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THE LEGAL CONTEXT OF INTER-RELATIONSHIP BETWEEN STATE AND RELIGION – THE GEORGIAN MODEL

A short comparative legal survey based on examples from the European Union

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INTRODUCTION

In general, a constitution is perceived as a legal form of a society's self-manifestation, the natural result of its past and a cultural phenomenon.[1] Taking this premise into account, the legislative arrangement regulating person-state relations is part of a national juridical (though not limited to) culture and one of its determining factors. In this regard, Georgia's present legislation that regulates freedom of religion is an interesting example.

In compliance with Chapter 16 (Articles 142, 143 and 144) of Georgia's first Constitution of 21 February 1921, "Church and State shall be separate and independent. No religion shall enjoy privilege. Expenditures from the State Treasury and the funds of local self-governance bodies for religious purposes shall be prohibited."

In compliance with Chapter 9 of Georgia's second Constitution of 24 August 1995: "The state shall declare complete freedom of belief and religion, as well as shall recognise the special role of the Apostolic Autocephalous Orthodox Church of Georgia in the history of Georgia and its independence from the state. The relations between the state of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia shall be determined by the Constitutional Agreement. The Constitu-

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[1] Starting from 1982 a concept of "Constitutional studies" pertaining to a kind of "Culture research" has been developed. *Habärle, Peter:* Das europäische Georgien, Speech at the Javakhishvili State University on the occasion of awarding doctorate degree honoris causa (10 March 2009). Jahrbuch des öffentlichen Rechts der Gegenwart. 58, 2010, S. 409-411.

tional Agreement shall correspond completely with universally recognised principles and norms of international law, in particular, in the field of human rights and fundamental freedoms."

Two similar provisions – from the first and the second (current) Constitutions respectively- describe two dramatically different realities in the field of freedom of religion. Georgia's post-Soviet juridical and political reality, as distinct from the beginning of the 20th century, seems relatively desecularised. But what is the actual juridical reality? The aims of the present article, given the scale and standard parameters of the issue in question, are to analyze those Georgian norms and European standards that define forum externum of freedom of religion as well as to identify lacunae in the present legislation, draft proposals for eradicating the lacunae and to intensify discussions on the subject. Using comparative-legal and systemic-logical methods, the article randomly reviews legal norms applied within the EU as well as legislative models of relationship between religious associations and the States; also, the problems of inter-relations between secularism and post-secularism, political ethics and so-called official theology. The article also analyses the legislative scheme underlying Georgian norms that regulate inter-relationship between the State and religions associations.

1. PRESENT MODELS OF LEGISLATIVE RELATIONS BETWEEN THE STATE AND CHURCH

At present, there are three classical models of State-Church inter-relationship defined by modern constitutional-legislative doctrine, these are[2]:

a) The State church or dominant church[3] model wherin institutional and functional inter-relationship exist between the State and the dominant religious entity, for example, the UK, Finland, Denmark, Greece and several cantons of Switzerland.

b) The second is the model of separation of religious entities from the State. This model implies that religion, as a societal phenomenon, belongs only to the private field and religious associations co-exist in the form of legal entities of private law. This model can be found in the Netherlands, Ireland, France, the USA, etc.

[2] The division of inter-relationship between state authorities and religious associations into three classical types based on the peculiarities of legal and religious traditions of each country is conventional. For example, in Ireland, the state and church are independent from each other; however, the Roman Catholic Church considerably dominates in several areas. *Unruh, Peter,* Religionsverfassungsrecht, Baden-Baden 2009, S. 312.

[3] References to the use of the above model only in case of institutions belonging to the Christian denominations are logical and defined by the European cultural-historic context. Historically, the level of presence of non-Christian religions in the EU has been considerably limited. *Roberts, Gerhard (Editor)*. The State and Church in the EU Member States, The Second Edition, 2011, p. 665

c) The third is the model of cooperation between the state and religious associations. Such co-operation takes place when a neutral state, in terms of religion, perceives religion and religious associations in a positive context, cooperates with them and grants them special legal status, for example, Spain, Portugal, Belgium, Luxembourg, Austria, Italy and Germany. The forms and scale of cooperation are different in each specific case, mainly, in terms of financing religious associations and style of cooperation in the field of education. This model of cooperation is perceived as a moderate model of separation which combines institutional separation with various forms and opportunities of cooperation.[4]

In general, there are two forms in which a religious association can be institutionalised: it can be registered as a Non-entrepreneurial (non-commercial) Legal Entity of Private Law (hereinafter NLEPL) and as a Legal Entity of Public Law (hereinafter LEPL). In some states there is no provision for registering a religious association as a specific legal association or as a legal entity per se. However, there are legal mechanisms for their integration into the national legal system (eparchies, attorneys, etc.). A religious association registered as LEPL differs from other entities in the following three features: it does not execute public governance, as an organisation is not part of official state bodies and is not subordinated to state authorities. The difference between the two statuses – NLEPL and LELP – is, mainly, in a better system of financing and a better legal status. A religious entity registered as LELP, as a rule, executes special educational and public functions.[5] In a system where registration as both entities is permitted, the difference between their statuses is counterbalanced by the legislative format and legislative environment which is favourable and equally acceptable to all religions.[6]

Parallel to the standard division of legal inter-relationship between the state and religious associations into three forms, there exists a thesis concerning a two-stage model of inter-relationship between religious associations and state authorities. According to the two-stage model, the state, while regulating the religious sphere, guarantees the right to the freedom of religion by ensuring individual and collective or corporate rights as a fundamental right at the constitutional level (stage one) and, at the next stage, creates specific legal and institutional resources, conforming to the national cultural and legal traditions, to exercise freedom of religion (the second stage).

The legal guarantees for exercising freedom of religion in the legal environment of EU are created within the abovementioned two-stage system.[7]

[4] Korioth, Stefan, Freiheit der Kirchen und Religionsgemenschaften, in: Merten, Detlef/Papier, Hans-Jürgen Hrsg., Hanbuch der Grundrechte, Heidelberg 2011, S. 620.

[5] For certain types, see Roberts, Gerhard (Editor) The State and the Church in the EU Member States, The Second Edition, 2011

[6] Walter, Christian, Religions- und Gewissensfreiheit, in: Grote, Rainer/Marauhn, Thilo (Hrsg.), Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Tübingen 2006, S. 860 ff.

[7] *Unruh, Peter,* Religionsverfassungsrecht, Baden-Baden 2009, S. 321 ff.

2. CERTAIN ASPECTS OF INSTITUTIONALIZATION OF RELIGIOUS ASSOCIATIONS IN THE EU

As a rule, freedom of religion[8] implies freedom of recognition or non-recognition of a religion, freedom of allowing non-disclosure of information about one's religious belief or of the right to change religion. This also includes the right to take or not take part in religious rituals either alone or together with other members of a religious community, and the right to serve a certain religion in words/deeds or to propagate.[9]

Freedom of religion, together with other fundamental rights, is provided by Article 6 of the Founding Treaties of the European Union, which, referring to the standard guranteed by the European Convention on Human Rights of the Council of Europe, defines the minimum standard of Human Rights' protection within the EU.[10] The articles that specifically refer to the right to freedom of religion are Article 9 of the European Convention,[11] Article 10 of the EU Charter of Fundamental Rights,[12] Part 1 of Article 21,[13]Article 22 ,[14] etc.[15]

[8] In the jurisdiction of the European Court for Human Rights no unambiguous and specific definition of freedom of religion has been elaborated so far. Walter, Christian, Religions- und Gewissensfreiheit, in: Grote, Rainer/Marauhn, Thilo (Hrsg.), Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Tübingen 2006, S. 838 ff.

[9] Meyer-Ladewig, Jens, EMRK – Europaische menschenrechtskonvention, Handkommentar, 3. Aufl., Baden-Baden 2011, S.228 ff.

[10] Treaty of European Union (TEU), Article 6: "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[11] The European Convention on Human Rights (ECHR), Article 9: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitation as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

[12] Charter of Fundamental Rights of the European Union (*CFREU*) Article 10 (Freedom of thought, conscience and religion): "1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."

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[14] Charter of Fundamental Rights of the European Union (CFREU) Article 21, Section 1 (Non-discrimination):
"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

[15] For example, Aricle 14 part 3 of the Charter protects the free will of parents to provide their children with general education in conformity with their religious belief etc. Charter of Fundamental Rights of the European Union (*CFREU*), Article 14, Section 3 (Right to education): "The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right."

In compliance with articles 5 and 6 of the EU Foundation Treaties,[16] the EU institutions have no competence for elaborating mechanisms for ensuring freedom of religion within the EU member States[17]. The Treaty on European Union (TEU), Article 4, Section 2 says, "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures[18], political and constitutional,[19] inclusive of regional and local self-government." The national identities comprise constitutional order, including the constitutional and legal formats ensuring freedom of religion at the national level, which, given the diverse historical context of legal cultures, creates conditions for coexistence of religion and the State in all the three forms within the single European space. In this context, Article 17 of the Treaty of the Functioning of the EU[20] says, "The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations." Article 19 of the same Treaty substantiates inadmissibility of discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and the right of EU bodies, within the limits of the powers conferred by them upon the Foundation Treaties, to combat discrimination.[21] The Preamble to the Framework Convention for the protection of National Minorities[22] also contains a very interesting provision that the States signatories to the Convention and the member States of the Council of Europe sign the Convention considering an ethical obligation that says, "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a

[16] *Korioth, Stefan,* freiheit der Kirchen und Religionsgemeinschaften, in: *Merten, Detlef/Papier, Hans-Jürgen (Hrsg.),* Hanbuch der Grundrechte, Heidelberg 2011, S. 637-661.

[17] This does not imply specific EU directives and resolutions which, depending on the sphere they regulate, make only indirect references to religious associations. E.g. According to one of the EU directives, a radio programme which broadcasts a religious sermon which is less than 30 minutes, cannot be broken up for a commercial. Such examples are numerous. *Unruh, Peter,* Religionsverfassungsrecht, Baden-Baden 2009, S. 324 ff.

[18] Treaty of European Union (TEU), Article 4, Section 2: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

[19] *Unruh, Peter,* Religionsverfassungsrecht, Baden-Baden 2009, S. 322.

[20] Treaty of European Union (TEU), Article 6: "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[21] Treaty of the Functioning of the European Union (TFEU), Article 19: 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

[22] Framework Convention for the protection of National Minorities, 1. II. 1995. Georgia is a signatory to the Convention. The Convention came into force in Georgia on 1 April 2006.

national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity."[23]

Freedom of religion at regional and global level is protected by a number of international legal acts. For example, in Africa the African Charter on Human and Peoples' Rights is applied at the regional level.[24] The **American Convention on Human Rights** covers almost all of the American continent.[25] At the local level, the European Convention on Human Rights adopted by the Council of Europe and the documents of the OSCE are in force. At the global level, the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly[26] as well as the The *Declaration* on the *Elimination* of *All Forms* of *Intolerance Based* on *Religion* or *Belief*[27]*, the* International Covenant on Civil and Political Rights[28] are in force.

3. THE RELIGIOUS - PHILOSOPHICAL NEUTRALITY OF STATE AUTHORITIES

In conformity with the provisions of Article 9 and 11 of the European Convention of Human Rights, religious entities have the right to be registered as legal entities in conformity with the national legislations of the member States.[29] While recognizing and registering religious associations, state bodies have an obligation to adhere to the principle of neutrality which implies inadmissibility of ascribing themselves to any religious entity based on their philosophy.[30] If domestic legislation provides for registering religious associations as legal entities, the authorities are responsible for ensuring equal legislative conditions for all religious associations so that they acquire a relevant status.[31] In such circumstances, the State acts as a religiously neutral subject whose aim is to ensure normative standards for harmonious coexistence of religious associations while eusuring adherence to the principle of tolerance.

[23] Framework Convention for the protection of National Minorities: "The member States of the Council of Europe and the other States, signatories to the present framework Convention, [...] Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity..."

[24] The African Charter on Human and Peoples' Rights, in force from 21 October 1986.

[25] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force on July 18, 1978.

[26] The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly (10 December 1948 at Palais de Chaillot, Paris).

[27] The Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief, adopted by the UNGA (resolution 36/55) on 25 November 1981 .

[28] The International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly on December 16, 1966, in force from March 23, 1976.

[29] Meyer-Ladewig, Jens, EMRK – Europaische menschenrechtskonvention, Handkommentar, 3. Aufl., Baden-Baden 2011, S.230 ff.

[30] See Decision of the European Court for Human Rights - 21.7.2008, 40825/98, Jehovah's Witnesses v. Austria.

[31] See Decision of the European Court for Human Rights - 12.3.2009, 42967/98, Löffelmann v. Austria.

The European Convention on Human Rights and the Foundation Treaties of the EU do not give specific details for providing religious associations with institutional resources. The European Convention on Human Rights is not based on any specific legislative model of relations between religious associations and the State. It is generally accepted that all the three legislative models of relations between religious associations and the State satisfy the provisions of the Convention with regard to ensuring freedom of religion.[32] Articles 14, in combination with Article 9 of the Convention, with a focus on inadmissibility of religious discrimination, creates a certain basis for the member States to ensure selection of institutional formats for religious associations through their national legislations.

The European Court of Human Rights has not elaborated an unambiguous concept of religious neutrality so far.[33] The principle of neutrality is defined by a common European historic context and is based on the normative concepts engrained in the domestic legislations of the member States, which, in turn, given the examples of Great Britain and France, are quite often extremely ambivalent.

The issues of how and in what conditions the religious neutrality of state authorities may be defined, and whether it can be based on the concept of strict separation between State and church are disputable in the present constitutional studies.[34] The only view that is considered axiomatic is that during disputes between religious associations, the State, in general, has an obligation to be neutral.

It has been observed in the jurisdiction of the European Court of Human Rights that religious associations are trying to justify state neutrality by substantiating the need to have equal level of freedom of religion (principle of equality). In its judgments, the European Court of Human Rights justifies state neutrality towards various religious beliefs by the general concept of freedom of religion rather than by inadmissibility of religious discrimination. The Court's vision of the role of the State in a pluralist environment is that of a body that defuses confrontation, acting as a neutral arbiter combining diverse concepts: "However, in exersising its regulatory power in this sphere and in its relations with various religions, denominations and beliefs, the state has a duty to remain neutral and impartial. What is at stake here is the preservation of pluralism and the proper functionning of democracy, one of the principle characteristics of which is the possibility it offers or resolving a country's problems through dialogue, without recourse to violence, even when they are irksome".[35] In the above citation the Court describes the objective side of the principle of neutrality. Notably, it justifies that neutrality is a normative component of freedom of religion as the fundamental right; also, it is a certain ethical principle through which freedom of religion is regarded as a fundamental right.

[32] Walter, Christian, Religions- und Gewissensfreiheit, in: Grote, Rainer/Marauhn, Thilo (Hrsg.), Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Tübingen 2006, S. 859 ff.

[33] Ibid, p 891

[34] Ibid.

[35] See the Decision of the European Court of Human Rights - 13.12.2001, 45701/99, Metropolitan Church of Bessarabie and others v. Moldova; Zittiert in: *Walter, Christian,* Religions- und Gewissensfreiheit, in: *Grote, Rainer/Marauhn, Thilo (Hrsg.),* Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Tübingen 2006, S. 892;

Article 9 of the European Convention of Human Rights confers not only negative (impartiality, neutrality, non-interference into internal matters of religious associations) but also positive obligations which are aimed at protecting freedom of religion from third parties on the member states of the Council of Europe. [36]

4. Secularism, post-secularism, political ethics and official theology

A modern typology of forms of state governance is often perceived as a logical outcome of secularization.[37] Secularization itself is perceived as decline in the importance of religion, the return of religion into personal, private sphere, the institutional and constitutional separation of state and religion.[38] There are several types of secularism.[39] In general, the process of secularization is divided into three stages:

a) The Middle Ages, the break up of unity between state and church;

b) Religious infightings and state absolutism when religious uniformity gave way to religious pluralism;

c) Natural law, Enlightenment and French Revolution which led to ensuring the freedom of religion as a normative basic right.[40]

The process of separation of civil and religious authorities became stronger in the period of Reformation (1517 – 1648), even though the legal literature often notes[41] that the Reformation brought the development of principle of neutrality within the framework of two Christian confessions rather than the recognition of religious freedom.

First germs of modern religious law appeared as early as in the second half of the 16th century. In his well-known work, *Les six livres de la République* (published in 1576) which was inspired by impressions of the St. Bartholomew's Day massacre (1572), Jean Bodin (1529-1596) emphasizes a special importance of state sovereignty and formulates a new concept of its legitimacy: the aim of the state is not to fight for the establishment of religious truth but to establish order that will enable citizens to coexist peacefully.[42] This latter aim, according to Bodin, requires the concentration of power exclusively in a monarch's authority.

Development of the idea of sovereignty gave birth to a new concept about subordinating religious authority to earthly (state) authority. This concept, which was easier to realize in France of the

[36] See the Decision of the European Court of Human Rights - 3.5.2007, 71156/01, Members of Gldani Congregation of Jehova's Witness and 4 others v. Georgia.

[37] *Walter, Christian,* Religionsverfassungsrecht, Tübingen 2006,, S. 23 ff.

[38] *Polke, Christian,* Öffentliche Religion in der Demokratie, Leipzig 2009, S. 33.; *Casanova, Cosé,* Chansen und Gefahren öffentlicher Religion. Ost- und westeuropa im Vergleich, in: O. kallscheuer (Hrsg.), das Europa der Religionen, Frankfurt/M., 181-210.

[39] For various types of secularism see Reid B. Locklin. The Many Windows of the Wall. Review of Constitutional Law, V, 2012, pp. 88-112.

[40] *Walter, Christian,* Religionsverfassungsrecht, Tübingen 2006, S. 23 ff.

[41] Ibid.

[42] Ibid., see also *Bodin, Jean,* Sechs Bücher über den Staat", Buch I-III, München 1981, 11 ff.

17th century[43], given the political role of the Catholic Church of France, as compared to the legal reality of England of that time, is reflected in the political philosophy of Thomas Hobbes (1588-1679).[44] In his Leviathan, Hobbes argues that a state seeking to establish universal peace cannot tolerate a rival – a parallel power in the form of religious authority of church.

Hobbes' idea of unlimited sovereignty could not ensure modern standards of freedom of religion. A modern concept of religious freedom was developed in the Age of Enlightenment in parallel with the growing tendencies of pluralism and individualization of public space.[45] Against the backdrop of the doctrine of state sovereignty and the secularization of state goals resulting from the Enlightenment, the freedom of individual religion was accentuated. Legal literature often notes that Hobbes' ideas ensured the principle of tolerance on the level of only one of components of the religious freedom – that of forum internum.

As regards a more elaborated formula of the principle of tolerance, John Locke's (1632-1704) "A Letter Concerning Toleration", and Pierre Bayles' (1647-1706) works are seen as first attempts to substantiate religious tolerance. Locke argues about the necessity to exercise principle of tolerance towards those who "think differently" although he, in contrast to Bayles, does not include atheists and Catholics among them.[46] Because of this very factor Locke's liberalism is often referred to as theistic liberalism in American literature.[47]

Opinions about church and state relationship can also be discerned in Voltaire's (1694-1778) works,[48] which though speaking about the necessity of separation of state and religion still tended to believe in the need of state religion provided that the principle of tolerance was ensured. In a similar vein, Montesquieu (1689-1755) in his work *De l'Espirit des Lois* argued that state and religious interests could coincide. Montesquieu replaced the term "church" with the term "religion", portrayed religion as a social phenomenon, and recognized the supremacy of the principle of tolerance. Institutionalization of religion remained an open issue in Montesquieu's work as well.[49]

A concept of civil religion provided by Jean-Jacques Rousseau (1712-1778) in his extensive work, *Du Contrat Social*, which relies on the theory of social contract, is interesting.According to him, rights handed over to the sovereign include only values which serve the public welfare, including the right of every citizen to have religion as the inspiration for their own civil obligations.[50]

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[43] *Walter, Christian,* Religionsverfassungsrecht, Tübingen 2006, S. 30 ff.

[44] Ibid., see also *Hobbes, Thomas,* Leviathan, Frankfurt 1984, 39. Kapitel, 357 ff.

[45] About these two phenomena and about individual freedom see *Kant, Immanuel*, Metaphysik der Sitten, Einleitung in die Rechtslehre, B.

[46] *Walter, Christian,* Religionsverfassungsrecht, Tübingen 2006, S. 41 ff.; About positions of Locke and Bayles, see *Dunn, J.,* The Claim to Freedom of Conscience: Freedom of Speech, Freedom of Thought, Freedom of Worship?, in: *Grell, O/Israel, J.I/Tyacke, N.,* From Persecution to Toleration – The Glorious Revolution and Religion in England, Oxford 1991, 171-188.

[47] Ibid.

[48] See, *Pomeau, René,* La religion de Voltaire, 2. Aufl., Paris 1994.

[49] *Walter, Christian,* Religionsverfassungsrecht, Tübingen 2006, S. 59 f.;

[50] Ibid., pg. 61

Works by Locke, Voltaire and Rousseau laid a foundation for the development of the idea of individualization of religion. The next stage, the 19th century, saw the perception of religion as a social phenomenon and establishment of sociology of religion as a scientific discipline by Max Weber (1864-1920) and Émile Durkheim (1858-1917).[51]

Individualization of religion and secularization of public space, resulting from the Enlightenment, conditioned the establishment of different (considering historical and cultural modifications) institutional resources (E.g. Laicism in France, cooperative model in Germany, Anglican Church in Britain led by the monarch, Evangelical Lutheran Church in Denmark, etc) which continue to coexist to date in a globalized uniform legal space of European Union and Council of Europe.[52] An individual, a society and a state represent those three phenomena, whose legal relationship with each other is conceptually inexhaustible and develops constantly.

The so-called post-secular society is seen as the next step of secular society, in which[53] the forum internum of religious freedom as well as the capacity of its implementation (institutional resources of the religious freedom are established), forum externum, are protected, discussion is focused on separate details of admissibility of restriction of religious freedom, and of ensuring the principle of equality in practice. A format of legal system in which the freedom of religion is protected as a fundamental freedom is conditioned by three characteristics viz. the role of religion in post-secular society; internationalization of religion law; and finally, regulation of freedom of religion, not on the ground of inevitability of cultural assimilation but the necessity to create a free space aimed at protecting and ensuring a practical possibility to have a religious life.[54]

With regard to the principle of tolerance, John Rawls (1921-2002), in his monographs *A Theory of Justice* and *The Law of Peoples*, provides an interesting version of standards of political ethics[55] of modern democracy which is often criticized.[56] According to Rawls, the basis of collective coexistence of citizens in secular and liberal societies is not Kant's moral autonomy but a political autonomy as the legal freedom and the right to equal political participation. In Rawls' view, political autonomy is also a normative concept which implies moral willingness of citizens to create conditions of fair coexistence to each other as to individuals (to offer to and accept from one another). Rationalism of the principle of fairness is expressed in the ability of citizens to offer one another such conditions which can be realized in a pluralistic society. A concept of social unity instead of antagonistic pluralism is an idea which, in Rawls' view, is realized not in metaphysical but political liberalism. In his opinion, a hermeneutical objective of political philosophy is revealed in rational political liberalism which includes the obligatoriness of the political concept of fairness without considering "indi-

[51] Ibid., pg. 67

[52] *Polke, Christian,* Öffentliche Religion in der Demokratie, Leipzig 2009, S. 29 ff.

[53] *Habermas, Jürgen,* Glauben und Wissen, Frankfurt 2001, S. 13.; *Walter, Christian,* Religionsverfassungsrecht, Tübingen 2006, S. 607 ff.

[54] Ibid.

[55] Political ethics, in this case, involve ethical composition of normative criteria of institutionalization of political order, political activity and political decision making process.

[56] *Kaufmann, Matthias,* Moderne Demokratie zwischen Institution und Instruktion, in: Jahrbuch für Recht und Politik, Band 19, S. 3-18.

vidual truths" of citizens (a normative obligation without the necessity to prove fairness within the boundaries of "individual truths" of citizens is a sort of paradox).

As regards "political theology," this as a term articulates traditions of Hellenic philosophy in the form of Stoicism. One of the types of political theology is Martin Luther's (1483-1546) classical theory about the existence of two kingdoms (heavenly and earthly) and consequently, the separation of political status of state and church. A modern formation of political theology is the so-called public theology, the first attempt of whose definition is seen in the United States.[57] The concept of public theology implies that even though forms of expression of public theology may not coincide with each other because of diversity of social context, it still has a common feature which, in turn, rests on the belief in a special public function of church and theology.[58] Public theology tries to develop an integrated concept of Christian ethics which is directed not towards clergy but the society, the civil sector. Integrated ethics does not imply de-sacralization or disregard of Christian ethics, but includes an official strategy according to which the church ensures its role in society not with the aim of establishing or strengthening monopolistic authority but for reintegrating its ethical and enlightening resources into pluralistic social spaces through policy of tolerance towards fair, impartial, and diverse opinion, based on the principle of tolerance. Public theology is often called a process of "self-secularization." An ethical standard described by public theology can be realized within all the three legal and political systems of religion-state relationship. One may say that public theology is a sort of utilitarian concept which relies on ethical and rational projection of the principle of fairness and is implemented based on political and social consensus.

4. A GEORGIAN MODEL OF INSTITUTIONALIZATION OF RELIGIOUS ASSOCIATIONS

Provisions that define the legal status of religious associations create an individual format of exercising religious freedom (forum externum) in the national legal space. In this regard, the Georgian legislation is marked with peculiarities.

The freedom of religion as a fundamental right is protected by Article 19 of the Constitution of Georgia of 24 August 1995.[59] Article 14 prohibits any discrimination on religious grounds. In Article 9 of the Constitution, the state recognizes the freedom of belief and religion and separates the church from the state. According to Article 9, Orthodox Christianity is not a state religion although,

[57] *Körtner, Ulrich H.J.,* Politische Ethik und Politische Theologie, in: Jahrbuch für Recht und Politik, Band 19, S. 28.

[58] Ibid.

[59] There is an opinion that Article 24 of the Constitution protects forum internum of religion. About this issue see Vakhushti Menabde, Freedom of Religion – Where to Find It?; Review of Constitutional Law V, 2012, pg. 121-137.

in contrast to other religions and religious associations, it enjoys a special legal status. The status of Orthodox Christianity is regulated by the Constitutional Agreement of 14 October 2002 between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia, which is the highest legal normative act in the hierarchy of Georgian legislative acts.[60]

Apart from the Constitution itself and the Constitutional Agreement (which defines the status of the Orthodox Christian Church alone), the only normative act in Georgia which deals with a legal aspect of relationship between the state and religious associations is the Civil Code of Georgia. Articles 1509 and 1509' of this Code introduce a legal innovation which was integrated in the Civil Code on 5 July 2011 through a well known law on Amendments to the Civil Code of Georgia.[61] This law contains only two articles, modifying paragraph 1 of Article 1509[62] and adding Article 1509'[63] to the Code, which defines the rule of registration of religious associations.

With the amendments made to the Civil Code of Georgia, religious associations are given an opportunity to obtain a status. Even though under the Constitutional Agreement the state recognizes the Apostolic Autocephalous Orthodox Church of Georgia as a legal entity of public law,[64] the status of other religious associations, which have already and will be registered as legal entities of public law, is not equalized with the status of the Autocephalous Orthodox Church for the following reasons:

[60] Complete text of Constitutional Agreement is available on the official webpage of the Georgian Patriarchate: http://www.patriarchate.ge/?action=kons_shet.

[61] Media often refers to it as the Law on Religious Associations which leads to misinterpretation.

[62] The modified wording of paragraph 1, Article 1509 of the Civil Code of Georgia is as follows:
"Article 1509. Legal Persons of Private and Public Law
1. The following entities are deemed to be Legal Persons of Public Law as prescribed by the Civil Code:
a. The state;
b. Self-governments;
c. Legal persons created by the state on the grounds of legislation or an administrative act that are not established in an organizational-juridical form defined under the Civil Code or under the Law on Entrepreneurs;
d. State institutions and state foundations that are not created in accordance with the Civil Code or the Law on Entrepreneurs;
e. Non-governmental organizations created on the grounds of legislation for accomplishment ofpublic objectives (political parties, etc.).
f. The Apostolic Autocephalous Orthodox Church of Georgia, a legal entity of public law recognized under the Constitutional Agreement of Georgia;
g. Religious associations envisaged in Article 1509[1] of this Code."

[63] Wording of Article 1509'
"Article 1509'. Registration procedure of religious associations
1. Religious associations can register as legal entities of public law.
2. First paragraph of this article does not restrict the right of religious associations to register as non-profit (non-commercial) legal entities as defined by this Code, as well as to operate as non-registered unions as defined by this Code.
3. Religious associations are registered by the National Agency of Public Registry - legal entity of public law operating within the field of governance of the Ministry of Justice.
4. The National Agency of Public Registry - legal entity of public law operating within the field of governance of the Ministry of Justice - is authorized to register as legal entity of public law the religious group, which has close historic ties with Georgia or which is recognized as a religion by the laws of members states of the Council of Europe.
5. The law on Legal Entity of Public Law does not apply to religious associations registered as legal entities of public law.
6. The procedure for the registration of non-profit (non-commercial) legal entities extends to the registration of religious associations as provided by the first paragraph of this article and their powers are defined by the second chapter of the first section of this Code."

[64] Pursuant to paragraph 3, Article 1 of the Constitutional Agreement: "Church is a historically established public legal person – a full legal public person recognized by the State that exercises its activities according to the Ecclesiastical (Canon) Law, the Constitution of Georgia, the present Agreement, and Georgian legislation."

According to paragraph 5, Article 1509' of the Civil Code of Georgia, the law on Legal Entity of Public Law does not apply to religious associations registered as legal entities of public law. Consequently, apart from constitutional norms recognizing the religious freedom as one of the fundamental rights, the only legislative act which regulates status of religious associations is the Civil Code of Georgia in the form of two above mentioned articles (1509 and 1509') and very general provisions of Title 1, Chapter 2 (general provisions about registration, representation and powers of a legal entity). This means that concrete powers of religious associations registered as legal entities of public law are absolutely unclear when it comes to the realization of religious freedom. In particular, the issue of financing, details of relationship and/or cooperation with the state, issues concerning the military service of clergymen, the issue of ownership of religious buildings of corresponding religions existing in the territory of Georgia etc. Therefore, religious associations registered as legal entities of public law do not differ in terms of powers from religious organizations which are registered as non-profit (non-commercial) legal entities except for their titles (legal entity of public law or non-profit [non-commercial] legal entity), registration procedure and that classical modification which makes a legal entity of public law different from a non-profit (non-commercial) legal entity. According to modern legal practice, religious associations are registered as legal entities of public law with the aim of awarding special privileges to them, for cooperation with the state in certain segments or obtaining guarantees of financial security. In the case of Georgia this issue is not regulated.

As regards the Georgian Orthodox Church, its status[65] is regulated relatively better by Article 9 of the Constitution and the Constitutional Agreement. For example, a religious servant is exempt from military service; the state, upon the agreement with the church, ensures the establishment of the institution of priests in armed forces, prisons and jails and adoption of relevant legal acts; the state and the church are authorized to implement joint social programs for population; property and other ownership rights of the church are protected by the law; the state recognizes any Orthodox church, monastery (whether operational or non-operational), and ruins thereof throughout the territory of Georgia as well as land on which they are located as the property owned by the church; the state recognizes ecclesiastic treasure protected (in museums, vaults) by the state (except for those being in private ownership) as the property of the Church; the development, modification of curricula in educational institutions as well as appointment and release of teachers are carried out upon the submission of the Church; the Church gets annual financing from the state budget etc. The Law of Georgia on Legal Entity of Public Law, in its essence, does not apply to the Orthodox Church either. The Georgian Autocephalous Orthodox Church does not require registration. It is acknowledged as a legal entity of public law under the Constitutional Agreement – it already enjoys this status.

[65] Examples of cooperation between the church and state are the agreement between the Apostolic Autocephalous Orthodox Church of Georgia and Ministry of Justice of Georgia in the sphere of re-socialization of probationers and non-prisoners (1 March 2006), the agreement between the Apostolic Autocephalous Orthodox Church of Georgia and Ministry of Justice of Georgia (20 April 2001), also, a memorandum of understanding of a joint commission of the Apostolic Autocephalous Orthodox Church of Georgia and Ministry of Education of Georgia.

Proceeding from the abovementioned, under the effective legislation, religious associations in Georgia (which do not include Georgian Autocephalous Orthodox Church for understandable reasons) have three alternatives viz. to exist as legal entities of public law, as non-profit (non-commercial) legal entities or as in the form of unregistered union. The latter does not constitute a legal entity. As regards the former two, the difference in the status of them in terms of realization of religious freedom does not exist within the Georgian legislation regulating institutionalization of religious freedom, except for a classical functional difference between legal entities of public law and non-profit (non-commercial) legal entities.

Another important issue which is interesting in the context of interrelation between the state and religious associations are the prerequisites for the registration of religious associations, defined in paragraph 4, Article 1509' of the Civil Code of Georgia, which specifies that "the National Agency of Public Registry, a legal entity of public law operating under the Ministry of Justice, is authorized to register a religious group as a legal entity of public law, which has close historic ties with Georgia or which is recognized as a religion by the laws of the member states of the Council of Europe". Since no clear-cut legal definition of religion exists in reality, the latter alternative in the quoted provision should probably be interpreted as a power of the National Agency of Public Registry to register the followers of those religions which are registered in the same form in the member states of the Council of Europe as a religious association. As regards another alternative, registration of a religious group having close historic ties with Georgia as a legal entity of public law, it is abstract and poses quite difficult dilemma for the National Agency of Public Registry (to establish the fact of historical ties of a religious group with Georgia) which is not charged with the task of searching and analyzing historical sources/ties. Consequently, Article 1509, which defines the prerequisites for the registration of religious groups as legal entities of public law, needs to be improved both in terms of its content as well as legislative technique. The status of religious associations should better be regulated separately, by a special law which will represent a better version in terms of legislative technique than the present scheme of regulation by two articles of the Civil Code.

Considering the abovementioned, the improvement is needed not only for Article 1509, but also for modern Georgian legal norms that regulate the relationship between the religion and state, which ensure the legal status of religious associations only nominally. At least three articles of the Constitution of Georgia speak about the freedom of religion and recognize the freedom of belief and religion but the standards of its realization (except for two articles of the Civil Code that regulate the registration process) are not specified in the legislation.

CONCLUSION

All the three models discussed in this paper create a legal construction fragmented into three parts only nominally; to compile their separate characteristics is absolutely possible. It is difficult to fit the existing Georgian legislative scheme into any of the three models, especially considering that a legal format of realizing corporate freedom of religion by any other religious association, save the Orthodox Church in the Georgian legislation, does not contain anything else except the possibility to be registered in three organizational forms (legal entity of public law, non-profit -non-commercial- legal entity, and unregistered union). The existing scheme of financing the Orthodox Church, which does not envisage any financial control, also creates a weird system (budget funding does not apply to other religious associations under the existing legislation). In general, the issue of financing religious associations belongs to the sphere of intra-national autonomy of the state. Consequently, in defining a scheme of financing, the state must rely on two principles alone viz. state neutrality and tolerance. In this regard, the Georgian legislation is again mute about the regulation of financing or self-financing of religious associations (including the Orthodox Church). It seems that the registration of religious associations as legal entities of public law was aimed at establishing a Georgian scheme of institutionalizing religious freedom (forum externum), which, for its part, does not apply to anything else so far but the procedure of registration. Such legal vacuum is not even observed in any of legal models (state church, or dominant church) of Christian denominations recognized as state religions, which are described in this paper.

In conclusion, it can be said that in the Georgian legal reality the issue of realization of corporate freedom of religion (meaning forum externum of religion, not forum internum) is absolutely undeveloped for religious associations except the Georgian Orthodox Autocephalous Church. In this regard, a Georgian legal scheme of relationship between the state and religion has serious shortcomings and they need to be improved through developing a new legal model of relations between the state and religious associations. The new model must be developed by taking into account the interests of all stakeholders (all religious associations/denominations represented in Georgia, including the Georgian Orthodox Autocephalous Church), based on transparent dialogue and detailed analysis of all the three modern models of relationship between the state and religion through, at least, public discussions on the legislative proposals/drafts, with the broad involvement of Georgia's multiethnic and multi-religious population.

The dominant role of Christianity itself (for example, the United Kingdom with state Anglican Church or Scandinavian countries with Evangelical Lutheran Church) is conditioned by the historic context which, similar to the French Laicism (distinct separation) or German cooperative model, is paradoxical in a modern pluralistic society, but, considering the pluralistic context of secularism itself, does not create contradiction within the effective legal standards of the European Union in the sphere of religious freedom (French Laicism as well as the existence of Vatican City, and the scheme of financing religious associations from the state budget etc, fit into the pluralistic understanding of secularism). The dominant role of Orthodox Autocephalous Church in Georgia can also be ex-

plained by such historical and cultural conditions. There is no doubt that Christianity, from the very first centuries, played an exceptional role in establishing the Georgian statehoods and the cultural identity of the society. Consequently, the choice of Orthodox Christianity as a dominant religion by the majority of Georgian society is absolutely logical and understandable. A scale of realization of freedom of this choice must be counterbalanced by ensuring the principle of tolerance towards other religions in a pluralistic society, the principle which represents one of the important segments of both political and Christian ethics. Georgia has always been multi-denominational with reference to Christianity in the form of Georgian Orthodox Autocephalous Church and its personal "official theology," which played a sort of balancing function in parallel with independent and secular state authority. In this regard, the post-Soviet Georgian narrative starkly differs from post-secular political and legal reality of Jürgen Habermas,[66] which must develop through the introduction of legal mechanisms in the Georgian legal system, ensuring corporate freedom of religion on the basis of reconsidering political and Christian ethics anew and separating powers of state and church (development of a Georgian model based on one of European models or even, as a result of compilation of their features by taking into account of the Georgian cultural identity). In a renewed legal format, based on modern standards (principle of tolerance and state neutrality), it must be elaborated that the model of separation of religion and state which exists in the form of a political consensus historically existed. In this process a certain dominant role of Georgian Orthodox Autocephalous Church in its relationship with the state in cultural and educational spheres can even not be excluded, which also is in line with European standards of institutionalization of the freedom of religion in those countries the national culture of which historically rests on Christian values.

[66] *Habermas, Jürgen,* Glauben und Wissen, Frankfurt 2001, S. 13.; *Walter, Christian,* Religionsverfassungsrecht, Tübingen 2006, S. 607 ff.