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Conference Proceedings

Petr Mrkývka (ed.)

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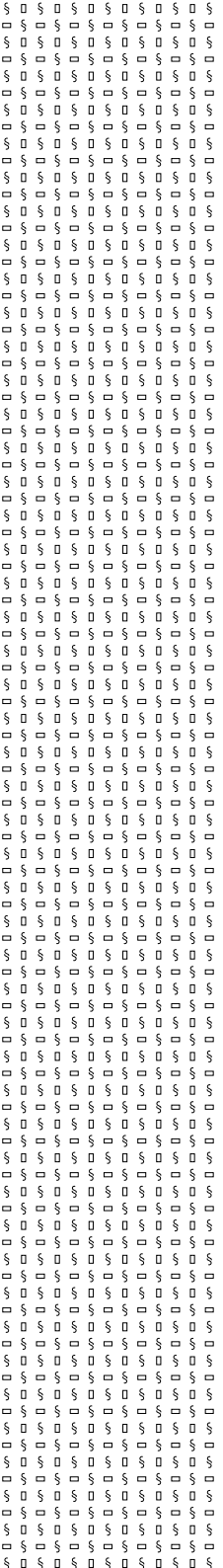

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POST-SOVIET CONCEPTIONS OF THE SYSTEM OF FINANCIAL LAW: PHILOSOPHIC-METHODOLOGICAL ANALYSIS

Petro Patsurkivskyy [1]

Abstract

The article deals with the analysis of a scientific research status of the problem in the science of financial law from the perspective of system approach. It is shown that the post-soviet science of financial law still understands this law as, a determined by the environment, mechanical aggregate of legal norms created or authorized by the state. It is proved that in post-soviet financial law there remained all three basic conceptions of financial law formulated by soviet legal scholars: fund conception, institutional conception, subject conception. It is substantiated that the system philosophic-methodological approach should be applied for true scientific cognition of the system of financial law as a procedural reality.

Key words

System of financial law; fund conception of the system of financial law; institutional conception of the system of financial law; subject conception of the system of financial law; system philosophic-methodological approach.

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1 Introduction

The most important characteristic of the whole post-soviet science of financial law still remains its traditional commitment to the positivist tradition

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of legal studies. It found its most concentrated expression in etatist doctrine of financial law which associates the emergence of financial law exclusively with substantial state, with its requirements. That is why financial law, according to a given doctrine, is nothing but **state financial law,** with the following inherent *substantial characteristics*: a) *attribution* of financial law to the state (*public character of financial law* is explained this way by a given cognitive tradition); b) financial-legal *sovereignty of state*; c) *lawful issue* (establishment by operation of law) of financial-legal norms; d) *coercive character* of financial-legal duty; e) *asymmetry* of financial law; f) special, punitive on the part of state, and *sacrificial* on the part of its counterparty to financial-legal relation, character of responsibility for violation of finance-legal sovereignty of the state; g) *paternalism* as a *functional* characteristic of state financial law.

In other words, financial law of a substantial state – is the whole world of its substantive values, in the light of criterion requirements of which, state counterparties to financial-legal relations are not of inherent value, being for the state a *means*, *not a purpose* to achieve its own objectives. It is a concerted, more over – a unified position of the adherents of all the conceptions of etatist doctrine of financial law. And only in approaches to the systematization of positive financial law of the substantial state their positions are traditionally divided into several separate viewpoints on a given problem.

The level of scientific development of the problem in the post-soviet science of financial law can be defined as an initial, establishing one, since for a quarter of a century there has been a related publication of a special monograph by E. D. Sokolova (Sokolova, 2006) in the Russian Federation, and in Ukraine A. A. Lukashev (Lukashev, 2011) defended respective doctoral thesis. Not considering the research material renewal, the philosophic-methodological approaches applied to them remained soviet (elementarist approach to the research of the system), and the conclusions – also, paradigm Marxist ones.

They gave neither renewal of philosophic-methodological approaches to the problem investigation, nor essential increase in new scientific knowledge on the cognoscible subject.

The objective of a present publication is the research, from philosophic-methodological perspectives of system approach, of basic conceptual

concepts, their nature and distinctive features, investigation of their relationship and divergence, and also, the reasons of their emergence and persistence.

2 Fund conception of the system of financial law

Fund conception of the system of financial law was historically the first to emerge. Its author is commonly thought to be Efim Abramovich Rovinskiy (Rovinskiy, 1940: 29-48), though many soviet academics in the field of financial law suggested the similar ideas long before him. In the context of that time it was a natural phenomenon for the soviet legal scholars, since a general methodological directive for them was a postulate that "economic structure of a society" and "law" correlated with each other as a "real basis" and "juridical superstructure" (Marks, Engels, 1958: 6).

Fund conception of the system of financial law was finally formed in the course of the first All-Union discussion of legal scholars on the problems of the system of soviet law in general. In the context of the system of financial law the following conclusion of E. A. Rovinskiy proved to be the key one: "The principle of planned accumulation and planned distribution of **state funds** is *in our concept* (emphasis added – P. P.) crucial also in the establishment of internal system … of financial law of the USSR" (Rovinskiy, 1940: 34). The most obvious and, at the same time, fundamental disadvantage of a given philosophic-methodological approach to the systematization of a positive financial law of the state was the fact that, in this case, the *criterion of systematization* of legal norms turned out to be extralegal, in essence occasional, which was in outmost contradiction in requirements of *general systems theory*. That is why, the list of the institutions of financial law defined by the above mentioned methodological approach, was not only unlike that of its adherents' but, very often contradictory and even mutually exclusive.

Nevertheless, in the post-soviet period of financial law development by virtue of both, *thinking inertia*, influence of *established tradition of law cognition,* and many other reasons and factors, the given approach to the systematization of positive financial law of the state was preserved and its sympathizers retain a hold on above mentioned criterion without any its essential changes. Among a large number of these legal scholars the brightest and

the most consequential successor of *fund conception* of the systematization of financial law is the founder of Kazakhstan post-soviet scientific school of financial law Alexey Ivanovich Khudyakov. A. I. Khudyakov's reflections on *philosophic-methodological grounds*, *criterions of formation* of the system of positive financial law of post-soviet states are the most logical and reasoned, conceptually consistent, but like the soviet fund conception, they are *doctrinally doomed*, because *he seeks the criterion of systematization of positive financial law of state out of the law domain*. Particularly, in one of his works at the beginning of XX c. A. I. Khudyakov speaks, as the matter of fact, that in the context to the system of *special part of financial law* in legal science there has been formed a conviction, according to which financial system of state is embodied in the system of financial law as objectively existing economic phenomenon. And, in his opinion, it should be taken as proved.

Nevertheless, L. I. Khudyakov stipulates that there arise two problems as minimum. Firstly, the structure of financial system, though it is a real "objectively existing economic category" (and not merely "category", but also a phenomenon of objective reality), is not revealed to a full degree with certainty and without controversy, neither by economic nor by legal sciences. As a result, A. I. Khudyakov notes, in different literature sources there is presented a wide range of institutes included into this system. Secondly, the concept "financial system", continues he, has essentially different meaning depending on what it covers: *only state financ*e or *finance in total* (i. e., both state and private). And it again brings us back to the central question, what is the very object of financial law: finance in total or state finance only? Financial-legal science, writes A. I. Khudyakov, is likely to incline to the last variant, but once looking at the lists of institutions of special part of financial law available in legal literature, it is not difficult to notice that many of them mediate specifically private finance. Moreover, among the numerous works on financial law there are no even two, summarizes he, adhering to the same list. That is, the question of the structure of special part of financial law refers to controversial ones (Khudyakov, 2001: 101).

Special scientific literature on financial law in most cases really points out its following institutes: budget law; tax law; non-budget funds; finance of state enterprises; state revenues; state credit; property and personal insurance

(sometimes only its organization is formed); public expenditures; bank credit; monetary circulation and payments; currency regulation (Voronova, 1998: 53-56).

A. I. Khudyakov criticizes the abovementioned, typical for post-soviet science of financial law, classification of norms of positive financial law as one that "sins by grave disadvantages", specifically, in his opinion, both state and private finance are denoted as the object of finance law[2]. That is why, A. I. Khudyakov considers their integration in financial law in the function of institutes of its special part to be incorrect, since only government finance can be the object of financial activity of the state (Khudyakov, 2001: 101-102).

Moreover, A. I. Khudyakov notices, that the system investigated is characterized by the fact that while constructing it, there was defied one of the basic methodological principles of systematization, according to which phenomena grouping in forming classified series must be performed on the basis of a uniform criterion. In the above case financial-legal institutes are formed by various criterions. Thus, some of them are selected on grounds of corresponding monetary assets fund availability (budget law, non-budget funds, finance of state enterprises), the characteristic of cash flow as revenues or expenditures (public revenue, public expenditures) is taken as the basis of others, selection criterion for the third is the method of financial activity of state (tax law, state credit), the forth represent type of entrepreneurial activity (insurance, bank credit), the fifth – terms of cash flow and currency circulation (monetary circulation and payments, currency regulation). A. I. Khudyakov summarizes: "It is the same as dividing people into the women, the tall, the blond and the snub-nosed in one classification series" (Khudyakov, 2001: 102). As a result of chaotic use of system-building criterions of the system, the system proper does not exist, numerous inconsistencies, stratifications and doublings emerge, then it is impossible to determine the subject of what legal institute this or that social relation is.

At last A. I. Khudyakov asserts that the existence of any legal institute included in special part of financial law means the availability of a specific

[2] Herewith he points at the examples of property and personal insurance, bank credit which in terms of market economy represent, as a rule, variety of private enterprise activity and are exercised generally by public bodies – private insurance companies and banks – and based on privately owned funds.

group of social relations relatively separated from other social relations and distinguishing from others by something essential. This group of social relations, according to the approach of A. I. Khudykov, forms this or that legal institute acting as the subject of its legal regulation. Thus, the question of types of the institutes of special part of financial law, concludes he, is the *question of systematization of social relations* which are the subject of financial law. Herewith, it is obvious that one and the same financial relation, logically notes A. I. Khudyakov, can not be the subject of different legal institutes at the same time (Khudyakov, 2001: 102). But the best criterion of positive financial law norms systematization, in his opinion, is the availability of a corresponding fund of monetary assets: the fund is – the financial institute is, the financial institute is – there is a corresponding financial-legal institute. This is A. I. Khudyakov hypothesis. But the given criterion did not help even him to create a scientific system of financial law: in the textbook on Special part of financial law he highlights *not the institutes* of positive financial law but *chapters,* without giving explanation whether given notions are identical in their sense or not, and if not, then how they interrelate with each other (Khudyakov, 2001: 101, 102, et al.).

A. A. Mamedov (Mamedov, 2005), G. F. Ruchkina (Ruchkina, 2003), A. A. Nechai (Nechai, 2006) and many other post-soviet legal scholars share this approach to the systematization of positive financial law of the state. Though, during the post-soviet period, neither they nor other post-soviet scientists – their sympathizers – enriched *fund conception* of the system of positive financial law of the state with anything essentially new and significant. Since its emergence and till nowadays it has been beneath any scientific criticism in the quality required.

3 Institutional conception

Institutional conception of the system of positive financial law of the state emerged in the final period of the USSR existence. It was produced by the same E. A. Rovinskiy, being definitely disappointed in the decline of his years in a system-building potential of *fund conception.* Developing his approach to the comprehension of the system of positive financial law of the state E. A. Rovinskiy came to the conclusion that true systematization of financial-legal norms is associated with their classification "in

terms of specific peculiarities of uniform financial relations" (Rovinskiy, 1960: 78). Nevertheless, he does not provide even separate examples of the so-called specific peculiarities, moreover, any *qualitative, substantial differences* of uniform financial-legal institutions either in a given work or any other researches. More then twenty years after E. A. Rovinskiy, a special attempt of a theoretic-methodological grounding of institutional conception of the system of positive financial law was undertaken by S. D. Tsypkin. He was an opponent to identification of financial system of the state with the system of the state funds of monetary assets and understood it exclusively as an "aggregate and interrelation of just **financial** (economic) **relations**" and affirmed that the propriety of that very perception of financial system is undoubted (Tsypkin, 1983: 4, 5, 6, 9). Analyzing financial system of the USSR at the turn of 70s – 80s of XX c. S. D. Tsypkin summarizes, that in the country there has been worked out the five-link model of this system (Tsypkin, 1983: 18).

What is the nature of a given link – essence and phenomenon (internal and external), cause and effect, substance and form or any other? The science of financial law can consider any answer to this question as a true one, depending on the approach of the researcher to understanding public nature of the institution of financial law. In other words, choosing any of the variants of the answer the legal scholar-financier in this way reveals the core of his approach to a given problem. As a result, not only the pluralism but a broad disperse of scientists' opinions on the structure of the institutes of financial law is unavoidable, from several institutes as by S. D. Tsypkin, to many dozens and even hundreds of institutes of financial law (Patsurkivskyy, Havrylyuk, Hohulyak, 2006: 35-44). But the main disadvantage of the *institutional conception* of the system of positive law of the state is even not in it, it lacks precision, qualitative determinacy and unity of the *criterion of systematization of financial-legal norms* much more than the *fund conception*. Consequently, it loses true scientific character and practical significance, and transforms into the conversation of the *blind* with the *deaf*.

The brightest and the most consecutive representative of the *institutional conception* of the system of financial law in the post-soviet science of financial law is *M. V. Karaseva*. She permanently considers the subject of legal regulation in the sense of corresponding public relations to be the criterion

of financial-legal institutions construction (Karaseva, 2000: 52). Sharing traditional position of S. S. Alekseev (Alekseev, 1972: 140) to a given problem, she notes, that financial-legal institution should be understood as a **legislatively selected** body of legal rules providing complex regulation of a certain group of public relations (Karaseva, 2000: 142). M. V. Karaseva consistently and with reason criticizes fund conception of the institutes of financial law. She shows that several institutes of financial law are determined by some funds of public financial resources simultaneously, and at the same time some funds of public resources cause the emergence of several institutions of financial law (Karaseva, 2000: 55). Also, M. V. Karaseva was not able to give an exhaustive list of the institutes of financial law in the Russian Federation.

Besides M. V. Karaseva, the institutional conception of the system of positive financial law of state is supported by the following well-known post-soviet legal scholars, as Yu. A. Krokhina (Krokhina, 2007), G. V. Petrova (Petrova, 2004), E. M. Ashmarina (Ashmarina, 2004), A. A. Yalbulganov (Yalbulganov, 2007: 38-39), et al in the Russian Federation, L. K. Voronova (Voronova, 2006), N. P. Kucheryavenko (Kucheryavenko, 2004), E. P. Orlyuk (Orlyuk, 2010), N. Yu. Prishva (Prishva, 2003), L. A. Savchenko (Savchenko, 2001), E. A. Alisov (Alisov, 2006), I. B. Zaveruha (Zaveruha, 2006) et al in Ukraine, most scientists in the Republic of Belarus, Kazakhstan and other post-soviet states. They all adhere to one and the same philosophic-methodological approach to the systematization of positive financial law of state, and at the same time each of them separately gives the list of institutes of financial law, not repeating others. Even before the conventional truth, here is dominating a fairly impressive distance which has not been reduced for the last decade.

4 Subject conception

Subject conception of the system of positive financial law emerged much later than two previous and became a natural response of the part of scholars in the field of financial law to the impossibility of an adequate solution of acute practical and theoretical problems of systematization of financial law of state. Thus, the transformation of understanding the financial law of state has taken place among the part of soviet academics till the mid

of 70s of XX century. They started identifying the financial system of state not with different funds of state financial resources (fund conception), or the institutes of financial public relations (institutional conception), but with *bodies* and *institutions* exercising financial activity of the state (Ruvkina, 1974).

This phenomenon caused a corresponding reaction among legal scholars. In particular, E. A. Rovinskiy, mentioned above for several times, yet again changed his previous comprehension of the determining factors of the system of financial law and their nature. In the textbook on financial law of that period he wrote, that "**financial system as an aggregate of state bodies and institutions** (emphasis added – P. P.) – is a branching network of financial bodies and credit institutions which perform a direct management of financial activity of the state. System of financial bodies is headed by Union-Republic Ministry of Finance of the USSR" (Rovinskiy, 1978: 9).

That is, at the end of his scientific life E. A. Rovinskiy identified the notion of *financial system and systems of financial bodies*, reduced the first to the second, both in content and in a logic volume, which is, by all means, methodologically wrong.

At that time L. K. Voronova shared this approach (Voronova, 1988: 14).

From above mentioned it is obvious that active adherents of subject conception of the system of financial law E. A. Rovinskiy and L. K. Voronova in the end of 70s – beginning of 80s of XX c. did not propose new philosophic-methodological solutions of the system of financial law, but a direct borrowing of the public finance scholars' approaches and the attempts of mechanical adjusting them to the systematization of financial law. They, also, did not have evident supporters of subject conception of systematization of financial law in the science of financial law.

In post-soviet science of financial law the active attempts to reanimate subject conception of the system of financial law were undertaken at the level of doctoral dissertations by A. D. Selyukov (Selyukov, 2003) and N. A. Sheveleva (Sheveleva, 2005) in the Russian Federation, and A. T. Kovalchuk (Kovalchuk, 2007) in Ukraine. Nevertheless, they did not propose any new scientific solutions of this problem. It is clearly demonstrated, for example, by the last of mentioned authors A. T. Kovalchuk. His philosophic-methodological constructions actually copy L. K. Voronova's approach to the

problem, which she asserted at the turn of 70s-80s of the last century though, they are "wrapped" in the clothes of a "new word in the science of financial law". In particular, in the conclusions to the subchapter "Object and Subject of Financial Law" in his monograph he writes that "financial law is a determining "supervisor" of abovementioned relations [distributive and redistributive – P. P.] not directly, but by the **system of corresponding financial-legal institutions** (emphasis added – P. P.) – Ministry of Justice, Ministry of Economy, Central Bank, State Tax Administration, State Echequer Chamber, State Finance Monitoring Service, Accounting Chamber, Control and Revision Office and others" (Kovalchuk, 2007: 130).

Thus, post-soviet *fund, institutional* and *subject* conceptions of the nature of institutes of financial law and the criterions of their separations, i. e., systematization of positive financial law of state emerged and were entirely formed still in the soviet science of financial law. As philosophic-methodological analysis of given conceptions persuades, they are based on etatist understanding the nature of financial law as the right of the state only, and also proceed from pure Marxist, low, their authors' perception of the correlation of objective and subjective in the law. *Fund, institutional* and *subject* conception of the system of financial law are imbued with understanding the law as some *external superstructure* over *internal economic basis of the society*, and not as the relation of the form and the content. General for all three abovementioned conceptions is the absolute priority given to this or that, but unitary and, more over, extralegal factor as a criterion of the systematization of positive norms of financial law. The given criterion has been required **to be qualitatively defined, obviously different on the given grounds from all other consistent phenomena.** As consequence, the number of "institutes" of financial law grew unusually large and still keeps on increasing to infinity, and the number of "systems" of financial law is almost the same as of legal authors writing about it. (Patsurkivskyy, Havrylyuk, Hohulyak, 2006: 41).

5 Alternative approaches to the search of criterions of systematization of financial law

Philosophic-methodological barrenness of *fund, institutional* and *subject* conceptions of the system of financial law is recognized nowadays by a growing

number of post-soviet scholars though, only some of them made constructive actions logically subsequent of it. To this group I subsume first of all, an original post-soviet theorist of financial law of Yuriy Fedkovych Chernivtsi National University R. O. Havrylyuk, well-known author from Ural Academy of Law (Ekaterinburg) D. V. Vinnitskiy and myself, P. P. Patsurkivskyy.

R. O. Havrylyuk reasonably contributes the most "revolutionary" suggestions, side stepping them – means to foredoom the science of financial law to prolongation of its wasteland and stagnation. First of all, taking into account the problem discussed at this conference, it should be acceded to her conclusion, that financial law as the law on the whole, is not a mechanical aggregate of positive legal norms of the state, but a **procedural constructive reality**, that cannot be scientifically cognized on the basis of *classic* standards of scientific approach. For true scientific cognition of financial law, she asserts, only *non-classic* or *post-non-classic* standards of the scientific rigor are applicable. R. O. Havrylyuk substantiates that financial law in particular, as law on the whole, has *anthropo-socio-cultural nature*, thus, for its true cognition *instrumentally-based on needs philosophic-methodological approach* is required. R. O. Havrylyuk suggests to cognize the system organization of financial law by its fundamental attribute of *constructivity* (Havrylyuk, 2012: 281-295, 437-455, 633-654, 737-756; Havrylyuk, 2012: 165-173; Havrylyuk, 2012: 94-105). That is, the approach of R. O. Havrylyuk at paradigm level is different from *fund, institutional* and *subject* conception of the system of financial law. Also, a paradigm new, legal is the approach of D. V. Vinnitskiy to understanding the criterions of financial law systematization. In particular, he came to the conclusion that: "The separation of tax law in legal system as an independent branch is the result of *differentiation of legal substance* (Vinnitskiy, 2003: 128), both by *functional* and *objective* criterions". He also asserts that "the segregation of legal commonalities in either case is caused by the peculiarity of *functions* realized by a certain branch of legal system" (Vinnitskiy, 2003: 119). In its turn, D. V. Vinnitskiy subdivides functions of tax law into *substantial* and *instrumental* (Vinnitskiy, 2003: 120-127).

The author of these lines also drew attention to the necessity of the reconstruction of legal understanding and legal cognition on paradigm different fundamentals. In particular, we noted that in "post-soviet legal science

on the whole and in the science of financial law in particular, there was formed the situation, the same to the one in Newtonian physics of the end of XIX c., in cybernetics and genetics of 40s XX c., when an adequate apprehension of a new objective reality unavoidably requires a qualitative change of a research context, introducing principally new methods of cognition, distinctive by paradigm character" (Patsurkivskyy, 2006: 10).

Anew I enunciate and solve the basic question of the science of financial law: what is financial law in reality, whether it is a creation of socium or state, and if of the both, then what is the role of socium and what is the role of the state in the existence of financial law? Our answer is that law is objective in its nature, it is created by the society and the state creates only its legal form which in our case is called financial legislation (Patsurkivskyy, 2003: 91-102). Thus, the criterions of systematization of financial law, an the law on the whole, should be searched not outside of law but in it, relying on the general systems theory of N. Luman and philosophic-legal conceptions of underlying form of law by G. Spencer-Brown and R. M. Unger (Patsurkivskyy, 2010: 52-60; Unger, 1976; Spencer Brown, 1972; Luman, 2007; Luman, 2007).

6 Conclusions

Nowadays' domination of fund, institutional and subjective conceptions of financial law system throughout the post-soviet area convinces that post-soviet science of financial law, both Ukrainian and foreign, on the whole remains at Marxist philosophic-methodological positions of understanding law and its system-building factors. It comprehends law as *a mechanical body of legal rules,* created or authorized by the state, appealed to regulate this medium, in our case, public financial reality, which is nonsense in itself. In the systematization of positive financial law there is overemphasized the elementarist approach, the nature of which is adjusted to solve absolutely another tasks. Notwithstanding that financial law, as well as the law on the whole, presents procedural reality, it insistently remains to be cognized from perspectives of classical (mechanical) standards of scientific approach, destined for achievement of another purposes. Philosophic-legal conceptions of underlying legal form by R. M. Unger, G. Spencer-Brown

and system theory by N. Luman can and must be adequate and efficient approaches to the system nature and properties cognition of financial law and also, its system on the whole.

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