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Redrafting of the Ukrainian Law on Religious Freedom: Ukrainian Churches vs. Ukraine's Obligation to the Council of Europe*

*Gennadiy Druzenko***

ABSTRACT

In 2005, the Council of Europe criticized the current Ukrainian Law “On the Freedom of Conscience and Religious Organizations” (“Law”). In response to this criticism, the President of Ukraine called for substantial amendments to the Law and commissioned the Ministry of Justice to prepare a draft of these amendments. Even though the drafting of the Law involved representatives from the largest Ukrainian churches and was generally welcomed by the Venice Commission, major Ukrainian denominations took a conservative stance toward the legal reform and successfully opposed any material changes to the current edition of the Law. This deadlock led to a standstill in drafting the amendments, which lasted until 2010 when a newly elected President of Ukraine resumed drafting efforts. However, it seems that the All-Ukrainian Council of Churches and Religious Organizations, which unites major Ukrainian churches, has again blocked the advancement of the amendments to the Law.

This Article analyzes the causes of the apparent collision between Ukraine's obligation to the Council of Europe and the Ukrainian religious community's firm opposition to amending the current Law.

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More specifically, it argues that the fundamental human rights creed quite predictably clashes with the religious majority's agenda in Ukraine, and that it is critical not to confuse respect and protection of human rights with the state favoring major religious denominations.

I. BACKGROUND INFORMATION

The current Ukrainian Law "On Freedom of Conscience and Religious Organizations" was adopted in 1991¹ and has since been amended several times. According to the authoritative opinion of the Council of Europe, this "quite progressive law for the time of its adoption now requires significant rewording."²

The principal defects of the Law, vis-à-vis European standards, were summarized in the Explanatory Memorandum to the Resolution of the Council of Europe on Honouring of Obligations and Commitments by Ukraine in 2005.³ These defects were listed as follows:

(1) The Law limits the forms in which a religious organization might be set up;

(2) The Law requires at least ten adult citizens to be founders of a religious community to register an organization's charter and thus obtain legal entity status (whereas the same requirement for other civic associations is three persons);

(3) The Law does not provide a mechanism for establishing separate units or subdivisions (e.g., branches) of a religious organization without obtaining legal entity status;

(4) The Law does not provide a mechanism for granting legal entity status to religious associations (which include unions of religious organizations, churches, or confessions⁴);

(5) The Law discriminates against foreigners and stateless persons;

(6) The Law is not clear on which organizations should be registered by regional state administrations and which should be registered by the central authority responsible for religious matters;

1. Law of Ukraine "On Freedom of Conscience and Religious Organizations," Apr. 23, 1991, No. 987-XII, available at <http://zakon2.rada.gov.ua/laws/show/987-12>.

2. See EUR. PARL. ASS., *Honouring of Obligations and Commitments by Ukraine*, 3d. Sess., Doc. No. 10676, § 269 (2005) [hereinafter *Explanatory Memorandum*], available at <http://bit.ly/x0YLmf>.

3. *Id.*

4. In this context, the author refers to "confessions" as religious bodies which share a confession of faith, but do not use the word "church" in their names.

(7) The Law also “contains a number of other ambiguous provisions, which leave wide discretion to the implementing authorities.”⁵

In response to this criticism, Victor Yushchenko, the President of Ukraine at that time, approved an Action Plan for the Honouring of Obligations and Commitments of Ukraine to the Council of Europe through presidential decree at the beginning of 2006.⁶ The President’s decree ordered, among other things, the Ministry of Justice of Ukraine to draft and submit to the Cabinet of Ministers of Ukraine a new edition of the Law before September 1, 2006.⁷

The Ministry of Justice set up an *ad hoc* drafting team consisting of the relevant Ministry experts, representatives of registered churches, non-governmental organizations, and academics.⁸ The team prepared a draft of the Law’s rewording. In July 2006, the Ministry of Justice of Ukraine submitted the draft to the Venice Commission and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODHIR),⁹ with a request that those bodies examine it vis-à-vis relevant European standards.¹⁰ The Venice Commission and OSCE/ODHIR prepared a joint opinion on the matter.¹¹ They reached the conclusion that “[i]n general, the draft law can be seen as a liberal and favourable framework for the exercise of freedom of religion” in Ukraine.¹² However, the opinion also provided a significant number of particular remarks and recommendations¹³ to bring

5. See *Explanatory Memorandum*, *supra* note 2.

6. See Ukaz Presydynta Ukrayiny [Decree of the President of Ukraine], No. 39/2006, 4 OFITSIYNYI VISNYK UKRAYINY [Official Gazette of Ukraine] 24, art. 143; Action Plan for the Honouring of Obligations and Commitments of Ukraine to the Council of Europe (2006) [hereinafter *2006 Action Plan*]. English translation is available at <http://www.minjust.gov.ua/0/6985>.

7. See Ukaz Presydynta Ukrayiny [Decree of the President of Ukraine], No. 39/2006, 4 OFITSIYNYI VISNYK UKRAYINY [Official Gazette of Ukraine] 24, art. 143 § 2(6).

8. See Office for Democratic Institutions and Human Rights of Organization for Security and Co-operation in Europe (“OSCE/ODIHR”) and European Commission for Democracy Through Law (“Venice Commission”), *Opinion on the Draft Law on the Insertion of Amendments on Freedom of Conscience and Religious Organisations in Ukraine*, Opinion No. 391/2006, § 8 [hereinafter *Venice Commission Opinion*], available at <http://bit.ly/HaupFa> (adopted by the Venice Commission at its 68th Plenary Session when it convened on October 13th and 14th of 2006).

9. The draft of proposed amendments to the Law as submitted to the Venice Commission was published by the Venice Commission on September 13, 2006. Venice Commission, *Draft Law on the Insertion of Amendments on Freedom of Conscience and Religious Organisations in Ukraine*, Opinion No. 391/2006 [hereinafter *2006 Draft*], available at <http://bit.ly/AjFzSE>.

10. *Venice Commission Opinion*, *supra* note 8, § 1.

11. *Id.*

12. *Id.* § 13.

13. See *id.* §§ 19, 22, 24, 26, 27, 30–36, 42, 46, 48–52, 56, 60–61, 64–68.

the draft into conformity with the provisions of the European Convention on Human Rights regarding religious freedom¹⁴ and its application by the European Court of Human Rights. These recommendations were also designed to align the draft with the European principles included in the Guidelines for Review of Legislation Pertaining to Religion or Belief, which was prepared by the OSCE/ODIHR Advisory Panel of Experts on the Freedom of Religion or Belief in consultation with the Venice Commission.¹⁵

After receipt of the Venice Commission's opinion, the 2006 draft law was refined by the drafting team, and the Ministry of Justice put the draft out for public consultation.¹⁶ Soon thereafter, the draft was discussed by the All-Ukrainian Council of Churches and Religious Organizations ("AUCCRO"), an independent, inter-religious forum that represents the interests of the overwhelming majority of religious organizations in Ukraine.¹⁷ AUCCRO, driven chiefly by the Ukrainian Orthodox Church of the Kyivan Patriarchate ("UOC-KP"),¹⁸ recommended to abstain from advancing the draft law, particularly its prompt approval by the Cabinet of Ministers and its further introduction by the Cabinet to the Parliament.¹⁹ Instead, AUCCRO called the

14. European Convention on Human Rights, art. 9, Nov. 4, 1950, C.E.T.S. No. 5, available at <http://bit.ly/y7KdpZ>.

15. *Venice Commission Opinion*, supra note 8, § 9. OSCE/ODIHR, *Guidelines for Review of Legislation Pertaining to Religion or Belief*, (2004), available at <http://www.osce.org/odihr/13993> (adopted in June 2004 by the Venice Commission and welcomed by the OSCE Parliamentary Assembly at its annual session in July 2004).

16. See *Venice Commission Opinion*, supra note 8, ¶ 8; *Minyust wynosyt na hromadske obhovorennia proekt novoi redaktsii Zakonu pro svobodu sovisti ta relihiyni orhanizatsii* [Ministry of Justice takes on public discussion on the draft of the new Law on Freedom of Conscience and Religious Organizations], URYADOVYI PORTAL [GOVERNMENT PORTAL], (July 4, 2006, 5:25 PM), <http://bit.ly/GYHBKG>.

17. Today, the Council unites nineteen major religious denominations in Ukraine, which embody more than 90% of religious organizations in the country. All-Ukrainian Council of Churches and Religious Organizations ("AUCCRO"), *List of Members of the Ukrainian Council of Churches and Religious Organizations*, VSEUKRAYINSKA RADA TSERKOV I RELIHIYNYKH ORHANIZATSIY [ALL-UKRAINIAN COUNCIL OF CHURCHES AND RELIGIOUS ORGANIZATIONS] (July 19, 2011), <http://bit.ly/xXcNuh>; AUCCRO, *Information about the Council*, VSEUKRAYINSKA RADA TSERKOV I RELIHIYNYKH ORHANIZATSIY [ALL-UKRAINIAN COUNCIL OF CHURCHES AND RELIGIOUS ORGANIZATIONS] (July 19, 2011), <http://bit.ly/GAiJ97>.

18. See *Statement of the Holy Synod of the Ukrainian Orthodox Church of the Kyivan Patriarchate on the New Draft Law of Ukraine "On Freedom of Conscience and Religious Organizations"*, (Dec. 20, 2006), available at http://risu.org.ua/ua/index/resources/church_doc/uockp_doc/34106/.

19. According to the Constitution of Ukraine, the Cabinet of Ministers along with the President and Members of the Parliament are entitled to introduce law drafts to the Parliament (Art. 93). The prerequisite for such draft law introduction to the Parliament is its consideration and

authorities “to carry on consultations with regard to elaboration of the draft law.”²⁰ The reasons offered in support of this recommendation were rather vague, as no church proposed specific amendments to or criticized specific provisions of the proposed draft.²¹ It seems that the principal point of concern for the Council’s members was their conviction that it was an inopportune time for introduction and consideration of the bill.²² Consequently, the draft law has never been considered by the Cabinet of Ministers, let alone the Parliament of Ukraine.

Meanwhile, the European Court of Human Rights (“ECtHR”) delivered its first decision on a case brought before the Court by a Ukrainian religious organization.²³ In its judgment, the Court referred to the Explanatory Memorandum²⁴ and held that it was principally the shortcomings of the Ukrainian legislation on religious freedom that led the Ukrainian courts to violate the Convention.²⁵ The Ukrainian political leadership at that time, which was immersed in a perpetual political tug of war between the President and the Prime Minister, did not react to the judgment. Although the Law of Ukraine “On the Enforcement of Judgements and Application of Case Law of the European Court of Human Rights” sets forth a special provision that obligates the Government to draft legislative amendments in response to a decision of the ECtHR against Ukraine when the judgment stems from legislative

approval by the Cabinet on its meeting.

20. See Letter of the All-Ukrainian Council of Churches and Religious Organizations to the President, Prime Minister, and the Head of the Parliament (Nov. 24, 2006) (on file with author) (this quote was translated by the author from its original Ukrainian).

21. See *id.*

22. According to the Head of the Board of the Institute for Religious Freedom, Mr. Oleksand Zayets (who was involved in preparing and holding the AUCRO meeting of November 24, 2006), the draft law “has not been submitted to the Cabinet of Ministers for approval and further introduction to the Parliament because the members of AUCCRO had not reached consensus concerning some fundamental provisions of the draft law.” See O Zayets, “Vseukrayinska Rada Tserkov i relihiynyh orhanizatsiy ta yiyi pozysiya vidnosno zakonodavchykh initsiatyv u relihiyniy sferi” [*The All-Ukrainian Council of Churches and Religious Organizations and its Stance on legislative initiatives in the religious sphere*], Instytut Relihiynoyi Svobody [INSTITUTE OF RELIGIOUS FREEDOM] (May 19, 2008, 23:24), http://www.irs.in.ua/index.php?option=com_content&view=article&id=179%3A1&catid=37%3AArt&Itemid=64&lang=uk.

23. *Svato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 (June 14, 2007 Eur. Ct. H.R.).

24. See *Explanatory Memorandum*, *supra* note 2.

25. See *Svato-Mykhaylivska Parafiya*, App. No. 7703/01, §§ 87, 152.

defects,²⁶ the pledge of the ruling coalition “to redraft and adopt a new version of the Law on Freedom of Conscience and Religious Organization,”²⁷ made public at the end of 2007, brought no visible consequences until the beginning of 2010 when the President and the Cabinet changed.

It is worth mentioning that after some postponement, the drafting of the amendments to the Law was resumed by the State Committee on Nationalities and Religious Matters²⁸ in 2009 and then again in 2010. Pursuant to the presidential commission, the rewritten draft law (clearly based on the 2006 draft) was formally submitted in November 2010 by the State Committee to the Cabinet of Ministers for consideration and approval.²⁹

The All-Ukrainian Council of Churches and Religious Organizations immediately reacted. In its letter dated November 5, 2010, the Council reiterated its stance that the amendments to the Law are possible and advisable only if consensus is reached among all religious organizations in Ukraine, which has not been the case, as evidenced by the Council’s opinion of the amendments.³⁰ Moreover, the Council insisted that the Concept of State-Church Relations³¹ should pass the Parliament first.³²

26. Law of Ukraine “On the Enforcement of the Judgments and Application of the Case Law of the European Court of Human Rights,” Feb. 23, 2006, No. 3477-IV, arts. 13–15, *available at* <http://zakon1.rada.gov.ua/laws/show/3477-15>.

27. *See* Agreement Establishing the Coalition of the Democratic Forces, 6th Verkhovna Rada (Parliament of Ukraine), Dec. 12, 2007, HOLOS UKRAYINY [UKRAINIAN VOICE] No. 223–24, sec. 2.2, art. 1.4.

28. Article 30 of the Law provides for the creation of a special state authority on religious matters designed to ensure implementation of state policy on religion and church. *See* Law of Ukraine “On Freedom of Conscience and Religious Organizations,” Apr. 23, 1991, No. 987-XII, art. 30, *available at* <http://zakon2.rada.gov.ua/laws/show/987-12>. The name and status of this special state authority has been modified continuously; currently it is the Ministry of Culture of Ukraine, which is invested with the functions of a special state authority on religious matters.

29. Draft of Law of Ukraine “On Freedom of Conscience and Religious Organizations,” Nov. 24, 2010 [hereinafter *2010 Draft*], *available at* <http://bit.ly/wE7FUq>.

30. *See, e.g.*, Letter from Bishop Markiyak Trofimyak, on behalf of the All-Ukrainian Council of Churches and Religious Organizations (AUCCRO), to the President of Ukraine (Nov. 5, 2010) (on file with author).

31. *See* Razumkov Centre, *Concept of Relations Between Church and State in Ukraine*, NATIONAL SECURITY AND DEFENCE, NO. 8/92 (2007), *available at* www.uceps.org/ukr/files/category_journal/NSD92_ukr.pdf. Note that the Concept of Relations Between Church and State is a document prepared by the Razumkov Centre, an influential Ukrainian think tank, in cooperation with representatives of some of the major Ukrainian churches. The Concept is promoted by AUCCRO as an advisable first step for legislative reform in the area of religious freedom.

32. *See* Letter from Bishop Markiyak Trofimyak, *supra* note 30.

II. RECENT DEVELOPMENTS

It should be kept in mind that in 2010, a major change occurred in the Ukrainian political landscape. The election of the opposition leader at that time, President Victor Yanukovich, put an end to the ongoing rivalry between his predecessor, President Viktor Yushchenko, and then Prime-Minister Yulia Tymoshenko.³³ The rivalry that had been ongoing since the constitutional reform of 2006³⁴ transformed Ukraine into a parliamentary-presidential republic by empowering the Parliament to form the Cabinet instead of allowing the President to do so. Moreover, a judgment of the Constitutional Court of Ukraine on September 30, 2010, declared the constitutional amendments of 2004 null and void.³⁵ Consequently, the President *de jure* gathered a mass of the power which had previously only belonged to him *de facto* due to his loyal majority in the Parliament. Thereafter, the ability of the incumbent President to push legislation through Parliament skyrocketed in comparison with that of his predecessor, which is the principal reason why the events described below disturbed the Ukrainian religious community.

On December 9, 2010, the President launched an administrative reform and issued a decree that among other things terminated the State Committee on Nationalities and Religious Matters.³⁶ This move took Ukrainian religious organizations by surprise. Naturally, since they had built up and fostered close relationships with that committee for years,

33. Victor Yanukovich was sworn in on February 25, 2010. See *Background Note: Ukraine*, U.S. DEPARTMENT OF STATE (Jan. 4, 2012), <http://www.state.gov/r/pa/ei/bgn/3211.htm>. Soon after, the Ukrainian Parliament passed a vote of no confidence in the government of Yuliya Tymoshenko, the principal rival of Mr. Yanukovich in the presidential election, and on March 12, 2010, approved the new Cabinet chaired by Yanukovich's right-hand man, Mykola Azarov. See *id.*; Yuri Kulikov and Natalya Zinets, *Ukraine's Government Falls in No-Confidence Vote*, REUTERS (Mar. 3, 2010), <http://reut.rs/pBCJZv>.

34. The Constitutional reform was approved on December 8, 2004, as a core component of the package deal aimed at peaceful settlement of the political crisis known as the "Orange Revolution." See Law of Ukraine "Amendments to the Constitution of Ukraine," Dec. 8, 2004, No. 2222-IV. English translation is available at <http://bit.ly/zlZweS>. Most of the constitutional amendments came into effect on January 1, 2006, and the rest became operative on May 25, 2006, when the new parliament of Ukraine was sworn in. See *id.*

35. Constitutional Court of Ukraine, No. 1-45/2010, Sept. 30, 2010. English translation of the judgment is available at <http://bit.ly/yDcP6s>.

36. Ukaz Presydynta Ukrayiny No. 1085/2010 [Decree of the President of Ukraine No. 1085/2010], 94 OFITSIYNYI VISNYK UKRAYINY [OFFICIAL GAZETTE OF UKRAINE] 15, art. 3334, available at <http://www.president.gov.ua/documents/12584.html>.

their perceptions of the termination of the Committee were candidly negative.³⁷

Undeterred, the President pressed forward. On January 12, 2011, he approved³⁸ an updated Action Plan for the Honouring of Obligations and Commitments of Ukraine to the Council of Europe.³⁹ The Action Plan, among other things, ordered the Ministry of Culture⁴⁰ and the Ministry of Justice to submit a draft of the amendments to the Law to the Cabinet of Ministers before February 1, 2011, for consideration, approval, and introduction to the Parliament.⁴¹

In response, eight major Ukrainian religious denominations⁴² requested a public hearing on the matter.⁴³ According to Ukrainian legislation, a hearing of this type is obligatory if requested by at least three civil society institutions.⁴⁴ On February 17, 2011, members of

37. See Petition of AUCCRO to the President of Ukraine (Dec. 14, 2010) (on file with author).

38. The approval of the updated Action Plan was accomplished through Presidential Decree. See Ukaz Presydynta Ukrayiny No. 24/2011 [Decree of the President of Ukraine No. 24/2011], 4 OFITSIYNYI VISNYK UKRAYINY [OFFICIAL GAZETTE OF UKRAINE] 810, art. 197, (2011), available at <http://www.president.gov.ua/ru/documents/12867.html>. This decree was, in fact, a re-approval of Yushenko's Action Plan that was approved on January 20, 2006, with the exception of some obligations that had already been fulfilled. See *supra* note 6 and accompanying text.

39. Action Plan for the Honouring of Obligations and Commitments of Ukraine to the Council of Europe, (2011) [hereinafter *2011 Action Plan*], available at <http://www.president.gov.ua/documents/12867.html>.

40. Presidential Decree No. 1085/2010 indicates that the responsibility of the State Committee on Nationalities and Religious Matters to implement national policy in the area of religion should be handed over to the newly-created Ministry of Culture of Ukraine. See Ukaz Presydynta Ukrayiny No. 1085/2010, *supra* note 36.

41. See *2011 Action Plan*, *supra* note 39, § 2(6).

42. These denominations included the Ukrainian Orthodox Church (affiliated with the Moscow Patriarchate), the Ukrainian Orthodox Church of the Kyivan Patriarchate, the Ukrainian Greek-Catholic Church, the All-Ukrainian Union of Churches of Evangelical Christian-Baptists, the All-Ukraine Union of Christians of the Evangelical Faith-Pentecostals, the Ukrainian Christian Evangelical Church, the Union of Jewish Religious Organizations of Ukraine, and the Spiritual Direction of the Muslims of Ukraine. See *Popravky do Zakonodavstva pro Svobodu Sovisti Povynni Proty Publichne Hromadske Obhovorenia – Zvernenia Konfessiy* [Denominations Appeal: Amendments to the Legislation on Freedom of Conscience Must be Discussed Publicly], INSTYTUT RELIHIYNOYI SVOBODY [INSTITUTE OF RELIGIOUS FREEDOM], <http://bit.ly/yCGyFG> (last updated Feb. 2, 2011).

43. The eight Ukrainian denominations sent the request to the Ministry of Culture of Ukraine and the Ministry of Justice of Ukraine on February 2, 2011. See Letter from Eight Major Ukrainian Denominations to the Minister of Culture of Ukraine (Feb. 2, 2011) (on file with author).

44. See Regulation of the Cabinet of Ministers of Ukraine, November 3, 2010, No. 996, Pro Zabezpechenia Uchasti Hromadskosti u Formuvanni ta Realizatsii Derzhavnoyi Polityky [On Ensuring Public Participation in Policy Making and Policy Implementation], URIADOVYI KURYER [GOVERNMENT COURIER] 211, ¶ 7, available at <http://zakon2.rada.gov.ua/laws/show/996-2010->

AUCCRO held a meeting with the Minister of Culture of Ukraine and other high-level officials to discuss recent legislative developments in the sphere of religious freedom.⁴⁵ The Council's representatives reiterated their view that the amendments to the Law are unseasonable and, in any case, should be improved in close cooperation with the Council.⁴⁶ In response to this request, the Minister of Culture proposed to establish a special group consisting of the relevant officials and representatives of religious organizations to aid in drafting the amendments to the Law.⁴⁷ Yet the status of this February meeting remained unclear from a legal standpoint because it did not meet the procedural requirements to be considered a formal public hearing sought by the churches as they are prescribed by law.⁴⁸ In particular, the Ministry did not publish a public hearing announcement on its official web-site as required by law.⁴⁹

However, this February meeting did result in the establishment of a new drafting (or, rather, "improving") team for preparation of legislative drafts in the sphere of religious freedom. This team held its first meeting on March 16, 2011.⁵⁰ Predictably, nothing conceptually new was proposed during this meeting. Further, at this meeting, a representative from the Ukrainian Greek-Catholic Church claimed the church was entitled not only to recovery of religious buildings and premises, but also to restitution of, or compensation for, all former church property nationalized by the state.⁵¹ The UOC-KP's representative, for the umpteenth time, also cautioned against the advancement of the reworded draft law.⁵² Finally, the team members agreed to prepare and present

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45. See *U Minkultury vidbulas zustrich predstavnykiv vlady z Vseukrayinskoyu Radoyu Tserkov* [Government Representatives and the All-Ukrainian Council of Churches Met at the Ministry of Culture], INSTYTUT RELIHIYNOYI SVOBODY [INSTITUTE OF RELIGIOUS FREEDOM] (Feb. 18, 2011, 5:12 PM), <http://bit.ly/wz2QUO>.

46. See *id.*

47. *Id.*

48. Procedural requirements for a public hearing are set forth in the Rules of Holding Public Hearings. See Regulation of the Cabinet of Ministers of Ukraine, November 3, 2010, No. 996, *supra* note 44.

49. *Id.* § 14.

50. *Pry Minkultury stvorena Robocha hrupa z pidhotovky zakonoproektiv u haluzi svobody sovisti* [The Ministry of Culture Established the Working Group to Prepare the Draft Laws in the Area of Freedom of Conscience], INSTYTUT RELIHIYNOYI SVOBODY [INSTITUTE OF RELIGIOUS FREEDOM] (Mar. 22, 2011, 11:54 AM), <http://bit.ly/xPopYy>.

51. *Id.*

52. *Id.*

their views on the proposed amendments to the religious freedom legislation at the next team meeting.⁵³

After this initial meeting, the drafting team met on April 8, 2011,⁵⁴ and again on June 10, 2011.⁵⁵ Quite predictably, the team reached a conclusion that it was inadvisable to push forward with the rewording of the Law. It proposed to focus legislative efforts on “pinpoint” amendments to sectoral legislation.⁵⁶ At the meeting of the AUCCRO on July 19, 2011, the First Deputy Minister of Culture of Ukraine, Mr. Yuriy Bohutskiy, informed the Council that the drafting team had concluded that Ukraine’s obligations to the Council of Europe do not require substantial rewording of the Law.⁵⁷ There has been no progress since then regarding the draft law.⁵⁸

Meanwhile, AUCCRO was granted a long-awaited meeting with the President of Ukraine on April 21, 2011.⁵⁹ Before the meeting, the Council approved a petition to the President that insisted on abandoning the substantial amendments to the Law.⁶⁰ During his meeting with religious leaders, the President promised to take into account the Council’s position on amending the Law.⁶¹ However, in his annual

53. *See id.*

54. *See Robocha hrupa pry Minkultury vyroblyla pidkhdid do pokraschenia zakonodavstva u haluzi svobody virospovidania* [The Working Group at the Ministry of Culture Has Developed an Approach to Improving Legislation on Religious Freedom], INSTYTUT RELIHIYNOYI SVOBODY [Institute of Religious Freedom] (Apr. 11, 2011, 6:17 PM), <http://bit.ly/waDhQ>.

55. *See Robocha hrupa pry Minkultury hotuye rekomendatzii schodo zakonodavchoho zabezpechenia svobody virospovidania* [The Working Group at the Ministry of Culture Makes Legislation Recommendation in Support of Religious Freedom], INSTYTUT RELIHIYNOYI SVOBODY [INSTITUTE OF RELIGIOUS FREEDOM] (June 14, 2011, 4:42 PM), <http://bit.ly/yJe17X>.

56. *See Robocha hrupa pry Minkultury vyroblyla pidkhdid do pokraschenia zakonodavstva u haluzi svobody virospovidania*, *supra* note 54.

57. *See Vseukrayinska Rada Tserkov zaklykaye Presydena ne pospishaty z novoyu redaktsiyeyu Zakonu pro svobodu sovisti* [All-Ukrainian Council of Churches Urges the President Not to Hurry with Amendments to the Law on Freedom of Conscience], INSTITUTE RELIHIYNOYI SVOBODY [INSTITUTE OF RELIGIOUS FREEDOM] (July 21, 2011, 4:33 PM), <http://bit.ly/zHOqVR>.

58. There has been no progress on the draft law as of the completion of this Article.

59. *See Presyden Yanukovych hotovyi vrakhuvaty zauvazhenia Rady Tserkov schodo zminy zakonodavstva pro svobodu sovisti* [President Yanukovych Is Ready to Take into Consideration the Comments of the Council of Churches Concerning Amendments to the Law on Freedom of Conscience], INSTYTUT RELIHIYNOYI SVOBODY [INSTITUTE OF RELIGIOUS FREEDOM] (Apr. 22, 2011, 11:25 AM), <http://bit.ly/z3cmOl>.

60. *See Zvernenia Vseukrayinskoyi Rady Tserkov do Presydena Ukrayiny Viktora Yanukovycha* [Address of the All-Ukrainian Council of Churches to the President of Ukraine Viktor Yanukovych], INSTYTUT RELIHIYNOYI SVOBODY [INSTITUTE OF RELIGIOUS FREEDOM] (Apr. 21, 2011, 2:33 PM), <http://bit.ly/wXxofv>.

61. *See Presyden Yanukovych hotovyi*, *supra* note 59.

address to the Parliament, the President opined that adoption of a substantially reworded version of the Law was both reasonable and advisable.⁶²

The 2011 Annual Report of the Ukrainian Ombudsman, which was publicized at the beginning of 2012, echoes the President's stance. The Ombudsman reached the conclusion that "[h]armonization of the domestic model of state-church relations with European standards requires the urgent passage of the Concept of State-Confessional Relations in Ukraine and a new version of the Law of Ukraine 'On the Freedom of Conscience and Religious Organizations.'"⁶³

However, all things considered, it is obvious now that the blitzkrieg ordered by the President in his Decree on January 12, 2011, which approved the 2011 Action Plan,⁶⁴ to finalize and introduce the amendment of the Law to Parliament has failed. This failure has led to a loss of momentum in drafting the Law, and it seems that the draft law has been shelved again.

III. UKRAINIAN CHURCHES VS. THE COUNCIL OF EUROPE

Because the draft law has not even been officially resubmitted to the Cabinet of Ministers yet, it is hardly reasonable to discuss the draft's provisions in detail in this Article. Without a doubt the draft law will be subject to further updating before being officially resubmitted to the Cabinet of Ministers, if it is submitted at all.

Rather, it is enough to repeat that the draft law presented by the State Committee on Nationalities and Religious Matters in November 2010 was clearly based on the 2006 draft with some minor modifications. Some of these minor modifications implement recommendations of the Venice Commission,⁶⁵ while others clearly contradict them.⁶⁶ Therefore,

62. President Viktor Yanukovich, Annual Address to the Parliament of Ukraine: Modernization of Ukraine is our Strategic Choice, 43 (Apr. 7, 2011), available at http://www.president.gov.ua/docs/Poslannya_sborka.pdf.

63. See SHCHORICHNA DOPOVID UPOVNOVAZHENOGO VERKHOVNOI RADY UKRAINY Z PRAV LYUDYNY PRO STAN DOTRYMANNIA TA ZAKHYSTU PRAV I SVOBOD LYUDYNY V UKRAINY [THE ANNUAL REPORT OF THE OMBUDSMAN OF UKRAINE ON THE STATE OF ADHERENCE AND PROTECTION OF HUMAN RIGHTS IN UKRAINE] 123, § 4.3. "Freedom of religion and beliefs," (2011), available at <http://bit.ly/GUivym> (this quote was translated by the author from its original Ukrainian text).

64. See 2011 Action Plan, *supra* note 39.

65. See Venice Commission Opinion, *supra* note 8, §§ 22, 27, 30, 49 (outlining the Venice Commission's recommendations that have been implemented in the 2010 edition of the draft law).

66. Compare 2010 Draft, *supra* note 29, at art. 4(4) (banning "hostility and hate") with Law of Ukraine "On Freedom of Conscience and Religious Organizations," Apr. 23, 1991, No. 987-XII,

the discussion below does not deal with the wording of the draft law, but instead focuses on the apparent deadlock between Ukraine's obligations to the Council of Europe and the misgivings of the religious community about any essential legislative change in the realm of religious freedom.

At first glance it seems quite absurd that the Council of Europe urges one of its member states to amend national legislation against the will of the major stakeholders, the majority churches. However, this is a delusive impression. One should keep in mind that human rights historically emerged as, and substantially are first and foremost, rights of individuals and minorities vis-à-vis the power of sovereign and the majority's dictate.

However, seventy years of a government aggressively imposing atheism on its people under the former Soviet Union⁶⁷ has skewed perceptions of religious freedom in Ukraine. As a result of the influence of communism, religious freedom has been understood first and foremost as a right to worship and disseminate one's beliefs without state intervention or hindrance. The painful persecution of all believers regardless of their confessional affiliation and aggressive state-sponsored secularism emphasized the importance of the freedom-from-state component of religious freedom and bedimmed the freedom-from-religious-majority-domination aspect of this fundamental human right.

As a result of this narrow perception of religious freedom, the major religious institutions have been given free rein to trample the rights of minority religions. Some signs of Ukrainian religious majority stakeholders defying minority and individual rights are obvious. For instance, all major Ukrainian confessions remain adamant that the minimum number of natural persons required for incorporation of a religious community must not be decreased in order to match the minimum number of a non-religious NGO founders prescribed by law.⁶⁸ The rationale for such position is unclear, but it may be based on tacit

art. 4, indent 2, available at <http://zakon2.rada.gov.ua/laws/show/987-12> (prohibiting promotion of "hostility and intolerance") and 2006 Draft, *supra* note 9, at art. 4(4) (saying substantially the same thing as the current law). Another example of how the 2010 Draft worsens the wording of the 2006 Draft is that the 2010 Draft restricts the right to conscientious objection to religious grounds only while the draft 2006 envisaged such a right for secular conscientious objectors. Compare 2010 Draft, *supra* note 29, at art. 4(5) with 2006 Draft, *supra* note 9, at art. 4(5).

67. See, e.g., Paul Froese, *Forced Secularization in Soviet Russia: Why an Atheistic Monopoly Failed*, 43 J. FOR SCI. STUDY RELIGION 35, 35 (2004), available at <http://www.thedivineconspiracy.org/Z3211C.pdf>.

68. See 2006 Draft, *supra* note 9, at art. 9(2) (the footnote attached to this Article explains the position of the Ukrainian Churches on this matter).

desire to impede new or non-conventional religious movements from establishing themselves in Ukraine.⁶⁹ Another example is the major churches' indifference, at best, to secular conscientious objectors' rights.⁷⁰ And yet another illustration is that the major churches have proposed a prohibition against allowing the same person to create more than one religious entity,⁷¹ although this proposal was excluded from the last draft law edition.⁷²

Ironically, it was not civil servants but, rather, representatives from the major Ukrainian churches and academics who were the principal drafters of the draft law of 2006.⁷³ Therefore, it is even more intriguing why the majority churches' leadership did not back the draft and have been doing their best to block the introduction of the draft law to the legislature, let alone its passage by the Parliament.⁷⁴

Their opposition seems even more surprising considering that AUCCRO has reiterated several times that, overall, it views the movement to improve the law on religious freedom and the draft positively.⁷⁵ It should be noted that the Council's ambition that the Concept of State-Church Relations⁷⁶ pass the Parliament first elucidates nothing because the Concept is in fact a soft law, which has no provisions capable to insure its implementation, particularly it contains no imperative norms or sanctions for its infringement. In Ukraine, soft

69. This surmise is implicitly corroborated by the complex first-time registration procedure for religious organizations that practice "foreign religions not represented in Ukraine," which was inserted in the draft law at the request of religious organizations and criticized by the Venice Commission. See *Venice Commission Opinion*, *supra* note 8, ¶ 24.

70. Currently, Ukrainian conscientious objectors enjoy the right to non-military service only if they tender evidence that they belong to one of the religious organizations that ban military service. The exhaustive list of such organizations is approved by government regulation. See *On Approval of the Application of the Law of Ukraine "On Alternative (Civilian) Service," Cabinet of Ministers of Ukraine Resolution*, Nov. 10, 1999, No. 2066, available at <http://zakon2.rada.gov.ua/laws/show/2066-99-%D0%BF>.

71. See *2006 Draft*, *supra* note 9, at arts. 9(3), 11(5).

72. See *2010 Draft*, *supra* note 29, at arts. 3–5.

73. The drafting team established by the Minister of Justice of Ukraine in 2006 included representatives of the Ukrainian Orthodox Church (affiliated with the Moscow Patriarchate), the Ukrainian Orthodox Church of the Kyivan Patriarchate, the Ukrainian Greek-Catholic Church, the Roman Catholic Church, the All-Ukrainian Union of Churches of Evangelical Christian-Baptists, the Ukrainian Union Conference of Seventh-day Adventists, the Union of Jewish Religious Organizations of Ukraine, and the Spiritual Direction of the Muslims of Crimea. See *Order of the Ministry of Justice of Ukraine*, Apr. 7, 2006, No. 328/7 (on file with author).

74. See, e.g., *supra* note 20 and accompanying text.

75. See, e.g., Letter from the All-Ukrainian Council of Churches and Religious Organizations to President Victor Yuschenko (June 2, 2006) (on file with author).

76. See *supra* note 31.

law without imperative precepts, even if approved by the legislature, is little more than weasel words.⁷⁷ Furthermore, the clerical critics of the draft could simply bring the provisions of the draft law into compliance with the principles of the Concept of State-Church Relations, if the draft law contradicts the Concept from their point of view. However, this idea has never been even discussed by the AUCCRO.

It is also suspicious that the majority religious leaders are reluctant to advance the draft law, as evidenced by their making very few specific remarks, comments, or proposals to the draft. The Ukrainian Orthodox Church that is affiliated with Moscow Patriarchate, for instance, once criticized proposed rules for establishment of local religious associations (unions of religious organizations) as being restrictive of autonomy of religious organizations and contradicting the traditional structure of the Orthodox Church.⁷⁸ The Ukrainian Orthodox Church of the Kyivan Patriarchate also opposes granting legal entity status to religious unions, as required by the Council of Europe, because the Kyivan Patriarchate fears that such a change as envisaged by the draft law would lead to the Moscow Patriarchate taking over its assets.⁷⁹ However, the logical connection between the proposed legislative amendments and possible property seizure remains unclear.

Overall, it seems that five years would be enough for deliberating over and coming to a consensus on the 20-page draft law if Ukrainian religious leaders genuinely sought such development. But apparently this has not been the case as the call for deliberation on the draft law, which sounded reasonable and persuasive five years ago, does not sound reasonable anymore.

IV. DOMESTIC CASE LAW AS A BENCHMARK

The last question to be addressed in this Article is how Ukrainian domestic case law on religious matters prompts reform of religious

77. Compare Law of Ukraine "On the Concept of the National Program for Adaptation of Legislation of Ukraine to European Union Legislation," Nov. 21, 2002, No. 228-IV, available at <http://zakon1.rada.gov.ua/laws/show/228-15>, with Law of Ukraine "On the National Program for Adaptation of Legislation of Ukraine to the European Union Legislation," Mar. 18, 2004, No. 1629-IV, available at <http://zakon1.rada.gov.ua/laws/show/1629-15>. This comparison will show several essential differences between the Concept and the Program adopted in execution of the Concept.

78. See Letter from Metropolitan Volodymyr, Head of the UOC, to the then Minister of Justice of Ukraine, Mr. Holovaty, No. 900 (Dec. 26, 2006) (on file with author).

79. See, e.g., Petition to the President, Victor Yanukovich (Jan. 23, 2011), available at <http://www.cerkva.info/uk/archsobor/1219-zvern-prezidentu.html> (approved by the Bishops' Council of the UOC-KP on Jan. 23, 2011).

legislation. If the relevant legislation is coherent enough to not generate excessive litigation and the relevant case law is coherent enough that different courts deliver similar judgements in similar cases, then there is no urgency to reform the law, and perhaps there is no need to reform it at all.

The findings of the Council of Europe summarized in the Explanatory Memo⁸⁰ are rather theoretical and deductive and not grounded on statistical data, domestic case law analysis, or field study. If the domestic legislation is clear, coherent, and predictable enough and does not generate conflicts between religious organizations, why should Ukraine risk disturbing religious harmony through law reform resulting exclusively from slavish adherence to the Council of Europe's recommendations?

The UOC-KP has already criticized the Council of Europe for not consulting with the religious community and having a vague understanding of what happens on the ground in Ukraine in the religious realm.⁸¹

However, as it will be shown below, the Council of Europe's conclusions are indeed supported by domestic case law analysis, which evidences that the current Law "On the Freedom of Conscience and Religious Organizations" is neither clear nor coherent nor predictable enough, and that these internal defects *per se* generate conflicts between religious organizations on the one hand and between religious organizations and central and local governments on the other. Thus, it seems that it is the internal shortcomings of the Law that overload the courts with "religious" cases and that should prompt revision of the Law more than the Council of Europe's recommendations.

Statistics show that annually hundreds of religious organizations have been involved in legal actions as plaintiffs or defendants during the last four years since the Single State Register of Judicial Decisions (SSRJD) was set up in Ukraine.⁸² The SSRJD contains at least 560 legal actions that were brought by or against religious organizations during the

80. See *Explanatory Memorandum*, *supra* note 2.

81. In its Petition to the President Victor Yanukovich the Bishops' Council of the UOC-KP stated that the "[Parliamentary Assembly of the Council of Europe]'s recommendations do not take into consideration realities of the state-church and inter-confessional relationships in Ukraine." *Petition to the President*, *supra* note 79.

82. The Single State Register of Judicial Decisions is a free, government-administered, electronic database of Ukrainian court decisions established pursuant to the Law of Ukraine "On Access to Judicial Decisions," Dec. 22, 2005, No. 3262-IV, available at <http://zakon1.rada.gov.ua/laws/show/3262-15>.

2007 to 2010 period.⁸³ An independent assessment of the share of judicial decisions accessible through the SSRJD shows that the portion of cases posted to SSRJD is less than one-fifth of the total decisions delivered by Ukrainian courts.⁸⁴ Therefore, one may estimate that the Ukrainian domestic courts' annual docket of "religious cases" is about 700 cases. Taking into account that there are about 35,000 religious organizations that have been registered in Ukraine⁸⁵ so far and that there is a substantial amount of litigation between religious organizations, one may estimate that at least one out of every fifty religious organizations registered in Ukraine is involved in litigation annually. Keeping in mind that religious organizations are generally reluctant to litigate and appear in court, the number of cases which religious organizations participate in is remarkable and seems to imply that there are substantial legislative shortcomings.

The scope of this Article does not allow for extensive analysis of special groups of judicial decisions in religious cases. Yet, even the following brief consideration of the religious cases docket shows the principal weaknesses of the current Law "On the Freedom of Conscience and Religious Organizations" and those that generate the most controversies such that they lead parties to court. They are as follows:

1. There is a lack of an effective and unambiguous mechanism for registration of religious organizations, particularly those not affiliated with existing institutionalized churches, such that a believer's freedom of association with others is not ensured in fact. It seems that much of the wording of the relevant provisions of the Law is too declarative and not precise enough.⁸⁶ Consequently, the discretion of the registering authorities is too wide.⁸⁷

83. The Single State Register of Judicial Decisions is accessible on-line at: <http://www.reyestr.court.gov.ua> (only in Ukrainian).

84. According to the report of the project "From Accessible Judgments to the Rule of Law," which was carried out by the Eastern-Ukrainian Center for Civic Initiatives in 2006–2009, less than a fifth of the total number of Ukrainian judicial decisions have been registered at, and thus are accessible through, the SSRJD. See *Barometr dostupnosti sudovykh rishen* [*Barometer of Judicial Decisions Accessibility*], PRAVOVYI TIZHDEN [LEGAL WEEKLY] No. 35(161), Sept. 1, 2009, available at <http://www.legalweekly.com.ua/article/?uid=1360> (in Ukrainian).

85. See U.S. DEP'T OF STATE, *July–December, 2010 International Religious Freedom Report, "Ukraine,"* (Sept. 13, 2011), <http://www.state.gov/documents/organization/171728.pdf> (indicating that as of the end of 2010, more than 33,000 religious organizations had been registered in Ukraine). More precise and detailed statistics might be found at: Religious Information Service of Ukraine, *Religious Organizations in Ukraine (as of January 1, 2011)*, RISU, <http://risu.org.ua/ua/index/resourses/statistics/ukr2011>.

86. See, e.g., Law of Ukraine "On Freedom of Conscience and Religious Organizations,"

2. There is a lack of transparent and effective provisions that perspicuously guide an authority's actions in cases where there is a conflict within a divided religious community, while still allowing preservation of religious autonomy.⁸⁸

3. There is a lack of clarity as to the right of registered religious communities established by natural persons to freely shift their affiliation from one religious leadership to another. This is quite an urgent problem in Ukraine where at least three Ukrainian Orthodox Churches compete for believers and church property.⁸⁹ The case law evidences that sometimes courts uphold such a right even contrary to a religious community's charter provisions,⁹⁰ while other courts have decided that a

Apr. 23, 1991, No. 987-XII, arts. 8(2), 15, 17(2), 17(6), 21(3), 22(3), 23(2), 26, 29, 31, *available at* <http://zakon2.rada.gov.ua/laws/show/987-12>.

87. *See, e.g.*, Kyiv Circuit Administrative Court, July 19, 2010, No. 2a-7985/10/2670, *available at* <http://www.reyestr.court.gov.ua/Review/10524890> (upholding the rejection of the registration application of a religious organization, and thus denying it legal entity status, based merely on the presence of the word "Center" in the name of the organization); Kyiv Circuit Administrative Court, Sept. 6, 2010, No. 2a-10279/10/2670, *available at* <http://www.reyestr.court.gov.ua/Review/11260364> (upholding rejection of the registration of a religious organization, and thus denying legal entity status, because the founders wanted to register an independent Christian religious community that was not affiliated with any registered Christian denomination); Kyiv Appeal Administrative Court, Nov. 9, 2010, No. 2a-10279/10/2670, *available at* <http://www.reyestr.court.gov.ua/Review/12333376> (overturning previous judgment in the same case); Higher Administrative Court of Ukraine, June 27, 2007, No. K-3177/06, *available at* <http://www.reyestr.court.gov.ua/Review/858427> (upholding, as the inferior courts did, the rejection of the registration of a religious community that declared canonical affiliation with the unregistered Orthodox Church).

88. *See, e.g.*, Svato-Mykhaylivska Parafiya v. Ukraine, App. No. 77703/01, §§ 50–81 (June 14, 2007 Eur. Ct. H.R.) (describing the Svato-Mykhaylivska Parafia cases from the national courts); Higher Administrative Court, July 4, 2007, No. K-1737/06, *available at* <http://www.reyestr.court.gov.ua/Review/1083181> (outlining the line of cases related to the St. Resurrection Parish of Ostroh City of Rivnenska Oblast and the judgment of the Rivne City Court of October 26, 2006); Appellate Court of Rivnenska Oblast, Nov. 30, 2006, No. 22–1239, *available at* <http://www.reyestr.court.gov.ua/Review/325074> (outlining and overruling the decision of the Ostroh District Court, Sept. 22, 2006); Appellate Court of Rivnenska Oblast, Dec. 21, 2006, No. 22-ac-478, *available at* <http://www.reyestr.court.gov.ua/Review/374630>.

89. Namely, the Ukrainian Orthodox Church affiliated with the Moscow Patriarchate, the Ukrainian Orthodox Church of the Kyivan Patriarchate, and the Ukrainian Autocephalous Orthodox Church. *See, e.g.*, Joseph R. Gregory, *Ukraine: Christians in Conflict*, FIRST THINGS, March 1997, at 24–27, *available at* <http://bit.ly/GUYV46>.

90. *See, e.g.*, Kaniv Town-and-District Court, May 7, 2009, No. 2-541/2009, *available at* <http://www.reyestr.court.gov.ua/Review/6206376> (finding that a religious community's charter provision that restricted the right to shift canonical affiliation was null and void); Higher Administrative Court of Ukraine, June 10, 2009, K-20583/08,K-21717/08, *available at* <http://www.reyestr.court.gov.ua/Review/3859899> (outlining and overruling the decision of the Economic Court of Lviv Oblast, Nov. 20, 2007, and the decision of the Lviv Appellate Administrative Court, Sept. 9, 2008, and reinstating provisions of two orders of the Head of the Lviv

community's charter provisions that envisage a requirement of some form of assent from its spiritual leadership to change of canonical affiliation should prevail.⁹¹

4. There is confusion surrounding the provisions on rotating worship in the same church or temple, as envisaged by the Article 17, indent 3 of the Law.⁹² Some churches like the UOC regard other confessions as schismatic or heretical and thus perceive rotating worship as repeated profanation of their halidom. Rotating worship was justified as a temporary provision at the beginning and middle of the 1990s when there was an acute shortage of temples that resulted from a dramatic increase of religious communities at the time.⁹³ Currently, however, rotating worship merely generates unnecessary conflicts between religious communities, which have had enough time to build their own churches.⁹⁴

5. The provisions guiding the restitution of religious communities' former property that was nationalized by Soviet power are incredibly vague.⁹⁵ There are very broad and obscure instructions as to which religious community the specific property should be conveyed to if more than one community claims succession rights.⁹⁶ Moreover, the choice

Oblast State Administration under which a parish charter was amended and its affiliation changed).

91. See, e.g., Zaporizhzhya Circuit Administrative Court, Nov. 10, 2009, No. 2a-4453/09/0870, available at <http://www.reyestr.court.gov.ua/Review/6730648> (holding that a change in denomination affiliation is possible only with the approval of the religious leader of the religious union that the parish is currently affiliated with); Higher Administrative Court of Ukraine, Nov. 23, 2006, No. 4-390/05/06, available at <http://www.reyestr.court.gov.ua/Review/399424> (holding that the right to shift canonical affiliation that is set forth in law is not an absolute one and might be restricted by a religious community's charter).

92. See Law of Ukraine "On Freedom of Conscience and Religious Organizations," Apr. 23, 1991, No. 987-XII, art. 17, indent 3, available at <http://zakon2.rada.gov.ua/laws/show/987-12>.

93. According to the official statistics, the number of registered religious organizations almost tripled in Ukraine from 1985 (when there were 6,262 registered religious organizations) to 1995 (when there were 16,934 registered religious organizations), and increased almost four times from 1985 to 2000 (when there were 23,543 registered religious organizations). See Razumkov Centre, "RELIHIYA I VLADA V UKRAYINI: PROBLEMY VZAYEMOVIDNOSYN" [RELIGION AND AUTHORITIES IN UKRAINE: PROBLEMS OF RELATIONSHIPS] 4 (2011), available at <http://bit.ly/HboGZz>. On the other hand, the growth of religious organizations from 2007 to 2009 was only 2% annually. *Id.* at 3.

94. See, e.g., Rakhiv District Court of Zakarpatska Oblast, Feb. 15, 2010, No. 2-a-9/10, available at <http://jurportal.org/writ/11036239>; Higher Commercial Court of Ukraine, Mar. 15, 2007, No. 11/180, available at <http://www.reyestr.court.gov.ua/Review/504472>; Economic Court of Ivano-Frankivska Oblast, Aug. 12, 2008, No. 22/15, available at <http://www.reyestr.court.gov.ua/Review/1954442>.

95. For an in-depth discussion of the restitution matter see Thomas Mark Németh, *Restitution of Religious Property in Ukraine*, in RESTITUTIONS OF CHURCH PROPERTY 22 (Michaela Moravčíková ed., 2010).

96. See On the Procedure of Entry into Force of the Law of Ukraine "On Freedom of

between returning the ownership rights and transferring the property into a gratis rent remains at the full discretion of the municipal or local government with few exceptions.⁹⁷ Such legislative uncertainty has, quite predictably, prompted a remarkable volume of legal actions.⁹⁸

The legislative drawbacks outlined above are aggravated by the controversial operation of the judicial case law. For instance, in dealing with the case of the Orthodox St. Pokrovska Parish of Mostyska town, different courts have overturned the decisions of each other several times.⁹⁹ This example shows that even decisions of the Higher

Conscience and Religious Organizations,” Resolution of the Verkhovna Rada (Parliament) of Ukrainian Soviet Socialist Republic, Apr. 23, 1991, No. 988-XII, available at http://search.ligazakon.ua/l_doc2.nsf/link1/ed_1991_04_23/an/15/T098800.html#15. The Resolution was amended twice in 1991 and 1993. Since the new Constitution of Ukraine came into force in 1996, the legal force of Parliamentary resolutions became uncertain. Moreover, according to the Constitution of Ukraine the “legal regime of property” is regulated exclusively by the laws of Ukraine; therefore, all restitution-related issues should be regulated by law and not by resolutions of Parliament. CONSTITUTION OF UKRAINE, June 28, 1996, art. 92(7).

97. See *Explanatory Memorandum*, *supra* note 2, § 270.

98. See, e.g., Economic Court of Ivano-Frankivska Oblast, Feb. 5, 2009, No. 13-15/219-9/19-10/350-14/58-8/100, available at <http://www.reyestr.court.gov.ua/Review/2942739>. This decision was overruled by the Higher Economic Court of Ukraine, Oct. 20, 2009, No. 13-15/219-9/19-10/350-14/58-8/100, available at <http://www.reyestr.court.gov.ua/Review/6451370>. In both cases one religious community attacked the legality of the temple use agreement concluded between the local government and the other religious organization. See also Kyiv City Economic Court, Feb. 5, 2008, No. 1/148-IIH-05-38/490, available at <http://www.reyestr.court.gov.ua/Review/1416932> (holding that the local government should transfer a former priest’s building to a religious community); Economic Court of Dnipropetrovska Oblast, Nov. 6, 2006, No. A7/330-06, available at <http://www.reyestr.court.gov.ua/Review/240464>. This decision was overturned by the Appellate Economic Court of Dnipropetrovska Oblast, Mar. 14, 2007, No. A7/330-06, available at <http://www.reyestr.court.gov.ua/Review/514511> and later upheld by the Higher Administrative Court of Ukraine, Mar. 11, 2009, No. K-8938/07. A brief overview of all these decisions is given in Economic Court of Dnipropetrovska Oblast, July 20, 2009, No. A7/330-06, available at <http://www.reyestr.court.gov.ua/Review/4217999>.

99. See the line of St. Pokrovska Parish of Mostyska town cases, namely: Economic Court of Lvivska Oblast, Nov. 20, 2007, No. 3/186-10/121, available at <http://www.reyestr.court.gov.ua/Review/1187334>; Lviv Appellate Administrative Court of Sept. 9, 2008, No. 22-a-5097/08, available at <http://www.reyestr.court.gov.ua/Review/2922088>; Higher Administrative Court of Ukraine, June 10, 2009, No. K-20583/08, K-21717/08, available at <http://www.reyestr.court.gov.ua/Review/3859899>; Supreme Court of Ukraine, Nov. 10, 2009, No. 09/221, available at http://search.ligazakon.ua/l_doc2.nsf/link1/VS091163.html; Lviv Appellate Economic Court, Nov. 26, 2009, No. 19/153, available at <http://www.reyestr.court.gov.ua/Review/6979444>; Economic Court of Lvivska Oblast, July 8, 2010, No. 20/119, available at <http://www.reyestr.court.gov.ua/Review/10413091>; Economic Court of Lvivska Oblast, Dec. 20, 2010, No. 19/153, available at <http://www.reyestr.court.gov.ua/Review/13063200>; Lviv Circuit Administrative Court, Dec. 28, 2010, No. 2a-8423/10/1370, available at <http://www.reyestr.court.gov.ua/Review/13400215>; Lviv Appellate Economic Court, Mar. 15, 2011, No. 19/153, available at <http://www.reyestr.court.gov.ua/Review/14290715>.

Administrative Court of Ukraine and the Supreme Court of Ukraine, the courts of last resort, which reached opposite outcomes in the same case, have been unable to overcome legislative shortcomings and put an end to this endless set of cases.

V. CONCLUSION

As we have seen, the rather theoretical conclusion of the Council of Europe that the “quite progressive law [the Law of Ukraine ‘On the Freedom of Conscience and Religious Organizations’] . . . now requires significant rewording”¹⁰⁰ has been corroborated by domestic case law. It is true that some provisions like those involving putative discrimination against foreigners and stateless persons (which apparently resulted from the wording of the Articles 3, 4, 5, and 6 of the Law, which utilize words “citizens of Ukraine” or “citizens,”¹⁰¹ while international instruments, particularly the European Convention on Human Rights, use the more proper term “everyone”)¹⁰² have never been troublesome in practice. Others, like rotating worship, may be cured fairly easily by eliminating the relevant provisions of the Law.¹⁰³

On the other hand, other provisions clearly require revision, as they could allow discrimination against religious minorities and even violate religious majority rights. Such provisions include discrimination against new (at least new for Ukraine) religious movements, legal regulation of state registration aimed at providing religious entities legal entity status, and the unjustifiably restrictive forms in which a religious organization might be set up. Additionally, establishing a consistent legal framework for corporate governance of religious communities based on respect for their autonomy;¹⁰⁴ providing legal entity status for churches as

100. See *Explanatory Memorandum*, *supra* note 2, § 269.

101. See Law of Ukraine “On Freedom of Conscience and Religious Organizations,” Apr. 23, 1991, No. 987-XII, arts. 3–6, available at <http://zakon2.rada.gov.ua/laws/show/987-12>.

102. European Convention on Human Rights, art. 9, Nov. 4, 1950, C.E.T.S. No. 5 (“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.”).

103. See Law of Ukraine “On Freedom of Conscience and Religious Organizations,” Apr. 23, 1991, No. 987-XII, art. 17, indent 3, available at <http://zakon2.rada.gov.ua/laws/show/987-12>.

104. Articles 5, indent 3 and 7, indent 1 of the current Law declare that “religious organizations in Ukraine . . . act according to their hierarchical and institutional framework, elect, appoint and replace their staff pursuant to their charters,” while Article 8, indents 1 and 2 and Article 12, indent 2 regard religious communities (parishes) exclusively as assemblies of natural persons who enjoy the right to freely change their subordination to religious centers or leadership and/or affiliation with any denomination. *Id.* Within hierarchical churches like the Catholic or Orthodox

associations of religious organizations; and establishing transparent and exhaustive rules for recovery of former religious property are currently urgent demands. All undoubtedly require a fundamental rewording of the Law.

Regardless of such clear inducements for substantially revising the Law, most of the major Ukrainian confessions, or rather, their leadership, oppose sweeping reform of the current legal framework for religious freedom and state-church relations. The reasons for their reluctance are apparently threefold. First, having accustomed themselves to act, survive, develop, and succeed under the current Law application practices, major players in the Ukrainian religious field, which are represented mostly by aged leaders,¹⁰⁵ are *eo ipso* reluctant to accept any major changes in the rules of the game.

Second, the opponents of reform of the religious legislation fear that even a perfect bill introduced in the Parliament might be altered beyond recognition in the course of its consideration by the legislature. Until 2010, this reason was a trump card for those opposing reform. But this is not the case anymore. The incumbent Ukrainian President has concentrated full power in his own hands. The Parliament rubber stamps almost every presidential bill, even those as significant as the Judicial Reform Act¹⁰⁶ or the Law on the Cabinet of Ministers of Ukraine.¹⁰⁷ Therefore, if the President merely hints to the parliamentary majority loyal to him that he wants the bill to be passed without any significant amendments, there is no doubt that the Parliament will not vitiate the

Church this legally unavoidable absolute autonomy of religious communities that is entrenched in the Law *volens volens* generates conflicts between parishioners and religious leaderships.

105. The Head of the Ukrainian Orthodox Church affiliated with the Moscow Patriarchate, Metropolitan Volodymyr (Sabodan), is 76. *Volodymyr Sabodan*, WIKIPEDIA, <http://bit.ly/x24GmT> (last visited Mar. 27, 2012). Patriarch Filaret (Denysenko), the Head of the Ukrainian Orthodox Church of the Kyivan Patriarchate, is 83. *Patriarch Filaret (Denysenko)*, WIKIPEDIA, <http://bit.ly/yRe8tI> (last visited Mar. 27, 2012). The former leader of the Ukrainian Greek-Catholic Church (as of February 2011), the Major Archbishop Lubomyr Husar, is 79. *Lubomyr Husar*, WIKIPEDIA, <http://bit.ly/fTHpqM> (last visited Mar. 27, 2012). Note that Archbishop Husar's successor (the current Head of the Ukrainian Greek-Catholic Church), Archbishop Sviatoslav Shevchuk, who is 41 years old, was enthroned comparatively recently, on March 27, 2011. *Sviatoslav Shevchuk*, WIKIPEDIA, <http://bit.ly/AINGZg> (last visited Mar. 27, 2012).

106. See the Law of Ukraine "On the Judiciary and the Status of Judges," July 7, 2010, No. 2453-VI, available at <http://zakon1.rada.gov.ua/laws/show/2453-17>, which was introduced by the President to the Parliament on May 31, 2010 and passed by the legislature on July 7, 2010.

107. See the Law of Ukraine "On the Cabinet of Ministers of Ukraine," Oct. 7, 2010, No. 2591-VI, available at <http://zakon1.rada.gov.ua/laws/show/2591-17>, which was introduced by the President to the Parliament on October 4, 2010 and passed by the legislature on October 7, 2010.

presidential draft. Whether the President is inclined to send such a message to the legislature is a different matter.

Third, probable reasons for resistance to religious law reform is the aversion of major religious denominations to new religious movements and their fear that law reform might prompt divisions within existing churches. Even though the current Ukrainian legal framework, in principle, allows registration of independent religious communities, founders of such organizations often face formidable hurdles¹⁰⁸ since the current Law requires that a religious community's charter must identify "the place of the religious organization in the organizational structure of the religious association."¹⁰⁹ Obviously, it is a hard task to define such a place for a religious entity of a newly established religious movement.

Division of existing religious associations is also clearly discouraged by the current application of the law. The lack of even the possibility of obtaining legal entity status for religious unions (associations of religious organizations), and thus also the lack of opportunity to register their charters, results in vagueness on whether and how churches may incorporate themselves. This legislative gap subjects religious dissenters to the arbitrary discretion of the registering authorities. Since well-established confessions and their leadership generally enjoy far closer and warmer links with politicians and high-ranking officials, in most cases they can successfully prevent their churches from splitting by preventing the splitters from being officially recognized by the state.¹¹⁰

Thus, equalization of the prerequisites and procedures for establishment of religious and non-religious civic associations, which has been promoted by the Council of Europe¹¹¹ and particularly by the European Court of Human Rights,¹¹² would likely lead to increased

108. The SSRJD contains hundreds of judicial decisions in cases brought against registering authorities by natural persons whose application to register a religious community that they established was rejected. *See, e.g., supra* note 87 and accompanying text.

109. *See* Law of Ukraine "On Freedom of Conscience and Religious Organizations," Apr. 23, 1991, No. 987-XII, art. 12, indent 3, § 2, *available at* <http://zakon2.rada.gov.ua/laws/show/987-12>.

110. The Ukrainian Autocephalous Orthodox Church (UAOC) suffered an unregistered, and thus, semi-underground existence from 1992 to 1995 because the Ukrainian authorities believed that in 1992 the UAOC had merged with the Ukrainian Orthodox Church in such a way that established the Ukrainian Orthodox Church of the Kyivan Patriarchate, which was favored by then-President Mr. Kravchuk. *See* a brief history of the UAOC at *Ukrainian Autocephalous Orthodox Church*, RISU.ORG (June, 20, 2011), http://risu.org.ua/en/index/reference/major_religions/~%D0%A3%D0%90%D0%9F%D0%A6/33294.

111. *See Explanatory Memorandum, supra* note 2, § 269.

112. The ECtHR has reiterated that "[s]ince religious communities traditionally exist in the form of organized structures, Article 9 must be interpreted in the light of Article 11 of the

religious competition in Ukraine. Major players in the national religious field naturally have little enthusiasm for such a development.

In summary, it might be supposed that in facing a fundamental rewording challenge to the Law “On the Freedom of Conscience and Religious Organizations,” Ukraine is being tested on its perceptions and understandings of religious freedom. The post-communist understanding of religious freedom as merely the right to worship, manifest, and disseminate one’s religious beliefs without State suppression is now being challenged by a wider, enhanced, and foundational concept of religious freedom: the right against religious majority domination.

Whether the incumbent President will dare to push forward with proclaimed reform regardless of united religious majority opposition is still an open issue. It will be a litmus test for how genuinely the current political leadership of Ukraine is willing to implement European values, particularly in the realm of religious freedom and even at the cost of its own popularity in the eyes of churches that are the most popular social institutions in contemporary Ukraine.

Convention, which safeguards associative life against unjustified State interference” in, e.g., the judgments in the cases *Jehovah’s Witnesses of Moscow and Others v. Russia*, § 99, App. No. 302/02 (Oct. 10, 2010 Eur. Ct. H.R.); *Church of Scientology Moscow v. Russia*, § 72, App. No. 18147/02 (May 4, 2007 Eur. Ct. H.R.); *Moscow Branch of the Salvation Army v. Russia*, § 58, App. No. 72881/01 (May 10, 2006 Eur. Ct. H.R.).