

## *The Scholar Discussion on the Concept of Economic Law in Soviet Union in the Years 1956–1958\**

### Abstract

Formulating the concept of economic law as one of the branches of law became possible as a result of a resumption of scholar discussion on the system of Soviet law after the 20<sup>th</sup> Congress of the Communist Party of the Soviet Union in February 1956. Argumentation in favor of the separation of economic law within the system of law, which was presented by V.S. Tadevosyan, V.P. Efimochkin and I.V. Pavlov, concerned mainly the areas of theory of law and functional aspects of research on economic law. In the field of theory of law the argumentation focused on objective separateness of social relations constituting the matter of economic law. Functional reasons corresponded to the need for deepening scholar reflection on the provisions regarding state economy, due to its dynamic growth and modifications. The concept of economic law as a separate branch of law was, however, met with criticism concerning the theoretical inadequacy of separating the matter of economic law and contradiction with the views of V.I. Lenin.

**Keywords:** economic law, Soviet law, branch of law, Soviet jurisprudence.

**Słowa kluczowe:** prawo i ekonomia, prawo sowieckie, gałąź prawa, jurysprudencja radziecka.

### 1. Introduction

Throughout Soviet history the question whether economic law (хозяйственное право) should be recognized as a separate branch of the Soviet system of law kept igniting ani-

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mated debates fuelled by politics and legal theory. From the political perspective it was a problem of adopting the appropriate general (classificatory and normative) concept for the production sphere of the socialist economy. Moreover, economic law which covered the vertical and horizontal dimensions of social relations was not incompatible with the Leninist dogma on the unacceptability of the public and private law divide within socialist law.<sup>1</sup> In the field of legal theory the argument in favour of recognition of an autonomous economic law was sustained by the need to construct a system of law that would take account of the realities of economic life. The jurists' discussions which focused on conceptual problems and criteria of classification often hinged on different assumptions about the status of economic law.

As this introduction makes clear the problem of giving recognition and conceptual form to a separate economic law kept attracting a great deal of attention and divergent views. While in the 1920s and 1930s, when academic discourse was still relatively free, the debates on economic law ranged widely, they came to an abrupt end in 1938. For the next two decades everybody had to toe the line drawn by the Prosecutor General of the USSR Andrey Vyshinsky who declared that there was no such thing as economic law. The debate was resumed in 1956, after the groundbreaking 20th Congress of the Communist Party of the Soviet Union; it putting the recognition of economic law as distinct element of the Soviet legal system back on the agenda. However, many Soviet academics remained skeptical. In 1956–1958, as the restrictions on academic freedom eased, both sides engaged in a lively exchange, arguing the case for and against the legitimization of economic law.

The argument on either side was by no means simplistic. This study examines the theses of the proponents and opponents of the concept of economic law on three levels of the debate, the juristic, the functional, and the ideological. The analysis will lead to conclusions which include an assessment of the argument advanced by either side and an interpretation of their positions in a broad context of legal and economic history.

## 2. Historical contexts of the economic law debate

### 2.1. The development of the idea of economic law

History shows that at every stage of social development the economy needs some sort of legal frame – even in ancient Mesopotamia the exchange of goods was regulated by laws of various degree of specificity.<sup>2</sup> Until the 19th century the rules prescribed by law were for the most part concerned with “horizontal” relations; bundled into the code of com-

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<sup>1</sup> I.V. Pavlov, О системе советского социалистического права [The System of Soviet Socialist Law], “Советское государство и право” 1958, No. 11, p. 5.

<sup>2</sup> T. Giaro, *Prawo handlowe czy gospodarcze? Kilka modeli historycznych* [Commercial Law or Economic Law? Some Historical Models] [in:] *Prawo handlowe XXI wieku. Czas stabilizacji, ewolucji czy rewolucji. Księga jubileuszowa Profesora Józefa Okolskiego* [Commercial Law in the 21<sup>st</sup> Century. A Festschrift in Honour of Professor Józef Okolski], ed. M. Modrzejewska, Warszawa 2010, p. 166.

mercial law, they were generally regarded as a branch of private law.<sup>3</sup> The great 19th-century codifications of commercial law, Napoleon's *Code de commerce* (1807) and the German *Handelsgesetzbuch* of 1897, were both institutions of private law.<sup>4</sup>

The emergence of an autonomous economic law – distinct from commercial law – was a symptom of the rise of state interventionism and its ambition to bring the economy under the control of public law regulations. Although the concept of economic law made its appearance in the 19th century,<sup>5</sup> its day of triumph came in the second decade of the 20th century as Europe slipped into the First World War. In time of war it was as necessary to “extend [state] control over raw materials and food, administer their allocation and impose price caps in the private sector”<sup>6</sup> as to mark out and install a body of law, i.e. economic law, that would legitimize those controls. Germany was Europe's leader in the scale and persistence of state interventionism – it could not be abandoned after the war because the state needed every tool in box to absorb the effects of the economic crisis of 1921–1924 and the Great Depression, and after Hitler's takeover of power it was employed to get the economy into shape for a new war.<sup>7</sup> The institutionalization of a body of law that expressed the state's controlling power over the horizontal relations of the free market was not lost on German jurists. A centre dedicated to the study the new economic law, Institut für Wirtschaftsrecht, was set up in Jena in 1919, and the following year saw the publication of Arthur Nussbaum's authoritative *Das neue deutsche Wirtschaftsrecht*.<sup>8</sup> It blazed the trail for more analyses of the nature and status of economic law written by some of Germany's most eminent jurists like Justus W. Hedemann, Emil Westhoff, Ernst Rudolf Huber, Hans Goldschmidt and Friedrich Klausing.<sup>9</sup>

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<sup>3</sup> R. Jastrzębski, *Prawo handlowe in statu nascendi II RP – pojęcie i zagadnienia kodyfikacyjne* [Commercial Law in statu nascendi in Interwar Poland: the Concept and Problems of Codification], “Przegląd Prawa Handlowego” 2015, No. 5, p. 50.

<sup>4</sup> S. Włodyka, *Problem “prawa gospodarczego”* [The Problem of “Economic Law”], “Studia Cywilistyczne” 1964, vol. 5, p. 73–74.

<sup>5</sup> T. Giaro points out that the first to use that concept was the German economist Gustav von Schmoller in 1874; then it appears in “Das Recht der Wirtschaft” (1895) by the Austrian lawyer and sociologist Eduard August Schroeder. Cf. T. Giaro, *Prawo handlowe czy gospodarcze? Kilka modeli historycznych*, p. 177.

<sup>6</sup> S. Janczewski, *Prawo gospodarcze jako nauka* [Economic Law as a Science], “Państwo i Prawo” 1948, Nos. 5–6, p. 36.

<sup>7</sup> Cf. S. Włodyka, *Problem “prawa gospodarczego”*, p. 75. According to Stanisław Dniestrzański the history of economic law in Germany dates back to the aftermath of World War I, when legal norms were promulgated in compliance with proper procedural requirements. He argues that “economic decrees issued during the war, under the auspices of the military bypassing other institutions representing the [German] society, do not belong to economic law *sensu stricto*; rule by decree or executive orders is the opposite of legal order [a system of law] and cannot be regarded as economic law proper, i.e. in that sense in which it is generally understood in Central and Western Europe”. Cf. S. Dniestrzański, *O istocie prawa gospodarczego* [The Nature of Economic Law], “Czasopismo Prawne i Ekonomiczne” 1932, p. 349.

<sup>8</sup> A. Chelmoński, *Prawo gospodarcze* [Economic Law], “Ustawodawstwo Gospodarcze” 1948, No. 1, p. 2.

<sup>9</sup> A review of the German contributions in this field, cf. S. Dniestrzański, *O istocie prawa gospodarczego*, p. 349–352, and S. Włodyka, *Problem “prawa gospodarczego”*, p. 78–82.

## 2.2 The idea of economic law in the Soviet Union in the 1920s and 1930s

In the 1920s the idea of establishing a body of law that would serve the management of the economy had broad support of the Soviet jurists. It was no doubt connected with the New Economic Policy (NEP), adopted at the 10th Congress of the Russian Communist Party (Bolsheviks) in March 1921.<sup>10</sup> The reform put an end to two and a half years of War Communism, characterized by extreme centralization of economic life with the state acting as the sole producer and distributor of goods and services, and replaced it with a system of mixed economy in which private individuals were allowed to own small enterprises.<sup>11</sup> The relaxation of state control made it necessary to create a legal framework for private enterprise and private transactions. Although the problem was in a way solved by the adoption in October 1922 of the Civil Code of the RSFSR, whose provisions gave some room for the private sector without compromising the principle of state control,<sup>12</sup> the calls for the creation of an autonomous “economic law” acting as a complement or counterbalance to civil law did not die out.<sup>13</sup>

Out of the 1920s and early-1930s debates there emerged two formulas of the proposed economic law. One of them was the two-sector theory (двухсекторная теория) devised by Peter Stuchka. Drawing on the experience of the NEP, it foresaw the establishing of a separate economic law that would comprise all norms and regulations of the state (socialist) sector,<sup>14</sup> while the private (bourgeois) sector would remain under the sway of the civil law.<sup>15</sup> However, this duality would not last. Stuchka, a believer in the ironclad law of historical necessity, was absolutely sure that the competition between the two sectors must end in the retreat of the private sector, and with it the withering away of civil law.<sup>16</sup> Since either sector is equipped with a system of legal norms of its own, the triumph of the socialist sector should bring all social relations into the domain of economic law.<sup>17</sup>

<sup>10</sup> D.R. Marples, *Historia ZSRR [Motherland: Russia in the Twentieth Century]*. Pol. transl. by I. Scharoch, Wrocław 2006, p. 100.

<sup>11</sup> S. Włodyka, *Problem “prawa gospodarczego”*, p. 83.

<sup>12</sup> The German institutionalization of economic law might was in all likelihood a source of inspiration for the Soviet Union; the keen interest in the German findings is demonstrated by the fact that J.W. Hedemann’s “Grundzüge des Wirtschaftsrecht” originally published in 1922 was translated into Russian and published in Kharkov two years later. Cf. E. Iserzon, *Wokół koncepcji prawa gospodarczego [On the Concept of Economic Law]*, “Przegląd Ustawodawstwa Gospodarczego” 1956, No. 10, p. 364.

<sup>13</sup> A. Bosiacki, *Utopia, władza, prawo. Doktryna i koncepcje prawne bolszewickiej Rosji 1917–1921 [Utopia – Power – the Law: The Doctrine and Legal Concepts of Bolshevik Russia, 1917–1921]*, Warszawa 2012, p. 367–368.

<sup>14</sup> M. Likhtey, *Развитие советского хозяйственного права во второй половине 20-х годов XX века [The Development of Soviet Economic Law in the Late 1920s]*, “**Підприємництво, господарство і право**” 2011, No. 8, p. 23.

<sup>15</sup> P. Stuchka, *Курс советского гражданского права [A Course of Soviet Civil Law]*, vol. 3: *Особенная часть [Special Provisions]*, Moscow–Leningrad 1931, p. 5–6.

<sup>16</sup> *Ibidem*, p. 6. Cf. also W.S. Martemianow, *Хозяйственное право [Economic Law]*, Moscow 1994, p. 19.

<sup>17</sup> P. Stuchka, *Курс советского гражданского права*, p. 9–11. Cf. also O.S. Ioffe, *Избранные труды по гражданскому праву: Из истории цивилистической мысли. Гражданское правоотношение. Критика теории “хозяйственного права” [Selected Works on Civil Law: From the History of the Idea of Civil Law, Relation under Civil Law, A Critique of the Theory of “Economic Law”]*, Moscow 2000, p. 699.

The critics of the two-sector theory, led by Leonid Ginzburg and Evgeny Pashukanis, formed the single economic law school (школа единого хозяйственного права). Their time came about 1930, when it became clear that the NEP was a thing of the past (it was in fact dismantled in 1929) and the Soviet economy was being rapidly reshaped into a single whole. As all economic and social resources were about to be brought under central command (enforcing “the dictatorship of the proletariat”) with a mission of constructing a communist society, there was no need to have two different systems of law, one for the state entities and another for the private sector.<sup>18</sup> Ginzburg and Pashukanis postulated that economic law should regulate all property rights; a move that would make civil law superfluous outright. Indeed, by the mid-1930s classic civil law issues like legal capacity, ownership, property and inheritance were indeed annexed by economic law.<sup>19</sup> In the light of these facts we cannot but fully agree with Olimpiad Ioffe’s observation that the latter, armed with the single economic law doctrine, was able to annex the whole territory of the civil law at one go.<sup>20</sup>

The single economic law school’s favourite line of attack on the two-sector model was that it stood in the way of socialist (communist) development. Yet this kind of denunciation is unfounded. After all, Stuchka believed that (before long) the private sector would be squeezed out and the bourgeois relic of civil law would get obsolete. It seems therefore that the principal difference between his model and that of Ginzburg and Pashukanis’ lay in their assessment of the structure and the condition of society rather than in their vision of the scope and role of economic law in the Soviet system become reality.

### 2.3 Rejection of the idea of economic law in the Soviet Union in the late 1930s

The change of attitude towards economic law, i.e. the repudiation of all attempts at elevating economic law to the level of a separate and superior branch of law, can be dated back to a fundamental discussion about Soviet law initiated at the All-Union Meeting of Soviet Jurists in 1938. Its conclusions were published in 1941 as the theses of the Institute of Law of the Soviet Academy of Sciences.<sup>21</sup> One aspect of the great turnabout in Soviet jurisprudence, championed by Andrey Vyshinsky, the powerful Procurator General of the USSR, was the ditching of utopia-driven views of law and its function in society in favour of a “scientific” pragmatism and stability. According to Vyshinsky

<sup>18</sup> V.S. Belykh, *Правовое регулирование предпринимательской деятельности в России* [Legal Regulations of Entrepreneurship in Russia], Moscow 2005, p. 7.

<sup>19</sup> S.I. Vilniansky, *К вопросу о системе советского права* [On the Question of the Soviet Law System], “Советское государство и право” 1957, No. 1, p. 108.

<sup>20</sup> O.S. Ioffe, *Избранные труды по гражданскому праву*, p. 213–214.

<sup>21</sup> *Система Советского социалистического права: (тезисы)* [The System of Soviet Socialist Law: Theses], Moscow 1941; V.F. Meshera, *О делении советского права на отрасли* [The Division of Soviet Law into Branches], “Советское государство и право” 1957, No. 3, p. 93.

a “system of law is crucial to our knowledge of the nature, principles and characteristic features of law in general and each of the particular institutions of the law”.<sup>22</sup>

The law reform was one of the points discussed at the 18<sup>th</sup> Congress of the All-Union Communist Party (Bolsheviks) in March 1939. As a result the system of law was divided into nine separate branches (the branch became now the official basic unit of classification). They were state law, labour law, kolkhoz law, administrative law, budget and financial law, family law, civil law, criminal law and judicial law (plus one more slot reserved for international law).<sup>23</sup> Soviet commentators saw in the reconfiguration of the system of law into discrete branches the implementation of the object-related classification, postulated in the discussions about the law in the late 1930s.<sup>24</sup> Today Russian jurists tend to regard the 1939 reform (without denying its restorative objective with regard to the traditional legal disciplines) not as a product of any discussions but as the brainchild of one man, Andrey Vyshinsky, whose position at the centre of power enabled him at that time to impose his will on the whole legal community.<sup>25</sup>

Conspicuously absent from the 1939 catalogue of legal disciplines was economic law. It may well have been caused by the fact that the very name had fallen into disrepute in the course of a broad campaign against the one-size-fits-all economic law. The leading argument in the chorus of discontent was that a body of law intended to regulate the functioning of state enterprises expanded beyond its proper sphere and eroded the rights of Soviet citizens. By allowing them no more recognition than other participants of economic life, economic law reduced the legal status they were entitled to in the socialist society.<sup>26</sup> The tone was set by Vyshinsky himself in 1937. At the first of a series of conferences convoked to discuss the twin subject of Soviet state and law he lambasted economic law for treating civil-law relations solely from the point of view economic management which resulted in “ignoring or complete misunderstanding of real people, made of flesh and blood, with their interest, rights, their will, their wishes and desires”.<sup>27</sup>

It seems that the exclusion of economic law from the legal taxonomy after 1937 had both more principled and more mundane reasons. On the level of ideology (on this occasion taking the high moral ground), the single economic law was practically knocked out in the confrontation with the cause of human rights under socialism. The other reason for it not being mentioned, even by the jurists, must be sought in the prevailing opportunism, or perhaps the prudent abstention from presenting views that might be seen as unhelpful at the time of the Great Terror. At any rate, a strict anathema on economic law was in place, according to Valentin Mamutov, for the following twenty years, i.e. until 1957.<sup>28</sup>

<sup>22</sup> A.J. Vyshinsky, *XVIII Съезд ВКП(б) и задачи науки социалистического права* [18<sup>th</sup> Congress of the AUCP (b) and the Agenda of Socialist Jurisprudence], “Советское государство и право” 1939, No. 3, p. 23.

<sup>23</sup> *Ibidem*, p. 39.

<sup>24</sup> I.V. Pavlov, *О системе советского социалистического права*, p. 6.

<sup>25</sup> D.M. Azmi, *Система права и ее строение: методологические подходы и решения* [The System of Law: Methodological Approaches and Solutions], Moscow 2014, p. 23–25, 27.

<sup>26</sup> S.I. Vilniansky, *К вопросу о системе советского права*, p. 107–108.

<sup>27</sup> Foll. L.Y. Ginzburg, *К вопросу о хозяйственном праве* [On the Question of Economic Law], “Советское государство и право” 1956, No. 10, p. 87.

<sup>28</sup> *Хозяйственное право: учебник* [Economic Law: a Textbook], ed. V.K. Mamutov, Kiev 2002, p. 7.

### 3. The economic law debates in 1956–1958

#### 3.1. General remarks

The discussion about the idea of economic law was resumed after the 20th Congress of the CPSU in February 1956, whose groundbreaking effect could soon be felt across all spheres of life, from politics to law. The catalyst for a new debate on economic law were two theses adopted by the Congress. One called for the healing of the rift between the overly-theoretic work in the field of law (but also philosophy, economy and history) and the demand for practical solutions; the other urged the jurists to start work on the codification of each of the branches of Soviet law. The draft codes were to be collated with a major project on the principles of civil legislation, a comprehensive code that would cover all relationships in the state sector.<sup>29</sup>

The return of economic law was key issue of the legal discussions sparked off by the 20th Congress and conducted primarily in the journal “**Советское государство и право**” [The Soviet state and law]. In 1956–1958 a number of the distinguished academics joined the debate which culminated in a big conference at the Institute of Law at the Soviet Academy of Sciences in June/July 1958 (a report was also published in the SSL).<sup>30</sup> The debate revealed an amazingly diverse spectrum of opinions and lines of argument. Among those who were in favour of reinstating economic law as a separate branch of law were Vramshapu Tadevosyan, Valery Yefimochkin and Ivan Pavlov; the opposition was led by Mikhail Shargorodsky, Olimpiad Ioffe and Solomon Vilniansky. Generally, the advocates and the opponents of the rehabilitation of economic law fought their battles on three fronts, the juristic, the functional, and the ideological.

#### 3.2. The juristic (theory-of-law) discourse

The main battlefield between those who were in favour of bringing back economic law and those were against it was the theory of law. To a large extent the positions of the two parties depended on their answer to the fundamental question about the nature of the law and its structure. The view that law had a reality of its own was the orthodoxy of the mid-thirties yet many held on to it because they found it right. So did Ioffe who explained it like this: the branches of law, like social relations, exist objectively, and therefore the job of the legal science is to discover rather than to invent, or, even worse, to create new branches with the help of theoretical constructions.<sup>31</sup> The philosophical dimension of

<sup>29</sup> P.Z. Livshits, *Теория права* [Theory of Law], Moscow 1994, p. 115; L.Y. Ginzburg, *К вопросу о хозяйственном праве*, p. 84; I.V. Pavlov, *О системе советского социалистического права*, p. 4.

<sup>30</sup> L.Y. Ginzburg, *Обсуждение вопросов системы советского права и социалистической законности* [A Reassessment of the Issues Connected with the Soviet System of Law and Socialist Rule of Law], “*Советское государство и право*” 1958, No. 11, p. 117–128. In Poland a summary of the main conclusions of that session was presented by W. Bagiński, *Prawo gospodarcze jako samodzielna gałąź prawa socjalistycznego* [Economic Law as an Independent Branch of Socialist Law], “*Przegląd Ustawodawstwa Gospodarczego*” 1959, No. 3.

<sup>31</sup> O.S. Ioffe, *Избранные труды по гражданскому праву*, p. 707.

the argument (Ioffe makes the case against economic law from the nominalist position) explains the double focus of the argument – the status of economic law as a general concept and as a branch of law (a unit of the classificatory system, but sustained by the reality on the ground).<sup>32</sup>

When the reformers of the late thirties decided to make out the branches of law on the basis of an objective criterion (i.e. based on the presence of a certain aggregate object in the real world), they also set the terms for subsequent theoretical debates. Working within that framework, the advocates of economic law now concentrated on establishing its distinctness, which required finding a specific, fairly homogeneous type of relationships that could be served by no other law. And soon enough Tadevosyan, Yefimochkin and Pavlov one by one declared to have found the site where this such relationships were objectively present. It was the state sector.<sup>33</sup> However, their argument went further. The social relationships which constituted the object of economic law exhibited some distinctive characteristics (facets) that needed to be taken into account. These facets were categorized as the subjective and the objective-functional qualification. The former acknowledged the fact that the relationships were maintained by autonomous actors (subjects); the latter identified a feature unique to this type of social relationships. While the three scholars agreed that social relationships between socialist economic organizations made up the proper object of economic law, they had different ideas on what determined the specific nature of these relationships. Yefimochkin and Pavlov believed their uniqueness was due to the subjective element. However, whereas Pavlov focused on the benign influence of the principles of democratic centralism and planning, Yefimochkin pointed to the integrative role of *khozraschyot* (хозрасчёт), a co-operative model of operational autonomy and internal budget-balancing.<sup>34</sup> Tadevosyan, on the other hand, prioritized the functional element, i.e. the practice of establishing and shaping relationships to ensure the increase of productivity.<sup>35</sup> Despite those differences, it seems that on the whole Tadevosyan, Yefimochkin and Pavlov addressed the problem of economic law in much the same way. In the end, the distinctness of the object of economic law was determined by both the subjective and the objective-functional facets of the social relationships in question. Furthermore, this mid-fifties concept of economic law has an unmistakable public-law profile and, thanks to its exclusive concentration on the rules and regulations in the economic sphere, its object can be separated with due clarity from that of the administrative law.<sup>36</sup>

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<sup>32</sup> M.D. Shargorodsky, O.S. Ioffe, О системе советского права [On the System of Soviet Law], “Советское государство и право” 1957, No. 6, p. 103.

<sup>33</sup> I.V. Pavlov, О системе советского социалистического права, p. 11–12.

<sup>34</sup> The term *khozraschyot* (an abbreviation of хозяйственный расчёт, lit. economic accounting) was used in the Soviet economy to refer to a method of running of a state enterprise on the basis self-financing, i.e. covering of one’s expenses (losses) from one’s income, without the participation of the state budget.

<sup>35</sup> V.P. Yefimochkin, К вопросу о принципах построения системы права [On the Question of the Principles of Constructing a System of Law], “Советское государство и право” 1957, No 3, p. 88; I.V. Pavlov, О системе советского социалистического права, p. 11; V.S. Tadevosyan, Некоторые вопросы системы советского права [Some Problems of the System of Soviet Law], “Советское государство и право” 1956, No. 8, p. 102.

<sup>36</sup> V.P. Yefimochkin, К вопросу о принципах построения системы права, p. 91.



It is worth noting that the thesis that economic law and civil law have distinct objects was put forth by Grigori Sverdlov at a conference on the system of Soviet law at the Institute of Law of the Academy of Sciences of the USSR held between 30 June and 3 July 1958. He came down on the side of Ivan Pavlov, whose paper opened the debate, with the following argument. Although economic law and civil law may share certain characteristics, like the commodity-monetary nexus (товарно-денежная форма) and the law of value (закон стоимости), they can play only a limited role in economic law in conditions of centrally planned economy. This makes it possible to distinguish and separate social relationships based on the commodity-monetary nexus and the law of value, and exposed to intense public law control mechanisms from commodity-monetary relationships in their classic form. The former are the object of economic law, while the latter belong to the realm of civil law.<sup>37</sup>

Meanwhile, the very opposite, i.e. that it is not possible to distinguish the proper sphere of economic law, was argued in a formal mode by Shargorodsky and Ioffe. After taking a closer look at the facets of economic law, they came to the conclusion that there was no criterion that would allow us to identify and separate the subjects of economic law from those of civil law. In fact, different criteria are used for each, which leads to overlapping and inconsistencies. So, economic law finds its object by looking for a certain type of economic activity, i.e. the functioning of socialist economic organizations in the state sector, while the object of civil law is identified on the basis of the subjective criterion, i.e. the norms concerning the rights and obligations of citizens. The two sets clearly overlap, which means that a clear, disjunctive separation of the province of economic law does not work. This is also true of borderlines between economic law and other types of law. For instance, a delivery contract (договор поставки) which can be said to belong to the sphere of economic law, co-operative law, agrarian law, etc.<sup>38</sup> If the job of marking out the object of economic law cannot be done with a minimum of precision and in a disjunctive manner, then, Shargorodsky and Ioffe conclude, economic law cannot qualify for the status of a branch of law.<sup>39</sup>

Another critic of the restoration of economic law was Solomon Vilniansky. He spotted the following fundamental contradiction in the reasoning of the other side. They claimed that the object of economic law was the economic facet of a certain type social relationships while at the same time conceded that the legal aspect of the of those relationships was the proper object of civil law, with all the consequences, namely the use of the general provisions of civil law concerning private persons, contracts and property. Clearly, it meant that virtually in every case economic law would be overridden and left without an object of its own.<sup>40</sup> Vilniansky was ready to concede that social relationships in the state economy had a pronounced economic facet. That could justify the admission of an economic law, but, he insisted, only if it was focused exclusively on matters that were economic, and that was not possible unless it was completely rebuilt.

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<sup>37</sup> L.Y. Ginzburg, *Обсуждение вопросов системы советского права и социалистической законности*, p. 126.

<sup>38</sup> M.D. Shargorodsky, O.S. Ioffe, *О системе советского права*, p. 106.

<sup>39</sup> *Ibidem*, s. 105.

<sup>40</sup> S.I. Vilniansky, *К вопросу о системе советского права*, p. 108.

In the discussions that were resumed in 1956 the issue of the criteria required for a recognition of a branch of law was bound up not only with the question of identifying its exclusive object but also possessing a distinctive method, i.e. “a specific method used to by the state to make people behave in such a way that they become [willing] participants of the legal relationships”.<sup>41</sup> Nevertheless, in the 1956–1958 controversy over economic law the latter was at best a side issue. Of the leading proponents of economic law only Vramshapu Tadevosyan made it part of his argument. He insisted that economic law should employ a whole range of methods alongside *khozraschyot* and contract enforcement (договорная дисциплина).<sup>42</sup> In working out his plan Tadevosyan fell back on an excessively detailed formula of regulation, yet it was his stance that anticipated a claim, often raised in recent discussions, that economic law needs no method of its own because it uses a number of various methods.<sup>43</sup> The fact that the question of method was not properly addressed did not prevent the trio Tadevosyan, Yefimochkin and Pavlov from proclaiming economic law a legitimate branch of law.<sup>44</sup>

A compromise solution to the problem of the status of economic law was proposed by Vladimir Pokrovsky. He realized that economic law was short on method, and yet he supported its reinstatement as a separate discipline. To do it he drew on a distinction made in 1947 by Vladimir Raicher between primary and complex branches of law. According to Raicher the primary branches of law required a method of its own, the complex ones did not. Pokrovsky used that division to give economic law the status of a complex branch of art, but, as if not quite pleased with that inferior rank, allowed it also the right to autonomous functioning.<sup>45</sup> This solution met with general acceptance in the Soviet era. Nowadays, too, it is endorsed by leading Russian specialists in economic and business law, e.g. Inna Ershova, Natalya Kruglova and Viktor Ulybin.<sup>46</sup>

### 3.3. Functional discourse

Whereas in the field of the juristic discourse the two sides of the debate seemed to be even, the functional argument, concerned the practical aspects of bringing in economic law, was without doubt dominated completely by the supporters of this idea. Goaded by a directive of the 20th Congress of the CPSU calling for the study of law be refocused on the practical needs of social and economic life, they rushed to recommend economic law as the right tool to achieve that goal. Some came up with assurances that the creation

<sup>41</sup> M.D. Shargorodsky, O.S. Ioffe, *О системе советского права*, p. 104–105.

<sup>42</sup> V.S. Tadevosyan, *Некоторые вопросы системы советского права*, p. 102.

<sup>43</sup> Cf. also V.V. Laptev, *Предпринимательское право: понятие и субъекты* [Business Law: the Concept and the Subjects], Moscow 1997; I.V. Ershova, *Предпринимательское право* [Business Law], Moscow 2009, p. 9.

<sup>44</sup> V.S. Tadevosyan, *Некоторые вопросы системы советского права*, s. 102; V.P. Yefimochkin, *К вопросу о принципах построения системы права*, p. 91; I.V. Pavlov, *О системе советского социалистического права*, p. 12.

<sup>45</sup> L.Y. Ginzburg, *Обсуждение вопросов системы советского права и социалистической законности*, p. 127; *Предпринимательское право Российской Федерации* [Business Law of the Russian Federation], ed. J.P. Gubin and P.G. Lachno, Moscow 2011.

<sup>46</sup> I.W. Ershova, *Предпринимательское право*, p. 14; N.Y. Kruglova, *Хозяйственное право* [Economic Law], p. 24; V.A. Ulybin, *Предпринимательское право* [Business Law], Moscow 2012, p. 13.

of a consolidated regulatory framework in the form of one code would put the economy on the path of all-round growth.<sup>47</sup> Others, like Vramshapu Tadevosyan and Valery Yefimochkin saw the economy moving rapidly forward and getting more complex in the process, which made more complex legal regulations – in the form of economic law – both necessary and urgent. Tadevosyan took his cue from the Soviet Prime Minister Nikolai Bulganin. At the 20<sup>th</sup> Congress of the CPSU Bulganin spoke of the need to maximize the use of “the gigantic and in fact inexhaustible” potential of the Soviet economy, and added that the Central Committee of the CPSU “never tires of asking our cadres to address the economic problems of production and examine the best experiences in that field”. Tadevosyan interpreted Bulganin’s message as a call for the bundling of the study and setting of norms for the national economy into one type of law, i.e. economic law, in order to increase productivity growth.<sup>48</sup>

As the targets were being set for the next, sixth five-year plan, which was to run in 1956–1960, many pinned their hopes on economic law. Yefimochkin saw the situation like this. To meet the target of 65% of an overall increase of production the management of the economy would have to undergo massive change, e.g. *khozraschyot* should play a much bigger role, the competence of the managers should be broadened, the management of the economy decentralized. The reform would result in more intense and more complex exchanges between socialist economic organizations, and that in turn would necessitate the creation of a consistent body of law, i.e. economic law, because these relationships would not be incompatible with formulas of civil law.<sup>49</sup> Ivan Pavlov, too, believed that the ongoing restructuring of the management of industry, which had already had impacted on the system of norms regulating relations between socialist economic organizations, would force the codification of the assorted rules into one whole, i.e. economic law with the status of an independent branch of law.<sup>50</sup>

On the whole, the functional argument presented by the advocates of economic law did not draw fire from their opponents. Their reticence may have been caused by the difficulty of finding an empirical premise for an a priori critique of the impact of economic law on the functioning of Soviet economy. One way of facing off the functional argument was to adopt a position that could be described as conservative / skeptical. This was done by Raisa Khalfina who questioned the need for instituting economic law on the grounds that the system of management already in place was good enough for the economy as it was (the *status quo*) while the economy the advocates of economic law talked about in hyperbole (“gigantic growth”, etc.) had not arrived yet.<sup>51</sup>

The opposition to economic law had one notable figure on the functional front, Dmitry Genkin. His argument combines originality and a concern for the practicalities of economic life. He believed found that the exposure of a socialist economic organization to the norms of both administrative and civil law was perfectly suited to the two modes of its functioning. One was the authoritative mode connected with its role as an executor

<sup>47</sup> L.Y. Ginzburg, К вопросу о хозяйственном праве, p. 84.

<sup>48</sup> V.S. Tadevosyan, Некоторые вопросы системы советского права, p. 99.

<sup>49</sup> V.P. Yefimochkin, К вопросу о принципах построения системы права, p. 88.

<sup>50</sup> I.V. Pavlov, О системе советского социалистического права, p. 12.

<sup>51</sup> L.Y. Ginzburg, Обсуждение вопросов системы советского права и социалистической законности, p. 119.

of state plans and policies, the other was the mode of participation in trade on the basis of equality. The unification of all norms shaping the activity of socialist organizations under the umbrella of economic law would result in the obliteration of the difference between the two spheres and in effect – due to the domination of administrative norms in economic law – the “administrativization” of the functioning of those organizations. That would hamper their ability to develop trading relationships which are best served by civil law regulations.<sup>52</sup>

### 3.4. Ideological discourse

Although adherence to the tenets of Marxism-Leninism was always an important criterion in assessing any new idea produced in the academic community, the jurists were told to do even better by the 20th Congress of the CPSU. Its conclusions called on them directly to develop and improve the socialist rule of law and the socialist justice system.<sup>53</sup> So it should come as no surprise that either side in the controversy over economic law tried to demonstrate that their views conform to the dogmas of the ruling ideology while their opponents’ proposals do not.

It seems that a better, i.e. ideologically more sound, argument was presented by the opponents of economic law. The principal point of their critique, formulated with absolute clarity by Lev Galesnik, was the distinction between economic law and civil law on the basis of the object criterion. The concept of economic law implied that the distinctive feature of civil law as a separate branch of law was the competence to regulate relationships (between citizens) devoid of the public law facet. Relationships that had a public law dimension were the proper object of economic law, so runs the argument. This reconstruction of the gist of the other side’s argument leads to the conclusion that their project involves “the resurrection (воскрешение) of public and private law”, something that Lenin was vehemently opposed to.<sup>54</sup> When work was underway to draft the Civil Code of the RFSRS in February 1922, Lenin expressly rejected the idea of taking Roman law as a model for the new Soviet legislation. In particular, he had in mind Ulpian’s division of law into public and private. As the following quotation shows Lenin was adamant that there can be no separate laws in the economy or matters of property: “for us in the domain of economics everything is public law, not private”.<sup>55</sup>

The charge of incompatibility with Leninist dogma is also at the core of Solomon Vilniansky critique of the concept of economic law. In his view, the expansion of the object of economic law at the expense of administrative law would reduce the latter to a package of law and order regulations, thus degrading that branch of law to a “police law” (“полицейское” право). Such a degradation was unacceptable as it ran counter to Lenin’s vision of a proactive state which would need a robust administrative law for the

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<sup>52</sup> D.M. Genkin, *К вопросу о системе советского социалистического права* [On the Question of the Soviet Socialist Law], “Советское государство и право” 1956, No. 9, p. 86.

<sup>53</sup> I.V. Pavlov, *О системе советского социалистического права*, p. 4.

<sup>54</sup> L.S. Galesnik, *О проблемах системы советского права* [Problems of the System of Soviet Law], “Советское государство и право” 1957, No. 2, p. 114.

<sup>55</sup> V.I. Lenin, *Полное собрание сочинений* [Complete works], Vol. 44, Moscow 1974, p. 398.

job.<sup>56</sup> In his speech at the Congress of Russian Soviets of the National Economy in May 1918 Lenin said that – inspired by the example of the Supreme Soviet of the National Economy – the state apparatus charged with the task of managing the economy would “grow, develop, and become stronger” while the administrative apparatus representative of the state that had become obsolete (аппарат старого государства), and with no role in the economy would die.<sup>57</sup> Not to be missed in Vilniansky’s use of the phrase “police law” is an allusion to the words of the senior administrative lawyer Semyon Bertsinsky about the bourgeois state. Bertsinsky claimed that its true nature is revealed in police repression (полицейское принуждение) and the shape of its administrative law, designed to give the police a free rein. By contrast, in the Soviet Union the state should see its function in a benevolent regulatory management (регулятивно-положительное управление) of the economy, social and cultural life, and defence.<sup>58</sup>

A notable attempt to inscribe the concept of economic law into the ideological framework of socialism and rebut the charge of dualism came from Vramshapu Tadevosyan. He argued that the handover of the sphere of legal relationships in the state economy to civil law was irreconcilable with the essence of ownership under socialism, expressed in the public ownership of the means of production. For once, it would turn civil law into an unsustainable hybrid of two different spheres, the public and the private, each requiring its own legal norms. Tadevosyan pointed out that “socialist economic policy... cannot be implemented unless it has at its disposal the instrument of economic law”.<sup>59</sup> Unlike the critics of economic law Tadevosyan did not stud his text with direct quotations from Lenin. Instead he built his argument on the Marxist dogma of public ownership of the means of production. The premise was unassailable. This form of ownership was one of the foundations of the Soviet economy and Soviet social order as proclaimed in Article 4 of the 1936 Constitution of the USSR.

#### 4. Normative implications of the concept of economic law for other socialist countries

Although in the juristic confrontation of the supporters and opponents of the recognition of economic law ended in a draw, on the legislative front the opponents won the game, even if was not that clear immediately. Nevertheless, it became obvious when repeated attempts of the advocates of the economic law to get the appropriate code through parliament ended in failure. A series of draft versions of the Code of Economic Law were compiled, two of them in 1970 and 1985 by teams that included luminaries like Yefimochkin,

<sup>56</sup> V.I. Lenin, Полное собрание сочинений [Complete works], Vol. 36, Moscow 1974, p. 377–378.

<sup>57</sup> S.I. Vilniansky, К вопросу о системе советского права, p. 108.

<sup>58</sup> S.M. Bertsinsky, Предмет советского административного права и метод его изучения [The Object of Soviet Administrative Law and the Method of Studying It], “Проблемы социалистического права” 1939, No. 2, p. 66–67.

<sup>59</sup> V.S. Tadevosyan, Некоторые вопросы системы советского права, p. 100.

Laptev and Mamutov working under the auspices of the Academy of Sciences of the USSR, but none managed to get the approval of the Supreme Soviet.<sup>60</sup>

The idea of economic law was more successful in other socialist countries. Its greatest triumph was the adoption of a code of economic law by Czechoslovakia in 1964. The *Hospodářský zákoník* was a comprehensive collection of rules for the state sector, both in the vertical and horizontal dimension.<sup>61</sup> A separate legislation of this kind was also introduced in the German Democratic Republic: two acts bearing the same name *Gesetz über das Vertragssystem in der sozialistischen Wirtschaft* [Law of contracts in the socialist economy] were adopted in 1957 and 1965.<sup>62</sup> These acts become the core element of a division of law labelled *Das Recht des sozialistischen Wirtschaft* [Law of the socialist economy], which encompassed both state-owned enterprises and small businesses in the private sector.<sup>63</sup> The concept of economic law was also discussed in Poland – this discussion reached its high point during a broader debate about the draft of a new civil code in the early 1960s.<sup>64</sup> In the end though, the new Civil Code made no reference to any economic law legislation. Indeed, the opening statement of Article 1 Paragraph 1 made it clear that the Civil Code alone regulates among others “the civil and legal relationships between units of the state-owned economy”.<sup>65</sup>

<sup>60</sup> V.Y. Ishutin, История кодификации отечественного хозяйственного законодательства в советский и постсоветский периоды [A History of the Codification of National Economic Legislation in the Soviet and the Post-Soviet Era], “Бизнес и право в России и за рубежом (Предпринимательское право: Приложение)” 2010, No. 3, p. 57–58; Хозяйственное право: учебник, p. 121.

<sup>61</sup> T. Rabska, *Prawo administracyjne stosunków gospodarczych* [Administrative Law of Economic Relations], Warszawa–Poznań 1978, p. 25; J. Grabowski, *Kryteria wyodrębniania, przedmiot i zakres publicznego prawa gospodarczego* [Criteria of Demarcation, the Object and Scope of Public Economic Law] [in:] *Publiczne prawo gospodarcze. System prawa administracyjnego* [Public Economic Law: System of Administrative Law], vol. 8a and 8b, ed. J. Grabowski, L. Kieres, and A. Walaszek-Pyziół, Warszawa 2013, p. 21.

<sup>62</sup> S. Włodyka, *Problem “prawa gospodarczego”*, p. 92–93.

<sup>63</sup> T. Giaro, *Prawo handlowe czy gospodarcze? Kilka modeli historycznych*, p. 179; S. Włodyka, *Problem “prawa gospodarczego”*, p. 93.

<sup>64</sup> Cf. W. Bagiński, *Prawo gospodarcze jako samodzielna gałąź prawa socjalistycznego*; J. Topiński, *Problem prawa gospodarczego* [The problem of economic law], “Państwo i Prawo” 1960, No. 2; J. Wasilkowski, *Kodeks cywilny PRL a zagadnienie prawa gospodarczego* [The Civil Code of the People’s Republic of Poland and the problem of economic law], “Państwo i Prawo” 1960, No. 3; J. Gwiazdomorski, *Socjalistyczne organizacje gospodarcze w projekcie kodeksu cywilnego PRL* [Socialist economic organizations in the draft Civil Code of the People’s Republic of Poland], “Przegląd Ustawodawstwa Gospodarczego” 1960, No. 4; A. Hermelin, M. Madey, *Obrót socjalistyczny w projekcie kodeksu cywilnego* [Socialist trade in the draft Civil Code], “Przegląd Ustawodawstwa Gospodarczego” 1960, No. 8; Z. Radwański, *Uwagi o zakresie kodeksu cywilnego. Zagadnienia inkorporacji do kodeksu cywilnego prawa rodzinnego i gospodarczego* [The scope of the Civil Code; The problem of incorporation of family law and economic law into the Civil Code], “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1961, No. 4; S. Buczkowski, *Problematyka obrotu uspołecznionego w kodeksie cywilnym* [The problem of state-controlled trade in the Civil Code], “Państwo i Prawo” 1964, No. 10.

<sup>65</sup> Dz.U. Nr. 16, poz. 93.

## 5. Conclusion

A comparison of the outcomes of the clash of the supporters and opponents of the legitimation of economic law in the grand debate of 1956–1958 on the three main discursive battlefields shows a rather uneven performance of either party. Whereas in the juristic confrontation both sides presented their views on the status of economic law and the effective demarcation of its object in an exhaustive and fairly symmetrical manner, in the other two confrontations the imbalances could not be more conspicuous. The functional discourse was dominated completely by the supporters of economic law. Their claim that the improvement of normative standards in the state sector by means of a revamped economic law would boost growth and efficiency was practically unopposed. Finally, the ideological scene saw the triumph of the opponents of economic law. They had the better argument when they demonstrated that its premises were incompatible with the programmatic statements of Lenin himself. It seems that the controversy over the recognition of economic law in the Soviet jurisprudence was a symptom of a general concern about the functioning of the economy in socialism. It was also an expression of a conflict between two mindsets, the functional and the ideological – one seeking to improve the efficiency of the economy and the institutions of the law, the other committed above all else to the goals and promises of the official doctrine.

Whereas in the Soviet economy at large the rule of ideology seems to have gone unchallenged, in the field of economic law the conflict between the functional and the ideological approach remained unresolved. The controversy continued until the collapse of the USSR. In contemporary Russia the concept of economic law as an independent branch law formulated in 1956 and developed by a number of renowned jurists – e.g. Vladimir Laptev, Valentin Mamutov and Valentin Martemianov – has been dubbed “postwar” (послевоенная концепция хозяйственного права). It is regarded – alongside the theories of Peter Stuchka, Leonid Ginzburg and Evgeny Pashukanis – as one of the most important Soviet theories of economic law.<sup>66</sup>

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<sup>66</sup> V.S. Belykh, *Правовое регулирование предпринимательской деятельности в России*, p. 9.

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