

Oleksandr Bilash
Tetyana Karabin
Pavlo Cherevko

**THE SYSTEM OF ECCLESIASTICAL LAW SOURCES
OF UKRAINE**

INTRODUCTION

The development of the Ukrainian legal system over the last decades can be characterized by two features that appear with apparently strong intensity.

First of all, it is a substantial update of the legislation, which is traced in all branches and fields. Private law was the first to be renewed, and public law and procedural branches of legislation were subject to the next update. The changes that took place are determined by the effort to improve the provision of human and citizen rights, to properly implement all elements of democracy, to increase the efficiency of administrative bodies, as well as to fulfill the European integration requirements that Ukraine faces.

PROF. DR. OLEKSANDR BILASH – Uzhhorod National University; correspondence address: Kapitulna street 26, 88000 Uzhhorod, Ukraine; e-mail: oleksandr.bilash@uzhnu.edu.ua; <https://orcid.org/0000-0002-1248-7798>

PROF. DR. HABIL. TETYANA KARABIN – Uzhhorod National University; correspondence address: Kapitulna street 26, 88000 Uzhhorod, Ukraine; e-mail: tetyana.karabin@uzhnu.edu.ua; <https://orcid.org/0000-0002-6538-5269>

ASSOC. PROF. DR. PAVLO CHEREVKO – Uzhhorod National University; correspondence address: Kapitulna street 26, 88000 Uzhhorod, Ukraine; e-mail: pavel.cherevko@uzhnu.edu.ua; <https://orcid.org/0000-0002-5311-324X>

Secondly, the approach to the systematization and formal grouping of legislative provisions or the legislative acts themselves into institutes, sub-branches, branches of law, and legislation has changed. Ukrainian Soviet legal dogmatics rather rigidly defined the structural elements of the legal system and justified clear and unshakable boundaries between branches, sub-branches, and institutions. Today, a more flexible approach is used to the issue of norms' affiliation to groups. This question is not so much dogmatic as utilitarian significance for the practice of law implementation. The basis is the need of the person (physical or legal) and society as a whole, and not dogmatic provisions regarding the subject and method of legal regulation of a certain set of norms.

Certainly, the immutable "red lines" in the matter of composing the provisions of legislation into certain system formations (for example, they can be called "complex institutions of legislation") remain the unchanged division of law into private and public. It is the criterion that must be permanent and decisive.

Otherwise, combining norms into notional formations should be useful, convenient, and understandable for lawmakers, subjects of law implementation, as well as researchers, and those who study law. From this, it would be fair to conclude that the focus of researchers should be transferred from theoretical reflections on what a certain branch should be, to the plane of the sources of a specific legal body and legislation in particular.

Such generalizations are common to all parts of the legal system of Ukraine, in particular, to that part of it, which is most often called "Ecclesiastical law". This set of norms of public law regulates the implementation of the right to freedom of conscience and religion, the legal status of churches and religious organizations in the state, as well as state-church relations in general [Bilash 2015b, 5]. Legal norms of ecclesiastical law may be contained in acts of national and international law, include and provisions of constitutional, administrative, financial, criminal, labor, tax, and other branches.

Therefore, one of the primary tasks for understanding the content of ecclesiastical law and its establishment in the legal system of Ukraine is the determination, systematization, and research of the system of its sources. This is what this article is dedicated to, the scientific research of the authors was aimed at this.

1. THE DEFINITION AND TYPES OF SOURCES OF ECCLESIASTICAL LAW

Most frequently, sources of law in the literature are defined as ways of establishing and external expression of legal norms, references to which confirm their existence [Petryshyn 2020, 113]. Norms of ecclesiastical law, like any other set of norms, are always established in certain forms and have an external expression. It is these external forms (mainly acts of different legal forces), reflecting norms, that enable participants in legal relations to obtain reliable knowledge about their content, to model appropriate and lawful behavior in various circumstances, create opportunities for the application of norms, and for courts – the opportunity to justify decisions, referring to the sources that contain the required standards. Therefore, in general, the understanding and definition of sources have not only theoretical yet also important practical significance.

A variety of sources is typical for the ecclesiastical law of Ukraine, this field does not have a single systematized act, therefore it can be called polycentric. All sources are independent and can be considered separately, but collectively they form a complex, multi-level, dynamic, and open system, the constituent elements of which are united by structural links [Parkhomenko 2008, 200]. Each individual law or other act is only a *source of law* and not a part of law itself [Gray 2019, 85]. Therefore, they must be consistent with each other and with other sources, including customs, moral norms, and judicial decisions. And it is their interaction and alignment that form the integrity of the institution of the ecclesiastical law. Accordingly, questions arise about the types of sources of law, their grouping, and systematization.

In Ukrainian textbooks, you can find the classification of sources of law into formalized and informalized. The formalized include those that have been consolidated in the form of a document (legal act), while the informal ones have not received such consolidation and exist in the form of traditions, customs, morals, and doctrine. In general, the sources of law do not include all social regulators, but only those that the state recognized as universally binding and legally significant, those that are state-sanctioned. Certainly, the norms that we attribute to the field of public law, including the norms of ecclesiastical law, are mostly formalized. Some of them used to exist in the form of customs or traditions, but in the pro-

cess of development of the legal system, they were consolidated in normative acts.

Here it is crucial to understand the place of acts of religious organizations in the system of ecclesiastical law sources. For sure, acts of religious organizations are not sources of ecclesiastical law by themselves. The church and other religious organizations or their associations are not formed for the realization of political goals, accordingly, the acts and rules established by them cannot be considered law. Acts adopted by them, of course, can and do regulate internal issues of the organizations themselves, the relations of citizens with religious organizations, but even the limits and subject of such a regulation are determined by the state and acts adopted by the state itself. The body of constitutional jurisdiction in Ukraine drew attention to this issue and stated that the internal organization, mutual relations of citizens' associations members, their subdivisions, the charter responsibility of members of these associations are regulated by corporate norms established by the citizens' associations themselves, which are based *on the law* (emphasis is put by the authors).¹

It is also important that even if the state grants religious organizations the right to adopt acts and regulate relations, it does not automatically turn such objects into the area of its own regulation and protection. Therefore, in case of a dispute regarding the violation of the rights and freedoms of citizens by religious organizations, the (state) courts are not responsible for disputes regarding the appeal of associations' acts and actions that belong to their intra-organizational activities or the exclusive competence of religious organizations. At the same time, when considering and deciding cases, courts can use the acts of religious organizations to justify the decisions made. In this case, they will become a kind of "source of judicial decisions" [Gray 2019, 85] but not a law as such.

If religious norms are established in such a form that determines the legal force of certain rules of behavior if they are sanctioned by the state, are adopted in the form of normative legal acts, which have the appropriate legal force and are mandatory for implementation, act as regulators of the social relations of believers, influencing the consciousness of subjects, which ensures compliance with the established universally binding rules of conduct, is defined as a model of proper behavior with an inducement to

¹ Constitutional Court of Ukraine, decision dated May 23, 2001, No. 6-rp/2001.

commit lawful actions, only then can we consider such norms as legal, and their sources as sources of law [Arabadji 2021, 134].

Sources can also be classified by scope: inter-state and international. Inter-state laws include those adopted by national entities, in particular, the Constitution, laws, and bylaws of Ukraine. Respectively, the acts whose regulatory influence is not limited to the territory of Ukraine refer to international law, in particular, these are the acts adopted within the framework of international organizations. In the sphere of ecclesiastical relations, such acts can be, in particular, the Convention for the protection of human rights and fundamental freedoms (1950); International Covenant on Civil and Political Rights (1966), and others.

There is also a horizontal distribution of legal sources [Konstantyy 2005]. Nominally, among the sources of ecclesiastical law, it is possible to single out acts that regulate the procedure for the formation and registration of religious organizations, educational, publishing, and other cultural and enlightening activities of religious organizations, funding and taxation of religious organizations, responsibility for committing offenses in the field of freedom of conscience, as well as conflicting issues of law application in the field of freedom of conscience. However, in the doctrine, the question of the interaction of these subsystems in ensuring horizontal connections remains poorly studied and unexplored [Klaban 2015, 27].

The Ukrainian legal system is characterized by a hierarchy of sources, that is, formal inequality and subordination of some sources to others. It is the feature that determines their relationship, forms a coherent system, and enables to resolution of possible conflicts of legal norms. At the same time, it should be taken into account that the place of a specific normative legal act in the system of sources is determined by the place of the body issuing it in the system of state bodies and its competence.

Usually, the hierarchical system of sources includes 1) the Constitution of Ukraine; 2) International normative legal acts; 3) Laws; 4) Bylaws; 5) Court decisions.

Some Ukrainian scientists also single out religious norms (religious acts) among inter-state sources of law [Rabinovych 2001, 85-86]. However, further justification of such author's suggestions reduces to the fact that religious norms are factors that determine the content of law [Melnikovych 2019, 239], and therefore, are its "sources" and "origins". In this context, it is worth pointing out that the understanding of the concept of

“source of law” in the original meaning was actually understood as where the law comes from or what gives it its origin. In particular, in this sense, the source of law was used by Titus Livius to denote the Laws of the XII Tables *fons omnis publici privatique iuris* (Liv. 3, 34, 6).² However since the sources of law in the modern interpretation are understood as methods of external expression and objectivation of norms, it would be incorrect to consider religious norms on the same level as laws and other acts as sources of law.

2. CONSTITUTIONAL PROVISIONS CONTAINING NORMS OF ECCLESIASTICAL LAW

The Constitution stays at the top of the sources’ hierarchy, its provisions are specified and detailed in legislation and legal acts of the Constitutional Court of Ukraine. The main groups of constitutional provisions that regulate the state-confessional sphere of relations include the following:

1) Provisions relating to rights and freedoms. Thus, part 1, 2 of article 35 defines that “everyone shall have the right to freedom of personal philosophy and religion. This right shall include the freedom to profess any religion or profess no religion, to freely practice religious rites and ceremonial rituals, alone or collectively, and to pursue religious activities. The exercise of this right may be restricted by law only to protect the public order, health and morality of the population, or to protect the rights and freedoms of other persons.” Part 1 of Article 24 of the Constitution also prohibits the establishment of privileges or restrictions based on religious beliefs.

2) Provisions that determine the positive duties of the state in the field of religion. For instance, Article 11 establishes that the state shall promote the consolidation and development of the Ukrainian nation, its historical consciousness, traditions, and culture, as well as the development of religious identity of all indigenous peoples and national minorities of Ukraine.

² It should be noted, that in his statement, Titus Livius does not refer to the twelve tables, but only to the first ten, that is, those that were adopted in the first year of the Decemvirate. But it does not matter for the content of the quote.

3) Provisions defining Ukraine as a secular state. In particular, Part 3 of Article 35 determines that the church and religious organizations in Ukraine shall be separated from the state and no religion shall be recognized by the state as mandatory.

4) Provisions that serve as a legal basis for the relationship between the church and the school and determine that the school is separated from the church. The above is regulated by Part 3 of Article 35 of the Constitution.

5) Provisions that became the grounds for the development of the institute of alternative non-military service.

In particular, Part 4 of Article 35 stipulates, that no one shall be exempt from one's duties to the state or refuse to abide by laws on religious grounds. If the performance of military duty contradicts the religious beliefs of a citizen, the performance of this duty shall be replaced by alternative (non-military) service.

3. INTERNATIONAL LEGAL ACTS AS SOURCES OF ECCLESIASTICAL LAW

When defining international legal acts as sources of state-confessional law, several points require special attention.

1. *The first point* is the determination of the place of acts adopted by supranational bodies and institutions in the hierarchy of legal sources of a specific country. The position of received norms of international law within the hierarchy of norms of internal law is an important issue for solving the process of reception of norms of international law [Němec 2007, 30]. Some countries admit a supra-constitutional or constitutional level of international law regulation. Others define international legal acts as having weaker legal force than constitutional provisions but may have a higher force than ordinary law or have the same force as laws passed by parliament.

In Ukraine, this issue is resolved by the provisions of the constitution itself. Thus, the provisions of Article 9 determine that "International treaties in force ratified by the Verkhovna Rada of Ukraine shall be a part of the national legislation of Ukraine. Conclusion of international treaties that contravene the Constitution of Ukraine shall be possible only after introducing relevant amendments to the Constitution of Ukraine." These

provisions, on the one hand, indicate the priority of the Constitution as a source of law over international treaties, and, on the other hand, the priority of international treaties in relation to the laws of Ukraine.

Ratification through the adoption of the relevant law by the parliament, in fact, transforms the international treaty into a law and also legitimizes its adoption [Zabokrytskyi 2015, 72]. Such conclusions are confirmed by the provisions of various laws stating that in case of conflict between the law and the international treaty, the provisions of the latter apply. On the other hand, the provisions of international treaties upon their ratification are subject to judicial constitutional control for compliance with the Constitution of Ukraine.

The cited constitutional provision of Article 9 also indicates that the international treaties recognized by Ukraine not only influence the creation and content of national legal acts of Ukraine, but they also have the capacity of direct action, that is, they can be directly applied in the relevant intrastate relations [Ragulina 2018, 36].

2. *The second point*, which is quite significant for ecclesiastical law and extremely complicated – is which treaties exactly can be identified as the sources of law? The answer to the question, of course, is important for determining the general possibilities of applying an international act in the case, for example, when such an act has not been ratified [Bernaziuk 2022, 228] or when the parties to the contract are not states. In the context of the ecclesiastical law of Ukraine, it is important to establish whether the Agreement on Cooperation and Interaction, which was concluded and signed between Ukraine by the President of Ukraine and the Ecumenical Patriarchate of Constantinople, the Archbishop of Constantinople, can be considered a source of law. But what is the status of such an act?

Recalling again the constitutional interpretations, it can be stated that, undoubtedly, those treaties whose binding consent has been given by the Verkhovna Rada of Ukraine, that is, those ratified by the parliament, are sources of law. At the same time, some scientists believe that generally recognized principles and norms of international law, as well as international treaties, are part of the national legal system and have priority over the national legislation of Ukraine [Buromenskiy 2012, 264]. Such an approach is due to the effect of the principle of bona fide fulfillment of international obligations, which consists of imposing on states the obligation to properly perform the obligations they have undertaken in accordance with

the UN Charter, in accordance with the generally recognized principles and norms of international law and international treaties [Zadorozhnyi 2015, 247].

At the same time, according to the content of Article 13 of the Law ‘On International Treaties of Ukraine’, not all international treaties require ratification through the adoption of a corresponding law by the Verkhovna Rada, as Ukraine can join some types of international treaties by adopting decisions in the form of a decree of the President of Ukraine or a resolution of the Cabinet of Ministers of Ukraine. This issue was also summarized in the Resolution of the Plenum of the Higher Specialized Court of Ukraine on consideration of civil and criminal matters “On the application of international treaties of Ukraine by the courts in the administration of justice” No. 13 of December 19, 2014. In this judicial summary, it was clarified that international treaties in force, ratified by the Verkhovna Rada of Ukraine, and treaties that do not require ratification and are approved in the form of a decree of the President of Ukraine or a resolution of the Cabinet of Ministers of Ukraine, are part of the national legislation of Ukraine. In this regard, when applying international treaties of Ukraine during the administration of justice, the courts should take into account that not only the international treaties of Ukraine ratified by the Verkhovna Rada of Ukraine but also those international treaties whose binding consent has been given in other forms should be considered as part of national legislation. agreed by the parties, for example, by means of “signing”, “acceptance”, “approval” and “accession”, with the help of which the state expresses in the international manner its consent to the obligation of the treaty for it (clause 2).

All this in a complex gives grounds to conclude that international treaties recognized (ratified) by the parliament in the hierarchy of sources are lower than the Constitution but higher than laws. However, other agreements agreed upon by the President of Ukraine, the Cabinet of Ministers of Ukraine, but not ratified, are also part of national legislation. However, the legal force of such acts is lower and depends on the body that is a party (signer). If the international act is signed by the President, it acquires the same legal force as Presidential decrees. If the act is signed by the Prime Minister of Ukraine, then such an act acquires the same legal force as government resolutions.

The issues of the parties to the agreement (if the parties are not states, but other subjects of international law) in this case can be resolved in the same way as it is resolved in relation to concordats: agreements which are concluded by the Holy See with states and regulate the position of the Catholic Church in different countries. The main question that is discussed in the scientific literature is whether the provisions of the Vienna Convention on the Law of International Treaties of 1969 can be applied to concordats (and accordingly to the Agreement with the Ecumenical Patriarchate) [Bilash 2014, 237], since Article 1 of this Convention states that it “applies to treaties between states.” The content of the conventional definition, of course, does not allow this. However, the following provisions of the convention establish that the fact that this Convention does not apply to international agreements concluded between states and other subjects of international law does not affect either the legal force of such agreements or the application to them of any norms set forth in Conventions to which they would be subject on the basis of international law, regardless of this Convention.

Therefore, regarding the validity of the Agreement on Cooperation and Interaction between Ukraine and the Ecumenical Patriarchate of Constantinople, such an agreement should be considered part of national law under Ukrainian legislation. As for agreements with the Holy See, they have not yet been concluded with Ukraine. In the literature, fears are expressed that the conclusion of such an agreement will ensure the privileged position of the Roman Catholic Church among other denominations existing in our state and will violate the principle of equality of all religions, faiths, and religious organizations before the law (Part 5 of Article 5 of the Law ‘On Freedom of Conscience and Religious Organizations’) [Otrosh 2017, 315-16].

However, it is believed that anti-discrimination reasons were not decisive in the aspect of non-signing. This is also evidenced by the fact that the Agreement with the Ecumenical Patriarchate of Constantinople was signed by the President, and the compliance of its provisions with the principle of equality is not questioned either by scientists, or courts, or state authorities. The purpose of concluding this agreement is to consolidate cooperation regarding the constituting of the Autocephalous Local Orthodox Church in Ukraine within the framework of the Tomos on Autocephaly granted by the Ecumenical Patriarchate and promotion of con-

tacts of the religious organization Mission «Stauropigion of the Ecumenical Patriarchate in Ukraine» between the Autocephalous Local Orthodox Church in Ukraine and the Ecumenical Patriarchate.³ The rights and obligations of this religious organization are not discussed in the agreement, they are regulated by national legislation in acts that regulate the legal status of all religious organizations.

Thus, the answer to the question of whether the Agreement on Cooperation and Interaction between Ukraine and the Ecumenical Patriarchate of Constantinople can be classified as a source of state-confessional law is not related to the definition of the parties to such an agreement, the procedure for recognition or ratification, but rather to the content of its provisions. In general, if the provisions of an international agreement contain legal norms, then, certainly, they can be attributed to the sources of ecclesiastical law. However, if the act contains provisions on readiness and intentions for future cooperation, then such an agreement, most likely, cannot be recognized as a source of law, since it is a political document. A concordat may also become such a document in the future if it is concluded between Ukraine and the Holy See.

3. *The third point.* A separate group of sources of ecclesiastical law is formed by soft law acts. They are either not legally binding, or their binding force is somewhat “weaker” than the force of traditional imperative norms (hard law). Nevertheless, despite the lack of formal binding of soft law, it influences the practice of national rule-making and law implementation through the credibility of the organizations within which it is adopted, as well as its remarkable political and moral significance [Shpakovych 2011, 150]. For Ukraine, legal acts of the EU also serve formally as a soft law, since the state is not a member of the Commonwealth. However, the question is raised more and more frequently in the literature that with the conclusion of the Association Agreement between Ukraine and the EU, the acquisition of candidate status, and the start of official negotiations on joining the EU, not only did legal grounds for the implementation of EU principles and norms appear in the legal system of Ukraine, but the positive obligations of the state to implement the provisions of EU law into national legislation have also emerged.

³ The official site of the President of Ukraine: https://www.president.gov.ua/storage/j-files-storage/00/65/02/39d5327fe27135d96c04d0f53e1e5745_1551875784.pdf [last access: 10.08.2023].

Acts of soft law in the field of state-confessional law include, for example, documents adopted by the Parliamentary Assembly of the Council of Europe (approved as resolutions and recommendations) that cover all areas of state-confessional relations and have a wide range of application [Bilash 2015a, 6]. They include PACE Resolution No. 1510 (2006) “Freedom of Expression and Respect for Religious Beliefs”, PACE Resolution No. 1928 (2013) “Safeguarding Human Rights in Relation to Religion and Belief, and Protecting Religious Communities from Violence”; PACE Recommendation No. 1202 (1993) “Religion Tolerance in a Democratic Society”, PACE Recommendation No. 1720 (2005) “Education and Religion” and PACE Resolution No. 1580 (2007) “The Dangers of Creationism in Education”. There is also a separate PACE Recommendation No. 190 (1995) devoted to Ukraine (“Regarding the Accession of Ukraine”), which recommends that the Committee of Ministers invite Ukraine to become a member of the Council of Europe. A separate item has also referred to the situation between the churches, and in relation to the events of that time, the Council of Europe expressed the hope that “a peaceful solution to the disputes existing among the orthodox churches will be facilitated while respecting the church’s independence vis-à-vis the state, a new non-discriminatory system of church registration and a legal solution for the restitution of church property will be introduced.”⁴

4. LAWS AND BYLAWS

Laws in Ukraine are adopted by the Verkhovna Rada, are “standards of expression the will of Ukrainian people” and in the hierarchy of normative legal acts have a higher legal force compared to acts adopted by other state bodies. This means that all other acts (bylaws) must meet the requirements of the law and ensure its implementation [Kozyubra 2015, 179].

Article 92 of the Constitution of Ukraine establishes that laws exclusively determine human and citizens’ rights and freedoms, the guarantees of these rights and freedoms, the main duties of the citizen, citizenship, the legal personality of citizens, the status of foreigners and stateless per-

⁴ Opinion №190 (1995) (26 September 1995) on Ukraine’s application to join the Council of Europe, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13929&lang=en> [last access: 10.08.2023].

sons, the organization and activity of executive authorities, the fundamentals of civil service, the organization of state statistics and informatics, the principles of local self-government, the fundamentals of national security, the organization of the Armed Forces of Ukraine and ensuring public order, the legal regime of martial law and a state of emergency, zones of ecological emergency situations, military, diplomatic, and other special ranks, and other issues.

According to the level of systematization of normative material, laws can be divided into simple laws and codified laws.

Simple laws are the most common, they regulate various aspects of ecclesiastical relations. In particular, the fundamental law that defines the foundations of ecclesiastical relations is the law 'On Freedom of Conscience and Religious Organizations' (1991). Among the laws whose regulatory influence is aimed entirely at state-confessional relations, it is also worth mentioning the Law of Ukraine 'On Military Chaplaincy Service' (2021), Law of Ukraine 'On the peculiarities of the use of St. Andrew's Church of the National Reserve "Sophia Kyivska"' (2018).

There are laws that, along with other issues, also regulate the relationship between the state and the church. In particular, the Law of Ukraine 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations' (2003) regulates the procedure for state registration of associations of citizens, including religious organizations of various types. Also, the Law 'On Higher Education' (2014) regulates the operation of higher education institutions, including private ones established by religious organizations.

Codified laws are consolidated, legally, and logically holistic acts. They contain the norms of ecclesiastical law only in a certain part (more or less), and in the rest – norms of other branches. For example, the Tax Code of Ukraine (2011) defines the procedure for taxing the activities of religious organizations, but in addition to this, there is also a wide range of tax legal relations. The Criminal Procedure Code of Ukraine (2012) establishes the witness immunity of a priest in relation to the information obtained by him during the confession of believers, although the main part of the provisions of the corresponding code is devoted to the regulation of other issues of criminal proceedings.

Bylaws – are acts of the President of Ukraine, acts of executive authorities, and local self-government bodies. By-laws specify and detail the provisions of laws and stay in a hierarchical relationship among themselves.

The value of the decrees of the President of Ukraine in the regulation of legal relations is related to the status of the President as the head of state, the guarantor of state sovereignty and territorial integrity. Among the decrees of the President, which are defined as the sources of norms of ecclesiastical law, it is worth mentioning the decrees ‘On measures to return religious property to the religious organisations’ (1992), ‘On Urgent Measures for Final Overcoming the Negative Consequences of the Totalitarian Policy of the Former USSR on Religion and Reinstatement of Violated Rights of Churches and Religious Organisations’ (2002).

The highest body in the system of executive bodies is the Cabinet of Ministers of Ukraine, therefore its acts have the highest legal force among the acts of other executive bodies. Acts of the government, which contain norms and, accordingly, are sources of law, are called regulations. Government resolutions, which are the sources of ecclesiastical law, can include: Resolution of the Cabinet of Ministers of Ukraine ‘On the conditions of transfer of religious buildings – architectural monuments to religious organisations’ (2002), Resolution of the Cabinet of Ministers of Ukraine ‘On the approval of the Regulations on the State Service of Ukraine for Ethnopolitics and Freedom of Conscience and Amendments to the Regulations on the Ministry of Culture of Ukraine’ (2019).

5. COURT DECISIONS IN THE SYSTEM OF ECCLESIASTICAL LAW SOURCES

The presence of judicial law-making in the sphere of ecclesiastical law can be stated with confidence in the context of the activities of the European Court of Human Rights, the Constitutional Court, and the Supreme Court, based on individual provisions of the legislation.

In particular, the Law ‘On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights’ (2006) specifies that courts apply the practice of the ECtHR as a source of law when considering cases. Accordingly, examples can be given as decisions of the ECtHR concerning Ukraine and which can be attributed to the sources of

ecclesiastical rights:⁵ Case of Svyato-Mykhaylivska Parafiya v. Ukraine (Application no. 77703/01), 14 June 2007; Case of Religious Community of Jehovah's Witnesses of Kryvyi Rih's Ternivsky District v. Ukraine (Application no. 21477/10), 3 September 2019; Case of Ilyin and Others v. Ukraine (Application no. 74852/14) 03.04.2023.

Thus, Case of Svyato-Mykhaylivska Parafiya v. Ukraine was related to the issue of state registration of a religious organization and amendments to its charter. In particular, in Ukraine, there is no requirement for fixed membership in a religious organization (by the way, it has not been established until now), but normative acts give the right to independently determine how new members are admitted to the organization, membership criteria, and the procedure for electing management bodies. Regarding the Svyato-Mykhaylivska Parafiya, this requirement was violated by the registration authorities, the administrative authorities tried to apply their vision of the composition of the parish, which the ECtHR pointed out, reminding that the internal structure of a religious organization and the norms governing its membership should be considered as a way in which such organizations express their views and adhere to their religious traditions. Therefore, a refusal by the domestic authorities to grant the status of a legal entity to an association of believers amounts to an interference with the right to freedom of religion under Article 9 of the Convention.

Case of Religious Community of Jehovah's Witnesses of Kryvyi Rih's Ternivsky District v. Ukraine concerns land issues. For many years, the religious community could not to obtain rights to land and planning approvals to build a place of worship on the land that belonged to the territorial community, but on which there was a building that was the property of the religious community and it has been using as a place of worship. Despite the fact that the national court found the refusal of the city council to approve the application of the religious community to be illegal from the point of view of national legislation, the city council did not implement these decisions and, accordingly, acted arbitrarily and not in accordance with the law. This was pointed out in the decision of the ECtHR.

The most recent case on which there is a decision in the ECtHR and which concerns ecclesiastical relations is the Case of Ilyin and Others

⁵ It should be noted that the sources of law are not only those decisions of the ECtHR that concern the state of Ukraine but also the provisions of other decisions in which the court expressed general conclusions.

v. Ukraine. This case concerns a refusal to register a religious community of the Unification Church, but the Court did not find a decision on the administrative body's refusal to register a violation of the Convention requirements. Nevertheless, this case is interesting from the point of view of building a system of norms of ecclesiastical law. The ECtHR, in this case, cited the provisions of the case *Svyato-Mykhaylivska Parafiya*, where assessed one of the relevant statutory provisions of the Freedom of Conscience and Religious Organisations Act as follows: As to 'foreseeability' of the law, the Court considers that ... only one vague reason for refusal to register a religious association or changes to it: if 'the statute of a religious organization or its activity contravenes existing legislation'. Moreover, the Act required the registering body to give reasons for a refusal to register a religious association or its statute, but it did not specify how detailed this reasoning should be or whether the reasoning should refer only to the textual incompatibility of the Statute with the provisions of the law or substantive incompatibility of the aim and activities of the religious association with the requirements of the law. Thus, in the court's opinion, this violates the principle of 'foreseeability' of the law.

Another manifestation of judicial law-making in the sphere of ecclesiastical relations is the Decision of the Constitutional Court of Ukraine. He has a monopoly on the interpretation of constitutional provisions, he also reviews laws for their compliance with the provisions of the constitution and fundamental values.

There are only two decisions of the Constitutional Court that directly relate to state-confessional relations: a) Decision of the Constitutional Court of Ukraine "Upon the case of the constitutional complaint of the Parliament Commissioner for Human Rights on the alignment of the Constitution of Ukraine (constitutionality) provisions of the fifth part of Article 21 of the Law of Ukraine On Freedom of Conscience and Religious Organisations (case of early notification of public worship, religious rites, ceremonies and processions)" No. 6-rp/2016 of September 8, 2016; b) Decision of the Constitutional Court of Ukraine "Regarding the name of religious organizations (associations), which are included in the structure (are part of) a religious organization (association), the guiding centre (director) of which is outside Ukraine in the state recognised by law as having committed military aggression against Ukraine and/or temporarily oc-

cupied part of the territory of Ukraine” (case regarding the full name of religious organizations) No. 4-p/2022 of December 27, 2022.

The first decision of the Constitutional Court of Ukraine concerns the procedure for holding public religious gatherings. In it, the Constitutional Court emphasized that religious gatherings belong to peaceful gatherings, accordingly, if such events take place in public and are of a peaceful nature, they are subject to constitutional requirements regarding the advance notification of executive power bodies or local self-government bodies about their holding, their organizers and participants may subject to restrictions in the interests of national security and public order with the aim to prevent riots or crimes, to protect public health or to protect the rights and freedoms of other people.

The second decision of the Constitutional Court concerns the legislative restrictions on religious organizations (associations), the guiding centre (directorate) of which is outside Ukraine in the state recognized by law as having committed military aggression against Ukraine. Such restrictions refer to the names of religious organizations (the obligation to indicate the connection in their name) and the prohibition of free access of clergymen of such religious organizations to parts of the armed forces of the state. Both restrictions were recognized by the Constitutional Court as legitimate, and therefore admissible.

Regarding the decisions of general courts, the Law ‘On the Judiciary and the Status of Judges’ (2016) specifies that the conclusions on the application of legal norms, set out in the Supreme Court’s decisions, are binding for all subjects of authority, which apply in their activities legal act containing the relevant rule of law. However, scientific and educational literature on the theory of law also indicates that other court decisions, which contain legal features of monotonous and repeated application and interpretation of legal norms, can also acquire the status of a source of law [Petryshyn 2020, 129].

There are few decisions of the Supreme Court that relate to the implementation of the right to freedom of conscience, the foundation and activity of religious organizations, control over their activities, and form a stable judicial practice. Among them, in particular, we can highlight:

The decisions of the Supreme Court in cases No. 817/1950/16 and No. 460/939/19 – regarding the provision for the use or transfer of ownership

to religious organizations of religious buildings that were recognized as state property during Soviet times;

The resolution of the Grand Chamber of the Supreme Court in case No. 910/8132/19, decision of the Supreme Court in case No. 598/157/15-ц – regarding the impossibility of a judicial appeal against decisions made by the general assembly of a religious community and aimed at ensuring the activities of the religious community itself and satisfying the interests members of the religious community;

The decision of the Appellate Chamber of the Higher Anti-Corruption Court in case No. 991/5479/22 – regarding the fact that forcing a believer to submit an e-declaration in the absence of a legal alternative method of submitting such a declaration is a violation of the right to freedom of thought, conscience, and religion.

CONCLUSION

Thus, the system of sources of ecclesiastical law is characterized by formal inequality and the subordination of some sources to others, which is due to the place of the body issuing it in the system of state bodies and its competence.

The Constitution of Ukraine stays at the top of the hierarchy of sources, which contains provisions relating to human rights and freedoms (right to freedom of conscience and religion, prohibition of discrimination on religious grounds, right to alternative non-military service), provisions defining Ukraine as a secular state and determine the positive duties of the state in the field of religion.

The place of international legal acts in the system of ecclesiastical law sources depends on who are the parties of the agreement, as well as on their content. International treaties ratified by the parliament are lower than the Constitution in the hierarchy of sources, but higher than laws, and the legal force of other agreements depends on the body that is a party (signer) to it – the President, Prime Minister of Ukraine, etc. International treaties containing provisions on the intentions of future cooperation are political documents and do not belong to the sources of law.

The largest number of ecclesiastical legal norms are contained in laws regulating various aspects of state-confessional relations. In particular,

separate laws regulate the grounds of ecclesiastical relations, chaplain service in the Armed Forces, and the use of St. Andrew's Church of the National Reserve "Sophia Kyivska". Laws, which are sources of not only ecclesiastical law, regulate the procedure for state registration of religious organizations of various types, activities of higher education institutions, taxation of religious organizations activities, etc.

Bylaws are acts that take up lower levels in the hierarchy of sources and must comply with laws. They specify and detail the provisions of laws.

Judicial law-making in the field of ecclesiastical law is manifested through the decisions of the European Court of Human Rights, which in Ukraine are considered the sources of law, through the decisions of the Constitutional Court of Ukraine, which revises laws for compliance with the constitution and fundamental values, as well as the decisions of the Supreme Court, the conclusions of which are binding not only for judicial bodies but also for all subjects of authority, which implement in their activities a legal act containing the relevant legal norm.

REFERENCES

- Arabadj, Nataliya. 2021. "Vplyv khrystyyanstva na pravovu systemu Ukrayiny v umovakh transformatsiy derzhavno-relihiynykh vidnosyn." *Publichne pravo* 2(42):130-37. <https://doi.org/10.32782/2306-9082/2021-42-13>
- Bernaziuk, Yan. 2022. "Priorityetnist' mizhnarodnykh dohovoriv pry vyrishenni koliziy u zakonodavstvi: analiz sudovoyi praktyky." *Yurydychnyy naukovyy elektronnyy zhurnal* 8:223-29. <https://doi.org/10.32782/2524-0374/2022-8/48>
- Bilash, Oleksandr V. 2014. "Konkordat yak riznovyd mizhnarodnoi uhody ta rehuliator derzhavno-konfesiynykh vidnosyn." *Naukovyy visnyk Uzhhorods'koho natsional'noho universytetu. Seriya: Pravo* 29(2):236-40.
- Bilash, Oleksandr. 2015a. *Mizhnarodno-pravovi akty pro pravo na svobodu sovisti ta virospovidannya*. Uzhhorod: Vydavnytstvo Oleksandry Harkushi.
- Bilash, Oleksandr. 2015b. "Derzhavno-konfesiyne pravo yak skladova systemy vyshchoyi yurydychnoyi osvity Zakhidnoyi ta Tsentral'noyi Yevropy." *Pravo i suspil'stvo* 6(3):3-8.
- Buromenskiy, Mikhail. 2012. "K voprosu o deystvii norm mezhdunarodnogo prava vo vnutrennem pravoporyadke Ukrainy." In *Mezhdunarodnoye pravo kak osnova sovremennogo mirovoporyadka*, ed. Andrey Mel'nik, Svetlana Mel'nik, and Timur Kotkiy, 251-72. Kiyev-Odessa: Feniks.
- Gray, John C. 2019. *The Nature and Sources of the Law*. Edition 2. Taylor & Francis.

- Klaban, Volodymyr. 2015. "Suchasna systema dzherel prava Ukrainy: deyaki teoretychni ta praktychni aspekty." *Visnyk L'vivskoho universytetu. Seriya yurydychna* 61:24-29.
- Konstantyy, Oleksandr. 2005. *Dzherela administratyvnoho prava Ukrainy*. Kyiv: Ukrainy's'ke ahentstvo informatsiyi ta druku "Rada".
- Kozyubra, Mykola, red. 2015. *Zahal'na teoriya prava*. Kyiv: Vaite.
- Melnikovych, Mykhaylo. 2019. "Relihiyni osnovy systemy zakonodavstva Ukrainy." *Yurydychna nauka* 5(95):237-44.
- Němec, Damian. 2007. *Konkordátní smlouvy Apoštolského stolce s postkomunistickými zeměmi (1990-2007)*. Habilitační práce. Univerzita Palackého v Olomouci.
- Otrosh, Mykhaylo. I. 2017. *Mistse i rol' Katolyts'koyi tserkvy u mizhnarodnomu pravoporyadku*. Odesa: Feniks.
- Parkhomenko, Nataliya. 2008. *Dzherela prava: problemy teorii ta metodolohiyi*. Kyiv: Yurydychna dumka.
- Petryshyn, Oleksandr (ed.). 2020. *Zahal'na teoriya prava*. Kharkiv: Pravo.
- Rabinovych, Petro. 2001. *Osnovy zahal'noyi teorii prava ta derzhavy*. Kyiv: Atika.
- Ragulina, Kseniia. 2018. "Vplyv mizhnarodnykh dohovoriv na natsional'ne zakonodavstvo Ukrainy: zahal'noteoretychnyy aspekt." *Naukovyy visnyk Mizhnarodnoho humanitarnoho universytetu. Seriya: Yurysprudentsiya* 35(1):32-36.
- Shpakovych, Ol'ha. M. 2011. *Vplyv aktiv mizhnarodnykh orhanizatsiy na vnutrishni pravoporyadky derzhav-chleniv: teoriya i praktyka*. Kyiv: «Kyivskiy universytet».
- Zabokrytskyy, Ihor. 2015. "Problemy pravovoho statusu mizhnarodnykh dohovoriv Ukrainy u systemi dzherel konstytutsiynoho prava Ukrainy." *Visnyk Natsional'noho universytetu «L'vivska politekhnika»*. *Yurydychni nauky* 825:69-78.
- Zadorozhnyi, Oleksandr. V. 2015. *Porushennya ahresynoyu viynoyu Rosiys'koyi Federatsiyi proty Ukrainy osnovnykh pryntsyviv mizhnarodnoho prava*. Kyiv: K.I.S.

The System of Ecclesiastical Law Sources of Ukraine

Abstract

The article is devoted to the determination, systematization, and study of the system of Ecclesiastical Law sources. This is a necessary and primary task for understanding the content of ecclesiastical law and its establishment in the legal system of Ukraine.

The conducted analysis has given grounds to make up conclusions concerning the formal inequality and the subordination of some sources to others.

The Constitution provisions contains norms and principles relating to human rights and freedoms, defining Ukraine as a secular state and determine the positive duties of the state in the field of religion. The laws if Ukraine contains the large number of ecclesiastical legal norms regulating various aspects of state-confessional relations. Bylaws specify and detail the provisions of laws. Judicial law-making in the field of ecclesiastical law is manifested through the decisions of the European Court of Hu-

man Rights, which in Ukraine are considered the sources of law, through the decisions of the Constitutional Court of Ukraine, which revises laws for compliance with the constitution and fundamental values, as well as the decisions of the Supreme Court, the conclusions of which are binding not only for judicial bodies but also for all subjects of authority, which implement in their activities a legal act containing the relevant legal norm.

Keywords: sources of law; Ecclesiastical Law; Laws; international legal acts; bylaws; decisions of the courts; legal system of Ukraine

System źródeł prawa wyznaniowego Ukrainy

Abstrakt

Artykuł poświęcony jest definicji, systematyzacji i badaniu systemu źródeł prawa wyznaniowego. Jest to niezbędne i podstawowe zadanie dla zrozumienia jego treści i ugruntowania w systemie prawnym Ukrainy. Analiza pozwoliła autorom wyciągnąć wnioski na temat formalnej nierówności i podporządkowania jednych źródeł innym. Zasady zawarte w Konstytucji zawierają normy i zasady odnoszące się do praw i wolności człowieka, definiują Ukrainę jako państwo świeckie i określają pozytywne obowiązki państwa w dziedzinie religii. Ustawy Ukrainy zawierają dużą liczbę przepisów regulujących różne aspekty stosunków wyznaniowych. Ustawodawstwo niższego szczebla precyzuje i uszczegóławia przepisy ustaw. Prawotwórstwo sądowe w dziedzinie prawa wyznaniowego przejawia się w decyzjach Europejskiego Trybunału Praw Człowieka, które są uważane za źródła prawa na Ukrainie, w decyzjach Sądu Konstytucyjnego Ukrainy, który bada ustawy pod kątem zgodności z konstytucją i podstawowymi wartościami, a także w decyzjach Sądu Najwyższego, których wnioski są wiążące nie tylko dla sądownictwa, ale także dla wszystkich organów władzy państwowej, które realizują akt prawny w swojej działalności.

Słowa kluczowe: źródła prawa; prawo wyznaniowe; ustawy; międzynarodowe akty prawne; regulaminy; orzeczenia sądowe; system prawny Ukrainy

Informacje o Autorze: PROF. DR OLEKSANDR BILASH – Uzhorodzki Uniwersytet Narodowy; adres do korespondencji: Kapitulna street 26, 88000 Uzhhorod, Ukraina; e-mail: oleksandr.bilash@uzhnu.edu.ua; <https://orcid.org/0000-0002-1248-7798>

Informacje o Autorze: PROF. DR HAB. TETYANA KARABIN – Uzhorodzki Uniwersytet Narodowy; adres do korespondencji: Kapitulna street 26, 88000 Uzhhorod, Ukraina; e-mail: tetyana.karabin@uzhnu.edu.ua; <https://orcid.org/0000-0002-6538-5269>

Informacje o Autorze: ASSOC. PROF. DR PAVLO CHEREVKO – Uzhorodzki Uniwersytet Narodowy; adres do korespondencji: Kapitulna street 26, 88000 Uzhhorod, Ukraina; e-mail: pavel.cherevko@uzhnu.edu.ua; <https://orcid.org/0000-0002-5311-324X>