

PART III

CONCEPT OF ODIIOUS DEBT AND IMPLICATIONS IN KENYA



THE DOCTRINE OF ODIIOUS DEBT

Outline

- In this presentation, we ask ourselves:
 - (a) What are the formulations of the doctrine of odious debt?
 - (b) Is this a legally recognized doctrine?
 - (c) What are the effects?

Definitions of Odious Debts: Formulations of the concept of Odious Debt

1. Alexander Nahum Sack

- “If a despotic power contracts a debt not for the needs and not in the interest of a State but in order to fortify its despotic regime, to suppress the population from its fight, etc., then this debt is odious for the population of the entire State. This debt is not obligatory for the nation; it is (rather) a debt of the regime, a personal debt of the power which has contracted it ... The reason why such odious debts cannot be seen as burdening the territory of a State is that these debts do not comply with one of the conditions which determine the regularity of State debts, namely: the debts of a State must be contracted and the funds thereof must be used for the needs and in the interest of the State.”

Definitions of Odious Debts: Formulations of the concept of Odious Debt

- Sack identified three elements that characterise odious debts:
 - a) that the need for the fulfillment of which the former government has contracted the particular debt is ‘odious’ and evidently contrary to the interests of the population of all or part of the former territory.
 - b) that the creditors – at the time of the issuance of the bonds- had knowledge of the said odious purpose.
 - c) Once these two requirements are established, it is up to the creditors to bear the burden of proof to establish that the funds resulting from such bonds have in fact not been used for odious needs.

Definitions of Odious Debts: Formulations of the concept of Odious Debt

2. Mohammed Bedjaoui and the International Law Commission

- Bedjaoui identified the following sets of situations when defining odious debts: there must be a succession of states (not merely a succession of governments), there must be debts contracted or guaranteed by the predecessor state, and these debts must result from a state's financial obligation towards another state.

Definitions of Odious Debts: Formulations of the concept of Odious Debt

- On the basis of his study of the subject, Bedjaoui identified two draft articles to the Charter of the United Nations:

“Article C. Definition of odious debts

For the purposes of the present articles, ‘odious debts’ means:

(a) all debts contracted by the predecessor State with a view to attaining objectives

contrary to the major interests of the successor State or of the transferred territory;

(b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article D. Non-transferability of odious debts

[Except in the case of the merger of States] odious debts contracted by the predecessor State are not transferable to the successor State.”

Is there a legally recognized doctrine of odious debt?

1. The Legal and Political Approaches

- A political approach to dealing with odious debt does not rely on legal techniques to show the existence of odious debt; instead an argument is made based on political principles.
- In international and domestic law, a legal approach shows the existence of odious debts by having recourse to rules of domestic and international law.
- For the doctrine to be effective, it must not remain a political theory, but should have legal force.

Is there a legally recognized doctrine of odious debt?

2. The Legal Approach

(a) International law

- Article 38 (1) of the Statute of the International Court of Justice is accepted as an authoritative statement of the sources of international law. There are four categories:
 - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognized by civilized nations;
 - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Is there a legally recognized doctrine of odious debt?

- There are no international conventions or express rules specifically defining or providing for odious debts.
- On the other hand, for a rule of customary international law to exist:
 - (a) There must be uniform and extensive state practice regarding the rule or principle.
 - (b) States should have acted consistently with the rule or doctrine, justifying a conclusion that there is a the belief by a state that behaved in a certain way that it was under a legal obligation to act that way- opinion juris.

Is there a legally recognized doctrine of odious debt?

- While there have been some cases where the concept of odious debt has been used to forgive or repudiate debt in transitional contexts, this practice does not seem to have reached the level of state practice.
- There is also no sufficient evidence of opinion juris supporting odious debt.
- With respect to the general principles of law (itself quite a controversial source of international law), it appears to be hard to find a general principle to the effect that odious debts are void or unenforceable.

Is there a legally recognized doctrine of odious debt?

- Similarly, there does not seem to be any instance in which a country may be regarded as having made an internationally legally binding declaration to renounce credits corresponding to “odious debts”.

Odious Debt in the Kenyan Context

- The concept of odious debt is not directly defined in Kenyan law or policy.
- However, the legal framework in Kenya governing public debt provides guidelines on what kind of debt would fit, to some degree, within the description provided for under the formulations of the concept of odious debt.

Odious Debt in the Kenyan Context

- The legal and institutional framework governing public debt management is provided for in the:
 - a) Constitution of Kenya 2010;
 - b) The Public Finance Management Act 2012;
 - c) The Public Finance Management (National Government) Regulations, 2015; and
 - d) The Public Finance Management (County Governments) Regulations, 2015.

Odious Debt in the Kenyan Context

1. The Constitution of Kenya 2010

- Public debt under Article 214 (2)- all financial obligations attendant to loans raised or guaranteed and securities issued or guaranteed by the national government.
- Under Article 212, the county government may borrow only
 - a) if the national government guarantees the loan; and
 - b) with the approval of the county government's assembly.

Odious Debt in the Kenyan Context

- The National Assembly exercises oversight national revenue and its expenditure- Article 95 and 96 of the CoK.
- The role of the Controller of Budget- oversee the implementation of budgets of the national and county governments by authorizing withdrawals from public funds under the Equalization Fund, county revenue funds, the consolidated fund and other public funds- Articles 204, 206 and 207 of the CoK.
- The role of the auditor general- audit and report within six (6) months of a financial year public debt, confirm whether or not public money has been lawfully applied and in an effective way- Article 229 of the CoK.

Odious Debt in the Kenyan Context

2. The Public Finance Management Act 2012

- Section 49 of the Act provides that the Cabinet Secretary may raise a loan on behalf of the national government if the loan and the terms and conditions of the loan are set out in writing and in accordance with:
 - a) **The fiscal responsibility principles and financial objectives set out in the most recent Budget Policy Statement;**
 - b) **The debt management strategy** of the national government over the medium term.
- Section 50 of the Act provides that the national government **shall ensure that its financing needs and payment obligations are met at the lowest possible cost** in the market which is **consistent with a prudent degree of risk**, while ensuring that the overall level of public debt is sustainable.

Odious Debt in the Kenyan Context

3. The Public Finance Management (National Government) Regulations, 2015

- Regulation 183 of the above regulations provides that national government borrowing shall be guided by the following principles:
 - a) The need to ensure stability in the domestic financial markets;
 - b) Promotion of inter-generational equity in the sharing of burdens and benefits of public borrowing;
 - c) Determination of thresholds of borrowing rights for both levels of government;
 - d) Use of objective criteria for evaluating national government entities or county government eligibility for national government debt guarantee; and
 - e) Prudence and equity in setting limits for debt stock levels for each county government.

Odious Debt in the Kenyan Context

- Regulation 26 (1) of the Public Finance Management (National Government) Regulations, 2015 fiscal responsibility principles applicable to the management of public finances.
- Amongst these principles, subsection (c) provides that the national public debt shall not exceed 50 percent of Gross Domestic Product (GDP) in net present value terms.

Odious Debt in the Kenyan Context

4. The Public Finance Management (County Governments) Regulations, 2015.

- Amongst the fiscal responsibility principles under Regulation 25 applicable to the management of county finances is that the county public debt shall never exceed twenty(20%) percent of the county governments total revenue at any one time.
- Under Regulation 179 (2), the annual debt service cost of a county government shall not exceed fifteen (15%) percent of the most recent audited revenue of that county government, as approved by county assembly.

Odious Debt in the Kenyan Context

- Regulation 178 limits county government borrowings to the following purposes:
 - a) financing county government budget deficits;
 - b) cash management;
 - c) refinancing outstanding debt or repaying a loan prior to its date of repayment;
 - d) mitigation against adverse effects caused by an urgent and unforeseen event in cases where the Emergency Fund has been depleted;
 - e) meeting any other development policy objectives that the County Executive Committee Member shall deem necessary, consistent with the law, and as County Assembly may approve.

What are the effects?

- Part VII of the Public Finance Management Act 2012 on Enforcement Provisions provides a series of penal sanctions against public officers who fail to adhere to legal requirements under relevant laws in the management of public finances.
- This satisfies the formulation of odious debt to the extent that it is possible to identify within the law debts that go against the interests of the people.
- However, the law does not provide any repercussion to a debt obligation should it become apparent that the creditor was aware that a debt obligation was illegally incurred by a public officer.

What are the effects?

- Pancta sunt servanda, Article 26, The Vienna Convention on the Law of Treaties (1969)- every treaty in force is binding upon the parties to it and must be performed by them in good faith.
- By this doctrine, every debt obligation should be met regardless of whether it is an odious debt.
- Absent any limitation, it appears that the legal position in Kenya is that debt obligations remain binding regardless of whether they are odious.

Key Considerations

- Should the doctrine of odious debt be a limitation on the obligation to foreign debt if the elements of the doctrine are satisfied?
- Is there a case for the formal recognition of the odious debt as a limitation on the responsibility to repay sovereign debts?

Sources

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