



PROSPECTS FOR IMPROVED DEBT MANAGEMENT IN COPAC'S DRAFT CONSTITUTION

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Introduction

The ongoing constitutional reform process in Zimbabwe has opened up immense opportunities for the country to create a new framework for sound economic management. An area where this transformation is urgently needed, and will be greatly felt is public finance management, particularly in administration of public debt. An analysis of the public finance framework of the draft using various benchmarks for sound debt management shows that the proposed draft has some improvements on the current constitution in terms of enhanced accountability, transparency and inclusiveness in the loan contraction and debt management process, with scope for improvement. This will benefit citizens, who ultimately owe the public debt and pay for it through the taxes they pay, as well as suffer its negative impacts in human development terms when it becomes unsustainable.

The state of play with Zimbabwe's external public debt

The government of the day is seized with implementing various programmes targeted at economic recovery, since it was sworn in 2009. Currently, they are focusing on the Medium Term Plan (MTP), which needs approximately, US\$9 billion total investment to meet its growth and development targets between 2011 and 2015. Prior to that there was the Short Term Economic Recovery Programme (STERP), whose total resource requirements were in excess of US\$ 8 billion. At the time STERP was in force, the Finance Minister said US\$ 45 billion is needed to get the country back to its peak level of 1996-97¹. On the other hand, the African Development Bank (AfDB) also says Zimbabwe needs an estimated \$14 billion for rehabilitation and upgrading of infrastructure². For various reasons government does not have the capacity to generate adequate resources internally to activate these programmes, hence the need for external support in the short to medium term.

¹ Agence France Presse "Zimbabwe needs 45 billion dollars for economy: minister" on www.reliefweb.int 23 December 2009 accessed 10/5/12

² G. Sibanda "Zim needs US\$14 bn for infrastructure" The Herald 9 March 2011 page B1. Also see Kudzai Chimhangwa "U.S. \$16 Billion Needed to Revamp Infrastructure" The Standard 21 March 2011

Unfortunately, Zimbabwe owes bilateral and multilateral creditors various amounts, which are beyond its internal capacity to repay at present. The external debt position is projected to grow to more than US\$8 billion this year (118 % of GDP)³. The Ministry of Finance (MoF) is currently engaging its creditors in a process of verifying actual amounts owed by Zimbabwe, so this figure should be put in its proper perspective. Generally, the country has been in default on its external obligations for the greater part of the last decade. The bulk of this debt is therefore made up of interest and arrears. Creditors have insisted on repayment of outstanding arrears and implementation of specific reforms before Zimbabwe can receive debt relief and more aid.⁴ This means that the unserviceable debt stands in the way of full economic recovery of the country, let alone investments in infrastructure and social sectors. To address this problem, the government of Zimbabwe (GoZ) launched the Accelerated Clearance, Debt and Development Strategy in March 2012 for a debt resolution aimed at inclusive growth, job creation and poverty reduction.

Despite these efforts however, GoZ had started borrowing again at non-concessional terms, on projects which stakeholders deem to be of questionable national benefit. The IMF in its report on the Article IV consultations which ended on March 30 2011 raised concern with the fact that GoZ was now going into non-concessional borrowing, which they say is not affordable and could complicate future external arrears clearance. According to them,

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“Recent borrowing and guaranteeing of non-concessional loans by the government has intensified debt distress. Zimbabwe is not likely to reach debt sustainability even taking into account increased receipts from the country’s mineral resources and assuming a significant strengthening of policies in line with staff.”⁴

Similar concerns with this borrowing have also come from Parliament. It is clear from reports that the Legislature which ratified these loans was not involved in the negotiation process.⁵ Furthermore MPs raised concerns with the terms of these loans, as well as the use of Parliament as a rubber stamping mechanism.ⁱⁱ

It is now increasingly agreed that although external causes such as the lending policies of creditors contributed greatly to the debt crisis in many African countries, internal factors are equally important. Studies have shown that the causes of this problem are also attributable to poor debt policy, a weak institutional and legal framework and lack of accountability, transparency and inclusiveness of the involved institutions in the loan contraction process. Part of the policy and institutional framework for debt management is captured in the constitution; hence the important link between such concerns with the current process to amend the country’s supreme law.

3 Radio VOP ‘Zim’s Debt Arrears To Reach US\$8b In 2012: Minister Biti’ 21 April 2012 <http://www.radiovop.com/index.php/business/8776-zim-s-debt-arrears-to-reach-us-8b-in-2012-minister-biti.html> accessed 9/5/12

4 International Monetary Fund 2011 Article IV Consultation Country Report No. 11/135 www.imf.org

5 Meja, V 2005. The Public Loan Contraction Process – A Key to Debt Management and Economic Governance AFRODAD Occasional Papers (5) page 1

Background on constitutional reform in Zimbabwe

On 15 September 2008, the main political parties, Zanu PF and the two MDC formations, signed the Global Political Agreement (GPA) mediated by the leaders of the Southern African SADC, to form an inclusive government (IG) and resolve the challenges facing Zimbabwe focusing on a number of key areas. One important area identified in this agreement is constitutional reform, specified under Article 6 of the GPA, which is guaranteed by the three main political parties and to be led by the Parliament of Zimbabwe.

A draft has been handed over to the Zimbabwe Constitution Select Committee (COPAC), and is being serialised in the print media. The remaining stages will include holding of the second All Stakeholders Conference and presentation of draft to Parliament and referendum. Whilst the process is far from finished, these developments give stakeholders an opportunity to assess various aspects of the content.

The role of constitutions, enabling legislation and institutions in economic governance

The role of constitutions in sound economic governance is indisputable. According to the Institute for democracy and Electoral Assistance (IDEA), “contemporary constitutions serve multiple objectives, including functioning as a framework for the institutions and mechanisms that can promote economic growth, development and poverty reduction.”⁶ In their view, empirical evidence from around the world illustrates the close association between constitution building and economic reform.

Indeed, constitutional norms govern a wide range of areas within the national economy such as wealth sharing and distribution, fiscal management, implementation of economic rights and management of national debt amongst other things. These norms are realised through enabling acts through which legislative bodies grant their governments legitimacy to take certain actions. It is therefore plausible to assert that the quality of these laws and the constitutions governing them impact greatly on, or correlate closely with the health of an economy. According to Uteem in Hedling (2011: III) people also look to constitutions to solve modern problems of the state and governance. Looking to constitutions to solve problems of poverty and inequality induced by indebtedness is therefore a legitimate exercise.

Good constitutions and laws are however ineffective without a sound institutional framework to implement them. Furthermore, governments and all citizens under their jurisdiction must agree to be bound by and adhere to them. This is best understood in the prescriptive use of the concept of constitutionalism, which is the idea that, “government can and should be legally limited in its powers, and that its authority depends on its observing these limitations.”⁷ Indeed, respect for the rule of

⁶ Institute for democracy and Electoral Assistance (IDEA) Concept Note Dialogue for Constitution Building Practitioners 20-23 March 2011, South Africa page 1

⁷ W. Waluchow (2001) Stanford Encyclopaedia of Philosophy, Wil Waluchow (Constitutionalism) (Intro Jan 2001 (revised Feb 20, 2007) in Wikipedia http://en.wikipedia.org/wiki/Constitutionalism#cite_note-5 accessed 9/5/12

law is critical in the normal functioning of the economy. The degree of constitutionalism in a country however, is closely related to the context in which they are crafted, and that should not be ignored. IDEA (2001: 3) notes that the power dynamics in any society is supremely important when analysing this context.

The African Forum and Network on Debt and Development (AFRODAD) recently published a borrowing charter which contains principles and guidelines on sovereign financial borrowing. The Zimbabwe Coalition on Debt and Development (ZIMCODD) has also analysed Zimbabwe legal framework for contracting and managing public loans and debt. Using their frameworks and perspectives, one is able to assess the quality debt management in current enabling legislation, as well as COPAC's draft.

Debt management in current enabling legislation

Apart from the constitution, which is the supreme law, the legal framework governing external debts in Zimbabwe is defined by the Public Finance Management (PFM) Act (Chapter 22:19) hereafter "the Act" which was promulgated in 2010. ZIMCODD (2009) cites various acts linked to debt management, such as the Reserve Bank of Zimbabwe Act (Chapter 22:15), International Bank Loans Assumptions Act (Chapter 22:08), Former Administration (Liabilities) Act (Chapter 22:06), as well as recognising law governing Councils, Parastatals and Private Sector borrowings.⁸ However, the Act is the main legislation governing debt management.

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Briefly, the purpose of the Act is to,

"provide for the control and management of public resources and the protection and recovery thereof; to provide for the appointment, powers and duties of the Accountant-General and of his or her staff; to provide for the national budget; to provide for the preparation of financial statements; to provide for the regulation and control of public entities; **to provide for the raising, administration and repayment of loans by the State and for the giving of guarantees in respect of certain loans**; to provide for general treasury matters; to provide for the examination and audit of public accounts; to provide for matters pertaining to financial misconduct of public officials..."⁹

The Act, which also repealed the State Loans and Guarantees Act, (Chapter 22:13) and the Audit and Exchequer Act (Chapter 22:03), was introduced as a tool for improving management of public finance.

According to ZIMCODD, section 52 of the Act on Borrowing Powers holds that, "the President authorises the Minister to borrow for *any purpose* the President considers expedient with one limitation, being that borrowing within Zimbabwe can only be up to 30 % of the revenues of the general revenues

⁸ Z. Chadambuka. 2009. A Critical Review of the Legal Framework of the Public Loan Contract and debt Management in Zimbabwe Harare: ZIMCODD pages 13 to 31

⁹ Ministry of Finance Zimbabwe Public Finance Management Act (Chapter 22:19) 2010 page 147

of the country in the preceding financial year.”¹⁰ This, they say, retains the previous position where legislation gave an excessive amount of discretion for only two offices (the Presidency and the Minister of Finance). Interestingly, section 53 on purposes for which the Minister may borrow money states in section (f) that the Minister is authorised to borrow money for any other purpose approved by Parliament through special resolution. This appears to give the legislature additional discretion on the purpose for borrowing. The Act also gives the Minister the power to give loan guarantees, with the consent of the President.

In ZIMCODD's view, the ideal situation is for the loans or guarantees be limited by specific sustainability ratios (e.g. against total debt or debt service), as well as implement them with reference to another body which is empowered to make an objective determination and bar the loan if need be, such as the Public Accounts Committee (PAC) in Parliament.¹¹ This would prevent a situation where Parliament has no influence on negotiating the terms of loans, since their role appears to be that of ratifying what has already been negotiated and signed by the Executive. They also feel that the purposes for borrowing are too wide ranging, creating absolute discretion, whilst the consultation framework on loan contraction is limited by the exclusion of beneficiaries or a specialised commission.

Based on their analysis, ZIMCODD therefore assert that the Act “ended up being little by way of advantage over the Bill where loan contraction and debt management are concerned specifically.”¹² This deficiency seems to be echoed by GoZ, who in its current debt strategy says, “The PFMA... does not adequately provide for the contraction and management of external debt.”¹³ ZIMCODD however does acknowledge that in general public finance terms, the Act introduced positive changes, mainly as regards greater provision of information to Parliament through regular reporting.¹⁴

Debt management in the COPAC draft

According to IDEA (2011), “each constitution contains a set of principles that explain its purpose and normative foundation and guide the understanding of the constitution as a whole.”¹⁵ These principles embrace certain standards by the state in an ‘obligatory’ or ‘aspirational’ sense. In this view principles shed light to a great extent on the ‘context’ of a constitution’s building. In the section on principles of public finance, clause 17.1 (a) of the COPAC draft states that there must be **transparency and accountability** in financial matters. Clause (c) in the same section also states that the burdens and benefits of the use of resources and public borrowing must be **shared equitably between present and future generations**.¹⁶ This essential reference to the principle of sustainable development is glaringly absent from the Lancaster document.¹⁷ AFRODAD's charter emphasises in section 6.1 the right of citizens to exercise their right to sustainable development even in the process of loan contraction

10 Z. Chadambuka. Policy Brief # 3/ 2010 ‘A Review of Loan Contraction and Debt Management in the Public Finance Management Act 2010’ page 5

11 Ibid. page 5

12 Ibid. page 10

13 Ministry of Finance Zimbabwe, Accelerated Arrears Clearance, Debt and Development Strategy 16 March 2012 page 9

14 Z. Chadambuka. Policy Brief # 3/ 2010 ‘A Review of Loan Contraction and Debt Management’ page 1

15 N. Hedling, 2011 ‘A Practical Guide to Constitution Building: Principles and Cross Cutting Themes’ Stockholm: IDEA page 5

16 The Zimbabwe Draft Constitution (17) NewsDay May 19 2012 Alpha Media Holdings page 20

17 AFRODAD Charter page 23

and debt management. These principles can generally be considered to resonate with those in the AFRODAD's charter.

Section 17.3 (1. a – c) of COPAC's draft governs **limits** on state borrowings, public debt and state guarantees which will be achieved through an act of Parliament.¹⁸ AFRODAD's charter includes a guideline (2.3) which recommends the creation of, "laws, regulations and policies which stipulate the limits of external public debt borrowing. This must include sovereign guarantees for private borrowing and should be linked to the country's debt ratios and GDP/exports."¹⁹ AFRODAD is clearer on the considerations borrowing limits must be based on, compared to the COPAC's draft, as well as including publicly guaranteed private sector debt, which is also important to monitor and control in the overall debt situation. However, there is alignment here in the idea of limiting borrowings. An explicit constitutional provision calling for legislative limits on borrowings is not provided for in the Lancaster constitution. The COPAC draft could be strengthened by adopting the above recommendation on constitutionally guaranteed limits on borrowing according to specific criteria.

Clause 17.3 (2) of the COPAC draft stipulates that all loan agreements negotiated by or on behalf of the government, including loan agreements with international financial institutions, **must be approved by the National Assembly before they are implemented**. This resonates with guideline 1.4 of the charter which recommends the adoption of legislative measures that ensure borrowing and debt management receives Parliamentary approval.²⁰ It is however important to highlight guideline 2.4 in AFRODAD's charter, which recommends,

*"The Legislative arm of government – Parliament should approve loans **before** contracts are signed so as to ensure that the loan contraction process is done within the established guidelines and laws, and can be serviced within the National Budget. Parliaments represent the citizens who bear the burden of repayment."²¹*

This provision is stronger in that it states more clearly that the powers of Parliament take force before borrower and creditor put pen to paper, not merely to ratify what has been agreed already prior to implementation.

Clause 17.3 (2) of the COPAC draft mentioned above also relates well with guideline 3.3 of the AFRODAD charter which talks about parliamentary oversight, and guideline 5.1 on ownership and accountability. Guideline 5.1 of the charter not only refers to the role of MPs fostering citizen ownership and accountability, but also recognises the role of civic groups as watchdogs which enhance public finance ownership and accountability.²²

Clause 17.3 (4) of the COPAC draft states, "Within ninety days after a loan agreement or Government guarantee has been approved by the National Assembly under subsection (3), the Speaker must

18 The Zimbabwe Draft Constitution (17) page 20

19 AFRODAD Charter page 12

20 Ibid. page 9

21 Ibid page 12

22 Ibid. page 20

cause its **terms to be published in the Gazette**.²³ This part of the proposed draft falls in line with guideline 5.4 of AFRODAD's charter on public disclosure of information. Says AFRODAD,

*"Government legislation on Public Finance and Accountability must clearly stipulate that information on the use of borrowed funds must be made available to the public especially civic groups that are interested in monitoring government loans and grants. The loan contract must be available to the public and transmitted to various stakeholders using appropriate and locally-accessible means of communication. This could be via Members of Parliament, announcements through websites, national press, radio and/or television."*²⁴

Public disclosure on loans ex post facto is also strengthened in the COPAC draft in clause 17.3 (5). It says that the Minister responsible for finance must **report to Parliament on the performance of loans** raised and guaranteed by the State at least twice a year, at the same time as the estimates of revenue and expenditure are laid before them. Such explicit disclosure on the use of borrowed funds specifically is silent in the Lancaster document.

Section 17.6 (4) of the COPAC draft **charges all** debt charges of which the State is liable, to the **Consolidated Revenue Fund (CRF)**.²⁵ This is the same in Section 104 (3) of the current constitution, which like the proposed draft defines debt charges as including, "interest, sinking fund charges, the repayment or amortisation of debt and all expenditure in connection with the raising of loans on the security of the [CRF] and the service and redemption of debt created..²⁶

It is not possible that all best practice would be included, but generally speaking, sections referring to loan contraction and debt management in the COPAC draft are consistent in a significant way, with recommendations in AFRODAD's charter. The COPAC draft is quite detailed in debt management, whilst the current constitution is however threadbare, in this regard. As ZIMCODD rightfully observes the Lancaster constitution, "only barely touches the issue of debt management and does not even mention the issue of loan contraction."²⁷

This does however, not mean there are no areas of improvement in the COPAC draft. As highlighted above, the draft could clearly state that Parliament approves new loans **prior to signing of contracts** to give them more meaningful input in the process and avoid rubber stamping. The **time needed for Parliament to consider the terms** of loans could also be specified in the same way that deadlines for reporting terms and usage are. The COPAC draft could also make a clear description of the structure to guarantee a prior role for Parliament in negotiating loans in the form of a **standing committee**. It is also clear that a more explicit **recognition of civic groups as watchdogs** which enhance public finance ownership and accountability could be made, in addition to Parliament.

23 The Zimbabwe Draft Constitution (17) page 20

24 AFRODAD Charter page 22

25 The Zimbabwe Draft Constitution (18) NewsDay May 21 2012 Alpha Media Holdings page 7

26 Government of Zimbabwe 'Constitution of Zimbabwe As amended at 13th February, 2009 [including amendments made by Constitution of Zimbabwe Amendment No. 19' (Distributed by Veritas Trust) page 93

27 Z. Chadambuka. 2009. A Critical Review of the Legal Framework of the Public Loan Contract and debt Management in Zimbabwe Harare: ZIMCODD page 13

Debt management in other constitutions

An analysis of debt management in the current and proposed regulatory framework would not be complete without a brief overview of the treatment of the same issue in other jurisdictions. As Uteem (2011) observed, “constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world.”²⁸

In its analysis of comparable provisions in other countries, ZIMCODD (2009) notes that the constitutions of Angola, Egypt, Ghana, Malawi, Sierra Leone and Uganda stipulate that the legislature by resolution may authorise government to enter into loan negotiations. The constitutions administer loans and debt via the CRF. They also stipulate that loans and debt management will be authorised under a specific Act of Parliament.

This paper notes that Ghana's constitution in particular states that the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament. The Uganda constitution has a provision similar to the Ghanaian one, but includes a remarkable clause where some loans can be raised *outside* the ambit of an Act of Parliament, with the terms and conditions not necessarily presented before Parliament. It is also up to Uganda's President to cause reports on the extent of indebtedness and performance of loans to be presented before Parliament. This does not fall in line with some of the AFRODAD charter's recommendations for a number of reasons. Firstly, guideline 1.4 of AFRODAD's charter recommends that states must, “undertake to adopt legislative measures that ensure that all public borrowing and debt management receives Parliamentary approval.”²⁹ Furthermore, guideline 2.1 of the charter also says that, “all public loan contraction and debt management rules and regulations must be anchored on constitutional provisions and other precise pieces of legislation defining how public loans should be obtained, used and serviced.”³⁰ The idea that some loans can occur outside the ambit of an Act of Parliament is not consistent with these recommendations.

As discussed above, the role of Parliaments in checking the power of the Executive in loan contraction is a widespread practice. However, these constitutions could also specify an optimum amount of time for Parliament to consider the terms of loans, as well as explicit prior approval by them before signing. This would avert a situation where legislators feel that they are acting in a rubber stamping role as described above.

28 Foreword by C. Uteem, former Mauritian President in N. Hedling, 2011 ‘A Practical Guide to Constitution Building: Principles and Cross Cutting Themes’ Stockholm: IDEA page III

29 AFRODAD Charter page 9

30 Ibid. page 11

Conclusion

Given the foregoing it is clear that the current constitution is vague and unclear on principles and roles in loan contraction and debt management. With caution one may state that the COPAC draft is an improvement on the constitutions above because it deals in a more detailed way with debt management. Specific areas to note in the COPAC draft in this regard are the direct reference to the principle of generational justice of the debt, borrowing limits, gazetting of loan terms and granting criteria ninety days after the fact and systematic public statement of the levels of indebtedness. There are therefore improvements in accountability, transparency and inclusiveness of the involved institutions in the processes of loan contraction and debt management. Many countries, including Zimbabwe have left the detail to enabling legislation. In some cases, the subordinate legislation needs improvement to make it effective, hence the prevailing weaknesses in their internal mechanisms. Having said this, the issue of context highlighted above is acknowledged, as having a bearing on the institutional and legal framework. Citizens may therefore wish to look closely at specific aspects of the proposed draft governing public finance management, as part of a comprehensive assessment whether to adopt it or not in the upcoming referendum.

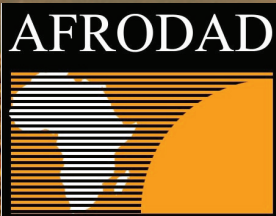
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Endnotes

- i See "No aid for Zim yet – IMF" in the Zimbabwe Independent 12 March 2010 p4 and "IMF not prepared to resume loans to Zimbabwe" The Zimbabwean 14 March 2010 p19. The former Director General of the IMF, Dominique Strauss Kahn was quoted as saying no fresh assistance would come to Zimbabwe if the country did not address issues relating to arrears and governance.
- ii According to various sources on public record, the upper and lower houses of Zimbabwe's Parliament were recalled early to ratify a loan deal in May 2011. After some heated debate, they approved a 20-year \$98 million loan from China to build a defence college. Legislators objected to the short notice given to members to study the agreement. They also queried how such a large loan would be contracted when the country's current debt is unserviceable while civil servants are not getting properly paid. Concern was raised over the tendency of Chinese companies to bring their own materials and labour on infrastructure projects, prejudicing local suppliers and workers. Another bone of contention was the idea that the state's revenues from joint venture with a Chinese mining company would be used to service the loan.



AFRICAN FORUM AND NETWORK ON
DEBT AND DEVELOPMENT

About AFRODAD

Vision

AFRODAD aspires for an equitable and sustainable development process leading to a prosperous Africa.

Mission

To secure policies that will redress the African debt crisis based on a human rights value system.

Objectives include the following:

- 1 To enhance efficient and effective management and use of resources by Africa governments.
- 2 To secure a paradigm shift in the international socio-economic and political world order to a development process that addresses the needs and aspirations of the majority of people in the world.
- 3 To facilitate dialogue between civil society and governments on issues related to Debt and development in Africa and elsewhere.

From the vision and the mission statements and from our objectives, it is clear that the Debt crisis, apart from being apolitical, economic and structural issue, has an intrinsic link to human rights. This forms the guiding philosophy for our work on Debt and the need to have African external debts cancelled for poverty eradication and attainment of social and economic justice. Furthermore, the principle of equity must of necessity apply and in this regard, responsibility of creditors and debtors in the debt crisis should be acknowledged and assumed by the parties. When this is not done, it is a reflection of failure of governance mechanisms at the global level that protect the interests of the weaker nations. The Transparent Arbitration mechanism proposed by AFRODAD as one way of dealing with the debt crisis finds a fundamental basis in this respect.

AFRODAD aspires for an African and global society that is just (equal access to and fair distribution of resources), respects human rights and promotes popular participation as a fundamental right of citizens (Arusha Declaration of 1980). In this light, African society should have the space in the global development arena to generate its own solutions, uphold good values that ensure that its development process is owned and driven by its people and not dominated by markets/profits and international financial institutions.

AFRODAD is governed by a Board of seven people from the five regions of Africa, namely East, Central, West, Southern and the North. The Board meets twice a year. The Secretariat is based in Harare, Zimbabwe.

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