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THE OBLIGATION TO ATTEND RELIGION CLASSES AS A MANIFESTATION OF SPECIAL INSTITUTIONAL AUTHORITY

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Summary. This paper is devoted to the issue of acceptability of defining religion classes as a compulsory subject in public schools run by religious legal persons. However, while taking into account the achievements of the ecclesiastical law doctrine, the author analyzes this issue from the point of view of the administrative law and indicates the possibility of appropriately applying to this case the regulations pertaining to public establishments and the special institutional governance. In realizing the established research goals the author considers such issues as a school as a public establishment, requirements regarding running public schools, the legal character of statutes of schools or the unique characteristics of the schools run by denominations having legal personality.
As a result of the conducted legal analysis the author concluded that when taking into consideration the voluntariness of attending religion classes it is acceptable to, under the special institutional governance, recognize religion classes as a compulsory subject in the public schools run by entities other than local self-government units. However, such possibility exists only when there is no catchment area established for such schools which results in the voluntariness of selecting such schools as a place of realization of compulsory schooling as well as in the prospect of selecting a different public school in which parents or pupils of legal age may resign from attending religion classes.

Key words: public establishment, special institutional governance, public school, voluntariness of attending religion classes

The issue of the right to learn religion at public schools has been the subject matter of numerous scientific studies both in monographic forms [Mezglewski 2004] and as scientific articles [Więcek 2014]. Apparently the mainstream research in this area has primarily addressed the denominations' right to teach religion at public schools [Abramowicz 2012], the right to establish and run schools or the right to shape the core curriculum and professional eligibility of teachers to teach religion. The right to take religion lessons has also been obviously considered in terms of human rights, including the right to education and religious freedom [Mezglewski 2008]. The analysis of the abundant achievements of the doctrine, as well as jurisprudence and, above all, constitutional regulations allows for the unequivocal statement that the right to study religion at a public school no longer raises any legal doubts. Unfortunately, however, the doubts appear when religion is taught at schools, governing bodies of which are denominations having legal personality (church legal entities) and when religion is indicated as a compulsory subject in the statutes of those schools. It should be remembered that in

the case of schools run by denominations having legal personality, teaching religion is usually associated not only with the transfer of knowledge within one subject, but also determines the identity of those schools, being reflected (while observing the core curricula) also in teaching other subjects. On the one hand, defining religion as a compulsory subject is a direct emanation of the constitutional right of parents to provide their children with moral and religious education and teaching in accordance with their beliefs,[1] on the other hand, it may be perceived as an interference with the freedom of conscience and religion, manifested in the possibility of deciding on one's will to attend this type of classes.

Taking into consideration the above-mentioned issues, a number of legal questions arise, including whether, in the light of the applicable legal regulations, due to the identity mentioned above, it is permissible to define religion classes as compulsory at schools run by religious legal persons. Especially when the schools have the status of public ones, being therefore financed from public funds. Further, if so, whether it is compatible with the impartiality of the State in matters of religious beliefs as expressed in the Polish Constitution and the principle of organising religious education at the request of parents or adult students [Pilich 2015; Berdzik 2016] as well as the prohibition of discrimination in connection with non-participation in school religion classes.[2]

In this context, also due to the multitude of acts of law governing the issue of teaching religion at schools, fairly significant interpretation doubts arise. On the one hand, denominations are undoubtedly entitled to establish and run schools, the nature of which is closely related to the values underlying each of the denominations. On the other hand, however, when a school has the status of a public school, and therefore is financed from public funds, it could be expected that it should teach religion on the same terms as public schools, run for example by local government units, i.e. on a voluntary basis.

The analysis of the existing binding legal regulations does not give any unequivocal answer to the question whether it is admissible to define religion as a compulsory subject, when the body running the school is a religious legal entity. Recognising the enormous and, above all, innovative achievements of the doctrine of the ecclesiastical law to this end, it seems that the use of the achievements of the administrative law doctrine related to the functioning of public establishments may prove helpful if not primary in answering the key questions identified in the presented research problem. However, it must be preceded by an administrative and legal analysis of legal regulations concerning the right to teach religion at public schools.

As previously noted, the right to teach religion at public schools is confirmed in legal acts of varied rank. It results directly from the Polish Constitution which

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, No. 114, item 946 [henceforth cited as: Polish Constitution], Art. 53, sect. 3.
[2] Regulation of the Minister of National Education of 14 April 1992 on the conditions and manner of organising religious education in public kindergartens, Journal of Laws of 2020, item 983, para. 1.

in Art. 70, sect. 1 indicates that everyone has the right to education. It should be recognised that it also includes the right to be educated in the professed religion, especially in the context of the provisions of Art. 53, sect. 3 of the Polish Constitution, indicating that parents have the right to provide moral and religious upbringing and teaching in accordance with their beliefs, and sect. 4 of the cited Article, stating that the religion of a church or another religious denomination may be taught at school, without violating the freedom of conscience and religion of other people.

The right to learn religion at school is therefore one of the elements of religious freedom. This is directly confirmed by the law and related regulations setting forth the guarantee of freedom of conscience and religion.[3] The legislator has indicated in them that churches and other denominations may teach religion and religiously educate children and the youth in accordance with the choice made by their parents or legal guardians, and furthermore, teaching religion to students of public schools and public kindergartens may also take place at schools and kindergartens upon the terms and conditions set out in a separate act of law.

The right to religious education and religious education by churches and denominations is thus fulfilled through the possibility to organise this teaching, e.g. in catechetical points located at churches, prayer houses (Art. 20 of the Act on Guarantees) or, more importantly, from the point of view of the purpose of drawing up legal regulations allowing for establishment of schools and kindergartens and other educational and care-and-educational institutions upon the terms and conditions set out in separate legal regulations. Those schools are subsidised by the State in compliance with the provisions of the law and related regulations (Art. 21 of the Act on Guarantees). Religious education is also organised by public kindergartens and primary schools, which arrange for religious education at the request of parents, and in the case of public secondary schools, at the request of either parents or pupils themselves[4] [Balicki, Pyter, and Kokot 2016]; after reaching the age of majority students may decide themselves whether to study religion or not.

Therefore, it should be assumed that the legal structure presented above shows that churches and denominations have the right not only to teach religion at schools, but also to arrange for religious education, which should be understood more broadly as the right to refer to the entire subject-based scope of the curriculum implemented by values associated with professing a particular religion. In the case of the Catholic Church, it will be, for example, education in the spirit of the Catholic social teaching, or more broadly, referring to the Christian vision of man and the world. The consequence of the education law set forth by the legislator, that is binding in respect of churches and denominations, is not only the right to define the content of religious education, but also, under the applicable regulations, the right to define the principles of the functioning of schools and institutions for which religious legal persons act as governing bodies.

[3] Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion, Journal of Laws of 2017, item 1153 [henceforth cited as: Act on Guarantees], Art. 20, sect. 1.
[4] Act of 7 September 1991 on the System of Education, Journal of Laws of 2020, item 1327, Art. 12.

In the area specified above, the activities of the indicated schools may be subsidised by the State. At the same time, in the author's opinion, the legislator has in no way made this right dependent on the obligation to run schools in the same way as those for which the managing authorities are public entities. The only reasons for recognising a school as public, and thus financed from public funds, are set out in Art. 14, sect. 1 in conjunction with Art. 88, para. 4 of the Act of 14 December 2016 on Education Law.[5] The legislator assumes that a public school is the one that: provides free education in the field of framework curricula, recruits students based on the principle of universal access, employs teachers with qualifications specified in separate legal regulations, implements curricula taking into account the core curriculum of general education, and in the case of schools providing vocational education – also the core curriculum for education in the professional occupations or the core curriculum for education in the art professions and the framework curriculum, and implements the principles of assessing, classifying and promoting students and conducting examinations also specified in separate legal regulations.

The above-mentioned legal regulations do not exclude the freedom (within the framework of the applicable law and related legal regulations) to define the school organisational by-laws as well as specific (additional) obligations of students resulting, for example, from the mission of the school or, in other words, the nature of the school. Moreover, Art. 98, sect. 1 of the Education Law, which sets forth the requirements in respect of the school statute, indicates the need to define the school's goals and tasks to be pursued, i.e. to enable the preservation of religious identity and to define the rights and obligations of students, including cases in which they may be removed from the list of students as well as the organisation and forms of cooperation between the school and parents in the field of teaching, upbringing, care and prevention. The governing body of the school, that is also a denominational legal person, by adopting its first statute, is therefore entitled, under the applicable legal framework, to define specific operational rules of the school, as long as this does not contradict the commonly binding operational principles applicable to schools. In the author's opinion, the definition of religion as a compulsory subject is set within the freedom to determine the internal operational rules of the school, provided, however, that there are additional rationale in place.

First of all, it should be noted that the presented legal regulations are nothing more than the statutory grounds for determining the internal system of a public institution, which is undoubtedly a school [Boć 1997, 153], and for determining the scope of governance under the applicable law, i.e. a specific legal voluntary relationship linking a student (on behalf of whom a parent acts) and the school.

Leaving aside, on account of the limitations imposed by the volume of the study, the issue of public establishments, which has comprehensively been elabo-

[5] Journal of Laws of 2020, item 910 as amended [henceforth cited as: Education Law].

rated by the doctrine of the administrative law, in the context of the aims of the paper, particular attention should be paid to special institutional governance. It is treated as a special type of legal relationship linking the establishment (school) with the beneficiary (student) benefiting from its services [Zimmermann 2008, 112]. It usually consists in the obligation to comply with the rules (and even orders), according to which the institution operates [Wierzbowski 2001, 119]. At the same time, it is not a civil-legal relationship, which has its source in the contract, but it has public-law features, i.e. it is confirmed primarily in the generally applicable law and related regulations. The special institutional governance as a constituent of the administrative authority is nothing else than the right of a public establishment to implement its own orders aimed at achieving the objectives of the establishment, also using administrative coercion [Czarnik and Posłuszny 2011, 488]. The scope, type of sanctions and the method of applying administrative coercion to the beneficiary in the event of his or her failure to comply with the regulations underlying the legal relationship between him or her and the institution/establishment depend both on the content of the generally applicable provisions of law and internal regulations. The authorities of the public establishment are entitled to set the standards of the prescribed behaviour, which in the event of failure to comply with them by their beneficiaries may result in a specific sanction, i.e. for example termination of the legal relationship between the public establishment and the beneficiary, especially if the relationship is based on the principle of voluntary action. In other words, special institutional governance means the establishment's right to unilaterally [Ochendowski 2001, 234] use the means provided for by law, which constitute a special type of the governance-based relationship, providing the basis for implementing its own rules of conduct aimed at achieving the goals, which is guaranteed by the State [Czarnik and Posłuszny 2011, 489].The school (the governing body or school bodies) as a specific type of public (administrative) [Wierzbowski 2009, 106] institution may, within the applicable legal framework, establish specific internal rules of operation that shall be respected by its beneficiaries (students).

When analysing the presented arguments, it should be stated that the key to achieving the intended research goals is to determine whether, if a school run by a church legal entity is a public school, i.e. financed from the State budget, e.g. through the budget of local government units, it is possible to conclude that due to the Catholic nature of the school, religious education may be considered compulsory even if the declaration referred to in para. 1, sect. 2 of the Regulation of the Minister of National Education of 14 April 1992.

In the author's opinion, the indicated issue should be considered primarily in three aspects. Firstly, the obligation of the State to ensure that everyone who remains under the authority of the Republic of Poland exercises the right to education, regardless of nationality or religion, without being exposed to any discrimination on that basis, and secondly, the right to establish and run public schools by churches and denominations, and enforce (within the framework of the appli-

cable law) the internal organisational by-laws, and thirdly, to maintain the voluntary choice of participation in religion classes, also manifested by the obligation to ensure the possibility of attending the school in which religion will not be a compulsory subject.

Considering the first of the above-mentioned aspects, it should certainly be stated that in the case of public schools run by denominational legal entities, in which teaching religion is defined as compulsory in accordance with the statutory provisions, the student's right to education, whose parent has changed the content of the declaration referred to in para. 1, sect. 2 of the Regulation has been retained, even if it were to entail deletion from the list of students of this school. However, this is only when the school does not have its catchment area established, in the case of a primary school or the school that is a school without any specific catchment area. As a result, the provisions of Art. 130, sect. 2 and sect. 4 of the Act on Education Law indicate that children and adolescents residing in the catchment area are admitted *ex officio* to the public primary school, the catchment area of which has been established. Thus, if a school has no catchment area, even if it has the status of a public school, recruitment and education are voluntary. The student always has the option of attending a public school run by the local government unit competent for the place of residence, in the event of which the parent is always and unconditionally entitled to withdraw the declaration of consent to attend religion classes. In this case, therefore, in relation to the third analysed aspect, the voluntary consent to attend religion classes or the consent to the definition of religion as a compulsory subject is already expressed by the choice of school by parents or an adult student.

The second aspect apparently refers to the right to define religion as a compulsory subject. In this case, the fact whether a school has a catchment area or not will be significant. If a catchment area is designated for a public school, it is not permissible to make religious education compulsory. In this case, the provisions of Art. 130 of the Act on Education Law, which grant the right to attend the school in the district where a child is domiciled, will supersede and prevail. That school has to guarantee the right to give up religion classes. However, in the event that the school has not been designated a catchment area and attending it is voluntary, and the student can always and unconditionally exercise the right to perform compulsory education in the circuit school, it is possible and permitted by law to define religious education as compulsory. This is due to the aforementioned rationale.

As it has already been indicated, churches and denominations can teach religion and religiously educate children and the youth, according to the choice made by their parents or legal guardians. Churches and other denominations have the right to establish and run schools and kindergartens as well as other educational, educational-and-care establishments upon the terms and conditions specified in the acts of law. Those schools are subsidised by the State or local government bodies. In the case of the Catholic Church, the above-mentioned right is also governed at the level of international agreements. Art. 14 of the Concordat between the

Holy See and the Republic of Poland of 28 July 1993[6] indicates that the Catholic Church has the right to establish and run educational institutions, including kindergartens and schools of all kinds, in accordance with the provisions of the canon law and upon the terms specified by the relevant act of law. Those schools are governed by the Polish law and related regulations when implementing the minimum curriculum for compulsory subjects and issuing officially certified documentary proof. In carrying out the curriculum of other subjects, the schools follow the regulations set out by the Church. The public nature of those schools and institutions is determined by the Polish and national laws. One should also pay attention to Art. 20 of the Act of 17 May 1989 on the Relationship of the State to the Catholic Church in the Republic of Poland[7] which unequivocally specifies that church legal entities have the right to establish and run schools and other educational, care-and-educational institutions in compliance with the organisational and curricular principles stipulated by the relevant acts of law and related regulations. They are Catholic in nature and are subject to the Church authority.

The indicated regulations clearly and unequivocally authorise church legal entities to establish and run Catholic schools on the basis of the principles set out in the generally applicable provisions of law and in accordance with the internal bylaws.

It should be assumed that already at the level of general regulations, it is permissible to define religious education at a "Catholic school" as a compulsory subject, but it must not be contrary to generally applicable provisions of the law and related legal regulations, i.e. it must first of all respect the student's right to education, which is fulfilled through the right to pursue compulsory education, especially in the school catchment area in which the student is domiciled. However, if teaching at school is carried out on a voluntary basis (the school does not have a catchment area), then the definition of religion classes as a compulsory subject can in no way be treated as an interference in the sphere of freedom of religion or the right to perform compulsory education at a public school. In this case, it should be considered indisputable that education at a Catholic school without a catchment area, in which religion lessons are defined as compulsory, takes place on a voluntary basis because there is always a public school in which a student can fulfil compulsory education without attending religion classes.

Summing up, it is plausible to state that the above-mentioned arguments, supported by the analysis of the legal status, make it possible to unequivocally state that both the legal status of religious legal persons (including legal persons of the Catholic Church) and the rights in the field of establishing and running schools defined in *ius cogens* unequivocally account for the entitlement to define religion classes as compulsory. It is determined both by the operations of the school as a public institution which can function on the basis of specific internal operational

[6] Journal of Laws of 1998, No 51, item 318.
[7] Journal of Laws of 2019, item 1347.

by-laws in conformity with the generally applicable standards governing the operations of this type of establishments (schools).

Therefore, if, pursuant to Art. 98 of the Education Law, religion is defined as a compulsory subject in the school statute, and if the student's parents, knowing such statutory provisions, have voluntarily decided that their child should attend school or an adult student has expressed such a will, then, according to the rules of special institutional governance, they are obliged to respect those rules. Otherwise, the lack of respect for the internal by-laws, according to which the school (administrative unit) operates, may result in removal from the list of students. A separate issue, which, however, goes beyond the scope of the study is the issue of the possibility of not classifying a student in respect of the subject of religion, if, despite his or her obligation, he or she has not attended the religion lessons. However, due to the complexity of the issues, it requires a separate study.

On a side note, and apart from the above elaborations, when considering the issue of the entitlement to define religion as a compulsory subject at public schools run by religious legal persons, it should be noted that this is not related to the issue of financing public schools from public funds. It bears noting that no legal regulation, including but not limited to Art. 14 of the Act on Education Law, indicates that, since the activity of public schools is financed from public funds, they cannot enforce additional requirements (which are justified, e.g. as a school's mission) pre-conditioned by the objectives set out by the governing body. Therefore, if the school is run by a religious legal person, it is permissible and consistent with the applicable legal status to define religion lessons as a compulsory subject. It neither infringes the freedom of conscience and religion, and due to the provisions of Art. 14, sect. 1, point 2 regarding the principle of conducting recruitment based on the principle of universal availability, the statute of the school may not provide for the requirement that a student professes this religion (or any religion) with which the activity of a religious legal person performing the tasks of the governing body is related. The statute may only require that, due to the nature of the school, the student should be classified (has completed the core curriculum) in religion lessons as a compulsory subject.

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OBOWIĄZEK UCZESTNICTWA W LEKCJACH RELIGII JAKO PRZEJAW SPECJALNEGO WŁADZTWA ZAKŁADOWEGO

Streszczenie. Artykuł poświęcony został dopuszczalności określenia lekcji religii jako przedmiotu obowiązkowego w szkołach publicznych prowadzonych przez wyznaniowe osoby prawne. Autor uwzględniając dorobek doktryny prawa wyznaniowego, rozpatruje jednak to zagadnienie z punktu widzenia prawa administracyjnego, wskazując na możliwości odpowiedniego zastosowania w tym przypadku regulacji dotyczących zakładu publicznego oraz władztwa zakładowego. Realizując, założone cele badawcze autor rozważa takie zagadnienia szkoły jako zakładu publicznego, wymagań w zakresie prowadzenia szkół publicznych, charakteru prawnego statutów szkół czy też szczególnych cech szkół prowadzonych przez osoby prawne związków wyznaniowych.
W wyniku przeprowadzonej analizy prawnej autor doszedł do wniosku, że przy uwzględnieniu zasady dobrowolności uczestnictwa w lekcjach religii dopuszczalnym jest, w ramach władztwa zakładowego, uznanie jej za przedmiot obowiązkowy w szkołach publicznych prowadzonych przez inne podmioty niż jednostki samorządu terytorialnego. Taka możliwość istnieje jednak wyłącznie w przypadku gdy szkołom tym nie wyznaczono obwodu, co skutkuje dobrowolnością ich wyboru jako miejsca realizacji obowiązku szkolnego oraz perspektywą wyboru innej szkoły publicznej, w której rodzice lub uczeń pełnoletni może zrezygnować z uczestnictwa w lekcjach religii.

Słowa kluczowe: zakład publiczny, władztwo zakładowe, szkoła publiczna, dobrowolność uczęszczania na lekcje religii

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