SAVE THE UOC

LEGAL ANALYSIS OF UKRAINIAN DRAFT LAW 8371

A SUPPLMENT TO THE UOC WHITE PAPER
BY AMSTERDAM & PARTNERS LLP

Prepared by :

AMSTERDAM & PARTNERS LLP

Contact:

https://savetheuoc.com
https://amsterdamandpartners.com

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EXECUTIVE SUMMARY

The UOC has long faced spurious accusations that it acts as an agent of the Russian state, a legacy of its complex history of subordination to the Russian Orthodox Church. Building on the rights to self-governance and broad autonomy that it acquired in 1990, the UOC declared its independence on 27 May 2022. Despite its efforts to support Ukraine and its citizens during the war with Russia, the Ukrainian Government has decided to disestablish the Church and prohibit its activities (**Draft Law 8371**). This legislative assault fails to account for the steps taken by the UOC to declare independence and support Ukraine.

Draft Law 8371 passed its first reading in Ukraine's parliament, the Verkhovna Rada, on 19 October 2023 with a majority of 267 votes. A second reading is expected in early 2024, with the expectation that President Zelensky would sign the legislation soon thereafter.

Amsterdam & Partners LLP has prepared a detailed Supplement to the White Paper on Draft Law 8371. This Supplement examines the legal standing of Draft Law 8371 and finds it to be a grave violation of the freedom of religion and other legal standards inherent to the functioning of a modern, European democracy. This includes the freedom of religion and belief, as guaranteed by Article 9 of the European Convention on Human Rights and Article 18 of the International Covenant on Civil and Political Rights.

The Venice Commission, the Council of Europe's advisory body on constitutional and administrative matters, has established a series of tests for the acceptable curtailment of religious freedom. These are derived from guidance and case law of the European Court of Human Rights. Any legitimate restriction to the freedom of religion must be (i) prescribed by law; (ii) have a legitimate objective; (iii) be necessary and proportionate; and (iv) be non-discriminatory. After setting out each of these tests, the Supplement analyses whether Draft Law 8371 meets each of these criteria.

Draft Law 8371 fails not just one, but *all* of the criteria required for restrictions on religion to be permissible. Its restrictions are inadequately prescribed by law, may not be intended to protect public order and public safety, are neither necessary or proportionate, and would amount to a form of targeted discrimination.

In addition to failing these tests, Draft Law 8371 also poses several other related problems. Draft Law 8371 would impose a form of collective punishment on the Church, its clergy and parishioners; breaches the principal of non-interference into the internal affairs of a religious organisation; contains insufficient rectification or appeal rights; and breaches international guidance on the determination of foreign influence over religious organisations.

Should Draft Law 8371 pass its second reading, it will be subject to legal challenge in the courts of Ukraine and the European Court of Human Rights. We call on the Ukrainian Government to withdraw Draft Law 8371 from the Verkhovna Rada and honour the rights guaranteed under international law.

I. INTRODUCTION

On 3 January 2024, Amsterdam & Partners LLP issued a White Paper on the growing threat to religious freedom and rule of law in Ukraine.[1] The White Paper examines attacks on the Ukrainian Orthodox Church (**UOC**) by the Ukrainian Government and the security services in the context of Russia's illegal invasion of Ukraine. It provides an overview of the historical background, political interference, intimidation of UOC clergy and the international response.

As part of a broad campaign to eradicate even remote perceptions of Russian influence in Ukraine, the Ukrainian Government has introduced legislation designed to ban the UOC in its entirety, 'The Law of Ukraine on amending certain Ukrainian legislation regarding the activities of religious organisations in Ukraine' (**Draft Law 8371**). Draft Law 8371 passed its first reading in Ukraine's parliament, the Verkhovna Rada, on 19 October 2023 with a majority of 267 votes.[2] A second reading is expected in early 2024, with the expectation that President Zelensky would sign the legislation soon thereafter.

By way of background and as detailed in the 3 January 2024 White Paper, the UOC is one of the largest Orthodox denominations in Ukraine in terms of both the number of parishes and worshippers. Historically, the UOC was subordinated to the Russian Orthodox Church (**ROC**), which was a legacy of the subjugation of Ukraine by the Russian Empire and, subsequently, the Soviet Union. The collapse of the Soviet Union provided the UOC a chance to challenge its subordination to the ROC. In 1990, a *Gramota* was issued by Patriarch Aleksei II of the ROC, which granted the UOC the right to broad autonomy in terms of self-governance and independence (Gramota).[3] After Russia's illegal invasion of Ukraine in 2022, the self-governance of the UOC was reaffirmed when the UOC passed a resolution declaring independence from the ROC on 27 May 2022.[4] After this declaration was issued, Elena Bohdan, the former head of Ukraine's State Service for Ethnopolicy and Freedom of Conscience (**DESS**) emphasised that the UOC is not legally and organisationally subordinated to the ROC.[5] Despite this official position, Draft Law 8371 is designed to prohibit the operation of the UOC based on poorly drafted and discriminatory provisions that empower the authorities to make an adverse determination of the UOC's status and, in turn, ban the UOC's activities.

This Supplement examines the legal standing of Draft Law 8371 and finds it to be a grave violation of the freedom of religion and other legal standards inherent to the functioning of a modern, European democracy. The Supplement takes as its starting point opinions issued by The European Commission for Democracy through Law, the Council of

Europe's advisory body on constitutional and administrative matters (the **Venice Commission**). The Venice Commission has played an active role in ensuring the compatibility of national legislation with international and European standards. Governments typically submit constitutional and administrative legislation to the Venice Commission for review. The Venice Commission then issues a legal opinion on the compatibility of proposed legislation with relevant international and European standards of constitutional and administrative law. The opinions of the Venice Commission often refer to the European Convention on Human Rights (**ECHR**), case law of the European Court of Human Rights (**ECtHR**), guidance issued by the ECtHR on Article 9 of the ECHR (**ECHR Guide**),[6] the EU Charter of Fundamental Rights, the International Covenant on Civil and Political Rights (**ICCPR**) and other applicable UN guidance.

Drawing on the work of the Venice Commission, our analysis concludes that even if the law was drafted to address concerns of public safety in Ukraine, the limitations to religious freedom it imposes are blatant violations of European and international law. More specifically, Draft Law 8371 fails a series of tests established by the Venice Commission for the acceptable curtailment of religious freedom: its restrictions are inadequately prescribed by law, may not be intended to protect public order and public safety, are neither necessary or proportionate, and would amount to a form of targeted discrimination. Beyond the Venice Commission's framework of analysis, this Supplement identifies a series of additional deficiencies in Draft Law 8371 that render it a dangerous abrogation of the rule of law. Draft Law 8371 would impose a form of collective punishment; breaches the principal of non-interference into the internal affairs of a religious organisation; contains insufficient rectification or appeal rights; and breaches international guidance on the determination of foreign influence over religious organisations.

I(B)THE SALIENCE OF THE VENICE COMMISSION

The Venice Commission is an 'independent consultative body' with a mandate for 'promoting the rule of law and democracy' and 'examining the problems raised by the working of democratic institutions'.[7] It seeks to help member states of the Council of Europe enshrine and protect 'constitutional, legislative, and administrative principles and techniques which serve the efficiency of democratic institutions […], as well as the principle of the rule of law' and to protect 'fundamental rights and freedoms, notably those that involve the participation of citizens in public life'.[8] As such, the work of the Venice Commission provides a key touch-stone for evaluating the legality of legislation such as Draft Law 8371.

In addition to the aforementioned opinions with regard to particular countries' legislative proposals, the Venice Commission also produces guidance documentation to assist countries with the drafting of national legislation and to provide a benchmark for future opinions. The Venice Commission's Joint Guidelines on the Legal Personality of Religious or Belief Communities, adopted by the Venice Commission at its 99th Plenary Session (13–14 June 2014) (**2014 Guidelines**), is particularly pertinent to an evaluation of Draft Law 8371.[9] The 2014 Guidelines build upon and enhance prior guidance produced by the Venice Commission—the Guidelines for Review of Legislation Pertaining to Religion or Belief, adopted by the Venice Commission at its 59th Plenary session (18–19 June 2004) (**2004 Guidelines**).[10]

Although the Venice Commission's Guidelines are not themselves legally binding, they are derived from international legal commitments and 'reflect common European standards' for the functioning of democracy. The Venice Commission 'recommends that all States take the necessary steps to comply with them'.[11]

Since its accession to the Council of Europe, the Ukrainian Government has regularly requested opinions of the Venice Commission on a range of constitutional and administrative instruments.[12] This includes a request in 2006 to review a draft law on 'Freedom of Conscience and Religious Organisations'.[13] On 24 February 2022, the Ukrainian government imposed martial law. It issued a notice of derogation with respect to key Articles of the ECHR, including Article 9 (Freedom of thought, conscience and religion). This notice of derogation has subsequently been extended several times.[14] Other applicable international legal standards—including the protection of the freedom of religion in Article 18 of the ICCPR—remain in force.

Notwithstanding Ukraine's notice of derogation, the Venice Commission has continued to evaluate Ukrainian draft legislation on constitutional and administrative matters, including a recent legislative initiative by the Ukrainian government to address the power of oligarchs—'The prevention of threats to national security, associated with excessive influence of persons having significant economic or political weight in public life (Oligarchs) (**Oligarch Law**).[15] Given its history of proactive engagement with the Venice Commission and its purported commitment to rights and democracy, it is both notable and concerning that the Ukrainian Government has decided not to submit its draft legislation prohibiting the UOC to the Venice Commission. Any claims by the Ukrainian Government that the urgency of the issue does not afford time for an opinion from the Commission are inapt given the speed of the Commission's actions under an urgency procedure[16] which the Ukrainian Government has used since the Russian invasion.[17]

Given the implications of Draft Law 8371 for Ukrainian democracy and the freedom of religion, the Ukrainian Government should seek an opinion from the Venice Commission on the legislation before a second reading by the Verkhovna Rada. As the Government has not done so, this Supplement details the issues that the Venice Commission would likely raise if it were given the opportunity to review Draft Law 8371. While any legislation passed will eventually be subject to legal challenge in Ukraine and Strasbourg, these judicial processes are slow, with cases before the ECtHR taking an average of 5-6 years. In the meantime, Draft Law 8371 poses an imminent and irreparable harm to the rights of the Ukrainian people that should be addressed pre-emptively by the Venice Commission

ENDNOTES

1 Freedom of Religion Under Attack in Ukraine https://amsterdamandpartners.com/amsterdam-partners-llp-releases-new-white-paper-detailing-violations-of-religious-freedoms-in-ukraine/

2 https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=8371&conv=9

3 A *Gramota* is an official certificate denoting a designation by the Orthodox Church. Denysenko, *The Orthodox Church in Ukraine*, p. 170.

4 https://hrwf.eu/ukraine-ukrainian-orthodox-church-breaks-ties-with-the-moscow-patriarchate/?print=print

5 Що відбувається в українському православ'ї та чому досі існує канонічний зв'язок з РПЦ [What is happening in Ukrainian Orthodoxy and why there is still a canonical connection with the Russian Orthodox Church], *RISU* (27/11/2022) https://risu.ua/shcho-vidbuvayetsya-v-ukrayinskomu-pravoslavyi-ta-chomu-dosi-isnuye-kanonichnij-zvyazok-z-rpc_n134279. By contrast, the current head of the DESS, Viktor Yelensky takes a an unfairly critical approach toward the UOC and has incorrectly described the UOC's hierarchy as 'Moscow Patriarchate-controlled'. Viktor Yelensky, '"Then What Are We Fighting For": Securitizing religion in the Ukrainian-Russian Conflict', *Occasional Papers on Religion in Eastern Europe*, Vol 41, issue 6 (2021), 1–69 (p. 25).

6 Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion. Updated on 31 August 2022.

7 Article 1 of Statute of the Venice Commission.

8 Ibid.

9 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)023-e

10 https://www.osce.org/odihr/13993 The 2004 Guidelines were prepared by OSCE Office for Democratic Institutions and Human Rights in consultation with the Venice Commission.

11 Opinion on the legal status of Religious Communities in Turkey and the right of the Orthodox Patriarchate of Istanbul to use the adjective "Ecumenical", CDL-AD(2010)005 adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), paragraph 72.

12 https://www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN

13 Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine CDL-AD(2006)030-e adopted by the Venice Commission at its 68th Plenary Session (Venice, 13-14 October 2006)

14 https://www.rnbo.gov.ua/en/Diialnist/6702.html

15 Opinion on the Law on the prevention of threats to national security, associated with excessive influence of persons having significant economic or political weight in public life (oligarchs) CDL-AD(2023)018-e adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023).

16 https://www.venice.coe.int/WebForms/pages/?p=01_Media&lang=EN

17 As an example, see Opinion on the draft law 'On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis' CDL-AD(2022)054-e adopted by the Venice Commission at its 133rd Plenary session (Venice, 16-17 December 2022).

II. DRAFT LAW 8371

This Supplement undertakes a review of Draft Law 8371 based on the text prepared by the Cabinet of Ministers in January 2023.[18] Since the Ukrainian Government has not provided an authorised translation, the analysis in this Supplement is based on an English translation of Draft Law 8371 by a professional translator. A copy of this translation is appended to this Supplement.

Among the numerous problems with the legislative process behind the law, there is confusion over the precise text of the bill that was approved by Verkhovna Rada on 19 October 2023. Notwithstanding this confusion, many of the legal issues examined in this Supplement relate broadly to the policy intent of prohibiting the UOC, which any version of the legislation presented to the Rada would do.

Separate to Draft Law 8371, another bill was circulated in 2023, titled 'On amendments to the law of Ukraine "On freedom of conscience and religious Organisations" regarding restrictions on the exercise of the freedom to profess a religion or belief that is necessary to protect public safety and order, life, health and morality, as well as rights and freedoms of other citizens' (**Draft Law 8371-1**).[19] Draft Law 8371-1 was later withdrawn from the Verkhovna Rada.[20] This bill included more detailed provisions for determining the relationship between a religious organisation in Ukraine with one located in a state carrying out armed aggression against Ukraine. Given the uncertainty surrounding the legislative process, including the amendments that might be made to Draft Law 8371 and the text that might be presented to the Rada in a second reading, this Supplement focuses on the basic text of Draft Law 8371 and makes references to some of the proposed amendments included in Draft Law 8371-1 to illustrate changes that might be introduced in the second reading.

At its core, Draft Law 8371 modifies aspects of the 1991 'Law of Ukraine On Freedom of Conscience and Religious Organisations' (**1991 Religion Law**) and the 2003 'Law of Ukraine on State Registration of Legal Entities, Individual Entrepreneurs and Public Organisations' (**State Registration Law**).[21] Draft Law 8371 seeks to introduce provisions into those legislative frameworks that would allow the government to prohibit the UOC as an institution and bar the Church's religious activities. If it is ultimately passed and applied to the UOC, it would result in a total ban on the UOC in Ukraine. The key provisions of Draft Law 8371 are presented below.

A. ARTICLE I.1 OF DRAFT LAW 8371

Article I.1 of Draft Law 8371 would supplement the following provisions of the 1991 Religion Law:

i) Article 5 (Separation of the Church (religious organisations) from the State);
ii) Article 16 (Termination of a religious organisation); and
iii) Article 30 (Central executive authority that implements the state policy in the field of religion).

Each of the amendments to the provisions of the 1991 Religion Law will be considered in turn.

i) *Article 5 (Separation of the Church (religious organisations) from the State) of the 1991 Religion Law*

Article 5 of the 1991 Religion law sets out several provisions concerning the relationship between the state and religion. This includes an obligation on the state to not interfere in the legitimate activities of a religious organisation. Article 5 also sets out certain rights and obligations of religious organisations. For example, although religious organisations have the right to participate in public life, they are not permitted to perform state functions.

Article I.1.1 of Draft Law 8371 supplements these provisions by adding the following text:

> The activity of religious organisations that are affiliated with the centres of influence of a religious organisation (association), the management centre (authority) of which is located outside of Ukraine in a state that carries out armed aggression against Ukraine, is not allowed.

No definitions are provided in Draft Law 8371 or the 1991 Religion Law for the operative terms used in this proposed amendment. Unlike the more detailed Draft Law 8371-1 that was withdrawn, Draft Law 8371 provides no framework for the government to determine whether a religious organisation is subject to foreign control. Draft Law 8371 takes a broad approach and makes it easier for the government to assert that a religious organisation is subject to foreign control or influence without any clear criteria for such a determination.

ii) *Article 16 (Termination of a religious organisation) of the 1991 Religion Law*

Article 16 of the 1991 Religion Law contains provisions for the termination of a religious organisation. Article I.1.2 of Draft Law 8371 would supplement the fourth paragraph of Article 16 of the 1991 Religion Law with an additional subclause. The fourth paragraph of Article 16 of the 1991 Religion Law provides:

> A religious organisation shall be terminated by court decision only in the following cases:
> 1) commission by a religious organisation of acts inadmissible under Articles 3, 5 and 17 of this Law;
> 2) combination of ceremonial or preaching activities of a religious organisation with infringements on life, health, freedom and dignity of a person;
> 3) systematic violation by a religious organisation of statutory procedures for holding public religious events (worship services, rites, ceremonies, processions, etc.);
> 4) inducement of citizens to fail to perform their constitutional duties or to actions accompanied by gross violations of public order or infringement on the rights and property of state, public or religious organisations.[22]

The additional sub-clause proposed by Article I.1.2 of Draft Law 8371 provides:

> In case of discovering of other violations of the requirements regarding the establishment and activity of a religious organisation (association), as foreseen by the Constitution of Ukraine, this and other laws of Ukraine.

This new subclause provides a mechanism for terminating a religious organisation that has been held to meet the conditions of being connected to a religious organisation in a state that carries out armed aggression against Ukraine.

Article I.1.2 of Draft Law 8371 would also introduce into Article 16 of the 1991 Religion Law the following provision as a new paragraph:

> In the cases provided for by this Law, the activity of a religious organisation may be terminated in a court of law at the request of the central executive authority that implements state policy in the field of religion, or the prosecutor.

This provision empowers the central executive authority or the prosecutor to terminate the religious organisation merely by filing a request at court.

With respect to the UOC and its termination, is important to consider its legal structure. According to Archimandrite Cyril Hovorun, professor of Ecclesiology, International Relations, and Ecumenism at University College Stockholm, the UOC does not exist as a single legal entity; each community and diocese of the UOC has its own separate legal status.[23] This poses the question of whether the central executive authority would need to launch individual claims against each of the separate legal entities that comprise the UOC.

iii) *Article 30 (Central executive authority that implements the state policy in the field of religion) of the 1991 Religion Law.*

Article 30 of the 1991 Religion Law enumerates the responsibilities of the central executive authority, including registering the statutes of religious organisations. Article I.1.3 of Draft Law 8371 would supplement these responsibilities with the following provisions:

> conducting a religious examination of the activity of religious organisations to identify subordination in canonical and organisational issues with the influence centres of a religious organisation (association), the management centre (authority) of which is located outside of Ukraine in a state that carries out armed aggression against Ukraine;
>
> issuance of prescriptions for the elimination of violations identified as a result of the religious examination, within a month from the date of issuance of such prescription;
>
> appeal to the court with a claim to terminate the activity of a religious organisation in case that it does not comply with the instructions regarding the elimination of violations discovered as a result of the religious examination within the established time.

These provisions suggest the basis on which the central executive authority determine the relationship between a Ukrainian religious organisation, and one located in a state that is carrying out armed aggression against Ukraine. A 'religious examination' would be undertaken of 'canonical and organisational issues'. If an adverse determination is made, the central executive authority would issue its

recommendations to resolve the issues found. The affected religious organisation would have one month to try and rectify any concerns identified. If it fails to do so within this timeframe, a termination claim would be issued by the central executive authority at court. This appears to operate in conjunction with Article 16 (Termination of a religious organisation) of Ukraine's 1991 Religion Law, according to which a court shall consider the case on terminations of a religious organisation under proceedings provided by the Civil Procedure Code of Ukraine. No further clarity is provided by Draft Law 8371 or the 1991 Religion Law on the process and role of the court in this procedure.

Neither Draft Law 8371 or the 1991 Religion Law provide a definition of the 'central executive authority' or governmental agency within which 'the central executive authority' sits. Separate legislation suggests that the central executive authority sits within the DESS, but this is far from clear. Therefore, it might be assumed that the current Head of the DESS, Viktor Yelensky, is the relevant 'central executive authority'. Yelensky is a long-standing critic of the UOC who lacks meaningful independence.[24]

iv) Article 4.2 (General provisions on state registration) of the State Registration Law

Article I.2 of Draft Law 8371 would amend the third paragraph of Article 4.2 (General provisions on state registration) of the State Registration Law.[25] The proposed amendment in Article I.2 of Draft Law 8371 is a technical change to a provision concerning the state registration of 'individual entrepreneurs' and the submission of relevant documentation. Article I.2 extends this provision to include 'legal entities – religious organisations'. Documentation submitted by these entities is expressed to be held—presumably by the relevant state department—regardless of where the individual entrepreneur or legal entity is located. This provision will not be considered in this Supplement. Instead, the legal analysis focuses on the more substantive provisions that relate to the limitation of freedom of religion outlined above.

B. EFFECT OF DRAFT LAW 8371

Although many of the provisions of Draft Law 8371 are technical and narrow, taken together and in light of the existing legislative framework they would empower the Ukrainian government to abolish the Ukrainian Orthodox Church. Passage of Draft Law 8371 empowers the central executive authority to examine the UOC's alleged links to the ROC (notably without clear guidance on what connections are deemed problematic and to prescribe required changes to the UOC's statutes and operations. The central executive authority could then apply to the relevant court to prohibit the UOC. There is every reason to believe that in the context of Ukraine today, the court would not conduct an independent review, but merely rubber stamp the determination of the central executive authority. If passed, this legislation can be understood to effectively terminate the UOC.

Beyond merely shutting down the UOC, the legislation would allow the government to seize the church's property. The disposal of property would be carried out under Article 20 (Disposal of property of terminated religious organisations) of the 1991 Religion Law. Under these provisions the property of the UOC would be transferred to the state or to other religious organisations.

ENDNOTES

18 https://itd.rada.gov.ua/billInfo/Bills/pubFile/1622350

19 https://itd.rada.gov.ua/billInfo/Bills/pubFile/1641591

20 The following two links on the legislative process of state that Draft Law 8371-1 'was heard and withdrawn from consideration'. https://itd.rada.gov.ua/billInfo/Bills/Card/41303 and https://itd.rada.gov.ua/billInfo/Bills/Card/41303

21 For an official English translation of the 1991 Religion Law, see https://zakon.rada.gov.ua/laws/show/en/987-12#Text. For an official English translation of the State Registration Law, see https://zakon.rada.gov.ua/laws/show/en/755-15#Text

22 Note, the official English language version of the 1991 Religion Law does not contain an additional subclause 5 to paragraph four. In the Ukrainian language version, subclause 5 provides: conviction of its authorised persons for committing a criminal offence against the foundations of national security of Ukraine under Article 111-1 of the Criminal Code of Ukraine. This was introduced by amendment in 2022 https://zakon.rada.gov.ua/laws/show/en/2107-20#Text

23 'What Is Behind the Ukrainian Orthodox Church (Moscow Patriarchate)?', *Ukraine World* (20/12/2022) https://ukraineworld.org/articles/analysis/uoc-mp

24 In his extended academic essay on the 'securitisation' of religion in Ukraine and Russia, Yelensky unfairly claimed that the UOC has justified aggression against Ukraine. Viktor Yelenskyi, '"Then What Are We Fighting For"', p. 25.

25 Note, the provision contained in Article I.2 of Draft Law 8371 refers to the 'Law of Ukraine "On State Registration of Legal Entities, Private Entrepreneurs and Public Organisations" (The Vidomosti Verkhovna Rada of Ukraine, 2016, No. 2, Article 17) (**2016 Amendment**). The 2016 Amendment was passed by the Rada to amend the earlier State Registration Law. Article 4 of the 2016 Amendment does not contain the language specified for amendment in Article I.2 of Draft Law 8371 (nor is it contained elsewhere in the 2016 Amendment). Instead, the provision and language specified in Article I.2 of Draft Law 8371 can be found in the original 2003 State Registration Law.

III. LEGAL FRAMEWORK FOR RESTRICTIONS ON FREEDOM OF RELIGION AND BELIEF

The January 3, 2024 White Paper provided an overview of the legal framework for freedom of religion and belief guaranteed in international and Ukrainian Law. This section of the Supplement provides more detail on when a state might legitimately limit the rights to freedom of religion and belief under existing international law, as interpreted by the Venice Commission. Before turning to an analysis of Draft Law 8371's compatibility (or lack thereof) with these standards, this Supplement begins by laying out the circumstances in which a country can restrict the freedom of religion.

The starting point for analysis is the ECHR, of which Ukraine has been a Party since 1995. Article 9.1 ECHR (Freedom of Thought, Conscience and Religion) provides:

> 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.[26]

The right of freedom of religion is likewise guaranteed by Article 18 ICCPR, which contains language broadly similar to Article 9.1 ECHR.[27] Collectively, these guarantees are absolute and unconditional.

There are certain basic values that underlie the international standard for freedom of religion or belief. This includes the principle that the right to have, adopt, or change religion or belief is not subject to limitation.[28] However, the right to manifest one's religion or belief, alone or collectively, can be regulated by governments in certain narrowly defined circumstances.

ECtHR case law provides that 'the manifestation of religious belief may take the form of worship, teaching, practice and observance'.[29] Article 9.2 ECHR states:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations 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.[30]

The 2014 Guidelines issued by the Venice Commission provide clarity on when

limitations to the freedom to manifest a religion or belief are legitimate and meet the requirements of the ECHR. For a state to limit the freedom to manifest a religion or belief, all of the following criteria must be satisfied:

i) The limitation is prescribed by law;
ii) The limitation has the purpose of protecting public safety, (public) order, health or morals, or the fundamental rights and freedoms of others;
iii) The limitation is necessary for the achievement of one of these purposes and proportionate to the intended aim; and
iv) The limitation is not imposed for discriminatory purposes or applied in a discriminatory manner.[31]

Each of the criteria articulated by the Venice Commission is considered in turn. These rules governing permissible restrictions on the freedom of religion must be interpreted strictly. Any legislation limiting the freedom of religion or belief must be drafted with due care and 'show that there is a pressing social need for the limitation, and that the limitation is narrowly tailored to avoid undue burdens on religious freedom, and that it is non-discriminatory'.[32] The 2014 Guidelines make it clear that the right to manifest a religion or belief in community with others is not a privilege, but a fundamental element of the freedom of religion or belief.

i) *Prescribed by law*

The 'prescribed by law' requirement is a critical safeguard on 'commitments to the rule of law, including the value of legal certainty'.[33] For a restriction on the freedom of religion to be 'prescribed by law' it must be drafted in a way that makes affected parties aware of their legal obligations and able to act in conformity therewith. To do so, the law should be 'formulated with sufficient precision to enable the individual—if need be with appropriate advice—to regulate his conduct'.[34] With respect to the drafting of restrictions on the freedom of religion, the ECtHR has held that:

> the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.[35]

Allowable restrictions on the freedom of religion must also protect against arbitrary interference by government authorities with the rights and freedoms guaranteed by international law. Any legal discretion granted to a government to limit religious freedom must not be circumscribed.[36] Significantly, the Venice Commission's 2014 Guidelines provide that laws that restrict religion:

> must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. It also requires that limitations may not be retroactively or arbitrarily imposed on specific individuals or groups; neither may they be imposed by rules that purport to be laws, but which are so vague that they do not give fair notice of what the law requires or which allow for arbitrary enforcement.[37]

ii) *Legitimate objective*

Second, any interference with the freedom of religion must advance a legitimate objective.

The ECHR Guide states that 'if a limitation is to be compatible with the Convention it must, in particular, pursue an aim that be linked to one of those listed in this provision'.[38] Legitimate aims are limited to: protecting public safety, (public) order, health or morals, or the fundamental rights and freedoms of others. Notably, national security is not included as a legitimate aim to limit religious freedom under Article 9.2. ECtHR case law explains that the exclusion of national security:

> reflects the primordial importance of religious pluralism as "one of the foundations of a 'democratic society' within the meaning of the Convention" and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs.[39]

Even when a state limits religious freedom in the name of a legitimate aim specified in the Convention, it must do so in a way that still preserves – to the degree possible – the relevant right in question (i.e. those under Article 9.1 ECHR). States are given a margin of appreciation to determine the most appropriate mechanisms to use when advancing one of the legitimate aims listed in Article 9.2 ECHR,[40] but restrictions will only be permissible if they are 'generally and neutrally applicable in the public sphere, without impinging on the freedom guaranteed by Article 9'.[41] The Venice Commission has opined that 'in interpreting the scope of permissible limitation clauses, states should proceed from the need to protect the rights guaranteed under international instruments'.[42]

iii) *Necessary and Proportionate*

For a government to limit the freedom of religion, the restrictions imposed must be both necessary and proportionate to the legitimate aim pursued.[43] Necessity is a narrow test that places a burden on the government to show both that there is a 'pressing social need' which is 'proportionate to the legitimate aim pursued',[44] and that the measure imposed is the least restrictive means of addressing that need.

To satisfy the necessary requirement, a restriction on the freedom of religion must be directly related to a pressing social need and legitimate policy objective. The 2014 Guidelines state that 'the concept of a 'pressing social need' should be narrowly interpreted. This means that limitations should not just be useful or desirable, but must be necessary'.[45] The ECHR Guide also notes that restrictions will only be permissible if there is 'no other means of achieving the same end that would interfere less seriously with the fundamental right concerned'.[46] As an example, in its earlier review of religious legislation submitted by Ukraine, the Venice Commission held it unnecessary in a democratic society – under the provisions of that law – to 'prohibit all activities of a religious organisation upon one act in breach of an unclear law of only one representative of this religious organisation'.[47] Finally, limitations 'cannot pass the necessary test if they reflect state conduct that is not neutral and impartial, or that imposes arbitrary constraints on the right to manifest religion'.[48]

In addition, restrictions on the freedom of religion must be proportionate to the legitimate objective pursued. The ECHR Guide holds that the ECtHR must 'look at the interference complained of in the light of the case as a whole and determine whether ""it was proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant

and sufficient'".[49] The 2014 Guidelines further provide:

> For an interference [with the right to religion] to be proportionate, there must be a rational connection between a public policy objective and the means employed to achieve it. In addition, there has to be a fair balance between the demands of the general interest and requirements to protect an individual's fundamental rights, the justification for the limitation must be relevant and sufficient and the least intrusive means available must be used.[50]

In terms of assessing proportionality, due consideration must always be given to the general purpose of Article 9, which is the need to preserve genuine religious pluralism vital for a democratic society.[51]

iv) *Non-Discriminatory*

Finally, any restrictions to the freedom of religion or belief must not have a discriminatory intent or impact.[52] The 2004 Guidelines provide:

> legislation should be reviewed to assure that any differentiations among religions are justified by genuinely objective factors and that the risk of prejudicial treatment is minimized or totally eliminated. Legislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for discrimination.[53]

There may be circumstances when it is necessary to place restrictions on religious organisations where several religions co-exist in a country. Given the importance of 'the preservation of pluralism and the proper functioning of democracy', for a state to legitimately exercise its regulatory powers, it must remain neutral and impartial between different religions.[54] The 2004 Guidelines further emphasise that states are obliged to act neutrally and impartially when limiting freedom of religion and have an obligation not to take sides in religious disputes.[55] For a limitation to be considered non-discriminatory, any differential treatment between religious organisations must have an objective and reasonable justification, and not have a disproportionate impact on the freedom of religion and belief.

The Venice Commission has found that restrictions on the freedom of religion may also implicate the separate right to the freedom of association found in Article 11 ECHR. Case law of the ECtHR accepts that 'religious communities traditionally and universally exist in the form of organised structures'.[56] Where such communities are under threat by national law, the right to the freedom of religion must be interpreted in connection with the freedom of association. The autonomous existence of religious organisations is seen as essential 'for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords'.[57] Indeed, the functioning of the organisation of a community is crucial to the effective enjoyment of the freedom of religion of its members. If the organisational life of a religious community is unprotected, then the individual's freedom of religion is at risk.

ENDNOTES

26 See the equivalent right in Article 18.1 ICCPR.

27 Article 18 of the 1945 Universal Declaration of Human Rights; Article 18 ICCPR; Article 10 EU Charter of Fundamental Rights. See White Paper for further detail.

28 Part II.B, Paragraph 1 of the 2004 Guidelines. Paragraph 4 of the 2014 Guidelines. Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, CDL-AD(2012)022, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), paragraphs 28 and 30.

29 ECtHR 27 May 2013 Eweida and Others v. UK (48420/10, 59842/10, 51671/10 and 36516/1), paragraph 80. Furthermore, according to the ECHR Guide, 'in order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief', paragraph 29.

30 See the equivalent right in Article 18.3 ICCPR.

31 Paragraph 5 of the 2014 Guidelines.

32 Joint Opinion on Freedom of Conscience and Religious Organisations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on Freedom of Religion or Belief, CDL-AD(2008)032, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), paragraph 10.

33 Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, the administrative offences code and the law on the relations between the Republic of Armenia and the Holy Armenian Apostolic Church of the Republic of Armenia by the Venice Commission and the OSCE/ODIHR, CDL-AD(2011)028, paragraph 35.

34 ECtHR 26 October 2000, Hasan and Chaush v Bulgaria (30985/96), paragraph 84.

35 Ibid.

36 Paragraph 7 of the 2014 Guidelines.

37 Ibid.

38 ECHR Guide, paragraph 36. See also ECtHR 14 June 2007 Svyato-Mykhalyivak Parafiya v. Ukraine (77703/01), paragraphs 132 and 137 and ECtHR 1 July 2014 S.A.S. v. France (43835/11), paragraph 113.

39 ECtHR 12 February 2009 Nolan and K. v. Russia (2512/04), paragraph 73.

40 ECtHR 25 May 1993 Kokkinakis v. Greece, 17 E.H.R.R. 397 (14307/88); ECtHR 10 June 2010, Jehova's Witnesses of Moscow and others v. Russia, (302/02); and ECtHR 13 December 2001 Metropolitan Church of Bessarabia v. Moldova (45701/99).

41 Paragraph 41 of the ECHR Guide.

42 Paragraph 6 of the 2014 Guidelines.

43 Paragraph 9 of the 2014 Guidelines.

44 Joint Opinion on Freedom of Conscience and Religious Organisations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on Freedom of Religion or Belief, CDL-AD(2008)032, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), paragraph 9. See also ECtHR 25 May 1993 Kokkinakis v. Greece, 17 E.H.R.R. 397 (14307/88), paragraph 49; ECtHR 25 November 1996 Wingrove v. United Kingdom (17419/90), paragraph 53; ECtHR 26 September 1996 Manoussakis and Others v. Greece, 23 E.H.R.R. 387 (18748/91), paragraphs 43-53; and ECtHR 14 December 1999 Serif v. Greece (38178/97), paragraph 49.

45 Paragraph 9 of the 2014 Guidelines. See also ECtHR 14 June 2007 Svyato-Mykhalyivak Parafiya v. Ukraine (77703/01), paragraph 116.

46 Paragraph 46 of the ECHR Guide.

47 Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine, CDL-AD(2006)030, paragraph 51.

48 Joint Opinion on Freedom of Conscience and Religious Organisations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on Freedom of Religion or Belief, CDL-AD(2008)032, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), paragraph 9. See also See also ECtHR 13 December 2001 Metropolitan Church of Bessarabia v. Moldova (45701/99), paragraphs 116, 188; ECtHR 26 September 1996 Manoussakis and Others v. Greece, 23 E.H.R.R. 387 (18748/91), paragraphs 43–53.

49 Paragraph 46 of the ECHR Guide.

50 Paragraph 9 of the 2014 Guidelines.

51 Paragraph 47 of the ECHR Guide.

52 United Nations Human Rights Committee, General Comment 22, Paragraph 8.

53 Part II.B, Paragraph 3 of the 2004 Guidelines.

54 Paragraph 45 of the ECHR Guide. See also ECtHR 13 December 2001 Metropolitan Church of Bessarabia v. Moldova (45701/99), paragraphs 115–116.

55 Part II.B, Paragraph 4 of the 2004 Guidelines. See also Opinion on the draft Law on amendment and supplementation of Law no 02/L-31 on freedom of religion (Kosovo) CDL-A (2014)012, paragraphs 21–22.

56 ECtHR 26 October 2000, Hasan and Chaush v Bulgaria (30985/96), paragraph 62.

57 Ibid. See also ECtHR 13 December 2001 Metropolitan Church of Bessarabia v. Moldova (45701/99), paragraph 119 and Paragraph 18 of the 2014 Guidelines.

IV. LEGAL ANALYSIS OF DRAFT LAW 8371

Draft Law 8371 is a restriction on the freedom of religion. For Draft Law 8371 to comply with European and international obligations it must meet the strict criteria set out above.[58] It does not. In fact, Draft Law 8371 fails not just one, but *all* of the criteria required for restrictions on religion to be permissible. Draft Law 8371 is a poorly drafted, discriminatory measure that is neither necessary nor proportionate to a pressing social need.

A. DRAFT LAW 8371 DOES NOT MEET THE STANDARD OF 'PRESCRIBED BY LAW'

Draft law 8371 is vague and underspecified. Its text does not specify what connections to religious organisations in foreign nations are permissible, the process through which determinations of foreign connections shall be, or which specific governmental actors have the authority to regulate the foreign connections of religious organisations. To meet the 'prescribed by law' standard, legislation must on its face make it possible for an individual to conform with the law, provide certainty as to the law's implementation, and be clearly limited in its duration of application. Draft law 8371 does none of these.

First, the legislation must be 'formulated with sufficient precision to enable the individual […] to regulate his conduct'.[59] Draft Law 8371 is imprecise in its specification of how a determination will be made on the 'affiliation' between a religious organisation in Ukraine with 'centres of influence of a religious organisation (association), the management centre (authority) of which is located outside of Ukraine in a state that carries out armed aggression against Ukraine'.[60] Draft Law 8371 provides no definitions for several critical terms used in Article I.1.1, including 'affiliated', 'centres of influence', and 'management centre (authority)'. This imprecision gives rise to any number of interpretations of the relationship of affiliation that would be permissible under the legislation. Article I.1.3 of Draft Law 8371 merely provides that the central executive authority will assess 'the activity of religious organisations to identify canonical and organisational issues' and thereafter determine whether an impermissible relationship with a foreign power exists. None of these terms are defined. No one could possibly know what actions they must take to comply with the law.

Perhaps the most critical, but undefined, term is 'affiliated'. The legislation provides no indication as to the nature or substance of affiliation that is impermissible. 'Affiliated' could be interpreted to mean a substantive connection, such as reporting structures or documented methods of control. It could equally refer to mere references to other religious

organisations contained in formal registration documentation. Alternatively, it might be a reference to historical, cultural or canonical connections between the religious organisations from centuries or millennia past.

While Draft Law 8371 implies determinations of connections between religious organisations may be made on the basis of 'canonical and organisational issues', the complexities and interpretive indeterminacies of canon law render it a poor proxy for current affiliations. The lack of a definition for 'affiliated' gives essentially unfettered power to the central executive authority to decide what connections between religions are impermissible. As a result, individuals and religious organisations to whom the law is addressed cannot possibly conform their behaviour to the new legal rules.

Equally problematic is that Draft Law 8371 provides no definition of the key term 'centres of influence of a religious organisation'. The law does not make clear to which religious organisation the 'centres of influence' relates. It could be the religious organisation located in Ukraine, i.e. the UOC. On this reading, the question becomes whether the UOC has its 'management centre (authority)' in Russia. Alternatively, the 'centres of influence' might refer to the religious organisation located outside Ukraine, i.e. the ROC. A further complication arises from the fact that the provision provides the plural term 'centres', which implies that a religious organisation may have multiple 'centres of influence'. Once again, no clarity is provided in the legislation as to which centres of influence are relevant. There is also no definition as to what constitutes 'influence'. Is influence a formal legal relationship? Does it refer to something more general and pervasive, such as religious or cultural connections? Furthermore, the undefined reference to 'management centre (authority)' creates doubt as to whether the legislation only prohibits a substantive chain of command or any informal influence. How could the UOC or any other religious organisation structure its behaviour to comply with a law that is so grossly underspecified?

Alternative legislation considered by the Verkhovna Rada provided somewhat greater specificity of the conditions under which a determination of foreign influence could be made. Specifically, Draft Law 8371-1 provided far more detailed criteria, but this legislation was withdrawn prior to the first reading of the legislation. While more clearly specified, the provisions of Draft Law 8371-1 are equally problematic. Given the uncertainties around the text that will be presented in a second reading and the possibility that the more specific provisions of Draft Law 8371-1 might be reincorporated prior thereto, they merit brief consideration.

Draft Law 8371-1 specified the conditions on which determinations of foreign connections could be made. Specifically, under this version of the legislation, the central executive authority could determine a religious organisation is part of a religious organisation whose governing centre is located in a state that has committed armed aggression against Ukraine (or has temporarily occupied a part of the territory of Ukraine) based on:

i) references in the UOC's statutes to its membership of the ROC;
ii) references in the ROC's statutes to the UOC's membership of the ROC; and
iii) provision in the ROC's statutes of mandatory membership of the leaders and/or authorised representatives of the UOC in the statutory governing bodies of the ROC.

However, even this approach fails the 'prescribed by law' requirement for restrictions on the freedom of religion. Draft Law 8371-1 provided no definitions for what would constitute a 'reference'. Most egregiously, two of the conditions to establish a relationship in Draft Law 8371-1 related to statutes over which the UOC has no control—namely the statutes of the ROC—making it impossible for the relevant religious organisation in Ukraine to conform with prescriptions concerning those statutes by the central executive authority. Any amendments to Draft Law 8371 that adopt the approach of Draft Law 8371-1 would be highly concerning.

Draft Law 8371 also fails to provide an adequate description of who is empowered to enforce the law, how the law will be enforced, and how it can be challenged.[61] Paragraph 35 of the 2014 Guidelines provides:

> while there are a number of different systems in place to ensure access to legal personality, including those where courts take the initial decision and those where administrative bodies do so, access to court and a proper and effective review of relevant decisions should always be possible. This principle applies regardless of whether an independent tribunal decides on legal personality directly, or whether such a decision is taken by an administrative body, in which case subsequent control of the decision should be exercised by an independent and impartial court, including the right to appeal to a higher instance.[62]

Draft Law 8371 fails to define the central executive authority that it empowers to enforce the law. Neither Draft Law 8371 nor the 1991 Religion Law provide detail on the structure, composition, or membership of this central executive authority. The central executive authority appears to sit within the DESS which, based on separate Ukrainian legislation, has responsibility to exercise state control over the observance of legislation on freedom of conscience and religious organisations. However, this responsibility is not qualified by a responsibility to mitigate bias and ensure there is fair representation.[63] To ensure fair representation, the Venice Commission has held that enforcement agencies should be organised as 'an agency which operates, and be seen to operate, in a manner independent of Government and strictly according to the law'.[64] This does not appear to be the case with respect to the central executive authority, or indeed, DESS.

Although Article I.1.3 Draft Law 8371 requires the central executive authority to indicate violations of the law, it does not stipulate how an impacted religious organisation may challenge such a determination.[65] Article I.1.3 of Draft Law 8371 merely provides that the central executive authority can issue a claim at court to terminate the activity of a religious organisation.

Finally, to satisfy the requirements of 'prescribed by law,' legislation must make clear its period of applicability. As the Venice Commission's opinion on the Ukrainian Oligarch Law found, restrictions must 'be strictly limited in time'.[66] This is especially important while Ukraine is operating under Martial Law. Draft Law 8371 includes no time limits and could remain in force, even post-conflict.

B. THE LIMITATION ON RELIGIOUS FREEDOM MAY HAVE AN IMPROPER PURPOSE

Any valid restriction on the freedom of religion must have the purpose of protecting 'public

safety, public order, health or morals or the fundamental rights and freedoms of others' (Article 9.2 ECHR). Draft Law 8371 fails to specify a purpose included in this list and there is reason to suspect the real motives of the Ukrainian government in passing the law may be more sinister than the text of this legislation might suggest.

The Ukrainian Government likely claims the aim of Draft Law 8371 is to protect public safety and public order. Notwithstanding the context of an active armed conflict, both the Venice Commission and the ECtHR have defined public safety and public order narrowly. As one scholar explains, 'the reference to "public order" as a legitimating ground must be understood narrowly as referring to prevention of public disturbances as opposed to a more generalized sense of respecting general public policies'.[67] There is no evidence to suggest that the mere existence of the UOC or worship by Ukrainian citizens under the auspices of the Church is a threat to public order.

Notably, national security itself is not a legitimate aim under the ECHR. If the real objective of Draft law 8371 were national security—not public order or public safety—the aim would be impermissible. Even worse, should the true motive of Draft Law 8371 be to preference the state's preferred Church—the Orthodox Church of Ukraine (**OCU**)—or to enrich the government through the transfer of UOC property to the state—the draft legislation would be manifestly unjustifiable. The separate White Paper of 3 January 2024 detailed several examples from recent history that at least suggest the possibility of such a nefarious purpose.

There is, for example, a long pattern of political interference in favour of the OCU, such as the role the government played in obtaining the Tomos of autocephaly for the OCU from the Ecumenical Patriarchate. Viktor Yelensky, the head of the DESS, has stated that such moves were a legitimate 'securitisation' of religion, designed to respond to national security concerns.[68] In reality, the recognition of the autocephalous status of the OCU appears to have been a cornerstone of a nationalist agenda. Petro Poroshenko, Ukraine's president at the time, weaponised and 'actively instrumentalized the religious issue', and used 'the formation of an autocephalous church in Ukraine as an important component of his election campaign'.[69] Even Yelensky has stated that 'there is no doubt that [Poroshenko] sought to strengthen his popular support ahead of the upcoming 2019 presidential elections and to capitalize the obtained autocephaly into electoral success'.[70]

There have also been moves to terminate the UOC's church lease agreements on spurious grounds. This included the historic Kyiv-Pechersk Monastery. The authorities attempted to expel UOC clergy from the Monastery and ordered some 200 UOC monks and 600 workers to leave the premises, unilaterally terminating a 2013 agreement with the UOC to occupy the holy site.[71] Most shockingly, there has also been widespread intimidation by the security services of UOC clergy on false charges of collaborating with the Russian regime. This includes the imprisonment of elderly priests, in some cases with signs of evidence planting.[72] This pattern of behaviour suggests the Ukrainian Government may well have an nefarious purpose in attempting to prohibit the UOC.

C. THE LIMITATION ON RELIGIOUS FREEDOM IS NEITHER NECESSARY NOR PROPORTIONATE

Any limitation on the freedom of religion must be necessary to achieve the legitimate aim pursued. Even if we assume that Draft

Law 8371 has the legitimate aim of protecting public order and safety, the restrictions it imposes on the freedom of religion are neither necessary nor proportionate to that aim.

To meet the requirements of necessity, guidance from the Venice Commission provides that, 'the justification for the limitation must be relevant and sufficient and the least intrusive means available must be used'.[73] The restriction on religious liberty cannot be merely useful or desirable but must be strictly necessary. Draft Law 8371 imposes a full prohibition on the religious activities of the affected religious organisation, and no lesser alternatives to achieve public order and safety are considered.

Even if the Ukrainian Government is concerned about reducing Russian influence in Ukraine, Draft Law 8371 fails to consider the myriad ways this goal could be achieved short of the disestablishment of the UOC. The Venice Commission has opined that:

> where religious groups can point to alternative ways that a particular state objective can be achieved that would be less burdensome for the religious group and would substantially accomplish the state's objective, it is difficult to claim that the more burdensome alternative is genuinely necessary.[74]

Instead of an outright ban on the UOC, the Ukrainian authorities could have taken a targeted approach by charging specific individuals who present a threat to public order with criminal offences. The Ukrainian Government has access to a range of legal tools narrower in effect and less punitive in application than the disestablishment of a church. Criminal wrongdoing can and should be addressed on a case-by-case basis.[75] As the Venice Commission has opined, 'care needs to be taken to avoid punishing the organisation and its believers for actions attributable only to a single or small group of leaders or members'.[76] Instead, the blanket ban contemplated by Draft Law 8371 amounts to an extraordinarily punitive collective sanction with profound implications for the freedom of religion and belief of innocent parishioners and clergy.

The Venice Commission's recent opinion on Ukraine's Oligarch Law is instructive. It recommended that 'a comprehensive, detailed analysis of the failings of existing legislation, policies and institutions'[77] precede the implementation of more restrictive measures. Before moving to a broad-based prohibition of a religious organisation, the Ukrainian government is required to consider the broader system of criminal and administrative measures that might address its concerns regarding public order without unduly restricting the freedom of religion.

The restrictions on the freedom of religion imposed by Draft Law 8371 are also disproportionate to the aims pursued by the Ukrainian Government. Although the ECtHR has held that 'states are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population', they must do so with full respect to the principle of proportionality.[78] The ECtHR has opined that 'any such restriction must correspond to a "'pressing social need" and must be 'proportionate to the legitimate aim pursued"'.[79]

The freedom of religion is among the most significant of human rights. The Venice Commission has found that 'state interests must be weighty indeed to justify abrogating a right that is that significant'.[80] Draft Law 8371 amounts to an extraordinarily punitive

measure that would dis-establish the UOC as a religious organisation, seriously undermine Ukraine's commitments to freedom of religion and belief, and the associated rights to freely associate. It threatens the autonomous existence of a religious community and the freedom of individual Ukrainians to worship in their preferred manner. Even recognizing the importance of public order and safety, banning the OUC would have a highly disproportionate impact by depriving the members of the UOC of a centuries old institution, their places of worship and access to their own clergy.[81]

In the balancing act of proportionality, it is critical to weigh the correct aims and limitations. The threat that must be considered is not the threat posed by the Russian Federation's illegal invasion, but the threat posed by the mere existence of the UOC. Even though Ukraine may be in an existential armed conflict with Russia, that fact alone cannot justify restrictions on the freedom of religion not directly related to the threat. The deprivation of human rights in banning a church far exceeds any threat to the public order that the mere existence of the UOC might impose.

The Venice Commission has taken a particularly sceptical view as to the proportionality of government measures that would amount to the dis-establishment of a religious organisation, opining that:

> dissolution should only be possible in case of grave and repeated violations endangering the public order and only as a last means, if no other sanctions can be applied. Otherwise the principle of proportionality would be violated.[82]

Similarly, the Venice Commission has found that withdrawing the legal personality of a religious organisation has been deemed a particularly extreme measure that would almost never be proportionate:

> Considering the wide-ranging and significant consequences that withdrawing the legal personality status of a religious or belief organisation will have on its status, funding and activities, any decision to do so should be a matter of last resort. In case of grave and repeated violations endangering public order, such measures may be appropriate, if no other sanctions can be applied effectively, but only when all the conditions described in Part I of these guidelines are fulfilled. Otherwise the principles of proportionality and subsidiarity as a rule would be violated. In order to be able to comply with these principles, legislation should contain a range of various lighter sanctions, such as a warning, a fine or withdrawal of tax benefits, which – depending on the seriousness of the offence – should be applied before the withdrawal of legal personality is contemplated.[83]

The disestablishment of the UOC that would follow from the passage of Draft Law 8371 is in no conceivable way a proportionate response to even the pressing social need of public order and safety.

D. THE LIMITATION ON RELIGIOUS FREEDOM HAS A DISCRIMINATORY PURPOSE AND EFFECT

Any legitimate restrictions on the freedom of religion must not be imposed for discriminatory purposes, be applied in a discriminatory manner, or create risk of prejudicial treatment. Draft Law 8371, in contrast, is an expressly

discriminatory law. In the present political and social context in Ukraine, Draft Law 8371 can only be understood as an act of discrimination against the UOC and those who worship within the Church. The legislation is intentionally targeted at a particular religious organisation and contains no procedural guarantees to ensure neutral and impartial application. As the Venice Commission has opined:

> When dealing with the legal status of religious communities, it is of the utmost importance that the State take particular care to respect their autonomous existence. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[84]

Although Draft Law 8371 does not name the UOC, the drafting of the law and the context of its introduction into the Verkhovna Rada make clear its intent to single out the UOC for punitive action. The legislation itself has been formulated in a narrow way that applies solely to the UOC.

The Ukrainian government has engaged in a wide range of discriminatory actions against the UOC, which provides crucial context to establish the discriminatory goal of Draft Law 8371. As the White Paper of January 2024 documents, since 2018 the Ukrainian Government has mounted extraordinary interventions into religious affairs in Ukraine. It has gone to extreme lengths to support its preferred branch of Orthodoxy—the OCU—over the UOC. Indeed, President Poroshenko provided unprecedented political support for the establishment of the OUC. Furthermore, Victor Yelensky, the current Head of the DESS has been a long-time critic of the UOC and a key supporter of the policy of autocephaly that created the OCU.[85]

As noted, the Ukrainian government has employed the powers of the state—including civil and criminal processes—to discriminate against the UOC and its worshipers. Sanctions have been imposed on senior UOC leaders, including Metropolitan Pavel Lebid, the Superior of the Kyiv-Pechersk Lavra Monastery. The Security Service of Ukraine has carried out extensive searches on church buildings under the UOC's authority. It has also opened criminal investigations involving UOC clergy for alleged collaboration or treason. Some of these clerics have even been questioned with the use of a polygraph.[86]

In this context, the narrow targeting of Draft Law 8371 can only be understood as a further discriminatory act by the Ukrainian government and marks the final stage of its policy of meting out retribution on the UOC. In enacting the law, the Ukrainian Government has breached the guidance of the Venice Commission on refraining from taking sides in religious disputes.[87] It fails to account for the complex history of Orthodoxy in Ukraine and the unique role the UOC has played as the canonical home of Orthodoxy with full apostolic succession.

In short, Draft Law 8371 fails to satisfy the basic requirements for the restriction of religious liberty outlined by the Venice Commission. Even if the law has a legitimate aim, it is not sufficiently specific to meet the requirement of prescription by law, it does not have a legitimate aim, it is neither necessary nor proportionate, and in the current context it is clearly discriminatory. Should the Venice Commission have the opportunity to review and evaluate the legislation, it would unquestionably find it in breach of the norms of democratic governance.

ENDNOTES

58 To emphasise the point, see ECtHR Svyato-Mykhaylivska Parafiya v Ukraine, judgment of 14 June 2007, paragraph 114, which states that 'the list of exceptions to freedom of religion and assembly, as contained in Articles 9 and 11 of the Convention, is exhaustive, they must be construed strictly and only convincing and compelling reasons can justify restrictions. The States have only a limited margin of appreciation in these matters'.

59 ECtHR 26 October 2000, Hasan and Chaush v Bulgaria (30985/96), paragraph 84.

60 Article I.1.1 of Draft Law 8371.

61 Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine, CDL-AD(2006)030, paragraphs 52, 64–65.

62 See also Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, CDL-AD(2012)004, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), paragraphs 82–83.

63 Article 4.3 of On the approval of the Regulation on the State Service of Ukraine for Ethnopolicy and Freedom of Conscience and amendments to the Regulation on the Ministry of Culture of Ukraine 2019 (812) as amended. https://zakon.rada.gov.ua/laws/show/en/812-2019-%D0%BF?find=1&lang=en&text=%D0%BF%D0%BE%D0%BB%D1%96%D1%82%D0%B8%D0%BA%D0%B0#Text

64 Opinion on the draft Law on amendment and supplementation of Law no 02/L-31 on freedom of religion (Kosovo) CDL-A (2014)012, paragraph 77.

65 This point is considered in Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, the administrative offences code and the law on the relations between the Republic of Armenia and the Holy Armenian Apostolic Church of the Republic of Armenia by the Venice Commission and the OSCE/ODIHR, CDL-AD(2011)028, paragraph 38.

66 On the Law on the prevention of threats to national security, associated with excessive influence of persons having significant economic or political weight in public life (oligarchs) (CDL-AD(2023)018-e), paragraph 59.

67 Commentary on Article 18.3 ICCPR in W. Cole Jr, Matthew K. Richards, Donlu D. Thayer, 'The Status of and Threats to International Law on Freedom of Religion and Belief', in The Future of Religious Freedom: Global Challenges, ed. by Allen D. Hertzke (Oxford: Oxford University Press, 2013), pp. 30–66 (p. 44)

68 Yelenskyi, '"Then What Are We Fighting For"', pp. 45–46, 49.

69 'Inter-Orthodox crisis in Ukraine: Recent Developments and Reflections', *Observatoire International Du Religieux* (May 2023) https://obsreligion.cnrs.fr/bulletin/inter-orthodox-crisis-in-ukraine-recent-developments-and-reflections-english-version/

70 Yelenskyi, '"Then What Are We Fighting For"', p. 49. Notwithstanding this claim, Yelensky broadly approved of the movement to achieve autocephaly for the OCU, which he characterised in this essay as part of a positive and acceptable move to 'securitise' religion in Ukraine.

71 'Ukraine expels pro-Russian clergy from Kyiv cave monastery complex', *POLITICO* (29/03/2023) https://www.politico.eu/article/ukraine-expels-pro-russian-clergy-from-kyiv-monastery-lavra-schism-dividing-orthodox-maidan-protesters-oleksandr-tkachenko-moscow-patriarchate/

72 'Lawyer: "Evidence" of Bishop Jonathan's guilt was created artificially', *UOJ* (14/09/2023) https://spzh.news/en/news/75940-lawyer-evidence-of-bishop-jonathans-guilt-was-created-artificially

73 Paragraph 9 of the 2014 Guidelines.

74 Joint Opinion on Freedom of Conscience and Religious Organizations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on Freedom of Religion or Belief, CDL-AD(2008)032, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), paragraph 9.

75 Such existing tools must not be used in a discriminatory way and must not be directed against a particular religious organisation. Given the arrests of UOC clergy on false charges, with signs of evidence planting, there are serious doubts whether the Ukrainian Government would use such tools non-discriminatively. See the White Paper for details of these cases.

76 Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, the administrative offences code and the law on the relations between the Republic of Armenia and the Holy Armenian Apostolic Church of the Republic of Armenia by the Venice Commission and the OSCE/ODIHR, CDL-AD(2011)028, paragraph 88.

77 On the Law on the prevention of threats to national security, associated with excessive influence of persons having significant economic or political weight in public life (oligarchs) (CDL-AD(2023)018-e), paragraph 30, paragraph 41.

78 ECtHR 26 September 1996 Manoussakis and Others v. Greece, 23 E.H.R.R. 387 (18748/91), paragraphs 40, 44.

79 See ECtHR 14 June 2007 Svyato-Mykhalyivak Parafiya v. Ukraine (77703/01), paragraph 137.

80 Joint Opinion on Freedom of Conscience and Religious Organisations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on Freedom of Religion or Belief, CDL-AD(2008)032, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), paragraph 9.

81 Paragraph 42 of the 2014 Guidelines. Opinion on the draft Law on amendment and supplementation of Law no 02/L-31 on freedom of religion, CDLAD(2014)012, paragraphs 41-67.

82 Opinion on the draft law on freedom of Religion, religious organisations and mutual relations with the state of Albania, CDL-AD(2007)041, adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007), paragraph 48.

83 Paragraph 33 of the 2014 Guidelines. See also Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, CDL-AD(2012)022, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), paragraph 93. ECtHR 10 June 2010, Jehova's Witnesses of Moscow and others v. Russia (302/02_, paragraph 159; ECtHR 8 October 2009, Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan (37083/03), paragraph 82.

84 Opinion on the Draft Law regarding the Religious Freedom and the General Regime of Religions in Romania adopted by the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005), CDL-AD(2005)037-e, paragraph 20.

85 In his extended essay, Yelensky claimed that the establishment of the OCU and its Tomos of autocephaly 'created a legitimate ecclesial alternate to the Moscow Patriarchate in terms of the canon law'. Yelenskyi, '"Then What Are We Fighting For"', p. 49,

86 'Report on the Human Rights Situation in Ukraine 1 August 2022 - 31 January 2023', United Nations Human Rights Office of the High Commissioner (24/03/2023) https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-35th-periodic-report-ENG.pdf at page 32 para 113

87 Part II.B, Paragraph 4 of the 2004 Guidelines. See also Opinion on the draft Law on amendment and supplementation of Law no 02/L-31 on freedom of religion (Kosovo) CDL-A (2014)012, paragraphs 21–22.

V. ADDITIONAL AREAS OF CONCERN

While the Venice Commission would be expected to evaluate Draft Law 8371 based on the above four criteria that must be satisfied for legitimate restrictions on the freedom of religion, it would likely find a number of other problems with the proposed legislation. This Supplement considers four of those additional areas of concern. Specifically, Draft Law 8371:

i) amounts to a collective sanction;
ii) breaches the principal of non-interference;
iii) contains insufficient rectification or appeal rights; and
iv) ignores a broader framework for treating subordination to a religious organisation located outside a country.

Each will now be considered in turn.

A. DRAFT LAW 8371 AMOUNTS TO A COLLECTIVE SANCTION

The implementation of Draft Law 8371 against the UOC would amount to a collective sanction imposed on all those Ukrainians who worship within the Church. A ban on the Church would interfere with the freedom of religion of innocent Ukrainians and, specifically, the ability of UOC parishioners or clergy to worship. Banning the UOC would undermine the individual rights of millions of Ukrainians to worship freely, as guaranteed by Article 9.1 ECHR, and to associate, as guaranteed by Article 11 ECHR. Indeed, the prohibition contemplated by Article 3.1 of Draft Law 8371 would restrict the ability of members of the UOC to worship collectively for their mutual interest.[88]

The Venice Commission observes that:

> depriving such communities of their basic rights or even deciding to prohibit them may have grave consequences for the religious life of all their members and, for that reason, care should be taken not to inhibit or terminate the activities of a religious community merely because of the wrongdoing of some of its individual members. Doing so would impose a collective sanction on the community as a whole for actions that in fairness should be attributed to specific individuals. Thus, any wrongdoings of individual leaders and members of religious organisations should be addressed to the person in question through criminal, administrative or civil proceedings, rather than to the community and other members.[89]

The Ukrainian government must pursue individual criminal investigations of those who may have violated Ukrainian law, rather

than impose a collective sanction on all those who worship within the UOC.

B. DRAFT LAW 8371 BREACHES OF PRINCIPAL OF NON-INTERFERENCE

Draft Law 8371 poses an extraordinary intervention in the internal affairs of the UOC in violation of an international principle of non-interference. The principle of non-interference requires that a government respects a religious organisation's own determination of both its internal structure and its affiliation with international religious organisations. Draft Law 8371 imposes unjustifiable interference with both of key organisational dimensions of the UOC.

First, with respect to a state's intervention into a religious organisation's internal affairs, the 2014 Guidelines provide that:

> states should observe their obligations by ensuring that national law leaves it to the religious or belief community itself to decide on its leadership, its internal rules, the substantive content of its beliefs, the structure of the community and methods of appointment of the clergy and its name and other symbols.[90]

Both the Venice Commission and ECtHR have found that governments should not unreasonably interfere with the organisational affairs of religious organisations.[91] In particular, the Venice Commission observes:

> allowing religious groups to choose their own structures is a core element of religious autonomy and religious freedom and is well protected under OSCE commitments: states will "respect the right of (...) religious communities to (...) organize themselves according to their own hierarchical and institutional structure".[92]

Interference by a state into these 'internal' aspects of a religious organisation undercuts its autonomy and thereby breaches Article 9 ECHR. Any naming conventions or organisational structures of the UOC are a matter for the Church alone to consider and resolve. The UOC's declaration of self-governance confirmed its separation from the ROC. The failure of the Ukrainian government to respect that determination likewise breaches the principle of non-interference.[93]

Second, with respect to international affiliations, the Venice Commission has found that a government may not interfere with a church's integration into an international religious community. The Commission's opinion on a proposed religious law submitted for review by Turkey found that:

> the right of self-determination of a religious community includes the general right to decide on its organisational structure. This decision may imply the institution of branches or parishes on regional or local level as well as the integration of a national church or religious community into an international church or community or even in a worldwide organisational structure such as the (Roman) Catholic Church.[94]

Banning any religious organisation on the basis of poorly defined affiliations breaches the principle of non-interference with a church's structures and operations. Indeed, it contravenes Article 30 of Ukraine's 1991 Religion Law, which provides that 'the State shall

not interfere in the legitimate activities of religious organisations'. Furthermore, given the issues already noted with respect to due process, there are real concerns about the ability of the affected religious organisation to adequately challenge such interference.

C. DRAFT LAW 8371 FAILS TO PROVIDE FOR INTERMEDIATE SANCTIONS OR A MEANS OF RECTIFICATION OR APPEAL

Draft Law 8371 provides for no intermediate sanctions short of an outright ban on a religious organisation, offers limited opportunities to rectify any breaches under the terms of the legislation, and fails to establish mechanisms to appeal or challenge determinations made under the legislation.

The right to rectify a breach of Draft Law 8371 is limited and vague. While the proposed legislation permits a religious organisation the chance to 'comply with the instructions regarding the elimination of violations discovered as a result of the religious examination' by the central executive authority,[95] It is unclear how a religious organisation can do so or demonstrate its compliance.

Similarly, Draft Law 8371 fails to establish a mechanism to challenge or appeal determinations of the central executive authority. Where the central executive authority decides to deny the legal personality of a religious organisation, that organisation must have access to a court with the power to provide an effective remedy.[96] As the Venice Commission found in its review of religious legislation submitted by Azerbaijan:

> The Law should furthermore provide for a detailed appeals procedure so that a religious organisation which is facing liquidation (or other sanctions) could contest the respective underlying decision, preferably before a judicial body.[97]

While Draft Law 8371 does not specify any right of appeal, it might be understood to operate in conjunction with Article 16 (Termination of a religious organisation) of Ukraine's 1991 Religion Law, according to which a court shall consider the case on terminations of a religious organisation under proceedings provided by the Civil Procedure Code of Ukraine. Nonetheless, in the current political context it is all but certain that the UOC will not have an adequate opportunity to contest the decision of the central executive authority once it has filed a claim to the court to ban the UOC. There is good reason to assume any court implementing the legislation will merely rubber stamp the determination of the central executive authority. Setting aside all its other failings, decisions by the central executive authority to limit the freedom of religion must be subordinated to an intendant and impartial court that can provide for rectification, challenge, and appeal.[98]

D. DRAFT LAW 8371 IMPROPERLY PROHIBITS THE DECISION OF A RELIGIOUS ORGANISATION TO SUBORDINATE ITSELF TO ANOTHER ORGANISATION LOCATED OUTSIDE A COUNTRY

The Venice Commission has made clear that a religious organisation's links with or subordination to religious organisations in a foreign country is not a valid ground for discriminatory treatment. The Venice Commission advises that the mere fact of subordination alone is insufficient to restrict the activities of

a religious organisation. Paragraph 29 of the 2014 Guidelines provides:

> Since freedom of religion or belief is a right that is not restricted to citizens, legislation should not deny access to legal personality status to religious or belief communities on the grounds that some of the founding members of the community in question are foreign or non-citizens, or that its headquarters are located abroad.[99]

The Venice Commission opined on this point with respect to religious legislation submitted for its review by Kosovo. This proposed law introduced registration requirements for religious organisations that required such organisations to inform authorities of any membership in a foreign organisation. The Venice Commission held that this obligation contained 'a limitation of the freedom of religion, the freedom of association and the freedom of expression, which needs to be justified in the light of Article 9, 10 and 11, § 2, of the ECHR'.[100] The Venice Commission could not 'see the grounds on which' Kosovo's proposed legislation could be deemed to be 'necessary in a democratic society in the interests of public safety, public order, health or morals, or for the protection of the rights and freedoms of others'.[101] The Venice Commission recommended that the provision be deleted.

Draft Law 8371 goes even further than Kosovo's registration requirements—prohibiting a religious organisation solely on its purported connections to a foreign religious organisation. The UOC formally declared its self-governing status in May 2022, building upon the *Gramota* issued by the ROC in 1990 and is not in fact subordinate to any foreign religious organisation. None the less, Draft Law 8371 would allow the central executive authority to ban the church merely based on the finding of such a relationship. Basing any discriminatory treatment—much less the prohibition of a church—on such purported foreign connections is a clear breach of the Venice Commission standards.

ENDNOTES

88 Paragraph 18 of the 2014 Guidelines. ECtHR 13 December 2001 Metropolitan Church of Bessarabia v. Moldova (45701/99), paragraph 118; ECtHR 22 January 2009 Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria (412/03 and 35677/04), paragraph 103; ECtHR 26 October 2000, Hasan and Chaush v Bulgaria (30985/96), paragraph 62; ECtHR 1 October 2009, Kimlya and others v. Russia, (76836/01 and 32782/03), paragraph 84; and ECtHR 10 June 2010, Jehova's Witnesses of Moscow and others v. Russia (302/02), paragraph. 101. See also Opinion on the legal status of Religious Communities in Turkey and the right of the Orthodox Patriarchate of Istanbul to use the adjective "Ecumenical", CDL-AD(2010)005, paragraphs 9, 50–52.

89 Paragraph 34 of the 2014 Guidelines. This point was iterated in Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, CDL-AD(2012)022, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), paragraph 92.

90 Paragraph 31 of 2014 Guidelines.

91 Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, CDL-AD(2012)022, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), paragraph 76; Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, CDL-AD(2012)004, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), paragraph 39. ECtHR 13 December 2001 Metropolitan Church of Bessarabia v. Moldova (45701/99), paragraphs 118, 123; ECtHR 22 January 2009 Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria (412/03 and 35677/04), paragraphs 118–121.

92 Joint Opinion on Freedom of Conscience and Religious Organisations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on Freedom of Religion or Belief, CDL-AD(2008)032, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), paragraph 94.

93 Opinion on the legal status of Religious Communities in Turkey and the right of the Orthodox Patriarchate of Istanbul to use the adjective "Ecumenical", CDL-AD(2010)005, paragraph 87. See also ECtHR 22 January 2009 Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria, (412/03 and 35677/04), paragraph 103. This stated that 'the right of believers to freedom of religion encompasses the expectation that the community will be allowed to function free from arbitrary State intervention in its organisation. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable'.

94 Opinion on the legal status of Religious Communities in Turkey and the right of the Orthodox Patriarchate of Istanbul to use the adjective "Ecumenical", CDL-AD(2010)005, paragraph 86.

95 Article I.1.3 of Draft Law 8371.

96 Paragraph 35 of the 2014 Guidelines.

97 Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, CDL-AD(2012)022, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), paragraph 94.

98 This was considered in Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, CDL-AD(2012)004, paragraphs 81–83.

99 Paragraph 29 of the 2014 Guidelines. See also ECtHR 5 October 2006, Moscow Branch of the Salvation Army v. Russia (72881/01), paragraphs 81–86.

100 Opinion on the draft Law on amendment and supplementation of Law no 02/L-31 on freedom of religion (Kosovo) CDL-A (2014)012, paragraph 91.

101 Ibid.

VI. CONCLUSION

The prohibition of the UOC contemplated by Draft Law 8371 fails to meet the strict criteria for restrictions on religious freedom established by international and European law and articulated by the Venice Commission. Draft Law 8371 does not meet the requirements for prescription by law; there is reason to doubt the real aim of the legislation; its overbroad and draconian implications are neither necessary nor proportionate to the goals of the legislation; and the law itself is the apex of a long history of discrimination against the UOC. There is simply no way to justify the inevitable banning of the UOC under the proposed legislation with the standards of international law and democratic governance. Moreover, the legislation amounts to a highly punitive collective sanction, which breaches the principles of non-interference and access to adequate rectification and appeal.

If the Venice Commission were given the opportunity—either through a reference from Ukraine itself or from another member of the Council of Europe—to review Draft Law 8371, it would clearly find the proposed legislation in violation of Ukraine's international obligations and inconsistent with its commitment to democratic governance. The Commission would request that Ukraine reconsider the law and chose a different approach to ensuring public safety that protects the freedom of religion of all Ukrainians.

Any opinion issued by the Commission would conclude that the Ukrainian Government has failed to adopt a necessary and proportionate approach that focusses on specific breaches of law by identifiable persons. Instead, the government has chosen a punitive attack on the UOC as part of a systematic pattern of discrimination against the church.

While the outcome of a review of Draft Law 8371 by the Venice Commission is foretold, the Commission must be given the opportunity to evaluate the legislation and issue a formal opinion. If Ukraine is unwilling to subject its own legislation to the international review consistent with membership in the Council of Europe, it is incumbent on other members of the Council who are committed to the future of both Ukraine and Ukrainian democracy to refer Draft Law 8371 to the Venice Commission.

VII. APPENDIX

DRAFT LAW
Introduced by
The Cabinet of Ministers of Ukraine

D. Shmyhal
January 19, 2023

THE LAW OF UKRAINE

On amending certain Ukrainian legislation
regarding the activities of religious organisations in Ukraine

The Verkhovna Rada of Ukraine decrees:

I. To amend the following laws of Ukraine:

1. In the Law of Ukraine "On Freedom of Conscience and Religious Organisations" (The Vedomosti Verkhovna Rada of the Ukrainian SSR, 1991, No. 25, Article 283 with the following amendments):

1) Article 5 shall be supplemented with a part of the following content:

"The activity of religious organisations that are affiliated with the centres of influence of a religious organisation (association), the management centre (authority) of which is located outside of Ukraine in a state that carries out armed aggression against Ukraine, is not allowed.";

2) in Article 16:

supplement the fourth part with the clause 6 having the following content:

"6) in case of discovering of other violations of the requirements regarding the establishment and activity of a religious organisation (association), as foreseen by the Constitution of Ukraine, this and other laws of Ukraine.";

supplement the article after the fourth part with a new part having the following content:

“In the cases provided for by this Law, the activity of a religious organisation may be terminated in a court of law at the request of the central executive authority that implements state policy in the field of religion, or the prosecutor.”

In this respect, part five have to be considered part six;

3) to supplement Article 30 with the following paragraphs:

“conducting a religious examination of the activity of religious organisations to identify subordination in canonical and organisational issues with the influence centres of a religious organisation (association), the management centre (authority) of which is located outside of Ukraine in a state that carries out armed aggression against Ukraine;

issuance of prescriptions for the elimination of violations identified as a result of the religious examination, within a month from the date of issuance of such prescription;

appeal to the court with a claim to terminate the activity of a religious organisation in case that it does not comply with the instructions regarding the elimination of violations discovered as a result of the religious examination within the established time.”

2. In the third paragraph of the second part of Article 4 of the Law of Ukraine “On State Registration of Legal Entities, Private Entrepreneurs and Public Organisations” (The Vidomosti Verkhovna Rada of Ukraine, 2016, No. 2, Article 17 with the following amendments) the words “entrepreneurs on the basis of documents” shall be replaced by the words “entrepreneurs and legal entities – religious organisations on the grounds of documents submitted in paper or electronic form”.

II. This Law enters into force one month after its publication.

Head of the Verkhovna Rada of Ukraine