Fiscal Activism: Zakat and Debt Service?
Lyla Latif

I would like to introduce the idea of zakat into our discussions on how we can support the African state to maximise its potential and capacity to mobilise all sources of revenue that are available to it to finance human rights and repay its foreign debt.

Questions around the Use of Zakat as a Source of Revenue for Kenya

Zakat is the tax imposed under Islamic law on a Muslims wealth. The tax on wealth is set at 2.5%. Wealth is identified as savings reaching a specific threshold, gold, silver, shares, land, livestock and in today's digitised economy, cryptocurrencies. The rate of zakat on land and livestock differs and is progressive on the latter. Political decisions and academic scrutiny on thinking around alternative forms of development finance have not really looked at zakat especially in the context of non-Islamic, secular, or Muslim minority states. Neither has it considered questions around the legal permissibility of applying religious laws as part of a legal system that for example is constitutionally committed to separating the state from religion.

The idea of fiscal activism (which is the use of discretion in fiscal policy making) is therefore to project the Islamic fiscal system onto a state's domestic revenue mobilisation policy to assist the state with alternative forms of financing with which to service its debt. Under Islamic law, one of the objectives of paying zakat is to relieve debt burdens.

This touches on Luhman's idea of autopoiesis: the existence of independent systems within a system whose interaction or interface is supported by common norms. Taking Luhman's theory and contextualising it onto fiscal law and a fiscal system like the one in Kenya- the idea of fiscal activism explains the existence of autopoetic fiscal systems; one faith based, and the other constitutionally constructed. Both existing independently of each other; one implemented as part of private law, and the other part as the state's legal system but connected together through the Kenyan states acceptance of legal pluralism.

So, whether legal pluralism in Kenya allows the government to tap into zakat is what fiscal activism is all about. When we look at the current state of fiscal affairs in particular the economic shocks resulting out of the lockdown measures as a response to curbing the COVID-19 pandemic many states are adopting fiscal adjustment policies, in other words austerity, and budget cuts usually targeted towards reducing expenditure costs on social spending. The need to move towards innovative development finance or alternative methods of financing development calls for an examination of whether zakat is well positioned legally and politically to be made available to Muslim minority, secular or non-Islamic states.

This requires an investigation into a state's legal system and its approach to implementing Islamic fiscal law- the domain of Islamic states, but not non-Islamic states. So, by considering Kenya as a case study, I try to unpack whether fiscal activism to expand the government's domestic revenue mobilisation policy based on zakat, is or can be, supported by the Kenyan legal system. We have got to start by asking two questions to appraise the extent to which my proposal to support development finance with zakat can be considered politically feasible, legally permissible and theologically valid. These questions are:

1. Can religious funds be included as part of development finance?

2. Would operational challenges arise from a Law/Religion interface to finance development needs?

An attempt to answer these questions should start by placing them first in a specific discipline, and then consider the extent to which the discipline supports an interpretation that favours including religious funds to finance development needs. So, I thought of fiscal sociology and human rights as the disciplines within which the two themes under discussion: finance and development, fall.

In development finance, redistributive tax arrangements are critical to progress towards achieving sustainable development. Under the Islamic fiscal system such nexus is pegged on the collective redistributive action of zakat payers. Zakat takes the form a religious contract between God and Muslims to pay a tax on their wealth towards promoting the economic and social welfare of the poor in society. This is analogous to financing economic and social rights under human rights law. Development finance and human rights are therefore interlinked. In the arena of policy making the shift towards sustainable development goals (SDGs) as the targets through which development needs can be met has pushed human rights scholarship to evaluate how fiscal systems approach development finance. The role of finance, therefore, remains central to development.

When probing the definition of finance, it then becomes significant to construe the term from the human rights principle of maximum available resources to ask whether human rights law permits its doctrine to intersect with religious norms in designing a development finance model. Relatedly, what sort of operational challenges are presented in attempting to tie human rights with two fiscal systems whose sources of law are ousted by the other? Policy proposals to include zakat as part of development finance can augur well provided there is a strong theoretical or legal backing to it. This, I find, can be addressed through doctrinal analysis and legal theory describing a state's legal system.

The next step then is to look into development finance from a human rights-based approach – scrutinising the principles of progressive realisation and maximum available resources as part of the legal framework that allows the use of zakat to support financing human rights (HR). So, when we think of using zakat to finance HR, we begin to find support in allowing for example the Kenyan legal system to rely on a faith based fiscal system simply to generate funds towards its DRM policy which in turn will support the government to progress towards achieving HR or meeting its SDGs targets. Applying HR principles to bring together independent and separate autopoetic fiscal systems under a common purpose allows fiscal activism to gain ground in a legal system that separates law from religion.

Recommendations

The principle of maximum available resources suggests that available resources include not only the resources found within a state, but also those available from the international community through international cooperation and assistance. A state should do all that it can to mobilise resources locally to have the funds to progressively achieve HR. The role of non-state Muslim actors in contributing towards the mobilisation of domestic sources of funds, while not expressly set out under human rights law, resonates with the right to development approach. The right to development envisages a socio-legal order in which people are entitled to participate and contribute to economic and social development. The right to development approach offers new insights into scholarship on broadening the scope and definition of maximum available resources to consider the legal nuances that can potentially allow a state to accept to use zakat to finance HR.

What the principle of maximum available resources does not expressly set out is whether the obligation to use resources found within the state extends to zakat. A narrow understanding of the principle limits recognition of zakat. A realistic understanding of the principle incorporates the Declaration on the Right to Development under which individuals and groups become active subjects in ensuring realisation of HR which requires a state to engage in fiscal activism to strengthen its fiscal capacity towards mobilising development finance. Going by this, the idea of looking into Muslim money/zakat by the Kenyan state for example or any other non-Islamic state allows the government to broaden its revenue base and that is what we should be thinking about if we want to have an inclusive approach to development finance and a sustainable approach towards foreign debt service.

The Fiscal Eye is funded as part of ADHR under the OSIEA Grant ID: OR2021-83193. ADHR's Fiscal Eye aims to propose negotiating positions for African governments on addressing foreign debt at international forums. In this space, we feature commentaries on the content of fiscal related laws and bills responding to debt concerns, conduct audits of fiscal related laws showing how state redistribution policy is affected by debt service and propose new insights for fiscal research.