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Some Technical and Legal Problems of the Constitutional Agreement

Constitutional Agreement between Georgian State and the Georgian Apostolic Autocephalous Orthodox Church was signed in 2002. It includes many interesting norms, concerning Church-State relationship, but its full implementation hasn't begun. Constitutional Agreement, as the legal act has some technical and even legalproblems. The main goal of this article is to analyze these methodical and formal problems to make some recommendations to fix and improve them.

Key Words: *constitutional agreement, Georgia, church, legal problem, legal act, concordat, Orthodox.*

I. Introduction

Constitutional Agreement between the state of Georgia and Georgian Apostolic Autocephalous Orthodox Church was concluded in 2002, but, in spite of this fact, it remains a kind of "misty" document and judgment on its advantages and disadvantages and content has not started yet. Its reason lies, on the one hand, in delicate nature of the sphere of its regulation, and, on the other hand, the content of these issues, processing and analysis of which requires specific, interdisciplinary knowledge.

Many questions exist in regard to Constitutional Agreement, most of which is related to the aspects of its content and problems of enforcement. Its technical side, especially the aspect of legal technique, which, ultimately, conditions all other aspects, is no less important. The goal of the article is to analyse terminological issues of the Constitutional Agreement, consider the problem, related to its nature and place in the hierarchy of normative acts, outline purely legal-formal shortcomings and develop the ways of their resolution.

II. Terminological Shortcoming of the Title of the Constitutional Agreement

Relation of law and language is one of the permanent problems in legal theory and it never loses actuality, the more so for the legal place, which is in the process of formation.[1] Issues, related to language and notions cannot be secondary, as law, as such, is the system if behaviour rules, revealed in language and linguistic forms.[2] For this reason, well-defined terminology is one of the necessary components of legal system; moreover, it is one of the prerequisites of development of these systems.

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1 *Gegenava D.,* On Appropriateness of Some Notions in Georgian Constitutional Law, in the Book: Zurab Akhvlediani 80, Tbilisi, 2013, 191 (in Georgian).

2 *Khubua G.,* Theory of Law, Tbilisi, 2004, 121 (in Georgian).

The title of the Constitutional Agreement, as a legal document, is outstanding. Its contractual nature, on the one hand, and "constitutional" status, on the other hand, makes it etymologically outstanding document too. By using the word "constitutional", the legislator stresses its special importance, its constitutional-legal nature and status in the state system.[3]AAs professor Khetsuriani explains, giving the Agreement the name of "constitutional" is justified by the circumstance that "the possibility of concluding it and the circle of subjects will be determined only by the basic law of the state"[4].

The Constitution-based status of the Constitutional Agreement is quite proper and expedient. Nothing can stress the status and significance of legal act stronger than even terminological linkage to the Constitution, the more so that, in this case, it is based on the basic law content-wise. "Constitutional" ("კონსტიტუციური") and "Constitution-based" ("საკონსტიტუციო") in Georgian are often used as equivalents, which leads to many problems (It is conditioned by Georgian language, in Enlglish and other languages both of them can be determined by the term "Constitutional").[5] These two notions are very similar phonetically, but content-wise, taking the specificity of Georgian language into account, they significantly differ. "Constitution-based" means appropriate for Constitution, intended for Constitution, provided by Constitution, and "Constitutional" means complying with Constitution.[6] Content-wise, the mentioned notions cover overlapping meanings. All the above states obtain even more ambiguity in regard to the Constitutional Agreement. The "Constitutional Agreement", following its literary and grammatical content, means the agreement, which complies with the Constitution. From this viewpoint, any agreement, which does not contradict the Constitution, is constitutional. Besides, it is the prerogative of the Constitutional Court to determine whether something – including Constitutional Agreement – is constitutional or not, i.e. it (totally or partially) can turn out to be potentially unconstitutional, which fundamentally excludes its "constitutional" status.

"Constitution-based Agreement" truly reflects the content wise and terminological load, inherent to this institute. In this case, it completely includes the idea, which its creators had – following from the Constitution, directed towards the Constitution, having Constitution-based legal status and content. Giving the title "Constitution-based" will make the legal form of the institute proper not only technically, but also content wise and will create adequate perception in regard to its legal nature. In this case, the document will fit in the uniform system of normative acts of Georgia. After that, the issue of constitutionality of the "Constitution-related Agreement" will be logical as well as adequate, unlike the constitutionality of "Constitutional Agreement".

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[3] *Manitakis A.*, Comments on the Draft Constitutional Agreement between the State of Georgia and the Apostle Autocephalous Orthodox Church of Georgia, CDL (2001) 64, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 28 June 2001, 2.

[4] *Khetsuriani J.,* The State and the Chirch, Journal The Human and the Constitution, №1, 2001, 11 (in Georgian).

[5] See *Gegenava D.,* On Appropriateness of Some Notions In Georgian Constitutional Law, in the Book: Zurab Akhvlediani 80, Tbilisi, 2013 (in Georgian); *Gegenava D., Kantaria B., Tsanava L., Tevzadze T., Macharadze Z., Javakhishvili P., Erkvania T., Papashvili T.,* Georgian Constitutional Law, 3rd ed., Tbilisi, 2015 (in Georgian).

[6] See Explanatory Dictionary of Georgian Language, <http://ena.ge/explanatoryonline>, [05.11.2015].

III. Constitutional Agreement in the Hierarchy of Normative Acts

The provisions on the power of normative action of the Constitutional Agreement are included in the Constitution, as well as the Law "On Normative Acts". Unfortunately, some of these provisions are contradictory and vague, not allowing to arrive to clear conclusion on the place of the Constitutional Agreement in the hierarchy of normative acts.

In accordance with the Constitution of Georgia, the supreme law of Georgia is the Constitution and all legal acts shall comply with it.[7] Certainly, in this regard, the acts cover the Constitutional Agreement, which, like any other act, is a document, subordinated to the Constitution. Besides, the Constitution gives to international treaties and agreements prevailing legal power in regard to internal normative acts and considers them subordinated to the Constitution of Georgia and Constitutional Agreements.[8] Similar order is determined by the Law of Georgia "On Normative Acts", which repeats the provision of the basic law word for word.[9]

Confusion is brought about by the provision of the Constitution, according to which the Constitutional Agreement shall be in full compliance with the universally recognized principles and norms of international law, in particular, in the sphere of human rights and fundamental freedoms.[10] The purpose of the norm is easy to determine. Its goal is prevention of violation of fundamental human rights, infringement of religious rights of other persons and discrimination by the Constitutional Agreement; the above mentioned shall be ensured by stating the compliance with the rights of the Constitutional Agreement.[11] Nevertheless, internationally recognized rights and principles are unimaginable to exist separately, abstractedly; they shall be provided in some international legal act, and the latter, in its turn, has less power than the Constitutional Agreement – it turns out to be illogical – how the Constitutional Agreement shall comply with these principles and rights.[12]

It is not clear which governmental authority can determine the compliance of the Constitutional Agreement with the universally recognized principles and norms of international law in the sphere of human rights and fundamental freedoms. Logically, the primary governmental authority, which, in this regard, creates illusion, is, certainly, the Constitutional Court of Georgia. Unfortunately, it has not such authority according to the Constitution and legislation.[13] The main act, which is the primary source for it, is the Constitution; consequently, the litigation on compliance of normative acts with each other is beyond its competence. Professor Korkelia sees the way out in consideration and resolution of the compliance with the Constitutional Agreement and international treaty by common courts.[14] Such judgment is logical and hierarchic compliance of acts falls within the competence of administrative court, although the delicacy of the situation is in the fact that in

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7 Part 1 of the Article 6 of the Constitution of Georgia.
8 See Ibid, 2nd sentence of part 2.
9 See part 3 of the Article 7 of the Law of Georgia On Normative Acts.
10 2nd sentence of part 2 of the Article 9 of the Constitution of Georgia.
11 *Korkelia K.,* Application of European Convention on Human Rights in Georgia, Tbilisi, 2004, 86 (in Georgian).
12 See Ibid, 87.
13 See part 1 of the Article 89 of the Constitution of Georgia, Article 19 of the Organic Law of Georgia On the Constitutional Court of Georgia.
14 *Korkelia K.,* Application of European Convention on Human Rights in Georgia, Tbilisi, 2004, 87 (in Georgian).

this case, dispute touches fundamental human rights and not material or formal legality of the act itself.

Second sentence of p. 2 of the Article 9 of the Constitution is quite excessive and does not fit either in normative fabric of the Constitution or in uniform structure of deontic logic of the basic law. Constitutional Court can consider the issue of constitutionality of any normative act; besides, in this case, any person can apply to it for the purpose of determination of compliance of normative act or its part with the fundamental rights and freedoms recognized by Section 2 of the Constitution.[15] If the aim of the legislator is prevention of violation of fundamental right, it could be achieved without excessive norm. Even in the case of absence of the second sentence of p. 2 of the Article 9, any person could apply to the Constitutional Court and have litigation on constitutionality of provisions of the Constitutional Agreement. Besides, systemic analysis of the Articles 7 and 39 of the Constitution of Georgia makes it obvious, that fundamental rights, recognized by international law, provided in specific international acts could be accepted as the constituent part of not only legislation, but the Constitution; it would enable the Constitutional Court to fulfil the normative purpose, implied by the second sentence of p. 2 of the Article 9 and, even in the case of absence of specific norm in the Constitution, protect fundamental human rights and ensure practical realization of the rights. Consequently, the above-mentioned provision of the basic law is quite excessive and does not ensure protection of human rights; on the contrary, it creates normative casus, for resolution of which no empowered authority exists.

IV. Violation of Secularism and Limitation of the Church

Active modernization process does not mean disappearance of the purpose of the church in the society.[16] Although Orthodox Church always treats global novelties and initiatives with caution, and, it could be said, with certain fear, which is conditioned by its (ultra)conservative nature.[17] Nevertheless, it should not serve as a reason for limitation of autonomy of the church by the state instead of advantages and privileges in relations of the state and church. Historically, any state, granting constitutional privileges and special official status to the church, always demanded service and support from the relevant church.[18] The above mentioned has become the thing of the past and presently support from the side of the church is expressed mainly in social sphere through promotion and encouragement of integrity, unity of the state and public peace.

With consideration of specificity of modern church and state, the issues, exclusively managed by the church are education and training of ecclesiastic persons, religious services and labour relations with ecclesiastic persons, etc.[19]

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[15] Sub-paragraph "f" of part 1 of the Article 89 of the Constitution of Georgia.

[16] *Fokas E.*, Religion and Welfare in Greece: A New, or Renewed, Role for the Church? in: Orthodox Christianity in 21st Century Greece, The Role of Religion in Culture, Ethnicity and Politics, Edited by *V. Roudometof* and *V.N. Makrides,* Ashgate, 2010, 175.

[17] See Ibid, 180.

[18] *Dawson J.F.*, Friedrich Schleiermacher and the Separation of Church and State, Journal of Church and State, Vol. 7, №2, 1965, 219.

[19] See *Von Campenhausen A.F.*, Church Autonomy in Germany, in: Church Autonomy, A Comparative Survey, Edited by *G. Robbers*, Frankfurt am Main, 2001, 81-82.

1. Keeping Secrecy

The law provides the privilege of keeping secrecy for the lawyers, doctors and ecclesiastic persons.[20] It does not matter, to which legal system the country belongs and what legal understanding in there in the country, the privilege of keeping secrecy is guaranteed for these three categories. Georgian legislation ensures protection of such secrecy.[21] Besides, it shall be mentioned that there is certain differentiation between secrecy of these three categories. Unlike others, the principle of keeping secrecy for ecclesiastic persons is absolute and the state does not oblige them to reveal the secret of confession in any case.[22] Whereas a doctor and a lawyer, in exceptional cases, are obliged to apply to the relevant authorities, ecclesiastic persons enjoy absolute legislative privilege. In the case of Georgia, under "ecclesiastic person", a person with the relevant authority of any confession is implied and in this regard, the legislation does not provide for any kind of differentiation.

According to the Constitutional Agreement, the state equips orthodox ecclesiastic persons with the privilege of keeping secrecy in two direction: 1. Secrecy of confession and 2. Ecclesiastic secrecy.[23] The secret of confession is defined as the secret of remorse, established by Jesus Christ himself; voluntary recognition of sin in front of the God to confessor[24], which he has no right to tell others;[25] and ecclesiastic secrecy means confidential information of the church.[26] The information, obtained during confession, is a secret and church does not know the possibility of its disclosure; on the contrary, it is forbidden to give it out to anybody in any form or to tell it to anybody.[27] Moreover, ecclesiastic person, who commits it, will be punished according to ecclesiastic laws.[28]

As surprising as it can be, the state rules the secret of confession and ecclesiastic secret not as the privilege, but as the obligation and obliges ecclesiastic person not to give out information, which he, as a confessor, has, or became known to him, as to a confessor.[29] Establishing such obligation is unimaginable in the environment of constitutional secularism. The state is not authorized to interfere in internal affairs of the church, a fortiori, establish any kind of obligation to the person under the jurisdiction of the church, with the exception of civil, secular obligations, which, as a rule, any citizen has, anyway. The provision, formulated this way, contradicts the principle of delimitation of the state and the church and violates the constitutional-legal idea of autonomy of the church. The obligation of keeping the secret of confession and church secret shall be determined for ecclesiastic person

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[20] *Greenawalt K.*, Religion and Equality in: Christianity and Human Rights, An Introduction, Edited by. *J. Witte Jr.* and *F.S. Alexander,* NY, 2010, 243.

[21] See Criminal Procedural Code of Georgia, the Law of Georgia On Doctors' Rights, Code Of Ethics of Lawyers, the Law of Georgia On Lawyers.

[22] *Greenawalt K.*, Religion and Equality, in: Christianity and Human Rights, An Introduction, Edited by *Witte Jr.J.,* and *Alexander F.S.,* NY, 2010, 243.

[23] The 1st sentence of the Article 2 of the Constitutional Agreement between the State of Georgia and Georgian Apostolic Orthodox Church, (Hereinafter – the Constitutional Agreement).

[24] Ecclesiastic Person of Orthodox Church, who Hears Confession from this or that Person and Directs his/her Spiritual Life. Ibid, Explanations of Terms, part 16.

[25] Ibid, part 13.

[26] Ibid, part 14.

[27] *Bumis P.I.,* Canon Law, translated by *I. Garakanidze,* Tbilisi, 2007, 91 (in Georgian).

[28] Ibid.

[29] 2nd sentence of theArticle 2 of the Constitutional Agreement.

only by church and canon law. The state shall be absolutely neutral in this case and shall ensure the privileged status of secrecy not by obligation, but by the mechanism of granting authority.

Second sentence of the Article 2 of the Constitutional Agreement contradicts the Article 9 and p. 1 of the Article 19 of the Constitution of Georgia. Its formulation shall be changed and absurd obligation shall be transformed into legal privilege.

2. Licenses and Permits

Following the legal status and organizational capacities of the state, it often undertakes to carry out some event in favour of specific or certain religious associations. Most often, the state ensures collection- administration of taxes and fees from the church members.[30] Cooperation in this aspect is quite natural, as taxes are exclusively state's prerogative and it has much refined, properly working and simple system to ensure effective collection of taxes from the members of religious associations; but in any other case the state shall avoid implementation of any activity on behalf of the church, the more so when it directly falls under the competence of the church, as organizational-legal subject and, most importantly, it is absolutely possible to do without active interference of the state.

According to the Constitutional Agreement, the state undertakes the obligation to issue, in agreement with the church, a permit or license for the use of official terminology and symbols of the church, as well as manufacturing, import and supply of religious products.[31] Official terminology of the church is: "Georgian Apostolic", "autocephalous", "orthodox", "Catholicos-Patriarch", "Holy Synod".[32] The Constitutional Agreement conceded definition of symbols to the "Church Management Charter".[33] It shall be mentioned that the latter does not exist at all. The title of the document, adopted on September 18-19, 1995, on the extended local meeting of Georgian Orthodox Church is the "Regulations" and not "Charter". Besides, most importantly, the mentioned document does not regulate the issues, related to symbols at all.[34] Consequently, it could be said that the issue of symbols is left without regulation.

Undertaking of the obligation of issuing licenses/permits by the state is justified for the purpose of creation of uniform, centralized approach so that Orthodox perish does not fall under the influence of various trends, pretending as Orthodox for various reasons.[35] Nevertheless, this argument is of little use because in this case the state, undertaking such obligation, rather interferes with the religious freedom autonomy of the church, as religious association, independent subject, than helps it. Delimitation of the church and the state, primarily, liberated the church itself from interference of the state in its affairs, giving it absolute freedom of action.[36] Besides, religious freedom en-

[30] *Narindoshvili M., Gogelia V., Julakidze T., Jashi Z., Glurjidze E.,* Freedom of Religion, Tbilisi, 2004, 113 (in Georgian); See *Darby v. Sweden*, [ECtHR], App. №11581/85, 23 October 1990.
[31] Part 6 of the Article 6 of the Constitutional Agreement.
[32] Ibid, Explanations of Terms, part 28.
[33] Ibid, part 27.
[34] See Regulation of Management of Georgian Autocephalous Orthodox Church, September 18-19, 1995, Mtskheta, Svetitskhoveli.
[35] See *Chikvaidze D.,* Comments to the Constitutional Agreement, Concluded Between the State of Georgia and Georgian Apostolic Autocephalous Orthodox Church, Comments, Tbilisi, 2005, 29 (in Georgian).
[36] *Heckel M.*, Religious Human Rights in Germany, Emory International Law Review, Vol.10, 1996, 108.

sures legal expectation that religious association will be able to function without gross interference and encumbrance from the state.[37]

The church, which is the legal person of public law and is equipped with full legal capacity and ability, has enough capability to protect its rights using legal mechanism, through the court, including prohibition of use of its official terminology and symbols, etc. In this case, this dispute will have not religious but civil nature, resolution of which is the competence of Civil Court.[38] On the other hand, the state will avoid obvious favouritism towards specific religious association and expenditure of state resources, whether they are human or financial. It shall try to distance itself from the dispute of such content, the more so, in the sphere like licenses and permits, tax and customs law. It is how it happens in practice: the state did not reflect the mentioned provision of the Constitutional Agreement in the relevant legislation,[39] consequently, this record is a dead norm and it has not gone beyond formal boundaries. Nevertheless, it could be said that its existence in this form and placement in hierarchically second state act is the violation of the principle of secularism and, even in the environment of cooperation model, is obvious favouritism, which goes beyond normal boundaries of relations of the state and the church.

3. Limitation of Economic Freedom

The Constitutional Agreement includes the provision, according to which the church does not directly implement entrepreneurial activities.[40] The purpose of the norm should be to stress the primacy of implementation of spiritual function by the church and to promote its higher purpose; but the motivation of placement of such normative content in the Constitutional Agreement is not clear, the more so that the norm has declarative nature and contains the statement rather than any kind of legal obligation. Nevertheless, in the course of definition of the rules of model behaviour of relations of the state and the church, it is illogical – why limitation of entrepreneurial activities or distancing from the opportunity of implementation of such activities is required for the church.

Ensuring of autonomy for religious association is an integral part of modern democratic society and necessary condition of observance of the Article 9 of the European Convention.[41] European state shall not interfere and shall not be even interested in the internal affairs of the church; its main purpose shall be popularization and actualization of democratic values.[42] The principle of religious autonomy implies the right of the religious association to independently decide the issues, related to it and manage itself without the interference of the government.[43] Religious association has the right to independently resolve internal organizational issues, elect spiritual leaders, form and develop reli-

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[37] *Hasan and Chaush v. Bulgaria*, [ECtHR], Grand Chamber, App, № 30985/96, 26 October 2000, §62.
[38] *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 709 (1976).
[39] The Law of Georgia On Licenses and Permits, Tax Code of Georgia, Customs Code of Georgia.
[40] Part 3 of the Article 6 of the Constitutional Agreement.
[41] *Hasan and Chaush v.* Bulgaria, [ECtHR], Grand Chamber, App. № 30985/96, 26 October 2000, §62.
[42] *Kurtanidze K.,* Recommendation of EU Parliamentary Assembly: State, Religion, Secularity and Human Rights, Journal Solidarity, №1 (34), 2010, 99 (in Georgian).
[43] *Durham W.C.Jr.,* Religion and the World's Constitutions, in: Law, Religion, Constitution (Freedom of Religion, Equal Treatment, and the Law), Edited by *Cr. Cianitto, W.C. Durham, S. Ferrari, D.* Thayer, 2013, 6.

gious issues, determine the rules of acceptance and exclusion of members, etc.[44] The church shall decide itself where it will gain additional income from, what funds it will have and how it will dispose them. Certainly, it shall be implemented within the framework, determined by the law, but in this case private law will apply and the church, as the independent legal person, will have economic or personal freedom, autonomy. Its legal form does not matter, as it is not classical legal person of public law and the relevant legislation shall not be applicable to it.[45] Besides the church can establish the relevant legal person, who will implement entrepreneurial activities and nobody can prohibit it. Against this background, the provision of the Constitutional Agreement obtains hue that is more comic; it is not only declarative, but has completely resultless and fruitless content.

One of the main goals of freedom of religion is ensuring of autonomy and independence of religious association.[46] It is prohibited even for the court to interfere with the internal affairs or spiritual sphere of the church during proceedings.[47] In such environment, the existence of similar norm is completely out of the uniform logical context of legal system. Orthodox Church, which always had conservative position, has to revise its positions in parallel with modern challenges, technological development.[48] For this very motive, it has to apply to various, legal mechanisms of funding and may implement entrepreneurial activities too. It's a different story how it will use this opportunity in practice, but if other religious associations do not have similar limitation, it is also illogical to set it for the church, which enjoys privileged status and, on the contrary, may have more privileges.

4. Immunity of the Patriarch

In Middle Ages, the state used to rule judicial immunity in regard to the church and religious servants.[49] Immunity was protecting religious servants from lodging of charges.[50] This principle acted for a long period and the factor, conditioning it, was the sacral status of religious servants itself. Nevertheless, gradually, the immunity weakened and finally completely disappeared, which was conditioned by advancement of fundamental human rights and the principle of equality in the eyes of the law.

According to the Constitutional Agreements, the Catholicos- Patriarch is immune.[51] There is no legal definition of "immunity" in Georgian legal space; consequently, it shall be defined based on its every day, literary meaning. Consequently, legal immunity implies the impossibility of occurrence of legal, mainly criminal, responsibility in regard to the person. Detention, arrest, punishment of immune person according to the procedure, provided by the law, is impossible. The Constitution of Georgia grants such status to the only person, leader of the country – President of Georgia, during

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[44] *Svyato-Mykhayliyska Parafiya v. Ukraine*, [ECtHR], App. № 77703/01, 14 June 2007, §150.
[45] Part 5 of the Article 1509[1] of the Civil Code of Georgia.
[46] See *Sirico L.J.Jr.*, Church Property Disputes: Churches as Secular and Alien Institutions, Fordham Law Review, Vol.55, 1986, 335.
[47] See *Presbyterian Church v.* Hull Church, 393 U.S. 444 № 3 (1969).
[48] *Gegeshidze D.,* Criticism of Theological Concept of the Place and Role of Christianity in the History of Georgia, Tbilisi, 1985, 5 (in Georgian).
[49] *Dolidze I.,* Old Georgian Law, Tbilisi, 1953, 60 (in Georgian).
[50] *Vacheishvili Al.,* Essays from the History of Georgian Law, Vol. II, Tbilisi, 1948, 50 (in Georgian).
[51] Part 5 of the Article 1 of the Constitutional Agreement.

his/her period in the office.[52] It's unimaginable other way, as the President shall be able to exercise the power without obstacles, without any pressure and influence. However, his immunity is limited and expires with the expiration of dates in the office. Otherwise, the key principle of equality in the eyes of the law would be violated.

The idea of the church, as universal organization, did not prove to be successful and ultimately, it established in the form of national churches on state level.[53] Similar thing happened in Georgian reality; consequently, the leader of the church – Catholicos- Patriarch – enjoys special social status. As a result of the Constitutional Agreement, special legal status was established for him, but, unlike the President, which is an elected position with the number of the related limitations, "Patriarch" is a lifetime title. Consequently, immunity is guarantees for the Patriarch for much longer time. Besides, it is not clear what the purpose of immunity is in regard to the person, who is the church leader and why the law assumes the probability that he might commit a crime, in the case of which legal responsibility will occur towards him. The purpose of such wording in the text of the Agreement was stressing of respect in regard to the Catholicos- Patriarch and his promotion, but the result appeared to be reverse: full jurisdiction of the state will not apply to him, the principle of equality in the eyes of the law is violated, he obtains superior status and it shouldn't be favourable either fir the state of for the church.

Special status of the Catholicos is the sphere of social and not legal regulation; consequently, the state shall restrain from establishment of discriminative ruling, which may have special impact on specific groups of the society.

V. Conclusion

The Constitutional Agreement of Georgia is far from perfection; moreover, it contains and gives rise to numerous terminological, content-related and legal problems. It is necessary to improve it and establish better regulation to that the order, established by the Constitutional Agreement completely fits in Georgian governmental organism and legal space and ensure protection of others' rights at maximum level in this process.

Primarily, formal title of the Constitutional Agreement, as the legal act, hall be changed. "Constitutional" shall be replaced by "Constitution-based" and thus the legal nature and the idea of the Agreement will be finally determined – it will become based on the Constitution, directed towards the Constitution, instead of meaning simply compliant with the Constitution.

The Constitutional Agreement shall comply with fundamental human rights and freedoms, universally recognized by international law, otherwise is makes hierarchic relations completely vague and absurd. Universal norms and principles of international law in the sphere of fundamental human rights and freedoms will necessarily be provided in international acts in positive legal form. The Constitutional Agreement shall comply with the Constitution of Georgia, which automatically

[52] Part 1 of the Article 75 of the Constitution of Georgia.

[53] *Cranmer F.,* National Churches, Territoriality and Mission, Law & Justice, Vol.149, 2002, 157, see The Idea of an National Church, in The Church and Nation: Charges and Addresses, (London, 1901), 214.

means the necessity of it compliance with fundamental human rights, recognized by the Section 2 of the Constitution.

If there is a contradiction between the Constitutional Agreement and fundamental rights, recognized by the Constitution, the dispute will be resolved by the Constitutional Court of Georgia through constitutional proceedings on the basis of the suit/application of the interested person. Consequently, modification shall be made to the p. 2 of the Article 9 of the Constitution of Georgia and the second sentence of p. 2 shall be removed, the existence of which, from the point of view of legislative technique, is not related either to obligation or to the validity of mechanism for protection of rights. The Constitutional change shall be reflected in p. 4 of the Article 7 of the Law of Georgia "On Normative Acts", where the first sentence shall be also removed.

According to the second sentence of the Article 2 of the Constitutional Agreement, the state establishes the obligation of keeping the secrecy of confession, which is completely illogical, as it cannot interfere with the internal affairs of the church, the more so, impose religions responsibility on religious servant. Modification shall be made to the Article 2 of the Constitutional Agreement and its second sentence shall be formulated in the following wording: "Nobody shall have the right to request information from religious servant, which was confided to him, or became known to him, as to confessor".

Use of official terminology of symbols of the church by the state, production of religious products in agreement with the church, as well as undertaking the obligation to issue license/permit for import and supply of religious products is inadmissible. Georgian church enjoys full legal capacity, it has legal and practical ability to protect its rights. Besides the taken obligation is not just demonstration of good will, but imposition of religious functions to the state, as the church, as the legal person of public law, has the ability of administration and practical realization of the above mentioned. Consequently, p. 5 of the Article 6 of the Constitutional Agreement shall be abolished.

According to the Constitutional Agreement, the church is not directly performing entrepreneurial activities, which can be understood in two ways. On the one hand, the construction has declarative nature, so no obligation follows from it. On the other hand, such formulation is not unambiguous and during interpretation, allows possibility of another definition. In this case, an obligation is ruled for the church, prohibiting entrepreneurial activity for the church. In the case of any interpretation, the provision contradicts the idea of secularism. As far as similar limitation is not established for other religious associations, its application exclusively to Orthodox Church is not justified. The latter is free to decide what kind of activities it will perform. Besides, if it performs entrepreneurial activities not "directly", but through other person, established by it, this provision will still be useless. Following from the above mentioned, p. 3 of the Article 6 of the Constitutional Agreement shall be abolished.

By granting of immunity on the basis of the Constitutional Agreement, special respect and attitude towards the Catholicos-Patriarch is expresses, although, the above mentioned is, at the same time, degrading in some sense. It is hard to imagine that the Patriarch needs to me liberated from criminal responsibility; and, if, theoretically, such case occurs, it shall be asked – why any citizen of Georgia shall be liberated from responsibility; this way, discriminative and non-democratic prece-

dent may be established. All people are equal in the eyes of law; consequently, each has to be responsible for his/her action. P. 5 of the Article 1 of the Constitutional Agreement shall be abolished for its incompliance with the Article 14 of the Constitution.

As a result of taking of consideration of the recommendation, certainly, not all problems of the Constitutional Agreement will be eliminated; nevertheless, the document will be improved from the point of view of legal technique. Besides, by removal of several absurd provisions from the text of the Constitutional Agreement, Georgian model will partially fit into some system of relations of church and state. From the viewpoint of the content, many more changes are to be made to the Agreement and, most importantly, the issues, related to its enforcements, still create a vast agenda.