

Constitutionalization of tax law: the Ukrainian model

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Abstract

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CONSTITUTIONALIZATION OF TAX LAW:

THE UKRAINIAN MODEL

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THE UKRAINIAN MODEL

The article shows that during the evolution of human civilization, two opposite types of approaches for understanding taxes and the tax law were developed, and the nature of their constitutionalization. An incomparably widespread positivist approach comes from the fact that the tax and the tax law are attributes of the state. This cognitive tradition, under the constitutionalization of the tax law, understands positivism at the highest possible normative level of the constitutional duty of each to pay established taxes legally.

The opposite - anthropo-sociocultural - approach for understanding the nature of the tax law comes that the reason for its existence is the public needs of individuals, and therefore it arose and developed as a human right. The necessity of its constitutionalization, in this approach, is due to the fact that, in accordance with the key idea of the constitution, its true nature is human rights - this is the main part of the constitution, its bearing structure. The constitutionalization of human right to taxes means giving it the highest constitutional-legal - regime of protection, since it belongs to the most important constitutional - social values.

Anthropo-sociocultural approach has been chosen as a methodological basis for the study of the Ukrainian model of the constitutionalization of the tax law. It is a set of such heuristic tools, through which the tax law is studied as an attributive multidimensional phenomenon of the philosophical and methodological positions of man as the sole creator of society and its full subject through the sociocod of public needs, determined by the appropriate type of culture.

The specific tasks of this article are to analyze the legal structure of the Ukrainian model of the constitutionalization of the tax law and to find out its general features and national peculiarities. It is grounded that the constitutionalization of tax law in Ukraine is marked as common, for all states, approaches for this phenomenon, as well as national peculiarities.

The most important general feature of the Ukrainian model of the constitutionalization of the tax law is that its constitutional and legal structure is determined by the solidarity nature of this right, although the Constitution does not contain direct indications on this.

The most important feature of the Ukrainian model of the constitutionalization of the tax law is its fixation with the help of a shortened legal relationship as a general obligation of all individuals and legal entities. In the context of the concrete historical reality that has

developed in Ukraine today, this is the most optimal legal model for the constitutionalization of the tax law.

Keywords:

constitutionalization of the tax law; anthropo-sociocultural approach; the tax law as a kind of human rights; the Ukrainian model of the constitutionalization of the tax law.

1. Introduction

Researchers of the tax law have long noticed that the taxes and the tax law belong to the most unique achievements of human civilization. Being a natural product of a certain level of its maturity, further the tax and the tax law transformed into one of the attributive conditions of all subsequent progress of mankind [1: 727]. In the course of a long, even from a historical point of view, period of the evolution of tax and tax law at different times and among different peoples, two opposite types of approaches developed, both for understanding the nature of these phenomena, and for understanding the nature of the constitutionality of the taxes and the tax law [1: 726-746].

The most widespread of them is the positivist approach, which comes from the fact that the tax is an attribute of the state, and the tax law also belongs exclusively to the state [2: 144, 3, 4, 5: 10-85; 222-263]. This cognitive tradition about the constitutionalization of the tax law implies "a unique process of permanent objectification and subsequent arrangement" "of the constitutional duty of everyone to pay legally established taxes and fees" [6: 5]. The author of this legal construct V.I. Cruss believes that "the only legitimate subject of constitutionalization in the strict sense of this concept in relation to the legal system of the Russian Federation should be considered the Constitutional Court of the Russian Federation" [6: 5].

According to P.S.Patsurkivskiy and O.V.Savkina, the supporters of the positivist approach for the understanding of the tax law, as a result of the study of the tax-legal doctrine of modern Ukraine, consider that all post socialist states have the same "post -Soviet model of the tax law" [7: 192].

They analyze it "with the help of the theoretical arsenal of Soviet scholars of finance lawyers" [7]. In fact, the practice shows that each post -socialist country has already developed its own model of the tax law and even the tax culture [1, 8, 9], and their own legal features and even models for the

constitutionality of this right, are significantly different from each other [10, 11]. The anthropo -sociocultural approach for the knowledge of the nature of the tax law comes from the fact that "the reason for the existence of the tax law is public (common for all individuals or most of them) needs of people, and not the needs of the state, therefore, it arose and developed as a human right. The time of its appearance coincides with the appearance of human civilization, therefore, the state tax law was preceded by a long, even historically, pre-state period of its development as human rights "[4: 6- 7]. This cognitive tradition for the constitutionalization of the tax law means "the special fixing of this right [human. - A.H.] in direct form in the

constitution of the appropriate state "[4: 526]. We fully share the conclusion of R. O. Gavrylyuk that the necessity of fixing the human right to the taxes as natural human rights, as well as other natural human rights, in the constitution of the state and is due to the fact that, in accordance with the key idea of the constitution, its true nature of human right - this is the main part of the constitution, it is its bearing structure. Without a fixation of universally recognized human rights there is no constitution. "It is not just well-known postulates, axioms," summarizes R. O. Gavrylyuk, "and the highest values for all people, all democratic societies in the world, having sufficient theoretical substantiation

and practical confirmation" [4: 527]. We have to mention the principled position of a famous German constitutionalist in the field of regulating public finances K. Fogel: "In this area," he wrote, "it is necessary to be guided by the general

regulation of the basic law by analogy with the guarantee of rights and freedoms, as well as the principles of legal statehood and legislative competence. For the financial system of the existing general regulation, specific conclusions are made, they relate to the existence of financial law. Along with the written law stands, thus, wider, unwritten financial law of the Basic Law. In general, the constitutional financial law can not depend on the randomness, according to

which some items are found in the text of the Constitution full reflection, and others are not "[1 2]. The only legitimate subject of the constitutionalisation of the tax law in accordance with the anthropo sociocultural approach, based on the terminology already mentioned above by V.I. Kruss, is the parliaments of countries [4: 528-540].

As an methodological basis for the study of the Ukrainian model of the constitutionalization of the tax law, we chose an anthropo -sociocultural approach. By definition, R.O. Gavrylyuk, this "approach is a set of such

heuristic tools, through which the tax law is studied as an attributive man dimensional phenomenon of the philosophical and methodological positions of man as the sole creator of society and its full subject through the sociocod of public needs, determined by the appropriate type of culture".

But we have no right to neglect such a feature of the Ukrainian tax culture that , as found by P.S.Patsurkivskiy and O.Savkina, throughout its existence and development there were human -centeredness and etatism and they still remain [7: 198]. Therefore, as an important methodological supports, we will also use the original philosophical, methodological and factual findings, published in the articles below by P. S. Patskurkivskiy [2], R.O.Gavrylyuk [3], D.V.Kostya [13] and V.Raritska [14].

The specific tasks of this article are to analyze the legal structure of the Ukrainian model of constitutionalization of the tax law and to find out its general and specific features.

2. Theoretical Background

Patsurkivskiy P.S. argues that the natural goal of tax and financial law as a whole, as it follows from the current Constitution of Ukraine, "is to provide a socially necessary compromise on public finances between producers of public goods and public authorities, establishment and maintenance of balance of their natural rights and legitimate interests, creation of legal mechanisms and constructions, due to which actions will become more fully satisfied on the basis of the principle of competition of the declared social needs, these needs, on the one hand, and do not oppress, but rather increase the opportunities of the private sector of social production to meet their own needs and to produce at the same time a more

important public financial product that would more fully meet the growing public needs of society in public finances, on the other hand "[15: 13, 16: 722].

3. Argument of the paper

The modern tax and legal doctrine of Ukraine is formed on the basis of the postulate that the Constitution of Ukraine has a special place in the regulation of tax legal relations and is considered the main source of the tax law (the Constitution of Ukraine contains not only tax and legal norms, but also enshrines the fundamental values of society, which must be necessarily taken into account when establishing taxes and fees). A meaningful analysis of the Constitution of Ukraine shows that it directly establishes certain

principles and norms that are directly dedicated to the legal regulation of public finances, a large part of which is formed in a rather general and abstract form, in many cases, using evaluative concepts. According to Article 67 of the Constitution of Ukraine, "Everyone is obliged to pay taxes and fees in the order and in the amount established by law" [16: 721]. This constitutional norm is a peculiar benchmark for all tax legislation, it shows the social and legal essence of the tax system, shows the most important legal features of taxes and fees, makes it possible to distinguish tax payments from other legal phenomena.

The constitutional concept of "tax" (in the meaning of Articles 1, 3, 8, Chapter 3, 4, Article 13, Article 67 of the Constitution of Ukraine) gives reasonable grounds to believe that the collection is not a sign of tax.

According to Article 67 of the Constitution of Ukraine, the tax is not levied and not seized, and the taxes that are levied are not a tax [17]. According to the Constitution, the tax is a payment, an active action and the consequence of the voluntary act of the taxpayer. The term "collection" has a different legal nature and several meanings: firstly, the compulsory withdrawal of non-paid monetary amounts (taxes) within the established period; and secondly, the collection sometimes refers to a certain amount of money to be paid (withdrawn) in order to compensate for the damages. In the third case, the term "collection" is used to indicate the penalties for the wrongful acts. Consequently, on the one hand, a tax (in

accordance with Article 67 of the Constitution of Ukraine) is a payment - an active action of the payer who shows his will; and on the other hand collection - an active action of a public entity that shows its will in relation to a private entity. But the payment and collection of the same funds cannot occur at the same time. If the payment is made, then what is the reason to collect it?! Conversely, if there is a collection, there is no need to make a payment [18: 872-873].

According to the content of the Constitution of Ukraine, relations between institutions of public authority (state, territorial community) and individual (taxpayer) are based on the principle of formal equality. In tax relations, fiscal authorities are not able to subjugate the taxpayer to his act of power expression of will if each element of the content of this act will not be directly derived from the specific normative requirements of the legislator. According to the Constitution of Ukraine, the appointment of a tax law is not to legitimize the unlawful seizure, because of the rule of the state, of excessive part of the newly created added value in the private sector of social production for the benefit of the state, but providing a socially

necessary compromise of public and private needs and interests of individuals. The norms of the tax law, according to the Constitution of Ukraine, reflect the freedom of the state, other public entities in the tax legal relationship, contain requirements to another obliged party - taxpayers - to fulfill the tax obligations. However, this obliged party is only in the functional dependence on the power subject and organizationally in no way subjected to it [19: 138]. Such a functional dependence does not give grounds for treating the contractor of the state in tax law as a "secondary" entity and resort to state arbitrariness. Consequently, the Constitution of Ukraine fixes the most important properties of taxes and the tax system as a

whole. At the same time, the systematic analysis of the Constitution of Ukraine shows that a number of fundamentally important problems of the tax system remains outside the constitutional regulation. Thus, the Constitution of Ukraine does not establish the rights of the individual in the tax legal relations. It only contains in Chapter II "Rights, Freedoms and Responsibilities of a Person and Citizen" Article 67, which establishes the constitutional duty to pay taxes and fees established by law. Thus, in accordance with the Constitution of Ukraine, the constitutional obligation to pay taxes, taking into account the principle of establishing taxes and fees exclusively by law, forms the legal basis for the constitutional status

of the taxpayer. Therefore, it has to be noted that the rights of taxpayers are established only on the basis of the general rules of the relationship between the individual and the state. At the same time, the consolidation of the constitutional duty to pay taxes and fees in Chapter II "Rights, Freedoms and Responsibilities of a Person and Citizen" of the Constitution of Ukraine shows that this constitutional duty follows, first of all, from the constitutional rights and freedoms of the individual, and because it has a character derived from them and cannot violate them. This paradigmatic innovation in understanding the nature of the tax law and its constitutional construction was, the first in the whole post-socialist space, proposed by R.O.Gavrylyuk

[20]. In other words, the constitutional structure of the duty to pay taxes and fees established by law requires the protection of the rights and legitimate (in particular, property) interests of taxpayers, justification of the legality of the alienation of a part of private property when paying taxes. This article is important for constitutional law, both in terms of protecting the constitutional rights and freedoms of individuals, and from the point of view of protecting the constitutional order of the state, the necessary condition

for the existence of which is taxes; the criteria of the true-faith, legality and constitutionality of the tax system. Not including of the rights of the individual in the tax relations directly into the Constitution of Ukraine undoubtedly negatively affected the extent of their constitutional protection in comparison with all other human rights directly recorded in it.

At the same time, it should be noted that in the field of financial law, there are other views on this issue. Gavrylyuk R.O. convincingly proves that voluminous and, especially important, qualitative characteristics of the constitutional regulation of the tax system are determined not by the number of constitutional articles directly dedicated to these issues. The role of the Constitution of Ukraine for the tax system is not limited to the fact that, being the Basic Law, it contains norms of the appropriate branch content.

Equally important is the fact that the Constitution of Ukraine is a peculiar benchmark, criteria for evaluating the whole system of norms and institutions of the legal system for their conformity to the highest values that have received constitutional consolidation.

The author argues that under current market conditions, tax law cannot be limited only by constitutional provisions directly related to taxes and duties, as this would mean not seeing the main things in the Constitution of Ukraine, distorting the essence of the constitution, ignoring its spirit and methodological potential. The author observes that the tax law in Ukraine is not limited only to constitutional provisions that directly carry out a positive legal regulation of these social relations, since this would mean not seeing in the Constitution of Ukraine the "fundamental, distorting the essence of the constitution of the state, ignoring its spirit and methodological potential" [1: 158].

Tax law is based on a constitutional basis, it is permeated by all, without exception, constitutional values and requirements. In Ukraine, taxes and fees are not deprived of the fact that their nature, content and application are valued through the prism of the basic principles of constitutional order and constitutional norms of the rights and freedoms of the individual. That is, being built into the system of constitutional coordinates, the tax system is subordinated to the axiological criteria of modern constitutionalism, which is based on the universal recognition of universal constitutional values as a common achievement of human civilization.

Gavrylyuk R.O. justified the concept, according to which the constitution of Ukraine, in a specific way, enshrines the rights of the

individual in tax legal relations. In particular, she writes that according to Article 67 of the Constitution of Ukraine "Everyone is obliged to pay taxes and fees in the order and in the amount established by law" [17], the obligations of the state are positively fixed, as well as the fact that any human right includes both its right to claim other individuals and its adequate obligation to other individuals in an active form of obligation. It suggests as a hypothesis that in such a shortened form - in the form of fixing only the legal obligation of the individual to pay legally established taxes formulated the right of the individual for taxes, which in its full formula includes both the right of a person's claim to other individuals, and the

actual legal obligation to them (which is activated after providing the original rights of the individual) [4: 535]. An important argument in favor of such a position is the understanding of Article 67 of the Constitution of Ukraine, according to the approach of R.O.Gavrylyuk, there is a systematic interpretation of this act.

First of all, let's pay attention to the paradigmatic role of Article 3 of the Constitution of Ukraine. The quintessence of this article is well-known - it states that human rights and freedoms and their guarantees determine the content and direction of the state's activities and that the latter one is responsible to a human for its activities, and the main duty of the state is to establish and provide the human rights and freedoms [4]. At first sight, a serious counterargument against the above proposed interpretation of Article 67 of the Constitution of Ukraine (on the general obligation of taxation for everyone) - as a shortened presentation of the human right to taxes, according to the same researcher of the tax law, is article 74 of section

III "Elections. Referendum "of the Constitution of Ukraine:" A referendum is not allowed for draft laws on taxes, budget and amnesty. " However, taking into account such a fundamental specificity of the public good (the taxes have their main purpose of ensuring it), as its indivisibility, as well as the related laws of the inappropriate need to finance their own public goods for the behavior of very many people, when it comes to providing public goods in very large human groups that are proportionated with the whole of society, she sums up, then the prohibition of referendums on tax issues, on the contrary, can be regarded as one way of real protection of the individual's right to tax in societies where there is low as the general legal

culture, and especially the tax and legal culture. Unfortunately, Ukraine still belongs to such societies [4: 536]. In the interests of such an interpretation of the constitutional prohibition of referendums on tax issues in Ukraine,

this extremely widespread in Ukraine author also gives other convincing arguments [4: 536-7]. In his analysis of the novels of the Constitution of Ukraine, directly or indirectly related to the constitutionality of human rights to taxes, Gavrylyuk R.O. pays attention also to the fact that the domestic constituent came in a new way to the definition of the legal nature of tax incomes of the State Budget of Ukraine and the legal construction of ownership of them. In particular, in clause 1 of Art. 95 of the Constitution of Ukraine, she pays attention to "the budgetary system of Ukraine is based on the principles of a fair and impartial distribution of social wealth between citizens and territorial communities" [4: 538 -9]. And the next paragraph 2 of the same

article states: "Only the law on the State Budget of Ukraine determines any expenditures of the state for general needs, the amount and purpose of these expenditures" [21]. In particular, based on the new philosophical and methodological approach proposed by the Constitution of Ukraine for the understanding of the legal nature of tax incomes of public budgets, it is obvious, R.V.

Gavrylyuk concludes, that their essential characteristics are multidimensional. First of all, they are the legal form of the economic essence of public finances. The latter one is that the tax incomes to the budget are depersonalised and acquire the character of the fund of general consumption, public wealth, in accordance with the terminology of the Constitution of Ukraine, the only purpose of which is the financing of public goods [4: 538-9].

Secondly, the constitutional and legal structure of public wealth, she summarizes, is a measure of the necessary behavior of the state in relation to public finances, established with the Constitution of Ukraine. Taxes, as well as any other legitimate incomes of the budget of Ukraine, can not be used lawfully for anything but exclusively for public needs, the amount and purpose of which are determined solely by the Law of Ukraine on the State Budget of Ukraine for the relevant year. As the system analysis of the Constitution of Ukraine, especially the first and second sections, proves that this measure also includes the constitutional and legal definition of the fiscal payments taxpayer's limit in order to maintain a balance between satisfying

private and public needs of the people [20]. Such a division of the possibilities of individual taxpayers between private and public consumption in a market society has received, among the scientists of the West, the name of the effective distribution of Pareto. This distribution is the principle of the individual's own right to tax. In terms of

each individual, the practice of its implementation deviates from the ideal in one direction or the other, but does not allow the state, even for the pretext of protecting the public interest, to legitimately violate the individual's right to taxes, especially as regards his legal obligations to other individuals.

Thirdly, according to R.O. Gavrylyuk, the constitutional and legal structure of public wealth is the measure of the freedom of individual taxpayers in the tax legal relationship with the state, as defined by the Constitution of Ukraine. The part of their property, which is not subject to the constitutional and legal regime of public wealth, a priori completely and unconditionally is in their full private ownership, and they have the right to independently carry out a complete set of powers of the owner. For the part of their property, which is subject to the constitutional and legal regime of public wealth, taxpayers can claim, in cooperation with other members of society, not as former private owners, but only as consumers of public goods

together with other same consumers, on the basis of the principle of competition of their declared public needs. The selection of these needs is carried out within the State by the Verkhovna Rada of Ukraine in the annual Law of Ukraine on the State Budget of Ukraine, at regional and local levels, in decisions on the annual budgets of the relevant public entities in Ukraine [4: 540].

But the state, according to the Constitution of Ukraine, R.O. Gavrylyuk makes a general conclusion, there is no right to own public wealth - it only manages and disposes of it on behalf of society and in its interests. Moreover, as it explicitly follows from Article 95 of the Constitution of Ukraine, the state in the constitutional and legal structure, the public wealth is an obliged party and authorized to carry out only actions that are stipulated in the Constitution of Ukraine. That is, it is not the actual owner of the State Budget of Ukraine, but only on behalf of the true owner the society - has the right, in full accordance with the second part of Article 19 of the Constitution of Ukraine, to exercise rights "only on the basis,

within the limits of authority and in the manner prescribed by the Constitution of Ukraine and the laws of Ukraine "[4].

4. Conclusions

According to the anthropo -sociocultural approach to the knowledge of the nature of the tax law, the cause of its occurrence and existence is the public (common to all individuals or most of them) needs of people, so it arose and developed as a human right, has an existential, that is, natural

rooting. The necessity of fixing this right, as well as other natural human rights, is in the constitution of the state due to the fact that in accordance with the system -forming idea of the constitution, its true anthropo sociocultural nature, human rights are the basis of the constitution and its bearing structure. The constitutionalization of human right to taxes means giving it the highest - constitutional-legal - protection regime, since it belongs to the most important - constitutional social values.

The constitutionalization of the tax law in Ukraine is noted as common approaches for this phenomenon for all states, as well as national peculiarities. The most important general feature of the Ukrainian model of the constitutionalization of the tax law is that its constitutional and legal structure is determined by the solidarity nature of this right, although no direct indication of this is contained in the Constitution of Ukraine. The most important feature of the Ukrainian model of the constitutionalization of the tax law is its fixation with the help of a shortened legal relationship as a general obligation of all individuals and legal entities. In the context of the concrete historical reality that has developed in Ukraine today, this is the

most optimal legal model for the constitutionalization of the tax law.

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