Africa Tax *Spotlight*

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# Taxation and Human Rights

## EDITORIAL

When and how does a tax regime characterized by injustice facilitate a revolution? It could be said that the suicide by immolation of an informal street trader in Tunisia, Mohammed Bouazizi, catalyzed the 'North African' revolution. On December 27, 2010, Bouazizi's fruit cart was overturned by police. After years of collective patience with the regime of Ben Ali, Tunisia was ready for resistance. Bouazizi's was to make a statement using the only weapon he possessed: his body.

Peruvian economist Hernando de Soto, world renowned advisor to governments on solving poverty by breathing life into 'dead capital', claimed that the lack of legally recognized private property rights were behind Bouazizi's act. In contrast, political economist Patrick Bond, author of the book *Looting Africa,* identifies a different causal factor: inappropriate taxation of poor people in a context of economic cronyism and widespread human rights violations, both first (civil and political) and second generation (economic, cultural and social).

In September 2010, the International Monetary Fund (IMF) celebrated Ben Ali for his commitment, "to reduce tax rates on businesses and to offset those reductions by increasing the standard VAT [value added tax] rate" (Toujas-Bernate, J. and R.Bhattacharya 2010). Bouazizi's death, Bond argued in *The Review of African Political Economy*, reflects the stresses faced by a survivalist business that could not afford to contribute to the 18% VAT, imposed on the most vulnerable. Unjust 'official' taxation coupled with stealth 'corruption' taxes absorb at least 30% of an individual's income both in Bouazizi's town, throughout Africa, in countries where the informal or shadow economy accounted for 43% of the continent's GDP. (SOMO, 2008)

It is such kinds of human rights issues linked to taxation that the present edition intends to highlight. Using the example of South Africa's constitutional right to water, Bond unveils how the guarantee of rights does little good when resources are limited because of corporate tax exemptions and cheap state services to rich people that are all too often subsidized by the labour of the most impoverished.

Building on this, the article on Zambia's copper industry further describes how the neoliberal understanding of 'development' – and the 'accountability' industry, such as the Extractive Industries Transparency Initiative (EITI), deployed to monitor revenue flows - enables the use of national resources for private, corrupt gain, rather than equitable national development.

As exemplified by the Zimbabwe-based Center for Research and Development (CRD),arguably billions of dollars' worth of diamond wealth has been misappropriated, under the guise of development via the vehicle of the 'resource curse' (i.e. opaque exploitation of resources). South Africa's complicity and the failure of the Kimberley Process are also factors.

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# Editorial

In his article 'A Human Rights Approach to Taxation', Emmanuel Bagenda, a SJD (Doctor of Juridical Science) candidate and specialist in human rights law from Harvard University, articulates the procedural, substantive and other shape of a rights-based approach to taxation.

Professor Sarah Bracking, author of *Corruption and Development*, explains the quality of citizenship as the means of assessing the realization of economic and social rights. This, she states, is dependent on tax justice as the source of the State's fiscal base. If tax avoidance (technically legal) and tax evasion (illegal) continue unchecked, economic rights cannot be fulfilled.

The message is clear: connecting the dots between development and human rights is fundamentally rooted in tax (as the main source of non-aid development revenue) (Wachira, 2008).


Without bridging the gap between democracy, human rights, development and tax – the latter, limited not simply to just legislation, but also the political will required to enforce the law, we will already have lost.


This recognition of rights as a central element of development is the key driver of the African Charter on Human and Peoples' Rights (also known as the Banjul Charter), ratified by over 50 countries (2009). The Banjul Charter is a powerful document which places as much emphasis on the right to work, health, housing, education and food, as it does civil and political rights, as well as on the duties of citizens, including their duty to pay tax. But has it been implemented?

Very often, 'rights' documents, including constitutions, are perceived as documents 'seen to be written, not written to be seen'…But this is not always the situation, as unpacked by the article on the landmark Endorois case – evidencing the African Union (AU) playing a significant role in facilitating compensation for the Endorois peoples, evicted from their land some four decades ago, and importantly recognizing the right of the Endorois people to develop.

Major lessons to learn? Africa – comprised of countries large and small, free, un-free and somewhere in between – has the foundation of justice embedded in the characters of our peoples, our histories, and our various instruments of representation. We can make the difference if we choose to battle hard and smart. Without bridging the gap between democracy, human rights, development and tax – the latter, limited not simply to just legislation, but also the political will required to enforce the law, we will already have lost.

*By Khadija Sharife*
*Investigative Journalist*

HR Approach

# A HUMAN RIGHTS APPROACH TO TAXATION:

## SOME BRIEF COMMENTS

Taxation has traditionally been understood as a fundamentally "economic" or "development-related" undertaking by which policy makers generate revenue for socio-economic development. Primarily therefore, fiscal policy makers are concerned with the "economic" aspects of taxation (notably the maximization of tax revenue) rather than non-economic aspects like human rights and it is hardly surprising that the latter have remained secondary preoccupations.

Human rights doctrine, on the other hand, is founded upon the idea that human beings hold certain entitlements (rights) by virtue of their very being, and that such rights, are inalienable and indivisible.[1] They are spelt out in the "international bill of rights"[2] as well as a domestic "Bill of Rights" typically encoded in a country's constitution. It should be noted however, that the Western conceptualization of human rights, often limited to individual liberties and private properties, is viewed contentiously by some non-western critics, where this is perceived as marginalizing critical peoples' and communal rights.

From this traditional perspective therefore, it is normally considered that country tax codes do not violate human rights. Indeed, with the exception of the right to freedom from arbitrary deprivation of property and the right to privacy, it may be difficult to conceive of a right that is threatened (at least directly) by the lawful levying of taxes. As recent literature has demonstrated however, economic development, no matter how it is conceptualized, is inextricably intertwined with the enjoyment of human rights and cannot be pursued meaningfully in isolation from the latter (Uvin: 2004: 1-16). Just as human rights advocates have found it helpful to articulate their concerns in more economically friendly terms (Alston and Robinson: 19), economic policymakers have found that development frameworks which purposively engage with human rights questions are more effective in terms of promoting socio-economic transformation than those that avoid the latter (Sen: 1999: 35-53). A particularly key insight underpinning the link between development and human rights is that despite differences in conceptualization and methodology, the two phenomena are driven by the same overarching goal – improved social and economic welfare. The traditional perception of human rights as a narrow set of prescriptions with little or no connection to taxation changes therefore, when viewed within the wider context of the link between human rights and development. A fiscal framework that incorporates a human rights perspective takes a particularly broad view of the rights concept, one that extends beyond the narrow 'traditional' approach of rights as spelt out in the (international) bill of rights[3] to include a wider spectrum of rights implicated by the design and implementation of fiscal law and policy meant not only to protect the rights of the people but also to promote them. This brief commentary highlights the Human Rights-based Approach to Development (HRBAD) as a practical framework by which human rights consciousness may be brought to bear on a country's fiscal regime.

### The Human Rights Based Approach to Taxation

A fundamental insight underpinning the HRBAD is the recognition that despite pursuing different philosophical, theoretical and conceptual approaches,

[1] See the Vienna Declaration and Program of Action (1993) UN Doc. A/CONF.157.23

[2] See, for instance, Article 1(1) of both the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) and the International Covenant on Civil and Political Rights (1966)

[3] This is mainly comprised of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social, and Cultural Rights (1966).

the phenomena of human rights and development are ultimately driven by the same goal – improving the socio-economic welfare of individuals and groups (Uvin: 2004: 47-55). The HRBAD thus attempts to bridge some of the differences in approach by adopting a number of conceptual tools aimed at assuaging the concerns of both economists and human rights advocates. While the former are preoccupied with managing scarce resources to fit unlimited demands, the latter are driven by a desire to have social and economic goals articulated in the language of legally-enforceable entitlements often equated with "rights" though the two are not always aligned. Thus under the HRBAD, economic development's beneficiaries become "rights-holders" while development practitioners are "duty-bearers". In reality, however, rights holders can often be duty-bearers as well such as regards sharing of the resource 'commons' like rivers for the purposes of fisheries or flood recession agriculture.

In reality, however, rights holders can often be duty-bearers as well such as regards sharing of the resource 'commons' like rivers for the purposes of fisheries or flood recession agriculture.

Development practitioners are particularly charged with designing their interventions in ways that raise awareness of the human rights implications, enhance duty-bearers' ability to promote such rights, and enable rights-holders to enforce the same or seek reparations for violations (Alston and Robinson: 2005: 40-41).

A rights-based approach to taxation would therefore require fiscal policymakers to take into account a number of practical elements when designing and implementing a fiscal framework. In the *substantive* sense, the approach not only requires a 'negative' approach in which fiscal policy avoids any direct violation of rights, but also a 'positive' approach in which the tax regime is specifically designed to promote the rights in question.

Furthermore, and in a *procedural* sense, a rights-based approach to taxation entails a number of elements, most notably *transparency*, *participation*, and *accountability*. The fiscal framework must particularly be open and *transparent*, granting all "stakeholders," including civil society and the wider public access to full and timely information regarding the design and implementation of tax law and policy. As an illustration, a tax code with tax rates and exemptions that are not based on rational, objective and well-explained criteria violates the principle of transparency and is unlikely to command legitimacy.

Secondly, a human rights-based taxation framework must make provision for mechanisms enabling both proactive and reactive *participation* by the public before, during, and after the design and implementation of fiscal law and policy. A tax code that is conceptualized and designed in a manner that only involves policymakers while excluding civil society and the wider public, therefore, cannot be said to be compliant with the HRBAD.

Finally, a human rights-friendly fiscal framework must entail *accountability* mechanisms enabling any aggrieved party or member of the public to articulate their concerns regarding tax law and policy or its implementation in a manner that bears upon

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policymaking. Such accountability mechanisms must be both 'proactive'/preventative (enabling interested parties to bring policymakers to account at the point of design) and 'reactive'/restitutionary (enabling justice after implementation, particularly though (quasi-) judicial means).

*By Emmanuel Ekiba Bagenda*
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# WHEN 'RIGHTS' UNDERMINE 'RIGHT':

*Exploring the reality of South Africa's Constitutional Right to Water.*

'Human rights culture' is frequently invoked by both the state and social activists in post-apartheid South Africa when addressing the challenge of water and sanitation delivery to poor people, even in Africa's richest city (Johannesburg), and particularly its most politicized neighbourhood (Soweto). In Johannesburg, several thorny financial, technical and political barriers have arisen in the course of transforming rights discourse into justiciable service delivery. The limits of liberal capitalist democracy as the basis for social services provision in poor neighbourhoods—under circumstances of extreme inequality and fiscal pressures—became evident in 2009, when Soweto activists promoting a culture of water rights were defeated in the courts. The conclusion explores their potential move 'out of the box' of liberal rights culture toward a potentially more transformative 'commons' approach to water.

Since the 1948 United Nations Universal Declaration of Human Rights, the idea that all individuals have certain basic human 'rights', or entitlements to political, social, or economic goods (such as food, water, healthcare, education and even employment) has become a guiding framework for social democratic political discourse, invoking discourses of human rights, groups and individuals attempt to legitimize their cause and to accuse their opponents of 'denial of rights'. As water is essential to human life, social conflict surrounding water is now framed in the terms of the 'human right' to water. In this 'culture of rights' (which critics call a 'culture of entitlement'), social groups use 'rights talk' as a blanket justification for the provision of lifeline supplies of water to all, while in contrast, governments typically dispute their exact responsibilities for water provision and management.

During apartheid, water was a relatively low-cost luxury for white South Africans, who had one of the highest levels of home swimming pools per capita in the world. In contrast, black South Africans were highly vulnerable to inadequate water supplies in both urban townships and the segregated 'Bantustan' system of rural homelands that supplied male migrant workers to the white-owned mines, factories, and plantations. These rural homelands had weak or non-existent water and irrigation infrastructures, as the apartheid government directed investment to the white-dominated cities and suburbs and also to a much more limited extent to black urban townships. Black African women were particularly disadvantaged in the process.

After 1994, racial apartheid ended but South Africa immediately confronted several international trends towards water privatisation. These included municipal cost-recovery, commercialization (in which state agencies converted water into a 'commodity', i.e., to be sold for, at minimum, the cost of its production), and long-term municipal water management contracts that in some cases were roughly equivalent to privatization. As a result, water was soon priced beyond the reach of poor households. South Africa's 1996 Constitution, however, included socioeconomic clauses meant to do away not only with racial oppression but the developmental injustices of apartheid. Grassroots water activists in Soweto seized on the guarantee to clean water specified in the Constitution's Bill of Rights, ultimately insisting upon a social entitlement to an acceptable supply of clean water amounting to at least 50 liters supplied per person per day, delivered via a metering system based on credit, not prepayment.

At the same time, South Africa's primary corporate tax rate was dropped from 48 percent in 1994 to 28 percent by 2000, and exchange controls were liberalised in 1995 and 1999 to allow wealthy South Africans to move their assets offshore, including most of the largest firms which relocated their primary listings from the Johannesburg Stock Exchange to the London Stock Exchange. The push for decentralisation was accompanied with fiscal shortages so that more responsibilities were given to municipalities yet municipalities had fewer financial resources available to fulfil those responsibilities: the 'unfunded mandate

problem.' Without sufficient 'available resources,' as the Constitution puts it, a caveat is created that permits state agencies to default on their obligation to deliver water. (Section 27(2) of the South African Constitution).

Resistance against the shift to a market-based system of water access occurred in various ways, including mass protests, informal or illegal reconnections to official water supplies, the physical destruction of prepayment meters and 'trickler' systems which limited water supply, and by 2003, a constitutional challenge over water services emanating from Soweto. There, the Soweto activists learned in 2009 that a rights discourse has significant limitations so long as it remains primarily focused on the social domain.

## Water rights culture and denial in Soweto and Johannesburg

In September 2009, South Africa's Constitutional Court overturned a seminal finding in lower courts that human rights activists had hoped would substantially expand water access to impoverished communities. In *Mazibuko and Others v. Johannesburg Water & Others*, five Soweto women had successfully argued for their right to a larger supply of free municipal water and for abolishing the recently installed prepayment meter system. In the ruling, Johannesburg High Court Judge Moroa Tsoka ruled that the 'prepayment water system in Phiri Township' was 'unconstitutional and unlawful', and ordered the city to provide each applicant and other residents with a 'free basic water supply of 50 litres per person per day and the option of a metered supply installed at the cost of the City of Johannesburg'. Judge Tsoka accused city officials of racism for imposing credit control via prepayment 'in the historically poor black areas and not the historically rich white areas'. He noted that meter installation apparently occurred 'in terms of colour or geographical area', and the community consultation process was 'a publicity stunt' characterised by a 'big brother approach' (Mazibuko & Others v the City of Johannesburg & Others, paragraph 183.4-183.5; for further details, see Bond and Dugard, 2008). This was the first South African case to adjudicate the constitutional right of access to sufficient water (RSA 1996).

Johannesburg municipal and national government officials appealed the Mazibuko case, and also retracted the African National Congress's (ANC) promise of universal free basic water service. In the 2000 municipal election campaign, the ANC campaign statement was clear: 'The ANC-led local government will provide all residents with a free basic amount of water, electricity and other municipal services so as to help the poor. Those who use more than the basic amounts, will pay for the extra they use.' In early 2008, Johannesburg Water's policy change meant that the 2000 campaign promise of Free Basic Water would be kept only for the small proportion of the population declared 'indigent' (once onerous 'means tests' were applied), who would get an increase from 6 kiloliters per household each month to 10 kl.

Failure to properly tax luxury consumption of water was the central reason for Johannesburg's Water policy, a factor influenced by global financial pressure. The World Bank reported on its local economic development methodology developed for the City of Johannesburg in 1999. The latter sought to conceptualize an optimal role for a fiscally decentralized City in the form of a regulator that would seek to alleviate poverty by applying a two-pronged strategy. "The first prong would focus on reducing 'income-poverty' through job creation by creating an enabling business environment for private sector investment and economic growth in Johannesburg. The second prong would address non-income poverty reduction by directly tracking the effects of local government expenditures on service delivery to poor households in the city."

The 'enabling business environment' kept prices low for business but high for the poor, notwithstanding the 'second prong', which after the national 2001 move to Free Basic Water averaging 25 liters per person per day (a policy the World Bank vigorously opposed), appeared to have no impact on water pricing. If Johannesburg

Public Service

Water had been serious about delivering water to poor people, it would have expanded the Free Basic Water allocation above the national minimum norm, and paid for it by cross-subsidisation. The Soweto activists and others in the Anti-Privatisation Forum had demanded 50 liters per person per day minimum and a more concave slope in the tariff curve, which would have penalised over-consumers. Instead, Johannesburg Water provided the token free water but raised its prices dramatically for the second block, from 6 kl/household/month upwards.

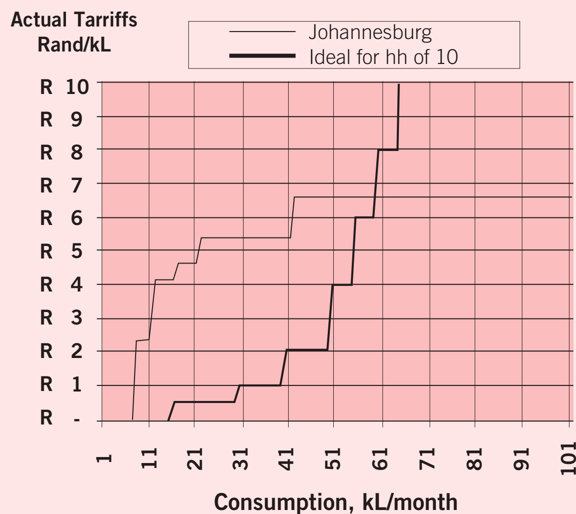
Figure 1 shows the vast difference between Johannesburg's high-cost pricing for very low-income households who consumed around 12 kl/hh/month (typical for the poorest families) and the price demanded by communities. Likewise, Johannesburg allowed wealthy, high-consumption households a relatively flat incremental rate of increase on water prices after 42 kl/hh/month was reached.

The regressive nature of water pricing soon became evident. In the main South African study of price elasticity, carried out in Durban for the years 1997-2004, it was found that the doubling of water prices to low-income households resulted in a drop from 22 to 15 kl/hh/month (elasticity of -0.55), compared to a drop from 35 to 32 kl/hh/month for the average higher-income household (elasticity of -0.11). With Johannesburg following similar patterns, it was inevitable that the failure to impose a luxury tax on high-income households to cross-subsidise low-income households would generate sharp social conflict.

By 2003, Johannesburg had become one of the world's main water wars, between a neoliberal municipality and a furious citizenry.

Another factor was the means Johannesburg Water chose for delivering water, influenced by its management agency, Suez (a for-profit Paris company which operated the city utility from 2001-06). Within the retail water payment system, unlike conventional meters in wealthy suburbs that provide due warning of future disconnection (and an opportunity to make representation), prepayment meter disconnection occurs automatically and without warning, following the exhaustion of the 6,000 liter free water supply. If the disconnection occurs during the night or over a weekend when water credit vendors are closed, the household has to go without water until the shops are open again, and if the household does not have money for additional water, it must borrow either money or water from neighbours in order to survive. The Mazibuko plaintiffs argued that the prepayment water meter represented not only a threat to dignity and health, but also a direct risk to life in the event of a fire. In fact, the deaths of two children in a Soweto shack fire in 2002 starkly illustrated the dangers of the self-disconnecting prepayment meters and catalysed the Mazibuko lawsuit.

**Figure 1 - Johannesburg water pricing: convex tariff curve (2001), and ideal-type concave curve**




*Source: Johannesburg Water tariffs (2001), and author estimates*

In sum, rights advocates argued, the underlying problem was that across South Africa, the self-interest of powerful municipal constituents – large businesses, farms, and rich ratepayers – was to keep water prices relatively low, a policy that in turn required limiting the provision of water in low-income neighbourhoods. In this context, rights advocates accused the city of adopting the following strategies:

1) Imposing water prices that soar after a very small free amount (roughly two toilet flushes per person per day per household member), so that the next block of consumption becomes unaffordable;

2) Disconnecting people too poor to pay for any water beyond the 6 kl free allocation;

3) Offering Free Basic Water on the basis of a household as a unit (rather than the ANC's 1994 Reconstruction and Development Programme (RDP) recommendation of 50 liters per person per day), which penalized larger families and those who have backyard shack dwellers or tenants who also draw upon the household's water supply;

4) Providing low-quality water and sanitation technology (prepayment meters, pit latrines, chemical toilets, and shallow sewage systems) to tens of thousands of poor households with the objective of reducing consumption; and

5) Providing differential technology according to geography, race, and class, such that water-saving hardware was only imposed on people in townships and informal settlements and not on those living in wealthier and whiter suburbs.

In March 2008, the water rights activists complained about three Johannesburg Council innovations:

1) use of an inaccurate register of indigency that recorded only a small proportion of the city's poor and thus excluded a large number of low-income people from free water allocations;

2) a new system of 'means testing' that combined a variety of municipal databases, even though gaining indigency status initially entailed an invasive process of surveillance; and

3) termination of the policy of universal free water services for all, even though termination directly contradicted the Constitution, the RDP, and the ANC municipal election promise that 'all residents' would receive free services.

## The limits of the rights culture

If there is an inadequate taxation policy that cannot properly redistribute national income as well as charge luxury consumption taxes on hedonistic water users, what use is a human rights discourse? Some argue that rights discourse (not just judgments like that of the Constitutional Court of South Africa in 2009) 'domesticates' the politics of need (see Madlingozi 2007) and distracts us from fundamental problems of income and wealth distribution. Roithmayr (2009: 1) debates a central assumption in liberal rights analyses:

> The liberal perspective is that when human rights aspirations are not being fulfilled, it is because a sound idea suffers flawed implementation. In contrast, the radical critique of human rights suggested that the whole project is flawed from the ground up in its design. This is because as framed, human rights discourse serves not to resist but to legitimize neoliberalism.
>
> The discourse of human rights pulls a slight of hand by giving moral claims a legal form that dilutes them, waters them down, and robs them of any real power. The legalization of human right does this in two ways. First, human rights discourse offers only very limited recognition of moral claims in certain circumstances. Second, even these limited moral claims by design are then converted

into bureaucratic, technical legal problems that cannot be solved because legal rights are indeterminate.

In South Africa, every protected right is immediately watered down because, under the Constitution's limitations clause, government can restrict people's rights so long as they are doing so 'reasonably'. Likewise, socio-economic rights are only progressively realizable and only within available resources.

Further, these limited claims become technical problems with no determinate answers. We should not be at all surprised that the right to reparations and access to justice became a technical question over the scope and reach of the TRC [Truth and Reconciliation Commission]. We should not be surprised that a universal moral human right to housing was converted to a technical question over the reach of supervisory jurisdiction, as we see in the Constitutional Court's wrangling over housing in Grootboom. This isn't failure of implementation. This is failure by design.

Maybe more importantly, human rights discourse leaves in place the class structure that reproduces racial inequality in South Africa. Human rights discourse bleeds off any real move to dismantle these processes by making change all about consciousness raising and recognition rather than redistribution and reparation.

*By Patrick Bond*
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**Public Service**

Transparency

# Transparency and Rights: Who Benefits?

The Extractive Industry Transparency Initiative (EITI), which aims to increase transparency in the payments by corporations to 'host' governments, as well as transparency over revenues received by governments, has been celebrated globally as the vehicle through which transparency (lending to accountability) is being realised. An initiative of the World Bank and the UK government, EITI is backed by dozens of resource-seeking transnational corporations like Shell, Chevron, Vale, BHP Billiton, and Anglo-American.

It is also celebrated as the means through which human rights, both first (civil and political) as well as second generation (economic, social and cultural) can be fulfilled through development of the State's tax base.

The EITI claims that corporations active in developing countries may be 'complicit' in corruption due to the criminogenic environments in which they operate, and can access many benefits from disclosure such as reduced reputational risks. Benefits for other participants include increased development revenue and realisation of human rights in developing countries that are host to mining activities.

According to Clare Short, EITI Chair and former British Secretary of State for International Development, a ministry created under former Prime Minister Tony Blair, once a country joins EITI, all companies operating within the "host" country must make full disclosures.The logic goes that, so long as there is disclosure of cash payments within national boundaries, transparency will act as a natural sanction - diminishing the potential for, and realisation of, corruption.

Zambia recently became the 26th country to publish an EITI report (released this year, focused on 2008 revenues), disclosing payments from mining companies for the year 2008. The EITI standard is meant to "facilitate transparency" by assessing net discrepancies between resource rents. For example, the difference between royalties and taxes remitted by multinationals and those received by governments.

Recently, the BBC World Debate screened a program exploring the contours of the 'resource curse' in Africa, focusing specifically on copper-rich Zambia. The program investigated the economic system that underpins the relationship between countries with abundant natural resources and the corporations vying to exploit them.

Africa - the scene of the crime, so to speak, was introduced by virtue of the continent's natural capital, which includes 40% of the world's uranium and gold, 75% of the world's platinum, and 90% of the world's diamonds. The show's presenter, Redi Tlhabi, went on to say that despite these resources, most Africans continue to live in a state of want. The UN's Human Development Index, she said, evidenced that African countries occupy 34 of the 41 lowest ranking positions.

Tlhabi began the narrative by listing the names of the panelists (Andrew DeSimone (Vale), Situmbeko Musokotwane (Zambian Minister of Finance and National Planning), Emmanuel Mutati, (Mopani Copper Mine), Steve Manteaw (ISODEC), Kapil Kapoor (the World Bank)before moving on to another very important individual, whose existence - devoid of both political and economic capital, rarely gives pause to decision-makers: Mr Mambwe - the driver - for 22 years, of an underground train in a Zambian copper

mine. 'We don't have toilets here. No toilets. No water. We have communal (public) toilets. I don't feel good. This pains me.'

"All over the world there has been total secrecy about the contracts, about how much the production was, about how much they really pay to the government, how much the government receives," stated EITI chair, Clare Short. If there's nothing to hide, let's get all of this out in the open. Let the people know what it costs, how much is being produced, what proportion of profits are being paid in taxes," she said.

Currently, Zambia is one of almost thirty EITI candidate countries, of which more than half are African, including Tanzania, Gabon, Cameroon, the Democratic Republic of the Congo, Chad, Mali, Mauritania, Sierra Leone, and Burkina Faso - among others. Already, five of eleven EITI "compliant" nations are African - many of them surprising choices - think Nigeria, Niger, and Liberia, countries renowned for cases of gross corruption and looting, both at a political and corporate level.

It is a logic that appears to bank on political or "demand-side" corruption, chiefly innate to the developing country's character - with corporations simply "going along" with the system - a kind of "when in Rome" response. But the EITI theory is vastly different from the reality that has a lot to do with financial secrecy and "first world" country ie: supply-side corruption. Zambia's first report, for instance, revealed that mining companies remitted $463 million in payments to the government in 2008. The EITI report claims "significant discrepancies" noting a net total of "unresolved discrepancies" of $66 million.

In that same year - 2008, much of Zambia's exported copper, almost half of which was earmarked for Switzerland – one of the world's leading secrecy jurisdictions, never arrived at its destination - disappearing into thin air. Moreover, the pricing structure for Swiss copper - remarkably similar to Zambia's exported copper - was six times higher than the funds Zambia received, facilitating a potential loss of some $11.4bn. This is especially interesting when taking into account that Zambia's entire GDP for 2008 was $14.3bn.

This type of corporate corruption - known as transfer mispricing made headlines recently when a leaked report authored by Grant Thornton at the request of the Zambia Revenue Authority (ZRA) unpacked how the Glencore-controlled lucrative Mopani Copper Mines (MCM) - a company which declared no profits, was cheating the country's tax base of copper revenue.

The auditors disclosed that MCM tried "resisting the pilot audit at every stage", rendering them unable to access crucial data in many instances. MCM's Chief Executive Officer, Emmanuel Mutati, claimed that the audit was not accurate, precisely because data was inaccurate. Yet Glencore, the world's largest commodity trader, controlling 50 per cent of the global copper market, is confident that MCM will be "exonerated".

In all probability, Glencore will be saying that transfer pricing is perfectly legal and central to trade. But the nature of "arms-length transfer pricing" within the current deregulated global financial architecture, enables multinationals (conducting as much as 60 per cent of global trade within - rather than between - corporations) to "self-regulate" pricing.

So, though pricing, in theory, is determined according to "market values", in reality, the "corporate veil" facilitates tremendous mispricing when subsidiaries of the same company trade with one another - the means through which Glencore allegedly purchased grade +1 copper well below market prices, with MCM allegedly preferring - all too often, the lowest price offered by a Glencore subsidiary, described by the audit as an act likely for buyers, not sellers, who would experience diminished profits.

Glencore International AG, based in Switzerland, the world's leading secrecy jurisdiction (according to the 2011 Financial Secrecy Index by TJN), handpicked by Glencore founder and notorious commodity trader Marc Rich, further enables the company to take further advantage of little or no taxation. Tax havens such as Switzerland are essential to resource-seeking corporations operating in Africa: more than 85 per cent of asset portfolios for sub-Saharan Africa pass through tax havens. In Zambia, MCM's structure - like that of Vedanta and others - keenly utilises tax havens as vehicles for shell companies able to access legal and financial opacity tools including banking secrecy, thin capitalisation, little or no taxation, zero disclosure of company accounts, use of nominees, and - best of all - high-level client confidentiality, all of which is entirely legal.

When companies use transfer mispricing routed through tax havens to avoid tax, it is legal however immoral. The financial

geography of MCM is located almost entirely in tax havens: though a Zambian company, it is 73 per cent owned by Carlisa Investments (a British Virgin Islands company, 82 per cent owned by Bermuda-based Glencore Finance, which is 100 per cent owned by Glencore International AG). MCM's mining partner, holding 18 per cent of Carlisa, is another mining entity active globally and in Zambia - First Quantum.

And while the extractive industry is being promoted rather aggressively as the primary vehicle to kickstart Zambia's real economy, mining companies generate just 2.2 per cent of revenue collected by Zambian authorities, with the bigger percentage of tax derived from withheld taxes paid by workers. The result? Just 4.4 per cent of actual taxes remitted from the already minute sum paid by mining houses comprise corporate tax. This is a particularly nifty boutique tax product called Total Tax Contribution, created by auditing firm PricewaterhouseCoopers, which provides tax planning services to companies.

MCM is the largest copper mining operation in Zambia - and Glencore certainly stands to benefit from locking down the copper market, not simply because copper underwires the modern world, but also because it is fundamental to renewable energy. In fact, shortages are estimated to drive up the price of copper from its current historic high at $9,000 per tonne, to that of about $11,000 by 2013, elevated in large parts by the demands of emerging nations such as China, the world's largest consumer.

Thus, catching revenue leakage through EITI - off the mark by billions - is impossible because it does not focus on what multinationals ought to have paid, but only on what they have paid, and it never investigates the means through which corporations were able to circumvent taxation.

There are several reasons for this: EITI allows inconsistent standards limited to national boundaries, despite the international nature of multinational economic activity. And the EITI system, for instance, provides national governments with choices that fragment the legitimacy and accuracy of conclusions - even insofar as they attempt to track cash payments, including whether reporting is mandatory, whether auditing is required, what should be published and the accounting policies used, materiality levels, et cetera. Therefore, it does not capture cross border trade which is actually the bulk of multinational economic activity. To find an example of the vacuum innate to the EITI, we need look no further than that of Glencore. For instance, the EITI does not capture corrupt payments that could be made to a politician in Zambia by another subsidiary company that is based in another jurisdiction. It also would not detect tax avoidance schemes that involve manipulation of thin capitalization rules or transfer mispricing within a group of companies.

Apart from the EITI, there are many other solutions to the problem of corporate transparency namely that of corporate country-by-country reporting (CbC), created by Richard Murphy, a co-founder of the Tax Justice Network. This would involve real natural sanctions prohibiting companies from artificially using tax havens (by disclosing the lack of substantial economic activities in these jurisdictions) while also limiting the scope of transfer mispricing.

Elements of CbC include the names of each country in which the multinational operates; the names of all companies trading in each country in which the company operates; the financial performance in each country in which it operates; sales between third parties and other group companies; purchases split between third parties and intra-group transactions; labour costs and employee numbers; financing costs; pre-tax profits; deferred taxation liabilities for the country at the start and close of each accounting period; the actual payments to the government; the tax charge for the split between current and deferred tax and so on.

It is a method inspired by a system already in place in the United States. Certainly, critics will claim that transfer mispricing is always possible, but the difference between CbC and EITI, is that with the former, it is exceedingly difficult, whereas with the latter, it is highly probable.

At the end of the day, the normalized systems of the global financial architecture – a kind of casino capitalism - does not benefit African citizens like Mr Mwambwe. Then again, perhaps it was never meant too. And this reality may just be why multinationals and many developed governments alike have signed on board and selectively implemented 'transparency' initiatives like the EITI.

*By Khadija Sharife*
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# Human Rights and tax justice

Economic, social and cultural rights are sometimes referred to as 'positive' rights, or 'the second generation' of human rights, as they are enabling rights giving someone the ability to do something, rather than the 'first generation' of civil and political rights which were couched in a negative sense as protection from something, such as torture, wrongful incarceration, or predatory government. Economic, social and cultural rights facilitate a person to 'be something', to have a life enjoyed to its full potential, with education, health, housing, employment, and a cultural life which gives meaning and context to identity and belonging. Economic, social and cultural rights, although formally assigned to the individual, are also generally only met in practise by a collective effort, through a political system that 'works' to collect tax from citizens and corporations, and then to pool monies together and organise the provision of public goods – schools, hospitals, clinics, and a regulatory framework for a working economy. Although some of these goods can be provided privately, this is unlikely to be for everyone, since some people will not have cash to pay, particularly the young, old, poor, vulnerable and sick, that is, those who will probably need the services most. The great benefit of couching these basic needs as rights is that they become something to which someone is entitled merely by the fact that they are human (ideally); or more commonly, that they are a citizen (more limiting, but still fairly inclusive). So the quality of citizenship is usually the chief determinant of whether someone has economic and social rights in practice--particularly so if that person doesn't have a lot of money. In other words, it is the quality of governance, including the ability to collect tax, which conditions peoples' enjoyment, or otherwise, of their rights.

Tax evasion (illegal) and tax avoidance (unfortunately legal), along with transfer pricing and money laundering, directly undermine the fiscal base on which the economic aspects of citizenship rely. As FitzGerald shows, the indirect tax pressure in Africa is approaching the world average rate of 8 per cent of GDP (for example, tax collected through VAT), but income and property tax pressure is only half of the developing country average (FitzGerald, 2010, 9). The rich and the corporate are getting away lightly compared to world averages, as taxes on capital gains and income from mobile capital investments are very low comparatively. However, this has not caused foreign firms to rush to invest in Africa (as classical economists might argue it would), but it has narrowed the developmental impact of the economic activity that does take place, due to the low associated tax take. FitzGerald further argues that a lack of local wealth, owned by nationals, is "not the key constraint

on investment in Africa, [since] capital flight (up to a half of African private assets) is evidence of private savings surplus" (FitzGerald, 2010, 13). He cites Keen and Mansour (2009) to the effect that tax incentives to investment are 'too high' and "need coordination and scaling back to prevent the 'race to

the bottom'" (FitzGerald, 2010, 13). Thus in the African case, low tax rates do not lead to 'efficiency' and more investment – this latter is kept low by "infrastructure, institutions, [and] uncertainty" – but do mean that public goods are not funded as well as they could be, since we can assume that some part of the tax collected would be spent on such things as health and education, or the facilitators of economic and social rights.

In 2008, Christian Aid provided aggregate data on the developmental effect of tax evasion with particular reference to the Millennium Development Goals (MDGs), and argued that USD 160 billion per year in corporate taxes is being lost, which is more than one and a half times the total global aid budget of USD 103.7 billion in 2007, and enough to fund the MDGs by 2015. In fact all the figures on tax avoidance are big. The Tax Justice Network (TJN) estimated that governments across the globe lose USD 255 billion annually in tax revenues from high net worth individuals, based on the likely income earned on some USD 11.5 trillion of assets held offshore (TJN).

Tax havens, taken singularly, attract USD 206 billion in 'flight capital' (IMF World Economic Outlook database), perhaps another USD 641-979 billion in illegal capital flows (Kar & Cartwright-Smith, 2009) and between USD 11-12, 000 billion in 2004 (Tax Justice Network) in placements from 'high net worth individuals' or rich people (figures from NOU, 2009: 11). Recent cases of limited disclosure suggest that only around five per cent of the latter has been declared for tax purposes in the country from which it has come.

So materially, the means are being generated that could pay for everyone's positive rights, to life, health, education and employment, but the money is being stolen from governments' budgets (notwithstanding that if it were there, parts of it might also be 'lost' by politicians). ActionAid calculated that if "all developing countries were able to raise just 15 percent of their national income as tax revenue, they could realize at least an additional USD 198 billion per year" (2009: 5). This would be the happy alternative. However, as it stands, the poor are without the 'inalienable' rights that they were born with and populations are subjected to the institutions and people bearing charity 'gifts' to the needy. To have what is yours by right is a world apart from having to beg or rely on gifts, since the latter relationship is an infringement of one's political and cultural rights – the right to dignity, political equality (not global beggardom) and an identity that is valued. Tax justice, in short, would not only achieve the second generation rights that are there in theory but not in practise, but it would also spell the end of the aid industry, and no one with human rights on their mind would mourn its passing!

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ActionAid calculated that if "all developing countries were able to raise just 15 percent of their national income as tax revenue, they could realize at least an additional USD 198 billion per year"

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# NEWS AND EVENTS

## Civil Society Organisation (CSO) Tax Justice Training Workshop, Lusaka Zambia.

The Centre for Trade Policy and Development (CTPD) in partnership with TJN-A and Christian Aid from May 11th to 13th 2011 held a three (3) day capacity building seminar in Lusaka Zambia targeting specific Civil Society Organizations (CSOs) working in the areas of trade, budget tracking, debt and aid, transparency, economic and social governance.

The Seminar which was officially opened by CTPD chairperson Reuben Lifuka had trainers from TJN-A – Alvin Mosioma, Christian Aid- UK – Sophie Powell and Amadu Sidi Bah-Christian Aid Sierra Leone. The first 2 days of the training were for CSOs and the main focus was to build the capacity of participants in various concepts and to develop key advocacy messages for the general public and policy makers around tax justice with some bias towards the Extractive industry.

The 3rd day was more practical and media related as it incorporated a group of journalist into the training. This gave an opportunity for both CSOs and the media to interact and share experiences on how CSOs can share information with the media and how the media can disseminate it. The workshop was attended by representatives of 15 CSOs such as Civil Society for Poverty Reduction (CSPR), Council of Churches in Zambia (CCZ), Evangelical Fellowship of Zambia (EFZ), Economics Association of Zambia (EAZ), GIZ, ActionAid International Zambia among others and 7 media houses which included Zambia National Broadcasting Corporation (ZNBC), QFM and the Zambia Daily Mail.

## 13th ANNUAL STRATEGY MEETING OF THE AFRICAN INITIATIVE ON MINING, ENVIRONMENT AND SOCIETY (AIMES)

### JUNE 21-24TH, 2011, HARARE, ZIMBABWE

**32** members of the African Initiative on Mining, Environment and Society (AIMES) from the Democratic Republic of Congo, Ghana, Guinea, Kenya, Mali, Zambia, Sierra Leone, South Africa and Zimbabwe and partners from the United Kingdom and such networks including the Africa Trade Network, the Zimbabwe Coalition on Debt and Development (ZIMCODD), Tax Justice Network-Africa, Zimbabwe Congress of Trade Unions (ZCTU) and the International Alliance on Natural Resources in Africa (IANRA) held their thirteenth Annual Strategy Meeting from June 21-24, 2011 in Harare, Zimbabwe.The meeting took place when there are growing threats to the Africa's mining reform agenda. Therefore, the 13th annual strategy meeting was structured as a platform to amongst other things develop and adopt specific policy positions and campaigning strategies to optimize the benefits of mining and the outcomes of the climate change negotiation to the peoples and economies of Africa and evaluate and reposition AIMES as an effective African vehicle for advocacy on mining, climate change and the Rio+20.

The meeting discussed issues such as the continental and regional reform agendas including the impetus of the reforms, economic competition, the prospects of the reform, the Africa Mining Vision and the Report of the International Study Group as alternatives to the current mining regimes in Africa, as well as the mining policy reform processes at SADC and ECOWAS. The growing threat to the reform agenda including the EU's Raw Materials Initiative, the Natural Resource Charter, the Africa Mineral Governance Programme and Bilateral Investment Treaties; domestic resource mobilization and the challenges of financing the reform agenda in Africa in particular and Africa's development in general were also discussed. The meeting also looked at the arenas and sites for advocacy, examining in particular the African Union and its institutions including the Regional Economic Blocs, the linkages between mining, climate change and the green economy proposed under the Rio+20 conference together with the role of AIMES as an effective vehicle for advocacy on mining and climate change. With regard to Domestic Resource Mobilisation and Financing the

reform agenda, participants noted that extractive resources have the potential for domestic resource mobilisation in Africa. This potential has not been realized due to the overly aid-dependent economies run by African governments. The cost of running the aid-dependent economies tends to result in excessive expropriation of the mineral resources of the continent.

Demands/Recommendations from the meeting included: a recognition of the relationship between domestic resource mobilization, economic development and democracy, in particular accountability of public institutions. On the basis of this recognition, demand was made towards a shift of emphasis from aid-dependence to domestic resource mobilization by such actions as enhancing the fiscal policies as well as exploring alternative sources of financing development. Given that information is a right and a critical resource for participatory development and accountability of public and private institutions, a call was made on African governments to ensure and promote public access to information by passing relevant laws on access to information

# PROFILE

## The Centre for Research and Development – Zimbabwe

The Centre for Research and Development (CRD) was formed in 2005 to advance the practice of good governance in Zimbabwe. The CRD is registered as a Trust in Zimbabwe and is governed by a Board of Directors working together with an International Advisory Board. The Board of Directors is largely responsible for driving the policy direction of the organisation while the International Advisory Board mainly promotes the organisation's international image and integration with the global civil society.

In the last five years, the CRD has become a key response to resource plunder and illicit trade in the country's natural resources extractive industry that negatively impact on revenues for the fiscus. It has grown to become an authoritative voice on transparency and accountability in the natural resources extractive industry sector. In recent years, Zimbabwe has experienced high levels of corruption in the public sector. As a result, opaque deals in the natural resources extractive industry sector, particularly the diamond industry have become rampant. The CRD initiative in this sector has sought to promote national policies that increase the flow of natural resource revenue to treasury and at the same time stem corruption to ensure that Zimbabwe's vast natural resources contribute to the country's economic development in a manner that integrates good governance.

The CRD has worked tirelessly to expose revenue leakages occurring in the industry. In Marange diamond fields, the organisation uncovered syndicates that seem to involve security forces, key public officials, some individuals linked to companies and foreign buyers that smuggle diamonds particularly through the porous Mozambican border. Some of the smuggled diamonds have been intercepted en route or in diamond markets of India, the United Arab Emirates, Israel and Lebanon among others. Further, the CRD also discovered that mining licenses in the area were irregularly awarded and worked to expose companies operating in the area. These activities have largely affected potential revenue accruing to the state.

Due to lack of transparency and accountability, millions of dollars worth of diamonds remains unaccounted for. Acknowledging the gravity of the problem, the Minister of Finance, from the co-ruling Movement for Democratic Change

(MDC), has previously conceded that he did not know how many diamonds were being sold. He complained that his treasury received almost no diamond-based revenue at all.

The CRD has regularly provided information about on-going problems in the diamond fields to the Kimberley Process, Zimbabweans and the international community in an endeavour to pressure Zimbabwe into promulgating measures that promote revenue accountability and transparency.

As a result of the CRD's research and advocacy activities, together with other organisations, the Kimberly Process (KP) appointed officials to visit Zimbabwe in 2009. The KP team concluded that Zimbabwe did not meet the minimum KP standards for the extracting and selling of diamonds in a manner that promoted adequate sales control and revenue accountability. Diamond smuggling activities were also confirmed leading to the suspension of Zimbabwe's diamond sales.

Unfortunately, following the CRD's representations to the second KP monitoring visit, the government responded by launching a massive crackdown on the CRD in May 2010 which severely paralysed the organisation's operations. With the full backing of the KP civil society coalition and other local, regional and international organisations, the CRD managed to restructure and resume its operations in October 2010.

The CRD has since continued its coverage of revenue transparency issues in the diamond fields with further emphasis on forced relocations of villagers from the area. It has noted with concern that relocations of villagers have not been followed by sufficient provisions of infrastructure (schools, health clinics, roads, housing) and sustainable livelihoods development which ordinarily should be drawn from diamond sales. If anything, diamond mining has become a curse that has plunged the people of Marange deeper into poverty. This is despite the fact that Zimbabwe is now the seventh largest producer of diamonds in the world. In this regard, the CRD has spearheaded Natural Resource Dialogue Forums for Civil Society and the formation of Community Based Organisations that advocate for revenue transparency.

*By Tyanai Masiya, Regional Coordinator, CRD*

*Tyanai Masiya*

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