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GEORGIAN CONSTITUTIONAL AGREEMENT WITH THE GEORGIAN ORTHODOX CHURCH: A LEGAL ANALYSIS

By Mariam Begadze

Mariam Begadze is a strategic litigation lawyer in EMC (Human Rights Education and Monitoring Center) who works on rights of religious minorities in Georgia. She holds a Bachelor's degree in General Studies of Law from Tbilisi State University and a LL.M. in Human Rights from Central European University in Budapest, Hungary. Her thesis title was: "Right to offend: what is it that matters most, the offender, the offended or the offence itself?" She published *Secularism: The Framework for State-Religion Relations, Review of Constitutional Law*, publication X, 2016, available at: <http://www.constcourt.ge/ge/publications/journals>.

1. Constitutional Status of the Constitutional Agreement

On March 30, 2001, an Amendment introducing the concept of a Constitutional Agreement to the supreme law was added to Article 9 of the Constitution of Georgia. On October 22, 2002, the Parliament of Georgia approved the Constitutional Agreement. Before the approval of the Constitutional Agreement, the recommendations¹ issued by international experts, including the Venice Commission had unfortunately not been considered.² The Venice Commission considered the "Constitutional" status of the Agreement problematic. According to the Commission, the status of the Church came close to the constitutional status of government branches and had the potential to raise doubts and risks of the domination of religious issues over secular ones. Granting constitutional status to the Agreement could indeed raise questions regarding the compliance with the principle of a secular state, since the fundamental principle of

¹ Khatuna Tsintsadze, Legal Aspects of Church-State Relations in Post-Revolutionary Georgia, *Brigham Young University Law Review*, 2007, #3, p.764.

² Venice Commission Report, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL%282001%29063-e#>

the mentioned is the separation of church and state. In addition, with such argumentation, the Venice Commission recommended forming the agreement between the Government of Georgia and the Church, rather than between the State and the Church.³ Before the approval of the Constitutional Agreement, the Committees of Legal Issues, Rule of Law and Administrative Reforms and Civil Integration issued positive recommendations. In these conclusions, the issue of mutual independence between church and state was underlined. The conclusion of the former committee, without any additional discussion, declared that the Agreement complied with the internationally recognized principles and norms of international law in the field of human rights and fundamental freedoms. The conclusion of the Civil Integration Committee pointed to the meetings held with the representatives of different traditional confessions, and highlighted their support of the mentioned Agreement.

It should be noted that formation of agreements with religious organizations on different issues is an accepted practice in other countries. In parallel with separating church and state, models of cooperation based on agreement exist in Portugal, Austria, Belgium, Luxemburg, Germany, Czech Republic, Hungary, Romania, Slovakia, Slovenia, Poland, Estonia, Latvia and Lithuania. Per the constitutions of Spain and Italy, the state maintains cooperation with the Catholic Church and other religious communities (e.g. in Spain, apart from the Catholic Church agreements are formed between the Ministry of Justice and Protestant, Jewish and Muslim communities). Similarly, the Constitution of Bulgaria underlines separation of religious organizations from the state, however, also declares the Orthodox Church as a “traditional

³Venice Commission Report, available at:<http://www.venice.coe.int/webforms/documents/?pdf=CDL%282001%29063-e#>

religion.” The Constitution of Greece recognizes freedom of religion for other religions, but determines that Orthodox Christianity is the main religion of the state.⁴

Regardless of the described practice, an analogue of church-state relations through a Constitutional Agreement of such status and normative content does not exist in other countries. There is a similarity with agreements formed between the Vatican and different states; however, in the discussed case, the essential difference is also evident, since, in contrast with the Vatican, the Church is not a subject of international law.⁵ The “Constitutional” status of the Agreement, which in practice means its priority over internal legislation, as well as its formation on behalf of the State and by the President indeed bears certain similarities with an international agreement, despite the fact that the agreement is formed between the State and one of the religious organizations under its general jurisdiction.⁶

The Constitution of Georgia describes the interrelations between the Church and the State in the first chapter (General Provisions). Paragraph 1 of Article 9 of the Constitution establishes the principle of church-state separation: “The State declares full freedom of belief and religion, and also recognizes the special role of the Apostolic Autocephaly Orthodox Church of Georgia in the history of Georgia and its independence from the State.” The Constitution also defines the status of the Apostolic Autocephaly Orthodox Church of Georgia. Paragraph 2 of Article 9 specifies that the relations between the Church and the State are determined by the Constitutional Agreement between the State of Georgia and the Apostolic Autocephaly Orthodox Church of Georgia.

⁴ Norman Doe, *Law and Religion in Europe*, Comparative Introduction, Oxford Scholarship Online, 2011, pp. 4-5

⁵ Konstantine Korkelia, “Towards the integration of European standards: European Convention on Human Rights and Georgian Experience, Chapter: European Convention Status in Georgian legislation.”

⁶ Tsintsadze, *op. cit.*, p.764.

In the hierarchy of normative acts, constitutional agreements have the highest legal power after the Constitution and the Constitutional law.⁷ On one hand, this implies that all other acts, including international agreements, should comply with the constitutional agreement. On the other hand, this means that the document itself should comply with the Constitution and Constitutional laws.⁸ Even though a constitutional agreement is a high-level normative act, its text is completely devoid of content related to human rights and does not even make general reference to the right to equality.⁹

The subordination of international contracts and laws to the Constitutional Agreement is a problematic legal issue, especially due to the complicated procedures of the rule for implementing amendments. Introduction of any changes and amendments in the Agreement, as well as its abolition, is impossible without agreement of parties, therefore, from the moment of its approval, the agreement *effectively* remains beyond the sphere of public sovereignty. Even in the case of agreement by both parties on any amendments or abolition, at least three-fifth of the total composition of the Parliament is necessary for their approval.¹⁰

Therefore, implementing any amendments in the Constitutional Agreement, including those with the aim of eliminating legislative asymmetry created because of privileges granted to the Church, becomes practically impossible due to the need for high level of parliamentary consensus and, especially, the agreement of the Church itself.¹¹

There are different legal and theoretical assessments in relation to granting constitutional agreements superior legal power to international laws. A number of authors consider that

⁷ Paragraph 2, Article 6 of the Constitution; Paragraph 3, Article 7 of the Law on Normative Acts.

⁸ Interestingly, the Constitutional Framework, as the source of church law, has one of the lowest rank in the hierarchy, see D. Chikvaidze Church Law, Tbilisi, 2008, p. 64.

⁹ Norwegian Centre for Human Rights (NCHR), The Constitutional Agreement's Departure from the Georgian Principle of Equality, 2015 p. 43

¹⁰ Article 66, Paragraph 1¹ of the Constitution of Georgia

¹¹ Joni Khetsuriani "Church and State", Journal *Individual and Constitution*, #1, 2001, p. 12.

determination of the hierarchical level of a normative act inside the country is a sovereign will of the State and universally recognized human rights norms can only be violated by such constitutional agreements that directly oppose the norms of international law, including international treaties.¹² Other authors consider that such will, specifically, the subordination of international treaties to the document regulating relations between two subjects, in its essence, represents a case of bypassing obligations assumed through international law. Therefore it opposes Articles 26 and 27 of the Venice Commission on international law, according to which all agreements in force are binding for their parties, so it should be implemented in good order and a party cannot refer to its internal legal provisions to justify the failure to implement the agreement. Georgia, as one of the parties has not presented a reservation concerning the mentioned articles and hence they are binding from the moment of ratification of the agreement.¹³

In the hierarchy of normative acts, the decision to grant such a document defining relations with a religious organization¹⁴ a superior power over international agreements must represent a symbolic declaration of high political loyalty towards the Church and a possible attempt to bypass the obligations undertaken through international law by referring to internal regulations. Certainly, such an aim opposes the provisions of the Venice Commission and international law regarding the compulsory nature of international agreements for parties. However, before the fact of a clear opposition between the Constitutional Agreement and the international obligations accepted by the state is not established and evaluated, arguing that

¹² Konstantine Korkelia, "Towards the integration of European standards: European Convention on Human Rights and Georgian Experience, Chapter: European Convention Status in Georgian legislation."

¹³ Norwegian Centre for Human Rights (NCHR), *The Constitutional Agreement's Departure from the Georgian Principle of Equality*, 2015 pp. 40-42.

¹⁴ Konstantine Korkelia, Nana Mchedlidze, Alexander Nalbandov, *Compatibility of Georgian legislation with the standards of the european convention on human rights and its protocols*, p. 207.

determination of hierarchy per se represents a violation of the obligations undertaken through the Venice Convention is an exaggerated assessment.

Furthermore, according to Article 9 of the Constitution of Georgia, in addition to the text of the Constitution itself, there is another standard for evaluating a constitutional agreement, which determines the necessity of compliance of the constitutional agreement with the universally recognized principles and norms of international law in the sphere of human rights and fundamental freedoms. Thus, it follows from Article 9 of the Constitution, that a Constitutional Agreement should comply not only with the Constitution and Constitutional law, but also with the said principles and norms of international law.

In this regard, it is a matter of discussion how the conflict between the Agreement and international treaties can be resolved when those, for example, the European Convention on Human Rights or the United Nations International Covenant on Civil and Political Rights, determine precisely the universally recognized principles and norms in the sphere of human rights and fundamental freedoms.

Per the formal definition of Article 6 of the Constitution and Law on Normative Acts¹⁵, the Constitutional Agreement has a superior power in relation to any international agreement. In terms of such interpretation, the standard of compliance of the Constitutional Agreement with universally recognized principles and norms merely bears a declaratory character and cannot be implemented in practice.¹⁶ By contrast, according to the human rights-based approach, the interpretation of Article 6 of the Constitution in conjunction with Article 9, calls for setting an exception in the Law on Normative Acts in relation to international agreements setting the universally recognized principles and norms in the field of human rights and fundamental

¹⁵Article 7, Paragraph 3 of the Law on Normative Acts.

¹⁶ Konstantine Korkelia, "Towards the integration of European standards: European Convention on Human Rights and Georgian Experience, Chapter: European Convention Status in Georgian legislation."

freedoms and the subordination of the Constitutional Agreement to them. In this case, the evaluation standard for the Constitutional Agreement set by Article 9 will have a real meaning, rather than a declaratory nature. Regardless of the possibility for such interpretation, it is desirable to change the content of Article 6 of the Constitution and explicitly identify superiority of those international agreements that declare universally recognized rights and freedoms.

There is no practical possibility to assess the compliance of normative acts with international acts based on the Constitutional Court's authority. However, it is worth noting that Articles 7 and 39 create the possibility to consider the universally recognized human rights, freedoms, and guarantees of citizens inherently stemming from the Constitutional principles as parts of the Constitution and thus evaluate compliance with them as compliance with the Constitution.¹⁷

2. Jurisprudence of the Constitutional Court regarding the Constitutional Agreement

It is interesting whether the Constitutional Court represents an effective mechanism for protecting the constitutionality of the Agreement, including its compliance with universally recognized rights, principles and norms.¹⁸ To assess this, it is important to discuss the already established scope of constitutional control over the Constitutional Agreement.

In the only case related to the constitutionality of the Agreement, *Zurab Aroshvili vs. Parliament of Georgia*, the plaintiff—religious organization “Orthodox Church in Georgia,” which was not subordinated to the Patriarchate of Georgia and was under the jurisdiction of the Orthodox Church of North America—was arguing that Paragraph 6 of Article 6 of the Agreement was not in compliance with Article 14 (the right to equality) of the Constitution.

¹⁷Article 39 and Article 89, Paragraph 1 of the Constitution of Georgia.

¹⁸Article 89, Paragraph 1, Subparagraph A of the Constitution of Georgia.

According to the said article of the Agreement, the State issues a license to use the official terminology of the Church in agreement with the Church. Therefore, according to the plaintiff, in contrast with the Church, it was not permitted to use the word “Orthodox” to define its religious denomination without the license.

According to the interpretation of the Constitutional Court of Georgia in 2002, the Constitutional Agreement applies to the parties only and does not concern third persons. “The subjects of the relations envisaged under the Constitutional Agreement are the State of Georgia on one hand and only the Apostolic Autocephaly Orthodox Church of Georgia on the other hand, excluding any other religious organizations, as demonstrated, in effect, in all articles of the Constitutional Agreement.”

In addition, with regards to the obligation of the State to protect equality, the Court clarified that “forming the Constitutional Agreement with the Apostolic Autocephaly Orthodox Church does not exclude the existence of different religious organizations of Georgia and under no circumstances means limitation to their activities, moreover their prohibition, which follows from the relevant provisions in the Constitution of Georgia.” As a concluding remark, the Court noted: “So any religious organization in Georgia has the right to use its symbols, terminology, or liturgical production without any permission, similarly as the Church of Georgia.”

It follows from the discussion of the court that the Constitutional Agreement cannot influence the status of any other religious association or its legal situation. With such argumentation, the Constitutional Court limits the possibility to assess the discriminatory nature of the Constitutional Agreement.

The provisions of the Constitutional Agreement can certainly not be understood as an a priori rejection to grant the same rights to other religious denominations. However, the failure to

apply certain analogous rights given in the Agreement to religious organizations through general legislation (e.g. the immunity of the Patriarch, restitution of religious buildings, protection of the religious buildings and other church items of the Church on foreign territories, legal recognition of religious marriage, and mutual recognition of certificates of education), in effect, does bring such results. While on the one hand, the Constitutional Court refrains from assessing the discriminatory nature of the Constitutional Agreement and on the other, the legislative base of general application is neutral and its content does not allow discussion on the unequal treatment before the Constitutional Court, the possibility to eliminate the discriminatory environment created by the Constitutional Agreement with the help of legal instrument is clearly rejected.

In addition, as noted in the decision of the Constitutional Court, the conclusion of the Constitutional Agreement only with the Apostolic Autocephaly Orthodox Church is due to its special role in the history of Georgia. Also, its existence in the independent and completed form has been decisive, while other denominations represent structural units of religious organizations existing outside the territory of Georgia.

The foundations of the mentioned conclusion of the court are unclear. In addition, even if the grounds of such a conclusion existed in the case of one religious organization, it needs to be assessed whether such a generalized conclusion can be made or whether it is the competence of the Constitutional Court to assess the existence of religious organizations in an independent and completed form, especially, to differentiate the Church from other religious denominations on the mentioned grounds.

The Constitutional Court does not exempt the State from the obligation to protect equality, but limits the scope of compliance of the Constitutional Agreement to the Constitution. If the Agreement concerns only the two subjects and hence does not limit the rights of third

parties, it is unclear why it was necessary to grant it superior power to international treaties and laws. At the same time, with the argument of applying the Constitutional Agreement to two parties only, the court effectively avoided assessing the Agreement itself, which contradicts Article 9 of the Constitution, since without an effective mechanism, the evaluation standard of the Agreement can only have a declaratory character.

However, the privileges established through the Constitutional Agreement are implemented largely by their reflection in general legislation. Therefore, when the Constitutional Court fails to assess the compliance of the Agreement between two parties with the Constitution, such limitations are eliminated in the case of differentiated treatment reflected in the general legislation with the aim of implementing the Agreement.

3. Execution of the Constitutional Agreement

Numerous norms of the Constitutional Agreement are not self-executing and require relevant measures of implementation. In 2003, five special commissions were created under Order N1 of the President of Georgia; yet, these commissions have never met and fulfilled their functions.¹⁹

Through Decree N63 of February 21, 2012 of the Government of Georgia, a governmental commission was created to discuss the issues envisaged in the Constitutional Agreement between the State of Georgia and the Apostolic Autocephaly Orthodox Church of Georgia. According to Article 3 of the Decree, the Commission includes eight working groups relevant to different issues covered by the Agreement, specifically: 1. Working group on the discussion of property issues and creation of relevant legislative base for economic activities of

¹⁹ Report of the Tolerance and Diversity Institute (TDI): Study on Religious Discrimination and Constitutional Secularism, pp. 21-22.

the Church; 2. Working group on the assessment of damages to the Church in the nineteenth and twentieth centuries (period of loss of independence in Georgia); 3. Working group on establishing care and maintenance regimes for Church treasures protected in state museums and churches of historical importance; 4. Working group on the recognition of religious marriage through a procedure envisaged by the law; 5. Working group on establishing the chaplaincy in military formations and penitentiary institutions; 6. Working group on establishing mutual cooperation in the sphere of education; 7. Working group on defining the legal status of the Patriarchate of Georgia in foreign countries and care and maintenance of Georgian churches and monasteries abroad as well as determination of the property rights on them; 8. Working group on examining the origins of religious buildings.

Even though the issues to be discussed by working groups may also concern the interests of other religious organizations, per Article 3 of the Decree, the working groups are comprised only of the representatives of the state of Georgia and the Apostolic Autocephaly Orthodox Church of Georgia.²⁰

Relevant issues were not studied by the working groups created through the mentioned Decree either.²¹ Therefore, to this day, the State has never made any real attempts to execute the Constitutional Agreement by placing it into a legislative framework. Interestingly, apart from the governmental commission, the authority of the State Agency on Religious Affairs also concerns issues related to the implementation of the Constitutional Agreement. Specifically, per Article 2 (Part I, Subparagraph C) of Decree N177 of the Government of Georgia “On Approving the regulation of the State Agency on Religious Affairs,” the Agency prepares recommendations related to the fulfillment of the objectives and aims of the Constitutional Agreement. Until now,

²⁰Report of the Tolerance and Diversity Institute (TDI): Study on Religious Discrimination and Constitutional Secularism, pp. 22-23.

²¹Correspondence #33220 – 08.09.2016 of the Administration of the Government of Georgia.

the State has not cooperated with the Commission in relation to this issue and has not applied its authority to prepare recommendations.²² In the conditions when with regard to the Constitutional Agreement, the authorities of the Commission and the Agency are not clearly separated, there is a risk that in the future, interpretations offered by these two actors regarding the same issue may differ.

4.Relevant International Standards in relation to Agreements with Religious Organizations

Granting certain privileges to religious organizations through different agreements does not imply violation of the equality principle. It is essential that other religious organizations have the possibility to form such relations.²³

The European Court of Human Rights (ECHR) discusses the significance of prohibiting preferential treatment to any religious organization and neutrality,²⁴ as well as state obligation to eliminate discrimination during the process of granting privileges and implementation.²⁵ According to ECHR, while regulating any issue related to different religious denominations and belief systems, the State should maintain neutrality and impartiality, which is important for the existence of pluralism in the State and functioning of democracy.²⁶ Furthermore, ECHR critically evaluates the inclusion of other organizations, inter alia, the “main” religious organization of the country, in the process of recognizing other religious groups.²⁷

In the case of *Ortega Moratilla v. Spain*, ECHR did not find violations of Article 14 of the Convention against the Evangelical Church, which disputed the case of discriminatory nature

²²Correspondence #1/609 – 16/09/2016; of LEPA State Agency on Religious Affairs; 2014 2015 reports of the Agency:<http://religion.geo.gov.ge/geo/document/reports>

²³Konstantine Korkelia, Nana Mchedlidze, Alexander Nalbandov, *Compatibility of Georgian legislation with the standards of the European convention on human rights and its protocols*, p. 207.

²⁴*Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, para 92.

²⁵ECtHR, *JehovasZeugen in Österreich v Austria*, para. 32; *Canea Catholic Church v. Greece*, para 47.

²⁶ *Metropolitan Church of Bessarabia v. Moldova*, para 116.

²⁷*Manoussakis and Others v. Greece*, para 43, 45

of tax exemptions granted to the Catholic Church regarding religious buildings. The Commission clarified that the reasonable and objective justification for differentiated treatment was the Agreement (Concordat) formed between Spain and the Vatican, according to which both parties had mutual rights and obligations. The Commission noted that such agreement did not exist with the plaintiff Church, and the case materials did not reveal any attempt to form such agreement. Hence, the plaintiff had no similar obligations to those of the Catholic Church before the State of Spain.²⁸ It should be noted that in this case, the Commission discussed mutual rights and obligations, while the Constitutional Agreement represents a document establishing privileges, and does not envisage obligations to be fulfilled by the Church.

In the case *Savez Crkava and Others v. Croatia*, ECHR found discriminatory treatment from the State in the process of enjoying religious freedom. A religious organization was denied an agreement that would grant it the same privileged status as other religious organizations and would enable it to deliver religious education in public schools and kindergartens or to have religious marriage recognized by the State, with the justification that it had not existed since 1941 and its members did not exceed 6000 persons. The Court clarified that the Convention does not exclude the possibility of establishing special regimes with religious organizations through agreements, but for differential approach, the existence of objective and reasonable justification and the possibility to establish such relations upon the will of religious organizations is necessary.²⁹

²⁸ Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Elective Series (New York: Aspen Publishers, 2010), p. 124.

²⁹ *Savez Crkava "Rijec Zivota" and Others v. Croatia* para 85

In the case of *Darby v. Sweden*, with regards to involuntary taxation with the aim of funding a specific church, ECHR noted that the State is obliged to respect the views of individuals and not force participation in funding for religious purposes.³⁰

Attribution of confessional aims of any religion to the State violates the secularism principle also according to the practice of the Constitutional Court of Georgia.³¹

General Comment N22 to Article 18 on Civil and Political Rights notes : “The fact of recognizing a religion as a state, official or traditional religion or that its adherents represent a majority of the population should not become basis for violating Articles 18 and 17 of the Covenant or for discriminating against the adherents of other religions or non-believers.”

In addition, in the case of *Arieh Hollis Waldman v. Canada*, the UN Committee on Human Rights notes that in relation to ensuring secular education, the aim of the State fully complies with the requirement to eliminate discrimination, and if the State decided to fund religious schools, this should take place without discriminating any religious group, based on objective and reasonable criteria in case of differentiation.

5. Preamble to the Constitutional Agreement

A brief overview of the general spirit of the Preamble to the Constitutional Agreement is necessary for legal analysis of the text of the Constitutional Agreement. The Preamble discusses the special role of the Orthodox Church in the history of Georgia, points to the “historical” status of state religion of the Orthodox Church and notes that a large majority of the population of Georgia remains Orthodox Christian.

³⁰Darby v. Sweden, App. No. 11581/85; 09.05.1989, Commission, para 58.

The Supreme Court of the United States noted in one of the cases (*Everson v. Board of Education of the Township of Ewing*) that regardless of amount, no tax should be levied on a person if it is to be used for funding of religious organizations and institutions, regardless of their form.

³¹See the February 26, 2016 ruling of the Constitutional Court of Georgia.

The recognition of the special role of the Orthodox Church in the history of Georgia does not imply legal problems, however, the reasonability of stating the status of “historical” state religion and the role in the development of the century-old Georgian culture, as well as the statement of the fact that a majority of Georgians are Orthodox Christians, is questionable.³²

Allusion to the state religion status has a symbolic meaning and may point to the analogous role of the Church in the life of the country today, with only formal regards to the secular legislative framework.³³

A legal environment upholding the secularism principle should not consider the services of the Church as a precondition for the Constitutional Agreement and acquire the form of legitimating its preferential treatment; moreover, it should not exclude the role of other religious groups in the development of Georgian culture.

Considering the place of the Constitutional Agreement in the hierarchy of normative acts, the definition of the changing information regarding the religious belonging of the majority of the population as static and consideration of this factor as an important circumstance for establishing a constitutional agreement, inherently implies a certain inconvenience with the spirit of the Constitution itself, since the latter does not delegate the freedom of religion and equality to the democratic process or subject it to majority rule.

6. Legal Review of the Main Text of the Constitutional Agreement and Relevant Legislation

6.1 Autonomy of the Church

³² Venice Commission criticizing the preamble for mentioning the autocephaly of the Church, “historical” status of the state religion and role in the development of centuries-old Georgian culture and religious belonging of the majority of the population.

³³ Korkelia, Mchedlidze, and Nalbandov, *op. cit.*, p. 202.

In parallel with establishing privileges, the text of the Agreement also concerns the autonomy of the Church. Even though the Agreement alludes to the autonomy of the Church,³⁴ and regardless of the fact that the Agreement itself is an autonomous decision of the Church, the provisions of the Agreement reveal incorrect approaches to the autonomy of the Church. ECHR considers autonomy of religious organizations as a sphere protected under religious freedom³⁵ and, according to its clarification, autonomy of religion implies the right of religious communities to decide internal organizational issues independently.³⁶

According to Article 2 of the Constitutional Agreement, “A priest shall be obliged not to disclose information he receives as a confessor or a cleric.” Church law, rather than normative acts should regulate the obligation stemming from religious doctrine. The establishment of obligation for a cleric, rather than inclusion of this authority within the sphere of voluntary decision in the form of privilege, opposes the principle of separation between church and state and illustrates interference in autonomy, thereby conflicting with Articles 9 and 19 of the Constitution. It is desirable to amend the formulation of this article to focus on the obligation of the State to ensure that the rules for questioning clerics comply with church law, rather than focusing on the obligation of a cleric to avoid violating rules established by church law.

According to Article 6, Paragraph 3 of the Constitutional Agreement, the Church shall not directly exercise business activity; hence, the State limits the Church from conducting activities allowed for other legal subjects. Nevertheless, the Church can establish a relevant legal person, to which this limitation will not apply. However, this does not exclude the in compliance of the even a “declaratory” norm with the principle of autonomy. Paragraph 4 of the same Article

³⁴Article 1, Paragraph 2 of the Constitutional Agreement.

³⁵ Fernandez Martinez v. Spain, para 127; Izzettin Dogan and Others v. Turkey, paras 121, 134, 135. Hasan and Chaush v. Bulgaria, para 62.

³⁶Svyato-mykhaylivska Parafiya v. Ukraine, para 150, Serif v. Greece, para 53.

lists funding sources for the Church. This provision too characterizes a certain frame for church activities, analogously conflicting with the essence of church autonomy.

Even though the mentioned provisions may not create factual legal problems and may be resulting from the Agreement formed voluntarily by the Church, it reflects the tendencies of exceeding proximity between church and state.

6.2 Privileges Granted to the Church through the Constitutional Agreement

6.2.1 Legal Status of the Church

The Constitutional Agreement³⁷ defined the status of the Church as a Legal Entity of Public Law (LEPL). After an amendment to the Civil Code of Georgia in 2011, the possibility of registering with this status under Article 1509¹ was granted to other religious organizations too.

However, the discriminatory environment for religious minorities, existing from 2002 to 2011, should be noted, since this violated religious freedom according to the clarifications of ECHR in a similar case against another country.³⁸

Per Article 1509, Paragraph 1 of the Civil Code of Georgia, up until 2005, non-state organizations created for public purposes, including religious organizations, were considered as LEPL. Therefore, religious organizations were not able to register as Legal Entities of Private Law. However, since the State had not adopted relevant legislation on the status and rule for registration of religious organizations, they were unable to register as LEPL as well. The Supreme Court of Georgia confirmed this in one of the cases and found it unacceptable to use the

³⁷Article 1, Paragraph 3 of the Constitutional Agreement.

³⁸Keresztény MennonitaEgyház and Others v Hungary, para 75-79.

organizational legal form of Legal Entity of Private Law of religious organizations until the adoption of relevant legislative regulations.³⁹

After the 2005 amendments, religious organizations received the right to register as Legal Entity of Private Law. After another amendment in 2011, other religious organizations also received the right to register as LEPL, thereby becoming equal to the Orthodox Church in terms of legal status.⁴⁰

It is also noteworthy that in contrast with the specificity of granting different legal status, in the Georgian reality, the nominal availability of such status is not related to the supplementary differential regime.⁴¹ With the exception of the Church, which holds privileges in relation to the Constitutional Agreement, rather than its status, religious organizations remain in essentially identical legal regime holding the status of either LEPL or non-profit (non-commercial) legal entity (N(N)LE).⁴²

6.2.2 Protection of Church Sacraments

The state exempts a cleric from the obligation to reveal information received as a confessor. According to the right to equality guaranteed by the Constitution, analogous regulation applies to the clerics of other religions as well; specifically, according to Article 50, Part I, Article C of the Criminal Procedure Code of Georgia, a clergy member is not obliged to act as a witness or communicate information that he/she has come to know as a result of a confession or other act of confiding.

³⁹ Ruling 33/599 of February 22, 2001 of the Civil, Entrepreneurial and Bankruptcy Cases Chamber of the Supreme Court of Georgia.

⁴⁰ Report of the Tolerance and Diversity Institute (TDI): Study on Religious Discrimination and Constitutional Secularism, pp. 20-21.

⁴¹ According to Article 15091 of the Civil Code of Georgia, the Law on the Legal Entities of Public Law does not apply to religious associations registered as LEPL

⁴² Tinatin Erkvania, "The Legal Context of Interrelations between Church and State – Georgian Model," pp. 15-16.

6.2.3 Military Service

Per Article 4 of the Agreement, clerics are exempt from military duty. Based on the right to equality guaranteed by the Constitution, analogous regulation should apply to clerics of other religions as well.

According to the Law of Georgia on Military Duty and Military Service, Article 30, Paragraph 1, Subparagraph K, priests or students of a theological school can defer military service.⁴³ According to the clarification of the Supreme Court of Georgia, “priests” may include clerics of any religious organization in general.⁴⁴ Even though the mentioned regulation grants lesser privileges to religious minorities, in practice, deferring the conscription on the precondition of existence of a clerical status does not lead to essential factual difference and relevant discrimination.

Based on the Law on Military Reserve Service, Article 8, Paragraph K, clerics are exempted from military reserve service, so the mentioned regulation places clerics of different religious groups in equal conditions, in contrast with the regulations of military service.

Nonetheless, from the decision of the Supreme Court of Georgia, it follows that systematic deference of military duty could be related to certain formal problems. According to the decision, the failure of clerics to appear in the conscription commission on time could lead to relevant liabilities under the Code of Administrative Offences.⁴⁵

⁴³Korkelia, Mchedlidze, and Nalbandov, *op. cit.*, p. 203.

⁴⁴Ruling bs - 1599-1575 (k-11) of February 9, 2012 of the Administrative Cases Panel of the Supreme Court of Georgia; Report of the Tolerance and Diversity Institute (TDI): Study on Religious Discrimination and Constitutional Secularism, pp.45-48.

⁴⁵Ruling bs - 1599-1575 (k-11) of February 9, 2012 of the Administrative Cases Panel of the Supreme Court of Georgia; Report of the Tolerance and Diversity Institute (TDI): Study on Religious Discrimination and Constitutional Secularism, p .24.

6.2.4 Declaration of Great Ecclesiastic Holy Days and Sundays as Public Holidays

According to Article 1, Paragraph 6 of the Constitutional Agreement, “As a rule great ecclesiastic holy days and Sundays shall be declared public holidays.”

Public holidays are established by Article 20 of organic law “Labor Code.” Part II of the Article envisages the possibility for the employee to request other day-offs instead of the holidays established through the law, which should be reflected in a labor contract. Even though the public holidays envisaged in the Labor Code are largely composed of the holy days of one religion, such possibility enables the elimination of unequal treatment.

6.3 Exclusive Privileges to the Church through the Constitutional Agreement

6.3.1 Immunity of the Patriarch

According to Article 1, Paragraph 5 of the Constitutional Agreement, the Patriarch of Georgia is immune. The content of “immunity” may be established by Article 75 of the Constitution, which envisages the status for the President of Georgia only. According to the mentioned norm, the President of Georgia is immune and cannot be arrested or criminally persecuted during his/her tenure.

The President is “immune” during his/her tenure only and, upon the conditions envisaged in the Constitution, he/she may be removed from office.

However, the Patriarch benefits from immunity before arrest and criminal persecution for an indefinite time, which is not allowed for any other religious leader or any other person,

regardless of status.⁴⁶ Such privilege clearly violates the principle of equality and neutrality of the State.⁴⁷

Putting the leader of one religious group above the law and recognition of immunity without exception clearly exemplifies inadmissible affiliation between the Church and the State. Recognition of such immunity opposes such fundamental principles of the Constitution as the rule of law, equality before the law, public sovereignty and legal state.

6.3.2 Recognition of Religious Marriage

According to Article 3 of the Agreement, the State shall recognize a religious marriage confirmed by the Church according to the law.

Regulations related to weddings under the Civil Code of Georgia⁴⁸ do not include any norms with regard to religious marriage and do not apply the privilege established for the Church through the Constitutional Agreement to other religious organizations, which opposes the right to equality guaranteed through the Constitution.⁴⁹

6.3.3 Education

According to Article 5 of the Constitutional Agreement, “Religious education in educational institutions shall be voluntary. Drafting, amending curriculums, teachers’ appointment and dismissal shall be subject to Church proposals.”

⁴⁶ Norwegian Centre for Human Rights (NCHR), *The Constitutional Agreement’s Departure from the Georgian Principle of Equality*, 2015, p. 44.

⁴⁷ U.S Department of State, *International Religious Freedom Report for 2015, Georgia*, available: <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2015&dliid=256191#wrapper>.

⁴⁸ Civil Code of Georgia, Book 5, Chapter 1.

⁴⁹ Tsintsadze, *op., cit.*, p. 766.

According to Article 18, Paragraph 4 of the Law on General Education, the pupils of public school shall have the right to study religion or conduct religious rituals outside of school time, if it serves the purposes of acquiring religious education. However, in contrast with the Church, there are no agreements/memoranda formed with other religious organizations regarding this issue.⁵⁰ It may be assumed, therefore, that in these conditions, the opportunity to teach relevant religions in schools upon request is not ensured for other organizations.⁵¹

Paragraph 2 of Article 5 of the Agreement concerns mutual recognition of diplomas, certificates, and scientific degrees issued by educational institutions. Based on the right to equality guaranteed by the Constitution, diplomas, certificates and scientific degrees issued by relevant educational institutions should be recognized in the case of other religious organizations as well.

According to Article 63⁵ of the Law on General Education, before January 1, 2015, the Ministry of Education and Science of Georgia and the Patriarchate of Georgia must compile a list of unlicensed educational institutions of Georgian Apostolic Autocephalous Orthodox Church whose documents issued before September 1, 2010 certifying general education are recognised by the State as provided for by the legislation of Georgia. Therefore, even though the Law on General Education does not include special regulations for the recognition of educational documents issued by the Church or other religious organizations, the mentioned regulation of the transitory provision of the law points to the direct application of the Constitutional Agreement with regards to the Church, in this specific case, as opposed to other religious organizations, towards the recognition of educational documents issued by the Church through the legislation of Georgia (Constitutional Agreement).

⁵⁰ Correspondence #MES 2 1601053142 – 12. 09. 2016 of the Ministry of Education and Science of Georgia.

⁵¹ Norwegian Centre for Human Rights (NCHR), The Constitutional Agreement's Departure from the Georgian Principle of Equality, 2015, p. 48.

According to Article 89⁵ of the Law of Georgia on Higher Education, before January 1, 2015, the Patriarch of all Georgia shall be authorized to define procedures for granting of academic degrees, other than procedures determined by the legislation of Georgia, and to grant academic degrees in accordance with such procedures in the field of Orthodox theological higher education. Documents certifying education, diplomas, granted under paragraph 1 are recognized by the State. Similarly, even though the law contains no special regulation for recognizing educational documents issued by the Church or other religious organizations, the mentioned regulation of the transitory provision of the law points to the direct application of the Constitutional Agreement with regards to the Church, in this specific case, towards the recognition of educational documents issued by the Church through the legislation of Georgia (Constitutional Agreement) as opposed to other religious organizations.

The Memorandum of understanding between the Church and the Ministry of Education and Science of Georgia envisages the creation of joint working groups, as well as elaboration of procedures for mutual and equal recognition of educational documents, academic degrees and titles issued by relevant educational institutions of the Church and the State and their legal provision. Similar memoranda have not been concluded with any other religious institution.⁵²

6.3.4. Tax Exemption

According to Article 6, Paragraph 5 of the Constitutional Agreement, all ecclesiastic goods produced, imported, and delivered by Church, as well as donations, non-economic property and land premises shall be duty free.

Such privileges, except the exemption from land taxation of premises under church property envisaged by the Agreement are implemented through the tax code.

⁵² Correspondence #MES 2 1601053142 – 12.09.2016 of the Ministry of Education and Science of Georgia.

Similarly, to the regime established through the Constitutional Agreement towards the Church, according to the tax code,⁵³ the property of any non-commercial organizations, including religious organizations, is exempted from **property tax**.

According to the tax code regulations, religious organizations are exempt from **corporate income tax** within the scope of religious activity. According to Article 9 of the Tax Code of Georgia, religious activities are not considered under economic activity. Additionally, Article 11 clarifies that activity of those enterprises of religious organizations (associations) to publish religious (religious service) literature or produce religious items; the activities of these organizations (associations) or their enterprises connected with the realization (dissemination) of religious (religious service) literature or religious items; as well as the use of the funds received from the above activities for performing religious activities shall be regarded as equal to religious activities. This complies with Article 96, which considers only enterprises as corporate taxpayers.

However, the Code⁵⁴ still singles out the Patriarchate of Georgia. According to the regulation, income received through the realization of crosses, candles, icons, books and calendars used for religious purposes by the Church are exempt from corporate income tax, including by the subjects that produce such items for the Patriarchate. Even though church activities are exempt from corporate tax according to Articles 9, 11 and 96 of the Code,⁵⁵ the

⁵³ Tax Code of Georgia, Article 206, Part I, Subparagraph E .

⁵⁴ Tax Code of Georgia, Article 99, Subparagraph D.

⁵⁵ Wide interpretation of the Constitutional Agreement and the Tax Code could imply the consideration of production, including non-liturgical production, within the scope of religious activity as part of religious activity and the exemption of e.g. production of wine by Alaverdi Monastery from corporate income tax.

legislation prioritizes and grants exemption to other subjects that will produce the above items for the Church.⁵⁶

Similarly, to the corporate income tax, the **value-added tax (VAT)** represents another tax linked to commercial activity. In this case too, as religious activity is not considered a commercial activity, religious organizations are not subject to VAT. Hence, even though the tax code⁵⁷ exempts the Orthodox Church from VAT when supplying items of religious purposes (e.g. candles, icons, and such items), such regulations also apply to other religious organizations based on Articles 9 and 11 of the code. However, in contrast with other religious organizations, other subjects responsible for constructions, reconstructions and paintings ordered by the Patriarchate are also exempt from VAT.⁵⁸

Therefore, with regard to corporate income tax and VAT, preferential treatment of the State towards the Church is clear. Other subjects are exempt from VAT when producing crosses, candles, icons, books and calendars with religious purposes only through the orders of the Patriarchate; analogously, other subjects are exempt from VAT when constructing, reconstructing, or painting churches only through the orders of the Patriarchate.⁵⁹

In addition, the apparently general, nondiscriminatory norms of the tax code, which do not exempt any religious organizations from land taxes, do not completely reflect the reality. The Constitutional Agreement superior to the law, a part of the Georgian legislation, exempts the Church from **land tax**.

⁵⁶2010 Report of the Public Defender of Georgia, pg. 313, available: <http://www.ombudsman.ge/uploads/other/0/84.pdf>

⁵⁷ Tax Code of Georgia, Article 168, Part I, Subparagraph F .

⁵⁸ Tax Code of Georgia, Article 168 , Part II, Subparagraph B.

⁵⁹2010 Report of the Public Defender of Georgia, pp. 314-315, available: <http://www.ombudsman.ge/uploads/other/0/84.pdf>.

Based on the equality principle guaranteed by the Constitution, other religious organizations and organizations implementing relevant activities through their orders, should be exempt from VAT envisaged under Article 168 of the tax code and from land taxes regulated through the Constitutional Agreement.⁶⁰

6.3.5 Places of Worship of the Church

According to Article 7 of the Agreement, the State recognizes Orthodox churches, monasteries (acting and non-acting), their remains and land premises they are built on all over Georgia to be in the property of the Church.

Through the mentioned provision, the State implements restitution policies in relation to the real estate confiscated from the Church during the Soviet era. As the Venice Commission pointed out, it is necessary that such regulations consider the parts in personal property and exclude automatic ownership rights of the Church on such properties.⁶¹

Judicial practice shows that the views of the Commission were not unsubstantiated. Specifically, according to the 2004 ruling of the Supreme Court, the Patriarchate established ownership rights on a building inside the yard of the cult building, which was on the balance of the Society for the Protection of Historical and Cultural Monuments until 1900 and was then listed under the property of the legal successor foundation in 2001. The Court considered the disputed building an inseparable part of the Anchiskhati Episcopal house, and therefore granted ownership rights to the adjacent building to the Patriarchate.⁶²

⁶⁰Tsintsadze, *op. cit.*, p. 768.

⁶¹Venice Commission Report, available: <http://www.venice.coe.int/webforms/documents/?pdf=CDL%282001%29063-e#>

⁶²Administrative chamber of the Supreme Court of Georgia, decision bs -470-408-k-04, 10 November, 2004; Report of the Tolerance and Diversity Institute (TDI): Study on Religious Discrimination and Constitutional Secularism, p. 31.

The mentioned regulation of the Constitutional Agreement is broadly interpreted by the courts and allows the recognition of those places of worship as the property of the Church, which have been illegally confiscated from other religious buildings and granted to the Church.⁶³ Therefore, restitution policy has not been implemented towards religious minorities,⁶⁴ and, in certain cases, historical places of worship belonging to other religious organizations were granted to the Church.⁶⁵

The recognition of the ownership rights on places of worship confiscated in the Soviet period for the Church creates legitimate expectation among other religious organizations that their ownership rights towards analogous property will also be recognized. The recognition of the ownership rights only in the case of the Church and implementation of restitution policy only in relation to it, with complete disregard of the problem in the case of other religious organizations and the refusal to study the issue, creates grounds for unfair treatment and is discriminatory against other religious organizations.

Based on the Law on State Property, free transfer of state property for ownership is only permitted in the case of the Orthodox Church. In the existing normative environment, the implementation of restitution policy towards religious minorities can only be limited to the transfer of places of worship for use.⁶⁶ Therefore, the discriminatory nature of restitution policy based on the Constitutional Agreement is further strengthened by the regime of general legislation, according to which the restitution policy has not only been not implemented towards religious minorities, but also cannot be fully implemented, i.e. places of worship under state

⁶³ Norwegian Centre for Human Rights (NCHR), *The Constitutional Agreement's Departure from the Georgian Principle of Equality*, 2015, p. 45.

⁶⁴ UN Human Rights Committee, Concluding observations on the fourth periodic report of Georgia, CCPR/C/GEO/CO/4, 19 August 2014, p. 18.

⁶⁵ Tsintsadze, *op. cit.*, p. 767, 768; Report of the Tolerance and Diversity Institute (TDI): Study on Religious Discrimination and Constitutional Secularism, pp. 45-48.

⁶⁶ Statement on the appeal prepared by the Constitutional Law Clinic of the Free University of Tbilisi and Tolerance and Diversity Institute (TDI), available: <http://tdi.ge/ge/news/350-religiuri-gaertianebebis-konstituciuri-sarcheli>.

property cannot be transferred for ownership. In this regard, the regimes established by the Law on State Property and the Constitutional Agreement are coherent.⁶⁷ The nonexistence of the possibility of restitution even in the case of relevant will from the executive government puts essentially equal persons in significantly different conditions and alienates them from equal opportunities even more than it would have been the case if the restitution policy applied to the Church only. Such intense instances of differentiation, even when classic differentiation grounds as religion are absent, are specially treated by the Constitutional Court and discussed under “Strict Scrutiny Test.”⁶⁸ It should be noted that the relevant norms of the Law on State Property have been appealed in the Constitutional Court and the constitutionality of the disputed norms is under consideration.⁶⁹

According to Article 10 of the Agreement, the State takes responsibility to negotiate with other states on protection, care and ownership of all Georgian Orthodox churches, monasteries, remains, other ecclesiastic buildings, and ecclesiastic items being on their territories.

The Georgian legislation does not envisage such responsibility towards other religious groups. The existence of such exclusive privilege leads to discrimination on religious grounds.⁷⁰

6.3.6 Partial Compensation for Property Confiscated in the Soviet Period

Article 11 of the Constitutional Agreement envisages partial compensation of material damage for property confiscated from the Orthodox Church in the Soviet Period. According to Part 1 of Article 11, the State shall acknowledge material and moral damage to the Church during the loss of state independence in the nineteenth to twentieth centuries (especially in 1921-

⁶⁷ Article 6³ Paragraph 1 of the Law on State Property of Georgia.

⁶⁸ Decision #1/1/493 of the Constitutional Court of Georgia of December 27, 2010 II.3. 5-6.

⁶⁹ Appeal811 available: <http://www.constcourt.ge/ge/court/sarchelebi>.

⁷⁰ Norwegian Centre for Human Rights (NCHR), The Constitutional Agreement’s Departure from the Georgian Principle of Equality, 2015, p. 46.

1990) and being factual owner of part of the confiscated property, the State shall take responsibility to partly compensate material damage. Part 2 of the same Article envisages that a target commission shall be formed within a one-month period of signing the present Agreement. The commission shall study compensation forms, amount, terms, property and land plot transfer procedures and other details, and make drafts of proper legal acts.

Until 2014, the State had not accepted such responsibility towards any other religious organization. In 2014, the government decided to finance four other religious organizations (the Muslim community, the Jewish community, the Catholic Church and the Armenian Apostolic Church) in the form of compensating for damages in the Soviet regime caused as a result of its repressive policy.⁷¹ Apart from the fact that the rule excludes any religious organization other than the four subject to the same kind of loss in the Soviet period, it imposes strict mechanisms of accountability and regulation of spending purposes towards the four religious organizations, and raise reasonable doubts regarding the actual purpose of the rule to exercise control over religious organizations by the government. The presumed purpose of it to have control over the core religious groups, rather than eliminate the discriminatory reality created by the Constitutional Agreement, became the subject of severe criticism of religious organizations, as well as local⁷² and international human rights organizations.⁷³

⁷¹ The Resolution N 117 of the Government of Georgia of, On Approval of the Procedure for Implementation of Certain Measures related to the Partial Compensation of Damages Inflicted during the Soviet Totalitarian Regime to the religious Organizations Present in Georgia, of January 27, 2014.

⁷² Joint study of EMC and Tolerance and Diversity Institute (TDI), assessment of practices of state funding of religious organizations, 2016, available at: <https://emc.org.ge/2016/07/16/emc-101/>.

⁷³ Report on freedom of religion, 2015, US State Department, available at: <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>; European Commission against Racism and Intolerance (ECRI), Report on Georgia (fifth cycle of monitoring), p. 76 p. 27, 2016, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Georgia/GEO-CbC-V-2016-002-GEO.pdf>.

6.3.7 Licenses and Permits

According to Paragraph 6 of Article 6 of the Constitutional Agreement, the State shall issue permissions and licenses on using official ecclesiastic terminology and symbols, also producing, importing and delivering ecclesiastic goods in agreement with the Church.

Even though the mentioned norm is not reflected in relevant legislation, the regulation points to the tendency of preferential treatment of the Church. While any religious organization, including the Church, is a legal subject and can prohibit the use of its official terminology and symbols based on the civil norms of general application, the mentioned regulation may only be an expression of exceptional loyalty towards the Church.

6.4 Spheres of Cooperation

6.4.1 Chaplaincy

According to Article 4, Paragraph 2 of the Constitutional Agreement, chaplaincy shall be created at armed forces, prisons, and jails.

Through Order N173 of the President of Georgia of April 30, 2003, the provision of the chaplaincy in military formations and penitentiary institutions was approved.

Before 2010, the issue of realization of religious freedom by representatives of religious minorities in penitentiary institutions remained unresolved, since, according to the existing practice, the entrance of clerics of different religious organizations into these institutions required permission from the Patriarchate, representing an inadmissible discrimination against religious associations.⁷⁴

Order N187 of the Minister of Probation and Legal Aid of Georgia of December 30, 2010 on the implementation of the right of defendants/convicts to participate in religious rituals and

⁷⁴2010 Report of the Public Defender of Georgia, available: <http://www.ombudsman.ge/uploads/other/0/84.pdf>.

meet with clerics ensured the conditions to satisfy the religious requirements of defendants/convicts. The norms of the mentioned regulation are general and are not clearly limited to the consideration of religious requirements of the Orthodox Christians. However, Article 2 of the Order should be highlighted, which separates the Church from other registered religious organizations and/or traditional denominations and mentions it separately, even though for the purposes of this Order, no differences exist.

Based not on the above-discussed Article 4, but Article 1 of the Constitutional Agreement, which envisages the authorization to make agreements on joint interest fields, on March 1, 2006, an agreement was concluded between the Church and the Ministry of Justice in the sphere of re-socialization of probationers and custodial convicts.⁷⁵ Based on Article 4, Paragraph 2 of this agreement, the Patriarchate of Georgia, in agreement with the Ministry of Justice, shall organize the satisfaction of religious requirements of non-Orthodox probationers and custodial convicts. The subordination of religious requirements of the representatives of one denomination to the positive activities of another religious organization leads to inconvenience and is incompliant with the obligatory neutrality of the State in relation to religious issues.

There is a memorandum concluded between the State Agency on Religious Affairs and the Ministry of Probation, which aims at supporting the belief of convicts and probationers in general and implementation of their freedom of belief.⁷⁶

At the same time, in accordance with the Constitutional Agreement, on August 17, 2014, an agreement was concluded between the Church and the Ministry of Defense. The agreement stands out for its non-secular formulations, e.g. “The parties put special importance to the maintenance, development and prosperity of Orthodox traditions [...]” The agreement aims at

⁷⁵The agreement is available: <http://www.orthodoxy.ge/samartali/shetankhmeba.htm>.

⁷⁶ Correspondence MCLA 2 15 00668876 – 14.08.2015 of the Ministry of Corrections, information available: <http://religion.geo.gov.ge/geo/memorandums/religiis-saagentosa-da-sasjelaghsrculebis>.

developing a chaplaincy in the Georgian military, but the essence of it is reflected only in the cooperation with one religious organization. The agreement envisages rules for implementing the chaplaincy, including remuneration for priests and provision of areas for service and other forms of support from the Ministry.⁷⁷

The implementation of a chaplaincy involving only one religious organization requires that it be effectively available for other religious organizations as well.

6.4.2 Education

Article 5 of the Constitutional Agreement envisages cooperation between the State and the Church, specifically, with regard to teaching religion, joint educational programs, and support to functioning educational institutions.

However, from the text, the meaning of joint educational programs or support to educational institutions is unclear. Such formulation appears declaratory and is not inherently problematic, and at its best, support to educational institutions may imply avoidance of bureaucratic complications. However, the analysis of the Law on Budget of 2016 enables more specific clarification of the responsibilities taken under this article. Specifically, the characterization of program code 4501 unambiguously notes: “For the upbringing of young people with Christian values, in different regions of Georgia (including mountainous regions), more than 70 educational-cultural and charity organizations of the Patriarchate, including, theological academies and seminaries, university, schools and gymnasiums, maternal and children’s homes, boarding schools for orphans and underprivileged children, center for rehabilitation and adaptation of children with hearing impairment, vocational college and schools will be financed.”

⁷⁷ Correspondence MOD 8 16 00910106 – 27/09/2016 of the Ministry of Defense

Article 9, Paragraph 3 of the Law on Higher Education may also be considered as a form of supporting functioning of educational institutions. According to this article, an Orthodox higher education institution can exist in the form of a structural unit of the Patriarchate or as a legal entity of private law, regardless of the general regulation, according to which a higher education institution is founded in the form of a legal entity of public law or legal entity of private law. According to Article 13, requirements of the Georgian legislation do not apply to Orthodox higher education institutions. Hence, in contrast with higher education institutions founded by other religious organizations, those of the Church are not subject to legal regulations.

Article 31¹ of the same law establishes the rule for the foundation and management of Orthodox higher education institutions. The fact of legal definition of the mentioned rule itself represents disregard of the autonomy of the Church. The rule should be defined by the religious organization, and not by the State. In addition, it is worth noting that the mentioned rule, in contrast with other religious organizations, allows for the definition of structure and management units different from those envisaged by the law to exist in higher education institutions of the Church. Numerous regulations⁷⁸ of the transitory provisions of the law envisage further exceptions and preferential treatment towards the Church.

In addition, the memorandum of understanding between the Church and the Ministry of Education and Science envisages the creation of a joint working group for different purposes, namely creation of manuals and curriculum for teaching Orthodox Christian religion; elaboration of procedures for the selection, training and appointment/dismissal of pedagogical personnel; creation of teaching plans for subjects related to Orthodox Christian belief; elaboration of procedures for the participation of the representatives of the Patriarchate in the process of discussing relevant curricula; funding and legal provision of property matters of educational

⁷⁸ Articles 89³-89⁶; 89⁹ of the Law on Higher Education.

institutions of the Church; elaboration of forms of cooperation between the Church and the State on the issues of upbringing pupils. Analogous memoranda have not been formed with any other religious organization.⁷⁹

6.4.3 Cooperation in Social Affairs

According to Article 4, Paragraph 3 of the Constitutional Agreement, the Church and the State have the authority to implement joint programs for social protection.

On September 28, 2011, an agreement was made “On the Cooperation between the Apostolic Autocephaly Church of Georgia and the Ministry of Labor, Health and Social Protection of Georgia.” Among others, the Agreement regulates the participation of the representatives of eparchies in the regional councils of care and guardianship bodies in the discussion of issues related to return of children from care facilities subordinated to the Church to biological families, adoption, foster care, and transfer to other care facilities. Analogous agreements have not been concluded between the Ministry and other religious organizations.⁸⁰

6.4.4 Issues Related to Church Treasures

As mentioned above, according to Article 7 of the Agreement, the State considers Orthodox churches, monasteries (acting and non-acting), their remains and land premises they are built on all over Georgia to be in the possession of the Church. According to Article 8, analogous regulation applies to ecclesiastic treasure under State security protection (kept at museums and treasury, except those owned privately), with the difference that the latter is under joint ownership of the State and the Church.

⁷⁹ Correspondence #MES 2 1601053142 – 12.09.2016 of the Ministry of Education and Science.

⁸⁰ Correspondence #01/67914 – 06.09.2016 of the Ministry of Labor, Health and Social Protection.

Article 9 clarifies that the State and the Church shall jointly protect and care for security and protection of ecclesiastic buildings and treasure of historic-architectural and archeological-architectural values. According to the recommendation of the Venice Commission, the primary responsibility of the State to supervise such care is specified in Article 6, Paragraph 2, Article 7, Paragraph 2 and Article 9, Paragraph 2.

There are two memoranda concluded between the Church and the Ministry of Culture and Protection of Monuments—one on cooperation on issues of cultural heritage and another on the creation and approval of the regulation of a joint council discussing the issues of cultural heritage monuments of the National Agency for the Protection of Cultural Heritage. Analogous agreements/memoranda have not been signed with other religious institutions.⁸¹

Conclusion

Considering the complicated procedures of amending constitutional agreements, focusing on the shortcomings identified through legal analysis is especially important.

An analogue of the relations between church and state through an agreement like the Constitutional Agreement cannot be found in any other country; additionally, conclusion of an agreement between the Church and the State is legally problematic.

Even in the conditions where the definition of the rank of the Constitutional Agreement in the hierarchy of normative acts is a sovereign right of the State, such a decision is not guided by human rights-based approach. The specific basis for granting an agreement between two parties a superior rank over international agreements is unclear, other than demonstrating loyalty towards the Church and maintaining the authority of the Agreement in the event of possible conflict with international agreements. In addition, it is noteworthy that the text of a normative

⁸¹ Correspondence #13/13-4005 – 13.10.2016 of the Ministry of Culture and Monuments Protection.

act of such a high ranking is completely deficient of content related to human rights and does not point to the right to equality even in a general manner.

In the given circumstances, it is important that the potential existing in Article 9 of the Constitution, specifically, the requirement for the Agreement to comply with the recognized principles and norms of international law in the field of human rights and freedoms be applied for the interpretation of the existing legislative framework for the benefit of human rights. Therefore, with regard to the international treaties establishing human rights and freedoms, exceptions should be made in the relevant article of the Law on Normative Acts.

The scope of assessing the compliance of a legal document of such a high ranking with the Constitution and, especially, the right to equality, is limited by the practice of the Constitutional Court. However, the necessity of such assessment is clear with the aim of eliminating discrimination in cases where general legislation does not regulate any of the issues given in the Agreement (e.g. immunity of religious leaders, recognition of church marriage, mutual recognition of certificates of education, restitution of places of worship and protection of places of worship and additional ecclesiastic items in foreign countries), while the privilege envisaged in the Constitutional Agreement is directly applied towards the Church only and puts other religious organizations in unequal positions. Naturally, discriminatory approach does not lead to different factual circumstances only because it is not reflected in subordinated legislation, and should not be left unevaluated.

Furthermore, the Agreement and subordinated legislation jointly establish unequal opportunities for participating in certain spheres of societal relations, such as the opportunity of voluntary learning of a subject on Orthodox Christian belief or tax exemptions with regards to land tax, corporate income tax, and VAT.

In addition, the analysis of the Agreement and subordinated legislation reveals preferential approaches towards the Church, some of which may certainly not be directly related to priority enjoyment of specific rights, but are nevertheless basis for unequal treatment (e.g. support for religious education), and others are declaratory, pointing towards the tendencies of affiliation of the Church and the State.

Unequal treatment is also identified in documents prepared for the purposes of the implementation of the Agreement, for example, in the involvement of the Church in organizing the process of realizing religious requirements of the representatives of other denominations. At the same time, the spheres of cooperation between the Church and the State, envisaged by the Agreement, also represent forms of support and preferential treatment of the Church and point to the problems of exceedingly close association.

It is important that the problems existing with regards to the fulfillment of the secular role of the State are revealed not only in the support of the Church, but also in the disregard towards the autonomy of the Church in a number of cases (e.g. establishment of clerical obligations by the agreement, limitation of commercial activities of the Church and definition of funding sources, interference in the definition of materials needed for voluntary education on Orthodox religion).

According to the clarifications of the Constitutional Court and standards established by international norms (See Chapter 4), the attribution of confessional purposes of any religion to the State violates the principle of secularism.⁸² Certain provisions of the Constitutional Agreement indeed reveal discriminatory support to confessional activities. At the same time, in the wider context, the non-secular purpose of declaring preferential treatment towards the Church in the adoption of this agreement becomes clear.

⁸² Ruling of February 26, 2016 of the Constitutional Court of Georgia.

The purpose of preferential treatment of the Church is clear in the Preamble of the Constitutional Agreement especially by the reference that Orthodox Christianity developed the centuries-old Georgian culture, disregarding the contribution of other religious groups.