A socio-economic rights centred evaluation of Kenya's law and practice on sovereign debt acquisition, servicing and restructuring

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Abstract

This paper addresses Kenya's rising sovereign debt burden and its implications for socio-economic rights. Despite constitutional mandates to safeguard these rights, Kenya's debt accumulation and management practices seem to prioritise servicing obligations over citizen welfare. This study comprehensively analyses Kenya's debt landscape, specifically looking at: debt accumulation, the link between sovereign debt and socio-economic rights, the legal framework underpinning sovereign debt in Kenya and its flaws, and international best practices in dealing with sovereign debt. Through this, the study aims to inform decision-making for more equitable and sustainable debt management practices in Kenya, aligning with constitutional obligations and promoting the fulfilment of socio-economic rights. The insights in this paper are intended to form the groundwork for a socio-economic rights-centred approach to sovereign debt acquisition, servicing, and restructuring.

Keywords: sovereign debt, socio-economic rights, acquisition, servicing, and restructuring

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Introduction

In recent years, the question of Kenya's debt sustainability has emerged.[1] With it has arisen the question of the divergence between the states obligation to service its sovereign debt and its obligation to fulfil socio-economic rights. The Constitution of Kenya (2010) in Article 43 obligates the state to ensure protection and implementation of socio-economic rights.[2] However, in situations of a burgeoning debt burden, states undertake debt management practices to alleviate the situation.[3] Often, they do this through inventing new taxes, implementing fiscal consolidation, making budget cuts, or diverting (already scarce) national resources, all in disregard of socio-economic rights.[4]

Kenya's debt has over the past few years grown to include a complex mix of multilateral, commercial and domestic obligations. The International Monetary Fund (IMF) and World Bank debt distress models for Kenya have been in high-risk territory since 2020, despite its overall debt burden being deemed sustainable.[5] Under IMF pressure, Kenya included KES 3.4 trillion of parastatal and county loans in its national debt figures.[6] In response to the Corona Virus Disease (COVID-19), the Paris club granted Kenya a debt suspension agreement to mitigate economic and social impacts.[7] In April 2021, Kenya initiated a 38-month, $2.34 billion IMF programme, aimed at strengthening fiscal and debt management.[8]

1 Economist Intelligence, 'Kenya faces a potential debt repayment crunch in 2024', 28 March 2023; Peter Mburu, 'Weak shilling raises Kenya debt repayment', *Business Daily*, 5 December 2023.

2 Constitution of Kenya (2010) Article 43.

3 Ilias Bantekas and Cephas Lumina, 'Sovereign debt and human rights: An introduction' in Ilias Bantekas and Cephas Lumina (eds) *Sovereign debt and human rights*, Oxford University Press, 2018, 4.

4 Bantekas and Lumina, 'Sovereign debt and human rights', 4.

5 African Sovereign Debt Justice Network, 'Ninety fourth sovereign debt news update: Kenya breaches its debt ceiling, anchors its debt to GDP', *Afronomics Law,* 4 September 2023.

6 Otiato Ouguyu, 'Kenya bows to IMF pressure on public debt disclosure', *Business Daily*, 10 January 2021.

7 'Paris club agrees to debt relief for Kenya', *Economist Intelligence Unit,* 18 January 2021.

8 International Monetary Fund, 'IMF Executive Board approves US$2.34 billion ECF and EFF arrangements for Kenya', Press Release No 21/98, 2 April 2021.

As 2022 approached, tightening global financial conditions caused Kenya to cancel a planned $1 billion Eurobond issuance due to high yields, straining foreign exchange reserves causing currency depreciation.[9] This intensified mid-year when the United States (US) monetary tightening and the Russia-Ukraine War triggered a surge in yields on Kenya's active Eurobonds, forcing another cancellation of a $1 billion Eurobond and depleting reserves amid rapid shilling depreciation.[10] Kenya sought debt service suspension from China but, the extension was rejected.[11] A temporary reprieve came in 2021 when an IMF disbursement boosted foreign exchange reserves, but economic pressures persisted.[12]

In 2023, the shilling's slide continued, stoking inflation and increasing debt servicing costs.[13] Throughout 2023, dwindling foreign exchange reserves prompted Kenya to seek financing from the World Bank, IMF programmes, and syndicated loans.[14] However, foreign exchange erosion persisted, posing long-term risks. Rising inflation in early 2023 compelled interest rate hikes. In March, Kenya issued an oversubscribed seven-year infrastructure bond at climbing interest rates as domestic debt took greater importance for budget financing amidst efforts to extend debt maturities.[15] To cope, Kenya scrapped its statutory debt limit for a GDP-based anchor.[16]

By June 2024, Kenya's domestic debt had risen to KES 5.41 trillion, a 5.8% increase from KES 4.832 trillion in June 2023. New local borrowings reached KES 577 billion, up from KES 545.2 billion the previous

9 'Kenya faces a potential debt repayment crunch in 2024', *Economist Intelligence Unit*.

10 'Kenya faces a potential debt repayment crunch in 2024', *Economist Intelligence Unit*.

11 Fergus Kell, 'Kenya's debt struggles go far deeper than Chinese loans', *Chatham House*, 31 May 2023.

12 World Bank Group, 'Kenya receives $750 million boost for COVID-19 recovery efforts', Press Release No 2021/158/AFR, 11 June 2021.

13 'Weak shilling raises Kenya debt repayment', *Business Daily*.

14 'Weak shilling raises Kenya debt repayment', *Business Daily*.

15 Kepha Muiruri, 'Seven-year infrastructure bond oversubscription eases cash jitters', *Business Daily*, 16 June 2023.

16 African Sovereign Debt Justice Network, 'Ninety fourth sovereign debt news update: Kenya breaches its debt ceiling, anchors its debt to GDP'.

year.[17] A critical factor was the looming $2 billion Eurobond repayment due in June 2024.[18] This mix of debt types has led to a complex situation where Kenya balances the benefits and drawbacks of each.

Effects of Kenya's recent debt accumulation

Between February and July 2022, overall inflation went up from 5.08% to 8.3%, while food inflation spiked even higher from 8.69% to 15.3%. The causes included rising global commodity prices, currency depreciation, and tax hikes aimed at reducing fiscal deficits.[19] This surge in food prices severely impacted the right to food security and freedom from hunger, especially for Kenya's poor and vulnerable populations.[20] Consequently, the right to education and health were also undermined.[21]

When President William Ruto's administration took over in August 2022 amid the pandemic's economic aftermath and global supply shocks, urgent liquidity needs prompted austerity measures.[22] These included slashing subsidies,[23] overhauling higher education funding,[24] and drastically increasing taxation through the 2023/24 Finance Bill.[25] This liquidity push aimed to service the mounting debt burden, espe-

17 Kabui Mwangi, 'Kenya's domestic debt up by Sh577bn in a year', *Nation*, Thursday 11 July 2024.

18 African Sovereign Debt Justice Network, 'Ninety fourth sovereign debt news update: Kenya breaches its debt ceiling, anchors its debt to GDP'.

19 Kenya National Bureau of Statistics, 'Consumer price indices and inflation rates', February to July 2022.

20 Francis Omondi and Perez A Onono-Okelo, 'Impact of debt servicing on social spending and wellbeing of low-income household in Kenya', Oxfam in Kenya, 24 March 2022.

21 Omondi and Onono-Okelo, 'Impact of debt servicing on social spending and wellbeing of low-income household in Kenya'.

22 Evelyne Musambi and Charles Gitonga, 'William Ruto: New Kenya president's bold move to scrap subsidies', *BBC News Nairobi,* 15 September 2022.

23 Musambi and Gitonga, 'William Ruto: New Kenya president's bold move to scrap subsidies'.

24 James Mbaka, 'Explainer: How new higher education funding model will work', *The Star,* 31 July 2023.

25 Charles Jaika Magotzwi, 'The Finance Bill of Kenya 2023 and its implications on financial inclusion,' *ICJ Kenya,* 6 June 2023.

cially the looming 2024 Eurobond maturity.[26] One of the most impactful tax measures was the introduction of a 16% VAT on fuel products like cooking gas, kerosene and petrol in 2023.[27] This pushed up prices of essential commodities even higher, deepening inequality and poverty while reducing economic activity – burdening many Kenyans who rely heavily on these fuel products.[28] Theoretically, revenues from projects funded by debt should service that debt. However, in reality the Kenyan government has shifted the debt servicing burden to taxpayers through fiscal consolidation measures aimed at raising more annual revenues.[29]

The 2024/2025 Finance Bill raised the measures introduced in the 2023/24 Finance Bill by several orders of magnitude. The proposed budget prioritised paying external creditors, accruing to a total KES 5.1 billion in interest and capital while spending less than 5% per person than it did in the year 2015.[30] The government would have spent more on sovereign debt interest payments than it would on education, childhood nutrition, clean drinking water and health.[31]

In June 2024, protests erupted against financial austerity measures imposed by the Finance Bill, 2024. On 25 June 2024, the protest was met with a heavily militarised response, with scores dying in the aftermath and in other instance since. This protest was also marked with abductions and disappearances, extra judicial killings, internet shutdowns, and threats of shutting down television stations covering the protest.

The first section of the paper is the general introduction to orient the reader in the magnitude and implications of the debt problem. Thereafter, this paper lays the analytical foundation by examining the relation-

26 'Kenya faces a potential debt repayment crunch in 2024', *Economist Intelligence Unit*.

27 Kepha Muiruri, 'How 16pc fuel tax will hit households, motorists from July', *Business Daily*, 22 June 2023.

28 Muiruri, 'How 16pc fuel tax will hit households, motorists from July'.

29 Musambi and Gitonga, 'William Ruto: New Kenya president's bold move to scrap subsidies'.

30 James Thuo Gathii, 'Alternatives to Kenya's austerity and the militarised response to the Gen Z revolution', *Afronomicslaw,* 26 June 2024.

31 Gathii, 'Alternatives to Kenya's austerity and the militarised response to the Gen Z revolution'.

ship between sovereign debt and socio-economic rights in Kenya. Building on this conceptual base, I will evaluate the effectiveness of Kenya's existing legal framework in safeguarding socio-economic rights amidst rising sovereign debt levels, pinpointing gaps that enable or contribute to violations. To gain further insights, the following section will conduct a comparative analysis of debt management best practices across other countries, aiming to identify lessons that could improve Kenya's approach to balancing debt obligations with socio-economic rights protection. Finally, the last section synthesises the key findings and conclusions from the preceding analysis into actionable recommendations for legal, policy, and institutional reforms to better harmonise Kenya's sovereign debt strategies with its socio-economic rights commitments under the Constitution of Kenya 2010.

Why socio-economic rights?

This section showcases the link between the two concepts; sovereign debt and socio-economic rights and, why a socio-economic rights centred move towards curtailing the ease (and resulting flagrancy) with which the state can acquire and service its sovereign debt is necessary. There is general acceptance of human rights as inalienable fundamental entitlements that stem from the inherent dignity of every person by virtue of being human.[32] The Constitution of Kenya 2010 echoes this sentiment in stating that:

> The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.[33]

The choice of socio-economic rights as an analytical lens is chosen based on this paradigm and the idea that actions that damage the inherent dignity of human beings are a violation of their rights. As a class of

[32] Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A (III), Preamble, para 1.

[33] Constitution of Kenya (2010) Article 19(2).

rights, socio-economic rights generally tend to require relatively greater resource consumption in realising their fulfilment. Therefore, actions that impede resource flow towards their realisation have a massively larger impact on their realisation than other rights.[34] If we think of sovereign debt simply as deferred taxation, then the link and the arising problem become clear.[35] The way sovereign debt is acquired, managed, and repaid can directly divert the resources available for essential (tax funded) services such as healthcare, education, housing, and disaster relief.[36]

Another dimension of consideration that has led to the choice of socio-economic rights is the question of the 'sovereign' in sovereign debt. This question is particularly important because the questions of legitimacy and moral orientation of debtors is a core facet of international sovereign debt adjudication.[37] Simply set, if the state takes on sovereign debt in a manner non-conforming to its constitution, then is the debt legitimate?

The Constitution of Kenya (2010) explicitly states that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.[38] It follows thus, that when the intended beneficiaries of debt (the citizens of Kenya) are placed at a disadvantage by the practices of the state then they have a right to cry foul.

The link between socio-economic rights and sovereign debt in the laws of Kenya

The Constitution of Kenya (2010) enshrines socio-economic rights under Article 43, including rights to health care, housing, food, water,

34 Muhammad Bello, 'The place of socio-economic rights in sovereign debt governance', Unpublished PhD Thesis, University of the Free State, March 2020, 10.
35 Bello, 'The place of socio-economic rights in sovereign debt governance', 10.
36 Bello, 'The place of socio-economic rights in sovereign debt governance', 10.
37 Bello, 'The place of socio-economic rights in sovereign debt governance', 10.
38 Constitution of Kenya (2010) Article 1(1).

social security and education.[39] The state is obligated to take measures to progressively realise these rights.[40] This directly links the realisation of these rights not just to the state's available budgetary resources, but to the prioritisation of their funding. The Constitution's socio-economic rights provisions directly link their realisation to reasonable and justifiable allocation of state resources. However, rising public debt and debt servicing costs restrict the budgetary resources available for implementing these rights as legally required.

The Public Finance Management (PFMA) Act, 2012 regulates public debt management. Section 49 requires the National Treasury to ensure public debt remains sustainable, with adherence to the fiscal responsibility principles and the financial objectives set out in the most recent Budget Policy Statement; and the debt management strategy of the national government over the medium term.[41]

As earlier mentioned, the government has a legal obligation to take reasonable measures, within its available resources, to realise socio-economic rights.[42] Naturally, in the context of sovereign debt, the government should ensure that its borrowing decisions, management practices and strategies do not diminish the state's ability to fulfil its socio-economic rights obligations.[43] It follows that excessive or mismanaged sovereign debt can directly impact the government's ability to allocate resources for the realisation of socio-economic rights.

The question of progressive realisation

Although the Constitution of Kenya (2010) under Article 43 lists the socio-economic rights that every person in Kenya is entitled to, it

39 Constitution of Kenya (2010) Article 43.

40 Constitution of Kenya (2010) Article 21(2); *Mitu-Bell Welfare Society v Kenya Airports Authority and 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*, Petition 3 of 2018, Judgement of the Supreme Court at Nairobi, 11 January 2021 [eKLR] para 15.

41 Public Finance Management Act (No 17 of 2022) Section 49.

42 Constitution of Kenya (2010) Article 43.

43 Bello, 'The place of socio-economic rights in sovereign debt governance', 10.

does not set out the implementation framework that is required for the realisation of these rights. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is therefore instrumental as it obligates State Parties to undertake steps both individually and with international assistance, particularly economic and technical, using their maximum available resources to progressively achieve full realisation.[44]

On its face, the concept of progressive realisation allows the state to decide, at will, the measures and the extent to which it will endeavour to fulfil its socio-economic rights obligations. However, on the issue of progressive realisation, General Comment 3 states that:

> It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for states parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[45]

From the above passage we can also glean an implicit negative obligation not to take action that impedes the realisation of socio-economic rights. It follows, thus that even the concept of progressive realisation cannot be used in defence of (even sovereign debt based) actions that would impede the expeditious and effective movement towards the fulfilment of socio-economic rights.

The Committee on Economic, Social and Cultural Rights has through its General Comment No 3 reiterated the minimum core obligation of all states parties to ensure the satisfaction of, at the very least, minimum levels of each of the rights.[46] Therefore, Kenya has an immediate obligation to realise the minimum levels of these socio-econom-

44 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993, Article 2(1).

45 UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 3: The Nature of State Parties' Obligations (Article 2 Paragraph 1 of the Covenant) 14 December 1990, E/1991/23, CESCR, para 9.

46 General Comment 3, CESCR, para 10.

ic rights.[47] In the context of sovereign debt, this means the acquisition, servicing and restructuring of sovereign debt in a manner that would impede the realisation of socio-economic rights can be considered a violation of the state's obligations in Article 43.

The United Nations Guiding Principles on Foreign Debt and Human Rights explicitly emphasise the importance of progressive realisation stating that, states are required to take steps to progressively realise human rights, which include ensuring that their foreign debt obligations do not hinder this process.[48] When addressing debt, states should prioritise the fulfilment of human rights ensuring that budgetary resources are allocated in a way that promotes the progressive realisation of these rights.[49]

In essence, using socio-economic rights as an analytical lens highlights the critical relationship between sovereign debt management and the state's obligations to its citizens. Socio-economic rights which demand significant resource allocation, provide a valuable framework for assessing how borrowing decisions affect the well-being of the population. This perspective underscores that debt mismanagement or excessive borrowing can undermine the state's ability to meet its constitutional and international obligations, particularly to marginalised and vulnerable groups. A socio-economic rights-based analysis reveals that sovereign debt management is not merely a fiscal issue, but one deeply intertwined with human well-being.

Problems arising within the Kenyan sovereign debt framework and their effect on the realisation of socio-economic rights

As outlined in the previous section, sovereign debt can have profound implications for the realisation of socio-economic rights and

47 Attiya Warris, 'Financing the progressive realization of socio-economic rights in Kenya', 8(1) *University of Nairobi Law Journal* (2015) 17.

48 United Nations Guiding Principles on Foreign Debt and Human Rights, June 2012, A/HRC/20/23, Annex, para 15.

49 United Nations Guiding Principles on Foreign Debt and Human Rights, Annex, para 16.

sustainable development. The legal and institutional frameworks governing sovereign debt acquisition, management and restructuring play a pivotal role in shaping these outcomes. The current creditor-biased international paradigm has largely rejected proposals for a statutory sovereign debt framework, forcing indebted nations into a dilemma of simultaneously satisfying conflicting obligations.[50] This paradigm has persistently ignored interests outside the bilateral creditor-debtor matrix, including those of debtors' citizens.[51] Meanwhile, the internationalisation of regulatory institutions and complex regional integration has blurred the traditional relationship between states and their citizens.[52]

This section is structured to provide a comprehensive analysis of the problems, that are prevalent within the Kenyan legal and institutional framework pertaining to sovereign debt. It systematically examines the three key phases of the sovereign debt cycle: acquisition, management or servicing and restructuring. For each phase, the section outlines the relevant laws and policies governing that aspect of sovereign debt in Kenya. It then identifies and critically examines the specific problems and challenges that arise within the existing legal framework, highlighting how these issues adversely impact the realisation of socio-economic rights.

Acquisition of debt

The Constitution of Kenya (2010) requires the state to promote an equitable society through fair sharing of the burden of taxation and use of expenditure to promote equitable development of the nation,[53] as well as ensuring that financial management shall be responsible, and fiscal reporting clear.[54] Simply put the state is obligated to ensure that it does not unduly disadvantage its people when carrying out any

50 Bello, 'The place of socio-economic rights in sovereign debt governance', 9.

51 Bello, 'The place of socio-economic rights in sovereign debt governance', 9.

52 Bello, 'The place of socio-economic rights in sovereign debt governance', 44.

53 Constitution of Kenya (2010) Article 201(b).

54 Constitution of Kenya (2010) Article 201(e).

activities involving public finance, naturally including sovereign debt acquisition.

In accordance with the Public Finance Management Act (PFMA), the Cabinet Secretary in charge of finance is accorded authority to raise the loans from within and outside Kenya on behalf of the national government.[55] The PFMA further obligates the national government to ensure that its financing needs and payment obligations are met at the lowest possible cost in the market which is consistent with a prudent degree of risk, while ensuring that the overall level of public debt is sustainable.[56]

The Public Debt and Borrowing Policy exists to provide a strong accountability framework in the borrowing and management of the public debt portfolio.[57] The policy provides the purposes for which government may borrow, including financing government budget deficits, refinancing and pre-financing existing debts.[58] The policy states that in deciding whether or not to contract new debt, the government should consider firstly, the level of the existing public debt and secondly, the potential cost and risk of new debt against the fiscal space and the economy of the state.[59] This encompasses an analysis of the solvency indicators like debt to GDP ratio and debt service to revenue and exports.[60]

Further, to manage the cost and the risk, the policy requires the borrowing decision to be informed of the creditor's concentration specifically, repayment terms and the currency of the contract.[61] The Government is also obligated to resort to short-term borrowing to manage temporary cash flow and long-term borrowing for capital or developing expenditure to ensure that the benefits accrued to the project may repay the debt.[62]

55 Public Finance Management Act (No 18 of 2012) Section 49.
56 Public Finance Management Act (No 18 of 2012) Section 50(1).
57 Public Debt and Borrowing Policy (2020) 1.1(2).
58 Public Debt and Borrowing Policy (2020) 4.1.
59 Public Debt and Borrowing Policy (2020) 4.2.
60 Public Debt and Borrowing Policy (2020) 4.3.
61 Public Debt and Borrowing Policy (2020) 4.3
62 Public Debt and Borrowing Policy (2020) 4.3.

Problems arising from acquisition of debt and their effect on socio-economic rights

Accountability and contractual transparency deficiencies

The Public Debt and Borrowing Policy reiterates the principles of public finance in the Constitution, applying them to the context of sovereign debt.[63] One principle that has suffered considerable disregard is the need for openness and accountability in the borrowing and management of public debt.[64] This position is based on the opaqueness and lack of contractual transparency manifested in Kenya's debt acquisition. Contractual transparency refers to the openness and availability of information in the contractual relations between a government and other entities.[65] In practical terms, it translates into greater availability of contractual terms, open publication of data related to government contracts, and informational disclosure during processes such as procurement.[66] In our context, this necessitates the disclosure and open publication of data on debt funded projects, aid and bonds.

The manifest disregard for these tenets of openness and accountability is displayed most explicitly in the Standard Gauge Railway (SGR) project. Over the last two decades, and mostly through the Chinese Export-Import Bank (China EXIM Bank), China has financed numerous infrastructural projects in Africa, with Chinese companies being awarded most of the contracts.[67] The most significant of these is Kenya's Standard Gauge Railway, awarded to the China Road and Bridge Corporation (CRBC). With the first phase alone estimated to cost around $3.6 billion,

63 Public Debt and Borrowing Policy (2020) 3.2.

64 Public Debt and Borrowing Policy (2020) 3.2(a).

65 Khalil Badbess and Cecil Abungu, 'The normative and constitutional requirements of contractual transparency: Reflections of Kenya's infrastructure projects with China and the United States of America', 6 *Kabarak Journal of Law and Ethics* (2022) 139.

66 Badbess and Abungu, 'The normative and constitutional requirements of contractual transparency: Reflections of Kenya's infrastructure projects with China and the United States of America', 139.

67 Badbess, and Abungu, 'The normative and constitutional requirements of contractual transparency: Reflections of Kenya's infrastructure projects with China and the United States of America', 139.

it is considered to be largest infrastructural project since Kenya's independence.[68] Yet, little is known about the details of this mega-project, raising concerns about contractual transparency.[69]

In 2019, the High Court ordered the government to provide the contract details to a civil society organisation, but the directive was defied, prompting the organisation to institute contempt of court proceedings against relevant government officials.[70] The idea of transparency is stressed numerous times in Kenya's Constitution and is listed as a national value that binds all state organs, state officers, public officers, and all persons in Kenya whenever they apply or interpret the Constitution. There is also an explicit constitutional requirement for public participation and access to information held by the state.[71]

Failure to manage the debt ceiling

The Public Finance Management Act (PFMA) grants Parliament the authority to set a public debt ceiling, which can be reviewed periodically.[72] Since borrowing is restricted by the debt ceiling set by the National Assembly, the National Treasury may request the National Assembly to review the debt ceiling to permit additional borrowing.[73] On 26 May 2022, the then Treasury Cabinet Secretary, published a legal gazette notice to amend Section 26 of the PFMA, 2015, raising the debt ceiling to KES 10 trillion.[74] This amendment came barely three years after the ceiling had been increased from KES 6 trillion to KES 9 trillion in

68 Railway Technology, 'Mombasa-Nairobi Standard Gauge Railway Project', *Railway Technology*, 17 January 2025.

69 Badbess, and Abungu, 'The normative and constitutional requirements of contractual transparency: Reflections of Kenya's infrastructure projects with China and the United States of America', 140.

70 Philip Muyanga, 'Court orders state to disclose secret Sh450bn SGR contract', *Business Daily*, 13 May 2022. See, *Khelef Khalifa and another v CS Transport and others*, Petition E032 of 2021, Judgement of the High Court at Mombasa, 13 May 2022 [eKLR] para 95.

71 Constitution of Kenya (2010) Article 10.

72 Public Finance Management Act (No 18 of 2012) Section 50(1).

73 Public Finance Management Act (No 18 of 2012) Section 50(1).

74 Public Finance Management (National Government) (Amendment) Regulations (2022) Section 2.

October 2019.[75] The then Leader of Majority, Amos Kimunya, initiated the debate on adjusting the debt ceiling, citing the 2022/2023 budget deficit as the reason for the change. The debt cap was raised again on 7 June 2022.[76]

The rapid increase in the public debt ceiling is manifestly problematic. Most evident is the fact that an easily adjustable debt limit is as good as no limit at all. This is showcased by the fact that, as shown above, the river of Kenya's debt has repeatedly burst its banks. Without a hard limit, the state is wont to forget that a higher level of public debt necessitates increased debt servicing costs, leading to reduced fiscal space for essential public services such as healthcare, education, and social protection.[77] The National Treasury has been submitting bloated supplementary budgets with higher deficit gaps during the implementation stage of every fiscal year.[78] It employs a technique of submitting these revised budgets towards the close of the financial year. A notable example is the Supplementary Estimates III in FY 2019/2020, which was submitted to the National Assembly merely seven days before the end of the financial year and allowed to sail through despite glaring legal shortfalls.[79]

Debt management and servicing

The National Treasury, in accordance with the Constitution of Kenya (2010) is given the responsibility of controlling the amount and makeup of the country's public debt as well as overseeing the Consolidated Fund.[80] The Public Financial Management Act of 2012 (PFMA) mandates the national treasury to ensure that the public debt is kept at a

75 Edwin Mutai, 'MPs increase debt ceiling to Sh10 trillion', *Business Daily,* June 2022.

76 National Assembly, 'Hansard Report', 7 June 2022, 12; Mutai, 'MPs increase debt ceiling to Sh10 trillion'.

77 Mutai, 'MPs increase debt ceiling to Sh10 trillion'.

78 National Democratic Institute for International Affairs, 'The role of parliament in public debt oversight in Kenya', NDI Program Reports, July 2022, 19.

79 National Democratic Institute for International Affairs, 'The role of parliament in public debt oversight in Kenya', 19.

80 Constitution of Kenya (2010) Article 225.

level that can be sustained and that has been approved by parliament.[81] The Act also mandates the National Treasury to establish a framework for sustainable debt management and encourage openness, efficient management and accountability with regard to public finances, serving as the entity responsible for enforcing the principles of fiscal responsibility.[82] The Act places emphasis on the National Assembly's oversight role of ensuring that debt management is conducted in accordance with the established legal framework.[83]

Another notable instrument is the government Medium Term Debt Strategy (MTDS). The MTDS is presented to parliament as part of the budget documents by the Cabinet Secretary for Finance.[84] The principal objective of the Kenyan government debt management strategy is to meet the national government's financing requirements at the least cost with a prudent degree of risk. The secondary objective of the strategy is to facilitate the government's access to financial markets and support development of a well-functioning vibrant domestic debt market.[85] The strategy seeks to balance the cost and risk of public debt while taking into account the central government's financing needs. In addition, the strategy incorporates initiatives to develop the domestic debt market, seek new funding sources, support macro-economic stability and achieve debt sustainability.[86]

Problems arising from debt management or servicing and their effect on socio-economic rights

Disregard for meaningful public participation

The Constitution of Kenya (2010) specifically includes participation of the people as a national value and principle of governance.[87] Public

[81] Public Finance Management Act (No 18 of 2012) Section 15.
[82] Public Finance Management Act (No 18 of 2012) Section 15.
[83] Public Finance Management Act (No 18 of 2012) Section 50(3).
[84] Public Finance Management Act (No 18 of 2012) Section 33.
[85] Republic of Kenya, Debt and Borrowing Policy (2020) 21.
[86] Republic of Kenya, Debt and Borrowing Policy (2020) 21.
[87] Constitution of Kenya (2010) Article 10(2)(a).

participation extends beyond mere consultation or information sharing. In *Robert N Gakuru and others v Governor Kiambu County and 3 others*, the Court was expressly clear in stating that:

> Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.[88]

Failure to allow for meaningful participation in this context is exemplified by the actions taken in 2019 by the then Transport Cabinet Secretary, James Macharia, who issued a directive mandating that all cargo handled at the Mombasa port be transported exclusively through the Standard Gauge Railway (SGR).[89] This does not seem at face value, to be a sovereign-debt issue. However, a deeper analysis shows the reasoning behind these actions. SGR was a debt funded by a Public Private Partnership (PPP) and upon completion, it came time to pay back the outstanding dues.[90] This is hardly an off-chance occurrence but rather the occurrence of what is termed as 'the cost of PPPs.'[91] A study commissioned by the County Government of Mombasa revealed that over 10,000 jobs were at stake.[92]

The possibility of losing these jobs threatened the right of Mombasa residents to the highest attainable economic and social standards, as guaranteed under Article 43(1) of the Constitution. Furthermore, the directive violated Article 6 of the International Covenant on Econom-

88 *Robert N Gakuru and others v Governor Kiambu County and 3 others,* Petition No 532 of 2013 Consolidated with Petitions No 12 of 2014, 35, 36 of 2014, 42 of 2014 and 72 of 2014 and Judicial Review Miscellaneous Application No 61 of 2014, Judgement of the High Court of Kenya at Nairobi, 17 April 2014 [eKLR] para 75.

89 Gitogo Wandiri, 'All imported cargo to be transported via SGR', *The Kenyan Wall Street*, 6 August 2019.

90 Kennedy Ogollah and others, 'Assessment report of the socio-economic impact of the operationalisation of the Mombasa-Nairobi standard gauge railway on port city Mombasa', University of Nairobi, 2019, 2-3.

91 María José Romero and Bodo Ellmers, 'The financial and social cost of public-private partnerships' in Bantekas and Lumina (eds) *Sovereign debt and human rights*, 2018, 106-128.

92 Kennedy Ogollah and others, 'Assessment report of the socio-economic impact of the operationalisation of the Mombasa-Nairobi standard gauge railway on port city Mombasa', 11-12.

ic, Social and Cultural Rights (ICESCR), which safeguards individuals' right to choose their employment and ensures they are not unfairly deprived of job opportunities.[93]

Corruption and political interference

In the wake of the Covid-19 pandemic, the International Monetary Fund (IMF) approved a US$2.34 billion loan package to support Kenya's pandemic response and economic reform programme. This is after Kenya agreed to reduce its debt vulnerabilities by addressing weaknesses in state-owned enterprises, and strengthening the anti-corruption framework.[94] This deal was met with concerns from the citizenry that the issuance of this loan came despite a number of accountability issues relating to the management of earlier loans.[95] These concerns were warranted on accounts of how some procurement contracts were irregularly awarded, with inflated costs to a group of shady suppliers, with some supplying subpar personal protective equipment (PPEs), completely disregarding the plight and welfare of frontline health workers.[96]

A significant part of Kenya's real debt burden stems from rampant corruption, not the loans themselves.[97] Mismanagement and extraneous salaries for state officials drain public funds, leading to massive financial losses and creating shortfalls which are naturally made up for through debt.[98]

A special audit by Auditor General Nancy Gathungu revealed that the Kenyan government borrowed KES 1.13 trillion through 13 syndicated loans and sovereign bonds between July 2010 and December 2021, but cannot show evidence of specific projects funded by this money.[99] The

93 International Covenant on Economic, Social and Cultural Rights, Article 6.

94 Sheila Masinde, 'Fight on corruption is panacea to public debt crisis', Transparency International-Kenya, 8 April 2021.

95 Masinde, 'Fight on corruption is panacea to public debt crisis'.

96 Masinde, 'Fight on corruption is panacea to public debt crisis'.

97 Tee Ngugi, 'The real debt burden in Kenya is corruption', *The East African*, 16 April 2021.

98 Ngugi, 'The real debt burden in Kenya is corruption'.

99 Peter Mburu, 'No projects to show for Sh1 trillion borrowings', *Business Daily*, Wednesday, 10 July, 2024.

audit examined 39 commercial loans totalling KES 1.36 trillion, including 16 dollar-denominated loans valued at KES 1 trillion, 22 Euro-denominated loans worth KES 288 billion, and one South Korean Won-denominated loan of KES 102 million.[100] By December 2021, these loans had cost taxpayers KES 621.8 billion in debt service, with 63 percent (equivalent to $2.7 billion plus £325 million) going towards interest, commitment fees, and other charges. Interest alone accounted for 59.8 percent of the total debt service costs. The audit also found that 26 out of the 39 loans were taken without the required legal opinion from the Attorney General, potentially exposing the country to unfavourable terms.[101]

Fear of collateralisation

Kenya's mounting debt to China spurred the fear that in event of debt default, Kenya might lose control over critical national assets like the Mombasa port.[102] Such fears have been amplified by accusations of China engaging in 'debt-trap diplomacy'.[103] Researchers and analysts have dismissed these fears, stating that they may be based on a misinterpretation of the actual loan agreements and terms.[104] According to these analyses, the loan structures for projects like the Standard Gauge Railway (SGR) do not include provisions that directly sign away rights to seize assets like the Mombasa Port upon default.[105]

Nciko wa Nciko, in his work showcases how collateralisation can be done in a manner far more nefarious and far less straight forward as we expect.[106] He showcases how, in the Democratic Republic of Congo, a $509.43 million R4I contract between the government and a consortium of Chinese state-owned companies led to the construction of the

[100] Mburu, 'No projects to show for Sh1 trillion borrowings'.

[101] Mburu, 'No projects to show for Sh1 trillion borrowings'.

[102] Kell, 'Kenya's debt struggles go far deeper than Chinese loans'.

[103] Kell, 'Kenya's debt struggles go far deeper than Chinese loans'.

[104] Kell, 'Kenya's debt struggles go far deeper than Chinese loans'.

[105] Fergus Kell, 'Kenya's debt struggles go far deeper than Chinese loans'.

[106] Nciko wa Nciko, 'China have mercy: The unacceptable collateralised sovereign debt burden that the Busanga hydropower plant places on the DRC', in James Thuo Gathii (ed) *How to reform the global debt and financial architecture*, Sheria Publishing House, 2023, 279.

Busanga HPP. [107] On paper, the DRC is using its copper and cobalt resources to reimburse the cost of the project, which was financed by the China Eximbank. However, the market value of the natural resources provided by the DRC as collateral exceeds the value of the infrastructure constructed.[108] This situation forces the DRC into an 'unsustainable collateralised sovereign debt position,' where the country receives little in return while the project primarily serves the interests of the Chinese consortium. The excess natural resources provided could have been used to meet other development goals in the DRC.[109]

The imbalance in this contract was made possible due to alleged corruption and illegal conduct by the Chinese consortium and the ruling clique under former President Joseph Kabila. In the Kenyan context, the state could have entered into such R4I contracts and as showcased in the section above on contractual transparency, the Kenyan citizenry would have no idea.[110] This could lead to an unsustainable debt burden and the diversion of valuable resources away from other development goals, undermining the realisation of socio-economic rights.[111]

Debt restructuring

Debt restructuring refers to a process where a debtor country renegotiates the terms of its outstanding debt obligations with its creditors.[112] This could involve extending the repayment period, reducing

107 Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 283.

108 Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 283.

109 Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 294.

110 See Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 294 on lack of transparency.

111 Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 294.

112 Skylar Brooks, Domenico Lombardi and Ezra Suruma, 'African perspectives on sovereign debt restructuring', Cigi Papers No 43, September 2014, 1.

the interest rate, or even reducing the principal amount owed.[113] There is currently no comprehensive legal framework for sovereign debt restructuring in the world. However, African countries have considerable experience with sovereign debt restructuring, having undertaken a total of 317 debt restructuring processes between the early 1980s and 2014.[114]

Traditionally, African countries have borrowed mostly from multilateral lenders like the IMF and World Bank, and high-income bilateral creditors in the Paris Club. Consequently, when African countries have needed to restructure debts, they have done so through the Paris Club and specific debt relief initiatives like the Heavily Indebted Poor Countries (HIPC) Initiative.[115]

More recently, the composition of Africa's creditors has been shifting, with countries increasingly turning to international capital markets and new bilateral creditors like China for financing.[116] As a characteristic, debt restructuring tends to utilise austerity and fiscal consolidation measures to ramp up the revenue of the debtor state, often to the detriment of its citizens' needs. Zambia's restructuring for example has seen the state freeze wage bills, eliminate agricultural subsidies as well as fuel and electricity subsidies.[117] This shift in debt restructuring strategies has parallels with the structural adjustment programmes implemented in Kenya, highlighting the socio-economic impacts of austerity measures on citizens.

[113] Brooks, Lombardi and Suruma, 'African perspectives on sovereign debt restructuring', 1.

[114] Brooks, Lombardi and Suruma, 'African perspectives on sovereign debt restructuring', 1.

[115] Brooks, Lombardi and Suruma, 'African perspectives on sovereign debt Restructuring', 3.

[116] Brooks, Lombardi and Suruma, 'African perspectives on sovereign debt restructuring', 3.

[117] International Monetary Fund, 'Zambia: Staff report for the 2015 Article IV consultation', IMF Staff Country Report No 15/152, 16 June 2015.

Structural adjustment programmes in Kenya: A look into the effect of restructuring

Restructuring tends to be followed by austerity measures. One way to look at the socio-economic effects of a possible future restructuring in Kenya would be to analyse the structural adjustment programmes (SAPs) undertaken in Kenya during the 1980s and 1990s.[118] These programmes aimed to stabilise and restructure economies but often included austerity measures such as reducing public sector spending, privatising state-owned enterprises, and liberalising trade and investment policies.[119]

One of the most notable impacts was the forced privatisation of 139 out of 250 state-owned companies.[120] Many of these enterprises were profitable, but the privatisation was justified as a necessary step to reduce government expenditure. However, this process often benefited well-connected individuals and entities, raising serious concerns about transparency and fairness.[121]

Education and public services also suffered significantly. The introduction of cost-sharing in public universities meant that students were required to pay KES 6,000 annually, a sharp departure from the previous system of free higher education.[122] This policy imposed a heavy financial burden on many families and diminished the quality and accessibility of essential services like education and healthcare due to reduced government funding.[123]

The austerity measures also led to job cuts in the public sector, exacerbating unemployment and hindering the government's ability to support social welfare programmes. The resulting socio-economic impact was severe, alongside increased ethnic hatred, discrimination,

118 Mwangi Githahu, 'Looking back at the SAPs processes of the early 1990s', *The Elephant,* 18 January 2024.

119 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

120 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

121 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

122 Tomasz Milej, 'Slaughtering Kenyan public universities with a blue knife: The new IMF loan conditionalities', *AfronomicsLaw,* 10 May 2021.

123 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

and welfare problems.[124] The IMF and World Bank's reforms focused on economic metrics at the expense of social welfare, often worsening the quality of life for ordinary citizens.[125]

The above analysis has highlighted the substantial gaps and shortcomings within Kenya's legal and institutional framework governing sovereign debt acquisition, management, and restructuring. There are persistent violations of constitutional principles for instance public participation, transparency, and accountability across all three phases. Rampant corruption, political interference, and a lack of enforceable debt ceilings undermine debt sustainability and divert resources away from socio-economic development.

The socio-economic consequences are severe – reduced fiscal space for essential public services, threats to livelihoods and employment, undermining of human rights like education and health, and an erosion of living standards for ordinary citizens. Kenya's experience with the structural adjustment programmes offers a sobering precedent of the potential adverse impacts. Addressing these legal and institutional gaps through comprehensive reforms is crucial to ensuring Kenya's sovereign debt is acquired and managed sustainably and that possible future restructurings uphold the socio-economic rights of the populace.

Popular solutions to the debt problem and their applicability in Kenya

As mentioned earlier, debt default is the norm instead of the exception.[126] More states in the world have defaulted on their sovereign debt.[127] Owing to the fact that there are as many debt management practices and solutions as there are states, this section aims to pick and analyse a few

124 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

125 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

126 Carmen M Reinhart and Kenneth S Rogoff, 'This time is different: A panoramic view of eight centuries of financial crises', Working Paper 13882, National Bureau of Economic Research Cambridge, March 2008, 5.

127 Reinhart and Rogoff, 'This time is different', 5.

solutions already utilised or studied for utility across the globe. From the onset it is important to state that debt abolition shall not form part of this section. This is because the geopolitical, historical and policy considerations necessary to analyse debt cancellation cannot be undertaken in a section alone. This paper is thus structured around the following solutions by which states, through their own action and initiative, used to move themselves away from the debt wall

Balanced budget amendments

A balanced budget amendment is a constitutional rule requiring government spending not to exceed its income over a given period of time (typically a fiscal year).[128] This would make it unconstitutional for the federal government to run annual budget deficits. When crafting the annual budget, projected expenditures on all government programmes and services cannot exceed the expected tax revenues and other receipts for that year.[129] However, the amendments generally build in some limited exceptions to the balanced budget requirement. Temporary deficit spending may be allowed during periods of national emergency for instance war, natural disaster, or economic recession when stimulus is needed.[130] Outside of crises, the amendment forces fiscal discipline as surpluses must be run during good economic times to offset any deficits incurred during downturns.[131]

The best-known application of a balanced budget amendment is Germany's *Schuldenbremse* (debt brake), introduced in 2009.[132] It limits the federal structural deficit to 0.35% of the GDP and prohibits state-level structural deficits since exceptions are allowed during emergencies,

[128] Peter G Peterson Foundation, 'Budget basics: Balanced budget amendment — pros and cons'.

[129] Peter G Peterson Foundation, 'Budget basics: Balanced budget amendment — pros and cons'.

[130] Peter G Peterson Foundation, 'Budget basics: Balanced budget amendment — pros and cons'.

[131] Peter G Peterson Foundation, 'Budget basics: Balanced budget amendment — pros and cons'.

[132] Alexander Thiele, 'The German way of curbing public debt', 11(1) *European Constitutional Law Review* (2015) 30.

such as economic crises or natural disasters.[133] The debt brake was created in the wake of the 2008 financial crisis with an excessive public deficit becoming one of the biggest German economic fears.[134] Other states with balanced budget provisions incorporated into their constitutions include Hong Kong, Italy, Poland, Slovenia, Spain, and Switzerland, as well as the constitutions of most US states. In the United States, the Republican Party has pushed for a balanced budget amendment to be added to the United States Constitution.[135]

Balanced budget amendments' flaws and challenges for implementation in Kenya

Germany's debt brake, introduced in 2009, requires the federal government and 16 states to balance their budgets without new borrowing. The federal government is allowed to borrow up to 0.35% of the GDP annually (about €13 billion in 2022, based on a GDP of €3.88 trillion).[136] The rule became binding for the federal government in 2016 and for states in 2020. From 2014 to 2019, Germany achieved balanced budgets. However, exceptions were made in 2020, 2021, and 2022 due to the COVID-19 pandemic and the Ukraine war, allowing borrowing in the 'three-digit billion-euro range' in 2022. A 2023 Constitutional Court ruling created a €60 billion shortfall in the 2024 federal budget. Amending the debt brake requires a two-thirds majority in the Bundestag(Germany's federal parliament), which is currently unlikely due to opposition from the Christian Democratic Union and Christian Social Union.[137]

Proponents of constitutionalised balanced budget provisions have argued that they have a significant effect in ensuring fiscal discipline.[138]

133 Basic Law for the Federal Republic of Germany (Grundgesetz) of 23 May 1949, Article 109(3); Thiele, 'The German way of curbing public debt', 30.

134 Thiel terms this phenomenon as 'German Angst' and credits it with being foundational to the fiscal compact; See Thiel, 'The German way of curbing public debt', 32.

135 Richard Kogan, 'March constitutional balanced budget amendment poses serious risks', *Centre on Budget and Policy Priorities,* 16 March 2018.

136 Sabine Kinkartz, 'What is Germany's debt brake?', *Deutsche Well*, 29 November 2023.

137 Kinkartz, 'What is Germany's debt brake?'.

138 Joe Amick, Terrence L Chapman and Zachary Elkins, 'On constitutionalising a balanced budget', 82 *The Journal of Politics* (2020) 1092.

On the other hand, arguments against balance budget amendments stress issues on the following fronts. First, it would force damaging cuts to spending or tax increases during economic downturns, exacerbating recessions and job losses by eliminating the 'automatic stabilisers' that help cushion the economy.[139] Second, obtaining the supermajority votes needed to waive the balanced budget requirement would likely prove extremely difficult therefore delaying necessary action.[140]

Third, the amendment would prevent major programmes like social security from drawing on their accumulated reserves to pay benefits as intended, instead requiring sudden cuts.[141] Fourth, it could also undermine the government's deposit insurance and other financial backing by prohibiting funds from being paid out if doing so created a deficit.[142] Fifth, the amendment rests on a false analogy – states can borrow for capital projects and families take out loans, practices that would be unconstitutional for the federal government. Finally, serious questions also remain about how such an amendment would be enforced and what powers the president or courts might have to unilaterally cut spending or raise taxes.[143]

Applying a balanced budget amendment to Kenya's Constitution could face significant challenges. Kenya's heavy reliance on volatile foreign aid and borrowing for revenue makes consistently achieving budget balance difficult based solely on domestic tax receipts.[144] The country's already high public debt levels which are over 60% of GDP would also necessitate painful fiscal consolidation efforts before operating under the new rules.[145] Politically, amending the constitution requires substantial cross-party consensus that may prove elusive for ceding such fiscal powers. While promoting fiscal discipline is desired,

[139] Kogan, 'March constitutional balanced budget amendment poses serious risks'.

[140] Kogan, 'March constitutional balanced budget amendment poses serious risks'.

[141] Kogan, 'March constitutional balanced budget amendment poses serious risks'.

[142] Kogan, 'March constitutional balanced budget amendment poses serious risks'.

[143] Kogan, 'March constitutional balanced budget amendment poses serious risks'.

[144] Joseph Sirengo, 'Determinants of Kenya's fiscal performance', KIPPRA Discussion Paper No 91 September 2008, 7.

[145] World Economics, 'Kenya debt to GDP ratio: 67.5%'.

an inflexible balanced budget amendment could undermine Kenya's developmental needs. A more gradual, flexible 'debt brake' approach may be more appropriate initially.[146] Further, it would hamper the government's ability to run deficits for developmental spending on crucial infrastructure and capital investments.

Debt for nature/climate swaps

A debt for nature swap (DFN) involves forgiving a portion of a country's sovereign debt in exchange for conservation commitments.[147] Typically, this takes the form of a locally financed and operated conservation fund, but can also include high-level policy commitments.[148] Debt forgiveness can result from a bilateral agreement between the debtor and creditor or a multi-party arrangement where philanthropic entities purchase the existing debt at a discount to fund conservation efforts.[149] In theory, it is a triple-win – reducing debt strain, financing environmental protection, and aligning a country's economic interests with conservation. Nations like Bolivia, Belize and Costa Rica have engaged in such swaps with creditors ranging from governments to environmental NGOs with Belize being cited as the most successful instance of a DFN by the African Development Bank in its report.[150]

Debt-for-climate and debt-for-nature swaps have been touted as innovative financial instruments that enable governments burdened by debt to invest in resilience against climate change and biodiversity loss without triggering fiscal crises.[151] They can also improve a country's

[146] Constitution of Kenya (2010) Article 257.

[147] African Natural Resources Management and Investment Centre, 'Debt for nature swaps – feasibility and policy significance in Africa's natural resources sector', African Development Bank Abidjan, Côte d'Ivoire, 2022, 21.

[148] African Natural Resources Management and Investment Centre, 'Debt for nature swaps', 21.

[149] African Natural Resources Management and Investment Centre, 'Debt for nature swaps', 21.

[150] African Natural Resources Management and Investment Centre, 'Debt for nature swaps', 23.

[151] Kristalina Georgieva, Marcos Chamon and Vimal Thakoor, 'Swapping debt for climate or nature pledges can help fund resilience', *IMF Blog*, 14 December 2022.

credit rating and generate additional revenue by protecting global public goods like carbon sinks.[152] Although swaps alone cannot resolve unsustainable debt, they can complement traditional debt relief and concessional finance, particularly in middle-income countries, by scaling up transactions, involving more third-party financing, and improving transaction terms. The International Monetary Fund can support these efforts through its Resilience and Sustainability Trust and other initiatives, helping countries integrate climate impacts into their macroeconomic frameworks and signalling policy ambitions to attract swap-related investments.[153] Despite this, scholars argue against the utility of debt for nature swaps in both alleviating African states debt burden and affecting climate change.

Debt for nature swaps' flaws and challenges for implementation in the Kenyan context

Salient concerns of debt for nature swaps include greenwashing, where creditors appear environmentally responsible without making substantial contributions.[154] This practice enhances their public image without real impact, diluting genuine environmental efforts. Thus, creditors can create the appearance of being environmentally conscious without taking meaningful action, benefiting from positive publicity while doing little to advance genuine sustainability goals.[155] In addition, inadequate monitoring, insufficient funding, and poorly designed initiatives have been cited as key obstacles. The focus on small-scale projects leads to minimal overall impact, with countries settling for minor

[152] Georgieva, Chamon and Thakoor, 'Swapping debt for climate or nature pledges can help fund resilience'.

[153] Georgieva, Chamon and Vimal Thakoor, 'Swapping debt for climate or nature pledges can help fund resilience'.

[154] Nciko Wa Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', in James Thuo Gathii, Adebayo Majekolagbe and Nona Tamale (eds) *Transforming climate finance in an era of sovereign debt distress,* Sheria Publishing House, 2023, 132.

[155] Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 132.

concessions instead of substantial debt relief or significant environmental improvements.[156]

Nciko argues against debt for nature swaps, stating that they are simply a new ground for capital accumulation by the AfDB and by Paris Club creditors.[157] He argues that the historical receptivity of the Paris Club to swaps merely resurrects a dormant market to the detriment of African states.[158] This is grounded on the following bases. First that, as the AfDB admits, debt for nature swaps have had minimal applicability in the past.[159] Second, Belize's debt for nature swap has had negligible environmental impact, despite this being the selling point.[160]

In the context of Kenya, President Ruto has expressed keen interest in utilising 'debt-for-climate adaptation' swaps as an innovative way to manage the nation's $70+ billion debt pile while raising much-needed capital for climate resilience projects. It is an enticing proposition given Kenya's vulnerability to climate shocks and its fiscal constraints.[161] However, legitimate concerns persist around economic sovereignty, asset valuation and governance. Structuring such deals requires immense care, transparency and legislative oversight to ensure that the nation does not unwittingly compromise its long-term strategic interests through a short-sighted debt liability transfer.[162]

In April 2024, Wanjiru Gikonyo filed a case at the East African Court of Justice challenging its actions while considering, setting up,

156 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 132.

157 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 125.

158 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 127.

159 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 131.

160 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 131.

161 Brian Ambani, 'Kenya eyes debt-for-nature swaps to construct water dams', *The East African*, 17 February 2023.

162 Adekunle Agbetiloye, 'Kenya considers debt-for-nature swap as $2 billion debt deadline looms', *Business Insider Africa,* 16 January 2024.

and implementing debt swap transactions, especially debt for nature swaps and debt for food security swaps to fund the budget deficit for Kenya's 2024/2025 financial year lacks transparency, accountability, and public participation.[163] The case centred on the state's failure to disclose any particulars on the details, transactions, actors and amounts involved in the debt swap arrangements.[164]

Citizen debt auditing

Citizen debt audits are comprehensive reviews of a country's public debt portfolio, conducted by independent commissions or citizen-led initiatives.[165] These audits aim to identify any irregularities, overpricing and lack of due process in the acquisition of debt, hence distinguishing between legitimate and illegitimate portions of the debt.[166] The concept of citizen debt audits originates from Ecuador, where in 2008, President Correa established a Debt Audit Commission to investigate the legitimacy of the country's debts.[167]

The Commission's findings led to the repudiation of significant portions ($3.2 billion of its external commercial debt) of Ecuador's external commercial debt that was deemed illegitimate, based on factors such as onerous terms and lack of transparency in the debt's origination.[168] The idea is rooted in the principle of odious debt, which asserts that debts incurred without the consent of the people and not used for their benefit should not be transferable to successor regimes. This concept dates back to the 19th century and emphasises the importance of accountability and

163 *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v Attorney-General of the Republic of Kenya*, 19, EACJ (2019).

164 *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v Attorney-General of the Republic of Kenya*, 19, EACJ (2019).

165 Molly Scott Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis', SSRN, 2 June 2012, 10.

166 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis', 10.

167 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

168 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

transparency in debt management, empowering citizens to participate in democratic processes concerning public finances.[169]

In Spain and Greece, campaigns like 'We don't owe: We won't pay' and various advocacy groups challenged austerity policies and called for democratic debates on national debt consequences.[170] Similarly, Portugal emphasised the importance of thorough debt audits to produce technically reliable results and challenge societal pressures for debt repayment.[171] Meanwhile, in Egypt, Tunisia, and Ireland, campaigns aimed to suspend payment of inherited foreign debts, address questionable loans, and increase awareness about the necessity of economic democracy for political democracy.[172] In Ireland, academic audits prompted public rejection of government agreements supporting private banks, sparking debates on the relationship between the state, citizens, and overvalued assets from previous economic booms.[173]

Challenges faced by debt audits and their applicability to the Kenyan context

In 2015, the Debt Truth Committee in Greece flagged concerns over predatory lending practices by EU institutions like the European Central Bank (ECB) during the debt crisis. However, its findings had limited traction against powerful creditors.[174] In Sri Lanka, leftist National People's Power (NPP)'s proposal of a debt audit was completely disregarded by the main opposition.[175] In Pakistan Committee for the

169 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10; See also Andy Haldane and Mark Kruger, 'The resolution of international financial crises: Private finance and public funds', *Bank of Canada Review* (2001-2002) 1-12.

170 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

171 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

172 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

173 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

174 Paris Gyparakis, 'The illegality of the Greek sovereign debt crisis: Contract law's response to the Greek government,' 16(1) *Journal of International Business and Law* (2016) 142.

175 Imal Kotelawala, 'Sri Lanka's SJB slams NPP's 'debt audit' proposal, insists restructuring is essential,' *Economy Next*, 17 April 2024.

Abolition of illegitimate Debt (CADTM) and the Labour Relief Campaign Pakistan called for the formation of such a commission to audit Pakistan's foreign debt. In 2011, CADTM Pakistan argued that an independent debt audit commission should be formed to investigate the legitimacy of Pakistan's debt, however these recommendations where never acted upon.[176] Effective audits require truly independent bodies with public legitimacy overseeing the process, along with technical capacity and access to comprehensive data.[177] Support from major creditors is essential to translate findings into substantive debt relief measures.[178]

As at the writing of this paper, President William Ruto has appointed a public debt audit task force to investigate Kenya's national debt, which he claims is nearly 'drowning' the country.[179] The task force is expected to uncover the full extent of Kenya's public debt and how public funds were used, with the goal of preventing excessive debt burdens that could harm the economy.[180] The task force is set to report its findings within three months. However, the constitutionality of the task force is currently in question.[181] The High Court, through Justice Lawrence Mugambi, has issued a conservatory order suspending President Ruto's Gazette Notice appointing the task force.[182] The court order prohibits the task force from discharging any duties pending the hearing of a case challenging its establishment.

176 Anonymous Reporter, 'Independent debt audit commission sought', *Dawn*, 17 September 2015; Abdul Wahid, 'Pakistan's debt dilemma', *IMF PFM Blog,* 30 August 2023.

177 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

178 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

179 Purity Wangechi, 'Ruto reassures Kenyans on public debt audit task force amid legal hurdles', *Capital News,* 14 July 2024.

180 Wangechi, 'Ruto reassures Kenyans on public debt audit task force amid legal hurdles'.

181 Wangechi, 'Ruto reassures Kenyans on public debt audit task force amid legal hurdles'.

182 Kenya Gazette, CXXVI (97) 5 July 2024, 8261; Purity, 'Ruto reassures Kenyans on public debt audit task force amid legal hurdles'.

Austerity

Austerity is defined as the deliberate deflation of domestic wages and prices through cuts to public spending.[183] Austerity measures are designed to reduce states' debts and deficits with advocates of austerity believing that slashing public spending spurs private investment.[184] This is because, ideally, it signals government unwillingness to add to its own debt burden and to crowd out the market through stimulus.[185] Most of Europe has been utilising austerity measures consistently for the years following the 2008 financial crisis, this is despite clear indicators that austerity failed to work as envisioned.[186]

In the aftermath of the 2008 financial crisis, which triggered a surge in public debt, numerous European nations steadfastly implemented austerity measures. However, the results were apparent and consistent: austerity was proven ineffective. Most economies on the fringes of the Eurozone experienced significant downturns from 2009, with the entire Eurozone contracting for the first time in the fourth quarter of 2012.[187]

According to Blythe, austerity is fundamentally flawed for three reasons. First, is the distributional dimension in that those at the bottom feel the effects of austerity more than those at the top.[188] This results in circumstances where:

> ...Those who can pay won't, while those who can't are being forced to do so.[189]

The second dimension is compositional. Everyone cannot cut their way to growth at the same time. If all states in a currency or economic union, which are each other's trading partners, cut their spending at the same time, the result can only be a contraction of the regional econ-

183 Mark Blyth, 'The austerity delusion: Why a bad idea won over the West', 92(3) *Foreign Affairs*, (2013) 42.

184 Blyth, 'The austerity delusion: Why a bad idea won over the West', 42.

185 Blyth, 'The austerity delusion: Why a bad idea won over the West', 42.

186 Blyth, 'The austerity delusion: Why a bad idea won over the West', 42.

187 Blyth, 'The austerity delusion: Why a bad idea won over the West', 43.

188 Blyth, 'The austerity delusion: Why a bad idea won over the West', 43.

189 Blyth, 'The austerity delusion: Why a bad idea won over the West', 44.

omy.[190] The third dimension is logical, that is, the notion that slashing government spending boosts investor confidence assumes that consumers anticipate and incorporate all government policy changes in their spending, a notion that has been proven wrong.[191]

Austerity in Kenya

In the 1990s, Kenya, under pressure from the International Monetary Fund (IMF) and the World Bank, embarked on a series of austerity measures known as structural adjustment programmes (SAPs).[192] These programmes, aimed at economic and political reforms, significantly impacted various aspects of Kenyan society. They led to a wave of privatisations, with the government selling off numerous state-owned companies, including successful and profitable entities.[193] Additionally, there were drastic cuts to the civil service, job losses, and the introduction of cost-sharing policies in education, which shocked the populace and had far-reaching social and economic consequences.[194]

The SAPs were characterised by significant social and economic upheaval including increased income inequality, inflation, unemployment and retrenchments.[195] While touted as necessary for economic restructuring, they brought about widespread hardship for ordinary Kenyans and exacerbated existing socio-economic challenges. The IMF and World Bank, inspired by neoliberal policies of the time, imposed these measures as conditions for financial assistance, making Kenya a testing ground for policies that had profound and enduring impacts on its citizens.[196]

In 2023 the IMF's approval of nearly $1 billion in loans to Kenya, contingent on the implementation of extensive taxation measures, sparked widespread protests due to their regressive nature and adverse

[190] Blyth, 'The austerity delusion: Why a bad idea won over the West', 45.
[191] Blyth, 'The austerity delusion: Why a bad idea won over the West', 45.
[192] Githahu, 'Looking back at the SAPs processes of the early 1990s'.
[193] Githahu, 'Looking back at the SAPs processes of the early 1990s'.
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impact on the population.[197] Despite government praise for the reforms, citizens took to the streets, highlighting the exacerbation of the cost-of-living crisis and the neglect of vulnerable groups.[198] The new tax regime features doubling Value Added Tax (VAT) on fuel and raising taxes on essentials like food, disproportionately affected the poor and small businesses, while leaving private wealth and corporations unaffected.[199] Critics argued that such austerity measures undermined economic growth and productivity, further entrenching Kenya in a cycle of debt dependency, as half of the projected revenues would go towards debt repayment, with debt already ballooning under President Ruto's tenure.[200]

Recommendations

Kenya can strengthen its sovereign debt management by implementing a series of comprehensive measures. Amendments to ensure fiscal discipline, such as a balanced budget amendment, can enforce prudent resource management while maintaining flexibility for emergencies. Enhancing accountability and transparency through reforms to the Public Finance Management Act (PFMA) would ensure greater openness in debt acquisition, including mandatory public disclosure of contractual terms and enhanced scrutiny of borrowing decisions.

Conducting independent citizen debt audits can help identify irregularities and distinguish between legitimate and illegitimate debts, potentially reducing the overall debt burden.

[197] Bretton Woods Project, 'The IMF in Kenya: Regressive taxation as the new face of austerity', 4 October 2023.

[198] Bretton Woods Project, 'The IMF in Kenya: Regressive taxation as the new face of austerity'.

[199] Bretton Woods Project, 'The IMF in Kenya: Regressive taxation as the new face of austerity'.

[200] Bretton Woods Project, 'The IMF in Kenya: Regressive taxation as the new face of austerity'.

In addition, strengthening anti-corruption measures and establishing independent oversight bodies can prevent the misuse of borrowed funds and reduce political interference in debt management processes.

Promoting meaningful public participation in debt-related decisions and mandating the open publication of government contracts and debt-funded projects can build public trust. Austerity measures should be implemented cautiously, protecting social welfare programmes and essential public services. Learning from past SAPs can help design more balanced and equitable restructuring programs. Adopting a socio-economic rights-centred approach in debt management and prioritising investments in critical public services can align debt management with sustainable development goals. Finally, ensuring transparent loan agreements, especially those involving significant assets, can mitigate fears of losing control over vital infrastructure.

Conclusion

The increasing accumulation of sovereign debt in Kenya significantly impacts the government's ability to fulfil its socio-economic obligations as enshrined in Article 43 of the Constitution of Kenya (2010). The analysis of the Kenyan legal framework reveals significant challenges in the acquisition, management, and restructuring of sovereign debt, adversely impacting the realisation of socio-economic rights. Corruption, political interference, and fears of collateralisation further complicate the situation, diverting valuable resources away from development goals and undermining the rights of Kenyan citizens. Ultimately, addressing these issues requires a holistic approach that considers the structural factors contributing to Kenya's debt dependency and implements policies that progressively consolidate socio-economic rights. By fostering an environment with ample opportunities for its citizens to flourish, Kenya can ensure a more sustainable and equitable economic future.