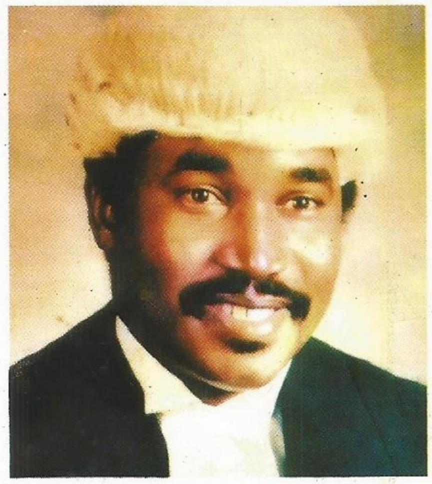
LEGAL PRISMS

Directions in NIGERIAN LAW AND PRACTICE



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In honour of his Excellency,

(Dr) Ibrahim Shehu Shema CON, FNIM, FNATE,
The Executive Governor of Katsina State

Edited By
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UNIVERSAL DEBT MANAGEMENT: THE LAGOS STATE GOVERNMENT'S SOLUTION

Edu, Hamzat Oladipupo

Introduction

This chapter focuses on universal debt management. Debt management had been the bane of the third world countries since the event at Breton Wood in July, 1944 that resulted in the creation of World Bank and its twin brother, International Monetary Fund (IMF),and their basic function of providing debt facilities to member nations of the UN (this had since been extended to non-members).

The Loan facilities of these two Institutes always come with stringent conditions that warrants very prudent management of all available resources of the proposed debtor[1], for example Nigeria was asked among other things to devalue its otherwise overvalued Naira (in their estimation), reduce or remove subsides in its oil sector e.t.c. in 1990, when the then Head of State, GenIbrahim Babagida (Rtd) intended to boost his new Structural Adjustment Programme, though the majority of the Nigerian voted against the loan, it is pertinent to note that the loan was taken despite the uprising that greeted the implementation of the conditionality of IMF particularly the removal of government subsidies that prompted incessant increment of pump price of petroleum products like petrol, kerosene, engine oil e.t.c.

In spite of all these, the fund from the IMF was grossly mismanaged, hence the decay in almost all social life in the country from galloping inflation, through infrastructure decay to complete lack of welfare amenities like health-care delivery and tourism. The devastating result of all this is that, new Government had to start afresh always, because continuity means witch-hunting about how loans, from any source previously, got missing.

To stem this spate of iniquities, the Lagos State Government under Governor Babatunde Raji Fashola (SAN) decided to manage the state debts, which are inevitable in the present dispensation, through the eagle-eye of the law. Hence, the passage of the law under in focus in

1 Debts: The UN Report on World Debts, 1990. p.13.

2008. As 'Lagos State Debt Management Office (Establishment) Law', effective from 2nd February 2008. This represents the struggle of modern states or nations to find solution to the crises of debt because similar effort has been inserted at the national level and among some nations in the international community to address the same problem, hence the necessity to look into this Law of the Lagos State, with particular reference to it merits and demerits viz-a-viz the provisions of Islamic Legislation on problem of debt and how they can be solved. Here is a brief highlight of the law with which the Lagos state Government intends to effectively manage and solve its debt problem

Legal Regime

The Law is not the bulky type. It has only 29 sections, and a section-S.28 is devoted for interpretation of some key terminologies in the law. It terminates in a single schedule relating to S.2 (3) of the Act concerning "Proceeding of the Boards and other matters" [2]

In its opening provisions, the Act created and distinguish clearly between 'Debt Management Office'[3] which was given the administrative functions like issuance of instruments, borrowing, maintenance of database for new and existing loans right up to "advise and propose funding mechanisation for infrastructural project"[4] and the debt management "office board"[5] which is given the supervisory functions like approval of policies strategies and procedures, appointment of technical committee, review of the economic impact of debt management strategies[6].

The Act clearly define the relationship between the office and the Board[7], when it gives the Board the power to hire, discipline and fire employees of the office[8] and even "provide for appeals by such employee against dismissal or such other disciplinary measures."[9]

2 Lagos State Debt Management(Est.) Law S. 2(3).

3 Ibid S. 1.

4 Ibid S. 5(a-p).

5 Ibid S.2.

6 Ibid S.7(a-e).

7 Ibid S .9&10

8 Ibid S.9&10.

9 Ibid S10(1)(b).

In general, the Law set a lofty assignment for both 'the office' and the "board" and with it are stringent rules like the ones guiding gifts to the office,[10] granting of loans to other states and its execution,[11] all which the office can regulate with the approval of the State House of Assembly.[12]

Effects of the Law

The Law effectively created an outlet for the bureaucracy involved with governance in the area of loan acquisition, dispensation, disbursement and payment. .Hence the following can be noted as the Legal effect of this Law

- ❖ Enhance efficiency and prudent management of loans from whatever source.
- ❖ Enhance management of these loans by involving individuals who are technocrats in the field of finance.
- ❖ Enhance efficiency of the state in acquisition, disbursement and payment of loans from whatever source judiciously.
- ❖ Strict monitoring of loans by involving the technocrats and the legislators.
- ❖ Facilitated availability of solid and verifiable data base for loans of all kinds thus enhancing accountability and judicious use of loans.
- ❖ The office can sue and be sued[13] hence confirming its status as a legal person.

Defects of the law

The idea of a well-planned management of corporate debts is noble, particularly in an age where accountability is thrown to the wind by various authorities. But laws are known to leave some defects which can be exploited to negate its spirit. So the Lagos state debt management office law is no exception. Examples of such detects are:

- ❖ Provisions are prone to corruption because for example, out of the

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10 Ibid S, 15.

11 Ibid S. 20 & 21.

12 Ibid S.21(2).

13 Lagos State Debt Management Office(Est.) Law, 2008, S.1(2)(ii).

five members of the board, the executive arm of the government has four representatives, two commissioners and two senior civil servants.[14] This may not be helpful if the government is to be manipulative.

- The office is given the right to receive gifts of anything, material or otherwise, from members of the public, but the gift 'must not be such that would influence the decisions and/or functions of the offices.' These latter categories of gifts need to be highlighted perhaps as we have in the Constitution as code of conduct for public officers,[15] because gifts are notorious for influencing decisions and functions if not properly defined.
- The appointment of representative of the private sector by the governor[16] may hinder the role of this board member as the representative of the named sector and it may result in 'unhealthy' lobbying, and the governor may have undue influence on the board. His nomination could have been, through the recommendation of the private sector to be screened by the House of Assembly.
- The director general's first tenure is longer than that of the governor that appointed him, innocuous at this may look only it may be an instrument of corruption later, but his tenure could have been attached to the tenure of the administration that appoints him, the administration may now reappoint him if it has the second mandate since, to me, it is a political appointment.

Conclusion

This is an eye opener to all corporate bodies-nations, states, establishments etc- dealing in debt, that Lagos state can so be concerned about this cankerworm ravaging the third world countries economy (i.e. debt management problem) to the extent of transferring a very important power to another corporate body, couple with the fact that it is a state in a developing third world country that has the reputation of topping the list of the world most corrupt countries, just a few years back is outstanding.

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14 Ibid S. 2 (1).

15 The Constitution of Nigeria, 1999, 5th Schedule; Part (1),(2) &(3).

16 Ibid S. 2(1)(f).

However, we must note that management or mis-management of debt is not the only cause of the economic woe of the third world countries resulting from debt, as the UN itself indicted its two financial institutions-the World Bank and the International Monetary Fund(I.M.F.) - about the world debts in one of its reports[17] where it lamented the role played by I.M.F. in compounding the world debt problem when it declared that 'the external creditors too have an inbuilt mechanism in their conditionality that perpetuate their debtors in poverty, hence the inability to repay the loan as at when due, one is the scheme of servicing loans with an amount well above the loan itself before the commencement of repayment. The UN explained it like this "a nation that obtain a loan of $10m to be serviced for ten years at the rate of 10% per annum simply means that the ten year duration is just to allow the debtor complete the lucrative project for which the loan was required after which there will be a negotiation for repayment probably from the yield of the project, but while waiting for this, the debtor must continue to "Service" the loan with 10% of the loan from a God-knows-where fund, if the debtor nation did not default by the end of 10years it must have paid an amount equal to the sum of the loan i.e. $1M for 10years, before the commencement of repayment, but if the debtor defaults once or twice he may have to pay more since the installment will be added to the original cost and a new 10% of the new sum will now emerge as compound interest, thus in our example if the debtor defaulted twice for example he will end-up having a debt of $12m with a compound interest of $1.2m per annum. Imagine a poor country that defaulted 5 or 6 times and the project failed to complete as scheduled or failed to yield proposed profit."[18].

Here, in Nigeria, we were living witnesses to the conditionality that were given to General Babagida (rtd) which include:

- Devaluation of naira, and
- Removal of subsidies; to mention two.

SFEM (second-tier foreign exchange market) was created to stem the probable effect of devaluation, but till date, Nigerian economy is still feeling the pinch of that devaluation that is fueled by the corrupt and insincerity of the operators, both Creditors and Debtors. We later discovered that the cliché 'Structural Adjustment' itself is a creation of

17 See Debt: The Report on The World Debt; pub. United Nation, 1990.

18 Debt; op. cit. p.38.

The World Bank, let us read from two famous Western Financial Journalists,[19] they wrote "The World Bank loans come in two major wrappings-non-project loans and policy-based loans. When unwrapped, the loans could either carry the tag 'Structural Adjustment Loans (SALs)' or 'Sectoral Adjustment Loans (SECALs)'."[20] As for the motives behind the creation of these loans they wrote further: "SALs and SECALs were launched in 1979 to act as catalysts and facilitate liberalization of a country's rules and regulations in the desired DIRECTION (emphasis mine)".[21] The question here is 'whose desire?'

The two Journalists revealed some hard realities about these external loans which I think must always be in contention whenever anybody is talking of success in debt management and administration, they wrote about the World Bank and its two amalgamates-International Bank for Reconstruction and Development (IRDB) and International Development Association (IDA), both big lenders to the third world Countries. They wrote about the former: 'IBRD loans do not come cheap. They are individually negotiated and have a five-year grace period during which no repayments are required. After the grace period borrowers then have to pay-up within 15-20years 'AT MARKET INTEREST RATE' (emphasis mine). In 1990 this averaged 7.5%. If Shakespeare were here, the IBRD would be called a Shylock.'[22] This is so because though the five years are supposed to *be ex-gratia* only that the Debtors must service this loan at a negotiated rate, if only to remind them of their indebtedness, before the commencement of repayment, imagine how much would have been paid to service the loan. This must also be part of Debt Management Policy which may not be expressed in the articles of an enactment.

The above is just the wisdom behind Islamic Law's prohibition of Usury with emphasis, the main reason this is the injustice and corrupt consumption of peoples' wealth, hence Allah (SWT) likened the cosumers of Usury to a 'devilishly mad' person.[23]

My advice therefore is that while perfecting the application of this law to debt management in the state, we should be thinking of a way of bringing these latter factors affecting administration of loans under the

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19 Susan George and Fabrizio Sabelli of Wall Street.

20 George and Sabelli: Faith and Credit: The World Bank's Secular Empire, 1995, p.15.

21 Ibid p.17.

22 Ibid p.20.

23 Qur'an 2: 274.

rule of law. The advice given by a Ghanaian Businessman in Los Angeles will be very relevant here: 'Let us use the facilities of the World Bank when and where we MUST, but only as a temporary measure in a carefully and intelligently crafted, comprehensive development strategy conceived in the context of OUR OWN REALITIES, vision and ethos.'[24]

In effect it means the wisdom in the acquisition and prudent dispensation of loans that does not carry the heavy burden of usury in any form or degree, coupled with use of loans as stop-gap when required, bring out the efficiency in any Debt Management policy a corporate body like Lagos State and the like may put in place.

With this law under however, we have started somewhere, but to actually reach the target goal of crisis free loan acquisition, management and disbursement we have consider seriously the position of Islamic Law on this issue especially when it is now obvious that the international organization of United Nation status had now recognize usury as a major problem as earlier highlighted. Lastly, other concerned-states, nations, governments etc, will take a cue from here with the hope of getting better by the year on improved Debt Management strategy.

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24 Ibid p. 42.