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The Concept of Odious Debt: Some Considerations

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Abstract

Despite the popularity of the term among advocates of debt forgiveness, there is little agreement on a workable definition of “odious” debts and there are but few examples where the concept has been invoked in law to justify non-payment of sovereign debts. Most often, these have been cases when a successor state or government has refused to honor certain debts contracted by its predecessor state or government. Repudiating sovereign debts on broader grounds—such as that money may have been misused by the borrower or that results were not as hoped for at the outset of lending—would create real risks not only of reduced financial flows to poorer

countries as a result of the danger of ex post challenges to lenders’ claims, but also of moral hazard and lack of project ownership. This paper presents a discussion of the extant legal and financial environment facing developing country sovereign borrowers and develops a proposed approach within this environment to address issues of concern underlying the concept of odious or illegitimate debt. The authors make the case for focusing attention on codes of conduct along the lines of the Equator Principles and on refining forward-looking attempts to increase aid effectiveness and recover stolen assets.

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THE CONCEPT OF ODIOS DEBT:

SOME CONSIDERATIONS

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I. INTRODUCTION

The debate on odious debts has grown in intensity in recent years, and not only in the international legal literature.¹ The concept has been invoked by some advocacy groups and civil society organizations in their manifestos for unilateral debt repudiation by developing countries. A few years ago, the concept was used as a possible justification for canceling the debts of post-Saddam Iraq. Yet, to different users, the expression “odious debts” may mean different things, largely because they use it to achieve different objectives. It is hardly surprising, then, that the participants in this debate tend to speak past each other. Within this context, the purpose of this discussion paper is modest:

- examine the main features of the traditional concept and categories of odious debts, and briefly examine whether a rule allowing the repudiation of odious debts may be said to have emerged in international law (Section II);
- consider recent attempts to expand the traditional concept and categories of odious debts, and ask whether they are sufficiently precise to contribute to the solution of the problems they are meant to address (Section III); and
- identify ways in which lenders and borrowers can address, or have indeed addressed, the underlying concerns to the concept of odious debts (Section IV).

¹ For example, *The North Carolina Journal of International Law and Commercial Regulation* held its seventh annual symposium, in February 2007, on the topic of odious debts, with the participation of academics and practitioners. As a result of this symposium, the Summer 2007 issue of that *Journal* was dedicated entirely to odious debts.

In other words, the modest objective of this discussion paper is to provide a summary of the terms of the debate on what remains a controversial subject and to examine how the underlying motivating forces driving the debate can be addressed in a constructive way.

II. TRADITIONAL CONCEPT AND CATEGORIES OF ODIUS DEBTS

In its initial use, the expression “odious debts” identified those debts that a state or a government had contracted with a view to attaining objectives that were prejudicial to the major interests of the successor state or government or of the local population. The debts thus identified are those contracted with an international legal subject (a state) under legal agreements governed by international law.² The issue of the existence of an international legal doctrine on odious debts can arise within the context of litigation both before international courts and arbitral tribunals and before national courts.³ With respect to financial agreements governed by a national legal system, the question (which will not be addressed in this paper) is whether a national, as opposed to an international, doctrine on odious debts exists.⁴

² A debt contracted by a state with a non-sovereign may give rise to an international claim through diplomatic protection, but this possibility will not be examined here.

³ For this latter case, see, for example, the reference to the fact that “the [People’s Republic of China] asserted as a long-established principle of international law that ‘odious’ debts are not to be succeeded to... a view they continue to advance, but do not explicitly rely on, in making this motion to dismiss” in *Marvin L. Morris, Jr., Plaintiff, against The People’s Republic of China, et al., Defendants. Gloria Bolanos Pons, et al., Plaintiffs, against The People’s Republic of China, et al., Defendants*, United States District Court for the Southern District of New York, 478 F. Supp. 2d 561; 2007 U.S. Dist. LEXIS 20784 (March 21, 2007, decided).

⁴ Ashfaq Khalfan has written that, at present, “it is unclear whether the laws of England and of New York, properly interpreted, provide support for the ‘odious’ debt doctrine. Given the interest of these jurisdictions in maintaining their positions as key financial centers, their courts are likely to reject the ‘odious’ debt doctrine.” (Sites and Strategic Legal Options for Addressing Illegitimate Debt, *Advancing the “odious” Debt Doctrine [CISDL working paper]*, 71.) While an argument based on the doctrine of odious

The operational area of the traditional concept and categories of odious debts, unlike their expanded concept and categories that will be examined in Section III below, is the succession of states and governments. International law requires, as a rule, a successor government to honor the public debt of a predecessor regime.⁵ However, if the question is not one of succession of governments but is one of succession of states, the law becomes uncertain. The extent to which a successor state is bound to honor the public debts of the replaced state is a matter of controversy. The solution reflected in the 1983 Vienna Convention on succession of states in respect of state property, archives and debts,⁶ providing for the passing of the public debt to the successor (unless it is a newly independent state) with a reduction according to an equitable proportion, is not immune from difficulties,⁷ and may be part of the explanation why the Convention has not universally been accepted and has not yet entered into force. In any event, the assumption for the operation of a doctrine of odious debts is that, save for the application of this doctrine, the debt in question would be binding on the successor state or government.

Historically, the theory of odious debts has mainly been developed in the writings of “Anglo-American jurists”.⁸ For example, the well known English lawyer John Westlake discussed odious debts (even though without using this heading) in his treatise

debts may not succeed in municipal courts, other arguments (which are as varied as the existing legal systems) may succeed in reaching the same result.

⁵ See *Oppenheim's International Law. Peace* (9th edn. Jennings and Watts, 1992), vol. I, 205.

⁶ Doc.A/CONF.117/14. The text of the Convention is electronically available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf. By the end of August 2007, only seven states had acceded to the Convention.

⁷ See Brownlie, *Principles of Public International Law* (6th edn., 2003), 625-6.

⁸ “Ninth report on succession of States in respect of matters other than treaties by Mr. Mohammed Bedjaoui, Special Rapporteur – draft articles on succession in respect of State debts, with commentaries”, *Yearbook of the International Law Commission* (1977, vol. II, Part 1), para. 115.

on international law at the beginning of the last century.⁹ However, the name most often linked to the emergence of a doctrine of odious debts is that of Alexander Nahum Sack, who wrote in the 1920s on the subject, when he lived in Paris as a Russian expatriate. In his principal writing on the topic, Sack identified three categories of odious debts, namely (a) “regime debts” (when a despotic regime “contracts a debt, not for the needs and in the interest of the state, but to strengthen its own despotic regime”),¹⁰ (b) “subjugation debts” (when the government “contracts debts to subjugate the population of part of its territory or to colonize it by members of the dominant nationality”),¹¹ and (c) “war debts” (when the government of a state contracts debts “with a view to waging war against another state”).¹² This tri-partition has proved helpful in the treatment of the topic by later writers and will therefore be adopted in this discussion paper as well.

War/subjugation/regime debts

There have been cases, in state practice, where a successor state has rejected war debts contracted by a predecessor state to sustain its war effort against the former. A case in point is the treatment of South Africa’s war debts when Great Britain annexed the Transvaal in 1900, after the Boer War. The Crown Counsel, in their opinion to the Colonial office, denied the existence of any international legal principle that would compel the British Government to recognize obligations incurred during the war or in

⁹ Westlake, *International Law. Part I. Peace* (2nd edn., 1910), 78-83.

¹⁰ “Si un pouvoir despotique contracte une dette non pas pour les besoins et dans l’intérêt de l’Etat, mais pour fortifier son régime despotique”, in Sack, *Les Effets des transformations des états sur leurs dettes publiques et autres obligations financiers. Traité juridique et financier* (1927), 157.

¹¹ “Lorsque le gouvernement contracte des dettes afin d’asservir la population d’une partie de son territoire ou de coloniser celle-ci par des ressortissants de la nationalité dominante”, *ibid.*, 158.

¹² “Ce sont les dettes conclues par le gouvernement de l’Etat en vue d’une guerre avec un autre Etat”, *ibid.*, 165.

contemplation of the war. However, there have also been cases in the opposite direction where, for considerations of political expedience, successor states have assumed the war debts of predecessor states, such as the assumption of a percentage of the Austrian war debts by the former Czechoslovakia after the First World War.¹³ This uneven practice has induced such an attentive observer as Feilchenfeld to doubt whether a specific international customary rule has emerged exempting war debts from assumption in the case of annexation or dismemberment.¹⁴

The classic case of rejection of a subjugation debt is the repudiation, by the United States, of the Cuban debts contracted by Spain allegedly on the ground that they had been imposed on Cuba against its will and that they had not been contracted for Cuba's benefit, but only to keep Cuba under Spanish domination and to suppress Cuba's war of independence. In opposition to this claim, Spain made the argument that these debts had been contracted on behalf and for the benefit of Cuba and, indeed, had contributed to the island's economic development. The 1898 Treaty of Peace, which ended the dispute, seemed to uphold the United States argument, in that neither the United States nor Cuba assumed the subjugation debts contracted by Spain. However, in this case too (as in the case of war debts), the view that a successor State should be relieved of responsibility for any debt contracted by a predecessor State to subjugate a territory did not go unchallenged. For example, Frantz Despagnet remarked in 1905, commenting on the *affaire* of the Cuban debts, that this view "opens the way to all manner of disputes as to the utility of expenditure incurred by the dismembered country

¹³ For the cases of the South African and Austrian war debts, and other instances from state practice, see Bedjaoui's "Ninth Report", paras. 141 to 156.

¹⁴ Feilchenfeld, *Public Debts and State Succession* (1931), 718-21.

for the portion that is separated from it; it encourages the most arbitrary and most iniquitous solutions.”¹⁵ Nor has the practice of states been consistent in its application. For instance, while declaring its readiness to assume certain debts before the Dutch capitulation to Japan on March 8, 1942 (Java), and April 7, 1942 (Sumatra), Indonesia refused to assume various debts after those dates, especially those resulting from Dutch military operations against the Indonesian national liberation movement. At a Round Table Conference in 1949, Indonesia and The Netherlands agreed on a formula of debt apportionment that departed from the principle of repudiation of subjugation debts.¹⁶ While the agreement reflecting this apportionment was later denounced by Indonesia, it remains questionable whether a customary international rule allowing the repudiation of subjugation debts really exists.

As a rule, arguments based on the non-enforceability of war and subjugation debts have been used within the context of state succession. The case of regime debts is different. The argument here is that, despite the continuity of the state, there has been a change in government and the successor government refuses to honor the debts contracted by the predecessor regime on account of their having been contracted in the exclusive interest of the predecessor regime, and not to the benefit of the state or its population. The traditional example is that of the loans extended by the Royal Bank of Canada to Frederico Tinoco, a former Secretary of War of Costa Rica who, at the time of the loans in question, was the head of the Costa Rican government, after having

¹⁵ Despagnet, *Cours de droit international public* (3rd edn., 1905), 111, quoted in English translation in Bedjaoui’s “Ninth Report”, para. 165. Despagnet’s original French text reads as follows: “Cette manière de voir ouvre la voie à toutes les contestations sur le caractère utile des dépenses faites pour le pays démembré pour la portion qui est détachée de lui; elle favorise les solutions les plus arbitraires et les plus iniques.”

¹⁶ On the Cuban and Indonesian subjugation debts, see Bedjaoui’s “Ninth Report”, paras. 157 to 170.

overthrown the previous government in 1917. Tinoco's government lasted two years, and the loans were contracted in the months before he left the country. Great Britain started arbitral proceedings against Costa Rica to force the new Costa Rican government to honor Tinoco's debts. The sole arbitrator (William Howard Taft, a former US President and, at the time of the arbitration, the US Chief Justice) held that the transactions involving Tinoco were "full of irregularities" and that the Royal Bank of Canada knew that the money would benefit only Tinoco, not the state or the people of Costa Rica. The new Costa Rican government was therefore right in declining its responsibility for the repayment of the loans.¹⁷ In this arbitral award, there was no recognition of any international customary norm allowing a successor government to repudiate the debts contracted for personal gain by the predecessor government. Rather, there was a factual analysis of the irregular transactions and the consideration that the lender knew of the use of the funds.

Is there an international legal norm on "odious" debts?

Treaties of peace and other international agreements may have indirectly recognized the claims of successor states to repudiate war and subjugation debts, but they have not led to any codification treaty embodying a general rule on odious debts. The International Law Commission (a subsidiary organ of the United Nations General Assembly entrusted with the task of codifying and progressively developing international law) was faced with a proposal to include an article on odious debts in its draft articles on

¹⁷ Arbitration between Great Britain and Costa Rica, 1 *United Nations Reports of International Arbitral Awards* (1923), 369.

the succession of states in respect of state property, archives and debts, which draft articles were the basis for the international conference that adopted the 1983 Vienna Convention mentioned above. However, having discussed the proposed articles presented by its Special Rapporteur (Mohammed Bedjaoui, who would later become President of the International Court of Justice), the Commission concluded that “the rules formulated for each type of succession of States might well settle the issues raised by the question and might dispose of the need to draft general provisions on it.”¹⁸ Without entering into the details of this conclusion, it will be sufficient to note here that the International Law Commission (a) declined a request to adopt a draft article on odious debts, and (b) in doing so, remarked that the practical issues that the concept of odious debts is intended to address could be settled in other ways.

A similar conclusion can be reached regarding the question of whether a rule on odious debts has developed in the other main source of international law besides treaty, namely international custom.¹⁹ International law distinguishes mere usages from customs. A usage is a practice that does not reflect a legal obligation, such as the ceremonial tradition of saluting at sea. A custom, on the other hand, is a consistent and general practice (the objective element of custom) accompanied by a sense of legal

¹⁸ “Report of the International Law Commission on the work of its thirty-first session”, *Yearbook of the International Law Commission* (1979, vol. II, Part 2), para. 43.

¹⁹ For the limited purposes of this discussion paper, there is no need to examine the third source of international law listed in Article 38(1) of the Statute of the International Court of Justice, namely the “general principles of law recognized by civilized nations”. In the committee of jurists that prepared the Statute (for what, at the time, was the Permanent Court of International Justice) there was no consensus on the meaning of this phrase. Moreover, despite occasional references to general principles (sometimes comingled with equitable considerations; e.g., Howse, 2007) in the legal literature on odious debts, there is hardly any sustained effort to investigate a plurality of national legal systems (assuming such principles have their origin in national law) with a view to showing that the exception to the repayment of odious debts is indeed a “general principle of law recognized by civilized nations”.

obligation (the subjective element of custom, called *opinio juris*). By comparison with treaty law, a distinctive feature of custom is its general sphere of validity, whereby a customary norm (other than a local custom) is binding on all states, except for those that have objected to it since its very inception (the so-called principle of the “persistent objector”).²⁰

In the case of odious debts, there have undoubtedly been instances, such as the ones mentioned above, in which war, subjugation or regime debts have been repudiated and found not to be transferable to a successor state or government. However, it is highly doubtful whether these instances have amounted to a general practice and whether the states and governments concerned have acted with the conviction of following a legally binding rule. In other words, it is questionable whether the two constitutive elements of international custom, i.e. general practice and *opinio juris*, have materialized in the case of an alleged international customary rule on “odious” debts or, better, an exception based on customary international law to the operation of the principle *pacta sunt servanda* on treaty compliance.²¹

This is also the conclusion reached by two practitioners who, while recently investigating the question whether there is a recognized legal doctrine of odious debts in

²⁰ On the principle of the “persistent objector”, and the question whether it applies also to norms of *jus cogens*, see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 59-72.

²¹ Article 26 (*pacta sunt servanda*) of the 1969 Vienna Convention on the law of treaties reads as follows: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” The Vienna Convention entered into force in 1980. Its text is electronically available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

customary international law, have concluded that “neither the threshold for state practice nor *opinio juris* have been met.”²²

A fortiori, the attempts that have been made to link odious debts to the invalidity of treaties for the violation of norms of *jus cogens* remain controversial. Pursuant to Article 53 of the Vienna Convention on the law of treaties (an article which is regarded by many as reflecting customary international law, and therefore binding on all states), a treaty is void if it is in conflict with a peremptory norm of general international law (*jus cogens*), namely a norm “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²³ What would be the norm, the derogation from which would determine the nullity of a financial agreement extending an odious debt? Obviously not an international norm on odious debts which, as was noted above, is hardly an international customary norm, let alone a norm “accepted and recognized by the international community of States as a whole” (an expression implying a higher burden of proof). If, on the other hand, the norm in question were meant to be one of the classic examples of *jus cogens* (such as the prohibition of genocide or acts of aggression), the difficult task, to be

²² Yianni and Tinkler, “Is There a Recognized Legal Doctrine of Odious Debts?”, 32 *The North Carolina Journal of International Law and Commercial Regulation* 749 (2007), at 771. In a 2007 monograph headed *Uncostitutional Regimes and the Validity of Sovereign Debt. A Legal Perspective*, Sabine Michalowski observed that “the doctrine of odious debts as a principle of international law stands on rather weak ground” (at 45, footnote omitted), though, according to the same author, “the arguments invoked in favour of the odiousness of large parts of the debt of developing countries are important in order to raise awareness of the fact that many of the loans which contributed to the debt problem of the developing world stem from morally and legally questionable operations” (at 67).

²³ Article 64 of the same Vienna Convention embodies the principle of *jus cogens superveniens*: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

assessed on the specific circumstances of each case, would remain of establishing a link between such a norm and the financial agreement in question. This leads to the conclusion that the class of debts that could be classified as odious because of the derogation of a norm of *jus cogens* would be narrow indeed, if existing at all.

Weaknesses in declaring *ex ante* that certain regimes are “odious”

A different proposal that has recently been put forward, and which constitutes a convenient bridge between the traditional and the expanded concept of odious debts, is to have some internationally accepted entity or individual(s) to declare *ex ante* that certain regimes are “odious”.²⁴ This would put lenders on notice that loans to such regimes could be repudiated by successor regimes with the support of the international community unless, of course, the lender could demonstrate that due diligence had been used to ensure the loan proceeds were used for legitimate purposes. But even such a seemingly appealing approach has many weaknesses. First, who — individual, group, agency, or institution — would declare *ex ante* that regimes are “odious”? Second, on which decisive factors would this arbiter distinguish “odious” from non-odious regimes: unrepresentative government, ethnic cleansing, racial discrimination, denial of fundamental human rights? Third, how would such declarations be treated in national courts having jurisdiction to resolve debt disputes? Although, as one writer has recently

²⁴ See Jayachandran and Kremer, “Odious Debt”, 96 *The American Economic Review* 82 (2006), electronically available at www.stanford.edu/~jayachan/odious_debt.pdf#search=%22Jayachandran%20Kremer%20%22odious%20debt%22%22.

put it, the problems with the *ex ante* model “may outweigh its advantages”,²⁵ there is of course nothing preventing governments (as has indeed happened) from imposing sanctions on, and prohibiting lending to, regimes that they consider “odious”, either unilaterally or through their participation in international organizations.²⁶

Conclusion

Three conclusions may be drawn from the analysis developed in this section. First, the traditional concept of odious debts is not open-ended but is instead restricted to easily identifiable categories (war, subjugation, and regime debts), discussed within the context of the succession of states or of governments. Second, even within these strict limits, no customary international rule (let alone a norm of *jus cogens*) allowing the repudiation of odious debts seems to have emerged from the scattered instances of state practice and arbitral decisions, nor has any codification treaty embodied an exception based on the odiousness of the debt.. Third, proposals to declare *ex ante* that certain

²⁵ King, “Odious Debt: The Terms of the Debate”, 32 *The North Carolina Journal of International Law and Commercial Regulation* 605 (2007), at 659. This writer identifies three main problems with this approach: “The first problem is that such an institution [entrusted with the task of designating certain regimes ex-ante as “odious”] will likely designate very few regimes as odious... A second problem is that declaring a regime, rather than a set of actions, to be odious is a rather ‘nuclear’ type of option and is unlikely to be deployed until the regime reaches pariah status... Both the first and second problems lead inexorably to the third, and indeed perhaps the most significant problem: if a given regime is not so designated, a creditor can rely on this fact in lending to it. In other words, and quite ironically, the idea of calling this model the ‘due diligence’ model is highly misleading. It would eliminate the need for any diligence at all.” (Ibid., 659-60.)

²⁶ Under the United Nations Charter, the Security Council can take, pursuant to its powers in the area of peace and security, decisions binding on states. On this ground, the Security Council has decided on economic sanctions and prohibited states from undertaking certain financial transactions with targeted states. However, even in such rare instances, all the Security Council can do is create a legal obligation for states not to enter into financial transactions. The authority of the Security Council does not extend to rendering invalid such transactions. In other words, non-compliance by a state with a Security Council’s prohibition to enter into a financial transaction would trigger the international responsibility of such a state, but not the invalidity of the financial transaction in question.

regimes are “odious” have their own weaknesses, some practical and some conceptual, and have consequently attained little traction. It is therefore not surprising that Iraq and South Africa, just to take two recent examples of countries with new governments that inherited large sovereign debts, chose not to repudiate those debts unilaterally on grounds that they were “odious”, but instead chose to negotiate a debt restructuring with their creditors.²⁷

²⁷ The reference to these two cases is limited to the fact of the final decision to negotiate a debt restructuring as opposed to repudiate “odious debts” unilaterally. These decisions were obviously the result of the specific circumstances prevailing in these two countries (as is always the case for such decisions), which need not be analyzed here.

III. EXPANDED CONCEPT AND CATEGORIES OF ODIIOUS DEBTS

While the debate on the traditional concept of odious debts focused on whether debt obligations may be repudiated by successor states or governments under exceptional circumstances, recent decades have seen a rising chorus of demands by non-governmental and civil society organizations to apply the concept of odious debts to new and different sub-categories. The objectives behind these demands are as different as the groups advancing them. Some may be seeking a legal basis for the cancellation of debt owed by developing countries. Others may want to punish international lenders for what they see as irresponsible and reckless lending. And yet others could be keen to suppress “odious” regimes by starving them of the flow of capital.²⁸

There are several respects in which the revived concept of odious debts and its newly articulated sub-categories differ from the traditional concept and categories that have just been examined. First, the limited setting of succession of state or government has been abandoned, with the consequence that the new concept is advocated in the case also of state or governmental continuity. Second, instead of a case-by-case analysis of individual loans with a view to determining whether they have given rise to odious debts, there is a tendency to proceed to an overall assessment not so much of the financial transactions in question as of the “odious” nature of the borrower (i.e. there would be

²⁸ These three examples do not exhaust the universe of motivations. Other examples include those who may be looking for a legal defense to protect themselves against creditors seeking repayment, or those attempting to carve a role for themselves as international arbiters of disputes between international creditors and sovereign borrowers.

“odious” debtors rather than “odious” debts).²⁹ (Such an extension rests in part on the concept of fungibility, namely that loans ostensibly provided for one purpose can release monies already allocated for that purpose to be used for an entirely different purpose, with or without the knowledge of the lender.) Third, greater emphasis is placed on the lender’s actual or presumed knowledge (and ensuing accountability) of how the borrowed funds will be used by the borrower. Fourth, unlike the traditional concept and categories of odious debts considered above, there is no appeal to any international customary rule that would justify the new concept and categories, the stress being rather on the moral or political unacceptability of repayment.

This expanded concept of odious debts and its various sub-categories can be found in some of the international literature and in advocacy materials produced by various non-governmental organizations. But these documents often lack the precision necessary to allow for a meaningful debate. For example, sometimes within the same article, the epithet “odious” is ascribed to lenders, regimes, countries, or debts. And within these writings one can identify different categories of odiousness. For reasons of convenience, this paper has chosen to focus on three — “criminal”, “unfair”, and “ineffective” debts.³⁰ While it is not easy to find a common thread that connects them, the term “illegitimate” is sometimes used as a term encompassing all these categories. (At other times, however, this term is described in a category of its own.)

²⁹ See the paragraph on declarations *ex ante*, in Section II above.

³⁰ While the present investigation is restricted to these three categories, the literature has spawned several other categories of odious debts, including “unpayable” debts, “onerous” debts, “unsustainable” debts, “dubious” debts, “honorific” debts, etc.

“Illegitimate debt” is, according to the definition provided by Hanlon, a debt “that the borrower cannot be required to repay because the original loan or conditions attached to that loan infringed the law or public policy, or because they were unfair, improper, or otherwise objectionable.”³¹ The key implication of this strand of argument is that it imposes a greater measure of legal responsibility on creditors, even when creditors do not have the power or the authority to control the borrowers’ actions once the loan is disbursed. It is such considerations that have led to the concept of “know your client” in retail and commercial banking, and requires lenders to guard against reckless behavior.³²

“Criminal” debts

The category of “criminal” debts encompasses loans that involve corruption and kickbacks. Proponents of this category argue that debt repayments by a country are unjust when the original loans to their governments are stolen by officials or businessmen, or where the debt is incurred to rescue an economy ravaged by corruption. In contrast, domestic financial transactions or loans that are misused as a result of corruption are considered to be completely different and do not fall within this category. They are

³¹ Hanlon, “Defining ‘illegitimate debt’: when creditors should be liable for improper loans”, in Jochnick and Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (2006), 125. In another paper, Hanlon has defined “illegitimate debt” as “loans which are so bad that by making them a bank has failed in its fiduciary responsibilities, and has no right to collect on those loans.” (Wolfowitz, the World Bank, and Illegitimate Lending, 13 *Brown Journal of World Affairs* 41 [2007].)

³² Patricia Adams (2005) writes: “Already, private sector financiers are careful to establish their due diligence and evidentiary basis to defend today’s loans in future.” Letters to the Editor, *Finance and Development*, Vol. 42: No. 2, June. It should also be noted, however, that much sovereign lending takes the form of more generalized financial support, whether through general budget support from official lenders or bond financing on international capital markets: in these cases the issue of the use of funds is obviously rendered rather vague.

instead categorized as purely domestic affairs that are consequently the subject of national law and domestic legal procedures.

An essential ingredient of this line of reasoning is that international lenders should be made wholly or partly responsible for the fiscal burden of the misuse of the loan if either (a) they were aware in advance that a part of the loan would be illegally siphoned off, or (b) they had the leverage to prevent (or at least greatly diminish) the illegal misuse of such loans.

Attractive as the above line of argument may seem, various considerations weaken it. First, once a loan is committed and disbursed by a lender to a sovereign borrower, any subsequent transaction between the sovereign and any other national unit, entity, or individual is, as a rule, a domestic financial transaction subject to national laws and legal procedures and is therefore usually outside the reach of international law. From this, it follows that the fiscal burden of any loss should be borne by the country, with the accompanying incentive on the country's law enforcement institutions to recover such losses from the corrupt perpetrators causing the loss.³³

Second, proponents of the concept of "criminal" debts are often unclear whether the required prior knowledge of lenders (as a necessary condition) should be with respect to any individual loan or more broadly to the financial climate within a country. Thus, while lenders may know that corruption exists in a country, they may not have any

³³ The point of the importance of incentives can be made the other way round: if any obligation to repay is rendered null by the misuse of funds, could this not create incentives for said misuse?

concrete knowledge in advance of plans to siphon proceeds from any individual loan (indeed such ignorance would appear highly likely, given that corrupt officials are not in the habit of advertising their intention to conduct an illegal activity). This raises the question of the burden imposed on creditors of the information they need to have in order to be held responsible for any wrongful act. For example, within the context of state-to-state relations, the International Law Commission has written, in its commentary on draft article 16 on state responsibility, that a state “providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act.”³⁴ The relevant point here is that it is not presumed knowledge, but actual knowledge, that may trigger responsibility.

Third, the proponents of the concept of “criminal” debts do not clarify how one can assess the lender’s ability to influence the borrower’s actions, and therefore the extent to which an international lender can be held responsible for the alleged corruption of the nationals of the borrowing country.³⁵

³⁴ Para. (4) of the commentary on draft article 16 (Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001), electronically available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

³⁵ Overstating the “policy reach” of lenders to sovereigns is not a phenomenon limited to the debate about the legitimacy of debts; and this can lead to inconsistencies. For example, the debate around the concept of “conditionality” often reflects an assumption of a particularly strong form of conditionality on the part of its opponents, in which the lender exerts an extremely high degree of control over the borrower’s actions. Ironically, when such control is not exerted and bad outcomes follow – for example in the case of “criminal” debts – greater control by lenders is then deemed not only feasible but also desirable.

“Unfair” debts

The category of “unfair” debts would include a wide variety of debts which have either been incurred for activities considered inappropriate, or which contain unacceptable conditions, such as usurious interest rates or policy demands inconsistent with the borrower’s national law.³⁶ (The international law equivalent would be lending that would violate the purposes and principles contained in Articles 1 and 2 of the United Nations Charter, including such all-encompassing principles as the prohibition of aggression, the protection of fundamental human rights, and self-determination.)

In the context of national law, it should be noted that courts *have* determined that repayment demands can be considered illegal on the grounds that the terms of the original loan were usurious, that the lenders perpetrated fraud on the borrowers, or that the lenders broke other national laws in order to extend the loan.

³⁶ E.g., Jubilee (UK) refer on their website to “debts that a country can’t afford to repay without meeting its people’s basic needs;... debt on unfair terms, such as very high interest rates; and debts contracted illegally, where proper processes weren’t gone through” (www.jubileedebtcampaign.org.uk). We therefore use the term “unfair” here to cover a variety of categories from the literature, not all of which themselves use this term, but where the implication is clear.

“Ineffective” debts

Finally, the category of “ineffective” debts can be defined to be that of loans that do not reach their developmental purpose and loans directly linked to capital flight. This line of argument differs from the previous two in that it recognizes that projects could fail and development purposes of loans may not be reached even when there is no corruption and all applicable national and international laws are followed.

Such a line of argument needs careful scrutiny, for its equivalent would be that domestic lenders to private borrowers should not be repaid when commercial projects fail. This, of course, is not the usual practice in most financial systems. On the contrary, when commercial projects fail on account of commercial risk, bankruptcy laws almost without exception require that lenders be among the first ones to be repaid (after all production costs and arrears to suppliers have been met). Indeed, from a financial perspective this is the defining characteristic of debt contracts, as opposed to other financial contracts, such as equity participation. In international lending, especially to poor countries for developmental purposes, the risks of failure are just as high, if not higher, than those faced in private transactions. If one thing has been learnt from the post-war experience of international cooperation, it is that development finance is a risky enterprise in which a certain degree of project failure is inevitable given the multiplicity of the challenges poor countries face. It is faulty logic to suppose that one can secure only those development successes that all agree are crucial without taking the risks that entail failure from time to time.

But there is more to the question of lender responsibility than realism about outcomes. National financial laws do not require lenders to pay the costs for project failure for two reasons: first, the act of lending usually cannot be considered the proximate cause of the failure of the project or activity, under any scenario; second, and more important, it could potentially create incentives for irresponsible behavior by borrowers (so-called “moral hazard”), because the costs would be born by the lenders. In economic terms, debt contracts are “incentive compatible” with maximizing the chances of project success, because they make those responsible for project execution – the borrowers – the sole beneficiaries, at the margin, of that success.

Another line of argument for declaring “ineffective” debts as “odious” derives from a more sophisticated line of reasoning. The essence of this argument rests on the principle that advisers to governments should be held legally accountable for their advice, and that failed projects are sometimes the result of poor advice provided by the lender. Where loans and advice are bundled together, the liability of the adviser for a failed project should be the non-payment of the loan itself.

However, upon examination, even this more sophisticated line of reasoning is subject to many of the same shortcomings as above. First, finding the advisers to be responsible for the failure would require isolating their advice from the more general context of the country’s circumstances and identify it as the sole or even the main cause of the failure. Second, even if it can be established that the advisors are responsible for

giving poor advice, there is little logic to suggest that this should result necessarily in refusing loan repayments. There are no contracts which underwrite advisory services with loan non-payment. Third, a legal system making advisers culpable for failure (i.e. considering them to have undertaken an obligation of result — “obligation de résultat” — rather than an obligation of means — “obligation de moyens”) would prevent any delivery of technical advice, especially if that technical advice is provided for free or as part of a broader aid package (much as making non-payment an outcome of financing a failed project would lead to a drying up of development finance: see below). And, fourth, the incentive structure of such a possibility still exacerbates the dangers of “moral hazard”, because it would encourage the reckless use of loans if there is a sense that the cost of failure would be borne by others.

Conclusion

It is difficult to infer, from the wide literature on the topic, a clear concept of odious debts in the expanded versions in which the term is used today. The categories that are proposed often overlap, they lack clarity, and they tend to apply the concept with equal facility and often at the same time to loans, regimes, countries, and debts. This lack of precision, and the array of practical objections that confront them, make it difficult to accept an expanded concept of odious debts based on current proposals, although such conceptual expansion has often been advanced in recent discourse (while it has not been reflected in the practice of states).

It is important to establish what such a rejection does and does not imply. There is no doubt that on occasion, lenders, whether through a lack of diligence or a misunderstanding of the needs of the borrower, contribute to poor outcomes in the sovereign states they finance. Independent evaluation of impact, quality-at-entry assessments, and operational safeguards all exist to minimize this risk but can equally be taken as evidence that the risk is real. The key element of the approach proposed by proponents of an expanded odious debt doctrine is that in some subset of these cases borrowers ought to repudiate their debts, that they should be provided with a new legal basis for doing so, or that they should do so at the determination of some newly created international arbiter.

That such a system could be set up is not at issue; its likely consequences are, however, the crux of the debate. As set out above, there are very clear reasons why much finance – including development finance to sovereign states – is provided in the form of debt. The reflows from successful repayments allow a leveraging of the scarce overseas development assistance provided by donors, vital if the millennium development goals are not to remain an illusion for many countries. Lenders' systems need to provide maximum due diligence to make sure that funds lent contribute to success in the borrowing country. But just as fundamentally, debt contracts keep the bulk of the incentives for success where they should be, at the level of the use of the funds provided, which means at the level of the borrower. It may be that there is scope for other forms of financial contracts within the architecture of development finance – for example, greater

equity stakes taken by international institutions in certain projects – to better align the incentives for success when borrowers may not be the main parties involved in project execution. But such an assertion is a long way from encouraging the repudiation of contracts, something that as a general policy prescription is not the way to build an investment climate propitious for economic growth and social development.

Of equal concern are the likely effects of a legalistic approach to odious debts on development finance. Lenders' ability to keep providing finance to poor countries, whether in the official sector or the private sector, depends on their balance sheets, present and future. Lenders would be obliged to “price in” the future possibility that their loans would at some undetermined point in the future, and possibly despite their best efforts, be declared odious. The likely effects on the flows of finance to developing countries are not hard to discern.³⁷ This would be doubly counterproductive at a time when donor countries are aiming to increase – not decrease – financial flows to the poorest nations in pursuit of the millennium development goals.

A different approach is therefore required to address the concerns that motivate many of the proposals that are grouped under the banner of odious debts. The various facets comprising this approach are the subject of the next section.

³⁷ See e.g., Rajan (2004) for a compelling account on this topic.

IV. IMPROVING LENDING AND BORROWING PRACTICES

The proponents of the expanded concept of odious debts, which was discussed in the previous section, argue that lenders must be held accountable for “illegitimate” debts. The underlying objectives for such a proposition are in principle laudable, as they aim at ensuring that international lending to developing countries (a) diminishes corruption (or, at the very least, does not encourage it), (b) is conducted in accordance with national and international laws, and (c) is used effectively for developmental purposes. A further objective may be to provide some legal support for the unilateral repudiation of debts by sovereign borrowers.

The previous section has argued, however, that taking lenders to court to force them to meet these objectives runs into various problems, most serious among which is the risk of disrupting international financial flows to developing countries altogether. There are other means by which the same objectives can be met, and it may be more appropriate to focus on these. Should these measures be found to be insufficient, the best approach does not seem to be the conversion of uncertain concepts and categories into law but rather the rigorous identification of the problem, the assessment whether even partial answers to the problem already exist – and, if not, the search for reasonable solutions in the interest of borrowers and lenders alike – and the continued healthy functioning of the international financial system.

Fighting corruption in international lending

Perhaps, the most important factor motivating the call for the cancellation of odious debts is the conviction that loan proceeds are often embezzled by corrupt officials and leaders in the borrowing countries, leaving it to future administrations and generations to pay back the debts having received none of their benefits. Such corrupt practices deserve not only moral outrage but also a thoughtful reaction on how to deal with them most effectively. In addition to what can be done by national governments, elected bodies, and civil society organizations within countries (which are all essential components of the equation), external lenders too can commit to follow good lending practices that may help remedy the problem over time. Not least among such practices is to assess the pecuniary and non-pecuniary risks of lending, to disclose these fully to shareholders as well as to the borrower, and to develop ways to mitigate these risks such that the probability of the loan being misused is minimized. For example, lenders could, among other things, implement the following measures:

- Examine the overall governance standards in the borrowing country, including anti-corruption programs and measures.
- Projects considered at high risk of corruption could be required to include anti-corruption action plans that build on knowledge gained from the experience of implementing previous projects, and which draw on tried-and-tested requirements for transparency and oversight, possibly including enhanced disclosure provisions, civil society oversight, complaint-handling mechanisms,

policies to reduce opportunities for collusion, mitigation of fraud and forgery risks, and specified sanctions and remedies.

- Well publicized mechanisms need to be put in place that allow the public – and internal “whistleblowers” – to come forward if they have allegations of corruption, with adequate safeguards to protect them against possible reprisals. Such allegations will need to be investigated thoroughly by the lender as well as the borrowing authorities, in full conformity with national laws and regulations. Any evidence emerging from investigations of wrongdoing should be made public and handed over to authorities for appropriate action consistent with the laws and regulations of the country concerned.
- As a form of protection against the possibility that covenants in loan agreements may be breached and loan proceeds may not be used for their intended purposes, lenders should reserve the right to cancel part of the loan and seek reimbursement of any funds that have been misused. In addition, those found guilty should be prosecuted by the borrower governments to the full extent under national law.
- Mechanisms need to be put in place for the debarment of firms and individuals that are found to be participating in fraud and corruption. Every effort should be expended by governments and the international community to recover stolen government assets, including money stolen from sovereign loans. Not only could lenders and borrowers publicize instances of fraud and corruption and the remedial measures taken, but at the same time join forces to develop systems that make such crimes harder to commit.

The above examples of good lending practices can be complemented by new initiatives to strengthen the array of anti-corruption measures that countries can implement, such as the Stolen Assets Recovery (StAR) initiative of the United Nations Office on Drugs and Crime (UNODC) and the World Bank. In recent years, countries as diverse as Nigeria, Peru, and the Philippines have enjoyed some success in securing the repatriation of assets stolen by their corrupt former leaders. Success, however, has been neither easy nor quick. To help developing countries seeking to recover stolen assets more easily and effectively, the UNODC and the World Bank have jointly developed the StAR initiative. This initiative expands the ambit of traditional support to improve governance and anti-corruption practices within countries and brings in the “other side of the equation”: stolen assets are frequently hidden in developed country financial centers, and often include bribes paid by multinational corporations. This initiative will help the countries that are parties to it to implement the United Nations Convention Against Corruption (UNCAC), which entered into force in 2005 as the first global anticorruption agreement.³⁸ It will also develop pilot programs to help specific countries recover the stock of stolen assets by providing needed technical assistance while also supporting improvements in public financial management, investigative capacity and fiscal transparency to prevent future looting. Finally, StAR aims at helping countries ensure that recovered assets are used effectively in support of development through monitoring programs with the voluntary agreement of the countries concerned.

³⁸ The text of the Convention is electronically available at http://www.unodc.org/unodc/crime_convention_corruption.html.

Ensuring the “fairness” of loans

Just as lenders can play an important pro-active role in protecting their loans from fraud and corruption, they could also exercise appropriate due diligence to ensure that the loans themselves are the results of processes and procedures consistent with the laws of the borrowing country and expected good practice according to international standards.

These include:

- Providing ample opportunities within the country to comment on, criticize, and shape the proposed loan, and stressing a country representative’s freedom to decline the loan throughout its preparation, appraisal, and approval process.
- Subjecting loans to intensive preparation, evaluation, appraisal, and negotiation, with full participation by the authorities of the country concerned and, as and where appropriate, by civil society and other relevant groups, and disclosing to the public the final appraisal documents. Depending on the applicable laws, regulations, and procedures, this could include scrutiny by elected representative bodies.
- Requiring legal opinions regularly, from acceptable counsel, confirming that the loan agreement in question is legally binding in accordance with its terms and has been approved in conformity with the internal laws and procedures of the borrowing country.

Of course, such steps could raise the cost of loan preparation, and this could prove to be a disincentive for lenders (and borrowers, if it raises the cost of borrowing). On the other

hand, these increased costs of loan preparation may be seen as an investment in obtaining potential benefits: for the borrower, better use of the loan proceeds, and, for the lender, a lower risk of default on the loan.

Improving the effectiveness of loans

To meet the concerns that underlie proposals to declare “ineffective” debts as odious, lending institutions could adopt a variety of measures. Before considering these, it is worth reiterating one point: as a rule, loan agreements do not create a link between the final success of the loan proceeds and the borrower’s repayment obligation. The reason is simple. One of the key aspects of international lending to *sovereigns* is the borrower’s “ownership” and complete control of the use of the proceeds and the acknowledgment that the lender’s role is limited to assisting the borrower in achieving the aims it has itself decided and for which it has requested financial assistance. Moreover, as argued above, loan agreements usually do not include a link between the repayment obligation and the final success of the financial assistance because it is recognized that (a) the success of a project entails risks that are usually outside the control of lenders, who also face larger risks since they have less information than borrowers (so-called “information asymmetry”); (b) such a link would reduce incentives for borrowers to make the project a success (since part of the cost of failure would then be borne by the lender); and (c) such a feature in loan agreements would give these loans an equity, rather than a debt, characteristic.

International lenders could nevertheless engage in efforts to ensure that the risks of inappropriate use are managed to the extent possible. These could include the following:

- Covenants in loans could expressly require that the loan proceeds be used for their intended purposes, and subsequent supervision efforts, in which the borrower and the lender cooperate, should be designed to ensure that proceeds are being used for and achieving their intended purposes.
- Lending institutions could regularly conduct – together with the sovereign borrower’s authorities – evaluations of the use of their loan proceeds and whether such loans have achieved their intended purposes. These evaluations may be conducted independently of the management of these institutions and the results could be made public.
- If international lending institutions are aware that they are lending into a high-risk environment because the borrowing country’s economic management institutions are weak and controls over the use of public resources may be less than adequate, then there may be a case for applying even higher standards of probity and more stringent safeguards than normal. Of course, there are few objective indicators on which such judgments can be based, which makes international lending for development purposes highly risky in the first place.

Differentiating between official and commercial creditors

Good lending practices of the sort described in this section could apply to official as well as commercial creditors. Since the shareholders of official creditors are sovereigns, the policies of such financial agencies – bilateral and multilateral – tend to be driven by public policy considerations. Shareholders in these institutions tend to apply constant pressure to improve lending practices, in part because they are concerned about the development impact of the finance provided by these agencies, but also because they hear the concerns raised by non-governmental and civil society organizations in their own countries as well as in the developing countries. This pressure has led to improved lending practices in some official lending institutions, although the room for improvement no doubt remains considerable.

One might think that commercial creditors would have less incentive to improve lending practices – especially if implementing such practices imposes additional costs. But the existence of the Equator Principles suggests otherwise. The Equator Principles are a set of ten benchmarks against which 52 of the world’s most prominent commercial financial institutions have agreed to determine, measure, and manage the social and environmental risks associated with project financing.³⁹ One of the key motivations for this initiative was the perceived importance of mitigating credit and reputational risk – a good example of how commercial considerations can potentially lead to socially desirable results. Supported by the International Finance Corporation (one of the institutions of the World Bank Group), the Equator Principles also facilitate collaboration

³⁹ See <http://www.equator-principles.com/index.html>.

and learning between member financial institutions on the interpretation and application of broader good-practice lending policies.

Of course, good lending practices, whether by official or commercial lending institutions, while important cannot by themselves guarantee the appropriate use of loan proceeds for development purposes. The responsibility of achieving this result must ultimately rest with the borrower.

Dealing with unsustainable debt stocks

There is little doubt that, if loans become the subject of fraud, embezzlement, or corruption, such debts can quickly accumulate to the point that they become unsustainable. Proponents of the expanded concept of odious debts would like to see a legal basis for the unilateral repudiation of debt stocks if such unsustainable debts were found to be odious. But there are other ways to deal with the problem of unsustainable debt stocks.

It is important to observe at the outset that, while misused loans can quickly accumulate into unsustainable debts, not all unsustainable debts are the result of misused loans. Loans can be used well and yet not achieve their desired results simply because circumstances can change, the economic environment affecting investments can suddenly deteriorate for reasons outside governmental control, natural disasters can strike, or the design of the investment itself may have been faulty from the start. When such

unforeseeable situations (or “shocks”) occur, debts can accumulate in relation to the repayment capacity of the country.⁴⁰

That countries must either pay their unsustainable debts or repudiate them is a false dichotomy. In reality, countries have chosen the middle path of restructuring their debt when it has become unsustainable. Such restructurings usually involve losses to creditors and therefore tend to be the result of prolonged and complex negotiations. But they do provide a useful alternative to repudiation that allows borrowing countries to maintain good relations with their creditors. Iraq and South Africa are recent examples of countries where new governments inherited large sovereign debts but, rather than repudiating them, chose instead to negotiate their restructuring with their creditors.

In the case of commercial creditors, debt restructuring negotiations have been between the sovereign and creditors’ committees such as the London Club or, as in more recent cases, representatives of bondholders. With official creditors, debt restructurings have usually taken place in the context of the Paris Club, an informal group of official creditors whose role is to find coordinated and sustainable solutions to payment difficulties experienced by sovereign debtors. The most prominent recent examples of large Paris Club debt reduction deals are those for Nigeria and Iraq.

Multilateral creditors are governed by agreed international frameworks on the treatment of debt problems in developing countries.⁴¹ Most notable among these are the

⁴⁰ See Kraay and Nehru, “When is External Debt Sustainable?”, *The World Bank Economic Review*, Volume 20, Number 3, 341-65.

Heavily Indebted Poor Countries (HIPC) initiative and the Multilateral Debt Relief Initiative (MDRI), which together have provided – and are expected to provide further – significant debt reduction to the poorest, most heavily indebted countries of the world. These initiatives implicitly recognize that the debts accumulated by the recipient countries have reached a point where they cannot be repaid without imposing unacceptable hardship on the population.

In addition to participating in international debt reduction initiatives, some international lenders have independently and voluntarily forgiven debts they were owed by developing countries. The most recent example is that of the Norwegian government which, in the 2007 national budget, cancelled, *ex gratia* and not out of any legal obligation, NOK 520 million (\$78 million) of official debts owed by Ecuador, Egypt, Jamaica, Peru, and Sierra Leone stemming from the Norwegian Ship Export Campaign (1976-80). The Norwegian government considered this campaign a development policy failure and consequently assumed “shared responsibility” for the debts that followed. This debt cancellation is additional to Norway’s ordinary overseas development assistance.

⁴¹ There have been a few examples of commercial entities canceling their claims on similar grounds, but these have usually been as a result of pressure generated by negative publicity in the media.

Dispute resolution

Notwithstanding all the above measures that international lenders or borrowing countries can apply, disputes will inevitably arise between lenders and borrowers and must be settled. Usually, loan agreements include clauses on the settlement of disputes. For loans from commercial creditors to sovereign borrowers, the jurisdiction for the settlement of disputes belongs to national courts, such as those of New York or London, which may apply laws that protect debtors against litigants, who may be seeking repayment in spite of evidence of bribery or “unclean hands” on the part of the lender, or of corrupt agents or public officials embezzling state funds under cover of government bureaucracy. In the case of loan agreements to which international institutions are parties, the settlement of disputes is usually devolved to arbitrators, even though in practice such disputes are regularly solved by direct negotiations between the parties, without any need to resort to arbitration.

Conclusion

Many of the concerns that have been raised by proponents of the expanded concept of odious debts have been fueled by moral outrage and the need for a just system of international lending to sovereigns. Such concerns can be addressed by improved practices of international lenders and sovereign borrowers. Despite some promising steps in this direction, much remains to be done. Rather than relying on an elusive, expanded concept of odious debts, with the many costs to developing countries that this would

entail, it seems more practical to assess what can be done to improve lending and borrowing practices at a more quotidian level. This approach has the advantage of channeling the valid concerns that underpin the debate on odious debts in constructive and widely shared directions.

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