A Covid-Era Discussion: Mobility of the Informal Sector, Fiscal Legitimacy and the Fiscal Contract in Kenya

We may share the same sun, but we do not share the same roofs.

—Kalenjin proverb (Kenyan)

Covid and the Kenyan response on movement

East Africa has known her fair share of calamity in the recent past. This includes floods, droughts, diseases and recently the desert locust invasion which ravaged parts of Kenya's maize-producing counties – Trans Nzoia and Uasin Gishu. Against this backdrop, Kenya has been grappling with the Covid-19 pandemic. The pandemic, having negatively affected the global economy, took its toll on the Kenyan population, though not recording as many Covid-related deaths as the United States and Europe. As at 24 November 2020, Kenya had a total of 77,785 positive Covid-19 cases since the first case was announced on 12 March 2020. Out of these, 51,903 recoveries were recorded and 1,392 people lost their lives to the virus. The government announced its first case of the virus through a press briefing held by the Cabinet Secretary for Health, Mutahi Kagwe, and has since taken many diverse measures as will be discussed below. As the opening proverb states, we are sharing the same problem – that of a pandemic – but how each household manages it varies based on their particular circumstances: we need governments who are cognisant of our roofs as well as the sun.

The Kenyan government's response to the pandemic was to impose lockdown measures restricting movement in and out of Nairobi, Mombasa, Kilifi and Mandera counties as well as a curfew from 7pm to 4am. While these were eased gradually as the numbers of new infections decreased, the effects are still being felt among the population. Although this curfew has since been reduced to 10pm to 5am, and then 9pm to 5pm. However, these diverse changes on the restriction of movement have meant that the population are more and more relaxing their behaviour and the streets of the cities look much like they did in the pre-Covid era.

Key among those affected are informal traders. The population forced into self-isolation and banned from movement in and out of the counties, expressed their dissatisfaction regularly on social media. Users often expressed the need to go about their regular businesses which had been stopped by the government's response to the pandemic. Since this informal sector makes up around 83.6% of the employed population, the effect on this huge workforce touches almost every family in the country. Direct taxes, such as the corporate income tax and the pay-as-you-earn (PAYE) tax on individuals are levied on 16.4% of the economy. Recent data shows that only 28% of the Kenyan population are registered with income tax, thus, the informal sector predominantly pays indirect taxes and the Kenyan fiscal system is system heavily reliant on indirect taxes. The imposition of lockdown measures, including the dusk-to-dawn curfew, has impaired operations in the informal sector, crippling an economy that has no/limited protections and also does not thrive on remote working.

The States' Fiscal Responses

Kenya's fiscal social contract is embodied by the provisions of the laws including the Constitution which at Article 209 empowers the governments – both national and county – to collect taxes assigned to them for running their functions.[1] These functions are provided for in the 4th Schedule of the Constitution and they include providing healthcare services.[2] The right to healthcare is recognised by the Constitution and international treaties such as the Universal Declaration on Human Rights (1948), to which Kenya is party. The government, in the fiscal social contract is the guarantor of this right by providing universal healthcare coverage to its population.

To cushion the economic strain suffered by most Kenyans, the government issued the following directives: exemption from PAYE for individual taxpayers earning less than 24,000 Kenya shillings, or 218.84 in US Dollars, per month, reduction of the upper limit of the effective tax rate from 30% to 25%, reduction of the VAT rate from 16% to 14% as well as the reduction of the Turnover Tax rate applicable to persons with less than 5 million Kenya shillings, equivalent to 45,591.76 US Dollars, in annual turnover from 3% to 1%.[3]

This move by the government could be read as a response to the strain on the fiscal social contract between the state and citizens, occasioned by the pandemic. The crux of a fiscal social contract is that taxpayers pay taxes to the government in exchange for benefits of governance such as the delivery of public services including infrastructure, healthcare and education. As at 2020, it was reported that there were 4.4 million compliant taxpayers up from 2 million. The revenue authority attributed this increase to the use of ICT facilities in tax administration.

[1] Constitution of Kenya 2010.
[2] ibid.
[3] Tax Laws (Ammendment) Act 2020.

However, this increase though welcome, is still far from ideal, since the number of registered voters in the country averaged 19.6 million, while the 2019 population census showed that the total Kenyan population was 47.6 million. In addition there are 7.6 million registered taxpayers however only approximately 4 million file annual returns.[4] The figures above show that only a fraction of the population is willing to take part in the fiscal social contract through the active remission of funds to the government in exchange for service delivery. Majority of the taxes collected to fund this contract are collected through indirect channels such as Value Added Tax paid by consumers. Thus, even though parts of the population do not actively remit monies using the direct tax channels, their contribution through the consumption taxes entitle them to service delivery within the contract. However the fiscal response has been targeting those paying income taxes(corporate and personal) much more than the informal sector whose operations are most severely affected.

With the onset of COVID-19, the lowering of the Value Added Tax rate to 14% would be expected to reduce the funds collectible by the authority, however, there was the introduction of this tax to formerly exempt products, broadening the tax base.[5] The fragile state of the fiscal contract as a result continues during this pandemic period owing to reduced economic power in the country as a result of the global and regional government responses in addition to the national level lockdown and curfew.

The pandemic highlighted the inadequacies of healthcare services where the quarantine centres were poorly equipped and further, testing reagents were lacking at some point countrywide. Healthcare as a devolved function was particularly sensitive since each county is responsible for primary healthcare provision, while the national government is responsible for coming up with a framework that enables proper healthcare systems in the country.[6]

Since healthcare provision is a benefit of the fiscal social contract, long before the onset of the pandemic, the effects of a compromised social contract had begun to show. Doctors and nurses' strikes had left many sick people unattended as a result of pay wrangles between the national and county governments, healthcare centres lacked medicine and patients were detained in hospitals where they were not able to raise fees after treatment.

This was the state of affairs in which Kenya entered the pandemic. The informal sector, who often relied on out-of-pocket payments for treatment, were faced with high costs of treatment for Covid-19 symptoms. While the cushioning which allowed more liquid cash in people's pockets was a welcome reprieve, this situation provided evidence of a compromised fiscal social contract.

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[4] Attiya Waris, Financing Africa (Langaa, Bamende) 2019
[5] Tax Laws (Ammendment) Act (n 8).
[6] Republic of Kenya, 'Health Sector Strategy 2014-2018' (2014).

What would have been the ideal situation? In reference to healthcare provision, where the taxpayer remits money to the government, the taxpayer expects to receive healthcare services. In this sense, taxes collected ought to be distributed to the stocking of healthcare centres. Further, where an individual remits monies to the National Health Insurance Fund, they ought to get insurance coverage that allows them and their dependants access to healthcare. However, a majority of those in the informal sector do not remit payments to the Insurance Fund, thus raising fiscal legitimacy concerns.

Trust in the State and Fiscal Legitimacy

Fiscal legitimacy stems from the ability of the state to be accountable, responsible, transparent, effective and efficient; fair and just.[7] It is a component of a functioning fiscal social contract that suggests that taxpayers are more willing to remit monies to the common pool where they see these elements being built within the state machinery. In democracies, the people elect political representatives who raise concerns on their behalf concerning the management of this pool of resources. Where persons are not satisfied with the delivery of services, they will most likely not contribute to this pool.[8]

Non-compliance by the informal sector is informed by among others, a lacking in fiscal legitimacy. These persons do not trust the trustees of these funds and as such, find it better to rely on out-of-pocket payments. Thus, in a situation where people’s resources are limited and out-of-pocket payments are expensive, the taxpayer is hard pressed. The lack of trust between the taxpayers and those commissioned to manage the resources is informed by a lack of service delivery. Where an individual takes out insurance cover, yet hospitals have no nurses and doctors or medicine, trust levels are bound to reduce and compliance with remitting funds is crippled.

Fiscal legitimacy is accompanied by access to fiscal information.[9] Statutory contributions such as the health insurance fund, direct taxes and all else, need to be properly accounted for. This is limited where information is withheld from the public. Access to information is a human right, much like the right to healthcare services. The fiscal social contract thrives where books of account are audited regularly, and citizens are involved in a step-by-step process involving their money. Roping the informal sector into the tax net would be challenging where fiscal information

[7] Attiya Waris, Tax and Development (LawAfrica 2013)
[8] Attiya Waris and Laila Latif, ‘Towards Establishing Fiscal Legitimacy Through Settled Fiscal Principles in Global Health Financing’ [2015] NCBI.
[9] Attiya Waris, *Financing Africa* (Langaa RPCIG 2019).

is not readily available to the public, which would undermine fiscal legitimacy and, in essence, undermine the social contract.

Financing healthcare services and the subsequent delivery of such services during the Covid-19 pandemic was impaired by corruption. Kenya reported losses of grand amounts of money to corruption as a result of the tendering process. This information was only made public through an exposé by local media in Kenya. Therefore, access to fiscal information must be easily consumable by all individuals taking into account language differences, literacy levels and access to tools of communication.

The pandemic brought with it considerations for an economy set to recover. The informal sector is an important part of the economy and should be considered keenly. An effective tax system is one that allows the taxpayer to pay with as few hiccups as possible.[10] Thus, the informal economy's participation hinges on the ease with which taxpayers participate. The government's preparedness for emergencies was also tested. The Contingencies Fund established under Article 208 of the Constitution requires adequate funding for emergencies.[11] The invasion by the locusts, floods and a global pandemic highlighted the importance of such funds at the county and national government levels. Finally, the pandemic raised questions around sustainable debt. Funding the Covid-19 response was done through loans from the IMF and the World Bank, amid a cry for debt forgiveness for heavily indebted countries. A possible consideration would be a debt ceiling, which would only be adjustable upward or otherwise, upon citizen decision as opposed to political pressure on the executive arm of government.[12]

The Covid-19 pandemic has exposed the weak fiscal social contract between the Kenyan government and citizens. To repair this, efforts must be made to enable access to fiscal information, fighting corruption, easing tax compliance by the informal sector and adjusting the debt framework, to facilitate sustainable debt. The media played a crucial role in delivering information to the public and this should be strengthened in a bid to promote fiscal legitimacy in a post-Covid Kenya.

However many members of the informal sector believe that the pandemic is a manufactured emergency to keep them in poverty and the absence of clear communication exacerbates this. In Kenya, Covid-19 precautions are not being observed as carefully anymore and following the easing of lockdown measures, there is need to maintain and increase sensitisation of the masses as well. The use of the criminal justice system as a means to effect the WHO measures such as fining those who are caught without masks has served to undermine the reality of the existence

[10] Atim (n 20).
[11] Constitution of Kenya (n 14).
[12] Waris (n 22).

of the pandemic. Persons now use masks only to be safe from police harassment and the payment of fines.

The fiscal social contract is one that relies on access to information by the citizens, specifically fiscal information. This calls for regular audits which should be publicised in the appropriate forum as highlighted above. The delivery of services such as healthcare and development of infrastructure is a sure means to facilitate fiscal legitimacy in the country, as we move into a new-normal economy, adjusting to the shocks dealt by COVID 19. Fiscal legitimacy requires that the system be tailored for the majority of the people and until this is done we will not have an inclusive system that is fair and just. As the state works hard to be aware of the sun, they must not lose sight of the roofs that are affected and those people that live within them.

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