Introduction: Taxation and the Social Contract in a Post-Pandemic Era - Domestic and International Dimensions

By:

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July 15, 2020

Jointly hosted by Afronomicslaw, the United Nations Development Programme (Africa) and the Centre for the Study of Economies of Africa

In responding to the coronavirus pandemic, countries have dug deep into their "war chest" through fiscal and monetary policies to protect their industries, ensure liquidity in the economy and safeguard the most vulnerable from the adverse effects of the pandemic. In some instances, countries have transferred cash to workers whose incomes have been affected by the changes that have had to be made by governments. These palliative measures introduced by governments have meant that the economies of many countries will dip into recession. In their bid to avert a full-blown recession or depression, the

palliative measures some countries have taken have been limited, in comparison to their peers in advanced economies. Many African countries, like Nigeria, Kenya and South Africa have by contrast borne the short end of the stick.

More importantly, the pandemic raises additional questions. First, should governments be blamed solely for the limited nature of palliative measures they have undertaken? Second, has the social contract between the state and the governed in many states been broken? Finally, can the broken social contract be repaired and what role can the law play in repairing the broken social contract?

This symposium addresses issues such as the low tax to GDP ratio in developing states, the broken social contract in these countries and the reforms needed to repair the social contract. The convener, in accepting the invitation of **Afronomicslaw** to host the tax symposium, called upon tax practitioners, academics, policy experts, philosophers, administrators, to offer insights on the relationship between taxation and the social contract. Authors have had the liberty to write on issues of choice around the theme, whether focusing on domestic tax issues or international tax issues. Some have made the needed connections between both domestic and international issues. The convener is truly grateful to all authors invited to share their knowledge for their time, insights, wisdom and in-depth analysis of the issues. This introduction introduces each of the contributions to this symposium.

Osasenaro Ese Omo-Osagie aptly introduces the conversation by claiming that, in theory and practice, the tax system of a country is a microcosm of the social contract, the implied legal relationship between citizens and those to whom governance has been assigned. This theory, popularized by the philosophers Rousseau, Hobbes and their contemporaries, concerns the legitimacy of the authority of the State over the individual. In its extension to tax, the fiscal social contract is the implied agreement between the citizens who make a contribution towards their collective welfare and the government who administers that contribution. She argues that, among the various reasons that have been linked to the difficulty of raising tax revenue in developing countries, i.e., leakages stemming from illicit financial flows, low deterrence for tax

evasion and even corruption among public officials, the fiscal social contract is worthy of examination as it appears to be the common thread here. Simply put, to understand why citizens are not paying taxes, it is beneficial to first determine why they should.

Douglas Bamford argues that if we claim that the social contract exists, then those involved in the international tax system—including tax evasion and facilitating novel forms of tax avoidance—are party to it. He further claims that all those involved in international taxation cannot use Hume's 'poor peasant' excuse to engage in tax abuse. Elites and investors are not forced to benefit from a country. He concludes that *If there is a social contract*, then certain participants in society are clearly party to it. This will include those in a position to engage in tax avoidance and evasion using the international loopholes. Sol Picciotto reminds us that transnational corporations (TNCs), by their nature, originate in a home state, but spread their tentacles around the world often into very many host states. This throws into doubt the application of the social contract concept, since TNCs are not 'citizens of the world', nor do we yet have a world government. Nevertheless, they derive super-profits from their ability to coordinate activities on a global scale. Fernando C. Saldivar, S.J., while admitting that social contract theory may be inadequate to address this gap in international taxation, introduces the Catholic School Teaching of integral ecology, developed under Pope Francis. Integral ecology flows from the understanding that "everything is closely interrelated" and that "today's problems call for a vision capable of taking into account every aspect of the global crisis."According to Saldivar, for those of us concerned with the building of a more progressive and transparent system of international taxation, and the role of Africa within that system, the integral ecology of Pope Francis offers us a compelling economic vision for the future.

Edem Andah advances the conversation by arguing that how states proceed with building consensus to create a social contract that facilitates effective taxation, especially in the light of the massive disruptions caused by the pandemic, will require continuous engagement by all parties. Success will perhaps depend on how proactively and quickly countries and the international taxation system unlearn old habits and adjust to the new normal way of doing things. Osarugue C. Obayuwana argues that in the experience of many

societies, the social contract is somewhat elusive in practice, especially when discussed against the backdrop of fiscal accountability, or the lack thereof. With public goods largely in shortage in developing and even in some developed societies, the fiscal social contract sometimes appears one-sided, with governments scarcely holding up their end of the bargain. It inevitably begs the question: is this a contract after all, and can the social contractarian theory continue to hold as a justification for taxation? She further argues that a discussion of the fiscal social contract is therefore, of necessity, one of social justice. It is a discussion of duty and of corresponding rights to public goods that must follow if legitimacy will be properly ascribed to the arrangement. It must be a conversation that goes beyond idealistic narratives to a practical investigation into how taxation can be applied as a tool for social good within a given society.

On the topic of the governor in the social contract arrangement, particular in the realm of international taxation, Allison Christians questions why the Organisation for Economic Co-operation and Development, (OECD's), Inclusive Framework should exist as is—sitting awkwardly under the OECD Council—when the United Nations already includes an all Inclusive Framework where all countries are full-fledged members. Per Christians, there is no substantive reason why the coordinating infrastructure in place at the United Nations should have been ignored while the OECD Secretariat created and directed a nascent organization. The good news, according to Christians, is since the Inclusive Framework is still an under-theorized and imperfect institution, its work could be easily moved over to the United Nations where it could become a fully representative body. She further opines that for governance institutions to be effective they must be transparent, not only about their hierarchical decision-making structures, but also about how they develop their policy prescriptions. Connecting transparency to inclusivity, the OECD's main claim to fame has always been its expertise. For international tax to develop coherently, the experts need work on the things that are of utmost importance to all countries around the world, and not exclusively on the matters that most agitate the most geo-politically powerful powers of the day. It is not clear how the Inclusive Framework can possibly achieve competence without its own secretariat dedicated to serving Inclusive Framework working parties.

Writing on the duties and rights of both the governor and the governed, Emmanuel Eze states that there are actions both parties to the fiscal contract must take post COVID-19 to make the contract work. The citizens must first commit to paying their taxes. Thereafter, they must band together to democratically demand the performance of the government's part of the bargain. The government on its parts must build trust with her citizens. A sure way of building trust is through tax transparency and accountability. He concludes by stating that for the fiscal contract to be effective post COVID-19, all parties to the contract must actively seek to engage on fairer terms. The terms must be implemented, in good faith and, with consideration to the economic and social realities created by the pandemic. A one-sided execution of the contract either by the government or the taxpayer would not cut it. After all, it takes two to tangle and *you can't clap with one hand*.

Still on the broad subject of social contract, Tarcisio Diniz Magalhaes holds that what this whole exercise teaches us is that another political consensus, much like the one that created the international tax system almost one hundred years ago, is about to emerge. Like before, this global compromise will not be science-based, but rather will result from the need to find a quick and reasonable coordinated solution to current challenges. But even more urgent than the digital economy are the socioeconomic costs of the new coronavirus. He further holds that to address the fiscal crisis brought on by COVID-19 in an effective and fair manner, what the world needs, and is substantively capable of producing, is a "global excess profits tax" (GEP tax). Using tools currently available for immediate action, a GEP tax could be developed alongside and complementary to the Organisation for Economic Co-operation and Development (OECD)'s two-pillar approach to reform the international tax system—a continuation of the Base Erosion and Profit Shifting (BEPS) project. Like the OECD's plan, the proposed pillar three would be aided by country-by-country reporting (CbCR), but differently it is submitted that new cooperative governance structures such as the Inclusive Framework platform should be used to make sure that the revenues raised are appropriately deployed to meet the pressing needs of the world's most vulnerable, notably in the Global South. He concludes by arguing that a three-pillar approach could ensure that the normal portion of big multinationals' profits are brought up to the GloBE level, at the same time that the excessive portion is taxed at the GEP tax level,

raising additional public money to help countries, especially developing ones, not only fight the viral outbreak and its disastrous consequences, but also pursue the achievement of sustainable development goals.

Monica Victor **,** on her part, recognizing that the debate about inequality and taxation has focused on wealth tax or global excess profits tax so far, invites us to consider other means of financing extraordinary expenses. Highlighting Brazil's response to the COVID pandemic, she informs us of Brazil's mix of tax exemptions, stimulus packs, minimum income grants, and deferrals without a clear public policy regarding the Post-COVID.

One area of concern to all stakeholders today is the taxation of the digital economy. The digital economy creates new social contracts between the players, consumers and governments. Taxing the digital economy effectively is of paramount importance to most governments and in the absence of global consensus on its effective taxation, unilateral measures by countries may become the order of the day. Hence, no surprise that many authors here focused on the taxation of the digital economy.

Chike Jude Emedosi, providing an overview of global efforts to attain consensus on the taxation of the digital economy warns that African countries may be left behind in the negotiations. The technical complexities involved in the ongoing negotiations and the speed with which the process is being driven in order to meet the 2020 deadline – a timeline the OECD itself admits to be "extremely ambitious" – may limit the ability of African countries to participate effectively, especially as they are already burdened by the fallouts of Covid-19. He recommends that African countries should be prepared for a no-deal scenario, which looks very likely considering the US withdrawal, and develop innovative solutions to the digital tax problem either unilaterally or at a regional level. He further opines that the threshold of €750 million being suggested in the proposal would only catch the world's largest companies while leaving some active regional businesses out of scope. A way around this may be to set two thresholds, one for the global giants and a much lower threshold for regional businesses. African countries would also need to ensure that the nexus-revenue threshold is as low as possible, in order to accommodate jurisdictions with relatively small market.

One suggestion for the nexus-revenue threshold is the adoption of significant economic presence rules and policies by governments. Abdul Muheet Chowdhary claims that: Significant Economic Presence (SEP) legislation is the most important requirement for effective taxation of the digitalized economy; Effective taxation of the digitalized economy is an essential component of the fulfilment of the social contract in a post-pandemic era; *Therefore, SEP legislation is an essential component of the fulfilment of the social contract in a post-pandemic era.*

Olumide K. Obayemi asks how would Nigerian tax administrators resolve the conflict between the SEP rule and the Model Double Taxation Treaties, (DTTs), which prescribe PE physical presence? Per Obayemi, a solution would be that Nigeria commences operating different tax standards regarding digital platforms located in countries that have DTTs with Nigeria and others without DTTs. He also questions, since SEP only applies to corporations, whether the 183 days physical presence rule which governs taxation of natural persons, be extended to all the employees of Non-Resident digital corporations in Nigeria

Kenneth Njuguna and Jade Makory write on Kenya's introduction of Digital Services Tax at the rate of 1.5%, which will be effective on 1 January 2021. Kenya is one of the few countries on the Continent to impose a unilateral DST regime and other jurisdictions are expected to adopt similar measures. They caution that while there is pressure to enhance tax revenues and unilateral tax measures in the digital economy are therefore expected to increase, it is important for these measures to be carefully implemented to ensure that they do not stifle the growth of the nascent digital sector, especially in developing countries.

Should we consider other aspects of allocating taxing rights? Ivan Ozai thinks so. According to Ozai, Global tax policy discourse has long focused on deontological consensus, namely around theories of tax nexus based on source and residence. But the past decade is witnessing a shift to consequentialism, which focuses on the distributional outcomes resulting from various tax policy design choices. The turn to consequentialism creates a need for normative guidance that prevailing tax theory does not provide. Distribution-based approaches require a normative principle that integrates distributive justice

considerations in a way that the predominant normative framework does not. If taxing rights are to be allocated based on distributional consequences, broader attention to the role of international tax in perpetuating or reducing international inequality is warranted. Per Ozai, one potential solution would be to allocate taxing rights between countries based on, among other factors, their levels of economic development, so that the poorer the country, the more taxing rights it retains. Although this may sound radical, well-respected economists Peggy and Richard Musgrave made a similar proposal almost five decades ago, arguing for a differentiated tax rate schedule based on countries' relative per capita income.

Departing from the conversation on taxation of the digital economy, another area of concern to stakeholders is the issue of tax incentives graciously granted by developing countries to attract and retain investments. Nana Ama Sarfo writes on the increased expectation that governments soliciting new investments will ensure those investments generate sustainable tax revenue, especially as economists warn of a potentially protracted economic recovery period. At the same time, one cannot ignore the element of competition between governments. The looming question is: when does one's tax sovereignty become another's tax dilemma? Tax incentives granted by a country, in the exercise of its fiscal sovereignty, could have devastating outcomes on another country, hence, a regional or multilateral arrangement may be necessary.

However, Mustapha Ndajiwo reminds us that, as shown by evidence, tax incentives are not key drivers of investment and the opportunity cost of the incentives are high with dire implications for the health sector in Africa. Thus, it becomes pertinent for African countries to re-evaluate and reform their tax incentives frameworks. To achieve this, African countries need to ensure that all tax incentives are only considered after conducting a cost-benefit analysis of the potential impact of the incentives. If tax incentives are granted, they should be followed with periodic monitoring and evaluation to ensure standards are adhered to and the aims and objectives of the incentives are met. Furthermore, African countries should focus on cost-based tax incentives which are less harmful than profit-based incentives. He concludes by stating that to improve the social contract between the state and citizen, transparency of tax

incentives is necessary, therefore, information regarding the objectives of the incentives, the beneficiaries as well as the amount of revenue forgone due to the incentives should be made public. Chidiebere Eze-Ajoku, re-emphasizing Ndajiwo's warnings, strongly states that rather than creating new incentives to add on to existing tax expenditure policies, there is a pressing need for governments to look back at existing tax expenditures and question the relevance of those policies in this season and the degree to which they can be suspended or modified.

Oluwabusayo Aderoju advises that the target of post-pandemic tax holidays by African governments should be given to job-creating SMEs, companies engaged in export-related manufacturing, companies operating in the health sector, private-sector engaged in essential services, and businesses who provide support to governments and health centers in the fight against the pandemic. Beyond short term tax holidays, African countries should, in the long-term, also apply lower income tax rates to companies in the aforementioned sectors so as to stimulate investment, recovery, and job creation.

Finally, Dr. Alexander Ezenagu & Dr. Eytan Tepper invite us to think about an issue that is not yet of interest but with the potential to dominate tax discourse in the near future—the taxation of outer space exploration. They note that, for decades, humans have been drawn to space exploration for scientific, security and commercial purposes. Private companies such as SpaceX and Blue Origin have undertaken daring projects to commercialize outer space, including tourism, mining space resources and establishing installations and even extra-terrestrial habitats. The allocation of the benefits from space is a highly disputed issue, from the early days of space exploration to date. Many claim that outer space is global commons or even the common heritage of mankind. Thus, no state should be denied from the resources and benefits of the Outer Space. While such claims are disputed and even suffer from epistemological deficientness, it is widely agreed that the exploration and use of outer space should be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. It is also arguable that States which conducted efforts towards the exploration and use of space have a special interest in the deriving benefits. These principles raise issues of inclusive economic development, environmental sustainability and

peace and security for all nations. A discussion of these issues will also contribute to similar issues that arise in the context of other areas that are beyond national jurisdiction - the High Sea, the Atmosphere, and the Antarctica.

One way of apportioning the cost of space exploration among states is through the establishment of a universal tax regime where countries are charged a percentage of their gross domestic product (GDP) as cost for potentially benefitting from the Outer Space. The authors hold the view that the issue of taxation, hardly discussed so far, is key in the consideration of the proper distribution of space benefits. In the absence of such global governance structure, there is the fear of the tragedy of commons. Therefore, the long debate on the distribution of space benefits will be served by a discussion on the investment and taxation aspects of space governance.

I invite you all to read each article as my Introduction does no justice to the depth of the conversations initiated by each of these essays. I also look forward to the engagements on each article and hearing the views of others. I am grateful to the Afronomicslaw team for bestowing me the honour to convene this symposium. I can’t thank all contributors enough for their contributions and insightful contributions.

Thank you.

Contributors

Douglas Bamford: The Social Contract, Tacit Consent, and International Taxation

Edem Andah: Taxation and the Social Contract in a Post-Pandemic Era: Domestic and International Dimensions

Allison Christians: Three principles for a new global contract on tax

Sol Picciotto: Taxation of Transnational Corporations and the Social Contract

Osarugue C. Obayuwana: The Fiscal Social Contract – Looking Beyond the Theory

Monica Victor: Taxing for Vulnerabilities

Fernando C. Saldivar, S.J.: Integral Ecology and Taxation: Catholic Social Teaching Pushing the Frontiers of Social Contract Theory in the Post-Pandemic Era

Ivan Ozai: The Shift Toward a Distribution-Based Tax Framework in a Post-Pandemic World

Mustapha Ndajiwo: Why African Countries need to rethink tax incentives in the post-pandemic Era

Chidiebere Eze-Ajoku: Tax Expenditures: A post-pandemic bond in social contracts

Tarcisio Diniz Magalhaes: A Global Excess Profits Tax for a Post-Pandemic World

Abdul Muheet Chowdhary: Significant Economic Presence laws key to fulfilling the post-pandemic social contract

Kenneth Njuguna and Jade Makory: An Analysis of Unilateral Digital Tax Measures vis-à-vis Redefined Fiscal Social Contracts and Inertia towards Global Consensus: A focus on the Post-COVID-19 Era

Nana Ama Sarfo: Sustainable Finance and Investment in the Age of COVID-19

Oluwabusayo Aderoju: Departing from the OECD's Conversation: Post-Pandemic Tax Policy Options for African Countries

Emmanuel Eze: Fiscal Social Contract and Taxation in a Post COVID-19 Pandemic Africa

Olumide K. Obayemi**:** Digitalization of Nigerian Businesses: Tax Challenges Post COVID-19

Osasenaro Ese Omo-Osagie: Post-pandemic Opportunities for Strengthening The Fiscal Social Contract In Nigeria

Chike Jude Emedosi: Global Digital Taxation in the Era of Covid-19: An African Perspective

Alexander Ezenagu & Eytan Tepper: Adopting a Universal Tax Regime for Outer Space Exploration

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