

JESUIT CENTRE FOR THEOLOGICAL REFLECTION
20 YEARS OF "PROMOTING FAITH AND JUSTICE" 1988-2008

**Submission on the Debt Legal Framework to the
Public Finance and Budget Committee of the
National Constitutional Conference**

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1. Introduction

The Jesuit Centre for Theological Reflection is a faith based non governmental organisation with a mission to generate activities for the promotion of the fullness of human life through research, education, advocacy and consultation.

Among the social justice activities and programmes that the JCTR does, it also hosts the Jubilee-Zambia campaign which is well known for its contribution towards the cancellation of Zambia's public external debt. Jubilee-Zambia and the Debt, Aid and Trade programme are currently promoting the improvement of the debt contraction and debt administration structures especially through legal reforms which assures sustainable debt for integral and sustainable human development.

Through the work of Jubilee-Zambia, proposals were made to the Mung'omba led Constitution Review Commission (CRC) regarding the legal concerns pertaining to the current constitution. Several of the proposals made to the CRC are now currently reflected in the draft constitution which is the main document under review at the National Constitution Conference (NCC).

We are glad to submit to the Public Finance and Budget committee of the NCC this paper which supports an inclusive, participatory, consultative, transparent and accountable debt contraction and debt management framework. Our submission benefits from two JCTR studies of 2003ⁱ and 2007ⁱⁱ which assessed the legal framework before and after the attainment of HIPC¹ completion point respectively. Both studies proposed ways of improving the legal architecture governing debt management and in our opinion the recommendations from the studies are in many ways congruent with the provisions in the draft constitution of June 29, 2005. Our submission mainly dwells on articles 312 and 313 of part XVII, Public Finance and Budget of the aforementioned draft constitution.

2. The Current Legal Framework

In Zambia, there are a number of laws which work together to authorise and regulate public external borrowing. The Legal framework changed substantially in 1969 from what it was at Independence. It is very significant to realise that the current law was enacted at around the time when a referendum was held to usher in the One-Party State. The domination of UNIP and its government was clearly intended to extend to public borrowing. Law reforms had the effect of ousting Parliamentary control over the borrowing process and legalising undemocratic contraction and management of debts.

¹ Heavily Indebted Poor Countries Initiative

The 1996 constitutionⁱⁱⁱ guides on public debt in Article 120 (Public Debt) where it states

- (1) *There shall be charged on the general revenues of the Republic all debt charges for which the Government is liable.*
- (2) *For the purposes of the Article, debt charges include interest, sinking fund charges, the repayment or amortisation of debt, and all expenditure in connection with the raising of loans on the security of the revenues of the former Protectorate of Northern Rhodesia or the Republic and on the service and redemption of debt thereby created.*

These clauses are limited to the charges on debt repayment and provide no clear and explicit insights into the oversight role of parliament in the contraction and management of debt. It further does not outline the process to be followed in the contraction of debt. Considering this weakness in the actual constitution, we now concentrate on other pieces of legislation in order to understand the general principles and guidelines on public debt in Zambia.

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 blanket authority to the Government to borrow. Once this authority is given, the debt contraction process tends to follow international principles and rules. There are a number of Acts that authorise the application of international law and multilateral financial institutions in Zambia. These are ***International Development Association, Cap. 361; Breton Woods Agreements Act, Cap. 367; International Finance Corporation, Cap. 368***. These Acts enable Zambia to be a member of and therefore eligible to borrow from these institutions.

The key provisions of the ***Loans and Guarantees (Authorisation) Act*** are as follows:

- Loans may be raised through the issue of bonds and stock, issue of treasury bills and by agreement in writing. The Minister determines the terms and conditions applicable. ***This expectation is unrealistic in view of the fact that the Minister is expected to negotiate terms that are favourable to Zambia in circumstances where the lenders clearly have the upper hand.***
- Section 3 of the Act gives the Minister of Finance a general power to borrow both within and outside Zambia, as he may deem desirable. ***This gives the Minister too much discretion to commit the country to dangerous levels of debt.*** The ceiling on borrowing is contained in a statutory instrument authorised by resolution of the National Assembly. (Under Article 80 of the Constitution, a statutory instrument is to be published in the Gazette within 28 days after it is approved by Parliament). When the National Assembly is not sitting, the Minister is authorized 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. *This creates another loophole. External debts are not subjected to the scrutiny of Parliament before they are obtained nor is the Auditor-General supplied with all loan documentation.*

- Loans for a period of not more than one year are payable into a special depository account but those for more than a year are payable into the general revenues of the Republic. *These are then difficult to monitor.* Loans raised for a specific purpose must be applied only to that purpose.
- All debt charges are paid out of the general revenues of the Republic and details included in the financial report to Parliament. *This report thus comes after the fact and serves little useful purpose.*
- Under Parts V and VI of the Act, the minister can guarantee or grant loans to persons and on such conditions as stated under the same provisions of the Act. For instance, upon the issue of a warrant by the President, the Minister can on written agreement and whatever conditions he deems fit, grant loans out of the general revenues of the Republic to any person or body specified in the warrant. *The Minister has wide and dangerous discretionary powers to lend out public resources.*

Generally the legal framework relating to public external debt is made up of national laws which authorise the Government to borrow and international practice and procedures which regulate the manner in which that power is exercised *vis-a-vis* foreign creditors. The basic relationship of borrower and lender is contained in a loan agreement, which creates a contractual relationship. The domestic laws that the country relies upon to negotiate loan agreements are scanty and vague, and not used effectively due to inexperience on the part of negotiating personnel. Sometimes there is a failure to comply with the law resulting in unauthorised persons contracting debts. In addition, international law is heavily biased in favour of the interests of creditors. As a result, the country does not benefit from the minimal protection that domestic laws have to offer.

Clearly, the ***Loans and Guarantees (Authorisation) Act*** does not provide adequate guidance with regard to the procedure to be followed by the Ministry of Finance in negotiating and monitoring debts. It should offer better protection from the risks of borrowing internationally.

3. Provisions in the Draft Constitution

Because the present system of borrowing ‘lacks legitimacy as the process does not include consultation with the people or their representatives before debts are contracted, nor does it result in real benefit to the people’ it is imperative to revise it. In this light, the provisions of the draft constitution would introduce significant changes through the following articles and clauses;

Article 312, clause (2): Government shall not borrow, guarantee, or raise a debt on behalf of itself or any state organ or institution, authority or person except as authorised by or under an Act of Parliament.

Article 312, clause (5): The national Assembly may, by resolution, authorise the government to enter into an agreement for the giving of a loan or a grant out of any public fund or public account.

Article 312, clause (6) An agreement entered into under clause (5) shall be laid before the National Assembly and shall not come into force unless it has been approved by a resolution supported by the vote of not less than two-thirds of all the members of the National Assembly.

Article 313, clause (2): The National Assembly shall approve all direct borrowing by the Government, before these take effect, for the purposes of incurring public debt or loan guarantees.

Certainly, the provisions of the draft constitution increase the oversight role of parliament by seeking parliamentary approval before the contraction of debts.

This oversight authority is broadened further as parliament can under these provisions for the first time discuss the terms and conditions of debts through powers provided for by the following clause:

Article 312 clause (3) Legislation enacted under clause (2) shall provide -

(a) that the terms and conditions of the loan shall be laid before the National Assembly and shall not come into operation unless they have been approved by a resolution of the National Assembly;

It is necessary to acknowledge that this provision is an essential deviation from the prevailing situation where parliament is seldom consulted in the loan contraction process and the role of the legislature is subordinated in so far as providing oversight in checks and balances on the debts is concerned.

The current challenge is how parliament will be involved in order to adequately perform the functions above amid concerns of capacity limitations among parliamentarians, potential overlaps with the executive, politicisation of the debt contraction and

management process as well as the likelihood of delaying the process of contracting debts.

There are a number of options which can unlock this controversy and conflict of interests. Our discussion, under 'the current debate' in this paper we discuss a few options with their accompanying pros and cons as well as our suggested approach embodied in the proposed debt management bill;

4. The Current Debate

Currently, Parliament approves all expenditure activities of the budget except for those financed by debts, as debts are contracted sometimes outside the budget presented to parliament and in many times to close up the financing gap. Parliament is at the time of the budget discussions not provided information on the specific debts to be contracted. However, Parliament is requested to approve expenditure on debt repayment once the debt falls due for repayment. This has been seen as a mismatch in the system.

This has contributed to the need for all Government borrowings to be approved by Parliament. This is also on the premise that these are the people's representatives and therefore need to reflect the wishes of the constituents in the borrowing process because it's the citizens funds that are used to repay the debts. On the other hand some sections have called for the use of a select committee of Parliament to approve loans which are later tabled before parliament for approval. The other counter view is the use of a select committee of Cabinet. This is in line with the need to keep legislative roles of parliament separate from executive roles.

4.1. USE OF PARLIAMENT

Pros

The use of parliament is already being practiced by many countries, most of which are developed. The advantage of using parliament is that every loan acquired will reflect the people's wishes and in turn benefit them unlike a situation where a loan may not be in the interest of the nation but that of the Executive.

It will improve on accountability and transparency.

Cons

It is expensive and will slow the process of debt contraction if the entire parliament is to be convened to approve a loan. This is more difficult in times of an emergency situation such as war or natural catastrophe.

There are overriding political factors that may affect loan approval even when it is a beneficial loan. It can be a tendency to politicise debt contraction for example for particular region whose politicians may not have a strong voice in parliament. It may also be the case that politicians will claim for similar loans for their regions.

4.2. USE OF SELECT COMMITTEE OF PARLIAMENT

Pros

It is quicker and cost effective for a select committee to approve debts through delegated powers and table the same before parliament. The political objectivity of a select committee may be easier managed than that of the entire parliament. It also satisfies the need for parliament to take charge of borrowing.

Cons

The fact that the entire parliament is not involved may still cause problems in terms of all citizens having a say in all borrowing as they all collectively participate in repayment of such debts.

4.3. SELECT COMMITTEE OF CABINET

Pros

The advantage with this is that the vesting of borrowing powers that are currently in the Minister of Finance will be diluted and bring about a more reflective borrowing strategy. It will also ensure that the running of the executive is independent from that of the legislature. It will also be quicker to raise debts than involving the whole Parliament.

Cons

It still will have the problem of accountability and transparency. It also does not address the problem of parliament being used as a rubber stamp by nodding expenditure it was not party to in approving.

5. The JCTR Proposal and its relationship to the Draft Constitution

The JCTR proposed debt management bill is a proposed law for debt, debt Issuance, and Guarantees of the Republic of Zambia.

Parliamentary oversight

The bill proposes a broader and inclusive debt contraction process which is not only limited to the Minister of Finance but also provides the authority to parliament to strengthen its oversight role in the contraction and management of debts.

It is premised on the position that parliamentary oversight should primarily commence with a Select Parliamentary committee^{iv} (here after referred to as ‘the committee’) which is similar to the committee referred to as “Appropriate Committee” in the draft constitution articles 309 (7) (8), 310 (d). The proposal elaborates the view that parliament, following recommendations of a Select parliamentary, should primarily develop **a framework of the key principles and terms of a debt agreement**. This framework should guide the executive and the proposed semi-autonomous ‘state debt management office’^v in the negotiations for debts.

The ‘select committee’ of parliament could be either one which is already existing such as the Economic Affairs and Labour committee, the Public Accounts Committee or the Estimates Committee or any other that may so be established for purposes of exercising oversight in line with part XVII, Public Finance and Budget of the constitution.

The committee should analyse every loan to be borrowed in the forthcoming financial year together with the ‘estimates of revenues and expenditure of the government’ stated under Article 309 clause (1) of the draft constitution which states;

The President shall, subject to clause (2), cause to be prepared and laid before the National Assembly in each financial year, not later than ninety days before the commencement of the financial year, estimates of revenues and expenditure of the Government for the next financial year.

This article is complemented by clause (7) of the same article which states;

Before the National Assembly considers the estimates of revenues and expenditure, laid before it by the Minister responsible for finance, the appropriate committee of the National Assembly shall discuss and review the estimates and make appropriate recommendations to the National Assembly.

When such a select or appropriate committee of parliament reviews the proposed expenditures and sources of revenue, we suggest that the loans to be contracted during the forthcoming financial year should also be part of their discussions. The committee should subsequently make recommendations on the appropriateness of the loans and the proposed loan agreements.

Enhanced Coordination with Budgetary Process

This definitely calls for enhanced coordination with the budgeting process and it follows therefore that article 310 (Budget Act) should also include an elaborate list of loans and layout of proposed projects to be undertaken or funded through debt. Particularly this should be a provision included under sub clause (d) of article 310 which states;

Article 310: Parliament shall enact a budget Act which shall provide for matters that relate to the annual budget and shall include

(d) the submission of anticipated revenues and expenditure for each financial year by the Minister responsible for finance to the appropriate committee of the National Assembly for prior consideration before the preparation and submission of the actual estimates for the financial year;

This particular clause should include the loans to be contracted in the respective financial year.

Regular State Debt Management Strategies

Additionally, the JCTR proposed legislation seeks to make the practice of operating with debt management strategies a regular practice. This can only be secured if the preparation of debt management strategies were not ad hoc but regular and emanating from a directive by law. This will enable the National Assembly as well as the public an opportunity to contribute to the preparation and implementation of such a strategy^{vi}.

With such forecasts on a three to five year period of debt management strategies, it should not be difficult for the Office of State Debt management to be able to provide to parliament a list of debts to be contracted in any year as these would have already been determined under the National Development Plans such as those implied under article 309 (Annual Financial Estimates) clause (6)

clause (6) Notwithstanding clause (1²), the President may cause to be prepared and laid before the National Assembly -

- (a) fiscal and monetary programmes and plans for economic and social development covering periods exceeding one year; and*
- (b) estimates of revenue and expenditure covering periods exceeding one year.*

² Clause 1 states; The President shall cause to be prepared and laid before the National Assembly in each financial year not later than ninety days before the commencement of the Financial year, estimates of revenues and expenditure of the government for the next financial year.

It is our considered view that the preparation of ‘Debt Management Strategies’ should be made more explicit and a directive of law. The clause should therefore include debt management strategies as part of either the fiscal and monetary programmes. Additionally clause 5 above is dependent on whether the President chooses to direct that such plans or programmes be prepared. The use of the persuasive term ‘may’ rather than ‘shall’ weakens this provision.

Limitations on external, domestic State debt and guarantees established annually by parliamentary decree

While the draft constitution is quite elaborate, it misses significant details such as the limitations on borrowing and the allowable limit for external debt outstanding at the end of any financial year.

The JCTR proposal extends parliamentary authority to the setting of limits and ceilings on an annual basis.

The debt limitations in the Annual State Budget Law shall expressly set forth,

- the amount of new external and domestic state debt that can be incurred during financial year,
- The total aggregate amount of external domestic state debt that can be outstanding on the final date of the Budget year.

The limitations on the amount of external and domestic state debt established in the Annual State Budget Law shall constitute authority to issue up to this amount of external and domestic State debt.

In broad terms, the JCTR proposal augments the provisions in the draft constitution and because it is a proposed bill, it therefore addresses other pertinent issues including the following;

1. Creation of the Office of State Debt Management

The management of the acquisition and issuance of state debt would require the establishment of the Office of State Debt Management within or outside the MoFNP to manage, monitor and plan state debt among other duties. The Office of State Debt Management would assist to ensure that contraction of loans or issuance of debts is free of political influence and is in conformity with the national requirements for sustainable debt levels.

2. Establishment of the National Debt Management Council^{vii}

Prudent debt management would entail that there should be a committee with advisory role to the Ministry on debt management and debt strategy. The Bill proposes a Debt Advisory Committee (DAC) appointed by Cabinet with its composition drawn from the Ministry of Finance, Bank of Zambia: representatives

of Civil Society, private sector and a Financial institution located in the republic of Zambia.

3. Inclusive contraction of External State Debt

An inclusive process of contracting debts is proposed which would ensure that debt agreements are also scrutinised by relevant bodies and authorities such as the Debt Advisory Committee, cabinet and the Attorney General (AG).

6. Conclusion

The current constitutional provisions (in the current constitution) regarding debt contraction and debt management are neither adequate nor appropriate enough to cushion Zambia from a possible debt trap.

For the reform on greater public involvement in the debt contraction process, a clear and detailed debt legal framework and enforcement of legal procedures is needed. The draft constitution of 2005 provides for essential changes which are in many ways appropriate. However, lacunae do exist. Parliament is still not provided oversight over important aspects such as limits and ceilings on new borrowing and stock of debt on annual basis.

The current difficulties of how parliamentary oversight can be exercised without creating overlaps in duties and roles with the executive is real but it can be easily resolved by allowing parliament to provide a framework for the management and contraction of debts.

7. Recommendations

The inclusion of parliament in the debt contraction and debt management legal framework is necessary and the current provisions in the draft constitution need to be upheld and augmented by broadening parliamentary oversight to include the determination of limits for borrowing and ceilings for allowable debt stock on an annual basis.

The linkages with budgetary processes should be strengthened and include a complete list of projected debts to be contracted and projects to be implemented from debt resources.

Article 310 (Budget Act) should also include an elaborate list of loans and layout of proposed projects to be undertaken or funded through debt. Article 310 (Budget Act) should therefore include an elaborate list of debts and layout of proposed projects to be undertaken or funded through debt.

The NCC Committee should consider the relationship of the different articles under part XVII and recommend a harmonious way in which debts can be contracted with parliamentary oversight without overriding on the role of the executive and vice versa. In our view, it will be appropriate to use a select committee of parliament which recommends to the National Assembly.

ENDNOTES

ⁱ Munalula, Mulela (2003). Debt Cancellation for Poverty Reduction: Research Report on the Debt Contraction process in Zambia. Study Commissioned by Jubilee-Zambia, Lusaka, Zambia

ⁱⁱ Jubilee-Zambia (2007). An Evaluation of the Strengths and Weaknesses of Public Debt Management in Zambia and the JCTR Comprehensive Public Debt Management Legal Review. Lusaka, Zambia

ⁱⁱⁱ Constitution of Zambia, 1996

^{iv} The Parliamentary Committee shall: -

- 1) request for reports within the confines of the law;
- 2) analyse the feasibility of the projects or programmes;
- 3) analyse the terms of the debts;
- 4) call upon the Minister of Finance, his officers or other institutions to make submissions and render opinions on particular debt matters; and
- 5) Annually review national debt sustainability reports and propose subsequent adjustments based on the social economic conditions especially human needs.

^v The Office of State Debt Management is contained in the JCTR Proposed Debt Management Bill. The office of state debt management is proposed to be semi-autonomous by virtue of the bodies it reports to, which is partly the executive and partly the legislature. Its activities are a liability to the general revenues account or the 'Consolidated Fund' as stipulated in the Draft constitution.

^{vi} State Debt Management Strategy is contained in the JCTR proposal and has the following provisions
(1) The Ministry, in cooperation with the Debt Advisory Committee, shall determine a proposal State Debt Management Strategy that the Council of Ministers shall approve not later than one month prior to the end of the fiscal year.

(2) The Ministry shall initiate debt issuance activities within the Debt Limitations established pursuant to this law.

(3) The State Debt Management Strategy shall include the following information:

- a) outstanding State Debt and State Guarantees;
- b) preparation of a three (3) to five (5) year medium term State Debt Management Strategy that shall include Entities and District Debt, in accordance with applicable Entity and District legislation;
- c) carry out annual reviews of the strategy in b) above;
- d) proposed State Debt and State Guarantees, including the purposes of such State Debt and Guarantees;
- e) projections of State Debt Service for the next five (5) years; and
- f) Other relevant information, such as reviewing the National Debt Sustainability Analysis, operationalisation of the debt strategy and policy.

^{vii} In the current JCTR proposal the National Debt Management Counsel is referred to as the 'Debt Advisory Committee'. This change arose out of consultations with different stakeholders who felt that the Executive at times marginalizes structures with which are advisory in nature.