

## THE PLACE AND MUTUAL RELATIONSHIP OF THE RIGHT TO FREE ENTERPRISE IN THE SYSTEM OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

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The right to free enterprise in the Republic of Azerbaijan is one of the fundamental human rights protected by the Constitution. This constitutional norm develops the principle of freedom for any individual's economic activity that is not prohibited by law [5]. However, this right is not recognized as a fundamental right in all countries. Although the right to free enterprise is not directly mentioned in the Constitution of the United States, elements of this right are reflected in it. In the legislation of the European Union, the right to free enterprise is recognized as a fundamental right. The relationship and position of this right with other rights and freedoms have been formed based on judicial practice.

The right to free enterprise falls under the category of economic rights and is implemented in connection with other rights within this category. At the same time, depending on the nature of its implementation, this right is also related to a number of social rights.

### *The right to free enterprise and property rights*

The foundation of free enterprise is property [2]. These rights exist in unity, as without property freedom, it's impossible to implement free enterprise. In this context, the Plenum of the Constitutional Court notes that the specific property right, right to free enterprise, freedom of contract, as well as princi-

ples of non-monopoly and unfair competition in economic relations established in Articles 13, 15, 29, and 59 of the Constitution constitute the constitutional foundations of the market economy [3].

The relationship between the right to free enterprise and property rights can be summarized as follows:

- 1) Property rights are the basis for the realization of the right to free enterprise;
- 2) Even though they have a constitutional character, neither is an absolute right, meaning they can be restricted under conditions specified by legislation;
- 3) Property is the factor causing liability in the right to free enterprise.

Analyzing the aforementioned separately is necessary to study the mutual relationship of these two rights.

### **1) Property rights are the basis for the realization of the right to free enterprise.**

In legal literature, the property right is considered one of the essential rights for the realization of the right to free enterprise. Free enterprise requires a legal basis that can ensure the recognition and protection of individual property. Article 29 of the Constitution of the Republic of Azerbaijan defines everyone's property rights, stating that entrepreneurs have the right to own property individually or jointly, use it, and make decisions about it [1, Art. 29].

The Plenum of the Constitutional Court of the Republic of Azerbaijan, in its decision

dated December 16, 2011, notes that property, an essential institution of civil society, is one of the most crucial factors in economic development. Thus, property is declared inviolable by Article 13 of the Constitution, protected by the state, and stands as the foundation of every individual's freedom in society, essential for personal development and free enterprise [4].

The concept of property right is given in Article 152.1 of the Civil Code. According to this article, the property right is the right recognized and protected by the state for the subject to own, use, and decide on an asset (item) belonging to him [8, Art.152.1]. Full protection of property is valued as one of the high values inherent in a legal state. The Constitutional Court of the Republic of Azerbaijan, in its decision dated June 12, 2017, states the importance of property rights for entrepreneurial activity as follows:

*“The Constitution, by establishing property rights, also guarantees its effective provision through means. For this reason, property rights are listed among the basic human and citizen rights and freedoms.*

*The legal position formulated by the Plenum of the Constitutional Court regarding property rights is that its content should be understood taking into account the provisions of Article 13 of the Constitution. Property, a significant institution of civil society, is a crucial factor for economic development. Therefore, property is declared inviolable by Article 13 of the Constitution and protected by the state. Property rights stand as the foundation of every individual's freedom in society, essential for personal development and free enterprise. The state should refrain from illegal interventions in the effective implementation of property rights and should prevent them” [4].*

The Plenum of the Constitutional Court of the Republic of Azerbaijan, in its decision dated February 28, 2020, notes that as a guarantee of free enterprise activity in the Republic of Azerbaijan, every individual and legal entity can freely direct their movable and immovable property, including national currency, foreign currency assets, etc., to entrepreneurial activity and other areas of economic activity not prohibited by law, and use them according to their considerations [2].

Based on the preamble of the “Law on Entrepreneurial Activity”, this law is aimed at implementing the principle of equality for all forms of property, choosing fields of activity independently, and making economic decisions, thereby creating conditions for the extensive manifestation of economic initiative and entrepreneurship [9, preamble]. The connection between the right to free enterprise and property rights can be better understood in Article 6 concerning the rights of entrepreneurs and in Article 8 based on the property responsibility of entrepreneurs. Specifically, according to Article 6, one of the rights of entrepreneurs is to fully or partially acquire the property, other property rights of institutions based on state and other forms of ownership, to participate in other institutions' activities with their property, and with the agreement of the parties, to use the property and intellectual property objects of other physical and legal persons.

In Article 12 of the law, legal norms related to the defense of the entrepreneur's rights and lawful interests by the state are reflected. That article guarantees state protection of the rights and lawful interests of entrepreneurs regardless of the form of ownership and asserts the inviolability of the entrepreneur's property.

The international recognition of the relation between the right to free enterprise and property rights is associated with the case of Mark Alemo-Herron. In this case, the state representative emphasized the close connection between these rights, stating that the right to free enterprise emerged from the necessity to protect economic entrepreneurship.

**2) Even though they have a constitutional character, neither of them is an absolute right, meaning they can be restricted under conditions defined by legislation.**

Both the right to free enterprise and property rights can be limited under certain circumstances, provided they meet the requirements set out in the legislation.

The right to free enterprise, in accordance with Article 59 of the Constitution, can be restricted through regulations related to the defense of state interests and the protection of

human life and health. It is noted in Article 12 of the “Law on Entrepreneurial Activity” that the property of an entrepreneur can be expropriated in circumstances and conditions specified in the Civil Code of the Republic of Azerbaijan, provided it is previously compensated at market value [1, art.12]. If the decisions or actions (or inactions) of authorities or responsible persons restrict the right to free enterprise, they can be challenged in court [6].

Regarding the possibility of restricting property rights, the following paragraphs from the decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated December 16, 2011, on the interpretation of Articles 107-2.1 and 107-5.1 of the Civil Code of the Republic of Azerbaijan should be mentioned:

*“The state must refrain from unlawful interference in the effective implementation of property rights and must prevent them. However, despite the importance of the aforementioned right, it is not absolute and can be restricted. It should be noted that while property plays a vital role in realizing an individual’s specific interests, it also has an essential social function in a socially-oriented state, based on the content of Article 15 of the Constitution. On the other hand, the boundaries of general and specific limitations of property rights are defined in the Constitution and the Constitutional Law of the Republic of Azerbaijan on the regulation of the implementation of human rights and freedoms in Azerbaijan. The National Assembly, when determining the content of property rights, must consider these boundaries and the balance of property functions”* [4].

### **3) Ownership is a factor causing liability in the right to free enterprise.**

Although the right to property is considered one of the fundamental rights for entrepreneurs to operate freely, this right leads to certain liabilities. Article 8 of the “Law on Entrepreneurial Activity” reflects the property liability of entrepreneurs. This article differentiates the property liability of entrepreneurs depending on whether they establish a legal entity. That is, entrepreneurs who operate by establishing a legal entity carry full or limited property liability, depending on the chosen organizational form. However, entre-

preneurs who operate without creating a legal entity are liable with all their property for their obligations [9, p. 12]. Article 29, section 5 of the Constitution also notes that private property causes social obligations.

*The right to free enterprise and intellectual property rights.*

The types of activities related to intellectual property carried out by the right to free enterprise are closely related to intellectual property rights.

Most of the comments related to the relationship between property rights and the right to free enterprise also apply to intellectual property rights. That is, this right is also one of the fundamental rights in the implementation of entrepreneurship; it is not an absolute right and results in certain obligations determined by the law.

Article 6 of the “Law on Entrepreneurial Activity” defines the right of entrepreneurs to use the intellectual property objects of other physical and legal entities. Article 7 specifies the obligations to comply with the legislative requirements for copyright protection and to follow the legislative requirements for trademarks and geographical indications.

Both rights are fundamental rights defined in the Constitution, and the implementation of intellectual property rights often depends on the existence of the right to free enterprise. The main relationship between these two rights is related to the power of one to restrict the other and balancing. Legal norms established for the protection of intellectual property rights sometimes have the power to restrict the right to free enterprise. However, it should be noted that such legal norms can only be applied after they meet the requirements of the proportionality test.

The decisions of the Court of Justice of the European Union (CJEU) in the direction of balancing the right to free enterprise with intellectual property rights should be noted. In the case of *Scarler Extended SA v. SABAM*, the main question before the CJEU was whether the filtering system’s application to prevent file sharing that violates copyright rights in the information society’s relevant EU legislation was considered in court

orders against internet service providers. In this case, the CJEU ruled that requiring an internet service provider to set up and maintain a complex computer system that requires significant expenses to monitor all electronic communications on the network for an indefinite period restricts his right to free enterprise under Article 16 of the Charter disproportionately. Therefore, the court concluded that the court's order to set up a filtering system disrupts the fair balance between the rights of copyright holders and the protection of the right to free enterprise of internet service providers [12].

In the case of *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, a similar application was made to the court to balance intellectual property rights with the right to free enterprise of internet access providers and the information freedom of internet users. The court had to determine in this case whether Article 16 of the Charter's recognized right to free enterprise excludes an order for internet service providers to block their customers' access to websites that violate copyright rights. The CJEU confirmed that such a court prohibition order, which may force internet service providers to take measures that are costly for them, significantly affects their business operations and requires the application of difficult and complex technical solutions, can restrict their right to entrepreneurship [13].

That is, although intellectual property rights play a significant role in the implementation of various types of entrepreneurship, this right can also emerge as one of the bases for restricting the right to free enterprise.

*The Right to Free Enterprise and Freedom of Expression*

First and foremost, it should be noted that when referring to freedom of expression here, commercial speech is intended. Commercial speech, being one of the methods of implementing the right to free enterprise, is a new concept for our national legislation. This is because both natural persons and legal entities are involved as subjects. A comprehensive understanding of commercial speech has

not been given either in Europe or in the US; however, the basic elements for such an understanding have begun to form.

In 1976, the US Supreme Court extended constitutional protection to commercial speech as well. As emphasized in the US Supreme Court's decision in *Valentine vs. Chrestensen* (1942), commercial speech has historically not been considered protected under the First Amendment [24]. Advertisements, promises, and solicitations that make up this category of expression have been heavily regulated to protect consumers and to prevent fraud. However, since the 1970s, the Supreme Court has progressively deemed this type of speech worthy of First Amendment protection [26].

In the case law regarding the First Amendment to the US Constitution, commercial speech has been defined as "speech proposing a commercial transaction" [17, paragraph 153]. This type of freedom raises issues distinct from those created by pure freedom of expression, as it is an integral part of the underlying commercial transaction [23, paragraph 6]. At the same time, whether the protection of commercial speech advances the same values as the constitutional guarantee of mere freedom of expression is a matter of debate.

In the *Central Hudson Gas & Electric Corp. vs. Public Service Commission* case, commercial speech is defined as speech guided by the economic interests of the speaker and their audience [22, paragraph 54]. Similarly, in another court case, State Attorney Fennelly describes commercial speech as:

*"the right to receive, submit information, express ideas, or present visuals as part of the recognition of commercial activity"* [17, paragraph 153].

In the case of the *Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council*, the US Supreme Court stated that "consumers can best pursue their own interests only when they are adequately informed, and the best means to achieve this is not to close off communication channels but to open them" [25, p. 770]. Justice Blackman has quite emphatically stated that "a specific consumer's interest in the free flow of commercial information might be even more pressing

for him than the day's most crucial political debate" [25, p.763].

In the legislation of the European Union, commercial speech freedom is considered as an integral part of general freedom of speech. The European Court of Human Rights has several times stated that statements made in a commercial context are included in the protection envisaged by Article 10 of the European Convention on Human Rights and Fundamental Freedoms. Article 10 of the ECHR states that everyone has the right to freedom of expression. Since this provision does not specify which types of statements are protected, it has a very general character. The ECHR has noted that there should be no distinction between different forms of expression and, regardless of their content, all expressions fall within the scope of Article 10 of the ECHR [14, paragraph 27].

It should be noted that Article 47 of the Constitution of the Republic of Azerbaijan guarantees everyone's freedom of thought and speech, but it is not clear which category of information is covered by freedom of thought and speech. Therefore, our Constitution does not directly protect commercial speech freedom. Commercial freedom of expression forms the basis of economic freedom and is an essential component of the right to free entrepreneurship. Therefore, examining and refining the legislative base for this freedom in our country is of great importance.

#### *The right to free enterprise and labor rights*

The relationship between the right to free enterprise and labor rights is somewhat complex. For example, in some foreign countries' legislation and international documents, the right to free enterprise is considered a component of labor rights. When we talk about labor rights here, we mostly mean everyone's freedom to engage in the type of work they desire. For instance, in the United Kingdom, workers are allowed to have legal relations as independent contractors, but in the Czech Republic, this is not permitted due to potential adverse impacts on worker protection and labor relations.

The right to free enterprise at the United Nations level is regulated within the frame-

work of the right to work, called Article 6 of the International Covenant on Economic, Social, and Cultural Rights, where everyone has the right to engage in the profession of their choice. Here, the right to work means both independent and salaried jobs, and the entrepreneurial right is included in the independent work category.

It should be noted that ensuring a balance between the right to free enterprise and labor rights is of great importance. This is manifested by certain restrictions applied to the implementation of the right to free enterprise in the state's labor law regulations. From this perspective, reviewing the decisions of the European Court of Justice is essential to determine the relationship between these two rights. It should be noted that the labor law model is primarily based on the idea put forward by Otto Kahn Freund. Namely, according to Otto Kahn Freund, the main objective of labor law has always been to fight against the imbalance of bargaining power inherent in labor relations [18, p.6].

In the case of *Alemo-Herron and Others v. Parkwood Leisure Ltd*, which was referred to by the Supreme Court of the United Kingdom for consideration, the CJEU determined that Article 16 should be applied in such a way that the rights of workers and the employer's right to engage in entrepreneurship are balanced [11].

In this regard, Spain and Finland were concerned about the repeal of the Directive No. 2002/15 of the European Parliament and the Council of the EU regulating the organization of working hours of people carrying out road transport activities. In this matter, both member states argued that the rules established by this Directive should not apply to self-employed individuals, as it could infringe on the freedom of economic activity and the right to entrepreneurship. The European Court of Justice ruled that these rights are general principles of EU legislation and should be interpreted considering their social function [16]. Therefore, these rights can be limited under two conditions: 1) the limitation must proportionately protect general interests and 2) such a limitation should not weaken or obstruct the nature of the right. As

part of the first condition, the Court determined that working hour restrictions can also apply to self-employed individuals because the purpose of such measures is to create better safety conditions [96].

An important point here is that the right to entrepreneurship, ensured by Article 16, is not an absolute right. In other words, member states can establish norms concerning the restriction of this right in certain cases. Thus, the stronger the protection of labor rights provided by national labor legislation, the stronger the pressure on national systems to justify the adoption of rules restricting entrepreneurial freedom [21, p. 180]. By “pressure,” it is understood that the requirements of the proportionality test must be met by the states when restricting the right to free entrepreneurship in the field of labor relations. Such a result suggests that labor laws in the European Union might need to pass the proportionality test and could be exceptions to market freedom and competition laws [15, p. 464].

On the other hand, it should be noted that ensuring the right to free enterprise can also facilitate the implementation of labor rights. Supporting entrepreneurship, promoting favorable market conditions for small and medium entrepreneurs, as well as foreign investors, leads to the creation of new jobs, thereby reducing unemployment and expanding opportunities for everyone to engage in their desired profession. Notably, the 8th of the 17 Sustainable Development Goals reflected in the “2030 Agenda for Sustainable Development” adopted by world leaders at the historic summit of the United Nations General Assembly in September 2015 is defined as “Promoting inclusive and sustainable economic growth, employment for all, and decent work.” The opportunity to implement labor rights is directly linked to the pace of economic development within this goal.

It should be noted that the second part of Article 35 of the Constitution of the Republic of Azerbaijan protects everyone’s right to choose their activity type, profession, occupation, and workplace based on their ability to work. This article, in its protection of “activity type and occupation,” can be considered as

part of the constitutional defense of the right to free enterprise.

Also, by examining the “Law on Entrepreneurial Activity” regarding the rights and duties of entrepreneurs in labor relations, we can analyze the relationship between these two rights. The 6th article of this law states that entrepreneurs have the right to hire and dismiss workers, determine the form and system of their labor payment, the amount of their property, and other types of income. However, these rights should be implemented considering the imperative requirements of labor legislation. The law also specifies the responsibilities of entrepreneurs in labor relations, which plays a crucial role in the mutual protection of the mentioned rights. The 7th article regulating the duties of entrepreneurs specifies the following:

- To fulfill all the obligations arising from the current legislation and the contracts it concludes;
- To sign contracts (agreements) with citizens who are hired, and if necessary, to conclude collective agreements with trade unions acting on behalf of labor collectives in accordance with the legislation of the Republic of Azerbaijan;
- Not to prevent workers from joining trade unions;
- To pay workers’ wages at a level not less than the minimum amount set by the legislation of the Republic of Azerbaijan;
- To allocate the specified amounts to the body (institution) determined by the relevant executive authority, as well as to other funds created for the social protection of workers in the manner and volume specified;
- To pay taxes as defined in the legislation;
- To provide workers with working conditions in accordance with the current legislation and contracts (agreements) [9, p.7].

In addition to the above, entrepreneurs should also ensure their activities based on the requirements of the Labor Code and other regulatory legal acts in the field of labor relations.

In conclusion, we can note that the complex relationship between labor law and free entrepreneurship is reflected in the legal sci-

ence and experience of the Republic of Azerbaijan.

*The right to free enterprise and the right to live in a healthy environment*

The right to free enterprise should be implemented in such a way that such activity does not hinder the right of individuals to live in a healthy environment. According to Article 39 of the Constitution, everyone has the right to live in a healthy environment and no one can pose a threat or harm to the environment or natural resources beyond the limits set by law [1, p.39].

It should be noted that the protection of human health emerges as one of the reasons for restricting the right to free enterprise. According to the second part of Article 71 of the Constitution, everyone's rights and freedoms are limited by the Constitution and laws, as well as by the rights and freedoms of others [1, p.71.2].

To better understand the relationship between these two rights, we reviewed a series of court cases. In the *DeutschesWeintor* court case, with Directive No. 1924/2006, the CJEU decided that the ban applied to wine producers and distributors using "easy digestion" health claims, even if this claim was naturally true, was in line with the Charter. The court believed such a prohibition does not significantly restrict the freedom to choose a profession and/or engage in entrepreneurship, but it restricts the methods of producing and selling products for producers and distributors. The court then emphasized that these freedoms are not absolute and must be balanced with the requirements of Article 35 of the Charter, which requires all EU policies and activities to ensure a high level of human health protection. In this context, the court pointed out that alcoholic beverages, especially from an advertising perspective, represent a special category of foods that are subject to serious regulation due to the known harmful effects related to addiction and misuse risks and alcohol consumption, including relevant advertising. In this context, the CJEU decided that a complete ban on any health claim (digestion) for wines/alcoholic beverages could be considered necessary" [10].

"In Spain, local legislation prohibits the advertising of alcoholic beverages in places where their sale, supply, and consumption are forbidden." In relation to a dispute that arose on this matter, the Supreme Court decided that the right to free enterprise is not superior to the right to health. If these rights intersect, then a balance is struck by determining the least restrictive measures that respect both interests, and an analysis of the interests is carried out. Restricting the right to free enterprise is considered legal if it is not proven that it can be ensured through less restrictive means. The Court decided that in this situation, the protection of consumers and their health takes precedence over the alleged infringement of the right to free enterprise, because the alcoholic beverages company could not prove that consumer health could be protected by less restrictive means [20].

In Portugal, when the installation of diagnostic medical devices was denied, the plaintiff applied to the court, alleging that the standards set for refusal were contrary to the constitution. The Central Administrative Court of Northern Portugal reported that this standard does not conflict with the right to establish a private company in the health sector. The right to free enterprise, including in the health sector, is not an absolute right; the state can impose restrictions based on the "public interest" and "ensuring appropriate quality and efficiency standards in health institutions," and also based on requirements for "discipline and control regarding the production, distribution, marketing, and use of treatment and diagnostic tools". The court concluded that the standards do not infringe on the freedom of enterprise because they are consistent with the implementation of rights and proportional restrictions [19].

Therefore, the right to free enterprise is non-absolute, while the right to live in a healthy environment is absolute. Hence, individuals must pay special attention to compliance with legal requirements aimed at protecting public health when carrying out entrepreneurial activities.

*The right to free enterprise and the right to freedom of association*

The right to associate is considered one of the main rights in the realization of the right to free enterprise. This right, established in Article 58 of the Constitution, reflects everyone's right to create a public association, to freely join (or not join) it, and to leave it [1, art. 58].

The relationship between the right to free enterprise and the right to associate was examined by the Constitutional Court in its decision dated September 20, 2004, concerning the examination of the compliance of Article 133.1 of the Civil Code of the Republic of Azerbaijan with the Constitution of the Republic of Azerbaijan:

*"The issues related to the establishment of a legal entity and the conduct of relevant activities by it are closely related to Article 58 (right to associate) and Article 59 (right to free enterprise) of the Constitution of the Republic of Azerbaijan. The Constitution of the Republic of Azerbaijan attributes the right to associate to fundamental human and citizen rights and freedoms. In international legal acts, this right is referred to as freedom of assembly and association. This freedom is evaluated by the European Court of Human Rights specifically through the prism of freedom of expression and speech. In the modern European legal system, it is mainly accepted as political and humanitarian law. Although this right is not absolute, restrictions on it are allowed only if it is both defined by law and necessary in a democratic society, responds to a high public necessity, and corresponds to the purposes of the law" [5].*

As can be seen from the above decision, the right to associate is defined as a form of realization of the right to free enterprise. In addition, in international documents, the right to associate is considered as a form of realizing the right to freedom of thought and speech. Like the right to free enterprise, the right to associate is not an absolute right and can be restricted provided it meets certain criteria".

*The Right to Free Enterprise and the Right to Petition*

The right to petition is considered one of the primary rights in the constitutional pro-

vision of the right to free enterprise. Article 57 of the Constitution grants entrepreneurs the right to directly address state bodies as well as send individual and collective written petitions. It is also specified that citizens of the Republic of Azerbaijan have the right to criticize the activities or work of state organs, their responsible individuals, political parties, trade unions, other public associations, and individual citizens [1, p. 57].

Thus, summarizing the points expressed in this article, we can arrive at the following conclusions:

1. The relationship between the right to free enterprise and the right to property can be generalized as follows:

a) The right to property is the foundation for the realization of the right to free enterprise;

b) Even if they possess a constitutional character, neither is an absolute right, meaning they can be restricted under specified legislative circumstances;

c) Property is the factor that causes responsibility in the right to free enterprise.

2. The term "commercial freedom of expression" is a new concept for our national legislation, representing one of the methods for implementing the right to free enterprise. This includes both individuals and legal entities as subjects.

3. The relationship between the right to free enterprise and labor rights has a somewhat complex character. For instance, in some foreign countries' legislations and international documents, the right to free enterprise is considered a component of labor rights. Additionally, the regulations introduced by the state in the field of labor rights manifest as certain types of restrictions when implementing the right to free enterprise. On the other hand, it should be noted that ensuring the right to free enterprise can also facilitate the implementation of labor rights.

### **Conclusion**

The right to free enterprise belongs to the category of economic rights and is realized in mutual relation with the rights within this category. At the same time, depending on the character of the relationships that arise from



its implementation, it is also related to a range of social rights. The current article examines the place of the right to free enterprise in the system of fundamental human rights and freedoms, especially in relation to property rights, intellectual property rights, freedom of expression, labor rights, the right to live in a healthy environment, the right to associate, and the right to petition, comparing and analyzing from both national and international legislative perspectives.

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