Party of Georgia v. the Parliament of Georgia", I.para.6.;

[16] The Constitution of Georgia, the 1st paragraph of the Article 85: The case is discussed in open session of the Court. The discussion of cases in closed session is permissible only in the cases provided by Law. The judgment is declared publicly; The claim was considered inadmissible because the 85th article is given not in the 2nd but in the 5th chapter, and the plaintiff is authorized to argue over the issues of compliance of the normative acts only with the rights guaranteed by the 2nd chapter of the Constitution of Georgia ("About the Constitutional Court", subparagraph "a" of the 1st paragraph of the 39th article of the Organic Law of Georgia);

3.2. Article 24 in the judgments of the Constitutional Court

All the cases that the Court discussed Article 24 independently were concerned with freedom of information.[17] In this process some interesting standards were established. For example, in the case of *Georgian Young Lawyers' Association and citizen Rusudan Tabatadze v. the Parliament of Georgia*, the plaintiffs declared that Article 24 protects the freedom of expression and it was the same as Article 10 of the European Convention of Human Rights.[18] The Court declared that "the noted article includes three rights- the right to information, thought and the means of the mass media"[19] In another case, the Court noted that "the right to expression without the interference of the state, the right to receive and impart information is recognized in Article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms. […] The noted regulations were expressed in Article 24 of the Constitution of Georgia. […].[20] In the same case, the Court mentions the noted article as "the right to thought".[21]

Accordingly, it can be said that from the point of view of the Court the provision under discussion is the same as Article 10 of the European Convention which is a classical document guaranteeing the right to expression.

3.3. The 19th and 24th articles in the judgments of the Constitutional Court

The first case where the Constitutional Court discussed Article 19 of the Constitution was the case of *Georgian Young Lawyers' Association and Zaal Tkeshelashvili, Nino Tkeshelashvili, Maia Sharikadze, Nino Basilashvili, Vera Basilashvili and Lela Gurashvili v. the Parliament of Georgia*. The case was about several articles of the law on [Assembly and Manifestations. At one of the hearings, the plaintiff expressed his opinion that the impugned provision was in conflict not only with the right to manifestations but also with the right to expression. The case discussed the obligation of stating the nature or purpose of a meeting or manifestation in the notice[22] which should be submitted by the organizers of a meeting

[17] Article 24, only from freedom of information perspective is discussed in the following cases: The judgment N1/3/209,276, June28,2004 of the 1st board of the Constitutional Court of Georgia on the case: The ombudsman of Georgia and the citizen of Georgia Ketevan Bakhtadze v. the Parliament of Georgia; Also: The judgment N2/3/406,408, October 30,2008 of the 2nd board of the Constitutional Court of Georgia on case of The ombudsman of Georgia and Georgian Young Lawyers' Association v. the Parliament of Georgia;

[18] The judgment N2/3/364, July, 2006 of the 2nd board of the Constitutional Court of Georgia on the case: Georgian Young Lawyers' Association and the citizen Rusudan Tabatadze v. the Parliament of Georgia.

[19] *Id*.

[20] The judgment No2/2/359,June 6, 2006,of the 2nd board of the Constitutional Court of Georgia on the case: Georgian Young Lawyers' Association v. the Parliament of Georgia.para.1

[21] *Ibid*, para.2:

[22] According to the legislation of Georgia, if the meeting or demonstration is held at a thoroughfare of public transport, the organizer is obliged to present the notice to the local self governmental organization about it, where at that time he must have indicated the following information: the form, aim, the place or the direction, the time of beginning and finishing, date, the approximate number of

to the local self -governmental organization. The author of the constitutional claim considered that […] "the obligation concerning the submission of information about the nature and the objective of the meeting or manifestation was against the rights guaranteed by the Constitution, which include the right to meetings and the right to speech. In particular, it is in conflict with the first paragraphs of Articles 19 and 24 of the Constitution."[23] In this case, the Constitutional Court was given the chance for the first time to demarcate the above mentioned two norms from each other. However, the Court did not focus its attention on this issue during its deliberations. While reviewing the plaintiff's corresponding request, the Court declared, "The right to freedom of speech has always belonged to the integral and fundamental functional elements of the democratic society for a long time. If we understand the freedom of meetings as the right to free expression of thought, the same can be said about it"[24]. Though as the Court did not make the differentiation between the two articles clear, it can be assumed that the Court's words intended to be applied to both the articles.

In the case of *Citizen Akaki Gogichaishvili v. the Parliament of Georgia*, the court analyzed the issue in a relatively broad manner. Under the Civil Code of Georgia and the Law on the Press and other Means of Mass Media, an individual has an obligation to retract his/her statement if he/she could not substantiate that his/her statement is true. The plaintiff thought that this law violates the 2nd paragraph of Article 19 of the Constitution of Georgia, which states that "it is inadmissible to persecute the person because of speech, thought, religion and belief, and to compel him/her to express his/her opinion about them". The plaintiff considered that to oblige a person to deny his/her statements for the want of supporting evidence as defined by the impugned norm meant exactly amounts to compelling a person to express his/her opinions. "The freedom of expression means not only the free expression of one's thoughts, but also the right to decline to express any opinion which you do not agree with. The information which a person is obliged to deny may still be the only truth for him/her. And the impugned norm, contrary to Article 19 of the Constitution, obliges him to disseminate the information and/or express his/her opinion against his will"[25]

It is true that in this case the complainant does not mention *forum internum* explicitly. But in fact he talks about it when he points out in his claim that the provision in paragraph 3 of article 19 of the Constitution of Georgia ("It is inadmissible to restrict the rights and freedoms listed in this article, if their manifestation does not violate rights of others") exactly means that only that part of freedom of thought can be restricted which is related to

the participants and others.

[23] Judgment N2/2/180-183, November 5,2002 of the 2nd board of the Constitutional Court of Georgia on the case of "Georgian Young Lawyers' Association and Zaal Tkeshelashvili, Nino Tkeshelashvili, Maia Sharikadze, Nino Basishvili, Vera Basishvili and Lela Gurashvili v. the parliament of Georgia"

[24] The named judgment of the Constitutional Court of Georgia, *Ibid*, para.6;

[25] The Second Board of the Constitutional Court of Georgia, the judgment N2/1/241. March 11, 2004 in the case of the citizen Akaki Gogichaishvili v. the Parliament of Georgia.

its expression. The cases, when we are not dealing with the expression, are protected by the absolute privilege.[26] In the complainant's opinion, under the Constitution of Georgia, even in the time of a state of emergency or war it is not allowed to restrict this right." [27]

In the same case, the respondent also expressed his opinion with respect to article 19 and article 24 and their interrelationship, though he was seeking similarities between the two, instead of demarcation. He did not challenge the scope of these norms.[28]

None of the lawyers[29] summoned as specialists in the Court have touched upon the issue of demarcating the scope of these Constitutional norms. They also declared unanimously that the impugned norms did not violate the Constitutional demands.[30]

In its decision, the Court paid attention to the fact that "under the 19th article of the Constitution of Georgia, there are certain recognized human rights which include the right to freedom of speech, thought, conscience, religion and belief". [31] However, in accordance with the claimant's request, the constitutionality of the impugned norms was reviewed with respect to the freedom of speech and thought.[32]

According to the opinion of the Court, under the Constitution " there are positive and negative guarantees provided for the protection of the freedoms enshrined in the Constitution, and article 19 includes the right to free expression and the right to abstain from expressing opinions which are contrary and unacceptable to one's own ideas."[33] It is true that the Court declared that "the freedom of speech and thought does not belong to the category of absolute, unrestricted rights."[34] However, the Court also noted that "this kind of provision [Article 19, paragraph 3] additionally guarantees the protection of the freedom of speech and thought. It prohibits the restriction of these freedoms in any ways, if their manifestation does not violate the rights of others" [35]

In this case, the Court established an unparalleled high standard for the freedom of expression: "[…] The restriction of the freedom of speech is admissible if its exercise violates the rights of others' and this is the only condition that can be made the basis for the restriction of the freedom of speech and thought. […] Therefore, the right of each person ends where

[26] *Ibid*;

[27] *Ibid*;

[28] *Ibid*;

[29] The invited specialists in this case were: Professor of the Law Faculty of Iv. Javakhishvili Tbilisi State University, Doctor of Juridical Science Shalva Chikvashvili; Scientific-Advisory Board Member of the Constitutional Court of Georgia, the Lawyer Roin Migriauli; candidate of the Juridical Science Polikarpe Moniava; The Deputy Director of the State and Law Institute of Academy of Sciences of Georgia, Candidate of Juridical Science Konstantine Korkelia;

[30] The citizen Akaki Gogichaishvili v. the Parliament of Georgia, supra note 25;

[31] *Ibid*,para.1

[32] *Ibid*, para.1

[33] *Ibid*,para.1

[34] *Ibid*, para.1

[35] *Ibid*, para.1

rights of others' begin."[36] The freedom of expression is indeed not an absolute right. The list of legitimate grounds for its restriction, *inter alia*, is far wider in the international legal instruments and the condition of rights of others' is by far not the only reason. Here it should be clarified that in this case the Court speculated on the freedom of thought in general instead of considering one of its specific aspects, which was later done by the plenum of the Constitutional Court. The Court was allowed to establish such a standard due to the structuring of article19 of the Constitution of Georgia, though this approach was changed later.

The Court separated ideas and the facts from each other. It declared that " idea is the individual's personal, subjective assessment made with respect to a given event, idea, fact or a person,[…] Factual information denotes the events or circumstances that actually happen and exist in reality which may be wrong or right. Hence, facts should always be based on evidence. Accordingly, disseminating facts is subject to the obligation of proving their correctness and truthfulness. As it is impossible to verify truthfulness of ideas, correspondingly, a person expressing opinions should not be obliged to do so.[…]"[37]

The Respondent won this case. The Court has not articulated any other concepts worth mentioning here in this case. It decided that the freedom of expression completely falls within the scope of article 19, without making any further explanations in this respect.

The next case examined on merits in which the Court considered article 19 is the case of Citizen Maia Natadze and Others v. the Parliament of Georgia and the President. In this case the complainant referred to article 19 (together with article 24) in the context of participation in elections.[38] The plaintiffs argued that the right to freedom of expression is related to the right of voting which amounts to expressing one's will through elections, and to the right of occupying an electoral position through popular elections. Restriction of this right is the same as restricting the expression of opinion. The complainants were not allowed to participate in governance themselves or through their representatives, take part in the process of decision-making and administration, and express their own views. So, the first paragraph of article 19 is violated."[39] It appears that the complainants did not distinguish between article24 from article 19. Again, the respondent did not declare anything noteworthy from this perspective.[40]

The court had to consider very interesting issue of whether " the values protected in these articles covered participation in elections and decision-making process of the repre-

[36] *Ibid*,para.1

[37] *Ibid*, para. II;

[38] The Court rejected this type of relation and declared that the free demonstration of the will of electors, which is decisive for the democratic process, also the election rights, are protected by article 28 of the Constitution and not by article19 and article 24. The Second Board of the Constitutional Court, the judgment N2/2-389 in the case of the citizen of Georgia Maia Natadze and others v. the Parliament of Georgia and the President of Georgia, para. II.15;

[39] *Ibid*, para.1.5.

[40] *Ibid*, para.1.6;

sentative bodies of high educational institutions and also occupation of certain positions in these institutions". [41]

In this case the Court tried to separate article 19 and article 24 from each other for the first time. The Court observed that "article 19 and article 24somehow complement each other from the point of view of constitutional protection of the freedom of expression".[42] According to this phrase, both these articles protect different aspects of freedom of expression.

After this, the Court pointed out the importance of receiving and disseminating information in a democratic society, and the absolute nature of the freedom of expression. "A free society consists of free individuals who live in the free informational space, think freely, have independent points of view, and take part in the democratic processes, which means the exchange of opinions and debate. Everyone has the right to express one's own ideas, or to decline to express one's ideas. The Constitution is categorical in this respect. It bans the persecution of a person for expressing his/her thoughts, and also bans compelling anyone to express his/her opinion. This is the strict rule that binds the State and its bodies without exception.[43] So, the Court unanimously declared that people shall not be subjected to persecution because of having certain opinions, neither can they be subjected to coercion to express their opinions, and these rights are absolute without any exceptions.

Then the Court talked about the aspect of expression of the freedom of thought, "[…] The Constitution protects the process of expressing and disseminating one's opinion, its contents and forms, though at the same time it establishes the formal and material conditions of restriction of these rights".[44] It appears that the Court actually discussed *forum internum* and *forum externum*, with the only deficiency being that the Court did not declare explicitly which articles protected the different aspects of the rights. We can speculate based on the phraseology it uses, which makes it is clear that its statements on the absolute nature of freedom of expression is based on paragraph 2 of article 19.

There is one more interesting hint in the following paragraph of the judgment: "The freedom of information, right to disseminate and receive it freely from the publicly available sources, from the sources of information which are useful for receiving and disseminating of information, is protected by paragraph 1 of article 24. It is impossible to form free opinions without free information. This is the norm that bans applying the "information filter" to the society, to the human mind, which is characteristic to undemocratic regimes. However, like the freedom of thought, this right is also subject to the Constitutional re-

[41] *Ibid*,para:II.12; As in the previous case, while reviewing the issue of compatibility of the impugned norm with article 19 of the Constitution, the Court did not discuss the freedom of conscience, religion and belief, and it limited itself only to the examination of the freedom of expression.

[42] *Ibid*, para.:II.13:

[43] *Ibid*, para:II.13;

[44] *Ibid*.para: II. 13;

strictions according to paragraph 4 of article 24.[45] In this part of the judgment, the Court c interpreted article 24 and declared that right to receive and disseminate information to be the substance of it. The Court does not consider that this article encompasses freedom of expression completely, but only one of its aspects, the freedom of information. As freedom of expression consists of *forum internum and forum externum*, the Court clearly implies expression when it comes to the part of restrictions. The Court also compares the right protected by article 24 to "freedom of thought", where it states that both these rights can be restricted. As the Court divided the freedom of expression into two parts, it turns out that the Court perceived paragraph 1 of article 24 to be dealing with the freedom of information, and article 19 as *forum internum* together with the freedom of thought. The Constitutional Court made this approach more clear when it said: "[…] the aim of articles 19 and 24 is to guarantee the process of free exchange of thought and information in the democratic society […].[46] Here it can be seen once more that the Court separated thought and information from each other, perceiving thought as self generating and information as a medium. Thus, to put it in order, article 19 corresponds to freedom of "thought", and article 24 to "information".

The last and the most important case which the plenum of the Constitutional Court adjudicated is the case of the so called meetings and manifestations. Though the Court discussed many important issues in this case, in this article we will only refer to those parts which are related to article 19 and 24 of the Constitution. Georgian Young Lawyers' Association challenged the constitutionality of article of the law which banned the meetings that call for the violent overthrow or violent change of the constitutional system of Georgia. The complainant asserted that the impugned law lacked the criteria of clear and present danger which in their view violated articles 19, 24 and 25.[47] In this case, the Court for the first time tried to separate the scope of these articles from each other explicitly, and not through hints. At the beginning of the discussion of the issue, the Court remarked that "there is no need of interpreting the abovementioned articles of the Constitution exhaustively; the contents of each of them will be analyzed only to the extent that is necessary for the review of constitutionality of the challenged laws"[48]

At first the Court talked about article 24: "Article 24 of the Constitution of Georgia includes different aspects of the right to the freedom of expression. Paragraph 1 of this article protects the right to dissemination of thought and information "orally, in writing or by other means'. It includes the guarantees for the freedom of expression, which ensure the

[45] *Ibid*, para. II.14;

[46] *Ibid*, para.: II.16;

[47] The Plenum of the Constitutional Court of Georgia, the judgment N2/482,483,487,502 April 18, 2011, in the case: The Political Union of Citizens – Movement for the United Georgia, the Political Union of Citizens- The Conservative Party of Georgia", the Citizens- Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, the Citizens- Dachi Tsaguria and Jaba Jishkariani, The Ombudsman of Georgia v. the Parliament of Georgia, para.I.34;

[48] *Ibid*, para; II.2

possibility of dissemination of opinion. This article protects the point of view of a person, his/her beliefs, information, also the means which a person chooses to express and disseminate them such as press, television, and other mediums of disseminating the information and thought […]".[49] In contrast to the previous decision, the Court did not state that article 24 substantially enshrines freedom of receiving and disseminating information; it declared that in addition to this right the article included the right to freedom of disseminating thoughts. Furthermore, while considering article 24, the Court mentioned the word "belief" which *inter alia* includes religion. Such reading means that article 24 protects the *forum externum* of freedom of expression and religion, and article 19 protects *forum internum* of the same rights. Against the background of this judgment, article 24, together with "the right to dissemination of information", also includes right to dissemination of thought.

In this case the Court broadly discussed article 19. The fundamental human right to the freedom of thought, speech, belief and conscience is protected by article 19 of the Constitution of Georgia. In spite of a certain similarity between articles 19 and 24 of the Constitution, that both of them mention the right to the freedom of thought, there is a substantial difference between these two articles.[50] To identify the scope of the right the Court employed two techniques: reading the article 19 of the Constitution together with other articles, and analyzing the forms and extent of restricting this right.[51]

While analyzing the basis of restrictions, the Court paid particular attention to the issue that in times of war and emergency, the possibility of the derogation of the right protected by article 19 is not provided in article 46 of the Constitution.[52] So the Court concluded that "[…] in the system of rights, special importance is given to the right protected by article 19. The Constitution provides for that category of rights, the derogation of which is inadmissible to pursue the state security, safety or other important public goals. At the same time, the only basis for the restriction of article 19 is the necessity of protecting others' rights.[53]

In line with the above logic, the Court concluded that article 19 protects the personal sphere of an individual, his/her freedom of having, sharing or/and denying an opinion, religion, and belief. The aim of the Constitution is to establish the guarantee of freedom of thought, speech, conscience and belief, as *forum internum*, for the inviolability of the inner world of an individual, one's personal sphere. This is the right (the aspect of right) which cannot be derogated or banned in the interests of the society, including in times of war and emergency. Nobody has the right to compel an individual to change his/her opinion or belief. The individual is also protected from being forced to say or not to say or express his/

[49] *Ibid*, para.II.3

[50] *Ibid*, para.:II.9

[51] *Ibid*, para.: II.9

[52] *Ibid.* Para.: II. 9

[53] *Ibid.* Para.: II.9

her own idea.[54] This right is not amenable to regulation because it forms the basis for the freedom of the individual, his/her identity and autonomy.[55]

It is generally known that *forum internum* is an absolute right.[56] If article 19 only protects this right, then the question arises with respect to the necessity of paragraph 3 of the same article, because it establishes the basis for the restriction (for protection of rights of others) of this right. The Constitutional Court tried to answer this question, though with its reply it denied the absolute character of *forum internum*, and declared that "the inner world of a person (*forum internum*), his personal sphere is protected from the interference of the State, but acts which cause violation of rights of other people within this personal sphere are subject to restriction."[57]

The Court tried to set the clear line after which *internum* will turn into *externum*. It observed that " The interest of the State or society towards the belief of an individual and his/her opinion can be established when beliefs or opinions are expressed through certain actions (or inactions) in social activities. The thought or speech will go beyond the personal scope and it may be subjected to restrictions, when it comes to the outer world and clashes with the rights of people not within the personal sphere, and the interests of the society. This kind of "expression" goes beyond the scope of the inner world and does not fall within article 19. This type of expression can be restricted on the basis provided in article 24 or/ and other articles of the Constitution"[58]

The court rejected the constitutional claim in this part.

As it appears, together with the development of the practice of the Constitutional Court, there are Court opinions being developed on the interrelation of articles19 and 24 of the Constitution. These approaches are important as in the process of forming its judgments the Court will take these opinions into account to develop its practice. It may share or change the existing jurisprudence, though these cases will undoubtedly play their role in separating the scope of article 19 and article 24.

[54] The same discussion is present in the case of Maia Natadze and others;

[55] The Political Union of Citizens – Movement for the United Georgia, the Political Union of Citizens- The Conservative Party of Georgia", the Citizens- Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, the Citizens- Dachi Tsaguria and Jaba Jishkariani, The Ombudsman of Georgia v. the Parliament of Georgia, supra note 47, para.: II.10;

[56] Jim Murdoch: Freedom of thought, conscience and religion; A guide to the implementation of Article 9 of the European Convention on Human Rights. Council of Europe, 2007, p.13;see also: Cantwell v. Connecticut (1940), http://supreme.justia.com/us/310/296/case.html;

[57] The Political Union of Citizens – Movement for the United Georgia, the Political Union of Citizens- The Conservative Party of Georgia", the Citizens- Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, the Citizens- Dachi Tsaguria and Jaba Jishkariani, The Ombudsman of Georgia v. the Parliament of Georgia, supra note 47, para.: II. 11

[58] *Ibid*, para.: II.12;

3.4. The Ombudsman against the parliament

The most important case which should answer the questions mentioned above in the context of this debate is the case of The Ombudsman v. the Parliament. As in the case of Menabde and Butbaia, the law on military reserve service is challenged as it does not provide the right to conscientious objection. It is interesting how the Ombudsman sees the contents of article 19. In the complainant's opinion, the right to religion and belief (as absolute rights) and the right to their expression are guaranteed by article 19 of the Constitution of Georgia. Under the Constitution of Georgia both inner belief and the external freedom of expression of this belief are protected. In the Constitutional claim it was stated that under paragraph 3 of article 19, the restriction of the external freedom of belief is considered to be allowed if its expression violates others' rights. Freedom of belief and conscience together with other rights implies the right of a person's free choice of adopting a particular religious or unreligious belief. Hence follows the right of a person to act according to his/her own belief, or not to participate in activities which are contrary to his/her views. Accordingly, the right to not to join the obligatory military service and replace it with a non-military alternative service is the fundamental aspect of the right to the freedom of belief and conscience which is protected by article 19 of the Constitution of Georgia, and by the international instrument of human rights.[59]

Unlike the previous case, the Court admitted this case for examination on merits, which means that it found the substantive link between article 19 of the Constitution and the challenged law. Otherwise, the case would not pass the examination of admissibility, and the Court would adopt an inadmissibility ruling.[60] The recording notice that the Court adopted is binding for the First Board of the Constitutional Court. The Court decides the interrelation between a challenged law and a constitutional right at the admissibility stage of a claim.[61] If the Court opines that the abovementioned aspect of the freedom of religion is not protected by article 19, this kind of approach will create inconvenience (The Court recognized the relation in the preliminary hearing and then did not recognize it in examination of merits).especially in light of the fact that the plenum of the Constitutional Court changed the approach to article 19 given in the recording notice.[62]

[59] The First Board of the Constitutional Court of Georgia, the Recording Notice #1/4/477, December 2,2009 of in the case of the Ombudsman of Georgia v. the Parliament of Georgia, paragraphs. I, 4 and 5;

[60] Cf., *Ibid.* Para.II.2

[61] Law of Georgia On the Proceedings in the Constitutional Court of Georgia, article 18.

[62] The Plenum of the Constitutional Court passed the judgment on April 18, 2011 (the case of meetings and manifestations), but the First Board adopted its recording notice far earlier on December 2, 2009.

4. THE SCOPE OF ARTICLE19 AND ARTICLE 24 AND THEIR SEPARATION

Interestingly, according to the Organic Law of the Constitutional Court of Georgia, only the Plenum of the Court is authorized to overrule a precedent. The Board is bound by the case law of the Court. The above discussed judgment of the Plenum of the Constitutional Court excludes the possibility of finding the violation of article 19 in the case of military reserve service. If the Constitutional Court follows the precedent, it would mean that the relation between the impugned law and article 19 of the Constitution is absent. However this type of relation, as it has been already noted, is determined not in the final judgment made after examination of merits, but in the ruling made after the preliminary hearing at the admissibility stage. And the Court has already recognized the claim as admissible. There may be only one argument to justify the aforementioned; when the First Board admitted case of military reserve service for examination of merits, the Plenum's judgment on the case of public meetings was not made yet.

However, there is an alternative solution which suggests that different aspects of the right to the freedom of expression should be distributed between two articles: article 24 shall protect *Forum Externum* of the freedom of expression, and article 19 shall protect *Forum Internum* of the freedom of expression. This will explain the recurrence of the word "thought" in article19 and article 24 of the 2nd chapter of the Constitution. As For the freedom of religion, it can be declared that it is completely enshrined in article 19, because the words "religion" and "belief", as well as the word "conscience", are not mentioned anywhere else in the 2nd chapter of the Constitution. There arises the question: Why is the freedom of religion so important (there is only one ground for its restriction- rights of others)? There is hardly a comparable right to the freedom of religion that is guaranteed by the Constitution of Georgia. International instruments allow for the restriction of the freedom of religion on numerous grounds while the authors of the Constitution of Georgia included only one such ground for restriction- rights of others. It is hard to find an answer to this question as it could have been dictated by the reality of Georgian multi – religious society; it may be explained by the particularly delicate attitudes toward religious issues; or it may be simply a legislative flaw. According to this approach, article 19 of the Constitution of Georgia protects the freedom of religion, its inner sphere and its expression, out of which the former is absolute and the latter can be restricted according to the test of proportionality, where only protection of others' rights can serve as the legitimate public aim for restriction.

5. CONCLUSION

The Court has many choices regarding the issue of separation of article 19 and article 24.After summing up the above mentioned discussion, the following probable solutions are identified:

I. Article19 and article 24 protect the right to freedom of expression (article 19 also protects freedom of religion), though they do not contain different aspects of this right.
II. Article 19 of the Constitution includes the right to form and disseminate opinions; and article 24 includes the right to receive and disseminate information (the original source of which is not the person who disseminates).
III. Article 24 protects the rights to freedom of expression and religion, and article 19 protects the inner sphere of the same rights (which is not absolute in contrast to the wide-spread approach to this issue, and can be restricted for the protection of rights of others).
IV. And finally, article 24 protects *Forum Externum* of the freedom of expression, and article 19 protects *Forum Externum* of the freedom of expression. As for the freedom of religion, it can be said that the scope of this right is completely enshrined in article 19.

In spite of the fact that the first approach has been the dominating doctrine for years, it has already been rejected for a long time. Due to this and partially by the decision of the Plenum, the possibility of article 19 and article 24 having the same scope of protections was excluded. It is less likely that the first board will choose this solution.

The second approach is also unlikely to be incorporated in the future judgments. The reason is that the Constitutional Court, adopting the third approach, rejected this approach in the case related to meetings and demonstrations.

The Court has already partially considered the fourth approach at the Admissibility stage and shared it (in the part of article 19).

Perhaps the second part of this approach is also logical, though it was noted that the Plenum of the Court has declared something different, from which the board can not deviate.

Thus, according to the last precedent, the result is likely to be the following: according to the court's previous approach *forum internum* will be defined to fall within the scope of article 19,and conscientious objection will be placed within this inner sphere by the Court. Though this is not an acknowledged approach, this kind of view exists. This kind of position is expected from the Court in the context of the case of meetings and demonstrations. Here the Court decided that belief of an individual belongs to *Forum Externum*, and also to personal and family relationships. Therefore it will not come as a surprise if the Court will assess coercion to act contrary to one's beliefs falls within the inner sphere of the right.