

## Chapter 4. Discriminatory Restitution Policy and Search for New Perspectives

Restitution Policy in Georgia is discriminatory. Since 90ies till now religious minorities cannot recover and protect historic property confiscated during the Soviet period. The process was settled only for the Orthodox Church. The state created all legal and practical guarantees for restitution and use of the property. Moreover, the restitution process in relation to the Orthodox Church became preferential and reflected excessive loyalty, which caused an accumulation of large amounts of property and financial resources. In these circumstances, religious groups cannot even register property rights on historic, operational buildings, not to mention disused and disputed historic places of worship, which face high risks of damage and destruction. Certainly, this is discriminatory and points to weak recognition of the history and interests of religious minorities. This reality raises the need for fair and equal restitution policy and its legislative regulation.

The present research aims to study relevant international standards, also experience of countries with a similar background, and analyze local practice and legislation in that light. Despite dissimilar resolution of restitution issues in domestically, the present document draws attention to common basic principles and approaches, that restitution legislation of different countries is based on.

The following methodological instruments were used for the study: analysis of the legislation of different countries, international standards, and secondary sources; assessment of practice on restitution in different countries and analysis of decisions of the European Court of Human Rights in this regard. As for the secondary sources, relevant analytic and policy documents were studied, which on the one hand describe the political environment and background of restitution legislation and on the other hand, discuss arguments on the expediency of adopting restitution legislation.

The first part of the document will critically assess Georgian legislation related to restitution and challenges due to the inexistence of the legislative framework. The second part of the document will analyze the basic characteristics of legislation on the restitution of property confiscated during the Soviet period as well as will try to identify best practices.

For identifying best practices, several countries were selected, which portray different models of state-church relations and accordingly, provide the opportunity for identifying best practices with regard to different contexts of adopting restitution legislation. Romania and Poland are those countries, in which the public and social role of religion is most recognized. Czech Republic at the end of the other spectrum, is an example of strict separation of the church and the state. Hungary takes a middle position in terms of recognizing public role of religion.<sup>1</sup> The scope of the research is limited, and it does not cover restitution of property confiscated during Nazi Germany and narrowly relates to those restitution legislations, which aim to return property of religious groups and places of worship confiscated during Soviet period. The document does not discuss individual claims on property confiscated during Soviet period either.

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<sup>1</sup> Zrinščak, Siniša. "Church, State and Society in Post-Communist Europe" In Religion and the State: A Comparative Sociology, edited by Jack Barbalet, Adam Possamai, and Bryan Turner, Anthem Press, 2011: 175-176;

## 1.1. Introduction: Restitution Problem and Local Context

Structural reason for legal asymmetry between dominant Church and other religious organizations became the Constitutional Agreement of 2002 concluded between the State and the Orthodox Church. The conclusion of the Constitutional Agreement with the dominant Church, granting it a high ranking in the hierarchy of normative acts and number of exclusive privileges envisaged in the Agreement, is a clear demonstration of state loyalty towards the Patriarchate of Georgia. Constitutional status of the Constitutional Agreement,<sup>2</sup> extreme barriers to modifications or revocation and its conclusion in the name of the state, which makes it resemble an agreement concluded with a sovereign international actor (e.g. a concordat concluded with Vatican), is the most vivid illustration of preferential treatment and its legal and symbolic formulation.<sup>3</sup> The provision of the Preamble, which exclusively relates cultural formation of the country to the Orthodox Church and with this neglects participation of other religious groups in this process, also deserves attention.<sup>4</sup> Conclusion of the Constitutional Agreement in 2002 in this form, which on its part is devoid of human rights language, created visible inequality between the Orthodox Church and other religious organizations, which is reflected in various spheres related to religious freedoms, including restitution. According to the Constitutional Agreement, the state acknowledged the right of the Orthodox Church to historic places of worship, its ruins and land, however, the same approach was absent with regard to other religious organizations. Religious minorities cannot register property rights on their historic places of worship, not to mention on those disputed, in the possession of the Patriarchate of Georgia or disused, which creates high risks of damage and in this manner contributes to erasing traces of other cultures.

Restitution problems of property confiscated during Soviet period is in direct link with the separation of state and church. Very often unresolved problems of restitution leave room for unifying state and church powers. In the absence of restitution legislation, religious organizations become dependent on the good will and financial support of the state. In the Georgian context, absence of general legislative framework on confiscated places of worship, besides property-related and material challenges is the source of additional conflicts.

## 1.2. Restitution Legislation in Georgia

Patriarchate of Georgia practically already during Soviet period enjoyed restitution-related rights. Towards the end of 80ies, according to decision of the Council of Ministers of the Soviet Republic of Georgia, Patriarchate regained the right to use confiscated places of worship. In this period, places of worship, which historically belonged to other religious communities and as a result of confiscation at that point represented state property, were also transferred to the Church.<sup>5</sup> Thus, after 80ies, the Church not

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<sup>2</sup> Tsintsadze Kh., Legal Aspects of Church-State Relations in Post-Revolutionary Georgia, "Brigham Young University Law Review", 2007, N3, p. 764;

<sup>3</sup> Freedom of Religion – Critique of Discriminatory and Nonsecular state policy, EMC, 2016, Part I, available at: <https://emc.org.ge/ka/products/kvleva-religiis-tavisufleba-sakhelmtsifos-diskriminatsiuli-da-arasekularuli-politikis-kritika>

<sup>4</sup> See Constitutional Agreement between the State and the Georgian Autocephalous Orthodox Church, available at: <https://matsne.gov.ge/document/view/41626?publication=0>

<sup>5</sup> Needs Study of Religious Organizations in Georgia, TDI pp. 23-33, available at: [https://tdi.ge/sites/default/files/religiuri-gaertianebebis-sachiroebebis-kvleva-sakartveloshi\\_0.pdf](https://tdi.ge/sites/default/files/religiuri-gaertianebebis-sachiroebebis-kvleva-sakartveloshi_0.pdf); State Of Cultural Heritage Of Religious Minorities In Georgia, 2016, Human Rights Center, pp. 19-38;

only recovered majority of confiscated places of worship, but those belonging to other religious communities were also placed in the Church's possession (e.g. 5 Catholic Churches). Return of places of worship by damaged religious minorities proved impossible through legal proceedings as well.<sup>6</sup> Also, restitution of places of worship by religious minorities (e.g. 6 Armenian Churches)<sup>7</sup> could not be achieved due to presentation of concurrent claims to property by the Patriarchate.

In legal terms, restitution process started with the Constitutional Agreement concluded between the State and Patriarchate in 2002. According to article 7 of the Agreement, the state recognizes as state property any kind of building, whether it is operational or not, apart from that, ruins, land, on which those are located also represent the property of the Church. According to this provision, the state carries out restitution policy in relation to immovable property of religious designation confiscated from the Church during Soviet period. As later court practice revealed, based on the Constitutional Agreement, the Patriarchate of Georgia was given the possibility to acquire rights to buildings adjacent to places of worship as well.<sup>8</sup>

It is noteworthy, that attempts to place places of worship/ruins historically belonging to other religious communities in the possession of the Patriarchate is still continuing. In July 2017, the Government of Georgia granted the request of the Patriarchate and transferred property rights on one more Armenian Church (Tandoyants), its ruins and adjacent territory through violation of law.<sup>9</sup> Example of similar attempt is the claim of the Patriarchate of Georgia to the historic building in the village of Mokhe, which was presented only after the Muslim community in Mokhe protested against the renovation and non-religious use of the building.<sup>10</sup>

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<http://humanrights.ge/admin/editor/uploads/pdf/angarishebi/hrdc/religiur%20umciresobata%20kulturuli%20memkvudreoba-geo.pdf>; Tsintsadze Kh., Legal Aspects of Church-State Relations in Post-Revolutionary Georgia, "Brigham Young University Law Review", 2007, №3, p. 767; 768; Council of Europe: European Commission Against Racism and Intolerance (ECRI), Report on Georgia (fifth Monitoring Cycle), 2016, available at: <https://www.refworld.org/docid/584e8b914.html>

<sup>6</sup> Constitutional Secularism and Religious Discrimination in Georgia, TDI, 2014, pp. 19, 45-49, available at: <https://tdi.ge/sites/default/files/religiuri-diskriminaciisa-da-konstituciuri-sekularizmis-kvleva.pdf>;

<sup>7</sup> For instance, on February 25, 1995, the Patriarchate of Georgia by holding religious service in Norashen Armenian Church attempted to bring the place of worship under its possession. Following protest of Armenian community, representatives of the Patriarchate did not hold any more religious services in the Church, however neither was it returned to the Armenian Community. In 2008, representatives of the Patriarchate of Georgia moved stones from the garden of the Church, at the same time brought gravestones with Georgian inscription. This aimed at erasing Armenian traces there, which would have made it easier to present claims to the Church. It is true that following the protest Armenian gravestones were returned to its original location, however, this incident well illustrates the strategy of the Patriarchate to claim Churches historically owned by other religious communities.

<sup>8</sup> Constitutional Secularism and Religious Discrimination in Georgia, TDI, 2014, pp. 31-32; Decision of the Chamber for administrative and cases of other categories issued by the Supreme Court of Georgia № 85-470-408-3-04, 10 November, 2004, available at: <https://tdi.ge/sites/default/files/religiuri-diskriminaciisa-da-konstituciuri-sekularizmis-kvleva.pdf>

<sup>9</sup> See information regarding developments around Tandoyants Church at: <http://www.tdi.ge/ge/news/494-xelisuplebam-tandoiancis-eklesia-sakartvelos-sapatriarkos-gadasca>;

<sup>10</sup> See analysis of developments in the village of Mokhe at: <http://tdi.ge/ge/news/126-sopel-moxeshi-ganvitarebuli-movlenebis-analizi>

Restitution policy in this form was not undertaken in relation to religious minorities.<sup>11</sup> As a result of international and domestic criticism, the Government resolution on the Human Rights Action Plan of 2016-2017 foresaw as the authority of the newly-created State Agency on Religious Affairs to return places of worship historically belonging to religious communities based on individual decisions, as well as to resolve possible disputes between religious communities. According to the Plan, the agency is authorized to ascertain the historic (confessional) owner of worship places and transfer buildings, also resolve disputes in relation to ownership of worship places through fast, transparent and fair procedure.<sup>12</sup> The Agency executes these authorities related to restitution policy through an Advisory Commission on Financial and Property Issues under its mandate.<sup>13</sup> The commission, by majority of votes, decides applications on restitution. In the framework of this procedure, restitution of immovable property to religious communities, mostly of buildings already in their possession is possible on the basis of politically motivated “good will” through individual decisions, with regard to which no other religious organization has presented claims.<sup>14</sup>

Furthermore, in contrast to goals of the Human Rights Action Plan, certain conflicts between religious communities ensued precisely in the process of executing this so-called restitution policy by the Agency as a result of transfers of places of worship without thorough examination of their confessional ownership. For instance, the dispute between the Administration of all Muslims of Georgia and non-registered Union ‘Imam Ali Mosque’ followed transferring of Imam Ali Mosque in Marneuli to LEPL Administration of all Muslims of Georgia for use without prior examination by the Agency. For years religious organization (non-registered Union ‘Imam Ali Mosque’) established by local population has been carrying out religious activities independently in Imam Ali Mosque.<sup>15</sup> Conflict also arose as a result of the transfer of Armenian Church (Tandoyants) by the Agency to the Patriarchate. The decision was based on a general indication by the Church that there were ruins of an Orthodox Church on the territory, despite the fact that for years the state itself in the official documents was referring to confessional ownership of the Church by Armenian eparchy.<sup>16</sup>

Despite the fact that the Agency did not decide on transferring the place of worship to any of these religious communities, due to its ineffective involvement in resolution of Mokhe conflict, Muslim community of Mokhe lost the opportunity to recover the place of worship. Namely, the commission created for resolving the dispute following renovation of the historic worship place aimed at changing its function, in which both sides of the conflict were represented by Muslim and Orthodox religious leaders,

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<sup>11</sup> Freedom of Religion – Critique of Discriminatory and Nonsecular state policy, EMC, 2016, pp. 51-53, 93-97, available at: <https://emc.org.ge/ka/products/kvleva-religiis-tavisufleba-sakhelmtsifos-diskriminatsiuli-da-arasekularuli-politikis-kritika>

<sup>12</sup> Government Resolution №338 on the approval of Government Action Plan on Human Rights for 2016-2017, para 11.1.3.4. available at <http://myrights.gov.ge/uploads/files/docs/14023952.pdf>

<sup>13</sup> Before the decision of the Constitutional Court of July 3, 2018 (№1/1/811), restitution of the property confiscated during Soviet period for religious minorities in contrast to Church was only possible by placing the property under their possession and use. Thus, until this date, even in case the will of the executive government existed, there was no possibility for full restitution for confiscated immovable property.

<sup>14</sup> Freedom of Religion – Critique of Discriminatory and Nonsecular state policy, EMC, 2016, pp. 93-97;

<sup>15</sup> See information regarding the dispute at: <https://emc.org.ge/ka/products/emc-ma-marneulshi-imam-alis-mechetis-restitutsiis-problemastan-dakavshirebit-sasamartlo-dava-daitsgo>

<sup>16</sup> Protection of Religious Minorities: Shadow Report on Human Rights Strategy and Action Plan (2016 - 2017), EMC, p. 59 available at: <https://emc.org.ge/ka/products/adamianis-uflebata-datsvis-strategiebisa-da-samokmedo-gegmebis-shesrulebis-monitoringis-pirveladi-shedegebi-2016-2017>

after two years of operation refused to ascertain the historic owner of the disputed building/ruins and decided to conserve it in the present condition. To illustrate legal nature of the Commission, it deserves to be noted, that according to the resolution on the Creation of the Commission, it could only make advisory decisions, which had to be consensual.<sup>17</sup>

In parallel to differential treatment with regard to return of immovable property, the legislation also establishes unequal treatment in relation to material compensation for the property (of any kind) confiscated during Soviet period. Namely, according to article 11 of the Constitutional Agreement, the state confirms the fact of inflicting material and moral damage to the Church and as the factual owner of part of the confiscated property, undertakes the obligation for partial material compensation for the damages. Despite the fact that the same provision foresees rules on determining compensation forms, amount, timeframes, and other details,<sup>18</sup> until today compensation of material damage is carried out through direct subsidies in accordance with the budget law without prior examination, or setting the timeframe.<sup>19</sup> It is noteworthy that in contrast to the general rule, which foresees a control mechanism for executing the budget and expending the resources, the state audit service does not monitor expenditures of budget resources by the Patriarchate.<sup>20</sup>

Furthermore, large amount of property is transferred to the Patriarchate beyond the restitution framework. For instance, apart from direct budgetary subsidies, the Orthodox Church receives financial support from the reserve funds of the Government and the President, also from budgets of municipality and city governments. Municipalities also transfer immovable property to the Patriarchate.<sup>21</sup> It is noteworthy, that these properties are not even linked to restitution process.

Similar to immovable property, the above-mentioned legislative framework on material compensation for the confiscated property exclusively relates to the Patriarchate. Before 2014, the state did not recognize the obligation to compensate with regard to other religious organizations, while starting from 2014 compensation for damages is carried out based on Government resolution and contracts are concluded only with four religious' organizations. According to Government resolution<sup>22</sup>, the state acknowledges the damage inflicted on religious organizations during Soviet totalitarian regime and despite absence of legal obligation to compensate, drawn from the principle of legal state, it provides symbolic and partial compensation for the material and moral damage to Muslim, Jewish, Catholic and Armenian Apostolic religious communities (legal successors of religious communities damaged during Soviet period).

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<sup>17</sup> Assessment of final decision by Mokhe Commission for establishing confessional ownership of the disputed building, EMC, 2017, available at: <https://emc.org.ge/ka/products/emc-mokhis-komisiis-saboloo-gadatsqvetilebas-afasebs>; Freedom of Religion – Critique of Discriminatory and Nonsecular state policy, EMC, 2016, pp. 97-100; EMC assesses the final decision of the Mokhe Commission

<sup>18</sup> The Parity Commission had to prepare draft normative acts regarding details of compensation within a month after signing the Constitutional Agreement.

<sup>19</sup> Freedom of Religion – Critique of Discriminatory and Nonsecular state policy, EMC, 2016, p. 54;

<sup>20</sup> Ibid, 49- 51;

<sup>21</sup> For instance, by December 31 of 2015, in accordance with official information provided by National Agency of Public Registry, 565 land plots with the total space of 16 742 987.82 sq. m. (1674.3 ha)

<sup>22</sup> Government Resolution N 117 of January 27, 2014 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, available at: <https://matsne.gov.ge/ka/document/view/2222828?publication=0>

In order to determine the amount,<sup>23</sup> rules on transfers and necessary preconditions to be met by religious organizations, appropriate contracts are concluded by the Agency with religious organizations. According to the position of the Agency, for determining amount of financial resources to be distributed to religious organizations, the following objective criteria have to be considered: how large the parish is, number of religious leaders; number of places of worship and their current condition, ongoing needs, etc. In turn, according to concluded contracts, religious organizations are obliged to spend the financial resources allocated to them for the following purposes: salaries of religious leaders, religious services;<sup>24</sup> restoration of places of worship and their preservation; religious educational activities; everyday expenses of religious organizations; cultural and charity activities. Apart from that, all four religious organizations are obliged to submit programs of financial reporting in line with contractual purposes within one month of concluding the agreements. Upon the request of the Agency, religious organizations are obliged to present financial reports in line with the said programs of financial reporting, which are subject to auditing scrutiny. In case, the audit report reveals cases of breaching the contract, the state will terminate financing in that year.<sup>25</sup> Thus, in contrast to the Patriarchate, the state sets the goals of financing other religious organizations and continues monitoring with regard to spending.

Without pre-determined criteria for determining the amount of financing, which will be linked to inflicted damage, the resolution describes the compensation as symbolic. In 2016, the Government itself in its response sent to European Commission against Racism and Intolerance (ECRI) conceded that financing of four religious organizations does not represent compensation or restitution for damages inflicted and the amount to be transferred is determined in accordance with current state of functioning of religious organizations.<sup>26</sup> Apart from that, it has to be noted that the above resolution does not concern restitution of immovable property and as already mentioned, it still remains within the discretion of the Advisory Commission on Financial and Property Issues.

### **1.3. International and Local Criticism: Human Rights Standard**

State inaction in relation to regulation of restitution issues has on numerous occasions been criticized by domestic actors, including the Public Defender of Georgia<sup>27</sup> and authoritative international organizations.

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<sup>23</sup> For instance, according to 2015 resolution, financial resources transferred to religious organizations doubled and amounted to 3 300 000 GEL. The said amount was distributed among religious organizations in the following way: Muslim community received - 2 000 000 GEL, Jewish community - 300 000 GEL, Roman – Catholic community - 400 000 GEL, Armenian Apostolic Christian Church - 600 000 GEL

<sup>24</sup> For instance, according to the agreement concluded by the Agency with Muslim religious community in 2014, the Muslim community was obliged to spend 75% of the financial resources received in 2014 for salaries of religious leaders and religious services. In the agreement concluded in 2015, this condition defined by specific percentage was removed.

<sup>25</sup> Freedom of Religion – Critique of Discriminatory and Nonsecular state policy, EMC, 2016, pp. 51-53;

<sup>26</sup> Council of Europe: European Commission Against Racism and Intolerance (ECRI), Report on Georgia (fifth Monitoring Cycle), 2016, p. 60 available at: <https://www.refworld.org/docid/584e8b914.html>

<sup>27</sup> See views of Public Defender of Georgia in annual reports regarding property confiscated during Soviet Union and corresponding restitution obligations (e.g. relevant chapters of Public Defender's Parliamentary Reports of 2007, 2010, 2013), available at: <http://www.ombudsman.ge/geo/saparlamento-angarishebi>;

Human Rights Committee,<sup>28</sup> ECRI,<sup>29</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities,<sup>30</sup> UN High Commissioner for Human Rights, Council of Europe Commissioner for Human Rights<sup>31</sup> unambiguously criticize discriminatory restitution policy against religious minorities.

### UN Human Rights Committee Standard

Within the reporting mandate, Human Rights Committee on a number of occasions expressed concerns regarding discriminatory restitution legislation in Georgia. According to the Committee, the state has the obligation to resolve existing problems concerning places of worship and other related property. The Committee specified that it is the state obligation to ensure appropriate legislation and practice for equal protection of religious freedoms. It is noteworthy, that the Committee in its 2014 report considers financial compensation as an alternative to restitution of places of worship, only when it is physically impossible.<sup>32</sup>

In its General Comment 31 on the Nature of the General Legal Obligation Imposed by the Covenant, the Committee explains that non-fulfillment of human rights obligations foreseen by the Covenant, cannot be merely justified by reference to social, cultural, and economic factors.<sup>33</sup> Apart from that, according to interpretations made within the legal proceedings, the Committee holds unequal treatment with regard to property confiscated due to persecution even on the basis of citizenship impermissible and requires reasonable and objective justification for such treatment.<sup>34</sup> Considering the standards related to differential treatment based on citizenship grounds, obviously, such treatment on the basis of religious belonging cannot be supported with reasonable and objective justification.

### Standard of the European Convention of Human Rights

European Convention on Human Rights does not recognize the right to restitution as part of the right to property, when confiscation took place before becoming party to the Convention. Apart from that, there is no obligation to return confiscated places of worship independently on the basis of freedom of religion. According to court case-law, for invoking the right to property, at minimum “possession” or a “legitimate expectation” of property had to be present.<sup>35</sup> Thus, despite that fact that in accordance with the

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<sup>28</sup> UN Human Rights Committee, Concluding observations on the fourth periodic report of Georgia, CCPR/C/GEO/CO/4, 19 August 2014;

<sup>29</sup> Council of Europe: European Commission Against Racism and Intolerance (ECRI), Report on Georgia (fifth Monitoring Cycle), 2016, available at: <https://www.refworld.org/docid/584e8b914.html>

<sup>30</sup> Advisory committee on the framework convention for the protection of national minorities, Second Opinion on Georgia, June 15, 2015;

<sup>31</sup> Observations on the human rights situation in Georgia, the Commissioner for Human Rights, Council of Europe, January 12, 2016

<sup>32</sup> UN Human Rights Committee, Concluding observations on the fourth periodic report of Georgia, CCPR/C/GEO/CO/4, 19 August 2014;

<sup>33</sup> UN Human Rights Committee, General comment no. 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 14; available at: <https://www.refworld.org/docid/478b26ae2.html>

<sup>34</sup> Messrs. Miroslav Blazek, George A. Hartman and George Krizek v. Czech Republic, U.N. Doc. CCPR/C/72/D/857/1999, Communication No. 857/1999, 12 July 2001, para. 5.8 – 5.9; Karadjova, Mariana. “Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses.” Review of Central and East European Law, no. Issue 3 (2004): 355

<sup>35</sup> Lupeni Greek Catholic Parish and Others v. Romania, no. 76943/11, Court (Third Section), 19 May 2015

Convention, the State is not obliged to formulate restitution legislation with regard to property confiscated during Soviet period, in case legislation on restitution is enacted, legitimate expectation of returning confiscated property may arise.

The Court acknowledges, that as a rule full restitution of the damages inflicted is practically impossible,<sup>36</sup> however, in case the state enacts restitution legislation proactively, it also has to satisfy other requirements of the Convention. For instance, the amount of compensation has to be reasonably related to the value of confiscated property, in this case to the market value of the confiscated property (Article 1 of Protocol No. 1).<sup>37</sup>

Apart from that, in case restitution obligation is fulfilled in relation to one religious group, due to prohibition of discrimination, similar rules have to apply to other religious communities (Protocol 12<sup>38</sup>). In addition, if the right to restitution is foreseen in the legislation, the state obligations to ensure access to fair court proceedings derived from article 6 of the Convention also arises. In a case decided against Romania, the Court defined state obligations, including in relation to access to court and right to a hearing within a reasonable time,<sup>39</sup> also recognized the state obligation to execute the court decision, despite the fact that the Orthodox population of Romania opposed it.<sup>40</sup>

However, guarantees under the Convention are limited and cannot ensure full fairness of restitution legislation/policy. Grand Chamber of the European Court in the decision rendered in 2016 *Lupeni Greek Catholic Parish and Others v. Romania*, did not find violation of equality, and accepted the legal provision, which took account of the wishes of local adherents, despite the fact that such majority almost always belonged to Romanian Orthodox Church and thus, this rule would have a discriminatory effect on other religious groups.<sup>41</sup> In contrast to cases discussed earlier, in this case supervision by domestic courts over decisions related to restitution was guaranteed, which was held to be sufficient by the European Court in terms of the right to fair proceedings.

Although the right to prohibition of discrimination under article 14 of the Convention can only be invoked in conjunction with other rights, guarantees for fairness of restitution legislation is contained within Protocol 12 of the Convention, based on which the right to equality stands independently of other rights in the Convention. Accordingly, despite the fact that the right to restitution is not derived from the right to property in the Convention, the formulated restitution regime has to establish rights of different religious groups equally. Thus, the states that have signed and ratified Protocol 12 of the Convention, besides guarantees of access to court have the obligation to formulate neutral restitution legislation/policy.<sup>42</sup>

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<sup>36</sup> Langlaude Doné, Sylvie, Religious Organisations, Internal Autonomy and Other Religious Rights Before the European Court of Human Rights and the OSCE, 34 *Netherlands Quarterly of Human Rights* 8, 2016, 28-29

<sup>37</sup> Pincová and Pinc v. the Czech Republic, no. 36548/97, § 53, ECHR 2002-VIII; Broniowski v. Poland (dec.) [GC], no. 31443/96, § 176, ECHR 2002-X Kuti, Csongor. *Post-Communist Restitution and the Rule of Law*. Budapest: Central European University Press, 2009, 225, 231;

<sup>38</sup> Article 14 of the Convention cannot become the basis for finding discrimination in this case, as based on the text of the Convention, it can be invoked only in conjunction with other Convention rights.

<sup>39</sup> *Sfântul Vasile Polonă Greek Catholic Parish v. Romania*, no. 65965/01, 7 April 2009

<sup>40</sup> *Bogdan Vodă Greek-Catholic Parish v. Romania*, no. 26270/04, 19 November 2013

<sup>41</sup> Fokas, Effie. "The Legal Status of Religious Minorities: Exploring the Impact of the European Court of Human Rights." *Social Compass* 65, no. 1, 2018: 31

<sup>42</sup> Karadjova, Mariana. "Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses." *Review of Central and East European Law*, no. Issue 3 (2004): 354-355



Apart from that, similar to Human Rights Committee, Parliamentary Assembly of the European Council, in its recommendations on restitution of confiscated property, considers financial compensation as an alternative to returning places of worship only if that is physically impossible.<sup>43</sup>

### Local Criticism

Absence of restitution policy is strictly criticized by the Public Defender<sup>44</sup> and the Religious Council operating under its mandate, which unites more than 30 religious' organizations. According to the assessment of the Religious Council, "up until today, restitution of places of worship confiscated during Soviet rule is unresolved and historic ownership of disputed heritage are not achieved. The problem, apart from concerning religious services and the property of religious communities, is also reflected in the condition of these buildings. Before ascertaining historic owners, places of worship in most cases remain unprotected and face risks of destruction, while their preservation and restoration, as a rule, is not part of the Government agenda." For years, Religious Council has been urging the Government to record disputed heritage and places of worship confiscated during Soviet period and to take measures for their preservation, also to create a commission with the involvement of Religious Council, experts from academic spheres and non-government organizations, that will formulate a clear plan of the restitution process.<sup>45</sup>

### Conclusion: Unresolved Issues of Restitution in Georgia

Constitutional Agreement and budget laws became basis for direct financing of the Church. In this context, financing of four religious organizations is more an instrument of control, than the legal basis for compensation of the damages inflicted in the Soviet period. That subsidies for religious organizations are not pre-determined by general criteria foreseen in the legislation and permits use of this compensation mechanism for their control. For instance, concluded agreements foresee purposes for the spending of financial resources, including the obligation to use them for salaries of religious leaders. Such dependence of religious leaders on state financing contradicts the principle of secularism, also leads to division between interests of representatives of religious communities and local adherents. This scheme of financing is not regarded as restitution by the state itself linking the criteria for determining the amount of financing to the needs of religious organizations.

Furthermore, recognition of the right to property with regard to places of worship confiscated from the Church during Soviet period was not accompanied by similar recognition for religious minorities. Also, Legislative framework, court interpretations and administrative practice permits use of places of worship historically belonging to other religious communities up until today. In turn, restitution policy initiated by the Agency depends on the "good will" of the state, does not grant entitlements to religious organizations and creates the possibility for making arbitrary decisions, which sometimes becomes the source of conflict between religious communities. Apart from that, Mokhe precedent illustrates the fate of any dispute over

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<sup>43</sup> Recommendation of Parliamentary Assembly of the Council of Europe 1556 (2002) available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16997&lang=en>

<sup>44</sup> Annual Report of the Public Defender on the Situation of Human Rights and Freedoms in Georgia 2014, available at: [https://drive.google.com/file/d/1Tyor20tgcN9rhR4kfRuFzVRO3CroM\\_Q5/view](https://drive.google.com/file/d/1Tyor20tgcN9rhR4kfRuFzVRO3CroM_Q5/view), also annual report of 2018, available at: <http://ombudsman.ge/res/docs/2019042620571319466.pdf>

<sup>45</sup> Recommendation of the Religious Council under the Public Defender of Georgia, 2017, available at: [http://www.tolerantoba.ge/failebi/qartuli\\_broshura\\_saxalxo\\_damcveli\\_87902.pdf](http://www.tolerantoba.ge/failebi/qartuli_broshura_saxalxo_damcveli_87902.pdf)

places of worship, when on one side of the conflict is the Patriarchate of Georgia. This points to significance of the restitution legislation for prevention of social conflicts and non-discriminatory resolution of property/possession rights on places of worship. Neither does the Action Plan on Human Rights formulated by the Government reflect systemic approach to restitution policy. With regard to restitution of property confiscated during Soviet period, the Plan makes religious minorities dependent on the good will of the state without legislative regulation, nor does it envision appropriate plan for the future. Without legislative regulation, politicization and arbitrariness by executive government becomes the core element of state policy.

In this context, restitution policy formulated in relation to the Patriarchate of Georgia creates legitimate expectation for other religious organizations, that their rights to similar property will also be recognized, as restitution policy on a legislative level is only undertaken with regard to the Church, and objective and reasonable justification for ignoring the problem in case of other religious organization is absent. However, such expectation of religious minorities and international and domestic criticism remains unaddressed. Apart from this, without comprehensive restitution legislation, delays in returning places of worship to religious minorities, also in resolution of property disputes, leads to destruction of places of worship and/or erasing of cultural and religious past.

#### **1.4. Forms of Restitution and Related Objective Challenges**

First, it has to be noted that there are two general types of restitution: in-kind restitution and financial compensation. In turn, in-kind restitution may be return of not only the same, but similar property, while financial compensation may be done in cash or through other instruments of financial value (voucher, shares).<sup>46</sup>

As a rule, legislation on restitution of places of worship itself defines restitution forms. Often legislation creates the possibility of choosing one among different restitution forms by the government (Lithuania) or the religious organization itself (Hungary). If such possibility to choose is not determined and confiscated property is still present, as a rule it is returned to respective religious group and compensation will take place only in case transfer of property in this form is impossible (Slovenia).<sup>47</sup> In those countries, where only compensation is defined as the general form of compensation (Hungary, Poland), with regard to places of worship in-kind restitution is still possible.<sup>48</sup> Also, in countries, where the legislation does not cover all kinds of immovable property, for instance does not establish the obligation to transfer property of economic designation or compensate for them, at minimum, it concerns transfer of places of worship (Lithuania, Hungary<sup>49</sup>, Czech Republic<sup>50</sup>, Ukraine<sup>51</sup>). In terms of prioritizing places of worship, exception is only Romania, where due to the purpose of delaying resolution of property disputes between the

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<sup>46</sup> Kuti, Csongor. *Post-Communist Restitution and the Rule of Law*. Budapest: Central European University Press, 2009, 218-222 (Hereinafter Kuti, Csongor);

<sup>47</sup> Doe, Norman. "The Property and Finances of Religion." In *Law and Religion in Europe: A Comparative Introduction*. Oxford: Oxford University Press, 2011. Oxford Scholarship Online, 2011, 184 (hereinafter Doe, Norman);

<sup>48</sup> Kuti, Csongor, 217

<sup>49</sup> Doe, Norman, 217

<sup>50</sup> A Minarik, Pavol. "Church-State Separation and Church Property Restitution in the Czech Republic." *Society* 54, no. 5, 2017: 462

<sup>51</sup> Summary of Property Restitution in Central and Eastern Europe, Bureau of European and Eurasian Affairs Washington, DC, July 16, 2002, available at: <https://2001-2009.state.gov/p/eur/rls/or/93062.htm>

Orthodox and Greek Catholic Churches, return of places of worship was not recognized as the primary goal of restitution.<sup>52</sup>

Before detailed discussion of best practices, it is appropriate to analyze objective challenges identified in the process of restitution. Certainly, challenges discussed below are not equally present in different countries and the domestic context has an effect on their significance. However, in any case their evaluation is necessary in the process of formulating restitution legislation. As the restitution aims compensation of damages inflicted in the past, it is necessary to identify legal successors of damaged religious groups in the past. Determination of legal succession may also be complicated due to destruction of documents during the repressive regime. Restitution legislation has to consider such criteria of establishing succession, that do not create unsurmountable difficulties in the process of identifying respective religious groups, as well as will avoid conflict between religious groups, who will present legitimate claims to succession of the same religious group. Interest of religious groups not to be obligated to act contrary to doctrinal restrictions as a precondition to realize the right to compensation, needs to be considered as well, for instance, religious groups should not be instructed to be affiliated with one another (e.g. creation of a union) for the purpose of receiving compensation, if this is not permitted by their creed.

Apart from that, due to time differences between confiscation and compensation of property, it is expected that value of property changes. The value of confiscated property may have increased today, or its function may have significantly changed. Property belonging to religious group in the past may have a public function today. As the claim to restitution is not an absolute right to compensation, it may be restricted if the property today is fulfilling an important public function, even if the right to restitution is defined on a legislative level. For instance, administrative court in Slovenia revoked the decision on restitution of confiscated land to the Church, as on this land roads were constructed, which represented public property and could not be returned.<sup>53</sup>

The state has to consider economic consequences of adopting restitution legislation in the process of its formulation. For developing countries, such as independent states recognized after dissolution of Soviet Union, economic difficulties represent legitimate ground for restricting rights, which is particularly salient in case of religious groups holding significant wealth in the past. Economic challenges are irrelevant in cases of in-kind restitution. While full compensation for the destroyed property or the one with a changed function represents significant burden on the state, restitution of existing places of worship is not an impediment, on the contrary, it is the means of ensuring religious freedoms, which are not related to additional costs.

Apart from that, it is to be noted that similar to Georgia, in several Post-soviet countries (Romania), restitution process started already during Soviet period in relation to dominant religious community and those places of worship historically belonging to other religious communities ended up in their possession. Such developments made conflict of interests between religious groups inevitable.<sup>54</sup>

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<sup>52</sup> Kuti, Csongor, 187

<sup>53</sup> Summary of Property Restitution in Central and Eastern Europe, Bureau of European and Eurasian Affairs Washington, DC, July 16, 2002, available at: <https://2001-2009.state.gov/p/eur/rls/or/93062.htm>

<sup>54</sup> Kuti, Csongor, 187

## 1.5. Post-Soviet Reality for Enacting Restitution Legislation

Since 1989 after dissolution of the Soviet Union, similar processes ensued in the post-soviet countries. Process of democratization was accompanied by restoration of individual property, which in turn was reflected in privatization and restitution of property. In the majority of post-soviet countries, restitution legislation of one or another form was adopted at an earlier stage. For instance, adoption of legislation on restitution (comprehensive or gradual) started in 1989 in Poland, in 1990 in Czech Republic, Lithuania and Romania, in 1991 in Hungary and in 1992 in Bulgaria.<sup>55</sup>

Democratization was followed by recognition of religious freedoms on the Constitutional level and separation between the state and Church.<sup>56</sup> In most of the post-soviet countries the choice was made on the cooperation model of state-church relations. Exception as the separationist model is the Czech Republic.<sup>57</sup> Participation in the financing of the Church within the cooperation model is an accepted practice. Number of countries do this through subsidies based on equality principle (Poland, Hungary) or within the restitution framework (Hungary, Slovenia).<sup>58</sup>

Apart from economic dimension, restitution process initiated in these countries entailed moral justifications regarding restoring rights of victims damaged during repressive political regime.<sup>59</sup> In case of religious groups, restitution of confiscated property was a means of restoring the rights of religious organizations to acquire and maintain property and of enjoying religious freedoms. Precisely due to this logic, in Poland, Hungary, Estonia,<sup>60</sup> Lithuania and Latvia<sup>61</sup>, in contrast to other communal property, priority was given to claims to restitute places of worship. For instance, unlike general compensation schemes in Poland and Hungary, in relation to places of worship in-kind restitution was envisaged.<sup>62</sup>

Restitution policies adopted for restoration of justice created grounds (sometimes reasonable) for differential treatment of certain groups. For instance, as stated priority was given to immovable property of religious designation in Poland, Hungary, Estonia, Lithuania, and Latvia. In Baltic states, as a result of introducing the citizenship requirement, ethnic Russians were not allowed to participate in the restitution process. In a number of countries, based on criteria of eligibility for restitution, for instance, by setting the relevant confiscation period for invoking the right to restitution, different ethnic groups were excluded from the restitution scheme, including Jews, whose property were confiscated during German rule (e.g. in Czech Republic). Often, legislation enacted for restitution harmed already most vulnerable and repressed groups (e.g. Bessarabian Orthodox Church).<sup>63</sup>

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<sup>55</sup> Doe, Norman, 169 (Footnote 43, 44, 45, 46, 50), 170 (footnote 48)

<sup>56</sup> Enyedi, Zsolt, and Joan O'Mahony. "Churches and the Consolidation of Democratic Culture: Difference and Convergence in the Czech Republic and Hungary." *Democratization* 11, no. 4, 2004: 173

<sup>57</sup> Minarik, Pavol. "Church-State Separation and Church Property Restitution in the Czech Republic." *Society* 54, no. 5, 2017: 465; Enyedi, Zsolt, and Joan O'Mahony. "Churches and the Consolidation of Democratic Culture: Difference and Convergence in the Czech Republic and Hungary." *Democratization* 11, no. 4, 2004:173 (hereinafter, Minarik, Pavol)

<sup>58</sup> Minarik, Pavol, 460

<sup>59</sup> *Ibid*, 462;

<sup>60</sup> Kuti, Csongor, 218 - 219;

<sup>61</sup> Stuart Eizenstat, *Restitution of Communal and Private Property in Central and Eastern Europe*, 6 *E. Eur. Const. Rev.* 50 (1997): 51;

<sup>62</sup> Kuti, Csongor, 234;

<sup>63</sup> *Ibid*, 147, 192 -199; 202-204; Karadjova, Mariana. "Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses." *Review of Central and East European Law*, no. Issue 3 (2004): 341-342, 347;

As the above analysis illustrates, for preventing arbitrary and discriminatory implementation of restitution policies, in the first place it is significant to formulate comprehensive legislative framework of restitution, treating all religious groups equally. In this regard, interesting interpretations have been made by Lithuanian Constitutional Court. The Court held as unconstitutional, in breach of separation of powers and rule of law those provisions, which granted the authority to the executive government, to decide on the procedure, conditions and intervals of financial compensation without pre-determined criteria/rules, which in turn had to meet the principles of foreseeability and legitimate expectation.<sup>64</sup> The best practices identified below share this view, namely that core principles of restitution, its forms and scope have to be clearly defined on a legislative level so that risks of arbitrariness by executive government on such sensitive issues, such as return of confiscated property by religious communities and resolution of property disputes between them, are minimized.

## 1.6. Restitution Legislative Framework: Best Practices

### Hungary

1991 restitution law of Hungary<sup>65</sup> specifically refers to property of religious designation. Hungarian scheme, similar to the Polish model discussed below, prioritizes restitution of places of worship and in contrast to other communal property, foresees the obligation of in-kind restitution with regard to places of worship. Apart from that, changes enacted later allows religious organizations to choose alternative forms of compensation instead of in-kind restitution, namely gives possibility to substitute it through annual financial compensation.<sup>66</sup>

According to the Preamble of the relevant law, restitution policy in Hungary is based on the principle of restoration of justice, also aims to create appropriate conditions for realizing traditional social and cultural function of religion. Based on this logic, the law concerns only such immovable property confiscated after 1948<sup>67</sup>, which initially were used for religious or related ends (except economic ones), provided that after transfers they will be used for the same purposes.<sup>68</sup> Based on the law, parity committees were created for all denominations, made up of church and state representatives. The law allowed the religious organizations to present claims to confiscated property. Accordingly, they drew list of claims concerning property to be restituted, in case of disagreement the state made the final decision.<sup>69</sup> Restitution law of Hungary also allows compensation or annual subsidies in exchange for property, restitution of which was impossible, provided that allocated resources would be used for social purposes.<sup>70</sup> The law also envisaged the obligation to compensate factual owner (mostly municipalities). As the procedure required more time than considered due to this obligation to compensate the owner, final term for deciding on the claims was

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<sup>64</sup> Kuti, Csongor, 220;

<sup>65</sup> 1991 Act on the Settlement of Ownership of Former Real Properties of the Churches.

<sup>66</sup> Kuti, Csongor, 219;

<sup>67</sup> Ibid, 147;

<sup>68</sup> Ibid, 193;

<sup>69</sup> Ferrari, Silvio, W. Cole Durham, and Elizabeth A. Sewel. Law and Religion in Post-Communist Europe. Law and Religion Studies: 1. Leuven: Peeters, 2003: 133-134;

<sup>70</sup> Kuti, Csongor, 191, 192, 199;

postponed from 10 to 20 years in 1997.<sup>71</sup> Hungarian Constitutional Court discussed constitutionality of such gradual restitution, and held it was justified, provided that the length of the process and its content was priorly determined by law.<sup>72</sup>

The Constitutional Court discussed the issues related to restitution for several more times, including unequal treatment of non-religious groups, namely absence of the possibility for in-kind restitution of non-religious communal property. The Court considered this approach of restitution acceptable due to significant differences between religious and non-religious organizations. Namely, the Court discussed the social function of religious organizations and the legitimate aim of the legislation to first address harms to religious freedoms.<sup>73</sup> The Constitutional Court discussed the possibility of providing subsidies in exchange for unreturned property provided that they will be used for social purposes. The Court admitted the problematic nature of the regulation, however, held financial compensation acceptable for unreturned property provided that the state has formulated a scheme of subsidies for religious and other autonomous organizations, within which this compensatory scheme can be located in a way that other non-religious organizations are not unequally treated.<sup>74</sup>

Legislative changes in 1997 introduced annual financing scheme, which is exhaustive and considers financial support proportional to the value of unreturned property. More specifically, in accordance with legislative changes of 1997, religious groups have the possibility to request compensation in the form of annual financing for unreturned property. Six religious groups waived their rights to in-kind restitution for compensation in the form of annual financing. These agreements concluded with the state were affirmed in legislation. According to the agreements and the law, annual payment is less than the value of unreturned property but is proportional to it.<sup>75</sup>

Early resolution of the restitution problem in Hungary enabled the political discussion and legislation on issues such as financial support of religious groups in the framework of taxing system considering religious belonging of the population<sup>76</sup> and financing of religious organizations within the scope of their social activities.<sup>77</sup>

## Czech Republic

In contrast to Hungary, restitution process in Czech Republic has often become source of political conflict. Accordingly, restitution process has been less consistent and more protracted. However, the reason for such protraction has not been the wish to maintain strong ties with dominant religious group, on the

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<sup>71</sup> Ferrari, Silvio, W. Cole Durham, and Elizabeth A. Sewel. *Law and Religion in Post-Communist Europe*. Law and Religion Studies: 1. Leuven: Peeters, 2003: 133-134;

<sup>72</sup> Kuti, Csongor, 220;

<sup>73</sup> Summary of Property Restitution in Central and Eastern Europe, Bureau of European and Eurasian Affairs Washington, DC, July 16, 2002, available at: <https://2001-2009.state.gov/p/eur/rls/or/93062.htm>; Kuti, Csongor. *Post-Communist Restitution and the Rule of Law*. Budapest: Central European University Press, 2009, 190 -191;

<sup>74</sup> Kuti, Csongor, 191, 192, 199;

<sup>75</sup> Doe, Norman, 184; Summary of Property Restitution in Central and Eastern Europe, Bureau of European and Eurasian Affairs Washington, DC, July 16, 2002, available at: <https://2001-2009.state.gov/p/eur/rls/or/93062.htm>; Appel, H. "Anti-Communist Justice and Founding the Post-Communist Order: Lustration and Restitution in Central Europe." *EAST EUROPEAN POLITICS AND SOCIETIES* 19, no. 3: 391-392;

<sup>76</sup> Enyedj, Zsolt, and Joan O'Mahony. "Churches and the Consolidation of Democratic Culture: Difference and Convergence in the Czech Republic and Hungary." *Democratization* 11, no. 4, 2004: 174

<sup>77</sup> Doe, Norman, 183;

contrary, Czech Republic among post-soviet countries stands out for minimal influence of religion over public life.<sup>78</sup>

In Czech Republic also, restitution of property of religious designation is regulated separately from the general legislation according to law enacted in 1990.<sup>79</sup> The said law lists concrete lands and buildings to be returned, which were confiscated from religious organizations in 1950ies.<sup>80</sup> The enactment of law was the first step in reestablishing religious activities; however, it was limited to those buildings, that are used for religious purposes and did not extend to immovable property of economic value. Furthermore, according to court interpretation of law, it did not permit presentation of additional claims by religious groups. Two significant rules became part of legislative framework on restitution through legislative acts adopted in 1991. Certain state property was transferred to municipalities. This change became particularly significant within the final legislative framework, based on which municipalities are not any more obliged to return confiscated property (see below). Apart from that, selling of property previously owned by religious groups was prohibited. The regulation aimed simplification of future restitution process, for instance, this rule suspended “development” of respective property for other purposes, as the owners did not have the motivation to invest in property with unclear legal status.<sup>81</sup>

In 1993-1997, restitution process in Czech Republic continued with individual decisions of the executive government (however, only several dozen requests were granted through this restitution approach). In 2012, after a yearlong parliamentary debate, Parliament of Czech Republic enacted final restitution law “on Property Settlement with Churches and Religious Societies”, which equally applied to all religious groups damaged during Soviet period.<sup>82</sup>

The obligation to transfer confiscated property in its current form envisaged in the law, applies to all religious groups. However, the obligation to transfer property and compensate does not extend to municipalities, due to which property transferred to municipalities remain beyond the reach of the restitution policy. Also, all property, which belongs to the military, national parks and private individuals, remained outside the ambit of the restitution regime. Apart from that, the law foresees restrictions in relation to property developed after confiscation and land designated for public purposes. According to law, compensation will be paid throughout 30 years without interest. According to the law, the final decision regarding compensation is made by the property owner - the Central Government based on requests of compensation presented by religious organizations.<sup>83</sup> The law also contains the mandate regarding conclusion of contract between the state and religious groups, which will on the one hand specify the request and the corresponding state obligation.<sup>84</sup>

In the Czech Republic, generally, legislation including in relation to non-religious property envisages financial compensation as an alternative to in-kind restitution. Furthermore, legislation apart from financial compensation foresees forms of restitution, such as transferring of similar property (e.g. in case

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<sup>78</sup> Minarik, Pavol. “Church-State Separation and Church Property Restitution in the Czech Republic.” *Society* 54, no. 5, 2017: 460;

<sup>79</sup> Minarik, Pavol, 462;

<sup>80</sup> Kovanic, Martin. “Transitional Justice Dynamics in Slovakia from Silence to the Nation’s Memory Institute.” *CEU Political Science Journal* 7, no. 4, 2012: 396;

<sup>81</sup> A Minarik, Pavol, 462;

<sup>82</sup> *ibid.*

<sup>83</sup> A Minarik, Pavol, 463;

<sup>84</sup> *ibid.*, 464;

of confiscated property, transferring land of similar value near the original location). The Constitutional Court of Czech Republic also underlines that in case of substantiated claim to restitution of property, when it is physically present, restitution of similar property or financial compensations may not suffice. However, the Court still permits the possibility to use these alternative forms of restitution by the State, even when the confiscated property is physically present, for instance in case of privatization of confiscated property, for the protection of the foreseeability principle and already acquired rights of third parties.<sup>85</sup>

In parallel to the financial compensation (payment obligation is divided over a period of 30 years), the legislation in Czech Republic, envisages 17-year transition period, when the state will continue to financially support religious groups (the religious organizations can use this financial support as they wish), however after this period religious groups will be financially fully independent from the state and like all non-commercial legal entities, will receive subsidies with similar status in the framework of activities carried out in respective fields (healthcare, education, social services, culture). According to this law, Czech Republic is the only separationist model among Post-soviet countries.<sup>86</sup> Explanatory note on the law directly indicates that adopted restitution/compensation regime is the guarantee for financial independence of religious groups.<sup>87</sup>

## Poland

Public and historic role of the Catholic Church in the Polish context is similar to the situation in Georgia. In Poland, Catholic Church has the dominant position.<sup>88</sup>

Considering public influence of the Catholic Church, the law enacted in 1989, which concerns relations between the state and the Catholic Church, and the property confiscated from the latter<sup>89</sup>, was enacted even before regulation of private property in Poland.<sup>90</sup> Based on the law, Commission was constituted by representatives of state agency working on religious issues and the Catholic Church. According to the law, as a result of consideration by the Commission, the property was to be returned to the Church, alternative property was to be transferred or if none of these was feasible, then the value of the property had to be compensated. In case the commission could not reach an agreement, the Catholic Church could present claims to court.<sup>91</sup>

In 1990, Parliament of Poland enacted law, according to which 5 independent committees were created for restitution of property in the possession of core religious organizations. The committees are constituted by representatives of Ministry of Internal Affairs and respective religious groups (Catholic, Lutheran, Orthodox and Jewish religious groups and the 5<sup>th</sup> for all the other). These committees operate

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<sup>85</sup> Kuti, Csongor, 222 -223;

<sup>86</sup> Ibid, 464-465;

<sup>87</sup> Enyedj, Zsolt, and Joan O'Mahony. "Churches and the Consolidation of Democratic Culture: Difference and Convergence in the Czech Republic and Hungary." *Democratization* 11, no. 4, 2004: 174;

<sup>88</sup> Regula Ludi. "Second-Wave Holocaust Restitution, Post-Communist Privatization, and the Global Triumph of Neoliberalism in the 1990s." *Yod*, 2018, pg. 17;

<sup>89</sup> Kuti, Csongor, 198 - 199; *Związek Nauczycielstwa Polskiego v. Poland*, no. 42049/98, ECHR 2004-IX;

<sup>90</sup> Ibid, 198 - 199;

<sup>91</sup> *Związek Nauczycielstwa Polskiego v. Poland*, no. 42049/98, ECHR 2004-IX: 4.



as arbitration bodies and their decisions are binding.<sup>92</sup> Therefore, they can be appealed in court. As studies indicate, in Poland requests on restitution are largely granted by these restitution bodies.<sup>93</sup>

It is noteworthy, that like Hungary, in Poland as well, in contrast to other communal property possibility for in-kind restitution exists only in relation to places of worship.<sup>94</sup>

### Problematic Experience of Restitution in Romania

During Soviet period, repression affected Greek Catholic Church the most. In 1948, Greek Catholic Church as the institution associated with strong Catholic western countries was banned. Number of religious leaders became victims of repression. Although all the other property was confiscated from the Romanian Orthodox Church, places of worship remained in its possession, apart from that, places of worship belonging to Greek Catholic Church were also transferred to it still during Soviet period.<sup>95</sup>

At an earlier stage, restitution in Romania was undertaken without legislative framework, through individual decisions, also through court's involvement. In this process, Roman Catholic and Protestant Churches recovered places of worship. However, disputes between Greek Catholic and Romanian Orthodox Churches remained problematic. The procedure for their resolution was also regulated on a legislative level.<sup>96</sup>

The law enacted in 1990 officially recognized Greek Catholic Church and established general framework of property restitution with regard to this Church. On the one hand, the law prescribes the rule for returning property under the ownership of the state, based on which properties to be returned are determined by the committee with the involvement of the State and the Church (each with 3 representatives). On the other hand, the law foresees the procedure for returning the property under the ownership of Orthodox Church to the Greek Catholic Church by the committee composed of representatives of both Churches, which among others envisages the rule on considering the wishes of local adherents. Apart from that, in the municipalities, where places of worship are not sufficient in proportion with the number of adherents, the state has the obligation to provide financial support in the process of building new places of worship. Among others, this can be allocation of land, if the adherents do not possess appropriate land and support in collection of financial resources necessary for construction works. In 1997, legislative changes were introduced, according to which, in villages where the Orthodox Church had several Greek churches, upon the request of Greek Catholic Eparchy, at minimum one had to be returned to them.<sup>97</sup> Later, in response to cases lost before the European Court, in 2004-2005 through legislative changes the possibility to address courts was clearly defined in the law, even in cases, when

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<sup>92</sup> Doe, Norman, 184; Summary of Property Restitution in Central and Eastern Europe, Bureau of European and Eurasian Affairs Washington, DC, July 16, 2002, available at: <https://2001-2009.state.gov/p/eur/rls/or/93062.htm>;

<sup>93</sup> Kuti, Csongor, 2009, pg. 87;

<sup>94</sup> Ibid, pg. 217;

<sup>95</sup> Minarik, Pavol, 460; Kuti, Csongor, 187;

<sup>96</sup> Summary of Property Restitution in Central and Eastern Europe, Bureau of European and Eurasian Affairs Washington, DC, July 16, 2002, available at: <https://2001-2009.state.gov/p/eur/rls/or/93062.htm>;

<sup>97</sup> Stan, Lavinia, and Lucian Turcescu. "The Politics of Orthodox-Greek Catholic Relations." In Religion and Politics in Post-Communist Romania. New York: Oxford University Press, 2007. Oxford Scholarship Online, 2007: 95, 101 (hereinafter, Stan, Lavinia);

the commission was convened, discussed the issue, however, one of the parties disagrees with the decision.<sup>98</sup>

This restitution legislation in Romania was problematic from the outset as it left number of issues unregulated. Apart from that, the legislation differentiated between restitution of places of worship and other property in such manner that restitution of places of worship was not prioritized. It can be said that on the contrary, due to problematic property disputes with the Orthodox Church, the legislation had the effect of protracting restitution of places of worship. Initially, the state denied the obligation to return property to the Greek Catholic Church currently owned by the Orthodox Church and regarded the property disputes between them as a religious, rather than a legal problem, thus as it stated, active engagement of the state with that, including the legislative branch was not justified. In critical situations, the state was emphasizing further dialogue, however, non-resolution of the dispute fell precisely in the interests of the Orthodox Church, which continued to use Greek Catholic Churches. Apart from that, the legal provision on construction of new places of worship through state support, in turn, indicated the absence of political will to resolve disputes and the wish to address the problems through alternative means.<sup>99</sup> Due to such positioning of the state and based on the arguments discussed, Orthodox Church managed to protract implementation of equal restitution policy in Romania, even when this was ordered by courts.<sup>100</sup>

Without detailed rules/procedures, the mixed commission often did not convene, or could not reach an agreement in the end. Consideration of unresolved disputes often continued in courts, sometimes courts agreed with the claims of the Catholic Church, other times courts refused to discuss the issue, indicating that the commission had exclusive jurisdiction to decide such issues. In the end, according to the interpretation of the Constitutional Court, the commission was recognized as the dispute resolution mechanism to be exhausted first, which in case of non-resolution of the dispute, did not rule out the possibility to address courts. The interpretation that courts had jurisdiction over issues to be discussed by the commission, also in light of the right to access courts based on the Convention, was ultimately shared by the Supreme Court as well.<sup>101</sup>

The resolution of the tension on the political level became the priority in late 90ies. Partly due to pressure from international actors, resolution of the issue was necessary to demonstrate the success of democratization. In this process, courts played a positive role, recognizing claims of the Catholic Church to places of worship. Up until 2005, the state refused to implement these decisions.<sup>102</sup> however, afterwards, part of confiscated property was indeed returned to Greek Catholic Church (by 2007 160 churches were returned). Despite these positive steps, some local adherents of Greek Catholic Church still had to pray outside. As a token for the recognition of the problem, throughout years the state allocated three times more financial resources for the Greek Church, than it was entitled to base on proportional ratio of its parish to the population, which enabled construction of more than 220 new Greek Catholic

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<sup>98</sup> Doe, Norman, 170 (Footnote 48); Lupeni Greek Catholic Parish and Others v. Romania, no. 76943/11, Court (Third Section) 19 May 2015;

<sup>99</sup> Stan, Lavinia, 95-96;

<sup>100</sup> *ibid*, 28;

<sup>101</sup> Kuti, Csongor, 201;

<sup>102</sup> Stanciu Florentin. "the restitution of religious property in Romania". *Revue Européenne du Droit Social* 42, 2019: 101;

churches.<sup>103</sup> Despite some progress, unresolved disputes between two religious groups over places of worship remain, which is a continuous source of conflict and subject of political instrumentalization.<sup>104</sup>

Public engagement parallel to legislative framework also deserves attention. In 1996-2000, during the rule of liberal government, Greek Catholic Church attempted to recover places of worship by force, which was followed by organized protest of the Orthodox Church. In their protests to these attempts of returning property, the core argument of the Orthodox Church related to small parish of the Greek Church and accordingly, lack of need for new worship places.<sup>105</sup> However, the Orthodox Church objected to restitution of those places of worship as well, which it did not intend to use itself, as they were in poor condition and/or on the specific location where they already had places of worship.<sup>106</sup>

In 2006, enactment of the Law on Religious Freedom in Romania turned out to be the breaking point, that had positive influence on state-church relations, as well as relations of dominant religious group with religious minorities. The changed context was signified by creation of Advisory Council of Religions in 2011. The Council was established upon the initiative of the Orthodox Patriarch and all officially recognized religious denominations were invited to be members. Due to initiation of its creation by Orthodox Church, certain religious groups refused to participate, however, today the Council operates based on equality and annual rotation of chairpersons. Representatives of Greek Catholic Church are also members, which points to neutralization of conflict between the latter and the Orthodox Church.<sup>107</sup>

As it was shown, Romanian context resembles situation in Georgia in many respects. Here as well, dominant religious group is supported by the state and for preserving status quo, it protracts the process. Instead of reacting to unlawful facts of transferring property of the Greek Catholic Church to the Orthodox Church during Soviet period, like Georgia, Romanian Government also shared the position of the Church, that these conflicts were religious and need not be resolved by state bodies, including through Parliament's involvement.

Romanian context is relevant for Georgia also because conflicts between dominant religious group and religious minorities exist beyond restitution issues, which was most salient during 90ies (facts of persecution, hindrances against Jehovah's witnesses, Baptists, and other Protestant groups). As in Georgia such conflicts in Romania are often supported and provoked by religious leaders, also public rhetoric in Romania as well alludes to foreign financing of these groups and their association with national identity threats. In Romania activities of religious minorities were additionally restricted by parallel unequal administrative practices.<sup>108</sup> Also, Romania similar to Georgia continues to finance religious leaders.<sup>109</sup>

### **Conclusion: Relevant Best Practices for Formulation of Restitution Legislation in Georgia**

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<sup>103</sup> Stan, Lavinia, 103;

<sup>104</sup> Mihai Popa & Liviu Andreescu Legal provisions, courts, and the status of religious communities: a socio-legal analysis of inter-religious relations in Romania, *Religion, State & Society*, 45:3-4, 2017: 303, (hereinafter Mihai Popa).

<sup>105</sup> Stanciu Florentin. "the restitution of religious property in Romania". *Revue Européenne du Droit Social* 42, 2019: 99-101;

<sup>106</sup> Stan, Lavinia, 116;

<sup>107</sup> Mihai Popa, 303;

<sup>108</sup> Mihai Popa, 299

<sup>109</sup> Stan, Lavinia, 139;

Georgia represents an exception in post-soviet countries in terms of restitution legislations. Unlike other eastern European countries formulation of **general restitution legislation on confiscated property of religious organizations has not been part of the democratization process**. It is noteworthy, that resolution of restitution problems in these countries is associated with a policy approach towards all damaged religious organizations. In Poland as well, where initially restitution policy concerned only Catholic Church, eventually restitution criteria and its scope with regard to other religious organizations were also determined by law. In the Czech Republic, restitution legislation was enacted gradually, and in the end legislative regulation of restitution for all religious organization based on common legal ground was preferred. Apart from best practices, problematic experience of restitution in Romania also points to the need of enacting legislative regulation on the issue. Despite similar and context and number of challenges, in Romania as well, legislative regulation applied to the most disputed restitution issue – forms and conditions for resolving disputes between the Greek Catholic and Orthodox Churches. Despite the fact that Romania still is regarded as a problematic case and is criticized on an international level<sup>110</sup>, unlike the Georgian situation it is at least an example of partial resolution of the issue.

As for the content of the restitution policy, the analysis of above-mentioned legislations shows that **claims to restitution of places of worship as a rule enjoy priority with regard to other kinds of immovable property** (Romania is an exception). Consensus is present, that **restitution at minimum has to be undertaken with regard to those places of worship, which are preserved with similar form and/or function**. Even in those countries, where legislation does not cover all types of immovable property, for instance, does not establish the obligation to transfer or compensate for the property of economic value, at minimum legislation regulates restitution of places of worship (Lithuania, Hungary, Czech Republic, Ukraine). Among properties of religious organizations, priority is given to places of worship as well, rather than other property of economic value belonging to the same religious organizations (Hungary, Czech Republic). Also, countries which gradually regulated restitution issues, for instance the Czech Republic, legislation first regulated restitution of places of worship. It is noteworthy, that this uniform practice is aided by the fact that restitution of places of worship are not linked to financial burdens and is an effective and reasonable means of ensuring rights of religious communities. This consensus on an international level indicates that restitution of property belonging to religious organizations, apart from right to property, is the means for protecting religious freedoms and accordingly, has to be determined within the relevant principles of freedom of religion, including the framework of secularism.

Examples of restitution legislation illustrates, that the obligation to compensate stands in proportion to the value of confiscated property and is exhaustible. Obligations to return the property and compensate are interlinked and mutually excludable, which means that compensation proportionally relates to that property, in-kind restitution of which is impossible. In turn, on the basis of the exhaustibility principle, the obligation to compensate is fulfilled after providing financial resources within a reasonable time period and limits. Thus, apart from being an alternative to in-kind restitution, consensus also exists that given compensation is linked to **unreturned property, is proportional to it and has to be defined as an exhaustible obligation**.

As it was shown, restitution policy can place certain groups in unfavorable conditions. Thus, **procedures for restitution/compensation have to be defined by legislation in advance and in a comprehensive manner**, also their content along with restoration of property rights and religious freedoms have to be interpreted in line with principles of equality and fairness. Failure of restitution legislation in Romania was precisely due to absence of detailed regulation, as without specific prescription of rules the goals

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<sup>110</sup> *ibid*, 116-117.

envisaged in law could not be realized. The analyzed best practices recognize the need not only to regulate restitution on a legislative level, but to define other details of implementation, for instance, phases and final length of the restitution process in advance by legislation (Hungary). Apart from that, affirming agreements with the state in law, is an additional guarantee that restitution policy devised through participation of representative body is not merely dependent on the executive will without parliamentary supervision (Czech Republic, Hungary).

Furthermore, the argument that restitution legislation is the only means of satisfying the needs of religious organizations and has to be necessarily related to the current needs of religious organizations is not substantiated. It is true that such needs are partially caused by repressive policies during Soviet period, however, even with exhaustible obligation to compensate, after religious organizations gain financial independence after partial restoration of property rights, the state can still consider the needs of religious organizations. As noted, within the cooperation model, considering strict guarantees of equality, number of European countries provide financial support to religious organizations. However, as apex courts of these countries emphasize, these subsidies have to be compatible with the right to equality. In Hungary, in parallel to resolution of restitution issues, there are other legitimate practices of financing religious organizations. Namely, subsidies integrated in the taxing scheme linked to religious representation in the country were introduced to satisfy the needs of religious groups. Financial relations are a critical aspect of state-church relations. Accordingly, **with regard to financial support both in the form of subsidies and restitution, definition of clear, pre-determined rules and procedures, represents an important aspect of the principle of secularism.**

The restitution legislation in Georgia concerned only one religious community, strongest among similar groups and created the ground for strengthening its privileged position. Regulation of restitution rights based on different legal grounds (on the one hand, constitutional agreements, and budget law, and on the other hand, government resolution and agreements dependent on the will of state) from the outset entailed risks of arbitrariness. Without comprehensive legislation of general application, restitution policy is the means of instrumentalizing financial dependence of religious groups.

Experience of Poland, Romania, Hungary and Czech Republic show that specification of conditions for restitution on the one hand through committees represented by respective religious organization and the state and on the other hand, through agreements between the state and religious groups is an accepted practice. However, in both cases, rules and conditions for the creation of the committee and conclusion of agreements are set by law, is based on general principles defined by law, such as prioritization of places of worship, proportional relation of compensation to unreturned property and its exhaustible nature. In certain cases, agreements itself exist in the form of law. Apart from that, decisions of respective committees are binding and subject to challenge in court, which in turn represents the obligation foreseen by European Court of Human Rights.

For instance, in Romania as well the rule on resolution of problematic property disputes between the dominant religious group and religious minority through mixed commission and decision-making in view of wishes of the majority local population is set by law, which foresees parallel obligations of the state to balance out its possible discriminatory effects. Decisions made by the commission is binding and subject to challenge in court. Apart from that, the law foresees state support for Greek Catholic Church in case of the need for places of worship. Also, if the Orthodox Church uses several Greek Catholic churches on a specific location, the law obliges the Orthodox Church to return at minimum one of them. Apart from that, recognition of the problem by the state is also visible in the subsidy mechanism, which considers the higher need for construction of Greek churches.

Thus, despite the fact that restitution policies in different countries contain elements of joint agreement between the state and religious organizations, informal resolution of the issues, emergence of conflicts outside law and risks of using restitution problems for the control of religious communities are minimized through a priorly defined comprehensive legislative framework of general application with regard to different religious groups.

Due to all of the above-said, for actual democratization processes, in Georgia as well restitution issues have to be regulated on a legislative level with a common legislative basis in relation to all religious groups. As the Constitutional Court of Lithuania indicated, such obligation to regulate among others is derived from the principles of separation of powers and rule of law. With regard to such sensitive issues, particularly property disputes between religious communities, to avoid arbitrary decisions by executive authorities, principles, procedures and conditions of restitution have to be defined by law enacted through an appropriate political process. Otherwise, fragmented restitution legislation will not have positive, but rather discriminatory effects and will remain the source of conflicts. Furthermore, restitution legislation of general application has to be based on principles of fairness, such as prioritization of places of worship, proportional relation of compensation to unreturned property and its exhaustible nature. In the legislative process, the Religious Council operating under the mandate of Public Defender. Religious Council, unlike its Romanian counterpart does not include the representatives of dominant religious group. However, considering the Georgian context of restitution policy, namely that restitution interests of the Orthodox Church is already affirmed in the existing legislation, , the Council is representative of all primarily interested religious groups and precisely is the space, which possesses the most relevant information regarding challenges of restitution evidenced throughout years.