

Legal, Regulatory And Institutional Constraints On Corporate Debt Financing By Local Authorities In Zambia

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Abstract

Councils in Zambia suffer from chronic financial distress. Issuance of public debt securities could therefore prove a valuable source of corporate finance that could be applied to capital projects, and possible re-investment of returns on the investment. In this respect, the availability collateral to secure loan obligations, an effective and efficient mechanism for determining priority of competing collateral interests, enforceability of security interests against the collateral, profit potential, goodwill, cash inflows and credit ratings of councils and their securities are some of the factors affecting the success of the public issue of public debt securities by councils. The study assesses the legal, regulatory and institutional framework for the public distribution of securities within Zambia and across international borders so as to establish whether or not it provides adequate incentives for the growth of corporate debt financing by councils in Zambia. The study employs the doctrinal approach to examining the effectiveness of legal and regulatory rules, and institutions. The main findings of the study were that: (a) while the legal, regulatory and institutional framework permits issue of public debt securities, it (i) does not recognize them as *listable* on securities exchanges, (ii) does not permit issue of public debt securities in dematerialized form, (iii) does not recognize public debt securities as distributable under prospectuses in Zambia, (b) the poor financial position and performance of councils is likely to affect credit ratings of councils and saleability of their public debt securities, (c) there are restrictions on judicial enforcement of loan obligations of councils, and (d) there are no rules for determining priority of competing security interests in the council general fund. As a possible way of remedying these shortcomings in the law, the article makes necessary recommendations for law reform.

Key words: Corporate, Debt, Financing, Local, Authorities.

Introduction.

This article examines the legal, regulatory and institutional framework for the public distribution of securities within Zambia and across international borders so as to establish whether or not it provides sufficient incentives for the growth of corporate debt financing by local authorities in Zambia. The article also fleshes out some of the constraints which affect the efficacy of the said framework in facilitating the raising of corporate debt finance by councils in Zambia. The article also makes the necessary proposals for remedial legal and regulatory reform. A legal, regulatory and institutional approach to the problem which is being investigated is necessitated by the position that the development of municipal credit is related to:[\[1\]](#)

- Improvements which occur in the legal and regulatory frameworks which govern local borrowing;
- The capacity of financial institutions to assess risk; and
- The borrower's (local authority's) capacity to support and manage debt.

i. *Possible Methods of Corporate Financing.*

There are three sources of corporate finance, namely:

- Debt;

- Equity, and
- Off-balance sheet financing.[\[2\]](#)

Traditionally, companies have a mix of debt and equity. The mix largely depends on the industry norm, the pressure imposed on the company by lenders and the relative cost of debt and equity.[\[3\]](#) Councils have no share capital and as such are incapable of raising equity finance through issuance of equity shares or shares generally. Therefore, equity financing and off-balance sheet financing are outside the scope of this article. This narrows the scope to debt finance for councils in Zambia. In Zambia, councils may raise debt finance by the following means, namely:

- Secured or unsecured loans from other councils;
- Secured or unsecured loans from banks or other financial institutions;
- Secured or unsecured loans from any other source;
- Overdrafts from banks or other financial institutions; and
- Secured or unsecured loans through issuance of public debt securities to the general public.[\[4\]](#)

From the sources of corporate debt finance which are available to councils, this article goes with corporate debt financing through the issuance of public debt securities to the general public.

Background To The Problem.

The revised Decentralization Policy, which encompasses Fiscal Decentralization, was launched by our beloved departed Republican President His Excellency Mr Michael Chilufya Sata on 16th June, 2013.[\[5\]](#) Fiscal Decentralization in Zambia is part of the broader framework of the revised Decentralization Policy.[\[6\]](#) It entails devolution of some budgetary powers of the Central Government to Councils.[\[7\]](#)

Over the last three decades, local authorities in Zambia have undergone significant erosion of financial capacity resulting which their revenue sources are inadequate for effective performance/delivery of their statutory functions/services.[\[8\]](#) The gradual decline in the revenue generating capacity of councils is mainly attributed to cumulative actions, decisions and policies of successive central governments.[\[9\]](#)

Between 1991 and 2015, various pieces of legislation and policies were passed and implemented. This resulted in a further reduction in the revenue base of councils. However, successive Central Governments have not, within the said period or beyond, implemented policies which could cushion the adverse effects of the said measures on the revenue generating capacity of councils or enhance their revenue generating capacity. Although the Markets and Bus Stations Act 2007 empowers councils to manage markets, traders, bus stations, bus operators, and collect revenue, the actual management of the said places and the collection of revenue from the said economic actors were until October 2021,[\[10\]](#) conducted by the ruling political party. Undoubtedly, this sort of conduct by the ruling political parties effectively robs councils of a meaningful source of revenue. Some of the negative measures and policies passed and implemented by the successive Central Governments and impacting the revenue base of councils include:[\[11\]](#)

- Transfer of motor vehicle licensing functions from councils to the Road Traffic Commission (RTC) which is the precursor of the present day Road Transport and Safety Agency (RATSA) in 1993;
- Transfer of the electricity supply functions from councils to the Zambia Electricity Supply Corporation (Z.E.S.CO) which is the present day Zesco Limited—1991-1993;
- Transfer of the water supply and sanitation function from councils to commercial utilities through the application of Statutory Instrument No. 55 of 2000 without corresponding transfer or proportional sharing of liabilities;
- The leasing and sale of commercial property/ventures of councils in 1993;
- Sale of commercial housing units (real estate) of councils since 1996;[\[12\]](#)

- The enactment of the Rating Act No. 12 of 1997 under which Act are many categories of property which is exempt or could easily qualify for exemption from paying rates to councils;
- Over-employment of council staff by the Local Government Service Commission (the LGSC) whereby over ninety per cent of the revenue collected by councils is used for settling the wage bill while less than ten per cent of the same is applied on service delivery; and
- The employment of under qualified staff by the LGSC which has contributed to poor financial management and lack of accountability thereby contributing to financial haemorrhage in councils.

Besides the constraints on revenue collection by councils which have been enumerated above, there is also the ever-soaring retirement benefits bill that most councils grapple with.[\[13\]](#) To add salt to injury, quite recently, the central government enacted the Business Regulatory Act No. 3 of 2014 (hereinafter ‘the BRA 2014’) which entered into force in 2015. This piece of legislation imposes an obligation on councils to establish, maintain and manage at own cost an electronic register for licenses and permits issued by the council and other regulatory agencies in a particular district. This is no doubt a huge financial burden which is likely to further reduce the quality of service delivery by the councils.[\[14\]](#) In a bid to ensure efficient and cost-effective regulation and licensing of business activities by business regulatory agencies, the BRA has streamlined the business licensing process whereby a license which could be issued and renewed yearly is now only issuable once in the lifetime of a business. Further, permits and certificates which could be issued yearly or biannually are now only issuable every three years.[\[15\]](#) Although this measure is likely to reduce the cost of doing business for enterprises, it no doubt robs the councils of a sure source of revenue.

Empirical evidence which was gathered from all the twenty five (25) respondent councils indicates that councils supplement funding of their service delivery through debt finance by way of bank overdrafts.[\[16\]](#) Against this backdrop, an argument could be made that, given the poor statements of financial position of councils—especially old councils—councils could only get so much from financial institutions under overdraft facilities. A corollary argument could be made that councils could raise more debt finance—beyond what their statements of financial position could allow—by issuing public debt securities to members of the public. This is more so where the contemplated securities issue is guaranteed by the Central Government. The realised loans could be applied to some capital projects which projects could in the short-run serve as a source of funding for the day-to-day operations of council and, in the long-run serve as a steady source of funds for re-investment.

i. *Statement of the Problem.*

Against the background to problem given above, the statement of the problem which is under investigation may be phrased as follows:

Has the legal, regulatory and institutional framework for the public distribution of securities within Zambia and across international borders provided adequate incentives for the growth of corporate debt financing by councils through issue of public debt securities in Zambia?

Methodology.

This research falls into the qualitative research category. It focuses on answering specific questions which relate to the problem which is under investigation by using both primary and secondary data. The research is underpinned by a doctrinal approach to examining the effectiveness of the legal, regulatory and institutional framework for the public distribution of securities within Zambia and across international borders. This method was used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law touching on the subject/problem were used.

Secondary sources such as journals and other written commentaries on primary sources were also used. A checklist of documentary sources was used. As a possible way of avoiding subjectivity in the selection of documentary sources, the study employed non-probability sampling method—purposive sampling. Both

primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons.

The main objective of the study is to answer the question whether or not the legal, regulatory and institutional framework for the public distribution of securities within Zambia and across international borders provides adequate incentives for the growth of corporate debt financing by local authorities in Zambia. The study fleshes out some shortcomings in the said framework, and makes necessary proposals for remedial reform.

The research questions used were:

1. Does the law and policy permit issue of public debt securities?
2. Does the law and policy permit issue of public debt securities in dematerialized form?
3. Does the law permit the raising of debt finance from foreign entities?
4. Does the law and policy permit listing of public debt securities on securities exchanges?
5. Does the law impose restrictions on judicial enforcement of loan obligations of councils?

Results.

The results of the study may be summarised in tabular form as follows:

Question	Findings	
	National Law	Regional Law
1. Does the law and policy permit issue of public debt securities?	YES	YES
2. Does the law and policy permit issue of public debt securities in dematerialized form?	NO	NO
3. Does the law and policy permit raising of loans from foreign entities?	YES	YES
4. Does the law permit listing of public debt securities on securities exchanges?	NO	YES
5. Does the law impose restrictions on judicial enforcement of loan obligations of councils?	YES	NO

Legal, Regulatory And Institutional Constraints On Public Issue Of Public Debt Securities By Councils.

Quite a number of legal, regulatory and institutional constraints on the growth of corporate debt financing by councils through issue of public debt securities have been identified. The constraints are briefly considered below.

i. *Constraints relating to the definition of ‘Listed Company’.*

The foundational question that begs an answer is ‘what sort of entities are eligible for listing (their securities) on the Lusaka Stock Exchange (the LuSE)?’ Under the LuSE Listing Rules 2012, a foreign issuer who has not listed on the LuSE before but wishes to list or cross-list on the LuSE may apply as a “new applicant”.^[17] In the event that they wish to apply for further cross-listings, they have to apply as “applicants”.^[18] “Applicant” is defined as a company issuer which is applying for further listing some of whose securities have been already listed.^[19] “New applicant” is defined as a company issuer which is applying for initial listing of its securities.^[20] The term “company” which runs through both definitions, is defined as a body corporate [wherever incorporated or established] including any other legal person, association of persons or entities and any trust or similar device [wherever established] that issues securities which are capable of being listed on the Lusaka Stock Exchange.^[21] From the definition of “company” given above, the following legal positions may be distilled, namely that:

- a. Both domestic and foreign un-incorporated bodies like associations and trusts that issue securities may list on LuSE provided the range of securities falls within the definition of “securities” which has been given in section 2 of the Securities Act 2016;
- b. Other bodies corporate like cooperative societies—domestic or foreign—which issue shares may also list on the LuSE;
- c. Domestic companies incorporated pursuant to the *Zambian Companies Act 2017* or earlier legislation, and foreign companies may apply for listing or cross-listing on the LuSE provided the range of their securities falls within the definition of “securities” which has been given in section 2 of the Securities Act 2016; and
- d. Other bodies corporate like local authorities and parastatals which issue public debt securities may list on the LuSE.^[22]

Constraints relating to the Narrow definition of ‘Listed Securities’ under the Securities Act 2016.

Although the definition of ‘company’ under the LuSE Listing Rules 2012 covers a wide range of listable securities—including those of councils, section 2 of the Securities Act 2016 defines ‘listed securities’ as “securities of a listed company”. And ‘listed company’ is a company which is incorporated under the laws of Zambia whose securities have been registered with the Commission and are tradable on a securities exchange.^[23] The author argues that although the definition of “company” under the Listing Rules imports the meaning of “issuer”^[24] which has been given in the Securities Act 2016, the class of issuers whose securities may be admitted to listing or cross-listing on Zambian securities exchanges is restricted to domestic company issuers as stipulated under the Securities Act 2016. This view is rationalized by the legal position that a ‘statutory instrument’^[25] (Listing Rules) cannot effectively alter the position of the parent Act—the Securities Act 2016.^[26] Thus, the *Zambian regulatory framework* excludes domestic and foreign councils, foreign companies, domestic and foreign cooperative societies, other bodies corporate, trusts, collective investment schemes and associations from listing or cross-listing their securities on *Zambian securities exchanges*. The inward focus of the *Zambian regulatory framework* is also highlighted by the auditing and corporate governance regime for listed issuers which is tailored to the regulation of domestic companies.^[27] Would it make regulatory sense to admit other entities than companies to official listing when such other entities are not subject to the corporate governance regime of the listing exchange? Under such circumstances, other listed entities than companies are likely to have high agency costs due to poor

corporate governance and associated ineffective disclosure. The high agency costs for such other listed entities are not only likely to tarnish the reputation of such entities and their securities in the listing market but also compromise the attractiveness of the listing exchange as a an investment or trading platform for failing to control for agency costs. It is therefore, humbly submitted that the legal, regulatory and institutional framework for public distribution of securities does not provide adequate incentives for the growth of the listing/cross-listing of public debt securities on domestic securities exchanges by councils. As a possible solution to this shortcoming in the said framework, it is proposed that the phrase ‘listed securities’ be redefined as ‘securities of a listed issuer’. Likewise, ‘listed issuer’ should be redefined as “a person or group of persons which has/have issued or proposed to issue securities to the public in accordance with the Act and the listing rules and whose securities have been registered with the Commission and admitted to trading on a securities exchange”. Further, the corporate governance regime for listed companies—Part XIII of the Securities Act 2016—should be recalibrated as an auditing and corporate governance regime for ‘listed issuers’. The author argues that the implementation of such measures would not only ensure that domestic and foreign councils are able to list/cross-list on the LuSE but also make them subject to the LuSE corporate governance regime for listed/cross-listed issuers. The author argues that, effective enforcement of corporate governance and disclosure obligations of listed councils is likely to reduce their agency costs and make their securities attractive to investors. An as argued above, effective corporate governance and disclosure by listed issuers are generally likely to enhance the attractiveness of the LuSE as an investment and trading platform.

ii. Constraints relating to the types of Securities that could be distributed under a Prospectus in Zambia.

The central premise of this subsection is that real demand for listed securities is partly influenced by investor awareness. Thus, to the extent that prospectuses enhance investor awareness of the issued securities, they are likely to increase real demand for council bonds. One way of promoting investment in council public debt securities is to ensure that such securities are distributable under prospectuses. However, under the *Zambian regulatory framework*, only ‘shares’ and ‘debentures’ may be distributed under a prospectus.^[28] Thus, other equity, debt and public debt securities which have technically been included in the broad definition of ‘securities’ in section 2 of the Securities Act 2016 have been excluded from distribution under prospectuses.^[29] It has already been established above that council are devoid of share capital and as such incapable of raising equity finance. The only issue which remains unsettled is whether or not councils could issue debentures.

The *Zambian Companies Act 2017* does not define the term ‘debenture’. Instead, the Act merely describes what may be regarded as such. Thus, under section 3 of the Companies Act 2017, ‘debenture’ includes a unit of a debenture, debenture stock, bonds and other securities of a company whether constituting a charge on the property of a [company] or not. The *Zambian Securities Act 2016* does not define the term ‘debenture’. However, the basic characteristic of a debenture—which is “a payment obligation which is created or acknowledged in an instrument which is issued or proposed to be issued by a [company]”—is subsumed in the definition of ‘debt securities’.^[30] “Debt securities” means debt created or acknowledged in an instrument which is issued or proposed to be issued [by a company], including debentures, debenture stock, loan stock, bonds, certificates of deposit, commercial paper and notes.^[31] However, at common law *Lindley, J. in British India, etc Co. vs I.R.C*^[32] has quite frankly admitted that ‘debenture’ is an elastic term which may be defined as ‘security for a loan or an acknowledgement of a debt of a [company].^[33] Since “public debt securities” refers to loan stock, bonds and other instruments which create or acknowledge the indebtedness by or on behalf of a public body or central bank,^[34] the position that could be distilled from the foregoing is that shares and debentures are peculiar to companies and as such alien to councils and other bodies corporate which cannot be properly regarded as companies which are incorporated or registered under the *Zambian Companies Act 2017* or predecessor legislation. Thus, it is submitted that the regulatory and institutional framework for public distribution of securities technically excludes public debt securities from distribution under prospectuses within Zambia and across international borders. The author argues that such a regulatory approach is likely to constrain the growth of investor awareness through securities

advertisement. The author also argues that poor investor awareness is likely to result in limited success or failure of bond issuances by councils. As a possible solution to this shortcoming in the regulatory framework, proposals are made for the amendment of the definition of ‘prospectus’ to:

[P]rospectus means a notice, circular, brochure, advertisement, publication or request issued in paper or other document, whether electronic or otherwise, inviting applications or offers from the public to subscribe or purchase, or offering to the public for subscription or purchase, of securities of an issuer or proposed issuer, and includes a statement attached to or intended to be read with the prospectus.

It is worth noting here that the regulatory approach which has been proposed above is embodied in Rule 2 definition of ‘prospectus’ in the Registration of Securities Rules 1993 which were made under the repealed Securities Act of 1993.^[35] In the said piece of legislation, ‘prospectus’ is defined as “a prospectus, notice, circular, advertisement of other invitation to the public to acquire or apply for securities^[36].” Such a conception would not only ensure that a wide range of securities of different styles of issuer are distributable under prospectuses, but also facilitate mutual recognition of prospectuses which are approved by other regulatory authorities in the region and holding other securities than shares and debentures.

iii. *Incentives for Cross-Border Bond Issuance.*

Before the repeal and replacement of the Local Government Act 1991 (the LGA 1991) by/with the Local Government Act 2019 (the LGA 2019), councils were prohibited from borrowing money from foreign organizations or governments.^[37] This implied that councils could not competently make multi-jurisdiction bond issues within the Eastern and Southern African region or beyond since subscribers in those foreign jurisdictions would be foreign entities. As a possible way of allowing councils the leverage of raising capital in broader and deeper foreign markets within the region or beyond at a lower cost, the Zambian Legislature repealed and replaced the LGA 1991 in 2019. Thus, by section 49 of the LGA 2019, with prior approval of the Minister of Local Government and Housing and the Minister of Finance, a local authority may borrow money or receive grants or donations from a source outside the Republic of Zambia. The author argues that the loans which could be realized from subscriptions in deeper and more liquid foreign markets within the region or elsewhere are likely to serve as a valuable source of funds which may be used to finance capital projects. The lifting of the prohibition on cross-border bond issuance by councils in Zambia should be commended for being in consonance with the spirit and letter of the Common Market for Eastern and Southern Africa Treaty 1993 (COMESA Treaty 1993) which places an obligation of Member States to:

- a. Cooperate in the creation of an enabling environment for foreign and cross-border investment;^[38]
- b. Encourage the free movement of capital across international borders within the Common Market;^[39]
- c. Ensure that citizens and persons resident in Member States are allowed to acquire stocks, shares and other securities in territories of other Member States. Stocks and shares are ‘equity securities’. Thus, reference to ‘other securities’ above could be construed as reference to ‘debt securities’ and ‘public debt securities’;^[40] and
- d. Encourage cross-border trade in government debt securities such as treasury bills, development and loan stocks within the Common Market.^[41]

As a possible way of enhancing the efficacy of section 49 of the LGA 2019 in promoting cross-border corporate debt financing by Zambian councils, it is proposed as follows:

- i. Encourage issuance of high-interest public debt securities;
- ii. Provide corporate tax incentives for entities which subscribe for public debt securities;
- iii. Promote the listing of public debt securities on the LuSE. In order to achieve this end, there would be need to educate councils and other local authorities on the economic benefits of issuing public debt securities as a mode of raising debt finance.^[42]

- iv. Promote Central Government participation in listed public debt securities;
- v. Encourage institutional investors like pension funds to invest in listed public debt securities;
- vi. Educate the Zambian public on the socio-economic benefits of investing in public debt securities such as improved public infrastructure and enhanced public service delivery by councils and other local authorities.

The measures which have been stipulated in paragraphs (i) and (iii) above, if implemented, are likely to increase the supply of public debt securities to the LuSE or the Bonds and Derivatives Exchange (BaDEX) or such other securities exchange as the SEC might in future approve. Measures stipulated in paragraphs (ii), (iv), (v) and (vi) above if implemented are likely to increase demand for the listed public debt securities.

Constraints relating to the poor financial position and indebtedness of Councils.

One of the core disclosure requirements for public securities issuance relates to the provision of such information as investors and their professional advisers would reasonably require for an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer of the securities. Also, the rights which attach to the securities which have been issued or proposed to be issued should be disclosed for the aforesaid purpose. Since most Zambian councils are quite indebted and most of their commercial real property has been privatised (sold off), the declaration of assets and liabilities in the relevant prospectus is unlikely to attract meaningful subscription for their foreign bond issuances. Also, the poor revenue collection capacity of most Zambian councils and the poor state of their general funds are unlikely to inspire meaningful subscription for their foreign bond issuances. As a possible way of increasing the efficacy of section 49 of the LGA 2019 in promoting cross-border bond issuances by Zambian councils, it is recommended that the proposal which have been made herein for the enhancement of financial and debt management, and the revenue generation capacity of councils be implemented.

iv. Constraints relating to restrictions on the types of Securities which could be issued in Dematerialized Form.

The Zambian Securities Act 2016 defines ‘dematerialized’ securities as:

Un-certificated securities which represent a share or other interest in property, of a company or obligation of the issuer that is not represented by an instrument but is registered on the issuer’s records.^[43]

By section 4(4) of the Zambian Interpretation and General Provisions Act,^[44] the use of ‘company or issuer’ in the definition of dematerialized securities above suggests two distinct classes—the category of companies and the category of issuers. However, the Zambian Securities Act does not define the term ‘company’. By section 5 of the Zambian Securities Act 2016, recourse could be had to the definition of ‘company’ in the Companies Act 2017 or the Banking and Financial Services Act 2017. Thus, a company means a company which is incorporated under the Zambian Companies Act 2017 or predecessor legislation.^[45] ‘Issuer’ is defined as a person or other entity^[46] that has issued or proposed to issue securities.^[47] Consequently, ‘issuer’ imports domestic and foreign companies, other bodies corporate, collective investment schemes, cooperative societies, trusts and associations. And, we know that ‘company’ is particular while ‘issuer’ is general. We also know that by the application of the *ejusdem generis* rule of statutory interpretation, where general words follow particular words, the general words should be construed as [limited] to persons or things or class of persons or things which has been outlined by the particular words.^[48] Thus, the use of the general word ‘issuer’ in the definition of ‘dematerialized securities’ should be construed as reference to obligations of foreign registered company issuers to the exclusion of domestic and foreign collective investment schemes, cooperatives, other bodies corporate, trusts and associations which would ordinarily be regarded as issuers. Also, by tying the definition of ‘dematerialized securities’ to a share in a company or other interests in the property of a company, the legislators have effectively excluded shares in foreign companies, domestic and foreign collective investment schemes, cooperatives, other bodies corporate, and interests in the property of such

entities. Further, even if shares in these other bodies corporate were encompassed, councils would still be left out on account of lack of share capital or shares as a measure of ownership. By way of the literal rule of statutory interpretation, it is quite clear from the definition of ‘dematerialized securities’ that dematerialized securities can only exist in form of ‘shares’ as opposed to other types of securities which have been accommodated in the definition of ‘securities’ in section 2 of the Securities Act 2016. Against this background, the author argues that public debt securities cannot be issued in dematerialized form. The following are the advantages of issuing dematerialized or uncertificated securities, namely:

- i. Lower transaction costs;
- ii. Lower trading costs;
- iii. Easy and speedy transfer by electronic debiting and crediting of securities accounts of the parties to a securities transaction;
- iv. High volumes of issue;
- v. Eliminated cost of custody;
- vi. Eliminated insurance costs of paper certificates;
- vii. No risk of loss through theft; and
- viii. Increase in stock market liquidity.

An argument is made that the narrowness of the class of issuers who can issue and list dematerialized securities is likely to lower the supply of un-certificated securities to the LuSE. Also, since the issuing and trading costs of dematerialized securities are generally much lower than those of certificated securities, the cost of capital is likely to be high for councils. As a possible solution to this shortcoming in the regulatory and institutional framework, proposals are made for the repeal of the definition of ‘dematerialized’ securities and replacement of the same with the following definition:

Dematerialized securities means un-certificated securities which represent a security, or other interest in property of an issuer, or an obligation of the issuer which is not represented by an instrument but is registered on the issuers records.^[49]

Such a definition is likely to ensure that other styles of issuer than companies are capable of issuing uncertificated securities. It is also likely to ensure that other types of securities than shares are capable of being issued in uncertificated form. Similarly, in South Africa, ‘un-certificated securities’ is defined as “securities of an [issuer] that are not evidenced by a certificate or instrument and are transferable by entry without such devices.”^[50] ‘Issuer’ is defined as “issuer of securities.”^[51] It is submitted that such a conception of ‘un-certificate securities’ is likely to claw in all kinds of issuer which are recognized as issuers of securities under the listing rules of the listing exchange.

v. *Constraints relating to Low Credit Ratings of Councils and their Securities.*

Section 2 of the Zambian Securities Act 2016 defines a ‘credit rating’ as “an opinion regarding the credit worthiness of a licensed person, securities or an issuer.” It must be noted that there is a fundamental difference between the credit worthiness of an issuer and the credit worthiness of its issued securities. The credit worthiness of an issuer is tied to the effectiveness of its corporate governance systems. Part XIII of the Securities Act 2016 introduces an auditing and corporate governance regime for listed companies. The credit ratings of listed issuers are partly influenced by the quality of the issuer’s compliance with the auditing and corporate governance regime. The credit worthiness of the issuer’s issued securities is a function of the issuer’s credit worthiness, profit potential, and the cost and the rate at which the securities are made available for sale or collateral purposes on securities exchanges. As Guynn et al observe:

The [value] of a security is a function of more than the issuer’s credit-worthiness or profit potential. It is also a function of the security’s liquidity both for sales and collateral transactions, i.e., the security’s ready availability for purchase, sale, lending or pledging at the right time and in the right place. For example, if existing pledging procedures make it prohibitively expensive or impossible for borrowers or transaction

counterparties to grant effective pledges of their interests in securities in the right place and at the right time, potential borrowers or transaction counterparties may be prevented from minimizing their overall cost of credit or cost of entering transactions involving credit exposure to them. Conversely, if such procedures make it prohibitively expensive or impossible for potential lenders or transaction counterparties to obtain enforceable first-priority pledges of a borrower's interest in securities, potential lenders or transaction counterparties may not be willing to enter into a number of otherwise risk-reducing and profit-maximizing lending or other transactions involving credit exposure to a borrower or transaction counterparty. As a result, a portion of the world's stock of securities may not be put to its highest or best use. The cost of credit may be higher and the value of securities may be lower than they would otherwise be.^[52]

Thus, exchange rules in so far as they facilitate listing, keep the securities listed at minimum cost, and prevent arbitrary suspension or cancellation of listings are likely to enhance credit ratings of listed securities. In Section 3.1 of this article above, it was noted that the LuSE Listing Rules adequately provide for these aspects. Thus, LuSE Listing Rules 2012 are likely to enhance the credit ratings of listed or cross-listed securities. However, the Parent Act—the Securities Act 2016—does not recognize councils as entities that could list on Zambian securities exchanges. Since, the availability for sale or for collateral purposes of the public debt securities depends on their being listed on a securities exchange, an argument could be made that the unlistability of councils is likely to lower the credit ratings their public debt securities. And, since public debt securities cannot be issued in dematerialized form, they may be issued in certificated form. The existence of public debt securities in certificated form is likely to lower the credit ratings of councils. Firstly, the paper certificates for certificated public debt securities are likely to increase transaction, trading, transportation, custody and insurance costs for paper certificates and transfer instruments. An argument is made that the higher transaction costs, lower trading volumes and the delayed settlement of trades which are associated with certificated securities are likely to lower the liquidity and credit ratings of the underlying council public debt securities. Secondly, the poor corporate governance which is deep-rooted in councils, and is manifested in poor financial management, and lack of transparency and accountability, is also likely to lower the credit ratings of councils. Since the creditworthiness of an issuer's listed securities is a function of the creditworthiness of the securities and of the issuer, it could be argued that the potential poor credit ratings of councils are likely to negatively impact the creditworthiness of their issued public debt securities. And, in the long-run, the poor creditworthiness of councils and the poor credit ratings of their public debt securities are likely to discourage further issue and trade in council securities. This view is rationalized by the position that a prudent or risk-averse lender (an investor in council public debt securities) is [unlikely] to advance a loan(s) to the issuer-council against public debt securities when there is the risk that:

- There might not be enough monies for the redemption of the public debt securities on maturity due to financial mismanagement in councils; and
- It might be difficult to realize their investment by selling off or pledging the public debt securities to a third party on account of the low credit ratings of the council securities.

As a possible solution to these shortcomings in the regulatory and institutional framework, proposals are made as follows:

- Implement the proposals for remedial reform which have been made in section 3.4 regarding the extension of the definition of 'dematerialized securities' to public debt securities;
- Increase public accounts auditing and vigilance, and effective prosecution of officers who are found guilty of embezzlement or financial mismanagement; and
- Employ competent staff who can ensure ethical and sound financial management, transparency, accountability and sound corporate governance practices in councils.

vi. *Constraints relating to immunity of Councils to Execution.*

A prudent or risk-averse lender would be willing to advance a loan to a debtor under the following circumstances, namely:

- Where there is sufficient collateral (security) for the loan;
- Where the debtor has steady cash-flow and profit potential; and
- In either (i) or (ii), the creditor can enforce the loan agreement in courts of law, obtain judgment against the debtor, and execute the judgment against the assets of the debtor.

For what it is worth, collateral is only significant to the extent that the collateral taker has a right of sale against it for the purpose of realizing the loan money. Given the councils' one year statutory immunity from execution of judgments against their assets, councils are unlikely to satisfy requirements (i) and (iii) above. Also, given the poor financial positions of councils in Zambia, councils are unlikely to satisfy requirement (ii) above. The author argues that prudent lenders (investors) are unlikely to advance loans to councils against potentially-unenforceable charges on the general fund in which may be created in favour of the lender(s). This view is rationalized by the position that an empty general fund like any other worthless collateral is not security at all.

- *Constraints relating to Bottlenecks on Access to Further Corporate Debt Finance.*

The underlying purpose of collateral is to ensure that the creditor has recourse to it in the event of default by the debtor. This notion finds expression in the definition of a 'pledge' in section 2 of the *Zambian Securities Act 2016* as "a contractual interest in a security that is delivered to, retained by, or considered to be in the possession of, a creditor to secure payment of a debt or other obligation". Thus, the essence of a pledge is to secure the repayment obligation of the debtor. Contrary to this conception, the repealed *LGA 1991* clothed councils with immunity against sequestration or execution of judgment or orders of the courts against council property. Section 67A of the *LGA 1991*, as amended by Act No. 9 of 2004, provided as follows:

Notwithstanding anything to the contrary contained in any written law, where any judgment or order has been obtained against a council, no execution or attachment or process of any nature shall be issued against a council or against any property of a council, BUT a Town Clerk or Council Secretary, shall cause to be paid out of the revenue of a council such amounts of the money as may, by judgment or order be awarded against a council to the person entitled to the money.

Thus, section 67A of the *LGA 1991* imposed a blanket prohibition on the execution of court judgments or orders against council property of any kind or description. However, the *Zambian Constitution* as amended by Act No. 2 of 2016 has altered that position by providing that "a person who obtains a judgment against a local authority may enforce the judgment against the local authority after one year from the date of judgment".^[53] Thus, since the repeal of the *LGA 1991* by Act No. 2 of 2019,^[54] article 160 of the *Zambian Constitution* is the provision which solely regulates the enforcement of court judgments and orders against council assets. The implication of this provision is that since a pledge of securities which is created under the *Zambian Securities Act 2016*—if they could be created by councils at all—is a 'contractual interest' which can only be realized after court judgment, the pledgor would have to wait for a year after judgment is rendered by a court. Similarly, in the event of default by a debtor council, a lender who has subscribed for council public debt securities will have to wait for year before they can realize the fruit of the judgment against the council. Against this backdrop, an argument is made that given slow wheels of our civil justice system—a simple civil case could take the average of five (5) years—a prudent lender/investor is unlikely to advance loans to a council against a pledge of their position in debt securities or indeed subscribe for their public debt securities. Also, councils are potential institutional investors who could invest their surplus money in listed debt securities or public debt securities. Once investment in debt securities or public debt securities of another council is made, the relevant council could pledge their securities position for further debt finance from financial institutions. However, the immunity against execution on their part is likely to discourage lending institutions from advancing further collateralized debt finance since the relevant

collateral (the relevant council's debt securities or public debt securities) would be immune from execution for a year since the date of judgment or the date on which the security interest became enforceable. And, as earlier alluded to, if the pledge is a contractual interest, a court order for the sale of the pledged securities would not be enforced against securities position of the relevant council on account of the immunity. Similarly, if the pledge is a proprietary interest, the enforcement of the right of sale against the relevant council's securities position would amount to sequestration of council property and as contemplated by Article 60 of the Zambian Constitution 2016.

Constraints relating to Implied Prohibition on the Creation of Pledges of Council Positions in Listed Debt Securities as Security for Council Borrowing.

As potential institutional investors, councils may invest money which is not required for immediate use in listed debt securities or public debt securities.^[55] However, under the establishing Act—the LGA 2019—councils are not allowed to charge or mortgage or indeed pledge the acquired securities position as security for further debt finance from lending institutions.^[56] What a council could do in that respect is create a charge on its general fund in favour of a lender.^[57] An argument is made that as councils (as institutional investors) and subsequent investors realize their investment by disposing of their positions,^[58] trade in securities is likely to increase. However, a counter-argument is made that since councils cannot competently pledge their debt securities positions as security for further debt finance—the appropriate collateral being the CGF—this shortcoming in the law is likely to lower trade in interests-in-securities. A further argument is made that such a shortcoming in the law is likely to reduce the volume of trades that could be settled in respect of council positions. Furthermore, this negative feature serves only to rob councils of a potential avenue for raising further debt finance. It is submitted that since the lender would not have recourse to any other property than the CGF, this provision only serves to shield other council property from seizure in execution. Given the poor state of the so-called CGF, limited usefulness of the security interests which may be created on the fund is likely to discourage lenders from advancing loans to councils. It is submitted that council property may well be protected through employment of competent staff who can ensure ethical and sound financial management, accountability, transparency and general corporate governance. As a possible solution to this shortcoming in the law, proposal are made for the repeal and replacement of this provision with the one which allows the pledging, mortgaging and charging of securities positions of councils in listed securities.

- *Constraints relating to the Dichotomy of the Ranking System for Security Interests in Council Property.*

The current ranking system for security interests in council property is bifurcated. As section 50 of the LGA 2019 provides:

50. (1) Monies borrowed by a local authority shall be a charge on the general fund of the local authority and **all securities** of a local authority shall rank in accordance with the provisions of the Movable Property (Security Interest) Act 2016 or any other written law.

(2) The interests for the time being payable in respect of any monies borrowed by a local authority is a charge on the general fund of a local authority.

The following positions may be distilled from this provision, namely:

- i. The principal and interest on the money borrowed by councils are a charge on the CGF; and
- ii. The securities (bonds or stock issued by councils) rank in accordance with the time at which the financing statements relating to the securities issuance are lodged in the Collateral Registry of the Patents and Company Registration Agency (PACRA).[\[59\]](#)

Charges are ‘security interests’ (interests in the property of the council) which are created in favour of the lender of a council. They are not ‘securities’ which are issued by a borrower council. Thus, reference to ‘all securities’ in section 50(1) of the LGA 2019 relates to ‘bonds and stock’ which are ‘securities’ which could be issued by councils in accordance with section 48(b) of the LGA 2019. Consequently, it may be argued that whereas bonds and stock of councils rank according to the time of lodgement of the financing statement, charges which are created on the CGF are without a ranking system. This view is rationalized by the position that under the Movable Property (Security Interest) Act 2016 (the MPSIA 2016), both the CGF (money) and ‘securities’ are distinct types of movable property which may be charged or mortgaged or indeed pledged as security for a loan.[\[60\]](#)

Constraints relating to the Pari Passu Ranking of Charges which are created on Council General Fund.

As noted above, charges which are created on the CGF rank equally without any priority.[\[61\]](#) It could be argued then that given the one year immunity to execution on the part of councils, a well-advised prudent or risk-averse lender is unlikely to extend finance to a council since subsequent lenders would rank equally with them. Since council property of any description could now be taken in execution of judgments or orders of courts after a year from the date of the judgment or order, as the case may be, it would make commercial sense to provide for the creation of mortgages, charges and pledges of debt securities and public debt securities which may be held by councils. This proposed measure should be extended to council property of any description also, since there is already in place a mechanism for determining the ranking of competing collateral interests in any kind of property. For instance, the priority of competing security interests in the same council movable property may be determined by the provisions of the MPSIA 2016.[\[62\]](#) Similarly, the priority of competing security interests in the same immovable property of a council could be determined by the Lands and Deeds Registry Act.[\[63\]](#) It would also be prudent to introduce a ranking criterion for charges which are created on the CGF. It is proposed that, subject to the express or implied agreement or conduct of the parties, charges which are created on the CGF be ranked in accordance with the time at which the financing statement which relates to their creation is registered. It is also proposed here that proposals (ii) and (iii) which have been made in section 3.5 above be implemented in this respect. An argument is made that the employment of competent staff who can ensure ethical and sound financial management, accountability and transparency in councils is likely to incentivize payment of rates, rent, levies and license fees to councils by members of the public. This in turn is likely to enhance revenue collection.[\[64\]](#)

- *Constraints relating to Competition among Bonds or Stock of the Same Class.*

As a rule of the thumb, municipal bonds or stock of the same class, like company debentures, of the same class, rank equally.

The ranking of Debentures of the same class: Similar circumstances and the Pari Passu Rule.

The *pari passu* rule governs priority of public, private, domestic and international debt obligations in syndicated loans or bond and stock issuances. *Pari passu* is a Latin phrase which imports “similar circumstances” or “similar situations”. This would imply that secured or unsecured debt which is contracted for the same purpose or under the same terms should rank equally. This implies that, subject to an agreement between/among the parties (lenders), syndicated debt obligation should rank equally. Similarly, where bonds are issued for a particular corporate purpose against separate loans from public subscribers, the bonds (the loan repayment obligations stipulated in the bonds) will rank equally. This also implies that

earlier or subsequent debt of a different class or which is contracted for a different purpose is dissimilarly circumstanced. Consequently, competition between a particular debt obligation and an earlier or subsequent one may well be determined by the date on which the financing statement which relates to the creation of the debt or security interest was registered. The standard *pari passu* clause which is often included in domestic and international bond issuances states that the issued bonds rank *pari passu* with each other and with other unsecured [payment] obligations.^[65] The basic elements of typical *pari passu* clause are as follows:

1. The intra-class element or internal element which stipulates that, [subject] to express or implied consent of the bondholder(s), bonds of the same class (a particular class) rank equally; and
2. Inter-class element or external element which defines the ranking of the issued bonds in relation to other debts of the issuer, as follows:
 - If the bonds are unsecured, they will rank *pari passu* with other unsecured debts of the issuer;
 - If the bonds are secured, [subject] to any express or implied consent of a party whose debt would otherwise have priority, they will rank with other secured debts in accordance with the time at which the financing statement or instrument which creates the debt was lodged with the relevant authority.

In either case, lenders have the liberty to trade away their priority. Consequently, a typical *pari passu* clause performs the following fundamental functions, namely:

- Protecting bondholder from the issuance of superior debt which may jeopardise the repayment of the loans;^[66]
- Ensuring that priority of bondholders is not altered without the consent of the holders;^[67]
- Ensuring the equal treatment of bondholders of the same class;

Undoubtedly, such functions of a *pari passu* clause are likely to encourage subscriptions for public bond issues. Contrary to international best practice, section 50(1) of the LGA 2019 ranks bond or stock issues in terms of the times at which the financing statement relating to their issue was registered with the collateral registry of PACRA. This implies that numerous subscribers who extent loans of different amounts under the same terms and for the same purpose will have to scramble for registration of the financing statements. Those that for one reason or the other delay in registering their financing statements risk being subordinated to those who register theirs earlier. Since the bondholders of the same class (and this includes further issues of the same class) are similarly circumstanced, it could be argued that the compulsory loss of priority to early the birds is tantamount to a violation of acquired property rights. It could also be argued that the risk of compulsory alteration of the ranking of bonds is likely to discourage subscription for council bonds and stock. As a possible way of encouraging subscription for council bonds and stock, it is proposed that section 50 of the LGA 2019 be recalibrated as follows:

50(1). Monies borrowed by a local authority may be secured by a charge, mortgage, pledge or lien on/of the local authority's property of any description.

(2). Priority of competing security interests in the same immovable property of a local authority shall be determined by in accordance with the provisions of Lands and Deeds Registry Act or any other written law.

(3). Priority of competing security interests in the same movable property of a local authority shall be determined by the provisions of the Movable Property (Security Interest) Act 2016.

(4). Notwithstanding the generality of subsection (3), the ranking of bonds or stock issued by a local authority shall be as follows:^[68]

1. [Subject] to express or implied consent of the bondholder, bonds of the same class (a particular class) shall rank equally.
2. [Subject] to express or implied consent of the bondholders, unsecured bonds or stock shall rank *pari passu* with other unsecured debts of the issuer.
3. [Subject] to any express or implied consent of a party whose debt would otherwise have priority, secured bonds or stock shall rank with other secured debts in accordance with the time at which the financing statement or instrument which creates the debt was lodged with the relevant authority.

A provision of this sort would ensure that other property of a council than the CGF are used as collateral for debt financing. Given the usual poor state of the CGF, it could be argued that the use of other council property as collateral is likely to encourage more lenders to extend debt finance to councils. The use of other property of the council than the CGF as collateral for debts could be justified by the fact that the very same property may be taken in execution of court judgments or orders against council. The restriction of collateralization of council property to the CGF, is an off-shoot of the previous [absolute immunity] against execution of court judgments or orders against other assets of the councils. The direct end of both these measures—the restriction on collateralization and the immunity against execution—was the protection of other assets of local authorities than the CGF, especially those which are dedicated to the core functions of local authorities, from onerous encumbrances and possible loss through execution. The rationale was that enormous encumbrances and loss of essential property through execution would impair the performance of the public functions of local authorities. It is the considered view of the author that the risk of loss of essential council property may be averted by Central Government intervention through bailout packages to financially distressed councils. At any rate, the national commercial bank (the Zambia National Commercial Bank—ZaNaCo) could seek necessary financial arrangements with the Central Bank (the Bank of Zambia—BoZ) and offer to buy the defaulted loan from current lenders and restructure its repayment by the financially challenged council. Such measures, it is submitted, are not only likely to prevent loss of essential council property but also encourage corporate debt financing by councils. Also, the subordination of debt that would come with the proposed provision is likely to facilitate further debt financing by councils. As Johnson observes:

Subordinated debt is a hybrid of debt and equity. It is a form of debt financing. However, subordinated debt has many of the financial characteristics of equity. Financially, it is equity; in law (and for taxation purposes) it is debt. Thus, this hybrid form of financing allows a company to raise finance which is akin to equity finance by issuing debt, and allows the company to reap financial benefits of equity, together with the taxation and other benefits.[\[69\]](#)

Conclusion.

The general conclusion which has been reached in this article is that the legal, regulatory and institutional framework for the public distribution of securities within Zambia and across international borders does not provide adequate incentives for the growth of corporate debt financing by councils through issuance of public debt securities. In particular, it was noted that although councils are entities that could list public debt securities on the LuSE under the current Listing rules, they are not so recognized by the Parent Act—the Securities Act 2016. An argument was made that this negative feature is likely to discourage the listing of council securities on the LuSE. Necessary proposals for remedial reform were made. It was also noted that council public debt securities are incapable of public distribution under prospectuses under the said framework. An argument was made that this negative feature is likely to discourage public distribution of council public debt securities. Necessary proposals for remedial reform were made in this respect also. It was further noted that council public debt securities cannot be issued in dematerialized form. Furthermore, it was noted that the certificated form of public debt securities is likely to increase transaction costs for their transfer and pledge and lower their credit rating. It was also noted that the poor financial management, lack of accountability, and transparency and general poor corporate governance in councils are likely to lower

the credit rating of council public debt securities further. Necessary proposals for remedial reform were made in that regard also. Finally, it was noted that the one-year-immunity against execution of court judgments and orders against other assets of a council than the CGF is likely to discourage lenders from advancing loans to councils against public debt securities given the frequently-poor state of the CGF. Necessary proposals for reform were made in that regard. The article has demonstrated that by implementing the remedial reforms which have been proposed herein, Zambian regulators, legislators and policy makers are likely to promote corporate debt financing by councils and other local authorities, and ease the liquidity and capital-project financing challenges which are faced by these public institutions.

Acknowledgment

I owe a huge debt of gratitude to Professor Kenneth Mwenda for supervising my PhD Thesis in International Securities Markets Regulation. Professor Mwenda introduced me to the advanced concepts of domestic and international corporate finance. And, for that, I am in his debt. The central thesis of this article is borrowed from a section of my PhD Thesis

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Footnotes

[1] Martell, C.R. & George M.G., (2006). Development of Local Government Debt Financing Markets. *Public Budgeting and Finance*. 26(1): 1-26.

[2] Off-balance sheet financing includes some forms of leasing and project financing: Wood, P.R., (1980). *Law and Practice of International Finance*. London: Sweet & Maxwell, at 403, in Johnson, B., (1987). *Debt Subordination: The Australian Perspective*. *Australian Business Law Review*. 15(80): 50-87, at 82.

[3] Johnson B. (1987), *ibid*

[4] See, the Local Government Act 2019, ss 24(3)(a), 48(a)(b)(c)(d)(e), Chapter 281 of the Laws of Zambia.

[5] See, the Report of the Parliamentary Committee on Budgetary Estimates, 'Fiscal Decentralization for Easy Access,' July, 2014. The Report is based on a study conducted by the Committee on the Capacity of Local Authorities to Implement Fiscal Decentralization, and the Challenges inherent in the Implementation Process.

[6] *ibid*

[7] *ibid*

[8] *ibid*

[9] *ibid*

[10] When the United Party for National Development (UPND) formed government in the year 2021, in October, they made a bold policy statement to the effect that the management of bus stations would revert to council. The UPND Government has lived up to their pronouncement. However, anecdotal evidence shows that the estimated Annual Revenue which could be collected from an average market would not meaningfully fund the construction of new infrastructure, the rehabilitation and maintenance of the existing infrastructure, and other critical social services such as public health and environmental protection. It is the central argument of this paper that, progressive policy statement such as the one which has been made by the UPND could be supplemented by public debt finance which may be realized through the issue of public debt securities to the general public.

[11] *ibid*

[12] See, Ministry of Local Government and Housing, Circular No. 2 of 1996.

[13] Of course the newly established councils are temporarily or considerably free from the shackles of the requirement of retirement benefits prompt and effective payment on retirement.

[14] It is the hope of central government, local authorities and the member of the public that the implementation of the decentralization policy—especially fiscal decentralization—will enhance service delivery by local authorities and increase participation of the general public in governance through the general decentralization framework. However, a question may be asked, “how will the fiscal decentralization work when councils have virtually no money to finance budgetary allocations?”. “What use would be the budgeting power when councils will still have to look up to central government for funding?”

[15] See, section 3 of the BRA 2014 as regards the types of licenses that regulatory agencies could issue.

[16] Questionnaires and interviews were conducted with personnel from Legal, and Finance Departments of all respondent councils.

[17] See, LuSE Listing Rules 2012, r 5.1

[18] *ibid*

[19] Definition of “applicant” and “issuer” as read together under the LuSE Listing Rules 2012.

[20] Definition of the term under the LuSE Listing Rules 2012.

[21] Definition of the term under LuSE Listing Rules 2012.

[22] Public debt securities have been included in the definition of ‘securities’ in section 2 of the Securities Act 2016: See, paragraph (c) in the definition of the term ‘securities’ in the Securities Act 2016; see also, the definition of ‘public debt securities’ as “securities issued by councils and parastatals: Section 2 of the Securities Act 216. They were not so recognized in the repealed Securities Act of 1993.

[23] See, the definition of ‘listed company’ in sections 2 of the Zambian Securities Act 2016 and section 2 of the Zambian Companies Act 1994, and definition of ‘company’ in sections 2 of the Zambian Securities Act 2016;

[24] ‘Issuer’ is defined in section 2 of the Zambian Securities Act 2016 as a ‘person’. We know that at general law, a ‘person’ could be a natural or juristic person. Thus, both local and foreign companies, cooperatives, other body corporates, trusts and associations qualify as ‘issuers’ and therefore ‘companies’ for purposes of applications for listing or cross-listing on the LuSE under the Listing Rules of 2012.

[25] LuSE Listing Rules are a form of Statutory Instrument: See, the Zambian Constitution 1996 (as amended by Act No. 2 of 2016, Art 266 (Definition of ‘Statutory Instrument’); Zambian Securities Act 2016, s 67.

[26] See *Bank of Zambia vs Anderson*, Supreme Court of Zambia Judgment No. 13 of 1993, and *Attorney General vs Mooka Mubiana*, Appeal No. 38 of 1993.

[27] See, Part XIII of the Zambian Securities Act 2016.

[28] Zambian Securities Act 2016, s 2 (Definition of ‘prospectus’). “Prospectus” means a notice, circular, brochure, advertisement, publication or request issued in paper or other document, whether electronic or otherwise, inviting applications or offers from the public to subscribe or purchase, or offering to the public for subscription or purchase, a share in or debenture of a company or proposed company, and includes a statement attached to or intended to be read with the prospectus: *ibid*.

[29] The LuSE Listing Rules 2012 do not help matters too since they only define ‘prospectus’ as “a prospectus as defined under the Securities Act”: See, the definition section in the LuSE Listing Rules 2012.

[30] See, the Securities Act 2016, s 2 (Definition of ‘debt securities’).

[31] *ibid*

[32] [1887] 7 Q.B.D. 165, at 172.

[33] See also the decision of the English Supreme Court (House of Lords as it then was) in *Knightbridge Estates Trust Ltd vs Byrn* [1940] AC 613, at 615-618; See also Clive M. Schmitthoff, C.M. (ed.), (1987). *Palmer’s Company Law*. 24th Edn. London:

Stevens & Sons Ltd, at 673.

[34] See, *Zambian Securities Act 2016*, s 2 (Definition of ‘public debt securities’). ‘Public body’ refers to the Government, a Ministry or department of the Government, the National Assembly, a local authority, parastatal, council, authority, the Commission or other body appointed by the Government or established by any other written law: *Zambian Securities Act 2016*, s 2 (Definition of ‘public body’).

[35] A Statutory Instrument made under a repealed Act of Parliament remains in force in so far as it is not inconsistent with the repealing law until repealed by a statutory instrument which is made under the repealing Act of Parliament: See, the *Zambian Interpretation and General Provisions Act*, s 15, Chapter 2 of the Laws of Zambia. The said S.I. has not been so repealed and as such, still in force. It is also trite law that an S.I. cannot effectively override the parent Act so that its position on a certain matter takes precedence: *Attorney General vs Mooka Mubiana*, Supreme Court of Zambia, Appeal No. 38 of 1993. Therefore, the current legal position on the types of securities that could be distributed under a prospectus in Zambia is the one provided in the *Securities Act 2016* as stated above. The proposed amendment of the particular portion of the *Securities Act 2016* is therefore, legally founded.

[36] Here ‘securities’ has been used rather than fishing out ‘share and debentures’ out of the large net of securities that could be distributed under a prospectus.

[37] See, *The Zambian Local Government Act 1991*, s 48 (Repealed). Cf *Zambian Local Government Act 2019*, s 49.

[38] See, the *COMESA Treaty 1993*, Art 3(c).

[39] See, *COMESA Treaty 1993*, Art 81(a).

[40] See, *COMESA Treaty 1993*, Art 81(b).

[41] See, *COMESA Treaty 1993*, Art 81(c). ‘Government’ here imports both central and local government.

[42] From the twenty five (25) respondent councils who were asked, among other things, to state the source of their debt finance and why that source, sixteen (16) councils who mentioned banks and other financial institutions and acknowledged the stock exchange as an alternative source of debt finance, stated that while it was more expensive, complex and cumbersome to comply with the requirements of a stock exchange, the requirements of bank overdrafts and loans were cheaper and easier to comply with. Nine (9) respondent councils indicated that they relied on bank overdrafts and bank loans and did not know they could raise debt finance by issuing bonds or loan stock to the public. Anecdotal evidence shows that bank overdrafts are a main source of debt finance for Zambian local authorities.

[43] See, the *Zambian Securities Act 2016*, s 2 (Definition of ‘Dematerialized Securities’).

[44] Chapter 2 of the Laws of Zambia.

[45] *Zambian Companies Act 2017*, s 3 (Definition of ‘company’).

[46] Though it is difficult to fathom any other legal form in which ‘persons’—companies, other bodies corporate and natural persons can exist than in form of trusts and associations.

[47] See, the *Zambian Securities Act 2016*, s 2 (Definition of ‘issuer’).

[48] *Lane vs London Electricity Board* [1955] 1 ALL ER 324, at 331.

[49] In section 68 of the *Zimbabwean Securities Act 2004*, ‘dematerialized security’ is defined as un-certificated securities or other obligation of an issuer’. Similarly, section 1 of the *South African Financial Markets Act 2012* broadly defines ‘un-certificated securities’ as securities of an issuer. Such pithy definitions are likely to increase the supply of dematerialized securities to and listing of the same on securities exchanges.

[50] See, the *South African Financial Markets Act 2012*, s 1 (Definition of ‘uncertificated securities’).

[51] See, the *South African Financial Markets Act 2012*, s 1 (Definition of ‘issuer’).

[52] Guynn R.D. (1996). *Modernizing Securities Ownership, Transfer and Pledging Laws: A Discussion Paper on the Need for International Harmonization*. 1-98 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026207 > accessed 14 December 2022.

[53] See, the *Zambian Constitution 2016*, Art 160.

[54] *LGA 2019*, s 81.

[55] See, *LGA 2019*, s 46, Chapter 281 of the Laws of Zambia.

[56] *LGA 2019*, s 50.

[57] *ibid*

[58] *ibid*

[59] See, the *Movable Property (Security Interests) Act 2016*, ss 7(1), 11(1), 13(1), 44(1)(2)(3), 52(a)(b)(c).

[60] Under the *MPSIA 2016*, “collateral” means movable property, whether tangible or intangible, that is subject to a security interest: *MPSIA 2016*, s 2 (Definition of ‘collateral’). In turn, “intangible asset” includes movable property, a financial contract, incorporeal rights, excluding goods, documents of title, securities, money and negotiable instruments: *MPSIA 2016*, s 2 (Definition of ‘intangible asset’). And, “movable property” includes goods, intangibles, securities, money, negotiable instruments

and negotiable documents: MPSIA 2016, s 2 (Definition of ‘Movable property’).

[61] See, LGA 1991, s 49 (Repealed).

[62] See, MPSIA 2016, ss 7(1), 11(1), 13(1), 44(1)(2)(3), 52(a)(b)(c), 2 (Definition of ‘movable property’).

[63] See, Lands and Deeds Registry Act, ss 4, 5, Chapter 185 of the Laws of Zambia.

[64] Fifteen (15) out of the twenty five (25) respondent councils indicated that immunity against execution of court judgments against the assets of councils have actually instilled and entrenched the culture of bad debt management by councils. They opined that if the immunity could be lifted councils would generally manage their indebtedness and finances better.

[65] See, Wood P. (2003). *Pari Passu Clauses—what do they mean?* *Butterworths Journal of International Banking and Financial Law*. 18(10): 371-374. Professor Wood observes that although the word ‘payment’ is often inserted before the word ‘obligation’ in the formulation of a *pari passu* clause, it adds nothing to the thrust of the provision since a bond is a payment obligation: *ibid*.

[66] See, *Republic of Argentina vs NML Capital Limited*, United States Court of Appeal for the Second Circuit, 573 U.S. (2d Cir. 2014); *NML Capital Limited vs Republic of Argentina*, 727 F. 3d 230 (2d Cir. 2013).

[67] *ibid*

[68] This sort of conception is reflected in section 225(3)(a)(b)(c) of the *Zambian Companies Act 2017* which provides as follows: Debentures which are declared to be of the same series by virtue of the terms that are stipulated in the debenture or a resolution which authorizes their issuance or a trust deed of a company which relates to their issue rank equally in all respects, despite the debentures having been issued on separate dates.

[69] Johnson B. (1987). *Debt Subordination: The Australian Perspective*. *Australian Business Law Review*. 15: 50-87, at 81.