To: European Commission for Democracy through Law / the Venice Commission

Assessment of the draft amendments of articles 9, 19, 39 of the Constitution of Georgia

Legal Analysis of the Draft Constitutional Amendments with regard to Provisions on Freedom of Religion

The following organizations working on matters concerning freedom of religion, Human Rights Education and Monitoring Center (EMC), Tolerance and Diversity Institute (TDI), Georgian Democracy Initiative (GDI), UN association of Georgia (UNAG), Media Development Foundation (MDF) request you to consider the amendments to be made to the existing formulations of Articles 9 and 19 of the Constitution of Georgia during the assessment of the current draft Constitutional amendments which restricts the existing declaratory provisions that support freedom of religion.

Weakening Emphasis on Human Rights in General Provisions of the Constitution

According to the draft Constitutional amendment, current article 9 of the constitution - "The State shall declare absolute freedom of belief and religion. At the same time, the State shall recognize the outstanding role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia and its independence from the State" - as the original provision is being amended so that instead of the following statement - **"shall declare absolute freedom of belief and religion"**, which was followed by the words **"at the same time"** and recognition of the role of the Church, the draft uses weaker provision with the following formulation: **"Along with freedom of belief and religion, the State shall recognize** the outstanding role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia and its independence from the State".

It is noteworthy that despite the maintenance of the words - freedom of religion – in article 9 of the Constitution, the core provision to focus on religious freedom (article 19) will be amended in a way to omit the part explicitly referring to religion, thus, he provision will be reduced to protection of freedom of belief and conscience. Certainly, if necessary, in accordance with internationally recognized principles,[1] freedom of belief will be construed broadly to include theistic beliefs and omission to freedom of religion will not take away religious freedoms. However, in view of the systemic changes diminishing emphasis on human rights and religious freedoms, the modification may create additional concerns for religious minorities and decrease their trust in the state readiness to protect religious expressions. Moreover, the modification of article 19 (article 16 in the draft amendments), is vague in terms of its inconsistency with article 9 which, unlike the latter, refers to both freedom of religion and belief.

Article 9.2 specifies that the relationship between the Church and the State is regulated by the Constitutional Agreement between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia. 2nd subparagraph of the Article 9.2 specifies that "Constitutional Agreement shall be in full compliance with the universally recognized principles and norms of international law, specifically in terms of human rights and fundamental freedoms". Thus, based on the existing formulation, there is another standard for evaluation of the Constitutional Agreement besides the Constitution, which stipulates the necessity of compliance of the Agreement with internationally recognized legal principles and norms **within the field of fundamental human rights and freedoms,** which, pursuant to the upcoming amendment, won't include specification with respect to human rights and freedoms.

Notably, conclusion of agreements with religious organizations (not merely with a single organization) on certain topics or recognition of their roles is a recurring practice in other countries as well.[2] For example, such relation between the Church and the State exists in Bulgaria. The Constitution of Bulgaria stipulates the status of the Orthodox Church as the "traditional religion", but points to the independence of religious organizations from the state, their freedom, as well as prohibition of utilization of religious beliefs for political purposes.[3] The Constitution of Ireland, despite the religious context of the county, or maybe because of it, directly prohibits the State from supporting any religion.[4] In a similar context, in order to underline the principle of secularism, the Constitution of Poland specifies that the State and religions are separated in their autonomous fields, but co-operate on matters related to public interest. Churches and other religious organizations enjoy equal rights, public authorities shall be unbiased towards matters concerning personal belief, and shall facilitate the individuals' freedom of expression in public spaces. Additionally, the Constitution of Poland,

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[1] General Comment N22 on article 18 of ICCPR, para 2;

[2] Simultaneously with separation of the State and religion, co-operation models based on agreements exist in Portugal, Austria, Belgium, Luxembourg, Germany, Czech Republic, Hungary, Romania, Slovakia, Slovenia, Poland, Estonia, Latvia and Lithuania. According to the Constitutions of Spain and Italy, the Stat retains respective co-operation with the Catholic Church, as well as other religious communities (thus, for example, in Spain, agreements with the Ministry of Justice is concluded not only with the Catholic Church, but with Protestant, Jewish, and Muslim communities as well).

[3] Article 13 of the Constitution of Bulgaria;

[4] Article 44, subparagraph 2.2 of the Constitution of Ireland;

similarly to the Constitution of Georgia, points to the relationship of the Roman Catholic Church with the State of Poland, which is regulated by the international agreement (because of the legal status of Vatican), as well as local legislation. The same provision of the Constitution allows conclusion of agreements with other religious organizations based on law and agreements, which are concluded between respective representatives from religious organizations and the Government of Poland.[5]

Thus, even in cases where such status for a religious organization is approved, Constitutional order sees the importance of inclusion of specific provisions that help prevent the abuse thereof.

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 Vatican and different states; however, in the discussed case, the essential difference is also evident, since, in contrast with Vatican, the Church is not a subject of international law.[6]

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.[7]

Notably, Article 6 of the Constitution that is not being amended based on the draft law, stipulates that "a treaty or international agreement of Georgia, **unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia,** shall take precedence over domestic normative acts". Such definition conforms to the "Constitutional" status of the agreement itself, because the Constitution is the national law that prevails over international agreements.[8] Unlike Article 9, Article 6 of the Constitution is not of merely declaratory nature and is reflected in the Law of Georgia on Normative Acts.[9]

Thus, the imposed legal regime points to the prevalence of the Constitutional Agreement over international agreements and declares its supremacy over such international agreements (e.g. European Convention on Human Rights and Fundamental freedoms and United Nations International Covenant on Civil and Political Rights) that define universally recognized human rights principles and norms.

The fact of defining the Constitutional Agreement as a superior act to international agreements per se does not constitute a breach of obligations under Vienna Convention on the law of treaties, if there is no clear conflict between the Agreement and international obligations undertaken by the State. However, assigning superior legal force to an agreement regulating relationship with a single religious organization over international agreements might constitute a way to circumvent the abovementioned obligations by referring to domestic legislation.

According to human rights based approach, interpretation of Article 6 in conjunction with Article 9 requires making an exception with regard to treaties that define internationally recognized human rights principles and norms and subordinating the Constitutional Agreement to those. However, purpose of such interpretation does not follow from the Law on Normative Acts as well, which makes the evaluation standard defined by Article 9 with respect to internationally recognized principles merely a declaration.

At a first glance, the abovementioned amendments to the constitution are merely editorial and do not change the constitutional standard regarding freedom of religion substantially. However, by modifying the formulation and relocating emphases, extraordinary constitutional status of the agreement with the Orthodox Church is reinforced, precisely at the expense of weakening and removing provisions on the importance of protection of freedom of religion and other human rights.

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[5] Article 25 of the Constitution of Poland;
[6] Constantine Korkelia, Towards Integration of European Stanards: European Convention on Human Rights and Geogian Experience, Chapter: Status of the European Convention in Georgian Legislation;
[7] Tsintsadze Kh., Legal Apects of Church-State Relations in Post-Revolutionary Georgia, "Brigham Young University Law Review",2007, N3, p.764;
[8] Conclusion by the Venice Committee, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL(2001)064-e;
[9] Article 7.3 of the Law of Georgia on Normative Acts;

Weakening emphasis on maintaining **"absolute"** freedom of religion of people belonging to other religious groups along with strengthening/supporting one religious organization through Constitutional Agreement, might restrict the scope of relative rights under freedom of belief and religion, and show less integrity in terms of protecting the principle of state secularism.

At a first glance, removal of specific definition of the scope of human rights and freedoms from the declaratory provision of Article 9 might be a positive change, because it points to internationally recognized legal principles and norms and doesn't limit it to fundamental human rights and freedoms. However, precisely because of the fact that the most relevant standard for evaluating the Constitutional Agreement is the field of human rights, not *jus cogens* more broadly, it is important to specify reference to human rights. Maintaining such an approach will be possible by replacing words "namely" with "including/among others".

Retaining emphasis on human rights is more significant as the formulation of the Agreement is devoid of content regarding human rights and it does not even generally refer to equality rights.[10] Moreover, it has to be taken into account, that the provision that assigns the Constitutional Agreement superior legal force over international agreements (Article 6) causes misunderstanding with regard to declaratory provision concerning the compliance of the Constitutional Agreement with internationally recognized legal principles and norms. Thus, in order to avoid interpretations against human rights, it was necessary to amend Article 6, or to reinforce the declaratory requirement of Article 9, instead of weakening emphasis on human rights.

Unfortunately, before the Constitutional Agreement is approved, the parliament didn't consider recommendations issued by international experts, including the Venice Commission.[11] The Venice Commission also saw an issue with the "Constitutional" status of the agreement. According to the Commission, by virtue of approving an agreement that prevails over national law, the status of the Church came close to the status of the branches of the Government, which may have had arisen suspicion and danger with regards to religious dominance over public matters. The Venice Commission recommended conclusion of the said agreement between the Church and the Government of Georgia, not the state. The Venice Committee was afraid that the constitutional status could be used by the Church to circumvent the rule of law, as well as evade observance of civil freedoms. Largely the Commission's fears came true. The attempt to exempt the Church from the responsibility was reflected in anti-discrimination law enacted in 2014, which stipulates, "No provision of this law can be construed to contradict the Constitution of Georgia and the Constitutional agreement between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia".

Relocation of Article 39 of the Constitution from the Chapter on Human Rights to General Provisions

The proposed amendment on the relocation of article 39 – "The Constitution of Georgia shall not deny other universally recognized rights, freedoms, and guarantees of an individual and a citizen that are not expressly referred to herein but stem inherently from the principles of the Constitution" to General Provisions presenting it as one of the definitions of the legal state is important generally with respect to protection of human rights. This way, internationally recognized rights and freedoms that are not directly mentioned in the Constitution appear as principles, as an additional instrument for interpretation by the Constitutional Court, and the possibilities for introducing any new rights within the constitutional order is reduced.

The amendment among others relates to guarantees of freedom of religion, including Article 9, which discusses compliance of the Constitutional Agreement with internationally recognized legal principles. Based on the authority granted to the Constitutional Court, there is no practical possibility of assessing compliance of normative acts to international treaties. However, currently Article 39 (along with Article 7, which is to become part of Article 4 integrating article 39 also) creates the opportunity to evaluate compliance of the Constitutional Agreement not only with the

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

[11] Conclusion by the Venice Committee, available at:
http://www.venice.coe.int/webforms/documents/?pdf=CDL(2001)064-e;
Freedom of Religion: Criticique of State discriminatory and nonsecular state policy, available:
https://emcrights.files.wordpress.com/2017/03/170x250-geo-web.pdf, p. 17

Constitution, but also with internationally recognized human rights and freedoms, which inherently follow from constitutional principles.[12]

Conclusion

Considering all of the above mentioned, signatory organizations note that:

1. By weakening the provision "recognition of absolute freedom of belief and religion" and removing the word "absolute", the scope of protection under freedom of religion does not change as such (it is protected by Article 19 which is not modified substantially by the upcoming amendment), however, the revision of the constitution modifies emphasis on a symbolic level. If the original text focused on freedom of religion and mentioned significant role of the Church in connection with that, the proposed amendment shifts accent on the role of the Church. Clearly, despite such formulation, the State remains obliged to offer full protection of freedom of religion and without discrimination. However, in order to underline the principle of secular state, it is important that the original provision is retained and the emphasis is maintained on the importance of full protection of freedom of belief and religion.
2. Removal of the provision on the compliance of the Constitutional Agreement with internationally recognized human rights principles and norms, technically, will not be able to annul the requirement of such compliance. The norm retains the provision on the compliance with internationally recognized general legal principles and norms, however, such specification underlines the primacy of human rights and it is important that such specification remains in the article through the use of the word "including". More importantly, the Constitutional Agreement itself, which comes after the Constitution in the hierarchy of normative acts and is an especially high-ranking legal document, does not stipulate or define anything regarding human rights, among others equality principle.
3. When there is no clear provision regarding mutual independence and separation of the Church and State, as well as on the relevance of state obligations under international treaties in respect of human rights protection, and considering that the commission had not discussed specification of constitutional guarantees in favor of the principle of the secular state, strengthening the provision on the significant role of the church (by modifying the provision on "absolute" protection of religious freedoms and removing the provision with the emphasis on compliance of the Constitutional Agreement with internationally recognized human rights principles and norms) reinforces, on the level of the constitution, the approach based on exclusive preferential treatment (support and strengthening) of the dominant Church.

   When there already is a lot of criticism regarding the Constitutional Agreement (Conclusion of the Agreement with the State, not a state body (e.g. the Government); Extremely complex and nearly impossible procedure of amending the Agreement; Superior legal force of the Constitutional Agreement over international agreements; practical impossibility of Constitutional control of the Agreement), reinforcing the Agreement and the role of the dominant Church seems devoid of legal rationality.
4. General Provisions should include fundamental principles of political and social setting of the state. It is vital that the provision regarding the Church-State relations puts an emphasis on the principle of secularism – mutual independence and separation of the State and the Church.

In conclusion, under the circumstances when the Constitutional Agreement and other legislative acts create a privileged, unequal and asymmetric legal state for the dominant Church and in some cases, contain signs of entanglement of Church and State, diminishing the importance of freedom of religion and other human rights in the Constitution which is a fundamental law and a document of political and social agreement, is very problematic and increases criticism on already evident non-secular state policy and the Government attempts of its institutionalization.

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[12] Articles 38 and 89.1 of the Constitution of Georgia;