

АКТУАЛЬНІ ПИТАННЯ АДМІНІСТРАТИВНОГО ПРАВА ТА ПРОЦЕСУ

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ADMINISTRATIVE AND FINANCIAL ISSUES OF THE APPLICATION OF THE LAW OF UKRAINE «ON AMENDMENTS TO SOME LAWS OF UKRAINE ON THE ESTABLISHMENT OF THE EDUCATIONAL INSTITUTIONS BY RELIGIOUS ORGANIZATIONS» BY LOCAL COUNCILS

In the article the national legal framework on freedom to profess religious beliefs has been analysed in comparison with the relevant European legislation. The authors have monitored the relationship of the church and the school around the world, including Western Europe. Some legal contradictions and problems on the practical implementation of the Law of Ukraine «On amendments to some laws of Ukraine» (concerning the establishment of the educational institutions by religious organizations) are studied.

Keywords: religious organization, education, nonprofit institution, charity.

Problem setting. In modern terms of restructuring the hierarchy of values, the aspect of religious education at schools is of particular importance. Educative space acts as the basis for the formation of future generations of the Ukrainian nation and thus the study of all the factors that influence it requires special prudence and tolerance.

Article 18 of the Universal Declaration of Human Rights states that «everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance» [1]. Similar provisions can be found in the European Convention on Human Rights (Art. 9) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Art. 1) [2; 3].

Item 4 of Article 18 of the International Covenant on Civil and Political Rights specifies the obligation of the states, participating in that Covenant, «to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions». Freedom of religious education is confirmed in Article 2 of the Protocol to the Convention for the Protection of Human

Rights and Fundamental Freedoms: «No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions» [4; 5].

Having such a powerful legal framework of international significance, until recent times Ukraine has almost been without any normative basis for practical realization of the rights of parents, who follow certain religious beliefs, to provide education to their children in accordance with religious teachings. The main form of educational institutions was so-called Sunday schools or similar institutions, which were often founded at churches with the aim of developing children's outlook in accordance with the tenets of a particular religious denomination.

Such situation has developed because of the consequences of anti-religious Soviet period. The first harbingers to find alternatives to the relationship between the church and the government were decrees and orders of the President of Ukraine: Decree of the President of Ukraine from 04.03.1992 №125/92 «On measures for the return of religious property to religious organizations»; Decree of the President of Ukraine from

21.03.2002 № 279/2002 «On urgent measures to overcome the negative effects of the totalitarian policy of the former USSR concerning religion and restoration of violated rights of churches and religious organizations finally»; Decree of the President of Ukraine №701/2005 from 20.04.2005 «Issues of the Ministry of Justice of Ukraine»; Order of the President of Ukraine from 22.06.1994 №53/94-рр «On the return of religious property to religious organizations».

Target of research. The purpose of the study is to investigate the administrative and financial issues at the local level regarding the application of the Law of Ukraine «On amendments to some laws of Ukraine» (on the establishment of the educational institutions by religious organizations) by local councils.

The object of research. The legal norms regulating the social relations that arise in the field of education, taking into account the possibility of the establishment of educational institutions by religious organizations at the local level in conditions of decentralization.

Article’s main body. The actuality of the issue of co-existence of religious and secondary schools as educational centers is growing in Ukraine from year to year. As for the analysis of the data given by the State Statistics Service and the State Department of Nationalities and Religions on the background of reduction of the number of secondary schools (including per capita), the growth of percentage of ratio of Sunday and secondary schools is increasing [6; 7].

Data on the network of Sunday schools and secondary schools in Ukraine (2012–2015)

Index	2012	2013	01.01.2014	01.01.2015
Number of religious communities	32521	33581	35646	33781
Number of religious educational institutions	200	202	206	198
Number of students of religious educational institutions	9649	10533	18229	17829
Number of Sunday schools	12762	13157	13104	12406
Number of secondary schools	19900	19700	19300	17600
Ratio of Sunday schools and secondary schools (%)	64,13 %	66,79 %	67,90 %	70,49 %

Index	2012	2013	01.01.2014	01.01.2015
Population, mln.	45,6	45,6	45,43	42,93
Number of Sunday schools per 100 thousand population	28	29	29	29
Number of secondary schools per 100 thousand population	44	43	42	41

In this context, the adoption of the Law of Ukraine «On amendments to some laws of Ukraine» (concerning establishment of educational institutions by religious organizations) (hereinafter – the Law) in June of this year acquires an extraordinary impact [8]. A responsible mission of restructuring of the educational process by forming a harmonious tandem with the requirements of secondary school and religious denomination is entrusted to the articles of the Law.

In view of the fact that religion has always been characterized by pedagogical intent, almost every state has faced the distribution of spheres of public and religious authorities’ influence. This multifaceted issue has been the subject of researches repeatedly. Works on the complex system of coexistence and reciprocal development of churches and schools belong to Druzenko G., Kalnysh Y., Nagorna T., Yelenskyi V., Zakovych M., Kolesova I., Metlyk I. and others.

In the western countries the relationships between school and religion were shaped under the influence of historical and political peculiarities of each state and subjected to certain structural transformation in different periods. It proves layering and complexity of the raised question. Most European countries follow the principle of the identification of religious and non-religious schools concerning their legal status. Some countries are practising a system in which schools founded by churches receive state benefits in the form of financial support and conferring the status of public schools. Equal to public religious schools in Germany, Austria, Switzerland, Italy and Slovakia are also assimilated to public. France and Spain are building a dialogue between the government and religious schools on a contract basis.

In this context Austria has its own originality because of the concordat with the Apostolic. Exactly this agreement with the Holy See gives the same status to all Catholic schools as the public schools have. It should be noted that the effect of these interpretations can be applied to the schools established only by recognized churches. The main requirements for the acquisition of

this status are the presence of the faithful in an amount not less than 2 percent of the population of Austria, and passing the length of probationary period for 20 years [9].

The experience of Germany is not less interesting: the state is multi-confessional. Most federal lands have the system of so-called Christian co-education. In fact, this means that students study general subjects together, and for religious lessons they are divided into groups according to their religious affiliation. Despite this wide space for all religious teachings, restrictions still exist in this system and they have been dictated by the need to optimize the network: the formation of classes of studying Religious Education is only provided if the number of students belonging to that denomination is enough [10].

The model of relations between the government and the church in most Western European countries is based on the principle of neutral attitude of the state to religion. The system of teaching Religious Education at schools has been formed under the influence of such parity. Belgium can be a good example of the country, where the principle of neutrality dominates. In other words, Religious Education is just an informative course. Indoctrination and especially imposition of religious provisions are prohibited.

The Constitution of the Portuguese Republic interprets relationship of church and state school ambiguously. Article 41 states «No one shall be persecuted, deprived of rights or exempted from civic obligations or duties because of his convictions or religious observance». But in Article 43 it is specified that «public education shall not be denominational». Thus, the constitutional provisions do not restrict cooperation between the church and the state, but the question of the role of the church in the sphere of state schools still remains [12].

Both the church and the school have a mission: the formation of human consciousness by gaining certain social and intellectual skills. For both institutions it is authentic. But in one case ritual relationship is initiated with the transcendent, and in another case – formalized relationship with the immanent: certain outlook and knowledge base, accumulated by the mankind. The Church implements its mission separately from the school. This fact will always catalyze inflammatory disputes, but it can not be ignored. The school initiates knowledge in current scheme, the church – faith.

According to the explanatory note to the draft Law authors defined its purpose as providing the constitutional rights of religious parents or individuals in loco parentis for the education of their children in conformity with their own religious beliefs and improving the relevant legislation.

And above all, the improvement of relevant legislation is urgently required, because this process involves the improvement of an existing one. The Constitution of

Ukraine (Article 35) states: «Everyone has the right to freedom of belief and religion. This right includes freedom to profess any religion or to profess no religion ... The church and religious organizations in Ukraine are separated from the state, and the school is separated from the church. No religion can be recognized by the state as obligatory....» In this article we trace a clear delineation between state, religion and schools. In the highest Law of the country there is no reference to the fact that the concept of separation of religion from the school only provides municipal sector and thus it comes to the educational institutions of all types and forms of ownership [13].

In Article 3 of the Law of Ukraine «On General Secondary Education» we find the position: secondary education aims to provide the comprehensive development of the personality through education and upbringing, based on common values and principles of the multiculturalism, secular education, civic awareness and mutual respect between nations and peoples [14]. This article complements the main provisions of Article 35 of the Constitution of Ukraine and stresses the dominant of the secular character of the educational process. And it is still confirmed in the Law of Ukraine “On freedom of conscience and religious organizations”. In Article 6 one can read: “The state system of education in Ukraine is separated from the church (religious organizations), and it is secular in its nature” [15]. As the state system of education is a combination of educational institutions, working in the country, the performance of the provisions of the article cover all schools, regardless of the form of foundation.

Turning to international law, the Vatican Declaration on Religious Freedom stipulates that religious organizations and believers must fulfil requirements of the secular power, observe public order, and a civil society has the right to defend itself from any abuse of religious slogans. It is also provided by the relevant legislation of Ukraine “On Prosecution”, “On the National Police,” “On the Security Service of Ukraine”; rules of those laws determine the law enforcement, based on strict adherence to legality [16].

Nowadays Ukraine as the state entered a period of radical restructuring of the management structure. Constitutional law and practice of state building of our country always declared a significant role of the decentralization - dispersion of authority powers and resources to lower levels of public administration. The external situation and internal political priorities of the state contributed to the fact that today that issue had become urgent. Local government reform, aimed at the decentralization of power, determines balance as an integral component by strengthening local communities and introducing the principle of subsidiarity, which provides a clear separation of powers among various local governments, as well

as executive authorities and local governments. Thus, according to the model of the reformed system of public authorities at the local level there are three levels: regional, district and community levels, with a clear level separation and consolidation of competencies. Issues concerning secondary, preschool and extracurricular education are referred to the competence of the community. This means that the network of the educational institutions should be formed according to the needs and the demand of the territorial communities of villages, towns, cities.

In this regard, there is a question if amendments to Article 11 of the Law of Ukraine «On General Secondary Education» meets the basic principles of local government reform in the part of transmission the right to independent determination of the need to establish schools and form the network by the religious organizations. Furthermore considering the current economic and social crisis this inconsistency in matters of formation of the educational space could exacerbate negative tendencies of strengthening identities among the population.

At the beginning of the third millennium a considerable success gained by astrology, occultism and ufology, esotericism and new religious movements that promote antisocial spiritual values. From a legal point of view it is extremely difficult to prove that dangerous religious groups are destructive religious organizations and there is no place for them in public institutions by law. There is no concept of «religious offense» in the legal system of Ukraine within the meaning, provided by legal acts in pre-Revolutionary times and enshrined in the regulations of some contemporary foreign countries. For violation of the legislation on freedom of conscience and religious organizations there is a civil, disciplinary, administrative and criminal liability [17]. A significant degree of impunity of religious groups is the result of the absence of authoritative experts and a certain system of independent and objective evaluation of the teachings of the group. Any act about the negative impact of the sect can be easily refuted by the counter document presenting the same organization exclusively as religious or charitable.

This threatening prospect requires from the state a clearer coordinative function that provides differentiation of religious groups based on their ideological security. For an example one can apply to the Lithuanian practice. The Law of 1995 on the right of religious communities to establish schools contains a list of confessions that meet the necessary requirements to the church as the association which can establish an institution: the Latin Rite Catholic, Greek Catholic, Evangelical Lutheran, Evangelical Reformed, Orthodox (Orthodox), the Old Believers, Jews, Sunni Muslims, Karaites. By law, only those religious groups may act as founders of schools and other educational institutions. If the other denominations have intent of founding schools, they will

have to go through the recognition as religious organizations or associations. The basic requirement for unhindered going through the procedure is the term of 25 years from the date of first registration. Recognition is possible according to a decision by the Sejm and the conclusions of the Ministry of Justice.

This carefully designed mechanism allows minimizing the possibility of the negative impact of spreading of destructive sects and religious groups through establishment of schools at the national level [18]. Article 14 of the Law of Ukraine «On Freedom of Conscience and Religious Associations» defines three months as maximum for registration of the statute of a religious organization. This means that during three months (and in the ordinary course of registration it is only one month) a destructive group that masquerades as a religious organization may obtain the right to establish an institution, and thus it will be able to direct harmful effects on the younger generation. The degree of economic attractiveness of this perspective is so significant that a positive conclusion of the registration statute of such organization may resort to corrupt practices of bribery.

Due to lack of precedents, many questions arise related to supervising the compliance of educational programs of the institutions, founded by religious organizations, with curricula. Filling of invariant component is of particular concern, because secular teachers won't make an objective assessment of the optimal religious filling and they can't define the boundary of imposing ideological postulates. Solution to this problem requires attracting members of the clergy and teachers of the traditional education system. Unfortunately, today there is no unified approach to the formation of the curricula of schools founded by religious organizations.

We cannot ignore one more sensitive issue – the formation of teaching corps of religious schools. On one hand, the definition of criteria for teachers is the prerogative of schools, on the other – according to the Law religious schools are almost equalized with public, and therefore the state has the right to intervene into this process. The Law of Ukraine «On Freedom of Conscience and Religious Organizations» in Article 3 clearly states: «... It is not allowed any coercion in determining the attitude to religion of the citizen ...». Thus, religious school teacher cannot feel any limitation of rights and freedoms, including religious, because of own beliefs. The moral side of the question has its arguments: the teacher has to respect religious orientation of the institution, where he or she teaches.

Therefore, to prevent the transformation of the Law into the detonator of social stress and significant omissions regarding the requirements of the state standards for elementary, basic and complete secondary education, it is need to carefully examine the potential negative effects of its direct action and neutralize the influence by

creating a system of multilevel control. There are a lot of «pitfalls» in the financial and economic side of the issue. The economic feasibility of the Law is conditioned, above all, by the ability to discharge the state budget reducing the number of pupils and students of the educational institutions of communal ownership.

Details of the potential economic impact of the introduction of the practice of founding institutions by religious organizations should be studied. To do it we should turn for a help to the Tax Code of Ukraine, because this document regulates the economic status of religious organizations. Moreover, the new edition of the Tax Code, which entered into force on January 1, 2015, provides much more space and fiscal freedom to religious organizations. Thus, in accordance with subparagraph 133.1.1 of paragraph 133.1 of Article 133 of the Tax Code of Ukraine taxpayers – residents are business entities – legal entities conducting economic activity both in Ukraine and abroad, except for: budgetary institutions; public associations, political parties, religious organizations, charities, pension funds, which purpose may not be receiving and distribution of profits among founders, members of authorities, other related individuals and employees of such organizations.

In part 4 of subparagraph 133.1.1 the condition is indicated, that the above mentioned organizations do not pay income tax from the date of inclusion in the Register of non-profit organizations and institutions by supervisory bodies in the procedure established by the central executive body, which forms and implements the national tax and customs policy [19]. Any other provisions regulating the taxation of non-profit organizations in Section III are absent.

Thus, by the new edition of the Tax Code it is set only two conditions for such organizations to get the right to be non-payers of income tax: the lack of purpose in the organization to implement distribution of profits among founders, members of authorities, other related individuals and employees; inclusion in the Register of nonprofit organizations and institutions in the procedure established by the central tax body. Unfortunately, the second part doesn't include recourse to lobbying positive results on inclusion in the Register using corruption illegal methods. But the most significant thing is that the principle of taxation of nonprofit organizations is modified: a large number of constraints present in the previous edition of the Tax Code of Ukraine is actually cancelled.

Turning to the educational institutions established by the religious organizations, there are no provisions in the Law determining the form of the establishment of potential educational institutions, but the explanatory memorandum clearly states that the organizations will be in the private sector. Therefore, we suggest that the institutions will be established in the form of private educational institutions. From the point of view of tax-

tion it means automatic assignment of responsibilities of a taxpayer on general terms.

And here again we face amendments of the new Tax Code. By January 1, 2015, the Tax Code of Ukraine had predicted that profits got from the provision of educational services by preschool and educational institutions of private ownership would be exempt from income tax. In the new editions of Section III of the Tax Code of Ukraine «Corporate income tax» there is no provision that can exempt income tax from the provision of educational services by preschool and secondary educational institutions. This situation has catalyzed the initiative for the return of preferential tax status for kindergartens and schools of not communal ownership. Thus, in the draft Law on amendments to the Tax Code of Ukraine (concerning the creation of favorable conditions for the provision of educational services by non-state preschool and secondary educational institutions) from 02.03.2015 № 2276 it is proposed to free non-state preschool and secondary educational establishments from paying income tax and tax on real property other than land plot, and to release these institutions regardless of ownership and funding sources from the land tax [20].

In addition, there is scepticism about absolute transparency of the estimate of tuition fees. The specific financial and legal side of religious organization functioning is determined by the system of donations and other charitable contributions. In the legal field it should be as follows: members of the organization may, at their discretion, add funds for charity, and in the case of their children studying at school or any other institution – must pay fixed fees. Thus both items of expenditure should be parallel, since the first group of funds is directed for a nonprofit organization, the second one – for a private institution. Infact, the situation may take a different look. Parents-members of a religious organization can add funds to the expense of the institution an amount which equals nominally set size. The difference between set and objective tuition fee can be transferred in favor of a religious organization in the form of donations.

For parents-parishioners this «arithmetic» is simple from an economic point of view, because changing summands the sum is not changed. But the answer can not be so straightforward considering the budget. The Tax Code or other normative documents ignore the regulation and control mechanism of payment for the education in religious educational institutions. The lack of clarification on this issue, unfortunately, gives considerable scope for fraud in avoiding tax responsibilities.

Thus, there is a threat instead of a source of preservation of the budget to receive additional mechanism of its devastation. And it can not only be done by the residents of the country. The Law does not limit the right of foreigners to be a founder of a religious organization in Ukraine. Moreover, Article 9 of the Law of Ukraine «On Freedom

of Conscience and Religious Associations» admits the existence of religious organizations, which governing centers are located outside Ukraine. Therefore, there is the possibility that the religious organization can be headed by a foreigner. Without a work permit a foreigner will not be able to become the official leader of any organization foreigner. But it should be understood that it does not affect all people from the governing staff of the religious organization. This obligation arises only for those positions that are provided in the staffing of the organization. For example, members of the Supervisory Board, the Audit Commission are not included into the staff, therefore, they do not require a work permit. There is a situation in which a nonresident of the country, being a member of the religious organization that established the school, indirectly receives ground for entrepreneurship bypassing the current legislation.

Conclusions and prospects for the development.

Consequently, all the above indicates that to establish effective communication within the triangle «school – power – church», which the Law of Ukraine «On amendments to some laws of Ukraine» (concerning the establishment of the educational institutions by religious organizations) is directed to can only be possible only if the legislative balance of competence of segments of power, and of religious organizations is found. Thus, the driving force that will enable provisions of the Act to switch from the plane of a formal declaration to practical implementation, must be the adoption of regulations

containing detailed interpretation of existing provisions, and additionally a clear sequence of actions for all stakeholders: public government, local government and religious organizations. It is necessary to consolidate restrictive criteria at the state level, on the basis of which it will be possible to distinguish denominations with pernicious influence. It will stop the potential threat of the establishment of the educational centers by sectarian groups legally. The Ministry of Finance and the State Fiscal Service of Ukraine should clarify the boundaries of benefits, giving tax preferences to religious organizations. A favorable tax climate mustn't become a source of devastation of local budgets. There is a task for the Ministry of Education and Science of Ukraine to approve Standard curriculum of the educational institution established by a religious organization or to introduce amendments in the current document taking into account peculiarities of the institution-founder.

In addition, we cannot neutralize the effect and degree of informative readiness of the society for such alterations in the structure of one of the most stable systems – education. This sphere is one of the clearest litmus reaction of the society to certain innovations, because it is under scrutiny for forming a new generation. Therefore, it is important to approach the issues of practical implementation of the Act accurately because it affects the perception of the world of younger generation, and what the economic culture and responsibility of those, who will form that outlook, will be.

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АДМИНИСТРАТИВНЫЕ И ФИНАНСОВЫЕ ВОПРОСЫ ПРИМЕНЕНИЯ ЗАКОНА УКРАИНЫ «О ВНЕСЕНИИ ИЗМЕНЕНИЙ В НЕКОТОРЫЕ ЗАКОНЫ УКРАИНЫ ПО СОЗДАНИЮ УЧЕБНЫХ ЗАВЕДЕНИЙ РЕЛИГИОЗНЫМИ ОРГАНИЗАЦИЯМИ» МЕСТНЫМИ СОВЕТАМИ

В статье анализируется национальная законодательная база о свободе исповедания религиозных убеждений в сравнении с соответствующим европейским законодательством, охарактеризованы отношения церкви и школы во всем мире, включая Западную Европу, изучены некоторые правовые противоречия и проблемы практической реализации Закона Украины «О внесении изменений в некоторые законы Украины по созданию учебных заведений религиозными организациями».

Ключевые слова: религиозная организация, образование, некоммерческое учреждение, благотворительность.

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АДМІНІСТРАТИВНІ ТА ФІНАНСОВІ ПИТАННЯ ЗАСТОСУВАННЯ ЗАКОНУ УКРАЇНИ «ПРО ВНЕСЕННЯ ЗМІН ДО ДЕЯКИХ ЗАКОНІВ УКРАЇНИ ЩОДО ЗАСНУВАННЯ РЕЛІГІЙНИМИ ОРГАНІЗАЦІЯМИ НАВЧАЛЬНИХ ЗАКЛАДІВ» МІСЦЕВИМИ РАДАМИ

У статті аналізується національна законодавча база щодо свободи сповідувати релігійні переконання у порівнянні з відповідним європейським законодавством, охарактеризовані взаємини церкви та школи у всьому світі, включаючи Західну Європу, вивчені деякі правові протиріччя та проблеми практичної реалізації Закону України «Про внесення змін до деяких законів України щодо створення навчальних закладів релігійними організаціями».

Ключові слова: релігійна організація, освіта, некомерційна установа, благодійність.