

# **LAW AND NIGERIA'S EXTERNAL BORROWING:**

**Diagnosing The Past, Prognosing The Future**

*by*

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**Nigerian Institute of Advanced Legal Studies**

**MAIDEN INAUGURAL LECTURE, SEPTEMBER 2010**

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*NIALS Maiden Inaugural Lecture*

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PROGNOSING THE FUTURE**

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## Foreword

Professor Bolaji Olufamileyi Owasanoye's Inaugural Lecture is historic in many ways. He has the singular honour of delivering the first ever Inaugural Lecture in the 31 years of the Institute's existence and on the eve of the 50<sup>th</sup> Anniversary of our great nation Nigeria.

His choice of topic for this Maiden Inaugural Lecture, *Law and Nigeria's External Borrowing: Diagnosing the Past, Prognosing the Future* could not be more apt coming on the eve of the nation's 50 years Anniversary.

Professor Owasanoye takes us on forage into the uncharted terrain of Debt Management. He opens his discourse on *What is the Law of External Debt Management*. He examines the dynamics of external borrowing by unravelling the true nature of external loans often given under the misnomer of economic aids or grants which on the long run, because of attached conditionalities are inimical to the developmental aspirations of a nation. He thus, posits and rightly so, that external debt is a hindrance to development in many Sub-Saharan African States.

His discourse moves on to examine and analyse the Legal and Institutional framework for external borrowing in a Federal structure by its constituents such as Federal and State Governments and Government Agencies or Corporations. He notes that prior to the Debt Management Office Act passed in 2003, there was no extant legal framework for the regulation of external borrowing. He attributes Nigeria's past history of reckless and unbridled external borrowing and its attendant economic problems to the absence of clear statutory or constitutional framework for Nigeria's external borrowing. He

justifies his position by carrying out a comparative analysis of the situation in a number of African countries such as Gambia, Sierra Leone, Ghana etc.

He leads the establishment of the Debt Management Office in Nigeria and discusses in details the Debt Management Office Act. He moves on to address the effect of the hydra headed monster call Corruption on the external borrowing of the country, on public procurement, aid delivery and in the negotiation of external loans.

Professor Owasanoye finally outlines his prognosis from his foregoing analysis and diagnosis of Nigeria's external borrowing.

In his prognosis, he identifies corruption as the biggest challenge to Nigeria's developmental aspirations and concludes by outlining guidelines and steps the legislature and government can adopt to prevent a return to an era of huge external debt burden.

Professor Bolaji Olufunmileyi Owasanoye's Inaugural Lecture is a tribute to hardwork, robust intellectual prowess and a fitting gift to our nation at 50. I commend this lecture to all tiers and arms of governments, heads of government, ministries and agencies, and all well meaning Nigerians.

**Professor Epiphany Aringo, SAN**

*Director-General*

*September, 2010*

LAW AND NIGERIA'S EXTERNAL BORROWING:  
DIAGNOSING THE PAST,  
PROGNOSING THE FUTURE

By

Prof. Bolaji Olufunmilayo Owasanoye<sup>1</sup>

*I*ntroduction

*Director-General sir,*

I am immensely grateful for the opportunity to deliver the very first *Inaugural Lecture* by this great Institute in its 31<sup>st</sup> year. Today's event is unique in many ways. Not only because it is the first inaugural lecture by this institution, but also because it is coming on the eve of the 50<sup>th</sup> anniversary of Nigeria. An event that has attracted much debate and discourse because of the huge sum of money voted for it and the implication of that for the economic well being of a nation perpetually in the throes of poverty. The third reason is that in two days' time, October 3<sup>rd</sup> precisely will mark my 24<sup>th</sup> year in academics having joined the Lagos State University as Assistant Lecturer on the 3<sup>rd</sup> of October 1986, and my 19<sup>th</sup> year in the Institute having joined the Institute 3<sup>rd</sup> January 1991. I regard myself as a part of the

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<sup>1</sup> Director of Research, Nigerian Institute of Advanced Legal Studies. "Neither a borrower nor a lender be, for loan oft loses both itself and friend, and borrowing dulls the edge of husbandry". *Hamlet*: Act 1, scene 3, 75-77.

1. Inaugural Lecture delivered at the Nigerian Institute of Advanced Legal Studies on 30th September 2016.



Institutional memory of the Institute next to the Institute Librarian Chief T.O Dada, who was a founding staff. The fourth reason is that it is almost 10 years since I was appointed a Research Professor by this Institute. Like other Professors appointed by the Institute before me, including the incumbent Director-General, I had no inkling that I would be delivering an inaugural lecture until the incumbent Director-General introduced inaugural lectures as part of his agenda in 2009. Indeed, the Director-General wished that this burden should fall on those appointed after it took effect until I offered to deliver the first inaugural Lecture because I see in the policy the making of history. The sixth reason is that, after I was appointed Research Professor with effect from 1<sup>st</sup> of January 2001, I was soberly reminded by the distinguished and elderly Professor of Music, Igwe Prof. Laz Ekwueme at my thanksgiving service at the Chapel of Christ Our Light, University of Lagos, that I must be specially thankful because he could only think of one other person appointed Professor of anything under the age of 40.

Since I was beginning to forget the grace and mercy that the appointment represented I decided that paying the price of an inaugural lecture would be another opportunity to saying "Thank You Lord" because "Promotion comes not from the East, West or South but from God in Mount Zion sides of the North the city of the Great King"<sup>2</sup>.

The last but not the least reason is that being the seventh Professor employed or appointed by the Institute after erudite scholars like Prof. Peter Oduyede, Late Prof. Jade Akande, Prof. Oluwofe Akanle, Prof. Isabella Okagbue, Prof. Amere Guobadia and Prof. Epiphany Azinge, and seven being the number of perfection and rest, I saw the opportunity as divine to

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2. Psalm 75:7, Psalm 48:2.

perfect my academic career and calling by discharge of this public duty.

In my academic career, I have traversed, researched, taught and published in different areas such as international economic law, corporate and commercial law, human rights, notably the rights of children and women in the family context, constitutional law and legislative drafting. Indeed, I am vaguely aware that I am expert in different things to different people. Those who interact with me in my civil society work regard me as a human rights activist or social development practitioner, my parishioners at the Chapel of Christ Our Light, the headquarters of heaven know me as Pastor and Bible scholar, my colleagues in private practice know me as legal consultant on corporate law while those in academia see me as an academic and no more.

In the light of such diversity of activity I had a little difficulty deciding the theme of my inaugural lecture. To compound this problem is the nature of academic work in a research institution without regular students and teaching schedule. Research career makes inquiry of diverse legal subjects inevitable, first out of curiosity and then as a matter of professional and academic interest. Despite these challenges, my academic work and many of my publications have focused on economic law in general and the law of external debt management, a not so common field, in particular. It is on this not so common area of law that I have chosen to deliver this lecture.

### **What is the Law of External Debt Management?**

Broadly speaking, the law of external debt management relates to the legal regime that governs how, why and where sovereign states borrow outside national currency and beyond national boundaries. Despite the sober warning of Polonius to his son Laertes on the risk of borrowing or lending, external borrowing for nations is useful for a number of reasons e.g. to supplement domestic savings; build up external reserves; avoid external shocks from stagnation or to supplement taxes and other profitable activities etc.<sup>1</sup> Because of its sensitive nature, external loans may be taken to temporarily add to public revenue or to finance indispensable public expenditure e.g. works, services, equipment etc., or to support sectors that will not attract private investment although we must assume that the selected sector will generate taxes to be used to repay the loan.

Whereas a government's influence in its domestic jurisdiction is overarching and virtually unlimited, its influence in external financial market is severely limited and this is especially true for developing countries. In light of this reality, political considerations are not used as the paramount factors in external borrowing, rather legal and economic considerations dominate decision making in discerning and organised countries.

Sovereign external borrowing is borrowing by government, whether federal, state, or their agencies. At each of these levels, the borrowing power, authority, and process are statutory and administrative. On the other hand, a government-guaranteed private loan, though not directly taken by the government has the potential to become a sovereign obligation where the private concern defaults in payment or makes payment as agreed to

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1. Bolaji Owanwole: "Legal Regulation of External Borrowing in Nigeria" in *External Debt and Financial Management in Nigeria*, Ayin and Owanwole (ed.) 1996, Nigerian Institute of Advanced Legal Studies. Pp 77-84.

government in local currency and government is unable to remit the foreign currency equivalent for whatever reason<sup>4</sup>. Before government guarantees such loan it must have a beneficial effect recognised by government.

### External Loan as Economic Aid

Economic aid in the context of external finance is a misnomer as it is doubtful that a facility can be loan and aid at the same time. Its application creates the impression that it is free. Economic aid is in fact often not free as nationals of developing countries are led to believe either by their own governments or by the so called "donor". The word "donor" is also a misnomer because what is donated is often taken back in a different manner. Some economic aid is repayable to the donor country because the aid is given from taxpayer's money in those countries. The donor government usually has statutory power to support a needy country but does not have power not to take back what is given<sup>5</sup> except where it is given under humanitarian circumstances. Since aid comes in trickles and from diverse sources it is usually not regarded as a problematic part of the debt problem of third world countries.<sup>6</sup> The only salutary aspect of it is that it may come with very low interest rate and a high grant element.<sup>7</sup>

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4. This sort of debts comprise London Club debts accumulated by Nigeria and many other countries in similar situations. See [https://en.wikipedia.org/wiki/London\\_Club](https://en.wikipedia.org/wiki/London_Club).

5. See for example, the Foreign Assistance Act of 1961 of the United States by which Congress proscribed the parameters for foreign economic aid.

6. See generally, Guy Arnold, *Aid and the Third World: The North-South Divide* pub. Robert Royce Limited 1985.

7. The grant element is the quantum of aid given in the sense that a discounted value of what is given is what is eventually paid back. Before the advent of the Debt Management Office, the External Loans and Grants Office of Central