



CFS Website: cfs.uonbi.ac.ke, Twitter: @CFS_UON

In further advancement of the greater work being done under the CFS- ADHR project, our Chair Ms. Lyla Latif participated as a guest speaker in the 13th Annual conference organised by **PAN AFRICAN LAWYERS UNION (PALU)** under the theme: **THE SOVEREIGN DEBT CRISIS IN AFRICA: THE ROLE OF THE LEGAL PROFESSION** held in Lusaka Zambia. Although the gathering started around the 1st, the actual date for the conference was the 6 to 7 of July 2023. Our Dr. Lyla presented her paper, **the Legal Foundations of the African Public Debt**-presented online.

The number of persons in attendance was in the thousands both physically and virtually.

Note: The methodology for this reporting is descriptive. Dr. Lyla’s presentation will be of key significance in this report. Overall, key action points will be bulleted at the end of this report. Enclosed to the report is the program for the conference and the paper presented by our Dr. Lyla Latif, Chair CFS.

Below is a cutout of the program showing Dr. Lyla’s time allocation for her presentation as highlighted in yellow

Venue	Zebra Hall	Lion Hall	Elephant & Giraffe Hall
Time	Stream 1 – Section on Business Law (SBL)	Stream 2 – Section on Legal Practice	Stream 3 – Section on Public Interest and Development Law (SPIDEL)
1000 - 1130	Arbitration: Recent Notable Developments	Women, the Law and Justice: scaling up the advocacy	Economic Law Master-Class, Session 1: The law around sovereign debt in Africa

	<p>Moderator: Adv. Ms. Ireen NAMBULE, Advocate, Howard & Marietta Legal Practitioners</p> <p>Panellists:</p> <ul style="list-style-type: none"> • Dr. Peter D. MAYNARD, President, Commonwealth Lawyers Association (CLA) • Hon. Mr. Justice RAO, Retired Justice of the Supreme Court of India • Adv. Mr. Franklin Cheluget KOSGEI, MCIArb 	<p><i>Sponsored by: the Legal Services Facility (LSF)</i></p> <p>Moderator: Mr. Alphonse, GURA, Senior Programme Officer, Legal Services Facility (LSF)</p> <p>Panellists:</p> <ul style="list-style-type: none"> • Adv. Ms. Linda KASONDE, Vice President for Africa, Commonwealth Lawyers Association (CLA); Founder, LCK Chambers • Adv. Ms. Adaobi EGBOKA, Africa Program Director, Cyrus R. Vance Center for International Justice, New York City (NYC) Bar Association • Ms. Lulu NG'WANAKILALA, Chief Executive Officer, Legal Services Facility (LSF) 	<p><i>Sponsored by: African Forum and Network on Debt and Development (AFRODAD)</i></p> <p>Moderator: Adv. Ms. Chioneso Samantha KANOYANGWA, Policy Assistant - Legal Analysis and Advocacy (LAAD), AFRODAD</p> <p>Main Presenter/ Principal: Dr. (Ms.) Lyla LATIF, Founder and Chief Executive Officer Lai'l Latif and Company (virtual)</p> <p>Respondents:</p> <ul style="list-style-type: none"> • Dr. (Mr.) Grieve CHELWA - Director of Research, Institute on Race, Power and Political Economy, The New School • Dr. (Mr.) Ohiocheoya OMIUNU Editor, Afronomicslaw.org, and Director of the Academic Forum of Afronomicslaw.org; Reader in International Economic Law, University of Kent Law School
--	--	--	--

Objectives of the conference:

The conference was organised to evaluate the position of debt in Africa and the place of lawyers in the debt campaign: To this end, the objectives were:

- to identify and stress the role of the legal profession in dealing with the public debt crisis;
- to train lawyers on the law around sovereign debt in Africa;
- to engage the law and enhance public interest litigation in matters of public debt and further train lawyers on litigation in local and sovereign debt issues;
- to train lawyers and give them an understanding of tax and law in Africa (tax being a major form of revenue that helps finance these debt repayments); and

- Establish linkages and generally networking to further conversations around the debt crisis and further run other campaigns for good debt management with accountability and transparency.

Day 6th July 2023

Opening remarks:

- The welcome remarks were made by among others the president of the host bar, the Law Association of Zambia, Adv. Mr. Lungisani Zulu. The Conference also received a keynote address by the Guest of Honour, the President of the Republic of Zambia, H.E. Mr. Hakainde Hichilema/or his representative.
- The Key on the theme of the conference was made by Prof. (Ms.) Attiya Waris, United Nations Independent Expert on Debt, International Financial Obligations, and Human Rights who stressed that:
 - Africa's debt crisis broadly speaking is a symptom of the failed economic and financial framework- trade, investments, tax, debt and financial financing.
 - Professionals must ask themselves who makes the rules governing their professional standards. It is not by choice that AFRODAD envisiobs Africa as a rule maker instead of a rule taker.
 - She further pointed out that debt restructuring agreements thar are in the pipeline compel the African governments to adopt the OECD guidelines on global tax reforms; which is contrary to the political resistance of African governments to an OECD-led global fora in the wake of the UN-led processes.
- Other discussants included Dr. (Mr.) Grieve Chelwa- Director of Research, Institute on race, power and political economy.

Key Points from Dr. Lyla's Presentation

The Legal Foundations of the African Public Debt- Lyla Latif (Dr.), Chair Committee on Fiscal Studies

Dr. Lyla's paper aims to address the challenges and opportunities associated with public debt in African economies and how they can be addressed through a comprehensive understanding of the historical emergence, legal foundations, theoretical dimensions, creation processes, rights and liabilities, and transparency mechanisms related to public debt. The paper and presentation scrutinized the genesis of public debt and the associated legal instruments in detail: From debt procurement, actors involved, contractual agreements, and the various debt instruments including bonds, treasury bills, notes, and sovereign loans, debt management amongst others.

- **Emergence of Public debt in African Economies:**

Dr. Lyla began with a reminder of the African Societies in the pre-colonial era. This she argues varied across different regions and communities in Africa but she noted that there were certain common features in these societies' practices on debt. Debt relationships were often reciprocal and

embedded within the broader social fabric of the community, debt was based on trust and reputation, personal relationships and social obligations, and repayment terms were based on the borrower's ability to fulfill their obligation rather than rigid timelines.

However, came colonialism, and its role can not be downplayed as it significantly disrupted pre-colonial debt practices. The European legal systems were imposed on colonised African states and new economic structures were built, and the monetisation of African states altered the dynamics of debt relationships. Public debt and colonial debt were intertwined and shaped by the economic and political dynamics of the colonial era. European colonial powers incurred substantial debts to finance their colonial ventures, including the establishment of administrative structures and the burden of repaying the debt fell on the colonised population. The inherited colonial debts became a significant burden for these countries as they faced the challenge of servicing the debt while trying to pursue their own development objectives. Thus the repayment of colonial debt and subsequent borrowing to meet development needs have contributed to the accumulation of public debt in African societies.

Effects of this colonial and capitalist constructs:

- Odious debt and the transfer of oppressive tax burden; she shared the case of Congo.
- It resulted in the extraction of resources within African states.
- Imposition of economic structures that favoured colonisers (prioritising the interest of creditors over the development needs and aspirations of African nations).
- Ultimately, development gaps and needs led most African countries to resort to external borrowing to meet their development needs.
- Monetary and fiscal policies implemented during these times played a crucial role in the ballooning of public debt levels i.e., the adoption of fixed exchange rate regimes, which aimed to maintain stability and facilitate international trade but these often created imbalances.
- The Structural Adjustments Programs (SAPs) as imposed by the financial institutions as conditions for loans and their negative effects in exacerbating social inequalities and further contributing to the accumulation of debt. The case for Ghana in the 1980s and 1990s.
- The accumulation of public debt in African economies, both during colonial rule and in the post-colonial period, has perpetuated economic dependency and reinforced the dominance of external actors.

Public debt under contract law

Dr. Lyla argues that fundamentally, public debt is a contractual phenomenon.

- A sovereign entity enters into agreements with creditors- either domestic or foreign- to borrow funds and the debt contracts are secured and enforced by law, set forth in the terms and conditions for borrowing, the rights and obligations of the parties, and the potential outcomes of potential default.
- She highlighted the principles of contract law: freedom to contract, good faith, certainty et al and argued them in the debt context. For instance, whilst sovereign nations have the freedom to contract, the freedom is often compromised by imbalances of power between the contracting states, and financial institutions amongst others.

- The concepts of interest (cost of borrowing) and profits (return sought by the creditor for providing capital) in borrowing and lending; exacerbate the challenges faced by borrowing nations. These lead to unsustainable debt burdens, limited fiscal space, and hinder social-economic development.
- Public debt contracts are negotiated behind closed doors and most times are quite technical and difficult for non-specialists to understand and the historical context should not be downplayed here.

The Legal Foundations of Debt

National law

- She stated that constitutional law and statutory legislation are the bedrock of public debt; for instance, the Constitution of Ethiopia under Article 43 (3) can subject debt contracts to scrutiny- all international agreements can be interpreted to refer to debt contracts.
- Statutory laws. These laws establish designated agencies and articulate measures for transparency and accountability in public debt administration. Nigeria's Fiscal Responsibility Act of 2001 & Debt Management Act of 2003, which establishes the debt management office, Kenya's Public Finance Act of 2012, and in Ghana, the Public Financial Management Act of 2016- outlines debt issuance procedures and repayment terms amongst other crucial positions.
- She argues however that the Management of Public debt in most African countries is often fragmented instead of being consolidated within a single integrated government debt management Act- this has far-reaching consequences and is risky as it impacts transparency, accountability, and effective debt management.

International/regional law

- In the context of transnational public debt transactions.
- Principles of international such as *pacta sunt servanda* (agreements must be kept), are applied to international debt agreements.
- Comprises a complex matrix of treaties, international guidelines, conventions, and informal arrangements that together constitutes a global governance framework for sovereign debt. In the African context, there are also regional economic communities, such as the West African Economic and Monetary Union (WAEMU) and the Central African Economic and Monetary Community (CEMAC), which have established convergence criteria that include limits on public debt. For instance, in the WAEMU, one of the convergence criteria is that public debt should not exceed 70% of GDP, Under the CEMAC's macroeconomic convergence framework, member states are required to maintain a public debt ratio below 70% of GDP while the East African Community (EAC) has a slightly more stringent debt limit of 50% of GDP in net present value terms. However, such treaties are largely binding only on the signatories and may not be universally applicable.
- UNCTAD developed principles on responsible sovereign lending and borrowing.
- Initiatives at the international level, like the Heavily Indebted Poor Countries (HIPC) Initiative by the World Bank have seen considerable amounts of countries' public debt forgiven.

- Dr. Lyla also noted the continental effort in framing regulatory aspects over public debt for Africa by AFRODAD’s borrowing charter- which sets out principles for responsible borrowing, guiding African governments in public debt management.

Theoretical Underpinnings

- Dr. Lyla uses the economic analysis using classical and neoclassical perspectives to emphasise fiscal discipline and efficiency and the Keynesian analysis which recognises the potential for public debt to stimulate economic growth and mitigate unemployment.
- She further uses a legal analysis particularly positive law which established the legal infrastructure for public debt encompassing the legal foundations as earlier alluded to. Through these legal provisions, she argues that governments are empowered to issue and manage public debt while safeguarding the interest of creditors and borrowers.
- The socio-legal approach recognises that public debt is embedded in broader social, political, and economic contexts.
- A human rights analysis which she argues is key in analysing public debt.
- Finally she draws an intersection between these theories in mitigating debt, which she argues helps us gain a comprehensive understanding of public debt and its socio-legal foundations. Though she warns that these may not fundamentally address the systemic issues related to debt accumulation, fiscal policies, and power dynamics that perpetuate economic inequalities and vulnerabilities.

The creation of public debt and its legal instruments is depicted in the diagram below as created by Dr. Lyla.



- The legal instruments are bonds, treasury bills, treasury notes, treasury bonds, and sovereign loans, and goes on to explain their distinct features.

Public debt management

- She also addressed the importance of effective management of debt which ultimately leads to macroeconomic stability and financial sustainability for countries. Analysing the instruments and structures guiding the debt management process and the efficacy of these instruments and structures.
- She also addresses the legal issues for creditors and borrowers in light of the increasing debt burden. The issue of public debt: non-disclosure and lack of transparency concerns.
- Using the Debt Transparency Monitor as developed by the USAID, she argues that the same evaluates the availability, completeness, and timeliness of public debt statistics and debt management documents posted on national authorities' websites.
- She also addressed the obstructions around debt transparency initiatives like the legal definition of public debt, delegation, and governance around debt which impedes transparency amongst others.

Concluding remarks and recommendations:

- Dr. Lyla giving a general recap of the paper stated that an issue of concern in public debt procurement is the lack of disclosure and transparency in negotiating and signing processes. This according to her leads to hidden debt, corruption, and mismanagement of public funds.
- She recommends a strengthening of legal frameworks, enhancement of transparency, and the need to promote responsible borrowing and debt management practices.
- Constitutional reforms, statutory reforms, debt management strategy reforms, coordination reforms, and independent debt management offices, address the challenges of sovereign debt and risk management, she recommended that the parties involved adopt more proactive measures to ensure responsible lending and borrowing practices.

Last Session: Proposals for future engagements (all participants)

Whilst the entire conference discussed a number of issues around debt including training of lawyers in this area, we found it particularly important to elaborate Dr. Lyla's paper which speaks to the law around debt. Understanding the law and apply in properly is everything.

Finally, the following proposals amongst others were made for future engagements:

- The role of the legal profession in dealing with the public debt crisis was agreed on and further emphasised
- The commitment to continue training lawyers on the law around sovereign debt in Africa and further creating awareness in these circles and above all among the populace.
- The Lawyers should use the law and enhance public interest litigation in matters of public debt and further train lawyers on litigation sovereign debt issues. Already precedence has been set in several countries. In Zimbabwe and Mozambique, courts have ruled in favour of citizens who have challenged unconstitutional debts and unfavourable clauses.
- To continue to train lawyers and give them an understanding in tax and law in Africa (tax being a major of revenue that helps finance these debt repayments) hence the linkage.

- Establish linkages and generally network to further conversations around the debt crisis and further run other campaigns for good debt management with accountability and transparency.

Prepared by:

The Rapporteur for the Conference



Joan A. Atim

Committee on Fiscal Studies, University of Nairobi