

About AFRODAD

AFRODAD Vision

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

AFRODAD Mission

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

AFRODAD Objectives include the following:

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

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

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

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They include,

- The need for the strengthening of institutional capacity for Parliament, civil society and the state, so as to engage in an effective process of loan negotiation with lenders, many of whom understand the local conditions; priorities and objectives.
- There is a need for a strong Legislative Assembly that is fully representative of the wider spectrum of society; strong civil society sector that is also accountable to the people in the area of economic governance.
- There is need for national constitutions to be revised to make the Executive more accountable to Parliament and more transparent in its dealings with the public as well as greater coordination among state agencies dealing with loan procurement, debt management and repayment.
- There is scope for CSOs to play a more meaningful role in the process through lobby and advocacy on accountability and prioritization of loan resources. CSOs can also assist Parliaments by conducting research to equip MPs with information that will enable them to speak from an informed position and to challenge loans that may not be beneficial to people. They can also disseminate information to ordinary citizens on a country's debt situation and suggest ways of how to get out of it.
- There is a need for countries to establish national debt management units in each country. The Macroeconomic and Financial Management Institute of Eastern and Southern Africa (MEFMI) could assist in the setting up of the units.
- Establish structures or processes outside Parliament through which citizens can influence public loan decisions.
- Governments should conform to the UNITAR best practices model with respect to the institutional and legal framework for external public borrowing, so as to share borrowing powers equally between the Executive and the Legislature.

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This has been carried over into the Presidential system where the first allegiance of MPs is to the President rather than to the people. The present system of borrowing lacks legitimacy because the loan contraction process does not include consultation with the people or their representatives before loans are contracted. Rather, the present system actually undermines the process of accountability, transparency and participation.

Furthermore Parliamentarians lack resources and personnel with enough skills, knowledge and information to assist them during the filibusters in Parliament on loan bill issues. The majority hardly have any influence beyond the Parliamentary debates. They are handicapped in contribution and do not focus on well-defined rationalised debates. Several factors seem to be at work here, including the political patronage of one political party that creates a political culture of retreat and apathy. It can also be said that this has contributed to explaining why the external creditors have generally not given Parliament serious consideration during loan negotiations procurement and use. Moreover, loan contraction appears more of a political decision than one for the technical people and, as a result, the institutions outlined above do, and will for the foreseeable future, play a peripheral role.

4.0 The Public Accounts Committee

The Public Accounts Committee is the Parliamentary institution mandated to scrutinise Government expenditure by verifying and commenting on the Auditor General's report. The Committee's findings and recommendations for disciplinary action in the event of mismanagement of public resources are presented to Parliament as a whole and published. The Committee can request any information other than ministerial files and minutes. It can also summon any controlling officers, including the Minister of Finance, to appear before it. However, its recommendations are generally ignored as they come in the form of a post-mortem, when the damage is already done and cannot be reversed. The Government's 'action taken' reports invariably say nothing more than 'noted'.

Despite the fact that the PAC - the parliamentary watchdog - is under the Parliamentary Standing Orders, empowered by law to conduct independent audits on all public spending and to take appropriate measures as deemed necessary according to provisions of the law, there is no documented evidence of the PAC ever coming out boldly on matters of external public debt. The PAC powers are compromised by the influence and dominance that the ruling party enjoys over the usually weak and fragmented opposition in Parliament.

5.0 Civil Society Organisation Participation

The current loan contraction process in the countries under review does not provide for civil society participation or involvement. CSOs are not part of teams that negotiate loans, neither are they mandated to monitor how the loans are used. CSOs have limited access to information about loans. Given this situation, their major role is to lobby for policies and legislation that allows them direct access to information on loan negotiations and monitor their use.

Although CSOs are not involved in the loan contraction processes, they can make significant contributions to the discussions by linking up with Parliament and other related key institutions in loan contraction. Civil society organisations can particularly play an important role in research and information

dissemination, lobby and advocacy, monitoring and, dialogue with government on debt issues to ensure citizen participation in projects that affect them.

6.0 The Auditor General

The Auditor General is the watchdog of the nation's finances and his or her office is set up in such a way as to ensure independence in the performance of these functions. The National Audit Office plays the oversight role in the loan contraction process. The National Audit Office should ensure that all the conditions in the loan agreements have been met. It audits all the loans that are funded by the donor community.

The office of the Auditor General should promote financial accountability in public affairs and should have the requisite 'expertise' and personnel to audit state and parastatal accounts. They have access to reports from the courts, the Anti-Corruption Bureau, civil society, and government departments to make it important in the investigation and prosecution of cases and allegations of corruption among the public officials.

However, the current state of affairs among the countries reveals another reality. The office is considered weak and suffers political patronage from the executive in countries that have the offices. Mozambique is yet to establish one.

7.0 Attorney General

While the Attorney General's role has been limited to drafting, reviewing and ensuring compliance with laws, this role has been ineffective in countries that have the institution. There has been continuous executive interference in the execution of its duties. On top of most of the Attorney General's offices are under resourced both financially and in expertise. This makes it difficult for the office to execute its duties and the many loan negotiations and numerous compliance requirements from different donors further compounds the problem. The Attorney general's on its own, therefore, cannot be effective in the loan contraction process. The office should rely on the the Auditor General's report, Parliament and other related institutions to carry out its mandate.

8.0 Conclusions

In a region with fledgling democracies and weak institutions of governance and inadequate legal framework, the loan contraction process remains solely focused on the Ministry of Finance on the one hand and the lenders on the other. The legitimate beneficiaries or their elected representatives' involvement is not considered. The watchdog institutions in most of these countries have over time been labelled as 'harmless barking dogs', with a parent law but no enabling legislation.

The lack of legal instruments, the lack of clarity regarding the role of various institutions in debt management and monitoring, the absence of clear and established borrowing and debt management strategies and the lack of participation by civil society jeopardize the chances of making loans work for the poor.

9.0 Recommendations

Apart from the foregoing issues in the loan contraction process, there is a need for key fundamental factors to be put in place before the loan contraction process becomes transparent, accountable and participatory.

Each of these levels of government can, in theory, borrow externally.

However, macroeconomic controls, authored by the centre, with the close monitoring of World Bank and IMF 'experts' have, since 1988, advocated a shift from project support to General Budget Support (GBS). Consequently, multilateral agents have preferred dealing with the centre to dealing directly with local governments. The result of this has been the adoption of a Standard Operating Procedure (SOP) that MFPED should first approve donor funding to the lower levels of government, and should also match such donations with sector priorities approved as per the ceilings provided under the MTEF. At MFPED level this is regulated by the Aid Management Manual (2003) that spells out the procedures in aid contraction, management, external aid accounting, monitoring and evaluation, and procurement guidelines¹⁰.

In Zambia, authority to borrow is controlled and limited through a number of laws, including the Constitution. Thus certain Acts provide mechanisms to monitor and control the power to borrow. Under the current legal framework, the most important piece of legislation is the Loans and Guarantees (Authorisation) Act, Cap 366 of the Laws of Zambia. This Act is primarily intended to give authority to the Government to borrow. The Minister of Finance determines the terms and conditions applicable. Section 3 of the Act gives the Minister of Finance a general power to borrow both within and outside Zambia, as she or he may deem desirable. When the National Assembly is not sitting, the Minister is authorised in the public interest and with the approval of the President, under section 26, to vary the ceiling on borrowing to the extent necessary to raise an urgent loan or guarantee. Under the current law, external loans are not subjected to the scrutiny of Parliament before they are obtained nor is the Auditor General supplied with all loan documentation.

The Constitution and the statutes mentioned above are neither exhaustive nor are they comprehensive in matters pursuant to external public borrowing. In certain instances Ministry of Finance and local authorities ignore the regulations. Institutions such as Parliament, the Attorney General, the Auditor and central banks must be involved in the early stages of loan contraction. More importantly consultation with civil society through Parliament, as it represents the intended beneficiaries of the loan, should be mandatory. However, in all the constitutions and statutes involvement of other institutions other than the Ministry of Finance and local authorities in some instance before a before loan contraction is not mentioned. External borrowing powers are concentrated in the hands of the Minister of Finance who only notifies the Parliament after negotiations have already begun.

3.0 Parliament Participation

Democracy and elections have raised hopes and expectations that Parliament can be more active in interrogating debt management policy of their respective governments, particularly those that relate to loan contraction. Parliaments in democratic societies represent the people, to whom they have a responsibility. They have a law making as well as an oversight function. However, as in many other important policy documents in Sub Sahara African countries, the role of Parliaments in the preparation and approval of public loan has generally been limited despite the widening democratic space. Not much has changed in terms of involving Parliament in decision-making processes such as loan contraction. They still perform the 'rubber stamping role' and have in themselves been accused of abdicating their watchdog role and

accepting loan acquisition to improve lavish expenditure on the Legislative arm of the government.

Parliament should be a vital institution that serves as a bridge between citizens and the state. To this end, Parliaments - and Parliamentarians should carry out their legislative, monitoring oversight and representative functions in ways that respect and strengthen good governance values of accountability, transparency and inclusiveness in decision-making. Parliament should hold the government accountable for actions taken or missed, on reducing corruption in public life, and on widening representation by more citizens in government decisions-including those shaping spending, taxation and loan contraction.

While Parliament is mandated to authorise loan contraction, in practice it has never refused authorisation of a loan proposal in all the countries under review. However, the actual loan contraction process does not involve Parliament or any of its committees (the Public Accounts Committee) but rather the Ministry of Finance. Further, it has no role in monitoring the implementation of loan-funded projects. In the case of Malawi the public perceives the Legislature as not being entirely above corruption. There have been observations from the auditor general's office of acts of misallocation of resources where Parliamentarians allocate themselves allowances – which are tax free - in a manner that is not transparent. The independence of Parliament from other branches of government is also overshadowed by the way Parliamentarians operate in respect of their party's patronage.

It is important for Parliament to exercise their monitoring and legislative roles in the debt contraction process to ensure accountability, transparency and inclusiveness in the process and that the money borrowed is put to the best use. The role of Parliament in loan contraction in the legislation and loan monitoring process is very crucial on how public institutions and governments deal with the public debt issue. Strong legal and institutional framework provides a basis, where government officials and policy makers can be held accountable to policy choices they make in regard to loan contraction as well as protect the national interest of the country. However, the general legal framework relating to debt is made up of national laws that are intended to protect the country and authorize the Government to borrow but have proved ineffective when applied in international transactions. They are affected by international practice and procedures, which regulate the relationship between the Government and foreign creditors that have proved more powerful and biased in favour of the interest of the creditors in terms of timelines and requirements for compliance in the loan contraction process. Chapters covering non-payment, misrepresentation, breach of obligation, cross default, insolvency, insolvency proceedings, change of activity, validity of agreement, unlawfulness, expropriation and disposal, moratorium, material adverse change, and project authority are not adequately covered by the national legislation. As a result, the countries do not benefit from the minimal protection that its domestic laws have to offer. Parliament, therefore, needs to be strengthened to provide credible and protective legislation to protect the country against debts that cannot be accounted for or defended within the domestic laws.

In terms of process the loan contraction process suffers from the lack of effective checks and balances, leaving Parliament basically as a rubber stamp. The disregard for Parliament and the people can be attributed to the hangover from the colonial days when the government's first allegiance was to the colonial master.

¹⁰ AFRODAD 2004e

While the organizational arrangements for the various functions involved can vary greatly between countries, there is agreement that for a debt management system to be effective there should be a clear allocation of responsibilities and tasks between agencies but also smoothly functioning relationships between the units involved. Other stakeholder involvement in this process is also crucial.

Debt Management at the International Level

Efforts towards debt management in place internationally have been mostly inadequate and non comprehensive largely because of two reasons. The first is that the mechanisms have not been inclusive enough to warrant legitimacy in the eyes of the citizens of the debtor country (internationally designed and implemented domestically) and perpetuated secrecy around debt management (loan contraction has been an exclusive right of a few in the Ministry Of Finance). Secondly, the debt management process, particularly the decision to contract loans, is political and does not include representatives of the 'beneficiary' or institutions that represent them. This negates the principles of accountability, transparency and inclusiveness. Key institutions such as Parliament, the Auditor General, Attorney General, civil society organisations and anti corruption bodies should, therefore, be part and parcel of the loan contraction process.

As part of its work with borrowers, in order to improve their performance as international debtors, the Bank has been engaged in training and institution-building since the mid-1980s. Other services have included debt restructuring and market access advisory work, or techniques and practices of asset and liability management.⁵ It must however be noted that the World Bank's involvement with the debt management process is limited to line ministries - mostly the Ministry Of Finance, Planning And National Development and the central banks. There is no direct involvement with the domestic legal aspect of debt management as well as with other institutions outside its mandate.

UNITAR and Debt Management

The United Nations Institute for Training and Research (UNITAR) conducts extensive training programmes in the legal aspects of debt and economic and financial management. The UNITAR programme is designed to create awareness and provide in-depth training in the legal aspects of debt and economic and financial management to senior officers, middle-level debt and finance managers, law professors, lawyers, trade officials and economists from the public and private sectors. The programme also seeks to strengthen existing human resources and institutional capacities within government ministries, universities and other selected institutions to make them self-reliant in conducting their own training programmes.⁶

Legal Framework For Loan Contraction

On the national level a number of statutes, government agencies and organizational arrangements for the various functions guide the loan contraction process. In Malawi, the loan contraction process is governed by the 1995 Constitution under the Public Finance Management Act. The Act allows the government to borrow externally under the authority of the Parliament. The Act also governs expenditure on external loans as well as public finances in general. The Act empowers the Ministry of Finance to be the only Ministry mandated to borrow on behalf of the government.

Each Ministry submits its budget proposal to the Ministry of Economic Planning and Development. Jointly, both the Ministry of Finance and that of Economic Planning and Development, look for money then seek Parliamentary approval to access it. Public (parastatal) institutions, such as statutory corporations and institutions like the National Food Reserve Agency (NFRA) may also borrow externally; in which case the government becomes the guarantor of such loans⁷.

In Mozambique there is no legal provision dealing with debt issues in general, but only internal regulations within the Ministry of Planning and Finance and the Central Bank. It is clear from these regulations that the only entity authorized to contract external loans is the Government of Mozambique, represented by the Ministry of Planning and Finance and the Bank of Mozambique. An exception is for large public and private companies that are allowed to take loans, but only with Ministry and Central Bank approval and the company must be ready to present guarantees⁸.

The Tanzanian loan contraction process is rooted in the Constitution of the United Republic of Tanzania (URT) of 1977 with various legislation including Act No. 30 of 1974 on Government Loans, Guarantees and Grants; the Public Finance Act of 2001; and the corresponding regulations and standing orders made by the Minister of Finance, to regulate the business of official public loan contraction in Tanzania. The Act No. 30 of 1974 empowers the Minister of Finance to raise or contract loans and grants on behalf of the government. Under the same Act the Minister of Finance is authorised to delegate to a public officer the authority to execute any agreement or instrument relating to a loan or guarantee raised on behalf of the government.

The Constitution and the statutes mentioned above are not exhaustive nor are they comprehensive in matters pursuant to external public borrowing. The Legislature, under both the Constitution and the statute, is not given legal powers to oversee Tanzania's external public debt. Nor is it the external public borrowing approving authority, although best practice in external debt contraction suggests that it should be. Other weaknesses in the statutes are found in the poor administration and enforcement. There are cases where unauthorised persons contracted loans without the consent of the Minister of Finance. This partly explains some foreign loans being contracted without respect for the legal limits, leading to the current unsustainable foreign debt burden⁹.

The Ugandan process is sanctioned by the 1995 Constitution. The power of Government to borrow and lend derives from Article 159, which states that: "subject to the provisions of the constitution, Government may borrow from any source". According to Section 2, all such borrowing and guaranteeing of loans must be under an Act of Parliament, specifying the terms and conditions of the loan and the mode of repaying it, while Section 4 makes informing Parliament of the status of public debt from time to time the responsibility of the President of Uganda. In the public interest, however, Parliament may pass a resolution for Government to enter an agreement for the giving or acquisition of any loan or grant.

The policy of decentralization was adopted under the 1995 Constitution. Accordingly, the description of what 'government' refers to has since oscillated between Local and Central Government, where the centre comprises the line ministries and Government's self accounting agencies, while local Government is at district and sub county levels, as defined by the Local Government Act (1997).

⁵ UNDP 1997

⁵ UNDP 1997

⁷ AFRODAD 2004b

⁸ AFRODAD 2004c

⁹ AFRODAD 2004d



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The Public Loan Contraction Process – A Key to Debt Management and Economic Governance

By Vitalice Meja¹

1.0 Introduction

'By law, public external debt is a monetary obligation that a country incurs by taking money from outside the country. The Government assumes a legal obligation to pay back the loans. In order to do so, the country has to raise revenue from taxes. It is therefore the people who are ultimately liable for the repayment of public debts.'²

The Debt crisis has contributed heavily to the economic and social crisis in Sub Saharan Africa and the consequences are still felt in a number of countries. In many cases, the debt has had a damaging impact on their macro-economic stability and international creditworthiness. It has stunted growth and investment in these economies as well as their participation in world trade. In the social sector performance, debt servicing has literally crowded out public expenditure on education; health and other social needs and many are still unable to fulfil their payment obligations. While many middle-income countries in the Third World have succeeded in reducing their debt burden and returned to growth, the debt overhang continues to have a damaging effect on the development of many African countries.

The causes of Africa's debt crisis are varied and complex. A lot of emphasis has been put on external factors while overlooking internal factors. Notwithstanding the external factors, it is clear that the causes of the debt crisis in many African countries are also attributable to poor debt policy, a weak institutional and legal framework and lack of accountability, transparency and inclusiveness of the involved institutions in the loan contraction process. The procurement, utilisation and management of public loans and debts are a national and international issue and, therefore, should be seen to be transparent, accountable, participatory and inclusive. The processes of loan procurement and debt management require legitimacy and systematic planning to be sustainable. The presence of internal debt management as well as the external mechanisms is a clear indication that debt management is important if economies in Sub Saharan Africa are to move out of stunted economic growth and the poverty trap.

Debt management cannot only be seen in isolation in the form of good fiscal and monetary policies and general macro-economic management but rather a legal framework complemented by an effective and inclusive instructional framework should be part and parcel of the debt management strategy. It is true that debt has strong linkages with other macro-economic variables and interacts closely with aid, trade, net factor income from abroad and investment flows.

However, good performance of these sectors heavily relies on sound debt management, therefore implying that a country must have coherent and integrated policies and an institutional framework addressing all these areas.

The major argument in this paper is that the process by which debtor countries agree to take on the terms and conditions for loans needs to be opened up to scrutiny by citizen groups and their representatives in Parliament and other formal democratic structures. This should help to avoid lending and borrowing mistakes, which in the past have led to the build-up of unsustainable debts that now have to be paid off at the cost of financing the MDGs. The paper reviews five HIPC experiences on the loan contraction legal framework; Parliament participation in the loan contraction process; Civil Society Organisation participation in the loan contraction process; the role of the Auditor General and that of the Attorney General. It focuses on Malawi, Mozambique, Tanzania, Uganda and Zambia. It concludes by pointing out that getting Parliament and civil society involved in loan contraction and strengthening the Auditor General's office is one way of improving debt management and economic governance.

2.0 Debt Management In Perspective

Since reaching their respective Decision-Points, under the HIPC Initiative, governments in Malawi, Mozambique, Tanzania, Uganda and Zambia have contracted US\$4.4 billion in new debts from the International Development Association (IDA), with another US\$2 billion of IDA loans in the pipeline for future projects. This debt stock is equivalent to the total amount they still need to repay all their creditors on their "reduced" debt stocks between 2000 and 2015³.

Realizing the seriousness of the debt crisis and importance of internal mechanisms to address the debt problem, AFRODAD commissioned a five-country case study⁴ in 2004 on loan contraction under the debt management framework and established on its basis a need for an inclusive transparent and participatory loan contraction process. The studies, among other things, revealed that many countries lacked the necessary tools to cope with a dramatic increase in the volume of foreign debt and its service. They also recommended that a better loan contraction framework could give stakeholders better information necessary both for the monitoring and for the formulation of a country's legislation for external borrowing.

The debt management system of a country is complex, involving many functions that are interrelated and interdependent and performed by a number of government agencies.

¹ Vitalice Meja is the AFRODAD Program Director for Lobby and Advocacy

² Jack Jones Zulu in the Loan Contraction Process in Africa, The Case for Zambia

³ AFRODAD 2004a

⁴ The countries involved in the studies include, Malawi, Mozambique, Tanzania, Uganda and Zambia and examined the legal framework for loan contraction and the role of various stakeholders in the process.