KENYA'S PUBLIC DEBT POSITION: EVALUATION OF THE EFFECTIVENESS OF THE OVERSIGHT ROLE OF PARLIAMENT IN PUBLIC DEBT MANAGEMENT

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DECLARATION

I, **GICHUNGU DAN KAMWARO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date: .....19 February 2024.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

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ABSTRACT

This discourse examines the legal framework and oversight tools in order to assess the efficacy of Parliament's oversight of Kenya's public debt management. The study employs doctrinal legal research methodology with a focus on detailed assessment of the legal rules, legislation, and case law. The major findings of this research include, but not limited to, the shortcomings and challenges that hinder effective public debt management such as lack of public participation, delays in reporting, absence of ratification of loans procured by the Cabinet Secretary (CS) on behalf of the national government. The proposed ways to solve the foregoing legal abeyances include codifying public participation laws, civil education and awareness, capacity-building, and reinforcement of the enforcement authority of Parliament and the relevant committees. The study's findings have important implications for current and future efforts to improve public debt management and parliamentary oversight in Kenya. Through tackling the recognized deficiencies and executing the suggested remedies, decision-makers and interested parties can endeavor to augment openness, accountability, and long-term stability in the management of public resources.

LIST OF ABBREVIATIONS

BPS	Budget Policy Statement
BROP	Budget Review and Outlook Paper
CS	Cabinet Secretary for Treasury
COB	Controller of Budget
CKRC	Constitution of Kenya Review Commission
CRA	Commission on Revenue Allocation
CSO	Civil Society Organizations
DSA	Debt Sustainability Analysis
FY	Financial Year
GDP	Gross Domestic Product
GIFT	Global Initiative for Fiscal Transparency
IMF	International Monetary Fund
IPU	Inter Parliamentary Union
JSC	Judicial Service Commission
KSH	Kenya Shilling
MTDS	Medium Term Debt Management Strategy
NDI	National Democratic Institute
NGO	Non-Governmental Organization
OAG	Office of Auditor General
OBS	Open Budget Survey (2019)
PAC	Public Accounts Committee
PDMO	Public Debt Management Office
PFMA	Public Finance Management Act
PFMR	Public Finance Management Regulations

PSC	Parliamentary Service Commission
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
USD	United States Dollar

LIST OF CASES

Kenya Human Rights Commission & Wanjiru Gikonyo v CS National Treasury and Attorney General (E179/2022)

LIST OF LEGAL INSTRUMENTS

Kenyan Instruments

Constitution of Kenya (2010)

Public Finance Management Act (2012)

Public Finance (National Government) Regulations (2015)

Debt Borrowing Policy (2020)

Standing Orders, 6th Edition (2020)

Legal Notice No. 34 of 2015

International Instruments

United Nations Principles on Promoting Sovereign Lending and Borrowing

IMF and World Bank Guidelines (2014)

CHAPTER 1

1.0 BACKGROUND

The term "public debt" refers to any financial commitments resulting from loans made or guaranteed and securities issued or guaranteed by the national government.[1] The public debt is charged on the Consolidated Fund, however it may be charged entirely or partially against other public funds pursuant to a parliamentary act.[2] Consolidated Fund is a fund where all monies received or raised by or on behalf of the government are deposited.[3] The county government does not yield powers to borrow on behalf of the national government unless the national government guarantees the loan and with the approval of the county assembly.[4] It is prudent to note that public debt has a categorization whereby it can either be domestic or foreign/external debt.[5] Furthermore, the relevant regulations stipulate further the sources from which the government can borrow.[6]

The Public Finance Management Act (2012), the Public Finance Management Regulations (2015), the Debt Borrowing Policy (2020), and the Kenyan Constitution (2010) all regulate public debt management. The executive, judicial, and legislative branches of government are defined by the Constitution. In this discussion, the legislature will be the main subject. The Parliament is allocated fiscal powers under public finance to exercise oversight over State organs, revenue and expenditure.[7] The powers extend to the oversight over government borrowing whereby it is required to prescribe the terms on which the government may borrow and promptly receive reports on all loans by the Cabinet Secretary (CS) Treasury.[8]

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[1] Article 214(2), *Constitution of Kenya*, (2010).

[2] Article 214(1), *Constitution of Kenya*, (2010).

[3] Article 206, *Constitution of Kenya*, (2010).

[4] Article 212, *Constitution of Kenya*, (2010).

[5] Section 49(2), *Public Finance Management Act*, (2019).

[6] Section 187, *Public Finance Management Regulations*, (2015).

[7] Article 95 and Article 96, *Constitution of Kenya*, (2010).

[8] Article 211, *Constitution of Kenya*, (2010).

In the current legal framework, every four months, the National Treasury is obligated to report to Parliament on loan balances, interest rates, terms of repayment, drawings and amortizations on new loans. This requirement is outlined in Section 31(3) of the Public Finance Management Act (PFM Act). According to the provision, the report must include information on the names of the parties involved, the loan's amount, its expressed and repayment amounts in currencies, the terms of repayment, including interest, the amount already advanced, and the intended uses and anticipated benefits of the proceeds. This shall be contrasted with the authority to borrow bestowed upon the CS Treasury[9], which has been subject to criticism emanating from the checks and balances in place the procurement of loans on behalf of the national government. This clause puts Parliament in a difficult situation because it reports on a loan that has already been obtained and makes it essentially impossible to change any decision or action taken by the National Treasury. Furthermore, some foreign loans e.g. the Standard Gauge Railway (SGR) loan, are alleged to have confidentiality agreements and are often free from this legal obligation.[10]

The government is only allowed to borrow subject to the limits set by Parliament.[11] A limit is passed by a resolution duly moved by the House. The limit is to be maintained at a sustainable level.[12] Moreover, the limitations on government borrowing clearly state that the national government must guarantee and borrow funds in a way that meets its financing needs and payment obligations at the lowest feasible cost in the financial marketplace, which is consistent with a prudent level of risk, and that the total sum of public debt is sustainable.[13] To aid in oversight, the CS Treasury is obligated to present to Parliament a statement outlining the Medium-Term Debt Management Strategy (MTDMS) of the national government by no later than 15 February each financial year.

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[9] Section 49(1), *PFM Act* (2012).

[10]NDI and WFD, 'Role of Parliaments in Public Debt Management', 29.

[11] Section 50(2), *PFM Act*, (2012).

[12] Section 15(2)(d), *PFM Act*, (2012).

[13] Section 50(1), *PFM Act*, (2012).

The Constitution lays out a number of guiding principles for public finance that are meant to guarantee that the purposes of debt incurrence are successfully carried out. The principles include but are not limited to, openness and transparency, prudent use of public money and clear fiscal reporting.[14] Moreover, there are objectives of public debt management which guide the conduct of public debt stewards while enhancing accountability and transparency.[15] The National Treasury is also subject to fiscal responsibility principles in the management of the national government's public finances.[16] Finally, the Constitution provides for the national values that are meant to bind all state organs, state officers, public officers and all persons whenever they make or implement public policy decisions.[17] These values include but are not limited to transparency, accountability and sustainable development.[18]

In the grand scheme of things, national borrowing and fiscal policies determine public debt. According to Section 12(1)(b) PFMA, the Treasury developed Debt and Borrowing Policy, which is hereafter referred to as the "Debt Policy." The goal of the policy is to serve as a guide for the National and County Governments' borrowing and public debt policies, including the debt portfolio management and issuance procedures. In order to ensure that public debt stays within sustainable levels over time, the policy offers guidelines for managing the portfolio of public debt with the least amount of risk and at the lowest feasible cost. It additionally includes guidance on obtaining funding through borrowing to finance the budget. The purpose of new legislation for policy alignment and pertinent laws is to enforce the policy.

The goal of the parliamentary oversight function of public debt is to make sure that the entities that acquire and oversee public debt adhere to the objectives, principles, and intents of borrowing. However, the aforementioned aim is highly dependent on the ability of Parliament to demand transparency and accountability from the National Treasury in their

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[14] Article 201, *Constitution of Kenya,* (2010).

[15] Section 62, *PFM Act* (2012), Section 193, *PFMA Regulations*, (2015).

[16] Section 15(2), *PFM Act,* (2012).

[17] Article 10(1), *Constitution of Kenya,* (2010).

[18] Article 10(2)(c), (d), *Constitution of Kenya*, (2010).

role of procuring loans. Parliamentary oversight functions in Kenya have often been performed based on the audits and reports from the Controller of Budget (COB)[19] and the Office of the Auditor General (OAG).[20] The downside is that these reports at times are delayed and caught up in procedural hitches for up to 3 years.[21] This is, therefore, limiting Parliament to scrutinize procurement of public debt on an ongoing basis.

Similarly, the PFM Act (2012) provides for the responsibilities of the National Assembly and Senate budget committees.[22] They consist of, but are not restricted to, keeping an eye on how the national government, Parliament, and judiciary are adhering to the public finance principles. Additionally, as mandated by Standing Order No. 205, the Public Accounts Committee (PAC) is in charge of reviewing all other accounts presented to the House that the Committee may think appropriate, as well as the accounts that demonstrate the appropriations of the amount voted by the House to meet public expenditures. Even though the PAC has power to summon any officer concerning public finances, the implementation of corrective legislation, enforcement of compliance or the issuance of formal sanctions has appeared to be an uphill task for parliamentary committees.[23]

Soaring national debt has sparked questions about how long it will continue. In addition, the crisis in Eastern Europe has increased import costs, and the drought brought on by climate change has made Kenya's financial situation and debt vulnerability worse. Below is a table on the public debt situation in Kenya in the last 5 financial years as recorded by the National Treasury (in millions Ksh):

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[19] Article 228(6), *Constitution of Kenya*, (2010).

[20] Article 229(4)(g), *Constitution of Kenya*, (2010).

[21] NDI and WFD, *'Role of Parliaments in Public Debt Management'*, 7

[22] Section 7 and 8, *PFM Act*, (2012).

[23]NDI and WFD, 'Role of Parliaments in Public Debt Management', March 2022, 33.

	JUN-18	JUN-19	JUN-20	JUN-21	JUN-22
Total Domestic Debt	2,478,835	2,785,483	3,177,526	3,697,093	4,288,333
As % of GDP	29.2	29.7	31.2	32.7	33.6
Total External debt	2,568,399	3,023,139	3,515,812	3,999,542	4,299,948
As % of GDP	30.2	32.3	34.6	35.4	33.7
TOTAL DEBT	5,047,234	5,809,076	6,693,338	7,696,635	8,588,281
As % of GDP	59.4	62	65.8	68.1	67.3

Furthermore, in the Quarterly Economic Review Report[24], the total debt stood close to 10.2 trillion Kenya shillings which translated into 70.2% of the GDP. This is juxtaposed with the World Bank's threshold of 64% of GDP.[25] The public debt took an 18.8% increase from the previous 2021/2022 financial year.

In view of the surging levels of public debt, Kenyans must demand for transparency and accountability on national government borrowing.[26] This is supported by the fact that public

[24] Central Bank, 2022/2023.

[25] Mehmet C et al, '*Finding the Tipping Point - When Sovereign Debt Turns Bad*', 2010, 7.

[26] Mutua M, 'Auditor General owes Public a Report on Public Debt' The Standard, https://www.standardmedia.co.ke/article/2000220743/auditor-general-owes-public-a-report-on-national-debt accessed on 1 February 2017.

debt repayment is a shared responsibility amongst the current and future generations. In addition, there is an ethical instinct to exclude them from repayment of corrupt loan procurements[27]. Thus, this study shall hereby seek to assess the effectiveness of Parliament in fulfilling its oversight role under public debt management aimed at ensuring that debt is maintained at a sustainable level. This shall be achieved through an analysis of the legal framework relevant to public debt management, the impacts of oversight in ensuring public debt transparency and the challenges that deface the effective oversight of public debt management by Parliament.

1.1 PROBLEM STATEMENT

As the government increasingly relies on borrowing to fund various developmental projects, there is a growing need to evaluate the effectiveness of parliamentary oversight mechanisms in ensuring responsible and transparent management of public debt. The external debt has erratically increased, more so in the 2014/15 financial year, where the first sovereign bond injected a ridiculous surge of public debt, among others. While the Constitution and relevant legislations empower the Parliament to oversee the government's management of public funds, including the approval and scrutiny of public debt, there is limited empirical evidence on the actual impact of parliamentary oversight on curbing irresponsible borrowing practices, ensuring optimal utilization of borrowed funds, and safeguarding the country from debt-related risks. The contrary has been the case with increased mismanagement of public funds which has hindered the facilitation of development and socio-economic rights and eroded public trust[28]. The effectiveness of Parliament in fulfilling its oversight role stipulated in relevant laws shall be evaluated herein while introducing plausible recommendations for transparent and accountable management of public funds, particularly public debt.

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[27] Lee C Bucheit, Mitu Gulati and Robert B Thompson, 'The dilemma of odious debts' 56(5) Duke Law Journal ,2016, 1201-1206.

[28] Mutuma A, 'Root out the costly indiscipline in Kenya's public finance management' The Business Daily, November 30 2023, 1, https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/root-out-the-costly-indiscipline-in-kenya-s-public-finance-management-4449700.

1.2 RESEARCH OBJECTIVES

1. To comprehensively elaborate the legal procedures and mechanisms set for the management of public debt while drawing insights from developed jurisprudence on the matter.

2. To assess the effectiveness of the Parliament's oversight tools in carrying out its mandate, specifically the examination of budgetary choices and the national government's acquisition of public debt, as well as the disclosure obstacles impeding full openness and accountability.

3. To proffer reforms that address the challenges bedeviling effective oversight of public debt management in Kenya.

1.3 RESEARCH QUESTIONS

1. What is the legal framework governing the exercise of Parliamentary oversight over the management of public debt in Kenya?

2. To what extent does parliamentary enforcement of scrutiny influence government budget decision-making on borrowing, debt-related policies, and the adherence to transparency and accountability?

3. What are the recommendations necessary for effective oversight of the management of public debt in Kenya in the pursuit of transparency and accountability?

1.4 HYPOTHESIS

Escalating public debt situation in Kenya necessitates enhanced parliamentary oversight and transparent reform of the legal framework governing public debt management to address gaps in procurement and ensure transparency in the use of loan proceeds.

1.5 JUSTIFICATION

The public debt in Kenya has been on an upward surge in the past decade resulting in vulnerability of Kenya's public debt situation. This unproportionate increase in financial liability is of concern to all stakeholders, including the people of the Republic of Kenya democratically represented in Parliament.[29] In this vein, the effective oversight of management of public debt is to be coveted, especially in a developing country. This study proves significant to the lawmakers and jurists as they undertake their responsibility in the reform of public finance sectoral laws. The study shall seek to inform possible amendments of the transparency measures therein for the enhancement of effective management of public debt. Moreover, the study shall illuminate policymaking by economic policy makers in Kenya to reinforce the role of Parliament in oversight of state officers and organs in the procurement and management of public debt.

1.6 LITERATURE REVIEW

1.6.1 On the significance of oversight of government by Parliament

Parliamentary oversight is defined by the Inter Parliamentary Union (IPU) and the United Nations Development Programme (UNDP) as the process by which Parliament and parliamentarians hold the government accountable between elections on behalf of the people[30]. Yamamoto, a scholar, declared that maintaining the law, enhancing the effectiveness of government financial operations, keeping an eye on the government's progress, and boosting operational openness would be the main objectives of parliamentary supervision.[31] Additionally, the oversight role is one among other roles of Parliament i.e., lawmaking and representation.

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[29] United Nations, 'Principles on promoting sovereign lending and borrowing', 8.

[30] IPU, *Global Parliamentary Report – Parliamentary Oversight: Parliament's power to hold government to account*, 2017, 1.

[31] Agora, *Portal for Parliamentary Development*, https://www.agora-parl.org/resources/aoe/parliamentary-function-oversight .

In this discussion of parliamentary supervision, scholars Stappenhurst and Pelizzo are cited. The academics agree that efficient supervision is beneficial to a democratic political system's smooth operation[32]. The argument for the assertion is that it can improve the caliber of government-initiated initiatives and policies and that laws adopted by Parliament have more authority. The researchers also point out that the establishment of meaningful and efficient monitoring is necessary for liberal democracy. Conversely, oversight mechanisms and institutions exist in formally democratic systems but are seldom well utilized. The government has the authority to rule in liberal democracies, but it is constrained by the need to justify its decisions and actions[33].

Furthermore, Parliament utilizes committee hearings, plenary assembly hearings, special inquiry committee creation, and parliamentary question time, interpellations, and an ombudsman as means of overseeing the executive machinery[34]. Additionally, they wisely point out that having oversight powers does not guarantee that Parliament is effectively overseeing anything at all. There is a need to increase efforts towards capacity building within the specific powers of Parliament, such as the provision of adequate information to Parliament by the government.

1.6.2 On the oversight role of Parliament in matters of public finance

The 2010 Constitution included oversight mechanisms by Parliament in an attempt to limit the Executive's power as one of the three branches of government and in accordance with the separation of powers doctrine. Professor Migai Akech appreciates the efforts by the current constitutional dispensation to demand accountability from the government's Executive arm.[35]

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[32] Pelizzo R, Stapenhurst R, Olson D, 'Parliamentary Oversight for Government Accountability' Singapore Management University, 137, 2006, 3.

[33] Pelizzo R, Stapenhurst R, Olson D, 'Parliamentary Oversight for Government Accountability' Singapore Management University, 137, 2006, 11.

[34] Pelizzo R, Stapenhurst R, Olson D, 'Parliamentary Oversight for Government Accountability' Singapore Management University, 137, 2006, 3 .

[35] Migai A, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability', Indiana Journal of Global Legal Studies, 2011, 18.

This is a step in the right direction bearing in mind the corruption and abuse of power instances evidenced in the previous constitutional regime. However, it is not to be assumed that the foregoing evils have been obliterated as there are still graft scandals till the present day.[36] Bert Rockman enunciates that parliamentary oversight is aimed at ensuring efficiency, preventing abuse and to represent public interest by monitoring and constraining the executive.[37]

Furthermore, in Kenya the role of oversight of public funds and resources traces its way back to the colonial government. Kenya, after independence, partly adopted the colonial framework of oversight and subsequently incorporated detrimental regulations in the process.[38] Samuel Njuguna and Phyllis Makau posit that the "rubber stamp"[39] policy operated for the enhancement of the Executive agenda has been manifested in the present public finance legal framework.[40] This is the position supported in this paper as the role of Parliament has been reduced to mere approval for the release of funds based on the retrospective application of the approval and reporting requirements.

The United Nations Economic Commission for Africa (UNECA) correctly espouses that the legislature being the people's elected representatives becomes the principal forum to exercise oversight over executive power, and to ensure transparency and accountability in the management of the economy.[41] The Parliament operates under a principal-agent relationship between the people and the Houses as they are a product of a democratic selection of popular

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[36] Migai A, *Abuse of Power and Corruption in Kenya*, 342.

[37] Rockman B, 'Legislative-Executive Relations and Legislative Oversight', Legislative Studies Quarterly, 1984, 417.

[38] Odhiambo M, 'Public service accountability and governance in Kenya since independence' 8(1) Africa Journal of Political Science, 2003, 120.

[39] "Rubber stamping" in this context refers to approval of bills/budgets brought to the House/Parliament without interrogation or critical review. An assessment of the Kenyan National Assembly conducted in 1999 by Joel Barkan noted that Parliament was 'neither independent nor effective.

[40] Njuguna S and Makau P, *'The Parliamentary Budget Oversight in Kenya: Analysis of the Framework and Practices since to Date*', Institute of Economic Affairs, 2009, 99.

[41] Economic Commission for Africa Governance and Public Administration Division (GPAD), *"The Role of Parliament in Promoting Good Governance*', 2013, https://repository.uneca.org/handle/10855/22131, accessed 2 April 2021.

representatives. The inclusion of the dictates of transparency and accountability in the text of the constitution is a true reflection of the intention of the people to ensure that public resources are prudently managed.[42]

1.6.3 On the transparency and accountability threshold for public finance management

According to Fung, the unifying goal of transparency systems is to rectify perceived information asymmetries that characterize market and political processes.[43] Asymmetries occur whereby there are information gaps that are yet to be filled on both sides of the transparency equation i.e. the government and the citizens(stakeholders). Consequently, it is of fundamental interest to the threshold of transparency that all necessary information is available and is presented in a concise and accurate form.

Mark Bovens represents the meaning of accountability as "a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other."[44] It is to be understood to mean that there exists a duty by the state to present information on public finance undertakings whilst the Parliament seeks to impose sanctions on commercially unreasonable actions. According to Bovens, the state is obligated to provide the Parliament and other relevant parties with an explanation and justification for its actions in this relationship.

Prof. Migai Akech, in the same vein, submits that accountability is the cornerstone of good governance and serves the purpose of legitimizing the functions of the government, securing public confidence in the present government and the bridging of the gap between the citizens

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[42] Constitution of Kenya Review Commission, '*Final Report of the CKRC*', 2005, 62-67; See also Constitution of Kenya Review Commission, '*Working Draft of the Final Report of the CKRC'*, 2004, 92-94.

[43] Fung A, Weil D, Graham M and Fagotto E, 'The political economy of transparency: What makes disclosure policies effective?' Ash Institute for Democratic Governance and Innovation, 2004, 1-2.

[44] Bovens M, 'Public Accountability', The Oxford Handbook for Public Management, 2007, 182-184.

and the government.[45] Migai Akech concurs with Bovens that accountability measures empower the populace to avert corruption and abuses of power.[46] Otiende Amollo reinforces the above discourse as he ascertains that accountability is a central feature in the provision of checks and balances against the arbitrary use of power by public officers.[47]

Moreover, in the Constitution of Kenya Review Commission's (CKRC) Final Report, the Commission noted that it was a popular grievance that the 'government of the day' failed to achieve transparency in resource-based decisions such as expenditure and public procurement. This is with regards to contractual transparency of loan-borrowing contracts as there has been a tendency by the government to release amorphous information on the particulars therein.[48]

1.7 METHODOLOGY

The methodology employed in this research is doctrinal legal research. Through a thorough and comprehensive examination of the legal principles provided in primary sources like legislation and court decisions, it focuses on the wording of the law. This discussion compiles laws pertaining to public debt transparency and reporting obligations in an effort to pinpoint any ambiguities. The rationale behind utilizing the methodology is to furnish succinct and lucid responses to legal inquiries, grounded in legally authoritative materials. This study will specifically use the technique to sort through the pertinent court rulings and the legislative framework on public debt management.

The methodology focuses on targeted inquiries to find relevant information to address specific legal concerns. The process entails a number of stages, such as dissecting and

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[45] Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' Indiana Journal of Global Legal Studies, 2011, 18.

[46] Bovens M, *Public Accountability*, 193.

[47] Amollo O, '*Accountability & Oversight'*, International Governance Summit, Leisure Lodge & Golf Resort, 7 November 2018.

[48] Kirira N, 'Public finance under Kenya's new Constitution', Society for International Press Constitution, Working Paper Number 5, 2011, 2-4.

evaluating the legal problems to identify those that need more investigation.[49] This stage is completed by reading background material to become acquainted with the legal field. After that, the researcher will locate and assess the appropriate primary material in order to ascertain the applicable rules and legislation. Secondary materials that expound on the concepts found in the core law serve to further strengthen the primary material. To sum up, it aims to reconcile the previously recognized problems with the relevant legal frameworks.

Merits of the methodology are based on the fact that it is the most commonly taught research methodology. Thus, it is widely accepted among legal researchers and practitioners. Furthermore, it is a more manageable approach to research, and it is predictable as it only focuses on already established primary sources such as treaties, statutes, legislation and case law. However, the methodology has been demerited on several instances in its disregard of social inputs and excessively relying on concepts.[50] Additionally, the methodology ignores other empirical techniques of collecting data and solely concentrating on court decisions and laws.[51]

1.8 CHAPTER BREAKDOWN

Chapter 1 acts as the introduction, providing background information on the study's objective, justification, and conceptual framework, among other things. It also lays the groundwork for the succeeding chapters.

Chapter 3 shall delve into the relevant statutes, treaties, case law and legislation. The chapter shall incorporate analysis of the mechanisms and measures employed within the realm of public debt management.

Chapter 4 shall analyze the impact of oversight tools of Parliament in fulfilling its oversight role. Particularly, the chapter shall focus on the oversight tools and how they reinforce the oversight of budgetary decisions and the procurement of public debt by the national

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[49] Ibrahim S, Dr. Yusoff Z, Dr. Amin, '*Legal Research of Doctrinal and Non-doctrinal*', Volume 4(1), 1.

[50] Ibrahim S, et al, '*Legal Research of Doctrinal and Non-doctrinal*', 2.

[51] Ishwara B, '*Ideas and Methods of Legal Research*', 2020, 143.

government. After that, the chapter will identify the conflicts that arise in the supervision of the executive branch's (the Cabinet Secretary for National Treasury) involvement in public finances, considering the separation of powers among the branches of government.

Chapter 5 shall seek to provide an amalgamation of the challenges and legal loopholes enunciated in the foregoing chapters. In addition, the chapter shall propose various legal recommendations for the challenges impeding effective oversight by Parliament and the hindrances to comprehensive disclosure practices and transparency.

CHAPTER 2
THEORETICAL FRAMEWORK
2.1 Introduction

This chapter elaborates the lens through which the research shall view public debt and its management. First, the research shall employ the Keynesian theory developed by John Maynard Keynes[52], a British economist, urged that government expenditure should be increased to bolster sluggish economic growth. He contends that increased government expenditure is necessary to ensure that aggregate demand stays strong enough to maintain full employment, particularly during a recovery from a recession or depression, when private demand is insufficient. Secondly, the research shall employ the modern liberal democratic theory wherein insights shall be drawn to illuminate the concept of accountability and transparency of government operations. The modern liberal democratic theory seeks to ensure that the ultimate sovereignty of the people, at the same time, limit the rule of the majority, to avoid infringement upon the rights of the individuals and minority.[53]

However, there has been differing schools of thought such as the Harvard economist Robert Barro claims that when the structures are included into long-term interest rates by lenders and investors, the government will eventually have to raise taxes to cover the accumulated government deficit financing.[54] This is the position with the new regime in Kenya, considering the closely maturing sovereign bond (Eurobond), among other loans, and the looming threat of defaulting. Furthermore, the populist dilemma flaws the theory as there ends up with competing interest of the majority rule and liberty of individuals.[55] This, consequently, begs for the maintenance of a successful balance between majority rule and individual rights.

2.2 Keynesian Theory

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[52] Jahan S, Mahmud A S, Chris P, '*What is Keynesian Economics*?' Vol. 51, No. 3, September 2014, 1.

[53] Oldfield A, "Liberal Democratic Theory: Some Reflections on its History and Present", Chapter 2, 84.

[54] Yueh L, "*What Keynes can teach us about government debt today*", Jun 5, 2019.

[55] Saskia et al, "Democracy and Populism: Testing a Contentious Relationship" University of Gothenburg, 2019, 2.

This theory was developed by John Maynard Keynes and emerged in the 1930's at the point of the Great Depression.[56] The foregoing theory rejected the argument by classical theorists that public debt was a burden to economies.[57] Instead, it proposed that it was necessary to raise revenue and for deficit financing of a state's budget. According to the theory, financing a deficit raises government expenditure, which in turn boosts aggregate demand and the use of unnecessary resources, enhancing the output of the country.[58]

In addition, Keynes suggests that during periods of unemployment, a country's current capital is increased through public debt increases that would not have happened otherwise. Furthermore, the theory's current iteration contends that public borrowing encourages the growth of banks, stocks, insurance providers, and individuals who use their savings to purchase government bonds, which constitute a portion of the nation's debt. Keynes makes the important observation that the economic impact of public debt should be evaluated in light of the type of spending for which it is undertaken as well as its capacity to generate income.

However, there has been wide criticism of the above theory stemming from classical economic theorists, such as Adam Smith, who lean more on the laissez faire approach against the promotion of government interventions in markets.[59] Furthermore, proponents of economic theory contend that the idea encourages "crowding out," a process whereby the government borrows money from the private sector to finance increased investment, leaving the latter with insufficient funds to support its own initiatives.[60] In conclusion, there exists criticism against the time lag for the aggregate demand to change which may happen when it is too late thus leading to inflation.[61]

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[56] Zahariev A, 'Chapter II: The Keynesian Theory of Deficit Financing', 2012, 19.

[57] Keynes J M, '*General Theory of Employment, Interest and Money*', 1936.

[58] Jahan S, et al, 'What is Keynesian Economics?', 2014, 54.

[59] Botha D J J, '*The critics of Keynesian Economics*', June 1963, 81.

[60] Hazlitt H, '*The critics of Keynesian Economics*', 1977.

[61] Kates S, '*What's wrong with Keynesian Economic Theory*', 2016.

This theory serves this study as it provides a justification of government borrowing and deficit financing as is the situation in Kenya's public finance context. Lastly, it enunciates that the government should intervene to stimulate demand and boost economic activity. Public debt plays a crucial role in Keynesian theory as a tool for government intervention.[62]

2.3 Modern Liberal Democratic Theory

Modern liberal democracy theory views transparency in public debt management as essential for upholding democratic principles and ensuring accountability in governance. In a liberal democracy, transparency is a fundamental aspect that allows citizens to hold their governments accountable and make informed decisions.[63] James Madison in a letter stated, "a popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[64] This claim is used to illustrate how fundamental transparency is to contemporary liberal democratic thought. Similar ideas can be found in the classical liberalism of Benthamite utilitarian philosophy, Kantian philosophy, Locke, Mill, and Rousseau.[65]

According to the theory, the state must explain itself to the public and defend its policies to each person and the community as a whole.[66] The legislature is expected to make efforts to curb secrecy and protect informed decision-making by the public and enable a public discussion on political decisions. This in turn promotes transparency and enhances development of a functional, democratic space.[67] An informed and intelligent citizen is necessary for a democratic society, and the electorate's intelligence fluctuates according to

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[62] Jahan S, et al, '*What is Keynesian Economics*?', 2014, 53-54.

[63] Mehrpouya A, Djelic ML, "*Transparency: From enlightenment to Neoliberalism or When a Norm of Liberation becomes a Tool of Governing*", HEC Paris Research Paper, September 2014.

[64] ("[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

[65] Fenster M, '*The Opacity of Transparency*', Iowa Law Review, 2006, 895.

[66] March G J, Olsen J P, '*Democratic Governance'*,1995, 146-148.

[67] Habermas J, '*The Structural Transformation of the Public Sphere: An Inquiry into a category of Bourgeois Society'*, 1962, 208-209.

the amount and caliber of information available to it.[68] The underlying assumption is that secrecy caused by opaque government transactions perpetuates an ignorant and suspicious electorate. In addition, a representative democracy is typified by information accessibility since it fosters public confidence in Parliament by facilitating communication between the government and the people and by educating members of the public.[69]

The relation of the theory to this research is the liberal democratic theory's embodiment of transparency which increases ability of the public to monitor government activity and hold officials, particularly incompetent and corrupt ones, accountable for their actions.[70] Furthermore, through more precise verification of countries' adherence to international agreements and standards and through more effective regulation of market activity and credible government oversight, transparency fosters stronger and more peaceful international relations. National markets also benefit from increased access to foreign investment.[71]

However, it is also important to note criticisms of this theory which recognize that transparency cannot be complete. Governments cannot operate in an environment where it gives full access to all records and activities. This is based on the presumption that it would interfere with crucial operations and violate the privacy rights of those who provide personal data to the government.[72] People who hold political or cultural opinions that differ from the majority will be sidelined or subjected to other forms of mistreatment in a democracy by the majority who holds different political views.[73]

2.4 Conclusion

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[68] House Report Rep. No. 89-1497, 1966,12.

[69] Michael James et al, '*Jeremy Bentham: Political'*, 1999, 29.

[70] Common Cause v Nuclear Regulatory Comm'n, 674 F.2d 921, 92, D.C. Cir. 198, Skelley Wright, J.

[71] Florini A, '*The End of Secrecy: Foreign Policy'*, Summer 1998, 50.

[72] Saloschin L R, 'The Department of Justice and the Explosion of Freedom of Information Act Litigation',2000, 1401-1407.

[73] Cunningham F, '*Theories of Democracy: a critical introduction'*, Chapter 4, 2002, 52-72.

In conclusion, both theoretical perspectives offer valuable insights into the complexities of public debt management. While Keynesian theory provides a rationale for government intervention in the economy through deficit spending, Modern Liberal Democratic theory highlights the necessity of transparency and accountability in ensuring responsible governance. Balancing these perspectives is not just an academic exercise, however it's a practical necessity for crafting policies that truly serve the needs of people while upholding democratic ideals. In the present world, this means finding ways to stimulate economic growth while ensuring that government actions are transparent, accountable, and aligned with the values of the society it serves. This then requires collaboration between policymakers, economists, civil society, and ordinary citizens to navigate the complexities of public debt management in a manner that promotes both economic prosperity and democratic governance.

CHAPTER 3
PUBLIC DEBT MANAGEMENT AND PARLIAMENTARY OVERSIGHT: A COMPREHENSIVE EXAMINATION OF THE LEGAL FRAMEWORK AND ITS SHORTCOMINGS IN KENYA

3.1 Introduction

The Kenyan Constitution (2010) serves as the cornerstone of the legal system controlling public debt management and the monitoring function of Parliament. Furthermore, the national debt policy, the PFMA, and PFM Regulations are essential to government officials' control of the public debt. In accordance with Article 211[74], Parliament has the authority to set reporting requirements and dictate the conditions under which the government may borrow money. This chapter shall discuss the public debt management legal framework and follow with the provisions that facilitate the role of Parliament in debt oversight. The focus shall be on public debt as part of the budget process and the authority to borrow, the principles and objectives of public debt management, the reporting requirements, the public debt ceiling, and the requirements for a sound public debt management framework.

3.2 The place of deficit financing and debt estimates in the budget-making process.

Public debt is part of the national budget making process, within the larger public finance framework, as the estimates presented in the budget include that of debt and deficit financing. The executive, every financial year, is tasked with the formulation of the budget and the relevant estimates. [75].

Estimates for the national government must be provided by the National Treasury and presen ted to Parliament[76]. Furthermore, the National Treasury must submit supporting documents for the estimates and other bills required to carry out the national government budget by April 30 of each fiscal year.[77] The format of the budget estimates should include an estimate

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[74] *Constitution of Kenya*, (2010).

[75] Section 12(a), *PFM Act*, (2012).

[76] Section 35(e), *PFM Act*, (2012).

[77] Section 37, *PFM Act*, (2012).

of any budget deficit or surplus for the financial year and medium term and the proposed sources of financing.[78] Additionally, a summary of budget policies including policies on revenue, expenditure, debt and deficit financing.[79]

Important to note, the authority to borrow is bestowed on the Cabinet Secretary of the National Treasury.[80] The Cabinet Secretary may, on behalf of the national government, raise a loan only if the loan and the terms and conditions for the loan are set out in writing and in accordance with the fiscal responsibility principles, the financial objectives set out in the most recent Budget Policy Statement and the debt management strategy of the national government over the medium term.[81] The provision further notes that the CS shall raise loans within Kenya or outside Kenya i.e., internal and external loans.[82] Section 187 of the PFMA Regulations indicates the sources from which the government may borrow.

3.3 The Reporting requirements of public debt

Section 31(3) of the PFM Act mandates that the National Treasury submit reports to Parliament every four months regarding loan balances, interest rates, terms of repayment, withdrawals and amortizations on new loans, in compliance with Article 211(1)(b)[83]. Section 31(2) also gives powers to Parliament to request and receive reports on loans made to the national government when debating matters relating to public debt. Furthermore, the Cabinet Secretary is required to submit to Parliament, a record of all guarantees given by the national government, not later than seven days after receiving a request to do so from either House of Parliament.[84]

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[78] Section 38 (1)(b)(vi), *PFM Act*, (2012).

[79] Section 38(1)(a)(i), *PFM Act* (2012).

[80] Section 49, PFM Act, (2012).

[81] Section 49(1)(a), (b), *PFM Act*, (2012).

[82] Section 49 (2), the *PFM Act*, (2012).

[83] *Constitution of Kenya* (2010).

[84] Section 32(1), *PFM Act*, (2012).

Section 33 of the PFMA requires the Cabinet Secretary to prepare a Medium-Term Debt Management Strategy (MTDMS) annually on a three-year rolling basis.[85] The MTDMS will include the total stock of debt, sources and principal risks associated with national government loans and guarantees, assumptions underlying the debt management strategy, and analysis of the sustainability of the amount of debt, both potential and actual.[86] The main objective of the MTDMS is to provide the national government's actual and potential liabilities in respect of the loans and guarantees and how the government plans to deal with those liabilities. The MTDMS is prepared and updated by the PDM office[87] and in line with the budget policy framework.

In addition, the CS is required to submit to Parliament the Debt Sustainability Analysis (DSA) annually. DSA is entrenched both in the PFM Act[88] and PFM Regulation.[89] Section 15(2) of the PFM Act recognizes public debt sustainability as one of the fiscal responsibility principles that both the national and county government must comply with and adhere to. The DSA is prepared by the PDM office on an annual basis.[90] The DSA is then presented to the Cabinet Secretary for approval who later submits the same to Parliament for consideration.

3.4 The Objectives and Principles of Public Debt Management

The law should provide for mechanisms of how Parliament shall ensure that public expenditure remains sustainable to meet the objectives and principles set out in the Constitution. The current constitutional dispensation introduces principles and objectives to guide public finance management.[91] The principles therein include but are not limited to,

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[85] Section 185(2), *PFMR*, (2015).

[86] Section 33(3), *PFM Act*, (2012).

[87] Section 63, *PFM Act*, (2012).

[88] Section 63, *PFM Act*, (2012).

[89] Section 194, PFMR, (2015).

[90] Section 63(c), *PFM Act*, (2012).

[91] IMF & World Bank Guidelines (2014), 4.

openness and accountability, prudent and responsible use of public money, and clear fiscal reporting. The aforementioned principles seek to enhance transparency in all aspects of public finance in the Republic.[92]

Furthermore, under the PFM Act (2012), the law provides for fiscal responsibility principles.[93] The National Treasury is obligated to manage the public finances in accordance with the Constitution and the foregoing fiscal responsibility principles. Particularly, the national government's borrowing over the medium-term shall be used only for purposes of financing development expenditure and not recurrent expenditure.[94] In conclusion, the legal framework around oversight by Parliament lacks teeth as it is unable to curb such violations of the fiscal responsibility principles by the executive (CS, National Treasury).

In the oversight of National Treasury by Parliament public debt and obligations are envisioned to be maintained at a sustainable level as approved by Parliament for national government and County Assembly for county government.[95] The essence of maintaining debt at a sustainable level is to ensure Kenya can service its debt in the short, medium, and long run without renegotiating or defaulting and without adopting policy adjustments that are crippling economically and politically[96] The Central Bank of Kenya (CBK) reports that total foreign debt climbed from US$10.2 billion (16.5% of GDP) in 2013 to US$34.8 billion (35.4%) in 2021. This increase was mostly due to a tenfold increase in commercial borrowing to US$10.4 billion and a nearly fourfold increase in bilateral loans to US$10.6 billion, led by China. Kenya's debt position is now exposed due to the quick increase in financial responsibility, making it susceptible to severe debt distress from soon-to-maturity long-term loans and bonds.

Furthermore, the PFM Regulations' section 193 puts forth the objectives that direct public

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[92] IMF & World Bank Guidelines (2014), 4.

[93] Section 15(2), *PFM Act*, (2012).

[94] Section 15(2)(c), *PFM Act,* (2012).

[95] Section 15(2)(d), *PFM Act,* (2012).

[96] IMF, *Annual Report*, 2004, https://doi.org/10.5089/9781589063716.011 .

finance management. The objectives of public debt management are to guarantee that, over the medium to long term, the government's funding needs and payment commitments are satisfied at the lowest feasible cost, with a sensible degree of risk, as well as to encourage the growth of the domestic debt market while making sure that the advantages and disadvantages of public debt are fairly distributed among the present and next generation. In addition, the Public Debt Management Office's (PDMO) objectives are stated in section 62 of the PFM Act. However, in recent years, the government's adherence to this objective has fallen short. The government's expensive borrowing poses a threat to the sustainability of the nation's debt.[97]

3.5 Public Debt Ceiling

Section 50(2) PFM Act (2012) mandates Parliament with the role of setting public debt ceilings. The current political regime proposed an amendment of the PFM Regulations to replace a 10 trillion numerical ceiling with a 55% debt to GDP ratio ceiling. The amendment was approved and signed by the President. This is then juxtaposed against the 10.2 trillion posited in the Quarterly Economic Review Report (2022/2023) which translated to 70.2% of GDP. Clearly, the government has crossed the threshold set by Parliament without due regard of the consensus arrived at in the plenary session. In 2019, Parliament set the ceiling at 9 trillion and later amended it in June 2022 to 10 trillion through a contentious motion tabled in Parliament by the government to finance the 2022/2023 budget deficit. In conclusion, the Legal Notice No. 34 of 2015 prescribed that it should be reviewed annually but does not prescribe the criteria Parliament should use to determine the threshold.[98]

3.6 Shortcomings of the current legal framework and the requirements for a sound public debt management framework

[97] Moody's, "*Rating Action: Moody's Places Kenya's B1 Rating on Review for Downgrade*", 2017.

[98] NDI and WFD, 'Role of Parliaments in Public Debt Management',29.

The contemporary legal framework governing the public debt management in Kenya, as elucidated above, has been a success largely considering the gaps and failures during the pre-2010 period. However, it is quite clear that there is a need for reform and improvement in certain areas of regulation. The flaws inherently hinder the effective performance of the oversight role of Parliament in pursuit of the adherence to the guiding principles and objectives.

Foremost, Section 49 of the PFM Act bestows authority on the CS Treasury to borrow on behalf of the national government, but it fails to provide for the body responsible for the continuous ratification of the public loans when raised by the CS. This abeyance in the law then results in the CS Treasury acting unilaterally in the procurement of loans. The law requires him to report on 'already concluded' loan agreements thus hindering necessary checks and balances in the exercise of the authority to borrow. In addition, Parliament seldom receives the requests in full and the information on public debt is never fully disclosed by the Executive.

Additionally, the persistent and rapid increase in the budget deficit has resulted in a disproportionate rise in the public debt in comparison to the GDP. This rapid increase in financial liability has exposed Kenya's debt position making it vulnerable from high debt distress of the soon maturing long-term loans and bonds. The foregoing has been occasioned by an increased appetite for commercial loans by the government over the last decade which is now forcing it to borrow to pay maturing foreign obligations and recurrent expenditure, contrary to the fiscal responsibility principles. Recently, the Budget Review and Outlook Paper (2023) explains the recent trends of government borrowing to pay salaries and other ongoing expenses.[99]

The conclusion is that despite the existence of a public debt ceiling set by Parliament, its role in public debt management is merely a legal limit rather than a sustainability indicator.[100] This conclusion is drawn from the fact that the limit is changed at the wish of the executive.

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[99] Amboko J, Mburu P, 'Treasury needs additional Sh140bn to pay salaries, raising Kenya's debt burden', The Daily Nation, 2023, September 19, .https://nation.africa/kenya/business/recurrent-spending-up-sh140bn-kenya-s-debt-burden-4373206 .

[100] NDI and WFD, 'Role of Parliaments in Public Debt Management', 8.

This was witnessed recently with the increase from 9 to 10 trillion through an unpopular motion in Parliament.

3.7 Conclusion

In conclusion, although there have been noticeable advancements in Kenya's legal framework governing public debt management compared to earlier periods, it's clear that there are significant flaws that demand attention and enhancement. While the existing framework offers some guidance, it falls short in providing adequate mechanisms for robust oversight, especially regarding parliamentary involvement and scrutiny. Essentially, while the legal framework lays the groundwork for managing public debt, its effectiveness is hindered by structural weaknesses and a lack of substantial parliamentary participation. Rectifying these issues is crucial to guaranteeing responsible fiscal practices, transparency, and the long-term sustainability of Kenya's public debt.

A robust legal framework and organizational setup must incorporate strategies to mitigate operational risk, which involves clearly assigning responsibilities and accountabilities among government entities engaged in debt management.[101] Effective public debt management typically involves acknowledging the advantages of well-defined objectives, assessing risks in relation to cost considerations, incorporating accountabilities through consultation and information exchange, and prudently handling the challenges associated with refinancing, market risks, and the interest expenses related to debt obligations. This is especially crucial to deter government officials from seeking immediate por personal benefits from engaging in corrupt or unfavorable debt agreements that do not align with the public interest. The executive branch might be inclined to incur debts, regardless of their drawbacks, to infuse capital that could be utilized for specific political advantages, even if it goes against the long-term financial stability of the nation. In some cases, corruption itself may be a driving factor behind the decision to enter such debts.[102]

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[101] Revised IMF and World Bank Guidelines, 2014.

[102] Duri J, Angelico F, Ferri C, Villeneuve J, '*Overview of Parliamentary Oversight Tools and Mechanisms*', 2022, 20.

CHAPTER 4
EVALUATION OF THE TOOLS AVAILABLE TO PARLIAMENT IN FULFILLING ITS ROLE OF OVERSIGHT OVER BUDGETARY DECISION-MAKING AND PROCUREMENT OF PUBLIC DEBT

4.1 Introduction

Parliamentary supervision is the procedure by which, on the directive of the people, the Parliament keeps government officials responsible in between elections.[103] Parliament's role comprises examining, overseeing, and monitoring government actions [104] Additionally, oversight covers all government activities including the National Treasury as part of the executive, and other state departments.

It's crucial to point out that parliamentary supervision offers a lot of advantages and aims to further specific objectives. Maintaining the rule of law, enhancing the efficacy and efficiency of government financial operations, keeping an eye on the government's accomplishment of goals established by law and its own initiatives, and enhancing operational transparency to boost public confidence in the current government are among the goals of such oversight.[105] Similarly, the benefits of oversight include strengthening governance by closely examining and tracking government actions to ensure inclusivity and openness. Furthermore, it promotes economic and human development by continuously reviewing and modifying policies and laws to ensure that the public interest is met.[106]

A key component of democracy is effective parliamentary oversight, which serves to maintain checks and balances on the executiv.[107] The Parliament must maintain stringent scrutiny given the executive's involvement in the budget process and the CS office's vested borrowing authority. Kenya needs to take particular action to address the aforementioned because of the increasing consolidation of power in the executive arm of government. This is

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[103] IPU and UNDP,2017, 13.

[104] Yamamoto H, IPU, '*Tools for parliamentary oversight: A comparative study of 88 national parliaments'* ,2007.

[105] Agora: 'Parliament functions of oversight', https://www.agora-parl.org/.

[106] NDI 'The Role of Parliament in public debt Oversight in Kenya', 2007,1.

[107] Stapenhurst and Pelizzo, 2012, 2.

considering Kenya's presidential system of government, which clearly separates the functions of the executive and legislative branches and prohibits members of one branch from holding office in another. This is a change from the independence constitution system, in which ministers were members of Parliament.

Furthermore, oversight tools facilitate the performance of this role by Parliament. Questions, summons, interpellations, and impeachment as specified by law, procedural rules, standing orders, and parliamentary practice form some of the tools used.[108] Depending on the system of government, oversight instruments are used differently. For example, the executive is less reliant on the legislative branch to stay in power under presidential systems like Kenya. In conclusion, this chapter shall be segmented into two stages of oversight i.e. ex-ante and ex-post while discussing in each the legal mechanisms of budget -making process, procurement of public debt/deficit financing, the tools available to Parliament, and the challenges that hinder effective oversight of public finances, especially debt.

4.2 The Ex-ante Stage.

4.2.1 Formulation

The generating and submitting of important documents for Cabinet and Parliament's approval is a part of the budget formulation and preparation process. The budget calendar serves as a guide for the process, outlining the deadlines for a number of crucial duties that must be completed in order to complete the budget and present it to Parliament by April 30 of each fiscal year.[109] The calendar is included in the Treasury Circulars along with the following documents: the Debt Management Strategy Paper, the Program Based Budgets and supporting details, the Appropriations Bill, the Finance Bill, the Division of Revenue Bill, the County Allocation of Revenue Bill, the Sector Budget Proposals, the Budget Policy Statement (BPS), and the Budget Review and Outlook Paper (the BROP).[110] Article 220[111]

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[108] IPU and UNDP, 2017, 28.

[109] Section 36, *PFMA*, 2012.

[110] National Treasury, Circular on Preparation for the FY 2024-25.

[111] The *Constitution of Kenya* (2010)

provides that the budgets of county and national governments shall contain the proposals regarding borrowing and other forms of public liability that will increase public debt during the following financial year.

Members of Parliament are able to stand up for policy priorities and hear and speak for the people because of their inclusion in the legislature. Pre-budget consultations and debates are among the instruments at the Parliament's disposal at this time.[112] The BPS must first and foremost comprise the overarching objectives and policy goals that will direct the national and county governments in developing their budgets for the upcoming fiscal year and the following few years, as required by section 25 of the PFMA. At this stage, the BPS will be discussed in Parliament with the intention of increasing oversight. A report with the suggestions will be prepared, and a resolution to accept it with or without changes will be passed.[113]

The Treasury is also required to ask the public and other interested parties for their comments and to consider them.[114] This provides for pre-budget consultations by Parliament to allow a forum for interested parties to present and explain their recommendations on priorities for inclusion in the next budget, while strengthening the representative function of Parliament.[115] In addition, the National Treasury is required to draft a BROP by September 30 of each fiscal year and present it to the cabinet for approval. After cabinet approval, the BROP is sent to the National Assembly's Budget Committee, where it will be presented to each House of Parliament for pre-budget debate no later than seven days.[116]

Nevertheless, there exist challenges that obscure the effectiveness of the pre-budget consultations and debates. Governments should be more aggressive in identifying and reaching out to excluded and vulnerable populations, according to the Open Budget Survey

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[112] Dubrow G, "Influencing the Budget During the Formulation Stage", WFD Financial Accountability Series, Briefing Paper,2020, 7.

[113] Section 25(7), *PFMA*, 2012.

[114] Section 25(5), *PFMA*, 2012.

[115] Dubrow, Influencing the Budget During the Formulation Stage,3, 2020.

[116] Section 26 (1), (3)(a), *PFMA*, 2012.

2019 (OBS), which notes that governments are generally not consulting broadly. In Kenya, those who are vulnerable or live in remote areas without access to government websites are hardly involved in public engagement during this phase. The (GIFT) Public Participation Principles state that opinions from historically marginalized and vulnerable groups must be included, and that participants must then promptly and precisely respond to public feedback. Furthermore, public hearings may be held and chaired by civil society groups to discuss the priorities as set out in the BPS, in line with the principle of inclusiveness under GIFT.

4.2.2 Approval

The national government may borrow for the budget only as approved by Parliament.[117] Furthermore, the Budget Committee is mandated with the examination of financial statements and other documents submitted to the National Assembly under Part III of the PFMA and make recommendations to the National Assembly for improving the management of Kenya's public finances.[118] This includes estimates submitted by the CS Treasury and Planning of the revenue and expenditure to Parliament, which thereafter are scrutinized by the budget committee and issues a report on thereon. The estimates include an estimate of any budget deficit or surplus for the financial year and medium term, and the proposed sources of funding.

The MTDS and DSA are two of the previously stated supporting documents, although they are not the only ones. First, Section 33(1) of the PFMA standards and the Debt and Borrowing Policy's instructions are followed in preparing the MTDS. The strategy, which is based on the BPS, highlights the objective of medium-term government debt management, which is to reduce the cost and risk associated with public debt.[119] The MTDS points out the total stock debt, sources of the loans, principal risks, underlying assumptions and an analysis of the sustainability of the amount of debt, both actual and potential.[120] Parliament should

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[117] Section 50(3), *PFMA*, 2012.

[118] Section 7 (f), *PFMA*, 2012.

[119] Section 33 (2), *PFMA*, 2012.

[120] Section 33(2), *PFMA*, 2012.

receive these materials by February 15th of each year, at the latest. Examining these records is a step in the procedure by which Parliament considers and adopts the budget.

When it comes to scrutinizing the budget's supporting documents and challenging its underlying presumptions, the Budget Committee takes the lead.[121] The Standing Orders[122] No. 207(3)(2) indicates that the budget committee's duties include "investigating, enquiring into, and reporting on all matters related to coordination, control, and monitoring of the national budget." The tools available to the committee include summons, consultations and questions. According to the International Benchmarks for Democratic Legislatures and the National Democratic Institute[123] posit that the standards on functioning of committees include the requirement for the power to summon persons, papers and records. Additionally, it is required to question and receive submissions from the chairpersons of all the Departmental Committees during the consideration of the budget. In conclusion, the budget committee may consult the public to provide opinions on the budgetary priorities therein.

The challenges that arise include the fact that parliamentary approval of debt procurement has proven to be proactive, which is against the spirit of the public finance laws. Section 49 is silent on who should ratify loans once they are raised by the CS treasury and Planning, thus providing leeway for procurement of public debt prior to approval by Parliament. This is important to address as Parliaments should retain the authority to ratify agreements. This is in an effort to deter the occurrence of imprudent borrowing without the appropriate government accountability. In addition, parliamentary involvement in loan approval enable Parliament to verify that the government has undertaken rigorous economic appraisal, selection, costing and monitoring of any public investment project.[124]

Secondly, during the execution phase, the National Treasury has been submitting supplementary budgets with higher deficits to Parliament haphazardly. The scrutiny of such

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[121] Dubrow G, 'The role of Parliament in Public Debt Management', 2020, 32.

[122] 6th Edition, 2020.

[123] 'The Role of Parliament in public debt oversight', 2007, 25-29.

[124] Japan International Cooperation Agency, '*Public Investment Management Handbook for capacity development*', September 2018.

budgets has been less stringent in recent years as the government presents them to Parliament strategically towards the close of the financial year.[125] This laxity has weakened the budgetary process, and it is an indicator of reduced parliamentary vigilance. Consequently, on average, the actual debt has been 12.5% above the approved debt in Parliament between FY 2016/17 and 2020/21.

In conclusion, the public perceives the legislature as one of the most corrupt government institutions.[126] The allegations are that Parliament do not serve the public interest but are motivated purely by selfish interests.[127] While it is expected that different interest groups will legitimately lobby the legislature to enact favorable policies and laws, there is still a need to ensure that lobbying does not subvert the public interests.[128] Illegal lobbying has been an ailment that Kenyan Parliament has suffered from for many years in efforts to push the agendas of the executive, without consideration of the public interests at large. The parliamentarians have a duty to question or even decline to follow instructions which ae motivated by improper partisan interests.[129]

4.3 The Ex-post Stage.

4.3.1 Reporting and Oversight

The ex-post stage provides a forum for Parliament to review and hod the government to account for how they spent the budgeted money. The Parliament checks the adherence to the policies and objectives as approved by Parliament during budget-making. The audit institution i.e. the Office of the Auditor General (OAG) is a key player in this stage as they are required to audit and report, within six months after the end of each financial year on

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[125] FY 2019/20 – The Treasury submitted the Supplementary Estimates III seven days to the end of the year.

[126] Cyrus Kinyungu 'MPs are Most Corrupt' The STANDARD, December 6, 1.

[127] Martin Mutua and Andrew Teyie, 'Shame: MPs for Hire', The STANDARD, Nov 18 2004, 1.

[128] Migai A, "Abuse of Power and Corruption in Kenya: Will the new Constitution enhance government accountability, Vol 8, 2011, 371.

[129] Sossin L, Commission of Inquiry into the sponsorship Programme, '*Defining Boundaries: The Constitutional argument for Bureaucratic Independence and its implication for the Accountability of Public Service'*, 2006.

several items, including public interest.[130] The audit reports confirm whether public funds have been applied lawfully and in an effective way.[131] The report is then tabled in Parliament[132] and within three months, it should debate and consider the report and take appropriate action.[133] Furthermore, the annual debt report is a key document in the fulfillment of ex-post review of the public debt position every financial year.

Section 31 of the PFMA provides for the reporting requirements of all loans made to the national government, its entities and county governments, every four months, in accordance with Article 211 of Constitution of Kenya (2010). However, the research argues that the specific information prescribed by section 31(3) of PFMA merely represents the granularity necessary for Parliament to effectively oversee the management of public debt. This is because there is an underlying exclusion of other accompanying documents of such contracts, thus creating transparency gaps.[134] In the case of **Kenya Human Rights Commission & Wanjiru Gikonyo v CS National Treasury and Attorney General**[135]the claimant sought to compel the production of information on Kenyan debt on treaties, agreements and contracts signed between Kenya and other states, international financial institutions and corporations. They sent a letter of request for information on 7th February 2022 and has been ignored to date.

Another challenge that arises is with the delay of reports from the audit institutions. These reports are often delayed to an extent of three years, thus denying Parliament the opportunity to scrutinize public debt procurements regularly and consistently.[136] In addition, there is a lack of political will by parliamentarians to act on the findings of such reports, despite clear

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[130] Article 229 (4)(g), *Constitution of Kenya*, 2010.

[131] Article 229 (6), *Constitution of Kenya*, 2010.

[132] Article 229 (7), *Constitution of Kenya*, 2010.

[133] Article 229 (8), *Constitution of Kenya*, 2010.

[134] Maslem S, Cigdem A, World Bank Group, 'Enhancinng Debt Transparency by Strengthening Public debt Transactions Disclosure Practices', 2022, 22.

[135] E179/2022.

[136]NDI, 'The Role of Parliament in public debt Oversight in Kenya', 2007, 27.

violations. Political will refers to the determination and commitment of political leaders/ parliamentarians to prioritize and effectively undertake their oversight responsibilities. The Kenyan Parliament has often displayed lack of political will to go to necessary ends to ensure public interests are reflected on the governments' activities. Moreover, the enforcement of findings of such reports are often ignored and sanctions often withheld from a lack of will to execute the orders therein.

4.4 Conclusion

In summary, parliamentary oversight in Kenya faces significant challenges that undermine its effectiveness in holding the government accountable. Pre-budget scrutiny is hampered by insufficient oversight of government spending, inefficiencies in debt procurement procedures, and restrictions on public participation, even though it plays a vital role in guaranteeing openness, effectiveness, and compliance with the law in government operations. Moreover, the execution phase witnesses laxity in monitoring actual debt levels, concerns about illegal lobbying, and a lack of political will among parliamentarians to prioritize public interests over partisan agendas. In the ex-post stage, delays in audit reports, a lack of enforcement of audit findings, and the failure to compel government agencies to disclose critical information on debt contracts and agreements further diminish the effectiveness of parliamentary oversight.

CHAPTER 5
RECOMMENDATIONS
5.1 Findings

The foregoing discourse has served to evaluate the effectiveness of the parliamentary oversight of public debt management in Kenya. In the process, there have been challenges that have been uncovered and proven to hinder the effective and efficient fulfillment of its role. The challenges include:

The government is not consulting widely enough and hesitates to seek out the opinions of the vulnerable and marginalized groups in remote parts of Kenya. This has been shown to hinder public participation in budgetary decision-making and debt procurement despite the burden of repayment laying heavily on their shoulders.

By virtue of the power to borrow, the Cabinet Secretary may obtain loans on behalf of the national government, although Parliament does not have complete authority to ratify such loans. Regarding whom should ratify loans when the CS raises them, the legislation is mute thus, allowing debt procurement prior to parliamentary approval, as long as estimates are submitted thereafter. This curtails the fight against imprudent borrowing by state officials.

Supplementary budgets with larger deficits presented to Parliament deliberately near the conclusion of the fiscal year have tainted the execution phase. As a result, there are now differences between the approved and actual budgets for that specific fiscal year. In addition, Parliament is unable to scrutinize the revised budgets carefully due to the time constraints at the point of their submission.

The Parliament is notorious for illegal lobbying and lack of political will to pursue accountability and openness of government activities. The shortcomings have arisen because of the need by the executive to push its agenda and conflicting partisan interests. The auditing offices delay the reports to an extent of up to three years. This hinders Parliament in the fulfillment of its ex-post oversight role by denying it the opportunity to regularly and consistently scrutinize debt reports.

The reporting requirements under the PFMA lack the requisite information granularity and merely represent the accompanying documents of such loan contracts. This proves to obscure

the oversight by Parliament as it is left in the dark and without sufficient knowledge of the ecosystem around the final loan figures stated in reports.

5.2 Interventions

The research has illuminated the foregoing challenges and, in an effort, to address them there is need for collaborative efforts from parliamentarians, government institutions, civil society, and citizens to strengthen accountability mechanisms, enhance public participation, and foster a culture of transparency and integrity.

According to the Public Finance Management PFMA, the public has a mandated role in participating in decision-making processes related to public finance. However, the existing mechanisms for public engagement lack a comprehensive framework that guarantees meaningful involvement, especially on matters concerning public borrowing. To bridge this gap, it is essential for Parliament to pass a law that formalizes public participation mechanisms in budgeting and debt management processes. This legislation would give citizens the authority to actively participate in decisions regarding public borrowing, ensuring transparency, accountability, and credibility in debt management.

Improving understanding among political parties, leaders, Civil Society Organizations (CSOs), and the public about Parliament's role in overseeing public debt is crucial. To achieve this, regular capacity-building initiatives must be implemented. These efforts should prioritize educating stakeholders on parliamentary procedures, budgetary principles, and the ripple effect of public debt on the country's development. The utilization of CSOs, Non-Governmental Organizations (NGOs), and development partners in conducting programs can greatly empower citizens to hold their elected officials accountable and advocate for transparent and responsible management of public debt.

There are numerous ways to elevate understanding of the critical role of parliamentary oversight in maintaining solid fiscal policies and preventing mishandling of public funds. By offering various training programs, workshops, and educational campaigns, we can effectively raise awareness on this important matter. Moreover, by empowering stakeholders with the necessary knowledge and skills to actively engage with Parliament on budget and

debt management matters, capacity-building initiatives greatly contribute to enhancing democratic governance and promoting citizen involvement in decision-making processes.

It is vital for Parliament to set a limit on the number of supplementary budgets permitted, reserving their use for unforeseen and urgent situations. These additional budgets are frequently exploited to bypass the standard budgetary procedures, resulting in irresponsible financial behavior and exorbitant governmental borrowing. By restricting the reliance on supplementary budgets, Parliament can foster fiscal responsibility and guarantee that budget allocations are followed, consequently reducing the danger of escalating public debt.

Parliament must take on the duty of authorizing all new loans prior to their acquisition by the government as a way to promote more accountability and transparency in the management of public debt. Currently, the National Treasury's Cabinet Secretary holds the primary authority to borrow, with minimal supervision from Parliament. By mandating parliamentary ratification for new loans, Parliament can bolster its supervision role and guarantee that loans align with the nation's development objectives and fiscal responsibility principles.

In conclusion, it is essential that Parliament be granted the authority to summon government officials for thorough questioning and investigation into matters concerning the management of public debt. Such power would enable Parliament to impose necessary sanctions and penalties in cases of non-compliance or misconduct. To further bolster Parliament's oversight capabilities, it is imperative that their committees responsible for overseeing public finance and debt management are strengthened. This move would equip Parliament with the essential resources and expertise needed to effectively examine government actions and ensure accountability from officials. Additionally, it is crucial for legal reforms to be implemented, guaranteeing that Parliament's decisions and recommendations related to public debt are both binding and enforceable. By doing so, we can enhance its effectiveness in promoting responsible fiscal management.

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