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UKRAINE: Draft law better than others, freedom of religion or belief concerns remain

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The Ukrainian government has produced a draft law prohibiting the operation of religious organisations affiliated with "centres of influence of religious organisations or associations with ruling centres" in Russia, but imposing an obligation on the state to prove any affiliation in court. The draft law in its present form raises freedom of religion or belief concerns. If adopted and implemented it may significantly change the Ukrainian Orthodox Church, which is historically and ecclesiastically linked to the Moscow Patriarchate.

The Russia-Ukraine war, starting with the annexation in 2014 of Crimea and the military conflict in Eastern Ukraine, and continuing with Russia's February 2022 full-scale invasion, has had a tremendous impact on freedom of religion or belief and other related human rights in the region. Murders, tortures, forced detention, and forced displacement of religious leaders and believers of many faiths, serious freedom of religion or belief and other human rights violations inspired and directed by Russian proxies, as well as expropriations of religious properties have become the reality in Ukrainian territories occupied by Russia since 2014.

Since Russia's renewed February 2022 full-scale invasion of Ukraine, Russia has up to January 2023 also destroyed or damaged up to 400 religious properties (<https://blog.liga.net/user/rkhalikov/article/49042>) belonging to Orthodox, Protestant, Catholic, Jewish, and Islamic religious communities. Around half of these have been estimated by Ruslan Khalikov of the Religion on Fire (<https://www.mar.in.ua/en/religion-on-fire>) Project to belong to the Ukrainian Orthodox Church (UOC), which is historically and ecclesiastically linked to the Moscow Patriarchate.

Freedom of religion or belief violations in the Ukrainian territories Russia has occupied since 2014 have not followed one pattern. In occupied Crimea the Russian government has forcibly imposed Russian laws and restrictions (https://www.forum18.org/archive.php?article_id=2774) on exercising human rights, including freedom of religion or belief. In occupied eastern Ukraine serious violations of freedom of religion and belief (<https://www.forum18.org/archive.php?country=87>) have also taken place, which have included violence by Russian military and paramilitary groups (<https://irf.in.ua/p/28>).

Russia in 2023 is now following a more coordinated approach to impose the full range of Russian restrictions on the exercise of freedom of religion or belief (<https://www.forum18.org/archive.php?country=10>) across all the Russian-occupied areas of Ukraine (<https://www.forum18.org/archive.php?country=17>).

The Ukrainian Orthodox Church and the Ukrainian government

On the territories under the Ukrainian government's control, Russia's 2014 attack on Ukraine significantly changed the government's relationship with the Ukrainian Orthodox Church (UOC). Under President Petro Poroshenko (who ruled from 2014 to 2019), the Ukrainian government made a crucial contribution to the establishment (<https://talkabout.iclrs.org/2019/03/29/religion-is-a-weapon-and-a-victim-of-the-conflict-in-ukraine/>) of the UOC's main rival in inter-Orthodox competition – the Orthodox Church of Ukraine (OCU). This included government diplomatic support for the OCU's ecclesiastical recognition by the Ecumenical Patriarchate in 2019.

Later in 2019, the Ukrainian parliament adopted two laws primarily affecting the UOC. The first law sets up a decision-making process for religious communities aiming to change their religious jurisdiction. The law requires that the decision of transition to a different jurisdiction shall be made solely by members of the religious organisation. This aims to prevent a practice common for both the UOC and the OCU when any changes to Orthodox parishes' charters must be approved by the respective ruling bishops.

Despite the fact that this law is formally generally applicable, the first law's authors and supporters did not conceal the fact that they passed the law to support the OCU (https://risu.ua/rpc-v-ukrajini-verhovna-rada-uhvalila-zakonoproekt-pro-nazvu-moskovskogo-patriarhatu_n95283), and that the law's prime goal is to simplify and encourage the transition of UOC communities to the OCU.

The second law forces religious organisations and associations with "ruling centres" in Russia to change their names in order to explicitly identify their links with Moscow. The law also prohibits these organisations from sending their chaplains to the Ukrainian Army. The second law was brought before the Ukrainian Constitutional Court, and in December 2022 the court declared the law constitutional, which allowed the forced renaming of religious communities.

Shift in Zelensky's attitude towards religious policy and the UOC

From May 2019, when President Volodymyr Zelensky took office, and during the first months of Russia's February 2022 full-scale invasion, he did not develop a religious policy (<https://talkabout.iclrs.org/2020/01/09/religious-policies-under-president-zelensky/>). In April 2022, members of Zelensky's parliamentary party insisted that Parliament would not consider a proposed ban on the UOC (<https://www.ukrinform.ua/rubric-politics/3466735-rada-ne-rozgladatime-zaboronu-upc-mp-do-kinca-vijni-stefancuk.html>) until the war was over, in order not to provoke divisions within Ukrainian society.

Zelensky's attitude changed in autumn 2022, apparently under the pressure of claims – some proven in court – of collaboration by some UOC clerics with the Russian military, and growing support among the Ukrainian public for sanctions against the UOC.

In October – December 2022, the Security Service of Ukraine (SBU) searched UOC properties and the homes of UOC clerics (<https://www.reuters.com/world/europe/ukraine-security-service-searches-monastery-warns-subversive-activities-2022-11-30/>) across the country. The SBU reportedly found Russian propaganda material, evidence of Russian citizenship obtained by several UOC clerics, as well as Russian army-issued food.

In December 2022, based on a decision of the National Security and Defence Council, President Zelensky asked the Cabinet of Ministers to draft a law banning religious organisations affiliated with Moscow. At the same time he emphasised that this law must comply with international standards of freedom of religion or belief (FoRB) and Ukraine's obligations to the Council of Europe.

In his decree, the President also requires the State Service for Ethnic Policy and Freedom of Conscience (DESS) to conduct a "religious expert examination" of the UOC Charter's ecclesiastical links with the Moscow Patriarchate.

The Cabinet of Ministers also dismissed DESS head Olena Bogdan (regarded as being basically neutral about religious policy). It replaced her with Viktor Yelensky, who was a long-term public critic of the UOC (<https://www.bbc.com/ukrainian/news-64017822>) and its leadership before his appointment.

The Government's draft law

The Cabinet of Ministers submitted its draft law to Parliament (<https://itd.rada.gov.ua/billInfo/Bills/Card/41219>) in mid-January 2023. According to the head of the Parliamentary Committee on Humanitarian and Information Policy, Mykyta Poturayev, the law is expected to be adopted in March (<https://ukranews.com/ua/news/911401-v-ukrayini-zaboronyat-pov-yazani-z-rf-tserkvy-u-berezni-poturayev>).

Draft laws targeting the UOC were submitted by opposition parliamentary deputies in March and November 2022. The March draft law imposed an automatic legislative ban on religious organisations affiliated with Russia. The November draft went even further and proposed, in addition to a full ban, a ban on any organisations except the Orthodox Church of Ukraine (OCU) and organisations approved by the OCU from using the word "Orthodox" in their title.

The government's draft law takes a different approach. It prohibits the operation of religious organisations (associations) affiliated with "centres of influence of religious organisations or associations with ruling centres" in "states conducting armed aggression against Ukraine" (a clear reference to Russia), but imposes on the state the obligation to prove any such affiliation in court. In such cases the DESS is required to conduct a religious expert examination identifying the affiliation with Moscow. Either the DESS or a prosecutor must bring a case to a court, which would have the power to make a final decision on whether to ban a religious organisation.

Freedom of religion or belief concerns

While being more moderate than the two earlier draft laws submitted by opposition parliamentary deputies, the government's draft law still raises at least three concerns from the FoRB perspective.

- What is "affiliation with centres of influence"?

First, the concept of "affiliation with centres of influence" in Russia is quite vague.

If it could be legally proven that the Russian Orthodox Church (ROC) or the Russian government had used the ROC to guide or compel UOC parishes, clergy or believers to conduct illegal activities - for example to collaborate with the Russian army and secret services - this can already lead to the state taking legally permissible action to defend national security. This requires no special

legislation such as the government's draft law. The existing criminal and other public law already allows the prosecution of any individual and entity involved in such illegal activities. As the Organisation for Security and Co-operation in Europe (OSCE)'s Freedom of Religion or Belief and Security: Policy Guidance (<https://www.osce.org/files/f/documents/e/2/429389.pdf>) notes: "Any wrongdoings on the part of individuals should, therefore, be addressed through criminal, administrative or civil proceedings against that person, rather than directed at the religious or belief community as a whole."

If affiliation means historical, symbolic or ecclesiastical links of a religious community to Russia without any illegal activities conducted by communities, clerics or believers, the affiliation can be publicly criticised. But such an affiliation is not in international law a sufficient reason to impose legal bans on these communities.

- Banning or deregistering

This leads us to the second concern. As the OSCE / Council of Europe Venice Commission Guidelines on the Legal Personality of Religious or Belief Communities (<https://www.osce.org/files/f/documents/9/9/139046.pdf>) note, international standards and good practice demand that: "Considering the wide-ranging and significant consequences that withdrawing the legal personality status of a religious or belief organisation will have on its status, funding and activities, any decision to do so should be a matter of last resort."

Similarly, "denial of legal personality or de-registration of a religious or belief community should not be based on alleged threats to security, but be clearly based on evidence of illegal acts by the religious or belief community in question," as the OSCE's Freedom of Religion or Belief and Security: Policy Guidance (<https://www.osce.org/files/f/documents/e/2/429389.pdf>) notes. It adds that this "can only be contemplated in cases of grave and repeated violations of endangering public order and if lighter sanctions, such as a warning, a fine or withdrawal of tax benefits, cannot be applied effectively".

So stripping a religious community of legal status can happen only when less restrictive measures cannot adequately address security concerns. This could mean that deregistration of a religious community can only legally happen when the entire leadership or the majority of members – not just individual leaders or members - are directly involved in illegal activities. "The fact that some individuals engage in such [illegal] acts is not an indication that an entire religious or belief community shares these views or condones these activities," as the OSCE Freedom of Religion or Belief and Security: Policy Guidance (<https://www.osce.org/files/f/documents/e/2/429389.pdf>) notes.

The ROC and its leadership has actively supported Vladimir Putin's aggression against Ukraine (https://www.forum18.org/archive.php?article_id=2738), and the Russian government has pressured other Russian religious leaders to support Putin's aggression (https://www.forum18.org/archive.php?article_id=2763) against Ukraine. Ukraine's SBU has reported many cases of UOC clerics justifying Russian aggression against Ukraine (<https://www.pravda.com.ua/news/2023/01/10/7384231/>), the incitement of religious hatred, and collaboration with Russian occupation forces (<https://suspilne.media/286994-upc-usunula-izumskogo-mitropolita-elisea-akij-prijmav-okupantiv-i-vtik-do-rf/>).

In December 2022, UOC priest Fr Andriy Pavlenko (who had been convicted by a Ukrainian court of spying for Russia) was exchanged with Russia (https://risu.ua/en/clergyman-or-spies-churches-become-tools-of-war-in-ukraine_n135432) in a prisoner exchange.

However, the UOC officially consists of about 11,000 communities, and they are all separate legal entities connected with each other ecclesiastically but often not legally. To ban or deregister the UOC, the state would have to prove in court that the leadership or the majority of parishioners of each of the 11,000 parishes are involved in illegal activities.

- "Expert examination"

Finally, the concept of a religious "expert examination" is also vague and legally questionable. Across the post-Soviet region, including in Belarus (https://www.forum18.org/archive.php?article_id=2806), occupied Crimea (https://www.forum18.org/archive.php?article_id=2774), and Central Asian states such as Kazakhstan (https://www.forum18.org/archive.php?article_id=2753), "expert analyses" are often used to justify freedom of religion or belief and other human rights violations, including jailing prisoners of conscience.

The examination President Zelensky's December 2022 decree requires the DESS to undertake is potentially problematic in international law, for as the OSCE / Council of Europe Venice Commission Guidelines on the Legal Personality of Religious or Belief Communities (<https://www.osce.org/files/f/documents/9/9/139046.pdf>) note: "the state should refrain from a substantive as opposed to a formal review of the statute and character of a religious organisation".

The DESS's examination of links between the UOC and the ROC started quickly. The UOC has challenged the impartiality of several engaged experts (<https://news.church.ua/2023/01/10/yuridichnij-viddil-upc-oprilyudniv-zayavu-pro-viluchennya-zi-skladu-komisiji-z-ekspertizi-statu-tu-upc-uperedzhenix-ekspertiv-ta-zaluchennya-jiji-roboti-mizhnarodnix-religijeznavciv/>), claiming that they belong to the OCU and are biased towards the UOC.

On 1 February 2023, the DESS published the opinion of its group of experts (<https://dessa.gov.ua/vysnovok-rehiiieznavchoi-ekspertyzy-statutu-pro-upravlinnia-ukrainskoi-pravoslavnoi-tserkvy/>) about the UOC's affiliation with the ROC. The experts point out that the Moscow Patriarchate does not recognise the UOC as fully independent, and that there is no evidence that UOC leader Metropolitan Onufry (Berezovsky) has left the ROC's Synod. In addition, they emphasise that no other Orthodox churches recognise the UOC as an independent (autocephalous) church, and that the UOC has not sought this. The experts conclude that the UOC remains a part of the ROC.

How is the government going to identify the "affiliation"?

The government's draft law contains no definition of "affiliation with centres of influence". However, the 1991 Ukrainian Law on Freedom of Conscience and Religious Organisations already defines "affiliation with ruling centres" in Russia for the purposes of regulating the name of religious organisations.

Article 12 of the Law - as amended in December 2018 - stipulates that religious organisations (associations) affiliated with a ruling centre in states attacking or occupying Ukraine (a clear reference to Russia) must identify this affiliation in their charter. In order to be recognised as affiliated with the Russian ruling centre, the Ukrainian religious organisation (association) must meet one of the following three criteria:

1. Its charter contains a provision regarding its incorporation in the religious organisation (association) with the ruling centre in Russia; or
2. The charter of the Russian organisation (association) contains a provision recognising the Ukrainian organisation (association) as a part of its structure, and the right of the Russian organisation (association) to adopt binding decisions regarding the Ukrainian organisation (association); or
3. The charter of the Ukrainian organisation (association) contains provisions regarding the mandatory participation of its leaders or representatives in ruling bodies of a Russian organisation (association) with the right of vote.

In May 2022, the UOC tried to address this issue. It declared its full independence from the ROC, and moved to eliminate from its charter all provisions regarding its subordination to the ROC and its Patriarch, as well as participation of UOC representatives in ROC ruling bodies (<https://spzh.news/ru/news/70410-v-upts-napomnili-cto-blazhennejshij-mitropolit-onufrij-vyshel-iz-sinoda-rpts>). Yet the UOC's status in relation to the ROC remains ambiguous (<https://carnegieendowment.org/politika/88811>).

The UOC also meets the second Ukrainian legal criterion for affiliation, as the ROC Charter (<https://www.patriarchia.ru/db/document/133114/>) still identifies the UOC as part of the Moscow Patriarchate. This effectively prevents the UOC from becoming "unaffiliated" in the eyes of the Ukrainian state and in terms of Ukrainian law.

In order to become "unaffiliated", the UOC must persuade the Moscow Patriarchate to change the ROC charter to remove all UOC-related provisions. This is highly unlikely and up to now the UOC has done little to start this process. It is more likely that the ROC will keep insisting that the UOC is a part of the Moscow Patriarchate.

Indeed, in January 2023 at a United Nations Security Council meeting, a high-ranking ROC cleric along with the Russian government representative attacked (<https://press.un.org/en/2023/sc15178.doc.htm>) what the Moscow Patriarchate representative described as "prohibiting the activities of churches with ties to the Russian Orthodox Church" and "mass political repression" of Orthodox believers. The UOC publicly disassociated itself (<https://news.church.ua/2023/01/16/u-viddili-zovnishnix-cerkovnix-zvyazkiv-prokomentovali-namir-rf-pidnyati-v-oon-pitannya-shh-odo-situaciji-navkolo-upc/>) from these claims.

What's next?

It is likely, given President Zelensky's recent actions and statements, that the draft law banning religious organisations affiliated with centres of influence with Russia will be adopted.

It is not known that the Ukrainian government has requested assistance from international human rights or rule of law organisations such as the OSCE Office of Democratic Institutions and Human Rights (<https://www.osce.org/odihr/freedom-of-religion-or-belief>) (ODIHR), or from the Council of Europe's Venice Commission (https://www.venice.coe.int/WebForms/pages/?p=01_Const_Assistance). Their involvement might, even at this stage, help the government to address the human rights concerns raised by the draft law.

As the DESS religious expert opinion concludes that the UOC is affiliated with Moscow, if the draft law is adopted with its present text, the government will gain the power to ban the Church. It remains unclear how the government might exercise this power.

As each of the UOC's parishes is a separate legal entity, legal and organisational obstacles would probably prevent all of the parishes being deregistered. It still though remains possible that some UOC parishes and other entities might be deregistered.

The draft law would also affect several small Orthodox religious communities with ecclesiastical ties with Russia, including communities affiliated with the Russian Orthodox Church Outside Russia. Some of these communities – such as the Bila Krynytsya Old Believers (<https://suspilne.media/346580-ukrainski-staroohradci-vijsli-z-pidporadkuvanna-rosijskoi-cerkvi-so-zminilosa-v-bilij-krinici-na-bukovini/>) – have cut their ties with Moscow, while others at present preserve such ties.

Whatever happens, the adoption and implementation of the draft law in its present form would significantly change the UOC, and also possibly affect the entire state of religious community - state relations in Ukraine.

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More reports on freedom of thought, conscience and belief in Russian-occupied Ukraine (<https://www.forum18.org/archive.php?country=17>)

More reports on freedom of thought, conscience and belief in all Ukraine (<https://www.forum18.org/archive.php?country=88>)

Forum 18's compilation of Organisation for Security and Co-operation in Europe (OSCE) freedom of religion or belief commitments (https://www.forum18.org/archive.php?article_id=1351)

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