Tax Justice Network Africa's Historic Win

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Could a Kenyan court case point the way towards a more just tax system? Amy Hall investigates.

Although Kenya has one of the highest concentrations of healthcare workers on the African continent, the government estimates that they are still down 3,238 medical officers. The shortage is worldwide, but Africa has one of the largest regional deficits.

'I'm looking forward to resilient and self-reliant African countries that are using the revenue that they are generating to actually deliver critical public services,' says **Tax Justice Network Africa (TJNA)** policy assistant Everlyn Muendo, when I ask about her vision for a global tax system of the future. 'We shouldn't be having women who are dying in the process of giving life in this day in age.'

Tax revenue should be a crucial part of states' ability to fund public services. But, as the Tax Justice Network (TJN) has estimated (PDF doc), the world is losing over $483 billion a year thanks to corporations and the wealthy using tax havens to underpay tax.

And while a number of political choices can contribute to shortages of healthcare workers, the fact that elected governments are missing out on tax income is significant. The loss of revenue is not a case of careless misplacement, but the result of a system rigged in favour of powerful companies, the mega-rich and former colonial powers.

Africa continues to be a net creditor to the world, with far more wealth leaving the continent, in various forms, than coming in, including aid. It's estimated that in 2015 this was a surplus of $41.3 billion (PDF doc).

One of the ways multinationals can avoid tax is through **double tax agreements (DTAs)**.

On the face of it, these seem harmless – the idea is that the same income is not taxed twice. But they can often result in double non-taxation, in which multinationals can avoid paying tax altogether.

There has been an increase in the signing of DTAs by Majority World countries (PDF doc). But as researcher Nicholas Shaxson highlights, double taxation puts them at a disadvantage.

For example, DTAs can enable European companies to avoid paying taxes on money made in Africa. An African country may agree not to tax the company's earnings there at all, or provide preferential rates.

Then the European company can send its earnings through a third conduit country, a secrecy jurisdiction, that has a treaty with the African country where the money was made.

The 'treaty haven' also agrees not to tax the income and the multinational is quids in. Meanwhile both the home European country and the African country miss out on tax revenues.

Research from TJNA estimated that in 2015, Sub-Saharan Africa had at least 300 double tax agreements in force, the majority of them signed with European countries.

The IMF has warned developing Majority World countries to be cautious of signing bilateral tax treaties.

'It's supposed to be a very fair process in which both countries win, but the ideal is not the reality, especially for African countries,' explains Muendo.

'The main reason for this is because they tend to be capital importing countries, and it's developed countries which are the capital exporting countries. In fact, the main reason why African countries keep getting into double taxation agreements is because they are trying to attract foreign direct investment.'

A HISTORIC WIN

In 2014, TJNA took the Kenyan government to court over its DTA with Mauritius, having labelled the island as one of the 'most corrosive corporate tax havens against African countries''. In 2019, the organization was victorious when the Kenya-Mauritius DTA was voided and declared unconstitutional by Kenya's High Court.

'It was historic really,' says Muendo. 'Nobody had ever really interacted with a double taxation agreement from a human rights perspective, and from a constitutional basis. That is a precedent that has been set and hopefully other African countries can borrow from it.'

There were two main arguments to the case.

1. the Kenya-Mauritius DTA was actually more likely to lead to revenue leakage and erode Kenya's tax base than attract foreign investment and ensure fairer taxation.
2. the process by which the agreement was entered into was unlawful – and unconstitutional to boot. 'The ministry of finance entered into the double taxation agreement but failed to table the DTA at parliament for approval,' explains Muendo. 'It wasn't a transparent process: there was no public participation involved.'

It was on this second point that TJNA secured its victory, but although it did not dismiss or disagree with technical arguments about the potential revenue losses associated with implementing the DTA, the ruling was not based on the substance of the DTA itself.

As Muendo says, 'a win is a win', but the fact that the ruling was based on procedure meant that the government could swiftly and quietly sign another agreement with Mauritius.

Joy Waruguru Ndubai, a teaching and research associate at the Institute for Austrian and International Tax Law, has studied the 2014 Kenya-Mauritius case in depth.

She argues that DTAs are not inherently bad. 'There is a purpose but there's also the risk of misuse and the question is whether the DTA can be safeguarded from this risk of misuse,' she explains. She agrees that the original Kenya-Mauritius DTA did not have the sufficient safeguards to prevent double non-taxation, or tax avoidance.

Mauritius, with its heavy British influence, is described by Shaxson as 'ideal as an offshore centre in many respects'. That is, 'it is politically stable, boasts a cheap, well-educated and multilingual labour force and is in the perfect time zone to serve Europe, Asia and Africa'.

And as the 2019 Mauritius Leaks investigation shows, multinationals, often aided by major accounting and advisory firms, have used Mauritius to avoid paying taxes in some of the world's poorest countries.

Now, TJNA are awaiting the results of another case, lodged in 2020, involving 10 of Kenya's DTAs, including the new Mauritius one. Results are expected in the first quarter of 2023.

SMALL VICTORIES AND BETTER SCRUTINY

While it awaits the outcome of the current case, it seems that TJNA has already helped bring about wider change in Kenya.

In 2021 the government proposed binding DTAs according to Kenya's Treaty-Making Ratification Act, therefore increasing the potential scrutiny of these agreements before they are signed.

'We are happy to see that MPs are playing their rightful role in the design of policy in Kenya that goes beyond rubberstamping decisions of the executive,' then TJNA executive director Alvin Mosioma said at the time.

One of the most important lessons from this process for Muendo is that change can take a long time. 'Sometimes it's a step by step process,' she explains. 'We haven't been able to win so far on the substance of double taxation agreements, but we have improved the regulatory frameworks about double taxation agreements.'

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Kenya's government is now more likely to call for public opinion on DTAs before they are signed. 'So we're also seeing a change at the practices level, and that's normally something that civil society struggles with – not only affecting a legal change but also a change within the practices of the government,' says Muendo.

The increased ability for the public to feed back on these agreements makes it even more important for civil society to skill-up on the technical details, argues Ndubai. 'Business can comment on it, advisory firms can comment on it – they know how to use these treaties, and they understand how they are framed to be more beneficial or less beneficial.

'Ultimately lobbying is more effective to prevent fire than fight fire, most times. It takes a lot of money to get involved in a court case and then it takes a long time to get an outcome.'

Muendo is playing the long game. 'I think that when you work in civil society you realize that sometimes the work you are doing now is not going to benefit you during your lifetime, but it will benefit others – I am the beneficiary of the work of civil society from the past 20 years,' she explains.

There is still a lot of work to do, she says. 'For Kenya to try and enter into a double taxation agreement with Ireland, which is a well-known tax haven, means that we still have a long fight when it comes to engaging the government on the substance, but the fact that they are changing the regulatory framework, as well as their practices gives us hope.'

Meanwhile, some African countries have binned their treaties with Mauritius altogether. In 2020, Senegal tore up its DTA with the island – the first time it has ended a bilateral tax treaty. The country estimated that the agreement had cost an estimated $257 million in lost tax revenue over 17 years.

‘This is a big deal,’ an anonymous Malawi tax researcher old the International Consortium of Investigative Journalists (ICIJ). ‘I have a feeling that this will trigger a wave of similar reactions, especially now that there is a lot more awareness of how African countries are losing out through DTAs with tax havens like Mauritius.’ Later that year, Zambia also tore up its DTA with Mauritius.

ROTTEN ROOTS

The inequality in the global tax system is not accidental. The rules and infrastructure by which it is currently organized were overwhelmingly created, and monitored, by richer and imperialist nations.

As chief executive Alex Cobham has described, tax ‘remains central to the extractive processes of economic and financial globalisation that have replaced formal empire’. This ‘new form of imperial extraction’ extends to both resources and taxing rights, and ‘relies on networks of dependent territories, above all those of the United Kingdom, which have been facilitated to establish themselves as financial hubs. This has involved the continuing political and legal support of the imperial power.’

Dereje Alemayehu, executive co-ordinator for the Global Alliance for Tax Justice, says: ‘It is not by accident that the most notorious secrecy jurisdictions are British crown dependencies and overseas territories and that they were set up really partly also to stash expropriated and looted income and wealth from colonies. Colonialism was replaced by neocolonialism – it didn’t go away, and then they adapted the institutions.’

Central to maintaining this state of affairs is the **Organisation for Economic Co-operation and Development (OECD)**, which sets rules and standards on tax treaties. Established in the 1960s, Cobham describes it in a feature for NI as a a ‘club of rich imperial powers and settler states’.

But a recent development has left many tax justice campaigners with a renewed sense of hope. Towards the end of 2022, the UN General Assembly adopted a resolution enabling intergovernmental discussions over possible UN reforms to the global tax system, ‘including the establishment of new UN bodies and mechanisms to monitor, evaluate and decide global tax rules’.

> “Colonialism was replaced by neocolonialism – it didn’t go away, and then they adapted the institutions”

It is hoped that this will mark ‘the beginning of the end’ of the OECD’s power over global tax and will open the door to the creation of a UN tax convention. Because more countries than just those in the OECD club will be able to have a say in how it works, the hope is that it will also be fairer.

Speaking on the organization’s monthly podcast Taxcast, TJN’s Rachel Etter-Phoya described watching the proceedings at the UN as ‘incredible’.

‘To see what was like a boxing match where the underdog Nigeria, representing the Africa group at the UN, alongside all other countries that have really been cut out of the international tax discussions to stand up and say, “this is the time to change the rules of the game, to start negotiations on international tax”… it is so different from how we’ve seen international tax negotiations over the last few years.’

CHANGE THE NARRATIVE

As we move to a more just tax system, we will need to be honest about where the power dynamics have come from, as well as how and why they are maintained. For Alemayehu, part of this is shifting the global discourse on corruption and stereotypes around African leaders. 'As an African it makes me angry,' he says.

Just three per cent of the $1.2 trillion to $1.4 trillion that was estimated to have left Africa in illicit financial flows between 1980 and 2009 was related to corrupt activities such as bribery and embezzlement, whereas commercial transactions by multinational companies make up around 60 per cent.

'The focus on development aid is really being superseded by "if we get our taxes we don't need development aid", says Alemayehu.

'It's giving corruption a different meaning – who are the enablers, who are the facilitators? It's about the structures that are making corruption possible. Showing the colonial roots and the cause and effect relationship without minimizing what the current leaders are doing – that is a major thing.'

For economist Priya Lukka, a more reparatory tax system would have to enshrine the principles of compensation, acknowledgment of harm caused, and non-repetition – a guarantee that the abuses will not happen again.

Tax would become much more about reversing, repairing and compensating for the impacts of neocolonialism, colonialism and neoliberalism.

'The tax system today is also very good at consolidating extreme wealth,' she says. 'So if we think about what a post-capitalist reparations tax system in 2073 would be, it would explicitly tackle poverty with real political intention. It would mitigate for widening inequality and it would include repair and redistribution in a much more meaningful way.'

The Ubuntu restoration tax is one idea that has been proposed to target the most wealthy people and corporations.

The proposal is for a financial transaction tax on global financial market trades, which increases over time. Instead of a one-off approach like a wealth tax or one-off reparations payments, it targets 'the epicentre of capitalism, finance capital and therefore the root of power'.

'Will we ever have a global tax system that works for us? Wow, that would be so nice,' says Muendo. 'We call the ordinary citizen in Kenya 'Wanjiku'. Essentially, we're going forward to a situation where Wanjiku isn't paying more taxes as per her income than a multinational is paying… I look forward to a system where we are sharing the tax burden fairly.

'We want to change the whole narrative of Africa being reliant on the West and developed countries when we are so blessed with resources.

If anything, they have been bleeding our resources for so long – from colonial times to right now – so that's the kind of Africa that I'm looking forward to.'

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P.S.

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https://newint.org/features/2023/03/03/tax-justice-network-africas-historic-win-over-double-tax-agreements