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## Paying Ability (Solvency), as One of the Most Important Constitutional Principles in the Field of Taxation

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### Abstract

*In the capitalist economies and in modern times, the privension of the principles of taxation by lawmakers are of an imperative importance. Some of these principles have put on an absolute power and have been provided to the constitution of democratic republics. There are two basic principles of taxation which are recognized by most of the European Countries. The principle of legality and the principle of the ability to pay (solvency). These two principles are expressed in the constitution of Germany, France, and Italy. Article 155, in our country's constitution, provides only the principle of legality, the other principle is not provided under the Albanian constitution. Through a metaanalysis methodology, I want to emphasize that in my believe, a further guarantee is needed and it can be achieved through the implementation of both principles of the "legality" and the "ability to pay". What impressed me most in the European constitutions that provide such principles, is the fact that these principles create a consistency and fiscal stability that will last through time. It is exactly what aims to achieve our legislator today, that fiscal maturity which will resist time and will be stable over time. I believe that in the near future an amendment should and will be made by the legislator to make a future incorporation of the two principles. According to the signed agreement of Stabilization and Association (MSA, which entered into force on April 1, 2009), fulfillment of the Copenhagen criteria (1993), along with the signing of the agreement of the receiving country's potential to become part of the European Union, Albania had to undertake a series of reforms, in institutional and economic character. And I believe that this reforms should begin by establishing principles that will serve as the foundation stones for all future fiscal legislation.*

**Keywords:** Taxation, paying ability, constitutional, principles.

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### 1. Introduction

The principles of taxation are very important elements, not only to have a better understanding in their mode of operation, but also to clearly comprehend the construction of a fiscal legislation. Since the strengthening role of taxes in capitalist economies, the first reflections on the principles of taxation started to emerge. According to his book "The Wealth of the Nation" (originally published in 1776), Adam Smith, defined four basic principles on taxes which should be taken into account by the legislator, in order to improve taxation systems. The four following maxims have influenced the actual legislation (Morse and Williams 2008):

1. People should contribute taxes in proportion to their incomes and wealth.
2. Taxes should be certain, not arbitrary.
3. Taxes should be levied in the most convenient way.
4. The costs of imposing and collecting taxes should be kept minimal.

Nowadays, we can add another set of principles that can be considered universal or general. Such principles are:

1. Taxes must be appropriate and internationally comparable. (Convenient and competitive internationally).
2. Selecting the fiscal system of taxation should be done in such a way that leaves little room to tax contributions.
3. The taxation system should aim to achieve a redistribution of income or assets in that direction and extent is considered socially desirable.
4. The tax system should be effective
5. The taxation system should be adapted to the needs of the country's development (Gjyli 2008).

We might go on with a very long list in terms of general or universal principles of taxation. Each of us might have their opinion in this regard. However, we can also mention that in modern times and in industrialized societies, some of these principles have put on an absolute power and have been provided to the constitution of democratic republics. There are

two basic principles of taxation which are recognized by the most of the European countries: The principle of legality and the principle of the ability to pay (solvency). These two principles are expressed in the constitution of Germany, France, and Italy. Article 155, in our country's constitution, provides only for the principle of legality, which mentions:

"Taxes, taxations and financial obligations, (national and local) and their liberation from certain categories of taxpayers, as well as the way of their collection are specified by law. In these cases, the law can not be given retroactive effect" (Albanian Constitution 1998). The principle of legality is also expressed in Article 23 of the Italian Constitution, in Article 76 of the German Constitution, in Article 47 of the French Constitution, in Article 119 of the Constitution of Kosovo. Why do we say that prediction is an important principle of legality in the constitution? At first, we can say that the principle of legality guarantees each citizen of a democratic country, the same way that the constitution becomes a guarantee not only for freedoms and fundamental rights but as well, for the income that they attain. Thus, the principle of legality serves as a legal guarantee for all citizens who have the role of taxpayers. According to this principle, duties and taxes, which have entered into force in a country, can not be collected without being expressly provided by law. However, in practice, the financial administration enjoys a greater freedom of management. Taxation authorities are responsible by law for the collection of taxes, during the time they exercise their public functions, they should lean not only to constitutional principles but also to the universal principles of taxation. This means that taxation authorities can not decide arbitrarily about taxation or fees, but only based on the strict implementation of the law. For instance, in our country after the 90's, we started to apply for the first time the principle of free economic initiative and freedom of the market. We had no experience in terms of capitalist structure, and for this reason we had to face the need for immediate approve of a series of laws that would be essential for social and economic life in the country. The problems that we faced were many. For instance, the first laws were passed in the fiscal area and become effective only during the period 1992 -1993, based on the best European experience, but only in 1998 were adopted and entered into force the first law regarding "Tax Procedures in the Republic of Albania". This setback caused a real chaos in the market. Although the establishment of taxes was determined by special laws, the method of collecting and the enforcement of law were left on the hands of the tax administration, which in some cases has acted arbitrarily and unilaterally. This situation led to a number of consequences, which were: Lack of confidence by citizens regarding the strict implementation of the law in the fiscal area, the taxpayers also began to hide their income by not declaring it (by committing tax evasion), tax authorities lost their efficiency, also the budget's income by taxes was reduced and as a result the draft budget plan couldn't finalize. This example explains the economic consequences that are a result of arbitrary behavior by the tax authorities in the country, or legal gaps in a given area of economic and social life. Another positive aspect lies in the fact that binds all laws to be adopted in the fiscal area; as a result this report should not only contradict with this principle but also with all other principles and general spirit of expression in the country's constitution. The Insufficiency of our constitution (Chapter 13 where we talk about "public finance"), lies in the fact that it provides no legal way to adopt fiscal laws. Consequently, they will be adopted as well as all other laws not part of Article 81, paragraph 2 of the Constitution, which would require the approval of a majority, specified by 2/3 of the members of parliament. All other laws need to be approved by a simple majority of the parliament 50% + 1 vote, described into a minimum number of votes that required 71 votes. Kosovo's Constitution does not expressly provide such a principle but mentions some of the most important universal principles. In Article 119, paragraph 8 concerning "Public Finance" Constitution of Kosovo states: "Each person is obliged to pay taxes and other contributions provided by law", and in Article 120, paragraph 1, states that: "Public Expenditure and Collection of Public Revenues should be based on principles of accountability, effectiveness, efficiency and transparency ". In general, we can say that: The Constitution of the Republic of Kosovo provides not only the principle of legality but mention some of the most important principles of universal character in the regard to taxation. Seen in this aspect the Constitution of the Republic of Kosovo brings innovations in comparison with the Constitution of the Republic of Albania. It underlines the importance of tax principles in the constitutional level, according to the fundamental law of a state, similarly the Constitution of the Italian Republic( Article 23), that states: "No personal liability or property can not be decided if is not based on law." Nowadays, a very important principle in the field of taxes is the principle of contributive ability or solvency. Having a look at all the constitutions of European developed countries we realize that these constitutions provide such a principle. So, we can mention the German Constitution Article 104 | a | b, in Chapter 10" Finances" and the French Constitution in Article 47. This article focuses mainly on the constitution of the Republic of Italy, Article 53 which states that: "All the citizens have the duty to contribute to the public expenditure according to their ability to contribute. Fiscal system is based on the criteria of progression ".

## 2. What do we mean by the principle of solvency and where does its importance lay?

Firstly, the emphasis of this principle has its origins in utilitarian theories of taxation under which individuals themselves (modern societies) are carrying the sovereignty of the state, who should be the main contributors in the public finances. According to A. C. Pigou (Gjyli 2008), "Social welfare coincides with economic welfare". The state itself holds the duty to manage the public finances and to spend them in the benefit of the society with the aim of maximizing social welfare. Adam Smith stated: "Citizens should contribute to keeping the country on foot, in proportion to the respective capacities, which means in proportion to the income that enjoy's under the protection of the state". In a modern state, each individual appears as a contributor in the field of taxation, sometimes by paying direct taxes (which are related to the income or wealth of individuals), or in cases that they appear as consumer or merchant (for all the goods that we consume we are paying the value added tax, so we pay indirect taxes). We come to the conclusion that the roles that we have in everyday life, whether as direct or indirect contributors, we are essential contributors to the state budget. On the other hand, the states duty is to ensure that these revenues will be used properly, in order to fulfill all those expenses or investments, which if are left in the private hand will lose their meaning. For instance: Protecting the country, Public safety, ensuring the functioning of the administration and justice and providing social and economic policies. According to the Italian author (De Viti de Marco 1953): "Can accept calmly that the consumption of general public services is in proportional to the income of each citizen (page 117). Thus, we can say that every individual, in accordance with the constitution of his country is legally obliged to pay taxes established by law. What do we mean by taxation: "Taxes are pouring and irreversible binding to administration versus tax charge for their collection by law". When we say that taxes are an outpouring of irreversible binding, we understand the fact that we do not get a service in return for their payment, but indirectly say that we take advantage of all the investments that the state conducts to increase social welfare. But what do we mean by "ability to pay or solvency "? According to Mario Leccisotti-n, "the term "ability to pay" its just an "empty box", which is filled with concrete content only from the work of legislators, at the moment when it sets rates for the distribution of the tax burden" (Leccisotti, 1995). In order to ensure the observance of horizontal impartiality (to impose a symmetric treatment for those who are in the same conditions), and to exclude distribution of the tax burden that are not supported in the economic conditions of the subject. I believe that the contributor ability relates only to those acts that are part of the regular structure of the tax system and derived from general principles of defining and regulating specific tax rate, norms which differ from those derived from the specific objectives of economic and social character of the legislator .The issue that has moved the interes of the researchers has to do with the structure and distribution of the fiscal quotes subscription between different contributors. The truth is that: The ability to contribute deals only with those norms that are part of the regular structure of the tax system and which derive from general principles of defining and regulating specific taxes, rates that differ from those derived from the specific objectives of economic and social character of the legislator. It is clear that we make a step forward when specified that "ability to pay", should be something objective, related to the tax structure, in the sense that the tax base should be rooted in a given fact or case law as an assessment of element of the asset. According to such clarifications, it has been made a move towards a more rational taxation rather than identifying a desired tax or that one which is prohibited by the Constitution. The conquence of rationality specified that constitutional jurisprudence was valid. The constitutional principle understood the solvency ratio, as an act that the lawmaker should observe this principle in order to comprehend the rational of legal taxation.

From the point of view of fundamental law, fiscal interest, and possesses tax simplicity, with all the issues examined by simplification (La Rosa 2006). As for, formal law, the application of the tax, and holds a regular collection of joint tax. Such target is due to the immediate application of financial law, under the general right, civil law, administrative right and penal right.

This is a delicate matter in our subject, the application of law such in some moments seem irracionale and arbitrary (De Mita, 2004). Here appears the tendency of constitutional norms, in order to reduce the feature of fiscal law in terms of the general law, a trend that needs to be balanced with fiscal interests. In fact, when the tendency of constitutional norms introduces orientations toward the principles and rules of law in general, then these directions do not violate the principles of equality (Article 18 of the constitution.). The purpose of this paper is primarily to highlight the positive effects of the principle of "solvency", and secondly to analyze why and constitution of the Republic of Albania had to predict such principle in its content. Although, as noted in chapter 13 of the Constitution of Albania, in the chapter entitled: "Public Finance" sections 155-161, have not been expressly provided for the principle of "solvency". During the discussions with students in the auditorium, we have stressed the importance of this principle and the fact that, if we look carefully at the general spirit expressed in the constitution but even in the general principles of the tax and spirit of Legislation in the

country, we will see that such a Principle is not expressed literally. Following the analysis of this reasoning, I would stop to analyze whether certain fiscal laws and not only, make us realize that such a principle exists in the Albanian legislation, is not expressed but implied, which lies in some specific laws. I would start my reasoning beginning from the very constitution of the Republic of Albania, as the fundamental law and the most important one in the country. In Article 157, paragraph 2, stated that: "The state budget is created by the revenues collected from taxes, fees and other financial obligations, as well as from other legitimate income", which includes all state spending". "From this definition, we understand that most of the state budget revenues are attained from taxes and fees collected from individuals and society. So, it is safe to say that the citizens are the main contributors to the state budget. Although, this article does not exclude and other forms of income, such as those conducted by public debt, the sale of public assets (privatization), or policies that are followed by states are rare, as the issue of banknote issuance. The legislator has emphasised that revenues from taxes and fees, in modern and contemporary states, they have become common revenues which constitute the most important and safer form of contribution to the state budget. The legislator wisely did not mention the fact that as individuals of this society we will contribute from our income. So, there is no defined form provided by the legislator, for the collection of taxes and fees, under the Albanian Constitution. This form will be progressive (as the Italian legislator has foreseen in Article 53), or will be proportionate with the incomes? This is why our legislator did not include it, in the constitution. In this case, I believe that our legislator has acted correctly, by leaving space to other laws that operating in the field instead of defining fiscal and tax collection form. Focusing on the socio-economic conditions in which our country actually is, the provision form of tax collection in the constitution would be a superfluous luxury. I mention this based on the fact that our country started to apply the principle of free economic initiative and market capitalist form only after 90's. Up to 90's, our country has been a monocratic state and faced the worst form of communist regimes. But on the other hand, in the early '90s, not everybody was aware of the severity, complexity and the content of political reforms, like: Institutional, economic and social, that will have to out, adopt and carry out. Initially, democracy was simply identified with political pluralism and justice with a reform of the legal framework, the market economy free without borders and the privatization thought that would include all of that immediately; as a magic wand that changes things instantly, economic development and social abundance will come as outsider help, by believing that foreign investment will be poured without an end (Angjeli 2010). But experience proof us wrong. Precisely, this transition from desires and European vision and in people's faith and ideals, to mechanization and concrete instruments of the transition, turned to that complex mechanism that will radically transform the state, its institutions, institutional relations, legislation, the model of governance mentality, the economy, the finance, the market and property relations, openness to the world and the efforts to reduce poverty, these challenges have been faced by the Albanian society these last 20 years. For the Nobel Prize Winner in Economics, Joseph Eugen Stiglitz, "The transition from communism to a market economy represents one of the most important experiments of all times" (Stiglitz 1994). I focused a little longer to show an accurate picture of voluminous labor reforms and diverse, which faced the Albanian state, but especially in the fiscal area they have been varied. After 90's, about 50 years without an efficient fiscal system, our country faced an immediate need to create a fiscal legislation as efficient, coherent and of incorporating the best European values in this direction. Based on the practice of Western developed countries, also mentioning the precious assistance of international financial institutions, prestigious as (IMF, WB, EU, Italian Guardian of Finance, The assistance British government, DFID), initially decided to invoke a progressive form of tax collection (Blejer 1992). But over the years, the high fiscal burdens brought enormous market instability which was accompanied by a number of negative effects like.

1. High rates of tax burden (up to 20% of the personal income tax, 30% income tax, 20% of value added tax), brought an increase of tax evasion.
2. The lengthy bureaucracy made businesses (the procedure initially required that businesses record their economic activity in the court and then to be recorded in certain tax authorities), prefer not to register and all their economic activities conducted illegally.
3. Promotion of illegal employment.
4. Most of the financial transactions were conducted in cash and not through the bank.
5. Foreign investment in the country, were going down instead of going up. Whether it's influenced by economic instability or the sequence of fiscal burden (Annaliza and Hammings 2005).
6. This lead to a fall in revenue that came as a result of tax collection in the state budget.

For this specific reason, in 2007, Albanian government, based on developments of the countries that came from the former communist bloc, which had applied the flat tax on income, decided to abandon the European spirit and embrace the spirit of eastern states in terms of the tax collection. So, in 2007 we started applying flat tax on personal

income, which means that the percentage of personal income tax and corporate income tax is the same as the extent of 10%. With changes and the reduction of tax rates incurred in the period 2000-2007, Albania can not be considered as a country with high rates and a large fiscal burden on investment, compared with other countries in the region and Europe. By comparing the data with those countries roughly similar to Albania, such as Bulgaria and Romania, shows that tax rates on direct taxes, indirect taxes like in our country are lower. On the other hand, fiscal burden in Albania (the ratio of tax revenues in accordance to the GDP ratio) is among the lowest. This indicator, for the OECD countries is about 36-38%, while for her special countries is higher as 41-43% Poland, Hungary, 39-41%, 40-41% Czech Republic (Alesina and Perotti 1996). While in our country, this indicator has ranged from 18.7% in 1993, 15.3% in 1996, and 16.2% in 2000 and about 22-24% in recent years. The increase of this ratio (the ratio of tax revenue collected compared to GDP in), in these years has come as a result of:

1. The increasing level of tax administration through modernization of tax administration, further informatization of taxes, the improvements of relations with taxpayers. Today, the discharge of taxes from all subjects can be done online.
2. There is an increase of inward and foreign investment, thank to the government initiative "Albania One Euro".
3. There is an increase in the number of businesses, and the awareness of the community at the same time to make their economic activity lawful for the payment of taxes.
4. The business registration procedures are simplified (the registration now takes place only at a record level near "national licensing center, QKL", and enables automatic registration in the relevant tax authorities.
5. In general, we can say that the tax revenues have been increased to the state budget.

According to the signed agreement of Stabilization and Association (MSA, which entered into force on April 1, 2009), fulfillment of the Copenhagen criteria (1993), along with the signing of the agreement of the receiving country's potential to become part of the European Union, Albania had to undertake a series of reforms, in institutional and economic character. As I mentioned above, a real revolution has undergone the fiscal framework in order to adapt more and more the legislation to the *acquis communautaire*. Therefore, it can be said that in the last 20 years, Albania has had to change quite often the legal framework and especially the fiscal legislation has had to be amendment quite a few times. In conclusion, It can be emphasized that the constitution of our country, has chosen not to define the form of collecting fees and charges, for the fact that in our country is not established yet a consistency in terms of the fiscal system. From 1992, the first step was the application of progressive taxes, we continue to apply the flat tax of 10% from 2007 onwards. The membership of our country in the big European family, will pass back into the form of collection of progressive taxation. But then, we'll have a few years experience in this field, we'll have a sustainable legal framework, technical and legal assistance to the European Union. This reasons have been taken into account by the lawmakers when deciding not to define the form of tax levy, but to delegate this power to the other laws in force, according to the preferences of the government and their economic and fiscal policies. Meanwhile, the Italian legislator has provided a fair form of tax levy in the country's fundamental law Article 53, to establishes the sustainability, financial and fiscal stability that will last through time. It is difficult for a country's constitution to change anytime in order to incorporate fiscal amendments. We notice a significant measuring maturity of the Italian legislation, a maturity that our legislator, in the near future is seeking to achieve. The decision not to define such a form, will prove to be extremely helpful for the future of tax legislation in Albania.

As mentioned above, the solvency principle is implicit in a number of laws of the fiscal package in our country and in particular: First, it finds expression in the law no. 9943, date 26.06.2008, on "Taxes on incomes in the Republic of Albania", in it's Article number 8 of "exempt income", in paragraph 1 (Law no. 9943, date 26.06.2008), states that "Revenues obtained as a result of insurance in the scheme of compulsory social and health insurance, as well as economic benefits for individuals without income or low income, are defined in the relevant legislation in force". In this article, we observe that would be exempt from paying personal income tax precisely those categories of entities, who can prove that they have the minimum or low income, student scholarships, income benefits that come as the result of benefits from the compulsory social and health scheme (pensions, entities that benefit from social assistance, etc.) This was further defined by the Council of Ministers, which has exempt from paying personal income tax the subjects who receive a salary, which is equal to the minimum wage in the country: 30,000 lek (Decretal no. 235, date 27.02.2011).. So, in this way, the lawmaker himself has taken into account in drafting the law, the ability to pay taxes on subjects, relating this capability of incomes that the subjects realize and creating facilities for certain categories of incomes who show that subjects in these conditions do not really have effective opportunities to pay taxes, because their incomes do not allow such a thing.

Law no. 9920, dated 19.05.2008, "On Tax Procedures in the Republic of Albania", in Article 12, which shows "The principles of tax administration", in paragraph 1, point b is noted that "The self-assessment and the self-disclosure of tax liability is carried by the taxpayer (Law no. 9920, dated 19.05.2008)". So, the law recognizes the right to taxpaying entities to substantiate by their own the situation of their income and wealth, and based on this self-assessment to determine the amount of tax they have to pay. And of course every taxpayer subject during the completion of their declaration they shall take into account their ability to pay, based on the income that they realize and the wealth that they occur in accordance with tax legislation in force. It has to be emphasized that the existence, not expressed, but implied of this principle, does not extend its action only in tax law, but even in the rest of the legislation in force in the country, thus giving this principle an important dimension. Under the Criminal Code of the Republic of Albania, in section 6 "Offenses in connection with fees and charges" in the article 181, entitled "The nonpayment of fees and charge" states: "The nonpayment of fees and charge within the prescribed period, despite the possibility of their payment, from the person against whom previously have been taken administrative measures to this end, is punishable by fine or imprisonment up to three years (Code of the Republic of Albania)". It is clearly stated under the Article 181 of the penal code, that in order for such act to be considered a criminal offense, two conditions must be present:

1. It has to be established that a particular subject has had the effective opportunity to pay taxes and duties, but he did not want to pay them with his free will, so has committed tax evasion. However, in practice it is difficult to identify a subject that has had the opportunity to pay taxes, but has not paid taxes.
2. This subject has to have precedent. This means that when all administrative measures are exhausted this subject continues to not pay taxes, even though the tax administration has confirmed that this subject is solvent, only then the tax administration has the right to prosecute this subject.

### 3. Conclusions

In conclusion, it is strongly believed that this area of law is of an imperative importance. For this reason the principle of "legitimacy", as well as the principle of "solvency", should be the integral part of Albania constitution. And in the near future the legislator should understand the importance of such principles. Generally citizens are inclined to avoid liability of tax payment. However, it should be stressed that it is the duty of every citizen of this country to sacrifice part of their wealth in exchange for preserving national sovereignty, to benefit from all the public services, this principle has to become a national consciousness. Professor Mario Leccisotti has stated: "The term "solvent" is nothing more than an "empty box", which is filled with concrete content only from the work of the legislator, at the moment when it sets the rates for the distribution of the tax burden"(Leccisotti 1995). In this statement it is implied that this principle will serve as a cornerstone for the establishment of all the country's fiscal system, and is an important task of the legislator to interpret such principle correctly. So, the relationship that is created in this case is mutual, the law requires the forecast of this principle, but this principle will also be defined by the legislator. As previously mentioned the spirit of the General Constitution of the Republic of Albania, expresses and implies the principle of solvency. However, I believe that a further guarantee is needed and it can be achieved through the implementation of the principle of solvency and the principle of legality. What impressed me most, in the European constitutions that provide such a principle, is the fact that these principles create a consistency and fiscal stability that will last through time. It is exactly what aims to achieve our legislator today, that fiscal maturity which will resist time and will be stable over time. For all these reasons, I believe that in the near future an amendment should and will be made by the legislator, in order to make a future incorporation of both principles.

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