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The prohibition of the Russian Orthodox Church in Ukraine: Emergency and human rights

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Abstract: *This article aims to determine the evolution of the national security clause as a legal ground for the dissolution of religious organisations, in particular, the Russian Orthodox Church in Ukraine (ROCU) in Ukraine. The assessment is conducted through the prism of Art. 9 and Art.11 of the ECHR and purports to establish the conformity of the Ukrainian legislature with the ECHR. Apart from that, the article elaborates on the interplay between emergency law, martial law, and legislative amendments concerning the status of the Church. I argue that the ROCU matter has been securitised in two stages. Firstly, during the presidency of the fifth President of Ukraine, in 2018-2019, when the Ukrainian independent church was created under "national identity" and "national security" slogans. Later, in the aftermath of the Russian invasion of Ukraine in 2022 when, a spark of investigations showing collaboration between some representatives of the ROCU and Russia led to the weaponisation of the ROCU. Consequently, the national legislature has been amended to reflect on these issues. I submit that the Russian invasion of Ukraine in 2022 allowed the introduction of martial law as an emergency regime, under which Ukraine was able to derogate from major human rights instruments, including ECHR. Derogations allowed Ukraine to expand its margin of appreciation. However, the ECHR can exercise post-factum control on the measures taken in times of emergency. I believe that prohibiting the ROCU's activities by legislative act will result in grave interference under the ECHR. Additionally, such a prohibition can fail to meet the requirements of the proportionality test, considering the current Ukrainian legislature. Also, the legislative changes raise the matter of attribution between the representatives of the ROCU and the ROCU as a religious organisation.*

Keywords: *ECHR, emergency, national security, ROCU*

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1. Introduction

The constitution of Ukraine provides a broad list of human rights. Art. 64 of the Constitution stipulates that "constitutional human and civil rights and freedoms shall not be restricted except in cases stipulated by the constitution of Ukraine" (The Constitution of Ukraine, Art.64). This "except" allows the State to expand its margin of appreciation and consequently limit human rights and freedoms.

Usually, this "except" is tied to an emergency. In this paper, I will pay particular attention to the "except". According to Art.64 of the constitution of Ukraine, "under the conditions of martial law or a state of emergency, specific restrictions on rights and freedoms may be established with the indication of the period of effect for such restrictions" (The Constitution of Ukraine, 1996). Among the rights that may be restricted under martial law, or a state of emergency are two of great importance in this study – the right to freedom of personal philosophy[1] and religion (Art.35) and the right to freedom of association (Art.36).

The State's power to utilise "exceptions" can be compared to the Hobbesian Leviathan, which, on some occasions, may employ its draconian power. Martial law and state of emergency are designed to secure the existential interests of the Leviathan from external or internal threats. However, Leviathan's "existential" usually faces Human's "essential". As the Constitutional Court of Ukraine pointed out, "[...] restrictions on the realisation of constitutional rights and freedoms cannot be arbitrary and unfair - they must be established exclusively by the constitution and laws of Ukraine, pursue a legitimate goal, be conditioned by the social necessity of achieving this goal, proportionate and justified" (CCU, case No 13-p/2018).

On 20 December 2018, the parliament of Ukraine officially adopted Law No 2662-VIII, requesting any religious organisation affiliated with Russia to display this connection in its official name. The fifth President of Ukraine, Perto Poroshenko, stated that "[...] people must know to whom they come either to the established autocephalous orthodox church of Ukraine or to the church that insists on maintaining its connection and dependence on the Russian Orthodox Church" (LB, 2018). This legal move marked a turn in Ukrainian politics towards the securitisation of the ROCU. Later, the Russian full-scale invasion of Ukraine and a wave of accusations of collaborating with Russia overflowed the ROCU. Ukrainian institutions started to act within the scope of martial law and with a need to deal with the weaponisation of ROCU's activity implemented by ROCU

1 The wording "personal philosophy" is a result of a translation from Ukrainian to English. Generally, it corresponds to thought or conscience as a part of freedom of thought, conscience and religion.

itself. The aftermath of this weaponisation led to the introduction of draft laws No 8371 and No 8221 aiming to prohibit the activity of the ROCU as a religious organisation. The question to pose is whether Ukraine, acting under martial law, may prohibit the activity of the ROCU as a religious organisation through a legislative act.

I am showing throughout the paper that such an attempt to prohibit the ROCU as a religious organisation may raise several legal issues. Specifically, it sparks a matter of conformity with the abovementioned actions and the requirements established to limit freedom of religion and freedom of association under ECHR. It raises the issue of the role of national security and the possibility to legitimately and legally utilise this ground to prohibit the activity of the church. Lastly, the prohibition may further erode the boundaries of the margin of appreciation, which are already blurred under martial law and derogations.

This paper purports to demonstrate the evolution of the national security clause towards the church. To cope with the research problem, the paper is structured as follows. The first part defines the notion of "emergency" in the context of this study. The second part introduces the process of securitisation of ROCU, firstly from a political perspective, that is, following Burry Buzan´s theory, and secondly, from a legal perspective, tracing the process of renaming the Ukrainian Orthodox Church – Moscow Patriarchate (UOC-MP) into ROCU. The third part establishes the transition from securitisation to weaponisation of ROCU. This part outlines the definition of weaponisation and reflects upon legal changes to tackle the weaponisation of the ROCU by prohibiting its activity. The last part discusses the conformity of the Ukrainian legislature to dissolve the ROCU with the European Convention on Human Rights in light of Ukrainian derogations.

2. The Idea of Emergency in Law

This paper deals with the notion of emergency in a legal and political sense. It is wise to introduce a brief contextual understanding of the term, and particularities related to the governing of emergency. The term "emergency" operates actively under derogation clauses that allow states to suspend the application of international human rights guarantees. For instance, the International Covenant on Civil and Political Rights (ICCPR) provides that "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present covenant may take measures derogating from their obligations under the present covenant" (ICCPR, 4). Similarly, the European Convention on Human Rights (ECHR) stipulates that "in time of war or other public emergency threatening the life of the nation, any high contracting party may take measures derogating from its obligations under this convention" (ECHR, 15).

However, I would like to emphasise that some of the rights belong to a non-derogable group. Thus, states under no circumstance may derogate from them. These are the right to life, the prohibition of torture, the prohibition of slavery, and punishment outside the principle of law. At some point, these rights are *Jus cogens* obligations, that is, "they reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable" (ILC, 2022).

No international legal instrument can provide a comprehensive definition of the emergency as such because it heavily interferes with state sovereignty. It is up to the state to define emergency *per se*. Nevertheless, States ought to comply with other obligations under international law. For instance, a state can derogate from a human rights instrument while at the same time finding itself under the obligation of other treaties or any form of intentional law obligations (*jus cogens, erma omnes)*. Additionally, as Evan J. Criddle has correctly pointed out, "the derogation clauses of the ICCPR and ECHR require that the derogating measures be 'strictly required by the exigencies of the situation'" (Criddle, 2016).

Meanwhile, general commonalities of emergency as a legal concept in the practices of some human rights may be deduced. As the Human Rights Committee (HRC) highlighted, "before a state moves to invoke Art. 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the state party must have officially proclaimed a state of emergency" (HRC, 2001). Apart from that, it observed that "not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation" (HRC, 2001). The European Court on Human Rights (ECHR) determined that the term "emergency" is understood "as an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed" (Lawless v. Ireland, 3,24).

Here is the moment to turn towards the national understanding of emergency. According to the Ukrainian legislature, there are three major emergency legal regimes: martial law, national emergency law and environmental emergency law. Each of these regimes offers specific definitions for its activation. It is better to proceed with the notion of national security, which lays down the common sense of emergency. The Law "On National Security" stipulates that "the national security of Ukraine constitutes the protection of state sovereignty, territorial integrity, democratic constitutional system and other national interests of Ukraine from real and potential threats" (Law on National Security, 1). Any event that by its gravity may threaten the sovereignty, territorial integrity, democratic constitutional system, and other national interests is capable of invoking the emergency law. The matter is about the type

of emergency (martial law, national emergency law or environmental emergency law).

However, the state does not necessarily have to invoke the emergency law *per se,* but it may invoke a national security clause to protect its interest. In the context of this research, it is essential to keep in mind that while the national security clause is a more generic term than the emergency law, the former is inherently connected to the latter, with one being a continuation of the other.

3. The Evolution of the National Security Clause Prior to 2022: Securitisation

To begin with, it is important to bear in mind that there is no official religion in Ukraine. The Constitution of Ukraine stipulates that "the church and religious organisations in Ukraine shall be separated from the State" (The Constitution of Ukraine, 35.3). Apart from that, no religion (Church) is recognised as supreme or mandatory. The freedom of personal philosophy and religion is constitutionally guaranteed (The Constitution of Ukraine, 35).

While constitutionally, all churches enjoy legal equality, they have different degrees of cultural and political influence within society. The Orthodox Church has the biggest number of followers. According to the information provided by cultural atlas, in 2021, approximately 60% of Ukrainians identified as Eastern Orthodox Christians (Kazmyrchuk and Scroope, 2023). According to yet another survey, in 2022, 72% of Ukrainians identified as Eastern Orthodox Christians (Hrushetskyi, 2022).

Due to historical reasons, the orthodox church is not unified under one religious organisation. Prior to 2018, there were three orthodox churches in Ukraine: Ukrainian Autocephalous Orthodox Church, Ukrainian Orthodox Church – Kyiv Patriarchate, and Ukrainian Orthodox Church – Moscow Patriarchate or UOC-MP. While I will develop the matter on renaming later in the paper, it is sufficient to mention for now that the ROCU is the name that the Ukrainian Orthodox Church – Moscow Patriarchate (UOC-MP) had to take in accordance with a law adopted in 2018. Also, the ROCU, by changing its statute, renamed itself into the Ukrainian Orthodox Church (UOC) in 2022. All these names and abbreviations are placed contextually throughout the paper.

In the context of the securitisation of the ROCU, it is possible to establish two periods. The first one is affiliated with the fifth President of Ukraine, Petro Poroshenko, and it focuses on the issue of renaming. In accordance with the Law No 2662-VIII, adopted in December 2018, the Ukrainian Orthodox Church – Moscow Patriarchate (UOC – MC) was expected to declare its affiliation with the Russian Orthodox Church

in its official name and state a new name – Russian Orthodox Church in Ukraine. The second period is affiliated with the sixth President of Ukraine – Volodymyr Zelenskiy, and the full-scale Russian invasion of Ukraine. This second phase is concerned with banning ROCU's activity as a religious organisation.

Following the pro-democratic Revolution of Dignity in Ukraine, Russia started its aggression against Ukraine, firstly in Crimea and later spread it to Eastern Ukraine. The representatives of the ROCU often made extremely controversial statements about the "brotherhood" between Ukrainians and Russians – a topic that, for more than a decade, was part of Russian propaganda (Kralyuk, 2022 and Pechko, 2023). Moreover, there were reports by Ukrainian generals that on the premises of ROCU, the Russian army stored its weapons and military munitions (Platonov, 2022 and Labyak, 2018). Another narrative which has been spread commonly by the representatives of the ROCU is the denial of Russian aggression, referring to it as the "civil war" in Ukraine (Platonov, 2022).

In such circumstances, with his political career at stake right before the elections, president Petro Poroshenko started a widespread political campaign to re-establish the independent Orthodox Church of Ukraine, which would not be controlled, managed or affiliated with the Russian Orthodox Church (ROC) (Chervonenko, 2016; Rudenko, 2018; Olszański, 2018). This combination of factors led to the securitisation of ROCU.

According to Barry Buzan, to securitise means to present an issue – church fragmentation and dependence on ROC, in this case – as an existential threat that requires emergency measures and hence justifies actions outside the normal bounds of political procedure (Buzan, 1998, 23-4). Petro Poroshenko referred to the matter of church independence as a "question of national security" and as a "component of state independence." He even went so far as to refer to the church as part of the formula of Ukraine's "national identity" (Platonov, 2022). This combination of "national security", "state independence", and "national identity", I believe, marks the activity of ROCU as an existential threat.

In December 2018, the unification council of the Eastern Orthodox Churches of Ukraine (Unification Council) convened and elected the head of the unified orthodox church of Ukraine (Istomina, 2018). The unification council has also adopted the statute of the Orthodox Church of Ukraine (Statute, 2018). On 6 January 2019, the Ecumenical Patriarch of Constantinople released a church decree (*tomos*) stating the autocephaly of the Orthodox Church of Ukraine (Rohtmets, 2019). Unsurprisingly, the ROC has opposed such a decision (Rohtmets, 2019). The newly unified Orthodox Church of Ukraine consisted of the Ukrainian Autocephalous Orthodox Church, the Ukrainian Orthodox Church – Kyiv Patriarchate and some parts of the Ukrainian Orthodox Church – Moscow Patriarchate.

The establishment of the Orthodox Church of Ukraine, followed by the "blessing" by the Ecumenical Patriarch of Constantinople, can be seen as an emergency measure adopted by Petro Poroshenko. While, as I stated earlier, the church, in accordance with Art. 35.3 of the Constitution, is separated from the state, the president, as head of the state, has been actively involved in the establishment of a new church. I claim that this is an example of Buzan's "justifying actions outside the normal bounds of political procedure." In doing this, the president justified his action outside the normal bounds of political procedure with his active involvement in establishing the new church.

In 2018, the Ukrainian parliament passed the Law "On National Security", which replaced a few legislative acts previously in force. Consequently, in December 2018, the Ukrainian parliament passed law No 2662–VIII that obliged "all religious organisations to amend their official names if these were controlled or managed from outside of Ukraine in a state recognised by law as having carried out military aggression against Ukraine and/or temporarily occupied part of the territory of Ukraine" (Law No 2662-VIII, Art.1). At the time, the Russian Federation was and is the only state that is recognised as an aggressor state by Ukrainian law (Statement by Verkhovna Rada of Ukraine, 2015). At this point, only one religious organisation was actually affected by the law – the Ukrainian Orthodox Church – Moscow Patriarchate (ROCU).

Some members of the Ukrainian parliament have attempted to challenge Law No 2662–VIII before different courts, particularly before the Constitutional Court of Ukraine (CCU) (LB, 2019; Constitutional submission, 2019; Chervonenko, 2022). In December 2018, 49 members of the Parliament requested the CCU to institute the constitutional procedure with the purpose of recognising the adopted law as unconstitutional (LB, 2019).

In December 2022, the CCU rendered its decision. The court recognised the law demanding this renaming to be constitutional (CCU, case No 4-p/, 2022). The CCU stated that "[...] the Court took into account not only the probable (hypothetical) risks that could exist in the process of adopting law No 2662–VIII but also the real consequences and threats from the activities of religious organisations (associations), controlled or managed from outside of Ukraine, in a state, which is recognised by law as having carried out military aggression against Ukraine and/or temporarily occupied its territory, in the conditions of a prolonged full-scale war of aggression against the Ukrainian state, encroachment on its sovereignty, territorial integrity and people's lives" (CCU, case No 4-p/, 2022).

By its decision, the CCU affirmed that the state has the right to apply measures limiting eventually, as I will show later in the paper, the freedom of religion, in particular, for reasons of public order (Art. 34

of the Constitution) and for reasons of national security (Art. 36 of the constitution). However, Art. 35 stands for the freedom of religion as such. It contains no restriction based on national security, while Art. 36, which stands for freedom of association, provides national security as a legitimate ground for restriction.

What is interesting for the purposes of this paper is the fact that in its deliberation, the CCU referred to the European Court of Human Rights decision in the Ilyin and others v. Ukraine case. In this case, the ECHR found "[...] the mere fact of a state requiring a religious organisation seeking registration to take on a name which is not liable to mislead believers and the general public, and which enables it to be distinguished from already existing organisations can, in principle be seen as a justified limitation on its right to choose its name freely" (Ilyin and others v. Ukraine, 77). The ECHR affirmed that the state might require religious organisations to change their name in order to demonstrate their affiliation, in this context between ROC and ROCU. Additionally, the ECHR confirmed that this limitation is justifiable and does not infringe on the essence of freedom of religion.

4. Martial Law and Religion after 2022

On 24 February 2022, the Russian Federation started the invasion of Ukraine in violation of Art. 2(4) of the United Nations Charter. The President of Ukraine declared martial law in force to withstand the open Russian aggression (Decree, 2022). As stipulated by decree No 64/2022, "during the period of the legal regime of martial law, the constitutional rights and freedoms of a person and a citizen, provided for in Articles 30 - 34, 38, 39, 41 - 44, 53 of the Constitution of Ukraine, may be restricted" (Decree, 2022).

As I showed in the previous part, the fifth President of Ukraine started the process of securitisation of the ROCU back in 2018. I would like to highlight two important moments which are linked to the Russian invasion of Ukraine in 2022. Firstly, the securitisation of the ROCU has been generally based on close ties with the ROC. In May 2022, ROCU changed its Statute with the purpose of disintegrating itself from ROC. Legally speaking, the ROCU attempted to overcome the ramifications of Law No 2662–VIII concerning affiliation and naming. From the perspective of the ROCU, a change of the statute should have demonstrated its "independence and integrity" (Statute, 2022). Authors affiliated with ROCU claimed that "all provisions establishing the relationship between the Ukrainian Orthodox Church and the Russian Orthodox Church were removed from the Statute" (Burega, 2022). However, the last expertise provided by the Ukrainian authorities has shown that the connection between UOC-MC was still present, so UOC-MC was under the obligation to demonstrate the connection with ROC in its name (Interfax-Ukraine,

2023). The CCU confirmed it once more in December 2022 by its decision regarding renaming.

Secondly, a vast number of facts indicating that representatives of the ROCU were somehow involved in hostilities or assisted the Russian forces have resulted in the weaponisation of the church. Thus, many criminal investigations were opened against representatives of the ROCU. In this paper, by the weaponisation of the ROCU, I mean the process of transition of ROCU from a civilian-oriented institution to a military-oriented one, where the church takes an active role in either supporting hostilities or being a part of these. The process of weaponisation contains two tracks. Firstly, it involves the actions of the ROCU representatives, and secondly, it involves a reaction from the state. I focus in this paper on the State´s reactions, that is, the legal measures it adopted to tackle this growing weaponisation of ROCU.

In April 2022, the law "on freedom of conscience and religious organisations" was amended, and a new ground for the dissolution of religious organisations was added. From April 2022, "any religious organisation can be banned in case its top officials are convicted of committing a criminal offence against the foundations of national security of Ukraine, as provided for in Art. 111-1 of the criminal code of Ukraine" (Law "On Freedom of Conscientiousness and Religious Organizations", Art.16).

Later, in the autumn of 2022, the Security Service of Ukraine (SSU) started active searches as part of criminal proceedings on different premises of the ROCU (BBC News Ukraine, 2022). In October of that year, one of the ROCU metropolitans was accused by SSU of supporting Russian aggression and inciting inter-religious hatred (BBC News Ukraine, 2022). Later, the head of SSU informed that "SSU opened 23 criminal proceedings against ROCU, including, among several others, on accounts of espionage and justification of the aggression; there are already 33 suspects in these cases" (BBC News Ukraine, 2022). I argue that the depicted events point to the transition from just securitisation to the weaponisation of the ROCU in the eyes of Ukrainian society and government. Consequently, it leads to a need for a more robust response than renaming. In addition, the initialisation of criminal proceedings against representatives of the ROCU aims, apart from tasks of criminal law, to establish the link between these representatives and the ROCU as a religious organisation. Therefore, it can allow the state to attribute these particular acts to the ROCU as a religious organisation. With no attribution, it is not possible to prohibit the ROCU without violating the ECHR. I will discuss this issue in the following part.

Following the searches conducted in autumn, in December 2022, the President of Ukraine – Volodymyr Zelenskiy, called a meeting of the national security and defence council of Ukraine with the purpose of

determining the level of affiliation between ROCU and ROC (BBC News Ukraine, 2022). Soon, the SSU conducted more than ten searches on UOC-MC premises (BBC News Ukraine, 2022).

In the meantime, a draft law No 8221 was submitted to the parliament with the purpose of prohibiting the activity of any religious organisation in any way affiliated with ROC. This draft, aiming at safeguarding national security in its wording and purpose, falls within the parameters of securitisation theory. For instance, Art.3 states that "foreign religious organisations can carry out activities in Ukraine provided that their actions do not harm national and public security protection of public order, health or morals, rights and freedoms of other persons" (Draft Law No 8221, Art.3). Art.4 of the draft introduces a complete ban on any religious organisations affiliated with the ROC (Draft Law No 8221, Art.4).

On 19 January 2023, another draft law, No 8371 dealing with "religious affiliation", was submitted to the parliament by the cabinet of ministers. The governmental draft does not explicitly employ the "national security" clause to prohibit the activity of UOC-MC or any other religious organisation. However, the wording introduced clearly creates a connection to national security (Draft Law No 8371). For instance, according to the draft, "the activity of any religious organisation that is controlled or managed from outside of Ukraine in a state recognised by law as having carried out military aggression against Ukraine and/or temporarily occupied part of the territory of Ukraine, is prohibited" (Draft Law No 8371, Art.1). In October 2023, this draft law was adopted by the Parliament of Ukraine as a basic draft but not a law – at least one additional parliamentary vote will be needed (Chervonenko, 2023).

5. Lawfulness and Lawfare: Derogations and Prohibition

On 28 February, Ukraine submitted to the Council of Europe a note on its decision "to derogate from the obligations under Articles 4 (paragraph 3), 8, 9, 10, 11, 13, 14, 16, Articles 1, 2 of the Additional Protocol, Art.2 of Protocol 4 to the ECHR" (Note Verbale, 2022). Among the derogated rights are freedom of thought, conscience, and religion (Art.9) and freedom of assembly and association (Art.11), stipulated by the ECHR. However, in April 2024, Ukraine withdrew its derogation from Art.9 but not Art. 11 (Note verbale, 2024).

In the given circumstances, Art. 9 shall be read in light of Art. 11, as the ECHR suggested in two of its rulings (Biblical Centre of the Chuvash Republic v. Russia, Taganrog LRO & Others v. Russia). The reason for this joint reading is that Ukraine may go so far as to prohibit the activity of the ROCU as a religious organisation. In such a situation, there is a need to invoke both freedoms. The prohibition may interfere with the freedom of religion for the followers of the ROCU and the freedom of association

for the ROCU as a religious organisation. As the ECHR framed it, "the forced dissolution under Art. 9 must be interpreted in the light of Art. 11 since religious communities traditionally exist in the form of organised structures" (Taganrog LRO & Others v. Russia, 146).

In the report presented in March 2023, the Office of the High Commissioner for Human Rights (OHCHR) emphasised its concern "regarding the Ukrainian state's activities targeting the UOC (ROCU), which could be discriminatory" (OHCHR, 2023). Later, the OHCHR observed how "national authorities notably searched places of worship and other UOC (ROCU) facilities, issued notices of suspicion and imposed measures of restraint against clergymen, including one of the UOC's (ROCU's) main hierarchs, several cities and regional councils also banned the "activities of the UOC" in the respective areas" (OHCHR, 2023).

Despite the note of derogation submitted by Ukraine, it is essential to stress that derogations from the above-mentioned articles are permitted under the ECHR if they are in accordance with Art.15. Art. 15 (1) of the Convention provides three main requirements for a state to exercise its right to derogate:

i. The derogation can be accepted only in time of war or other public emergency threatening the life of the nation any high contracting party;

ii. The measures adopted must be to the extent strictly required by the exigencies of the situation;

iii. And such measures are not inconsistent with its other obligations under international law.

The first requirement establishes the threshold for invoking the derogation clause and is objectively based. The derogation clause cannot be applied without existing "war or other public emergency threatening the life of the nation." The open Russian aggression against Ukraine on 24 February 2022 has been brought to the attention of the United Nations Security Council, which, due to the Russian "veto power", did not activate the collective security system under Chapter VII of the United Nations Charter (Security Council Report, 2022). Apart from that, the matter of Russian aggression against Ukraine has been "on the table" of the Security Council since 2014 (UNSC Ukraine, 2014). Thus, this requirement is met.

Regarding the third requirement, Ukraine submitted to the secretary-general of the United Nations the note "to derogate from the obligations under Articles 3, 8 (paragraph 3), 9, 12, 13, 17, 19, 20, 21, 22, 24, 25, 26, 27 of the International Covenant on Civil and Political Rights (ICCPR)"

(PMUUN, 2022; PMUUN, 2019). Also, Ukraine modified its derogation in April 2024 (Note verbale, 2024).

The official announcement of derogation clearly satisfies the "officially proclaimed" criteria under ICCPR (HRC, CCPR General Comment No. 29, 2). Additionally, in the light of Hassan v. the United Kingdom, Georgia v. Russia (II), and Ukraine and the Netherlands v. Russia (nos. 8019/16, 43800/14 & 28525/20), the matter of interplay between human rights and international humanitarian law will be invoked. Nonetheless, the interplay between these two realms of international law falls out of the scope of this study.

There are, however, some concerns regarding the second requirement. The primary concern is whether the parliament of Ukraine can prohibit the activity of the ROCU by legislative act and bypassing the court procedure. As I have previously mentioned in the paper, there were reports and accusations which supported the statement that the ROCU was affiliated with the ROC and, more importantly, supported or facilitated Russian aggression against Ukraine. These constitute the evidence based on which Ukrainian political parties support and call for the ban of ROCU, amounting practically to the dissolution of ROCU as a religious organisation by the legislative act of the parliament. For instance, the draft law No 8221 provides that "activities of the Russian Orthodox Church and religious organisations (associations), which are directly or indirectly, as constituent parts of another religious organisation (association), part of the Russian Orthodox Church, as well as religious centres, which are part of or recognise (declare) in any form of subordination the Russian Orthodox Church in canonical, organisational, and other matters, are prohibited on the territory of Ukraine" (Draft Law No 8221, art. 4.1).

By derogating from certain obligations under the Convention, Ukraine expands its margin of appreciation in terms of human rights. However, the forced dissolution of religious organisations amounts to interference under Art. 9 and Art. 11 of the Convention, and the ECHR already stressed it in the Jehovah's Witnesses of Moscow v. Russia case (Jehovah's Witnesses of Moscow v. Russia, 101-3). In the Taganrog LRO and Others v. Russia, the ECHR emphasised that "the forced dissolution would be warranted only in the most serious of cases, as the exceptions to the rights to freedom of religion and association are to be construed strictly, and only convincing and compelling reasons can justify restrictions on that freedom" (Taganrog LRO & Others v. Russia, 149).

Under Art. 9 (2) of the Convention, Ukraine may limit the freedom of thought, conscience and religion "on the basis of public safety, the protection of public order, health and morals, or the protection of the rights and freedoms of others." Again, national security does not constitute a ground for limiting. As the ECHR pointed out, "[...] under Articles 9 §

2 and 11 § 2 of the Convention exceptions to freedom of religion and association must be narrowly interpreted, such that their enumeration is strictly exhaustive and their definition is necessarily restrictive, legitimate aims exhaustively listed in this provision" (Svyato-Mykhaylivska Parafiya v. Ukraine, 132). To justify such interference, Ukraine has to demonstrate that the [possible] prohibition (i) is 'prescribed by law', (ii) has a legitimate aim, (iii) and is 'necessary in a democratic society' (ECHR, Art.9) The crux of the matter lies in the current Ukrainian legislature.

The first requirement of the proportionality test developed by the ECHR demands that the (potential) interference is "prescribed by law". According to the ECHR, "prescribed by law not only refers to a statutory basis in domestic law but also requires that the law be formulated with sufficient precision to enable the individual to foresee the consequences which a given action may entail. The law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention and indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise" (Taganrog LRO & Others v. Russia, 214).

In accordance with law "on freedom of conscience and religious organisations", a forced dissolution of religious organisations can be implemented only by a court decision (law on freedom of conscientiousness and religious organizations, Art.16). However, the "devil is in details". The law "on freedom of conscience and religious organisations" provides that "religious organisations in Ukraine are religious communities, administrations and centres, monasteries, religious brotherhoods, missionary societies (missions), spiritual and educational institutions, as well as associations consisting of the above-mentioned religious organisations" ("Law On Freedom of Conscientiousness & Religious Organizations", Art.7).

So, now comes the "devil": firstly, Ukraine cannot adopt a law which prohibits the activity of the ROCU *per se* (such as the draft law No 8221) because it is not consistent with the primary law "on freedom of conscience and religious organisations" which stipulates the judicial procedure for such prohibition. Apart from that, prohibiting the activity of the ROCU by legislative act, not by judicial decision, will hammer the essence of the freedom of religion and freedom of association. Secondly, the complete ban on the ROCU as an institution may be seen as suppressive due to foreseeable attribution issues. Thirdly, the legislative scheme and logic behind the notions of "religious organisation" suggest the Ukrainian government has to institute judicial proceedings against all religious organisations under the ROCU (religious communities, administrations and centres, monasteries, religious brotherhoods, missionary societies (missions), spiritual and educational institutions, as well as associations) one by one. According to the information provided by the state service

of Ukraine for ethnopolitics and freedom of conscience, 25 652 religious organisations were officially registered on 20 October 2022 within Ukraine (SSUEFC, 2022). In 2021, the ROCU had registered 8874 religious organisations (SSUEFC, 2022). This number decreased in 2022-2023. However, there are no proper statistics that can demonstrate this. During 2022-2023, there were reports in the media about instances in which religious organisations changed their affiliation from the ROCU to the Ukrainian Orthodox Church (Bohdanyok, 2023). By all means, the current number of religious organisations under the ROCU's umbrella is still high. Following the logic of the national legislature, to prohibit the activity of ROCU, the government has to institute judicial proceedings in respective territorial court jurisdiction and justify the need for prohibition.

Interference ought to have a legitimate aim. As has been shown in the paper, there is a constant link between "reasons for national security" and the activity of the ROCU. If the demand to rename a religious organisation may be seen as justifiable interference, it's as follows: "[was] meant to protect public order and the rights of others" (Ilyin & Others v. Ukraine, 64), it is much harder to disintegrate "public order" or "public safety" from "national security" in current circumstances when the government has already linked the ROCU to a "state recognised by law as having carried out military aggression against Ukraine and/or temporarily occupied part of the territory of Ukraine" in its draft law (Draft Law No 8371, Art.1).

As has been stressed before in the paper, the definition of national security employed by Law "On National Security" stipulates a "democratic constitutional system." as part of national security itself (Law on National Security, Art.1). Consequently, there can be an issue with the quality of the law element. As the ECHR stressed, "quality" requires law "[to be] sufficiently accessible and foreseeable as to its effects [...]" (Svyato-Mykhaylivska Parafiya v. Ukraine, 115). For instance, in the Taganrog LRO and Others v. Russia case, the ECHR, with the purpose of demonstrating the application of this element, stated that "the definitions of 'extremism' and 'extremist activities' in section 1 of the suppression of extremism act, as formulated and applied in practice by the Russian authorities, fell short of the lawfulness requirement, [due to], excessively broad interpretation of the concept of 'extremism' and broad definition of 'extremism activities', coupled with a lack of judicial safeguards" (Taganrog LRO & Others v. Russia, 159). For Ukraine, it will be hard to conceptualise "public order" or "public safety" independently from the "democratic constitutional system", which is a part of the national security definition.

Furthermore, the searches conducted by SSU, and the opened criminal proceedings are seen as extra justification to prohibit the activity of the ROCU. However, it opens another Pandora's box, which is the attribution of the actions of representatives of the religious organisation to the organisation as a whole. It would have to be established that pro-Russian

actions of the members of the church are attributed to all the "religious organisations" under the ROCU.

Lastly, the interference, to be proportionate, must be "necessary in a democratic society." As the ECHR noted, "pluralism is indissociable from a democratic society, which has been dearly won over the centuries [...]" (Jehovah's Witnesses of Moscow v. Russia, 99), "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Art. 9 ensures" (Jehovah's Witnesses of Moscow v. Russia, 99). According to the ECHR, "in a pluralist and democratic society, those who exercise their right to freedom of religion, whether as members of a religious majority or a minority, cannot reasonably expect to be shielded from exposure to ideas that may offend, shock or disturb them. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith" (Taganrog LRO & Others v. Russia, 154). Considering that the Independent Ukrainian Orthodox Church emerged with the wide support of the President of Ukraine in 2018-2019 and under the slogans of "national identity" and "security interest", it can be seen as the State "backing" another church. Hence, there will be a need to prove that Ukraine did not obstruct the plurality on the basis of the "national security" clause.

The solution meeting Ukraine´s purposes in this situation, where the representatives of the ROCU were accused of facilitating the Russian aggression, definitely does not lay in a complete legislative ban on the ROCU. First of all, the national legislature does not envision such a position. Additionally, it may come to the ECHR for a review later. The ECHR explicitly reserved the possibility of determining "whether the states have gone beyond the 'extent strictly required by the exigencies' of the crisis; consequently, the domestic margin of appreciation is thus accompanied by European supervision" (Ireland v. the United Kingdom, 207). The ECHR stressed that "the Contracting States must bear in mind that any measures taken in times of emergency should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness" (Mehmet Hasan Altan v. Turkey, 210). Additionally, the ECHR already emphasised the importance of domestic judicial review. In case A. and others v. the United Kingdom, the ECHR concluded that "where the highest domestic court has examined the issues relating to the state's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Art. 15 or the court's jurisprudence under that article or reached a conclusion which was manifestly unreasonable" (A. & Others v. the United Kingdom, 174).

6. Conclusions

National security and emergency have close ties and are complementary to each other. Emergency law allows the state to act sharply and decisively. However, it decreases the level of human rights protection and broadens the state's margin of appreciation. The freedom of religion is one of the most fundamental ones. It can, however, be limited in times of emergency. It is clear that relations between state and churches in Ukraine are complex. The role of a church in society is tangible, and it may impact the acceptance or non-acceptance of particular issues within the society.

The Russian aggression from 2014 has shown the issue of interdependence between the ROC and the ROCU. The flow of accusations against the ROCU in collaboration with Russia since 2014, particularly after 24 February 2022, elevated the issue of state control and national security.

Since 2018, the matter of the ROCU has been intensively securitised. As Buzan framed it, securitisation means the issue is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure. The huge campaign started and was actively supported by the fifth President of Ukraine with the purpose of framing the ROCU as a threat, particularly to national security and national identity, which led to the creation of the Independent Ukrainian church. Apart from this, since 2018, the national security clause towards religious organisations has started evolving bit by bit. Law No 2662–VIII obliged all religious organisations to amend their official names if they are controlled or managed from outside of Ukraine in a state recognised by law as having carried out military aggression against Ukraine and/or temporarily occupied part of the territory of Ukraine. Later, in 2022, this law withstood the CCU examination and was confirmed to be in accordance with the ECHR.

The open aggression against Ukraine in 2022 forced Ukraine to introduce the gravest emergency regime – martial law. Ukraine submitted extensive derogation to major human rights instruments (ICCPR and ECHR). Human rights have been restricted under Art.64 of the Constitution as well. Lately, many cases of collaboration between representatives of the ROCU and Russia have been reported. Ukraine has started an active search for a possible solution to handle the threat of the ROCU.

Ukrainian derogations to the ECHR are objectively based on national emergency and are officially proclaimed. However, there can be some issues regarding the measures adopted by Ukraine. The ECHR is able to exercise post-judicial control over the decisions made by Ukraine in times of emergency. The prohibition of religious organisations as a whole may be seen as overstepping the margin of appreciation that Ukraine has in

times of martial law. It is vital for Ukraine to fulfil all three requirements established by the ECHR to justify interference.

Firstly, the dissolution must be prescribed by law. Indeed, the Law "On Freedom of Conscientiousness & Religious Organizations" prescribes such a procedure carried out by the court. Apart from this, the current legislature defines religious organisations in Ukraine as religious communities, administrations and centres, monasteries, religious brotherhoods, missionary societies (missions), spiritual and educational institutions, as well as associations consisting of the above-mentioned religious organisations. So, each "part" of the ROCU must be prohibited by a separate judicial decision. The complete prohibition will violate the "prescribed by law" requirement, even under martial law and existing derogations, if it is conducted by the legislative act of the Parliament.

Secondly, national security is not a legitimate aim to prohibit the activity of the ROCU under the ECHR. The national definition of national security has a blurred ability to be distinguished from public safety or public order due to its broad framing. It also raises a matter of the quality of law. Thirdly, any measure taken by the government must be necessary in a democratic society, which requires Ukraine to tolerate pluralism as an integral part of this element. Due to historical reasons, there were always a few orthodox churches in Ukraine.

Lastly, there is the issue of attribution. The crux of the problem is whether the actions of particular representatives of the ROCU, against whom the criminal proceedings were instituted, can be attributed to every religious organisation under the ROCU and the ROCU as a whole. As the study has shown, this could prove difficult to sustain for Ukraine.

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