

CONSTITUTIONAL LEGAL PROBLEMS AND SOLUTIONS FOR THE PROTECTION OF FREE ENTREPRENEURSHIP

Bayram Orujov*

Abstract

This article examines the constitutional and legislative challenges to the protection and development of free entrepreneurship in the Republic of Azerbaijan. Despite significant reforms, discrepancies in the Constitution and inconsistencies among legislative acts continue to impede entrepreneurial activity. The article identifies key issues, including the narrow scope of state regulation grounds under Article 59 of the Constitution, the lack of explicit recognition of commercial freedom of expression, and the absence of constitutional guarantees for legal entities. It also highlights inconsistencies in laws such as the Law on Entrepreneurial Activity, Civil Code, and Tax Code, which hinder the effective implementation of entrepreneurial rights. Drawing on good practices from countries such as Poland, Spain, Kazakhstan, and others, the article emphasizes the need to establish an Entrepreneur Ombudsman in Azerbaijan to enhance the protection of entrepreneurial rights. The recommendations aim to strengthen the legal framework, ensure consistency across laws, and improve the overall entrepreneurial environment in Azerbaijan.

Keywords: *free entrepreneurship, constitutional protection, legislative framework, entrepreneurial rights, Entrepreneur Ombudsman, comparative analysis, commercial freedom of expression, Azerbaijan.*

Introduction

Free entrepreneurship serves as a cornerstone of a nation's economic growth and social progress. While the Republic of Azerbaijan has made notable strides in reforming its entrepreneurial framework, gaps persist in both legislative and enforcement mechanisms, hindering the full realization of this fundamental right. This article examines these challenges and proposes actionable solutions, supported by comparative analysis and international best practices. By addressing these shortcomings, the article aims to enhance the legal framework governing free entrepreneurship and promote its effective implementation in Azerbaijan.

Problems Regarding the Constitution of the Republic of Azerbaijan.

The first issue relates to Article 59 of the Constitution. Clause 2 of Article 59, which regulates the right to free entrepreneurship, states that the state regulates the entrepreneurial sector only in connection with the protection of state interests, human life, and health [16, art. 59]. It should be noted that state regulation of free entrepreneurship is general in nature, and the grounds of "state interests, protection of human life and health" do not fully encompass such regulation. The constitutions of several other countries define "protection of public interests" as one of the grounds for regulation in the field of free entrepreneurship. The theory of public interest is also a widely discussed concept in the area of state regulation of the economy. This theory asserts that regulation is provided in response to public demand to eliminate inefficient and unfair market practices [15, p. 1].

* PhD candidate in Law, Azerbaijani Bar Association

According to this theory, the state takes measures to prevent monopolistic activities and unfair competition, applies safety standards to protect human life and health, regulates the employer's monopsony power over employees, and ensures security in emissions to prevent investor fraud, among other measures. As noted here, neither the legislative nor organizational regulation implemented by the Republic of Azerbaijan in the field of free entrepreneurship is fully encompassed within the grounds specified in Article 59 of the Constitution. Furthermore, the basis of protecting human life and health is already covered under the umbrella of public interests. Considering these factors, it would be appropriate to amend the provision as follows: *"The state regulates the entrepreneurial sector only in connection with the protection of state interests and public interests."*

Another issue to consider in the Constitution is ensuring the protection of commercial freedom of expression. Article 47 of the Constitution of the Republic of Azerbaijan protects everyone's freedom of speech and expression. However, as the rights and freedoms specified in the Constitution apply only to natural persons, this article does not cover the commercial freedom of expression. By comparison, U.S. constitutional law recognizes the protection of commercial freedom of expression. The protection of freedom of expression for legal entities in the U.S. Constitution was established in the *Citizens United* court case [17]. It should be noted that constitutional guarantees of commercial freedom of expression are of great importance for the realization of free entrepreneurship. Therefore, it is proposed to add the following second sentence to Clause 1 of Article 47 of the Constitution:

"Freedom of thought and expression also protects the expressions of entrepreneurs within the framework of their right to free entrepreneurship."

The rights, freedoms, and guarantees envisaged in the Constitution of the Republic of Azerbaijan for entrepreneurs protect individual entrepreneurs acting as natural persons. However, the Constitution does not guarantee the rights and freedoms of entrepreneurs operating as legal entities. By comparison, the German Constitution protects the rights of legal entities as well. According to Clause 19(3) of the German Constitution, fundamental rights apply to legal entities to the extent that their nature allows [2, art. 19.3]. The German Federal Constitutional Court emphasizes the importance of considering both the nature of the rights and the nature of the legal entities [14, p. 692].

Among the rights that occupy a central place in the Constitution and should also apply to legal entities, the most important are the rights to free entrepreneurship and property, as well as constitutional legal guarantees. Although the provisions regulating these rights do not explicitly state that they apply solely to natural persons, the title of the relevant section is "Fundamental Human and Civil Rights and Freedoms." This creates certain ambiguities regarding the application of these rights to legal entities in appropriate cases.

The precedents of the European Court of Human Rights (ECtHR) are relevant in this context for several reasons. Due to the inherent prominence of companies, the ECtHR does not limit human rights standards to natural persons. Consequently, the ECtHR has provided comprehensive opinions on the human rights of commercial organizations in its cases [12, p. 43]. In this regard, the Hungarian Constitutional Court, in one of its decisions, stated that the Constitution also guarantees the fundamental rights of entities with legal personality.

Throughout American legal history, corporations have made various attempts to claim constitutional rights. This is understandable when considering the need to protect corporations' rights regarding private property and contractual obligations. The U.S. Supreme Court examined the property rights of corporations in *Terrett v. Taylor*, 13 U.S. 43 (1815). In this case, the Episcopal Church (a legal entity) asserted its property rights over specific land. The Supreme Court upheld the church's property rights and affirmed that corporations and other legal entities also possess fundamental rights [19].

In its early cases, the U.S. Supreme Court ruled that corporations are covered under the Contracts Clause of the Constitution. Article I of the Constitution states that no state shall pass laws impairing the obligation of contracts [7, art. 1]. The term "contractual obligations" refers to obligations arising from agreements between two parties. In the *Dartmouth College v. Woodward* (1819) case, the college (a corporation) sought protection under the Constitution's Contracts Clause [120]. The Supreme Court ruled that constitutional guarantees of contracts applied to colleges operating as educational corporations and held that New Hampshire had violated the Contracts Clause [13].

Based on the aforementioned points, it can be concluded that, in recognizing the progressive role of legal entities in achieving economic development, the aforementioned countries have determined that the rights and obligations under their constitutions apply to legal entities in appropriate cases. Since the Constitution of the Republic of Azerbaijan does not contain a provision addressing this matter, it remains unclear whether the rights, freedoms, and guarantees stipulated therein extend to legal entities. To address this gap, it is proposed to add a Clause IV to Article 24 of the Constitution with the following content:

"Fundamental rights, freedoms, and obligations stipulated in this section shall apply to legal entities in appropriate cases, to the extent permitted by the nature of the rights, freedoms, and obligations."

Problems in Legislative Acts on Entrepreneurial Activity

To strengthen the legal guarantees for entrepreneurship, the following problems and solutions related to the legislative acts in this field should be considered:

a) *Law on Entrepreneurial Activity*

- Clause 2 of Article 2 of the *Law on Entrepreneurial Activity* states that entrepreneurial activity carried out by establishing an enterprise is also regulated by the legislation of the Republic of Azerbaijan on enterprises [10, art. 2.2]. It should be noted that the *Law on Enterprises*, which regulated the activities of enterprises in the Republic of Azerbaijan, is no longer in force. Currently, the activities of legal entities are regulated by the Civil Code, as indicated in Clause 1 of this article. Therefore, it is appropriate to remove this clause.
- Article 6 of the law lists several fundamental rights of entrepreneurs. Although these rights cover a wide range of activities, they do not fully encompass the rights established for entrepreneurs in other legislative acts. For example, the rights listed in this article do not include the right of micro-entrepreneurs to obtain a startup certificate. Therefore, it is proposed to add the following paragraph as Clause 20 to this article:
"To exercise other rights provided for by legislation."
- Article 7 of the law outlines the obligations entrepreneurs bear in connection with their activities. Since other legislative acts also establish obligations for entrepreneurs, and this article does not cover those obligations, it is proposed to

add the following paragraph as Clause 19 to this article:
"To fulfill other obligations provided for by legislation."

- According to Article 8 of the law, the list of property exempt from payment demands is determined by the Civil Procedure Code of the Republic of Azerbaijan. It should be noted that the code does not contain any legal norms on this matter. Instead, this list is specified in the Cabinet of Ministers' Decision No. 89 dated June 5, 2002, titled "On the Approval of the Exact List of Types of Property Exempt from Payment Demands During the Execution of Enforcement Documents Against a Natural Person." For this reason, it is proposed either to remove this provision or to amend it as follows:
"The list of property exempt from payment demands is determined by relevant legislative acts."
- Article 11 of the *Law on Entrepreneurial Activity* includes legal norms related to licenses and permits required for conducting entrepreneurial activities. According to Clause 3 of this article, a decision on granting a special permit (license) by the relevant state authorities must be issued within 15 days after the submission of an application and the relevant documents in accordance with the law [10, art. 11]. However, according to Clause 19.8 of the *Law on Licenses and Permits*, unless a shorter period is specified in the laws of the Republic of Azerbaijan (excluding the *Law on Administrative Proceedings*), the licensing authority must issue a license or adopt an administrative act on refusal no later than 10 working days from the date the application and accompanying documents were registered [11, art. 19.8]. Regarding permits, Clause 19.9 of the *Law on Licenses and Permits* states that unless a shorter period is specified in the laws of the Republic of Azerbaijan (excluding the *Law on Administrative Proceedings*), the permitting authority must issue the permit (sign the contract or perform any other required action concerning the applicant) or adopt an administrative act on refusal no later than 7 working days from the date the application and accompanying documents were registered [11, art. 19.9]. As seen, while the *Law on Entrepreneurial Activity* sets a 15-day period for deciding on the issuance of licenses and permits, the *Law on Licenses and Permits* specifies 10 working days for licenses and 7 working days for permits. To resolve this discrepancy, it is proposed to align Clause 3 of Article 11 of the *Law on Entrepreneurial Activity* with Clauses 19.8 and 19.9 of the *Law on Licenses and Permits*.
- Additionally, the grounds for refusal specified in Clause 4 of Article 11 of the *Law on Entrepreneurial Activity* are inconsistent with Article 20 of the *Law on Licenses and Permits*. Therefore, to address this inconsistency, it is proposed to align Article 11 of the *Law on Entrepreneurial Activity* with Article 20 of the *Law on Licenses and Permits*.

b) *Civil Code and Tax Code*

- The definition of entrepreneurial activity provided in the *Law on Entrepreneurial Activity* does not align with the definitions provided in the Civil Code and Tax Code. This discrepancy relates to the primary purpose of the activity. Specifically, the Civil Code uses the term "sale of goods," while the Tax Code uses the term "provision of goods," both of which fall under the broader phrase "production and/or sale of goods" in the *Law on Entrepreneurial Activity*. To

ensure consistency in the definitions of entrepreneurial activity across legislative acts, relevant amendments should be made, and the definitions in the Tax Code and Civil Code should be aligned with a newly revised version of the definition of entrepreneurial activity in the *Law on Entrepreneurial Activity*.

- It should be noted that while the Tax Code's Article 13 provides definitions for various categories of taxpayers, it does not define the term "individual entrepreneur." In the Tax Code, this term is used under the headings "individual entrepreneur," "a person engaged in entrepreneurial activity without establishing a legal entity," and "a natural person conducting entrepreneurial activity without establishing a legal entity," creating a degree of ambiguity. To ensure legal uniformity, it is proposed that these headings be unified and replaced with the term "individual entrepreneur." Furthermore, it is suggested to include a definition for "individual entrepreneur" in the Tax Code under Clause 13.2.86 as follows:

"Individual entrepreneur – a natural person conducting entrepreneurial activity without establishing a legal entity."

Other Improvements in the Field of Entrepreneurial Activity and Good Practices from Foreign Countries

Taking into account examples of good practices from other countries, the following measures can be proposed as additional improvements in the field of entrepreneurial activity:

a) *Establishing an independent body – an Ombudsman – for the protection of entrepreneurs' rights.* The institution of an Ombudsman specifically responsible for safeguarding entrepreneurial rights already exists in the practices of several countries. In the Republic of Azerbaijan, the responsibility for protecting entrepreneurs' rights has been assigned to the Small and Medium Business Development Agency (KOBIA). However, given the broad scope of this state agency's activities, establishing a specialized Ombudsman body dedicated exclusively to the protection of entrepreneurial rights would ensure more effective protection of entrepreneurs' rights.

Several countries have established non-judicial bodies authorized to ensure the realization of entrepreneurs' rights and implement related measures. One example is the Ombudsman for Entrepreneurs in Poland. This institution was created to collect and evaluate information regarding violations or misuse of the right to free entrepreneurship by law enforcement agencies, government offices, local governments, and regulatory bodies [8, p. 50]. Based on this information, the Ombudsman appeals to relevant authorities for changes in laws or practices.

In Spain, the Defender of the Entrepreneur organization, established by the Catalan Confederation representing business organizations and enterprises, provides services to protect entrepreneurs whose rights are violated by local, regional, or national public authorities [8, p. 50].

Kazakhstan has also taken significant steps by establishing the position of the Business Ombudsman. A Presidential Decree on February 27, 2014, concerning essential measures for developing Kazakhstan's business environment, instructed relevant state bodies to strengthen the role of the National Chamber of Entrepreneurs and create the Business Ombudsman institution through legislative amendments [5]. The legal status of the Business Ombudsman is regulated by the Entrepreneurial Code, which came into

force in 2016. The Business Ombudsman's primary functions include representing and protecting the rights and legitimate interests of entrepreneurs and addressing their complaints [5].

Similar institutions exist in Russia, Uzbekistan, Tatarstan, Kyrgyzstan, Georgia, and Ukraine. In Ukraine, the Business Ombudsman Council focuses on protecting entrepreneurial rights, improving the investment climate, and combating corruption. This institution was established with support from the European Bank for Reconstruction and Development [4]. In Georgia, the Business Ombudsman, operating since June 5, 2015, monitors the protection of the rights and legitimate interests of individuals engaged in entrepreneurial activities and identifies cases of rights violations by administrative bodies, supporting the restoration of those rights [3].

In Australia, there is a more specific institution: the Ombudsman for Small Businesses and Family Enterprises. Established on March 11, 2016, its mission is to support and protect the rights of small businesses and family enterprises [1]. A similar body operates in the United States. Based on the Small Business Regulatory Enforcement Fairness Act of 1996, the Small Business Administration created the National Small Business Ombudsman, responsible for addressing small business complaints against federal executive agencies.

In the United Kingdom, two relevant bodies protect entrepreneurs' rights: the Financial Ombudsman Service and the Small Business Commissioner. Established in 2011, the Financial Ombudsman Service initially focused on resolving complaints between financial entrepreneurs and their clients. However, since 2019, this institution has also been tasked with protecting entrepreneurs' rights [148]. The Small Business Commissioner has a narrower scope, focusing on issues related to payments owed by large businesses to small enterprises [16].

Based on the above, it can be concluded that the institution of an Ombudsman for Entrepreneurs has been in place in many countries for years. Given the critical role of effectively and promptly protecting entrepreneurs' rights in realizing the right to free entrepreneurship, establishing such a body in the Republic of Azerbaijan is essential. The Ombudsman for Entrepreneurs would oversee the protection of rights and legitimate interests related to entrepreneurial activities, identify violations of these rights, and assist in restoring them. Therefore, it is proposed to establish an Ombudsman for Entrepreneurs in Azerbaijan and regulate its activities through an appropriate law.

The protection and development of free entrepreneurship require a robust legal framework that aligns with contemporary international standards and addresses existing legislative and procedural gaps. By incorporating amendments to the Constitution, ensuring consistency across legislative acts, and adopting practices such as establishing an Entrepreneur Ombudsman, Azerbaijan can provide stronger safeguards for entrepreneurs' rights. These measures not only advance economic freedom but also bolster the nation's overall socio-economic stability and global competitiveness. It is essential to prioritize these reforms to create a more conducive environment for sustainable entrepreneurial growth.

References:

1. Australian Small Business and Enterprise Ombudsman
URL: <https://www.asbfeo.gov.au/what-we-do> (last access: 02.01.24)
2. Basic Law for the Federal Republic of Germany of 23 May 1949
URL: https://www.gesetze-im-internet.de/englisch_gg/ (last access: 04.01.24)
3. Business Ombudsman Office of Georgia.
URL: <https://businessombudsman.ge/en/about-us/activities> (last access: 03.01.24)
4. Business Ombudsman Council Ukraine.
URL: <https://boi.org.ua/en/about/> (last access: 05.01.24)
5. Business Ombudsman Office of Kazakhstan.
URL: https://ombudsmanbiz.kz/eng/biznes_ombudsmen/istoriya_instituta/ (last access: 02.01.24)
6. Constitution of the Republic of Azerbaijan. November 12, 1995. Collection of Legislation of the Republic of Azerbaijan, July 31, 1997, issue no.: 01.
7. Constitution of the United States. Written in 1787, ratified in 1788, and in operation since 1789. URL: https://www.senate.gov/civics/constitution_item/constitution.htm (last access: 06.01.24)
8. European Union Agency for Fundamental Rights. Freedom to conduct a business: exploring the dimensions of a fundamental right Luxembourg: Publications Office of the European Union, 2015 p. 66.
9. Financial Ombudsman Service of the United Kingdom.
URL: <https://sme.financial-ombudsman.org.uk/who-we-are> (last access: 09.01.24)
10. Law of the Republic of Azerbaijan "On Entrepreneurial Activity," dated December 15, 1992. Bulletin of the Supreme Soviet of the Republic of Azerbaijan, December 15, 1992, issue no.: 23.
11. Law of the Republic of Azerbaijan "On Licenses and Permits," dated March 15, 2016. Azerbaijan Newspaper, April 23, 2016, issue no.: 86.
12. Murray N. Ruthbard, *An Austrian Perspective on the History of Economic Thought*, Vol.1, Misses Institute, 2006, p. 574
13. Omarov V., *Competition Law and Ensuring Citizens' Right to Free Entrepreneurship*. 2016.
14. Peter Oliver, 'Companies and their fundamental rights: A comparative Perspective' 64 (June) *International Law Quarterly*, 2015, p. 661-696
15. Richard A. Posner. *Theories of Economic Regulation*. NBER Working Paper Series, Working Paper 4, 1974, p. 44
16. Small Business Commissioner of the United Kingdom
URL: <https://www.smallbusinesscommissioner.gov.uk/deal-with-an-unpaid-invoice/get-advice/complain-to-the-small-business-commissioner/> (last access: 12.01.24)
17. Supreme Court of the United States. *Citizens United v. Federal Election Commission*. 21 January 2010. 558 U.S. 310
18. Supreme Court of the United States. *Dartmouth College v. Woodward*, 17 U.S. 481, 1819
19. Supreme Court of the United States. *Terrett v. Taylor*, 13 U.S. 9 Cranch 43 43, 1815.

Date of receipt of the article in the Editorial Office

(25.01.2024)