

# Tax Fairness Study Of Distinction Between Tax Fairness Principles

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## **Fiscal Constraint: Study of Factors and Impacts**

Tax is generally defined as: “a compulsory financial levy imposed by the State on the taxpayer, on a permanent basis and without compensation, in order to serve the public interest”.

In addition to the absence of a counterpart in the tax, compulsion and coercion are the distinguishing features of the tax compared to other financial levies that the state uses to finance the public treasury, such as public prices, fees, and credits, although fees are paid by compulsion, but they are characterized by the existence of a particular advantage for the beneficiary who pays the fee. The same applies to compulsory borrowing, which may be used by the state under certain conditions, but not permanently, and is done with a counterpart and a well-defined benefit is obtained represented by interest.

The tax takes a part of the income and wealth, and thus constitutes a restriction to investment and consumption. As a result, it infringes on the right to private property, which constitutions and declarations of human rights describe as sacred and inviolable. These constitutions require the intervention of the legislator in the name of the law, as it expresses the will of the nation to establish, amend or abolish general tax, since it cannot be imposed with an instrument inferior to the law.

## **Problematic of the research**

This research attempts to answer essential questions, the most important of which probably lies in the basis of the constraint? And what are its justifications? How can private property be reduced without any compensation and by coercion?

In addition, this article attempts to find an answer to the question of the criterion of choice of the taxpayer, and on what basis are the tax base and the tax rate determined?

Therefore, this research tries to answer all these questions through the theoretical roots of the fiscal Constraint concept.

## **The importance of research**

The research deals with the issue of fiscal constraint, the reasons for it and its basis. It is understood that the taxpayer is obliged to pay tax periodically and, on every occasion, or at every disposition that the state deems to express the tax capacity. Therefore, the deduction is made from private property.

This research will show that social solidarity is the logical and legal explanation of the tax constraint, and that this solidarity is required by the public interest until the State fulfills its constitutional obligations and public needs are largely satisfied.

Social solidarity will show us that fiscal constraint is a necessity to finance the public treasury, which explains the obligation to impose general taxes by force of law, and the need to

apply tax laws, even if their revenues exceed what is estimated in the state finance law.

### Research Topic

The research focuses on the study of the setting up and the establishment of the concept of tax constraint, while highlighting the basis of this coercion, its logic as well as its legality and necessity.

Moreover, if taxes are imposed by law, the justification of the fiscal constraint can be reduced to the fact that the law expresses the will of the nation, and that it is this will that imposes taxes, and that the source of this taxation is social solidarity, since there is no financial contract between the state and the taxpayer in the matter of taxes.

### Purpose of the Research

The research aims to explain the source of the tax constraint, and to demonstrate the importance of this source, and to accept it according to its motivations and results.

Social solidarity makes taxes an equitable deduction because they are based on the idea of belonging to the homeland and their links with society and because all individuals must contribute to bearing public costs and burdens, each according to their fiscal capacity and potential to contribute.

### Research Methodology

In the present research, we have opted for the analytical approach in order to examine the theoretical roots of the legal financial notions and by clarifying the real motivations that led to the idea of the tax constraint imposed by the constitutions and the declarations of human rights, which agreed to comply with it.

The analysis of the elements related to social solidarity led us to the clarification of the determinants of tax capacity and its close relationship with the designation of the taxpayer, the tax base, and the tax rate. These are the three

elements that determine the acceptance or rejection of the tax constraint.

### Structure of the Research

This research was divided into:

1. The traditional basis of the tax constraint
  - a. Objectives of traditional taxation
  - b. The social contract is the basis of fiscal constraint.
2. Social solidarity is the basis of fiscal constraint
  - a. New objectives of taxation
  - b. The determining factors of social solidarity
3. The effects of tax constraint
  - a. The obligation to apply tax laws
  - b. General tax by law

### Conclusions

1. Results
2. Recommendations

### The traditional basis of the tax constraint

The idea of tax constraint is based on the idea that the state offers many benefits to taxpayers. As such, taxation fulfills the state's objectives of protecting its citizens and residents living on its lands by providing them peace and security and resolving their disputes and conflicts, as a night-watchman state. Therefore, the basis of compulsion is to provide these benefits as a social contract between the state and the taxpayer, which is in fact a financial contract linked to the financial purpose of the tax.

### The objectives of night-watchman state

Liberal thought began with the emergence of the modern state at the dawn of the 17th century.

According to this idea, the state does not intervene in the economic and social activities of the individuals, but rather relies on the concept of freedom to organize and regulate their life<sup>1</sup>.

According to this thinking, state intervention in the economic life of individuals or the orientation of their social behavior is a kind of discrimination and preference for one group over another. This orientation or conduct of economic or social activity can even affect the nature and meaning of economic activity and free competition. In fact, it is the market that determines the attitudes and orientations of individuals without any interference from the state<sup>2</sup>.

Based on this liberal approach, it would not be appropriate for the state to intervene in economic activity, such as, for example, subsidizing farmers through what the state takes from the taxes of productive farmers, and then redistributes it to other non-productive farmers, under the pretext of helping and supporting them to gain access to agricultural production and competing with those from whom taxes are deducted<sup>3</sup>.

In the same vein, liberal doctrine considers that it is not possible to accept the idea of providing subsidies or financial incentives to professionals to the detriment of industrialists, or some advantages should be granted to craftsmen to the detriment of distributors. This leads to the rapid development of one sector of the economy to the prejudice of other economic activities<sup>4</sup>.

Nor is it acceptable in the traditional economic school for the state to intervene in the promotion of internal trade at the expense of intra-regional maritime and land trade. On the contrary, the state should stay away from any form of support and

bias towards a particular economic activity at the expense of another.

Therefore, reducing taxes for the benefit of a particular economic sector without reducing them for other sectors is seen as interference in the economic lives of individuals. The principle is that labor, skills, infrastructure and endogenous capacities are the driving force of all economic activity, so it is necessary to remove subsidies and incentives originally obtained from taxes and let competition drive and direct economic activities in a free world<sup>5</sup>. This is particularly the case with regard to the inadmissibility of supporting economic activities which, according to the liberal approach, it is in no way possible for the state to intervene in the social sphere, and thus to support education, public health, or to provide housing for low-income people. Therefore, the state is free and neutral and must let individuals manage their lives autonomously according to the rules and provisions of competition<sup>6</sup>.

The role and function of taxation according to this liberal school is to ensure the financial objective of the state without increase or decrease. The financial objective, as specified by Article (13) of the French Declaration of the Rights of Man and Citizen, is to maintain the public force, and the expenses of administration<sup>7</sup>.

The access of poor persons to educational services at the expense of the state means taking part of the taxpayer's income for the benefit of this category, and then putting them in an unequal competition with those who have financed their learning. The same goes for the free care offered to the sick people, which in reality serve to rehabilitate them and allow them to compete with those who have paid taxes for their treatment, in other words, from taxpayers' money<sup>8</sup>.

Thus, the role of the state according to liberal thinking is limited to ensuring defense against external aggression, ensuring internal security, and resolving conflicts between individuals within the state. Thus, the state in this case becomes a might-watchman state, not interfering in the affairs of social life<sup>9</sup>.

In the light of this, it is clear to us that taxes in the traditional liberal school have a neutral and clearly limited role, as they are limited to financing the expenses necessary to guarantee the role of the state, namely, military, police, or even judicial expenses and this is the sole purpose of taxes<sup>10</sup>.

This unique role, represented in the purely financial role, was emphasized by economists during the nineteenth and early twentieth centuries, following the example of the great thinker (Storm) defending in his book "The General System of Tax" published in 1912 his idea that taxes should be neither stimulating nor protective, but only an instrument for financing the public treasury<sup>11</sup>.

Based on this explicit explanation of the role of taxes in society, the US Constitution of 1787 stipulated in its first article of Chapter 8 that: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States". This thought is based on the prohibition of any financial interference by the state in the economic or social activity of the country, and much more, protests broke out against any state interference in the economic and social fields prompted by the unconstitutional decision to provide state social insurance to pensioners after World War I, or to provide free treasury bonds to veterans, considering that this support has a social

objective, and that offering these sums of money is not within the prerogatives of the US federal administration, which intended to take them from the taxes collected from American taxpayers<sup>12</sup>.

On this basis, it is not one of the purposes of taxation to secure social inequalities and reduce class disparities, nor to make it a public tool of motivation within society, and this has led to taxes with specific characteristics, so that they become primarily a productive tax, that is, they realize the greatest amount of revenue. This is what has caused indirect taxes to dominate because they are hidden behind the price of the good or service so that the taxpayer cannot accurately determine the amounts he has paid as taxes. Secondly, tax revenues must be constant, unaffected by economic fluctuations, especially in times of recession<sup>13</sup>. To this end, traditionalists call for taxes to be imposed in such a way as to prevent or reduce the fall in income during a recession, and it is therefore necessary to focus on indirect taxes on consumption, calculating the necessary volume of consumption that does not fall during a recession by more than a small percentage of income<sup>14</sup>. Thirdly, taxes must be flexible in nature, which means that they are imposed on goods and services that are not flexible, and in this way the revenue from taxes remains fixed with an increase in their rate<sup>15</sup>.

Fourthly and according to the classical school, taxes must be neutral, since the neutrality of taxes is the essential characteristic that distinguishes them from other taxes. According to the proponents of this school, the ultimate purpose of taxes is to finance the public treasury. Therefore, taxes should never interfere in economic and social affairs, in the sense that taxes never affect the relative positions of taxpayers. Moreover, according to the proponents

of this thinking, taxes are like money, neutral between the creditor and the debtor<sup>16</sup>.

Thus, for the supporters of the traditional school and in accordance with what was written by Adam Smith in his book "The Wealth of Nations", taxes, thanks to their sole financial objective, are consistent in their foundations, which are justice, certainty, convenience, and economy<sup>17</sup>

### **The social contract is the basis of fiscal constraint**

In this wake, Jean-Jacques Rousseau is considered as the founder of the social contract theory. According to this philosopher, taxation is seen as a financial contract between the state and the taxpayer, and the notion of taxation is based on the exchange between these two contracting parties. On the basis of this contact, the state provides services and benefits that are external and internal security and the establishment of justice, and it obtains the price for these services and benefits from the taxpayers' money.

Thus, individuals give up some of their freedoms and some of their private property in the form of taxes, in exchange for the state imposing these taxes to provide internal and external security and justice. Furthermore, he also explained in his book "The Social Contract" the concept of the theory of public will and national sovereignty, and that there is a social contract that forms the legal basis of the nation within the state, and it is this contract that justifies the imposition of taxes. In short, the state provides protection and interest in exchange for individuals giving up some of their freedoms, all to form a society<sup>18</sup>.

For their part, the financial philosophers of the French Revolution discussed this theory in the establishment of tax rules and regulations, as

did "Say" in his book entitled "A Treatise on Political Economy"<sup>19</sup>.

For his part, and in order to explain the legal basis of the tax through the social contract theory, Mirabeau turned to the fact that the tax constitutes a sales contract between the state and the taxpayer. To this end, the state is the seller when it sells internal security services, external defense services through military expenditure and services for the settlement of disputes between individuals through the payment of judges' salaries, and therefore the tax is a counterpart of the sale of these services and is paid by the taxpayer against their will<sup>20</sup>.

Adam Smith, on the other hand, then adapted the tax as a rental contract for services provided by the state, such as internal and external security and justice, and the amount of the tax is merely a consideration for the taxpayer's rental of these services<sup>21</sup>. This means that the tax is the remuneration offered by the taxpayer in return for the protection he rents for his benefit<sup>22</sup>.

In the same vein, "Montesquieu" adapted the tax as an insurance contract, so that the tax is part of the insurance that the insured pays as a taxpayer who ensures the rest of his money and the services he receives, while the state is the insurer that provides the service of internal and external security and justice. Therefore, Montesquieu went so far as to say that the tax is the insurance premium, so that each citizen pays a part of his money in exchange for the protection of the other parts and enjoys security<sup>23</sup>. Theories of financial compensation are based on the concept of the night-watchman state, where the state is considered only as a producer of security, but these theories cannot be accepted in contemporary times, as the state has some other important functions than security and realization

of justice. The establishment of these theories on the basis of contracts is legally flawed and cannot be based on their scientific foundations, since the sale is essentially based on the idea of the *quid pro quo* between the price and the thing sold, and the lease contract is based on the same concept, it means the proportionality between the rent and the benefit with the need to enjoy and possess it.

In addition, the insurance contract guarantees to the insured against damage and danger and is obliged to compensate him in the event of an accident, whereas in fact the state never guarantees this to the taxpayer and does not compensate him for the damage that may occur as a result of the taxpayer's loss<sup>24</sup>.

As a result, the theories of financial consideration have been forgotten because they are no longer acceptable in their interpretation of tax coercion as the basis for the idea of imposing taxes and determining their base and rates. On this basis, the theory of social solidarity emerged<sup>25</sup>, which later became the legal basis for the principle of taxation and the justification of compulsion.

### **Social solidarity as the basis of fiscal constraint**

Nowadays, the theory of social solidarity prevails and has become more and more frequent. This theory is based on the idea of the existence of a kind of solidarity between all members of society, each according to his or her capacity to bear the tax burden, in order to achieve the objectives that the State seeks to attain, which are economic and social objectives in addition to the traditional financial objective.

### **The new objectives of taxation**

After the collapse and disappearance of the theories of financial compensation based on the principle of tax constraint, it was necessary to

find a logical basis for justifying this constraint and the absence of a counterpart behind taxes. In this regard, the professor of financial law, "Justin Geis", adopted a theory based on the concept of the need to distribute financial burdens on the total capacity of taxpayers. From this, the idea of community solidarity emerged, which is based on the theory of social solidarity advocated by the school of solidarity led by the philosopher "Leon Bourgeois", according to which he justified the idea of taxing citizens by saying: "Citizens benefit from a set of services provided by the State, so it is natural that the financial burdens be distributed to them, each according to his abilities and financial capacities, and not according to nature or size of the benefits he gets from the State. The French Declaration of the Rights of Man and of the Citizen in its article (13) explicitly stated that: «Common contribution is essential for the maintenance of the public forces and for the cost of administration. This should be equitably distributed among all the citizens in proportion to their means..."<sup>26</sup>.

In the light of this, the tax capacity became the basis of taxation, and here we must mention in all honesty that "Adam Smith" had referred, even indirectly, to the tax capacity in his famous book "An Inquiry into the Nature and Causes of the Wealth of Nations". This famous philosopher stated that the first basic rule for a useful and acceptable tax is that this tax must be imposed taking into account the financial capacity of individuals<sup>27</sup>, so that this tax is distributed according to the fiscal capacity, or in other words, the tax must be equitably distributed and equal until the state achieves its goal and the objectives, they aim by imposing this tax.

Thus, after the First World War (1914-1918), the state moved from a *Might-watchman* state to an interventionist state. This transition was confirmed and consolidated after the great

economic depression in the United States of America in 1929. In this sense, and due to efforts of “Keynes”, a theory was established which allowed the state to intervene in order to revive the economy and motivate individuals and businessmen, and this intervention took the form of financial aid obtained from taxes. According to this approach, the state must restore economic and social balance and use taxes only for this purpose<sup>28</sup>.

We conclude that the concept of public needs has completely changed and transformed over time and is no longer limited to only internal and external security, but that public health has also become a public need and the State is obliged to provide hospitals, doctors and treatment to individuals free of charge, and this is stipulated in the Kuwaiti Constitution in article (15) by providing that: “The State shall care for public health through measures of precaution and cure of diseases and epidemics”. The State also guarantees assistance to the elderly, sick or incapacitated persons and also provides them with social insurance services, social assistance, and health care.

Accordingly, the state has established hospitals and health centers and provided doctors and nurses, and most countries, including the State of Kuwait, have worked to establish social insurance bodies for all workers by taking over a large part of the social insurance and required to pay pensions to retired people and subsequently to their dependents<sup>29</sup>. The State has also established old people's homes, taking care of disabled people, and providing them with allowances and facilities, as well as care for disabled people<sup>30</sup>. The same applies to housing, as the state decided to consider housing as a public need, and started to provide financial facilities and subsidized credits, and undertook

the granting of free or subsidized land to build private housing for families<sup>31</sup>.

On the other hand, public education has become one of the public needs guaranteed by the state. For example, the Kuwaiti constitution has made education free and compulsory in its preliminary stages. Article 40 of the constitution states that:

- “Education is a right for Kuwaitis, guaranteed by the State in accordance with law and within the limits of public policy and morals. Education in its preliminary stages is compulsory and free in accordance with the law.
- The law lays down the necessary plan to eliminate illiteracy.
- The State devotes particular care to the physical, moral, and mental development of the youth”<sup>32</sup>.

According to that, the state undertook the establishment of schools, the recruitment of teachers and the support agencies, while providing scientific textbooks at the state's expense. As for higher education, it is also free education that the State sponsors and provides financial assistance to all Kuwaiti students at universities and higher institutes in accordance with Law No. (34) of 2004 concerning the rewards for students at universities, colleges and higher institutions and institutes. In addition, the State pays a monthly allowance estimated at \$1,000 for each married Kuwaiti student in accordance with article 2 of the said law.

In addition, the State considers the care of divorced women and persons who are unable to work to be a public need, so that the State bears

the cost of providing suitable housing and financial assistance, in addition to assistance for homemakers and the elderly. The state also stepped in to help loan holders by easing their financial burden, providing for staggered payment of consumer credit owed to banks during the period of the coronavirus epidemic, and undertaking to pay interest rates to the banks<sup>33</sup>.

In the field of economic activity, the state has intervened extensively in this sector and uses taxes as an incentive for economic activities and mitigating some unnecessary industries. It also directs activity that it deems important and useful to achieve state objectives and encourage foreign investment by providing tax exemptions that help attract foreign investors, or rather the establishment of factories to increase the production rate.

In Kuwait, the legislator decides on tax exemptions for the foreign investor which can extend over a period of ten years from the date of the launch of the project<sup>34</sup>. The State of Kuwait also supports small and medium enterprises through the so-called The National Fund for Small and Medium Enterprises Development, whose objective is to support, motivate and encourage young people to work and fight against the phenomenon of unemployment, thus enabling the private sector to achieve the desired economic growth. By way of illustration, this fund receives direct financing from the State<sup>35</sup>.

On the other hand, the state considers the area of agrarian reform and cultivation and the increase and improvement of agricultural production as a public need. Therefore, it provides financial support to farmers to help them acquire seeds and agricultural equipment, as well

as fertilizers and pesticides, and allocates agricultural land at affordable prices<sup>36</sup>.

As with agriculture, the state has a strong interest in the industrial sector and provides significant support to factory owners, whether by allocating appropriate industrial land for factories through the industrial voucher system or by creating industrial zones and increasing the volume of production<sup>37</sup>.

In addition, countries are now working to encourage local industry through the customs tax system, then to address the balance of payments imbalance<sup>38</sup> and the use of tax exemptions and customs regulations to attract investors.

In practice, taxes are used to encourage and support economic programmers and major development projects. They are also used on value added to encourage savings and develop trade between countries, as the Gulf Cooperation Council countries have already done in the framework of the Value Added Tax Treaty (VAT) which entered into force on 01/12/2018 after its ratification by the Kingdom of Saudi Arabia and the United Arab Emirates<sup>39</sup>.

After the state moved from being a night-watchman to an interventionist, the new and contemporary objectives of taxation now require more money to finance its expenditures, as they have become public needs that must be met. Taxes have become the efficient mean to finance these objectives on the basis of a new vision that justifies coercion as the only and main way to obtain these funds.

This new theory is based on the philosophy of social solidarity, which is based on the obligation to contribute financially to all people according to their tax capacity in order to finance public expenditure of all kinds in the light of public needs and their complexity.



### **The determining factors of social solidarity**

The obligation of the state to satisfy various public needs requires a financial contribution of individuals, each according to his fiscal capacity and thus this financial contribution is distributed and divided according to this capacity. In fact, the idea of tax capacity and financial contribution explains to us perfectly the basis of fiscal constraint and answers to the fundamental questions concerning the designation of the taxpayer, the tax base, and the way to determine the tax rate. These questions control fiscal capacity and determine the elements of social solidarity.

In the same context, the taxpayer is considered to be any person linked to society by a bond of social solidarity. Therefore, tax is generally imposed according to the concept of general and public taxation, which means that all individuals are subject to tax and all citizens and groups that make up the people of the state are subject to tax even if they are outside the territory of the state because they are an integral part of the people, they influence it and are affected by it. Foreign residents in the territory of the state are also subject to tax in the same way as citizens because they participate with them in the affairs of the society in which they live. The tax is therefore based on the concept of financial citizenship, which means the presence on the territory of the state or outside it, as long as they participate in its solidarity<sup>40</sup>.

As a result, the theory of social solidarity is governed by the principle of the general and public character of taxation in terms of persons and money, where tax is imposed on all individuals according to their origin and without any exception<sup>41</sup>. If the taxpayer is determined

according to the concept of personal public for all persons associated with the state by the bond of social solidarity because they affect it and are affected by it, then social solidarity is determined by the tax base as a matter of tax imposition and also since it expresses the tax capacity<sup>42</sup>. Therefore, social solidarity requires that it is itself the subject of taxation, which means that the tax base reflects the tax capacity, since it is the one on which the tax is levied<sup>43</sup>.

The tax base from which the tax is levied by the state is the real determinant of fiscal capacity. Therefore, income tax is considered to be the most fair, appropriate, and credible tax given that income reflects the reality of tax capacity since it is repetitive and periodic<sup>44</sup>. Also, the value added tax is one of the taxes whose base is determined by consumption, and individuals tend to consume according to their financial capacity, so the base in this tax reflects the reality of fiscal capacity<sup>45</sup>.

In Kuwait, the vacant land tax is imposed on vacant land related to services when its area exceeds 5,000 square meters, and there is no doubt that this tax, through its container, expresses the fiscal capacity of the owner of the capital whose land area exceeds 5,000 square meters, and this undoubtedly reflects a real proportion between the area of the land space and the estimated fiscal capacity<sup>46</sup>.

The third element that determines fiscal capacity and thus social solidarity is the determination of the tax rate, or rather the tax cost. The tax rate must be adapted to the taxpayer's ability to bear the tax burden, in other words, it must be within the limits of tax capacity.

On this basis and in order to determine the tax rate, it is necessary to adopt the theory of the proportional increase in the volume of net

income on the withholding tax after deduction of living expenses, cost of debts and income expenses<sup>47</sup>.

As for the consumption tax, the type of product must be included in the process of calculating the tax rate, its necessity, its degree of flexibility and its nature. Therefore, we see that all these elements affect the fiscal capacity and then, they must be determined **on the basis of social solidarity and only within the limits of this principle**<sup>48</sup>. In this way, taxes are levied on individuals, each according to his fiscal capacity and ability to contribute financially to the service of society on the basis of fiscal justice founded on equality in order to collectively assume the public burden.

### **The effects of tax constraint**

As indicated earlier, taxes are based on the theory of social solidarity, and have been imposed on the basis of a criterion determined by the so-called tax capacity, and whose objective includes all public needs determined by the state with its sovereignty and authority, and this affects the nature of tax laws and their application.

### **The obligation to apply tax laws**

In accordance with articles 146 and 147 of the Constitution, public expenditure can only be defined by law. And since the disbursement of public expenditure is not mandatory, the State may not execute the public expenditure, but this issue will surely raise the political responsibility of the Government before the Parliament<sup>49</sup>.

On the other hand, taxes must be collected and levied by compulsion, which means that the government has no right to interfere with the application of the tax law and to link it to the finance law. In other words, it is not possible to

determine the amount and revenue of taxes by law, and even this determination is mentioned in the finance law, it is only given in the form of an estimate and a non-binding assessment, which means that if the value added taxes in the general budget were set in one year, for example, at an amount of 100 million dinars, and this amount was collected in the middle of the fiscal year, this will not prevent a collection higher than this amount contained in the finance law.

In addition, the volume and limits of public expenditure are stipulated in the text of the finance law, and it is not permitted to increase expenditure beyond what is indicated by this law or for this expenditure to exceed the estimates mentioned in it<sup>50</sup>. It is also not possible in any case to exceed the maximum expenditure estimates contained in the finance law and any supplementary law amending it<sup>51</sup>.

Accordingly, the State represented by the General Tax Administration is obliged to calculate and collect the revenue of taxes in accordance with the law, without having any discretionary authority in determining the amount and timing of such taxes<sup>52</sup>.

The tax law is not only a permit or declaration to collect taxes, but it is an obligation and a duty, so that failure to collect taxes or delay in collecting them are considered as violations and encroachment on the sanctity of public funds in accordance with the provisions of Law No. (1) of 1993 on the Preservation of Public Money<sup>53</sup>. Failure to collect and account for taxes by state employees is also considered a disciplinary offence of a financial nature for which the Court of Accounts is competent to investigate and recommend sanctions under Law No. 30 of 1964<sup>54</sup>, articles 57 and 58 of which oblige the President of the Court to refer the party violating

the financial rules of the disciplinary process, who is empowered to issue a recommendation on the sanction to be imposed on the offending official<sup>55</sup>. However, there are two exceptions to this obligation:

### **Tax exemptions**

The Kuwaiti Constitution stipulates in its article (134) that: "... No one may be exempted, wholly or partially, from the duty to pay such taxes except in the cases specified by law...". This constitutional provision means that tax exemptions are not fixed by law, but the law can only indicate or specify the conditions, forms, rules of application of these tax exemptions as well as the way they are evaluated and estimated and their duration or other relevant details. In this sense, the constitutional legislator has authorized the law to entrust the regulatory authority with the task of promulgating the provisions, rules, and conditions of these tax exemptions.

The Foreign Direct Investment law No. (116) of 2013 decided to establish the Direct Investment Committee by granting it, under Article (27), the power to assess the exemption from income tax or any other tax for a period not exceeding 10 years from the date of launching and activation of the project, in addition to exempting from these taxes, each new investment linked to the project for a period similar to the exemption period granted to the initial investment at the time of the project's launch<sup>56</sup>. Also, law may directly define tax exemptions, and the administrative authority has the obligation to apply these exemptions, so that it is the competent authority to interpret its provisions.

In this respect, an example is what was stipulated in the text of Article 5 of Law No. (26) of 1995 on the creation of free zones, which provided for tax and customs duty exemption for

projects carried out in free zones and on the profits they derive from carrying out their activities within these zones, in addition to the merchandise imported or exported from these free zones, including the necessary equipment of any kind<sup>57</sup>.

### **Tax reconciliation**

Law allows the administration to enter into tax settlement agreements with non-compliant taxpayer, either before the filing of a lawsuit, during its examination or before a court decision is made on it. The law provides that legal action comes after the completion of reconciliation procedures.

As an example, we mention here what was stipulated in The Unified Economic Agreement Between The Countries of The Gulf Cooperation Council, where Article (151) states that "The director general or his authorized representative may upon a written request by the person concerned- make a compromise (conciliation), in the smuggling issues, whether prior to the bringing of the action or when the action is being tried and prior to the issuance of the first instant judgment (...)"<sup>58</sup>.

It is noted here that the reconciliation agreement results in a reduction in the customs tax, and the agreement is concluded between two parties namely: the Directorate-General for Customs tax or his representative and the taxpayer<sup>59</sup>.

### **General tax by law**

The Kuwaiti constitution stipulates that the establishment, modification, or abolition of a general tax should not be provided for except by law. Accordingly, Article (134) of the Constitution states that: "No general tax may be established, amended, or abolished except by a

law...". On the other hand, the Constitution has allowed in the same article that no one may be required to pay any other tax, fee, or imposition except within the limits of law. In an expression more specifically, it is strictly prohibited to establish, modify or abolish, except by law, general taxes exclusively, but not other taxes, fees and financial charges<sup>60</sup>, which the constitution allows to be established, modified and abolished within the limits of what is authorized by law, it means that law may entrust the regulatory authority with the power to deal with it<sup>61</sup>.

By way of illustration, general taxes are taxes imposed by the State as a legal person under public law, regardless of the nature or form of the tax, in order to achieve one of the main fiscal objectives<sup>62</sup>.

The revenue from the general tax also accrues to the State treasury unless the law decides to earmark it, so that the public revenue can be earmarked for a specific form of exchange by law<sup>63</sup>, and this is the case with Law No. (19) of 2000 which decided to support the national workforce in the private sector. In this case, income tax revenues from listed companies were earmarked to support private sector employment.

Moreover, general taxes are levied in their subjective and personal generality on all persons subject to them without any discrimination except for the tax capacity of each individual. Also, they are objectively general, because of all tax bases are subject to this tax without any discrimination or geographical distinction or preference for one region or territory over another<sup>64</sup>.

As regards the term "other taxes" mentioned in the Constitution, it refers to decentralized taxes, local (communal) taxes or taxes for the benefit of

public legal persons, such as public industrial and commercial enterprise<sup>65</sup>.

In this light, the Kuwaiti Constitutional Court, in its decision issued on 11/5/2016, recognized that the legislator has given the general tax a high status in the Constitution and assessed its importance in view of the seriousness of the implications that may result from it. Therefore, Article (134) of the Constitution states that "No general tax may be established, amended, or abolished except by a law" which means, according to the opinion of the Constitutional Court, that the legislative power holds the reins of the public tax in its hands, and it is responsible for setting and regulating the conditions of it through a law<sup>66</sup>.

Undoubtedly, legislative interference with general taxes is explained by the fact that general taxes are imposed by the compulsion and unilateral will of the state. The latter obliges the taxpayer to pay them, despite the fact that the tax entails a kind of restriction on the private property and freedom of possession of individuals. Therefore, the financial tax authority must regulate it carefully and prudently to prevent the abuse of the individual's freedom and guaranteed right to property. It is therefore natural that the legislator should have the power in matters of taxation, its creation, modification, and abolition<sup>67</sup>. Indeed, it is this distinction between taxes and other public revenue tools on the one hand, and between taxes and public expenditure on the other, that inevitably explains the lack of indication of the amount of taxes imposed.

## Conclusion

This study has shown the basis of tax constraint, and the link between this recourse in levying tax on the taxpayer with the philosophical theories that have attempted to justify it, and the most

appropriate of these philosophical approaches is the theory of social solidarity because it is based on the idea of social justice, the support of which we find in the Holy Quran in the words of the Almighty: “And in their properties there was the right of the beggar, and the Mahrum (the poor who does not ask the others)”. And since the tax is one of the most productive means of financing the state treasury because of its flexibility, stability, and impartiality, it is different from other state levies. Although taxes are free, their purpose is greater than being measured in tangible materials, as they are the only means of satisfying public needs and thus creating social security and stability.

On the basis of the above, we can conclude from this study the following:

1. The evolution of tax objectives over time and through history, from the traditional objective (purely financial) of taxation in the light of the requirements of the role of the night-watchman state to the economic and social objective within the framework of the intervening and producing state.
2. The stability of the concept of social solidarity as a legal basis for tax constraint.
3. The general tax is determined by the State in terms of imposition, modification, and abolition by a legal text.
4. The tax base for taxes is closely related to the taxpayer's fiscal capacity.
5. The estimation of tax capacity requires a declaration by the taxpayer, the tax base, and the tax rate, which are the bases for determining the amount of tax revenue.
6. The tax law is enforceable by the State and the taxpayer.
7. The tax debt is a privileged debt on the basis of which the taxpayer is obliged to pay the tax, failing which he will be liable to the State.
8. The amount of tax revenue is not limited in the Finance law. Therefore, the State is obliged to withhold taxes in accordance with the tax laws, and if it exceeds the amount of the estimates contained in the finance law, the administrative and criminal responsibility lies with the employee and the body responsible for tax collection.
9. The imposition of general taxes requires a thorough study of financial citizen who is who is influenced and impacted by the state, taking into account the principle of societal justice.
10. The progressive tax, such as the one withheld from income (direct tax), and the indirect tax, which is withheld from material actions performed by the taxpayer, such as the value-added tax, is the indicator of the financial situation of the taxpayer on the basis of which the tax is imposed.

In light of this, we can propose the following recommendations:

1. It is important that individuals become aware of taxation so that everyone knows that tax is a national contribution that requires bearing public burdens, and the media and social networks can play a key role in creating this awareness.
2. Establish a specialized center for tax studies and research to benefit from the experiences and studies conducted in developed countries, in addition to

preparing research to be used in the tax imposition process, especially since the introduction of value added tax is on the horizon in the State of Kuwait.

3 . We hope that every reader and legal researcher will contribute to the creation of a tax conscience for a better nation.

4 . Finally, it is essential for society and learners to promote and highlight tax legislation

by increasing the number of lecture halls at institutes and universities and by organizing seminars on tax science, which will surely contribute to creating legal

awareness, in order to establish better thinking for a better society and a better Kuwait.

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