

CIVIL LAW STATUS OF THE INSTITUTION OF HIGHER EDUCATION IN UKRAINE

Nataliya Davydova, King Danylo University

Roman Sabodash, Taras Shevchenko National University of Kiev

Maria Mendzhul, Uzhgorod National University

Nadiia Milovska, F.H. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of the National Academy of Sciences of Ukraine

Iryna Lukasevych-Krutnyk, Ternopil National Economic University

ABSTRACT

Description: The purpose of the article is to examine the elements of the civil status of the institution of higher education as a legal entity.

The Subject of the Study: The subject of the study is the features of the institution of higher education as a legal entity created in the organizational and legal form of the institution.

Methodology: Research methods are chosen based on the object, subject and purpose of the study. The study used general scientific and special methods of legal science. Among them: dialectical, formal and logical, system and structural, comparative and legal, historical and legal, bibliographical methods and the method of scientific forecasting.

The Results of the Study: The results of the study showed that the features of the institution of higher education as a legal entity created in the organizational and legal form of the institution are: non-entrepreneurial nature of activities with special civil capacity; the main purpose of the activity is to provide non-material educational services; the presence of the special constituent document – the statute; special procedure for financing by the founder and transferring property by the founder; the specifics of the procedure for changing the objectives of the institution.

Practical Implications: It is concluded that the institution of higher education in Ukraine is endowed with a dual civil status. On the one hand, the institution is a non-profit legal entity and on the other – it is a full-fledged participant in commercial legal relations.

Value/Originality: While assigning the right to entrepreneurial activity of the institution, attention is drawn to the fact that the provision of educational services is a public affair, which the State implements through a network of public, municipal and private educational institutions, and not the means to satisfy corporate interests.

Keywords: Institution of Higher Education, Legal Regulation, Relations in the Area of Education, Educational Institution, Legal Entity, Civil Law.

INTRODUCTION

The institution of higher education (hereinafter referred to as IHE) holds a key position among the participants of the educational process, which, without any doubt, acts as a legal entity as a subject of civil law. The purpose of the legal entity is that its rules establish

organizational, structural, property, functional unity of the subject of law, the boundaries of its legal status, forms and procedures for its implementation, the order of establishment, reorganization and dissolution of legal entities, as well as a number of other regulations that determine the legal status of organizations as legal entities (Krasavchikov, 2005).

The institution of a legal entity performs several important functions. Firstly, this institution carries out the process of blending of capital, which makes it possible to implement projects that are inaccessible to individuals. Secondly, the institution of legal entity is also used to formalize various types of collective interests not only in the property sphere. In particular, legal entities operate for the purpose of education, religion, etc. (Kulagin, 1997).

The legislation of Ukraine stipulates that educational institutions of all levels have the status of legal entities: pre-school educational institutions (Article 15 of the Law of Ukraine “*On Preschool Education*”), out-of-school educational institution (Article 12 of the Law of Ukraine “*On Out-of-School Education*”), general secondary education institution (Article 1 of the Law of Ukraine “*On Complete General Secondary Education*”), vocational and technical educational institution (Article 21 of the Law of Ukraine “*On Vocational and Technical Education*”), IHE (Article 1 of the Law of Ukraine “*On Higher Education*”).

MATERIALS AND METHODS

Scientific methods were chosen according to the goals, object and subject of research. In particular, general scientific methods (dialectical, formal and logical, system and structural, etc.), as well as special methods of scientific cognition (comparative and legal, historical and legal, etc.) were used. Thus, dialectical and historical research methods made it possible to determine the genesis of the civil status of an educational institution. System and structural method was used to clarify the elements of civil status of the institution of higher education. The application of the hermeneutic method made it possible to analyze the content of domestic legal acts, regulating the issue under consideration. Method of analyses and synthesis made it possible to study the necessary categorical and conceptual apparatus. Bibliographical method helped to examine the relevant scientific literature, in which the problem of civil status of the institution of higher education was highlighted. Formal and logical method was used to formulate theoretical provisions and conclusions concerning the legal capacity of the legal entity. The method of scientific forecasting was applied to make proposals on the improvement of some issues related to the civil status of the institution of higher education.

The scientific and theoretical basis for the article is provisions of the Civil Code of Ukraine and some other post-Soviet countries, Law of Ukraine “*On Higher Education*” and other laws, orders and decrees, regulating the issues related to the civil status of the institution of higher education, as well as scientific works on the general theory of State and law, comparative law, constitutional law, civil law and philosophy of law.

RESULTS AND DISCUSSION

Par. 7, Part 1 of Art. 1 of the Law of Ukraine “*On Higher Education*” (Law of Ukraine, 2014) states that IHE is a separate type of institution, which is a legal entity of private or public law and operates in accordance with the issued license to conduct educational activities at certain levels of higher education, conducts scientific, scientific and technical, innovative and/or

methodical activity, provides the organization of educational process and acquisition of higher education, postgraduate education by individuals taking into account their vocations, interests and abilities.

An institution is an organization created by one or more persons (founders) who do not participate in its management, by combining (allocating) their property to achieve the goal set by the founders, at the expense of this property (Part 3 of Article 83 of the Civil Code of Ukraine) (Law of Ukraine, 2003). Kuznietsova (2012) proposes a similar definition: a private institution is an organization, the property of which is determined by the founder (founders) for the permanent service and for one or another purpose and the body is appointed to operate this property for its intended purpose. Various charitable foundations, educational institutions, libraries, museums, hospitals, non-profit organizations, etc. often operate in the form of institutions. Establishment of institutions for the purpose of treatment, education, management was already known to Roman law (stiftungen, fondations). These goals can go far beyond individual life, and serving such goals is a cherished human desire. In view of the above, it is natural to separate the service to these purposes from a particular physical subject, to give such service the character of devotion and duration. This can be achieved through the creation of the institution: the property is assigned and the bodies that will operate it for its intended purpose are determined for the permanent service of the purpose. The institution is an effective form of State implementation of its functions, especially in social sphere. An educational institution is a non-profit organization established by the owner to carry out educational activities in accordance with educational programs and State educational standards, which is funded by him in whole or in part (Maksymets, 2001).

The creation of a legal entity that does not intend to participate in the economy raises some doubts about its “*genetic value*” (Maksymets, 2001). It is obvious that the civil law structure of the institution differs from the classical structure of a legal entity. The regulation of relations on the establishment and operation of the institution was not the object of attention of the legislator in the early 20th century. According to Pokrovskii (2001) in the era, gripped by a common desire to free property from any attachment, the institutions, which chained property to one purpose forever, transfer it to a certain “*dead hand*” (main morte, Tote Hand), should have naturally been questionable. By creating an institution, the founder would dictate his (her) will to all future generations, restricting their freedom of activity.

A wonderful allegory for State institution was proposed by Kulagin (1997), who called it a “*legal mutant*”, with the help of which the State performs a social function. Such an institution is a “*facade for the State*” that acts as an intermediary between the State and the individual who consumes educational services. Despite the negative characterization of the institution as a “*legal mutant*”, the vast majority of modern post-Soviet scholars believe that the most acceptable organizational and legal form of State IHE is the institution, as it allows to concentrate efforts and resources on achieving socially significant educational goals, while retaining ownership of the founder to the property transferred to achieve this goal (Koroleva, 2006). The legal status of IHE as an institution is characterized by such a large set of special features, such a significant specificity of organizational and functional principles of activity, that Kurko (2010) considers it appropriate to adopt the Law of Ukraine “*On the Institution of Higher Education*”.

The institution as an organizational and legal form of a legal entity has the following characteristics:

1. Is a non-entrepreneurial legal entity;
2. Has a specific purpose of creation;
3. The constituent document is the charter;
4. Belongs to organizations that are not based on membership;
5. Fully or partially financed by the owner (founder);
6. Special procedure for the formation of property;
7. A special procedure for changing the objectives of the institution, as well as the structure of its bodies.

We consider it necessary to consider each of the above features separately. In some post-Soviet countries legal entities are divided into commercial and non-commercial ones (Art. 50 of the Civil Code of the Russian Federation, Art. 46 of the Civil Code of the Republic of Belarus, Art. 51 of the Civil Code of the Republic of Armenia, Art. 34 of the Civil Code of the Republic of Kazakhstan). Commercial entities are organizations, whose main purpose is to make a profit. Such legal entities are business associations, production cooperatives, and enterprises, regardless of ownership. Non-profit legal entities are those that are not created for profit, but for other purposes. Such non-profit legal entities are organizations, consumer cooperatives, foundations, etc. (Dzera et al., 2010). The Civil Code of Ukraine provides for the division of such legal entities as companies into entrepreneurial and non-entrepreneurial ones.

The purpose of the institution is determined by the founders. Depending on the area of activity, it can be the achievement of public goods: educational, scientific, cultural, charitable, etc. The purpose of free economic activity is to meet the intangible needs of the individual in intellectual, cultural and moral development by obtaining higher and postgraduate professional education; meeting the needs of society and the State in qualified specialists with higher education and scientific and pedagogical staff of higher qualification; organization and performing fundamental and applied scientific researches and other scientific and technical, research and development works (Kvanina, 2006). Even if the property of the IHE belongs to a private form of ownership, the main task is not to make a profit, but to transfer professional knowledge, skills and abilities from generation to generation, to spread, generalize and preserve the culture of society. Such features of private IHE as the focus on the achievement of public goods and the prohibition of the distribution of profits among the founders make it possible to distinguish paid educational activities from entrepreneurial ones (Karavaiev, 2006).

3. The institution acts on the basis of constituent documents, due to which it is externally separated from other institutions by the name, location, governing bodies, purpose of activity. Numerous bylaws, which adopted regulations and model statutes on various types of educational institutions, were passed. It should be noted that although the latter document is legally valid, it does not meet the requirements of the statute of the IHE established by the Law of Ukraine “*On Higher Education*”.

The provisions of the statute of the IHE can be classified into two groups: those that are traditional for the constituent documents of most institutions, and those that are unique to the institution of higher education. The first group includes provisions on the full name, location, date of the decision on formation, the rights and responsibilities of the founders, the amount of authorized capital, powers of management, rights and responsibilities of the head, sources of funding, reporting and financial control, and the procedure for amending the charter, the procedure for reorganization and liquidation. The second group includes: regulations on the type of the IHE (university, academy, college); the concept of educational activities; the procedure for electing representatives to public self-government bodies; grounds for early termination of the

contract with the head of the IHE and the head of the faculty and other provisions related to the peculiarities of the establishing and activity of the IHE.

The institution belongs to the organizations, the founders of which do not participate in the management, in contrast to the companies created by the association of persons (participants) who have the right to participate in this company. Thus, the institution does not have corporate relations between the founders. The relationship that arises between the institution and its founder is purely organizational in nature. It should be taken into account that private IHE are free to choose organizational and legal form of a legal entity. If, for example, a limited liability company is chosen to be the form, then corporate relations arise between the founders.

The institution is fully or partially financed by the owner (founder) according to the budget, which clearly states the items of expenditure and the amount allocated by the owner. Usually, the accounts of institutions are serviced only by the State Treasury of Ukraine. The Law of Ukraine “*On Higher Education*” expanded the property opportunities of the IHE and allowed to place the revenues in the territorial bodies of the central executive body in the area of treasury servicing of budget funds or in banking institutions (Par. 5, Part 2 of Article 36 of the Law).

The institution belongs to a group of organizations, to whose property the founder has the right of ownership, and the institution itself may have both the right of ownership and the right of operational management or economic management of the property provided by the founder.

The private owner transfers the property to the private institution on the right of ownership. The public owner transfers property to State and municipal IHE on the right of operative management or economic management which, i.e. they only have the right to own and use this property: houses, constructions, property complexes, equipment, other necessary property of consumer, social, cultural and other function, and also fixed on the right permanent use of land. It should be noted that the Civil Code of Ukraine does not contain provisions on the right of operational management and economic management, which causes many problems in practice.

A significant change in relation to the material and technical base of the IHE was the legal basis according to which the institution receives property. According to Part 1 of Art. 70 of the Law of Ukraine “*On Higher Education*” the founder assigns the IHE on the basis of economic management or transfers ownership of buildings, structures, property complexes, communications, equipment, vehicles and other property in order to ensure its statutory activities. In accordance with the abovementioned Law the property belonged to State and municipal IHE on the right of operative management. Replacing “*operational management*” with “*economic management*” is to some extent a revolutionary and positive innovation.

The norm of Part 1 of Art. 70 of the Law of Ukraine “*On Higher Education*” are progressive for two reasons. Firstly, there is the possibility of transferring property on the right of ownership by the founder of the IHE. Institutions are funded by the founding owners and usually receive a limited real right to the property provided to them and very few opportunities to participate independently in civil law (Sukhanov, 2002). The Ukrainian legislator has made every effort to bring the IHE closer to ordinary economic enterprises engaged in private entrepreneurial activity. Secondly, the right of economic management is closer to the right of ownership than the right of operational management. Replacement of the “*right of operational management*” with the “*right of economic management*” is significant, as the right of economic management is the proprietary right of a business entity that owns, uses and disposes of property assigned to it by the owner according to the Civil Code of Ukraine. The right of operative

management is the proprietary right of business entity, which owns, uses and disposes of the property assigned to it by the owner (authorized body) for non-commercial economic activity (Articles 136, 137 of the Civil Code of Ukraine). It can be concluded that according to the Law of Ukraine “*On Higher Education*” IHE are classified as business entities; they have the right to conduct financial, economic and other activities in accordance with the legislation and the statute of the IHE, which indicates the expansion of civil capacity of the IHE.

One of the legal characteristics of the organizational and legal form of the institution is the specifics of the objectives of its activities, as well as the structure of its bodies. If the implementation of the purpose of the institution has become impossible or it threatens the public interest, the relevant public authority may apply to the court to determine another purpose of the institution in consultation with the governing bodies of the institution (Part 1 of Article 103 of the Civil Code).

A comprehensive analysis of the civil status of the IHE as an institution depends on the solution of several important theoretical and practical issues. The first one: can the institution be engaged in entrepreneurial activity? The second one: does the legislator’s recognition of the right to be engaged in entrepreneurial activity affect the nature of the institution’s legal capacity?

The legal status of State and municipal IHE is of dual (dualistic) nature. They can combine the characteristics of non-profit institution and commercial enterprise. On the one hand, such institutions produce public good-free education, available for all citizens of Ukraine on an equal basis. However, on the other hand, the lack of funding by the State or territorial community for most state/municipal IHE has become traditional for the domestic turnover, which stimulates them to look for other sources of replenishment of their budget. Such IHE have their own revenues, received as payment for services provided in accordance with educational, scientific and educational-production activities, charitable contributions and grants in accordance with the decision made by the academic council of free economic zones.

There are two opposing positions on the issue of the possibility of free enterprise to be engaged in entrepreneurial activity. Astakhov (2011) gives a positive answer to this question: IHE is, on the one hand, a representative of the non-tradable sector of the economy—a non-profit institution, and on the other—a representative of commodity sector, whose activities, in fact, can be attributed to business. Sukhanov (2002) denies this point of view: an educational institution is created to solve social (educational) rather than commercial problems, and therefore belongs to non-profit organizations; its main activities (educational), including those carried out on paid (contractual) basis, cannot be considered entrepreneurial. The above opinion is shared by Borysova (2014), who notes that this activity cannot be called entrepreneurial, because it has significant limitations compared to the latter, in particular, must meet the purpose of the institution. Such activities should be defined as activities aimed at generating additional income. Changing the name of the activity from “*entrepreneurial*” to “*profit-making activity*” does not change the legal essence. Although the expansion of the rights of state/municipal IHE to conduct business activities blurs the line between different types of legal entities, the possibility of partial self-financing of institutions and their right to be engaged in entrepreneurial activities in the context of budget funding deficit should be justified.

Art. 86 of the Civil Code of Ukraine on the limited legal capacity of the institution is an exception to the general rule of Art. 91 of the Civil Code of Ukraine, which provides for universal or general legal capacity of a legal entity of private law. The target legal capacity of the institution is that: (1) the institution may have only those civil rights that meet its objectives, and

be liable in this regard; (2) the institution maybe engaged in entrepreneurial activity, unless (1) otherwise provided by law; (2) this activity corresponds to the purpose for which the institution was established and contributes to the achievement of such purpose; (3) the profit received by the institution from the specified activity does not belong to the founders and is not distributed among them.

We should agree with Koroleva (2006), who proposes to determine the criteria according to which the IHE obtain the right to engage in income-generating activities. Such criteria include: direct connection of the type of activity with the main educational activity in nature and direction; activities of this kind should not harm the main one-educational activity; such activities should serve to meet the needs of the educational process in the IHE.

The distinction between general (universal) and special legal capacity of legal entities is made in legal science. General legal capacity means the ability of an entity to have any rights and obligations, while special one presupposes the existence of legal entity's rights and obligations that correspond to the purpose of its activities and are directly enshrined in its constituent documents (Rekrut, 2003). The founder of the HIV defines the task and purpose of the institution, as being non-profit organization the HIV always has limited, targeted legal capacity.

Non-business associations and institutions in Ukraine are not absolutely free when performing entrepreneurial activities; their actions are limited by the requirements of Art. 86 of the Civil Code of Ukraine. Sometimes the term special, limited (target), functional (due to the obligation to perform public functions) is used to identify this type of legal capacity (Ivanov, 2011). Legal entities formed on the basis of State and communal property must have special legal capacity, limited by the purposes of their public functions, such as educational and scientific activities.

Kvanina (2006) proposes to recognize and consolidate the following types of legal capacity of legal entities: general, special, limited. Legal capacity, not limited by law, license and constituent documents is general legal capacity; legal capacity limited by law is special legal capacity; legal capacity limited by constituent documents or license is limited; other types of legal capacity listed in the legal literature (exclusive, additional, etc.) should be abandoned, as such a variety of its types does not lead to the desired result-the uniform regulation of such relations. We cannot agree with the given classification, because legal capacity limited by law (special legal capacity) and legal capacity limited by constituent documents or license (limited legal capacity) are one category by their legal essence. The author of the given classification came to the conclusion that the regime of special and limited legal capacity applies to the IHE simultaneously.

The IHE has a special (target) legal capacity. This is due to several reasons. Firstly, institutions are created to achieve the goal set by the founder, in particular, the implementation of educational activities at certain levels of higher education, the implementation of scientific, scientific and technical, innovative and/or methodological activities. Free educational institutions perform public function of providing educational services. Secondly, an educational institution as a non-profit organization can operate only within the limits of its statutory purpose. Thirdly, the State controls the activities of educational institutions in accordance with their purpose. A wide range of persons are beneficiaries from the activities of the HIV, for the protection of whose interests the above norm was designated.

It should be noted that the activities of the IHE related to the receipt of income (profit) do not have a clear terminology in the legislation on education. To consolidate it, the legislator,

without providing a precise definition, uses several similar concepts: economic, entrepreneurial, commercial, innovative, statutory activities, production and commercial work, paid additional educational services, non-profit activities. Note that the right of the IHE to conduct business, provided for in Art. 86 of the Civil Code of Ukraine, is also reflected in educational legislation; however, the legislator uses terms related to the content of the term “*entrepreneurial activity*”, in particular economic activity (Art. 70 of the Law of Ukraine “*On Higher Education*”), financial and economic activities (Article 32 of the specified law), activity on rendering of paid services (Art. 73 of this Law). Thus, the legislator overburdens the law with terms that essentially mean the activities of this entity aimed at obtaining additional income. In our opinion, it is necessary to unify the use of the above terms and use the unified term enshrined in the Civil Code of Ukraine “*entrepreneurial activity*”.

CONCLUSION

The functioning of any participant in civil law relations in Ukraine is associated with the acquisition of the appropriate legal status on the basis of current legislation. It is the legal status of the subject of civil law which allows it to participate in various types of civil law relations (contractual, non-contractual, property, etc.). The activity of a IHE is also associated with the acquisition of civil status, which allows it to carry out educational activities and be a full participant in civil relations.

Under modern conditions of reforming the legislation of Ukraine in the area of higher education, the issues of legal provision of conditions and procedure for obtaining the status of a IHE require thorough research in order to develop a single approach to the regulation of its civil law status.

The results obtained in the course of this study will contribute to the improvement of Ukrainian legislation in the area of higher education.

The IHE as a legal entity is endowed with general features inherent in any legal entity in the organizational and legal form of the institution, as well as special features, which are typical only for educational institutions. Such features are:

1. The IHE is a non-entrepreneurial legal entity with special civil capacity;
2. The main purpose of its activity is the provision of intangible educational services, performing basic scientific researches;
3. The presence of a special constituent document-the statute;
4. There is no membership in the institution and no corporate relationship between the founders;
5. Special procedure for financing and transferring property by the founder;
6. Special procedure for changing the objectives of the institution.

The institution is a legally recommended organizational and legal form for the IHE that is created primarily to achieve scientific and educational, educational, cultural and other goals of this kind. However, higher education institutions participate in the property turnover for the material support of their main non-commercial purpose if necessary, i.e. have a dual civil status. On the one hand, the institution is a non-profit legal entity, and on the other-it is a full-fledged participant in economic relations engaged in entrepreneurial activity.

REFERENCES

- Astakhov, V. (2011). *Educational law: Lecture notes*. Kharkiv: NUA Publishing House.
- Borysova, V. (2014). Institution as a special organizational and legal form of non-entrepreneurial legal entities. *Legal Journal Law of Ukraine*, 4(1), 51-59.
- Dzera, O., Kuznietsova, N., & Maidanyk, R. (2010). *Civil law of Ukraine*. General part: A textbook. Kyiv: Yurinkom Inter.
- Ivanov, S. (2011). The doctrine of ultra vires in the activities of legal entities of public law. *Forum prava*, 2(1), 303-310.
- Karavaiev, N. (2006). *Legal personality of a non-state higher educational institution*. Published PhD Dissertation. State educational institution of higher professional education Udmurt State University.
- Koroleva, T.V. (2006). *Civil law status of the State educational institution of higher professional education (State university) and its structural subdivisions*. Published PhD Dissertation. State educational institution of higher professional education Rostov State University.
- Krasavchikov, O.A. (2005). *The categories of science of civil law*. Moscow: Statute.
- Kulagin, M.I. (1997). *State-monopolistic capitalism and legal entity*. Moscow: Statut.
- Kurko, M.N. (2010). *Administrative and legal regulation of higher education in Ukraine*. Published Doctoral Dissertation. Kharkiv National University of Internal Affairs.
- Kuznietsova, N.S. (2012). *The concept and classification of legal entities in civil law of Ukraine: Theory and practice*. Legal Practice.
- Kvanina, V. (2006). *Civil law regulation in the sphere of higher professional education in the Russian Federation*. Published Doctoral Dissertation. Russian Academy of Justice.
- Law of Ukraine. (2003). *Civil code of January 16, no. 435-IV*. Retrieved September 30, 2020, from <https://zakon.rada.gov.ua/laws/show/435-15#Text>
- Law of Ukraine. (2014). *On higher education of July 01, no. 1556-VII*. Retrieved September 30, 2020, from <https://zakon.rada.gov.ua/laws/show/1556-18#Text>
- Maksymets, L. (2001). *Educational institution as a subject of civil law*. Published PhD Dissertation. Institute of State and Law of Russian Academy of Sciences.
- Pokrovskii, I.A. (2001). *The main problems of civil law*. Moscow: Statut.
- Rekrut, O. (2003). *Administrative law status of non-state institutions of higher education in Russia*. Published PhD Dissertation. State educational institution of higher professional education Saratov State Law Academy.
- Sukhanov, E. (2002). *Civil law: Textbook*. Moscow: BEK.
- Sukhanov, E. (2002). On the legal status of educational institutions. *Bulletin of the Supreme Arbitration Court of the Russian Federation*, 11(1), 62–73.