Public Debt Transparency and Global Public Law

José Ignacio Hernandez

25.09.2025 doi: 10.59704/f70df3670794c9f1

As the world faces an intensifying post-pandemic public debt crisis, demands for increased transparency in external public debt management have grown stronger, especially from international organizations such as the International Monetary Fund (IMF) and the World Bank. The 2025 Jubilee Year has reinforced those concerns. Nonetheless, a key question persists: how can transparency be institutionalized as a binding principle instead of just a recommended best practice?

A key step towards improving public debt transparency is to analyze it through the lens of constitutional law. As the first part of this post explains, applying a constitutional law framework to public debt governance recognizes the strong links between public debt and human rights. That framework also helps address two pressing and practical public debt problems by (i) recognizing that public debt contracts are not merely 'private' but also have a public policy dimension, and (ii) providing an alternative to the scattered international law framework of public debt through the perspective of transparency. These points highlight why questions of public debt should be integrated into the global public law framework.

Public debt transparency, constitutional law, and human rights

Although the connections between constitutional law and the macroeconomy are not as prominent as in other areas of government economic functions, modern Constitutions address many macroeconomic issues, especially concerning public spending and debt. Macroeconomic constitutional provisions are particularly prevalent in constitutional systems that adhere to the spirit of transformative constitutionalism. Constitutional obligations to uphold social and economic rights, along with mandates for transformative equality, impose fiscal pressure that leads governments to take on public debt. This situation encourages borrowing not only from multilateral institutions such as development banks but also increasingly from private capital markets. To avoid the risks of overborrowing or misusing the resources lent, constitutional frameworks have built-in checks and balances mechanisms.

African constitutional law offers several examples of such mechanisms. Article 211 of the Kenyan Constitution imposes parliamentary oversight over the Executive's borrowing and mandates the disclosure of "information concerning any particular loan or guarantee". This binding clause makes the validity of public debt dependent on the fulfillment of parliamentary control aimed at ensuring transparency. Aside from Kenya, the Zambian Constitution also sets limits on the debt transactions the Executive can enter into by requiring prior legislative approval (Article 63, Zambian Constitution). Other provisions condition public debt transactions upon the fulfillment of public objectives related to the common good. For instance, in Latin America, according to Article 290 of the Ecuadorian Constitution, public debt transactions "shall be used exclusively to finance programs and projects investing in infrastructure, or those with the financial capacity for repayment."

These examples highlight a core principle of transformative constitutionalism: the constitutional framework goes beyond traditional political institutions to include fiscal structures designed to boost economic capacity for achieving social and economic objectives, including public debt. As Cephas Lumina argues, due regard to the principles of public participation, transparency, and accountability in the implementation of public debt is necessary to protect human rights.

At the international level, the IMF—the key institution for public debt management—has also emphasized the importance of transparency in public debt to improve economic efficiency and reduce the risk of a

debt crisis. The violation of the constitutional framework that promotes transparency increases the risk of unsustainable debt, which occurs when the country borrows more than its actual economic capacity. A debt crisis, in turn, could lead to financial imbalances and austerity measures that hinder the achievement of transformative goals, as the U.N. Human Rights Council concludes. Constitutional law plays a crucial role in preventing debt crises by ensuring transparent debt management and addressing two practical problems related to contract design and internal debt management frameworks.

From private debt contracts to public contracts framed by constitutional law principles

The first practical problem that hinders debt transparency stems from the widespread conclusion that public debt contracts—especially external debt—are commercial transactions, similar to those carried out by private entities. The result, according to Professor Anna Gelpern, is the "strained marriage" of public debt and private contracts, because debt contracts adhere to standard clauses rooted in commercial law.

In addition, choice-of-law clauses specify that the agreement will typically be governed by New York or English law. Disputes between the borrowing country and the private lenders, such as debt defaults, are usually resolved by foreign courts as standard contract breach cases.

The use of private law contracts led to the "privatization" of public debt, obstructing the fulfillment of transparency, understood as a constitutional law principle. This privatization is also boosted by the waivers of sovereign immunity usually included in the contracts. Those waivers are designed to authorize courts to exert their jurisdiction over a foreign government, reducing the scope and enforceability of the domestic constitutional law provisions.

To strengthen debt transparency, it is essential to reframe debt contracts from a purely "private law" standpoint to a broader perspective that integrates a "public law" framework, aligning with core constitutional principles. While commercial law facilitates the market of public debt, it does not capture the binding constitutional law provisions aimed at preserving transparency and accountability to achieve public policy goals. Importantly, there is some precedent for this sort of recharacterization, with a similar shift having occurred with investor-state disputes. As Professor Stephan Schill noted, these disputes should be viewed through the lens of public law, not merely commercial law, because those disputes are closely related to public policy goals. The *Lex Mercatoria* for public debt should evolve into a *Lex Mercatoria Publica*.

A recent change introduced in 2024 by the New York State Court of Appeals—the highest tribunal of the state- has paved the way to enhance the public law dimension of public debt. According to the Court of Appeals, the constitutional law of the issuer government rules the validity of the public debt securities. Hence, violations of constitutional provisions that ensure public participation, transparency, and accountability could be relevant to challenge the validity of public debt.

This novel interpretation will allow the New York courts to interpret and enforce constitutional law provisions of the borrowing state related to the debt validity, as is the case with the provisions regarding parliamentary controls and transparency. As Professors Dixon and Jackson explain, those constitutional provisions have an extra-territorial effect that the New York courts should consider. The outcome could be a balanced approach aimed at integrating New York commercial law with constitutional provisions.

From international law guidance to a global public law principle

The second practical problem derives from the lack of a coherent international law framework that applies to the debt restructuring process, which involves three key players: (i) private creditors, ruled by debt contracts that as explained are usually treated as private contracts; (ii) multilateral institutions, such as the IMF, ruled by international law and (iii) official creditors, including those organized in the Paris Club, also covered by international law.

In practical terms, due to the predominant role of the IMF in debt restructuring, international law

provides the guidelines, including the Common Framework, implemented in 2020 to ensure an expeditious and orderly governance of debt restructuring in the post-pandemic crisis. These guidelines include best practices to enhance transparency throughout the restructuring process.

But in constitutional law, transparency is something other than a good practice: it is, as explained, a common principle rooted in the checks and balances mechanism over public debt. The challenge is to transform debt transparency into a source of international law, particularly regarding the Common Framework.

The answer to this challenge can be found in the global public law methodology and the expansion of the constitutional tenets at the international level.

The primary source of global public law is the general principles from domestic constitutional and administrative law identified through the comparative method, which are part of the "general principles of law recognized by civilized nations" that are a source of international law under Article 38 of the Statute of the International Court of Justice.

As a result, the disjointed international framework for managing public debt could be brought together with the general principles of public law, including transparency, to create a better environment for preventing opaque debt and increasing accountability in the debt restructuring process.

Under global public law, transparency can improve the efficient exchange of information among the numerous stakeholders involved in restructuring. This helps to address bottlenecks that, in cases like Zambia, have worsened the economic and social impacts of the debt crisis. Additionally, transparency could facilitate the participation of a fourth player in the debt restructuring process, crucial from the human rights perspective: civil society.

Conclusion

Transparency, as a constitutional principle, should be incorporated into the public debt framework, currently dominated by commercial law contracts and a disjointed international framework. The quest for public debt transparency, recently highlighted by Georgetown University and Queen Mary University of London, requires a global public law framework.

This blog recommends a three-part approach to advance this goal. First, public debt contracts should be analyzed from a constitutional law perspective, moving away from their classification as "private" contracts. Second, constitutional law provisions on public debt, including transparency principles, should be regarded as binding, determining the debt's validity even for contracts governed by foreign law, especially New York law. Lastly, debt restructuring before international forums, including the Common Framework, should integrate transparency as a global public law principle.

ABOUT THE AUTHOR

José Ignacio Hernandez

José Ignacio Hernandez is a Professor for Administrative and Constitutional Law at the Catholic University Andrés Bello (Venezuela). He is an Invited Professor at the Pontifical University Madre y Maestra (Dominican Republic) and a Senior Associate at the Center for Strategical and International Studies.

SUGGESTED CITATION

Hernandez, José Ignacio: Public Debt Transparency and Global Public Law, Verfassungsblog, 25.09.2025, doi: 10.59704/f70df3670794c9f1.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250925-151827-0.