DEBT, ACCESS TO INFORMATION AND ILLICIT FINANCIAL FLOWS: AN ANALYSIS BASED ON THE MOZAMBIQUE HIDDEN LOANS CASE

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Overview

The debt crisis in Africa is threatening the continent's ability to finance sustainable development. As of 2018, many African countries were in a debt distress. One such country was Mozambique, where state-owned enterprises had been used to secretly take out loans which led to a financial and development crisis for the citizens. The 'hidden loans' case, where citizens sought to challenge the validity of these loans, has brought to light the connection between debts taken out by state-owned enterprises - whose fiscal portfolio is not being captured in national budgets - with the lack of access to financial information in many African countries, a situation with the potential to facilitate illicit financial flows (IFFs) through state-owned enterprises. Against this background, this case study analysis seeks to examine the issues arising from the Mozambique hidden loans case by viewing them in the context of debt, access to information and IFFs. This brief analysis seeks to demonstrate that there is a need for data around state-owned enterprise borrowings to be made publicly available to prevent the use of these entities as vehicles for the facilitation of IFFs. The analysis will proceed by setting out a brief summary of the case in the background section. The next section will then delve into issues around borrowing by state-owned enterprises, access to financial information and IFFs. A famous Liberian proverb states that one should not measure the timbers for their house in the forest. This analysis adopts an approach inspired by this proverb - taking out different aspects of the case in order to examine them and build a general standpoint.

***Keywords**: Debt, access to information, illicit financial flows*

1. BACKGROUND TO THE MOZAMBIQUE HIDDEN LOANS CASE

Agreement No. 7 / CC / 2020 of May 8, 2020 was a case brought before the Mozambique Constitutional Court by a coalition of civil society organizations known as the Mozambique Budget Monitoring Forum. They claimed that it would be unfair for ordinary citizens to pay for a loan that had been illegally acquired and guaranteed by the government. In 2013 and 2014 two Mozambican state-owned companies, ProIndicus SA and Mozambique Asset Management (MAM) took out loans from credit companies, Suisse Group and Russian bank VTB. The loan was executed in form of government guaranteed bonds. It was meant for a fishing and maritime security project. The arguments of the petitioners were that the loans which were taken out valued at 535 million dollars and 622 million dollars respectively were illegal. This was in violation of the set amount of 5 million dollars that the Mozambique government could guarantee at the time. Moreover, the Assembly of the Republic had not been consulted on the process of government guaranteeing loans. The petitioners also claimed that the general state budget had no mention of the loans that were taken out therefore violating the Constitution under article 178(2).

The article states that the Assembly of the Republic is in charge of determining social and economic affairs of the State. According to the Court, the Constitution under article 244, states that the Constitutional Council has power to evaluate and declare unconstitutionality of laws and illegality of normative acts of State offices. Therefore, the Mozambican Court had jurisdiction to adjudicate on the matter of the sovereign debt incurred by its government and persons working in official capacity. Furthermore, the Constitution under article 179(p), set out that the Assembly of the Republic has exclusive power to authorize government to take out loans and establish the upper limit of guaranteeing loans. In this case the loan taken exceeded the 5 million dollars limit imposed by regulation. Therefore, the argument was for the loans to be rendered null and void. The Court decided that all the acts related to the taking out of the respective loans were null and void as they violated the Constitution.

2. ANALYSIS OF KEY ISSUES

The case raises a number of key issues which ought to be considered from the perspective of African countries. This will be done by considering the general state of debt, access to information and IFFs in these countries. The first issue, therefore, is on the role of state-owned enterprises in borrowing. State owned enterprises take up debt which is guaranteed by their government and therefore should comply with fiscal principles such as transparency and accountability. Waris in her book *Financing Africa* notes that all African governments own at least one business enterprise entirely (that is, parastatals) and tend to be shareholders in several other companies (Waris, 2019). However, information on debts from state-owned enterprises is difficult to find (Waris, 2019). In the African countries, many state-owned enterprises are predominantly perceived as loss-making entities. Their public accounts are unclear, and they are often left out of national budgets. In our opinion, both of these aspects are problematic - the former due to the fact that the public does not see these entities taking on debts and the latter as it leaves out a whole active section of government revenue from national budgets.

In the Mozambican case, state-owned enterprises were involved in taking of the loans. The case has highlighted the need to change this norm of secrecy (which is rooted in bad governance) around state-owned enterprises by availing detailed information on state-owned enterprises to the public and including them in national budgets. Following this, the second issue that relatedly emerges from the case is that of access to information, which is inextricably linked to public participation, transparency and accountability. One must consider whether the citizens have access to information (especially financial information) in their countries and to what extent, as well as how this freedom manifests. Although the right to information is underscored in various international and regional legal instruments, it has not been operationalised as part of the national laws of the African states, with an exception of a few.

The Universal Declaration on Human Rights provides for the right of information under Article 19 (United Nations, 1948). In 1998, the UN Special Rapporteur to the Commission on Human Rights pointed out that "*the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Governmen*t" (Hussain, 1998). In Africa, the African Commission on Human and People's Rights adopted the Declaration of Principles of Freedom of Expression in Africa (African Commission on Human and People's Rights, 2002). Principle IV thereof provides for the right to information, stating that "*public bodies hold information...as custodians for the public good and everyone has a right to access this information, subject only to clearly defined rules established by law*." The Declaration provides principles which guide the implementation of freedom of information - one of these is that public bodies are required to publish important information of significant public interest, even where no request has been made for the same (African Commission on Human and People's Rights, 2002).

Despite the above, as of 2019 only 22 African countries had passed national freedom of information laws (Feldman, 2019), hence majority of the countries on the continent still have to take positive steps to ensure the fulfilment of the right to information. However, the presence of these laws does not necessarily mean access to financial data, state to business contracts, tenders or procurement processes (Waris, 2019). In Mozambique, the Freedom of Information Law was passed in 2014, (Government of Mozambique, 2014) after the loans had been taken, but this raises an imperative question for other African countries without freedom of information laws - would the information come to light in a country where these laws were not present in the first place? A lot has to be done on the continent to ensure access to financial information by incorporating the right to freedom of information in the law and ensuring that the law in reality reflects doctrine.

Another silent issue that arises out of the case is that of illicit financial flows (IFFs). It is estimated that between 2005 and 2014, around 138 million dollars to 289 million dollars left Mozambique as IFFs. The country's Attorney General's Office estimated that IFFs cost the country 26.4 million dollars in 2016 alone. The major drivers of IFFs in the country include the informal economy, trade mis-invoicing, the extractive sector and corruption (Kukutschka, 2018). The 'hidden loans' case serves as an illustration that corruption can give rise to IFFs and is in fact facilitated where financial information around state-owned enterprises is not accessible. In the case, state-owned enterprises were used as a vehicle to borrow large amounts of money for national projects without observing the legal requirements, but the benefits did not materialise. This state of affairs was facilitated by the lack of information around state-owned enterprises, particularly information on borrowing. It is believed that the loans were intended to be used for personal enrichment and/or political patronage. The case also demonstrates that IFFs can actually involve illegal flows back into developing countries without complying with the formal oversight mechanisms and lending rules (Williams & Isaksen, 2016).

IFFs are a problem for the entire continent. Statistics show that around 100 billion dollars are lost from the African continent due to IFFs, but it has been argued that the data is underestimated (AU/ECA Conference of Ministers of Finance Planning and Economic Development, 2011; Waris & Makena, 2019) Waris and Makena posit that law on data collection and freedom of information has to be improved to increase the quality of this data (in terms of its veracity and reliability). They recommend that all transaction data should be availed to government and data collection agencies (Waris & Makena, 2019). In this regard, data from the Bank for International Settlements (BIS) would be critical. Although countries (including Mozambique) can access or request data from BIS, the Bank is at times limited in terms of the data it can provide to them (Kar, 2010). The African Union High Level Panel on Illicit Financial Flows recommends that BIS publish the data it has on international banking assets by country of origin and destination so that it can inform the analysis of IFFs from Africa. The Panel also stated that data on bilateral cross-border banking liabilities, which is also collected by BIS, should be made available to reduce financial secrecy in African countries (AU/ECA Conference of Ministers of Finance Planning and Economic Development, 2011). This information needs to be made available to curb IFFs that hinder the development of African countries.

The final issue is that of debt ceilings - how much debt *can* a country take and how much debt *should* a country take? This is connected to the issues of state-owned enterprise borrowing and lack of access to information. The debts taken by state-owned enterprises undeniably have an impact on the country's total national debt. Where information on state-owned enterprise borrowing is hidden, how will a country determine whether or not it has reached its debt ceiling? Interestingly, no African country has set out a debt ceiling constitutionally. With the emergence of the COVID-19 pandemic, debt ceilings have been raised and emergency funds are entering African countries in form of loans. The increasing level of debt poses a risk to financing sustainable development in African countries and increases pressure on revenue authorities which have to collect higher taxes to meet debt obligations (Waris, 2019). In 2019, the International Monetary Fund (IMF) warned that most African countries had borrowed more than they should have to avoid debt distress. With the emergence of the pandemic, many countries in Africa are now facing a difficulty fighting the pandemic while attempting to cushion their economies. The countries with the highest risk of debt default are those with limited savings and large external debts (The Economist, 2020). Now more than ever before, it is vital for countries to assess how much debt they can afford to take and set this out constitutionally.

In the Mozambican case, the loans taken out by Proindicus and MAM amounted to about 1.1 billion dollars, which significantly breached the country's debt ceiling of 5 million dollars that had been set out in the national budget. The loans have led to multiple negative impacts on the citizenry including higher costs of living, lower wages, slowed economic growth, lack of healthcare and sanitation due to a halt in donor funding and a loss of more than a third of the value of the country's currency over six months (The Economist, 2019). This demonstrates that even where debt ceilings have been set out in national budgets, there is a possibility that debts can escape oversight mechanisms and breach these ceilings. As a first step, debt ceilings should be set out in constitutions and mechanisms put in place to ensure strict adherence to these limits should be strengthened. For these measures to have an impact, transparency and access to information with regard to public funds and state-owned enterprises is crucial.

3. CONCLUDING REMARK

State owned enterprises are increasingly being used by African governments to take up debt, however, their failure to comply with the fiscal principles such as access to information, transparency and accountability could lead to an increase in illicit financial flows. The Mozambican case shows that state owned enterprises if unchecked can lead to taking up debt that is unsustainable for a country.

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