

THE DILEMMA OF ODIIOUS DEBTS

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Abstract

Public international law requires that states and governments inherit (“succeed to”) the debts incurred by their predecessors, however ill-advised those borrowings may have been. There are situations in which applying this rule of law strictly can lead to a morally reprehensible result. Example: forcing future generations of citizens to repay money borrowed in the state’s name by, and then stolen by, a former dictator.

Among the purported exceptions to the general rule of state succession are what have been labelled “odious debts”, defined in the early twentieth century as debts incurred by a despotic regime that do not benefit the people bound to repay the loans. The absconding dictator is the classic example.

The removal of Iraq’s Saddam Hussein in 2003 sparked a resurgence of interest in this subject. By enshrining a doctrine of odious debts as a recognized exception to the rule of state succession, some modern commentators have argued, a successor government would be able legally to repudiate the loans incurred by a malodorous prior regime. This, they contend, would have two benefits: it would avoid the morally repugnant consequence of forcing an innocent population to repay debts incurred in their name but not for their benefit, and it would simultaneously force prospective lenders to an odious regime to rethink the wisdom of advancing funds on so fragile a legal foundation.

The authors argue that in this recent debate the adjective “odious” has quietly migrated away from its traditional place as modifying the word “debts” (as in “odious debts”), so that it now modifies the word “regime” (as in “debts of an odious regime”). This is a major shift. If this new version of the odious debt doctrine is to be workable, someone must assume the task of painting a scarlet letter “O” on a great many regimes around the world. Who will make this assessment of odiousness and on what criteria? The stakes are high. An unworkable or vague doctrine could significantly reduce cross-border capital flows to sovereign borrowers generally.

The authors are skeptical that this definitional challenge can be met. Rather than jettison the whole initiative as quixotic, however, the authors investigate how far principles of private (domestic) law could be used to shield a successor government from the legal enforcement of a debt incurred by a prior regime under irregular circumstances. A wholesale repudiation of all contracts signed by an infamous predecessor may be more emotionally and politically satisfying for a successor government, but establishing defenses to the legal enforcement of certain of those claims based on well-recognized principles of domestic law may be the more prudent path. The authors believe that such defenses exist under U.S. law (and presumably elsewhere) and could be used to address many, although admittedly not all, cases of allegedly odious debts.