European Research Studies Journal
Volume XXI, Special Issue 1, 2018

pp. 41-50

The Formation of Constitutional Economics as a Scholarly Direction

L.G. Berlyavskiy,[1] A.G. Golovko,[2] L.Yu. Kolushkina,[3] M.Yu. Ponezhin[4]

Abstract:

Under the conditions of limited economic growth and risk of a budget deficit the concept of financial engineering allows corporate structures with state participation optimizing financial resources movement, attracting additional sources of financing and minimizing the cost of their usage.

On the basis of financial engineering the corporations solve the problems of diverse complexity in the field of financial transactions, in particular with securities, taking differentiated decisions by developing financial and investment projects.

Keywords: *Constitutional economics, jurisprudence, economic eonstitution, Brandeis brief, antitrust concept, scholarly direction, basic law, American jurisprudence, regulation.*

[1]*Doctor of History, Candidate of Legal Sciences, Professor of Constitutional and Municipal Law, Rostov State University of Economics.*
[2]*Candidate of Legal Sciences, Associate Professor of Constitutional and Municipal Law, Rostov State University of Economics.*
[3]*Candidate of Sociology, Associate Professor of Constitutional and Municipal Law, Rostov State University of Economics.*
[4]*Candidate of Legal Sciences, Associate Professor of Constitutional and Municipal Law, Rostov State University of Economics.*

1. Introduction

At present, the Constitutional Economics is one of the actively developing areas in the legal science. There are undoubted achievements in the study of general theoretical and special problems because of the correlation of law and economics, such as property rights, constitutional regulation of economic relations, Economic Constitution, constitutional economics, economic analysis of law, as well as various aspects of constitutionalism. At the same time, it is considered important, both in doctrinal and practical application, to raise the issue of a category of economic constitutionalism having a cross-sectoral nature, based on a relatively specific, self-contained content, its institutional characteristics and functional purpose, importance of economic (material) content and the constitutional legal basis for their design.

The Economic Constitution can be studied in three aspects. First, theoretically, as a scholarly concept; second, in a normative sense from the point of view of the content of economic provisions in the Constitution; third, in practical terms from the point of view of the implementation of constitutional provisions in the legislation and in the activities of Constitutional control bodies interpreting the Constitution. The combination of all three aspects gives a complete picture of the Economic Constitution.

The Constitutional Economics, according to domestic authors, is a scholarly direction that studies the principles of the optimal combination of economic expediency with the achieved level of constitutional development regulating economic and political activity in the State. One of the pioneers of this scholarly direction was the American economist James Buchanan, awarded in 1986 with the Nobel Prize in Economics.

2. Literature review

The concept of the "Economic Constitution" widely used in foreign economic and legal literature, and the concept of "the constitutionalization of the socio-economic development of statehood" are closely related to the category of "Constitutional Economics". As Hajiyev (2010) points out, the "Economic Constitution" can be referred to as the set of principles, norms, concepts, connected with each other by complex logical and legal links and, in virtue of this, constituting a certain unity. According to Andreeva (2006) the term "Economic Constitution" reflects the ability of a Constitution to set a certain framework for a market economy so that it serves, among other things, the society as a whole. Often, the Economic Constitution of Russia is understood as a legislative one with several acts; the Civil Code of the Russian Federation, the Tax Code of the Russian Federation, laws on the budget, or the totality of legal norms regulating the economic system of the country.

These problems continue to be relevant in modern scholarly discourse. In particular, Badura (2005) compares the Economic Constitution of the Basic Law of the Federal

Republic of Germany and the European Economic Constitution and notes that this Constitution, unlike the Basic Law, does not follow the guiding idea of political neutrality and the possibility of interventionism in it is much broader.

Cyrino (2007) worries that the formal Economic Constitution in Brazil has a wide scope, allowing it to be interpreted in an anti-democratic spirit. In this connection, the question is raised as to which state bodies should be given preference for the interpretation of economic provisions.

From the point of view of Vergotini (2012) the current Economic Constitution of Italy is an example of combining leftist ideas of communist and socialist sense with the ideas of liberalism and social Catholicism. The constitutional process (as a result of a significant representation of the left parties) was dominated by etatist culture, the idea of state intervention in the economy, the orientation toward the socialization of the economy, including the means of production, and the planned economic system.

The researcher of the Economic Constitution of Vietnam Nguyen Khan Bui (2007) draws attention to the differences of the Vietnamese socialist market economy from the social market economy, in particular, the functioning of the socialist market economy is associated with the leading role of the Communist Party of Vietnam in all significant issues of politics, economics and public life; the state sector plays a leading role in a multistructured economy, most of the enterprises created are small and medium-sized, as in other developing countries, and hence the low competitiveness of Vietnamese firms at the international level.

3. Methods of conducting research

In the study of the formation of Constitutional Economics as a scholarly direction the methodology of comparative, formal legal as well as historical and legal analysis, methods of comparative analysis of scholarly paradigms in jurisprudence, and methods of legal modeling were used. The methodological potential of the school of Legal realism, as well as Integrative jurisprudence, was also used.

4. Results

It should be noted that the majority of domestic and foreign researchers of the Economic Constitution are turning to the study of these issues in the US rather fragmentarily. Meanwhile, in the United States, research on these problems appeared at the beginning of the 20th century. In particular, very serious criticism of the US Constitution was subjected to the well-known book of Charles Beard "An Economic Interpretation of the Constitution of the United States" (1913). In his opinion, the public movement for ratification of the Constitution in 1787-1789 was headed by traders, merchants, creditors and land speculators who sought to protect their own interests from those whom James Madison called "ruling factions". Beard

believed that the authors of the "Federalist" could not hide the fact that they considered the protection of property as the essence of freedom. Disclosure of the economic motives of the "Founding Fathers", their interests, contributed to the demystification of the moral character of the Constitution.

In the 20-40-ies XXth century in the US an economic approach to legal research has been applied to analyze legislation in areas that explicitly regulate economic relations; antitrust and tax legislation, corporate law, the securities market, trade policy and the problems of providing public services. Legal realists believed that to understand the law it is necessary to use other social sciences, primarily the Economics, since these spheres have the greatest impact on each other.

Associated Juctice of the Supreme Court of the USA L.D. Brandeis (1856-1941) was the direct forerunner of such an influential direction in American jurisprudence as Law and Economics (economic analysis of law). It is the Brandeis (1911) brief that is named as a harbinger of this trend in the encyclopedic reference book "Law and Economics" edited by Backhaus (2005). According to the results of a survey of professors of Law, History and Political science conducted by the American Bar Association Brandeis is considered one of the four most outstanding judges of the United States.

The Muller v. Oregon case in 1908 is considered a landmark in the history of the State and Law of this country. According to it, almost the first decisions were made related to the prohibitions of discrimination on the basis of sex and the limitation of the working day of women. The plaintiff in this case sought that the US Supreme Court repeal the law of Oregon that established a limiting 10-hour working day for women employed in production and in the service sector. Speaking on the side of Oregon, Brandeis (1911) presented a brief to the court that amounted to more than 100 pages. Of these, only two contained the actual legal argumentation, the rest were statistics, reports of sanitary inspectors, quotes from books on social relations research, medicine, physiology, etc. The overall goal was to prove that more than 10 hours a day harms the health and life of women, and at the same time the people's health, morality and the well-being of the nation. Brandeis wrote that the reduction of the working day is beneficial to the industry itself, since it will raise the productivity of labor. The "mechanical logic" on which the previous jurisprudence relied, Brandeis opposed the arguments coming from the "new social reality", as it appeared not only to sanitary inspectors, but also Webb (1897) whose authoritative opinion was reported to the court.

This method, which until now is called Brandeis Brief, has become a model for subsequent appeals to the US Supreme Court in cases involving damage to the health and social well-being of individual and collective subjects. This method was subsequently successfully used in *Brown v. Board of Education case in 1954* to substantiate the adverse psychological impact of the segregated learning system on African American children.

Prominent theorist of the school of Law and Economics Posner (2004) drew attention to the dissenting opinion of Judge L. Brandeis in *New State Ice Co. V. Liebmann case in 1932* pointing to the "early criticism" associated with the fact that cases of freedom of contracts reflected a weak knowledge of economic theory.

Brandeis (1911; 1912; 1914; 1965; 1995) shared the position of the school of Legal realism - the direction of legal thought that especially flourished in the 1930s. Legal realism is regarded as a theoretical opposition to the schools of legal formalism, mechanistic jurisprudence. The realists argued that in reality the judges are more independent in their decisions than they themselves assume; they laughed at the idea that the case was solved with the help of logical deduction and that the solution stems from earlier decisions and previously adopted rules.

The legal concept by Brandeis in the domestic literature is referred to the sociological direction in the jurisprudence of the United States. At the same time, Legal realism as the theoretical basis of the non-original concept of Constitutional interpretation in the US was not a monolithic scholarly direction. It defined three trends: 1) critical-opposition, which sought to demonstrate the contradictions of classical legal formalism; 2) sociological, using empirical methods; 3) practical and political, which substantiated and implemented the reformist policy. Realistic jurisprudence is best known as functionalism - an attempt to understand Law in its own actual context, and also taking into account its economic and social consequences.

Brandeis was a supporter of the concept of "living Constitution" that is based on the idea of social change, the evolution of the legal system and the Basic Law. Its antitrust concept had a significant impact on the development of American law in general. In particular:

- in his opinion in *Liggett Co. V. Lee case in 1933* he stated that the prevalence of corporations in American life led many representatives of the current generation to the conclusion that the privilege of doing business in a corporate form has become an integral feature of the citizen. People take the vices of unlimited use of corporate mechanisms as an inevitable payment for the opportunity to enjoy the benefits of civilization. Property goes out of control, which eliminates many of the checks and balances that are formally involved in order to limit the abuse of wealth and power. Only the responsibility of many people for the development of business can ensure the moral and intellectual development of Americans, which is essential for rights and freedoms;

- to make a qualified decision, you need the appropriate conditions. With the development of business, the number of problems that need to be addressed increases. However, the heads of firms are less able to carefully study the facts to make such decisions. Such a situation is fraught with economic and social upheavals;

- business management has become a special profession requiring special legal regulation and development of norms of professional ethics. From his point of view, genuine success in business should be found in achievements comparable to the achievements of the artist, scientist, inventor or public servant. Satisfaction from business as a profession is incomparably a primitive gain of profit, gaining power or suppressing competitors;

- economic regulation must necessarily be accompanied by the development of labor and social legislation. In his article "Hours of Labor" Brandeis (1995) argued that the satisfaction of exclusively material needs cannot achieve civilized development. Therefore, strong and responsible trade unions are essential for running a honest business. Without them collective agreements will remain unilateral. If you adhere to the principle of fairness the parties to the employment contract should be in the same position. This means that workers must be organized, and their organizations must be recognized by employers as a condition for the peaceful development of the industry;

- economic and political decentralization ("localism"), expanding the competence of the states, which are "laboratories of democracy", should be supported by the movement in defense of the rights of consumers. In modern American scholarly literature all these initiatives are considered the remnants of the Progressive Constitution of the 1920s-1940s;

- publicity is rightly considered a tool for the treatment of social and economic ailments. If sunlight is the best disinfectant, then electric light is the most effective policeman. Industrial giants represent a potential threat, as they control the political sphere and violate the rights of consumers. He called for making the American society a choice either having democracy or wealth concentrated in few hands, both goals are unattainable.

The reason for this conclusion was, in particular, that at the end of the 19th century 25 millionaires sat in the Senate, almost a third of its membership, called by contemporaries "the club of millionaires." The leading senators-republicans of the late XIX century W. Allison, N. Aldrich, O. Platt and D. Spuner were lawyers of large corporations. As an active supporter and economic adviser to US President W. Wilson, L. Brandeis played a key role in the development of the Federal Reserve Act, as well as in the legislation on the establishment of the Federal Trade Commission. After consulting with Brandeis, Wilson said that the banking system should be public, not private in nature, it should be in the government's control so that banks are tools, not business owners.

The Federal Reserve Act approved by the US President on December 23, 1913, established the Federal Reserve System that acts as the Central Bank of the United States and granted the right to issue money in the United States. It was Brandeis who persuaded President W. Wilson to make a reasonable proposal that all the members

of the Federal Reserve Board of Governors be appointed directly by the President of the United States.

Brandeis stimulated the administration of President Wilson to draft bills related to the granting of rights to the Ministry of Justice related to the implementation of antitrust legislation. In 1914 the Federal Trade Commission Act established an independent agency of the US government responsible for protecting consumer rights and overseeing compliance with antitrust laws. Brandeis managed to persuade the President to support the Stevens bill, according to it the FTC received the right to issue orders to stop monopolistic activities (cease and desist orders) aimed at combating unfair competition in commodity markets. In 1921, by a decision of the Supreme Court, the right to determine unfair competition was submitted to federal courts.

5. Discussion

The study of the formation of the Constitutional Economics as a scholarly direction has controversial aspects. In particular, Kostyukov (2008) is sure that in any case it can be said that the category of the "Economic Constitution" reflects the normative aspect of the subject of Constitutional Economics and, accordingly, is covered by the latter as a broader category. The use of two concepts to study one set of phenomena seems superfluous and introduces ambiguity into the scholarly circulation. With this in mind, he proposes to adjust the proposed by Barenboim definition of the Constitutional Economics as a scholarly direction studying the principles of the optimal combination of economic expediency with the achieved level of constitutional development reflected in the norms of the Constitutional Law governing economic and political activity in the State due to its inaccuracy mainly due to the use of the term "economic expediency". In this regard, the following definition is proposed; Constitutional Economics is a scholarly direction, the subject of which is constitutional-legal regulation and economic development in their direct interrelationship; the impact of constitutional rules and principles on the process of adoption and implementation of economic decisions as well as the inverse correlation.

With this approach, Chirkin (2016) does not agree, stating that in some Russian legal works, to give significance to certain acts, they have long been given the high title of the constitution. It is a question of the financial constitution (the Tax code is sometimes meant, sometimes the Budget code), the Civil code is called the civil law constitution or similar, the Labor code is the constitution of labor relations, etc. Such terminology belittles the importance of the Constitution of the State as the Basic Law of the State, that consolidates and regulates, among other things, the foundations of economic relations in society and in the State.

In this case, as Alferova (2007) rightly concludes, the study and discussion of the concept of the Economic Constitution by the science community went through

several stages. At the initial stage, in addition to discussions about the name, the issues of the formal and material Economic Constitution were actively discussed. In the 30-50-ies, the topic of determining the boundaries of state intervention in economic life was also actual. The discussion arose again in the 1970s when the Constitution of Portugal in 1976 and the draft Constitution of Spain 1978 were discussed.

The views by Brandeis and other representatives of the school of Legal realism, that were based on the concept of social liberalism, limiting the dominance of monopolies, protecting the people of labor and the consumers' interests are extremely relevant today. According to modern Russian economist Grinberg (2013) more than thirty years of domination of market fundamentalism with its demonstrative disregard of the interests of society as such led not only to the widespread increase in inequality and the social polarization fraught with explosions. It became obvious that erecting selfishness into the rank of public virtue seriously harms the ethical bonds of the society. At the same time, there is a growing need for an alternative model of a human social system.

So the architect of the Polish liberalization of the 1990s Balcerowicz (2007) justifies the radical restriction of State functions, arguing that the traditional concepts of economic theory - the concepts of "public goods" and externalities - do not give a clear answer to the most important question; what is the optimal scale of the State? These concepts are inconsistent with the real situation and tend to exaggerate the optimal "size" of the State. The same can be said about most theories of modern political philosophy, including the famous works of Rawls (2008). The State that guarantees and actively defends the maximum level of economic freedom - a limited state - ensures better functioning of the society compared to other models of the state system, which are characterized by a broad understanding of state powers, including those that prevail today in the West.

In his book “State-Building Governance and World Order in the 21st Century”, the American philosopher, sociologist and futurist Fukuyama (2006), who believes that only states and exclusively states are able to unite and expediently place the forces of securing order, adheres to the opposite position. These forces are necessary to ensure the rule of Law within the country and preserve the international order. Those who advocate "the twilight of statehood" - whether they are advocates of the free market or committed to the idea of multilateral treaties - should explain what exactly will replace the strength of sovereign national states in the modern world. In fact, this chasm was filled by a motley collection of international organizations, criminal syndicates, terrorist groups, and so on, which may have, to some extent, power and legitimacy, but rarely both. For lack of a clear answer, we need only return to a sovereign national state and again try to understand how to make it strong and successful.

6. Conclusions

Serving the theoretical and practical basis of the Constitutional Economics, the concept of state regulation of the social and production sphere was aimed at forming the legal basis for antimonopoly policy and had a significant impact on the development of labor, social and antitrust legislation.

Brandeis brief, that is rightly considered the forerunner of the Constitutional Economics, was developed by the author in the struggle for the social and labor rights of employees of wage labor, which were not directly consolidated in the US Constitution.

It is on the basis of the decision of the US Supreme Court in *Muller v. Oregon case in 1908* affirmed the principle of state regulation in the sphere of economy. Brandeis defended the interests of the state of Oregon, whose authorities used fines against the employer - the owner of laundries, who violated the rights of female workers. In substantiating his position, Brandeis made a significant contribution to the Constitutional procedural law of the United States. Instead of presenting brief formal legal opinions to the court, defendant's lawyer Brandeis based on the methods of Sociology of law made a very convincing extensive study, in which statistical, medical data and expert assessments were widely used. On their basis, the author concluded that women are a weak side in labor relations, while "their bodies are in the public domain, which requires legal protection against excessive labor." In this regard, the public interest in public welfare should take precedence over the areedom of contract guaranteed by the 14th Amendment to the US Constitution.

References:

Alferova, E.V. 2007. Book review: Andreeva G.N. Economic constitution in foreign countries. M., Nauka, 268 p. Social and Human Sciences. Domestic and foreign literature. Series 4, State and Law, Abstract Journal, 2, 39-43.

Andreeva, G.N. 2006. Economic Constitution in foreign countries. M.

Backhaus, J.G., Elgar, E. 2005. The Elgar Companion to Law and Economics. Cheltenham, Northampton.

Badura, P. 2005. Wirtschaftsverfassung und Wirtschaftsvervaltung. 2 Aufl. Tübingen, Mohr Siebek.

Balcerowicz L. 2007. Towards a limited state. Translation from English. M.

Berlyavsky, L.G. 2017. Formation of antimonopoly legislation in the United States. Competition law, 2, 9-13.

Bondar, N.S. 2017. Economic Constitutionalism in Russia: Essays on the Theory and Practice.

Brandeis, L. 1911. Testimony before the United States Senate. Committee on Interstate Commerce, December 14.

Brandeis, L. 1912. Business - The New Profession. La Follette's Weekly Magazine, 4(47).

Brandeis, L. 1914. Other People's Money and How Bankers Use It.

Brandeis, L. 1965. The Curse of Bigness: Miscellaneous Papers.

Brandeis, L. 1995. Hours of Labor. Reprinted in Brandeis on Democracy 91, Philippa Strum.

Charales, A. 1913. Beard. An Economic Interpretation of the Constitution. N.Y., The Macmillan Company.

Chirkin, V.E. 2016. On the terms "Economic constitution" and "Constitutional Economics", as well as on Russian and Western science. Constitutional and Municipal Law, 3, 11-13.

Cyrino, A.R. 2007. Dirigismo e seu contraponto na Constituição de 1988. Nota sobre as teorias da constituição econômica. XXXIII Congresso nacional de procuradores de Estado: A descoberta de novos caminhos justiça para un novo mundo (De 07a 11 Outubro de). – Retrieved from http: //www.congressoprocuradores.com./br/procuradores/tesiss/TP%2045.PDK.

Fukuyama, F. 2006. State-Building Governance and World Order in the 21st Century. M.

Graff, H.E. 2002. The Presidents: A reference history. Thomson Gale.

Grinberg, R. 2013. Find a way out of the worldview impasse Academy. Weekly of Science and Education of the South of Russia, 11 May.

Hall, K.L., Ely, J.W., Joel, B.Jr. 2005. The Oxford companion to the Supreme Court of the United States. New York.

Hajiyev, G.A. 2010. Constitutional Economics. M.

Hajiyev, G.A. 2002. Constitutional principles of market economy: Development of the foundations of Civil law in the decisions of the Constitutional Court of the Russian Federation. Monograph.

Heckscher, A. 1956. The Politics of Woodrow Wilson: Selections from his Speeches and Writings.

Kostyukov, A.N. 2008. Constitutional Economics in Russia: Some Ways of Improvement. Bulletin of Omsk University. The series "Right", 3(16), 13-22.

Nguen, Khan Bui. 2007. Das Wettbewerbsrecht im Rahmen der Wirtschaftsverfassung Vietnams unter Berücksichtigung der deutschen und europäischen Wirtschaftsverfassung. Potsdam, Frank & Timme.

Posner, R. 2004. Economic analysis of Law, 2(1), St. Petersburg.

Rawls, J. 2008. Justice of Fairness. Stanford Encyclopedia of Philosophy.

Richard, C.S. 2005. The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940. University of Virginia Law School, Public Law and Legal Theory Working Series, 21.

Shakhov, A.N. 2011. Economic analysis of law: prerequisites, formation, essence. Bulletin of the AmSU, 52, 1-5.

Vergotini, G. 2012. La constitución económica Italiana: Pasado y actualidad. UNED, Teoría y realidad constitucional. Madrid, 29, 339-354.

Webb, B. 1897. Industrial Democracy. London, New York, Longmans, Green and Co.