

Africa's Debt Crisis needs a Fair and Transparent Arbitration Court

The law provides that an entity, be it a person, organisation or state is under no legal obligation whatsoever to repay loans that others fraudulently borrow in their name. From this, it is clear that debt, which is neither sanctioned by, nor contracted for the benefit of the people, is odious, and should not be honoured by successor governments.

Africa has classic cases of huge debts incurred by past rulers who borrowed recklessly and used the funds either to oppress the people or for personal gains. Cases include the Apartheid debt in South Africa, Mobuto Sese Seko in the former Zaire and Sani Abacha of Nigeria. The ordinary people did not benefit at all from the debts, and yet the creditors continuously and relentlessly pressurise debtor countries to pay such debts. Africa is not denying that it is partly to blame for poor debt management systems. Africa admits that there are isolated cases where governments have been less accountable to their people for borrowed resources, to the extent that corruption has flourished. But there are cases where the Heavily Indebted Poor Countries (HIPCs) have religiously followed creditor prescriptions, and failed to develop. In fact, these HIPCs have been underdeveloped by the imposed neo-liberal macroeconomic policies.

The current World Bank estimates for trade allude to the fact that sub-Sahara Africa alone is incurring trade losses of US\$ 60 billion per year due to deteriorating terms of trade which are largely fostered by creditor prescriptions. The assumption of the current debt relief initiatives is that the Debtor countries are solely responsible for the crisis. While accepting part of the responsibility, due to lack of proper debt management, corruption and other shortcomings, the Debtors point to the large impact of the external factors that have been identified to have contributed to the debt crisis including the existence of a global trade regime in which the Debtor countries continue to suffer declines in terms of trade and ongoing lack of global market access; natural disasters and factors introduced by inappropriate policy advice by IMF and the World Bank as well as the push factors in lending. Creditors have never acknowledged that they are part of the problem while it is abundantly clear that they obviously are.

The power imbalance between Debtors and Creditors exhibits the lack of global governance to secure a more balanced and just world. Indeed it can be said from the outset that, understood from this imbalance, the persistence of the current debt crisis suggests that the unpayable debt is illegitimate since it is defined and maintained by power imbalance which is unjust. Besides that, the current debt crisis is purely a primitive accumulation of wealth on the part of the rich nations which can be challenged by a just global society.

In some African countries, for example Zambia, more than 40% of government budget is spent in debt servicing as compared to only 15% spent on health and education combined, compromising human development. In terms of economic justice, equity and rights the responsibility of both the Creditor and Debtor governments is crucial to resolving the persistent debt crisis. Equally, the issues of power imbalance which underlie the debt crisis and for which the debt crisis is a symptom of, must be resolved on the basis of economic justice, equity and rights.

Arbitration is one of the alternative methods of resolving a dispute outside the traditional court system. It is a system that has been extensively used and continues to be used in many cultures. In this process an independent third party would provide a final decision on a dispute between two parties. The conceding party must accept the verdict and go along with it and live harmoniously with the winning party.

Arbitration agreements allow for settlement or final decisions to be made on grounds other than purely legal principles, by taking into consideration justice, equity and human rights issues. The parties must be given an opportunity to be heard, the arbitrator must be impartial, and the decision-making process, fair.

One of the prerequisites for arbitration is the existence of divergent views which are not reconcilable. While the Debtors have made undisputed and legitimate claims and demands for debt cancellation, the creditors on the other hand have alleged that debt cancellation is not the action needed to resolve the problem.

There are pointers to the fact that arbitration is necessary to resolve the debt crisis. Firstly, the Jubilee 2000 movement, collected millions of signatures from all over the world calling for total debt cancellation. Creditor governments and the International Financial Institutions ignored the call. Secondly, the Secretary General's Report of December 2000 to the Financing for Development Preparatory Committee Meetings noted the difficult situation of debt confronting severely indebted low-income countries; no matter how skilled their economic management is. The Report noted that there are cases where debt cancellation could be called for.

The way to resolve the debt crisis remains a point of divergence too as reflected by the fact that Creditor initiated and imposed Debt Relief Initiatives such as HIPC and refinancing of loans do not address the debt crisis adequately. They are meant to protect the interests of the Creditors and that of international financial system rather than Debtor countries and welfare of their people. The divergence of approaches by Creditors and Debtors on how the problem should be resolved is generally very clear. The divergence lends itself to arbitration if a fair, equitable and sustainable solution is to be found.

Perhaps one of the expectations to be ruled by an arbitration mechanism is that should there be Debt Relief mechanism, it should be designed by both the Creditors and the Debtors and not dominated by the Creditors. Or better still the Debtors should be given a platform to propose mechanisms on the debt crisis based on their realities.

There is a need for Arbitration on specific types of Loans or debt, in particular the odious and illegitimate debts, which include the following:

- Debts that cannot be serviced without causing harm to people and communities. It is a violation of human rights to repay debt at the expense of meeting human development needs.
- Debts incurred by illegitimate debtors and creditors acting illegitimately, which includes odious debts and loans misused through corruption.
- Debts incurred from illegitimate uses such as projects that did not benefit the people as was intended.
- Debts incurred through wrong policy advice or as a result of external factors over which debtors have no control.
- Debts in which the money was actually stolen and banked in the North. There has to be the return of wealth stolen to developing countries, for example, the Democratic Republic of Congo wealth stolen by Mobutu Sese Seko.

One of the major reasons for the lack of political will to resolve the debt crisis is that the Creditors see the protection of the international financial system as the basis of decision. Debtors on the other hand argue that a human rights criterion would better reflect the so-called partnership that is expected to exist between the developed countries and the developing countries. In this regard, debt repayment at the expense of human development is clearly a violation of human rights. The criteria used for making the decision on whether or not to have debt cancellation lends itself to arbitration.

The United Nations (UN) provides a framework for global governance. It is under the United Nations that binding mechanisms on all nations, big and small can be secured. The Fair and Transparent Arbitration mechanism on debt can be built under the UN as a delegated authority.

Although the UN is currently dominated by powerful nations, it still has to protect the interests of all, especially the weaker nations. Anything short of this can only lead to a chaotic universe with all undesirable consequences.

It is possible to establish a debt arbitration court, for example, currently there is the International Centre for Settlement of Investment Disputes (ICSID) and The Permanent Court of Arbitration which deals with various arbitration issues especially in the commercial field.

It is desirable that an International Treaty set up the proposed Court under the auspices of the United Nations on the basis of the fact that members of the United Nations in Article 3 of the United Nations Charter have agreed to “*settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered*”. A General Assembly Resolution of 1970, after quoting Article 2 (3), of the UN Charter proclaims that: “*States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.*”¹

The Court could be composed of not more than five arbitrators from both the Debtor and Creditor sides with an independent arbitrator to ensure impartiality. This kind of composition has been used in other arbitral tribunals. However, such a court could also maintain a panel of arbitrators from which parties can choose. It would have a secretariat to provide the necessary organisational support. Existing facilities such as courtrooms, library, and consultation rooms belonging to the Permanent Court of Arbitration in The Hague could be accessed.

Justifications for debt arbitration are that Debtor countries do not have the courage to face their Creditors, who are also their donors, and challenge them. Even the thought of a Debtor cartel seems quite remote for the weak poor nations of the Third World. This problem therefore needs to be resolved as a global problem.

At a Meeting of civil society organisations in Lusaka in 1999, it was declared that a failure to secure debt cancellation by December 31 2000, the Jubilee deadline, should prompt civil society to call for debt repudiation by debtor countries. This option seems quite remote since most governments of the HIPC's are far too weak to challenge the powerful nations of this world. A structural change, an Arbitration Court, might be more feasible and sustainable.

Debt arbitration is a promising way to go in order to alter the global financial system, address the inefficiencies of the market, and ensure morality and humanity for the good of the majority.

¹ General Assembly Declaration on principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), October 24, 1970. The resolution was adopted by the General Assembly without a vote. See also J.G. Merrills, *International Dispute Settlement*, 2nd Ed. Cambridge (Supra), at P2