

LICENCE TO LOOT: THE FAILURE OF CONSTITUTIONALISM IN THE MANAGEMENT OF SOVEREIGN DEBT IN ZAMBIA

O'Brien Kaaba¹

“Ubomba Mwibala alya mwibala, tabatila kulya nembuto kumo”
[You can steal, but do not steal everything],
President Edgar Lungu of Zambia, addressing senior government
and ruling party officials in February 2018.²

I

INTRODUCTION

Zambia reached the HIPC completion point in 2005 and had its external debt significantly reduced. The government was cautious to accumulate unsustainable public debt. However, in 2011, a new government was elected into office and has proved less cautious and has accumulated public debt to crisis proportions, under the pretext of infrastructure development. However, evidence is growing that substantial amounts of the moneys being borrowed are being looted through corruption by government officials. This article discusses corruption in Zambia in the contraction and management of public debt. It argues that the looming debt crisis is as a result of failure of constitutionalism in Zambia. The ruling elite, under state authorised looting, have systematically looted substantial amounts of the borrowed money. The article has five sections, the first being the introduction. This is followed by a discussion of the concepts

¹ LLB Hons (University of London), LLM (University of Zambia), LLD (University of South Africa), lecturer in Law at the University of Zambia and senior research fellow at Southern African Institute for Policy and Research (SAIPAR)

² Marilyn Rose, ‘you can steal.....but tabatila kulya nembuto kumo – Lungu’ (*The Mast*, February 12, 2018), <[http:// www.themastonline.com/2018/02/12/you-can-steal-but-tabatila-kulya-nembuto-kumo-lungu](http://www.themastonline.com/2018/02/12/you-can-steal-but-tabatila-kulya-nembuto-kumo-lungu)> [accessed May 5, 2018>

of constitutionalism and how these interplay with corruption and public debt. The third section seeks to demonstrate how corruption has affected the contraction and use of borrowed funds. The fourth section looks at the weaknesses in the legal frameworks that have allowed the looting to go on with impunity. The paper ends with a conclusion.

II

Constitutionalism, Corruption and Public Debt

The concept of constitutionalism derives from the idea of a written constitution. The current concepts of a written constitution for a nation-state have roots in the eighteenth century in the context of the French and American revolutions.³ What is distinct about the idea of a written constitution is that it is considered the fundamental law that not only establishes the government but regulates the exercise of governmental power by prescribing limits to such power. Liolos has argued that this entails that the constitution has two elements: the functional and aspirational.⁴ The functional elements of the constitution create the organs of the state and the rules that govern them, while the aspirational elements articulate the nation-state's principles and values such as social justice, transparency and accountability which every well-ordered state aims at achieving.⁵ In a well ordered state the aspirational elements of the constitution provide the nation with a moral campus that ought to dictate the policies and activities which the functional elements should implement to achieve legitimacy and promote social development.⁶

3 Albert HY Chen, 'The Achievement of Constitutionalism in Asia: Moving Beyond "Constitutions without Constitutionalism"' in Albert HY Chen (ed), *Constitutionalism in Asia in Early Twenty-First Century* (Cambridge University Press 2014) 4

4 John Liolos, 'Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring' (2013) 36 *Boston College International and Comparative Law Review* 2

5 John Liolos, 'Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring' (2013) 36 *Boston College International and Comparative Law Review* 2

6 'Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring' (2013) 36 *Boston College International and Comparative Law Review* 2

Distilled from this, constitutionalism therefore entails the establishment of a nation-state government that is enabled to carry out the task of governing effectively and efficiently, but doing so within the confines of constitutional limits and in furtherance of collective national values. In the words of Fombad, ‘constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions.’⁷ Fombad argues that constitutionalism further requires the establishment of ‘clearly defined mechanism for ensuring that the limitation on the government are legally enforceable.’⁸ So there should not just be limitations but those limitations must be enforceable.

Although the written constitution was conceived of as a fundamental law establishing the state, limiting its powers, disciplining its government and committing the national leadership to set collective values,⁹ once invented, the constitution could be utilised for purposes other than those for which it was conceived.¹⁰ Instead of limiting government and fostering collective values such as transparency and accountability, constitutions can be deployed by regimes to entrench themselves, violate human rights and loot public resources. The case of how several African regimes soon after independence amended constitutions to entrench single party dictatorships, violate human rights and consolidate power is well known. In many countries in Africa, this is still the *status quo*, leading constitutional scholars to coin phrases such as ‘politically

⁷ Charles Manga Fomba, ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects’ (2012) 59 *Buffalo Law Review* 5

⁸ Charles Manga Fomba, ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects’ (2012) 59 *Buffalo Law Review* 5

⁹ Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (2012) New York University School of Law Public Law and Legal Theory Research Paper Series Working Paper No. 10-87, 12 and Jorge Gonzalez-Jacome, ‘From Abusive Constitutionalism to Multilayered Understanding of Constitutionalism: Lessons from Latin America’ 15 *I. Con* 450

¹⁰ Albert HY Chen, ‘The Achievement of Constitutionalism in Asia: Moving Beyond “Constitutions without Constitutionalism”’ in Albert HY Chen (ed), *Constitutionalism in Asia in Early Twenty-First Century* (Cambridge University Press 2014) 5

enabling documents,’ ‘constitutions without constitutionalism,’ ‘façade constitutions,’ ‘trap constitutions,’ ‘nominal constitutions,’ and ‘abusive constitutionalism’ to aptly describe the phenomena.¹¹ In general, what all these phrases denote is that when seen from afar the constitutions look democratic and contain several elements of liberal constitutions that limit governmental power and foster democratic values. But viewed closely, one sees that such constitutions are crafted in a manner that undermines democratic values, allows for unchecked executive powers and serve the interests of the ruling and well-connected elite than the common good.

Such is the context of Zambia. Although the country has a constitution, there is hardly any spirit of constitutionalism as all organs of the state are captured by the executive. The well-being of the nation is largely dependent on the benevolence of the executive. This was succinctly stated by the African Peer Review Mechanism Country Report:

There is no real separation of powers between the principal branches of government and the executive is overly dominant, relatively unchecked and lacking accountability. The legislature is too weak and dominated by the executive for it to exercise effective oversight...the system of political patronage that permeates the entire organization of the government institutions renders all state institutions virtually beholden to the president.¹²

¹¹ See Albert HY Chen, ‘The Achievement of Constitutionalism in Asia: Moving Beyond “Constitutions without Constitutionalism”’ in Albert HY Chen (ed), *Constitutionalism in Asia in Early Twenty-First Century* (Cambridge University Press 2014) 12; Jorge Gonzalez-Jacome, ‘From Abusive Constitutionalism to Multilayered Understanding of Constitutionalism: Lessons from Latin America’ 15 *J. Con* 450; and David Landau, ‘Abusive Constitutionalism,’ (2013) *University of California* 191

¹² African Peer Review Mechanism, Country Report Republic of Zambia (APRM Secretariat 2013) para 4.2.11

What then is the relationship between constitutionalism, corruption and public debt? Corruption, as noted below, is the abuse of public resources for private gain. It is in a sense, the negation of common values and the common good and a manifest violation of the rule of law and constitutionalism. Chaskalson, then President of the South African Constitutional Court, stated the relationship between constitutionalism and corruption more eloquently:

Corruption and Maladministration are inconsistent with the rule of law...They undermine constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.¹³

This deleterious effect of corruption on constitutionalism and rule of law has been validated in recent studies indicating that corruption has a direct relationship on public debt. Separate research by Luigi Benfratello et al, Njangang Ndieupa and Eunji Kim et al has confirmed that corruption increases public debt.¹⁴ The Zambia situation discussed below seems to validate this finding as well.

Before proceeding to the next section it is necessary to dispose of somewhat popular views that suggest that Africans do not value democracy or constitutionalism or that there is no link between

¹³ *South African Association of Personal Injury Lawyers V. Health Willem Hendrik and Others Case CCT 27/00 (2000)*

¹⁴ Luigi Benfratello, Alfredo Del Monte and Luca Pennachio, 'Corruption and Public Debt: An Empirical Analysis,' University of Naples Working Paper, May 2015; Nyangang Ndieupa Henri, 'Impact of Corruption on Public Debt: Evidence from Sub-Saharan African Countries,' (2018) 8 *American Journal of Economics* 14-17; and Eunji Kim, Yoonhee Ha and Sangheon Kim, 'Public Debt Corruption and Sustainable Economic Growth' (2017) 9 *Sustainability*

constitutionalism and development. There are scholars arguing that no relationship exists between economic development on the one hand and democratic government on the other. Dambisa Moyo, for example, argues that democratic standards of transparency and accountability set out in good governance conditionalities are not a pre-requisite to African development.¹⁵ In fact, Moyo argues that democracy can hamper development in Africa and that an average Africa cares less about democratic freedoms than ‘about putting food on her table tonight.’¹⁶

These assertions by Moyo lack merit. Afrobarometer surveys have consistently demonstrated that the majority of Africans prefer democracy as opposed to other forms of government. The Afrobarometer survey of 2016, for example, found that 67 percent of African respondents stated that democracy is always preferable. Only 11 percent believed that non-democratic forms of government could be preferable in some instances.¹⁷

With regard to debt, Moyo strongly argues against African states receiving bilateral or multilateral aid, grants or concessionary loans, and considers that these have actually ‘hampered, stifled and retarded Africa’s development.’¹⁸ Instead Moyo urges African states to tap into ‘bonds issued in the commercial marketplace.’¹⁹ Moyo somehow thinks that because bonds issued in the commercial market have stringent requirements, with serious consequences for defaulting, African leaders would be forced to utilize money borrowed in this manner more responsibly than with aid funds. As the Zambian situation shows, this is grossly fallacious. Without effective oversight measures, transparency and accountability, public

¹⁵ Dambisa Moyo, *Dead Aid: Why Aid is Not Working and How there is Another Way for Africa* (Penguin books Ltd, 2009), 42

¹⁶ *Ibid*, 152

¹⁷ Robert Mattes and Michael Bratten, ‘Do Africans Still Want Democracy?’ Afrobarometer Policy Paper No. 36 (November 2016), 4

¹⁸ Dambisa Moyo, *Dead Aid: Why Aid is Not Working and How there is Another Way for Africa* (Penguin Books, 2009), 9.

¹⁹ Dambisa Moyo, *Dead Aid: Why Aid is Not Working and How there is Another Way for Africa* (Penguin Books, 2009), 77

resources, regardless of how or where they issued would be liable to abuse. The current Zambian regime, that has heavily borrowed on the commercial market but has abused debt funds, has demonstrated this beyond doubt, as discussed below.

III

Corruption in the Contraction and Management of Public Debt

There is no essay definition of corruption. The word ‘corruption’ is itself often used as an omnibus term to describe inordinate economic and political practices that benefit those involved.²⁰ When narrowly defined, it is often used to characterize the misuse of public resources by government officials for private ends,²¹ thus leaving out corruption in the private sector. The fact that the UN Convention Against Corruption (2003) and the AU Convention on Preventing and Combating Corruption (2003) do not attempt to thoroughly define corruption is illustrative of the challenge of crafting a widely acceptable definition.

However, unlike the UN and AU corruption Conventions, the SADC Protocol Against Corruption (2001) attempts a more comprehensive definition. It considers corruption as including ‘bribery and other behaviors in relation to persons entrusted with responsibilities in the public and private sectors... aimed at obtaining undue advantage of any kind for themselves and others.’²² The definition of corruption under the SADC Protocol is preferable as it readily covers corruption occurring in the context of acquiring and utilizing public debt in Zambia. The definition goes beyond the conventional definition of corruption as a misuse of public office for private ends, to include corruption in the private sector. This is important as corruption in the utilization of public debt in Zambia suggests massive collusion between the public officials and private entities.

²⁰ Inge Amundseu, ‘Political Corruption: An Introduction to the Issues’ Chri Michelseu Institutite Working Paper 1999/7, 1

²¹ Inge Amundseu, ‘Political Corruption: An Introduction to the Issues’ Chri Michelseu Institutite Working Paper 1999/7, 1

²² SADC Protocol Against Corruption 2001, article 1

This section has two parts. The first part discusses the harbingers of the current crisis, which should have sent signals about the vulnerability of the debt sector to looting by public officials. Had the signals been heeded and measures put in place to foster transparency and accountability, the current looming debt crisis could have been avoided. The second part discusses the current crisis, highlighting how corruption may have contributed to the looming debt crisis.

A. Harbingers of the Current Crisis

The area of contraction, management and servicing of public debt has been subject of corruption for a long time. What seems new is the scale and manner in which borrowed money is currently stolen and abused by officials. Past instances of this include the *Alstom*²³ and the *Donegal*²⁴ cases. In the *Alstom* case, Alstom in 2002 made an improper payments of Euros 110, 000 to a firm controlled by two former senior government officials in order to secure a World Bank funded power rehabilitation project in Zambia. This led to Alstom and its officiates being debarred for three years and having Alstom pay a restitution of us US\$ 9.5 million. With regard to *Donegal*, Donegal International Limited, a vulture fund, brought proceedings to claim debt of US \$ 55 million. Zambia owed Romania about US\$15million from a credit agreement concluded in 1979, which Donegal brought 1998 at US\$ 1.7 million and sought to enforce this in the British Courts. In 2003 Donegal and Zambia officials executed a settlement agreement under which the Zambia government accepted its indebtedness, agreed to commence payments and waived its state immunity. When Zambia defaulted and Donegal commenced legal action, the Zambia government sought to dismiss the action primarily on the grounds that the officials who facilitated the signing of the settlements agreements and the waiver of immunity had taken bribes from Donegal.

²³ World Bank, 'Enforcing Accountability: World Bank Debtors Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates,' World Bank Press Release No: 2012/282/INT (22 February, 2017); John Hatchard, 'Combating the Bribery of Foreign Public Officials and the Art of Persuasion: The Case of Alstom and the Energy Sector,' (2016) 28 *Denning Law Journal* 109-137

²⁴ *Donegal International Ltd. V. Republic of Zambia and another* [2007] EWHC 197

But perhaps the past case that better demonstrates how the public debt sector is vulnerable to corruption in Zambia is the case of former President Fredrick Chiluba.²⁵ Chiluba was President of Zambia from 1991 to 2001. From 1995 to 2001 the Ministry of Finance transferred large sums of money mainly into the Zamtrop account held by the Zambian government at the Zambia National Commercial Bank branch in London. The money was transferred for purposes of servicing or repaying the country's external debts. Chiluba and his senior officers including their Permanent Secretary in the Ministry of Finance and his intelligent chief, conspired to abuse these resources whereby most of the money transferred for debt servicing was diverted for personal use. This money was then laundered through Meer Care and Desai, a law firm, using its client accounts, whereby Zambia officials would subsequently instruct the law firm to release the funds to support personal expenses. The money laundered in this manner was then used to buy enormous amounts of expensive cloths, luxurious properties in Belgium and South Africa. The High Court in the UK found that through this mechanism the culprits defrauded the Zambia people and found them liable to pay back a total of US \$ 58 million.²⁶

In relation to Chiluba the London High Court had this to say:

At the end of the day he was the President at the top of the control of government finances. He was uniquely positioned to prevent any corruption. Instead of preventing corruption he actively participated in it and ensured it happened. It is difficult to find an adjective that adequately describes the failure on the part of F, TJ [Chiluba]. He has defrauded the Republic. He has deprived the people over whom he was

²⁵ *Attorney General of Zambia V. Meer Care and Desai (a firm) and others* [2007] EWHC 952 (ch). See also John Hatchard, *Combating Corruption: Legal Approached to Supporting Good Governance and Integrity in Africa* (Edward Elger publishing Limited, 2014), 34 and 189.

²⁶ *Ibid*

exercising stewardship on their behalf of huge sums of money which was supposed to be spent for their benefit. He has diverted those monies for wide ranging benefits of the Co-conspirators but has not shown restraint himself in the amount of money which he “plundered” from the government coffers. It is a shameful series of actions and he should be ashamed.²⁷

B. *The Current Looming Debt Crisis*

Public debt is the sum total of both public and publicly guaranteed debt, and includes both domestic and external debt.²⁸ The article, however, focuses on external debt or sovereign debt. Zambia qualified for the heavily indebted poor countries (HIPC) initiative December 2000.²⁹ It reached the HIPC initiative completion point in 2005, following which it received debt relief of about US \$ 6 billion. This saw the country’s external debt decline to 25 percent of GDP in 2005, from 104 percent. The GDP was also increasing at a much faster pace (8.9 percent) causing the debt - GDP rate to decline to 18.9 percent by 2010.³⁰ The government was cautious to accumulate burdensome public debt (especially external debt). Throughout 2007-2010 the debt buildup was slow and steady as the government remained cautious and ran only small fiscal deficits averaging 1.6 percent of GDP per year.³¹

Following the 2011 general elections, a new government, the Patriotic Front (PF), came into power and ostensibly dedicated to infrastructure development, threw all caution to the wind and

²⁷ Attorney General of Zambia V. Meer Care and Desai and other [2007] EWHC 952 (Ch), para 443

²⁸ AFRODAD, ‘An Overview of Domestic Debt in SADC: A Synthesis of Trends, Structure and Development’ (2014)

²⁹ AFRODAD, ‘The Loan Contraction Process in Africa, Making Locus Work for the Poor: The Case of Zambia’ (2013), 8

³⁰ The World Bank, ‘Zambia Economic Brief: How Zambia can Borrow Without Sorrow’ (10th Zambia Economic brief, December 2017), 26

³¹ Ibid

embarked on a project of massive borrowing to finance its ‘plans’. The accumulation of public debt expanded rapidly. In September 2012, Zambia issued its first ever sovereign bond in the international market, of US \$ 750 million, earmarked for transport and energy infrastructure development.³² This was followed in quick succession by the issuance of more Eurobonds, that is, in April 2014 for US\$ 1 billion and a second one in July 2015 for US \$ 1.25 billion.³³ These, together with other loans have pushed the country’s indebtedness to levels that may not be unsuitable

The World Bank in December 2017 estimated that the total public sector debt and publicly guaranteed debt was at 60.5 percent of GDP (US \$ 13 billion) at the end of 2016, from 15.6 percent in 2014. While the external debt stood at US \$ 8 billion.³⁴ The debt composition has also drastically changed, shifting significantly from concessional to non-concessional loans. The share of concessional loans dwindled from 60 percent in 2011 to 21 percent in 2016, while the share of loans from private banks and other investors increased to 50%, with the consequence that interest costs will increase and access to long term funding significantly reduced.³⁵ The IMF debt sustainability analysis of 2017 found that ‘Zambia faces a high risk of external debt distress, and heightened vulnerabilities on total public debt.’³⁶

The figures/ statistics of public debt by the IMF and World Bank are what the government publicly acknowledges. There are, however, fears that the government is hiding correct figures of debt, something that mirrors the Mozambique experience. In April 2018, Bloomberg published an article claiming that Zambia’s external debt was more

³² Michael Olabisi and Howard Smith, ‘“Sovereign Bond Issues: Do African Countries Pay More to Borrow?’ (2015)2 *Journal of African Trade* 88

³³ Michael Olabisi and Howard Smith, ‘“Sovereign Bond Issues: Do African Countries Pay More to Borrow?’ (2015)2 *Journal of African Trade*

³⁴ The World Bank, ‘Zambia Economic Brief: How Zambia Can Borrow Without Sorrow’ (10th Zambia Brief, December 2017), 22

³⁵ The World Bank, ‘Zambia Economic Brief: How Zambia Can Borrow Without Sorrow’ (10th Zambia Brief, December 2017), 22

³⁶ IMF, ‘Zambia Staff Report On the 2017 article IV Consultation – Debt Sustainability Analysis,’ September 2017.

than the US \$ 8.7 billion publicly acknowledged by the government.³⁷ The government was reportedly already seeking to restructure bilateral loans from China, estimated at about US \$ 5 billion.³⁸ Africa confidential, in a series of reports and detailed analysis has come to the conclusion that Zambia is hiding its debt, and stated that public debt was more than 100 percent of the GDP (Figures of external debt estimated at between US \$ 13 billion and US \$ 30 billion).³⁹

But where has all the money gone? What, if any, are the benefits to the ordinary people? Already statistics are indicating that debt servicing is consuming about 30 percent of the national budget. For a country that spends about 60% on official and public emoluments, this only leaves about 10 percent for social services and other expenses.⁴⁰ There is growing evidence that a substantial amount of funds from public debt has, through corruption, found its way into the pockets of government officials, often through kickbacks and inflated infrastructure contracts. This is in itself a double tragedy for the people as debt servicing has reduced the amount of money available for public service while the money from loans has largely gone into private pockets.

To get a better picture of the depth of the problem, it is important to look at the infrastructure sector, where most of the borrowed money is supposed to be invested. Once borrowed money started rolling in, the President moved the Road Development Agency

³⁷ Paul Wallace, 'Zambia's Bonds Plummet on Concern its Pulling a Mozambique,' (Bloomberg, April 9, 2018), <<http://www.bloomberg.com/news/articles/2018-04-09/Zambia-s-bonds-sink-on-concern-it-is-pulling-a-Mozambique-on-debt>> accessed April 10, 2018.

³⁸ Ibid. See also Mathew Hill, 'Zambia to Seek Restructuring of Debt to China after IMF Warning' (Bloomberg, February 13, 2018), <<https://www.bloomberg.com/news/articles/2018-02-13/zambia-to-see-restructuring-of-debt-to-china-after-imf-warning>> accessed May 1, 2018.

³⁹ 'Zambia: As the Debt Balloons, Lungu Avoids the Spotlight' Africa confidential April 2018, Vol 59, No 8.; 'Zambia: Stumbling into a Debt Crisis,' Africa confidential, December 2017, Vol. 59, No.25; 'Lungu's Costly Power Play,' Africa confidential January 2018, Vol.59, No.2; and 'Into the Valley of Debt' Africa Confidential, April 2018.

⁴⁰ 'Zambia: As the Debt Balloons, Lungu Avoids the Spotlight' Africa confidential April 2018, Vol 59, No 8.; 'Zambia: Stumbling into a Debt Crisis,' Africa confidential, December 2017, Vol. 59, No.25; 'Lungu's Costly Power Play,' Africa confidential January 2018, Vol.59, No.2; and 'Into the Valley of Debt' Africa Confidential, April 2018.

(RDA) the government entity responsible for transport infrastructure, from the Ministry responsible for transport and public works and placed it under his direct supervision at State House.⁴¹ The effect of this was to kill off transparency and accountability in the sector as the presidency is not easily accessible and not easily amenable to the scrutiny of oversight bodies, thus creating fertile ground for corruption to flourish with impunity.

The World Bank in December 2017 categorically stated that ‘unfortunately, when compared to the median cost of paving roads in the region, Zambia’s roads stand out as being very expensive,’ and that ‘the tragedy is not the recent rapid build-up of debt, but the lack of productive assets Zambia can show from the borrowing.’⁴² *Africa Confidential* in January 2018 reported: ‘A key reason behind the lack of certainty about the exact debt figures is that many of the loans that were contracted in 2016 and 2017 ended up in the pockets of individuals and cannot be accounted for.’⁴³ Similar sentiments were expressed by *The Economist*:

The government blames a fall in copper prices from 2011 [for the poor economic performance]. But the real reason is that Zambia is run by an inept and venal elite who used easy credit to line their own pockets. Much of the money Zambia borrowed was squandered or stolen. Big-wigs skimmed from worthy-sounding contracts.⁴⁴

⁴¹ ‘State Moves RDA to State House’ (Zambian Watchdog, September 20, 2018) <https://www.Zambianwatchdog.com./sate-moves-rda-to-start-house/> accessed May 2, 2018. See also ‘HH Condemns the transfer of RDA to State House,’ (Lusaka Times), <<https://www.lusakatimes.com/2012/09/23/hh-condemns-transfer-rda-state-house/66>> accessed May 2, 2018.

⁴² The World Bank Group, ‘Zambia Economic Brief: How Zambia can borrow without sorrow’ 10th Zambia brief December 2017)

⁴³ ‘Lungu’s Costly Power Play,’ *Africa Confidential*, January 2018, Vol. 59, No. 2

⁴⁴ *The Economist*, ‘Reckless in Lusaka: Zambia’s Looming Debt Crisis is a Warning for the Rest of Africa’ <<https://www.economist.com/leaders/2018/09/15/zambias-looming-debt-crisis-is-a-warning-for-the-rest-of-africa>> accessed 6 October 2018

Perhaps more damning and providing direct evidence of corruption is the Financial Intelligence Centre (FIC), an autonomous public institution created to investigate suspicious financial transactions. FIC, in its 2016 report, stated that over K3 billion (about US \$ 300 million) was received by public officials or their associates through kickbacks from public contracts.⁴⁵ In 2017, the FIC figures more than doubled. FIC reported that politically exposed persons received more than K6.3billion (US\$630million) in kickbacks mainly from the infrastructure contracts.⁴⁶ Considering that these are just figures for one year, and only capturing suspicious transactions through the formal banking system, one can safely conclude that what was reported is only the tip of an Iceberg. To underscore impurity, no investigation was initiated and no officials have been held accountable, rendering credence to the view that the thieving has the blessings of the state leadership, or what Michela Wrong has called ‘State House’s system of authorized looting.’⁴⁷

From all this a picture of lawlessness lack of transparency plus accountability and unbridled corruption seems to characterize the utilization of borrowed money in the infrastructure. Harry Kalaba, the former Minister of Foreign Affairs who resigned alleging grand corruption in government, depicted the situation more tellingly:

We are doing projects in this country, not because projects are important, but because somebody will get a Kickback..... our sustainable development is political sustainable development; it is politicians sustaining themselves....As a matter of fact, it is the contractors now who come with proposals for developmental projects

45 Financial Intelligence Center, ‘Money Laundering and Terrorist Financing Trends Report 2017’

46 Financial Intelligence center, ‘Money Laundering and Terrorist Financing Trends Report 2017,’ 10

47 Michela Wrong, *It’s Our Turn to Eat: The Story of a Kenyan Whistleblower* (Fourth Estate 2010)184

on behalf of the ministries, and government will allow the construction to go ahead depending on the bribe being offered, not the need for the project.⁴⁸

The picture of widespread corruption in the utilization of debt in the construction sector has been validated by a recent survey of key stakeholders in the construction sector and members of the community. The survey reported that 92 percent of stakeholders in the construction sector ‘admitted that corruption was a very serious problem and still high in the procurement process of construction projects,’⁴⁹ while 72 percent of community members surveyed indicated that corruption was ‘extremely common’ in the construction sector.⁵⁰

A recent audit of RDA by the Auditor General seems to equally validate the allegations of corruption, wastage and lawlessness in the construction sector. The audit report discovered numerous systematic shortcomings that suggest collusion between government officials and construction companies.⁵¹ They include: Systemic delays in engagement of supervising consultants for periods ranging from one to twelve months, resulting in projects being implemented without adequate supervision; most of the projects commenced without detailed road engineering designs; RDA procured works of the unconstrained budget as opposed to the approved budget by parliaments; there were inexplicable variations on several contracts ranging from 50 percent to 400 percent, which were beyond the allowed standard of 25%, and which significantly increased the cost and for which RDA never sought approval of the Attorney General; specifications were not adhered to leading to poor quality of works;

48 ‘Government Projects Inspired by Kickbacks, Not Necessity,’ (News Diggers, April 28, 2018), <http://diggers.news/opinion/2018/04/2018/04/28_govt_projects-inspired-by-kickbacks-not-necessity/> accessed May 2, 2018

49 University of Zambia, ‘Options for Reducing Corruption in Procurement: The Case of the Construction Sector in Zambia: Final Research Report’ (March 2018)

50 Ibid

51 Report of the Auditor General on the Road Projects under the Road Development Agency for the period January 2012 to December 2015 (February 2017)

and in many cases, the same contractor building the road was engaged to do detailed road designs for the same road.⁵²

The volume of these shortcomings suggests pre-meditation and not occasional lapses. The Auditor General for example, found that in 29 construction projects with an initial contract sum of K8, 011,422,391 (about us \$ 800 million) were procured and commenced without detailed designs.⁵³

The Auditor General Report movingly depicts the quality of the infrastructure as being of poor quality and not durable:

Samples of base course thickness did not meet the minimum specifications on selected roads. These were crumbled cores which were as a result of inadequate compaction. The surfacing of some sections of the roads were found to be peeling off. Drainage on selected roads in Lusaka were characterized by incomplete and abandoned works. Some road signs did not meet the required specification of refo-reflectivity. Surface irregularities were also observed on most roads, with seals. However, despite contractors not meeting specifications, all payments were made as per specifications in the contract resulting in overpayments, wasteful expenditure and lack of value for money.⁵⁴

Similarly, a parliamentary ‘inquiry’ that followed the Auditor General’s report, established that the infrastructure built was of poor

⁵² Report of the Auditor General on the Road Projects under the Road Development Agency for the period January 2012 to December 2015 (February 2017)

⁵³ Report of the Auditor General on the Road Projects under the Road Development Agency for the period January 2012 to December 2015 (February 2017) 18

⁵⁴ Report of the Auditor General on the Road Projects under the Road Development Agency for the period January 2012 to December 2015 (February 2017) 19

quality and did not reflect value for money.⁵⁵ The result is, ultimately, that Zambia has accumulated a huge mountain of debt on the pretext of infrastructure development, yet the very infrastructure being built is sub-standard, leaving the country heavily indebted and more impoverished.

Government's contempt for accountability is manifest in its response to the revelations and calls for accountability. When FIC reported the substantial amount of kickbacks received by government officials, the government responded by withholding funding to the entity.⁵⁶ And when the Auditor General exposed the abuse of resources in the construction sector, the government resorted to victimizing the Auditor General by launching an investigation into alleged 'irregularities' and 'lack of transparency' in the office of the Auditor General.⁵⁷ Perhaps more telling was the President's encouragement of senior government and ruling party officials to steal, but not to finish everything.⁵⁸

IV

Weaknesses in the Legal Framework

This section analyses legal weaknesses that may have enabled the current Zambian regime to prey on borrowed money with impunity. It is now widely accepted that sustainable development cannot be assured where there is no transparency and accountability over the utilization of public resources. A government that is transparent, accountable and respects human rights is more likely to foster inclusive and sustainable development. Without commitment to

⁵⁵ Report of the Public Accounts Committee on the Report of the Auditor General on the Road Projects Under the Road Development Agency for the Period January 2012 to December 2015 for the First Session of the Twelfth National Assembly

⁵⁶ Joseph Mwenda. 'Govt Withholds Salaries for FIC Employees' (News Diggers, January 17, 2018), <<https://diggers.news/local/2018/01/17/govt-withholds-salaries-for-fic-employees/>> accessed May 13, 2018

⁵⁷ 'Auditor General to be Probed' Daily Nation, May 16, 2018.

⁵⁸ Marilyn Rose, 'you can steal.....but tabatila kulya nembuto kumo – Lungu' (The Mast, February 12, 2018), <<http://www.themastonline.com/2018/02/12/you-can-stealbut-tabatila-kulya-nembuto-kumo-lungu>> accessed May 5, 2018

constitutionalism, public resources would routinely be lost through corruption and wastage. This realization was aptly stated by the World Bank in 1989:

Underlying the litany of Africa's development problem is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs...[Appropriate economic policies must] go hand-in-hand with good governance- a public service that is efficient, a judicial system that is reliable and an administration that is accountable to the public.⁵⁹

However, a well-crafted legal framework, starting with the national constitution, can significantly help foster transparency and accountability. This is not to argue that a good law is of itself sufficient to redress the problem. This is because the constitution, as the prime norm of the nation, offers an opportunity to enshrine fundamental aspirations and values that ought to underpin that society; these are the values that the people collectively desire to be governed by and by which they seek to discipline their government. In the words of Justice Ismail Mohammed, the national constitution is a 'mirror reflecting the national soul, the identification of the ideals and aspirations of a nation, the articulation of the values binding its people and disciplining its government.'⁶⁰

The IMF Guidelines for Public Debt Management⁶¹ and AFRODAD's Borrowing Charter⁶² provide minimum best practices national laws regulating the contraction and management of

⁵⁹ World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth (World Bank, 1989), 60

⁶⁰ State v Acheson 1991 (2) SA 805, p.813

⁶¹ IMF, Revised Guidelines for Public Debt Management (2014)

⁶² AFRODAD, Borrowing Charter: Principles and Guidelines on Sovereign Financial Borrowing by African Countries (2013)

public debt should contain. According to the IMF, the overriding objective of public debt management should be to ensure that ‘the government’s financing needs and its payment obligations are met at the lowest possible cost over the medium to long run, consistent with a prudent degree of risk.’⁶³ The key IMF guidelines on contraction and management of public debt can be reduced into three general principles.

First, the law should clearly allocate roles, responsibilities and objectives of government institutions, that is between the ministry of finance, the central bank and, where applicable, a debt management agency.⁶⁴ Further, the law should require public disclosure and access to the objectives for debt management, the costs and the risks.

Second, the law should require utmost disclosure of all material information relating to debt management operations. The legislature should be informed at least annually of the debt management operations and outcomes of the debt management strategy. The public too should regularly be informed on the outstanding stock and composition of public debt.⁶⁵ Thirdly, the law should require that debt management activities should be audited annually by external auditors. This audit should include subjecting Information Technology (IT) systems and risk control mechanisms to scrutiny. These measures should be in addition to regular internal audits of debt management activities, and of systems and control procedures.⁶⁶

The AFRODAD Borrowing Charter proposes, inter alia, the following best practices that should be enshrined in national laws regulating the contraction and management of public debt:

All public loans contraction and debt management rules and regulations must be anchored on constitutional provisions and other precise pieces of legislation defining

⁶³ IMF, 7

⁶⁴ IMF, 8

⁶⁵ IMF, 8

⁶⁶ IMF, 8

how public loans should be obtained, used and serviced. This should include the requirement that new loans should only be contracted within the context of the government's overall debt strategy and in line with stated national development plans; the law should clearly state the limits of external debt borrowing, which limit should be linked to the country's debt sustainability analysis; the law should require parliament or the legislature to approve all loans before the contracts are signed. In performing this role, parliament should have regard to the applicable law and the amounts being borrowed can be served within the national budget.⁶⁷

Measured against these standards, the Zambian legal framework, as shown below, manifests several weaknesses that would allow any predatory regime, like the current one, to siphon off borrowed money through corruption with impunity. Zambia's principal law relevant to the contraction and management of public debt is found in the national constitution, the Loans and Guarantees (Authorisation) Act Chapter 366 of the Laws of Zambia and the Public Finance Management Act No. 1 of 2018. The Zambian Constitution establishes the organs of the state, allocates their roles and powers and sets the norms by which the nation shall be governed. It is a superior norm by which the validity of subordinate legislation is measured. Therefore, the weaknesses of the constitution invariably affect subordinate legislation.

In order to understand the weaknesses of the Zambian constitution, it is important to appreciate the relationship between the principal organs of the state (the executive, legislature and judiciary). Under the Zambian constitution, the president (executive) dominates all organs of the state, including 'independent' oversight bodies.

⁶⁷ AFRODAD, 11

This entails that the institutions which ideally should be a check on the exercise of executive authority are themselves beholden to or captured by the executive, thereby creating a fertile ground for corruption, political patronage and a culture of political sycophancy. Although the constitution was extensively amended in 2016, this only served to enhance presidential powers than to reduce them.⁶⁸

When it comes to public debt regulation, the relevant part of the constitution is part XVI, which governs public finance and national budget. Article 202(2) of the constitution requires the minister of finance, when presenting the national budget, to specify the maximum limits the government intends to borrow in that financial year. The provision contemplates no role for the legislature as to either reject or vary the proposed amount to be borrowed, thereby vesting unchecked power over borrowing in the executive. Further, Article 202(4) categorically states that while the legislature may vary estimates of revenue and expenditure, it shall not amend the total amount of estimates of revenue and expenditure. The legislature, therefore, has no means of reducing the overall amount of borrowing the government may propose when presented as part of the overall budget estimates and expenditure.

Although article 63(2) of the constitution vests in the legislature power to approve all public debt before it is contracted, this is often side stepped by the executive, applying article 203(4) which empowers the president to incur expenditure, under warrant, outside of the budget and without first seeking parliamentary approval. Once the president has acted under this provision, the minister of finance is required to present the warrant to a relevant parliamentary committee ‘for approval.’⁶⁹ The provision does not contemplate parliamentary

⁶⁸ For example, article 174 of the 2016 constitution gives the president power to abolish Service Commissions, some of which have oversight responsibilities over the executive, while article 185(1) now gives the president power: ‘(a) to appoint and confirm public officers; (b) exercise disciplinary control over public officers; and (c) terminate the employment of public officers.’ Under such a law, public officers serve at the pleasure of the president and, therefore, very unlikely to help check on the excesses of the government.

⁶⁹ Constitution of Zambia 2016, article 203(5)

rejection of a presidential warrant. Its role is simply a formality of approving what is already a *fait accompli*.

Article 207 of the constitution empowers ‘government’ to raise loans or guarantee loans on behalf of public institutions. The use of the word ‘government’ is not helpful as it does not clarify in which institution has power to borrow and bind the state vests. This has proved problematic in Zambia. *Africa Confidential*, for example, in December 2017 reported that part of the reasons why the total debt figure for Zambia was unknown was because other ministers and government entities were contracting loans behind the back of the minister of finance.⁷⁰ In May 2018, *African Confidential* reported that President Lungu had personally signed some loans in suspicious circumstances, instead of the minister of finance.⁷¹

The constitution has no provision mandating public disclosure of debt. The minister of finance is simply required to report “debt repayments” in his annual report to parliament.⁷² There are no further specific mechanisms for public or parliamentary engagement over public debt management. Perhaps this explains why the government stopped issuing comprehensive public debt reports in 2012. Since then the whole country has been in the dark and is dependent on media leaks and World Bank and IMF reports. It can safely be concluded that the Zambian constitution completely lacks mechanisms that could help foster transparency and accountability in the contraction and management of public debt. This weakness is also manifest in subordinate legislation

The Loans and Guarantees (Authorisation) Act specifically deals with the contraction and management of public debt. Section 6 of the Act provides for raising loans and section 14 allows the minister to guarantee loans ‘if it appears to him necessary of expedient in public interest’ and to do so ‘on such terms and conditions as he may think fit.’ The provision sets no objective standards the minister should be

⁷⁰ *Africa confidential*, December 2017, Vol. 59, No.25

⁷¹ *African Confidential*, May 2018, Vol. 59, No.10

⁷² Constitution of Zambia 2016, article 211(4)(d)

guided by, not even the national development plans. The power is completely discretionary and open to abuse.

Section 15 of the Act governs the limit that can be placed upon the amount the government can guarantee. The section states that the amount the government can guarantee shall not exceed such amount as ‘the minister shall from time to time be authorized by resolution of the National Assembly to prescribe by statutory instrument.’⁷³ This effectively removes parliamentary oversight in setting the ceiling on government guarantees as the minister can vary the ceiling by statutory instrument. The same weakness relates to setting the ceiling for overall public debt. The Minister of Finance, for example, increased the debt ceiling in 2016 through a statutory instrument, from K60billion (US\$6billion) to K160billion (about US\$16billion), without recourse to parliament.⁷⁴ Moreover, section 26 of the Act vests the minister of finance with unilateral power, any time when the legislature is not in session, to contract any loan or give any guarantee. The only *safeguard* is that the minister must be authorized by the President. An executive which is desirous of avoiding parliamentary oversight would simply wait for the legislature to go on recess and act.

In April 2018 the Zambian parliament enacted the Public Finance and Management Act No 1 of 2018. The Act has mainly been a begrudging response to pressure from the IMF and World Bank to demonstrate that the government is prepared to enhance fiscal discipline in order to receive a concessionary loan to help deal with the current fiscal crisis. A careful look at the new statute, however, shows no serious attempt at creating a legal framework that would foster transparency and accountability in the public debt sector.

The new statute has no special focus on public debt. This cannot be a mere oversight considering the enormity of the current debt crisis, but signals lack of political will to redress the situation.

73 Loans and Guarantees (Authorisation) Act, section 15(1)

74 Alvin Chiinga, ‘Increasing Borrowing for Development- Kambwili’ (Zambia Daily Mail, February 27, 2016), <<https://www.daily-mail.co.zm/increased-borrowing-development-kambwili/>> accessed May 18, 2018

Section 26, which is the main provision dealing with public debt, simply purports to limit public entities and persons who may borrow or issue guarantees on behalf of the state. This, however, is subject to what is ‘authorized by the constitution’ or what is ‘authorized by the Loans, Grants and Guarantees (Authorisation) Act 2018,’ a statute that does not exist. But assuming the drafters were referring to the Loans and Guarantees (Authorisation) Act, this means the new Act simply preserves the status quo as it is subjecting its debt provisions to this Act. Nothing has changed.

V

Conclusion

The article has demonstrated the existence of corruption in the management of public debt. It would not be an exaggeration to state that the looming debt crisis has been facilitated by failure of constitutionalism. The ruling regime has not been transparent about public debt and has failed to account for the resources. The infrastructure that has been erected from the borrowed money has been over priced and of substandard. Substantial amounts of money have gone into the pockets of the rulers and those connected with them.

Part of the problem is the lack of an appropriate legal framework that would foster transparency and accountability. The current legal framework largely gives the executive unchecked discretion in the contraction and utilization of public resources. It is clear that in order to arrest the situation and ensure that a similar crisis never happens, the country needs to develop an appropriate legal framework that would foster transparency and accountability in the debt management sector. Although a good law is not enough to ensure a disciplined government, a good law is necessary to set acceptable standards of behavior and to hold erring leaders accountable. A good legal framework should clearly limit the discretion of the government in the management of public debt and provide enforceable mechanisms for holding accountable those who violate the set norms and limitations. The looming debt crisis, ultimately, is a failure of constitutionalism in Zambia.