

THE ANALYSIS OF THE NATIONAL LEGAL AND REGULATORY GROUNDS FOR THE INSTITUTIONAL AUTONOMY OF HIGHER EDUCATION INSTITUTIONS

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Andriichenko Zh. O., Chmutova I. M. The Analysis of the National Legal and Regulatory Grounds for the Institutional Autonomy of Higher Education Institutions

The article identifies and systematizes the existing legal obstacles to the autonomy of higher education institution and develops recommendations to overcome them. The approaches to establishing the legal status of institutions of higher education in the current legislation of Ukraine are characterized. The impact of the legal status of higher education institution on its legal personality and the institutional autonomy has been determined. Views of scholars together with foreign experience of property titles in the imposition of property on higher education institution, were analyzed. Directions for the development of legal regulation of the system of public law legal entities in Ukraine have been defined. In order to ensure the development of the model of public administration in the sphere of higher education, it has been proposed that most of the higher education institutions should change the legal status of public legal entity – budgetary institution to the status of private legal entity – profitable or non-profitable higher education institution of the public / communal form of ownership, for which the founder would regularize property on the right of ownership. This will eliminate the conservatism, strict regulation on the part of the State, that is linked to the status of publicity, and, in order to develop the autonomy of higher education institution, will allow to take advantage of dispositivity inherent in private law entities in determining their legal personality.

Keywords: higher education, higher education institution, autonomy, public law legal entity, private law legal entity, budgetary institution.

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Андрійченко Ж. О., Чмутова І. М. Аналіз національного нормативно-правового підґрунтя інституційної автономії ВНЗ

У статті виявлено та систематизовано існуючі правові перешкоди автономії ВНЗ та розроблено рекомендації щодо їх подолання. Охарактеризовано підходи до встановлення правового статусу закладів вищої освіти в чинному законодавстві України. Визначено вплив правового статусу ВНЗ на його правосуб'єктність та інституційну автономію. Проаналізовано погляди науковців та зарубіжний досвід щодо майнових титулів, за допомогою яких майно закріплюється за ВНЗ. Встановлено напрями розвитку правового регулювання системи юридичних осіб публічного права в Україні. З метою забезпечення розвитку моделі державно-громадського управління у сфері вищої освіти запропоновано змінити більшість закладів вищої освіти правового статусу публічної юридичної особи – бюджетної установи на статус приватної юридичної особи – прибуткового чи неприбуткового закладу вищої освіти державної/комунальної форми власності, за яким би засновник закріплював майно по праву власності. Це дозволить позбавитися консерватизму, суворого державного регулювання, яке пов'язано із статусом публічності, та використати на розвиток автономії ВНЗ переваги диспозитивності, властиві суб'єктам приватного права при визначенні їх правосуб'єктності.

Ключові слова: вища освіта, вищий навчальний заклад (ВНЗ), автономія, юридична особа публічного права, юридична особа приватного права, бюджетна установа.

Табл.: 1. **Бібл.:** 18.

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Андрейченко Ж. О., Чмутова И. М. Анализ национальной нормативно-правовой основы институциональной автономии ВУЗов

В статье выявлены и систематизированы существующие правовые препятствия автономии ВУЗа и разработаны рекомендации по их преодолению. Охарактеризованы подходы к установлению правового статуса высших учебных заведений в действующем законодательстве Украины. Определено влияние правового статуса ВУЗа на его правосубъектность и институциональную автономию. Проанализированы взгляды ученых и зарубежный опыт имущественных титулов, на основе которых имущество закрепляется за ВУЗом. Установлены направления развития правового регулирования системы юридических лиц публичного права в Украине. С целью обеспечения развития модели государственно-общественного управления в сфере высшего образования предложено изменить большинству высших учебных заведений правовой статус публичного юридического лица – бюджетное учреждение на статус частного юридического лица – прибыльного или некоммерческого учреждения высшего образования государственной/коммунальной формы собственности, за которым бы учредитель закреплял имущество по праву собственности. Это позволит избавиться от консерватизма, строгого государственного регулирования, которое связано со статусом публичности, и использовать для развития автономии ВУЗа преимущества диспозитивности, присущие субъектам частного права при определении их правосубъектности.

Ключевые слова: высшее образование, высшее учебное заведение (ВУЗ), автономия, юридическое лицо публичного права, юридическое лицо частного права, бюджетное учреждение.

Табл.: 1. **Библ.:** 18.

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The level of education of the country's population and of each particular citizen reflects the intellectual potential of the State and forms the vector of the future economic and political development. In view of the increasing knowledge content of public production and the globalization of economy, in order to maintain the status of a scientifically developed country, the State should consider education one of priorities.

The right to education is enshrined in the Article 53 of The Constitution of Ukraine that stipulates that everyone has the right to education, including the higher education [8]. According to the governments of various countries, the university sector, and the European Commission, an important step towards the modernization of higher education in the 21st century is the increasing autonomy of universities.

In accordance with the National strategy for the development of education in Ukraine up to the year 2021, the expansion of autonomy of higher education institutions will become one of the strategic directions of the State policy in the sphere of higher education. Therefore, certain legal grounds should be established to ensure the autonomy of universities, towards defining the legal, organizational and financial principles for the innovative development of the national education system in the context of globalization trends and current challenges [11].

In considering the legal grounds for the autonomy of higher education institutions, attention should first be drawn to the definition of the legal status of higher education institutions which provide for activities in the educational system. The possibility of securing and implementing institutional autonomy is largely dependent on the precision to which the status of these actors be defined in legislation.

The changes that have taken place in the legal regulation of higher education institutions related to the reform of education, in particular the amendment of the Ukrainian Law «On higher education» in September 2017, predetermine relevance of the topic studied.

The legal provision of higher education institutions was researched by Karabin T. O. [7], Bilan H. I. [2], Bugas N. V. and Bugas V. V. [3], Davydova N. O. [6]. For the most part, the publications were focused on analyzing legislation in the sphere of education, defining the legal status of institution, etc. The immediate attention to the issues of legal provisions for the autonomy of higher education institution, in particular its financial component, was directed by Vorobiova O. P. [1], Shevchenko L. S. [18] and others.

However, only a comprehensive review of the legal provision of all aspects of autonomy: organizational, academic, personal and financial, will give us an opportunity to thoroughly and fully analyze the national legal and regulatory grounds for the institutional autonomy of higher education institutions. Thus, in view of the need to increase the autonomy of higher education institution in Ukraine, it is appropriate to identify lacunas and discrepancies in the legal regulation of the autonomy of higher education institutions.

The *purpose* of the study is to identify and systematize existing legal obstacles to autonomy of higher education institution and to elaborate recommendations on how to overcome them.

The legal grounds of higher education are laid down in a number of legal and regulatory acts that can be divided into: general, which define the right to education – in the Constitution of Ukraine [8], the legal status of legal entities or institutions, first of all, in the Civil Code of Ukraine [16], also in the Economic Code of Ukraine [5], and the special acts, among them the Law of Ukraine «On education» [15], the Law of Ukraine «On higher education» [14], etc.

Under current legislation (Article 81, Part 2, the Civil Code of Ukraine), legal entities are divided into the private law legal entities and the public law legal entities that, as to the legislation [16], are distinguished in accordance with the order of their creation, and in the opinion of scholars [9] – in accordance with the purposes and characteristics of the exercise of legal personality.

The public law legal entities are those that are created and terminated by the executive order of the President of Ukraine, the State authority, the authority of the Autonomous Republic of Crimea, or one of the local government authorities, and their main activities under normal conditions are directed to the particular functions (administrative, managerial, educational, etc.) on the basis of a legally well-defined competence.

The legal personality (legal capacity and exercise) of public law legal entities is defined directly by law, so they can only perform the actions such as those prescribed by law. All public law legal persons are the holders of competence (a whole of rights and duties) and can act only within its limitations.

Under the Articles 167 and 169 of the Civil Code of Ukraine, both the public and the communal educational institutions are the public law legal entities.

Consequently, the institutional autonomy of higher education institutions, both public and communal, is strictly limited by the scope of the competences provided by the legislation in force. The entity of educational activities has the right to decide on any matter within the limits of his or her autonomy, as defined by the Law of Ukraine «On higher education», special laws and/or constitutive documents, in particular in regard of the matters not settled by law.

The subordinate legal and regulatory acts may not narrow the content and scope of the constitutional right to education, as well as the autonomy of the entities of educational activity and the academic freedoms of the participants in the educational process, as defined by law.

The Article 32 of the Law of Ukraine «On higher education» provides for equal rights, which represent the content of the autonomy and self-government of higher education institutions.

However, a private higher education institution is authorized, in full measure and without compliance with the requirements of the law, to determine independently the institution's statute, its structure, composition, functioning and powers of governance, the working and deliberative organs, both the public and the student self-government bodies, scientific societies, the procedure for the election or appointment of heads of the institution and its units (Article 27 of the Law of Ukraine «On higher education»).

In addition, the Article 27 of the Law of Ukraine «On higher Education» stipulates the statuses in which higher education institution may act as an economic entity:

- ✦ budgetary institution;
- ✦ non-profit higher education institution;
- ✦ profitable higher education institution – in combination with public and communal forms of ownership create a specific legal regime for the property of education institution – the right of economic conducting.

This property title restricts the possibility of higher education institution of disposing property which is based on its balance but belongs to the State-owned property. The Civil Code of Ukraine does not have the legal design of the limited property rights, such as the right of full economic conducting and the right of operational management, they are enshrined only in the Economic Code of Ukraine.

In the opinion of Ukrainian jurists [10], it is necessary to waive intermediate property titles when the property is secured for public law legal entities by establishing legal mechanisms at the legislative level to prevent abuse on the part of heads of public law legal entities, through the legislative limitation of the authorities to dispose of property, with the consent of the founder of the legal entity.

This approach seems to be more balanced and fair on the part of ensuring equal opportunities for the autonomy of higher education institution with various forms of ownership, because the right of universities to individually dispose of real estate and funds, acquire and build premises, is the economic basis on which the add-on constituents of institutional autonomy are based: organizational, academic, and personnel.

Studies by the European Association of Universities show that different countries deal with this problem differently – in 22 European countries, universities have the right to be owners of real estate and to freely dispose of funds, and in other countries there are different restrictions on the sale of real estate on the part of the State [1].

Public law legal entities are financed from the budget within their spending area. At the same time, own economic activity for some of them is not excluded. According to data from the State Statistical Service of Ukraine, in 2015 the sphere of higher education received 30,6 billion hryvnia (4,4% of the consolidated budget, 1,9% of GDP) [6, page 4]. Another approximately 10 billion hryvnia come to the sphere of higher education from natural and legal persons, especially in the form of tuition fees for contract students. Thus, Ukraine spends approximately 2,5% of its GDP on higher education, which is one of the highest rates in the world.

The calculation and cash services of higher education institutions – budgetary institutions, as budget managers, pursuant to Article 48, Paragraph 1, Subparagraph 2, of the Budget Code of Ukraine [4], are carried out by the State Treasury of Ukraine. The State Treasury of Ukraine does not only carry out transactions from a single treasury account directly to the operator, but also controls the directions of use of the funds and has full control over the turnover of public funds. It performs the function of «control of budgetary authorities in the admission of income, acceptance of

obligations and payment postings» (Paragraph 1 of Article 48 of the Budget Code of Ukraine). The funds committed are being spent on internal needs in accordance with the budget classification items under the Budget Code. As a result, the budgetary institution is not in a position to spend money for misappropriation. This applies not only to budgetary expenditures, but also to those that are received by the special fund of higher education institution – budgetary institution from other sources: grants or independent earnings [13].

A budget period in the Ukrainian public/communal higher education institution comprises one year. The short duration of the budget period, the need to use the funds allocated for the year, and the limitations by the budget items significantly reduce the level of autonomy of Ukrainian educational institutions.

There are almost no countries in Europe that apply the item-based method in budgeting higher educational institutions. The itemized budgets were retained only in Turkey, Greece, Cyprus [1] and Ukraine.

The most commonly used practice is the appropriation of block subsidization – the financial grants, which cover several categories of costs that can be distributed and utilized by the institutions themselves. Most countries in Europe have allowed educational institutions to borrow money in financial markets.

In Ukraine however, in recent years the State has provided virtually no funding for the capital costs of public institutions of higher education. In spite of the afforded opportunity for higher education institutions to use the funds involved, in particular, credits received from banks, financial companies and individual funds, such resources are hardly used in practice [1].

Another manifestation of the negative impact of the status of public legal entity – budgetary institution on the autonomy of higher education institutions, is the current methodology for calculating the number of rates for the scientific and pedagogical staff of higher education institution to service the State order for training of specialists, which establishes a direct proportional dependence on the number of employees from the number of students in the higher education institution. This approach, on the one hand, results in massive reductions in the system of higher education because of decline in the number of applicants as a result of the complex demographic situation and, on the other hand, prevents unsuccessful students from being exmatriculated because of the resistance to reductions on the part of the educational system. Given that such a practice severely restricts the autonomy of higher education institution, which can only be restricted by legislative enactment, the question arises whether it is appropriate to establish at the legal level the provisions which impede the basic objectives of the State regulation – ensuring the quality of education.

Thus, the legal status of higher education institutions, based on the public or communal property, the share of which constitutes 80 per cent of the total quantity of higher education institutions, does not meet the modern conditions of their existence and significantly complicates the implementation of institutional autonomy [12].

Scholars have different attitudes towards the issue of the legal determination of the status of higher education institution. Karabin T. O. considers that it would be appropriate and practicable to enshrine in the Law of Ukraine «On higher education» the following types of higher education institutions: the State-owned (public and communal), private (non-State-owned), and further on detailing their legal status: organizational-legal forms of activity, licensing of educational activities, certification of scientific-pedagogical workers, etc., should be contained in a separate law «On higher education institutions», providing definition of the concept of higher education institution, its types, tasks and functions, rights and duties, forms of interaction with the executive authorities, local self-government authorities and the public, as well as legal supporting for its organizational structures [7]. In fact, such an approach would not introduce significant changes, but would only formally distribute the legal norms to different laws in accordance with different regulatory objects. Therefore, development of existing views of scholars on the renunciation of intermediate property titles in the imposition of property on legal persons in public law and, accordingly, change of their legal status, merits attention. In the opinion of R. Maydanyk, «...reform of the Ukrainian system of public law legal entities can be carried out under one of two options: the first (maximum) provides for the establishment of fisk (treasury) at both the State and the communal levels. According to its legal status, fisk should have the rights of a public law legal entity, non-personable parts of which are ministries, authorities, public enterprise as branches (representatives) of the fisk. The second (moderate) option is that recognized public law legal entities are public or communal institutions/organizations which, by virtue of their legal personality, simultaneously exercise power-administrative and economic (private-legal) powers. In this case, the public bodies – the legal entities of such will be ministries, authorities, other public/communal bodies with legal personality; public/communal enterprises must be recognized as part of the treasury (fisk) as a legal entity that acts on behalf of the State/territorial community; the current unitary public/communal enterprises will be transformed into the economic societies of one member – the State/territorial community» [10].

Proceeding from this logic, it seems appropriate for higher education institutions to significantly reduce the use of the legal status such as public legal entity – budgetary institution, but to make a wider use of the status of private legal entity – non-profit or profitable higher education institution, for which the founder would regularize property on the right of ownership, on the basis of legislative restrictive mechanisms to prevent its misuse. For example, through netting the founder in the person of the Ministry of education and science of Ukraine with the Planning and budgeting committee [17] and the Supervisory board of the higher education institution. This would, accordingly, facilitate the expansion of institutional autonomy, which then would be fully implemented, without any restrictions, not only for the private but also for the public and the communal educational institutions.

In implementing this transformation in the legal status of higher education institution and the transition to block

subsidization, the financing of higher education institution, irrespective of the form of ownership, may be provided from the State (communal) budget on the basis of their accreditation, which certifies the quality of the skills of the specialists trained and determines the demand for the graduates of certain higher education institutions in the labor market.

A systematization of the existing legal obstacles to the autonomy of higher education institution together with the directions of overcoming them are presented in the *Tbl. 1*.

The carried out analysis of the legal and regulatory provision for the institutional autonomy of the higher education institutions in Ukraine leads to the conclusion that, despite the updating of the Law of Ukraine «On higher education» in 2017, there are still problematic issues in the legal mechanism for ensuring autonomy of higher education institution.

In opinion of several scholars [1], in order to ensure the autonomy of higher education institution, it is advisable to envisage a legislative mechanism for the transition of higher education institution from a budgetary institution to that of public enterprise. It does not appear, however, that this would solve in full measure the problem of the limited legal personality and autonomy of higher education institution, respectively, because the property of public enterprise is also regularized by the right of economic conducting, which, as noted previously, would limit autonomy. Moreover, the status of enterprise is not very suitable for higher education institution because of the socio-educational functions it implements.

CONCLUSIONS

The amended Law of Ukraine «On education», which led to changes in the the Law of Ukraine «On higher education», facilitated to some extent the autonomisation of higher education institutions. In particular, stipulating the statuses of higher education institution: budgetary institution, profitable and non-profit higher education institution – has made the legislative regulation of the legal status of higher education institution more precise.

It appears that development of the model of public administration in the sphere of higher education is possible only on the basis of the change by most of higher education institutions of the legal status of public legal entity – budgetary institution to the status of private legal entity – profitable or non-profit higher education institution with the public / communal form of ownership, according to which the founder would regularize property on the right of ownership. This will eliminate the conservatism, strict regulation on the part of the State, that is linked to the status of publicity, and, in order to develop the autonomy of higher education institution, will allow to take advantage of dispositivity inherent in private law entities in determining their legal personality. To prospects for further research belong the development of combined legal statuses for higher education institutions which would allow transformation of higher education institution – budgetary institution – public law legal entity into corporate private law legal entity, to which the founders – the State (territorial communities) and the private founders – would transfer property to their

The legal and regulatory support for the institutional autonomy of the higher education institutions in Ukraine

Content of autonomy (rights of higher education institution)	Autonomy obstacles	Directions of overcoming
1	2	3
Organizational component		
1) Forming and approving the institution's own staffing table in accordance with the legislation	Legislating as a norm the following: when reducing the number of persons who are enrolled in each educational program within 20 per cent of the number identified at the beginning of this program, the number of scientific and pedagogical workers is not reduced	Making regulation more lenient, leaving the matter to the higher education institution's consideration
2) Making a final decision on recognition, including the definition of equivalence of the grades, earned in foreign higher education institutions: bachelor, master, doctor of philosophy/doctor of arts, doctor of sciences and academic degrees of associate professor, professor, at the time of matriculation and/or assignment for a scientific or pedagogical worker	The lack of regulatory assignment of approaches to the comparison of Ukrainian and European levels of education and qualifications, and the imperfection of legislation to ensure that the scientific level of higher education corresponds to the National Framework of Qualifications (doctor of sciences corresponds to the non-existent 10th level of NFC, as it is not envisaged in the NFC, which currently has 9 levels)	Harmonization of the National Framework of Qualifications with the qualifications of the European space for higher education to ensure academic and professional mobility and lifelong learning, as well as harmonization of the domestic Legislation as to the 10th level
3) Introducing rating of the achievements of participants in the educational process	Absence of an effective methodology for the rating of participants in the educational process due to the lack of clear, legislated criteria for assessing the achievements of participants in the educational process	Develop qualification characterizations of educational and scientific-pedagogical workers of education institutions
4) Providing additional educational and other services under the legislation.	The legal status of the public legal entity – budgetary institution, which provides for severe restrictions on the right of disposal of property and strict regulation of legal personality, which significantly limits their autonomy compared with private education institutions	Ensuring that the changed legal status of budgetary institution prevails as the status of private legal entity – profitable/ non-profit education institution of any form of ownership
5) Establishing institutions of general secondary education in consultation with local government authorities;		
6) Being a founder or co-founder of vocational (vocational and technical) establishments, vocational pre-higher education, and colleges.		
7) Placing their educational, research and educational-scientific and production subdivisions in enterprises, institutions and organizations.		
8) Performing financial-economic and other activities in accordance with the legislation, the statute of the higher education institution, etc.		
Academic component		
1) Developing and implementing educational (scientific) programs within the limits of licensed specialization.	– In the absence of public standards of higher education, considering the recommendations of the European Parliament and the Council of the European Union, – the incomprehensible guidelines for the implementation of educational activities; – on the part of the State: setting requirements for the process of recruitment of students	– Develop and implement public standards of higher education, taking into consideration the recommendations of the European Parliament and the Council of the European Union; – consolidate the requirements of the student recruitment process in the local legal and regulatory acts of higher education institution
2) Independently determining the forms of education and the modalities of organizing the educational process.		
3) Selecting the types of bachelor's and master's programs provided for in the International Standard Classification of Education		

1	2	3
Financial component		
1) Administering their own income (for higher education institutions of the public or the communal form of ownership), in particular from the provision of paid services. 2) Opening current and deposit accounts in banks. 3) Exercising other rights that are not contrary to the legislation	The legal status of public legal entity – budgetary institution, which imposes severe restrictions on the right to dispose of property and to manage assets, even if earned independently, and the strict regulation of legal personality, which significantly limits their autonomy compared to private education institutions	– Ensure that the changed legal status to budgetary institution prevails over the status of private legal entity – profitable /non-profit institution of any form of ownership, with assignment of property according to ownership right; – amend the itemized budgetary financing for block subsidization of the higher education institution's costs
Personnel component		
1) Employing pedagogical, scientific, scientific-pedagogical and other workers	– The high level of detailization on the internal personnel structures in the primary legislation (especially the Articles 55–58); – little opportunities for career advancement; – the high level of detailization regarding the size and conditions of allowances for scientific-pedagogical workers (Article 59)	Inclusion of these elements in the university statutes when the higher education institution acquires the status of private legal entity – profitable/non-profit institution of higher education

Source: compiled on the basis of [1–3; 14].

ownership and then carry out the grant financing of the activities for the execution of functions of higher education institution envisaged on the basis of autonomy. ■

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