



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 28 June 2001

<cdl\doc\2001\cdl\064-e>

Restricted
CDL (2001) 64
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

(by Mr Antonis Manitakis, Commission Expert)

A. General comments

1. I consider necessary that the term 'constitutional' is abandoned and replaced by the term statutory. The replacement of this term will solve the numerous interpretative and institutional problems caused by its use. These problems have already been pointed out in the commentaries brought to my attention.

The term constitutional implies that the agreement has constitutional authority, that it has the same place in the hierarchy of laws with the constitution and can only be altered with a revision of the Constitution.

The most important, however consequence of the use of the term 'constitutional' is that the Orthodox Church due to the constitutional nature of the agreement acquires constitutional status, equivalent to the State with which it comes to an agreement. This agreement takes place independently or concurrently with the framing of the Constitution. Thus, the character of the agreement becomes constituent and the Church seems to be exercising constitutive power, and to be placed above the Constitution of the State of Georgia.

According to this logic, the provisions of a constitutional agreement should be considered to have the same place in the hierarchy of legal norms with the Constitution, perhaps even allocating to the Church power above the legislative. Consequently, the Church could claim that it does not have an obligation to abide by the requirements of the rule of law or to respect the Constitution and the civil liberties.

A constitutional agreement would be justifiable only if the Patriarchate of Georgia was an international legal entity like the Vatican and under this capacity it made a treaty with the State of Georgia, which however is clearly not the case here.

In conclusion, such an agreement is against all the principles of a secular state, whose basic characteristic is the separation between religious and governmental authority and the total submission of any religious power to the state power as well as the recognition of the state's dominion and its authority over all the affairs of the state.

For the above reasons I believe that the appropriate term for this agreement is 'statutory agreement'. Such an agreement should not be made between the State and the Church but between the cabinet of Georgia and the Orthodox Patriarchate of Georgia. The cabinet may be represented either by the Head of the State or by the minister competent for religious issues. The agreement may be ratified by the Parliament with big majority of votes so that it will acquire authority and it will bind the legislative power to respect its provisions.

Similar changes must be made to articles 9, 66, 73 and 89 of the Constitution of Georgia. The term "constitutional" should be replaced by the term statutory agreement.

This statutory agreement is subject to the Constitution, must be made in accordance with it and respect its provisions. Furthermore, it must be in accordance with the international commitments of the state as dictated by the international covenants.

2. Normative power over religious issues.

It must be made clear that the State of Georgia retains the absolute authority to legislate and decide on all 'secular issues'. The Patriarchate may regulate with its own acts (that may have normative power) the "spiritual issues" as well as the issues connected with the administration of the Church. Where issues of general interest are concerned (mutual issues), the State simply has the obligation to consult with the Church. However, it is the State that has the legislative power.

The agreement must not recognize normative power to the Church, that exclusively issues acts concerning its own regulation.

3. The legal status of the Orthodox Church.

It is indeed necessary to establish in the agreement the legal status of the Patriarchate and more specifically of the Orthodox Church. It must be made clear whether it shall be a legal entity that belongs to the public or to the private sector, or even a unique legal entity that is recognized by the Constitution and enjoys a special legal status. The legal status of the Patriarchate must be specified by the laws of the state.

4. The necessity of the protection of monuments and of religious and cultural inheritance.

It must be made clear that the State shall have the responsibility to protect and preserved all the possessions of the Orthodox Church that are considered a part of the national and international cultural inheritance. The Church is the owner of the religious constructions that have historical, cultural, archaeological and architectural value and the other cultural and art objects related to them but it is the State that supervises their protection and preservation. The Church shall preserve and exploit financially the above property according, however, to the provisions of the laws regulating the protection of monuments and objects that are a part of the cultural inheritance.

B. Comments on specific provisions of the agreement.

The second sentence of the Preamble must be deleted, as it is irrelevant with a legal agreement between Church and State because it refers to the Canon Law and the Ecclesiastical history of the Orthodox Church. Thus, the sentence: “Due to the Independence of the Georgian Apostle Orthodox Church of Georgia since 5th century” must be deleted.

The 3rd sentence of the Preamble of the Draft Constitutional agreement must also be deleted. The wording of this sentence is against the system of separation between Church and State established by the Constitution of Georgia. It could lead in legitimizing in the future the enjoyment by the Orthodox Church of privileges that other religious communities will not enjoy and encourage the Orthodox Church to claim to be treated by the State as a “Church of the State”. Thus, the sentence: “Since the Orthodox Religion historically has been the state religion in Georgia and the historical continuance means the unity of past, present and future’, must be deleted.

From the 4th sentence of the Preamble it is advisable that the phrase proclaiming the dominant position of the Orthodox religion in the Georgian society be deleted. This phrase infringes the cultural neutrality of the state and the equal access and participation of all the religions to the culture of Georgia.

For the same reasons it would be proper to rephrase the 5th sentence of the Preamble, which should become: “Due to the fact that a part of the Georgian population is orthodox Christian” Finally, the 8th sentence of the Preamble must also be deleted, because it may become the foundation of religious discriminations and should not be a part of a legal agreement between Church and State. Thus the phrase: “Due to the fact that the world’s high developed states historic churches have the special legal status”

Articles 1 and 2 of the Draft Constitutional agreement must be completed in accordance to the principles of the contemporary legal civilization. Furthermore, the word “lawful” is not the appropriate term and must be replaced. Therefore, the provision could be written as follows: “The Georgian Patriarchate is called to contribute to the building of united, independent, democratic state of Georgia and to respect The Constitution, the rule of law and the human rights”

The word “interrelation” in article 2 should also be replaced because it is imprecise. The provision may thus be drafted as follows: “The Government and the Georgian Patriarchate

affirm their separate normative orders and their cooperation on mixed matters, and take the obligation to respect this principle”.

Article 4 must be completely deleted, because it concerns the Canon Law of the Orthodox Church and should not be a part of a legal agreement between Church and State.

Article 5 is badly phrased and could create many interpretative problems. The only possible meaning it may have is that “The government has the obligation to put under the consideration of the Georgian Patriarchate the drafts of normative acts concerning the matters of reciprocal interests. As mixed matters could be considered mainly: the ecclesiastical education, the religious support to the schools, the armed forces, the prisons and the charity institutions, the lesson of religious education according to the Christian Orthodox religion, social welfare and the protection of the religious constructions and objects that have cultural value”

For the above reasons the words “in the fields of reciprocal interest” in article 6 must be replaced by the words “on mixed matters”. Furthermore, the words “and on these matters State should adopt normative acts” must also be deleted and replaced by the sentence “The Government and the Georgian Patriarchate are empowered to come to agreements on mixed matters”. Thus, the delegation of state legislative power to a denomination shall be avoided.

In articles 12 and 13, the words “by the Georgian Patriarchate” must be replaced by the words “by an agreement between the Government and the Georgian Patriarchate”. The armed forces as well as the prisons are special places where the power of the state is exercised. Consequently, the dominion of the state is violated if the rules concerning the structure of Military Teaching Institution in military units and the structure of ecclesiastic institution in the prisons and the penitentiary establishments are enacted exclusively by the Georgian Patriarchate. This would also be the case if the Georgian Patriarchate would appoint the religious ministers in the armed forces and the prisons without the approval of these appointments by the State. Thus, article 12 must be replaced by: “The state guarantees the establishment of the structure of ecclesiastic institution in the prisons and the penitentiary establishments. The regulation of abovementioned institution is enacted by an agreement between the Government and the Georgian Patriarchate. The religious ministers belonging to this structure are appointed by the Georgian Patriarchate and approved by the Government”.

Article 16 must end with the following words "...state schools in the respect of the religious beliefs of all students."

In article 22 the following words must be added: "in accordance with the state law". This will guarantee that the charity activities of the Georgian Patriarchate are lawful. The provision thus, should be replaced with: "Georgian Patriarchate is empowered to establish the orphanage-houses, shelters for old people, establishments with different specification in social and medical care, in accordance with the state law.

Article 23 and 24 must be replaced as follows: art. 23: "Georgian Patriarchate affirms the project of orthodox churches and gives permissions for building orthodox churches on the entire territory of Georgia, in the context of respect of the state urban legislation" and art 24: "Georgian Patriarchate gives permissions and according to legislation of Georgia on cultural goods affirms the projects of restoration of orthodox churches with cultural-historic meaning". The phrases "in the context of respect of the state urban legislation" and "on cultural goods" must be added because they are necessary in order to clarify that the Georgian Patriarchate abides by the state legislation on issues of urban planning and culture as dictated by rule of law principle in a modern democracy.

In article 24 the following sentence must be added: "in the churches under the jurisdiction of the Patriarchate of Georgia". Otherwise the article violates the freedom of business initiative which is protected by article 24 of the Constitution of Georgia. The wording of the article must thus be "1. Georgian Patriarchate has the right to carry out economic activity as determined by state legislation. 2. Georgian Patriarchate does not directly carry out business undertakings, unless under state legislation"

At the end of each paragraph of article 30 the following words must be added: "without prejudice of the legally acquired rights of individuals. Thus the violation of the right to property of individuals protected by article 21 of the Constitution of Georgia shall be avoided. The suggested wording for this provision is: "The property of the Patriarchate of Georgia comprises all orthodox churches, monasteries, cathedrals and their ruins, icons and all church items, as well as all religious (cult) constructions located on the whole territory of Georgia, without prejudice of the legally acquired rights of individuals. 2. The property of the

Patriarchate of Georgia comprises the land on which religious constructions enlisted in Paragraph 1of this Article are located, without prejudice of the legally acquired rights of individuals.”

In article 35&1 the words “under the supervision of the State” must be added so that the Patriarchate of Georgia will not misunderstand the extent of the state’s jurisdiction over cultural issues. In a modern democracy founded on the rule of law principle the State is responsible for and supervises the protection of all cultural goods, and everything that is considered cultural inheritance, despite the fact that they may be property of a particular denomination. The suggested wording for this provision is therefore: “The Patriarchate of Georgia shall to preserve the religious constructions that are of historical, archaeological, cultural and architectural value and other cultural goods and art objects related to them”

In article 39&1 the presumption of lack of authority of the state must be overturned. It must be transformed to a presumption of normative authority of the state over all matters not directly regulated by this agreement. The suggested wording for this provision is the following: "If the present agreement does not directly regulate any matter, the state is authorized to act within its normative jurisdiction”.

In article 41&2 the words “by the minister competent for the cults”. The agreement is not a bilateral international treaty but a part of the domestic public law and therefore it must not be signed by the President of the Republic but by the competent minister. The Patriarch of Georgia correctly represents the Church. An agreement signed by the Head of the State and the Patriarch, would be a reminiscence of the Byzantine theocratic system of Church and State relations, where the two supreme institutions of the empire were the emperor and the Patriarch. Consequently, the suggested wording for this provision is: “2. The present agreement is signed by the minister competent for the cults and the Catholicos Patriarch of Georgia”