

SOME THOUGHTS ABOUT THE DELIMITATION OF THE LAW OF PUBLIC FINANCES IN THE LIGHT OF THE HUNGARIAN LEGISLATION

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ABSTRACT: *This paper is a summary about the main parts of the Law of Public Finances. I examine how did change and develop the area of the Hungarian Law of Public Finances since the economic transition to nowadays, what is the content and definition of this branch of law, what are involved in it., and how could change the areas of the law of public Finances. Before the economical transition in Hungary the most important area was the regulation of the Budget in the Law of Public Finances, so we can say it was “the budgetary fetishism”, but after the Transition this area of the law starts to grow, so it became “the renaissance of the tax law”. Examining the place of the financial law in the law system the following establishment can be laid down: the financial law became independent from the law of public administration. Its characteristics that it contains public law elements, namely, it is typical that in the financial relations the sub,- and super ordination of the parties turn up, the presence of the state, and imperative, cogent regulation are typical as well. Changed the areas of the law of public Finances, and grown the number of regulations in this territory, mainly the new financial institutions, as the Stock Exchange, or the law of state aids, and the field and special regulations, law sources of the European tax harmonisation, the not legally binding rules.*

KEYWORD: *definition of financial law, fields of the law of public finances, development of Hungarian financial law, delimitation of branch of law, public law*

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1. INTRODUCTION

In the Hungarian legal system every branches of law have suffered and have been suffering significant changes since the 1990's economic and social Transition, these changes are especially typical in the financial law. Nowadays the financial law has got - contrary to the period before the economic transition- a central status in our legal system, we can worthily say, that it has become one of the branches of law, the knowledge of which has a lot of uses in the practical life as well. The financial law is a significant part

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of the economical public law rules, nearly all people get in touch with its rules during his/her life, who work with the financial law as a profession- both the tax advisers, accountants, economists, auditors and tax- lawyers- and the members of the businesses, officials. The financial law has been developing, changing, increasing with new elements, its newer and newer areas are coming to the front, and its importance has grown compared to before the Transition.

The economic and social transition has happened in the field of the financial law as well, the law of the public financial affairs changed structurally significantly during the period of the transition into the modern market economy. The results of this change can be observed today and probably we will have to face them for decades.

So it can be established in advance, that the financial law has become a significant part of our legal system not only because of the number and the scope of the legal rules made in its field, but because of that change in the branch of law, which was induced by the economic transition and because of its growing importance and role in the practical life.

Accordingly, I will examine the following in my essay:

1. How did the definition of the financial law and its feature of the branch of law changed in the XXIst century?
2. Where can we find demarcations in the legal system concerning to the limitation as a branch of law?
3. What kind of developmental tendencies and characteristics can be found in the field of development of the Law of Public Finances as a branch of law.

2. THE MAIN CHARACTERISTICS OF THE HUNGARIAN FINANCIAL LAW BEFORE AND AFTER THE HUNGARIAN ECONOMIC TRANSITION

A Hungarian law Professor dealing with Financial Law, Daniel Deák¹ in his publication in 1993 wrote: there was a transition in the financial law. Before the transition the budget fetishism was typical of the financial law, and after the transition changes happened inner the branch of law because of this, the “*budget fetishism*” was replaced by “*renaissance of the tax law*”. (Deák, 1993), (Deák, 1992), (Ferenczy, 1993)

In order to illustrate the development, we have to look back in the past. In the state socialism, the budget management was of great importance, beside the central planned economy, no legal institutions, which could have assured the constitutional control over the government responsible to the parliament, developed. In the period of the “*budget fetishism*” the key elements of the economy are not the decisions of the companies but rather the decisions of the budgetary institutions which centralise the resources. In such circumstances the role of the state budget was overrated. (Deák, 1993)

The existence of the Financial Law as a separate branch of law is out of the question. However, its importance as compared to the other branches of law is slight (Meznerics, 1977)².

¹ Dániel Deák is a Professor of the Budapest Corvinus University of Economics and State Administration

² See in details from the most famous figure in the socialist financial jurisprudence, Iván Meznerics: In Hungary the formation of the financial science broke away from the mercantilist-kameralist schools at the beginning of the 19th century, which is the result of the scientific work of Gergely Berzeviczy, Ágost Karvasy, Gyula Kautz and Béla Földes. The beginning of the literature of the Financial Law is associated with the name of Vilmos Mariska at the beginning of the century.”

The legal rules are built around three fields:

- budget law, constituting the bulk of the rules,
- few regulations on companies' income and
- a few taxation rules concerning individual persons. (Nagy, 1980)³

Although the influence by financial means played a role in the development and operation of the management of the economy, there was no reform until 1988.

In order to see the changes occurred in the branch of law, we must survey what the definition of the financial law was in this period and what fields it was divided into.

According to Tibor Nagy (Nagy, 1980)⁴, the definition and division of the Hungarian financial law of this period is as follows:

Financial Law: major groups of financial affairs with similar subjects and characters regulated by legal norms, namely:

- a) budget law: norms relating to the budgetary system and its management
- b) the regulation of corporate financial affairs: (money management) forming of funds in the framework of income regulation, budgetary relations
- c) the law of state income (the law of taxes, substantive and procedural rules of the customs law)
- d) bank- and credit system (forms of payment, the credit procedure)
- e) money system (the affairs relating to bank notes and coins)
- f) the norms relating to insurance
- g) the law of foreign currency
- h) financial control
- i) international financial law.

This division of the branch of law is not complete. It does not include price law and investment law. On the contrary to this wide range of parts, the branch of law was of low practical importance. One of the reasons for this may be found in the fact that not everyone was affected by these financial rules and thus the application of the financial rules and the sanctioning⁵ did not reach the level the financial law represents today.

We can also see from the inner structure of this branch of law that the financial legislation of this era is characterised by "*the budgetary fetishism*". The constitutional basis for the budgetary law will be established only after "*the market conform economic regulators*" (Deák, 1993) appear.

No. 7 footnote on the same page: „According to Eörsi: the socialist financial law has two forms: a.) as a *branch of law*, and its reflection on codex level; in this sense, it perfectly fits in the legal system and from the side of the economy it seems to be splitted up and b.) as *financial law activity*, the synopsis of its all relations, in this sense, it is a heterogeneous phenomenon combining - unified from economic aspect, and different from legal aspect - elements.”

³ Such as: General income tax, which is the tax of artisans, retailers, agricultural produce growers strange for the state property, the income tax of craft and subsidiary economies, asset taxes:

1. taxes on real estates: house tax, house value tax, land tax, land registry contribution
2. taxes on vehicles: motor vehicle tax, water vehicle tax; turnover taxes: private individuals' turnover taxes, wine sales tax; excise taxes: tax on spirits, tax on tobacco; national defence contribution; local budgetary taxes: cost developmental contribution, holiday resort tax; tax on dogs

Though according to this list, the word "a few" may not seem appropriate, but pursuant to the income side of the budget, the significance of these taxes is very slight, and they did not affect the population extensively.

⁴ Dr. Tibor Nagy: Professor Emeritus of Loránd Eötvös University, Faculty of Law

⁵ Concerning the sanctions, it is enough to state that it would be useless to look for economic crimes in the Code of Criminal Law. They were introduced only after the Transition.

Although the forerunners of the change were first appreciable in the economic policy and the economy regulators, the need for the transformation of the financial law at the end of the 1980's was evident.

The reforms occurred in 1987, however, we must mention one change before that - Act I of 1986 on duties. It is typical for this period that the fetishism of the budget disappeared, the regulation of the corporate income was born again and the time of the "renaissance of the taxation law" (Deák, 1993)⁶ came along again.

The main characteristics of the financial law - as a branch of law - have remained, however, the number of legal rules has risen significantly and the importance of the financial legal legislation has also increased.

The reforms affected the following areas of the financial law: the composition of the Code of Duties, the reform of the system of the financial institutions: the transition from the monolithic banking system to the two-level banking system, the reform of the taxation law, the reform of securities - the appearance of the stock exchange, the reform of the state finances, the reform of the financial control.⁷

The process was helped by *several rules belonging to other legal fields*, like: the introduction of Act VI of 1988 on companies, which abolished the taboo of the state property and gave way to the private property; companies established on the basis of the Act and the freedom of businesses; the Act on the protection of foreign investments⁸; the Act on the transformation of state companies⁹; the acts on privatisation (Erdős, 2001)¹⁰; and in 1991 the acts on accountancy, compensation and the financial reorganisation.¹¹

The reform of the taxation law in 1988, with the introduction of the acts on individual persons' income taxes, on value added taxes¹², on companies' profit taxes establishes "the renaissance of the taxation law" that is tax law became a significant substantive law within the financial law. Not only did the reform of the taxation law introduce new tax forms and regulations, but it also extended the circle of the subjects: it became general to pay income taxes or to pay value added taxes on the trade of products.

The germs of the financial procedural law appeared in the field of the taxation law: a new act was published on the procedure of the tax administration.¹³ By the integration of these rules, Act XCI of 1990 on the order of taxation was born. It gives a uniform order of the collection and payment of central and local taxes, both in the relation to individual persons and businesses.

⁷ In the field of financial control, the reform process started with the establishment of the State Audit Office (1989) independent of the government with the responsibility to report to the Parliament only (Act XXXVIII of 1989, now: Act LXVI of 2011.), but it also included the regulations of the bank supervision, insurance supervision and the supervision of the securities market.

⁸ Act XXIV of 1988 on Hungarian investments by foreigners

⁹ Act XIII of 1989 on the transformation of businesses and companies

¹⁰ After the period of the spontaneous privatisation, in 1990 the last regulators appeared: like the first Act on privatisation: Act VII of 1990 on the State Property Management Agency and on the management and utilisation of the assets belonging to the Agency

¹¹ Act IL of 1991 on bankruptcy, liquidation and final settlement

¹² Act VI of 1987 on the income tax of individual persons, Act V of 1987 on the value added tax (now Act about Personal Income Tax: CXVII. Of 1995. and Act about Value Added Tax: CXXVII. Of 2007.)

¹³ No 50/1987. (X.14.) Council of Ministers' decree on the procedure of taxation management, though at that time No. 58/1981. (XI.19.) Council of Ministers' decree on the general rules of the procedure of individual persons' taxation management was still in force.

The reform of the state finances, which is still in progress, is also considered to be a very important step and so is the appearance of Act XXXVIII of 1992 on state finances¹⁴.

The Act on state finances replaced the Act on state financial affairs (Ferenczy, 1992)¹⁵, which is still in effect - though only few of its sections.

The Act includes both the substantive and procedural regulations relating to the passing of the budget, and it defines the general principles of the management of the state finances, and the order of the utilisation of public monies and its supervision. The reform of the state finances has not been finished, but it can obviously be regarded great progress in the transformation of the financial law. The unification relating to the order of the state finances, the budget, the management of local and central governmental institutions was a great result as compared to the Act on state financial affairs. The reform of the state finances has not been finished, but it can obviously be regarded great progress in the transformation of the financial law.

The Act on state finances has laid down *the principles appropriate for the rule of law and democratic legislation*.¹⁶

We can also see that some law fields disappeared in the financial law- like the law of foreign currency, the law of insurance,- but on the other hand some law fields became stronger- taxation law, financial procedural law-, the structure of the branch of law changed, the inner structure changed both in focus and in content as well.

Examining the place of the financial law in the law system *the following establishment can be laid down*: the financial law became independent from the law of public administration. Its characteristics that it contains public law elements, namely, it is typical that in the financial relations the sub,- and super ordination of the parties turn up, the presence of the state, and imperative, cogent regulation are typical as well.

3. THE CHANGES OF THE DEFINITION OF THE FINANCIAL LAW AND THE FEATURE AS A BRANCH OF LAW

Concerning the definition of the financial law, the extended circle of the regulation did not change the characteristics, and except for the Act II of 1979 on state financial affairs other rules did not attempt to define the financial law and the feature of the branch of law. Accordingly, the definition of the financial law is:

- Financial law includes all the legal regulations, which regulate the financial affairs of the state, the legal relations originating from the financial activities of the state, the financial institutions, procedures, and rules which determine the methods and forms of

¹⁴ Now it is the Act CXCV. of 2011. About the Public Finance Law

¹⁵ The Act on the state finances became a necessary means of the effort to establish the market economy. As far as its importance is concerned, it is the most important one of the financial reforms, so the ranging does not reflect importance but it is based on chronology. However, the Act did not mean immediate results in the transformation of the financial law. This is proved by the fact that the reform concerning the "refinement" of the Act is still in progress. On the criticism after the issue of the Act on the state finances see in more details:

¹⁶ The Act lays down that: a) for whom and on the basis of what title the state may determine liabilities to pay, b) only acts may regulate and change the liability to pay which affects most of the citizens, c) the principle of proportionate sharing in taxation that is the progressive income centralisation, growing contribution to the public expenses in proportion with growing income, d) the principle of generality that is the starting point that those who make use of public services have to contribute in proportion with their income and assets, e) the principle of the separation of the central and the local administration, to promote the independence of local governments.

financial control. (Meznerics, 1977) The presence of the large institutions of the state is always typical of the legal relation.

- Primarily, the financial legal relations regulate the financial affairs established between state power, state administration organisations, local governments and their organs, the financial affairs established between banks, insurance companies and the financial affairs established between all the above organisations and individual persons and businesses.¹⁷

Consequently, financial law does not include the financial affairs of the private sphere that is the financial affairs between individual persons, those between businesses and the financial affairs between individual persons and businesses.

- The object of the financial legal relation is the financial affairs of the state that is all the cases, where the payment, the issue of money and financing are present.

- In the financial legal relation the parties are never in a co-ordinate relation, the parties' subordinate - superordinate relation is typical, because of the presence of the state.

- The financial legal rules are imperative, cogent, while the rules of the private law are dispositive.

- Financial law includes the elements of public law, it is a separate branch of law.

The separation of the financial law from the law of public administration (Meznerics, 1977) (Nagy, 1993) and its becoming independent is now a fact that does not need proof. The rise in size significantly changed the importance of the fields of the financial law, its separation as branch of law, its characteristics.

4. THE CHANGES OF THE INNER STRUCTURE OF THE FINANCIAL LAW REGARD TO THE DEMARCATIONS OF THE BRANCH OF LAW

The structure of the financial law has changed the most as a result of the economic reforms.

Important characters of the financial law of this century (Földes, 2000) mention *different inner structures* in their works.

At the Faculty of Law, University of Miskolc, a special structural system according to the subjects¹⁸ is considered the basis of the inner structure of the branch of law. According to this, *the financial law may be divided into the following areas:*

1.) *The financial law of the state finances*, within which we can find the law of state incomes, public expenses and state debts.

This field contains financial legal rules which determine from whom and by what title the state may draw away monies, what the title of the public expenses, and their procedural order may be, what the order of the execution of the budget may be, how public expenses may be supervised and how state debts may be eliminated.

2.) *The financial law of businesses*. The financial legal regulations belonging to this area are those into which the state intervenes that is the financial rules of the

¹⁷ The earlier referred definition of the Act on state financial affairs is still valid, although this section was annulled by the Act on state finances. However, the Act on state finances did not attempt to give a complex definition of the financial law, thus we have to refer back to the Financial Act (Act II. of 1979) that is already annulled.

¹⁸ The grouping originates from Dr. Endre Ferenczy associate professor, the earlier Head of the Department of Financial Law at the Faculty of Law, University of Miskolc

establishment, operation and liquidation of businesses including the law of special businesses, like, financial institutions and insurance companies.

The taxes belonging to the group of the law of public incomes fall under the order of operation, and we must also mention here the law of investments and state subsidisation and the price law.

3.) *The financial law of individual persons:*

This group includes the financial regulations which concern the state deprival (by the title of central and local taxes) from individual persons and the subsidies due to individual persons.

4.) *The financial law of organisations operating on the basis of the right of association:*

(churches, political parties, associations, foundations, public corporations, public-service corporations) the rules belonging to this group involve the financial rules of the establishment, operation and liquidation. The speciality of these organisations is that they represent a border-line between the public and the private sphere.

5.) *International financial law*

This area includes the financial regulations issued by international organisations and other non-binding usances and other rules. The international agreements on the avoidance of double taxation, the primary and secondary financial sources of law of the European Union and the publications of the Committee belong here.

It can be stated that the grouping, the inner structure of the financial law may differ in theory, but the theories correspond to one another in their statements that the banking law, the law of monetary management and the law of taxation have come into the limelight - both in quantity and importance - as compared to the law of budget. Consequently, as a result of the reforms, the fetishism of the budget has disappeared and the renaissance of the law of taxation has got ahead.

The demarcation of the financial law as a branch of law has also changed a lot as a result of the reforms. (Meznerics, 1977)¹⁹ Financial law is a complex branch of law of economic character and it is important because several financial legal institutions may belong to other branches of law, as well.

One of the major changes occurred in the financial law is the difficulty of its demarcation from other branches of law, the borders grew blurred, the civil law elements turned up in the fields of the borders.

5. SUMMARY ABOUT THE TENDENCIES AND DEVELOPMENT OF THE FINANCIAL LAW AS A BRANCH OF LAW, THE CHALLENGES

After the survey of the reforms, we must make conclusions concerning the tendencies of the development of the financial law:

1. As a result of the introduction of new taxes and the extension of the circle of the taxation the monocacy of the budget law has terminated and the law of taxation has come into limelight. According to our division, the law of taxation is both a part of the law of state incomes and the financial law of individual persons and businesses operating on the basis of the right of association.

¹⁹ The Demarcation of the Socialist Financial Law.

2. With the abolishment of the monolithic banking system and the banking system becoming two-level, new institutions of the financial management and control have appeared such as: the monetary means of central bank management and the earlier State Supervisory Office of Financial Institutions, and now the National Bank of Hungary, which is the unified supervisory organisation of the system of the financial institutions.

3. The Stock Exchanges have been established as a result of the reforms and the development of the market of securities points towards *the globalisation*.

The transformation of the Stock Exchange into a joint-stock company has pushed the so far sui generis self-regulatory organisation towards the civil law, but from the aspect of the globalisation this can be appreciated a good solution since among the exchange associations the BÉT (Budapest Stock Exchange) may have a chance only this way.²⁰

4. Since the economic Transition *the legal importance of the monetary regulation has increased*, the institutions and procedures relating to the management of state finances have been established, the inner structure of the branch of law has changed and the proportions in the direction of the continuously developing law of taxation have significantly shifted.

5. As a result of the increasing number of financial regulations and the constant modifications in the financial legislation, the branch of law is in permanent progress.²¹

I must say that we - university lecturers - can feel this development the most, since it is almost impossible to write a book on financial law, which is up to date.

The branch is in constant move, however this movement and the rising number of the regulations have brought *the result* wished that is financial law in higher education is today not only one of the subjects in which students have to take a university exam, but it is also *an independent, expanding legal field*, the significance of which has risen, it comprises the body of the professional teaching material and it is very important from practical aspect for the work of the future lawyers. Although financial law is not a part of the special legal examination, quite a few of its fields can be found in the material of the special legal exam relating to the economy.

6. The elements of the definition of the financial law and the characteristics of the branch have remained, however, in places *the elements of public law have begun to be pushed into the background, and the limits of the branch* - simultaneously with the expansion of its frames - *have started to fade away*. There are more and more overlaps with several parts of the civil and commercial law. The enormous bulk of economic legal regulations raise *new branch-regulatory concepts*. (Sárközy, 1998) (Bodnár, 1999)

The limits of the branches have faded away. The regulations relating to securities, for example, are such a legal field, in which beside the financial rules we can find the elements of civil and corporate law, as well.

²⁰ In this subject see in more details: No. 5/1991. (IV.4.) Ministry of Justice decree, Article 5 of which lists the parts of the special legal examination. Within the "economic law" there is the law relating to credit institutions and financial businesses and the law of the capital market, while within the field of the civil procedural law we can find several parts of the Act on duties. It must be mentioned here that the special examination in public administration and taxation expertise includes the law of state finances, the law of taxation and the procedural rules relating to these fields.

²¹ I must say that university lecturers – as me - can feel this development the most, since it is almost impossible to write a valid book on financial law, which is up to date.

As an effect of the bulk appearance of economic legal rules, the argument according to which it would be necessary to put the rules or some of them into a separate branch or a Code, for example, into a Code of Commerce is more and more frequent. This theory was failed, now the new Civil Code²² contents the rules of business corporates, and the field of law of securities is in a separate Act. According to Tamás Sárközy's concept the chapter of the Code of Commerce dealing with a special field of its would lay down - uniformly - the rules of banking and competition law.

The lawyer of financial law must not agree with this concept since in this case in the unified regulation there would be no place for the elements of the public law. As a result of the legal development, the problem of demarcation has been pushed towards the civil law and it has raised the question of restructuring the branch with the possibility of establishing the economic law (public and private law).

7. It is the result of the fact that the limits of the branch are fading away that the elements of public and private law mix more often in the financial law. (Halustyik, 2001)

In the field of *the methods of international payment* (accredit), in the circle of usances containing the international regulations of numerous financial procedures worked out by the International Chamber of Commerce, or *in the law of state subsidisation*, too. Among the state subsidies, the ministries make the contract on subsidisation with businesses - so the state is present in the legal relation many times - however, the contract includes the elements of civil law and public law, too. (Harmathy, 1983)²³

8. The development of the branch raised the necessity of the separation of substantive and procedural law. We can regard Act CXI of 1990, later the Act of XCII. of 2003. on the order of taxation as the first step.

In my opinion, the separation of the procedural elements in the law of state finances may be attempted.

9. Last but not least as one of the challenges of the XXIst century we must *mention the changes as a result of the intensification of international processes*, among which the most intensive one is the process of the harmonisation directed by the European Union.

The harmonisation of taxation in the European Union has resulted in many changes in the field of the financial law - another study may be written about them.

From the aspect of the legal development, however, we call the attention to the new tendency, which is in connection with *the spread of non-binding legal resources* appearing during the international and European harmonisation of the taxation.

The regulation, which is a tendency in the legislation of the OECD and the European Union, has resulted in the restructuring of the legal resources of the financial law. Namely, at the end of the 1990's, during the harmonisation of the direct taxes, *non-binding regulations appeared, which the member states add to their legal systems by voluntary law-follow-up, without being sanctioned for not doing so.*

The new tendencies were started by the OECD, when it issued its report on the deteriorate taxation competition in 1998.²⁴ The report gave the definition of the deteriorate taxation competition and worked out the means that can be used against it.

²² Act V of 2013 the new Civil Code

²³ Attila Harmathy already dealt with the problem before the Transition

²⁴ Harmful Tax Competition an Emerging Global Issue OECD, Paris 1998.
www.oecd.org/pdf/M00004000/M000045117pdf.

The report of the OECD contains recommendations for national legislation how to avoid the causeless taxation competition. The signing countries integrated the OECD report's provisions into their national legal system.

The other very important European document is the Code of Conduct on Business Taxation²⁵ by the ECOFIN Council, which is not the type of the legal sources, because it is not legally binding, it is not enforceable, it has no sanction, even so the states who signed this document, follow its' regulations.²⁶

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²⁵ Code of Conduct (Resolution on a code of conduct for business taxation adopted on December 1, 1997 by the ECOFIN Council) Celex No. 398Y0106 (01).

²⁶ "This research was (partially) carried out in the framework of the Center of Excellence of Mechatronics and Logistics at the University of Miskolc."