THE LEGAL STATUS OF LEGAL ENTITIES AS SUBJECTS OF ENTREPRENEURIAL ACTIVITY

Aysel Abbasli
(ayselabbasli@yahoo.com)
Ph.D of law
(Baku State University)

Abstract

The present article covers a research on legal status of legal entities as subjects of entrepreneurial activity with a brief historical observation of theories on judicial nature of legal entities. Based on the research the author comes to the conclusion that enterprises in Azerbaijan are not independent legal categories.

Also it is proposed to make necessary changes in the legislation according to which the enterprise will be perceived neither as the subject of law, nor as a real estate. The author offers his own version of "enterprise" term definition. It is proposed to add to the legislation a common norm along the lines of: "Parties are entitled to enter contracts with enterprises as property complexes in subject. By the will of parties any kind of property can be part of such an enterprise. In this case facilities that form such an enterprise must respond the purposes of this enterprise and must be transferred in condition suitable for these purposes."

Keywords: *criminal liability, crime, object of crime, criminal and legal protection, cultural heritage object, destruction, damage, ruining, historical value, cultural value, public morality, punishment.*

According to Article 3 of the Law of the Republic of Azerbaijan "On entrepreneurial activity", legal entities, regardless of the form of ownership, may engage in entrepreneurial activities.

The concept of a legal entity emerged later than that of individual form of business activity. Roman lawyers did not develop it fully - Roman Law did not consider the concept of "legal entity" itself, yet, there existed associations of individuals (corporations), created for entrepreneurial activities, with the analogy of segregated property, yet whose debts were not the debts of their founders [22 , 115-116]. Basically, their activities were regulated by public law.

The very concept of a legal entity and its first serious development belong to the glossators of the Middle Ages. The activities of corporations were compared to the activities of individuals. The "theory of fiction" (the 13th century) originates from here. This theory claims that a human can only possess features of a subject of law (such as will, consciousness). However, as practice shows, the existence of numerous cases where property rights belong to a group of people, a corporation rather than an individual, the legislator recognizes the individual's features of a corporation, while being aware of the fact that a corporation cannot be a person, allowing a fact of a fiction in this particular case [11, 50].

Further in history, we can note a certain "bust" in the development of the concept of a legal entity caused by objective historical conditions in Europe, culminating in the French bourgeois revolution of 1789, when the category of legal entity fell out of scientific use for decades and was not applied in legislation [23, 154].

Active understanding of the concept of a legal entity started only nearly at the

end of the 19th - the beginning of the 20th centuries. Therefore, F.C Savigny and other scientists developed the theory of fiction (the theory of impersonation) in their works in the nineteenth century. It was attached by such theories as: the theory of destinators (R. Ihering, N. M. Korkunov), the core of which stated since only a person can be a carrier of rights, a legal entity is no more than a way of existence of legal relations of its person-members (Destinators of right); the theory of property impersonation (the theory of combined (selected) property), which, in the framework of the theory of fiction, was developed by A. Brinz and others, according to which, a legal entity represents a continuing state of property management, separate from all other properties; the theory of collective ownership (M. Planiol, Yu. S. Gambarov, Bertel, Mollengraf) - even if a person can be a legal entity, this does not mean that only one individual should be granted the legal right, the form of granting right can be one-man as well as collective, such "collective entities" are legal entities; theory of the official or collective property is also listed in this group (Hölder and Binder, etc. [10, 122]).

In modern conditions, a legal entity is defined as one of the full legal entities, differing from an individual person with its collective nature, expressed in special requirements established to it by law.

According to Art. 43.1 of the Civil Code of Azerbaijan Republic, a legal entity is a specially created, state-registered structure that owns separate property and is liable for its obligations with this property, can, on its own behalf, acquire and exercise property and personal non-property rights, bear obligations, act as a plaintiff or a defendant in court. A legal entity must have an independent balance (sheet) [1, 82].

Legal capacity of legal entities had variously been interpreted at different stages of market relations' development. Specific capacity of legal entities was typical for the first period of capitalism, that is, they could only enter into such legal relations that were required to achieve the goals defined by the law or statute.

Non-commercial organizations with activities not aimed at making profit have such legal capacity until nowadays. In contrast, the modern period of developed capitalist turnover is characterized by the legalization of general legal capacity with respect to commercial organizations. It promotes the free movement of capital in search of the most profitable spheres of application, unlocks the initiative of the economic entity.

This tendency is most clearly observed in Switzerland, the law of which states that legal entities can acquire all rights and assume any obligations, except for those for which the prerequisite is a human trait such as gender, age or kinship (Swiss Civil Code, 51) [4, 105-107].

In one form or another, the tendency to legalize general legal capacity is also observed in the legislation of other countries with developed capitalist relations (Germany, England, USA, etc.). For example, in Germany, despite a number of decrees of a Civil Code, stipulating the conditionality of legal capacity to the purpose stipulated in the statute, and requiring obtaining relevant permission of the competent state authority to change this goal, judicial practice and doctrine assume that the purpose stipulated by the statute is for internal relations only. Hence, transactions made by a legal entity in excess of statutory rights are considered valid with respect to a third party [8, 107].

A similar practice can be observed in all developed capitalist countries. In contrast, in the Soviet legal doctrine and practice, the legal capacity of legal entities was treated as strictly special one. The starting point for this was the creation of each entity to perform strictly defined functions in a production or socio-cultural area and for these purposes carried out one or another strictly defined activity.

Accordingly, a legal entity needs to acquire not rights of any type in general, but only those civil rights and obligations that are associated with the implementation of the tasks assigned to it. This provision was secured in part II. Art. 25 of the Civil Code of Azerbaijan SSR of 1964, which states that "a legal entity has legal capacity in accordance with the established aims of its activities," that is, the legal capacity of a legal entity was special. Strictly observed specialization of legal capacity of a legal entity was treated as an effective mechanism serving to strengthen the rule of law in the field of economic activity, ensure the implementation of national economic plans and the proportional development of the national economy as a whole [4, 105-107].

At the same time, the literature emphasized that the principle of special legal capacity does not mean that the rights and obligations that a legal entity can acquire are absolutely limited and exhaustive. Prof. D.M. Genkin wrote that an organization could perform a wide variety of single transactions, if these transactions accompanying the main activities of the organization are required by the purpose of this organization established in its charter or in the regulation on it [6, 43].

However, this tolerance did not in any way weaken the principle of the special legal capacity of a legal entity, since transactions outside the limits defined by the charter or the legal entity's order were recognized as non-statutory and, as such, did not produce legal consequences, that is, were invalid [4, 108].

These rules did not allow for any exceptions. This explains the fact that in a planned economy, when the bulk of economic entities were state enterprises, the term "competence" rather than "legal capacity" was used to characterize the rights and obligations of subjects of economic law. The strict specialization of the legal capacity of legal entities neutered their initiative, standing in the way of the development of cost-accounting relations.

Along with the implementation of radical transformations in the economy in our country and the transition to market relations, the task was to bring legislation in line with new economic realities, including with regard to the legal status of a legal entity.

In Azerbaijan, this task was performed with the adoption of a new Civil Code, enacted on September 1, 2000. Art. 43 of the Civil Code "The concept of a legal entity" has involved a new classification of legal entities - dividing them into commercial organizations pursuing profit as their main goal, and non-profit organizations that do not have profit as such a goal, hence do not distribute the profit among the participants. This classification has determined the differences in the legal capacity of both.

Art. 44.2 of the Civil Code has enacted that "legal entities that are commercial organizations may have civil rights and bear civil obligations necessary to carry out any activities not prohibited by law", that is, the legal capacity of a commercial legal entity is classified as general (universal). As a result, there is no need to specify the objectives of its activities in the charter of a commercial organization. This require-

ment of the Civil Code applies only to non-profit organizations (Article 47 of the Civil Code "Charter of a legal entity").

Such transformation has removed many bureaucratic barriers that were neutering the economic initiative of entrepreneurs, contributed to the development of the private sector of the economy, as well as the growth of small and medium-sized businesses. It is important to note it considering that private commercial organizations prevail numerically in the country's economy.

In contrast, non-profit organizations that pursue specific social, cultural, and other generally useful goals still carry not common, but special legal capacity. The state unitary enterprises, whose subject of activity is clearly defined in their statutes, must be listed among them. Preserving the special legal capacity of these organizations enables the founders to exercise targeted control over their activities in order to implement the tasks set forth in the statutes.

The general rule on the universal legal capacity of commercial legal entities allows for certain reservations. Thus, some commercial non-governmental organizations (banks, insurance companies), which are prohibited from consolidating their main activity with any other, have special legal capacity in accordance with the law.

Another factor limiting the legal capacity of commercial legal entities is the need to obtain a license to engage in certain types of activities provided for by law.

Moreover, if the condition for obtaining a license involves the requirement to engage in such activities as exceptional, then during the period of its validity the license recipient does not have the right to carry out other activities beyond those allowed by the license. Thus, obtaining a license converts the general legal capacity of a commercial organization into a special one [12, 35].

Another issue that requires some clarification regarding a legal entity as a business entity is the ambiguous use of the concept of "enterprise" in legal acts and legal literature as not only an organizational and technical category or object of law, but also as a synonym or type of legal entity.

Some authors have indicated the need to replace or supplement the category of "legal entity" with the term "enterprise" in relation to a collective business entity coordinated by management and regulation bodies. Moreover, this refers to the enterprise as a synonym or the main type of commercial organization, i.e., a collective entrepreneurial entity in its pure form, not just a legal entity [15, 15-18; 16, 5].

Another approach, based on current Civil Law, assumes that only those commercial organizations that do not have ownership rights to the property assigned to them and use it on the basis of economic management or operational management (state or municipal unitary enterprises) are considered an enterprise as a subject of law, in the rest cases the "enterprise" should be considered as a property complex, an object of law [20, 80 —82].

The fundamentals of the development of the modern concept of the enterprise were established back in the era of Roman law. The Roman law developed the concept of "entire property complexes united by an economic purpose": "the earliest definition of a citizen's property is given in the laws of XII tables under the term "familia pecuniaque" - originally a collection (unity) of slaves and cattle (pecuspecunia). Later, familia also denoted the entire aggregate of property [21 p, 154].

As we know, the norms and institutions of Roman law in practice acted on the territory of a number of German lands prior to the beginning of the unification process. However, the development of the concept of an enterprise as an object of rights falls mainly on the period of industrial growth, the intensification of commodity-money relations, that is, the middle of the XIX - early XX centuries.

Some German legal scholars of the first half of the XIX century started to consider an enterprise as a legal entity. However, this opinion was rejected. Since then, the opinion has prevailed that the enterprise is an object of rights [8, 112; 5, 3]. It acts as the central anchor point of trade law, recognized as an alienable and inheritable unit [9, 13].

According to M. Sharifov, the definition of an enterprise as a subject of law is inherent in Soviet law (as well as in the legal systems of some post-socialist countries) [24, 6].

The concept of an enterprise is used in both economic and legal sciences. It is obvious that an enterprise primarily acts as an economic category, being an instrument of entrepreneurial activity, the main element of an organization of productive forces and production relations, created in the course of activity of an initiative subject of the process of social production.

From an economic point of view, an enterprise is a "property-separated economic unit designed to solve economic and production tasks (production of consumer-oriented goods and services) and capable of self-reproduction (ensuring its life cycle)"; "Sometimes,"-as per Y. M. Osipov and Y.Y.Smirnova, an enterprise is called a commercial organization, in order to deliver the main purpose of its activity, to separate it from a non-commercial organization... " [19, 22].

In Western economic science, the collective concept of an enterprise is described as "economic unity, in which human and material factors of economic activity are combined and coordinated" [16, 15].

From this approach, actual domination over the means of production, the actual possibility of exercising control and managing over the economic unit containing these means of production, is of primary importance for answering the question about the ownership of an enterprise by a particular person. Issues of legal registration of these relations are largely beyond the scope. In addition, the question is not whether the enterprise is a subject or an object of legal relations, no distinction is made between an enterprise and a subject of rights to it. As a rule, economics considers the owner of the factors of production and the factors of production, its material base, as a whole. Meanwhile, legal science is not indifferent to how the rights for a given economic unit are formed, how they are exercised, what rights a subject of law has in relation to it.

This case is also relevant for the legislation of Azerbaijan Republic. Thus, a number of legal acts of Azerbaijan Republic consider an enterprise not as an object, but as a subject of law. In particular, for example, according to Art. 13.2.9 of the Tax Code of Azerbaijan Republic, an enterprise is primarily a legal entity, along with its branches, representative offices and other units having an independent balance sheet [2, 34].

Meanwhile, the Civil Code of Azerbaijan Republic itself often uses the concepts of "educational enterprise ", "medical enterprise" (art. 1112), "medical enterprise" (35, 362, 1103, etc.), etc. in terms of a legal entity (art. 1119, 1121, 1181, etc.), In the

Civil Code of the Republic of Azerbaijan there are other examples of using the concept of an enterprise in terms of a legal entity. For example, in Art. 723 of the Civil Code of the Republic of Azerbaijan definition of the concept of a franchise agreement is given by means of an "independent enterprise". In Art. 1048-1.2.3 of the Civil Code of Azerbaijan Republic, "enterprises and organizations" are mentioned as recipients of treasury bills. Art. 1048-2.2 of the Civil Code of the Republic of Azerbaijan mentions "financial and investment enterprises" along with credit organizations that are legal entities.

However, there is only one case, where the Civil Code of Azerbaijan clearly refers to the enterprise as an object of law - Chapter 34 "Leases". Art. 700.2 states: "The subject of a lease may be land plots, buildings, movables, rights and enterprises." This approach is met in the following articles of the named chapter of the Civil Code: 701.1, 703, 704, 711.2, 712.3, 714.2, 720.1.1, 720.1.2 and 720.3.3.

Another example refers to a custodial services agreement: "The owner of a hotel or restaurant is considered to be a person who provides shelter to other persons (guests). The owner of a hotel or restaurant is responsible for any damage or theft of things stored by the guests in the premises of the owner of the hotel or restaurant or in another place outside the enterprise determined by the owner of the hotel or restaurant or his staff, or otherwise accepted for storage by the owner of the hotel or restaurant or its staff "(Art. 831.1 of the Civil Code of the Azerbaijan Republic). Obviously, the subject (owner) and the object (hotel, restaurant) are differentiated here.

At the same time, there are provisions in the Civil Code of Azerbaijan Republic where it is impossible to understand unambiguously the exact meaning of the concept of an enterprise. For example, Art. 815.2, regulating the commission agreement, states: "The amount of commission is established by a commission agreement, and if there is no such clause in it, according to the local customs of business turnover, if commission transactions relate to the subject matter of the commissioner's enterprise."

In the context of the issue studied, the Rules of Keeping the State Register of Real Estate, approved by Decree No. 135 of the President of the Republic of Azerbaijan dated October 14, 2004, are indicative. Thus, clause 20.2 of these Rules de facto implies that an enterprise is considered an object of law if only it belongs to an individual entrepreneur. Otherwise, the enterprise is a legal entity, that is, a legal entity.

Given the above, we can conclude that the legislation of Azerbaijan contains a controversial approach to the definition of an enterprise: it appears either as a subject or as an object of law. In addition, despite the fact that the latter approach is becoming increasingly widespread, there are too many legal acts with the first approach in the legislation of Azerbaijan.

Yet, the legislation of Azerbaijan also does not provide a direct definition of an enterprise as an object of law. At the same time, as per Art.202. of the Law of the Republic of Azerbaijan "On the State Register of Real Estate" it indirectly implies that an enterprise is a complex of tangible and intangible assets, including buildings, structures, facilities, equipment, inventory, raw materials, finished goods, claims, patents and other exclusive rights.

An enterprise is not just a certain property of an entrepreneur, but in a certain way, a property segregated in economic circulation, which acts as a single object of law. Thus, under the influence of subjective rights on an enterprise, not several, but one object of law is influenced. The property, perceived as an enterprise, is subject to a single legal regime [24, 6].

According to F.F.Mamedov only a tangible thing can be considered immovable property, yet an enterprise is not a thing; therefore, the existing legislative assignment of an enterprise to real estate is incorrect. According to him, in the Republic of Azerbaijan, buildings that are part of an enterprise are not only registered as separate real estate objects, but formally, the enterprise registered in the State Register of Real Estate includes only immovable objects: land and buildings. It is curious that almost all such enterprises are privatized [16, 15].

According to S.R.Minikayeva, "enterprise" as a kind of subject of law is the "inertia" of thinking. As per him, the use of the term "state and municipal unitary enterprise" is already an established expression, however, to streamline legal terminology, it makes sense to change the term "enterprise" to "organization", indicating that there are "full" organizations based on the right of ownership, and there are unitary organizations that own property on the right of economic and operational management [17, 18].

An enterprise in Azerbaijan is nothing more than a synonym for complex property, that is, a real estate complex consisting exclusively of land plots and buildings on them. Consequently, an enterprise is not a property complex in the classical definition of this term that the legislator tried to consolidate in the Law of the Republic of Azerbaijan "On the State Register of Real Estate". In other words, an enterprise in Azerbaijan is not an independent legal category.

Considering the above, we consider it appropriate to make the necessary changes in the legislation, according to which the enterprise will be defined neither as a subject of law, nor immovable property. For legislation, it will suffice to have a general rule of the following content: "The parties may enter into transactions, the subject of which is an enterprise as a property complex. The structure of such an enterprise as per the will of the parties may include any type of property. In this case, individual objects that are part of an enterprise must meet the purpose of such an enterprise and be transferred in a state corresponding its purpose. "

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