ARTICLE

Beyond Caesar's Grasp: Setting Constraints on Government's Taxing Hand

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Abstract

Are there conceivable limits to Caesar's power in defining and claiming what is his? This paper revisits the ageless financial tribute embodied in the adage 'give Caesar what belongs to Caesar'. We explore echoes of the adage in modern taxation and the fiscal demands of contemporary governance in constitutional democracies. We reflect on the boundaries, or perhaps the lack thereof, to what can truly belong to Caesar. Indeed, taxation is the lifeblood of any government. Without taxes no government would run. It is against this and the consequential impact on the social contract theory that the law exists or should exist to limit the excesses of a deceptive or overly ambitious government. Using a case study of Kenya, we depict the challenges citizens face when it becomes evident that the executive and legislature collaborate to impose taxes without the blessings of the citizenry. In such scenarios, citizens often seek refuge in the Judiciary, notwithstanding its limited authority to dictate terms to the other branches of government. The emergence of proponents advocating for the establishment of a mechanism to set a maximum tax ceiling, beyond which the government can impose further taxes reflects the growing consensus. This paper critically engages with these fundamental questions, providing insights into the challenges and potential strategies for achieving a balanced and just taxation system within the constitutional governance framework. Simultaneously, it scrutinizes the link between taxes and socio-economic rights in middle-economies and offers progressive solutions to the menace of unsustainable tax policies in middle-economies. The need for such a framework cannot be gainsaid. In middle-economies like Kenya, policies that govern tax are a major stake on the trajectory the economy takes in terms of development, infrastructure and provision of socio-economic rights. Adequate provision of socio-economic rights is made possible directly or indirectly by the policies adopted by the government. As such, high-rate tax models will inevitably lead to inadequate provision of socio-economic rights and delayed growth. And yet, taxes imposed through perfect models, can prompt the growth of an economy which results in adequate provision of socio-economic rights. We conclude that even though there is no mathematical precision in determining how high taxes should go, taxes should not be oppressive. A perfect tax policy is one that does not violate socio-economic rights or any other rights.

Keywords - Constitutionality, Middle-economies, Tax Policy, Socio-economic Rights, Social-Contract, Fiscal Laws and Public Participation

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I. INTRODUCTION

Taxation is a fundamental aspect of governance, serving as a primary source of revenue for governments worldwide. It is the core feature of state capacity.[409] The adage 'give Caesar what belongs to Caesar' underpins the obligation of citizens to contribute financially to the functioning of the state. However, the exercise of taxing authority has limits, particularly in constitutional democracies where principles of equity, accountability, and the protection of human rights are paramount.

This paper explores the boundaries of government authority in taxation, the impact on socio-economic rights, and the need for constraints on government's taxing hand to prevent potential abuse of taxing power. The exploration shall include a multidimensional analysis of Kenya's tax regime, including historical context, current practices, principles of tax policy, and the dynamics of legislative-executive collaboration. This paper provides insights into the complexities of taxation in contemporary governance.

The contemporary tax regime in Kenya is multifaceted, comprising various types of taxes imposed by both the national and county governments. Key revenue sources include income tax, value-added tax (VAT), excise duty, and customs duties. While taxation is essential for funding public services and infrastructure development, the impact on socio-economic rights remains a subject of debate. Issues such as tax compliance, revenue collection efficiency, and the equitable distribution of tax burdens require careful consideration to ensure the effectiveness and fairness of the tax system.

Background

The Kenyan citizenry has experienced the toughest tax rates in the recent past. Apart from the new taxes which have been added on their already heavy burden, this comes at a time when governments are realigning from the impacts of the 2019 pandemic. Additionally, the Kenyan government under the current regime has been faced with protests over taxation policies as well as court battles over the same. For instance, through imposition of the Finance Act 2023 which led to public outrage and Finance Bill 2024 which resulted to protests dabbed as Rejected finance Bill 2024. These protests led to its recall by the Parliament.

Historically, pre-independence, Kenyans were still paying taxes. These taxes included land tax, hut tax and poll tax.[410] Upon independence, we modernized our tax systems by enacting laws on customs duty, income tax, and sales tax among others. During this period, tax laws within the East African Community (EAC) were common. However, as time passed, around 1977, each state party began modifying their tax laws to adopt to their domestic needs.

Recently, Kenyans have expressed that the tax burden has become too much. They feel that the taxes are now ripping off their human dignity. That the taxes are hindering their access to some public services, that they cannot afford even the basic minimum standards of living. That they are closing their businesses because of the high taxes rates. And, to worsen the situation, the

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[409] Kiser, E. and Karceski, S.M. (2017) 'Political Economy of Taxation', *Annual Review of Political Science*, 20(1), pp. 75–92. doi: 10.1146/annurev-polisci-052615-025442. Available at https://www.annualreviews.org/doi/10.1146/annurev-polisci-052615-025442.

[410] Cabinet Secretary, Yatani, U. (2022) *National Tax Policy*. Nairobi, Kenya: The National Treasury and Planning. p. 1.

government seems to be in a continuous enactment of more tax laws on the untaxed areas. These high rate taxes impinge directly on accessibility of socio-economic rights and demean human dignity as shall be discussed in this paper.

Taxes are levied for two purposes; either to raise revenue or to regulate the tax subjects.[411] Nevertheless, although this remains a policy to date, when the legislature over-regulates, the cascades of the over-regulated taxes result in infringement of constitutional rights. Chief Justice Marshall says this is because 'the power to tax involves the power to destroy'.[412] This statement justifies our theme. That is, the extent to which a people can be taxed, might exposes them to arbitral taxation which violates their constitutional rights.

Edrey, a tax expert opines that, taxes may be unconstitutional if they infringe on general welfare of the citizenry, if they do not represent the collective consent or if they are in violation of constitutional rights.[413] Additionally, if the power to levy is abused, the citizenry are put in a vulnerable situation of facing arbitral taxes. It is from this background that we intend to scrutinize how fiscal laws relate with socio-economic rights and the solutions available when the two conflict.

However, we also bear in mind that the state has justified power to levy taxes and to object under *sections 58, 59, 59A and 60 of the Tax Procedures Act*.[414] Including power to search and seize. This is under the principle that every subject of law has an obligation to pay taxes. Thus, it gives the government a good ground for infringement.

Thus, the big question is, how deep can Caesar put his hand into the pockets of the Jews?

Who has the power to tax in Kenya?

Taxation, like any other legal issue, derives its primary source and authority from the Constitution of the country in which it is applied. However, unlike other laws founded on fixed principles, tax law and its policy objectives for specific countries evolve based on the goals or aims of the current government, reflecting its desired outcomes.[415]

In Kenya, Article 209 of the Constitution[416] confers the power to impose tax on the National government of Kenya and the County Governments. The National Government is mandated to impose income tax, value added tax, customs duties and other duties on import and export of goods as well as excise tax.

Simultaneously, Article 209(3) of the Constitution[417] gives the County Governments the power to impose property rates, entertainment rates and any other tax that it may be authorised to impose by an Act of Parliament. Article 209 (2) [418] further allows the National Government to, by an Act

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[411] Murphy, J.P. (1974) 'Constitutional Limitations on the Power to Tax: Alco Parking Corp. v Pittsburgh', *Hastings Law Journal*, 26(1), pp. 215–232. p. 216.

[412] *Ibid*, p. 217.

[413] Edrey, Y. (2007) 'Constitutional Review and Tax Law: Analytical Framework', *American University Law Review*, 56(5), pp. 1187–1228. doi:http://digitalcommons.wcl.american.edu/aulr. p. 1186.

[414] Sections 58, 59A, 59 and 60 of the Tax Procedures Act, 2022. Chapter 469B Laws of Kenya.

[415] Waris, A. (2007) 'Taxation without Principles: A Historical Analysis of the Kenyan Taxation System', *Kenya Law Review*, 1, pp. 272–304 https://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Waris_Paper.pdf. p. 273.

[416] Constitution of Kenya, 2010. Art 209 (1).

[417] *Supra* note 8, Art. 209 (3).

[418] *Ibid*, Art. 209 (2).

of Parliament to impose any other tax or duty other that property rates and entertainment taxes, to whom the power has been vested on the county governments.

Both the National Government and the County Governments have the power to impose charges for services.[419] Article 209(5) sets a limit to County Governments to only collect tax and engage in other revenue-raising activities in a manner that does not prejudice national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.[420]

Principles Guiding Tax Policies in Kenya

Adam Smith, in his book, *'The Wealth of Nations'*[421] coined some canons which have been accepted as the basic principles of a good taxation system. Smith's principles include the cannon of equality and equity, which emphasizes economic justice by advocating that the wealthier individuals should pay more taxes due to the state's protection allowing for additional income. The cannon of certainty, which asserts that taxpayers should not be subject to arbitrary decisions by tax officials: That arbitrariness can lead to corrupt tax administration. The cannon of convenience stresses that tax payment methods and timings should be convenient for taxpayers. And lastly, the cannon of economy recommends minimizing the cost of tax collection for both the government and taxpayers. We intend to focus on this last principle.

Other scholars have added further principles, including the cannon of productivity (fiscal adequacy), which ensures that the tax system generates sufficient revenue without resorting to deficit financing. The cannon of buoyancy, which mandates that tax revenue should increase with national income growth, even without adjustments to tax rates or coverage.[422] The cannon of flexibility, which allows authorities to promptly adjust the tax structure to meet changing economic and fiscal needs. The cannon of simplicity, which advocates for a straightforward tax system that is easy to understand, administer, and avoids legal disputes. Lastly, cannon of diversity asserts that tax revenue should not rely heavily on a few sources of income. [423]

Is the list of principles outlined above excessively long, calling for a summary or prioritization based on importance? Or is it overly rigid and in need of expansion? We concur with Waris,[424] that the canons of taxation should be viewed as criteria for categorizing policy considerations rather than being exhaustive in themselves. It is evident that there is no one-size-fits-all solution, as attempting to condense the list may result in overlapping criteria, while expanding it could lead to conflicts among principles. The ultimate objective should be the pursuit of an optimal tax system solution.

Kenya's tax policy is guided by constitutional principles aimed at promoting equity, efficiency, transparency, and accountability.[425] These principles serve as normative benchmarks for tax policy

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[419] *Ibid*, Art. 209 (4).
[420] *Ibid*, Art. 209 (5).
[421] Smith A, (1977) *An Inquiry into the Nature and Causes of the Wealth of Nation*. Edwin Cannan. New York, the Modern Library, pp. 777-779.
[422] *Supra* note 7, Waris, A. (2007) 'Taxation without Principles', p. 273.
[423] Charles W. Eliot, (1909) *Harvard Classics Vol. 10: Wealth of Nations - Adam Smith*. New York: Collier and Sons. p. 76.
[424] *Supra* note 7, Waris, p. 273.
[425] *Supra* note 8, Art. 10(2).

formulation and implementation, emphasizing the need to balance the fiscal needs of the state with the rights and welfare of its citizens.

Therefore, ensuring compliance with these principles is essential for maintaining public trust in the tax system and upholding democratic values.

Objectives of tax imposition

There are three primary objectives of taxation that are widely accepted:[426]

a) *Revenue generation:* The main aim of taxation is to raise funds for government operations and public services. That taxation is the lifeblood of any government.[427]

b) *Income redistribution:* Taxation is used or can be used as a tool to redistribute wealth and promote greater equality by imposing higher taxes on the affluent and providing benefits or tax breaks to those with lower incomes.[428] While the efficacy of this approach to taxation has been attacked and discredited by some scholars, it has actually influenced taxations in several jurisdictions over the years.

c) *Implementation of government policy/regulatory component:* Taxation may serve to implement various government policies, such as promoting investment or encouraging specific industries.[429]

Other multifaceted goals as summarized by Waris[430] include:

d) *Addressing market imperfections:* Taxes are imposed to address market failures and correct distortions in resource allocation, such as externalities or monopolies.

e) *Economic stabilization:* Tax policies are designed to contribute to macroeconomic stability by influencing aggregate demand, controlling inflation, or managing economic cycles.

f) *Deterrence of anti-social behavior:* Taxes may be levied on activities deemed harmful to society, such as pollution or tobacco consumption, to discourage such behaviors.

g) *Mitigating social disparities:* Taxes can be used to mitigate social inequalities and provide assistance to marginalized groups, enabling them to lead a life of material dignity.

h) *Emphasis on indirect taxes:* Certain indirect taxes may be prioritized in a tax portfolio due to their lower visibility to the public, making them less susceptible to political mobilization.

i) *Influence of national traditions and path dependence:* Tax policies may be influenced by historical patterns and national traditions, leading to certain tax practices persisting over time without systematic consideration of their efficacy or relevance.

Regardless of understanding of the aims of taxation, this paper explores the possibility of establishing a maximum threshold beyond which the government cannot exceed and examines the characteristics of such a system.

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[426] Avi-Yonah, R.S., (2006) 'The Three Goals of Taxation', *University of Michigan Law School Scholarship Repository*, 60(1), pp. 1-28.

[427] Ventry, D.J. (2009) 'Equity vs. Efficiency and the U.S. Tax System in Historical Perspective: Tax Justice: The ongoing Debate, p. 25.

[428] Bird, R.M. and Zolt, E.M. (2005) 'Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries', *University of California Los Ageles Law Review*, 52, pp. 1627–1695.

[429] Surrey, S.S. and McDaniel, P.R. (1985) *Tax Expenditures Vol 1*. Cambridge, Massachusetts: Harvard University Press. p. 177-181.

[430] *Supra* note 7, Waris, p. 277.

II. SOCIAL CONTRACT THEORY AND PUBLIC PARTICIPATION IN TAXATION

The concept of the social contract posits that citizens' consent to taxation in exchange for the provision of public goods and services by the government. This is anchored on the notion that citizens forfeited their freedoms and rights to the state in promise that the state would reciprocate this by providing security and order.[431] In addition, under human rights perspective, a government has a positive duty to provide for its citizens.[432]

In Kenya, taxation is viewed as a means of fulfilling the state's obligations to its citizens, including the protection of socio-economic rights and the promotion of general welfare. However, the fulfillment of social contract requires transparency, accountability, and effective governance to ensure that tax revenues are used efficiently and equitably.[433] Thus, the citizens are justified in expecting the state to provide and protect violation of socio-economic rights.

Public participation in taxation is a core value and one of the cornerstones of the social contract. Public participation keeps the public informed on what they should expect from government. It allows a community of people or stakeholders to express their concerns, fears and demands to cater for their interests. The Supreme Court of Kenya in *British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health & 2 others*[434] explained the importance of public participation as follows:

> '[…] public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.'

Article 10(2)(a) of the Constitution[435] affirms public participation as part of the national values and principles of governance that must guide all persons, state organs, state officers and public officers when making or implementing public policy decisions. Moreover, Article 118[436] provides for participation by the people in the legislative process as follows: 'Public access and participation (1) Parliament shall – (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and (b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees'.

Article 1(1)[437] states that the Kenyan people govern the country in accordance with the Constitution. Article 1(2)[438] outlines two methods by which the people may govern: directly or indirectly through their democratically elected representatives. Governance through

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[431] Kinyua, W. and Mulinge, G. (2023) 'A Comparative Analysis of Africa's Labour Experience with Gulf Region States: Are we Still Slaves? The Kenya Case'. *The International Law Journal of Vrije Universiteit Amsterdam*; *Amsterdam Law Forum*. Vol.15 (2). Pp.32-46. p. 37.

[432] *Ibid.*

[433] *Supra* note 8, Art. 10(2).

[434] *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR. Para. 96.

[435] *Supra* note 8, Art. 10(2)(a).

[436] *Ibid*, Art. 118.

[437] *Ibid*, Art. 1(1).

[438] *Ibid*, Art. 1(2).

democratically elected representatives is the commonly recognised form of indirect participation of the people, also known as political participation.[439]

The meaning and implementation of principle of public participation in the law-making process has been a subject of several judicial decisions in Kenya. The Supreme Court of Kenya, *In the Matter of the National Land Commission,*[440] acknowledged the principle of public participation as a form of checks and balances on the various arms of government in the execution of their mandates. The court stated as follows:

> 'Public participation stands as a cornerstone of democracy and governance, allowing citizens to shape the state's direction as envisioned by the Constitution. With devolution, citizen involvement ensures accountability, fostering progress and stability. Courts, deriving authority from the people, prioritize public participation as a fundamental principle.'

Despite those guiding principles established by the Supreme Court in *British American Tobacco PLC,*[441] the problem has always been that situations arise where the new law/policy is neither what the public debated nor the result of the public debate in question.

Hence, in *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others,*[442] the Petitioners complained that some of the submissions by members of the public were rejected without giving reasons. The court held that; '[…] the enactment of Finance Act is a legislative process and in discharge of its legislative mandate, the National Assembly passed it. There is no express obligation on Parliament to give written reasons for adopting or rejecting any proposals received from members of the public.'[443]

The National Assembly Standing Orders, 132 and 133[444] permit amendments to be made to a Bill during the Committee stage. The Court of Appeal in the case of *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others*[445] affirmed that parliament has power to make changes during the legislative process, including to make changes to a bill post public participation. The court held that the amendments need not align with public views precisely but it suffices that those views have been considered.[446]

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[439] *In the Matter of the National Land Commission* [2015] eKLR Advisory Opinion Reference No. 2 of 2014.

[440] *Ibid.*

[441] *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR.

[442] *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties) (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated))* [2023] KEHC 25872 (KLR) (Constitutional and Human Rights) (28 November 2023) (Judgment).

[443] *Supra* note 34, para. 154.

[444] The National Assembly Standing Orders. As adopted by the National Assembly on 9th January 2013 during the Fourth Session of the Tenth Parliament and amended on 15th June, 2017 during the Fifth Session of the Eleventh Parliament; 23rd August, 2018 during the Second Session of the Twelfth Parliament; 6th May, 2020 during the Fourth Session of the Twelfth Parliament; and 7th June 2022 during the Sixth Session of the Twelfth Parliament.

[445] *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR. Civil Appeal No. 11 of 2018 (Referred to as the ***Pevans case*****).**

[446] *Supra* note 37, *Pevans Case.*

The position obtaining as of the time of writing this paper is that the National Assembly, as per the *Pevans case,*[447] has the legislative mandate to amend bills based on public and stakeholder input without re-submitting amendments for public participation on narrow issues.

This paper contends that where the process of enactment of tax legislation has been challenged, it should be incumbent upon the authority to prove that adequate public participation actually occurred. Such proof must entail production of material to show that the end product reflects the deliberations which took place during the process of public participation.

Additionally, this test is drawn from the opinion of Odunga J. (as he then was) in the case of *Okiya Omatatah Okoiti v Cabinet Secretary for the National Treasury & Others*[448] where the court held that if the authority concerned comes up with new provisions after public participation which were not in the original draft, the onus lies on the authority to prove that the provisions were a product of public participation.

In light of these challenges, it is essential to establish a robust framework for public participation in the legislative process, particularly concerning tax legislation. Authorities must ensure that public input is genuine, meaningful, and transparent, with provisions made to address concerns raised by citizens and stakeholders. Upholding the principles of public participation is crucial in fostering trust, accountability, and legitimacy in governance processes within the social contract.

- ***Collaboration between the legislature and executive in taxing policy***

Montesquieu envisions three arms of government that would work independently but cooperate for the benefit of the citizen. This is the doctrine of separation of powers. This doctrine is held together by a bond called government integrity.[449] This simply means that, although the executive and parliament will work separately, we trust them to have integrity to cooperate without betraying the people's interests. However, sometimes, the executive and parliament combine energies to become Judas Iscariot.

This betrayal comes up when government integrity has been weakened. In that case, for instance, the Executive will have an agenda. However, it cannot impose this agenda without the parliament because a law has to be passed. It therefore approaches the parliament and gives it thirty silver coins. Consequently, the parliament blindly passes the law not through its own merits check but under a hidden command of the executive. At this point, separation of powers exists in theory and not in practice. As such, the people find that they have been betrayed by the parliament and executive.

Nevertheless, courts have been reluctant to oust a legislation because of its unreasonable high rates.[450] The court does not have the power to limit the wisdom or lack of it of the parliament. For instance, the high rate of taxes alone is an insufficient reason to declare a tax unconstitutional.[451] This is because, there is institutional inability. The judiciary is not in a position to review the legislature's judgment because of the doctrine of separation of powers.[452]

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[447] *Ibid.*

[448] *Okiya Omatatah Okoiti v Cabinet Secretary for the National Treasury & Hon. Attorney General (Respondents) and Retirement Benefits Authority (Interested Party)* Nairobi HC Consolidated Constitutional Petition Nos. 329 and 310 of 2017.

[449] *Supra* note 3, Murphy p. 226.

[450] *Supra* note 3, Murphy p. 226.

[451] *Ibid.*

[452] *Ibid.*

In such a case, we suggest that, to save the court the labour, a link must be drawn showing that the high rate of taxes is the cause of inaccessibility of socio-economic rights, and violation of human dignity.

The above imagery depicts an ailing government. A government that cannot afford checks and balances. Dicey would aptly describe such a government as one that cannot avoid excessive contractions of political power in the hands of one person.[453] In the above scenario, the collaboration between the executive and parliament is not one envisaged by Dicey. It is a battle of political interests. If the parliament lacks integrity, it will pass what the executive proposes without scrutiny. In many cases, the executive is not an angel. As such, the people's interest will be trampled upon.

III. THE COLLABORATION UNDERMINING DEMOCRACY

The collaboration between the legislature and executive arms of government in crafting tax policy is crucial for democratic governance and accountability. However, as we have highlighted above, such a power gap allowing the legislature to amend tax Bills without re-submitting them for public approval, even if the changes do not align with public input is concerning. It raises questions about democratic processes and citizen engagement in tax policymaking.[454]

The executive typically proposes tax measures, drawing on expertise and stakeholder consultations. These proposals then undergo legislative scrutiny to ensure alignment with constitutional principles and the public interest. However, challenges such as executive dominance, lack of transparency, and limited public participation undermine the sovereignty of the people. The Kenyan fiscal law-making process is ailing from the above vices.

Executive dominance, fueled by political affiliations or institutional hierarchies, can sideline dissenting voices and narrow the scope of debate, undermining democratic principles. Transparency deficits in the policymaking process further erodes public trust, as citizens lack insight into the rationale behind tax measures and their potential impacts.

In fact, limited public participation exacerbates these challenges because meaningful engagement with diverse stakeholders is essential for crafting inclusive and effective tax policies. Insufficient public consultations create a rift between policymakers and the people they serve. This hinders democratic decision-making.

To address these issues, reforms are needed to bolster legislative oversight, enhance transparency, and promote inclusive decision-making. Empowering legislative committees, enacting legislation mandating public consultations, and improving access to information can bridge the gap between branches of government and foster public trust. Additionally, cultivating a culture of accountability and openness within government institutions is vital for ensuring the legitimacy of tax policies and upholding democratic values.

The role of parliament and executive in formulating tax policy

Edrey opines that fiscal laws should not be enacted without proper representation.[455] Proper representation is public consent. In Kenya, the parliament is delegated this role by the people,

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[453] Waldron, J. (2013) 'Separation of Powers in Thought and in Practice?' *Boston College Law Review*, 54(433), pp. 433–468. p. 433.

[454] *Supra* note 40, *Okiya Omtata v CS National Treasury & Others.*

[455] *Supra* note 5, Edrey p. 1192.

through consent to be represented. This flows from the notion that, in a civilized nation, no one is forced to pay taxes without consent.

Nonetheless, this consent is not to be understood as individual consent. That is, an act of levying tax by a government is only legitimate if it is authorised by the legislature. The legislature is composed of members representing the citizenry. As such, there is an assumption that what they pass is an accurate representation of the people's wishes. Consequently, this becomes collective consent.

Parliament should be alive to the fact that extreme taxes hinder progressive realisation of socio-economic goals. Thus, it is charged to ensure that it balances between taxing to collect revenue and ensuring that it does not hinder the progressive realisation of socio-economic rights.

Do we still have a legislature that can effect checks and balances on the executive?

The current Kenyan executive is suspicious. Recently, in the Finance Bill 2023, the President came out clearly to say what he intends with the Bill. To proceed with it. Despite constitutional flaws, despite the Bill attempting to go beyond the ceiling of taxes, the Parliament passed it. The Finance Bill 2024 had to be recalled after weeks of intense protests against it following a public outcry that it was oppressive.

Montesquieu in his chapter, '*The Spirit of the Laws*'[456] stated that in Turkey, the three powers are united in the person of Sultan. Lamenting about this unity, he says that an atrocious despotism will reign from this unity. Montesquieu was envisioning our situation in Kenya, where the executive is passing laws through the parliament, laws that are oppressive. The scholar concludes that, when legislative power is united with executive power in one Sultan, there lacks liberty.[457]

Waldron writes that if we fail to separate powers, we will fall into arbitrariness.[458] That is where we are. Where the parliament passes law as a command from the executive. We are susceptible to being ruled arbitrarily in such a case. Instead, this can be avoided by simply ensuring that there is government integrity. All that parliament should do, is scrutinize laws before passing them. The executive should do its work – administration, while the judiciary should interpret the law.

The above three tasks flown upon contamination. That is, each of the three arms has its own integrity.[459] But does political pressure allow this integrity to blossom? For instance, adopting the Westminster-style constitution (which is the case in Kenya), the executive is a group of the ruling party in the legislature, it is likely that the danger of the legislature leaning naturally towards the executive's agenda will succeed.[460] This being the case, the integrity of the parliament is contaminated. And further, it simply means that the parliament cannot effect checks and balances against its godfather.

IV. RELATIONSHIP BETWEEN TAXATION AND SOCIO-ECONOMIC RIGHTS

Socio-economic rights are derived from the constitution under the Bill of Rights.[461] Taxing power is also derived from the same constitution. However, when striking a balance between the two, we are invited to scrutinize the supremacy of the constitution's spirit. For instance, is it the

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456 *Supra* note 45, Waldron p. 451.
457 *Supra* note 45, Waldron p. 451.
458 *Ibid,* p. 454.
459 *Ibid*, p. 460.
460 *Supra* note 45, Waldron, p. 461.
461 *Supra* note 8, Art. 43.

intention of the constitution that taxes should be unbearable? It suffices that, taxes should not violate constitutional rights.[462] Accordingly, taxes should reflect Article 19 of the constitution by preserving dignity of individuals and communities through promoting social justice and realisation of the potential of all human beings. This can then be enforced as a violation of the Bill of Rights under Article 23 of the Constitution.

In addition, human rights doctrine is anchored on the idea that human beings bear some entitlement by virtue of being human.[463] This being the case, human rights and development have a common goal. To ensure there is improved socio-economic welfare of the society.

Immerging jurisprudence in in Africa indicates that right to development is a justiciable human right.[464] International Human Rights jurisprudence concurs with this jurisprudence. Article 1 of the International Covenant on Civil and Political Rights (ICCPR)[465] provides for the right to self-determination. It goes further to elaborate self-determination as right to freely determine political status and pursue economic development as a people. In addition, Article 43 of the Constitution envisages development in various ways including accessibility of education, and housing among other socio-economic rights.

The relationship between taxes and socio-economic rights is inseparable.[466] The two are joined at the hip bone. This is because, accessibility of socio-economic rights are informed by a nation's taxing rate. Simply put, taxation policy is vital in determining a government's ability to levy tax for realisation of human rights.[467] The amount of revenue collected through taxes is a determinant of the provision of socio-economic need to the citizenry. In contrast, if a government taxes that which is necessary for minimum standard of living, then it is violating constitutional principles on socio-economic rights.[468]

Additionally, socio-economic rights is the cloth of dignity that a people can wear. As such, taxes violating socio-economic rights snatches the peoples' human dignity and rips off the society's right to development.[469]

Conversely, public services are provided through the scheme of tax collection. A tax policy that is working makes it easier for the people to access education, clean water, healthcare, and sanitation and right to an adequate standard of living among other socio-economic rights provided under Article 43 of the Constitution. Chigubu and Legwaila opines that sane tax policy must not only be judged by its effectiveness in levying taxes, but must also be judged on how it upholds human rights.[470] It is thus prudent that tax policies must be mindful of human rights obligations.

Economic freedom

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[462] *Supra* note 5, Edrey, p. 1186.

[463] Vienna Declaration and Program of Action (1993) UN Doc. A. Conf.157. 23 quoted in *Africa Tax Spotlight* p.2. See also, *Universality of Human Rights* in Kinyua W. and Mulinge G., *Supra* note 21, p. 38.

[464] Browning R. (2011) 'The Right to Development in Africa: Emerging Jurisprudence?' *Kenya Law, The National Council of Law Reporting.*

[465] Art. 1 of the International Covenant on Civil and Political Rights (ICCPR) 1966.

[466] *Supra* note 2, The *National Tax Policy,* p. 5.

[467] Chigubu, S. and Legwaila, T. (2021) 'Converging Tax Policies and Human Rights in the Face of Tax Abuse: A Developing Country Perspective', *Constitutional Court Review 2021*, 11, pp. 379–409. doi: https://doi.org/102989/ccr.2021.0014. p. 380.

[468] *Supra* note 5, Edrey p. 1201.

[469] *Supra* note 5, Edrey p. 1224.

[470] *Supra* note 59, Chigubu and Legwaila, p. 388.

Fiscal Law scholars Sameti and Shahchera define economic freedom as 'including personal choice, voluntary exchange, freedom to compete, and protection of person and property'.[471] On the one hand, Economic freedom is promoted through the government providing legal structures that embrace protection of freedoms in the above definition. On the other hand, the government must refrain from arbitrarily enforcing fiscal laws that violate 'personal choice, voluntary exchange, and the freedom to enter and compete in labor and product markets and specially reduce tax rates'.[472]

If you have burdens on your back, you cannot walk as fast as a person without them. Similarly, a citizenry that is overburdened with taxes lacks the freedom to walk faster. That is, to contribute effectively to the nations' economy and development by paying taxes.

Consequently, it means that the citizenry does not have liberty in conducting their business. It trickles down to closure of businesses and discouraging new businesses – an investment hostile environment. Accordingly, economic freedom should be a reflection of people's 'right and ability to freely conduct entrepreneurial activities'.[473] Inevitably, an investment hostile environment leads to low revenue collection through taxes. This can be explained by economic theory which holds that economic freedom affects incentives, effectiveness of resource use, productive efforts and investments.[474]

Economic freedom theory thus provides that a government that fails to protect its citizen and establishes fiscal laws that limit voluntary exchange, violates the economic freedom of its subjects.[475] Foley and Clark support this by writing that: 'higher levels of overall economic freedom in an economy promotes a higher level of economic activity and hence yield higher level of income'.[476] They conclude that '[t]echnically, fiscal freedom includes freedom from both the tax burden, in terms of both the top income tax rate […] and the overall amount of tax revenue.'[477] Consequently, 'burdensome, redundant regulations are the most common barriers to the free conduct of entrepreneurial endeavors'.[478]

Minimum provisions

The idea of minimum provisions is closely related to economic freedom. If people can access public services, and afford all basic living standards, then the country has achieved minimum provisions. Further, it is the responsibility of the government to provide the citizenry adequate housing, healthcare, and food among other socio-economic rights.[479] For the government to provide this, it must have resources. One way of acquiring resources is through taxes, and another is by way of foreign debts.

Even so, a government must neither tax its people to the extreme of ripping off the people's dignity nor borrow heavily creating unsustainable deficits. This directly impacts on future economic

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[471] Sameti, M. and Shahchera, M. (2006) 'Economic Freedom, Economic Growth Governments Tax Revenue in (MENA)'. *Iranian Economic Review*, 10 (17). Pp. 67-86. p. 67.
[472] *Ibid.*
[473] Foley, M. and Clark, J.R (2016) 'Economic Freedom and Real Income'. *The Journal of Regional Analysis & Policy*. 46(1). Pp. 52-59, p. 54.
[474] *Supra* note 63, Sameti and Shahchera, p. 69.
[475] *Ibid*.
[476] *Supra* note 65, Foley M. and Clark J.R, p. 52.
[477] *Ibid*, p. 53-54.
[478] *Ibid*, p. 54.
[479] *Supra* note 59, Chigubu and Legwaila, p. 384.

needs. This is true, especially where the resources acquired through taxes and borrowing cannot be accounted for. For instance, recently the Auditor General has been complaining about extravagant use of public funds by the executive.

V. THE COURT'S ROLE AND CONSTITUTIONALITY OF TAX POLICIES

Article 159(2)(e),[480] provides that judicial authority should be exercised in a way that the purpose and the principles of the constitution are protected and promoted. One of the purpose of the constitution is to safeguard the Bill of Rights under it. Further, under the Bill of Rights, we find the socio-economic rights[481] which ought to be protected. These rights can only be protected if we have an accommodative tax policy. The court is the guardian of justice. As such, its sacred role is to interpret the law and identify oppressive and unprocedural laws passed by parliament.

Furthermore, it is a sacred duty of the court to declare a tax unconstitutional whenever the government imposes a tax that impinge upon fundamental constitutional right[482] like public participation. As such, the recognition of socio-economic rights in fiscal laws may attract a court's intervention to make orders which may impact on budget planning. This is because, taxes can directly or indirectly discourage enjoyment of fundamental rights. For instance, the right to housing becomes inadequate if the construction materials are too expensive as a result of taxes.

The role of the court is not to be an adversary of the tax laws passed by the parliament. Its role is to scrutinize the constitutionality of tax laws regardless of the political atmosphere prevailing at the time. Thus, in the case of *Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers Union v Kenya Revenue Authority* as quoted in *Waweru and Others v National Assembly and others*,[483] the court stated that, Article 209 empowers the national government to levy taxes. In addition, the manner in which the taxes are defined, administered and collected is for the parliament to determine.[484] As such, it is not for the court to interfere with legislature's work, simply because the legislature would have come up with a better legislation.

Subsequently, the court is like a referee in a football match. It will only interfere when there is a gross foul by the parliament. Hence, unless there is a fundamental and specific violation of the constitution, the court cannot question the wisdom of parliament.[485] These flows from the notion that, the parliament is a house of representatives, being such, it is assumed that the representatives of the people are aware of the needs of the people. Furthermore, the court will allow justified and reasonable limitation of peoples' rights.

The court is then left with one task. That is, to check whether the policy adopted by parliament adheres to constitutional principles and values.[486] As the guardian of the constitution, the court must ensure that no law or practice that is contrary to the constitution survives the sword of the goddess of justice.

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480 *Supra* note 8, Art. 159(2)(e).

481 *Ibid*, Art. 43.

482 *Supra* note 3, Murphy. p. 221.

483 Constitutional Petition E005 & E001 (Consolidated) of 2021; *Waweru and 3 others v National Assembly and 2 others (2021) Machakos High Court,* para. 331.

484 *Ibid,* para. 331.

485 *Ibid*, para. 332.

486 *Ibid*, para. 334.

VI. SETTING CONSTRAINTS ON GOVERNMENT'S TAXING – IS IT POSSIBLE?

Fiscal Law experts maintain that, the level of government income should be proportional to the level of government spending, especially for middle-economies.[487] Once this is achieved, it is easier to create an equilibrium between government's ambitions in spending and the revenue to be collected through taxes. This is because, once we have determined the optimal level of taxing, it is tantamount to determining the optimal level of government spending.[488]

Chigubu and Legwaila appreciates that developing countries are facing challenges in coming up with efficient tax policies.[489] Partly, this is due to political ambitions and partly, government debts. Nevertheless, they find that 'it is naïve to expect developing countries to increase their tax take through more vigorous collection efforts.[490] This simply signals towards cautioning a government not to increase its tax take in a bid to achieve its ambitions. Rather, it should diversify tax levying. The following three tests demonstrates how government's hand in taxing can be constrained:

Economic limit – Ceiling Test

Goode, a tax scholar finds that; it is possible for an absolute limit to prevail. That is, if there are no new taxes imposed. However, this is rarely encountered.[491] Goode simply analyses this scenario as follows; although a tax limit is not fixed at a precise optimal point, there is an extent that denotes extremes of taxes.[492] We christen it, the *Ceiling Test*. Ideally, if raising taxes is leading to a greater harm than the intended advantage of obtaining revenue, then the taxes have surpassed the ceiling level. Although this test is not statutory, it exists by implication.

The implications of the ceiling test are experienced through the consequences of the extreme taxes. Theoretically and practically, the ceiling test may operate as a tax limit. This is so because, a government that imposes excessive taxes, hinders productivity capacity, it discourages investments, it weakens economic initiatives, it prompts tax resistance and evasion, and it imposes an unbearable administrative burden.[493] In many cases the government will have to borrow heavily to sustain life above the ceiling test.

Thus, excessive tax rates, regardless of the purpose they are imposed for, will inevitably cause economic distortions, dormancy in development, increase tax avoidance, and tax evasion. All these are vices of development.

One virtue of a sane tax policy is that; it stimulates willingness of taxpayers to comply. That is, if tax payers comply, the revenue we collect goes up. Tax evasion is minimized. On the one hand, a government that has reached its tax ceiling is vulnerable. It does not have options to tax more for it to run. On the other hand, a government that has not exceeded its tax limits has options. It can breathe. It can either draw taxes on unused taxable potentials or it can hold the taxation below the limit. As a virtue, such a government is a pearl. It is an oasis.

Constitutional limit test

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487 Tanzi, V. and Zee, H. (2001) 'Tax Policy for Developing Countries', *International Monetary Fund* [Preprint], (27). Available at: https://www.imf.org/external/pubs/ft/issues/issues27.

488 *Ibid*.

489 *Supra* note 59, Chigubu and Legwaila, p. 391.

490 *Ibid*, p. 391.

491 Goode, R. (1980) 'Limits of Taxation', *Finance & Development*, pp. 11–13. p. 11.

492 *Ibid*.

493 *Supra* note *83,* Goode, p.11.

Although Caesar has authority to get into your pockets, Caesar cannot go into some depth into your pocket. This depth is the constitutional limit. This depth is characterised by your dignity under Article 28.[494] Additionally, this depth is determined by accessibility of your socio economic rights under Article 43.[495] That is, if Caesar gets deep into your pocket such that you cannot afford the basic minimum standard for living, then Caesar is beyond the constitutional limit.

To qualify this test, 'a tax is subject to constitutional review if it violates constitutional rights and interests […]'.[496] This is meant to ensure that a citizenry can pay their taxes; contribute towards development, provision of social amenities and simultaneously enjoy their economic freedom. This embraces their dignity.

Fiscal Sociology

Sociology is the study of behaviours. Fiscal sociology is the study of tax-payers behaviour. Socio-economic factors affect the behaviour of taxpayers.[497] Thus, the study of this behaviour is crucial in determining the rate of taxes to be imposed upon a people. Additionally, the behaviour of taxpayers, which includes economic, social factors, cultural and legal considerations affect tax compliance. Consequently, a government should not tax people to an extent where the above factors are infringed. This shall inevitably reflect in the peoples' behaviour in tax compliance.

In a state where taxes are inconsistent and uncertain, and where the tax rate is high, it is likely that the behaviour of investors will shift towards moving out of the country. It is likely that taxpayers will embrace tax avoidance. The behaviour of the relationship of such a government and its taxpayers is characterized by resistance. This goes to the core of tax compliance. Again, inevitably we lose on the amount of tax we ought to have collected.

Accordingly, through fiscal sociology, a government can do a simple factual analysis of taxpayers' behaviour from its previous financial years. It simply says, when we raised taxes to a certain level, A, this is how taxpayers behaved. And when the tax rates were low to level, B, this is how the taxpayers behaved. From this, a well-informed tax level can be deduced from the study of fiscal behaviour. The findings can then caution that taxes should not be raised to level A because we know how that will affect socio-economic rights.

VII. CONCLUSION

The above analysis demonstrates that Caesars hand can be constrained. This can be through application of the Ceiling Test, which we have established above or the constitutional limit to taxes or Fiscal Sociology. Either way, the target is hit. A combined application is however preferred.

Additionally, we have analysed the collaboration of the Kenya Executive and parliament, what it is, and what it ought to be. Through Montesquieu, we have elaborated the consequences of a unified point of power. Lack of liberty. And further, the lack of liberty brings forth arbitrariness. As noted above, government's thirst for taxing should not exceed the limit which balances the accessibility of minimum living standards. That is, there is an imaginary equilibrium, upon which

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[494] *Supra* note 8, Art. 28.
[495] *Ibid*, Art. 43.
[496] *Supra* note 5, Edrey, p. 1228.
[497] Dayioğlu Erul, R.E. (2020) 'Socio-economic variables and tax compliance in the scope of fiscal sociology: A research on the European Union and OECD', *The Journal of Social Science*, 4(7), pp. 1–17. doi:10.30520/tjsosci.655840. p. 2.

the government should not exceed since this will hinder adequate provision of socio-economic rights. This equilibrium level is the ceiling for taxing.

Accordingly, if we can achieve governmental integrity, we gain liberty. As such, we move closer to non-oppressive laws being enacted by parliament. By the same token, we will have solved our tax policy issues since they are emanating from our overly ambitious executive. Moreover, adequate tax system will lead to progressive development and sustainability. All these depict a slippery slope towards prioritizing socio-economic rights which is in turn, our dignity as a people. Closely related to this, we have elaborated that social contract theory applies to the relationship between a government and its taxpayers. That is, we pay taxes, you provide socio-economic rights and economic freedom for us. Closely linked to this idea is the principle of public participation. We have demonstrated that public participation is the tool of the citizenry to question, shape and influence the law that govern them. Where it fails, the law is procedurally flawed and unconstitutional as this principle is a fundamental provision in our constitution.

Further, we have demonstrated that the relationship between tax and human rights is inseparable. Conclusively, socio-economic rights can be provided through tax policies that appreciate human rights. However, this relationship can only be cultivated if there is political will and momentum to observe constitutional principles and values regarding socio-economics rights.

VIII. RECOMMENDATIONS

The idea of establishing a maximum tax ceiling as a safeguard against governmental overreach and ensuring a fair and balanced tax system is indeed intriguing, particularly the hurdles that must be met to come up with practicable framework for implementation. Such a system would likely involve a combination of legal mechanisms, institutional checks, and public oversight to prevent the arbitrary imposition of taxes beyond the predetermined threshold. We provide the following recommendations to explore in pursuit of this objective:

a) That before fiscal policies are passed, the government should conduct a Human Rights Impact Assessment report. This will predict the level of impact the fiscal law will cause. This information can then help in standardizing the proposed fiscal law.
b) Enshrining the maximum tax limit in legal statutes or constitutional provisions to establish a clear framework for taxation.
c) Establishing independent fiscal bodies or oversight committees to evaluate government tax proposals and ensure adherence to the predetermined ceiling.
d) Implementing mechanisms for public engagement and accountability, including stakeholder consultations and avenues for challenging excessive taxation through legal or electoral means.
e) Allowing flexibility in the system to accommodate changing economic circumstances and fiscal demands, particularly during crises or emergencies.
f) Incorporating sunset clauses into tax legislation, mandating regular review and renewal of tax measures to align with economic conditions, cost benefit analysis, stakeholder consultations and the maximum tax ceiling. Consequently, this shall enhance accountability by requiring policymakers to justify tax policy continuation or modification based on performance and outcomes.

g) Integrating trigger mechanisms within sunset clauses to automatically prompt reviews or adjustments to tax policies in response to predefined conditions, ensuring adaptability to economic shifts and emerging challenges.

h) Ensuring that our people are educated on fiscal laws in schools. In addition, political parties should show good will by educating their policy makers on importance and consequences of fiscal laws they pass.

In summation, while the idea of instituting a maximum tax ceiling poses practical challenges, it harbours the potential of mitigating excessive taxation and curtailing governmental overstep. By conscientiously examining the feasibility and ramifications of such a framework, policymakers can endeavor to strike a harmonious balance between fiscal requisites and individual rights within the framework of democratic governance.

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