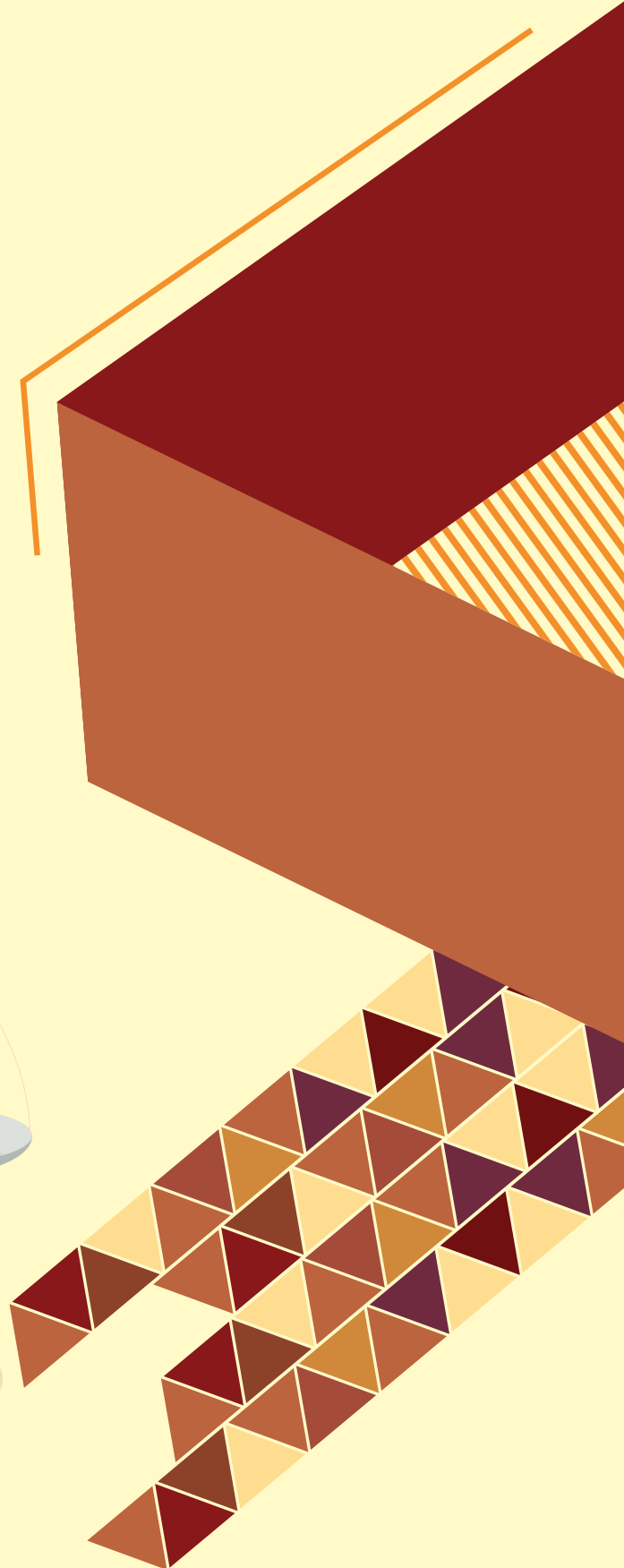




AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

THE LEGAL FOUNDATIONS OF THE AFRICAN PUBLIC DEBT



CONTENTS

Introduction	3
PART 1	4
1. The Emergence of Public Debt in African Economies	5
1.1. Public debt: A colonial and capitalist construct	7
1.2. Public debt: Created under contract law	11
2. The Legal Foundations of Debt	13
2.1. National law	13
2.2. International/regional law	16
3. Theoretical Underpinnings	19
3.1. Economic analyses	19
3.2. Legal analysis	20
3.3. Human rights analyses	21
3.4. Intersections across the theories and mitigating public debt	22
PART 2	25
1. The Creation of Public Debt and its Legal Instruments	26
1.1. The process of procuring debt	27
1.2. Contractual provisions	28
1.3. Actors	28
1.4. Debt instruments	29
1.4.1. Bonds	30
1.4.2. Treasury bills	30
1.4.3. Treasury notes	30
1.4.4. Treasury bonds	31
1.4.5. Sovereign loans	31
1.4.6. Contingent liabilities	31
1.5. The rights and liabilities created under debt instruments and key considerations	33
1.6. Public debt management	34
1.6.1. Instruments and structures guiding the debt management process	34
1.6.2. Efficacy of these instruments and structures	36
1.7. Legal issues for creditors and borrowers in light of increasing debt burden	38
1.8. Public debt: non-disclosure and lack of transparency concerns	39
2. Assessing Public Debt Contraction, Management, Transparency and Accountability Mechanisms of African countries	41
2.1. The African Debt Monitor, Debt Transparency Monitor and Debt Reporting Heat Map	41
2.2. Obstructions around debt transparency initiatives	43
3. Concluding Remarks	45
4. Policy Recommendations	46



INTRODUCTION

Public debt in African economies has become a subject of critical examination as nations grapple with the challenges and opportunities it presents. This research paper embarks on a comprehensive exploration of the complexities surrounding public debt in Africa, aiming to shed light on its historical roots, legal foundations, theoretical dimensions, creation processes, rights and liabilities, and transparency mechanisms. By addressing these multifaceted aspects, this study seeks to offer valuable insights and policy recommendations for effective debt management and governance.

The burden of public debt in African economies has far-reaching implications for economic stability, growth, and development. Understanding the historical emergence of this debt phenomenon is crucial for comprehending its present-day manifestations. Accordingly, Part 1 of this paper traces the origins of public debt, connecting it to colonial constructs and the evolution of contract law. Furthermore, the legal foundations of public debt are explored, both within national borders and in the context of international law. The theoretical backdrop of public debt, encompassing economic, legal, and human rights perspectives, is also examined to provide a holistic framework for analysis.

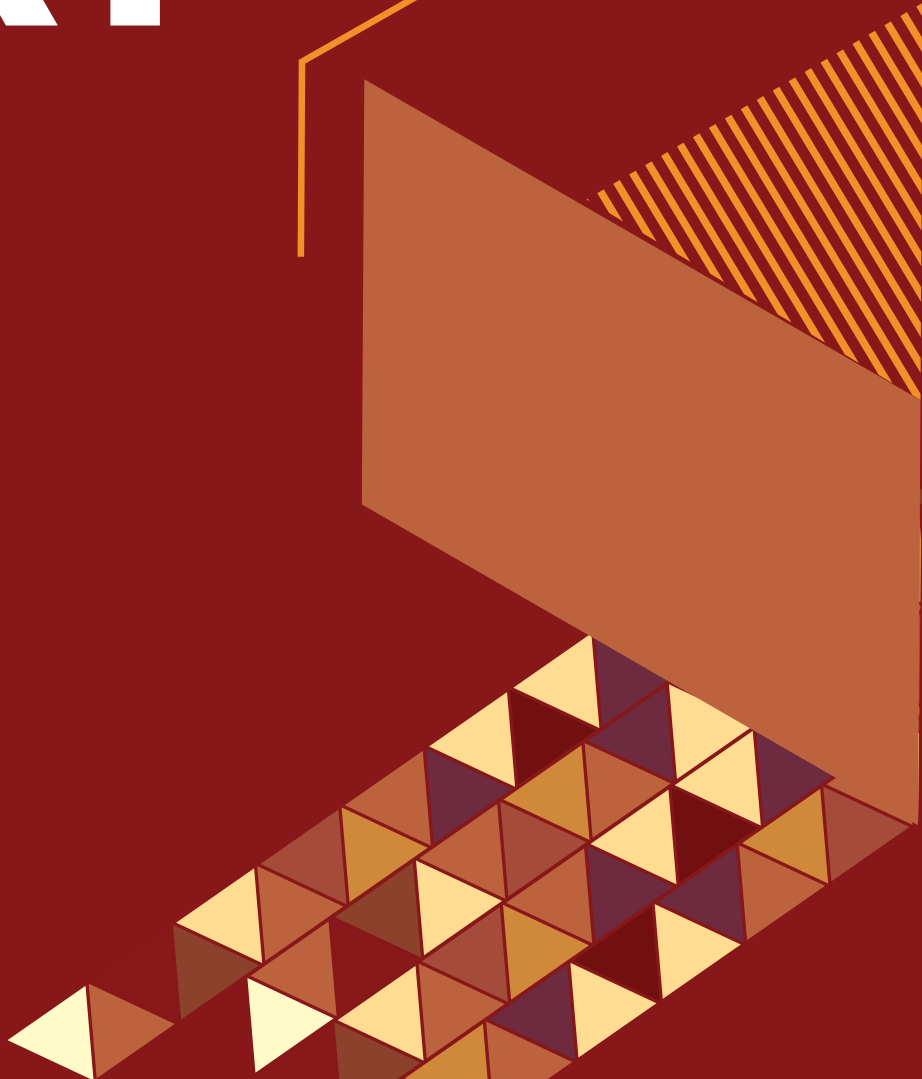
Part 2 delves into the genesis of public debt in African economies, scrutinizing the various instruments utilized in its creation. A detailed investigation of debt procurement processes, key actors involved, and contractual provisions sheds light on the complexities surrounding public borrowing. The array of debt instruments, including bonds, treasury bills, notes, and sovereign loans, is thoroughly explored, accompanied by a deep dive into the rights and liabilities arising from these financial arrangements. The aim is to identify critical considerations for effective public debt management, seeking to optimize the balance between development financing and fiscal prudence.

Beyond the mechanics of debt creation, this research addresses the legal dilemmas faced by creditors and borrowers in the face of mounting public debt. Non-disclosure and transparency deficits further exacerbate the challenges, making it imperative to evaluate the mechanisms deployed by African countries to ensure accountability and transparency in their public debt management practices. By analysing existing obstacles to debt transparency initiatives, this study aims to provide actionable insights for better governance and accountability.

In conclusion, this research paper synthesizes the comprehensive analysis conducted in both parts, culminating in a set of informed policy recommendations. These recommendations are intended to serve as guiding principles for enhancing the management and transparency of public debt across African economies. As policymakers and stakeholders grapple with the complexities of public debt, the insights presented here contribute to a deeper understanding of the challenges and opportunities that define the landscape of African economies. By forging a path towards sustainable and responsible debt management, this study endeavours to influence positive change and foster economic growth in the region.



PART 1



1

THE EMERGENCE OF PUBLIC DEBT IN AFRICAN ECONOMIES

Before the era of colonialism, African societies had their own systems of economic exchange and debt practices. These pre-colonial debt practices varied across different regions and communities in Africa.¹ While it is challenging to generalise these practices, certain common features can be identified. In many traditional west African societies such as among the Yoruba, debt was an integral part of economic and social relationships.² Debt served as a mechanism for facilitating trade, building social networks, and strengthening community ties. Debt relationships were often reciprocal and embedded within the broader social fabric of the community.³ Debt in pre-colonial African societies, such as in Buganda, Ankole, Rwanda, Burundi, Kanem, northern Nigeria, Senegal and Swaziland was typically based on mutual trust and reputation rather than formal legal frameworks.⁴ Personal relationships and social obligations played a crucial role in shaping debt arrangements. Informal mechanisms, such as communal norms, customary laws, and the involvement of elders or community leaders, governed debt relationships and their resolution.⁵

Debt in pre-colonial African societies was often characterised by flexibility and adaptability. Repayment terms were determined based on the borrower's ability to fulfil their obligations rather than rigid timelines. In some cases, like in Ghana and Buganda, debt repayment was linked to seasonal cycles, harvests, or other economic activities.⁶ Additionally, traditional African societies had mechanisms for debt resolution and dispute settlement. Disputes arising from debt for instance among the Yoruba and Igbo societies and the Pondo tribe in South Africa, were often resolved through community-based mechanisms, such as mediation, arbitration, or collective decision-making processes. These approaches emphasised restoring harmony and maintaining social cohesion within the community.⁷

The introduction of colonialism significantly disrupted these pre-colonial debt practices.⁸ The imposition of European legal systems, new economic structures, and the monetisation of African economies altered the dynamics of debt relationships. The transition to a cash-based economy and the influence of colonial powers brought about significant changes in debt practices and the role of debt in African societies.⁹ During European colonialism in Africa, public debt and colonial debt were intertwined and shaped by the economic and political dynamics of the colonial era. European colonial powers incurred substantial debts to finance their colonial ventures, including the establishment of administrative structures, infrastructure development, and military operations. These debts were often classified as public debts of the colonial powers.¹⁰

1 Adebayo. A.G., 'Money, Credit and Banking in Precolonial Africa: The Yoruba Experience' (1994) *Anthropos*, 89, 4/6, 379-400.

2 Ibid.

3 Ayittey, G.B.N. *Indigenous African Institutions* (BRILL, 2006): Ch 8: The Indigenous Economic System: Capital and Production.

4 Lemarchand, R. 'African Peasantries, Reciprocity and the Market. The Economy of Affection Reconsidered', (1989) *Cahiers d'Etudes africaines*, 113, pp. 33-67

5 Adebayo. A.G., 'Money, Credit and Banking in Precolonial Africa: The Yoruba Experience' (1994) *Anthropos*, 89, 4/6, 379-400; Lemarchand, R. 'African Peasantries, Reciprocity and the Market. The Economy of Affection Reconsidered', (1989) *Cahiers d'Etudes africaines*, 113, pp. 33-67; Scott, J.C. *The Moral Economy of the Peasant* (New Haven, CT: Yale University Press, 1976).

6 Van Hear, N. 'By Day Boys and Dariga Men', (1984) *Review of African Political Economy*, 31: 29-43; Young, C. 'Buganda', in R. Lemarchand, ed., *African Kingships in Perspective* (London: Fran Cass, 1977).

7 Ajayi, A.T and Buhari, L.O. 'Methods of Conflict Resolution in African Traditional Society' (2014) *Multidisciplinary Journal, Ethiopia*, Vol 8 (2), 33: 138-157. Adebayo. A.G., 'Money, Credit and Banking in Precolonial Africa: The Yoruba Experience' (1994) *Anthropos*, 89, 4/6, 379-400.

8 Ayittey, G.B.N. *Indigenous African Institutions* (BRILL, 2006): Ch 8: The Indigenous Economic System: Capital and Production.

9 Green R.M., 'The integration of Africa into the world capitalist system' (1976).

10 Stammer, D.W., 'British Colonial Public Finance' *Social and Economic Studies* (1967) Vol 16, No. 2, pp. 191-205



The burden of repaying colonial debt fell on the colonised populations after achieving independence.

Colonial debt played a crucial role in furthering the economic interests of the colonising powers. It provided the necessary financial resources to support the extraction of African resources, the establishment of trade networks, and the maintenance of colonial control.¹¹ Infrastructure projects such as railways, ports, and mining facilities were financed through colonial debt, primarily serving the economic objectives of the colonial powers. The burden of repaying colonial debt fell on the colonised populations after achieving independence. This transfer of debt obligations from the colonial powers to the newly independent African countries was often done without their consent or meaningful input. The inherited colonial debts became a significant burden for these countries, as they faced the challenge of servicing the debt while trying to pursue their own development objectives.¹²

Critics argue that colonial debt can be seen as odious debt,¹³ as it was often incurred without the direct benefit of the colonised populations. The borrowed funds were used to maintain colonial control and exploit African resources, rather than serving the best interests of the local communities. As a result, the debt became an unjust burden imposed on the newly independent African countries. As it will be demonstrated in the subsection that

follows, the legacy of colonial debt continues to impact African economies today. The repayment of colonial debt and subsequent borrowing to meet development needs have contributed to the accumulation of public debt in African countries. The terms and conditions attached to post-colonial borrowing, influenced by international financial institutions and external creditors, have at times imposed structural adjustment programs and conditionalities that prioritise debt servicing over social spending. This perpetuates a cycle of economic dependency and can hinder the ability of African countries to pursue independent development paths.

Analysing public debt and colonial debt during European colonialism helps to understand the historical and structural factors that have shaped the debt landscapes of African economies. It highlights the power dynamics, exploitation, and economic control inherent in the colonial project. By critically examining the impact of colonial debt, scholars and policymakers can advocate for more equitable debt management practices and economic policies that prioritise the interests and development aspirations of African nations.

¹¹ Gardner, L. 'Colonialism or Supersanctions: Sovereignty and Debt in West Africa, 1871-1914' (2017) *African Economic History Network*.

¹² Latif, L., "Is Africa's Fiscal Space Undermined by Debt Related Illicit Financial Flows?" Working Paper 1 (Committee on Fiscal Studies, 2022

¹³ Ndikumana, L. and J.K. Boyce. *Africa's Odious Debt: How Foreign Loans and Capital Flight Bled a Continent.* (London: Zed Books, 2011).

1.1. Public debt: A colonial and capitalist construct

Public debt, while an essential component of modern fiscal policy worldwide, presents unique complexities within African economies. Its genesis is intimately tied to the colonial legacy left by European powers, which has contributed to the accumulation of odious debt and the transfer of oppressive debt burdens to independent African nations constricting their fiscal spaces.¹⁴ The exploitative practices and economic control of colonial powers during the colonial era resulted in the extraction of resources and the imposition of economic structures that favoured colonisers. Upon achieving independence, African nations inherited the burdensome debts incurred by the colonial powers, perpetuating economic dependency, and hindering development.

For instance, upon achieving independence in 1962, Uganda inherited a dual economy system from British colonial rule with a profitable cash crop sector built around coffee and a neglected food crop sector.¹⁵ The necessity to invest in broad-based development led Uganda, like many other African countries, to turn to external borrowing, planting the seeds of public debt. The legacy of colonialism significantly shaped the emergence of public debt in many other African nations. For example, upon achieving independence in 1960, Nigeria had to address a significant development gap. The extraction-oriented economy, left by British colonial rule, lacked diversified industries and basic infrastructure. Dibua (1994) highlights how Nigeria turned to external borrowing to facilitate economic development, thereby initiating a cycle of public debt.¹⁶

14 An example of odious debt as colonial debt can be observed in the case of the Democratic Republic of Congo (DRC). During the colonial era, the Belgian colonial administration incurred substantial debt to finance their control and exploitation of the country's resources. The funds obtained through this debt were used to finance infrastructure projects and other activities that primarily served the interests of the colonial powers. However, the Congolese population did not consent to these borrowings, nor did they benefit from the investments made with the borrowed funds. Following independence in 1960, the DRC inherited this oppressive debt burden, which significantly constrained the country's fiscal capacity and hindered its economic development. Blocher, J., et al., 'King Leopold's Bonds and the Odious Debts Mystery', *Virginia Journal of International Law* (2020) Vol 60:3.

15 Latif, L. 'Imperilled Welfare States of Eastern Africa: A Comparative Analysis of the Policy Legacies of Taxation Politics in Kenya and Uganda', in G Onyango (ed) *State Politics and Public Policy in Eastern Africa: A Comparative Perspective* (Palgrave Macmillan, 2023); Haas, M. 'Reconstructing income inequality in a colonial cash crop economy: five social tables for Uganda, 1925-1965', *European Review of Economic History*, (2021) Vol 26, Issue 2, pp.255-283

16 Dibua, J. I. 'The Post-Colonial State and Development Planning in Nigeria, 1962-1985', *Journal of Eastern African Research & Development* 24 (1994): 212-28.

Similarly, Chad's reliance on public debt and underdevelopment are largely influenced by its colonial history under French rule, marked by a neglected infrastructure, unbalanced economy oriented towards resource extraction, and weak state institutions. The colonial administration's emphasis on cash crops and exploitation of natural resources, while neglecting the development of vital infrastructure and local governmental capacities, left Chad economically vulnerable at independence. Furthermore, the divide-and-rule tactics employed by colonial powers sowed seeds of deep ethnic and regional divisions that have culminated in persistent post-independence conflicts, further derailing economic development. The enduring effects of this colonial legacy, coupled with geopolitical complications and insufficient investment in education and human capital, have perpetuated economic instability and necessitated a heavy reliance on public debt to finance Chad's development aspirations.¹⁷

Another case is Angola, which achieved independence from Portugal in 1975 amidst a brutal civil war that lasted for almost three decades.¹⁸ The legacy of Portuguese colonial rule, the war, and the urgent need for reconstruction and development led Angola to accumulate significant public debt, primarily from bilateral sources and oil-backed loans.¹⁹ Similarly, post-independence Kenya in 1963 was faced with the challenge of transforming an economy that, under British colonial rule, had been geared towards the extraction of raw materials, mainly agricultural.²⁰ To develop industries, infrastructure, and enhance social services, Kenya had to resort to external borrowing, thereby increasing its public debt.²¹ In Senegal, the aftermath of French colonial rule left the newly independent nation in 1960 with an economy centred around peanut production and phosphate mining. To diversify the economy and build essential infrastructure, Senegal incurred external debt.²²

17 Decalo, S. 'Chad: The Roots of Centre-Periphery Strife', *African Affairs* 79:317 (1980), pp. 490-509.

18 Gonçalves, J. 'The Economy of Angola: From Independence to the 2008 Worldwide Crisis.' *The Perspective of the World Review*, (2010): v. 2, n. 3.

19 Mihalyi, D., et al. 'Resource-Backed Loans in Sub-Saharan

20 Mohiddin, A. *African Socialism in Two Countries* (London: Croom Helm, 1981).

21 Latif, L.A. 'The Lure of the Welfare State following Decolonisation in Kenya' in Gurminder Bhambra and Julia McClure (eds) *Imperial Inequalities: The politics of economic governance across European empires* (University of Manchester Press, 2022).

22 Andersson, J., Andersson, M. 'Beyond Miracle and Malaise. Social Capability in Côte d'Ivoire and Senegal during the Development Era 1930-1980; *St Comp Int Dev* (2019): 54, 210-232.

Similarly, at independence in 1966, Botswana found itself as one of the world's poorest countries. The minimal infrastructure left by British colonial rule necessitated substantial public investment. Hillbom (2008) discusses how external borrowing played a key role in Botswana's efforts to kick-start its economy, leading to the establishment of public debt.²³

Public debt, while an essential component of modern fiscal policy worldwide, presents unique complexities within African economies.

to independence in 1960 was fraught with political instability and economic challenges. Following Belgian colonial rule, the DRC needed extensive investment in its infrastructure and public services. Rosoux (2014) points out that the DRC, similar to other African countries, turned to external borrowing as a means to address these developmental needs, paving the way for the evolution of public debt.²⁴

Egypt provides a slightly different example. Although it was never formally a colony, it was a British Protectorate from 1882 until 1952. During this period, the British focused on the development of the Suez Canal and Egypt's cotton industry, neglecting other sectors of the economy. After the revolution in 1952, the new government embarked on a program of industrialisation and land reform, financed in part by external borrowing.²⁵ This marked the beginning of Egypt's public debt. Morocco, which gained independence from France in 1956, faced similar challenges. The French had developed certain sectors of the Moroccan economy, such as phosphate mining and agriculture, while neglecting others. At independence, Morocco sought to diversify its economy, develop its infrastructure, and improve social services, which led to an increase in public debt.²⁶ Such similar patterns are observed in Tunisia and Algeria as well where the legacy of colonial rule significantly shaped the economic structures of these countries and influenced their patterns of borrowing and debt accumulation.



In the Democratic Republic of Congo (DRC), the transition
23 Hillbom, E. 'Diamonds or Development? A Structural Assessment of Botswana's Forty Years of Success.' *The Journal of Modern African Studies* 46, no. 2 (2008): 191–214.

www.afrodad.org

24 Rosoux, V. 'The Two Faces of Belgium in the Congo: Perpetrator and Rescuer.' *European Review of International Studies* 1, no. 3 (2014): 16–38.
25 Shukla, R. L. 'Presidential Address: British Colonialism at Work in India and Egypt A Comparative View.' (1987) *Proceedings of the Indian History Congress*, vol. 48, pp. 603–19. JSTOR.

26 Salem, A. 'The Negative Impacts of Colonisation on the Local Population: Evidence from Morocco' (2022); https://adres2022.sciencesconf.org/data/pages/Salem_JMP.pdf

These examples demonstrate the link between colonial legacies and the emergence of public debt in Africa, reinforcing Muiu (2010) and Austin's (2010) argument about the crucial role of post-colonial borrowing in the early stages of nation-building in Africa.²⁷ The trajectory of public debt was further influenced by capitalism, globalisation and the involvement of international financial institutions. In addition to the historical factors discussed, various monetary and fiscal policies implemented during these times played a crucial role in the ballooning of public debt levels.

One such policy was the adoption of fixed exchange rate regimes, which aimed to maintain stability and facilitate international trade. However, these fixed exchange rate systems often created imbalances and led to overvaluation of domestic currencies, making African exports less competitive and exacerbating trade deficits. To support overvalued exchange rates, countries had to borrow heavily to accumulate foreign currency reserves, resulting in increased public debt. Another policy that affected debt levels was the pursuit of import substitution industrialization (ISI). Many African countries sought to reduce dependence on imported goods by promoting domestic industries. However, the implementation of ISI policies required substantial investment and importation of capital goods and technologies, leading to a surge in external borrowing to finance these industrialization efforts.

Furthermore, fiscal policies, such as expansive government spending, subsidies, and social welfare programs, were often implemented to address social and developmental needs. However, the financing of these policies through increased borrowing without corresponding revenue generation or effective debt management strategies contributed to the growth of public debt. Structural Adjustment Programs (SAPs) implemented in response to economic crises also played a significant role in shaping debt levels. These programs, often imposed by international financial institutions, aimed to address macroeconomic imbalances, and promote economic liberalisation.

These programs emphasised reducing government spending and subsidies, which had adverse effects on social welfare programs. Drastic cuts in public expenditure for education, healthcare, and social services disproportionately affected the most vulnerable populations, deepening poverty and exacerbating existing inequalities. The burden of these austerity measures fell heavily on the poorest citizens, while the wealthy few remained relatively unaffected. The focus on liberal markets and privatisation within SAPs has hindered development in African countries. These programs have fostered economic dependency, undermined public control over vital resources, and exacerbated social inequalities.

However, the austerity measures and fiscal adjustments prescribed under SAPs, such as reduction of government expenditures, removal of subsidies, and privatisation, had adverse effects on social welfare and further contributed to the accumulation of debt. For example, SAPs, such as those implemented in Ghana in the 1980s and 1990s, intended to promote economic liberalisation.²⁸ However, the austerity measures and subsidy reductions that were part of these SAPs often worsened social inequality and increased public debt levels, pushing many nations into a cycle of constant borrowing. Tanzania also implemented SAPs in the mid-1980s due to a severe economic crisis induced by the global energy crisis, falling commodity prices, and a socialist-oriented economic policy that proved unsustainable.²⁹ The SAPs involved widespread privatisation, liberalisation, and fiscal austerity, leading to significant socio-economic hardships and increased public debt as Tanzania turned to external creditors to mitigate the adverse effects.³⁰ Similarly, in the Ivory Coast, SAPs were introduced in the mid-1980s to counterbalance the decline in the global price of cocoa, a major export product.³¹ Measures included devaluation of the currency, reduction in public sector wages, and cuts in public spending. This not only heightened social tensions but also increased the country's reliance on external borrowing, contributing to a significant rise in public debt.³²

27 Muiu, M. 'Colonial and Postcolonial State and Development in Africa.' *Social Research* 77, no. 4 (2010): 1311–38; Gareth, A. 'African Economic Development and Colonial Legacies', *International Development Policy | Revue internationale de politique de développement*, 1 (2010): 11–32.

28 Kraus, J. 'The Struggle over Structural Adjustment in Ghana.' *Africa Today* 38, no. 4 (1991): 19–37.

29 Kaiser, P.J. 'Structural Adjustment and the Fragile Nation: The Demise of Social Unity in Tanzania.' *The Journal of Modern African Studies* 34, no. 2 (1996): 227–37.

30 Mohiddin (1981), *supra* n. 14.

31 Mahieu, F.R. 'Variable Dimension Adjustment in the Côte d'Ivoire: Reasons for Failure.' *Review of African Political Economy* 22, no. 63 (1995): 9–26.

32 *Ibid.*

Clearly, the colonial period and its post-colonial engineering of continuing to extract resources under capitalism and its call for liberal markets from African countries through SAPs left a lasting imprint on African economies, with colonial powers often structuring economies around resource extraction for export to the metropole. Consequently, newly independent African nations inherited economies that were ill-equipped for diversified growth and development. This economic structure led the African nations to resort to external borrowing in a bid to facilitate broad-based economic development and nation-building. This marked the genesis of a cycle of public debt, which some scholars view as a continuation of the extraction and exploitation characterising the colonial era.³³

The accumulation of public debt in African economies, both during colonial rule and in the post-colonial period, has perpetuated economic dependency and reinforced the dominance of external actors. The conditions attached to loans, such as structural adjustment programs and market-oriented reforms, have often prioritised the interests of creditors over the development needs and aspirations of African nations. This serves to maintain and reinforce hegemonic power relations, where the borrowing nations are subjected to the economic influence of more powerful global actors. Moreover, public debt has been used as a tool to exercise control and influence over the policies and decision-making processes of debtor nations. Creditors may impose conditionalities, such as fiscal austerity measures and market liberalisation, which can result in social hardships, economic inequality, and limited policy autonomy. This further entrenches the economic and power imbalances between African nations and external creditors, perpetuating a cycle of debt dependence.

The asymmetrical power relations embedded in public debt have broader implications for the global financial architecture. African nations often face limited opportunities for participation in decision-making processes that shape international financial rules and regulations. This lack of representation further entrenches the hegemony of powerful nations and institutions, reinforcing the structural inequalities that perpetuate debt burdens and hinder sustainable development in African economies. To address the inherent power imbalances and embed fairer economic relationships, it is essential to challenge the notion that public debt is solely an economic tool.

A critical analysis of public debt in the context of capitalism recognises the complex web of political, economic, and social factors that shape borrowing and lending relationships. It calls for transformative approaches that prioritise economic sovereignty, equity, and the fulfilment of the development aspirations of African nations, such as the current economic and fiscal initiatives taken in the establishment of the African Continental Free Trade Area (AfCFTA).

AfCFTA exemplifies Africa's emphasis on regional integration to enhance intra-African trade and economic cooperation. Countries like Kenya and South Africa have actively participated in and supported the AfCFTA initiative. Furthermore, economic diversification strategies in countries like Nigeria and Ethiopia aim to reduce reliance on primary commodities and foster sustainable economic growth through investments in industries and technology sectors. Prudent debt management and negotiation with international financial institutions have been undertaken by Ghana and Senegal, demonstrating their commitment to avoid excessive debt burdens. Additionally, Rwanda's efforts in promoting SMEs and advocating for fair trade practices reflect the continent's determination to challenge existing power imbalances and assert greater agency in shaping Africa's economic trajectory. These initiatives collectively reflect Africa's commitment to charting an independent and inclusive path towards economic prosperity, aiming to transcend the legacy of colonialism and neo-liberalism and establish itself as a rule maker on the global economic stage.

The discussion in this section demonstrates the origins and trajectory of public debt in African nations as being deeply entwined with historical colonial legacies, capitalism and political developments. These factors have indelibly shaped the economic realities these nations confront. Yet, at its essence, the manifestation and management of public debt are rooted in its legal foundations. It is this legal infrastructure, embedded in contract law but also operating within a larger legal structure that includes constitutional law, international law, and financial regulatory law, among others, that enables and governs the issuance, management, and servicing of public debt.

³³ Latif (2022), *supra* n. 21.

1.2. Public debt: Created under contract law

Public debt, fundamentally, is a contractual phenomenon. A sovereign entity enters into agreements with creditors—either domestic or foreign—to borrow funds. These debt contracts, secured and enforced by law, set forth the terms and conditions for borrowing, the rights and obligations of the parties, and the potential outcomes of a sovereign default. Contract law is premised on several key principles - freedom to contract, good faith, certainty, and flexibility among others. The freedom to contract allows parties to voluntarily enter into agreements on terms they deem beneficial. In the context of public debt, this principle means that sovereign nations have the right to engage in borrowing agreements with willing creditors. However, this freedom is often compromised by imbalances of power between the contracting parties. Creditors, usually wealthier nations, or international financial institutions, often have the upper hand in negotiations, leading to contracts that can sometimes favour the creditors. This, in combination with the contract law principle of certainty, which enforces the binding nature of these agreements, can perpetuate the power dynamics reminiscent of colonial relationships.

Embedded within public debt contracts are the concepts of interest and profit, which play a central role in the dynamics of borrowing and lending. Interest represents the cost of borrowing funds, while profit reflects the return sought by creditors for providing capital. These financial motivations underline the ultimate aim of debt, which is to generate returns for creditors and secure financial benefits for the lending parties. However, in the context of public debt in African economies, the pursuit of interest and profit can sometimes exacerbate the challenges faced by borrowing nations. The quest for financial gain, particularly when coupled with power imbalances and lack of transparency, can lead to unsustainable debt burdens, limited fiscal space, and hindered socio-economic development.

Moreover, issues around transparency often arise due to the complex nature of these contracts and the fact that they are negotiated behind closed doors. Public debt contracts can be quite technical and difficult for non-specialists to understand. Additionally, the negotiations leading up to these contracts are usually confidential, which may lead to unfavourable or unsustainable terms for the borrowing nation. Although contract law does not explicitly require transparency or good faith negotiations, it is generally seen as a desirable quality, as it fosters trust and ensures fair dealing. Transparency in public debt contracting can promote accountability, reduce corruption, and contribute to more balanced and sustainable agreements.

Seeing public debt from a contract law perspective holds significant implications, especially when considering post-colonial African nations. During the late 20th century, Structural Adjustment Programs (SAPs) were broadly implemented across Africa under the supervision of global financial institutions. These SAPs were not simply financial guidelines but were legally binding contracts. They typically demanded economic liberalisation and fiscal austerity measures. Therefore, compliance with these SAP conditions was not just a strategic economic decision but was a legal decision. This legal enforcement lent SAPs their transformative power, reshaping African economies, often resulting in social inequalities and cycles of increasing public debt.³⁴

Simultaneously, public debt and its legal regulations also played a critical role within the larger capitalist economic structure. Capitalism depends on legal regulations that facilitate the movement and accumulation of capital. Public debt contracts, ensconced within this legal framework, act as a conduit for the flow of capital into these economies. However, this interaction can inadvertently lead to the creation of 'capital enclaves', reinforcing systemic economic disparities. The legal mechanisms regulating public debt contracts carry an undercurrent of historical power dynamics, reminiscent of colonial relationships. While the laws themselves may be ostensibly neutral, they can facilitate a continuation of influence by creditor nations, many of whom are former colonial powers or their institutional representatives.



³⁴ Crisp, B.F., and Kelly, M.J. "The Socioeconomic Impacts of Structural Adjustment." *International Studies Quarterly* 43, no. 3 (1999): 533–52.

The effect is a subtle yet persistent influence on the borrower's economic policy choices, preserving a semblance of the colonial power dynamics of the past.³⁵

In essence, while public debt in Africa is a product of historical and political circumstances, it is the legal foundations of debt that operationalise its existence and influence its trajectory. A comprehensive understanding of public debt in the African context, thus, necessitates a thorough examination of these legal underpinnings. Through this lens, we can better understand the complexities of public debt and contribute to more effective policy and legal strategies for addressing its challenges.



³⁵ Okanga, O, and Latif, L.A. 'Tax Vulnerabilities in Africa: Revisiting Inclusivity in Global Tax Governance'. *African Journal of International Economic Law*, Vulnerabilities in International Economic Law, 1 (2). 2021.

2

THE LEGAL FOUNDATIONS OF DEBT

The legal underpinnings of public debt sit at the intersection of national and international law. These two domains provide unique, yet complementary, aspects of the legal architecture that governs public debt.



2.1. National law

At the national level, constitutional law and statutory legislation form the bedrock of public debt law. Constitutions, as apex legal instruments, typically delineate the powers and procedural norms for public borrowing. They often bestow the authority to accrue debt to specific governmental organs, generally the executive and legislative branches, and may stipulate processes for debt approval, including checks to prevent excessive indebtedness. For instance, Article 214 of the South African Constitution bestows the power to the National Assembly to approve the quantum of money the government may borrow.³⁶ Article 211 of the Kenyan Constitution prescribes that legislation will set out the terms on which the national government may borrow, and the reporting requirements the government will need to comply with.³⁷ Article 182 read together with Article 178 of Ghana's Constitution stipulates that its public debt shall be charged on the Consolidated Fund and other public funds of Ghana and that legislation will further address its appropriation and spending.³⁸

While these constitutions set out norms relating to public debt, the constitutions of Ethiopia and Chad, for example, have no provisions on oversight mechanisms, such as requiring legislative approval for borrowing nor outlining the country's position instilling predictability in public debt. It is, therefore, not surprising to find that in 2021 Chad requested a debt restructuring in light of its increasing debt service to revenue ratio of 16 percent which led the nation to external debt distress.³⁹ Having clear delineation on responsibility for accruing and managing public debt would have helped to ensure accountability over debt procurement and management decisions. With respect to Ethiopia, it can however be assumed that Article 43(3) of its Constitution can subject debt contracts to scrutiny. The Article reads: 'All international agreements and relations concluded, established or conducted by the State shall protect and

³⁶ <https://www.lawglobalhub.com/section-213-219-constitution-of-south-africa-1996/>

³⁷ <https://www.klrc.go.ke/index.php/constitution-of-kenya/149-chapter-twelve-public-finance/part-3-revenue-raising-powers-and-the-public-debt/380-211-borrowing-by-national-government>

³⁸ <https://constitutionnet.org/sites/default/files/Ghana%20Constitution.pdf>

³⁹ World Bank. The World Bank in Chad. (2023): <https://www.worldbank.org/en/country/chad/overview>; <https://media.afreximbank.com/afrexim/CHAD-COUNTRY-BRIEF-DECEMBER-2018-4.pdf>

ensure Ethiopia's right to sustainable development'.⁴⁰ All 'international agreements' can be interpreted to refer to debt contracts. Despite this, Ethiopia's fiscal space has 'essentially disappeared, and the allocation of spending has become skewed to debt service and defence'⁴¹ instead of sustainable development.

In synergy with constitutional provisions, statutory laws provide further nuance to the national legal framework of public debt. These laws prescribe specific mechanisms for debt management, establish designated agencies for this purpose, and articulate measures for transparency and accountability in public debt administration. An illustration of this is Nigeria's Fiscal Responsibility Act 2001, Kenya's Public Finance Management Act 2012⁴², and Ghana's Public Financial Management Act 2016⁴³ which outline the detailed mechanisms for managing and controlling public debt, including its issuance by the national government. Several African countries have developed robust legal frameworks to govern public debt issuance and management while also ensuring the protection of bondholders' interests. For instance, in South Africa, the Public Finance Management Act of 1999 provides guidelines and procedures for public debt management, with bondholders' rights safeguarded through trust indentures.⁴⁴ Similarly, Nigeria's Debt Management Office Act of 2003 establishes the Debt Management Office (DMO) as the coordinating agency for public debt activities, ensuring adherence to legal requirements and overseeing debt restructuring.⁴⁵

Several African countries have developed robust legal frameworks to govern public debt issuance and management while also ensuring the protection of bondholders' interests.

40 <https://www.ilo.org/dyn/natlex/docs/ELECTRON-IC/41544/63844/F-300752700/ETH41544%202.pdf>

41 UNCTAD. *From Debt to Development: What are Ethiopia's Choices?* (2023): <https://www.undp.org/sites/g/files/zskgke326/files/2023-04/UNDP%20-%20Shock%20Document%20-%20Working%20Paper%20Series%203%20-%20Final%20April%20132023.pdf>

42 http://www.parliament.go.ke/sites/default/files/2017-05/Gazette_Notice_Vol_No_CXVII_No_26.pdf

43 <https://mofep.gov.gh/public-debt>

44 <https://www.treasury.gov.za/legislation/pfma/PFMA%201999%20as%20amended%20March%202017.pdf>

45 <https://www.dmo.gov.ng/publications/other-publications/dmo-establishment-act/1289-dmo-act-1/file>

In Ghana, the Public Financial Management Act of 2016 outlines debt issuance procedures and repayment terms, incorporating mechanisms to protect bondholders' rights.⁴⁶ Kenya's Public Finance Management Act of 2012 provides a clear framework for borrowing and debt management, including mechanisms to safeguard bondholders' interests.⁴⁷



It is also crucial to point out that the management of public debt in African countries is often fragmented, with debt management provisions dispersed across various laws, directives, medium term strategies and circulars, instead of being consolidated within a single integrated government debt management Act. This fragmented approach has implications for transparency, accountability, and prudent debt management. For instance, countries like Nigeria, Kenya, and Ghana incorporate debt management within broader public finance management legislation, rather than having a dedicated Act solely focused on debt management. As a result, reporting and disclosure of public debt-related information may lack transparency, limiting public access to comprehensive and up-to-date debt data.



46 <https://mofep.gov.gh/sites/default/files/acts/PUBLIC-FINANCIAL-MANAGEMENT-ACT-2016.pdf>

47 *Supra* n. 37.

The absence of clear accountability mechanisms within a dedicated Act can also lead to a lack of clear responsibility and oversight in debt management practices. Moreover, the fragmented nature of debt management may hinder coordinated strategies, risk assessment frameworks, and debt sustainability analysis, potentially resulting in suboptimal debt management practices. Therefore, the consolidation of debt management provisions into a comprehensive and consolidated Act could enhance transparency, accountability, and prudent debt management in African countries, fostering sustainable economic growth and development.

The fragmentation of debt management in African countries results in a number of challenges and shortcomings that impact transparency, accountability, and effective debt management practices. The dispersion of debt management provisions across various laws, directives, medium-term strategies, and circulars leads to a lack of cohesion and coordination in debt management efforts. This fragmentation hampers transparency by making it difficult to obtain a comprehensive and up-to-date view of public debt-related information. It also creates gaps in accountability, as the absence of clear responsibilities and oversight mechanisms within a dedicated Act can lead to ambiguity and a lack of clear lines of responsibility. Additionally, the fragmented nature of debt management inhibits the development of coordinated strategies, risk assessment frameworks, and debt sustainability analysis, potentially resulting in

suboptimal decision-making and unsustainable debt burdens. Such fragmentation allows for amendments to be introduced. Some amendments, rather than strengthening the legal framework, have often been aligned with the demands of creditors, potentially compromising transparency, accountability, and prudent debt management practices.

For instance, amendments to public debt management laws in countries like Kenya and Ghana have been criticised for diluting oversight mechanisms, reducing parliamentary approval requirements for certain loans, and allowing for borrowing without sufficient checks and balances. These changes can undermine transparency in debt-related reporting and disclosure, diminish accountability by weakening oversight mechanisms, and increase the risk of unsustainable borrowing. The Public Finance Management (National Government) (Amendment) Regulations, 2023, which proposed to move Kenya's debt ceiling to 55% of GDP, is an example of a recent amendment that warrants assessment in the context of debt management in African countries. This amendment raises concerns about the potential impact on debt sustainability and fiscal discipline. By increasing the debt ceiling, there is a risk of allowing governments to accumulate higher levels of debt without sufficient regard for the long-term implications. This can pose challenges in terms of debt servicing, interest payments, and the overall debt burden on future generations.



2.2. International/regional law



In concert with these national legal constructs, international law also has a significant bearing, primarily in the context of transnational public debt transactions. Core principles of international law, such as *pacta sunt servanda* (agreements must be kept), are applied to international debt agreements, thereby ensuring their enforceability. African countries, like Mozambique, Chad and Ethiopia engage in treaties and agreements with global financial institutions like the International Monetary Fund (IMF) and World Bank, which impose specific obligations on the borrowing nations.⁴⁸ These engagements often lead to economic restructuring and reforms, with implications for the public debt landscape.⁴⁹

The legal foundations of public debt under international law comprise a complex matrix of treaties, institutional guidelines, conventions, and informal arrangements that together constitute a global governance framework for sovereign debt. While there is no universally accepted international legal framework that regulates public debt comprehensively, various elements of international law play pivotal roles in shaping norms, best practices, and dispute resolution mechanisms related to public debt.

International treaties and conventions, although sparse and often regionally confined, offer some legal provisions on public debt. For instance, in the African context, there are also regional economic communities, such as the West African Economic and Monetary Union (WAEMU) and the Central African Economic and Monetary Community (CEMAC), which have established convergence criteria that include limits on public debt. For instance, in the WAEMU, one of the convergence criteria is that public debt should not exceed 70% of GDP,⁵⁰ in SADC the public debt ratio should be maintained at below 60% of GDP. Under the CEMAC's macroeconomic convergence framework, member states are required to maintain a public debt ratio below 70% of GDP.⁵¹ Meanwhile, the East African Community (EAC) has a slightly more stringent debt limit of 50% of GDP in net present value terms.⁵² However, such treaties are largely binding only on the signatories and may not be universally applicable (as seen from Kenya's proposal to increase the debt ceiling to 55%).

⁴⁸ <https://www.imf.org/en/Countries/MOZ>;
<https://www.imf.org/en/Countries/ETH>;
<https://www.imf.org/en/News/Articles/2022/12/22/pr22458-chad-imf-executive-board-completes-first-and-second-reviews-of-ecf-arrangement>.

⁴⁹ Ibid.

⁵⁰ IMF. Strengthening the WAEMU Regional Fiscal Framework (2022): <https://www.imf.org/-/media/Files/Publications/WP/2022/English/wpica2022049-print-pdf.ashx>

⁵¹ IMF. Central African Economic and Monetary Community (2019): <https://www.imf.org/-/media/Files/Publications/CR/2019/1CAEEA2019004.ashx>

⁵² UNECA. The East African Monetary Union: Ready or Not? (2018): https://archive.uneca.org/sites/default/files/images/eamu_report.pdf

It is important to acknowledge that adherence to debt limits and convergence criteria varies among countries.



55% of GDP	KENYA
66.7% of GDP	RWANDA
66.4% of GDP	BURUNDI

It is important to acknowledge that adherence to these debt limits and convergence criteria varies among countries. Recent amendments to debt management laws in some countries, such as Kenya, which proposed an increase in the debt ceiling to 55% of GDP, raise concerns about potential deviations from the prescribed limits. Countries like Rwanda, with a public debt ratio of 66.7% of GDP, and Burundi, with a public debt ratio of 66.4% of GDP, also demonstrate instances where debt levels exceed the recommended thresholds. The deviations from prescribed debt limits in certain countries can be attributed to various factors. These factors may include economic conditions, development priorities, domestic policy choices, and challenges in implementing effective debt management strategies. It is important to note that international treaties and regional economic community guidelines on debt limits often carry a soft law nature, meaning they lack binding enforcement mechanisms.

The lack of a multilateral legal framework for the sovereign debt restructuring process poses significant

challenges and complexities in addressing debt crises effectively. The absence of clear rules and an established restructuring framework often leads to prolonged and contentious negotiations, hindering debtor countries from achieving debt sustainability. The current system's reliance on voluntary approaches has limitations, as geographically dispersed creditors and bondholders have incentives to hold out from debt restructuring deals. The absence of an established seniority structure can lead to debt dilution and additional indebtedness, further exacerbating borrowing costs and risks for both debtors and creditors. Moreover, the lack of a formal process for declaring a standstill during debt distress can trigger panicked responses from creditors, causing rollover crises and instability in the global financial system. These challenges demonstrate the need for a comprehensive and enforceable multilateral legal framework that can provide clear rules, facilitate timely resolutions, and protect the interests of both debtors and creditors, ultimately contributing to greater financial stability and sustainability on a global scale.

The UN General Assembly Resolution 68/304 attempted to shed light on the urgent need for a multilateral legal framework to address sovereign debt crises comprehensively. However, its voluntary nature and resistance from powerful creditor nations hindered its effectiveness in bringing about meaningful change. The failure to establish a robust framework underscored the challenges of navigating the interests of different stakeholders and highlighted the ongoing need for more concerted efforts to develop a fair, transparent, and enforceable system for sovereign debt restructuring.

At the institutional level, the International Monetary Fund (IMF) and the World Bank play crucial roles in creating normative standards and offering technical assistance to member states. The IMF's Articles of Agreement, and guidelines on fiscal transparency and debt sustainability aim to pre-empt debt crises, promoting orderly public debt management and creating a platform for better fiscal policies.⁵³ However, the implementation of these policies has often resulted in the imposition of austerity measures on countries in need of financial assistance, often contrary to the national objectives of the countries.⁵⁴ To advance international norms on public debt, the United Nations Conference on Trade and Development (UNCTAD) developed principles on responsible sovereign lending and borrowing.⁵⁵ These principles aim to alleviate sovereign debt crises and foster fairness in the resolution of such crises, emphasising both the responsibilities of the debtor nations and the rights of creditor nations. Credit Rating Agencies (CRAs), albeit non-governmental, are crucial players in shaping public debt standards.⁵⁶ By assessing countries' creditworthiness, CRAs influence a nation's borrowing capacity on international markets. The International Public Sector Accounting Standards (IPSAS) also provide guidelines for public sector entities regarding the recognition, measurement, and disclosure of public sector debt.⁵⁷

There are also initiatives at the international level that provide regulations towards debt relief. For example, the Heavily Indebted Poor Countries (HIPC) initiative, established by the World Bank and the IMF in 1996, represented a significant shift in the international approach to public debt, particularly concerning the world's poorest countries, many of which were in Africa.⁵⁸ The HIPC initiative was designed to ensure that no poor country faces a debt burden it cannot manage. To achieve this, the HIPC initiative proposed debt relief for countries struggling with unsustainable debt burdens. Mozambique, Chad, and Uganda for example, as beneficiaries of the initiative, saw considerable amounts of their public debt forgiven, allowing the countries to manage their public debt and reallocate resources towards public investment.⁵⁹ Before the HIPC initiative, debt relief was coordinated on a bilateral basis or through non-governmental organizations. HIPC marked a more comprehensive approach, involving all creditors, including multilateral organisations, in the debt relief process.

A noteworthy continental effort in framing regulatory aspects over public debt for Africa is the African Forum and Network on Debt and Development (AFRODAD)'s African Borrowing Charter. The Charter presents a set of principles for responsible borrowing, guiding African governments in public debt management. It underscores the role of national laws in providing predictable debt management rules and regulations and creating a conducive legal environment for sustainable borrowing. Having explored the legal foundations of public debt and the contractual provisions that secure it, we now turn our attention to the theoretical underpinnings that inform our understanding of public debt and its economic implications.

53 IMF: <https://www.imf.org/en/About/Factsheets/Sheets/2023/imf-world-bank-debt-sustainability-framework-for-low-income-countries>

54 <https://www.commondreams.org/news/2022/04/19/87-imf-loans-forcing-austerity-crisis-ravaged-nations-analysis>

55 UNCTAD. *Principles on Promoting Responsible Sovereign Lending and Borrowing* (2012): https://unctad.org/system/files/official-document/gdsddf-2012misc1_en.pdf

56 UNDESA. *Credit Rating Agencies and Sovereign Debt* (2022): https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2022-03/Credit%20Rating%20Agencies_paper_0.pdf

57 IFAC. *Handbook of International Public Sector Accounting* (2023): https://www.ifac.org/system/files/publications/files/2021-IPSASB-Handbook-Vol-1_ENG_Web_Secure.pdf

58 [https://www.imf.org/en/About/Factsheets/Sheets/2023/Debt-relief-under-the-heavily-indebted-poor-countries-initiative-HIPC#:~:text=Debt%20Relief%20Under%20the%20Heavily%20Indebted%20Poor%20Countries%20\(HIPC\)%20Initiative.faces%20an%20unmanageable%20debt%20burden.](https://www.imf.org/en/About/Factsheets/Sheets/2023/Debt-relief-under-the-heavily-indebted-poor-countries-initiative-HIPC#:~:text=Debt%20Relief%20Under%20the%20Heavily%20Indebted%20Poor%20Countries%20(HIPC)%20Initiative.faces%20an%20unmanageable%20debt%20burden.)

59 <https://documents.worldbank.org/curated/en/792041583532831724/pdf/Mozambique-Enhanced-Heavily-Indebted-Poor-Countries-HIPC-Initiative.pdf>

<https://www.imf.org/external/np/hipc/pdf/ugandad2.pdf> <https://www.imf.org/en/About/Factsheets/Sheets/2023/Debt-relief-under-the-heavily-indebted-poor-countries-initiative-HIPC>

3

THEORETICAL UNDERPINNINGS

3.1. Economic analyses

To fully grasp the complexities and implications of public debt, it is crucial to delve into the theoretical underpinnings that inform our understanding of this economic phenomenon. The study of public debt necessitates a multidimensional approach that encompasses economic theories, legal foundations, and broader socio-legal and human rights perspectives. The starting point is then by examining the perspectives of classical and neoclassical economists, as well as Keynesian analysis.

Classical economists, such as Adam Smith⁶⁰ and David Ricardo⁶¹, focused on the role of public debt in financing government expenditures and its potential impact on resource allocation. They argued that excessive public debt could crowd out private investment and lead to higher interest rates, hindering economic growth. Neoclassical economists, such as Milton Friedman⁶² and Robert Lucas⁶³ building upon classical theories, emphasised the importance of fiscal discipline and balanced budgets to ensure sustainable economic development. Their focus on market mechanisms and efficiency shaped discussions on debt management and the potential distortions caused by public debt. In contrast, Keynesian economics, developed by John Maynard Keynes,⁶⁴ provides an alternative perspective on public debt. Keynesian analysis highlights the potential for public debt to stimulate economic growth and mitigate unemployment during economic downturns. According to Keynesian theory, governments can use deficit spending and public debt to boost aggregate demand, leading to increased investment, consumption, and employment.

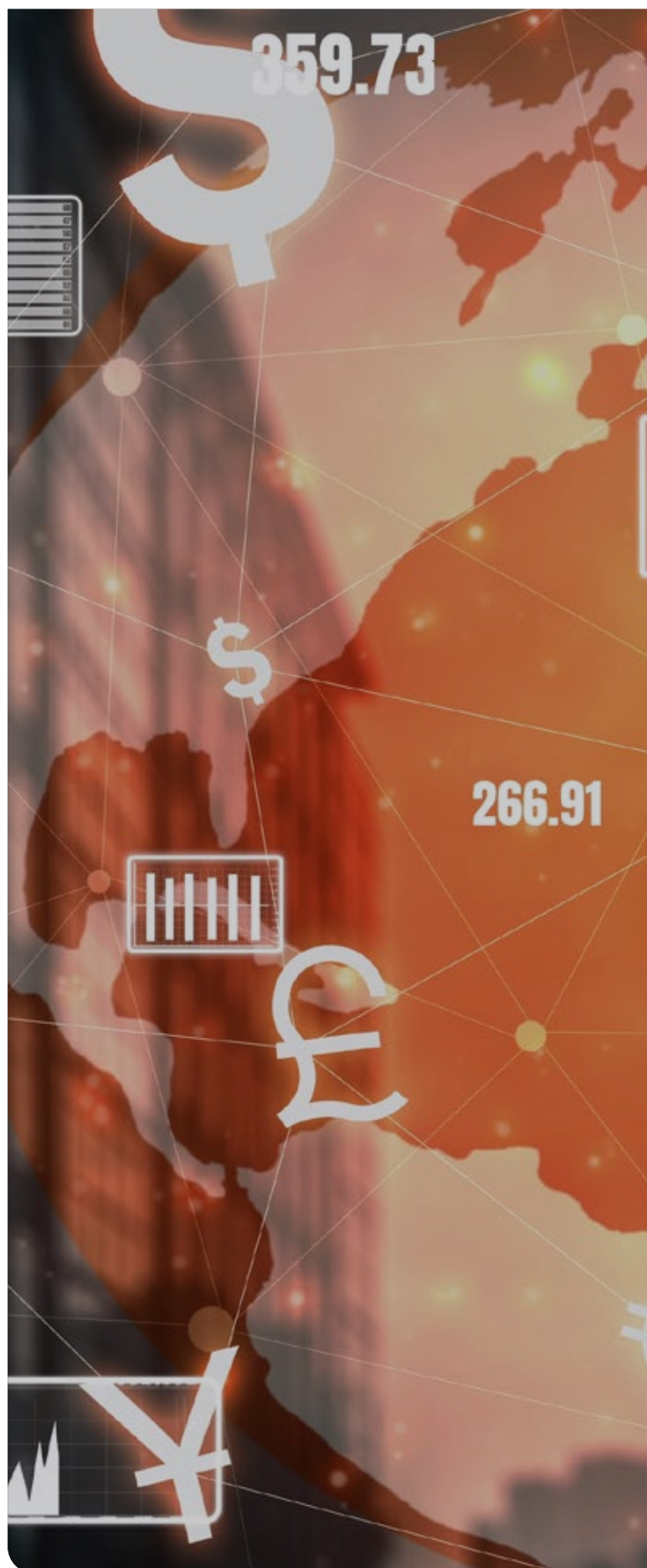
60 Smith, A, 1723-1790. *The Wealth of Nations* / Adam Smith; Introduction by Robert Reich; Edited, with Notes, Marginal Summary, and Enlarged Index by Edwin Cannan. (New York: Modern Library, 2000).

61 Ricardo, David, 1772-1823. *On the Principles of Political Economy and Taxation*. (London: John Murray, 1817).

62 Friedman, M, 1912-2006. *Capitalism and Freedom*. (Chicago: University of Chicago Press, 1963)

63 Lucas, R. 'The mechanics of economic development' *Journal of Monetary Economics* (1988): vol 7, no.1, pp.3-42

64 Keynes, J.M, 1883-1946. *The General Theory of Employment, Interest and Money*. (London: Macmillan, 1936).



In the African context, where many countries face developmental challenges and limited fiscal space, Keynesian perspectives suggest that strategic use of public debt, particularly for productive investments, can support economic development and poverty reduction. Integrating classical, neoclassical, and Keynesian perspectives into the analysis of public debt in African economies allows for a nuanced understanding of its implications. Classical and neoclassical theories emphasise the importance of fiscal discipline, efficiency, and resource allocation, cautioning against excessive debt. These perspectives highlight the potential risks of public debt, particularly when it is not accompanied by sound fiscal management and clear predictable legal rules. On the other hand, Keynesian analysis recognises the role of public debt as a countercyclical tool, emphasising its potential to stimulate economic activity and promote development.

However, it is essential to contextualise these economic perspectives within the broader socio-legal and human rights dimensions of public debt in African economies. The social and distributive implications of public debt, including its impact on access to public services, poverty reduction, and inequality, must be taken into account. Moreover, the legal frameworks that govern public debt, the power dynamics involved, and the human rights obligations of states shape the way public debt is managed and its impact on society. Incorporating these dimensions into the analysis provides a comprehensive understanding of public debt in Africa, taking into consideration economic, legal, social, and human rights aspects.

It would be noteworthy to assert here that while classical and neoclassical perspectives emphasise fiscal discipline and efficiency, Keynesian analysis recognises the potential for public debt to stimulate economic growth and mitigate unemployment. However, the practical implementation of these theories can be influenced by power dynamics, policy pressures, and the interests of creditors. Policy recommendations in Africa often blur the boundaries between these theoretical perspectives, with creditors imposing austerity measures and debt repayment conditions. It is crucial for policymakers to critically take into account the socio-economic context, power dynamics, and human rights implications to promote inclusive and sustainable development in African economies.

3.2. Legal analysis

This is the point at which the paper turns to further examine the legal foundations of public debt from law. Positive law⁶⁵ establishes the legal infrastructure for public debt, encompassing constitutional provisions, statutory legislation, international treaties, and financial regulatory frameworks. Through these legal provisions, governments are empowered to issue and manage public debt while safeguarding the interests of creditors and borrowers. Moreover, legal frameworks facilitate debt repayment mechanisms, protect the rights of bondholders, and create transparency and accountability in debt management. To understand the full complexity of public debt, socio-legal approaches⁶⁶ are also essential. Adopting a socio-legal perspective recognises that public debt is embedded in broader social, political, and economic contexts. This perspective explores the interplay between legal frameworks and social realities, shedding light on power dynamics, corruption risks, distributional effects, and social justice implications of public debt. It examines how legal frameworks interact with social structures, institutions, and governance systems in shaping debt outcomes, including their impact on access to public services, poverty reduction, and inequality.



65 Positive law, in its broadest sense, refers to law that is “posited” or formally established through institutional processes and procedures. It includes all laws that have been enacted or codified by a legislative authority or governing body. They are made by humans and can be changed by humans and are usually specific to particular societies and times. See: HLA Hart, *The Concept of Law* (Clarendon Press, 1994)

66 The socio-legal approach to studying law views law not just as a set of rules or mandates, but as a social institution that is deeply interconnected with other social institutions and structures. This perspective acknowledges that law both influences and is influenced by the social, cultural, economic, and political contexts within which it operates. Socio-legal scholars argue that to fully understand law—including its creation, implementation, and impact—we must examine these broader societal contexts. They may use methodologies from social sciences such as anthropology, sociology, political science, economics, and psychology to analyse legal phenomena. See: Cotterrell, R., *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing, 2006) and Luhman, N., *Law as a Social System* (Oxford University Press, 2004)

The socio-legal approach can be best illustrated through Frantz Fanon and Walter Rodney who both critically analysed the socioeconomic structures and implications of colonialism. Although neither focused explicitly on the legal foundations of public debt, their work provides a theoretical framework to critique and understand this issue within the context of postcolonial societies. Frantz Fanon, in 'The Wretched of the Earth',⁶⁷ detailed the psychological and socioeconomic repercussions of colonialism, emphasising that the colonial structure persists even after the formal end of colonial rule. This perspective suggests that the legal and economic structures that govern public debt in postcolonial societies may perpetuate economic dependence and inequality. Fanon argued for a radical break from these structures, which could imply a call for significant debt restructuring or forgiveness. Specifically, the legal frameworks that govern public debt and international lending often reflect power dynamics that disadvantage poorer nations. These laws and regulations are typically created and enforced by institutions dominated by wealthier countries, akin to Fanon's observation about colonial structures continuing in the postcolonial state. The policies and conditions often attached to loans, including austerity measures and economic liberalisation, can exacerbate inequality and hinder sustainable development.

Walter Rodney, in 'How Europe Underdeveloped Africa', focused on the economic exploitation during the colonial period.⁶⁸ He argued that Europe enriched itself at the expense of Africa, leaving a legacy of underdevelopment. By extension, the public debt held by many African countries could be seen as a continuation of this dynamic, with the global North continuing to extract wealth from the global South. From a socio-legal perspective, Rodney's analysis suggests a critique of the laws governing public debt. If the high levels of debt in many African countries are seen as a result of underdevelopment caused by colonialism, this could lead to calls for debt forgiveness as a form of reparations. Moreover, Rodney's critique can extend to the international legal and financial structures that perpetuate inequalities between nations, such as those embodied in SAPs, international trade agreements, and the practices of international financial institutions.

⁶⁷ Fanon, F, 1925-1961. *The Wretched of the Earth*. (New York: Grove Press, 1968).

⁶⁸ Rodney, W. *How Europe Underdeveloped Africa*. (London: Bogle-l'Ouverture Publications 1972).



3.3. Human rights analyses

In addition to the economic, legal, and socio-legal theoretical frameworks to understand public debt, incorporating human rights considerations into the analysis of public debt is also crucial. The human rights framework recognises that public debt should not hinder the realisation of economic, social, and cultural rights. It highlights the importance of debt sustainability and responsible borrowing practices to uphold human rights obligations. Integrating human rights perspectives into the analysis of public debt involves assessing whether debt management policies align with human rights principles of equality, non-discrimination, and participation. It also entails examining the potential adverse impacts of debt on marginalised and vulnerable populations and seeking ways to mitigate such risks.

3.4. Intersections across the theories and mitigating public debt

By drawing on economic theories, legal foundations, socio-legal approaches, and human rights perspectives, we gain a comprehensive understanding of public debt and its socio-legal foundations. These analytical lenses provide insights into the economic implications, legal frameworks, social dynamics, and human rights dimensions of public debt. Examining public debt through these multidimensional perspectives contributes to informed policy decisions, ensuring that debt management aligns with sustainable economic growth, social justice, and the fulfilment of human rights obligations.

Integrating these theories, socio-legal approaches, and human rights perspectives provides a comprehensive understanding of public debt in African economies. Such an analysis considers the economic efficiency, optimal debt levels, social dynamics, and human rights implications of public debt. It facilitates informed policy decisions that prioritise sustainable economic growth, social justice, and the fulfilment of human rights obligations. By linking these perspectives, scholars and policymakers gain a holistic view of public debt in African contexts, encompassing economic, legal, social, and human rights dimensions.

In fact, these theories have led to the emergence of initiatives such as the Heavily Indebted Poor Countries (HIPC) initiative (already addressed in section 3.2), Multilateral Debt Relief Initiative (MDRI), the Paris Club, and the G20 Debt Service Suspension Initiative (DSSI) reflecting a shift towards integrating human rights considerations into the realm of public debt.⁶⁹ These initiatives aim to alleviate the debt burdens of the world's poorest countries, freeing up resources for poverty reduction and development. By placing debt relief within a human rights framework, these initiatives acknowledge the importance of ensuring that public debt does not impede the realisation of economic, social, and cultural rights.

The MDRI, building upon the HIPC initiative, provides 100% debt relief for eligible countries, including those in Africa, by multilateral institutions such as the World Bank, the IMF, and the African Development Fund. By reducing the debt burdens of the poorest countries, the MDRI aims to create fiscal space for investment in poverty reduction programs and sustainable development. This initiative recognises the importance of addressing debt as a barrier to human rights and seeks to foster a more equitable and just global economic system. The Paris Club, as an informal group of creditor nations, has played a significant role in debt restructuring and relief for developing countries, often in coordination with HIPC and MDRI initiatives. Through negotiations and dialogue, the Paris Club seeks to find viable solutions for countries facing payment difficulties, taking into account their social and economic circumstances.

⁶⁹ These initiatives recognise the impact of debt burdens on the realisation of economic, social, and cultural rights. By providing debt relief to the world's poorest countries, these initiatives aim to alleviate their debt burdens and create fiscal space for poverty reduction and development, thereby promoting the fulfilment of human rights. The inclusion of human rights considerations in debt relief initiatives reflects a growing recognition of the importance of ensuring that public debt does not impede the realisation of human rights obligations.

This approach acknowledges the need to balance debt repayment obligations with the promotion of human rights, poverty reduction, and sustainable development.

In response to the COVID-19 pandemic, the G20 launched the Debt Service Suspension Initiative (DSSI) to provide temporary debt service suspension for the world's poorest countries. The initiative aims to help these countries manage the immediate impacts of the pandemic and redirect resources towards healthcare, social protection, and economic recovery. By linking debt relief to the urgent needs of countries facing severe economic challenges, the DSSI aligns with the principles of human rights and recognises the imperative of protecting the well-being and livelihoods of vulnerable populations.

However, it is important to note that the DSSI is a temporary measure, providing relief in the short-term but not addressing the long-term debt sustainability issues faced by many poor countries. This is where the G20's Common Framework for Debt Treatments beyond the DSSI comes into play, offering a more comprehensive approach to debt vulnerabilities. It takes the principles embodied by the DSSI - global solidarity, human rights, and economic recovery - and applies them to a broader and more lasting debt treatment plan. The Common Framework goes beyond mere suspension of debt service payments to include rescheduling and reduction where necessary, thereby addressing the underlying debt sustainability issues. But the G20 Common Framework's effectiveness in addressing sovereign debt challenges is hindered by certain weaknesses that need to be acknowledged.

One notable limitation is its narrow scope, mainly focusing on providing debt relief within the context of the COVID-19 pandemic. While the immediate crisis demands urgent attention and support, the framework fails to fully tackle the underlying structural issues and long-term debt sustainability concerns faced by countries outside the pandemic context. As a result, its impact on addressing broader debt challenges beyond the immediate crisis may be limited. The G20 Common Framework demonstrates inherent inadequacies, rendering it ineffective in addressing sovereign debt challenges comprehensively. Primarily, it lacks a well-defined and systematic approach, leading to an ad hoc response to distressed cases. Consequently, its inability to provide a clear roadmap for prompt debt sustainability restoration undermines its utility.

Moreover, the framework's reliance on ad hoc financing assurances from individual countries, such as China, engenders uncertainty and hampers the timely

provision of vital financial assistance by the International Monetary Fund (IMF). This disjointed reliance on bilateral commitments accentuates the challenges in achieving coordinated and coherent solutions to debt crises. Furthermore, the Common Framework's deficiency is evident in its failure to establish a structured framework for negotiations in critical test cases, exemplified by the situation in Zambia. The absence of standardised procedures and a comprehensive approach undermines the framework's efficacy in effectively handling intricate debt restructuring scenarios. Collectively, these limitations highlight the inadequacy of the G20 Common Framework in addressing sovereign debt challenges comprehensively. A more sophisticated and robust multilateral instrument is imperative to ensure timely and coordinated responses, fostering sustainable debt management and global financial stability in a cohesive manner. This instrument should encompass a broader range of debt-related issues, provide a standardised and transparent debt resolution process, and involve all relevant stakeholders, including debtor countries, private creditors, and multilateral institutions. A well-designed multilateral instrument would enhance debt sustainability and strengthen global financial stability by addressing both crisis-driven debt relief and the long-term structural challenges faced by debtor countries.

Further, the G20 Common Framework for Debt Treatments, with only one African member (South Africa), raises concerns about its ability to address the diverse debt challenges faced by African countries. Africa consists of 54 nations, each with unique circumstances, and a tailored approach is necessary. The limited representation of African countries within the framework also hampers its understanding of the continent's debt dynamics. Furthermore, with only four African countries (Chad, Ethiopia and Zambia) participating voluntarily, the voices and perspectives of the majority of African nations may not be fully considered. Consequently, the framework's limited capacity to offer a clear roadmap further diminishes its utility in effectively managing sovereign debt crises.

Despite their shortcomings, these initiatives reflect a growing recognition of the need to address public debt within a human rights framework, moving away from the historical, colonial, and capitalist underpinnings of debt as continued extraction. By placing emphasis on poverty reduction, social welfare, and sustainable development, these initiatives prioritise human rights and aim to create a more equitable global economic order. While challenges and questions remain regarding the effectiveness and implementation of these initiatives, their emergence demonstrates a shift towards addressing public debt in

a manner that acknowledges the rights and well-being of the most vulnerable populations, offering potential avenues for breaking away from historical patterns of exploitation and inequality.

A continental initiative has also been proposed through AFRODAD's 'African Borrowing Charter'⁷⁰ which sets out principles and guidelines for African countries to ensure that borrowing is conducted transparently, responsibly, and in line with development priorities. The charter emphasises the importance of debt sustainability, public participation, accountability, and the consideration of social and environmental impacts in the borrowing process. It encourages countries to conduct comprehensive debt sustainability assessments, engage in inclusive dialogue with stakeholders, and prioritise investments that contribute to poverty reduction, economic diversification, and social development. By endorsing the African Borrowing Charter, countries in Africa commit to adopting prudent debt management practices that safeguard their economic well-being and protect the rights and welfare of their citizens.

The charter provides a framework to promote sustainable borrowing practices, reduce the risk of debt distress, and ensure that borrowed funds are used effectively for development purposes. It aligns with the principles of responsible borrowing and human rights, recognising the importance of debt management in safeguarding economic stability, poverty reduction, and the fulfilment of human rights obligations. The inclusion of the Charter in the discussion of public debt and its legal foundations highlights the efforts within Africa to shape borrowing practices and debt management in a manner that prioritises sustainable development, poverty reduction, and the protection of human rights. This initiative reinforces the growing recognition of the need to address public debt within a broader framework that incorporates economic, social, and human rights considerations, further emphasising the importance of moving away from historical patterns of exploitation and inequality.

In considering the efforts and initiatives to address Africa's debt burdens, it is important to assess their alignment with the theoretical considerations highlighted, particularly in terms of human rights and the classical/neoclassical views. The initiatives discussed, such as the HIPC initiative, MDRI, Paris Club, G20 DSSI, and AFRODAD's African Borrowing Charter, demonstrate a growing recognition of the need to address public debt within a framework that incorporates economic, social, and human rights considerations. From a human rights perspective, initiatives like the MDRI, Paris Club,

⁷⁰ <https://afrodad.org/initiatives/the-african-borrowing-charter/>

and G20 DSSI acknowledge the importance of debt relief in creating fiscal space for poverty reduction and sustainable development. These initiatives prioritise the well-being and livelihoods of vulnerable populations, aligning with the principles of human rights. By providing debt relief and temporary suspension of debt service, they respond to the immediate needs of countries facing economic challenges, particularly in the context of the COVID-19 pandemic.

However, it is worth noting that these initiatives may not fully challenge the classical/neoclassical views that emphasise fiscal discipline and efficiency. While they address the immediate economic needs of countries, they may not fundamentally address the systemic issues related to debt accumulation, fiscal policies, and power dynamics that perpetuate economic inequalities and vulnerabilities. Therefore, advocating for a more comprehensive approach that considers long-term debt sustainability, equitable economic structures, and human rights considerations would be beneficial from a policy perspective.

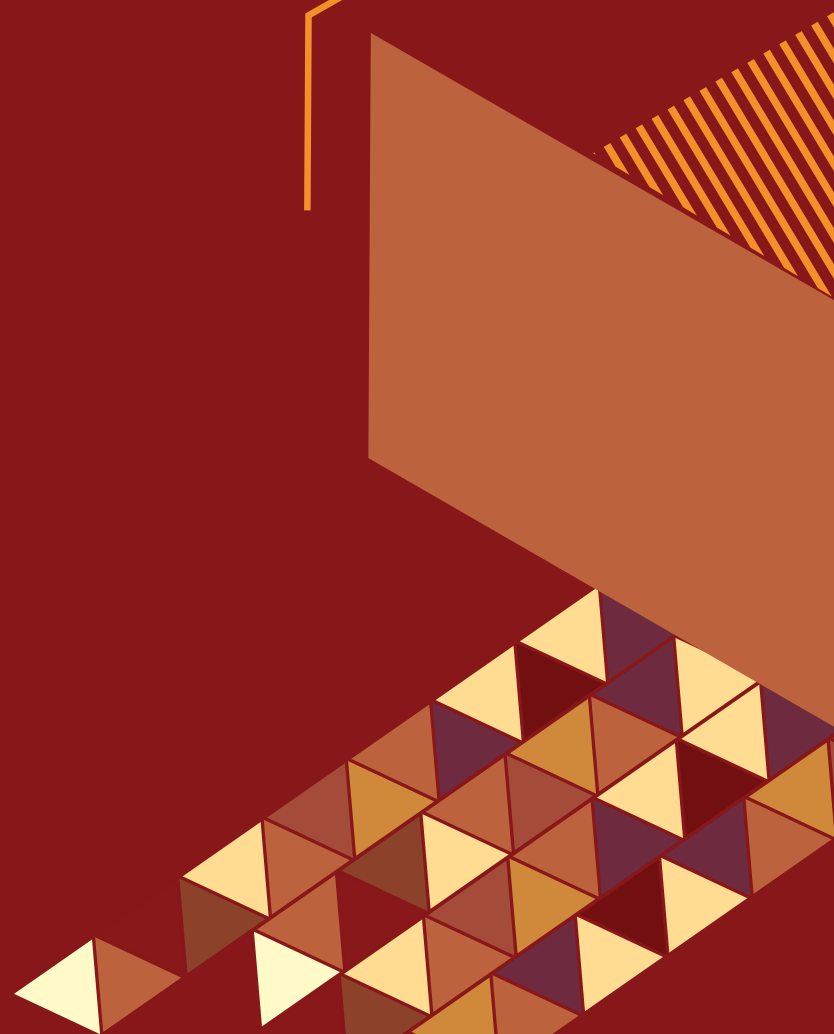
In this regard, the AFRODAD's African Borrowing Charter aligns well with the theoretical considerations highlighted. By promoting transparent, responsible, and sustainable borrowing practices, the Charter emphasises the importance of debt sustainability, public participation, accountability, and social and environmental impacts. This initiative goes beyond short-term debt relief and focuses on long-term debt management practices that safeguard economic stability, poverty reduction, and the fulfilment of human rights obligations. Advocating for the adoption and implementation of the African Borrowing Charter can contribute to a more comprehensive and rights-based approach to public debt management in African countries.

Ultimately, a policy perspective that combines the principles of fiscal discipline, efficiency, and debt sustainability with a human rights framework that prioritises social justice, poverty reduction, and equitable development would be most beneficial. This entails addressing the systemic issues that perpetuate debt burdens and economic vulnerabilities, while also ensuring that debt management practices align with human rights obligations and contribute.

Building upon the theoretical underpinnings, the paper now delves into the process of debt creation and the instruments utilised to procure public debt, shedding light on the intricate mechanisms involved and the key actors, stakeholders, and legal frameworks that shape the landscape of public debt.



PART 2

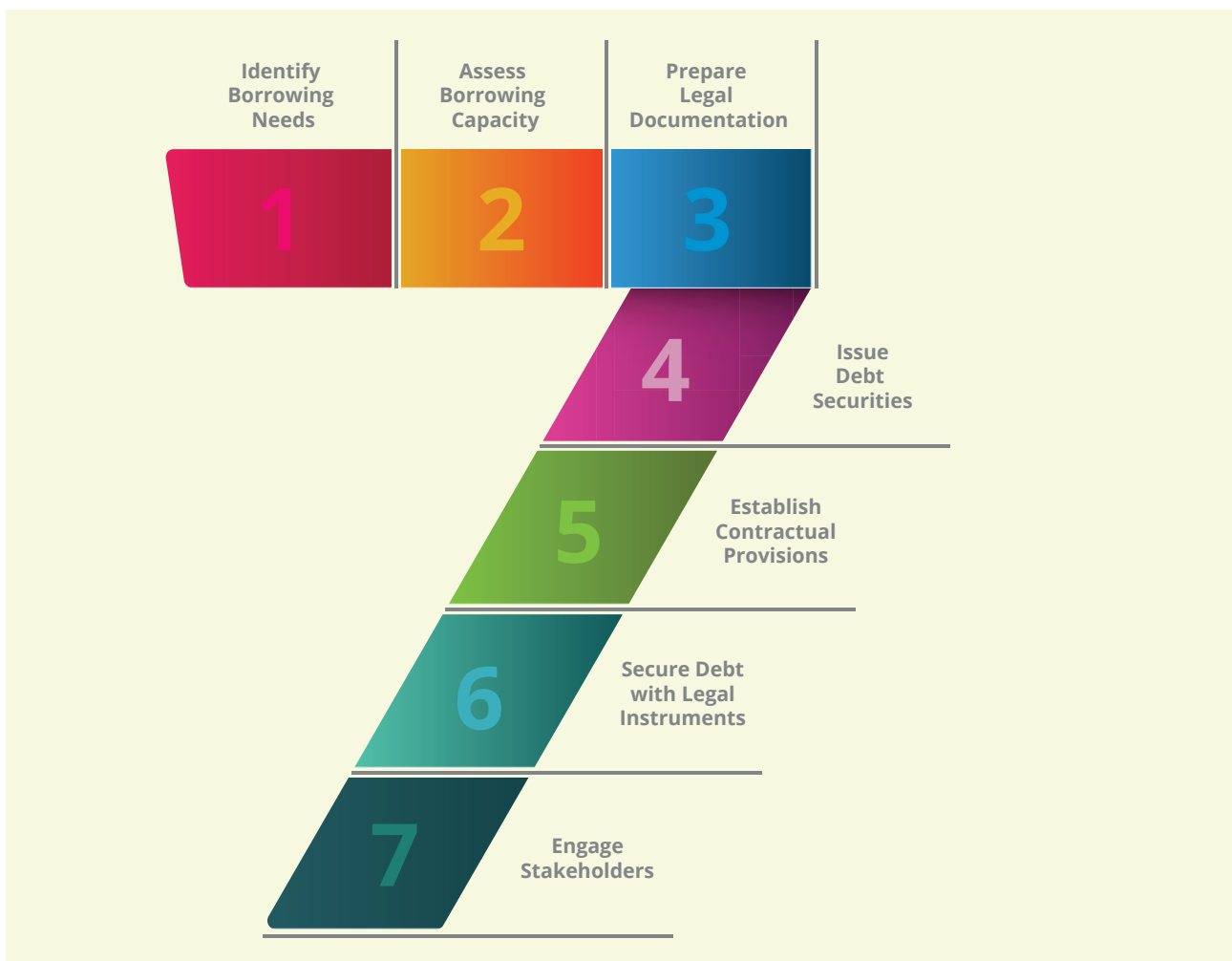


1

THE CREATION OF PUBLIC DEBT AND ITS LEGAL INSTRUMENTS

Diagram 1 illustrates the sequential flow of steps involved in the process of procuring public debt. It starts with the identification of borrowing needs, followed by an assessment of borrowing capacity. Legal documentation is then prepared, leading to the issuance of debt securities in the primary market. Contractual provisions are established to outline the rights and obligations of both parties, and the debt is secured with appropriate legal instruments. Finally, stakeholders are engaged throughout the process to ensure effective debt management and implementation.

Diagram 1: Process of procuring public debt



Source: Author

Procuring public debt involves a complex process that requires careful consideration of legal instruments, contractual provisions, and the involvement of various actors and stakeholders. The discussion in this section aims to provide a comprehensive overview of the procurement process and the legal framework underpinning public debt, with a focus on the instruments used to secure debt. Additionally, it will highlight relevant examples to illustrate the practical application of these concepts.



1.1. The process of procuring debt

The process of procuring public debt typically begins with the identification of borrowing needs by the government or relevant authorities. These needs may arise from various factors, such as financing infrastructure projects, funding social programs, or addressing budget deficits. Once the borrowing needs are determined, the government must assess its borrowing capacity, considering factors such as debt sustainability, creditworthiness, and market conditions and regional commitments, such as under SADC for the debt to GDP threshold not to exceed 60%.⁷¹ To secure public debt, governments typically issue debt securities, such as bonds or treasury bills, through the primary market. These securities represent the contractual obligations between the government (as the borrower) and investors (as the lenders). The issuance process involves the preparation of legal documentation, including prospectuses or offering circulars, which provide detailed information about the terms and conditions of the debt instrument, the purpose of borrowing, and the rights and obligations of both parties.

Governments also employ a range of other instruments to secure public debt, beyond bonds and treasury bills commonly used in the primary market. These instruments include loans obtained from international financial institutions such as the IMF or World Bank, as well as bilateral lenders like other governments or development agencies.

Another crucial source of public debt includes commercial loans from private creditors, often extended by banks or other financial institutions. These loans, used for a wide array of purposes such as infrastructure projects or budget financing, often offer more flexibility, allowing governments to negotiate terms such as interest rates, repayment schedules, and loan amounts directly with the lender. While beneficial in providing crucial funding, especially in times of economic stress, these commercial loans can come at a higher cost due to the elevated risk perceived by the private creditors and may also carry stricter terms and conditions. Therefore, effective monitoring, risk assessment, and transparent reporting of these loans are essential to maintain fiscal health and stability.

Eurobonds, debt securities issued in foreign currencies and sold to international investors, also play a role in public debt management. Furthermore, governments may receive development assistance in the form of grants or concessional loans from donor countries, regional development banks, or international aid organisations. Syndicated loans, involving a group of lenders coordinated by a lead bank, offer flexibility in terms of loan size, repayment schedule, and interest rates. Export credit financing, provided by governments or financial institutions, supports a country's exports through guarantees and insurance. Sovereign Sukuk, complying with Islamic principles, are utilised by governments to raise funds.

Lastly, Special Drawing Rights (SDRs), an international reserve asset created by the IMF, supplement foreign exchange reserves. These diverse debt instruments allow governments to diversify their sources of financing and access different types of investors based on market conditions, creditworthiness, and funding requirements. Careful consideration of the terms and conditions associated with these instruments is essential to align with debt management strategies and ensure long-term fiscal sustainability.

⁷¹ <https://www.sadc.int/pillars/public-debt#:~:text=Public%20Debt%20and%20the%20Protocol%20on%20Finance%20and%20Investment&text=In%20order%20to%20obtain%20these,of%20no%20greater%20than%2060%25.>

1.2. Contractual provisions

Contractual provisions play a crucial role in securing public debt and establishing the legal framework for debt management. These provisions outline the rights and responsibilities of the borrower and the lenders, specifying terms such as the principal amount, interest rate, maturity date, repayment schedule, and any associated fees or penalties. The inclusion of covenants, which are contractual clauses that set conditions or restrictions on the borrower, ensures that the government complies with certain obligations, such as maintaining fiscal discipline, providing timely financial reporting, or securing the debt with specific assets or revenue streams.

The legal instruments used to secure public debt vary depending on the jurisdiction and the specific requirements of the borrowing entity. One common instrument is the trust indenture, which establishes a fiduciary relationship between the government and a trustee appointed to represent the interests of bondholders. The trust indenture safeguards the rights of bondholders and ensures compliance with the contractual provisions. Another important legal instrument is the sovereign guarantee, which is a commitment by the government to assume the debt obligations if the borrowing entity defaults. Sovereign guarantees provide assurance to lenders, enhancing the creditworthiness of the borrowing entity and reducing the borrowing costs.

However, the use of sovereign guarantees should be approached with caution, as it can expose governments to significant financial risks and contingent liabilities. Examples from African countries can shed light on the practical application of these legal instruments in securing public debt. For instance, South Africa has issued government bonds through its primary market, the Government Bond Auctions, which are regulated by the South African Reserve Bank. These bonds are secured by the full faith and credit of the South African government, providing investors with a high level of confidence in the repayment of principal and interest.⁷² In Nigeria, the government has utilised the legal framework established by the Debt Management Office Act to issue debt securities, including treasury bills and bonds. These securities are secured by the sovereign guarantee of the Nigerian government, which ensures the timely repayment of debt obligations.⁷³

⁷² <https://investor.treasury.gov.za/Pages/Auctions.aspx>

⁷³ *Supra* n 45.

1.3. Actors

When a government decides to issue public debt instruments, it typically involves several actors and stakeholders in the process. Within the government, key ministries or agencies are responsible for debt management and the coordination of debt issuance. These entities, such as the treasury department or debt management office, work closely with the central bank and finance ministry to formulate debt management strategies, assess borrowing needs, and determine the appropriate timing and structure of debt issuance.

Financial institutions, including investment banks and underwriters, play a crucial role in facilitating the issuance of public debt instruments. These institutions assist the government in structuring the debt offering, pricing the securities, and coordinating the sale process. They often act as intermediaries between the government and potential investors, leveraging their expertise and network to attract buyers for the debt securities. Investment banks also provide valuable advice on market conditions, investor demand, and appropriate issuance strategies.

Credit rating agencies are another important player in the creation of public debt instruments. These agencies assess the creditworthiness and risk profile of the borrowing entity, in this case, the government. They analyse various factors, including the country's economic performance, fiscal discipline, political stability, and debt sustainability, to assign a credit rating. This rating serves as an indicator of the government's ability to repay its debt obligations and influences the pricing and perception of risk associated with the debt instruments. Investors often rely on credit ratings to make informed decisions about investing in public debt.

The involvement of these actors and stakeholders brings expertise, market access, and risk assessment capabilities to the process of creating public debt instruments. Their collective efforts contribute to the successful issuance of debt securities, ensuring that the government can raise funds to meet its financing needs while attracting investors with favourable terms and pricing. The collaboration between the government, financial institutions, and credit rating agencies is essential for the effective functioning of the debt market and the sustainable management of public debt.

1.4. Debt instruments

This section delves into the realm of public debt instruments, exploring their legal provisions and the process by which they are created and utilised. The discussion encompasses prominent instruments, including bonds, treasury bills, treasury notes, treasury bonds, and sovereign loans. Each instrument possesses distinct characteristics, serving different borrowing needs and catering to varying timeframes. The legal provisions associated with these debt instruments play a critical role in safeguarding the rights and obligations of both borrowing governments and investors/lenders. These provisions establish the terms and conditions of the debt, such as the principal amount, interest rate, maturity date, and repayment terms. Furthermore, contractual covenants may be incorporated to ensure compliance with specific obligations, such as maintaining fiscal discipline or securing the debt with specific assets.

Examining the creation and utilisation of public debt instruments sheds light on the diverse mechanisms governments employ to access capital and manage their fiscal responsibilities. Through examples and case studies, the section explores how African countries have utilised these instruments to meet their financing needs and support their economic development aspirations. Additionally, it discusses the rights and liabilities that arise for borrowing governments and investors/lenders when engaging in public debt transactions. It considers the key factors governments must bear in mind, including debt sustainability, interest rates, risk management, transparency, and accountability. Understanding these aspects is paramount for governments to maintain fiscal stability, protect their interests, and foster positive relationships with investors/lenders.

By delving into the creation, utilisation, legal provisions, and considerations surrounding public debt instruments, this section provides a comprehensive framework for understanding the intricate landscape of debt procurement. Such understanding is crucial for governments, policymakers, and civil society stakeholders to make informed decisions and ensure responsible and sustainable debt management.



1.4.1. Bonds

Bonds are long-term debt securities issued by governments or corporations to raise capital. They typically have a fixed interest rate, a specified maturity date, and provide periodic interest payments. Bonds are created through a legal process that involves the preparation of offering documents, such as a prospectus, which provides detailed information about the bond's terms and conditions. The legal provisions of bonds include the principal amount, interest rate, repayment terms, and any associated covenants. Bonds are utilised to finance various government projects, such as infrastructure development, or to meet budgetary requirements. Investors purchase bonds and receive regular interest payments until the bond's maturity, at which point they are repaid the principal amount.

1.4.2. Treasury bills

Treasury bills (T-bills) are short-term debt securities issued by governments to raise funds for a specified period, usually less than a year. T-bills are typically issued at a discount from their face value and redeemed at their full-face value upon maturity. The legal provisions of T-bills include the discount rate, maturity date, and repayment terms. They are created through auctions conducted by government agencies, such as the central bank or treasury department. T-bills are utilised by governments to manage short-term financing needs, such as covering budgetary shortfalls or managing cash flow. Investors purchase T-bills and earn a return based on the difference between the purchase price and the face value received at maturity.

1.4.3. Treasury notes

Treasury notes are medium-term debt securities issued by governments with maturities typically ranging from two to ten years. They bear a fixed interest rate, and interest payments are made semi-annually. Treasury notes are created through the issuance process similar to bonds, involving the preparation of offering documents. The legal provisions of treasury notes include the principal amount, interest rate, repayment terms, and any associated covenants. Treasury notes are utilised by governments to fund medium-term expenditures, such as infrastructure projects or debt refinancing. Investors purchase treasury notes and receive regular interest payments until the notes mature, at which point they are repaid the principal amount.



1.4.4. Treasury bonds

Treasury bonds are long-term debt securities issued by governments with maturities typically ranging from ten to thirty years. They pay a fixed interest rate, with interest payments made semi-annually. The creation and utilisation process of treasury bonds is similar to that of bonds and treasury notes. The legal provisions of treasury bonds include the principal amount, interest rate, repayment terms, and covenants. Governments utilise treasury bonds for long-term financing needs, such as large infrastructure projects or refinancing long-term debt. Investors purchase treasury bonds and receive regular interest payments until the bonds mature, at which point they are repaid the principal amount.

1.4.5. Sovereign loans

When governments seek to secure funds through sovereign loans, they have a range of options available to meet their specific financing needs. Bilateral loans, for example, involve agreements between two governments, wherein one government lends funds to another. These loans often benefit from diplomatic relations and political considerations, providing flexibility and potentially favourable terms. Another option is multilateral loans obtained from international organisations such as the International Monetary Fund (IMF), World Bank, or regional development banks. These loans are governed by agreements and policies set by the respective organisations. While they offer access to substantial funds and technical expertise, they often come with conditions and policy requirements aimed at promoting economic stability, structural reforms, and development objectives.

Governments can also acquire commercial loans from private lenders, such as commercial banks or financial institutions. These loans are based on market terms and conditions, including interest rates, repayment schedules, and collateral requirements. Commercial loans offer flexibility in terms of usage but typically come with higher interest rates and stricter repayment terms. Eurobonds are yet another form of sovereign loans issued in international capital markets. These bonds are denominated in a currency different from the issuing government's domestic currency, expanding the pool of potential investors. Eurobonds feature fixed interest rates and maturity periods, requiring the government to make regular interest payments and repay the principal at maturity. Concessional loans, provided on concessional terms, are commonly offered by international financial institutions or donor countries. These loans aim to support development projects and often come with lower interest rates, longer repayment periods, and more

flexible conditions. Concessional loans serve as financing options for governments facing budget constraints, particularly in priority sectors like education, healthcare, or infrastructure development.

In each case, the creation of sovereign loans involves negotiation and agreement between the borrowing government and the lender. Loan agreements detail the terms and conditions, including repayment schedules, interest rates, grace periods, and any associated covenants or conditions. These agreements are legally binding, providing a framework for the borrowing government to manage and fulfil its debt obligations. However, the process of creating sovereign loans is often marked by substantial asymmetries, particularly when the borrower is a low-income or developing nation, and the lender is a wealthier country or an international financial institution. These asymmetries manifest in a variety of ways, including information disparities, differences in financial and technical capacity, disproportionate negotiating power, and varying degrees of access to international credit markets.

Hence, there is an urgent need to address these imbalances to foster equality, equity and fairness in the process of sovereign lending. This could be achieved through capacity building for low-income countries, enhancing their ability to negotiate more effectively and manage their debts proficiently. Greater transparency in loan agreements could also help mitigate information asymmetries, as could collective negotiation tactics, which might help to level the playing field. The introduction of fair and neutral mediation mechanisms in the event of disputes could further safeguard the rights of less advantaged nations.

1.4.6. Contingent liabilities

Contingent liabilities arising from Public-Private Partnerships (PPPs) can indeed have implications for public debt. While contingent liabilities do not immediately represent direct debt obligations, they have the potential to transform into actual debt if certain events or conditions occur. In the context of PPPs, contingent liabilities typically arise from contractual arrangements between the government and the private partner. These liabilities may include guarantees, indemnities, or other commitments by the government to assume responsibility for specific risks or obligations associated with the PPP project. Examples of contingent liabilities in PPPs could be guarantees for project loans, availability payments, or compensation in case of project failure. If the agreed-upon conditions triggering the contingent

liability occur, such as a default by the private partner or a shortfall in project revenues, the government may be required to step in and honour the obligations. In such cases, the contingent liabilities are converted into actual debt, creating a direct financial obligation for the government.

One example of contingent liabilities transforming into debt for an African country is the case of Mozambique's hidden debt crisis. In 2013 and 2014, the Mozambican government, through state-owned companies, borrowed significant amounts of money from international banks to finance maritime projects, including a fishing fleet and coastal protection programs. However, these loans were not properly disclosed to the public or international financial institutions, leading to a hidden debt crisis. When the loans came to light in 2016, it was revealed that Mozambique had accumulated approximately \$2 billion in undisclosed debt, significantly exceeding the country's debt sustainability levels. As a result, the contingent liabilities associated with these loans transformed into actual debt obligations for the Mozambican government. The government was required to repay the loans, including accrued interest, and faced challenges in meeting its debt servicing obligations. The debt crisis severely affected Mozambique's economy, leading to a sharp decline in foreign investment, reduced access to international financial markets, and a downgrade in its credit ratings. The hidden debt crisis in Mozambique serves as a stark example of how contingent liabilities, when mismanaged or undisclosed, can transform into actual debt burdens for a country. It highlights the importance of transparency, proper disclosure, and effective management of contingent liabilities to avoid severe financial and economic consequences.

The conversion of contingent liabilities into actual debt can have significant implications for public finances. It may lead to an increase in the government's debt stock, impacting debt-to-GDP ratios, debt servicing costs, and overall fiscal sustainability. The government may need to allocate resources to service the debt, potentially affecting budgetary priorities and limiting fiscal flexibility. To mitigate the impact of contingent liabilities on public debt, governments need to carefully assess and manage these risks. This includes conducting rigorous due diligence and risk analysis during the PPP procurement process, ensuring the financial viability and sustainability of the project. Governments should also establish robust monitoring mechanisms to track the performance of PPP projects and assess potential risks that may trigger contingent liabilities.

But the responsibility for prudent debt management should not solely fall on the borrowing government. Creditors also have a key role to play in ensuring the sustainability of public debt. They too should conduct rigorous due diligence to ensure that the borrower is not exceeding their debt-to-GDP threshold, which is a key indicator of a country's ability to repay its debts without incurring further debt. By ensuring that a borrowing government's debt remains within a sustainable threshold, creditors can help prevent debt crises, which are detrimental not only to the borrower but also to the global financial system. They can also help ensure that the funds they provide are used effectively and do not contribute to a cycle of over-indebtedness.



1.5. The rights and liabilities created under debt instruments and key considerations

Public debt instruments entail certain rights and liabilities for both the borrowing government and the investors/lenders. Understanding these rights and liabilities is crucial for governments to ensure responsible debt management and protect their interests. These are some key considerations:

Rights of Borrowing Governments:

- » Public debt instruments provide governments with access to the necessary capital to finance development projects, infrastructure, and public services.
- » Governments have the flexibility to determine the amount and timing of borrowing, based on their specific needs and fiscal considerations.
- » Borrowing governments enjoy sovereign immunity, which grants them certain legal protections from legal actions and enforcement measures by creditors.
- » In the event of financial distress or repayment challenges, governments may negotiate debt restructuring agreements with creditors to adjust repayment terms, including extending maturity dates or reducing interest rates.

Liabilities of Borrowing Governments:

- » Governments have a legal obligation to repay the principal amount and interest to investors/lenders in accordance with the terms and conditions specified in the debt instruments.
- » Borrowing governments are responsible for making periodic interest payments to investors/lenders as per the agreed-upon interest rates.
- » Debt instruments may include covenants that impose certain restrictions or obligations on the borrowing government, such as maintaining specific debt-to-GDP ratios, fiscal discipline, or timely financial reporting. Non-compliance with these covenants can result in penalties or trigger default events.

Key considerations for governments when utilising public debt instruments include:

- » Governments must carefully assess their borrowing capacity and ensure that the debt levels remain sustainable in the long run. High debt levels can lead to debt servicing challenges, reduced fiscal space, and potential economic instability.
- » Governments should consider the prevailing market conditions, interest rates, and borrowing costs when issuing debt. High interest rates can increase debt servicing burdens and impact the overall fiscal health of the country.
- » Governments need to identify and manage various risks associated with public debt, such as interest rate risk, currency risk, refinancing risk, and liquidity risk. Appropriate risk mitigation strategies, such as diversifying borrowing sources and implementing hedging mechanisms, should be considered.
- » Governments should prioritise transparency and accountability in the issuance and utilisation of public debt. This includes providing clear and comprehensive information to investors/lenders, implementing robust financial reporting, and auditing practices, and ensuring effective governance and oversight mechanisms.
- » Conducting regular debt sustainability analyses helps governments assess their ability to manage debt obligations and avoid unsustainable debt burdens. These analyses consider factors such as debt-to-GDP ratios, debt service-to-revenue ratios, and external debt sustainability indicators.

By taking these considerations into account, governments can ensure responsible debt management, protect their fiscal stability, and maintain positive relationships with investors/lenders. Having explored the rights and liabilities associated with public debt instruments and the key considerations that governments must be wary of, it is essential to next address how public debt is managed and the pressing concerns surrounding non-disclosure and lack of transparency in negotiating and signing public debt agreements.

1.6. Public debt management

Public debt, once procured, presents a significant commitment for a nation. The importance of its effective management cannot be overstated, as it can have profound implications for the macroeconomic stability and financial sustainability of the country. A poorly managed public debt can lead to adverse consequences, including financial instability, crowding out of private sector investment, and weakened public trust. For this discourse, the lens of analysis will be directed at Nigeria, South Africa, Kenya, and Ghana. It is necessary to appreciate that each of these nations, having procured public debt, employs distinct strategies to manage this obligation. The efficacy of their strategies is contingent on a myriad of internal and external factors.

Nigeria has faced issues associated with managing its public debt effectively, given its heavy reliance on volatile oil revenues. The management of its public debt thus becomes a task of not only servicing the debt but also coping with the vulnerability of its primary revenue source. By seeking to diversify its economy, Nigeria is indirectly managing its public debt by mitigating risks associated with oil price fluctuations, thereby creating a broader and more resilient revenue base to service its debt.⁷⁴ In South Africa, the management of public debt has necessitated a strategy of fiscal consolidation.⁷⁵ It involves controlling government expenditure and striving to raise revenues, aiming to reduce the budget deficit. As debt increases, the interest payments also increase, necessitating either an increase in revenue or a decrease in other types of expenditure. In this sense, South Africa's management of its public debt is intertwined with its broader fiscal policy.

Kenya's debt management strategy underscores the significance of the sources of borrowing. The country's increasing reliance on non-concessional external debt, which has higher interest rates and stricter repayment terms, poses a considerable challenge in its public debt management.⁷⁶ Thus, the conditions under which public debt is procured profoundly influence its management. Ghana presents a scenario where public debt management is tied closely to the overall health and composition of the economy. High public debt levels, coupled with reliance on commodity exports, make its debt management susceptible to global commodity price swings. Consequently, Ghana's debt management strategy includes attempts to diversify its economy and lessen dependence on commodity exports.⁷⁷

The management of public debt is an intricate process. It involves a symbiotic relationship with fiscal policy, revenue diversification, and broader macroeconomic factors. While it's crucial to focus on strategies to procure public debt, equal attention, if not more, must be paid to the subsequent management of that debt. Debt management strategies should be flexible and adaptable, capable of responding to the shifting dynamics of global markets and the nation's own evolving economic landscape. Relatedly there exist key legal instruments and structures that guide the debt management process.

1.6.1. Instruments and structures guiding the debt management process

First, there is the Debt Sustainability Frameworks. These are analytical tools utilised by international financial institutions like the IMF and the World Bank. They assess a country's ability to service its external and public debt without incurring arrears or resorting to debt relief, rescheduling, or the accumulation of unsustainable debt. These frameworks focus on a country's current and projected debt situation and evaluate potential risks to debt sustainability.⁷⁸ They take into account factors like a country's borrowing terms, projected economic growth, fiscal position, external financing requirements, and the soundness of its monetary policy.

74 Eremiokhale, R. 'Diversifying Nigeria's Economy Beyond Oil' *Voice of Nigeria* 21, Oct 2022. Available: <https://von.gov.ng/diversifying-nigerias-economy-beyond-oil/#:~:text=Three%20sectors%2C%20agriculture%2C%20tourism%20and,for%20diversifying%20the%20Nigerian%20economy.>

75 Ple, L. South Africa: 'The government still plans to hit optimistic fiscal consolidation targets', *BNP Paribas*, 08 March 2023. Available: <https://economic-research.bnpparibas.com/html/en-US/South-Africa-government-still-plans-optimistic-fiscal-consolidation-targets-3/8/2023,48336>

76 Republic of Kenya, *2023 Medium Term Debt Management Strategy* (National Treasury and Economic Planning, 2023) Available: <https://www.treasury.go.ke/wp-content/uploads/2023/02/Medium-Term-Debt-Management-Strategy-2023.pdf>

77 IMF, Ghana. *IMF Country Report No. 23/168* (2023) Available: <https://www.imf.org/-/media/Files/Publications/CR/2023/English/IGHAEA2023001.ashx>

78 World Bank, Debt Sustainability Framework, available at: <https://www.worldbank.org/en/programs/debt-toolkit/dsf>

By doing so, they help policymakers identify potential vulnerabilities, make informed borrowing decisions, and design appropriate debt management strategies. For example, the Joint World Bank-IMF Debt Sustainability Framework for Low-Income Countries (LICDSF) provides a structured approach to assessing these countries' debt vulnerabilities, providing guidelines on prudent borrowing.⁷⁹

Second is the Medium-Term Debt Management Strategy (MTDS) which outlines a country's debt management objectives over the medium term, usually three to five years. It identifies the desired composition of the government's debt portfolio and sets out strategies to achieve it, considering the cost-risk trade-off. An effective MTDS takes into account the country's current and projected fiscal situation, its monetary policy stance, the development of the domestic financial market (functioning government securities), and its access to international capital markets. The MTDS helps align borrowing with the country's fiscal policy and macroeconomic framework, providing a roadmap for debt issuance, risk management, and debt servicing.

Third is the Public Financial Management (PFM) System, which are integral to a country's economic governance. They cover the entire cycle of public finance operations: revenue mobilisation, budgeting, expenditure management, accounting, and reporting, internal controls, and audits. A robust PFM system ensures efficient and effective allocation of economic resources. It ensures that public resources are used for their intended purposes, provides information for decision-making and policy design, and guarantees transparency and accountability in the use of public resources. In the context of debt management, PFM systems are crucial in ensuring that borrowed funds are utilized effectively for public spending and repaid timely, reducing the risk of debt distress.

Fourth is the Debt Management Offices (DMO), which are specialised agencies, usually within a country's finance ministry or central bank, tasked with managing the nation's debt portfolio. Their functions include debt issuance, risk management, debt servicing, and advising on borrowing decisions. An effective DMO with independent oversight ensures that the government's financing needs are met at the lowest possible cost, consistent with a prudent level of risk, contributing to the country's macroeconomic stability. It helps in developing a domestic debt market, promotes transparency and accountability in public debt management, and improves the quality of the government's fiscal data. DMOs can also play a crucial role in dealing with external shocks, such as sudden currency depreciations or commodity price shocks, which could impact the country's debt sustainability.

⁷⁹ IMF, *debt Sustainability Analysis in low Income Countries*, available at: <https://www.imf.org/en/publications/dsa>

Fifth, is the African Legal Support Facility (ALSF), hosted by the African Development Bank Group, which plays a pivotal role in guiding the debt management process in Africa. Its mission is to provide legal advice and technical assistance to African countries, particularly in the negotiation of complex commercial transactions and litigation with creditors. This support is crucial in ensuring that African nations are not disadvantaged in legal dealings that could have significant impacts on their economic stability.

One of the primary ways the ALSF aids in debt management is through direct legal assistance during the negotiation of debt-related transactions. This support ensures that the terms of debt agreements are fair and equitable, and that African nations are adequately equipped to manage their debt obligations. By providing expert legal counsel, the ALSF helps to level the playing field and ensure that African countries can negotiate from a position of strength. In addition to providing immediate legal support, the ALSF is also committed to capacity building. It offers training to lawyers and legal officers from African governments, enhancing their ability to handle complex commercial legal transactions, including those related to debt. This focus on education and skill development helps to build long-term capacity within African nations, ensuring they have the expertise needed to effectively manage and negotiate debt in the future.

The ALSF also prioritises knowledge management, developing tools and services to improve the sharing of information among its member countries. This includes creating databases and disseminating best practices related to debt management, which can be invaluable resources for countries navigating their own debt challenges. Another significant aspect of the ALSF's work is its assistance in litigation brought by vulture funds. These entities buy the debt of financially distressed countries at a discount, then sue for the full amount, often causing substantial financial loss for the debtor nations. The ALSF's legal support can help protect these countries from such predatory practices, safeguarding their financial stability. Finally, the ALSF provides advisory services on various aspects of debt management. This can include advice on debt restructuring, guidance on the issuance of sovereign bonds, and assistance in the negotiation of infrastructure contracts. These advisory services help to ensure that African countries are making informed, strategic decisions about their debt management.

1.6.2. Efficacy of these instruments and structures

The extent to which borrowing and lending decisions reflect these debt management instruments and structures largely depends on the domestic and international context, the soundness of the instruments themselves, and the institutional capacity of the country. Debt Sustainability Frameworks are intended to inform borrowing decisions by providing a clear picture of a country's debt burden and its ability to service it. However, their effectiveness can be hampered by a lack of reliable data, overly optimistic economic forecasts, and unexpected external shocks such as commodity price fluctuations or changes in global financial conditions. Furthermore, while DSFs can highlight potential risks, they may not prevent a country from taking on excessive debt, especially if the country is under significant economic or political pressure. For example, Mozambique underwent a debt crisis in 2016 when it was discovered that the government had taken on massive undisclosed loans, leading to a default. This case showed that DSFs, while valuable, can be undermined by transparency issues. The undisclosed debts significantly distorted the true picture of Mozambique's debt burden, rendering DSF assessments inaccurate.

While an MTDS provides a strategic roadmap for managing a country's debt and aligning its borrowing decisions with its macroeconomic policies, its effectiveness depends on the country's ability to implement it effectively. In countries with weak institutions or volatile political and economic conditions, the implementation of the MTDS may be challenging. For example, Kenya developed its first MTDS in 2008, which has been updated periodically since. The MTDS has helped Kenya maintain its debt at sustainable levels by outlining cost-risk trade-offs, supporting the development of the domestic debt market, and enhancing the predictability of its borrowing. However, implementation challenges persist due to factors such as fiscal indiscipline and external shocks, contributing to rising public debt levels in recent years.

Further, robust PFM systems can improve the effectiveness of public spending, including the use of borrowed funds, and strengthen fiscal discipline, which in turn can enhance a country's creditworthiness and reduce its borrowing costs. However, in many developing countries, PFM systems are often weak or underdeveloped, undermining their effectiveness.

For example, Ghana has made significant efforts to reform its PFM systems, with steps like implementing the Ghana Integrated Financial Management Information System and enacting the Public Financial Management Act in 2016. Despite these efforts, challenges such as weak domestic revenue mobilisation and inefficiencies in public spending have persisted, contributing to high public debt levels and budget deficits.

Finally, a well-functioning DMO can improve a country's debt management and its access to credit markets. However, the effectiveness of DMOs depends on their technical capacity, their level of independence, and the quality of the information they have at their disposal. In countries where these conditions are not met, the effectiveness of DMOs can be limited. For example, Nigeria's DMO, established in 2000, has played a key role in managing the country's debt portfolio, developing the domestic bond market, and enhancing transparency in public debt management. Nevertheless, Nigeria's public debt has risen significantly in recent years due to factors such as lower oil prices, high budget deficits, and the economic impact of the COVID-19 pandemic. The UK is an example of a country with an independent DMO.⁸⁰ The UK DMO, established in 1998, operates as an executive agency of the UK Treasury and is responsible for managing the government's debt and cash. The DMO's independence allows it to make informed decisions on debt issuance, interest rate management, and risk mitigation without political interference. This independence contributes to investor confidence and effective debt management. Best practices for DMO independence include clear legal frameworks, well-defined mandates, transparent governance structures, and adherence to international standards. Countries like Australia⁸¹ and Sweden⁸² also have independent and effective DMOs. These practices aim to ensure efficient debt management, access to credit markets, and fiscal sustainability.

In terms of the adequacy of these instruments in helping countries cope with debt burdens, they are essential tools but are not a panacea. They need to be complemented by sound macroeconomic policies, strong institutions, and a conducive domestic and international economic environment. Furthermore, while these instruments can help manage debt burdens, they do not address the root causes of excessive debt, such as structural economic issues, governance problems, or global financial conditions. Therefore, a comprehensive approach to debt sustainability would not only involve effective debt management but also efforts to promote economic growth, improve governance, and ensure a fair and sustainable international financial system. These issues and efforts to tackle them are core concerns for creditors and borrowers in light of the increasing debt burden. The next sections therefore consider the legal issues that are considered by the parties to a debt contract, and the challenges posed by non-disclosure and lack of transparency.



80 <https://www.dmo.gov.uk/>

81 <https://www.aofm.gov.au/>

82 <https://www.government.se/government-agencies/swedish-national-debt-office--rikskalden/>

1.7. Legal issues for creditors and borrowers in light of increasing debt burden

Following escalating debt levels, several legal issues of paramount importance demand the attention of both creditors and borrowers in order to safeguard debt sustainability. At the heart of these considerations lie the:

- a. Contractual Obligations. Each party should possess an unequivocal understanding of the obligations and potential consequences entrenched in a loan agreement. These encompass not only the interest rate and repayment terms but also extend to default clauses and stipulations governing the utilisation of loan proceeds. Negligence or failure to adhere to these obligations could lead to legal disputes (arbitration, mediation, negotiation, litigation) and potential legal consequences.
- b. Compliance with Regulatory Frameworks emerges as another crucial aspect. Both creditors and borrowers are mandated to comply with a multitude of regulations that govern lending and borrowing at local, state, and international levels. These incorporate fair lending practices, and provisions concerning data privacy. Any infringement of these laws could potentially culminate in punitive actions and inflict reputational damage.
- c. When loans are secured against collateral, the security and collateral aspect becomes pivotal. In instances of borrower default, lenders typically reserve the right to seize and liquidate the collateral. However, the precise rules governing this process vary, thereby necessitating an understanding of the rights and responsibilities on all sides.
- d. An understanding of Bankruptcy Laws is crucial to the pursuit of debt sustainability. In situations where borrowers become insolvent, they may potentially be eligible to discharge some or all of their debts via bankruptcy. However, these laws exhibit substantial variation, carrying significant legal and financial implications for both creditors and borrowers.
- e. Transparency and disclosure is another critical factor. Lenders are obligated to provide exhaustive information about the loan, while borrowers are expected to furnish accurate data about their financial status. Fraudulent activities or misrepresentations may result in legal proceedings and even criminal charges.
- f. In scenarios where debt becomes untenable, Restructuring and Refinancing may provide a viable solution. This option could offer borrowers more manageable repayment terms. However, it also presents legal implications to ponder, including potential impacts on credit ratings and the possibility of penalties or fees.
- g. Lastly, adherence to Consumer Protection Laws, designed to shield borrowers from unfair practices by creditors, is vital. These laws, while varying from one jurisdiction to another, often stipulate rules on transparency, fairness, and the right to dispute inaccurate information.

Several legal issues of paramount importance demand the attention of both creditors and borrowers in order to safeguard debt sustainability.



1.8. Public debt: non-disclosure and lack of transparency concerns

Non-disclosure and lack of transparency in negotiating and signing public debt agreements pose significant challenges and raise concerns regarding accountability, good governance, and potential negative impacts on borrower countries. In fact non-disclosure and lack of transparency in negotiating and signing public debt agreements have been linked to litigation and legal challenges, particularly in the context of debt justice and public interest litigation. Several African countries have experienced such challenges, where the lack of transparency in debt-related processes has led to legal action seeking redress and justice. One example is Mozambique, which faced a debt scandal in 2016 when it was revealed that the government had taken on significant undisclosed debts, leading to a debt crisis. The loans were used to finance various infrastructure projects, including a state-owned fishing fleet and maritime security vessels. The lack of transparency and non-disclosure of these debts raised concerns regarding corruption, mismanagement, and the diversion of funds. As a result, Mozambique faced legal action from international investors and creditors who sought to recover their investments. Additionally, civil society organisations and activists engaged in public interest litigation to demand transparency, accountability, and debt justice.⁸³

Another example is the case of Zambia, which has faced legal challenges related to non-disclosure and lack of transparency in its debt management. In 2020, a group of Zambian civil society organisations filed a case in the High Court of Zambia, seeking the disclosure of loan agreements and other related documents. The lawsuit aimed to address concerns over the lack of transparency in the borrowing process and the potential negative impacts on the country's economy and public welfare. The litigation underscored the importance of transparency, accountability, and the public's right to access information regarding public debt.⁸⁴

A further example was the non-disclosure and lack of transparency surrounding the Kenya Standard Gauge Railway (SGR) loan. This loan carries significant implications, such as potential violations of the right to information, breaches of legal obligations regarding transparency and accountability, increased risk of corruption and mismanagement, the potential for legal

claims from affected parties, and challenges to public accountability through public interest litigation. These consequences can undermine investor confidence, erode public trust, and result in instances related to corruption, financial misconduct, and violations of rights. The specific legal implications may vary, but the overall effect of non-disclosure and lack of transparency in the SGR loan can lead to legal challenges, investigations, and public demands for transparency and accountability.

Recently, the Supreme Court of Kenya ruled that the SGR loan contract was legal and binding. While this addresses the *legal status* of the loan, it *doesn't entirely allay concerns about the feasibility and transparency* of the contract.⁸⁵ Transparency in all aspects of the contract, from the negotiation process to the terms and conditions, is crucial to prevent potential misunderstandings and disputes, and to ensure that the public and all stakeholders have access to necessary information. This can help to build public trust, reduce corruption and foster a more accountable government. Feasibility, on the other hand, ensures that the loan can be serviced without straining the country's finances or negatively impacting its economy. It necessitates rigorous due diligence and risk assessment, with both the borrower and the lender being responsible for ensuring that the loan is sustainable and beneficial to the country.

These examples highlight the significance of transparency and disclosure in public debt management. Non-disclosure and lack of transparency can lead to litigation as affected parties seek legal remedies and debt justice. Public interest litigation plays a crucial role in holding governments accountable for their actions and advocating for transparency, good governance, and the protection of public interests. Through litigation, affected parties and civil society organisations can bring attention to the non-transparent practices surrounding public debt, demand accountability, and work towards achieving debt justice.

Without doubt, the opaqueness surrounding these processes can lead to detrimental outcomes, including increased debt burdens, misallocation of resources, and reduced public trust in government. One of the primary reasons why non-disclosure and lack of transparency are issues in public debt negotiations is the absence of robust legal frameworks and regulations that mandate transparency and accountability. The absence of clear legal provisions allows governments to engage in debt procurement processes behind closed doors, shielding crucial information from public scrutiny.

⁸³ <https://debtjustice.org.uk/news/mozambique-takes-legal-action-secret-loans>

⁸⁴ <https://www.ndi.org/our-stories/tackling-zambia-s-debt-problem-supporting-debt-management-reforms-through-cso>

⁸⁵ Muthoni, K. 'SGR procurement was legal, Supreme Court rules', *The Sunday Standard* 16 June 2023.



This lack of transparency creates an environment ripe for corruption, collusion, and mismanagement of public funds. African countries have witnessed instances where public debt has been procured in secrecy, exacerbating the negative impacts of non-disclosure. For example, in Mozambique, the revelation of hidden loans amounting to billions of dollars in 2016 exposed the lack of transparency and accountability in the debt procurement process.⁸⁶ The loans were obtained by state-owned companies without the knowledge or approval of the Mozambican parliament or international financial institutions. The non-disclosure of these loans resulted in a severe debt crisis, leading to economic instability and a loss of investor confidence in the country.

Similarly, in Zambia, concerns have been raised about the lack of transparency in the country's debt procurement.⁸⁷ The government's failure to disclose the full extent of its borrowing and the terms of its debt agreements raised suspicions about potential fiscal risks and hidden debt culminating in legal proceedings against the Minister of Finance.⁸⁸ In Chad, there have been concerns about the lack of transparency and accountability in the country's debt management. The government has been accused of obtaining loans without proper disclosure or parliamentary approval. In 2018, it was reported that Chad had accumulated a high level of hidden debt, primarily from loans provided by Glencore, an international commodity trading company. The loans were secured against future oil revenues and were not properly disclosed to the public or international financial institutions.⁸⁹ This lack of transparency and non-disclosure raised concerns about the country's debt sustainability and the impact on public finances. Similarly, Ethiopia has faced criticism for its lack of transparency in public debt management. Ethiopia has accumulated a significant amount of hidden debt from Chinese creditors. These debts were not disclosed to the public or international financial institutions, leading to concerns about the country's debt sustainability and its ability to manage its public finances effectively.⁹⁰ The non-disclosure of these loans raised questions about the accountability and transparency of the government's debt procurement processes.

These examples from Mozambique, Zambia, Chad, and Ethiopia highlight the negative consequences of non-disclosure and lack of transparency in public debt negotiations. They contribute to a climate of uncertainty, increase the risk of corruption and mismanagement of funds, and can lead to economic instability and loss of investor confidence in the affected countries. The lack of transparency in debt negotiations hampers effective debt management, obscures the true cost of borrowing, and limits public oversight and accountability. Addressing the issue of non-disclosure and lack of transparency in public debt negotiations requires comprehensive legal reforms. These countries should enact legislation that explicitly mandates transparency and accountability in the debt procurement process. This includes requirements for disclosure of key information, such as the terms and conditions of loans, repayment schedules, and associated risks.

Additionally, mechanisms for public participation, independent audits, and oversight bodies should be established to ensure that debt procurement is conducted in a transparent and accountable manner. International initiatives and organisations can also play a crucial role in promoting transparency in public debt negotiations. For instance, the Debt Service Suspension Initiative (DSSI) introduced by the G20 during the COVID-19 pandemic includes a transparency framework that encourages participating countries to publicly disclose their debt contracts and related information. Such initiatives can help foster a culture of transparency and accountability in debt procurement processes. Non-disclosure and lack of transparency in negotiating and signing public debt agreements are significant concerns that undermine good governance and expose countries to fiscal risks and potential economic instability. African countries have experienced the negative consequences of non-disclosure, leading to debt crises and loss of public trust. Addressing this issue requires robust legal frameworks, public participation, and international cooperation to promote transparency and accountability in the debt procurement process. By enhancing transparency, countries can better manage their debt burdens, ensure responsible borrowing, and promote sustainable economic development.

86 Hayson, S. 'The fallout from the Mozambican 'secret loans' scandal', *DGRIS Note no 7* (2019).

87 Muleya, F.B. *The Allure of Commercial Debt: The Case of Zambia and Mozambique*. (United Nations, 2021).

88 <https://www.bloomberg.com/news/articles/2019-05-20/zimbabwe-got-loan-from-afreximbank-using-platinum-as-collateral>

89 Wilson, T. 'Chad signs deal with Glencore after review of \$1 billion debt.' *Bloomberg*, 21 February, 2018, <https://www.bloomberg.com/news/articles/2018-02-21/chad-signs-deal-with-glencore-after-review-of-1-billion-debt>

90 Sany, J. 'Despite high stakes in Ethiopia, China sits on the side-lines of peace efforts.' (United States Institute of Peace, 2022): <https://www.usip.org/publications/2022/01/despite-high-stakes-ethiopia-china-sits-sidelines-peace-efforts>

2

ASSESSING PUBLIC DEBT CONTRACTION, MANAGEMENT, TRANSPARENCY AND ACCOUNTABILITY MECHANISMS OF AFRICAN COUNTRIES

2.1. The African Debt Monitor, Debt Transparency Monitor and Debt Reporting Heat Map

The Africa Debt Monitor, launched in 2019 was developed by CABRI in consultation with African debt management offices. It provides a 'unique platform for sharing information on African central government debt and debt management policies, practices and institutional arrangements.'⁹¹ It currently provides data on debt between 2016 and 2019 on 10 African countries.⁹² In 2022, CABRI published its report on the trends in debt management in Africa based on analyses from the Africa Debt Monitor. The report documents what it refers to as the 'six dimensions of debt transparency and accountability' in Africa. Through these six dimensions, CABRI reports on the legal framework, institutional arrangements, computerised debt recording and management systems, debt data quality, data reporting and dissemination and oversight of how debt is contracted and managed.⁹³

The Debt Transparency Monitor⁹⁴, developed by the USAID, is a tool for assessing the transparency of debt reporting practices of countries. It evaluates the availability, completeness, and timeliness of public debt statistics and debt management documents posted on national authorities' websites. This assessment is updated annually. The World Bank has also developed its Debt Reporting Heat Map⁹⁵ through which it has identified significant gaps in global and national systems for tracking debt in low-income countries, with debt burdens at record highs.

Since a lack of debt transparency could endanger the economic recovery in these countries, the Bank has provided a detailed analysis of the challenges of debt transparency in developing economies, noting that when debt data is available, it tends to be limited to central government loans and securities, excluding other public sector components and debt instruments.

This lack of clarity about the extent of their indebtedness hampers governments from making sound decisions about borrowing. To help low-income countries improve their debt-management operations, the World Bank provides tools and policy advice. These recommendations include developing a sound public debt management legal framework, publishing core public and publicly guaranteed debt statistics annually, limiting the scope of confidentiality clauses in borrowing, and adopting strict processes for approval and implementation of resource-backed loans, among others.

⁹¹ Budgets in Africa, Africa Debt Monitor, available: <https://www.cabri-sbo.org/en/budgets-in-africa/africa-debt-monitor>

⁹² <https://www.cabri-sbo.org/en/our-work/adm/countries?v=1>

⁹³ <https://www.cabri-sbo.org/en/publications/africa-debt-monitor-analysis-the-state-of-public-debt-transparency-and-accountability-in-africa>

⁹⁴ https://pdf.usaid.gov/pdf_docs/PA00ZTMQ.pdf

⁹⁵ <https://www.worldbank.org/en/topic/debt/brief/debt-transparency-report>

As an example of an African country's debt management and transparency practices, Burkina Faso stands out. Despite challenges, including terrorist attacks and population displacements leading to increased borrowing needs, Burkina Faso has achieved a 'full disclosure' rating in all nine categories on the debt transparency Heat Map. The country has taken steps to improve debt reporting, including partnering with the Debt Management Facility to enhance debt reporting capacity. They have published comprehensive Statistical Debt Bulletins on time and with detailed information about loan guarantees related to public enterprises and public-private partnership contracts. These efforts have resulted in lower borrowing costs and extended the maturity of bonds from five to ten years, among other benefits.

Based on the foregoing, it is critical to include in loan agreements a provision for comprehensive and independent debt sustainability assessments. Such a provision is crucial to ensure that borrowing is done in a responsible and sustainable manner, taking into account a country's ability to repay without jeopardising its long-term fiscal stability and development objectives. By incorporating such a provision, African countries can assess the potential risks and implications of new borrowing before entering into loan agreements. These assessments should consider factors such as debt service-to-revenue ratios, debt-to-GDP ratios, and external debt sustainability indicators. Independent experts or institutions can be involved to provide objective analysis and guidance in assessing the sustainability of proposed loans. Having this recommendation not only helps protect African countries from excessive debt burdens but also promotes transparency and informed decision-making. It enables governments to make sound borrowing decisions based on a comprehensive understanding of the potential impact on their economies and ensures that loan agreements are aligned with long-term development goals. If Africa were to develop a model law on loan agreements, the inclusion of the provision for comprehensive and independent debt sustainability assessments would be a crucial recommendation to enhance debt transparency, accountability, and sustainability in the region.



2.2. Obstructions around debt transparency initiatives

Public debt transparency is a critical issue, necessary for financial stability, fiscal risk management, and market confidence. However, multiple factors can hinder the realisation of debt transparency initiatives. These can broadly be classified into legal, governance, and institutional factors as discussed below.

i. Legal definition of public debt

Public debt is typically defined by law or regulations in a country, but the definition can vary widely across countries. Some countries, such as Nigeria⁹⁶ have a narrow definition that only includes central government debt, while others, such as Mauritius have a broader definition that includes local government debt, guarantees, and other contingent liabilities. The absence of a universally accepted definition can lead to discrepancies in the measurement and reporting of public debt, hampering transparency initiatives.

ii. Delegation and governance

The delegation of authority in managing public debt can also impede transparency. In some countries, the responsibility for debt management is distributed across multiple entities, creating fragmentation and a lack of coordination. This can lead to inconsistencies in the recording, reporting, and oversight of public debt. Furthermore, the lack of clear governance and oversight mechanisms can exacerbate these challenges.

In Kenya, section 50(2) of the Public Finance Management Act, 2012 stipulates that the national government may borrow money in accordance with the Act or any other legislation, and the borrowing shall not exceed a limit set by Parliament. This provision highlights the role of Parliament in setting limits on the borrowing capacity of the national government. It grants Parliament the authority to establish and regulate the maximum amount of debt that the government can incur. By doing so, Parliament exercises its control over the borrowing activities of the government, ensuring that they are within specified limits and aligned with the country's fiscal sustainability objectives.

⁹⁶ Federal Republic of Nigeria, *National Debt Management Framework (2008-2012)* (DMO): In Nigeria, for instance, the definition of public debt includes both the external and domestic debt of the federal, state and local governments. However, it does not include the debt of public enterprises, which means that a significant portion of liabilities may be excluded from public debt statistics, leading to underreporting and lack of transparency.

However, it is important to note that the Act does not explicitly outline the specific process or mechanisms through which Parliament exercises its authority in setting the borrowing limit. The Act primarily focuses on the establishment of the Public Debt Management Office (PDMO) and the responsibilities of the office in managing public debt. Public debt management therefore, is the responsibility of multiple institutions, including the National Treasury, Central Bank, and Parliamentary Budget Office. This multiplicity can sometimes lead to lack of coordination, thereby creating a challenge for effective debt management and transparency.

iii. Reporting and confidentiality clauses

Reporting practices vary widely across countries. Some countries regularly publish comprehensive and timely information on their public debt, while others disclose very little information. Additionally, confidentiality clauses in loan agreements can prevent the disclosure of important information about the debt, such as its terms and conditions, further undermining transparency. Ghana, like many African countries, has several loans that contain confidentiality clauses.⁹⁷ These restrict the disclosure of loan terms and conditions, limiting the amount of information that is publicly available. This can hamper the ability of policymakers, analysts, and the public to fully understand the country's debt obligations.

iv. Unmonitored contingent liabilities

Contingent liabilities, such as loan guarantees and other potential obligations that the government may have to pay in the future, pose a significant challenge for debt transparency. These liabilities are often not included in traditional measures of public debt and are not regularly monitored or reported, making it difficult to accurately assess a country's total debt exposure. South Africa, despite its relatively robust public financial management system, has faced challenges in monitoring contingent liabilities, such as guarantees to state-owned enterprises. These contingent liabilities, if not properly managed, could materialise and significantly increase the government's debt burden.⁹⁸

One concerning aspect is that Parliament is frequently not provided with comprehensive information on contingent liabilities undertaken by the government. This lack of transparency restricts parliamentary oversight and control over these liabilities. Without access to this information, legislators may not be able to effectively assess the potential risks and financial implications associated with contingent liabilities.

⁹⁷ Rosenblum, P., and Maples, S. *Contracts Confidential: Secret deals in the extractives industries* (Revenue Watch Institute, 2009).

⁹⁸ Republic of South Africa, *Government debt and contingent liabilities* (Budget Review, 2021)



The absence of parliamentary approval or control over contingent liabilities poses a significant risk. If unrecorded debt arising from these obligations suddenly needs to be paid due to an unexpected event or trigger, it can significantly impact a country's debt burden. This sudden increase in debt can lead to debt distress or a high risk of debt distress, as the government may not have anticipated or planned for such liabilities.

v. Accountability

Transparency is closely linked to accountability. Without transparency, it is difficult to hold governments accountable for their borrowing decisions and debt management practices. However, political, and institutional factors can undermine accountability mechanisms. For instance, weak parliamentary oversight, a lack of independent audit institutions, and the absence of an informed public debate about public debt can all obstruct debt transparency initiatives. Zimbabwe provides a poignant example of the challenges related to accountability. Despite the country's significant public debt burden, there has been limited public debate about the government's borrowing decisions and debt management practices. This lack of accountability can impede transparency initiatives.⁹⁹

However, a compelling recent development in Zimbabwe highlights the importance of parliamentary oversight in promoting transparency and accountability in public debt management. In March 2023, the High Court of Zimbabwe issued a ruling affirming the role of parliament in overseeing public debt management. This ruling serves as a positive example, recognising that parliamentary oversight is a vital mechanism for ensuring that government borrowing is conducted within established laws, procedures, and guidelines, with clear purposes, terms, and conditions. The court's order in Zimbabwe signifies a step towards curbing the extensive powers of the Minister of Finance and fostering greater accountability in the loan contracting process. By affirming the importance of parliamentary involvement, the ruling reinforces the need for transparency and oversight in public debt management. It ensures that the decision-making process for borrowing aligns with established legal frameworks and that the terms and conditions of loans are thoroughly examined.¹⁰⁰

In summary, debt transparency initiatives face numerous challenges, from legal ambiguities to governance issues, reporting practices, unmonitored contingent liabilities, and accountability mechanisms. Addressing these challenges requires a multi-pronged approach that involves enhancing legal and regulatory frameworks, improving governance and institutional arrangements, promoting better reporting practices, monitoring contingent liabilities, and strengthening accountability mechanisms. By addressing these obstacles, countries can enhance public debt transparency, improve fiscal risk management, and promote financial stability.

⁹⁹ AFRODAD, Annual Debt Management Report for Zimbabwe 2022.

¹⁰⁰ <https://zimcodd.org/wp-content/uploads/2023/03/Order-Zimcodd.pdf>

3

CONCLUDING REMARKS

In conclusion, this research paper has examined the legal foundations of public debt in African economies, contextualising its historical origins in colonial legacies and its evolution through economic, legal, and socio-legal perspectives. By analysing the economic theories, we have gained insights into the economic implications and management of public debt in Africa. These theories provide analytical frameworks for understanding the role of public debt in economic growth, investment, and welfare outcomes. Moreover, this paper has explored the legal frameworks that govern public debt, emphasising the significance of contract law in facilitating debt issuance, protecting the rights of creditors and borrowers, and ensuring transparency and accountability in debt management. The integration of socio-legal approaches and human rights perspectives has shed light on the broader social, political, and economic contexts in which public debt operates. It has revealed the interplay between legal frameworks, social structures, power dynamics, and the implications of public debt on poverty reduction, inequality, and access to public services.

Additionally, we have discussed international initiatives such as the HIPC initiative, the MDRI, the Paris Club, and the DSSI, which reflect a shift towards integrating human rights considerations into the realm of public debt. These initiatives aim to alleviate debt burdens, promote sustainable development, and ensure the realisation of economic, social, and cultural rights. AFRODAD's African Borrowing Charter has been highlighted as a framework for responsible borrowing and debt management practices, emphasising transparency, accountability, and the pursuit of development priorities in African countries. By drawing upon economic theories, legal foundations, socio-legal approaches, and human rights perspectives, this research has provided a comprehensive understanding of public debt in African economies. It has contributed to the academic discourse on public debt by bridging theoretical frameworks with practical considerations and highlighting the need for tailored approaches that address the specific challenges faced by African countries.

The process of procuring public debt was also explored, including the creation of various debt instruments

such as bonds, treasury bills, and sovereign loans. The paper also examined the rights and liabilities that arise under these instruments, emphasising the importance of contractual provisions and considerations such as debt sustainability, interest rates, and repayment terms. The research has shed light on the key considerations and issues surrounding public debt. It has highlighted the significance of responsible borrowing practices, transparency, and accountability in debt management. Governments must carefully assess their borrowing capacity, consider debt sustainability, and ensure that public debt is utilised for productive purposes that benefit society as a whole. The importance of balancing the rights and obligations of both borrowers and lenders has been emphasised, as well as the need to avoid excessive debt burdens that can hinder economic development and infringe upon the rights of future generations.

An issue of concern in public debt procurement is the lack of disclosure and transparency in negotiation and signing processes. Non-disclosure agreements and secretive practices can prevent citizens and civil society from accessing crucial information about public debt, limiting their ability to hold governments accountable and participate in decision-making processes. This lack of transparency can lead to hidden debt, corruption, and mismanagement of public funds. African countries have not been immune to such issues, with examples of public debt being procured in secrecy, such as undisclosed loans in Mozambique that led to a debt crisis.

The insights gained from this research can inform policy decisions, enabling policymakers and civil society organisations to navigate the complexities of public debt, promote sustainable economic growth, poverty reduction, and the fulfilment of human rights obligations. However, it is essential to acknowledge the limitations of this research. The analysis has focused on theoretical frameworks and examples from African economies, but the context and dynamics of public debt vary across countries and regions. Further research is needed to explore the specific challenges and opportunities related to public debt in individual African countries, considering their unique circumstances, institutional capacity, and development priorities.

4

POLICY RECOMMENDATIONS

To address the challenges noted in this paper, it is necessary to strengthen legal frameworks, enhance transparency, and promote responsible borrowing and debt management practices. Governments should establish robust mechanisms for disclosure and accountability, ensuring that citizens have access to comprehensive and accurate information about public debt. Civil society organisations and media play a crucial role in monitoring and advocating for transparency in debt-related matters. The African Borrowing Charter by AFRODAD provides a framework for responsible borrowing practices, emphasising transparency, accountability, and the pursuit of development priorities in African countries. Based on this the following recommendations are suggested for domestic implementation.

- i. Constitutional reforms: This is an uppermost legal framework that can guide public debt management. To strengthen public debt management and promote fiscal discipline, it is recommended that constitutions be amended to include the following provisions:
 - » Debt Ceiling: Establish a constitutional debt ceiling, defining a predetermined limit on public debt as a percentage of GDP or another relevant metric, to prevent the accumulation of unsustainable debt.
 - » Parliamentary Approval: Require parliamentary approval for government borrowing, ensuring transparency, accountability, and democratic oversight in debt decision-making.
 - » Clear Debt Descriptions: Mandate clear and comprehensive descriptions of debt obligations, enabling informed decision-making by policymakers, investors, and the public.

Implementation should involve broad consensus among key stakeholders and the involvement of technical experts in finance, economics, and law. These constitutional reforms will contribute to responsible debt management and long-term economic stability.

- ii. Statutory reforms: This can involve updating or implementing new laws and regulations related to public debt management. Laws can clarify the definition of public debt, specify who is responsible for debt management, set out reporting requirements, and establish oversight mechanisms. For instance, Ghana's Public Financial Management Act of 2016 mandates comprehensive and timely reporting of public debt, thus fostering transparency.
- iii. Debt management strategy reforms: A sound debt management strategy can help guide borrowing decisions and reduce risks. For example, Nigeria has a Debt Management Strategy (2020-2023) which outlines the composition of external and domestic debt to manage exchange rate risk.¹⁰¹ Regular reviews and updates of the strategy can ensure it remains responsive to changing economic and fiscal conditions.
- iv. Coordination reforms: Enhancing coordination among the entities involved in debt management can streamline processes and ensure consistency in decision-making and reporting. For instance, South Africa has a clear delineation of roles in public debt management between the National Treasury and the South African Reserve Bank, with established platforms for coordination.
- v. Independent Debt Management Office: The establishment of an independent DMO is a strategic decision that many countries have adopted to manage their public debt.
 - » The independence of a DMO allows it to make informed decisions on debt issuance, interest rate management, and risk mitigation without political interference. This independence can contribute to investor confidence and effective debt management. Countries like Australia, Canada, and Sweden have set up independent and

¹⁰¹ Debt Management Office. *Nigeria's Debt Management Strategy, 2020-2023*. Available: <https://www.dmo.gov.ng/publications/other-publications/debt-management-strategy/3469-nigeria-s-medium-term-debt-management-strategy-2020-2023/file>

effective DMOs, guided by best practices such as clear legal frameworks, well-defined mandates, transparent governance structures, and adherence to international standards. These practices aim to ensure efficient debt management, access to credit markets, and fiscal sustainability.

- » However, the concept of an independent DMO, while seemingly advantageous, is not without its potential pitfalls. One of the main critiques is the potential for coordination challenges with other government agencies, particularly the central bank and the finance ministry. This could lead to policy inconsistencies, especially in times of economic crisis when swift and coordinated action is needed. Another concern is the issue of accountability.
 - » While independence can shield a DMO from political interference, it can also lead to accountability issues. If a DMO operates without sufficient oversight, it could make decisions that are not in the best interest of the country's economy or its citizens. Furthermore, the lack of political insight could be a drawback. Politicians may have a broader perspective on the country's needs and priorities, which could be overlooked by an independent DMO focused solely on debt management. Additionally, an independent DMO might become isolated from the rest of the government, leading to a lack of understanding or appreciation of the broader fiscal and economic context in which debt management decisions are made.
 - » While the independence of a DMO can bring significant benefits, it's crucial to consider these potential drawbacks. The decision to establish an independent DMO should be based on a careful analysis of a country's specific circumstances, including its debt portfolio, institutional capacity, and the quality of its governance structures. The ideal scenario would be to strike a balance between independence and accountability, ensuring that the DMO can operate effectively while remaining answerable to the citizens it serves.
- vi. To ensure greater transparency and accountability, it is crucial for governments to provide Parliament with comprehensive information on contingent liabilities. Parliament plays a crucial role in reviewing and approving public debt and should have the authority to monitor and assess all forms of debt, including contingent liabilities. By involving Parliament in the decision-making process and providing them

with accurate and timely information, countries can enhance debt transparency, strengthen fiscal discipline, and mitigate the risks associated with contingent liabilities.

- vii. To address the challenges of sovereign debt and the risks of contingent liabilities effectively, it is recommended that both borrowing governments and creditors adopt more proactive measures to ensure responsible lending and borrowing practices. For borrowing governments, the first step is to conduct rigorous due diligence and risk analysis during Public-Private Partnership (PPP) procurement processes. This entails comprehensive financial assessments to ensure the viability and sustainability of projects before they are undertaken. In addition, borrowing governments should establish robust monitoring mechanisms for PPP projects. This would allow them to track project performance and assess potential risks that could trigger contingent liabilities. Moreover, it is crucial that these projects are regularly re-evaluated to confirm that they remain viable and sustainable over time. For creditors, they need to carry out comprehensive due diligence to ensure that the borrowing government is not exceeding their debt-to-GDP threshold. This is a crucial step in verifying the borrower's capacity to manage and repay its debts sustainably. Furthermore, creditors need to be proactive in their lending practices to avoid contributing to unsustainable debt levels. This can be achieved by keeping a close eye on the borrowing government's debt management strategies and maintaining open lines of communication with them. Such measures can help ensure that lending practices remain responsible and sustainable.

Finally, at the international level, one key recommendation for addressing sovereign debt challenges comprehensively is to establish a robust and inclusive Multilateral Sovereign Debt Restructuring Mechanism (MSDRM). This mechanism should be governed by a well-defined framework, encouraging the participation of a wide range of countries, especially those most affected by debt distress. The MSDRM should facilitate coordinated action among official creditors, private creditors, and multilateral institutions, ensuring a unified approach to debt restructuring negotiations. By promoting transparency, sustainable development, and proactive debt management, the MSDRM can offer a fair and timely resolution to debt crises, preventing them from escalating and fostering financial stability in the global economy.



**AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT**

31 Atkinson Drive, Hillside,
PO Box CY1517, Causeway, Harare, Zimbabwe,
Tel: +263 4 778531/6, +263 2912751-4
Email: info@afrodad.org
Website: www.afrodad.org

