

**Public Debt Management in Kenya: An Analysis of the Public Finance
Management Act, 2023 on Debt Ceiling**

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**Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws at
Strathmore University**



Strathmore Law School

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Nairobi, Kenya

June, 2025

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Abstract

This study examines whether the shift from a nominal to GDP debt ceiling is a proper mechanism to ensure that public debt management is transparent, accountable and sustainable. The motivation for this research arises from the 2023 amendment to the Public Finance Management (Amendment) Act 2023, which replaced the fixed KSh 10 trillion nominal debt ceiling with a flexible threshold set at 55% of the Gross Domestic Product (GDP). This shift was intended to align borrowing limits with economic performance which has transferred significant borrowing discretion from Parliament to the Executive, raising concerns regarding executive discretion, parliamentary oversight and fiscal sustainability. To analyze these concerns, the study adopts a doctrinal and comparative legal methodology, evaluating the constitutional and statutory provisions governing public debt management. It further examines international best practices and comparative jurisdictions, specifically Botswana and Poland, which have implemented strong legislative measures. The study finds that the amendments to the Public Finance Management (Amendment) Act 2023 have weakened parliamentary oversight by allowing the Executive to unilaterally adjust debt levels with limited legislative scrutiny. Additionally, Judicial decisions have demonstrated the opacity in Kenya's debt management, with courts finding that the Executive has failed to disclose critical debt information, thereby violating constitutional principles of transparency. These cases paint a broader picture of an Executive with extensive control over debt governance, raising concerns about the implications of this power shift under a GDP debt ceiling. Comparative analysis reveals that both Poland and Botswana have stronger legal safeguards. Poland employs a multi-tiered debt rule framework that triggers specific corrective actions when debt surpasses predefined levels, ensuring fiscal discipline. Similarly, Botswana mandates parliamentary oversight for all external borrowing and imposes strict debt caps, reinforcing fiscal responsibility. These measures contrast sharply with Kenya's framework, where executive discretion remains largely unchecked, increasing the risks of unsustainable borrowing and fiscal mismanagement. Based on these findings, the study recommends strengthening parliamentary control over debt limits, enhancing public debt transparency through a centralized online portal and adopting a debt anchor policy with clear implementation frameworks. Ultimately, this study contributes to the discourse on public debt management by highlighting the risks posed by excessive Executive discretion in debt governance.

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List of Abbreviations

ABP	Annual Borrowing Plan
BOB	Bank of Botswana
BPS	Budget Policy Statement
CBK	Central Bank of Kenya
COB	Controller of Budget
CoB	Constitution of Botswana
CoK	Constitution of Kenya
CS	Cabinet Secretary
CSO	Central Statistics Office
DMD	Debt Management Department
DSSI	Debt Service Suspension Initiative
EAC	East African Community
EAMU	East African Community's Monetary Union Convergence Criteria
EDP	Excessive Deficit Procedure
ERD	External Resources Department
EU	European Union
FEC	Finance and Estimates Committee
FLRs	Fiscal Responsibility Laws
GDP	Gross Domestic Product
GOK	Government of Kenya
IBP	International Budget Partnership
IMF	International Monetary Fund
MOF	Minister of Finance
MTDS	Medium-Term Debt Management Strategy
NDI	National Democratic Institute

OAG	Office of the Auditor General
PAC	Public Accounts Committee
PBO	Parliamentary Budget Office
PDMO	Public Debt Management Office
PDPC	Public Debt and Privatization Committee
PFM	Public Financial Management
PFMA	Public Finance Management Act
PFMR	The Public Finance Management Regulations
PFMRP	Public Financial Management Reform Programme
PIC	Public Investments Committee
SADC	Southern African Development Community
SGR	Standard Railway Gauge
TISA	The Institute for Social Accountability
WAEMU	West African Economic Monetary Union



List of Legal Instruments

The Constitution of Kenya, 2010

The Constitution of Poland, 1997.

The Constitution of Botswana ,1966.

Kenyan Statutes

The Public Finance Management Act, 2012

The Public Finance Management (Amendment) Act, 2023

The Public Finance Management (National Government) Regulations, 2015

Access to Information Act, CAP. 7M

Official Secrets Act, Cap. 187

Botswana Statutes

Public Finance Management Act, 2016

Finance and Audit Act, 2011

Stock, Bonds, and Treasury Bills Act, 2006

Poland Legislation

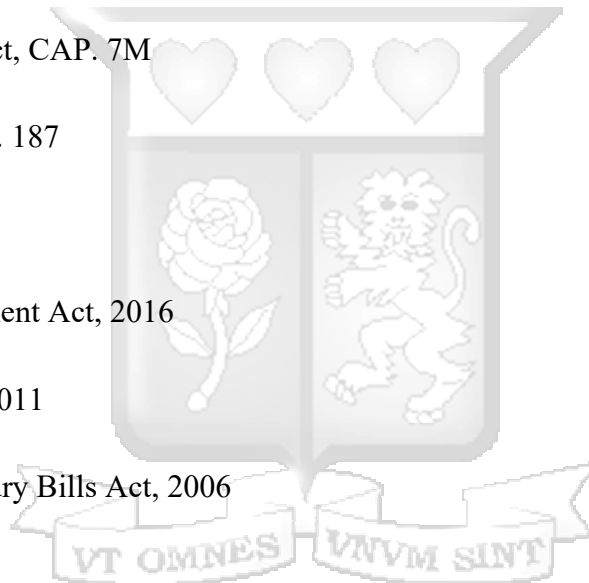
Public Finance Act, 2009

Ghana Legislation

Public Financial Management Act, 2016 (Act 921)

Canada Legislation

Financial Administration Act, 1985



List of Cases

Kenya

Kenya Human Rights Commission & another v Attorney General & another; Law Society of Kenya (Petition E179 of 2022) [2022] eKLR

Khalifa and another v Principal Secretary Ministry of Transport (Constitutional Petition E032 of 2019) [2022] KEHC 368 (KLR)

NjonjoMue&Another v. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR

Okiya Omtatah Okoiti & another v Uhuru Muigai Kenyatta & 7 others [2016] eKLR

Timothy Njoya v. Attorney General & Another (2014) eKLR

East Africa Court of Justice

Eugenia Wanjiru Gikonyo V. The Attorney General the Republic of Kenya Reference No. 19 of 2024

South Africa

President of the Republic of South Africa v M&G Media Ltd [2011] ZACC 32

United States

Oland v Secretary to the Department of Justice, 2010 SCC 23, [2010] 1 SCR 815

Acknowledgements

My deepest gratitude to my Creator for granting me the strength required to write this thesis. I wish to sincerely thank my supervisor, Dr. Antoinette Kankindi, for her willingness to assist and guide me through the final stages of this work. I also appreciate the guidance of my former supervisor, the late Dr. Wilfred Mutubwa, and the proposal panel, whose friendly and expert insights have been invaluable throughout this process. I am grateful to my parents and siblings for their support. I also wish to recognize my friends, John Muasa and Daniel Murakaru for their patience and encouragement throughout this journey. Finally, I commend myself for my determination and commitment.



Dedication

I dedicate this thesis to my beloved parents, Fahima Mohammed and Mohammed Loo, and to my sister, Farhat Loo, who patiently endured my endless discussions about it. Their unwavering support has been my greatest source of strength.

Furthermore, I dedicate this thesis to my future self, as a reminder that this is an Amanah entrusted to me by my Lord. May this pursuit of knowledge always be guided by the intention to achieve the highest good.



Chapter one: Introduction

1.1 Background

Public debt is a crucial economic performance indicator for any country.¹ Globally, its management has become increasingly complex as countries navigate rising debt levels amid fluctuating economic conditions.² As of 2023, global public debt had reached 91% of Gross Domestic Product (GDP), sparking concerns about long-term fiscal sustainability.³ The World Bank underscores the importance of comprehensive debt strategies to mitigate fiscal risks, advocating for responsible borrowing and sound public debt management.⁴

Public debt management is particularly critical for developing countries, where governments must navigate the trade-off between ensuring fiscal sustainability and financing economic growth.⁵ Fiscal rules play a critical role in this balancing act by providing legally binding constraints on government borrowing, spending and debt accumulation.⁶ These rules can manifest in the form of debt ceilings, deficit limits or expenditure rules, which are designed to enhance fiscal discipline, improve debt transparency and prevent excessive borrowing.⁷ In Kenya this balance is especially difficult, as the complexities of managing public debt threaten to exacerbate economic vulnerabilities.⁸

To address these challenges, many developing countries, including Kenya, rely on fiscal rules like debt ceilings to manage their public debt effectively. A debt ceiling serves as a legally mandated borrowing limit to prevent unsustainable debt accumulation.⁹ Debt ceilings can be employed in

¹ M. Kithinji, 'Determination of Optimal Public Debt Ceiling for Kenya Using Stochastic Control' Published thesis, Strathmore University (2018) p.11 <https://su-plus.strathmore.edu/> accessed on 15th May 2024.

² United Nations Economic and Social Commission, "Addressing Public Debt Challenges to Effectively Pursue the Sustainable Development Goals: Regional Perspectives" (2023) <<https://www.unescap.org/resources/policy-brief-addressing-public-debt-challenges>> accessed on June 24th 2024

³ United Nations General Assembly, *IMF World Economic Outlook* (April 2024) World Economic Outlook - All Issues.

⁴ World Bank and International Monetary Fund, *Revised Guidelines for Public Debt Management* (2016) <https://www.imf.org/en/Publications/TNM/Issues/2016/12/31/Revised-Guidelines-for-Public-Debt-Management-2016-43908> on 23rd June 2024.

⁵ C Manasseh, et al, 'External Debt and Economic Growth in Sub-Saharan Africa: Does Governance Matter?' (2022) 17(3) <https://doi.org/10.1371/journal.pone.0264082>.

⁶ A. Weber et al, 'Fiscal Rules in Response to the Crisis: Toward the "Next-Generation" Rules: A New Dataset' (2012).
⁷ *ibid* (n 6).

⁸ Hassan et al, 'The effect of national public debt on economic growth in Kenya' (2023) 19(7) *European Scientific Journal* 79.

⁹ Republic of Kenya, *The Hansard* (Vol II No 47, 15 June 2023) 21.

either nominal terms, specified as fixed amounts in a particular currency, or in relative terms, expressed as a percentage of GDP.¹⁰ This approach allows governments to tailor their debt management strategies to their economic conditions, ensuring that fiscal policies support sustainable growth while maintaining fiscal stability.

Debt ceilings are established through various mechanisms to ensure they are not merely conceptual but also enforceable legal and fiscal tools. These mechanisms include constitutional and statutory provisions, parliamentary initiatives, political obligations, global agreements, or ministerial guidelines.¹¹ For instance, Kenya's Public Finance Management (Amendment) Act, 2023 that provides a statutory debt ceiling.¹² Establishing clear borrowing thresholds and debt ceilings helps reduce the likelihood of default and creates the necessary fiscal space for governments to absorb economic shocks, thus enhancing resilience within the economy.¹³ However, recent data indicates that the effectiveness of debt ceilings can be compromised by their potential to be circumvented or their inability to address underlying fiscal issues, highlighting the need for robust enforcement mechanisms and comprehensive fiscal reforms.¹⁴

In Kenya, the Constitution of Kenya (CoK) and the Public Finance Management Act, 2012 grant Parliament the oversight responsibility for Public Debt Management, including the authority to establish and adjust debt ceilings.¹⁵ Historically, Kenya operated under the nominal debt ceiling, which allowed Parliament to review and modify borrowing limits in response to changing fiscal conditions.¹⁶ For instance, the debt ceiling was first established at Ksh 6 trillion with the implementation of the Public Finance Management Act, 2012.¹⁷ This limit was later adjusted to Ksh 9 trillion in 2019 and further increased to Ksh 10 trillion in July 2022.¹⁸ These adjustments

¹⁰ KIPPRA Policy Brief No. 30 of 2023/2024, 'Public Debt Ceiling: The Experience for Kenya and Lessons from Other Countries' (2023/2024) Globally most countries have adopted the GPD model with the USA now relying on the nominal Debt ceiling accessed on 25th June 2024 <https://repository.kippira.or.ke/handle/123456789/4913>

¹¹ A Awadzi, *Designing Legal Frameworks for Public Debt Management* (IMF Working Paper No WP/15/121, July 2015). For instance, The Constitution of Poland, Article 216 (5) which set it at 60 % of the GDP. In certain jurisdictions including Canada and Cape Verde, debt ceilings are set within a fiscal responsibility framework that relies on policy commitments.

¹² Public Finance Management (Amendment) Act, 2023

¹³ M Aguiar et al, 'Coordination and Crisis in Monetary Unions' (2015) 130 *The Quarterly Journal of Economics* 1727.

¹⁴ *ibid* (n 6).

¹⁵ Constitution of Kenya (2010) Article 211, 209 and the Public Finance Management Act (No 18 of 2012).

¹⁶ *ibid* (n 10).

¹⁷ Public Finance Management Act (No 18 of 2012).

¹⁸ The National Treasury and Planning, *Annual Public Debt Management Report for the Financial Year 2021/2022* pg. 17 accessed <https://www.treasury.go.ke/wp-content/uploads/2023/06/Annual-Public-Debt-Report-2021-2022.pdf> and the Republic of Kenya, "Budget Policy Statement 2023" p 106.

were justified as necessary to meet debt obligations and prevent default, but required parliamentary approval.¹⁹

Despite Parliament's constitutional mandate to oversee public debt, concerns persist regarding its effectiveness in exercising this role.²⁰ Evidence suggests that the Executive wields significant influence over debt management.²¹ For instance, the Public Finance Management Act, 2012, permits the Executive to borrow without needing prior approval from Parliament, as loans are not subject to parliamentary ratification.²² Instead, the law allows the Executive to secure debt first and later submit supplementary estimates to Parliament for approval. This lack of clear procedural safeguards grants the National Treasury broad discretion in debt management, enabling it to make critical borrowing decisions without sufficient parliamentary scrutiny.²³

Recent developments further illustrate Parliament's limited influence over public debt management. The Public Finance Management (Amendment) Act, 2023, which amended the Public Finance Management Act, 2012 has shifted the debt ceiling framework.²⁴ Under the new framework, the debt ceiling shifted from a nominal debt ceiling to a GDP set at 55% in present value terms, with a provision for a margin of up to 5%, effectively establishing a ceiling of 60%.²⁵ Proponents argue that the GDP ceiling aims to create a more adaptable and responsive debt management system, aligning borrowing limits with the economy's performance.²⁶ However, this shift significantly reduces Parliament's role in debt governance, as it allows the Executive greater discretion in determining borrowing levels within the set threshold.²⁷

According to Adwazi, effective enforcement mechanisms are essential for compliance with debt ceilings.²⁸ However, the recent amendments to the Public Finance Management Act, 2012 have significantly consolidated fiscal control within the executive branch, weakening Parliament's oversight role in Public Debt Management. Section 50 (5) of the Act, reiterates the mandate of

¹⁹ Public Finance Management Act (No 18 of 2012) section 50(2).

²⁰ National Democratic Institute for International Affairs (NDI), 'The Role of Parliament in Public Debt Oversight in Kenya' 2022 <https://www.ndi.org/publications/role-parliament-public-debt-oversight-kenya> accessed on 25th July 2024.

²¹ *ibid* (n 20).

²² *ibid* (n 20).

²³ *ibid* (n 20).

²⁴ Public Finance Management (Amendment) Act, 2023, Section 6 (A-D) and Public Finance Management Act, 2012 sec 50 (2) A-D.

²⁵ Public Finance Management Act (No 18 of 2012) Section 50 2(A).

²⁶ P. Heimberger, "Do Higher Public Debt Levels Reduce Economic Growth?" *Journal of Economic Surveys* 37(4) (2023) 1061-1089.

²⁷ Public Finance Management Act (No 18 of 2012), Section 50 (2) A-D.

²⁸ *ibid* (11).

Parliament to establish the borrowing thresholds.²⁹ Conversely, section 50 (2B) grants the Cabinet Secretary (CS) for the National Treasury greater discretionary power to adjust the debt ceiling based on GDP and can exceed it by up to 5% in exceptional circumstances.³⁰ This marks a significant departure from where Parliament had direct control over setting and adjusting the debt limits.³¹ The deletion of a clause requiring the Treasury to justify breaches of the debt anchor further undermines legislative scrutiny, raising concerns about transparency and accountability in public debt management.

These changes have shifted Parliament's function from proactive approval of borrowing thresholds to a reporting-based oversight process.³² Under this framework, Parliament now receives reports on borrowing decisions made by the Executive rather than actively setting and adjusting debt ceilings based on fiscal conditions. Section 50(2D) of the Act requires the Cabinet Secretary (CS) for the National Treasury to report breaches of the debt threshold to Parliament. However, the provision does not specify a timeline for these disclosures, leaving room for delays and undermining real-time oversight. This situation raises serious transparency concerns, particularly under the previous nominal debt ceiling framework, where the Executive failed to fulfill its reporting obligations. For instance, in 2019, a significant portion of mandatory debt reports were either delayed or incomplete, thereby impeding Parliament's ability to effectively discharge its oversight mandate.³³

Additionally, Section 50(2C), further intensifies this conflict by granting the Executive direct control over debt reduction strategies.³⁴ This section mandates the CS to take measures within five years to ensure that national government borrowing adheres to established thresholds.³⁵ While this provision places a legal obligation on the Executive to reduce public debt, it does not provide clear guidelines on how these reductions will be achieved, leaving substantial discretion in the hands of the National Treasury. Furthermore, it does not clarify the legally established role of Parliament in overseeing debt given that Parliament is constitutionally mandated to regulate borrowing and debt levels.³⁶

²⁹ Public Finance Management Act (No 18 of 2012), Section 50 (5).

³⁰ Public Finance Management Act (No 18 of 2012), Section 50 (2)(D).

³¹ Susan Musuamba, *'A Review of Public Debt Management Legal Framework'* (Master's Thesis, University of Nairobi, School of Law 2017).

³² Public Finance Management Act (No 18 of 2012) Section 50(2)(D).

³³ OAG, *Report of the Auditor-General on the National Government Ministries 2021/2022* (2022).

³⁴ Public Finance Management Act (No 18 of 2012) Section 50(2) (C).

³⁵ Public Finance Management Act (No 18 of 2012) Section 50(2) (C).

³⁶ Public Finance Management Act (No 18 of 2012) Section 50(5).

Unlike a fixed nominal ceiling, a GDP ceiling approach depends on timely and accurate economic data to ascertain appropriate borrowing thresholds.³⁷ Given that GDP fluctuates based on economic conditions, meticulous economic reporting from the Executive to Parliament and other oversight entities is crucial.³⁸ While proponents argue that this system ensures borrowing limits align with economic performance, Kenya's recent fiscal practices reveal significant risks associated with executive discretion over economic reporting.³⁹ For instance, in 2021, the National Treasury faced criticism for discrepancies in reporting government revenue and expenditure figures, raising concerns about the accuracy of economic data used to inform borrowing decisions.⁴⁰ These inaccuracies hindered Parliament's ability to effectively monitor compliance with borrowing limits under the nominal debt ceiling framework.

The broader implications of the 2023 amendment are profound, reflecting a tension between flexibility and accountability in public debt management.⁴¹ On one hand, adopting a GDP debt ceiling aligns Kenya's fiscal policy providing flexibility to adjust borrowing in response to economic fluctuations.⁴² Conversely, the diminished role of Parliament raises concerns about the erosion of legislative oversight, potentially shifting greater control over debt management to the Executive. This tension is particularly pronounced given Kenya's historical challenges with debt transparency.⁴³

The shift to a GDP debt ceiling is consistent with regional and international standards, such as recommendations by the International Monetary Fund (IMF) and the East African Monetary Union Community's (EAMU), which sets a public debt limit of 60% and 50% respectively of GDP.⁴⁴ However, aligning with global norms imposes an obligation on Kenya to ensure that the domestic legal and institutional frameworks are capable of managing the complexities of a GDP model effectively. The risk is that flexibility without corresponding institutional safeguards may lead to fiscal irresponsibility, undermining the very objectives the reform purports to achieve.⁴⁵

³⁷ K. Buysse et al., "Indebtedness around the world: Is the sky the limit?" (2021) *Economics Tijdschrift/Nationale Bank van België-Brussel* 69-116.

³⁸ L. Martinez, 'How Much Should We Trust the Dictator's GDP Growth Estimates?' (2022) 130(10) *JPE* 2731.

³⁹ K. Brown, "Why hide? Africa's unreported debt to China" (2023) *The Review of International Organizations* 1-32.

⁴⁰ National Treasury, *Nairobi* (2021). *Nairobi* <https://www.Speech during the Launch of the 2021 Economic Survey Report: 9th September 2021>.

⁴¹ L. Latif, *The Legal Foundations of the African Public Debt* <https://doi.org/10.13140/RG.2.2.31295.28321>.

⁴² IMF, *Reform of the Policy on Public Debt Limits in IMF-Supported Programs* (November 2020).

⁴³ *ibid* (20).

⁴⁴ Protocol on the Establishment of the East African Monetary Union, Article 6 2(c).

⁴⁵ A. Shah, *Public Sector Governance and Accountability Series: Fiscal Management* (World Bank, 2007) <https://documents1.worldbank.org/curated/en/620711468140976154/pdf/343770PAPER0Fi101OFFICIAL0USE00NLY1.pdf>.

The implementation of GDP debt ceilings in countries like Poland exemplifies the importance of robust institutional frameworks in ensuring fiscal prudence. Poland's success in this regard is underpinned by independent oversight bodies such as the National Bank of Poland (NBP) which play a crucial role in verifying the accuracy of economic projections that inform borrowing decisions.⁴⁶ These institutions operate within a well-defined legal framework that mandates timely reporting and enforces compliance with borrowing thresholds. For instance, Poland's debt management system includes provisions for gradual borrowing restrictions and corrective mechanisms when the debt ratio exceeds 50% of GDP, thereby ensuring that fiscal discipline is maintained.⁴⁷

In contrast, Kenya's institutional framework for public debt management, while present, lacks the necessary legal institutional and operational independence to effectively implement a GDP debt ceiling. While Parliament and the National Treasury are constitutionally mandated to oversee public debt, the absence of clear legal provisions governing reporting timelines and enforcement mechanisms leaves the process vulnerable to executive discretion and political influence. Furthermore, Kenya's reliance on economic data for setting GDP-linked borrowing limits is complicated by inconsistencies in reporting practices. Without robust data verification processes and independent oversight mechanisms, Kenya's GDP debt ceiling risks becoming a tool for unchecked borrowing rather than a safeguard for fiscal discipline. To realize the intended benefits of a GDP debt ceiling, Kenya must undertake comprehensive reforms to enhance institutional capacity and independence.

Despite a growing body of scholarly work on Public Debt Management, the evolving oversight role of Parliament under the GDP debt ceiling framework remains underexplored. This study is critical given Kenya's increasing debt burden and the constitutional imperative for transparency and accountability in public financial management. By analyzing the shift to a GDP debt ceiling, the study contributes to the discourse on sustainable debt management and the balance of power between the executive and Parliament. This research aims to fill this gap by interrogating whether the shift from a nominal to a GDP debt ceiling constitutes an effective mechanism for promoting transparency, accountability and sustainability in Kenya's public debt management framework.

⁴⁶ Poland, Public Finance Act, 2009

⁴⁷ Poland, Public Finance Act, 2009, Article 87.

1.2 Problem Statement

The Constitution of Kenya mandates Parliament to oversee public debt management, ensuring transparency and accountability. Historically, debt ceilings in Kenya were expressed in absolute terms, requiring express parliamentary approval for any revisions, thus safeguarding legislative oversight and promoting fiscal discipline. However, following the amendment of Section 6 of the Public Finance Management Act (PFMA) in 2023 borrowing thresholds are now tied to GDP debt ceiling, granting the Executive significantly broader discretion over debt decisions. Consequently, Parliament's role has shifted from proactive regulation to passive oversight, merely receiving borrowing reports after debt has already been contracted.⁴⁸ This transition raises significant concerns. By diluting parliamentary oversight, the shift to a GDP debt ceiling undermines checks and balances and heightens the risk of unchecked, opaque and potentially politically driven borrowing. It further threatens fiscal transparency by enabling potential data manipulation and limiting prior legislative scrutiny. This research interrogates whether the shift from a nominal debt ceiling to GDP debt ceiling constitutes an effective mechanism for promoting transparency, accountability and sustainability in Kenya's public debt management framework.

1.3 Research Objectives

The **core focus** of this study is to establish whether the shift from a nominal to GDP debt ceiling constitutes an effective mechanism for promoting transparency, accountability and sustainability in Kenya's public debt management framework. To achieve this, the research shall consider the following specific objectives:

1. To investigate Kenya's public debt management legal framework and identify gaps affecting the implementation of the GDP debt ceiling.
2. To analyze case law on the implementation of Kenya's public debt management framework, focusing on the GDP debt ceiling's effectiveness.
3. To extract lessons from Botswana's and Poland's experiences with GDP debt ceilings for Kenya's transition from a nominal to a GDP debt ceiling framework.
4. To propose legal and regulatory reforms to enhance transparency, accountability and sustainability in Kenya's GDP debt ceiling system.

⁴⁸ Public Finance Management Act (Amendment) 2023 Section 6 (2) (A)-(D).

1.4 Research Questions

The **main research** question is whether Kenya's transition from a nominal to a GDP debt ceiling constitutes an effective mechanism for promoting transparency, accountability and sustainability in Kenya's public debt management framework.

The research shall consider the following sub-questions:

1. What are the key gaps in Kenya's public debt management legal framework that hinder the effective implementation of the GDP debt ceiling?
2. How do Kenyan court cases on public debt transparency, accountability and sustainability reveal potential challenges in implementing a GDP debt ceiling, given prior issues under the nominal system?
3. What lessons can Kenya learn from Botswana and Poland's experiences with GDP debt ceilings to improve its own framework?
4. What legal and regulatory reforms are needed to enhance transparency, accountability and sustainability in Kenya's GDP debt ceiling system?

1.5 Research Hypothesis

This study hypothesizes that Kenya's current legal framework for Public Debt Management lacks the necessary safeguards to ensure transparency, accountability and sustainability in the transition from a nominal to a GDP debt ceiling. Without strengthened legal provisions and institutional reforms, the flexibility of the GDP model may increase the risk of executive overreach, potentially weakening parliamentary oversight and undermining the effectiveness of Public Debt Management.

1.6 Significance of the study

This research is significant in the context of Kenya's transition from a nominal to a GDP debt ceiling, a shift with profound implications for transparency, accountability, and sustainability. As Kenya's public debt continues to rise, there is an urgent need to assess whether the existing legal framework adequately safeguards these crucial principles in public debt management. The study addresses this need by evaluating whether Parliament retains sufficient oversight powers to hold the Executive accountable for borrowing decisions, particularly under the Public Finance Management (Amendment) Act 2023, as well as examining transparency and accountability. Parliament, as the primary oversight body, will gain a deeper understanding of the extent to which its constitutional mandate has been altered by the shift to a GDP debt ceiling.

The findings will inform debates on whether additional legislative safeguards are necessary to strengthen parliamentary scrutiny over borrowing decisions; by identifying legal gaps that weaken parliamentary oversight, this research offers concrete recommendations for legislative and institutional reforms aimed at enhancing fiscal discipline. Furthermore, institutions such as the National Treasury, the Public Debt Management Office (PDMO), the Central Bank of Kenya (CBK), and the Office of the Auditor-General will benefit from an in-depth analysis of their respective roles in ensuring sustainable debt practices. By providing a rigorous legal analysis of Kenya's transition to a GDP debt ceiling, the study offers practical recommendations that can strengthen the country's debt management framework, improve parliamentary oversight, and enhance transparency in government borrowing.

1.7 Theoretical framework

This study is grounded on theories that analyze the governance dynamics of Public Debt Management in Kenya, particularly in light of the transition to a GDP debt ceiling.

1.7.1 Public Choice Theory

James Buchanan is credited with developing public choice theory in the 1960s.⁴⁹ The theory suggests that individuals, including politicians and bureaucrats, act in their own self-interest, often leading to outcomes that may not align with the public good. The theory offers a critical framework for analyzing public debt by emphasizing the rational behavior of individuals involved in political decision-making.⁵⁰ They act in their self-interest, similar to participants in market dynamics.⁵¹ This perspective is essential for understanding the complexities of government borrowing, especially in contexts like Kenya, where accountability and transparency are paramount during the transition to a GDP debt ceiling.

The relevance of public choice theory to public debt lies in its capacity to illuminate potential inefficiencies and abuses that can arise when political actors exert excessive control over fiscal policies. The theory asserts that individuals in government are motivated by personal interests, leading to policies that emphasize quick gains while neglecting long-term economic resilience. Politicians may favor policies that secure immediate benefits for their constituents to ensure re-election, even if such policies contribute to unsustainable debt levels. In this transition to a GDP debt framework, the risk of undermining Parliament's oversight role becomes significant. This

⁴⁹ J. Buchanan et al, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press 1962) pg. 23.

⁵⁰ N. Gunningham, 'Public Choice: The Economic Analysis of Public Law' (1992) 21(1) *Federal Law Review* 117.

⁵¹ *ibid* (n 54).

aligns with historical concerns in Kenya, where opaque debt practices and limited disclosure of borrowing terms as seen in cases like the Eurobond and Standard Gauge Railway (SGR) financing.⁵²

However, public choice theory is not without its limitations. It tends to emphasize the negative aspects of public debt while downplaying its potential benefits. Classical views argue that public debt is inherently wasteful, yet many developing countries, including Kenya, have partially utilized borrowing to build infrastructure and improve public welfare. Additionally, public choice theory may oversimplify the motivations of political actors by assuming they are solely driven by self-interest, neglecting the influence of ideology, values, and public service motivation in decision-making processes.⁵³

1.7.2 Institutional Theory

Institutional theory, primarily developed by scholars such as Douglass North and Oliver Williamson emphasizes how institutions, both formal and informal, influence decision-making, policies and governance.⁵⁴ This theory posits that institutions play a crucial role in influencing behavior by establishing standards that govern the actions of individuals and organizations within a society.⁵⁵ By focusing on the interplay between institutions and societal outcomes, institutional theory provides valuable insights into the complexities of governance and public policy, particularly in the context of Public Debt Management .

In relation to the transition to a GDP debt ceiling in Kenya, institutional theory highlights the importance of establishing robust legal and institutional frameworks that can effectively guide fiscal policies and borrowing decisions. This framework helps in understanding how legislative oversight, transparency mechanisms and institutional checks can mitigate the risks of mismanagement and abuse of power in public debt decisions.

Despite its strengths, institutional theory has certain limitations. One major critique is its tendency to underemphasize the agency of individual actors and their capacity to influence institutional dynamics. While institutions are critical in shaping behavior, political actors often operate within the interests that can lead to deviations from established norms. Additionally, the theory may not

⁵²Kenyans for Peace with Truth and Justice (KPTJ), *Eurobond Accountability: Facts, Figures, Questions* – by David Ndi. <https://kptj.or.ke/eurobond-accountability-facts-figures-questions-by-david-ndii/>.

⁵³E Arara et al, *Routledge Handbook of Public Policy* (Routledge 2015) pg. 331.

⁵⁴ C. Douglass. *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) pg. 3-10.

⁵⁵ E. Oliver. *The Mechanisms of Governance* (Oxford University Press 1996) pg. 223.

fully account for the contextual and historical factors that shape institutional development and their efficacy in practice, particularly in rapidly changing political landscapes such as Kenya's.

1.8 Research Methodology

This study adopts a dual methodology to assess Kenya's transition to a GDP debt ceiling. First, Doctrinal Analysis is used to examine primary legal documents, including the Public Finance Management Act (PFMA) 2023, constitutional provisions, relevant statutes and key judicial decisions. This approach allows for an in-depth understanding of the legal framework governing public debt management and identifies its limitations. Second, Comparative Analysis is employed by comparing Kenya's framework with those of Poland and Botswana. Poland's system features a constitutional debt limit with corrective measures and emergency provisions, ensuring that debt levels remain below 55 % of GDP. Botswana, on the other hand, has a statutory debt ceiling that differentiates between domestic and external debt, requiring parliamentary ratification for each loan, and includes strong institutional oversight and legally mandated corrective measures. By analyzing these international models, this research draws insights into best practices that Kenya could consider in enhancing its fiscal discipline and public debt management system. The study will evaluate the effectiveness of the GDP debt ceiling in ensuring transparency, accountability and sustainability.

1.9 Literature Review

1.9.1 Public Debt Management

Adwazi discussed the need for an effective legal framework Public Debt Management is crucial for ensuring accountability and transparency in public finances.⁵⁶ *Adwazi's* focus on the key aspects of Public Debt Management provides valuable insights into the legal mechanisms necessary for sustainable debt practices.⁵⁷ Her paper further canvasses on the proper institutional arrangement required in order to have an effective Public Debt Management system. This aligns closely with my study, which examines how legal frameworks can support a smooth GDP transition by implementing clear debt ceilings and fostering accountability. However, there is a gap in existing research regarding the specific challenges and legal implications of transitioning from a nominal to a GDP debt ceiling in Kenya, particularly in terms of parliamentary oversight, accountability, and transparency. This study evaluates how the new framework affects fiscal accountability, transparency and sustainability of borrowing decisions.

⁵⁶ *ibid* (n 11).

⁵⁷ *ibid* (n 11).

Cormier provides a comprehensive comparative analysis of Public Debt Management in South Africa and Botswana, examining the role of independent Debt Management Offices (DMOs) and the influence of political dynamics on debt sustainability.⁵⁸ The study highlights that, while Botswana benefits from favorable borrowing conditions through official credit, South Africa's ANC faces significant political pressures that result in reliance on expensive market financing.⁵⁹ *Cormier* argues that the assumption that institutional autonomy alone leads to effective debt management is flawed, as political factors can constrain the effectiveness of DMOs, particularly in developing countries. This observation is highly relevant to this thesis on Kenya's transition to a GDP debt ceiling, where political influences similarly shape debt management outcomes. The gap in existing research lies in addressing how the transition to a GDP debt ceiling affects transparency, accountability and debt sustainability. This study aims to fill this gap by examining the legal and institutional frameworks that support effective debt management while ensuring greater transparency and accountability.

Ewang highlights challenges in enforcing openness and accountability in Kenya's Public Financial Management (PFM) system, emphasizing that legal weaknesses are compounded by attitudes of officials and citizens.⁶⁰ He argues that while PFM laws have weaknesses, the core issue lies in the attitudes of government officials and citizens. However, the study does not specifically address the legal implications of implementing such fiscal reforms or how these reforms can enhance accountability in the context of public debt management. This paper aims to fill this gap by examining the specific legal and institutional frameworks necessary for the successful implementation of a GDP debt ceiling.

Lovemore discusses PFM in Botswana, emphasizing the role of institutional capacity, transparency, and political commitment in ensuring effective fiscal discipline and accountability.⁶¹ *Love more* emphasis on political will and transparent debt management provides a useful framework for understanding how Kenya can align its legal and institutional structures to ensure public debt sustainability during its economic transition.⁶² These reforms are relevant to this thesis on the role of Parliament in oversight under the GDP debt ceiling in Kenya. Just as Botswana's institutional reforms and political commitment have bolstered public financial sustainability,

⁵⁸ B. Cormier, 'Interests over Institutions: Political-Economic Constraints on Public Debt Management in Developing Countries' (2021) 34(4) *Governance* 1167-1191.

⁵⁹ *ibid* (n 58).

⁶⁰ A. Ewang, 'Reforming Public Finance Management in Kenya: Implementation Challenges on the Principle of Openness and Accountability in Public Finance Management' (LLM Research Project, University of Nairobi, 2019)

⁶¹ Public Financial Management Reforms in Botswana: A Review of Literature' (2023) 14(12) *Research Journal of Finance and Accounting* 1, 45-152 <https://www.iiste.org/Journals/index.php/RJFA/article/viewFile/61136/63103>

⁶² *ibid* (n 61).

Kenya's successful transition to a GDP debt ceiling will require similar strengthening of institutions, including the Treasury and the Public Debt Management Office (PDMO).

*Susan*⁶³ critically analyzes the law governing Public Debt Management in Kenya, aiming to identify potential gaps. While the findings indicate that the existing legal framework largely incorporates essential components for effective management, they also highlight the necessity for public debt managers to strictly adhere to these laws.⁶⁴ However, there is a gap in the research regarding the specific challenges and legal implications of transitioning from a nominal to a GDP debt ceiling in Kenya, particularly in terms of ensuring transparency, accountability, and the effectiveness of parliamentary oversight.

Nkatha highlights debt sustainability risks in East Africa, emphasizing foreign exchange, refinancing, and liquidity challenges despite existing legal frameworks.⁶⁵ It underscores the importance of fiscal rules, parliamentary oversight, and independent fiscal councils in ensuring transparency and accountability. As Kenya transitions to a GDP debt ceiling, these insights stress the need for stronger enforcement mechanisms to prevent executive overreach. My study will bridge this gap by analyzing whether Kenya's shift enhances fiscal discipline compared to nominal limits.

Ombwayo highlights challenges in Kenya's domestic public debt management, including weak institutional frameworks, lack of transparency, and fragmented debt oversight.⁶⁶ These issues undermine fiscal discipline, increasing the risk of unsustainable debt accumulation.⁶⁷ As Kenya transitions to a GDP debt ceiling, these weaknesses raise concerns about the effectiveness of debt controls and oversight mechanisms.⁶⁸ The paper suggests Kenya's debt management remains disjointed and vulnerable to executive overreach. My study will examine whether strengthening institutional frameworks and enforcement mechanisms can ensure Kenya's GDP ceiling enhances fiscal sustainability.

⁶³ *ibid* (n 31).

⁶⁴ *ibid* (n 31).

⁶⁵ W. Nkatha, "Resolving the Debt Sustainability Issues from a Legal and Institutional Perspective: A Kenyan Case Study", *Working Paper 03/03 ADHR* (CFS, 2022).

⁶⁶ R. Mbwayo, 'An Investigation into The Challenges Facing Domestic Public Debt Management Practices in Kenya' Master of Business Administration (MBA) (Finance) Master's Thesis of Kenyatta University.

⁶⁷ *ibid* (n 66).

⁶⁸ *ibid* (n 66).

1.9.2 Institutional Framework and Public Debts

Ochieng provides valuable context for understanding the dynamics between Parliament and the Executive, particularly regarding legislative oversight.⁶⁹ Its insights into how conflictual and cordial relations influenced political stability and governance are useful.⁷⁰ However, the study does not address public debt management, the transition to GDP, or the legal frameworks that are central to my research. Furthermore, its focus on the 2008-2013 period limits its relevance to ongoing legal transitions. This paper aims to address these gaps by examining the influence of legislative oversight on public debt management in the context of GDP transitions, offering a more comprehensive analysis of how executive-legislature relations shape legal frameworks beyond the specific timeframe of the study.

Waga argues that the introduction of the CoK, along with relevant domestic laws and debt management strategies, has not significantly enhanced public debt management in Kenya.⁷¹ This shortfall is largely due to interconnected factors, particularly Parliament's inability to effectively enforce legislative measures. This analysis is pertinent to my research as it highlights the critical role of Parliament in Public Debt Management, aligning with my focus on the legal framework for Kenya's transition to a GDP debt ceiling. However, this study does not address the internal shift to GDP debt ceilings. This paper aims to address this gap by exploring the implications of this transition for overall public debt management in Kenya, stressing the importance of robust legal and institutional frameworks.

Marium et al highlight the critical importance of transparency in Public Debt Management within developing countries.⁷² The paper highlights as nations adopt new fiscal frameworks, enhancing institutional quality is essential to address corruption's detrimental effects on public debt growth.⁷³ The identified benchmarks for institutional quality align with my research, emphasizing the need for strong oversight mechanisms. While the paper provides valuable insights into institutional

⁶⁹A. Ochieng, (2019). *The Influence of Executive-Legislature Relations on Legislative Oversight in Kenya, 2008-2013* Master's thesis, University of Nairobi (2019)
http://erepository.uonbi.ac.ke/bitstream/handle/11295/108683/Ambasa_The%20influence%20of%20executive-legislature%20Relations%20on%20Legislative%20Oversight%20in%20Kenya%2C%202008-2013.pdf?sequence=1&isAllowed=y accessed on 24th September 2024.

⁷⁰ibid (n 69).

⁷¹Waga, *Legal Reforms on External Public Debt Law in Kenya* (University of Nairobi,2019)
https://erepository.uonbi.ac.ke/bitstream/handle/11295/107823/Waga_Legal%20Reforms%20on%20External%20Public%20Debt%20Law%20in%20Kenya.pdf?sequence=1&isAllowed=y

⁷²M.Naz, 'Corruption and Public Debt in Developing Countries: Role of Institutional Quality' (2021) 42 *Journal of Economic Cooperation and Development* 59-90.

⁷³ ibid (n 72).

quality, it does not specifically address the relationship between the GDP ceiling, the oversight role of Parliament, and issues of accountability which this paper will address.

Carolyn examines the National Assembly's historical role as a 'rubber-stamp' for executive agendas, an issue that the framers of the 2010 Constitution sought to rectify by promoting accountable governance and effective public financial management through enhanced parliamentary oversight.⁷⁴ This literature is particularly relevant to my research on Kenya's transition to GDP debt ceilings, as it underscores the critical need for robust parliamentary oversight, along with transparency and accountability, to improve fiscal management in the country. However, there is a gap in existing research regarding how parliamentary oversight can be strengthened within the framework of a GDP debt ceiling. My paper will address this gap by analyzing how legal and institutional reforms can enhance Parliament's oversight role, ensuring that it can effectively hold the Executive accountable for borrowing decisions and maintain fiscal discipline.

1.9.3 Fiscal Policy and Debt Ceilings

Aleksander highlights that expenditure-led deficits require targeted spending limits to complement debt ceilings.⁷⁵ Additionally, legally enshrined fiscal rules with automatic enforcement have proven more effective in ensuring fiscal discipline.⁷⁶ However, Poland's debt thresholds have not entirely prevented high deficits, underscoring the need for complementary fiscal measures.⁷⁷ For Kenya, this suggests that without robust enforcement and institutional safeguards, a GDP debt ceiling alone may fail to prevent excessive borrowing and fiscal instability. However, existing research does not sufficiently examine the specific legal and institutional mechanisms required to ensure the effective enforcement of Kenya's GDP debt ceiling. My paper addresses this gap by exploring the role of transparency, accountability, and legal safeguards in strengthening Kenya's debt management framework.

⁷⁴L Carolyn, 'Parliamentary Oversight Over National Revenue Expenditure in Kenya: A Study of the Public Accounts Committee of the 11th Parliament (2013-2017)' (Master's Thesis, University of Nairobi 2021) accessed on 24th September 2024
<http://erepository.uonbi.ac.ke/bitstream/handle/11295/160331/Leitoro%20carolyn%20sein%20-%20Project.pdf?sequence=1>

⁷⁵A. Rutkowski, 'Ceilings and anchors: fiscal rules for Poland Economic analysis from the European Commission's Directorate-General for Economic and Financial Affairs' (2007) 4.

⁷⁶ *ibid* (n 75).

⁷⁷ *ibid* (n 75).

Ana et al suggest that Fiscal Responsibility Laws (FRLs) must be broad to ensure fiscal rules effectively guide budget policies.⁷⁸The paper states that strong enforcement and legislative backing enhance fiscal discipline, preventing excessive borrowing. Thus, as Kenya transitions to a GDP ceiling, comprehensive FRLs are essential to uphold transparency and accountability. Without strict enforcement, the Executive may circumvent debt limits, weakening fiscal sustainability. Independent fiscal institutions can further improve budget credibility and prevent data manipulation.⁷⁹ However, there is a gap in understanding how Kenya's transition to a GDP debt ceiling is impacted by the absence of comprehensive FRLs and the lack of strict enforcement mechanisms.

Jeffery highlights how governments' over-optimistic economic forecasts undermine fiscal discipline.⁸⁰ It finds that bias in GDP forecasts often leads to understated deficits, weakening fiscal rules. Similarly, as Kenya transitions to a GDP debt ceiling, the accuracy of economic forecasts becomes critical in determining borrowing limits. However, there is a gap in understanding the implications of Kenya's lack of independent fiscal institutions to verify GDP estimates. Without such oversight, the risk of manipulated economic projections could allow the Executive to justify higher debt levels, ultimately threatening fiscal sustainability and undermining the credibility of the GDP debt ceiling framework.

Oksana provides a comprehensive analysis of Poland's debt management framework, emphasizing its constitutional debt limit, fiscal discipline, and adherence to EU fiscal criteria⁸¹. It effectively illustrates how legal regulations and institutional controls contribute to debt sustainability, with Poland maintaining debt levels below 60% of GDP. My study will build on this by examining Poland's enforcement strategies and comparing them to Kenya's transition to a GDP debt ceiling, highlighting best practices that could enhance Kenya's fiscal sustainability.⁸²

Davoodi et al the paper suggests that fiscal rules and independent fiscal councils are essential for ensuring fiscal discipline and transparency, particularly in managing public debt.⁸³ The paper states that strong legal frameworks and oversight mechanisms enhance compliance with debt and

⁷⁸M.Kumar et al 'Promoting Fiscal Discipline' International Monetary Fund <https://doi.org/10.5089/9781589066090.071>

⁷⁹ibid (n 78)

⁸⁰F. Jesse, 'Over-optimistic Official Forecasts in the Eurozone and Fiscal Rules' (2012) 149 *Review of World Economics* <https://link.springer.com/article/10.1007/s10290-013-0150-9> accessed on 25th June 2025.

⁸¹O. Oksana et al 'Public Debt Management in Poland Compared to Other Countries of the European Union' (2016) doi [10.20472/BMC.2016.003.021](https://doi.org/10.20472/BMC.2016.003.021) accessed on 25th June 2025.

⁸²ibid (n 81).

⁸³A.Devoid et al 'Fiscal Rules and Fiscal Councils: Recent Trends and Performance during the COVID-19 Pandemic' (2022) International Monetary Fund <https://ideas.repec.org/p/imf/imfwpa/2022-011.html> accessed on 25th June 2024.

expenditure limits, preventing excessive borrowing.⁸⁴ However, there is a gap in understanding how the absence of an independent fiscal council in Kenya impacts the effectiveness of its transition to a GDP debt ceiling. This gap is significant, as the lack of robust oversight and enforcement mechanisms may hinder compliance with the new fiscal framework, affecting the long-term sustainability of public debt management in Kenya.

Latif's examination of public debt in African economies offers critical insights into contemporary debt management practices, particularly through the exploration of historical contexts and legal frameworks.⁸⁵ She argues for policies that effectively balance fiscal discipline with social responsibility, underscoring the importance of transparency and accountability.⁸⁶ Latif identifies transparency deficits as significant barriers to effective governance, aligning with my advocacy for stronger mechanisms within public debt management. While her analysis provides a valuable framework, there is a gap in examining how Kenya's specific legal and institutional context impacts the effectiveness of its proposed debt ceiling.

Luis analyzes the overstatement of GDP growth in autocracies using night-time light (NTL) data, finding that civilian autocracies tend to have the highest elasticity, while parliamentary democracies are better at preventing GDP manipulation.⁸⁷ While his findings indicate that civilian autocracies exhibit the highest elasticity in GDP manipulation and parliamentary democracies perform better at preventing such distortions, there is a gap in understanding how these dynamics specifically apply to developing economies like Kenya. This gap is particularly relevant in the context of Kenya's transition to a GDP debt ceiling, where institutional frameworks and the quality of economic data reporting are critical to the effectiveness and credibility of the new debt management model.⁸⁸

1.10 Chapter Breakdown

Chapter One introduces the study, focusing on Kenya's transition from a nominal to a GDP debt ceiling. It outlines the study's background, problem statement, objectives, and theoretical framework, aiming to assess the legal and fiscal implications of this shift. The chapter also details the research methodology, limitations and provides an outline of the study's structure.

⁸⁴ibid (n 83).

⁸⁵ibid (n 41).

⁸⁶ibid (n 41).

⁸⁷ibid (n 38).

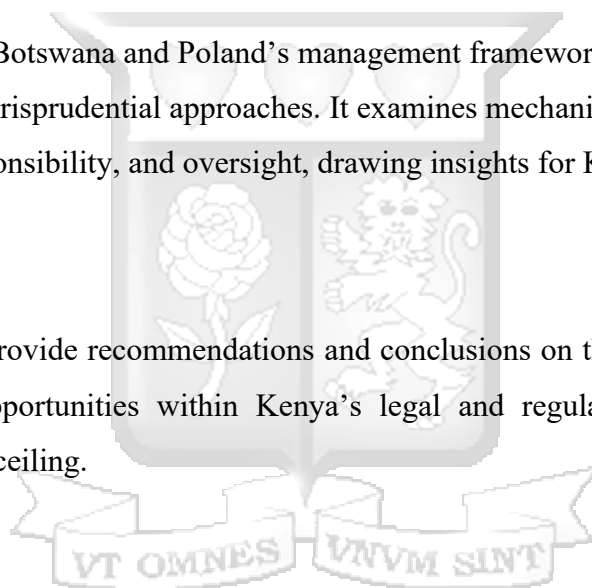
⁸⁸ibid (n 38).

Chapter two investigates Kenya’s legal and institutional framework on public debt management, examining constitutional, statutory, and regulatory provisions. It evaluates their effectiveness in ensuring fiscal responsibility, transparency, and sustainability. The chapter also presents findings on institutional gaps and enforcement challenges, offering insights on the transition to the GDP ceiling.

Chapter three analyzes case law on public debt management in Kenya, focusing on judicial interpretations of transparency, accountability, and the executive-legislature relationship in debt governance. It provides legal context for Kenya’s transition to a GDP debt ceiling, assessing fiscal responsibility and oversight mechanisms.

Chapter Four analyzes Botswana and Poland’s management frameworks, focusing on their legal, institutional, and jurisprudential approaches. It examines mechanisms for debt sustainability, fiscal responsibility, and oversight, drawing insights for Kenya’s transition to a GDP debt ceiling.

Lastly, **Chapter 5** will provide recommendations and conclusions on the strengths, weaknesses, and potential reform opportunities within Kenya’s legal and regulatory framework for the transition to a GDP debt ceiling.



Chapter Two

2.0 An Examination of Kenya's Legal Framework Governing Public Debt Ceilings

This chapter examines Kenya's public debt management legal and institutional framework. These laws include the Constitution of Kenya (2010), the Public Finance Management Act, 2012 (PFMA), the Public Finance Management Regulations, 2014 (PFMR), and the Public Debt and Borrowing Policy of 2020. By analyzing the legal framework on Public Debt Management it explores the legal and institutional structure supporting the GDP debt ceiling shift. In doing so, it assesses whether these legal foundations are robust enough to ensure transparency, accountability and debt sustainability amid the transition to a GDP debt ceiling. Additionally, it introduces the broader implications of this shift for fiscal governance.

2.1 Public debt management legal regime

2.1.1 An ideal Public Debt Management Framework

A well-designed legal framework for Public Debt Management clearly establishes borrowing authority while also imposing necessary limits to ensure fiscal discipline and alignment with public financial objectives.⁸⁹ In most jurisdictions the Legislature has the oversight role of Public Debt Management.⁹⁰ Typically, this power is delegated to the executive branch, often the Cabinet Secretary (CS).⁹¹ This authority, however, is not without limits.⁹² These controls ensure that borrowing is not arbitrary and aligns with broader fiscal and economic goals. This includes, defining the purposes for which funds can be borrowed and setting debt ceilings.⁹³ The effectiveness of a Public Debt Management system relies on not just the establishment of clear authority and limits, but also on mechanisms that ensure these systems are adhered to. This includes stringent reporting requirements, parliamentary oversight, and transparency in debt-related matters. The end goal of this system is to ensure that debt remains sustainable.⁹⁴

⁸⁹ Chapter 2 auditing the legal framework for public debt <https://www.idi.no/elibrary/professional-sais/audit-lending-and-borrowing-frameworks/1241-audit-of-public-debt-management-handbook-for-sais-v1-chapter-2/file%3E%20accessed%2012%20December%202024>

⁹⁰ *ibid* (n 11).

⁹¹ For example, in Canada, the Governor in Council (Cabinet) is vested with borrowing authority and may authorize the Minister of Finance to act on behalf of the state, subject to stipulated conditions. Furthermore, the Minister may delegate these powers to subordinate officials or entities within legally defined boundaries.

⁹² See U.S. Constitution, Article 1 Section 8; the U.S. Constitution empowers Congress to “borrow money on the credit of the United States” and not the executive. Also see Australian Constitution, Article 51.

⁹³ See Canada's Financial Administration Act (R.S.C., 1985, c. F-11), Sections 43 (1) & 44 (1) & (3).

⁹⁴ *ibid* (n 20).

2.1.2 The evolution of Public Debt Management and Debt Ceilings in Kenya

The management of public debt in Kenya has undergone significant evolution over the years driven primarily by institutional reforms designed to consolidate debt functions and strengthen governance frameworks.⁹⁵ Initially, Public Debt Management in Kenya was fragmented across various entities, including the Ministry of Finance, the Central Bank of Kenya (“CBK”), the External Resources Department (“ERD”) and the Department of Government Investments and Public Enterprises.⁹⁶ This dispersion created inefficiencies, as each entity worked with limited coordination, leading to challenges such as data inconsistencies, delays in debt servicing and incomplete debt records.⁹⁷

In 2006, the Kenyan Government, with the support of the World Bank, launched the Public Financial Management Reform Programme (“PFMRP”) to address various institutional challenges.⁹⁸ The program aimed to centralize debt management by establishing a dedicated Debt Management Department (“DMD”) within the Ministry of Finance.⁹⁹ The DMD adopted the Medium-Term Debt Management Strategy (“MTDS”) to guide borrowing decisions and introduced improved technology, such as the CS-DRMS 2000+ software¹⁰⁰, to digitize and streamline debt data and payment processes.¹⁰¹ With these changes, the DMD became the primary body responsible for debt management.

Kenya’s Parliament historically played a minimal role in public finance management, including the oversight of public debt.¹⁰² The Executive arm of Government, particularly the Ministry of Finance, held the primary authority over fiscal matters, including borrowing and debt management.¹⁰³ Parliament’s role was largely passive, limited to reviewing and approving the

⁹⁵O.Kutty, *The Paradox of State Power in Africa: Debt Management Policies in Kenya and Zimbabwe* (2014) <https://doi.org/10.2307/524868> accessed 23rd September 2024.

⁹⁶B Gibet, *Public Debt: How Is It Managed? A Case Study of Kenya Public Debt Management* (2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4320689 accessed on 23rd September 2024.

⁹⁷ *ibid* (n.96).

⁹⁸ *ibid* (n. 60).

⁹⁹ J. Muchira, ‘Challenges of Strategy Implementation at the Ministry of Finance in Kenya’ (Doctoral dissertation, University of Nairobi 2012) <https://erepository.uonbi.ac.ke/handle/11295/95928> accessed 23rd September 2024.

¹⁰⁰ The Commonwealth Secretariat Debt Recording and Management System (“CS-DRMS”) is a sophisticated system for recording, analyzing, and reporting public sector debt. It is continuously refined to adapt to the dynamic nature of debt management practices, and offers an integrated and comprehensive approach. It encompasses a wide range of debt liabilities and financial instruments to various governments.

¹⁰¹ *ibid* (n.99).

¹⁰² Onyango G, ‘Legislative Oversight and Policy-Reforms in “Unsettled” Political Contexts of Public Administration’ (2019) 43(3) *International Journal of Public Administration* 213. <https://doi.org/10.1080/01900692.2019.1627556>.

¹⁰³ Hassan, ‘Continuity despite Change: Kenya’s New Constitution and Executive Power’ (2015) 22(4) *Democratization* 587. <https://doi.org/10.1080/13510347.2013.853174>

national budget without significant input into specific borrowing activities or debt ceilings.¹⁰⁴ The absence of constitutional mandates for parliamentary oversight on debt allowed the Executive to engage in extensive borrowing with minimal accountability, which often led to unmonitored debt accumulation.¹⁰⁵ For instance, the Executives unchecked borrowing averaged at 13.2 % which prioritized political and developmental goals over sustainability.¹⁰⁶

2.2. Legal reforms

2.2.1 The Constitution of Kenya

The Constitution of Kenya, 2010 establishes key principles governing public finance, including transparency, accountability, public participation, good governance and equitable distribution of benefits and burdens across generations.¹⁰⁷ Article 214 defines public debt as all monetary obligations tied to loans backed by the state, charging these liabilities to the Consolidated Fund, thereby ensuring constitutional oversight.¹⁰⁸ This Fund, created under Article 206, is held in the National Exchequer Account at the Central Bank of Kenya, with the National Treasury acting as its administrator.¹⁰⁹ Furthermore, Article 211 vests Parliament with the authority to oversee public borrowing, mandating the Executive through the Cabinet Secretary for the National Treasury to spearhead the borrowing process.¹¹⁰ In addition to these constitutional provisions, key institutions such as the Central Bank of Kenya (CBK), the Controller of Budget (CoB), and the Auditor-General (AoG) are established to provide checks and balances in the management of public debt. A comprehensive analysis of the roles and mandates of these institutions is presented in the subsequent section on the institutional framework.

2.2.2 The Public Finance Management Act, No 18 of 2012

The Public Finance Management Act, 2012 serves as the primary legal framework governing the management of public debt in Kenya.¹¹¹ It establishes and mandates key institutions such as the National Treasury and the Public Debt Management Office (PDMO), assigning them defined responsibilities in the formulation, execution, and oversight of debt policy. Section 15 of the Public

¹⁰⁴ M. Agatha, 'The Principle and Practice of Parliamentary Independence: Interrogating the Case of Kenya, 1963–2014' (doctoral dissertation, Kenyatta University 2015).

¹⁰⁵ *ibid* (n 83).

¹⁰⁶ T. Zeleza, 'Economic Policy and Performance in Kenya since Independence' (*Transafrican Journal of History* 1991) 35–76.

¹⁰⁷ Constitution of Kenya (2010) Article 201.

¹⁰⁸ Constitution of Kenya (2010) Article 214.

¹⁰⁹ Constitution of Kenya (2010) Article 206.

¹¹⁰ Constitution of Kenya (2010) Article 211 (1).

¹¹¹ Public Finance Management Act (No 18 of 2012).

Finance Management Act outlines core fiscal responsibility principles. It provides that borrowing should be directed primarily toward development expenditure and that public debt levels must remain within sustainable thresholds.¹¹² These provisions anchor Kenya's commitment to long-term fiscal sustainability and responsible intergenerational burden-sharing. Further, Section 35(2) reinforces democratic accountability by mandating public participation in the budgeting process, thereby embedding transparency and civic engagement into fiscal governance¹¹³

Section 49, grants the Cabinet Secretary for Finance the authority to raise loans for the national government, provided the loans adhere to fiscal responsibility principles and the medium-term debt management strategy.¹¹⁴ While this provision establishes a framework for prudent borrowing, it does not specify detailed enforcement mechanisms to ensure compliance. The discretion afforded to the Cabinet Secretary, particularly in defining borrowing terms, creates the potential for over borrowing, exacerbating Kenya's public debt challenges.

Section 50 imposes obligations on the national government to ensure borrowing is conducted at the lowest possible cost, with sustainable levels of public debt. It also limits the national government's borrowing to 55% of GDP in present value terms, with a 5% leeway under exceptional circumstances.¹¹⁵ This section will be covered extensively in the subsequent section. Lastly, section 51 governs borrowing by national government entities, requiring Cabinet Secretary approval for borrowing programs over the medium term and annually.¹¹⁶ This provision ensures alignment with national fiscal goals but excludes Parliament from directly overseeing these borrowing activities. Additionally, the government's limited liability for debts incurred by these entities, unless explicitly guaranteed, presents a potential risk of unmonitored debt accumulation.

2.2.3. Access to Information Act, 2016

Article 35(1)(a) and 35(3) of the Constitution guarantee citizens the right to access information held by the State and place a duty on the State to proactively publish information of national significance.¹¹⁷ This constitutional mandate is reinforced by Section 4 of the Access to Information Act, which affirms and operationalizes these rights.¹¹⁸ In the context of public debt, these provisions underscore the State's obligation to ensure that information relating to borrowing, debt

¹¹²Public Finance Management Act (No 18 of 2012) Section 15.

¹¹³Public Finance Management Act (No 18 of 2012) Section 35 (2).

¹¹⁴Public Finance Management Act (No 18 of 2012) Section 49.

¹¹⁵Public Finance Management Act (No 18 of 2012) Section 50 (2B).

¹¹⁶ Public Finance Management Act (No 18 of 2012) Section 51.

¹¹⁷ Constitution of Kenya (2010) Article 35 1 and 35 (3).

¹¹⁸ Access to Information Act,2016 Section 4.

sustainability, repayment obligations, and associated risks is made publicly available in a timely, accurate, and accessible manner.

2.3 Policy reforms

2.3.1 The Public Finance Management (National Government) Regulations 2015

This section examines the Public Finance Management Regulations (PFMR), 2015, focusing on their role in operationalizing Kenya's fiscal responsibility principles and public debt management framework.

Section 183 emphasizes inter-generational equity in the distribution of the costs and benefits of public borrowing.¹¹⁹ Section 26(1)(c) establishes the debt ceiling at 10 trillion.¹²⁰ Section 27 elaborates on the BPS requirements, mandating the inclusion of key fiscal and economic details, such as assessments of domestic and international economic impacts and resource allocations.¹²¹ It also requires a statement of fiscal responsibility principles to ensure adherence to fiscal policies. However, gaps in oversight emerge with the inclusion of a fiscal risk statement addressing contingent liabilities and state corporation losses, raising concerns about transparency in fiscal forecasts. While the provisions align with fiscal planning best practices, deviations permitted under Regulation 27(6) could undermine parliamentary scrutiny and weaken the integrity of fiscal policies.

Section 28 focuses on the preparation of a comprehensive macroeconomic framework for fiscal planning, including GDP, inflation, and balance of payments forecasts for the medium term.¹²² Section 29 emphasizes fiscal transparency by requiring updated revenue, expenditure, and debt forecasts, expressed as percentages of GDP.¹²³ It mandates sensitivity analyses and macroeconomic assumptions, ensuring Parliament has a robust basis for fiscal evaluation.¹²⁴ However, the Cabinet Secretary's discretion to determine additional material information may limit effective oversight. The absence of clear criteria for assessing changes in fiscal strategies also undermines efforts to hold the executive accountable.

The Regulations also establish that the Medium-Term Debt Management Strategy, developed and implemented by the Public Debt Management Office, forms the basis of the policy framework for

¹¹⁹ Public Finance Management (National Government) Regulations Section 183.

¹²⁰ Public Finance Management (National Government) Regulations Section 26 1 (c).

¹²¹ Public Finance Management (National Government) Regulation Section 27.

¹²² Public Finance Management (National Government) Regulation Section 28.

¹²³ Public Finance Management (National Government) Regulation Section 29.

¹²⁴ Public Finance Management (National Government) Regulation Section 28.

debt management. Additionally, section 192 outlines the purposes for which the government may borrow, while section 193 identifies the core objectives of managing public debt.¹²⁵ It also permits borrowing for unforeseen events and development policy objectives, subject to parliamentary approval. However, discretionary authority granted to the Cabinet Secretary introduces risks of arbitrary borrowing.

2.3.2 Public Debt and Borrowing Policy, 2020

The Public Debt and Borrowing Policy establishes a robust accountability framework to guide the acquisition and management of Kenya's public debt portfolio.¹²⁶ It outlines the legitimate purposes for which the government may engage in borrowing, including bridging budgetary shortfalls, refinancing maturing obligations and pre-financing existing debt commitments.¹²⁷ In assessing whether to undertake new borrowing, the policy requires the government to evaluate both the current public debt stock and the potential fiscal and economic implications of additional debt.¹²⁸

This entails consideration of key solvency indicators, such as the debt-to-GDP ratio and debt service-to-revenue and exports ratio. To ensure prudent risk and cost management, the policy further mandates an assessment of creditor concentration, including repayment structures and the currency composition of debt.¹²⁹ Additionally, the policy differentiates between short-term borrowing, which should be employed for managing temporary cash flow mismatches, and long-term borrowing, which is to be allocated to capital or development projects capable of generating sufficient returns to service the debt incurred.¹³⁰

2.3.3 Protocol on the Establishment of the East African Community Monetary Union

As a member of the East African Community Monetary Union, Kenya has committed to maintaining a fiscal deficit, including grants, at 3% of Gross Domestic Product (GDP), a public debt limit of 50% of GDP in net present value terms, a reserve cover equivalent to 4.5 months of imports, and a tax-to-GDP ratio of 25%.¹³¹ While these benchmarks were formally adopted at the regional level, Kenya has yet to fully domesticate or operationalize them within its national fiscal

¹²⁵ Public Finance Management (National Government) Regulation Section 193.

¹²⁶ Public Debt and Borrowing Policy (2020) 1.1(2).

¹²⁷ Public Debt and Borrowing Policy (2020) 4.1.

¹²⁸ Public Debt and Borrowing Policy (2020) 4.3.

¹²⁹ Public Debt and Borrowing Policy (2020) 4.3.

¹³⁰ Public Debt and Borrowing Policy (2020) 4.3.

¹³¹ Protocol on the Establishment of the East African Community Monetary Union Article 5: Macroeconomic Convergence Criteria.

and legal frameworks. This gap between commitment and implementation continues to raise concerns regarding Kenya's alignment with EAC macroeconomic convergence objectives.

2.4 Institutional Reforms

As previously mentioned, much of the responsibility for public debt management was delegated to the executive. However, the Constitution has established certain institutions to aid in the management of public debt. This section will discuss the institutions established by the Constitution to facilitate the management of public debt.

2.4.1 The National Treasury

The National Treasury plays a central role in Kenya's public finance architecture, with its mandate articulated under Article 225 of the Constitution of Kenya, 2010.¹³² It is charged with the responsibility of formulating macroeconomic policies, managing national debt, and coordinating resource mobilization for both the national and county governments.¹³³ Under Section 11 of the PFMA, the National Treasury is tasked with overseeing the management of national public debt and the administration of the Consolidated Fund.¹³⁴ The PFMA further requires the Treasury to establish a framework aimed at maintaining public debt at sustainable levels, while promoting transparency, accountability and sound fiscal governance.

In line with Section 15 of the Act, the Treasury must ensure that debt levels remain within the sustainability thresholds determined by Parliament and guided by the Medium-Term Debt Strategy (MTDS). Additionally, it is responsible for managing fiscal risks prudently and ensuring that debt levels adhere to the thresholds outlined in the MTDS.¹³⁵ Under the National Treasury, the PDMO is tasked with executing the government's debt management policy.¹³⁶ Its responsibilities include maintaining a comprehensive debt database, preparing the annual MTDMS, and conducting debt sustainability analyses. Additionally, it monitors borrowing and debt-related transactions to ensure alignment with established risk parameters.¹³⁷

¹³² Constitution of Kenya (2010) Article 225.

¹³³ Public Finance Management Act (No 18 of 2012) Section 12-15.

¹³⁴ Public Finance Management Act (No 18 of 2012) Section 11.

¹³⁵ Public Finance Management Act (No 18 of 2012) Section 15.

¹³⁶ Public Finance Management Act (No 18 of 2012) Section 62.

¹³⁷ Public Finance Management Act (No 18 of 2012) Section 63.

2.4.2 Parliament

Article 93 of the Constitution establishes Parliament, outlining its responsibilities as an oversight body, representative of the public, and a legislator for laws and policies. Parliament grants the authority to set the conditions under which the national government can borrow and impose reporting requirements.¹³⁸ Additionally, Article 225 empowers Parliament to pass laws that ensure expenditure control and transparency across all levels of government, as well as create systems for enforcing these laws.¹³⁹ Parliament is also tasked with determining the debt ceiling. Although the Constitution grants Parliament significant authority, it has permitted the Executive to secure loans under unfavorable conditions, thereby subjecting Kenya to elevated costs and refinancing risks. Moreover, Parliament has not effectively held the Executive accountable for deficiencies in fiscal transparency.

Moreover, the PFMA mandates the National Treasury to provide Parliament with comprehensive reports on public debt, borrowing conditions, and fiscal risks. Sections 9 and 10 of the PFMA introduce the Parliamentary Budget Office (PBO) under Parliament.¹⁴⁰ Its mandates include providing fiscal insights, evaluating financial risks, and analyzing budgetary position the PBO as a guardian of fiscal discipline.¹⁴¹ Additionally, under Section 10(1)(h), the PBO is empowered to propose alternative fiscal frameworks, enabling it to challenge unsustainable borrowing practices.¹⁴²

Additionally, The Public Debt and Privatization Committee, as established under Section 207A of the Standing orders plays a critical role in the oversight of public debt management and the privatization process.¹⁴³ It reviews government borrowing plans, ensures compliance with fiscal responsibility principles, and recommends adjustments to debt ceilings.¹⁴⁴ The committee ensures transparency and accountability in debt management, contributing to the formulation of policies aligned with national economic goals. It also ensures that borrowing activities are sustainable and within legal limits, fostering effective public debt oversight.¹⁴⁵

¹³⁸ Public Finance Management Act (No 18 of 2012) Section 35.

¹³⁹ Constitution of Kenya (2010) Article 225.

¹⁴⁰ Public Finance Management Act (No 18 of 2012) Section 9 and 10.

¹⁴¹ Public Finance Management Act (No 18 of 2012) Section 10.

¹⁴² Public Finance Management Act (No 18 of 2012) Section 10.

¹⁴³ Republic of Kenya, The National Assembly Standing Orders (6th Edition), Section 207 A.

¹⁴⁴ *ibid* (n 143).

¹⁴⁵ *ibid* (n 143).

2.4.3 Office of the Auditor General

Article 229 of the Constitution creates the Office of the Auditor General as an independent body tasked with auditing public debt.¹⁴⁶ The Office is responsible for assessing whether borrowed funds have been used legally and effectively, submitting a report to Parliament within six months after the close of the financial year. In addition, Article 254(3) mandates independent constitutional offices, including the Auditor General's Office, to release and make their reports public.¹⁴⁷ Notably, there is a lack of an effective mechanism to ensure the implementation and enforcement of audit findings and recommendations. This stems from the fact that the Office of the Auditor-General (OAG) is legally mandated only to conduct audits and submit reports to Parliament. Consequently, many of the audit issues identified persist in subsequent reports without being adequately addressed.

2.4.5 Office of the Controller of Budget

Article 228 of the Constitution assigns the Office of the Controller of Budget the responsibility of overseeing the implementation of the national budget and ensuring that withdrawals from public funds comply with legal requirements.¹⁴⁸ According to Section 228(6), the Office is required to submit a report to Parliament every four months on the progress of budget implementation.¹⁴⁹ Additionally, under Article 225(7), the Office has the authority to report to Parliament in cases of significant or recurring violations of legal provisions.¹⁵⁰ Although the Office of the Controller of Budget has raised concerns regarding the rapid accumulation of public debt, highlighting its adverse impact on effective budget execution, there is no indication that Parliament has compelled the National Treasury to formally address the issues identified in reports by both the Office of the Auditor-General and the Controller of Budget.

2.4.6 The Central Bank of Kenya

The CBK established under Article 231 of the CoK and supported by an Act of Parliament, plays a pivotal role in the country's monetary policy framework.¹⁵¹ The primary mandate of the CBK is to formulate and implement monetary policy aimed at maintaining price stability.¹⁵² In addition, the Bank is tasked with managing foreign exchange reserves, overseeing payment and settlement

¹⁴⁶ Constitution of Kenya (2010) Article 143.

¹⁴⁷ Constitution of Kenya (2010) Article 254(3)

¹⁴⁸ Constitution of Kenya (2010) Article 228

¹⁴⁹ Constitution of Kenya (2010) Article 228 (6).

¹⁵⁰ Constitution of Kenya (2010) Article 225(7).

¹⁵¹ Constitution of Kenya (2010) Article 231.

¹⁵² Constitution of Kenya (2010) Article and Central Bank Act No. 15 of 1966, Section 4.

systems, acting as the government's banker and fiscal agent, and issuing currency.¹⁵³ The CBK's advisory role, especially regarding debt sustainability, underscores the need for a careful approach to borrowing, with suggestions such as debt reorganization to mitigate risks.¹⁵⁴

2.5 Public Debt Ceilings

Public debt ceilings serve as a critical component in managing national debt by establishing upper limits on borrowing. According to Awadzi the nominal debt ceilings are absolute numbers which serve as the upper limit for debt.¹⁵⁵

2.5.1 The Trend of Kenya's Debt Ceilings

From 2006 to 2022, Kenya operated under a nominal debt ceiling that required parliamentary approval for any changes.¹⁵⁶ Historically, Kenya had used a nominal debt ceiling, which was enshrined in the PFMA, 2015 and adjusted annually by Parliament.¹⁵⁷ The first nominal debt ceiling in Kenya was set at Ksh 10 million, which restricted the executive's borrowing authority and ensured parliamentary oversight.¹⁵⁸ However, over the years, there has been a discrepancy in adhering to these requirements stated in Legal Notice No. 34 of 2015, which mandates the annual specification of the debt limit in both the budget policy statement and the Medium-term debt management strategy paper.¹⁵⁹ This stipulation has not been consistently observed, leading to inconsistencies in the budgetary and strategic planning processes related to debt management.

In 2014, the Kenyan Parliament increased the domestic borrowing limit from Ksh 1.3 trillion to Ksh 2.5 trillion.¹⁶⁰ Further, in 2017 the debt ceiling was set at 74 percent of GDP and later revised to 55 percent. By 2019, Kenya faced fiscal constraints that necessitated another revision of the debt ceiling. In response to limited fiscal capacity, Parliament approved a new absolute debt ceiling of Ksh 9 trillion, aimed at generating the necessary fiscal space to restructure Kenya's public debt and make it more manageable.¹⁶¹ On 26 May 2022, the then Cabinet Secretary for the National

¹⁵³ Central Bank Act No. 15 of 1966, Section 4.

¹⁵⁴ Sumbi DM, 'The Effect of Public Debt on Interest Rates in Kenya' (PhD diss, University of Nairobi 2016).

¹⁵⁵ *ibid* (n 15).

¹⁵⁶ KIPPR Policy Brief No. 30 of 2023/2024, 'Public Debt Ceiling: The Experience for Kenya and Lessons from Other Countries' (2023/2024) accessed on 25th June 2024 <https://repository.kippra.or.ke/handle/123456789/4913>

¹⁵⁷ Public Finance Management Act (No 18 of 2012) section 50(2).

¹⁵⁸ Public Finance Management Act (No 18 of 2012) section and Regulation 26 1 (c).

¹⁵⁹ Public Finance Management Act (No 18 of 2012) section, s 33.

¹⁶⁰ National Treasury of Kenya, *Annual Public Debt Report 2014-2015* <https://www.treasury.go.ke/annual-public-debt-report-2014-2015> accessed 27 September 2024.

¹⁶¹ The National Treasury and Planning, 'Annual Public Debt Management Report for the Financial Year 2021/2022' pg. 17 accessed <https://www.treasury.go.ke/wp-content/uploads/2023/06/Annual-Public-Debt-Report-2021-2022.pdf>

Treasury issued a legal notice in the Kenya Gazette amending Section 26 of the Public Finance Management Act, 2015, thereby increasing the statutory debt ceiling to KES 10 trillion.¹⁶²

In 2023, Kenya's National Assembly's Public Debt and Privatization Committee through the amendment of the PFMA set the public debt threshold at 55% of GDP in present value terms, allowing a margin of up to 5% to accommodate a 60% threshold.¹⁶³ The government indicated that achieving this goal will necessitate a minimum of five years of implementation.¹⁶⁴

2.5.2 Inadequate Management of Kenya's Nominal Debt Ceiling

Kenya's reliance on a fixed nominal debt ceiling revealed significant structural weaknesses in the country's debt governance framework.¹⁶⁵ By setting the debt limit in absolute shilling terms, the ceiling lacked responsiveness to changing economic realities such as inflation, GDP growth and currency depreciation.¹⁶⁶ This rigidity made the threshold obsolete within short periods, necessitating frequent revisions that diluted its effectiveness as a fiscal control mechanism.¹⁶⁷ Rather than signaling improved fiscal capacity, these upward adjustments served as a stopgap measure to legitimize excessive borrowing, further entrenching fiscal indiscipline.¹⁶⁸

Moreover, the absence of a firm borrowing cap enabled the National Treasury to adopt expansionary fiscal strategies with limited scrutiny.¹⁶⁹ The Treasury regularly submitted supplementary budgets with widened fiscal deficits during the implementation phase of the financial year. As noted by Alex, this practice has been recurrent, with similar trends observed in the 2021/2022 and 2022/2023 fiscal years, where budget revisions increased spending pressures without corresponding adjustments to revenue forecasts.¹⁷⁰

These challenges underscored the limitations of relying on an inflexible nominal ceiling in a dynamic economic environment. In response, Kenya transitioned to a GDP debt ceiling, intended to introduce a more adaptive and internationally aligned framework. However, while this shift

¹⁶² Public Finance Management Act (National Government) (Amendment) Regulations (2022) Section 2 Republic of Kenya, "Budget Policy Statement 2023" p 106.

¹⁶³ The Public Finance Management (Amendment) Act, 2023

¹⁶⁴ The Public Finance Management (Amendment) Act, 2023, Section 6 (2C).

¹⁶⁵ A. Tamie, 'A Socio-Economic Rights Centred Evaluation of Kenya's Law and Practice on Sovereign Debt Acquisition, Servicing and Restructuring' (2024) 3 Kabarak Law Review <https://doi.org/10.58216/klr.v3i>

¹⁶⁶ *ibid* (n 167).

¹⁶⁷ *ibid* (n 167).

¹⁶⁸ *ibid* (n 167).

¹⁶⁹ *ibid* (n 167).

¹⁷⁰ *ibid* (n 167).

reflects a positive evolution, it raises critical questions regarding its potential efficacy in promoting fiscal discipline and improving public debt management.

2.6 Legal implications of the GDP debt ceiling and its effects on Public Debt Management

The introduction of a GDP debt ceiling in Kenya's Public Debt Management Framework brings with it various implications across the Public Finance ecosystem. The effects of the GDP debt ceiling cut across the institutions presently charged with managing public debt, the existing legal framework and the relationship between the Executive and Legislature in the procurement of public debt. The implications are two-fold; on the functioning of the institutional frameworks and transparency and accountability in Public debt management. This section analyzes both.

2.6.1 Robust institutional frameworks

2.6.1.1 Parliament's Diminished Oversight Role

Institutional theory underscores the role of formal and informal structures in shaping behavior and ensuring accountability.¹⁷¹In the context of Public Debt Management , the CoK 2010 and associated legislative frameworks establish the legal foundations for parliamentary oversight. However, as Wyplosz and Marium in their paper suggest, effective oversight requires robust institutional mechanisms that align legal mandates with practical enforcement tools.¹⁷² Originally, the CoK and PFMA aimed for accountable governance and effective public financial management through enhanced parliamentary oversight.¹⁷³

However, Carolyne in her paper notes that Parliament in Kenya has historically functioned as a rubber-stamp for executive decisions, despite constitutional reforms aimed at strengthening legislative oversight.¹⁷⁴ For instance, despite the Office of the Auditor General Report for FY 2017/18 reporting that the accuracy of outstanding loan balances could not be confirmed due to absence of details on the loans, there are no reports on the actions taken by Parliament to enforce this important principle of public finance.¹⁷⁵ This has limited the ability of interested parties to effectively monitor and hold the government accountable.

Between 2012 and 2015, Parliament overlooked recommendations from the Medium-Term Debt Management Strategy during annual budget approvals, neglecting external and domestic debt

¹⁷¹ *ibid* (n 83).

¹⁷² *ibid* (n 72).

¹⁷³ Constitution of Kenya (2010) and The Public Finance Management Act (No 18 of 2012).

¹⁷⁴ *ibid* (n 74).

¹⁷⁵ Republic of Kenya National Treasury, "Medium term debt management strategies," (Nairobi: Government Printer, 2021)

proportions.¹⁷⁶ Additionally, it revised the debt ceiling twice, diverging from the ideal for a medium policy performer and the 50% Gross Domestic Product net present value requirement.¹⁷⁷

Initially, Parliament held the core mandate of setting public debt ceilings, thereby serving as the primary institutional check on the Executive's borrowing powers. This authority was central to ensuring democratic oversight and fiscal discipline.¹⁷⁸ By weakening parliamentary oversight and increasing executive discretion, this amendment risks undermining the institutional checks and balances necessary for sustainable debt management. Parliament's powers are limited and seldom used to oversee the Executive's borrowing. While the PFMA mandates the CS-Finance to report all loans within seven days of a Parliamentary request, the NDI report highlights that Parliament has delegated this duty to agencies like the debt management office, undermining its ability to effectively exercise its legal authority.¹⁷⁹

Parliament does not approve loans prior to procurement, as required by law.¹⁸⁰ Instead, the CS-Treasury borrows and spends before seeking approval, providing supplementary estimates afterward. This limits Parliament's oversight of expenditure quality on borrowed funds and their benefits to the public. Additionally, the PFMA Act mandates that the National Treasury reports loan balances and repayment terms to Parliament every four months.¹⁸¹ Further the act also gives power to parliament to request and receive reports on loans made to the national government when debating matters relating to public debt.¹⁸² The National Treasury often withholds debt-related information from Parliament, which consequently depends on Controller of Budget reports, limiting Parliament's involvement in effectively managing public debt.¹⁸³

Against the above backdrop, the powers of Parliament with respect to oversight on public debt have been significantly diminished. Initially, Parliament had direct control over borrowing limits. The nominal debt ceiling framework required parliamentary approval before any adjustments could be made. By weakening parliamentary oversight and increasing executive discretion, this amendment risks undermining the institutional checks and balances necessary for sustainable debt management. Under the new framework, the Executive can adjust the debt ceiling based on GDP

¹⁷⁶ *ibid* (n 20).

¹⁷⁷ *ibid* (n 20).

¹⁷⁸ *ibid* (n 20).

¹⁷⁹ *ibid* (n 20).

¹⁸⁰ *ibid* (n 20).

¹⁸¹ Public Finance Management Act (No 18 of 2012) section 31.

¹⁸² *ibid* (n 181).

¹⁸³ International Budget Partnership, *Open Budget Survey* (8th edn, 2021) accessed on 17th March 2025 <https://internationalbudget.org/open-budget-survey/open-budget-survey-2021>

and exceed it by up to 5% in undefined exceptional circumstances, though these circumstances are not clearly defined in the law.¹⁸⁴

Awadzi in her paper contends that the absence of clearly defined corrective measures when a debt ceiling is breached can create ambiguities.¹⁸⁵ She states that jurisdictions should establish specific parameters to address such breaches, ensuring accountability and fiscal discipline.¹⁸⁶ While Section 50(2) of the PFMA 2012 stipulates that national government borrowing should not exceed a limit set by Parliament, it lacks explicit details on how Parliament exercises this authority.¹⁸⁷ The 2023 amendment replaces the term “limit” with “set threshold” and introduces a provision requiring the Cabinet Secretary for the National Treasury to submit a written report to Parliament when unable to maintain the debt threshold.¹⁸⁸ Nkatha in her working paper notes that the Act lacks clear provisions on the specific procedures or mechanisms through which Parliament exercises its authority in determining the borrowing limit.¹⁸⁹ The shift in power to the executive branch could undermine transparency and accountability.

2.6.1.2 Increased Executive Discretion on Public Debt Ceilings

The 2023 amendment to the Public Finance Management Act introduces a five-year transition period for the implementation of the GDP-based debt ceiling.¹⁹⁰ During this period, the Cabinet Secretary for the National Treasury is tasked with aligning the country’s borrowing practices with the new threshold, pegged at 55% of GDP in present value terms.¹⁹¹

However, the law does not clearly define the oversight role of Parliament during this transition. It remains legally ambiguous whether Parliament retains its full constitutional authority to approve or reject borrowing decisions in this interim phase, or whether the Executive can continue to borrow without direct legislative scrutiny, so long as it provides periodic reports. This lack of clarity raises several critical concerns. First, it is unclear whether Parliament maintains its full oversight powers during the transition or whether these powers are temporarily suspended. Second,

¹⁸⁴ The Public Finance Management (Amendment) Act, 2023, Section 6 (2C).

¹⁸⁵ *ibid* (n 14).

¹⁸⁶ *ibid* (n 14).

¹⁸⁷ Republic of Kenya, The National Assembly, Thirteenth Parliament, Public Debt and Privatization Committee Report of the Public Debt Committee on the consideration of the Public Finance Management amendment bill 2023 <http://www.parliament.go.ke/sites/default/files/2023-06/Report%20of%20the%20Public%20Debt%20Committee%20on%20the%20consideration%20of%20the%20Public%20Finance%20Management%20amendment%20bill%202023.pdf>

¹⁸⁸ *ibid* (n 188).

¹⁸⁹ *ibid* (n 65).

¹⁹⁰ The Public Finance Management (Amendment) Act, 2023 Section 2A- 2D.

¹⁹¹ *ibid* (n 191).

there is uncertainty about the mechanisms in place to ensure that borrowing remains within prudent limits during this transitional period. Third, questions arise regarding who is responsible for monitoring and enforcing compliance with fiscal targets during the transition phase.

The shift of borrowing authority from Parliament to the Executive aligns with Public Choice Theory, as it allows policymakers to make borrowing decisions without sufficient checks, reinforcing concerns about transparency deficits and rent-seeking behavior. Latif and Waga emphasize the need for legal frameworks to include enforceable provisions that ensure compliance and transparency.¹⁹²

2.6.1.3 Institutional Capacity

In the current Public Debt Management Framework, it is not only Parliament that has faltered in its obligations with regard to public debt management. As discussed in previous sections, there are various institutions that are involved in public debt management in Kenya. As the shift to GDP debt ceiling is implemented, it is likely to encounter the same challenges that have been part of the current framework.

The PFMA establishes the Public Debt Management Office within the National Treasury and outlines the objectives and functions of the office.¹⁹³ The PFMA states that the Cabinet Secretary in charge of Finance shall be accountable for the work of the Public Debt Management Office.¹⁹⁴ Whereas the Public Finance Management Act, provides for publishing and publicizing of the Register of the National Government Securities, the exact timeline for publishing and publicizing is missing, thereby undermining fiscal transparency principles.¹⁹⁵

It has been argued that in order to enhance objectivity in delivering on their mandate, the PDMO should be independent from the National Treasury. For instance, while the PDMO provides recommendations in the Medium-Term Debt Management Strategy on the best alternative to adopt when borrowing, between the FY 2012/13 and 2015/16, the Cabinet Secretary in charge of Finance submitted annual budgets to Parliament which had deviated from the Medium-Term Debt Management Strategy.¹⁹⁶

¹⁹² *ibid* (n 71) and *ibid* (n 41).

¹⁹³ Public Finance Management Act (No 18 of 2012) section 62.

¹⁹⁴ Public Finance Management Act (No 18 of 2012) section 62 (4).

¹⁹⁵ Public Finance Management Act (No 18 of 2012) section 55 (4).

¹⁹⁶ *ibid* (n 20).

The institutional framework for public debt management in Kenya reveals critical structural weaknesses that a GDP debt ceiling alone cannot remedy. Parliament's oversight role has been progressively diminished, with the 2023 PFMA amendment shifting significant discretion to the Executive while historical evidence shows legislative bodies functioning largely as rubber stamps for debt decisions. The PDMO, despite clear statutory mandates, lacks true independence from Treasury influence, demonstrated by inconsistent adherence to debt strategy recommendations and the absence of enforcement mechanisms when the Cabinet Secretary deviates from the Medium-Term Debt Management Strategy.

Other institutions tasked with ensuring accountability and transparency face similar constraints. The PBO lacks adequate resources to rigorously scrutinize borrowing proposals or provide independent debt analysis as noted by the NDI.¹⁹⁷ Further, The OAG, despite its constitutional role, often publishes reports too late to influence fiscal policy. These delays were previously linked to the failure of ministries, departments and agencies to submit their reports within the required timelines. For example, although the Office of the Auditor General's Report for the 2017/18 financial year noted that the accuracy of outstanding loan balances could not be verified due to a lack of loan details, there is no indication that Parliament took any action to enforce this fundamental principle of public financial accountability.¹⁹⁸

Further, As noted by NDI, while the Public Accounts Committee (PAC) and the Public Investments Committee (PIC) are empowered to summon public officers regarding financial matters, Cabinet Secretaries often fail to attend or comply with such summons, partly due to political allegiances within Parliament.¹⁹⁹ Meanwhile, the CBK plays a technical role in domestic debt issuance but lacks policy influence in shaping sustainable debt strategies.²⁰⁰ These overlapping mandates without enforceable coordination mechanisms hinder effective oversight. Without correcting the institutional asymmetry between legislative oversight and executive discretion, Kenya's GDP-based debt ceiling may become another nominal target devoid of enforceable limits or fiscal responsibility. Carolyne warns, a deficit in transparency is the foundation of failed governance, and the current trajectory risks exacerbating Kenya's debt vulnerabilities.²⁰¹

¹⁹⁷ *ibid* (n 20).

¹⁹⁸ *ibid* (n 20).

¹⁹⁹ *ibid* (n 20). Pg. 30.

²⁰⁰ *ibid* (n 20).

²⁰¹ *ibid* (n 74).

2.6.2 Implications for Debt Transparency and Accountability

2.6.2.1 Clarity in Debt Ceiling Levels

The transition to a GDP debt ceiling introduces both opportunities and risks for fiscal transparency and accountability. The transition to a GDP debt ceiling demands enhanced legal clarity and consistency to safeguard fiscal discipline. A major gap lies in the statutory definition of public debt, which does not explicitly distinguish between internal and external debt. This ambiguity creates interpretive leeway, especially concerning what debt is counted under the ceiling. Given Kenya's growing reliance on external borrowing often at higher costs and greater exposure to exchange rate risks this omission is critical.²⁰² Given that the move toward a GDP debt ceiling was largely driven by concerns over external debt sustainability and the need to align debt limits with macroeconomic indicators.

2.6.2.2 Accuracy of GDP Data

The accuracy of GDP data is paramount to the integrity and effectiveness of a GDP-based debt ceiling framework. In Kenya's transition from a nominal debt ceiling to a GDP-tied limit, the calculation of the debt-to-GDP ratio hinges on the precision and timeliness of GDP figures. A misreporting or delay in GDP data not only undermines the fundamental premise of debt sustainability but also distorts the ability to assess fiscal health accurately. Further, Luis notes that the GDP-based ceilings require real-time data and parliamentary democracies to prevent GDP manipulation.²⁰³ Moreover, inconsistencies in the MTDS, BPS and ABP remain incoherent, with borrowing targets frequently shifting without clear justification combined with poor-quality economic data and unexplained variances in debt reporting, weakening the GDP-based ceiling's integrity. Further as recommended by Davoodi without independent verification of GDP projections, Kenya risks weakening fiscal discipline under the new debt framework.²⁰⁴

In Kenya, where a significant portion of national debt is external, inaccuracies in GDP data pose a heightened risk. External borrowing, subject to fluctuating exchange rates and international market conditions, may be underreported or mischaracterized if GDP figures are not updated promptly or are flawed. This misalignment could lead to a false sense of fiscal health, permitting the government to engage in excessive borrowing or to overlook fiscal sustainability risks. This issue becomes particularly problematic in light of ongoing challenges with reporting accuracy, where discrepancies in the publication of key fiscal data have previously undermined transparency.

²⁰² *ibid* (n 79).

²⁰³ *ibid* (n 38).

²⁰⁴ *ibid* (n 83).

Studies show that governments tend to inflate economic growth projections, thereby rationalizing higher borrowing without proper scrutiny.²⁰⁵

2.6.2.3 Inconsistencies Between PFMA and PRFM

Despite the 2023 amendment, which introduced a GDP-tied debt ceiling, the subsidiary legislation specifically Regulation 26(1)(c) of the PFMR still refers to a nominal debt ceiling in absolute shilling terms.²⁰⁶ This creates a legal inconsistency between the primary law and its implementing regulations, generating ambiguity in the application and enforcement of debt limits. Such contradictions risk undermining legal certainty, as institutions may interpret and apply the provisions inconsistently.

2.6.2.4 Adjustment and Emergency Provisions

The legal provisions that allow for adjustments to the debt ceiling under exceptional circumstances are problematic due to their lack of clarity and oversight. The Public Finance Management Act permits the Executive to increase borrowing by up to 5% of the debt ceiling in response to emergency situations. However, the law fails to define what constitutes an "emergency," leaving considerable room for interpretation and potential abuse. Furthermore, there is no buffer mechanism or preemptive checks in place to ensure Parliament can effectively oversee these adjustments before they occur. Instead, Parliament is only notified post facto, undermining its role in fiscal oversight and leaving the door open for the Executive to act without adequate scrutiny. This weakens the system of checks and balances, creating risks for unchecked fiscal decision-making.

2.6.2.5 Reporting Requirements

Kenya's debt management framework establishes statutory obligations for public debt disclosure; however, the lack of specific timelines for reporting significantly undermines the effectiveness of these provisions, particularly during the transition to a GDP-based debt ceiling. In practice, delays and inconsistencies in reporting, such as those seen with the Monthly Debt Bulletins and the External Debt Register impede Parliament's ability to exercise timely and meaningful oversight.²⁰⁷ These delays also limit the capacity of the public to scrutinize borrowing decisions and fiscal risk exposures.

²⁰⁵ *ibid* (n 42).

²⁰⁶ Public Finance Management (National Government) Regulations Section 26 1 (c).

²⁰⁷ Institute of Public Finance and Oxfam-Kenya, *State of Debt Transparency in Kenya* (January 2025)

<https://ipfglobal.or.ke/wp-content/uploads/2025/01/State-of-Debt-Transparency-in-Kenya-FINAL-.pdf> accessed 15 April 2025 / <https://ipfglobal.or.ke/wp-content/uploads/2025/01/State-of-Debt-Transparency-in-Kenya-FINAL-.pdf>

The situation is further exacerbated by the absence of publicly available quarterly reports on newly contracted debt, despite legal requirements. For instance, as of August 2024, the latest Monthly Bulletin contained data only up to April, creating a lag in critical information dissemination.²⁰⁸ As Kenya operationalizes the present value debt limit of 55% of GDP, it becomes imperative to set clear, enforceable deadlines for the publication of debt data. It also granted the Cabinet Secretary the discretion to exceed this threshold temporarily, subject only to reporting such breaches to Parliament. This raises legitimate concerns over transparency and the adequacy of oversight mechanisms during the transitional phase. Thus, in the absence of enforceable timelines and proactive publication of comprehensive debt data, including creditor identities, loan terms, and expenditure purpose, the transition to a GDP-based ceiling risks amounting to a symbolic rather than substantive reform.

2.7 Findings

The 2023 PFMA amendment significantly weakens parliamentary oversight in Kenya's public debt management by shifting greater borrowing discretion to the Executive. This shift creates institutional and legal ambiguities, particularly in Section 50(2), where the absence of clear enforcement mechanisms undermines fiscal accountability. The transition to a GDP debt ceiling introduces transparency deficits, as Parliament is now informed of debt adjustments only after they occur, reducing its ability to enforce borrowing limits effectively. Additionally, Kenya's reliance on inconsistent debt strategies and poor-quality economic data raises concerns about the credibility of the GDP debt ceiling, increasing the risk of data manipulation and fiscal misreporting. Without independent fiscal councils to counterbalance Executive control, the risk of over-optimistic economic projections remains high, weakening fiscal discipline.

2.8 Conclusion

Kenya's transition to a GDP debt ceiling represents a significant shift in its public debt management framework, aimed at aligning borrowing with economic performance. However, the reforms introduced under the 2023 PFMA amendment raise fundamental concerns regarding institutional accountability, transparency, and fiscal oversight. By shifting borrowing discretion to the Executive, the amendment weakens the system of checks and balances envisioned under Articles 201 and 211 of the Constitution, eroding transparency and accountability. Without comprehensive legal and institutional reforms, this transition may inadvertently exacerbate fiscal

²⁰⁸ *ibid* (n 208).

vulnerabilities, data manipulation risks and unsustainable borrowing practices. Kenya must strengthen legislative safeguards, enhance transparency measures, and establish independent oversight mechanisms that reinforce accountability in public debt management.



Chapter Three

3.0 The Enforcement of Public Debt Management Laws in Kenya by Courts

This chapter examines the enforcement of public debt management laws in Kenya through an analysis of pertinent case law. The selected cases are the only cases heard and determined highlighting the challenges of transparency and accountability in fiscal governance. The chapter interrogates the stark disconnect between the legal framework and the realities of its implementation from the perspective of court's decisions in the following cases: *Kenya Human Rights Commission & Another v Attorney General & Another* and *Khelif Khalifa and Another V Principal Secretary Ministry of Transport and 6 others Constitutional Petition No. E032 of 2021*.

Additional judicial decisions addressing public debt governance in Kenya include ; *Eugenia Wanjiru Gikonyo v The Attorney-General of the Republic of Kenya* at the East African Court of Justice and *Okiya Omtatah Okoiti & another v Uhuru Muigai Kenyatta & 7 others [2016] eKLR*, both of which have not been fully decided and thus could not be relied upon for the purposes of this chapter.²⁰⁹

3.1. Kenya Human Rights Commission & another v Attorney General & another; Law Society of Kenya, Petition E179 OF 2022

The petition was filed due to the respondents' failure to provide information regarding bilateral and international loans procured by the Executive. The petitioners argued that the Executive had borrowed loans without transparency or public involvement, violating constitutional principles.

3.1.1 Facts of the case

The Petition concerns the application of Article 35 of the CoK 2010 on the right to access information.²¹⁰ The Petitioners alleged that the Respondents failed to provide information on bilateral and international loans, procured by the Executive for external lending over the previous nine years.²¹¹ Despite formal requests and subsequent intervention by the Commission on Administrative Justice (CAJ)²¹², the Petitioners contended that the Respondents' actions violated constitutional principles of transparency, accountability²¹³, the rule of law and integrity²¹⁴.

²⁰⁹*Eugenia Wanjiru Gikonyo v The Attorney-General of the Republic of Kenya* No 19 of 2024 *Okiya Omtatah Okoiti & another v Uhuru Muigai Kenyatta & 7 others* [2016] KEHC 7365 (KLR)

²¹⁰ E179 OF 2022, Para. 2.

²¹¹ E179 OF 2022, Para. 6.

²¹² E179 OF 2022, Para. 6.

²¹³ E179 OF 2022, Para. 7, Constitution of Kenya (2010) Article 201(a).

²¹⁴ E179 OF 2022, Para. 8 Constitution of Kenya (2010) Article 10 (Chapter Six of the Constitution of Kenya).

The Respondents asserted that they provided the requested information as far as permissible under the PFMA²¹⁵, and that additional details are publicly available through the National Assembly, prospectuses, and the Ministry of Foreign Affairs.²¹⁶ They argued that disclosing certain information, such as bondholder details, would violate privacy and security protections under the Access to Information Act 2016²¹⁷. In this respect, they argued that since the bonds were traded in the London Stock Exchange, they frequently changed hands and the beneficial ownership information changed regularly as a result. In any event, it was their case that such information was protected by Data Protection laws in the countries of origin of the bond traders.²¹⁸ They claimed that the Petitioners failed to establish the necessity for disclosure.²¹⁹ The 1st Respondent further claimed that the information is protected under Section 6(1)(d) and (f) of the Access to Information Act, and also Section 3(6) and (7) of the Official Secrets Act.

3.1.2 Determination

The Court identified two primary issues for determination: whether the Respondents violated the Petitioners' right to access information under Article 35 of the CoK 2010 and whether the Petitioners were entitled to the reliefs sought.²²⁰

Justice L.N. Mugambi's decision reflects a robust interpretation of the constitutional right to access information, as provided under Article 35(1) of the Constitution. On the first issue, Justice Mugambi held that the refusal by the 2nd Respondent to disclose details regarding Kenya's sovereign bonds and related financial agreements constituted a breach not only of the right to access information but also of the principles of transparency, accountability and openness²²¹. The judge emphasized that the Access to Information Act imposes a duty on the State to facilitate disclosure, with non-disclosure permissible only in limited circumstances.²²²

Rejecting the 2nd Respondent's argument that the requested information was available in budget policy statements, the judge observed that these statements only contained borrowing proposals

²¹⁵ E179 OF 2022, Para. 11; The Principal Secretary, Julius Maia filed a replying affidavit deposing that the records of the sovereign bonds were issued in line with Section 49a and 53A of the Public Finance Management Act (N0 18 of 2012),

²¹⁶ E179 OF 2022, Para. 11-14. The Principal Secretary asserted that the bonds are often traded on London Stocks Exchange and therefore constantly changed hands. Furthermore, the data of the respective bond holders is protected by UK's data protection law and cannot be divulged. In any case, the information requested is provided in the Annual Budget Policy Statement and supplied to the National Assembly for publication on the website.

²¹⁷ E179 OF 2022, Para 15-16.

²¹⁸ E179 OF 2022. Para 12.

²¹⁹ E179 OF 2022, Para 17.

²²⁰ E179 OF 2022, Para. 64.

²²¹ Access to information Act 2016 Section 4 (2) and Section 6.

²²² Constitution of Kenya (2010) Article 10 (2) and Article 201.

rather than the records of actual borrowing sought by the petitioners. This distinction underscores the fundamental need for comprehensive and accurate financial disclosures to promote fiscal accountability.

The judgment substantiated its stance by relying on following domestic and international jurisprudential precedents:

In adjudicating the matter concerning the right of access to information, the court referenced several pivotal cases to substantiate its decision. The court relied on *Timothy Njoya v Attorney General & Another* the court noted the critical role of the right to information in promoting transparency and accountability. The right to information in promoting accountability can be extended for matters on Public Debt Management.

"Still, we entertain no doubt that the right to information is critical to the attainment of a transparent and accountable government and is an enabler to the exercise and enjoyment of other rights by citizens..."²²³

The court drew upon on the case of *President of the Republic of South Africa & Others v M & G Media Limited*, the case emphasized that the burden of proof lies with the state to justify any refusal of access to information. The court view is that the burden to disclose information for transparency and accountability purposes is on the Executive. The court observed:

'...To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair... This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure...'²²⁴

Further, the court depended on the case of *Khalifa & Another v Principal Secretary, Ministry of Transport & 4 Others; Katiba Institute & Another* the court highlighted that the Access to Information Act was enacted to actualize the constitutional right of access to information. It stated that the Access to Information Act affirms that the right to access information held by the State is fundamental. Consequently, the Act operates on the principle that information should be disclosed

²²³ E179 OF 2022, Para. 71.

²²⁴ E179 OF 2022, Para. 86.

by default, with non-disclosure being permitted only in specific, exempted circumstances outlined in section 6.²²⁵

The court further reaffirmed the right of citizens to access information held by public agencies through the case of *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others* the Supreme Court decision stated that Article 35(1)(a) and (b) of the Constitution, in conjunction with Section 3 of the Access to Information Act, unequivocally establish that every citizen has the right to access information held by the State or public agencies.²²⁶

3.1.3 Analysis

The case affirms the principles of transparency and accountability in public debt management in accordance with the CoK. The court reaffirmed the public's legitimate interest in understanding the terms and conditions under which public debt is incurred, managed and repaid.

The Executive's failure to provide timely access to details on Kenya's debt obligations demonstrated a disregard for statutory obligations. The Right of Access to Information is grounded under Article 35 of the Constitution which is unequivocal that every citizen has a right to access information held by the state.²²⁷ Article 35(3) behooves the state to publish and publicize any important information affecting the nation.²²⁸ The information sought by the Petitioners in the case was in relation to the bilateral and international loans procured by the Executive.²²⁹ This was information held by the state and as such the Petitioners were within their rights seeking it from the Respondents.

The court decried the manner in which the Respondents handled the request for information noting that the response to the Petitioners request for information was actioned almost three months later in clear violation of Section 9(1) of the Access to Information Act that requires a response be provided within twenty-one (21) days.²³⁰ The conduct of the National treasury in this instance, can be explained by the Institutional theory which postulates that institutions play a crucial role in influencing behavior by establishing norms and standards that govern the actions of individuals and organizations within a society.²³¹ As the body responsible for the public borrowing in the

²²⁵ E179 OF 2022, Para. 73.

²²⁶ E179 OF 2022, Para. 70.

²²⁷ The CoK, Art 35(1).

²²⁸ The CoK, Art 35(3).

²²⁹ E179 OF 2022, Para. 2.

²³⁰ E179 OF 2022, Para. 76.

²³¹ Oliver E. *The Mechanisms of Governance* (Oxford University Press 1996) pg. 27.

country, the attitude of the National Treasury in its lethargic and inordinately delayed response to the request for information is not only concerning, but also indicative of a deficiency of accountability and transparency in the National Treasury as an institution.

This is in consonance with the findings of Ewang who notes that while PFM laws in Kenya have their own weaknesses, the core issue lies in the attitudes of government officials and citizens.²³² It is unclear why the National Treasury was not forthcoming in its response to the request for information even in the face of the intervention of the Commission on Administrative Justice. This points to a worrying trend where government officials entrusted with the public borrowing mandate, willingly subvert the law at their pleasure. This erodes public confidence in institutions and also undermines the values of transparency and accountability expected of state institutions.

In her work, Susan argues that public debt managers need to strictly adhere to the law. The National Treasury, as the institution mandated with public debt management must at all times act in accordance with the law. The National Treasury had argued that the information sought by the Petitioners was available in the public domain pursuant to Section 49 and 53A of the PFM Act since the budget policy statement provided information for all the monies borrowed in each year and that the same was subject to public participation.²³³

Further, it was argued that the information regarding the treaties and agreements procured between Kenya and other states or international financial institutions was held by the Ministry of Foreign Affairs. It was also argued that information relating to the Sovereign Bonds could not be provided since it was subject to data protection laws in the countries of origin of the bond holders.²³⁴ It is important to rehash these arguments to properly contextualize the manner in which the National Treasury executed its transparency and accountability obligations in the present case.

Marium highlights the critical importance of transparency and accountability in public finance management within developing countries.²³⁵ Latif adds to the foregoing discussion arguing that transparency deficits are significant barriers to effective debt management mechanisms.²³⁶ Thus, the authors are in agreement that transparency plays a central role within the public debt management framework. This extends to information related to the acquisition and use of public debt. It is on this basis that the court's rejection of the Treasury's arguments above can be viewed.

²³²ibid (n 60).

²³³E179 OF 2022, Para. 2

²³⁴E179 OF 2022, Para. 78 - 79.

²³⁵ibid (n 72).

²³⁶ibid (n 41).

The court found that first, the information that the Petitioners sought was records of what had actually been borrowed and not proposals in the Budget Policy Statement. The court further held that according to Section 4(2) of the Access to Information Act, the right to the information is not affected by the reason the Petitioner might have given in requesting for information held by the State, in other words, the Petitioner needed not to have justified the request since the State is under duty to provide the information on request by a Citizen unless the State can validly justify its refusal to supply the information under Section 6 of the Act.²³⁷

The determination by the court was a clear message to the National treasury that it was under a duty to be transparent, accountable, and act in accordance with the law in the execution of its mandate. This explains the far reaching order of mandamus that compelled it to submit all information requested by the Petitioner and information concerning how the funds raised from the sovereign bonds were expended within 45 days of the Judgment.²³⁸

The central impetus of the case was the reiteration of the values and principles of governance under Article 10 of the Constitution. These include transparency, accountability and the rule of law. These principles are instrumental in the public debt management framework as they serve to keep institutions accountable to the Public. Nonetheless, political and executive interference remains to be a challenge in the achievement of these aspirations. Where there is no goodwill from the mandated institutions, citizens will constantly be forced to institute litigation against access to crucial information. While litigation may lead to successful outcomes, it is often prolonged, and by its conclusion, the information sought could no longer be relevant to the purpose for which it was requested.

3.2. Khelif Khalifa and Another V Principal Secretary Ministry of Transport and 6 others Constitutional Petition No. E032 of 2021

The Petition was filed on the account of the Respondent's failure to provide information related to the expenditure incurred in the construction of the Standard Gauge Railway (the SGR). The Petitioners argued that the project was undertaken with controversy and secrecy and as such, information relating to the financing, tendering and construction process of the SGR ought to have been released to the Public.

²³⁷E179 OF 2022, Para. 81

²³⁸E179 OF 2022, Para. 83

3.2.1 Facts of the Case

The Petitioner argued that the SGR was largely obtained through a concessional and commercial loan obtained from the China Exim Bank and that the National Treasury had already begun loan repayments.²³⁹ It was further the Petitioners case that the SGR was operated by a private company that was paid in operating costs in excess of KES 1 Billion per month. They argued that the SGR was operating at a financial loss and owing to the secrecy of the agreements executed between the government and the lender, the consequences of default were not known to the public.²⁴⁰ Accordingly, it was their submission that the project was undertaken with no public participation and provision of sufficient information on the implications of the project on the public purse.

It was on this basis that the Petitioners wrote to each of the Respondents to provide them with information relating to the financing of the project, any Agreements entered between the government of Kenya (GOK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to the SGR and all documents relating to the viability, economic, social, cultural and environmental impacts of the project.²⁴¹ They argued that this information was not provided and as a result, they filed the petition.

In response, the Respondents argued that the Petition was Res Judicata having been decided separately in a suit where the Petitioners and Respondents were parties and the agreements for the SGR were the subject matter in the said case.²⁴² They further argued that the project was not shrouded in secrecy and as a matter of fact, in the disclosed suit, the Respondent had explained the rationale for obtaining the loan and that the rationale of the government of constructing the SGR was to alleviate the socio-economic wellbeing of the nation.²⁴³ With respect to the request for information, the Respondents argued that the loan agreements were executed between the two governments and they were the subject of non-disclosure clauses.

3.2.2 Determination

The court first determined whether the Petition was barred by the doctrine of res judicata. The court noted that from a reading of the subject matter, the facts and issues for determination disclosed in the Petition and those determined in the consolidated petitions revealed that the issues were manifestly different.²⁴⁴ In the quoted cases, the disputes surrounded the interpretation of

²³⁹E032 of 2021, Para 4.

²⁴⁰E032 of 2021, Para 5.

²⁴¹E032 of 2021, Para 6.

²⁴²E032 of 2021, Para 10.

²⁴³E032 of 2021, Para 12.

²⁴⁴E032 of 2021, Para 5.9

contractual clauses and the validity of directives issued by the Kenya Ports Authority while the instant petition concerned requests for information. On those grounds, the court dismissed the plea of *res judicata*.²⁴⁵

With reference to the request for information, the court found that a proper request was directed at the Respondents and in line with Section 9 of the Access to Information Act, the Respondent was under an obligation to respond within 21 days after receiving the request.²⁴⁶ The court reiterated that where a response is not issued within the required timelines, it is deemed to have been refused. Accordingly, the Respondent could not argue that the Petitioners had not exhausted the statutory dispute resolution mechanisms.

On the Application of the Official Secrets Act, the court held that the Access to Information Act was enacted to give effect to Article 35 of the constitution and to provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles. In this respect, the court pointed out that Section 29 of the Act specifically provided that the Official Secrets Act would apply subject to Article 35 of the constitution.²⁴⁷ As such, the Respondents could not purport that the information requested was protected under the Official Secrets Act as the only exclusions on the provision of information were those listed in the Access to Information Act.

On the question of whether the information sought was within the ambit of section 6 of the Access to Information Act as to warrant non-disclosure based on the conditions prescribed therein; the court held that the burden of proof of establishing that the refusal of access to information was justified fell squarely on the Respondent.²⁴⁸ Specifically the court noted

*'...A reading of the provisions of the Access to Information Act leaves no doubt that the act was enacted to give effect to the constitutional right of access to any information held by the State. And the formulation of the sections casts the exercise of this right in peremptory terms – the requester - must be given access to the information so long as the request does not fall within the exceptions in section 6 of the act....'*²⁴⁹

On the basis of the evidence before the court, it was the court's view that no justifiable explanation was provided to demonstrate that the requested information fell within the exceptions in Section 6

²⁴⁵E032 of 2021.

²⁴⁶E032 of 2021, Para 76.

²⁴⁷E032 of 2021, Para 77.

²⁴⁸E032 of 2021, Para 86.

²⁴⁹ E032 of 2021, Para 84.

of the Act. Moreover, the failure to take a decision by the Respondent was a refusal in the context of the act. Thus, the court allowed the Petition and issued an order compelling the Respondent to forthwith provide, at their cost, the information sought by the Petitioner.²⁵⁰

3.2.3 Analysis

The *Khelef Khalifa* decision is important for two reasons. First, it clarified the extent of the Application of the Access to Information Act and second, disabused the notion that the state could withhold information on the basis of national security without providing evidence to justify the same point in case the Cabinet Secretary under the executive.

On the first issue, the court reiterated that the Access to Information Act was the principal act with respect to Access to Information. Therefore, references to the Official Secrets Act could not be invoked to justify the refusal to provide information to a request for information brought under the Access to Information Act. The court further held that the Access to Information Act promotes a culture of justification where the state is under an obligation to demonstrate that any limitation on the right to information is the least restrictive and it is compatible with democratic principles. This holding is in line with the Institutional theory which states that institutions play a crucial role in influencing behavior by establishing norms and standards that govern the actions of individuals and organizations within a society. By the judgment in *Khelef*, institutions are under a duty to entrench a culture of justification within their operations

The judgment is also significant in balancing national security concerns with the right to access information. While national security is a legitimate reason for withholding certain information, the decision highlights that such claims must be substantiated. Further, the judgment entrenches a rights based approach in Access to Information under the Access to Information Act. In this sense, the provision of information under the Act is the norm, not the exception. This not only affirms the principles of accountability and transparency, but also reinforces the extent to which limitations on the Right to Information can be applied.

3.3 Findings

The Kenya Human Rights Commission case established that the executive branch violated Article 35 of the Constitution by not disclosing information on sovereign bonds, thus hindering public access to information. The court rejected the government's claim that budget policy statements

²⁵⁰E032 de 2021, Para 95.

were adequate substitutes for actual loan agreements, emphasizing the need for transparency for parliamentary oversight, accountability, and public participation. The court also found the executive in violation of Articles 201(a) and 10 of the Constitution, indicating a pattern of unconstitutional actions, and reinforcing the idea that public access to information is vital for a functioning democracy. This case underscores that the executive has a duty to provide detailed information on public debt and cannot use generalized statements to avoid scrutiny.

In the *Khelef Khalifa* case, the court equally found that the Respondent was in breach of Article 35 of the constitution by its failure to provide the requested information. The case further highlighted that a refusal of information under the Access to Information Act on the grounds of national security had to be established by clear and compelling evidence. It was not enough to simply allege through affidavits that the information requested if provided would constitute a threat to national security. Especially where the CoK and the PFMA prescribes a mechanism of control through reporting on these debts.

The two cases are reflective of the approach that the government has in the recent past taken with respect to requests for information on loans taken out by the government to finance its activities or controversial development projects. The deliberate refusal to provide critical information either by acquiescing to the request, refusing the request outright, or invoking national security considerations not only undermines the principles of public finance under Chapter 12 of the constitution but also erodes public trust on the government's borrowing and spending habits.

3.4 Conclusion

The cases illuminate the structural deficiencies inherent in Kenya's public debt management framework, exposing a troubling interplay of opacity, inadequate oversight mechanisms, reporting of public debts and the pervasive influence of political interests. These cases demonstrate a concerning trend where the application of the Constitution seems to be inconsistent, especially in relation to transparency and accountability in public debt management. The law, as it stands, is intended to ensure openness, but the executive branch's actions reveal a stark contradiction. Despite the constitutional provisions for access to information and oversight, loopholes in Kenya's legal framework allow the Executive to exert excessive discretion over public debt management, often bypassing established checks and balances. It appears as if the legal framework and its application are at odds, with the executive asserting control over information and oversight in ways that seem to undermine constitutional principles.

The situation is paradoxical: while the Constitution envisions a system of accountability, the executive has assumed an outsized role in overseeing public debt, making it difficult for Parliament and the public to access critical information. The failure to provide information under the current framework raises serious questions as to whether the same will be achieved under the GDP ceiling. This inversion of roles raises serious questions about the effectiveness of oversight mechanisms especially in the transition of the GDP ceiling that seeks to extend more control to the Executive.



Chapter Four

4.0 A Comparative Analysis of Public Debt Management: Assessing the Kenya GDP Debt Ceiling in Relation to The Botswana and Poland Models

4.1 Introduction

The GDP debt ceiling is a Public Debt Management mechanism that ensures a country's borrowing aligns with economic growth to promote debt sustainability. To assess sustainability, it is crucial to understand why Kenya has moved from a nominal Debt Ceiling to a GDP Debt Ceiling. This chapter examines how different jurisdictions have implemented similar frameworks and the results they have achieved.

Botswana and Poland have been selected for the comparison because of several reasons. On the one hand, Botswana has clear debt limits, Central Statistics Office involvement, automatic corrective measures and a proactive parliamentary approval for borrowing beyond set limits, Poland on the other hand places strict corrective measures on their public debt ceilings as a means of ensuring Public Debt Management. Two African countries that adopted the GDP debt ceiling could have been used in the study. However, there are limitations to their experience. Ghana's GDP debt ceiling faced challenges due to the manner in which the Executive infringed provisions of the Public Finance Management Act, 2016.²⁵¹ Zambia's GDP debt ceiling mechanism, adopted in 2022, is too recent to provide substantial information for the study.²⁵²

4.2 The rationale for adopting Botswana and Poland as a benchmark for Kenya

4.2.1 Botswana Approach to the GDP Debt ceiling

In 2024, Kenya's public debt stood at 70.1% of GDP, significantly higher than Botswana's 17.3% in the same period.²⁵³ Notably, Botswana has maintained a relatively low and stable debt ratio, peaking at 19.3% in 2021.²⁵⁴ This data portrays a stark difference in debt management approaches,

²⁵¹ Ghana's Public Financial Management Act, 2016 (Act 921) sect 7 2(b). <https://mofep.gov.gh/publications/acts-and-policies/the-new-public-financial-management-act-921-2016>

²⁵² The Public Finance Management Act, 2022 <https://mofep.gov.gh/publications/acts-and-policies/the-new-public-financial-management-act-921-2016> sec 12 <https://www.parliament.gov.zm/node/7513>

²⁵³ Republic of Kenya, The National Treasury and Economic Planning, Annual Public Debt Management Report 2023/2024, September 2024

<http://www.parliament.go.ke/sites/default/files/2024-10/Annual%20Public%20Debt%20Management%20Report%202023%202024%20from%20the%20National%20Treasury%20and%20Economic%20Planning.pdf> accessed on 28th February 2025 and Ministry of Finance Botswana, Government Debt, Quarterly Debt Update June to March 2024 https://www.finance.gov.bw/index.php?option=com_content&view=article&id=3&Itemid=182&catid=10

²⁵⁴ Ministry of Finance Botswana, Government Debt, Quarterly Debt Update 2021

https://www.finance.gov.bw/index.php?option=com_content&view=article&id=3&Itemid=182&catid=10

with Botswana demonstrating fiscal prudence through a sustained low debt to GDP ratio . Kenya's high debt to GDP ratio indicates greater reliance on borrowing, raising concerns about long term sustainability and fiscal discipline. Based on these statistics, the preceding sections will seek to interrogate both Public Debt Management systems and identify the differences in legal frameworks while highlighting key lessons for debt management from a debt ceilings perspective.

Both Botswana and Kenya have established constitutional and statutory frameworks to manage public debt.²⁵⁵ The respective frameworks present similarities in their institutional structures and differ in their approach to fiscal discipline and debt oversight. The purpose of borrowing in both Kenya and Botswana is primarily for infrastructure projects and economic development.²⁵⁶

While Botswana adopts a fiscally conservative approach, prioritizing budget surpluses and financial reserves over borrowing, Kenya has a more debt-dependent fiscal strategy.²⁵⁷ Kenya actively utilizes borrowing as a key tool for financing development .²⁵⁸ Unlike Botswana, which relies primarily on official creditors for concessional financing, Kenya actively engages external debt to meet its financing needs.²⁵⁹ This reflects a fundamental difference in debt governance, where Botswana exercises fiscal restraint to minimize borrowing, while Kenya strategically leverages debt to fund economic growth.²⁶⁰

4.2.1.1 Legal and Institutional Framework

Both Botswana's and Kenya's debt governance framework is grounded in the Constitution and Public Finance statutes.²⁶¹ Article 118 of Constitution of Botswana (CoB) provides that all public debt obligations be charged to the Consolidated Fund, ensuring that funds are only utilized through parliamentary approval.²⁶² This position is similar to that of Kenya under Article 214(1) of the

²⁵⁵ Kenya - Public Finance Management Act (No 18 of 2012), Public Finance Management Act, 2013 Chapter 54:01 Botswana, The Finance and Audit Act, Chapter 54: 01 and the Stocks, Bonds and Treasury Bills Act 2005.

²⁵⁶ Public Finance Management Act (No 18 of 2012) sec 15 2 (c).

²⁵⁷ *ibid* (n 254).

²⁵⁸ *ibid* (n 254).

²⁵⁹ *ibid* (n 254) and Africa Centre for People Institutions and Society (ACEPIS), *Risky Borrowing and Economic Justice: The Role of Private Creditors in Kenya's Public Debt Problem* (EATGN, TJNA, 2023) <https://www.acepis.org/publication/the-role-of-private-creditors-in-kenyas-public-debt-problem>

²⁶⁰ *ibid* (n 76).

²⁶¹ Kenya - Public Finance Management Act (No 18 of 2012) and Botswana Public Finance Management Act, 2013 Chapter 54:01 Botswana, The Finance and Audit Act, Chapter 54: 01 and the Stocks, Bonds and Treasury Bills Act 2005.

²⁶² Constitution of Botswana (1996), Article 118 and 123.

CoK.²⁶³In both countries, the National Assembly is responsible for enacting laws and providing oversight of the executive branch.²⁶⁴

4.2.1.2 Institutional Architecture

To supplement the Legislature's roles in Public Debt Management Kenya has the following institutions: Parliamentary Budget Office (PBO) and the Public Debt and Privatization committee.²⁶⁵ On the other hand Botswana makes use of the Public Accounts Committee (PAC) tasked with reviewing government financial management, including debt. Further Botswana utilizes the Finance and Estimates Committee(FEC) tasked with monitoring expenditure and ensuring that corrective actions are taken in the course of each fiscal year without waiting for the next fiscal year.²⁶⁶ The main difference between Kenya's and Botswana's PAC is that Kenya's PAC's role involves linking parliamentary approval to the release of funds, rather than overseeing the quality of expenditure or the achievement of results as is seen in Botswana.²⁶⁷ Kenya's PBO on the other hand supports parliamentary oversight by analyzing the national budget and economic policies to provide information and an analysis of the economy.²⁶⁸ Botswana, however, lacks a similar institution for budgetary analysis as its Executive is mandated to carry out that role.

In relation to the role of the Executive in Public Debt Management both Kenya and Botswana grants the MOF the power to borrow funds on behalf of the government.²⁶⁹ In both countries, the MOF is expected in its annual budget estimates presented to the National Assembly to outline the financial requirements for servicing all government loans and guarantees, including principal repayments, interest and associated costs.²⁷⁰ Additionally, the estimates must specify the projected revenue from loans and grants for the financial year and detail any legally incurred public debt.²⁷¹

The Public Debt Management Office (PDMO), Central Bank of Kenya (CBK), and the Controller of Budget (CoB) function as theoretically decentralized institutions under the executive in

²⁶³Constitution of Kenya (2010) Article 214 (2).

²⁶⁴Constitution of Kenya (2010) Article 119.

²⁶⁵Public Finance Management Act (No 18 of 2012) Section 9 and Republic of Kenya, The National Assembly Standing Orders (6th Edition), Section 207 (A)

²⁶⁶Republic of Botswana, *Public Expenditure and Financial Accountability: Public Financial Management Performance Assessment Report*, Final Report (European Commission Delegation Botswana, Specific Contract No: 2008/0504/Version 2) /<https://www.pefa.org/sites/pefa/files/assessments/reports/BW-Feb09-PFMPR-Public.pdf> accessed on 28th February 2025.

²⁶⁷ibid (n 226).

²⁶⁸Public Finance Management Act (No 18 of 2012), sec 9.

²⁶⁹The Finance and Audit Act, section 10 and The Public Finance Management Act, section 19 and 20. Botswana PFMA 2011, sec 4 -5 and PFMA 2023, sec 15.

²⁷⁰Botswana, Public Finance Management Act 2013, Section 6.

²⁷¹Botswana, Public Finance Management Act 2013, Section 25 (d).

Kenya.²⁷²The PDMO is tasked with ensuring cost-effective borrowing while managing risks, maintaining a comprehensive debt database, and implementing the MTDS.²⁷³ The CBK acts as the fiscal agent of the government in issuing debt securities and managing monetary policy to support debt sustainability , while the COB ensures that public funds are utilized as approved by Parliament, preventing excessive or unauthorized borrowing .²⁷⁴

In contrast, Botswana follows a highly centralized approach to debt management under the Ministry of finance (MOF).²⁷⁵ The MOF holds primary authority over borrowing decisions, ensuring debt sustainability and fiscal discipline while reporting to Parliament.²⁷⁶The Debt Management Office (DMO) operates under MFED with centralized control over borrowing, issuing government securities, and implementing debt strategies with strict executive oversight. A key difference between the two countries is the level of autonomy granted to debt management offices.

Kenya's PDMO operates with relative independence, with reporting and transparency requirements ensuring parliamentary oversight of borrowing decisions.²⁷⁷ In Botswana, however, the DMO is more tightly controlled by the executive, reflecting a fiscally conservative model that limits borrowing despite having the legal space to take on more debt.²⁷⁸The Bank of Botswana (BoB) has a limited role in debt management, mainly assisting in bond issuance Botswana follows a conservative borrowing approach, favoring concessional loans, while Kenya engages both domestic and international markets for financing.²⁷⁹ The BoB prioritizes macroeconomic stability and low debt accumulation, whereas CBK adapts monetary policy to support Kenya's higher borrowing needs.²⁸⁰

4.2.1.3 Role of Statistics and Data Institutions

Additionally, in Botswana, this MOF is supported by the Development and Budget Division (DBD) within the Ministry, which is responsible for coordinating the annual budget, managing debt service, advising government entities, state-owned enterprises and local authorities on

²⁷²PDMO, Public Finance Management Act (No 18 of 2012), Central Bank of Kenya Act (No 15 of 1996), Section 6.

²⁷³ Public Finance Management Act (No 18 of 2012) Section 63.

²⁷⁴ Central Bank of Kenya Act (No 15 of 1996), Section 6.

²⁷⁵ Botswana, Finance and Audit Act (Chapter 54:01) Section 4.

²⁷⁶ Botswana Public Finance Management Act 2012, Section 6.

²⁷⁷ Public Finance Management Act (No 18 of 2012), Section 63.

²⁷⁸ Botswana, Public Finance Management Act (No 18 of 2012), Section 5 (3).

²⁷⁹ Botswana, Public Finance Management Act (No 18 of 2012) Section 5 (3).

²⁸⁰ Central Bank of Kenya Act (No 15 of 1996), Section 6.

borrowing terms and conditions.²⁸¹ The Central Statistics Office, also under the MOF , provides essential economic data, which aids in making informed decisions regarding fiscal policies, debt management and national budgeting.²⁸²

However, Kenya lacks a Central Statistics Office; instead, its statistical functions are primarily handled by the Kenya National Bureau of Statistics (KNBS). Unlike centralized statistics offices in some countries, KNBS is responsible for data collection, economic reporting, and national statistics.²⁸³ However, its autonomy in economic and fiscal reporting may not be as robust as that of independent statistics agencies in other jurisdictions, given that it operates under the Statistics Act,2006.²⁸⁴ Further, there appears to be no clarity whether the KNBS shall be used for this new system.

4.2.1.4 Debt Ceiling Design and Corrective Measures

Parliamentary approval plays a crucial role in ensuring transparency and accountability in government borrowing, with Botswana and Kenya adopting distinct approaches to legislative oversight. In Botswana, the MOF must obtain parliamentary approval for both borrowing limits and each loan.²⁸⁵ This ensures strict legislative oversight and reinforces fiscal accountability. In contrast, Kenya grants the CS greater autonomy in borrowing under Section 49 of the PFMA where loan ratification is only required by the Executive and not Parliament .²⁸⁶ The only direct parliamentary control is under Section 50(5) that requires parliamentary approval for debt limits.²⁸⁷ Thus, while Botswana follows a rigid approval process, Kenya's framework allows for greater executive discretion in borrowing decisions, potentially reducing legislative oversight.

Both Botswana and Kenya implement statutory GDP debt ceiling limits as a mechanism to regulate government borrowing and ensure fiscal sustainability.²⁸⁸ Botswana borrowing limits are provided for under Section 20 of the Stocks, Bond and Treasury Bills SBT Act.²⁸⁹ Botswana enforces a dual debt ceiling, capping external and domestic borrowing at 20% of GDP each, ensuring a balanced approach to debt accumulation. Specifically the act prescribes that the combined total of domestic

²⁸¹ Ministry of Finance Botswana,

https://www.finance.gov.bw/index.php?Itemid=141&option=com_content&view=article&id=112&catid=16

²⁸² G. Chambray Central Statistics Office Botswana, Some experiences/<https://paris21.org/sites/default/files/721.pdf>

²⁸³ Statistics Act, No 4 of 2006.

²⁸⁴ *ibid* (n 243).

²⁸⁵ Botswana, Public Finance Management Act Section 20 (4).

²⁸⁶ Public Finance Management Act (No 18 of 2012) Section 49.

²⁸⁷ Public Finance Management Act (No 18 of 2012) Section 50 (5).

²⁸⁸ Public Finance Management Act (No 18 of 2012) Section 50 (A-D) while in Botswana, Stocks, Bonds and Treasury Bill Act, 2005 Section 20.

²⁸⁹ Stocks, Bonds and Treasury Bill Act, 2005 Section 20.

debt and government-guaranteed liabilities shall be capped at 40% of the country's annual GDP, with domestic debt capped at 20 % while foreign debt and external liabilities capped at 20% bringing the aggregate to 40 % of the GDP.²⁹⁰

These legal constraints prevent governments from overextending fiscal commitments without oversight, a weakness in Kenya's framework, where borrowing limits are frequently adjusted without clear sustainability measures.²⁹¹ The distinction between external and domestic debt in debt limits allows governments to manage risks associated with foreign exchange volatility and domestic liquidity constraints. The Minister is required to seek parliamentary approval before proceeding with borrowing.²⁹²

In contrast, Kenya has adopted a GDP debt ceiling under the PFMA 2023, to set the debt threshold at 55% of GDP in present value terms and an additional 5 % of the GDP. In contrast to Botswana, Kenya applies a single GDP debt ceiling, covering both external and domestic debt, which allows for greater flexibility but also increases exposure to exchange rate risks and debt servicing pressures. The framework allows the CS for the National Treasury to exceed the debt ceiling by up to 5% in exceptional circumstances. Parliamentary approval is not immediately required for these adjustments.²⁹³ The CS must report to Parliament on any breach of the debt ceiling, detailing the exceptional circumstances.

Unlike Botswana, Kenya lacks binding fiscal correction measures, relying on post-facto reporting to Parliament. This grants the Executive greater flexibility in managing debt levels. In contrast, Botswana enforces a strict debt ceiling, which cannot be exceeded without prior parliamentary approval.²⁹⁴ This requirement ensures that any borrowing beyond the prescribed limits is subject to legislative scrutiny before implementation, reinforcing fiscal discipline and accountability.

4.2.1.5 Audit and Independent Oversight

In relation to independent offices both countries make use of the Auditor General who is responsible for ensuring accountability in PFM by auditing government entities and reporting to Parliament.²⁹⁵ However, in Botswana, audit reports are first submitted to the Minister of Finance,

²⁹⁰ Botswana, Stocks, Bonds and Treasury Bill Act, 2005 Section .20 (2) and (3).

²⁹¹ *ibid* (n 63).

²⁹² Botswana, Stocks, Bonds and Treasury Bill Act, 2005 Section 8(1).

²⁹³ Public Finance Management Act (No 18 of 2012), Section 50 (2B).

²⁹⁴ *ibid* (n 252).

²⁹⁵ Botswana, Finance and Audit Act, sec 29 (1) and Public Finance Management Act (No 18 of 2012), Section 81-82.

while in Kenya, they go directly to Parliament, ensuring greater autonomy.²⁹⁶ Fraud reporting differs, with Botswana requiring ministerial approval before action, Kenya allows direct reporting to Parliament or law enforcement.²⁹⁷ Botswana has a Government Audit Committee, while Kenya mandates internal audit committees in all public entities.²⁹⁸ Overall, Kenya's framework provides for independent oversight, while Botswana emphasizes ministerial review before parliamentary reporting.

4.3 Analysis of Botswana's Public Debt Management Framework on Debt ceilings

Botswana's fiscal framework reflects institutional conservatism, procedural discipline, and strong ex-ante oversight. Its dual-debt ceiling model, capping external and domestic debt separately, combined with the legal requirement for parliamentary approval before any deviation, represents a firm commitment to fiscal restraint.²⁹⁹ As Ana rightly argues, the absence of binding correction mechanisms weakens the credibility of a debt ceiling.³⁰⁰ Kenya's post-facto reporting structure aligns poorly with this principle, unlike Botswana's ex-ante approval model, which enforces real-time accountability. This difference highlights how institutional structures shape the effectiveness of debt management frameworks.

Institutionally, Botswana's centralized debt management approach ensures coherence and strategic focus. All borrowing decisions are funneled through the Ministry of Finance, promoting fiscal unity and clear lines of responsibility. Kenya's decentralized model, by contrast, involves multiple oversight bodies; the PDMO, PBO, CoB, and the Public Debt and Privatization Committee. While this institutional pluralism might appear to enhance scrutiny, it creates fragmentation and coordination challenges, as different actors pursue their own institutional interests. According to Davoodi et al, effective debt ceilings are often undermined where institutional roles are unclear or overlapping, as is the case in Kenya.³⁰¹ This fragmentation suggests a failure of institutional alignment that could be explained through Public Choice Theory, which posits that political and bureaucratic actors, driven by their own interests, may weaken institutional effectiveness. In

²⁹⁶ Botswana, Finance and Audit Act, Section 36(1) and PFMA Public Finance Management Act (No 18 of 2012), Section 82.

²⁹⁷ Botswana, Finance and Audit Act, Section 33 and Public Finance Management Act (No 18 of 2012) Section 200.

²⁹⁸ Botswana Public Finance Management Act, Section 12 and Public Finance Management Act (No 18 of 2012) Section 73(5).

²⁹⁹ Botswana, Stocks, Bonds and Treasury Bill Act, 2005 Section 20.20 (2) and (3).

³⁰⁰ *ibid* (n 78).

³⁰¹ *ibid* (n 83).

Kenya, multiple institutions with overlapping mandates may dilute accountability and lead to inefficiency.

Botswana's requirement for pre-approval of both the ceiling and specific loan arrangements ensures a more robust legislative check, strengthening fiscal discipline. From an Institutional Theory perspective, Botswana's centralized approach creates clear institutional accountability, where each institutional actor knows its role in fiscal oversight. Public Choice Theory further suggests that this strong institutional framework reduces the opportunities for political actors to use debt for short-term gain, as the approval process limits discretion and introduces more checks on decision-making. Kenya's post-facto reporting structure, by contrast, allows more flexibility in borrowing decisions, which might cater to political expediency but weakens long-term fiscal sustainability.

Equally important is the role of data institutions. Botswana's Central Statistics Office (CSO) operates within the Ministry of Finance, ensuring close alignment between statistical output and fiscal planning. This institutional integration ensures that data supports sound, policy-driven decision-making. Kenya's KNBS, while legally mandated to support public finance policy, operates at arm's length from the debt management framework, creating a disconnect between data producers and decision-makers. Institutional Theory highlights how such structural disconnection can hinder the proper functioning of fiscal policy, while Public Choice Theory suggests that fragmented institutional structures may incentivize actors to prioritize their own goals over the collective efficiency of debt management. Love More points out that this disconnection undermines the credibility of debt sustainability assessments, leading to poor governance in debt management.³⁰²

4.4 Poland Approach to the GDP ceiling

4.4.1 Institutional Framework for Debt Management

The Public Debt Management frameworks in Poland and Kenya differ notably in terms of structure and oversight. The oversight mechanisms for public debt in Poland and Kenya differ in structure and implementation. In Poland, the Sejm (Parliament) exercises oversight through post-budget scrutiny, primarily reviewing the Council of Ministers' annual debt report.³⁰³ This mechanism ensures accountability but does not require prior parliamentary approval before borrowing occurs.

³⁰² *ibid* (n 61).

³⁰³ Public Finance Act, 2009, Article 182.

Conversely, in Kenya, the National Assembly must receive prior approval.³⁰⁴ Additionally, Kenya has a multi-layered oversight framework under Parliament with the Controller of Budget (COB), and the Parliamentary Budget Office (PBO) monitoring debt servicing, expenditure, and compliance with fiscal responsibility principles. The COB monitors government expenditure and debt servicing, ensuring compliance with fiscal responsibility laws. Meanwhile, the PBO provides independent analysis and advice to Parliament on fiscal matters, helping ensure that the government adheres to its budgetary and debt management rules. This multi-layered system aims to provide strong checks and balances, though it faces challenges in coordination and effective implementation.

4.4.2 Debt Strategy and Reporting Requirements

The MOF holds the primary authority for Public Debt Management in both Poland and Kenya, operating under their respective .³⁰⁵ In Poland, the Council of Ministers approves a Four-Year Debt Management Strategy, which details public debt trends, borrowing forecasts, and fiscal sustainability measures.³⁰⁶ Additionally, the MOF is required to publish annual debt reports, outlining government liabilities, treasury obligations, and guarantees issued by the public sector.³⁰⁷

In Kenya, the CS for the National Treasury is responsible for Public Debt Management ensuring that borrowing aligns with GDP debt ceilings and fiscal sustainability.³⁰⁸ Section 50(5) of the PFMA mandates that the Cabinet Secretary submit an annual debt strategy report to Parliament, detailing debt sustainability and associated risks.³⁰⁹ Unlike Poland, Kenya has multiple oversight institutions, including Parliament, the COB, the PBO, and the Auditor-General, who monitor debt servicing and financial transparency.³¹⁰

4.4.3 Role of Statistics office

Further, Poland's Central Statistical Office (CSO) plays a crucial role in publishing information on the relationship between public debt and GDP, ensuring accurate monitoring of the debt-to-GDP ratio.³¹¹ Similarly, in Kenya, the National Treasury is tasked with aligning debt levels with GDP, ensuring compliance with fiscal responsibility principles. Poland also benefits from

³⁰⁴ Public Finance Management Act (No 18 of 2012), Section 50 (5).

³⁰⁵ Public Finance Act, 2009 Article, 74 and the Public Finance Management Act (No 18 of 2012) Section 15.

³⁰⁶ Public Finance Act, 2009 Article 75.

³⁰⁷ Public Finance Act, 2009 Article 38.

³⁰⁸ Public Finance Management Act (No 18 of 2012) Section 15.

³⁰⁹ Public Finance Management Act (No 18 of 2012) Section 50 (5).

³¹⁰ Public Finance Management Act (No 18 of 2012) Section 82-84, 200

³¹¹ Public Finance Act, 2009 Article 38.

Eurostat's independent monitoring, reinforced by the Excessive Deficit Procedure (EDP), which enforces strict fiscal discipline.³¹²

4.4.4 Debt Ceilings, Corrective Measures and Sanctions

Poland's debt framework has established a rigid constitutional and legislative framework for debt limits, ensuring fiscal discipline and public debt sustainability. Article 216(5) of the 1997 Constitution imposes a binding debt ceiling of 60% of GDP, aligning with the Maastricht Treaty requirement for European Union (EU) member states.³¹³ In comparison Kenya relies on a statutory debt ceiling under section 50 (2) of the PFMA set at 55% of the GDP, subject to potential adjustments of up to 5% by the Cabinet Secretary in exceptional circumstances.³¹⁴

In Poland, The MOF, under Article 74, holds the primary responsibility for debt oversight, ensuring that public debt does not exceed 60% of GDP, in accordance with the constitutional debt ceiling.³¹⁵ Poland establishes a structured mechanism for managing public debt by setting clear thresholds and corrective measures when debt approaches critical levels.³¹⁶ Article 86 mandates that if public debt exceeds 55% but remains below 60% of GDP, for the following fiscal year, the council of ministers shall have measures.³¹⁷

These measures include freezing public sector wages, limiting pension adjustments to inflation rates, prohibiting new loans from the state budget, and imposing expenditure restrictions on government agencies.³¹⁸ Additionally, the Council must review foreign loan-financed expenditures and multi-year programs, ensuring that fiscal discipline is maintained. To reinforce oversight, the Sejm (Parliament) must be presented with a corrective action plan, outlining strategies to reduce the debt-to-GDP ratio.³¹⁹ Further, Compliance is monitored by Eurostat and enforced through the Excessive Deficit Procedure.³²⁰

If debt equals or surpasses 60% of GDP, stricter sanctions are triggered. The Council of Ministers is required, within one month, to present a fiscal consolidation plan to the Sejm, detailing

³¹² *ibid* (n 278).

³¹³ The Constitution of the Republic of Poland, 1997, Article 216(5).

³¹⁴ Public Finance Management Act (No 18 of 2012), Section 50 (2).

³¹⁵ Public Finance Act, 2009 Article 47.

³¹⁶ Public Finance Act, 2009 Chapter 3 Prudential and sanitary procedures

³¹⁷ Public Finance Act, 2009 Article 86.

³¹⁸ *ibid* (n 254).

³¹⁹ *ibid* (n 254).

³²⁰ The aim of the excessive deficit procedure (EDP) is that EU countries correct excessive deficit and/or debt levels. The European Commission can launch an EDP against an EU country not respecting the Stability and Growth Pact (SGP), a body of rules governing the coordination of EU countries' fiscal policies. <https://eur-lex.europa.eu/EN/legal-content/glossary/excessive-deficit-procedure-edp.html>

immediate corrective actions.³²¹ Poland enforces strict municipal borrowing limits through Article 243a of the PFA, ensuring that local governments cannot accumulate unsustainable debt. These limits are integrated into the national budget law, preventing fiscal risks from devolved units.³²² Local governments are prohibited from incurring additional debt, and the public finance sector is barred from issuing new guarantees or guarantees.³²³

These automatic mechanisms ensure political discretion does not drive unsustainable borrowing, creating a self-correcting fiscal system. However, unlike Poland, Kenya does not have specific corrective measures triggered when debt approaches critical thresholds. Poland's Public Choice Theory-driven framework acknowledges that government officials may prioritize political survival over long-term economic stability. Awadzi argues that the absence of clearly defined corrective measures weakens fiscal discipline, a concern evident in Kenya's approach, where debt ceilings have been revised multiple times without corresponding fiscal reforms.³²⁴

Moreover, Article 87 mandates that any sanction program must include a three-year public debt forecast, assessing macroeconomic conditions and proposing legal solutions to reduce debt.³²⁵ However, Article 88 provides exemptions in extraordinary circumstances, such as martial law, a national emergency or a natural disaster, allowing temporary deviations from standard debt limits.³²⁶ The National Bank of Poland shall make available to the MOF the data, including individual data and the statements and evaluations before the MOF can borrow a loan.³²⁷

In Kenya, while the Cabinet Secretary for the National Treasury manages public debt, there is no formal requirement for a three-year public debt forecast specifically tied to a sanction program. Further, extraordinary circumstances such as national emergencies or natural disasters are not explicitly addressed in Kenya's Public Debt Management framework.

4.5 Analysis of Poland's Public Debt Management Framework on Debt ceilings

Poland's public debt management framework, guided by constitutional debt limits and adherence to EU fiscal criteria, provides a solid foundation for fiscal discipline. Oksana emphasizes how legal regulations and institutional controls contribute to Poland's success in maintaining debt levels

³²¹ *ibid* (n 254).

³²² Public Finance Act, 2009 Article 234 a.

³²³ Public Finance Act, 2009 Article 87.

³²⁴ *ibid* (n 14).

³²⁵ *ibid* (n 290).

³²⁶ Public Finance Act, 2009 Article 88.

³²⁷ Public Finance Act, 2009 Article 85.

below 60% of GDP, underlining the importance of well-defined legal frameworks.³²⁸ The framework is further strengthened by automatic corrective measures and fiscal responsibility laws (FRLs) which ensure that borrowing remains within sustainable limits, avoiding excessive debt accumulation. In light of this, Poland's framework can serve as a useful model for Kenya, particularly in incorporating strong legal and institutional frameworks to enforce a GDP debt ceiling.

However, as noted by Alexanders, Poland's debt thresholds have not entirely shielded the country from high deficits, highlighting that the mere presence of a ceiling is insufficient without complementary fiscal measures.³²⁹ Poland's system relies on enforceable legal provisions, such as the mandatory publication of debt reports, which provide transparency and accountability. This mechanism ensures that the government cannot exceed set borrowing limits without immediate corrective action. For Kenya, adopting these stringent measures could strengthen its ability to manage public debt effectively, ensuring that the GDP debt ceiling achieves its intended fiscal stability.

4.6 Conclusion

Comparing Botswana and Poland's public debt management frameworks highlights critical lessons for Kenya. It highlights key differences in fiscal discipline, oversight, and borrowing strategies. Botswana enforces strict parliamentary approval for borrowing, ensuring executive accountability, while Kenya grants greater autonomy to the Cabinet Secretary for the National Treasury, increasing flexibility but also fiscal risks. Poland's framework integrates automatic corrective measures, preventing excessive debt accumulation, whereas Kenya lacks binding fiscal corrections, relying on post-facto reporting. Botswana's dual GDP debt ceiling ensures balanced debt allocation, while Kenya's single ceiling system increases debt servicing pressures. Additionally, Kenya's stronger institutional oversight contrasts with Botswana's centralized debt management and Poland's EU-monitored fiscal discipline. Strengthening Kenya's legal framework with structured corrective measures would enhance fiscal sustainability and debt transparency. By adopting these lessons, Kenya can build a more disciplined, transparent, and accountable public debt management system that supports long-term economic stability.

³²⁸ *ibid* (n 81).

³²⁹ *ibid* (n 75).

Chapter Five

5.0 Conclusions and Recommendations

5.1 Introduction

This chapter presents the findings of the study, conclusion and recommendations based on the balance of power between the Executive and the Legislature in Kenya's transition from a nominal to a GDP debt ceiling system of Public Debt Management.

The basis of the research stemmed from the shift in Kenya's Public Debt Management framework, following the amendment of the PFMA which transitioned the country from a nominal to a GDP debt ceiling. The primary objective of the study was to assess Kenya's transition from a nominal to GDP debt ceiling as a mechanism for enhancing transparency, accountability and debt sustainability. The central research question guiding this study was whether Kenya's transition to a GDP debt ceiling enhances transparency, accountability and sustainability in Public Debt Management.

The study initially examined the legal framework governing Public Debt Management, focusing on the transition from a nominal to a GDP debt ceiling. The study subsequently analyzed jurisprudence, assessing how Kenyan courts have interpreted Public Debt Management laws, particularly in relation to parliamentary oversight and executive discretion. Finally, the study conducted a comparative of Botswana and Poland's Public Debt Management framework specifically on the debt ceiling. This structured approach was guided by the study's central hypothesis, which posits that the current Public Debt Management framework lacks sufficient safeguards to ensure effective parliamentary oversight, thereby increasing the risk of executive overreach.

This chapter presents a nuanced analytical overview of the study's findings, identifying gaps and weaknesses within the Public Debt Management framework for the transition to a GDP ceiling. It outlines recommendations to address these shortcomings, with the overarching goal of transparency, accountability and sustainability in Public Debt Management.

5.2 Findings of the study

Chapter Two sought to address the first research question. It analyzed Kenya's legal framework on Public Debt Management highlighting weaknesses following the amendment of the PFMA

2023, identifying legal gaps in the transition to the GDP debt ceiling.³³⁰ The study found that section 6 of PFMA ,2023 amendment reduced parliamentary oversight in that Parliament's constitutional and statutory mandate to regulate debt levels and impose borrowing restrictions has been transferred to the Executive. The same section allows the Executive to only inform Parliament over any adjustments ,after the transition to a GDP debt ceiling introduces transparency deficits with Parliament only informed of the adjustments after they occurred.³³¹

The study noted that the amendment usurps Parliament's oversight role of setting the debt ceilings from parliament to a statutory provision under the law, thereby contradicting the CoK. Additionally, the study noted that the amendment grants the Executive broad discretion to extend the debt ceiling, effectively sidelining parliamentary approval and diminishing accountability in public borrowing decisions. Lastly the study noted that the Executive, tasked with reporting debt data, is also responsible for providing credible data for the transition to a GDP debt ceiling, raising concerns about potential transparency gaps.³³²

Chapter Three examines the effectiveness of the GDP debt ceiling from the perspective of Kenya's courts' jurisprudence. The chapter analyzed two key court cases, *Kenya Human Rights Commission & another v Attorney General & another; Law Society of Kenya, Petition E179 OF 2022 and Khelif Khalifa and Another V Principal Secretary Ministry of Transport and 6 others Constitutional Petition No. E032 of 2021* .³³³ The two cases found that Kenya's current Public Debt Management lacks transparency and accountability because of an overarching Executive in debt management. Both cases exposed the Executive's failure to disclose critical information on sovereign debt, violating constitutional principles that guarantee public access to information and parliamentary oversight.³³⁴ The study found that government officials under the Executive attempted to avoid scrutiny by citing national security concerns without sufficient justification, ultimately eroding public trust in debt management practices. These findings illustrate that without stronger legal safeguards, the GDP debt ceiling may further shift borrowing discretion to the Executive, undermining Parliament's ability to regulate debt levels effectively.

Chapter Four evaluates Kenya's transition to a GDP debt ceiling by comparing it with public debt frameworks in Poland and Botswana. Poland sets its debt ceiling at 60% of GDP, enforcing strong parliamentary oversight and triggering corrective measures when debt surpasses both 60 % and

³³⁰ Public Finance (Amendment) Management Act ,2023.

³³¹ Public Finance (Amendment) Management Act ,2023.

³³²ibid (n 92).

³³³E179 of 2022 and E032 of 2021.

³³⁴ibid (n 290)

55% of the GDP. Botswana, on the other hand, has a more conservative limit of 40% of GDP, with separate caps for domestic and external debt, closely monitored by the Central Statistics Office. Both countries incorporate mechanisms that prioritize spending adjustments and require parliamentary approval for additional borrowing. The study noted that for Botswana each loan must be approved by Parliament. These comparative insights highlight valuable lessons, as Kenya's issue lies in its legal framework, requiring better laws and compliance with said laws, as seen in Botswana and Poland, to enhance debt sustainability and accountability.

5.3 Conclusion

Kenya's transition to a GDP debt ceiling fundamentally contradicts the Constitution, which grants Parliament the oversight role in public debt management. By shifting greater borrowing discretion to the Executive, the 2023 amendments erode the system of checks and balances envisioned under Articles 201 and 211 of the Constitution. This change weakens parliamentary scrutiny, making debt decisions more opaque and reducing accountability. Comparative analysis with Botswana and Poland highlights that sustainable debt management requires enforceable oversight mechanisms, yet Kenya's framework lacks clear enforcement measures. Furthermore, jurisprudence on public debt governance reveals systemic challenges, including executive dominance, transparency deficits, and legal ambiguities that undermine fiscal discipline. This study ultimately confirms the hypothesis that Kenya's current legal framework for public debt management lacks the necessary safeguards to ensure transparency, accountability, and sustainability in the transition to a GDP debt ceiling.

5.4 Recommendations regarding Kenya's debt management mechanism

5.4.1 Strengthening Parliamentary Control Over Debt Limits

To address the deficiencies inherent in Kenya's current debt governance framework, particularly the extensive discretion afforded to the Executive, there is a compelling need to amend the PFMA. Such an amendment should unequivocally vest the authority to set public debt limits in Parliament and mandate prior legislative approval for all borrowing decisions. This reform would serve to curtail executive overreach, bolster fiscal discipline, and enhance the transparency and accountability of Kenya's public debt management regime, especially within the context of the country's transition to a GDP-anchored debt ceiling. Furthermore, parliamentary oversight should extend beyond the mere approval of aggregate debt thresholds to encompass the scrutiny of individual loan agreements, as exemplified in Botswana's legal framework. The absence of this power in Kenya substantially diminishes Parliament's ability to perform meaningful oversight. In

addition, the institutionalization of mandatory debt impact assessments prior to the conclusion of loan contracts would introduce a proactive mechanism for evaluating fiscal risks and long-term sustainability.

5.4.2 Enhance Public Debt Transparency

To strengthen public debt transparency, Kenya should develop a centralized, publicly accessible online portal that provides real-time data on total debt stock and servicing costs. This initiative would give effect to Article 35 of the Constitution, which guarantees access to information, and Article 201, which enshrines principles of openness and accountability in public finance. Furthermore, establishing an independent fiscal council to verify economic forecasts and assess fiscal risks would prevent potential manipulation of macroeconomic indicators—particularly important under the GDP-linked debt ceiling framework.

5.4.3 Adoption of a Debt Anchor Policy with a Defined Implementation Framework

Kenya would benefit from adopting a debt anchor policy that places a clear and firm limit on public debt in relation to GDP, similar to Poland's approach. The policy should enforce spending and borrowing controls, ensuring debt aligns with national priorities. It should establish spending and borrowing controls to ensure that new debt aligns with sustainable fiscal policies and national development priorities. A clear debt reduction framework should require the National Treasury to implement gradual fiscal adjustments, such as expenditure cuts or revenue-enhancing measures, when debt nears the prescribed anchor. Additionally, independent debt sustainability assessments should verify compliance and prevent data manipulation. This aligns with Section 50(2)(D), requiring a five-year plan to reduce Kenya's debt from 68.1% to 60%.

5.4.4 Implement Enforceable Corrective Measures and Sanctions

Kenya must introduce legally binding corrective mechanisms in the PFMA to enforce fiscal discipline. Like Poland's model, automatic fiscal adjustments should trigger spending caps and hiring freezes when debt exceeds 60% of GDP. Any borrowing beyond the ceiling should require a two-thirds parliamentary majority for strict oversight. To prevent slippages, mandatory budget cuts and revenue measures should be implemented when debt surpasses critical levels. Additionally, accountability sanctions, including budgetary restrictions and personal liability for unauthorized borrowing, should be imposed on officials to enhance transparency and debt sustainability.

5.4.5 Establish Clear and Balanced Debt Limits for Domestic and External Borrowing

Since Kenya prioritizes external borrowing, it should establish clear and balanced debt limits for both domestic and external borrowing to mitigate exchange rate risks and over-reliance on foreign debt. A structured framework should cap external debt as a percentage of GDP while encouraging greater utilization of domestic borrowing to strengthen local financial markets. Additionally, legally binding thresholds should ensure that borrowing decisions align with debt sustainability principles. Adopting Botswana's dual borrowing limit model would enhance fiscal stability and reduce Kenya's vulnerability to external shocks.



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APPENDICES

Appendix A: Similarity Report

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Appendix B: Strathmore University Ethics Review Clearance Certificate



4th December 2024

Ms Loo Saada,
saada.loo@strathmore.edu

Dear Ms Loo,

RE: Public Debt Ceiling: Evaluating the Effectiveness of Parliamentary Oversight in Kenya's GDP-Based Debt Ceiling Framework

This is to inform you that SU-ISERC has reviewed and **approved** your above **SU-masters** proposal. Your application reference number is **SU-ISERC2488/24**. The approval period is from **4th December 2024 to 3rd December 2025**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used.
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-ISERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-ISERC within 72 hours of notification.
- iv. Any changes anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-ISERC within 72 hours.
- v. Clearance for the export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to the expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days of completion of the study to SU-ISERC.

Before commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

Mr Ambrose Rachier,
Chairperson; SU-ISERC

Amended Strathmore University Ethics Review Clearance Certificate



3rd March 2025

Ms Loo Saada,
saada.loo@strathmore.edu

Dear Ms Loo,

REF: SU-ISERC2693/25 (AMENDMENT) PROPOSAL "Public Debt Management in Kenya: An Analysis of Section 50 of the Public Finance Management Act, 2023 on Debt Ceiling"

I refer to your application for the approval of a proposed amendment submitted on 20th February 2025. We acknowledge receipt of the following submitted documents for amendment.

- a) Amendment Cover letter
- b) Amended Study Proposal
- c) Informed Consent Form and document outlining participation conditions
- d) Study budget
- e) Study tools
- f) CV(s) of investigators

The committee noted the following amendment

- 1. Change of supervisor due to uncontrollable circumstances**
- 2. Topic changes:** From "Public Debt Ceiling: Evaluating the Effectiveness of Parliamentary Oversight in Kenya's GDP-Based Debt Ceiling Framework." to "Public Debt Management in Kenya: An Analysis of Section 50 of the Public Finance Management Act, 2023 on Debt Ceiling."
- 3. Refinement of Research Objectives and Questions**
- 4. Updated Literature Review:** Additional sources and recent publications have been incorporated to provide a more comprehensive review on GDP-based debt ceilings
- 5. Revised Structure and Formatting:** Minor structural changes have been made to enhance the logical flow of chapters and improve readability, ensuring consistency with academic standards.

Ole Sangale Rd, Madaraka Estate, PO Box 59857-00200, Nairobi, Kenya. Tel +254 (0)703 034000
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The Committee concluded that the suggested amendments are justified and will not increase the participants' risk. The proposed changes have therefore been approved for implementation. You may continue with your study.

You are required to submit any further changes to this protocol version to SU-ISERC for review and approval before implementing any additional changes.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Ambrose Rachier".

Mr Ambrose Rachier,
Chairperson: SU-ISERC