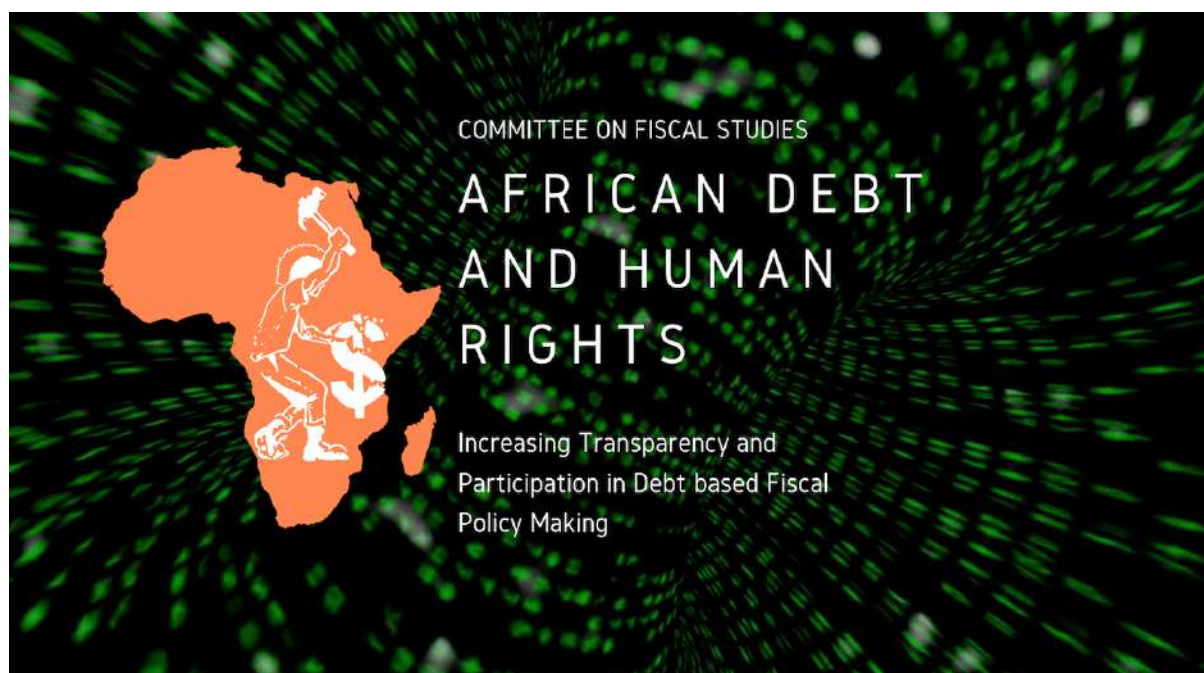


THE TENSION AROUND THE RIGHT TO INFORMATION VERSUS NON-DISCLOSURE CLAUSES IN LOAN CONTRACTS



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Summary

Most African countries are crumbling under the weight of foreign debt. Yet these governments rely on debt as their largest financial portfolio,¹ as is the case even with developed economies. However, the problem lies in the way debt portfolios are structured. One of the big conversations around the topic of debt management is the lack of transparency - and in particular, non-disclosure clauses in government loan contracts. Against this backdrop, is the right of a state's citizenry to access public information, especially, concerning debt agreements entered by the government on behalf of and for their benefit. This paper delves into the legal framework underpinning the right to information, the status of implementation of this right in African countries and why access to information is important for the citizenry, governments, lenders, and all other debt stakeholders. The paper also discusses the limitations on the right to information and how those limitations have and can be used by governments to justify retention of non-disclosure clauses in loan contracts. Further, the paper demonstrates how it is not enough to have access to information laws because poor or inconsistent implementation of these laws jeopardises citizens' access to information. To better understand why lenders and borrowers favour disclosure over transparency, this paper considers the various forms that non-disclosure takes and the practice of different lenders in this regard. It goes on to give examples of the consequences of non-disclosure and the potential benefits of voluntary and proactive disclosure by governments, including some good practices from a few African states. The paper concludes by proposing a framework for disclosure by African governments, their creditors, and other stakeholders.

Keywords: *Africa; access to information; confidentiality; debt transparency; loan contracts; non-disclosure clauses*

1. INTRODUCTION

Debt is one of a country's significant sources of income but also its largest liability, especially in the context of developing and least developed countries.² Governments borrow to invest and carry out long-term economic development for the benefit of their citizens. Since domestic funds are scarce in most developing and least developed economies, external debt is preferred. Additionally, external borrowing is sometimes cheaper than domestic options, and if channelled into the right projects, can help a country realise economic growth. In these economies, government loans have not only been used to meet the costs of building infrastructure but also improve people's livelihoods, particularly those in vulnerable situations. In Kenya, for example, the current government has used such resources, in part, towards realising the Big 4 Agenda - affordable housing, universal health care, manufacturing and job

¹ IMF and World Bank 2003, 3

² UNCTAD n.d., 1

creation.³ Other countries have used such loans to finance their education sector, infrastructure projects, and the like.

African governments seek debt from a wide range of creditors, and in recent years, China has become one of the continent's largest bilateral lenders.⁴ In Kenya, external debt was previously sought from the China Exim Bank to fund the construction of the Standard Gauge Railway, one of the biggest infrastructure projects in the country.⁵ Kenya is just one of 32 African countries indebted to China. Apart from China, African governments continue to borrow from other governments, state-owned banks, multilateral financial institutions (such as the World Bank, AfDB and IMF), export-import banks and commercial/private lenders. According to data from the World Bank on 49 African countries, about 39% of external debt is owed to multilateral financial institutions, 35% to private creditors, 12% to Chinese creditors and 13% is owed to other governments.⁶

While debt can help a country realise its development goals and promote the realisation of human rights for its people, practice over the years has demonstrated how external borrowing can plunge economies into crises. Since 2010, there has been an increase in debt on the continent, with more African countries resorting to more commercial and less concessional lending than before.⁷ While there are now more diverse borrowing options, this trend comes with its own risks. This, coupled with the onset of the COVID-19 pandemic and its aftermath raised a lot of questions regarding the continent's detrimental borrowing habits, and the realisation that a lot should be done to ensure that African countries get out of the 'debt trap' and better manage their debt.⁸ One of the main issues of concern has been the lack of disclosure or minimal disclosure of loan contracts and the related issues of corruption, poor governance, lack of accountability in relation to debt management in general. Closely related to the issue of non-disclosure clauses in loan contracts, is the competing right of the public to access information, particularly information on government debt.

Having contextualised the two related concerns: right to information and non-disclosure clauses, this paper will first present an overview of the legal framework on the right to information, in particular, in the context of Africa. Here, arguments will be made for the disclosure of information on debt as falling within the purview of the kind of information that should be made available to the public. Secondly, the paper will discuss the use of non-disclosure clauses in loan contracts, and why this is the norm rather than the exception. Arguments will be made for the disclosure of debt information. The third section will discuss the proposed framework for dealing with the tension between the right to information and confidentiality in loan contracts, making concrete recommendations at the domestic, regional

³ The Presidency n.d.

⁴ Reisen 2007, 1; Acker and Brautigam 2021

⁵ Railway Technology 2020

⁶ World Bank 2022a

⁷ Calderón and Zeufack 2020, 11

⁸ IMF 2021)

and AU level. Throughout, the paper will present some best practices from a few African countries, as well as from developed ones. The last section concludes the paper.

2. THE RIGHT TO INFORMATION IN THE AFRICAN CONTEXT

UNESCO defines the right to information (RTI) as ‘the right to seek, receive and impart information held by public bodies’.⁹ The right to information is safeguarded under international, regional, and domestic instruments. At the international level, the right is enshrined in both Article 19 of the Universal Declaration on Human Rights (UDHR) and Article 19 of the International Convention on Civil and Political Rights (ICCPR) as an appendage to the right to freedom of expression.¹⁰ At the regional level, the African Charter on Human and Peoples’ Rights provides for the right to receive information under Article 9. At the domestic level, the right to information is usually enshrined in the Constitution, and/or in acts of parliament. In Kenya, for example, the framework includes – the Constitution of Kenya 2010 and the Access to Information Act. Other laws and regulations may also have provisions requiring the government to furnish the public with information; for example, section 93 of the County Governments Act of Kenya provides that access to information is one of the principles of public communication that should guide the actions of county governments in Kenya.¹¹

The importance of the right to information has also been enshrined in the Sustainable Development Goals as Goal 16 whose aim is to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels’.¹² Though there has been significant progress on the enactment of RTI laws since the publishing of the Model Law on Access to Information by the African Commission on Human and Peoples Rights,¹³ Africa still has a long way to go in ensuring access to information. Figure 1 below displays an infographic from Article 19,¹⁴ demonstrating how Africa lags in respect of right to information laws – only about 23 countries have passed a law or regulation on freedom to information; the rest of the countries either have a pending right to information law, none at all or there is no information on the same.

In the countries where the RTI is enshrined, it is not always the case that the right to information equates to access to information due to poor implementation of the RTI laws.¹⁵ In a report from the Africa Freedom of Information Centre which aimed to test the levels of implementation of RTI laws, the African countries sampled had varied but largely worrying levels of implementation of the RTI legislation. The parameters which were used in the report were: the extent to which the state proactively discloses information, the existence of

⁹ UNESCO n.d.

¹⁰ United Nations (General Assembly) 1966, art. 19) and (United Nations 1948, art. 19

¹¹ Government of Kenya 2012, sec. 93

¹² United Nations 2022

¹³ African Commission on Human and Peoples’ Rights 2013

¹⁴ Article 19 2022

¹⁵ Kuswandini and Aoutail 2022

institutional measures to assist with implementation of RTI laws and whether requests for information are responded to in a timely and dutiful manner.¹⁶ For instance, the report found that a number of Nigerian institutions sampled did not proactively disclose information on their functions, budgets and organisational structure despite the fact Nigeria has both a constitutional guarantee of RTI and a RTI law.¹⁷ Similarly, Zimbabwe was found to be lax in proactive disclosure of information and institutional arrangements for the implementation of RTI even though it also has RTI entrenched in the constitution and in a separate legislation.¹⁸ On the contrary, Namibia has no constitutional guarantee of access to information and a pending RTI law but it was found to fare better than the other 3 countries.¹⁹

Figure 1: Progress on laws implementing the right to information



Source: Article 19

2.1. The Right to Information and Debt Management

A key element of sound public debt management is the public and comprehensive reporting of government debt, which improves the capacity of policy makers and the broader public to assess the fiscal position and appropriately weigh public balance sheet risks alongside spending and revenue priorities. Access to information regarding public debt is particularly important because of the adverse consequences that burgeoning public debt may have. One is that the higher the debt burden, the more likely it is that a government will resort to increased

¹⁶ Free Press Unlimited et al. 2021, 6

¹⁷ Free Press Unlimited et al. 2021, 11

¹⁸ Free Press Unlimited et al. 2021, 16

¹⁹ Free Press Unlimited et al. 2021, 19

taxation in order to sustain debt servicing in addition to financing normal government operations.²⁰ Secondly, very high levels of debt (for example debt at 85% of GDP as suggested by some authors) may have the effect of slowing economic growth even though the intention of debt is to enhance it.²¹ Thirdly, information enables policy makers, stakeholders and the public to accurately assess the financial position of a government and determine the involved risks *vis-a-vis* revenue priorities.²²

When it comes to information on debt, and information from governments in general, while international, regional and domestic laws provide for the right to access information, the onus is on a government to implement those laws and come up with regulations to give them effect. Where there is a right to access information but there are weak institutions and no concrete guidelines on what kind of information should be availed and how, the RTI is put in jeopardy. Yet this information is crucial, especially now that the effects of public debt have been brought into sharper focus thanks to the COVID-19 pandemic.²³ The pandemic has demonstrated the need for debt transparency systems in ensuring that governments do not pile up detrimental or unsustainable amounts of debt.²⁴

2.2.Limitations of the Right to Information

The right to information is not an absolute right but can be qualified under certain circumstances. The ICCPR provides that the right may be limited if provided for by law and if required in order to respect the rights or reputations of others or in order to protect national security, public order, public health or morals.²⁵ The countries which have RTI laws will most likely provide for instances in which the RTI will be limited; for example the Access to Information Act of Kenya provides that some of the instances in which RTI can be limited is if the disclosure is likely to undermine the national security of Kenya, endanger the safety, health or life of any person, substantially prejudice the commercial interests of another party or cause substantial harm to the ability of the government to manage the economy among other instances.²⁶ The RTI law of South Africa, for example, provides that a public body may refuse to grant access to information if the disclosure of that information could reasonably be expected to cause prejudice to the defence or security of the country, international relations of the country or reveal information supplied in confidence by another state or international organisation.²⁷

It is therefore conceivable that governments may seek to limit disclosure of certain information, including information on debt, on the basis that such information would be

²⁰ Burriel et al. 2020, 21

²¹ Cecchetti, Mohanty, and Zampolli 2011, 21

²² Sinem et al. 2019, 12

²³ Heitzig, Uche, and Senbet 2021, 3

²⁴ Rivetti 2021

²⁵ United Nations (General Assembly) 1966, art. 19(3)(b)

²⁶ Government of Kenya 2016

²⁷ Republic of South Africa 2000, sec. 41

detrimental to national security or economic interests of a country. Courts in some African countries have decided on the conditions that governments must meet if they are to seek to rely on the limitations to the right to information. In the case of *President of the Republic of South Africa and Others v M & G Media*,²⁸ the Constitutional Court of South Africa held that it is not enough for a state to merely recite the language of the exemptions to the right to information; the state must ‘put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed’.²⁹

This South African case has been relied upon in a recent Kenyan case touching on debt transparency. In a petition filed at the Kenyan High Court against the officials of the Kenyan ministries of Planning, the Treasury and the Attorney General, the High Court held that the failure of the Kenyan ministries to disclose information on the contracts for the standard gauge railway was a violation of the citizens’ right to information.³⁰ The government officials sought to rely on the limitations to the right to information and the non-disclosure clauses in the contracts to justify their failure to respond to the petitioners’ requests for information.³¹ However, the court held that the government failed to prove that the non-disclosure of the information fell within the limitations namely information that could cause material harm to defence, security, international relations, economic interests and financial welfare of the country.³² The court further held that in cognisance of the importance of the RTI to transparency and accountability, the government officials should have availed recanted documents and leave it to the court to decide whether the redacted information rightly falls within the exemptions.³³

After setting out the framework and current situation when it comes to implementing the right to information, it is evident that the lack of access to information could be a failure on the part African governments because the governments are responsible for formulating right to information laws and regulations and where those laws are already in place, they are responsible for implementing them. In the next section, the paper digs deeper into the use of non-disclosure clauses and the practice of borrowers and lenders in this regard.

3. NON-DISCLOSURE V DISCLOSURE & INCENTIVES FOR DEBT TRANSPARENCY

Debt in developing and least developed States, particularly in Africa, has been rising.³⁴ Poor debt management has led to crises or near-crisis in many African countries. In 2016, for example, Zimbabwe experienced an economic crisis which was partly caused by previously

²⁸ Constitutional Court of South Africa 1984

²⁹ Constitutional Court of South Africa 1984, para. 23

³⁰ High Court of Kenya 2022

³¹ High Court of Kenya 2022

³² Government of Kenya 2016

³³ High Court of Kenya 2022, para. 93

³⁴ Rivetti 2021; Calderón and Zeufack 2020; Pazarbasioglu 2019

undisclosed loans.³⁵ In Mozambique and the Republic of Congo, the non-disclosure of previously unreported debt led to the countries being reclassified as being in debt distress after the debt was revealed.³⁶ In Zambia, inadequate sharing of debt information hindered debt restructuring negotiations which subsequently led to Zambia defaulting on a bond interest payment.³⁷

Such issues have prompted different stakeholders to urgently call for transparency in debt management by African governments. However, debt transparency is not as simple an issue as requiring data on debt. It goes beyond data and includes borrowing operations of African governments. Three main areas of concern have been identified by the World Bank:³⁸ one, lack of transparency in domestic debt operations whereby fiscal arrears are unreported or where they are reported, only scanty information is relayed to investors; two, the tendency of low-income states to use their natural resources or future revenue streams as collateral, incurring steep interest rates as a result. These resource-backed loans are usually underreported or not reported at all either because they are contracted off budget or they are unrecognisable by the borrowing government. Third, is limited information on trading and restructuring of commercial loans, which creates “debt surprises” and has the effect of diluting creditors’ rights. Before delving into the specifics of what form such transparency should take, it is necessary to first look at some statistics on debt reporting by African countries.

3.1. Statistics on Debt Reporting in Africa

The World Bank estimated that by 2019, 40% of low-income countries (most of which are African countries) had not published data on their sovereign data in the previous 2 years.³⁹ According to the Debt Transparency Heat Map prepared by the World Bank, only one country out of the 35 African countries sampled has achieved full transparency on the nine parameters that the World Bank was testing for.⁴⁰ Most of the countries have achieved full transparency in only four to five of the parameters that were tested while six countries failed on all the parameters.⁴¹ In a separate study, the USAID reported that out of the 44 sub-Saharan African countries it surveyed in its debt transparency report, the average score in terms of transparency was 57% across the 14 indicators that were tested.⁴² Below is an infographic on the state of debt transparency in Africa; the green is for the countries which are the top third performers, the yellow is for the second third performers and the red is for the countries which are in the bottom third performers.⁴³

³⁵ Estevão 2022; Rivetti 2021

³⁶ Maslen and Aslan 2022, 12

³⁷ Maslen and Aslan 2022, 13

³⁸ Estevão 2022; Rivetti 2021

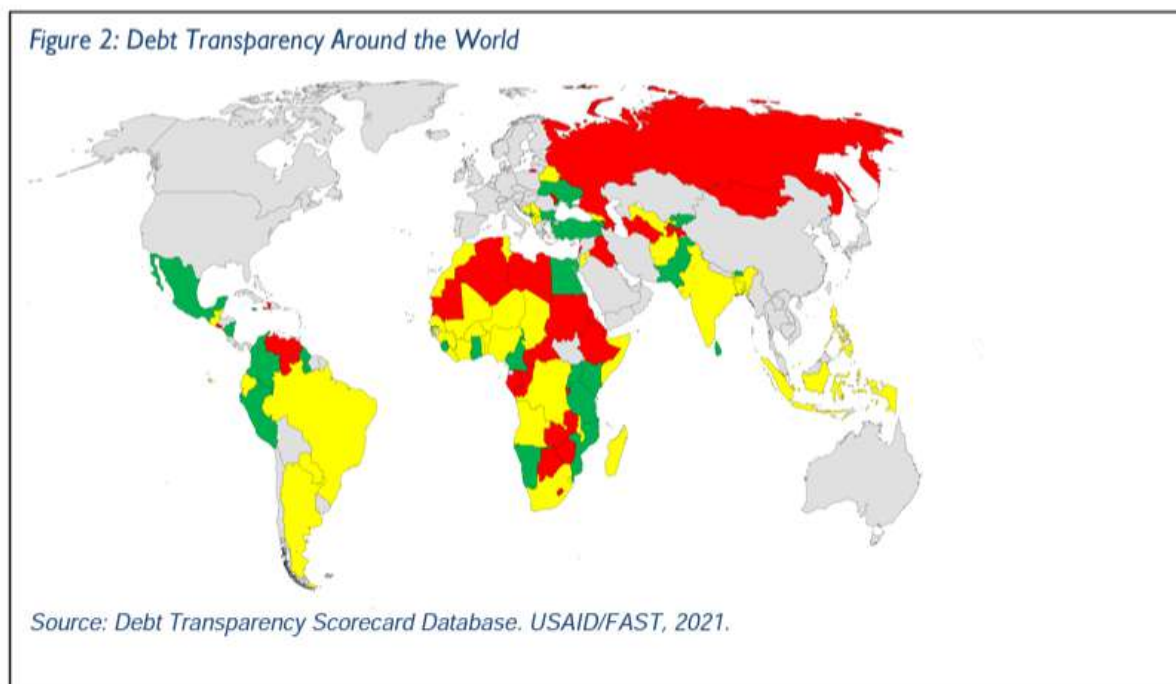
³⁹ Rivetti 2021

⁴⁰ World Bank 2022b

⁴¹ World Bank 2022b

⁴² Gallagher et al. 2022, 7

⁴³ Gallagher et al. 2022, 9



Even in the instances where such information is made publicly available, there have been inconsistencies with data reported by lending institutions such as multilateral development banks.⁴⁴ Even more problematic is the tendency of some African states to use their natural resources as collateral without disclosing the nature of such agreements.⁴⁵

3.2. Forms of Confidentiality in Government Loan Contracts

One of the main reasons why information on public debt of African states is difficult to access is because, apart from governments failing to officially report such data, loan agreements often have confidentiality clauses which prohibit or limit the disclosure of such information.⁴⁶ But what form does confidentiality in loan agreements take? Firstly, non-disclosure or confidentiality clauses are commonplace in financial transactions, only that they vary in form depending on the parties involved as well as prevailing market practice.⁴⁷ Some general components include: what (the confidential information which the parties seek to protect); who (the party which bears the obligation of maintaining confidentiality); when (the duration of the obligation, including the instances whereby disclosure is permissible or when confidential information ceases to be confidential).⁴⁸

⁴⁴ Estevão 2022

⁴⁵ Estevão 2022

⁴⁶ Estevão 2022; Rivetti 2021

⁴⁷ Maslen and Aslan 2022

⁴⁸ Maslen and Aslan 2022, 17

The practice when it comes to loan agreements involving states has been as follows:

<p>For commercial loans</p>	<p>Parties typically use templates and models from organisations such as the Loan Market Association for the UK and the Loan Syndications and Trading Association (LSTA) for the US.⁴⁹ When loan facilities are drafted following such models, negotiations between the borrower and the lender may involve various alterations and adjustments, including the insertion of a confidentiality clause, at the request of either party or both. A look at the confidentiality clauses of these two different models sheds some light as to the practice of borrowers. Both models have confidentiality clauses which are aimed largely towards the lender rather than the borrower, making it possible for public disclosure by the borrower regardless. States negotiating and choosing not to publicly disclose information that is not expressly stipulated as confidential under the models reflects states' lack of goodwill on transparency and their predisposition to secrecy rather than voluntary or proactive disclosure.</p>
<p>For multilateral financial institutions</p>	<p>The approach is generally policy-oriented and leaning towards public disclosure. IMF for example, provides capacity building and technical assistance to countries in relation to public debt management⁵⁰ which can include assistance on transparency requirements. The IMF is also empowered by its Articles of Agreement⁵¹ to request any information that it deems necessary for its activities; it follows that it could request for debt information if the same should be necessary, for example to assess the financial position of a country. As a lender, the IMF can also request information on pre-existing debt as a condition for lending, especially where the debt to be disbursed is complex.⁵² The IDA and IBRD, on the other hand, operate according to the World Bank Policy on Access to Information.⁵³ Other multilateral financial institutions such as the AfDB, also have disclosure requirements as part of their loan conditions.⁵⁴ In these conditions, the lender maintains confidentiality as agreed with the borrower, but gives the lender the right to disclose information in accordance with its lending conditions. There seem to be no mandatory obligations for borrowers, under these conditions, to disclose to their citizenry information regarding their loan arrangements, meaning that recourse is to be found at the domestic level.</p>
<p>For export credit agencies and state-owned banks</p>	<p>Practice by these and other lenders varies but is mostly shrouded in opacity. An example is Chinese lending to African governments. China usually requires that its contract terms remain confidential unless otherwise required by law and the use of confidentiality clauses in debt contracts between China and Africa have been increasing steadily since 2010.⁵⁵ While there are loan agreements that contain confidentiality clauses, in practice, it is not always immediately clear whether government non-disclosure of debt is due to the existence of such clauses. It is therefore important to also look at the disclosure practice of African governments. Overall, it seems that disclosure to a country's citizenry lies largely in its negotiation of loan agreements. Where there is room for public disclosure, why do parties go instead for non-disclosure? It says a lot about the will of the state to disclose. Also, it seems that disclosure is usually not mandatory, rather voluntary. Additionally, lending countries or export credit agencies, while committing to lending practices that promote transparency, these are not binding and guaranteed so there are no sanctions for failing to follow them.⁵⁶</p>

⁴⁹ Maslen and Aslan 2022, 17

⁵⁰ IRC Task Force on IMF and Global Financial Governance Issues 2021, 28

⁵¹ IMF 2010, art. VIII, sec. 5

⁵² IRC Task Force on IMF and Global Financial Governance Issues 2021, 29–30

⁵³ Cormier 2022

⁵⁴ Maslen and Aslan 2022

⁵⁵ Usman 2021; Cormier 2022; 2021

⁵⁶ Maslen and Aslan 2022, 18

3.3. Why is Non-Disclosure the Norm?

Based on the findings made by the author, there are certain drivers of opacity or insufficient disclosure in government loans. These are:

- a. The lack of commitment and goodwill on the part of the government such that even where countries have RTI laws, these laws are not always implemented to the letter.
- b. It might be argued that the public may be disinterested in matters of government debt or may lack the capacity to understand ‘complexities’ of fiscal issues. However, as studies show, citizens are indeed interested in their government’s debt activities.⁵⁷ There has been public outcry in various African countries. In Kenya, for example, the public has voiced its concerns over the government’s borrowing in various instances, including an appeal to the IMF on social media in 2021.⁵⁸ As already discussed above, in 2022, the KHRC filed a petition demanding access to information on Kenya’s debt.⁵⁹ Elsewhere, in Zambia, as well as in the diaspora, there have been protests by citizens and anti-poverty campaigners urging lenders to defer or cancel the country’s debt repayment.⁶⁰ Such clamour by the public, especially with the onset of the COVID-19 pandemic, goes to show that citizens are invested in their government debt.
- c. African governments might be reluctant to disclose loan details because of public pressure and the fear of admitting to its citizens the true state of affairs. This might also be informed by the prevailing political situation, for example, elections and corruption.⁶¹
- d. Obstacles to disclosure may exist in the legal framework of the borrower or the lender, or both, for example under the provisions limiting access to information or in provisions in other laws, for example, data protection rules, privacy laws or laws on national security. Such provisions pit disclosure against other legal requirements. The problem with this is that the interpretation of what constitutes national security or other limitations to access to information is usually subject to broad interpretation.⁶²
- e. African governments could be entering unfavourable loan arrangements with strict confidentiality requirements because they cannot negotiate better terms thanks to their lower bargaining power.

⁵⁷ Bremer and Bürgisser 2021

⁵⁸ In 2021, Kenyans signed a social media petition to ask the IMF to stop disbursing loans to Kenya because of growing concern over Kenya’s burgeoning debt.

⁵⁹ Kenya Human Rights Commission 2022

⁶⁰ Wilson 2022

⁶¹ Maslen and Aslan 2022, para. 10

⁶² Maslen and Aslan 2022

3.4. Making a Case for Transparency: Benefits of Disclosure

Confidentiality clauses in loan agreements involving governments actively undermine debt transparency.⁶³ Additionally, such clauses might be in contravention of existing laws, or go against prevailing market practice as well as disclosure obligations provided by lending institutions.⁶⁴ It is inevitable that disclosure in government loan contracts might present a regulatory and financial cost to the state, however, there are many benefits to be realised. There are various rationales for enhancing transparency in debt management in general such as:

- a. Efficiency and effectiveness in the management of a government's loan portfolio
- b. Accountability by officials and institutions in charge of debt management.⁶⁵

The benefits of transparency in debt management are also numerous - not just for the borrower(s) and creditor(s) but also for the public - the taxpayer.⁶⁶ For borrowing governments, transparency is beneficial as it reduces the risks attached to lending and enables them to secure lower rates on loans.⁶⁷ For lenders, disclosure of a borrowing country's debt would enhance informed decision-making prior to lending.⁶⁸ In fact, there have been cases whereby donor support to countries has been frozen as a result of undisclosed debt, as was the case in Mozambique in 2016.⁶⁹ For the public, disclosure promotes scrutiny into debt management and provides avenues for the public to hold the government accountable for borrowing as well as spending of acquired debt.⁷⁰

3.5. Limitations of Disclosure - Are There Any?

As discussed above, confidentiality is not unreasonable in certain circumstances. In fact, some information may be kept confidential for a specified period. Additionally, it is reasonable to keep proprietary information or price sensitive information of either party private. However, the context, jurisdiction, parties involved and the circumstances surrounding the transaction may inform the reasonableness of these drivers of confidentiality.⁷¹ For example, it is reasonable that governments may wish to keep their pricing strategy confidential before repurchasing debt in order to secure better prices.⁷² However, it is the author's view that such

⁶³ Maslen and Aslan 2022, paras. 20–21

⁶⁴ Maslen and Aslan 2022

⁶⁵ IMF 2001, para. 18

⁶⁶ Maslen and Aslan 2022

⁶⁷ Jubilee Debt Campaign 2019, 1–2

⁶⁸ Jubilee Debt Campaign 2019

⁶⁹ Estevão 2022; Rivetti 2021

⁷⁰ Rivetti 2021

⁷¹ Maslen and Aslan 2022, 15

⁷² IMF 2001, para. 26

limitations should be an exception rather than the norm, and that the benefits of transparency far outweigh those of confidentiality.

4. BEST PRACTICES WITHIN THE CONTINENT

Current statistics notwithstanding, there have been cases of good practice within the continent. For example, the World Bank reports that Burkina Faso is one of the countries that has greatly improved its disclosure of debts to the point that it has achieved full disclosure.⁷³ It was able to achieve this with capacity building help from the Debt Management Facility,⁷⁴ which is a multi-donor fund launched by the World Bank.⁷⁵ The improved transparency has in the last two years helped to reduce the country's borrowing costs as the creditors have accurate information on the country's liabilities.⁷⁶ According to the World Bank's Debt Reporting heat map, two other countries that are doing fairly well on transparency are Benin which has achieved full transparency in eight out of the nine parameters and Cameroon which has achieved full transparency in six out of the nine parameters used to measure performance.⁷⁷

Cameroon was also lauded in a separate report as one of the few developing countries that had published all of its loan contracts for the period between 1999 and 2017.⁷⁸ However, it seems that Cameroon may have lost some of its steam in relation to transparency as some of its information relating to contracts issued during the Covid 19 pandemic was not fully disclosed.⁷⁹ In another study conducted by USAID, Uganda emerged top of the African countries surveyed for meeting all the requirements for the indicators used in the study.⁸⁰ Some of the indicators include availability of public sector balance sheets and medium term debt management strategies, availability of information on currency composition and maturity composition of debt and reporting of information on debt from China.⁸¹ In yet another study conducted on 20 African countries, Kenya and Nigeria were found to be the most debt transparent.⁸² Reconciling the right to information with the disclosure requirements of African governments requires creating new systems, strengthening existing ones and holding all stakeholders involved, particularly governments accountable. This, therefore, requires a discussion on what recommendations are needed for better transparency of government loans. But before delving into concrete proposals on how African governments can improve disclosure, the next sub-section looks at some overarching principles that can guide disclosure by African governments.

⁷³ World Bank 2022c; Rivetti 2021

⁷⁴ World Bank 2022c

⁷⁵ DMF n.d.

⁷⁶ World Bank 2022c

⁷⁷ World Bank 2022b

⁷⁸ Gelpern et al. 1997, 4, 15

⁷⁹ Transparency International 2021

⁸⁰ Gallagher et al. 2022, 7

⁸¹ Gallagher et al. 2022, 22–24

⁸² Development Reimagined 1990

4.1.Principles of Disclosure

Principle 1: non-disclosure must be limited	African governments should, where possible, not consent to clauses that seek to keep borrowing secret. Instead, they should only formulate limited confidentiality clauses that serve to protect information intended to be kept private by law and disclose the information that is non-detrimental to disclose. ⁸³
Principle 2: debt information disclosed should be relevant	At a bare minimum, it should be on an individual basis, including details of the lender, interest rates and repayment schedule. ⁸⁴ Where resources are used as collateral for government loans, such information should also be disclosed. ⁸⁵
Principle 3: disclosure must be timely	If debt information is disclosed after the fact, it ceases to be meaningful. For meaningful disclosure, debt information should be availed to the public and third parties (such as lending institutions) periodically, and/or, during the different stages of the loan - not after its maturity or repayment. ⁸⁶
Principle 4: governments should be proactive in disclosure	The main purpose of having RTI laws is to institutionalise and make disclosure the norm such that the information is readily available, absent of citizens making requests for such information. ⁸⁷ The Africa Model Law on RTI provides that one of the categories of information that should be disclosed proactively is ‘all contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body’. ⁸⁸ Public disclosure is beneficial because it provides equal access to information to all without the need to file requests, it reduces the administrative burden on states and minimises the resources required by the public to access information. ⁸⁹
Principle 5: debt information should be accessible. ⁹⁰	Information should be disseminated through various channels such as the internet, radio, TV, public libraries, and mobile phones to ensure that it reaches the most people. Not only should this information be made available, but it should also be easily retrievable. Sixthly, the information disseminated should be comprehensible by the audiences it is intended for. For example, it should be disseminated in the country’s official languages and where possible in vernacular languages to reach the average member of the public.
Principle 6: information should be availed for free and where not possible, it should be at a low and reasonable cost to the public	To meet these considerations and establish an environment conducive to debt transparency, African governments will need to invest in systems that can produce accurate debt information. ⁹¹

⁸³ Maslen and Aslan 2022, para. 20

⁸⁴ Jubilee Debt Campaign 2019, 2

⁸⁵ Jubilee Debt Campaign 2019

⁸⁶ Jubilee Debt Campaign 2019

⁸⁷ Ololade 2018, 81

⁸⁸ African Commission on Human and Peoples’ Rights 2013, sec. 7

⁸⁹ RTI n.d.

⁹⁰ Darbishire 2010, 31–32

⁹¹ Estevão 2022

4.2. Domestic Level Efforts

4.2.1. *Legal framework*

A strong debt transparency framework relies on an equally strong legal environment. One of the problems identified in this research is that less than half of all African states have some form of access to information laws, and while some have these in the form of an Act of Parliament, some have access to information obligations scattered in other laws, including in their Constitutions.⁹² International and regional instruments also contain access to information provisions. However, when it comes to the specific question of debt transparency, there must be put in place a legal framework that elaborates on what form such disclosure should take to avoid gaps that give governments wiggle room for non-disclosure.

States that do not have such laws in place should enact these laws, while those that do should work towards implementation. As a bare minimum, all African governments should consider having in place legislation on access to information, public participation, and public finance management. Where existing laws provide for access to information, they should go ahead and implement regulations to bring into effect these obligations in light of fiscal law, in particular debt operations. A good legal framework must not only put in place clear debt-authorisation procedures and provisions, but also set out the nature of public debt information to be disclosed and the frequency of doing so. Such a framework should also require information on available sources of funding as well as auditing of pending debts.⁹³ Cameroon, Guinea and Mozambique are some of the few African countries that have reportedly made progress in debt transparency and reporting through updating their existing legal frameworks.⁹⁴

4.2.2. *Institutional framework*

Effective and efficient institutions must be put in place or strengthened to ensure sound implementation of a good legal framework for the promotion of debt transparency. Some authors recommend the establishment of an independent debt office, while others propose the retention of debt matters within the ministries of finance. One of the advantages of having a separate debt management agency is that it is a specialised body charged with just that one role, as opposed to it being considered secondary if it were dealt with among other policies (monetary, fiscal etc) as part of the Ministry of Finance's mandate.⁹⁵ Creating a separate body charged solely with debt management also ensures professionalism and focussed attention and resources to this one mandate. However, for such a system to work, mechanisms that enhance transparency (mainly a favourable legal environment) and good governance must be fostered.

⁹² Article 19 2022

⁹³ Estevão 2022

⁹⁴ Morsy 2020

⁹⁵ IMF and World Bank 2003

Such an agency should be structured in line with best practices from other countries which have successfully set up a separate debt office, for example Sweden.⁹⁶

Proponents of retaining debt management functions within the Ministry of Finance or the Central Bank also back up their claims with merits. For example, linkages with fiscal and monetary policies can be maintained - which coordination is very important. This would also save on resources that would otherwise go towards establishing a separate debt office. However, considering that majority of African governments adopt the latter practice and still experience debt opacity, a lot needs to be done to ensure that those officials in charge of debt are highly skilled in debt management and that they are held accountable, including *vis-a-vis* the public (not just to the Ministry/Central Bank). It is important to note that some African countries have started setting up independent debt offices - for example, Kenya. However, implementation is still pending.

It is noteworthy that debt transparency is partly due to lack of capacity in debt management.⁹⁷ Therefore, whichever option of the two a government takes, capacity-building is crucial. It is also paramount that the roles and responsibilities of those in charge of debt management, as well as the objectives of the body charged with the task, are clarified. In most African countries, parliament plays an important role. As a representative of the people and the legislative arm of government, parliament should approve laws that promote debt transparency. As the body in charge of approving fiscal policies, they should also prioritise debt management policy because debt management greatly impacts on future government spending. In the countries which do not have access to information laws such as Sudan, Chad, Libya and Democratic Republic of Congo, parliaments should enact access to information laws to enable an environment that allows the public to hold its representatives accountable on matters of debt.

4.3. AU Level Efforts

For an African solution to the debt crisis in the continent, there must be a continent-wide strategy to address the debt transparency issue. Just recently, Ministers of Finance, Monetary Affairs, Economic Planning, and Integration of AU Member States convened for the 5th ordinary Session of the Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration and deliberated on how to improve Africa's access to capital, including the key issue of debt management and the rising influence of Credit Rating Agencies.⁹⁸ Among the recommendations discussed by the Committee was the need for African countries to exchange information on transparency in order to enhance accountability in debt management.⁹⁹ In order to achieve this continent-centered approach to debt transparency, and debt redistribution in general, African governments must come together and cooperate towards

⁹⁶ IMF and World Bank 2003

⁹⁷ Morsy 2020

⁹⁸ African Union 2022a

⁹⁹ African Union 2022b

this common goal. The operationalisation of Article 19 of the Constitutive Act of the AU on financial institutions could also provide avenues for addressing the challenges of debt transparency at the continental level.

4.4. The role of other stakeholders

4.4.1. Lenders

While African governments bear the larger responsibility when it comes to ensuring debt transparency at the domestic level, part of this responsibility should be borne by creditors too. International financial institutions, and lender governments and banks can help promote debt transparency in general by improving disclosure in their own lending portfolio and limiting the use of non-disclosure clauses. For example, the G-20 Operational Guidelines for Sustainable Financing recommend the publication of lending portfolio information by G-20 states. Recently, the World Bank has recommended and encouraged the standardisation and consolidation of data collection on debt, keeping in mind that the nature of data disclosed is also important.¹⁰⁰ African lending institutions, such as the AfDB, should also ramp up efforts to encourage reforms and to assess how African governments are complying with disclosure standards.¹⁰¹ Apart from setting standards favourable for disclosure in loan contracts, financial institutions can also help African governments to build capacity in the recording, reporting and monitoring of their debt.¹⁰² Strategies such as the 2021-2025 AfDB Strategy for Economic Governance in Africa (SEGA), if properly implemented, would be a positive step in this direction.¹⁰³ So far, the AfDB is providing technical assistance to countries to improve their debt management and reporting in conjunction with UNCTAD and the Commonwealth¹⁰⁴

4.4.2. Civil society and other actors

While governments owe their citizens a duty to provide information, this has not been enough to ensure debt transparency. The role of civil society organisations in keeping governments in check cannot be understated or underestimated. Organisations such as the Tax Justice Network, OXFAM and Transparency International, have influenced reforms in debt management in Africa, but more needs to be done. These CSOs work with other organisations and academia to generate much needed research on debt management issues which Africa grapples with, as well as best practices collated from other contexts to help streamline the debt transparency environment in Africa. Such CSOs need to foster more collaborations, including with governments, to help build the capacity of debt management officials. CSOs should also continue in their efforts to hold governments and lenders accountable.

¹⁰⁰ Estevão 2022; Rivetti 2021

¹⁰¹ Morsy 2020

¹⁰² Calderón and Zeufack 2020, 29

¹⁰³ AfDB 2021

¹⁰⁴ Morsy 2020

5. CONCLUSION

Throughout its length, this paper has juxtaposed the right to information which requires that governments furnish citizens with information on their operations and the tendency of governments and creditors to not disclose important information in debt instruments. The paper went on to propose a framework for enhancing disclosure in loan agreements, making recommendations on the legal and institutional frameworks conducive to debt transparency, as well as the role of various stakeholders. Considering the above discussion, this paper concludes as follows:

First, most African governments are doing poorly in terms of debt transparency. Even though there have been improvements in the last few years, the continent still has a long way to go. Therefore, more work needs to be done by the respective governments and all stakeholders to make sure that more countries join the bandwagon and for those which are already on it to maintain momentum to ensure debt transparency.

Second, while the RTI is recognised in a significant number of African countries, there is still a considerable number of countries that have not implemented access to information laws that safeguard their citizens' right to receive information. It is, therefore, imperative for all countries to not only enact but also implement RTI laws to compel the governments to disclose information and to empower citizens to demand information from their governments.

Overall, this paper concludes that the main responsibility of improving disclosure in government loan contracts lies with the government. With the assistance and cooperation of all relevant stakeholders, there need not be tension between right to information and non-disclosure in debt matters because improving debt transparency will have numerous benefits for citizens, governments, creditors, and all other stakeholders.

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