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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**COMMENTS ON THE DRAFT CONSTITUTIONAL AGREEMENT
BETWEEN THE STATE OF GEORGIA
AND
THE APOSTLE AUTOCEPHALOUS ORTHODOX CHURCH OF
GEORGIA**

(by Mr Hans-Heinrich VOGEL, Member, Sweden)

1 The Legal Nature of the Constitutional Agreement

The legal nature of the Constitutional Agreement is not defined. Neither is it a constitutional law based solely on the *pouvoir constituant* of the Sovereign, i.e. the people of Georgia as stated in Article 5 of the Georgian Constitution, nor is it a concordate-style treaty between subjects of international law. Perhaps one can describe it as a bilateral agreement under Georgian public law with one of the parties being the State. But such a description alone would not be very helpful, because it does not indicate, which set of existing supplementary rules (if any) to apply, if the Constitutional Agreement has to be changed, amended or cancelled. It is quite clear which procedures to apply, if it is necessary, for example, to change, amend or replace the Constitution or a concordate. But it is not clear how to proceed, if it is necessary to change, amend, replace or even cancel the Constitutional Agreement. Therefore, it should be considered either to further clarify the legal nature of the Constitutional Agreement with the aim to identify applicable rules of procedure for change, amendment, replacement or cancellation of the Constitutional Agreement or – at the very least – to add explicit provisions to the text of the Constitutional Agreement on how to change, amend, replace or cancel the Agreement.

2 The Application of the European Convention for the Protection of Human Rights and Fundamental Freedoms and other international human rights documents

It is obvious that the Constitutional Agreement should comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Protocols to this Convention and other applicable international human rights instruments. But compliance with the Convention is not easy to achieve – especially if both Article 9 on freedom of religion and Article 14 on prohibition of discrimination (or similar provisions in other human rights instruments) are in question.¹ If, for example, according to Article 15 of the Constitutional Agreement the Georgian “State guarantees to provide Georgian Patriarchate with broadcasting time in the State mass media” and “Georgian Patriarchate mass media with needed wave band for broadcasting” it is neither unthinkable nor unrealistic to foresee a complaint under the Convention of an individual not belonging to the Orthodox Church of Georgia but instead to another religious community, if this individual is unable to get needed “broadcasting time” or “wave band for broadcasting”. Similar problems may arise even in other situations (cf. Articles 7, 11, 16, 17, etc.), in which the Georgian State in the Constitutional Agreement issues guarantees to the Orthodox Church of Georgia or to its members or ecclesiastics, while similar guaranties are not available to other religious communities or its members or functionaries; even the provision in Article 38.2, that “[i]t is inadmissible to declare Sunday as a working day”, may – if literally and rigorously applied in non-Christian circumstances – lead to substantial difficulties. Therefore, it should be considered to combine the ratification of the Constitutional Agreement with legislation on the legal situation of religious communities other than the Orthodox Church of Georgia and to use the Constitutional Agreement as a blueprint for such legislation.

¹ Cf. European Court of Human Rights, case of *Darby v. Sweden*, 23 October 1990, Reports A 187, and the cases (many of them from Scandinavian countries) listed and discussed by J. A. Frowein and W. Peuckert (*Europäische Menschenrechtskonvention. EMRK-Kommentar. 2. Auflage. Kehl, Straßburg, Arlington 1996, p. 367-382 and 435-478*).

3 Internal Autonomy of the Church

The Preamble to the Constitutional Agreement confirms the constitutional rule (in Article 5 of the Georgian Constitution) that the Orthodox Church of Georgia is independent from the Georgian State. Therefore, the Constitutional Agreement appears to be based on the assumption that, as a rule, the Georgian State on the one hand should not take action in internal matters of the Orthodox Church of Georgia, and on the other, the Orthodox Church of Georgia should neither need nor receive approval of the Georgian State for its own action taken in internal matters, and that in all circumstances the overlapping areas should be as small as possible and well identified. With this in mind, Article 3 of the Constitutional Agreement seems to be not entirely clear. Why does the text distinguish between “functions” in paragraph 1 and “legal functions” in paragraph 2? Does the reference to “Canonic Law” in the Constitutional Agreement mean that the Georgian Patriarchate receives some kind of general approval for its application of Canonic Law? If that is so: Why would that be necessary and which implications would this approval lead to in case of a conflict with Georgian legislation?

4 Burial Sites and Cemeteries

Article 14 is not entirely clear either: In its paragraph 2 there is a reference to “Ecclesiastical Law”, while Article 3.1 refers to “Canonic Law”. Is this only an inconsistency of the English translation or does this choice of terms indicate a distinction made deliberately? If the latter is the case: What do the two terms and especially the term “Ecclesiastical Law” refer to? – Another question which may be asked in connection with Article 14 is what to do, if a person who did not belong to a Christian faith has to be buried in an area where there is only a Church cemetery under the administration of the Georgian Patriarchate. An answer to this question could and should be given in “the rules determined by the Legislation of Georgia”, which are envisaged in Article 14.1.

5 Taxation of the Georgian Patriarchate

According to Article 28.1² the Georgian Patriarchate and non-commercial organizations established by the Patriarchate are free from property and land taxes, and according to Article 29.5 “[t]he property of the Patriarchate of Georgia may comprise the agricultural and non-agricultural land, forests, lakes, springs.” Combined and interpreted literally, these two provisions may be construed as to provide a tax exemption of unusual and very substantial proportions. However, without detailed information on the Georgian tax legislation it is not now possible to tell, how far-reaching this exemption is at present or may become in the future.

6 Concluding Remarks

I received the text of the Draft Constitutional Agreement together with “Remarks ...” on the Draft. I am not sure who the author is of these remarks, but I share most of the views

² Paragraph 1 appears to be the only paragraph of Article 28.

expressed in them. However there is one exception, which concerns Articles 12 and 13. I agree entirely with the author(s) of the “Remarks” that the meaning of the English text is unclear. But without either a better translation of the Georgian text or – at least – additional information on the normative substance of Articles 12 and 13, I cannot at present endorse the proposals made in the “Remarks” for a re-arranged text.

Finally I may add, that these brief comments on the on the Draft Constitutional Agreement between the State of Georgia and the Apostle Autocephalous Orthodox Church of Georgia are to a large extent based on the very recent Swedish experience with the fundamental changes in the relationship between the Swedish State and the Church of Sweden. This process of separating church and state reached its final stage on 1 January 2000, when an amendment to the Swedish constitution and general legislation on religious communities (including the Church of Sweden) entered into force. The amendment to the constitution formally discontinued the state church system, as it had developed since the 16th century. An important component of the legislation was the establishment of a system to register religious communities and to let them become legal persons as a consequence of registration. Further, the legislations introduced of basic rules on liability of registered religious communities in civil law matters. Finally the income tax levied for the Church of Sweden was abolished; instead the Church of Sweden as well as any other registered religious community could introduce membership dues. The legislation therefore gave registered religious communities (including the Church of Sweden) the opportunity to apply for and get State assistance to collect the membership dues by procedures similar to those which apply for collection of taxes.