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Gennadiy Druzenko

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*Svato-Mykhaylivska Parafiya v. Ukraine:*  
A Thing Done by Halves?

Gennadiy Druzenko\*

I. INTRODUCTION

About two years have passed since the European Court of Human Rights (ECtHR) decided *Svato-Mykhaylivska Parafiya v. Ukraine*,<sup>1</sup> a case in which the Court held that Ukraine violated<sup>2</sup> Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>3</sup> At first glance, this case belongs to the line of ECtHR's case law which includes cases such as: *Metropolitan Church of Bessarabia and Others v. Moldova*,<sup>4</sup> *Moscow Branch of the*

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\* LLB (International Science and Technology University, Kyiv, Ukraine), LLM (Kyiv National Taras Shevchenko University, Ukraine), LLM in European Law (University of Aberdeen, Scotland, UK). An earlier edition of this paper was delivered to the Noodt Consultation on the Strasbourg Conference Project, Geneva, Switzerland, June 22, 2008.

1. Application no. 77703/01 (2007), *available at* <http://www.echr.coe.int/echr/> (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search application number "77703/01").

2. It was the second case Ukraine lost in the European Court of Human Rights under Article 9 of the European Convention on Human Rights. The first case was *Poltoratskiy v. Ukraine*, 39 Eur. Ct. H.R. 43 (2004).

3. Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the freedom of religion and provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such 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.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Sept. 1953, CETS 5, *available at* <http://conventions.coe.int/> (follow "Treaties" hyperlink; follow "Complete list" hyperlink; follow "Convention for the Protection of Human Rights and Fundamental Freedoms" hyperlink). Today, forty-seven European countries including Russia, Turkey, Georgia, Armenia, and Azerbaijan, but excluding Belarus, are signatories of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as European Convention on Human Rights.

4. 35 Eur. Ct. H.R. 13 (2002).

*Salvation Army v. Russia*,<sup>5</sup> and *Church of Scientology Moscow v. Russia*.<sup>6</sup> In all these cases, typical of former Soviet Republics, the state refused to register the “wrong” (from its point of view) religious organization and, thus, prevented the religious organization from obtaining status as a legal entity.

However, *Svato-Mykhaylivska Parafiya v. Ukraine* also belongs to another line of case law that started with *Serif v. Greece*,<sup>7</sup> and continued in *Hasan and Chaush v. Bulgaria*<sup>8</sup> and partly in *Metropolitan Church of Bessarabia and Others v. Moldova*.<sup>9</sup> All cases of this type deal with divided religious communities in circumstances where the state attempts to determine *which part* of the divided community is the proper assignee of the undivided predecessor. The peculiarity of this line of cases is that, in making this determination, the state does not examine or judge religious doctrine and does not doubt the religious doctrine’s legitimacy. Instead, the state tries to prevent the religious community from dividing, thereby forcing separated groups to reunite—or at least to identify the proper legal successor of the formerly undivided organization.

In addition to these shared characteristics, *Svato-Mykhaylivska Parafiya* has its own unique features. Below I argue that even though this case undoubtedly dealt with freedom of religion, it was essentially a corporate and property dispute. To substantiate this view, I start with a brief explanation of the historical and factual background against which events described in the judgment happened, mentioning in passing some factual lapses by the Court. I then briefly outline Ukrainian legislation in the field of religious freedom to demonstrate the general correctness of the Court’s critique of this legislation. Next, I critique the Court’s abstention from considering the argument between rival groups of believers as a property and corporate dispute. Finally, I present the domestic reaction to the ECtHR’s judgment.

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5. 44 Eur. Ct. H.R. 46 (2007).

6. 46 Eur. Ct. H.R. 16 (2008).

7. 31 Eur. Ct. H.R. 20 (2001).

8. 34 Eur. Ct. H.R. 55 (2002).

9. 35 Eur. Ct. H.R. 13 (2002).

## II. HISTORICAL BACKGROUND OF THE UKRAINIAN ORTHODOX CHURCH

From its foundation in the tenth to the end of the twelfth century, and from the midst of the fifteenth to the end of the seventeenth century, the Ukrainian Orthodox Church was independent from the Russian, or more precisely, the Moscow Church<sup>10</sup> and was a Metropolis (Archdiocese) of the Ecumenical Patriarchate of Constantinople. As Ukrainian territories gradually joined the Moscow Kingdom in the second part of the seventeenth century, however, the Ecumenical Patriarch of Constantinople was forced to abdicate jurisdiction over the Kyiv Metropolis to his Moscow counterpart. In the early twentieth century, during the short time of Ukrainian independence, the Ukrainian self-governing (so-called Autocephalous) Orthodox Church was established. The Ukrainian Orthodox Church was later annihilated by Soviet power in the 1930s, revived during German occupation in the 1940s, and officially revived again in 1989 on the eve of the collapse of the Soviet Union. Thus, in the early 1990s there were two Orthodox Churches in Ukraine: the Ukrainian Orthodox Church of Moscow Patriarchate (UOC MP) and the Ukrainian Autocephalous Orthodox Church (UAOC). In March of 1992, the leader of the UOC MP, Metropolitan Filaret, was forced by the Archbishop Council of the Moscow Patriarchate to retire from his position. He refused, however, to resign himself to the Council decision and took part of the UOC MP and united with part of the UAOC to establish the Ukrainian Orthodox Church of Kyiv Patriarchate (UOC KP).

It should thus be born in mind that the Svato-Mykhaylivska Parish, established in 1989, began when great changes in the structure of the Orthodox Church in Ukraine were taking place. Thousands of orthodox parishes unexpectedly faced the dilemma of choosing which Church to affiliate with when their religious leaders, who had just publicly mauled each other, suddenly amalgamated into new churches. The critical lack of temples surviving after the Soviet fight against religion, in conjunction with the jump in the

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10. From establishment of the ancient state of Kyivan Rus in the tenth century (and even earlier) to the middle of the seventeenth century, "Rus" and its derivatives were associated with the territory of modern Ukraine, or at least parts of Ukraine, and only in the second half of the seventeenth century was this name, together with Ukrainian lands, gradually appropriated by the Moscow Kingdom. Such transition of the Moscow Kingdom into the Russian Empire was completed by Peter the Great's reforms at the beginning of the 1700s.

number of religious organizations, led to intense competition for the churches, particularly between orthodox communities of different jurisdictions. Sometimes such rivalries ran to extremes and escalated into violence. Under these circumstances, the decision of the Svato-Mykhaylivska Parish, approved by the Parishioners' Assembly in 1992, to act under the religious guidance of the Archbishop of the Finnish Orthodox Church in canonical issues,<sup>11</sup> does not seem as peculiar as it may at first glance.

*A. The Government's Role in the Church Conflict*

In contrast to the UAOC, which was restored in 1989 on the initiative of some believers and clergymen in spite of the authorities' resistance, the UOC KP was established after consultation with and approval from the first Ukrainian President. Thus, while the Ukrainian government clearly supported one Orthodox Church, namely the UOC KP, this came at the cost of the two other orthodox churches, the UAOC and the UOC MP. However, the position of the local authorities and believers differed from region to region and thus weakened the effectiveness of the central government attempts "to build [a] unified independent Ukrainian Orthodox Church as a spiritual foundation of the independent Ukrainian State."<sup>12</sup>

After the Presidential election and change of the Ukrainian Head of State in 1994, the inclinations of the regime shifted completely to support the UOC MP. Since then, the UOC MP has been in good order with the new Kuchma administration. Thus, it is no wonder that in the course of the conflict within the Svato-Mykhaylivska Parish between supporters of different orthodox denominations (which happened during the second and more authoritarian term of Kuchma's presidency), all government agencies, including law-enforcement, tax authorities, and the Ukrainian courts, only supported adherents of the Moscow Patriarchate. In a conversation with a high-ranking official of the State Committee of the Religious Affairs, I was told that it was the standpoint of the Presidential

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11. Svato-Mykhaylivska Parafiya v. Ukraine, § 12, application no. 77703/01 (2007), available at <http://www.echr.coe.int/echr/> (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search application number "77703/01").

12. This phrase is often ascribed to the first Ukrainian President Mr. Leonid Kravchuk, and it indeed conveys the very essence of his ideology of the state-church relations.

Administration,<sup>13</sup> and perhaps of President Kuchma personally, that all property of the Svato-Mykhaylivska Parish should belong to the community that left under the jurisdiction of the Moscow Patriarchate.

### III. SVATO-MYKHAYLIVSKA PARAFIYA V. UKRAINE

Having outlined the historical background on which the Svato-Mykhaylivska Parish's conflict occurred, I proceed to the subject matter of the case. At the time of the division, the Svato-Mykhaylivska Parish had existed about 10 years. The Parish was established in 1989 and was granted legal entity status on February 8, 1993.<sup>14</sup> By the end of the 1990s, the Parish had launched construction of its impressive temple complex in Kyiv, Ukraine's capital. In addition, when the division between parishioners occurred, the Parish had already erected and owned several chapels and other ancillary buildings.

In March of 1990, when the Parish's first charter was approved by the religious association (then a group of believers with legal status similar to an ordinary partnership), and registered by the competent authority,<sup>15</sup> the governing bodies of the Parish were the Parishioners' Assembly, the Parishioners' Council, and the Supervisory Board. Mr. Makarchikov was the chairman of the Parishioners' Council. Later, the Parish changed its legal status and charter, but up to the end of 1999, the framework of the Parish's

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13. Unlike in the United States, the Ukraine Presidential administration does not mean government (which is formed by the Parliament and headed by the Prime-minister), but rather the Presidential administration helps a Head of State to perform his duties. However, during Kuchma's tenure, particularly in his second term, his Presidential Administration played the role of *éminence grise* in Ukrainian politics and was often more powerful than the Cabinet of Ministers.

14. The judgment implies that the Parish obtained legal entity status only in February of 1993, *Svato-Mykhaylivska Parafiya*, § 14, however, there are reasons to believe that it could have happened earlier. Paragraph four of the Resolution of the Ukrainian Parliament "On Procedure for Entering into Force of the Act of Ukraine *On the Freedom of Conscience and Religious Organizations*" of April 23, 1991, provided that religious organizations that had been registered (naturally without legal entity status) before the Act entered into force had until January 1, 1992, to submit their charters to registering authorities. There are no explanations in the text of the judgment why the Parish delayed its transformation into a legal entity until the beginning of 1993 while it was already possible in 1991. See *Svato-Mykhaylivska Parafiya*, § 14.

15. At that time, the registering authority was the Religious Affairs Council at the Council of Ministers of the Ukrainian Soviet Socialist Republic.

governmental structure and the leadership of Mr. Makarchikov in the Parishioners' Council remained immutable.

The Parish's charter, which was registered by the competent authority on February 8, 1993, and had been in force until the end of 1999, states:

2.1. The highest governing body of the Parish is the Parishioners' Assembly, which is eligible in presence of not less than 2/3 of members of the Parishioners' Assembly. Resolutions of the Parishioners' Assembly shall be adopted by a simple majority.

. . . .

2.5. All official Parish documents shall be signed by the prior and the chair of the Parishioners' Council; banking and other financial documents shall be signed by the chair of the Parishioners' Council and the treasurer.

. . . .

2.12. The Parishioners' Assembly shall accept new members from clergymen and laymen at their request, provided they are at least 18 years of age, attend religious services and confession, follow the canonical guidance of the prior and have not been excommunicated by the church or are being judged by the religious court.

. . . .

6.1. Decisions as to changes and amendments to the statute shall be proposed by the Parishioners' Council and adopted by the Parishioners' Assembly.<sup>16</sup>

From 1994 onward, the ecclesiastic authorities of the UOC MP pushed the Parish to amend its original charter in order to bring it in line with the model parish charter of the UOC MP. However, the Parish refused to do so on several different occasions. In the last quarter of 1999, tension between the Parish's management and the UOC MP ecclesiastical authorities escalated. The UOC MP accused the Parish's leaders of bad management of the economic activities of the Parish, although the legal basis for such an intervention by the ecclesiastical authorities in the Parish business was unclear. At the same time, some of the Parish's laymen accused Mr. Makarchikov

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16. See *Svato-Mykhaylivska Parafiya*, § 14.

and two clergymen of misusing funds that were raised for the construction of the church.

In short, the situation in the fourth quarter of 1999 became tense and contentious. On December 24, 1999, at a meeting attended by 21 of 27 members, the Parishioners' Assembly resolved to change the Parish's affiliation and canonical guidance from the Moscow Patriarchate to the Kyiv Patriarchate. The leader of the Kyiv Patriarchate, Patriarch Filaret, accepted the decision of the Parish and admitted it as a religious community acting under his jurisdiction. Some days later, authorized representatives of the Parish submitted to the Kyiv City State Administration all documents necessary to register the amendments to the Parish's charter aimed at legalizing the religious community's denominational shift. All these events occurred during several days at the end of 1999.

On January 1, 2000, adherents of the Moscow Patriarchate (who were the Parish's members as well as outsiders) gained control over all the Parish's premises. The next day, more than 300 believers (whose membership in or relationship with the Parish was at least questionable) held a meeting and discharged Mr. Makarchikov, elected new governing bodies for the religious community, and adopted a new charter in complete conformity with the model parish charter of the UOC MP. The fact that no one from the original Parish's Assembly took part in the meeting was merely ignored.

Thereafter, the original Parish's Assembly and Parish's Council, led by Mr. Makarchilov and backed by Patriarch Filaret, filed a number of complaints and claims before Ukrainian authorities, particularly law enforcement bodies such as the police and the prosecutor's office, with requests to defend their property rights. Unfortunately, the reaction of law-enforcement was counterproductive. For instance, the chief of the district police department threatened to initiate a criminal investigation against Mr. Makarchikov if he continued to confront the supporters of the Moscow Patriarchate. The sister of Mr. Makarchilov even requested political asylum in Norway on the grounds of alleged persecution in Ukraine linked to her participation in the Parish controversy and blood ties with her brother.

Despite the intervention by several members of the Ukrainian Parliament into the case, the active protest of Patriarch Filaret against the "seizure of the church" by the Moscow Patriarchate, and despite

the case's publicity,<sup>17</sup> the Kyiv City State Administration on January 21, 2000, refused to register the amendments approved by the original Parish's Assembly on December 24, 1999. Thereafter, the believers that backed Mr. Makarchikov filed the case before the Kyiv City Court complaining that the Kyiv City State Administration's refusal to register the Parish charter's amendments of December 24, 1999, was unlawful. On April 21, 2000, the Kyiv City Court dismissed the plaintiffs' claims (reasons for this decision will be scrutinized later). The plaintiffs appealed to the Supreme Court of Ukraine, which upheld the Kyiv Court's finding. Having then exhausted all domestic remedies, the original Parish Assembly decided in its meeting on October 6, 2000, to file the case before the ECtHR in Strasbourg.<sup>18</sup>

In Strasbourg, fortune smiled upon the believers led by Mr. Makarchikov. At the outset, the ECtHR rejected the Ukrainian government's objections concerning admissibility of the application,<sup>19</sup> and then the Court found that the Ukrainian Government did interfere with the freedom of religion rights of Mr. Makarchikov's religious association.<sup>20</sup> Thereafter, the Strasbourg Court held that even though such interference was prescribed by law,<sup>21</sup> such interference did not pursue a legitimate end and was not necessary in a democratic society; therefore it was unjustified.<sup>22</sup> While the Court concluded that the refusal to register amendments to the Parish's charter approved by the original Parish's Assembly constituted a violation of Article 9 of the Convention on Human Rights, it decided that the applicant's complaint that Ukraine had violated its property rights protected under Article 1 of Protocol 1 to the Convention was premature.<sup>23</sup> Apart from these substantive

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17. See, e.g., Yuriv Doroshenko, *Na maydani kolo tserkvi vzhe nikhto nikudi ne yde* [Nobody go anywhere at the square near the Church], UKRAYINA MOLODA [THE YOUTH OF UKRAINE], Jan. 22, 2000.

18. Because of the limited scope of this paper, I deliberately omit details of other litigation launched by Mr. Makarchikov together with his fellow believers against Svyato-Mykhaylivska Parish (Moscow Patriarchate) for the return of their personal property. I also omit any further details of persecutions that original members of the Parish's Assembly suffered from Ukrainian authorities since those were not the subject matter of the ECtHR proceeding.

19. *Svato-Mykhaylivska Parafiya v. Ukraine*, § 12.

20. *Id.* § 123.

21. *Id.* § 129.

22. *Id.* § 152.

23. *Id.* § 107.

holdings, the ECtHR in dicta evaluated the Ukrainian legislation concerning religious freedom.<sup>24</sup>

#### IV. THE ECtHR'S JUDGMENT IN LIGHT OF UKRAINIAN LEGISLATION

The last mentioned fact leads us to further analysis of the judgment in light of and in comparison with the domestic law, of which the core piece is the Act of Ukraine *On the Freedom of Conscience and Religious Organizations*. Before this comparison is made, however, an introduction to this Act is necessary.

##### A. *The Ukrainian Act on the Freedom of Conscience and Religious Organizations*

The Ukrainian Act *On the Freedom of Conscience and Religious Organizations* was passed in April of 1991. It was almost a copy of the USSR Act with the same name, which was passed in October 1990. First and foremost, the Ukrainian Act granted religious organizations the status of a legal entity, which stood as a significant shift from Soviet times when religious groups existed as pseudo-partnerships with very limited legal capacities.<sup>25</sup>

Apart from providing for the legal status of religious organizations, the Act reiterated most provisions of the international (mainly UN) instruments of human rights, and particularly the freedom of religion. From this viewpoint, the Ukrainian Act was in the 1990s (and maybe now) one of the most adjusted to international standards in this field. However, its main weakness was, and is, its declarative nature: the Act's concrete implementing provisions do not provide for an effective mechanism to ensure its wonderful declarations are realized.<sup>26</sup>

For instance, Chapter I of the Act echoes Article 9 of the European Convention on Human Rights, announcing in broad declarative fashion:

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24. *Id.* § 152; *see also id.* §§ 130, 145.

25. It may sound quite surprising, but the right to religious freedom as a constitutional principle was declared in all constitutions of the Union of Soviet Socialist Republic (USSR) as well as the Ukrainian SSR constitutions.

26. It should be borne in mind that Ukraine belongs to the family of civil law countries; therefore, it is virtually impossible to develop declarative provisions by judge-made law like has happened with the First Amendment to the U.S. Constitution.

Everyone enjoys the right to freedom of conscience. This right includes freedom to voluntarily adhere, embrace and change one's religion or beliefs and freedom, either alone or in community with others to profess whichever religion or do not profess anyone, worship, manifest in public and freely disseminate one's religious or atheistic beliefs.

....

Exercise of the freedom to manifest a religion or beliefs shall be subject only to such limitations as are necessary for securing public safety and public order, life, health and morality as well as rights and freedoms of others citizens which are prescribed by law and comply with international commitments of Ukraine.<sup>27</sup>

Notwithstanding the opening chapter's broad assertion of a universal freedom of religion, the specific provisions of the Act seem counterproductive to this rather lofty goal. For example, the Act includes an exhaustive list of forms in which religious organizations could be established.<sup>28</sup> This list is very limited, based on religious (and not on legal) classification, and does not embrace even such traditional religious entities as monastic orders or hermitages. There is no justification or explanation in the Act or other official documents as to why legislators limited the forms in which religious organizations could be established—although such limitation obviously constitutes restriction on religious freedom.

This is just one example of discrepancy between the Act's declarations and regulatory provisions exercised by administrative bodies in everyday practice. According to the Council of Europe, the main drawbacks of the Act, excluding the one just mentioned, are:

- 1) it requires ten adults to have the statute [i.e. charter] of a religious organization registered, whereas the same requirement for other civic associations is only three adults;
- 2) it prohibits the creation of local or regional divisions without legal entity status, such as branches and subsidiaries;
- 3) it lacks the possibility for granting legal entity status to religious associations [i.e. unions], such as the Catholic or Orthodox Churches, etc.;

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27. Act of Ukraine, On the Freedom of Conscience and Religious Organizations, art. 3 (Apr. 23, 1991).

28. *Id.* at art. 7.

- 4) it discriminates against foreigners and stateless persons;
- 5) it lacks clarity with regard to which organizations are required to register with regional state administrations and which with the State Committee on Religious Affairs;
- 6) the Law [i.e. the Act] also contains a number of other ambiguous provisions, which leave a wide discretion to the implementing authorities.<sup>29</sup>

As was pointed out above, the Act *On the Freedom of Conscience and Religious Organizations* was approved on the eve of Ukrainian independence. Regrettably, during the following years when Ukraine approved fundamental legal acts like the Constitution (1996) and the Civil Code (2003), the Act was never amended significantly. Consequently, I fully subscribe to the conclusion of Mrs. Severinsen and Mrs. Wohlwend, the former Monitoring Committee co-reporters of the PACE, who suggested that “the quite progressive law [i.e. the Act] for the time of its adoption now requires significant rewording.”<sup>30</sup>

*B. The Svato-Mykhaylivska Parish’s Legal Status Under the Ukrainian Act of 1991*

Having provided the critical outline of the Ukrainian Act designed to ensure religious freedom and regulate the relationship between the government and religious organizations, and before returning to the ECtHR’s judgment, I must address the legal status of the Parish, its corporate governance, and its interrelation with other Churches, i.e. religious unions with which the Parish is affiliated.

When the Svato-Mykhaylivska Parish was set up in April 1989, it immediately began various activities, including collecting the necessary documents and permissions to launch construction of a temple complex, even though it was not yet recognized as a legal

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29. Honouring of Obligations and Commitments by Ukraine, EUR. PARL. DOC. 10676, § 269 (2005), available at <http://assembly.coe.int/Documents/WorkingDocs/doc05/EDOC10676.htm>. The judgment, *Svato-Mykhaylivska Parafiya*, quotes this document at § 87.

30. *Id.*

entity. Probably until February 1993,<sup>31</sup> the Parish acted in the capacity of some kind of partnership and not as a corporate body.

From the moment the Parish shifted the form of business ownership and obtained the status of a legal entity, it “belonged to the Ukrainian Orthodox Church (Moscow Patriarchate).”<sup>32</sup> However, the term “belong” here is not precise enough from a legal point of view. As was mentioned above, the Act does not permit legal entity status for religious unions that include not just persons, but also other religious organizations. Thus, centralized churches like the Orthodox Church or the Catholic Church cannot receive legal entity status in Ukraine. Instead, the Act provides that “[r]eligious unions are represented by their centers (administrations).”<sup>33</sup> However, a center or an administration of the type mentioned in the Act is no more than a management body of a religious union and as such could not comprise, much less “possess,” any other organizations.

Thus, from a legal point of view, it is impossible for the Parish as a legal entity to “belong” to a religious union (like the Ukrainian Orthodox Church of Moscow Patriarchate) which does not enjoy any legal status. Because of this, relations between the Parish and the Church also are barred from being adjusted by agreement or contract. The sole document which governs participation of the Church authorities in the Parish management is the Parish Charter. According to the Act, a charter should contain information indicating what type of religion the organization follows and “place of the religious organization in the institutional framework of the religious union.”<sup>34</sup> No legislative provision requires specification in a charter of the role that ecclesiastical authorities are to play in the management of the organization’s activities.

Moreover, the Act provides: “The State takes into account traditions and internal guidelines of religious organizations and respects them as long as they conform to the law”<sup>35</sup> and adds that

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31. *See* Svato-Mykhaylivska Parafiya v. Ukraine, §§ 13–14, application no. 77703/01 (2007), available at <http://www.echr.coe.int/echr/> (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search application number “77703/01”).

32. *See id.* § 14.

33. Act of Ukraine, On the Freedom of Conscience and Religious Organizations, art. 7(2) (Apr. 23, 1991).

34. *Id.* at art. 12(1)–(2).

35. *Id.* at art. 5(3).

“[r]eligious organizations in Ukraine . . . act according to their hierarchic and institutional structure, elect, appoint and rotate their staff in accordance with their charters (regulations).”<sup>36</sup> It further provides: “A religious organization as a legal entity exercises rights and obligations determined by the legislation in force and its own charter.”<sup>37</sup> As for religious communities, the legislation states:

The State recognizes the right of a religious community<sup>38</sup> to subordinate itself in canonical or organizational matters to any religious centre (administration) residing within or outside Ukraine, as well as *free change of such a subordination*.<sup>39</sup>

It could be concluded from the quoted provisions that the Ukrainian legislation deems religious organizations, particularly those like a religious community founded directly by believers and not by another legal entity, as autonomous, self-governing units with wide discretion. In accordance with legal logic, authorities of a religious union should enjoy as much authority in the community’s business as the community has granted them. Under such legal conditions, ecclesiastical authorities are capable of curbing the community’s powers and increasing their own power in the community’s business only by the addition of the appropriate provisions into the community charter. That explains why in the analyzed case the ecclesiastical authority (Kyivan Metropolitan of the UOC MP) again and again demanded that the Parish approve a standard charter which would grant to the former a “golden share” in the Parish. Perhaps the same consideration induced the Parishioners’ Assembly to resist such demands.<sup>40</sup>

Accordingly, it was the Parish’s charter which regulated not only the corporate governance of the religious community but also the sensitive issue of denomination affiliation and its subsequent shift. The Kyivan Metropolitan (the “religious centre” of the Ukrainian

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36. *Id.* at art. 7(1).

37. *Id.* at art. 13(2).

38. In the text of the judgment, the Ukrainian term “religiyna hromada” was translated as a “religious group,” while it should be translated as a “religious community” to convey its meaning precisely. *See Svato-Mykhaylivska Parafiya v. Ukraine*, application no. 77703/01 (2007).

39. Act of Ukraine, On the Freedom of Conscience and Religious Organizations, art. 8(2) (Apr. 23, 1991) (emphasis added). The translation of this provision given in the judgment is quite loose. *See Svato-Mykhaylivska Parafiya*, § 83.

40. *See Svato-Mykhaylivska Parafiya*, §§ 15, 17.

Orthodox Church of Moscow Patriarchate) failed to persuade the Parish to amend its charter even though it was clear that ecclesiastical authority could put the Parish under an interdict or other canonical punishment. The Metropolitan was unable to legally prevent the Parish from changing its affiliation because the latter did so by virtue of the appropriate provisions of its charter. Therefore, the core question for those Ukrainian authorities, including the relevant judicial bodies that dealt with the Parish's dispute, should have been whether the original Parishioners' Assembly acted *intra vires* in deciding to change the jurisdiction and canonical guidance of the Parish.<sup>41</sup> Unfortunately, this was not the approach taken by those authorities.

From this point of view, the principal finding of the ECtHR may be reduced to one observation: instead of scrutinizing whether the body (or rather bodies) of the divided Parish acted in line with the Parish's charter and in such a way maintained respect for the autonomy of the religious community, Ukrainian authorities unjustifiably interfered into the field of religious freedom and freedom of association.<sup>42</sup> However, even with such a welcome outcome, the judgment of the Strasbourg bench is not above criticism.

### *C. The ECtHR's Missed Opportunity*

I begin my criticism of the ECtHR's judgment by pointing out some minor factual mistakes in its text. The judgment states: "On 22 March 1992 the Parishioners' Assembly passed resolutions for the religious association to change denomination, as it was dissatisfied with the leadership of Archbishop Filaret, *the head of the newly registered Ukrainian Orthodox Church of Kyiv Patriarchate . . .*"<sup>43</sup> In March 1992, Metropolitan (the correct title that, in the Orthodox hierarchy, is higher than Archbishop) Filaret was the head of the Ukrainian Orthodox Church of Moscow Patriarchate. The formal meeting of bishops (Archbishop Council) of the Russian Orthodox Church that forced him to resign office took place from March 31 to April 4, 1992, and the Ukrainian Orthodox Church of Kyiv Patriarchate was set up about two months later on June 25, 1992.

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41. *See id.* § 23.

42. *Id.* § 152.

43. *Id.* § 12 (emphasis added).

Therefore, it is not possible that Metropolitan Filaret headed the Kyiv Patriarchate in March 1992, because the latter did not then exist. However, this factual error certainly is not vital as it by no means affected the outcome of the Court's judgment.

The ECtHR continued its judgment by aptly criticizing the legal framework in which religious organizations provided their activity in Ukraine.<sup>44</sup> Nevertheless, it seems that in attacking Ukrainian legislation, the Strasbourg Court fell into the snare of loose translation, stating:

[T]here is a clear inconsistency in the domestic law as to what constitutes a "religious organisation" and what constitutes a "religious group", or whether they have the same meaning, the only difference between the two being the local status of a "religious group" and the lack of any requirement for its official registration under the Act.<sup>45</sup>

In fact, the Act referenced by the Court sufficiently and clearly distinguishes these two concepts. "Religious organisation" is a generic term which covers all religious establishments, while the term "religious group" (or rather "community" or "parish," language which more correctly conveys the meaning of the Ukrainian word "*bromada*") is specific for a type of religious organization formed directly by believers.<sup>46</sup> Nevertheless, this misstatement was not essential to the Court's finding. Aside from this terminological misunderstanding and the Court's silence regarding the impossibility that religious unions could be granted legal entity status, the Strasbourg Court's criticism of Ukrainian legislation was well-grounded and entirely correct.

But the ECtHR's later fallacy was not so innocuous. Despite the existence of a number of inconsistencies and ambiguities in the Ukrainian Act *On the Freedom of Conscience and Religious Organizations*, the Act does contain a set of sufficiently clear provisions that call for safeguarding the autonomy of religious communities against arbitrary state interference. In particular, the Act guarantees religious communities the freedom to subordinate themselves to religious centers and to change such affiliations

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44. *See id.* §§ 130, 145, 152.

45. *See id.* § 145.

46. Act of Ukraine, *On the Freedom of Conscience and Religious Organisation*, art. 7(2) (Apr. 23, 1991).

freely.<sup>47</sup> It also declares respect for traditions and internal guidelines of religious organizations.<sup>48</sup> Further, it clearly provides that “religious organizations in Ukraine . . . act according to their hierarchic and institutional structure, elect, appoint and rotate their staff in accordance with their charters (regulations).”<sup>49</sup>

The ECtHR asserted that the Ukrainian authorities’ refusal to register the amendments to the Parish statute, an action later upheld by Ukrainian courts, was caused principally “by the lack of coherence and foreseeability” of the legislation.<sup>50</sup> This conclusion is doubtful. My Ukrainian experience, along with my examination of Ukrainian legislation and information I obtained from state officials,<sup>51</sup> convince me that the apt English words for the Ukrainian authorities’ actions in this case are “arbitrariness” and “bias.” However, it should be kept in mind that the European Court of Human Rights must be much more politically correct when it criticizes a foreign country than do scholars when they judge their own countrymen.

One last remark should be made in this section. From my point of view, the Strasbourg Court did not focus enough on the fact that believers who decided to change their denomination would have faced no problem implementing such action. Nobody prevented or hindered the adherents from transferring themselves to another church and registering a *new* religious community. Rather, the crucial issue was which part of the divided religious community enjoyed the legal right to make such a decision on behalf of the Parish as a legal entity, especially considering that such a decision would concern canonical and organizational subordination to ecclesiastical authorities and the change of such subordination.

As was previously mentioned, the Ukrainian authorities that dealt with the Parish’s case faced a fundamental choice: to base their decisions on the charter as the Parish’s internal constitution (inasmuch as its provisions do not directly contravene the law) or to judge the case by other reasons, only taking the Parish’s charter into account *inter alia* as one, but not the core, benchmark against which the dispute could be measured. Unfortunately, Ukrainian authorities refused the first way, which presupposed that the clash between

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47. *Id.* at art. 8(2).

48. *Id.* at art. 5(3).

49. *Id.* at art. 7(1).

50. *See Svato-Mykhaylivska Parafiya*, § 152.

51. *See supra* text accompanying note 13.

believers would be judged as a purely corporate dispute.<sup>52</sup> Had the Ukrainian authorities chosen to do so, it would have been a clear and easy case. Most likely, the original Parish's Assembly would have removed the formal obstacle for the registration of the charter's amendments, namely the lack of the former's signature on the amendments of December 24, 1999,<sup>53</sup> and the argument would have been resolved.

In contrast, Ukrainian authorities, particularly those courts that dealt with the Parish's case, employed an alternative strategy. Consequently, the domestic courts' reasoning seems vague and inconsistent. For example, the Kyiv City Court treated the Parish like a Church subsidiary that was established or owned by the ecclesiastical authority, not as an autonomous association of believers that was free to determine its religious affiliation.<sup>54</sup> Moreover, the Supreme Court of Ukraine judged the case not from within the scope of the Parish's charter, but rather scrutinized the charter against current Ukrainian legislation.<sup>55</sup> The Supreme Court found that the charter contravened the law, particularly the fixed membership in the religious community prescribed by it. These findings were inconclusive and constitute a shining example of the "totalitarian" perception of the law: all is prohibited except what is clearly permitted. This approach is obviously incompatible with basic democratic principles.

Thus, we see that the questions posed by the case at hand were twofold. On the one hand, the Parish's dispute led to unjustified intrusion by state authorities into the Parish's autonomous arrangements, and the ECtHR ascertained such impropriety. On the other hand, the clash between rival groups of the divided religious community was in and of itself a purely corporate conflict that could and should have been resolved on the basis of, and in accordance with, the Parish's corporate charter. The ECtHR failed to highlight this fact properly. Consequently, the domestic follow-up of the Strasbourg judgment upholds such a view.

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52. *Cf. Svato-Mykhaylivska Parafiya*, § 139.

53. *Cf. id.* § 42.

54. *Id.* § 51 (outlining the Ukraine Supreme Court's reasoning).

55. *Id.* § 52.

## V. FOLLOW-UP AND CONCLUSION

The follow-up to the seemingly endless *Svato-Mykhaylivska Parish* narrative occurred about a year after the ECtHR's judgment was delivered in Strasbourg. Ukrainian legislation includes a special act entitled *On the Enforcement of Judgments and Application of Case-Law of the European Court of Human Rights*.<sup>56</sup> Even though Article 2 thereof declares that “[j]udgments [of the ECtHR] are obligatory for execution by Ukraine,”<sup>57</sup> Chapter III of the Act, which elaborates the methods of and procedures for such an execution, explains that, excluding pecuniary compensation, a court victory in Strasbourg simply means that the case decided by the ECtHR is subject to revision.<sup>58</sup>

Therefore, having won the case in Strasbourg, the Parish (or rather the group of believers that wanted to change the affiliation of the Parish and have been struggling to do so since the end of 1999) simply opened the door to further domestic litigation. The original plaintiff lodged a complaint about reopening the case, renewing its original claim. The Supreme Court of Ukraine (which was the domestic court of last resort that dealt with the case before it was lodged with the Strasbourg court) granted the Parish's complaint only in part. It held that the case should be reopened, but refused to deliver final judgment by itself, ordering a new hearing in the Kyiv District Administrative Court.

In remanding the case to the Kyiv District Administrative Court,<sup>59</sup> the Supreme Court asserted that the Code of Administrative Justice of Ukraine provides that if an international judicial body, the jurisdiction of which is recognized by Ukraine, holds that a judgment or decision delivered by a Ukrainian court violates an international obligation of Ukraine, such judgment or decision should be reopened and reviewed.<sup>60</sup> Under Ukrainian law,

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56. Act of Ukraine, *On the Enforcement of the Judgments and Application of the Case-Law of the European Court of Human Rights*, art. 13(1) (Feb. 23, 2006), available at [http://sutyajnik.ru/rus/echr/etc/2006\\_law\\_ukraine.htm#\\_ftnref1](http://sutyajnik.ru/rus/echr/etc/2006_law_ukraine.htm#_ftnref1).

57. *Id.* at art. 2(1). This quote was translated by the author from its original Ukrainian.

58. *Id.* at art. 10(1), (3).

59. Since the original action was brought before the court by Mr. Makarchikov in 2000, the design of the Ukrainian judicial system has been changed. An administrative justice system has been established, and therefore the case which fell within the jurisdiction of general courts in 2000 fell under the jurisdiction of administrative courts in 2007.

60. CODE OF ADMINISTRATIVE JUSTICE OF UKRAINE art. 237(2).

reviewing the grounds of such a case is classified as an “exceptional circumstance.” The Supreme Court noted that the judgment of the ECtHR in *Svato-Mykhaylivska Parish v. Ukraine* determined that the outcome of the national litigation violated Article 9 of the Convention, interpreted in the light of articles 6(1) and 11 thereof. As *obiter dictum*, the Ukrainian highest bench reiterated the view of the ECtHR that the national judiciary had failed to repair the violation of religious freedom made by administrative authorities because of what the Court saw as a contradiction in Ukrainian legislation and lack of foreseeability.

The Supreme Court of Ukraine also reworded ECtHR’s core statement, asserting that the state enjoys a narrow scope of discretion concerning restrictions of religious freedom. The highest bench concluded that such restrictions should be defined and applied strictly in line with the Convention and ECtHR’s interpretation thereof. On that basis, and by virtue of Article 13 of the Act *On the Enforcement of Judgments and Application of Case-Law of the European Court of Human Rights*, the Supreme Court held that it is against the law to restrict the right to freedom of religion by ungrounded refusal to register amendments to a charter by religious groups aimed at changing their confessional association if such restriction is not necessary in a democratic society.

The Ukrainian Supreme Court reached the conclusion that in dealing with the *Svato-Mykhaylivska Parish* case, the national judiciary had not taken into account provisions of the European Convention on Human Rights and its interpretation in ECtHR case law. This is what led to the substantial fault in the domestic litigation outcome. Therefore, the highest Ukrainian judicial body revoked the decision and judgment of the Kyiv Court (which was confirmed by the Supreme Court’s own decision) and expedited the case to the Kyiv District Administrative Court for a new trial which should take into consideration the provisions of the European Convention on Human Rights and its interpretation in the ECtHR case law.

But the substance of the dispute has not been resolved so far, and the longer it continues, the more complicated it becomes. This is because the partly new religious community formed at the beginning of 2000, and bound up with the Moscow Patriarchate, has been running the Parish’s business for more than eight years and has contributed significantly to the temple complex development. Therefore, deciding how to divide the Parish’s property between the

two religious communities will be very complicated, especially if the injustices suffered by Kyiv Patriarchate's adherents, led by Mr. Makarchikov, are to be redressed. Thus, the easy and fair solution of the dispute, based on observance of the Parish's charter which seemed apt in 2000, is now out of date.

What conclusions has Ukraine drawn from this case, which constitutes the first time the state lost in litigation with a religious organization before the Strasbourg Court? Unfortunately, and in spite of the clear prescription of the national law that obligated national authorities "to take an action aimed to correct the system's shortcomings,"<sup>61</sup> the Ukrainian government has done nothing. No discussion with regard to the ECtHR's judgment has been initiated, nor have necessary amendments to the current legislation been drafted. Even the temple complex of Svato-Mykhaylivska Parish up to now has remained under the control of the Moscow Patriarchate. Fulfillment of the governing coalition's pledge "to redraft the Act *On Freedom of Conscience and Religious Organization*"<sup>62</sup> that was given some months after the judgment became final has most likely been left for better days.

I, however, remain optimistic. Notwithstanding the aforementioned facts, the judgment has not passed unnoticed. I hope this case, which lies on the junction of religious freedom jurisprudence—with fundamental principles of constitutional and international law on the one hand, and corporate law and governance on the other—contributes not only to scholarly discussion and academic reflection, but also to the development of law and an improvement in national legislation. The main message of the judgment is that a religious community, just as any other corporation in private law, enjoys the right to determine its own structure and its association with ecclesiastical authorities, including the right to change its canonical and organizational subordination to or affiliation with the latter. There is no doubt, at least within Europe, that this message has been heard and has already become an important standard for human rights.

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61. See Act of Ukraine, On the Enforcement of the Judgments and Application of the Case-Law of the European Court of Human Rights, art. 13(2) (Feb. 23, 2006).

62. See the Agreement Establishing the Coalition of the Democratic Forces in the 6th Verkhovna Rada (the Parliament of Ukraine) of Nov. 29, 2007, art. 1.4, which was officially published in HOLOS UKRAYINI [UKRAINIAN VOICE], an official Ukrainian Parliament's gazette, No. 223–224, Dec. 12, 2007.