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The present publication includes reports presented during the Conference devoted to the 85th Anniversary of the Faculty of Law of the Yerevan State University. Articles relate to different fields of jurisprudence and represent the main line of legal thought in Armenia. Authors of the articles are the members of the Faculty of Law of the Yerevan State University. The present volume can be useful for legal scholars, legal professionals, Ph.D. students, as well as others who are interested in different legal issues relating to the legal system of Armenia.

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Contents

Artur Vagharshyan	
DEFENSIBILITY AS THE PRINCIPLE OF STATE CONSTRUCTION: CONCEPT AND NORMTIVE CONTENT	9
Taron Simonyan	
CONTROLLED REALITY AND THE FICTION OF FREEDOM: SYNERGY ALGORITHMS	25
Viktorya Ohanyan	
INTERSECTORAL AND INTEGRAL APPROACHES AS A RESPONSE OF THE THEORY OF LAW TO THE CONTEMPORARY ISSUES OF THE IMPLEMENTATION OF LAW	36
Karen Amiryan	
NATURE OF RELATIONS BETWEEN THE CONSTITUTIONAL COURT AND LEGISLATIVE AUTHORITY IN THE REPUBLIC OF ARMENIA	47
Vardan Ayvazyan	
SYSTEMATIZATION OF CONSTITUTIONALITY	57
Gevorg Danielyan	
EVOLUTION OF TERMINOLOGY IN THE CONTEXT OF ARMENIAN JURISPRUDENCE.....	72
Anahit Manasyan	
CONSTITUTIONAL DEVELOPMENTS REGARDING THE INSTITUTE OF CONSTITUTIONAL JUSTICE IN THE REPUBLIC OF ARMENIA.....	88
Rustam Makhmudyan	
KEY QUESTIONS (ISSUES) OF REALIZATION OF CONSTITUTIONAL-LEGAL STATUS OF LEGISLATION OF SUPREME JUDICIAL COUNCIL.....	95

Vahram Avetisyan	
	CORPORATE GOVERNANCE AND RESOLUTION OF CORPORATE DISPUTES IN THE REPUBLIC OF ARMENIA .. 110
Davit Serobyán	
	THE PROBLEM OF INTERPLAY OF THE CONCEPTS OF ECONOMIC ACTIVITY AND ENTREPRENEURIAL ACTIVITY IN THE LIGHT OF CONSTITUTIONAL AMENDMENTS..... 127
Arpine Hovhannisyan, Narine Avagyan	
	TRADEMARKS AND BRANDS: WHAT ARE THE DIFFERENCES? 138
Grikor Bekmezyan	
	ON SOME ISSUES PERTAINING TO COMPENSATION OF NON PECUNIARY DAMAGE IN CIVIL LAW OF THE REPUBLIC OF ARMENIA 153
Arsen Tavadyan	
	REGULATION OF INVALID CONTRACTS UNDER ARMENIAN LEGISLATION..... 166
Tatevik Davtyan	
	PROMOTING A PRO BONO CULTURE IN ARMENIA’S LEGAL PROFESSION 173
Harutyun Khachikyan	
	THE RESOCIALIZATION OF THE CONVICT AND THE NEW CRIMINAL AND PENITENTIARY LEGISLATIONS OF ARMENIA..... 190
Ara Gabuzyan	
	SOME ISSUES PERTAINING TO LEGISLATIVE DEFINITION OF “CRIMINAL OFFENSE” 203
Gagik Ghazinyan	
	THE CONSTITUTIONAL FOUNDATIONS OF THE INDEPENDENCE OF THE JUDICIAL POWER IN THE REPUBLIC OF ARMENIA 210

Vahe Yengibaryan	
THE KEY ISSUES OF THE CRIMINAL PROCEDURE GROUNDS FOR THE FORENSIC EXPERTISE.....	232
Tatevik Sujyan	
PECULIARITIES OF JUDICIAL ACTS APPEAL AND CASSATION REVISION IN CRIMINAL PROCEDURES	242
Armen Hovhannisyan	
JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS AS A BASIS FOR EXCEPTIONAL REVIEW IN CRIMINAL PROCEDURE IN A FORM OF NEW CIRCUMSTANCE	258
Nelli Aghababyan	
PECULIARITIES OF JUVENILE PROCEEDINGS IN THE CRIMINAL PROCEDURES OF THE REPUBLIC OF ARMENIA.....	270
Vahe Hovhannisyan	
THE CHALLENGES OF RIGHT TO EXAMINE THE CASE AT CIVIL COURT WITHIN A REASONABLE TIMEFRAME	278
Sergey Meghryan, Hayk Hovhannisyan	
APPORTION OF BURDEN OF PROOF IN WORKS AND/OR SERVICES CONTRACTS: ARMENIAN PERSPECTIVE: THEORY AND PRACTICE.....	291
Aida Iskoyan, Heghine Grigoryan	
THE ANTHOLOGY AND THE SYSTEM OF ENVIRONMENTAL LAW OF THE REPUBLIC OF ARMENIA	309
Tirayr Vardazaryan	
GENERIC DESCRIPTION OF EMPLOYMENT PROTECTION IN TRANSFERS OF UNDERTAKINGS (TUPE) UNDER THE ENGLISH LAW: DEFINITION AND CLASSIFICATION	332
Tigran Markosyan, Lilit Petrosyan	
GENERAL LEGAL CHARACTERISTICS AND FEATURES OF OBLIGATORY ACTION.....	350

Tigran Grigoryan, Mher Mkrtchyan
SOME CRITICAL REMARKS ON THE JUDGMENT OF THE
EUROPEAN COURT OF HUMAN RIGHTS CONCERNING THE
CASE AYVAZYAN v. ARMENIA 358

Ani Simonyan
RIGHT TO DEVELOPMENT:
KEY CONCEPTS AND OUTLOOK..... 373

THE PROBLEM OF INTERPLAY OF THE CONCEPTS OF ECONOMIC ACTIVITY AND ENTREPRENEURIAL ACTIVITY IN THE LIGHT OF CONSTITUTIONAL AMENDMENTS

Davit Serobyan¹

At this stage, widespread legislative changes are taking place in Armenia: the main law of the country was amended recently, our country is in transition to parliamentary republic, there are fundamental changes happening to civil, civil procedures and judicial codes of the Republic of Armenia, and the new tax code entered into force in January 2018². In the result of constitutional amendments the article 59(1) enshrines that everyone has the right to economic, and entrepreneurial activity. In the result of amendments to the Constitution of the Republic of Armenia³ part 1 of the Article 59 prescribes that everyone has the right to economic, as well as entrepreneurial activity. Part 1 of the Article 33.1 of the previous edition of the Constitution prescribed, that everyone has the right to entrepreneurial activity not prohibited by the law. In other words, we can state that Article 59 almost repeats Article 33.1 of the previous Constitution, which also prescribed the constitutional right of doing “business”⁴ with one essential exception. That exception is the current wording allows

¹ Candidate of Legal Sciences, Associate Professor of the Chair of Civil Law of the Yerevan State University. E-mail: d.serobyan@gmail.com.

² ՀՀՊՏ 2016.11.04/79(1259) Art.1038:

³ ՀՀՊՏ 2015.12.21/Special edition Art. 1118:

⁴ Among terms entrepreneurial and business activities we prefer the term business, however, considering that the present article’s aim is different and that both Constitution and Civil code use the term entrepreneurial activity in the text below we will operate with the term entrepreneurial activity, for more details please see The Concept of Economic Activity in the Light of the Constitutions 2017 | Article YSU Faculty of Law, Faculty of Law, Faculty of Journalism, YSU; head group. S. G. Ghazinyan, Yerevan, YSU, 2017, pp. 210-230, pp. 210-230; available at: <http://www.y-su.am/faculties/hy/Law/section/staff/page/3/person/David-Serobyan>:

everyone to engage in economic, including entrepreneurial activity,¹ which means that in the result of the recent amendments, the entrepreneurial activity is considered as a type of economic activity. A similar approach was undertaken in Russian Federation; however, Article 34 of the Russian Constitution is somewhat different. In particular, under the mentioned article everyone is granted the right to use his/her skills and assets in entrepreneurial and other economic activity, not prohibited by the law.² Three circumstance can be underlined here, first: entrepreneurial activity is a type of economic activity, second – priority is given to entrepreneurial activity among different types of economic activities. Additionally, different from the Armenian Constitution the provisions of Russian Constitution provide the option to use skills and assets in conducting entrepreneurial activity.

From the mentioned perspective, we can truly state that our Constitution has made a considerable progress from the moment of adoption. For example, Article 8 of the first Constitution of Armenia adopted after the independence provided³ The state shall guarantee the free development and equal legal protection of all forms of property, the freedom of economic activity and free economic competition. This is the constitutional basis for entrepreneurial activity at that time, which we think that was a massive step considering that only several years passed after the transition from planned economy to market economy. Later, in the result of amendments dated on 27.11.2005 the Constitution was amended to include new article 33.1, which enshrined that

¹ According to the Constitution, the term "businessman" is used in another sense, thus envisaging the 86th article of the same Constitution, the main goals of the state policy, one of those goals defines the business environment and promotes entrepreneurship.

² Available at:<http://www.constitution.ru/10003000/10003000-4.htm>

³ The Constitution was adopted during a referendum of July 5, 1995.

everyone has the right to engage in entrepreneurial activity not prohibited by the law.¹ Noticeable that although the article added after the amendments of 2005 is a progress in terms of regulating the matter of entrepreneurial activities on constitutional level, nevertheless one cannot consider such constitutional provision as a success.²

Article 2 of the Civil Code does not consider entrepreneurial activity as a type of economic activity³, hence it is highly important to study and analysis of the definition of the economic activity in the doctrinal setting, including legislative regulation thereof. Otherwise the link between constitutional basis of the entrepreneurial activity and legislation in force, allowing arbitrary interpretations of entrepreneurial activity, depending on subjective perceptions.

As it was noted above Article 8 of the previous wording of the Constitution freedom of economic activity and free economic competition are guaranteed in the Republic of Armenia.⁴ It is quite visible that the freedom of economic activity is expressed through entrepreneurial activity. Today the Article 114 of the Civil Code enshrines it from the point of view of result of the entrepreneurial activity of joint stock companies, moreover Articles 275 and 756 of the Civil Code stipulate it in the context of foreign economic activity, and operative economic activities of the contractor respectively. Although the new Tax Code

¹ ՀՀՊՏ 2005.12.05/ Special edition. Article 1426:

² The Article 33.1 of the 2005 edition of the RA Constitution has been commented on in more detail by comments made by the Constitution of the Republic of Armenia, G. Harutyunyan and A. Vagharshyan of the General Editor., Yerevan, Iravunk, 2010, pp. 406-417.

³ ՀՀ ՊՏ 1998/17(50) 10.08.98 hereinafter referred also as Civil Code.

⁴ Freedom of economic activity means a legally guaranteed opportunity to freely use his or her abilities and property for unlawful economic activity, that is, to carry out entrepreneurial activity. , General Commentary of the Constitution of the Republic of Armenia, G. Harutyunyan, A. Vagharshyan. - S.. "Iravunk", 2010, p. 121.

discusses uses the term “economic activity” when regulating a particular aspect of the taxpayers’ activity, however, it never defines it. The term “economic activity” is used in the Land Code of the Republic of Armenia¹ mainly for the purpose of regulating relationships in the context of agricultural activities. Similarly, in the Water Code, the term is used for the purpose of regulating² relationships connected with the use of water resources, and finally the term is used in the Administrative Offences Code³ for the purpose of prescribing responsibility for violations of financial-economic limitation during state of emergency.

We can continue listing such examples continuously, and what is the judicial practice on the issue? We can bring numerous examples from the judicial practice, where the term “economic activity” has been used in a judicial decision. However, no judicial act defines the term “economic activity” and how that term is related to the concept of entrepreneurial activity.⁴

In the decision # ՄԴՈ-152 The Constitutional Court has discussed the concepts of the freedom of economic activities and free economic competition.⁵ In the decision # ՄԴՈ-1131 the Constitutional Court uses the term economic activity in the ordinary meaning,⁶ in another case ՄԴՈ-1065 the Constitutional Court concluded that, “...in such case the general object is not the form of government, but the economic activity and the legal regulations should be directed at guaranteeing competitive, free

¹ ՀՀՊՏ 2001.06.15/17(149).

² ՀՀՊՏ 2002.07.10/24(199).

³ ՀՄՄՀԳՄՏ 1985/23:

⁴ See for example the Court of First Instance of Kentron and Nork-Marash Administrative Districts of Yerevan in case ԵԿԴ/0223/07/14, or the Cassation Court of the ECC / 0807/02/11 civil case used the expression of economic or business activities when expressing its legal position.

⁵ <http://www.concourt.am/armenian/decisions/common/1999/sdv-152.htm>

⁶ <http://www.concourt.am/armenian/decisions/common/2013/pdf/sdv-1131.pdf>

economic activity.¹

The Court of Cassation of the Republic of Armenia based on Article 2 of the Law on Value Added Tax, Article 26 of the Law on Taxes², Article 24 of the Law Civil Service has concluded that: “...considering that while there is a constitutional prohibition for the judge to engage in entrepreneurial activities, it is allowed for the judge to participate in a company or have saving account, the legislator does not consider the mentioned economic activities as elements of entrepreneurial activity. That is to say, participation in a commercial company the Court of Cassation does not consider as entrepreneurial activity, however it is considered as economic activity³. Nevertheless the Court of Cassation does not define the economic activity and does not reveal the content of it.

Thus, we can conclude that neither the legislation nor the judicial practice do not define the concept “economic activity”, or its features, subjects, and merely touches separate aspects of it and does not reveal the link and relationship with the entrepreneurial activity. We have discussed the mentioned issues in detail in the past⁴ and currently considering that concepts “economic activity” and “entrepreneurial activity” are widely applied both by the legislator and the courts, as well as the absence of a unified approach lead to arbitrary, situational solutions, hence the purpose of the present article is the doctrinal

¹ <http://www.concourt.am/armenian/decisions/common/2013/pdf/sdv-1065.pdf>

² ՀՀՊՏ 1997.05.20/11:

³ By considering the entrepreneurial activity in the current Constitution as a type of economic activity, in fact, it is not forbidden for a judge to engage in economic activity. See, Article 164 of the Constitution.

⁴ See, Serobyan DM, The Concept of Economic Activity in the light of Constitutional Changes 2017 | Article / A Collection of Materials of the Conference of the Faculty of Law at Yerevan State University, YSU; G.S. Ghazinyan, Yerevan, YSU, 2017, p. 210-230

[http://www.y-su.am/faculties/hy/Law/section/staff/page/3/person/David-Serobyan:](http://www.y-su.am/faculties/hy/Law/section/staff/page/3/person/David-Serobyan)

clarification of the mutual link between the two abovementioned concepts.

Without any doubt, the relationship of entrepreneurial activity and economic activity requires clarity, and all the elements of the entrepreneurial activity are derived from that clarity. Article 59 (1) of the Constitution of the Republic of Armenia is cornerstone provision in this regard. According to that provision entrepreneurial activity is a type of economic activity.

We are of the view that Article 59 has been enshrined in the Constitution based on the overwhelming view in the economic literature. According to that view entrepreneurial activity is a type of economic activity.¹ And that is true. Russian scholar Yershova supports that view: entrepreneurial activity is a kind of economic activity, and the main feature of it is the generation of profit.² Mamootov points that the concept of economic activity includes entrepreneurship, but does not amount to the latter.³ Belikh thinks that concepts of economic activity and entrepreneurial activity “intersect” with each other, and not every economic activity can be considered as entrepreneurial activity.⁴ Laptev points out that the concept “economic activity” is much wider compared to

¹ The fact that business activity is a type of economic activity has been represented by the legal opinion of the legal community back in 2007, for example, the regulation of business relationships in the RA legislation, Collection of materials of the Scientific Council, YSU 2007, p. 83, or articles of the Constitution of the Republic of Armenia, G.Harutyunyan, A. Vagharshyan, Yerevan, Iravunk, 2010, pp. 406-417 pp. 406-417.

² See Современное предпринимательское право. Монография. Отв. ред. док. юр. наук, проф. И.В. Ершова. (автор главы - И.В. Ершова.) Проспект. Москва. 2014 (Modern business law. Monograph. Ed. ed. doc legal sciences, prof. I.V. Ershov. (The author of the chapter is I. V. Ershov.) Prospectus. Moscow. 2014) P. 79.

³ See Хозяйственное право: Учебник/ под ред. В.К.Мамутова. Киев. 2002 (Economic law. Textbook / ed. V.K. Mamutov. Kiev. 2002) P. 3.

⁴ Предпринимательское право России: Учебник/ под ред. В.С.Белых (автор главы - В.С.Белых). М.2008. (Business Law of Russia: Textbook / ed. VS White (author of the chapter - V. White). Moscow 2008) p. 21.

entrepreneurial activity: in modern times economic activity is mainly is reflected in the form of entrepreneurial activity. Nevertheless, there can be such types of economic activity that don't have any feature of entrepreneurial activity.¹

In order to justify our position it would be correct to carry out a brief comparative between the concepts economic activity and entrepreneurial activity.

Features of economic activity are as follows:

- Economic activity is a publicly useful type of activity;
- Subjects of economic activity are individuals and legal entities, which carry out such activities either on their own or in cooperation with others;
- Material and spiritual values having monetary valuation are created in the result of economic activity;
- Economic activity is carried out in a specific sector of economy;
- The purpose of the economic activity is to satisfy the demands of the individuals and the society.²

Different from economic activity, the term entrepreneurial activity has been extensively discussed in the literature and many authors have expressed their views with regard to the issue. In particular, according to Professor Barseghyan the features of entrepreneurial activity are the professional character, organizing the

¹ See Предпринимательское право: понятие и субъекты. М. 1997 (Business law: concept and subjects. М. 1997) Р. 18; Предпринимательское право (хозяйственное) право: Учебник. Под ред. В.В.Лаптева, С.С. Занковского (автор главы - В.В.Лаптев). М., 2006 (Business Law (Business) Law: Textbook. Ed. V.V.Lapteva, S.S. Zankovsky (the author of the chapter is V.V. Laptev). М., 2006) p. 122.

² See Serobyana DM , The Concept of Economic Activity Under the Constituent Changes 2017 Article / A Collection of Materials of the Conference of the Faculty of Law at Yerevan State University, YSU; head group. S. Kazinyan, Yerevan, YSU, 2017,) pp. 227-228, <http://www.y-su.am/faculties/hy/Law/section/staff/page/3/person/David-Serobyana>:

work by own risks and receiving revenue periodically.¹ Here one could cite other authors, however, we can conclude that the mentioned opinion about the features of entrepreneurial activity is widespread in the doctrine. Scholars identify seven (including those already mentioned) features of economic activity, however, except for already mentioned features, it is rather disputed to enlist others as features of entrepreneurial activity², hence, we will only focus on the following four qualities: professional character, autonomy, conducting the work at his/her own risk, and regularly receiving revenue.

Now let's compare the features of economic and entrepreneurial activities. Both are types of human activity. In case of economic activity, it is publicly beneficial, i.e. directed by the interests of the society. And entrepreneurial activity can be both publicly beneficial and focused only on the interests of a particular person. Hence, both have some overlaps, however the ambit of entrepreneurial activity is much narrower. At the same time, if we emphasize the professional nature of entrepreneurial activity, sometimes the ambit of the entrepreneurial activity is narrowed down since additional strict requirements are presented to the subjects of such activity. While it is not always the case for the economic activity that subjects of it are required to comply with professional requirements. For example, person who grows vegetables in his garden is engaged in economic activity, while the person who does the same thing for the purpose of obtaining profit, is required to comply with a stricter requirement. Important to note that subjects of both economic and entrepreneurial activities can carry out their activity on their both on their own, and jointly, and there is no any specificity in this regard.

¹ See Բարսեղյան Տ.Կ. Գործարարական իրավունք. Երևան, ԵՊՀ հրատ (Barseghyan T.K. Entrepreneurial Law. Yerevan YSU.) p. 33:

² See Бельх В.С. Правовое регулирование предпринимательской деятельности в России. Монография. Проспект. Москва. 2009. (Belykh V.S. Legal Regulation of Entrepreneurial Activity in Russia. Monography. Moscow 2009) P.39:

Certain material and non-material values having monetary worth are created in the result of both activities. In both cases the activity is carried out in the economic sector, hence there is no difference between them in this regard.

As per performing the activity at it's own risk, it must be noted that it is a legislative and economic requirement set for the entrepreneurial activity, while not all business subjects bear the risk of non beneficial consequences. And if this condition is mandatory for entrepreneurs, it is non-mandatory for subjects performing economic activity, in other words risk does always have legal significance for economic activity.

Additionally we can conclude that the opportunity provided by the goals of the economic activity is much wider than the one for people engaged in entrepreneurial activity. The reason for such difference is explained by the fact that in case of entrepreneurial activity the receiving revenue is a requirement, even if the subject carrying out that activity is a non-commercial entity. The mentioned entities are non-commercial in nature, however are allowed to carry out entrepreneurial activity, with the condition that the revenue generated in the result of such activity is not divided between the founders (members) of that entity, which is impossible in many cases, that revenue should be spent in line with the charter goals of that non-commercial entity. Thus, based on the abovementioned one can be convinced that from the point of view of purposes the sphere of economic activity is much wider than that of the entrepreneurial activity.

Thus, in the result of the comparison of the characters of economic and entrepreneurial activities we can conclude that the sphere of economic activity is much wider than that of the entrepreneurial activity, and conditionally applying the well-known formula one can infer, that every type of entrepreneurial activity is economic in its nature, however we cannot make the opposite

assertion. Not all types of economic activities can satisfy the requirements of entrepreneurial activity, hence cannot always be qualified as entrepreneurial activity. That is to say, the legislation enshrines stricter requirements for entrepreneurial activity, which are not mandatory for carrying out economic activity, hence the sphere of the latter is wider. Continuing this thread, and based on philosophical concepts that certain phenomena are a variety of a group, when they have all the features required for that group, and at the same time have some unique characters, because of which are different from other phenomena of that group, accordingly the mentioned phenomena should be considered as a type within that group.¹ As a consequence, we can conclude that entrepreneurial activity is a separate type of economic activity. Let's once more emphasize the differences of entrepreneurial activity and economic activity without covering their similarities: from the point of view of the purpose – in case of entrepreneurial activity the generation of revenue is a mandatory normative condition, while that is not the case with the economic activity. From the point of view of subjects – only subjects having special legal status can engage in entrepreneurial activity, that is – person who has been registered, or, in some cases, has obtained a relevant license, in line with the requirements of the law, while that is not required for carrying out economic activity. The professional character is not always the case for the economic activity, additionally the risk does not always have legal significance for economic activity. Accordingly, we are of the view that, economic and entrepreneurial activities are related as class and type, since the entrepreneurial activity meets all the requirements for economic activity, and at the same time it has unique features, which make it different from classical economic activity and has narrower application.

¹ See *Философский словарь. Под ред. И.Т. Фролова. М., 1991 (Philosophical Dictionary. I.T. Frolova eds. Moscow 1991), p. 66:*

Concluding the abovementioned, we can conclude that Constitutional prescription of economic activity and regulating the entrepreneurial activity as a type of economic activity is justified and reasoned, and, we think, that it will promote the proper legal regulation of economic relations.