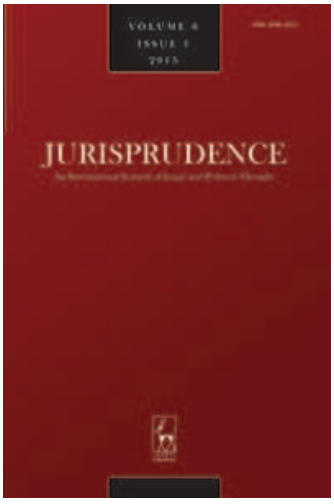

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ARTICLE

Odious Debts: A Moral Account

Cristian Dimitriu*

In this article I discuss the conditions under which sovereign debts are not morally binding for a state. Following an old legal doctrine, I call non-binding debts 'odious'. I proceed as follows. First, I argue that alternative accounts on the morality of debts are unsatisfactory. The problem these accounts have are that they do not clearly identify the philosophical issues that underlie the notion of odious debts, or that they fail to specify what exactly the immorality of odious debts consists in. Second, I defend the view that a debt is odious when two conditions are satisfied: (i) borrowed funds were used by public officials for purposes for which they were not authorised (ii) lenders knew, or should have known, about possible unauthorised uses of those funds. If these two conditions are both satisfied, debts should not be considered debts of the state, but rather personal debts of rulers. Third, I discuss the feasibility of my approach by exploring how it would work in the current world. Finally, I discuss the implications of my account and a possible reply to it. One of the remarkable upshots of this analysis is that it will show that the problem of odious debts is widespread and pervasive.

Keywords: odious debts; global justice; international law; human rights; corruption

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> When a despotic regime contracts a debt, not for the needs or in the interests of the state, but rather to strengthen itself, to suppress a popular insurrection, etc., this debt is odious for the people of the entire state. This debt does not bind the nation; it is a debt of the regime, a personal debt contracted by the ruler, and consequently it falls with the demise of the regime.[1]

Recent global justice debates have focused on many different issues, such as world poverty, human rights and world equality, among others. However, not enough attention has been paid to the pressing issue of the moral legitimacy of the debts of states. This is a serious omission, given the fact that debts are one of the main obstacles for development among many developing countries. In this article, I shall attempt to fill the gap in the discussion by examining the concept of odious debts and its moral implications. In doing so, I will show a previously unconsidered way in which international institutions are acting unjustly toward debtor states.

What is an odious debt? Suppose that a corrupt leader of a poor country borrows billions of dollars from an international financial institution in the name of the state he represents and later sends these funds to his private bank account in Switzerland, or buys a nice palace for his daughter. Lenders are aware of the situation; however, they keep lending because they know that they will recover the funds from successor governments. According to an old legal doctrine, not well established in contemporary international law, this debt is *odious* for the population. That is, the population of the territory is not obligated to repay it. More specifically, 'Odious debt' is a legal concept which holds that the national debt incurred by a regime for purposes that do not serve the best interests of the population of a state, without the consent of the population, and with full awareness of the creditor, should not be enforceable.[2] Such debts are considered by this concept to be personal debts of the public official that incurred them, and not debts of the state.[3] Thus, successor governments are

1 Alexander Nahum Sack, *Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financières: traité juridique et financier,* (Recueil Sirey, Paris, 1927).

2 This is the definition provided in Ashfaq Khalfan, Jeff King, and Bryan Thomas, 'Advancing the Odious Debt Doctrine' (11 March 2003) Centre for International Sustainable Development Law (CISDL) Working Paper, 1 <http://www.dette2000.org/data/File/odious_debt_CISDL.pdf> accessed 16 July 2015. However, there is some disagreement among scholars about which of these conditions is the most important one, how to interpret them and the exact scope and meaning of each of them. Kremer et al, for example, hold that Odious Debts are 'debts incurred by the government of a nation without either popular consent or a legitimate public purpose' (see Seema Jayachandran, Michael Kremer, Jonathan Shafter, 'Applying the Odious Debt Doctrine While Preserving Legitimate Lending' <http://iis-db.stanford.edu/pubs/21472/ApplyingtheOdiousDebtsDoctrine.pdf> accessed 16 July 2015; and King states that a debt is odious when funds are used 'with an aim and for a purpose not in conformity with international law': Jeff King, 'The Doctrine of Odious Debt in International Law: A Restatement' (21 January 2007), 18 <http://ssrn.com/abstract=1027682> and <http://dx.doi.org/10.2139/ssrn.1027682> accessed 16 July 2015.

3 Sack has been more specific about the necessary and sufficient condition of odious debts. On Sack's view (see Sack [n 1]), there are three conditions that have to be met in order for a debt to be considered odious. Debts are odious, they say, when:

(i) The debt is contracted by a despotic power
(ii) For a purpose that is not in the general interests and needs of the state
(iii) The lender knows that the proceeds of the debt will not benefit the nation as a whole

entitled to repudiate it. The moral question that underlies the notion of odious debts, then, is the following: if a regime has used borrowed funds for illegitimate purposes, then why should the population of a state and its future generations bear the burden to repay what are basically the personal debts of their former governments?

Despite the fact that many debts are odious, and that lenders are aware of possible corrupt uses of funds, they have kept lending, because it is convenient for them to do so. Very likely, they will recover the funds, along with additional money in the form of interest. This expectation is not unreasonable. In fact, the consequences for states not repaying their debts are usually very negative: exclusion from future loans, loss of reputation, diplomatic and commercial sanctions and rising interest rates derived from not repaying the debt, among others. Current positive international law considers these debts legally binding, and punishes states for not honouring their debts.

The implications of this situation are clear: the population of a state, and its future generations, end up bearing the burden of a debt that is not theirs. This is how financial markets normally work, and have been working for a long time.[4]

The problem is not a minor one, as billions of dollars are involved in this kind of massive injustice. The more details we learn about countries' past history of borrowing, the more we know that odious debts are not isolated cases. Almost all African countries, Haiti, Ecuador, Argentina, Indonesia and many others are affected by odious debts, as they were all ruled by governments which used the funds for purposes for which they were not authorised.

In this article I proceed as follows. First, I show that alternative accounts on the morality of debts are unsatisfactory. Second, I discuss and clarify the conditions under which debts are odious. That is, I show *what* exactly makes a big portion of debts of the poorest countries non-binding. In order to do this, I explain how states in general have the ability to bind their population, and how exceptions for this ability should be made for the case of odious debts. A debt is not binding, I argue, when two conditions are satisfied: (i) borrowed funds were used by public officials for purposes for which they were not authorised; (ii) lenders knew, or should have known, about possible unauthorised uses of those funds. If these two conditions are both satisfied, debts should not be considered debts of the *state*, but rather personal debts of rulers.[5] Third, I discuss the feasibility of my approach by exploring how it would work in the current world. Finally, I discuss the implications of my account and a possible reply to it. One of the remarkable upshots of this analysis is that it will show that the problem of odious debts is widespread and pervasive.

4 Part of the history of debts is explained in David Graeber, *Debts: The First 5000 Years* (Melville House, 2011).

5 That these two conditions generate an odious debt does not logically exclude the possibility that satisfying other conditions (or only the first one) also result in odious debts. I simply argue that, when it is the case that (i) and (ii) are both satisfied, the debt is non-binding. In other words, these two conditions (when they both occur simultaneously) are sufficient to make the very compelling case that the debt is odious.

1. ODIOUS DEBTS – INSUFFICIENCY OF ALTERNATIVE ACCOUNTS

The question of whether or not developed countries or the global order have harmed poor countries has been widely debated in philosophy.[6] Surprisingly, however, this debate has not focused on one specific, but important, mechanism through which developing countries are unfairly harmed: odious debts.[7]

The topic of odious debts has been debated for a long time now. In 1927, a Russian legal scholar stipulated the necessary and sufficient conditions for a debt to be odious.[8] He coined the term 'odious debt' and elaborated on the basics of the doctrine. Recently, a group of legal scholars have been more specific about the conditions that need to exist in order for a debt to be odious, and have made an effort to classify different kinds of odious debts.[9] The topic has also been debated by NGOs such as Jubilee and CADTM (Committee for the Abolition of the Third World Debt); and in various forums at United Nations. However, the approach that legal scholars and the public have adopted to this issue is mainly a legal one, not a moral one. That is, the moral and philosophical aspects of odious debts have been generally neglected, or are implicit in a non-obvious way in the debate. Because of this, it is not yet clear in the literature what exactly the immorality of odious debts consists in. The debate on debts, as developed so far, has in fact not reached yet an agreement on whether the odiousness of a debt lies in the nature of the government that borrows, the benefit or lack of benefit it generates, the simple fact that there was corruption involved, the fact that a debt is too big to force a state to repay it or a combination of those. Since the question that lies at the heart of this disagreement is a philosophical one (When are citizens of a state liable for what it does in their name?), philosophical accounts of debts will necessarily shed light on this debate.

On the other hand, philosophers have discussed the justice of debts, but have also failed to identify the conditions under which they are binding. According to Pogge,[10] one of the main failures of current international practices lies in the existence of the 'borrowing privilege', according to which any person or group holding

6 Eg, the discussion on harm in the volume *Ethics & International Affairs* 19(1) (2005) 1–7; Thomas W Pogge, *World Poverty and Human Rights* (Polity, 2008); Leif Wenar, 'Property Rights and the Resource Curse' (2008) 36(1) *Philosophy & Public Affairs* 2.

7 The only notable exception is probably Axel Grosserie's 'Should They Honor the Promises of Their Parents' Leaders?' (2007) 21 *Ethics & International Affairs* 99. However, the approach that Gosseries adopts in this article is different from the one I adopt here. In his article, Gosseries focuses on a generational perspective, and offers an account of inheritance of debt obligations across generations. In my article, instead, I discuss the conditions under which debts are *not* binding—neither for the generation in which the debt was incurred nor for successor ones.

8 See fn 2 for details on these conditions.

9 See eg Ashfaq Khalfan, Jeff King, and Bryan Thomas (n 2); Howse's report on odious debts for the United Nations: 'The Concept of Odious Debt in International Public Law' (July 2007) United Nations Conference on Trade and Development Discussion Paper 185, 10 <http://unctad.org/en/Docs/osgdp20074_en.pdf> accessed 16 July 2015; Albert H Choi and Eric A Posner, 'A Critique of the Odious Debt Doctrine' (2007) 70(3) *Law and Contemporary Problems* 33; Omri Ben-Shahar and Mitu Gulati, 'Partially Odious Debts?' (2007) 70(47) *Law and Contemporary Problems* 47 <http://scholarship.law.duke.edu/faculty_scholarship/1621/>; and others.

10 See eg Thomas Pogge, (2001) 15(1) 'Achieving Democracy' *Ethics & International Affairs* 3; *World Poverty and Human Rights* (Blackwell, 2002).

effective power in a territory, no matter how brutal or corrupt, is authorised by the international community to borrow in the name of the state. The problem with the borrowing privilege, Pogge says, is that it creates wrong incentives, as it helps rulers to remain in power even against popular discontent and opposition. Pogge claims, then, that lending to autocratic regimes is wrong, mainly because of the *effects* it will have on the quality of the government and, ultimately, on the population.

Pogge's point is important, but he also adopts an incorrect approach to this issue. Pogge seems to assume that loans provided to autocratic governments will automatically be non-binding, and that loans provided to democratic ones will not. This view, however, is misleading as loans incurred by autocratic regimes can in principle be binding on the state if they are used for legitimate public purposes (a point I will show in greater detail later in the article); and debts incurred by democratic governments can, in principle, be non-binding if public officials used funds for corrupt purposes.[11] Citizens should be held liable for decisions made in their name, I argue, for reasons that do not depend on the nature of the government that rules.

Another point of view, defended by Jaggar,[12] states that the debts of the poorest countries should not be binding because citizens were not consulted about the loans, and were uninformed about them. This cannot be correct, however, as it is a normal feature of any legitimate democratic government that governments do not consult citizens about their decisions, especially when they involve highly specialised knowledge. States, for instance, do not consult citizens when they design their taxation policy, their currency exchange policy or any other important public matter, and it is not expected that they do so. Governments, in other words, are authorised by citizens to make decisions in their name, and are not required to ask for their consent on every single policy they adopt. So unless one supports a radical democratic theory of legitimacy, according to which every single decision of public officials requires consultation and approval from citizens (a standard which would be too demanding, and that would yield the unintuitive result that almost all debts incurred in countries in which there is no ongoing consultation are odious), we should conclude that lack of consent about individual financial transactions is not a sufficient condition to consider a debt odious. The decision

11 Although there are exceptions to this claim (eg, King and Khalfan, Thomas Bucheit et al), legal scholars have also had the tendency to assume that what makes a debt odious is the autocratic nature of the government that borrows, instead of how the money is spent: see eg Patrick Bolton and David A Skeel, 'Odious Debts or Odious Regimes?' (2007) 70 *Law & Contemporary Problems* 83; U of Penn, available at SSRN: <http://ssrn.com/abstract=1027940> accessed 17 July 2015. This tendency has been noticed by Bucheit, Gulati and Thomson, who say 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: see Lee C Buchheit, G Mitu Gulati, and Robert B Thompson, 'The Dilemma of Odious Debts' (2007) *Duke Law Journal* 56, 1202. <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1317&context=dlj> accessed 17 July 2015.

12 See Alison Jaggar, 'A Feminist Critique of the Alleged Southern Debt' (2002) 17 *Hypatia* 119. Also, it is common to hear, in relation to the financial international crisis in Greece, the complaint that citizens should not repay the huge debt of countries because 'they were not consulted'.

of public authorities is rather typically autonomous with respect to several issues, and the conditions attached to loans are one of them.

Surprisingly, and despite the fact that the issue of debts is crucial, not much more has been said by global justice scholars on this topic. In this article, I make explicit the moral issues underlying the problem of odious debts, and discuss them in detail.

2. ODIOUS DEBTS AND COLLECTIVE RESPONSIBILITY

In this section I will argue that the main condition under which debts are not binding is that public officials have overstepped their authority by using funds from loans for purposes for which they were not authorised. What exactly public officials are not authorised to can be determined by relying on theories of collective responsibility. According to these theories, public officials bind the state when they uphold and enforce basic rights of citizens, and when they do it by taking all citizens into equal consideration. Thus, whenever public officials violate the basic rights of citizens, or act corruptly by using public funds for private gain, we can consider public officials to have acted in accordance with non-authorised purposes.

In order to develop the argument, I will assume that the reader accepts the claim that public officials are *agents* of the population of a state. By 'agent' I basically mean that public officials are contractually related to people of a state, are authorised to act in their name and have the ability to bind the state across generations. The idea that public officials are *agents* is not new. Standard views of state power suppose that officials are entitled to act on behalf of citizens, and that they are legally and morally empowered to make arrangements for others, within certain limits.[13] A public official, according to these views, can administer funds, incur debts, administer public companies, nationalise and privatise companies, decide the trading policy of a country and so on. Public officials can even go to war, and they are allowed to exercise their own fallible judgment about when and how to do so. Also, public officials commonly sign treaties and decide on crucial economic policies. The authority of public officials is not of course unrestricted. There are things that public officials, in their role as public officials, can do, and others that they are not authorised to do. Whenever they overstep their authority, the state—and therefore the population—is not bound by officials anymore. This is because people do not authorise public officials to act for those specific purposes in the first place. However, as long as they do not overstep their authority, they bind the state and future generations.

An important distinction should be highlighted here. *Lack of authority* to rule and *overstepping* public authority are different things. A public official lacks authority to rule if he has not passed any kind of authorisation procedure, such as having been

13 See for example Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009); Hobbes, *Leviathan* (J C A Gaskin ed, Oxford University Press, 1996), or Academy of Sciences (ed), *Kant's Gesammelte Schriften* (deGruyter, ongoing from 1900). Translations are from Mary J Gregor (ed), *Immanuel Kant: Practical Philosophy* (Cambridge University Press, 1996).

voted by most of the citizens in open and transparent elections. A public official, in contrast, oversteps his authority when he abuses entrusted power by doing things he is not authorised to do. So even if a public official's authority to rule is a justified one, this authority can be abused. Here I am interested in the latter case. That is, I am interested in discussing odious debts as cases of officials *overstepping* their authority to borrow, and not as cases of officials lacking authority to borrow.

Once we accept the premise that public officials are agents in the sense described above, we need to clarify what exactly the limits of public officials' authority are, and how their role should be defined. Given radical normative disagreement, this is not an easy task. Different people, and different theories of justice, might have incompatible views on what the proper scope of public officials is. Here I will not solve the radical disagreement on this issue. My strategy, rather, is to show that, under certain circumstances, decisions of public officials *clearly* and *evidently* count as overstepping their authority, under most—if not all—possible views on legitimate authority. In other words, although different views might disagree on what legitimate public authority is, they do not disagree on what public officials are *not* entitled to do. I certainly do not claim that these are the *only* cases that count as public officials overstepping their authority—it might well be possible that there are other cases that count as public officials overstepping their authority. I simply claim that this modest threshold is compelling enough to generate strong consensus among people that authority has been overstepped, and to show that the problem of odious debts is widespread and pervasive. In fact, even if the threshold I am stipulating is quite minimal, it is clearly the case that governments of both autocratic and democratic states have been acting below it.

Now, in order to understand and establish the content of this threshold we need to figure out what grounds public officials' authority to rule in the first place. Philosophical accounts of collective responsibility have provided a plausible account for this.[14] This account is not entirely uncontroversial, but it is a familiar line of thought in political philosophy. Also, since these accounts explain why states can sometimes do things on behalf of the citizens, and why states can contract debts on behalf of them, they are also crucial to understanding why some debts are non-binding, what exactly makes them so, and what the exact scope and meaning of odious debts are.

On these accounts, what makes us liable for decisions made by our governments is that they are authorised by us to interpret and defend our *rights*. Persons have basic rights, and governments are in a better position to interpret them and enforce them than we—the citizens—are. This is because our own judgment is partial, biased or limited, and the understanding that we have of our rights normally conflicts or is different from the understanding that others have. We therefore need an arbitrator's judgment that can provide a unitary interpretation of our rights. By endorsing a central authority, we obtain a unitary interpretation of our basic rights.

14 Such accounts have been provided by, eg, Anna Stilz and John M Parrish: see Anna Stilz, 'Collective Responsibility and the State' (2011) 19(2) 190. *Journal of Political Philosophy*. For a similar view, see John M Parrish, 'Collective Responsibility and the State' (2009) 1 *International Theory* 119.

So, insofar as policies of authorised officials are compatible with the defence of citizens' rights, and insofar as authorised officials takes the interest of all citizens into equal consideration, citizens are bound by them. Public officials are thus authorised to decide to go to war, if by going to war they uphold citizens' rights (in this case, the right to security). This is so, even if the official is mistaken about the real consequences of waging such war.

From the general conclusions that collective responsibilities theories propose, we can confidently state that there are two possible ways in which public officials' actions count as falling below the minimal threshold: by plainly violating the rights of the population, or by plainly acting corruptly when using public funds. I will explain with a bit more detail each of these.

1. *Human Rights*. Public officials can overstep their authority when they violate basic human rights of citizens. There is strong consensus among different theories of justice and in public international law that basic human rights include rights to life—that is, the right not to be unjustly killed—the right to physical security (which includes the right to bodily integrity, not to be tortured, the right not to be subject to arbitrary arrest, detention or imprisonment), the right against enslavement and involuntary servitude, and the right to association.[15] This list is recognised as valid in the most important human rights conventions in current international law.

We should notice here that the intentions that public officials allegedly have when making decisions, or the arguments they use to justify their behaviour, are irrelevant to determine the actual impact on citizens' rights. Public officials are usually smart at vindicating their policies, or at finding excuses when they act unjustly. Even the most egregious violation of human rights has historically been defended by corrupt governments with some sort of imaginative argument. What we need is a more objective procedure to establish that there have been abuses, which does not rely on the definition and interpretation that the violators themselves are offering. I will say more about this procedure in the section on feasibility. The central point for now is that when public officials violate the human rights of citizens, they overstep their authority and, consequently, the state is no longer bound by them.

2. *Corruption*. A second related way in which public officials can overstep their authority is by acting corruptly. There are many different possible cases and degrees of corruption. However, here I am interested in a kind of corruption that counts as clearly being outside the competence of officials, namely public officials abusing public office for private gain.[16]

Public officials can receive salaries and benefits in return for their service, but they cannot receive any other benefit on top of those benefits, such as bribes and gifts in return for favours. Also, they cannot transfer public funds to their personal

15 For a detailed discussion of basic human rights that international law should recognise, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2003).

16 For a complete discussion of this definition of corruption see Ivar Kolstad, 'Corruption as Violation of Distributed Ethical Obligations' (2012) 8(2–3) *Journal of Global Ethics* 239.

accounts. Whenever things like these happen, public officials are clearly acting in accordance to non-authorised purposes.

This definition is also connected with theories of collective responsibility. Evidently, people would not authorise officials, family members, friends or political allies to keep tax money in their private bank accounts. If officials were allowed to do that, it would not even make sense to delegate authority in the first place.

As in the case of human rights, there are grey areas here. Public officials can eventually benefit themselves by channelling public funds to their private accounts, but have a great deal of popular support; they can build a hospital but benefit the construction company owned by a minister, making it more expensive, or they can hire unemployed people to build private airports. But the fact that there are secondary benefits or potential justifications for these actions does not imply that these actions are not at least partially corrupt in the first place. So these examples still count as cases of public officials overstepping their authority. We can thus state that when a public official abuses his authority for private gain, that public official is overstepping its authority and is thus acting corruptly.

The general point that public officials do not bind the population when they act below the minimal threshold as defined so far can be applied to the case of debts. Debts incurred by rulers in the name of the state are generally binding and, as a matter of principle, debts should be repaid, because promises ought to be honoured. However, there are many cases in which borrowing money for certain purposes clearly and obviously fails to satisfy the minimal threshold mentioned earlier.[17] Examples include borrowing for the purposes of oppressing citizens in a way that violates their basic liberties, suppressing part of the population for political, religious or racial reasons or torturing political opponents. Embezzling money from loans for the personal benefit of rulers, friends or allies, as happens very often, cannot count as a legitimate public purpose of a public official either. Finally, nationalising private debts—an economic process that gave origin to the external debt of Argentina and other countries—should also be ruled out as a public purpose because it is a gift that the people, through the state, are making to private corporations in return for no tangible benefit.

One might argue here that the 'corruption' criterion I am proposing here is too strict, as it would classifying as odious loans that have been used for purposes that can potentially be acceptable for the population (eg, the example of the hospital mentioned earlier). Corruption, admittedly, is probably not as bad as human rights violations. However, as in the case of human rights violations, some corrupt actions clearly count as being incompatible with the role of public officials. These specific actions cannot be considered to be binding for the state.

17 For the case of debts, we should notice that there are intermediate cases that are hard to settle. In 1973, the Chilean dictatorial government used a national stadium to detain and execute thousands of political opponents. The stadium had been built with money obtained from loans in 1937. So on the one hand, the stadium was used for purposes that obviously did not benefit the population during the dictatorship; on the other hand, the stadium has been used as a public good both before the dictatorship started and ever since it ended. Is this a case of a loan used for private purposes? It is not clear.

Consider the case of corruption mixed with noble purposes. Since purposes are noble, embezzling some of the funds can be found to be acceptable for some people. However, on my account, the portion of the borrowed funds which were used for non-authorised funds would be odious. Private law is similar. If an agent uses a portion of the funds that he borrows in someone else's name for his own personal benefit, private law considers the agent liable for the portion of the debt that has been misused, and not for its totality. It might be hard to distinguish in real life funds that were used for private/corrupt purposes from funds that were used for acceptable purposes. For example, in the case of the hospital mentioned earlier, funding an efficient hospital and pocketing some of the funds can happen in virtually one single transaction. But the fact that it is hard to disentangle both kinds of transactions does not mean that, as a matter of justice, the state should be saddled with the debt.[18] What follows, rather, is that we should create empirical methods to identify and detect corrupt practices.

2a. Cases of Abusing Public Authority that are Not Included In My Account: Profligate Spending and Violation of Human Rights of Foreigners

So far, I have mentioned human rights and corruption as two possible ways of overstepping authority. In this section, I would like to discuss two possible ways of overstepping public authority that are *not included* in my account of odious debt: profligate spending and the violation of human rights of foreigners.

'*Profligate spending*' means, in this context, spending for extravagant, wasteful or reckless purposes. Imagine an eccentric and otherwise benign dictator keeping the population warm burning 100 dollar bills instead of with coal. Should borrowing for these kinds of purposes be considered odious? They do not violate the human rights or corruption standards I mentioned earlier. However, it seems to be unfair to the population to make them pay for this kind of behaviour.

In principle, I do not exclude the possibility that my account can be extended to these kinds of cases. In fact, they look like cases of public officials overstepping their authority. But I suspect consensus on the criteria that should be used to consider an action of a public official as 'profligate' will be harder to find, as there appears to be room for reasonable disagreement about them. In contrast, agreement on what constitutes human rights and corruption seems more solid. In any case, corruption and human rights are compelling enough to show that even with those modest standards; the problem of odious debts exists and is pervasive.

Human rights of foreigners. Another aspect of the account that should be clarified is the puzzling case of violations of human rights of foreigners. Suppose a government borrows funds with the intention of committing war crimes such as torture war prisoners, or massively killing civilians. Would the debt be odious? Clearly, violating the rights of foreigners in such an obvious way is an instance of a public official acting for

18 Incidentally, we can also point out that it is not so hard to disentangle bad expenditures from good ones after all. In the case of the hospital, for example, we can try to figure out the real price of building a hospital by asking construction companies what the price of the construction would be, then calculating the average, and finally comparing the final result with the price at which the hospital was actually built.

non-authorised purposes. However, I do not believe this would be a case of an odious debt. An odious debt, as defined so far, is a 'breach of contract' between the public official and the population *of its own state*; as a consequence of the fact that officials, in their role as agents, abused their entrusted authority. What discharges the population of the moral obligation to repay debts is precisely this breach of contract. In the case of human rights violations against foreigners, although clearly regrettable, such a breach of contract does not exist, for public officials are not agents of foreigners in the first place. Therefore, there is not any odious debt. Since a war is supposedly waged with the aim of defending the security of citizens, the whole state should be burdened with debts generated for the purpose of waging it. It might well be the case that the official lied to the people of its own state about the purpose of the war, or that it decided to wage it despite the fact that it lacked the authority to do so. If that happens, the debt might well be odious. However, the fact that the rights of *foreigners* were violated is not what would make the debt odious. The odiousness would lie, rather, on the fact that the public official could not have been authorised by its own people to act in defence of the state, if the reasons for going to war were based on a lie. The crucial point, in any case, is that violating the rights of foreigners would not count as an example of an odious debt (although, of course, the war would be unjust). Thus, the burden of repaying the debts incurred to wage such an unjust war should fall on the state.

In the interesting case of a public official borrowing money for the purpose of violating the rights of minorities *domestically*, with the explicit consent of the majority that benefits from that violation, other kinds of consideration come into play. In cases like these ones, the public official is acting outside its mandate by violating the rights of a portion of the population he is supposed to represent. Thus, we should not consider these debts *state debts*. In fact, if these debts were binding for the state, those whose rights have been violated will be the both the victims of human rights violations and, additionally, the holders of a debt incurred to violate their own rights. This is unacceptable. One might argue that this would have the perverse effect of discharging the majority who approved the violation from the obligation to repay their debts. However, people who were the victims of human rights violations will still have a valid claim against both their officials and the other majority for the rights that have been violated. So, domestically, the majority would not really be discharged of any obligation. What is clear, in any case, is that the lender will not be entitled to enforce repayment from the state (although perhaps he would from the public official).[19]

2b. Partial Conclusion

To sum up, what lies at the heart of the odious debt issue is not the fact that it creates incentives for autocratic regimes to stay in power (as Pogge would claim), or the fact

19 A similar assessment can be made in private law. If a CEO of a corporation borrows money to defraud some of the shareholders, the lender is aware of this situation, and still lends; the corporation is not 'on the hook'. Also, the shareholders who benefitted from the fraud will would not be discharged of their obligation to repay debts, as the victims would have a claim against them (and the CEO) if there had been proven complicity.

that people did not consent to the loans (as Jaggar would claim); but mainly the fact that public officials—regardless of the nature of this government (whether democratic or despotic)—used the money incurred by the government for illegitimate purposes; that is, for purposes that do not satisfy any minimally acceptable threshold of political action.[20] So, on my account, *the odiousness of the debts depends on how the money is spent by governments, and not on authority or lack of authority to rule.* The approach I am offering, thus, is a *transactional* one. That is, a debt is odious because of the (corrupt) decision that the government made about *some specific* loan, in a given situation. When a loan X contributes to a violation of human rights, or when the funds from loan X are stolen, that specific loan is not binding on the population. This partial conclusion suggests that possible institutional reforms to eradicate the problem of odious debts should not take into account the kind of regime that borrows but whether the government will (likely) use it for purposes that are against citizens' rights.

An important upshot of this conclusion—and in opposition with the view that a big group of legal scholars held[21]—is that an official might bind the state even if the population does not benefit from its policies, and, conversely, the state might not be bound by the government even if the government brings about benefits to the population. This is because benefitting the population is neither a necessary nor a sufficient condition to bind the population. Suppose that a public official receives a bribe from a foreign company in return for a state contract that does not harm the people in any way. Suppose further that this bribe even benefits the population of a state, because the money that is the basis of this bribe is spent for purposes that improve the general conditions of the population (eg, it creates jobs or promotes local consumption). Despite the fact that citizens benefit in this case, they are not bound by the decisions made by the government when receiving the bribe, as the government official was acting outside its legitimate mandate when receiving the bribe. An opposite example is also useful to illustrate the point that the state might be bound even if there is no benefit. The most recent US war in Iraq might have not only been unjust, but also harmful to the US economy. The massive public borrowing that helped to fund it did not obviously 'benefit' the people, or serve 'the best interest of the nation'. However, given the fact that public officials do not seem to have clearly and obviously overstepped their authority by borrowing for this war (at least in the sense of 'overstepping' defined above; that is, as acting below the threshold condition); we can reasonably conclude that these debts are collectively binding and that, therefore, taxpayers of the US should bear the burden of repaying them. This is true even if the purposes of the war were misguided or mistaken.

20 And also, as I will show in the next section, when there were clear indications, before lending, that the loans were going to be used for corrupt purposes.

21 See fn 2. Also, the condition that debts are odious when they do not 'benefit' the population has been made in several different contexts. Just to give an example, that is how it is defined in Seema Jayachandran and Michael Kremer, 'Odious Debt' (2006) 96(1) *American Economic Review* 82.

This point can be challenged on the grounds that it cannot reasonably be claimed that the government was acting within its legitimate mandate by waging such a war. But the point becomes clearer when we contrast this war with the classic example of an odious debt that is used to suppress a national liberation struggle, as it happened in Cuba in 1898,[22] or with the funds borrowed by Saddam Hussein to violently tyrannise Iraqi dissidents. In the case of the US invading Iraq, the government was acting in the name of the people and arguably in defence of their rights and interests: this was a war of a nation. In contrast, in the Cuban and Saddam Hussein cases, the governments borrowed funds and used them for personal gain, or to violate basic rights of some of its citizens. These were cases of governments acting on their own initiative, and outside their mandate; they were clearly failing to properly interpret citizens' rights.

3. AWARENESS OF LENDERS

So far, I have argued that the central condition for a debt to be odious is that governments spend funds for illegitimate purposes, after the loan is made. But a lender can say here that if loans are made in *good faith*—ie, in a situation in which lenders are completely unaware of the purposes of the loan, and could not have possibly known about them—to public officials who are authorised to borrow, and who showed no indication that funds were going to be misdirected, and the funds are subsequently stolen or used for corrupt purposes, they would still likely have a claim of restitution against the state. In fact, the argument would go, since it was impossible for them to foresee the use of those funds, it would be unfair to make them responsible for the illegitimate uses of funds. This objection makes sense; after all, why would lenders be responsible for something they could not have avoided, or even predicted? It has to be possible for them to exercise due diligence, and to determine ex ante whether a government has a fraudulent purpose in mind.[23]

The claim that some loans are odious when funds are used for illegitimate purposes can therefore be complemented with a second condition: debts are odious when loans are *not* made in good faith. That is, when lenders were 'on notice' of possible non-authorised uses of funds and still lent. This condition is reasonable: it is hard to argue that a successor government should be liable for the dishonest or criminal act of two others.

We should notice at this point that even if a lender lends in good faith, the debt might still be odious. In other words, the good faith condition is not strictly necessary in the definition of odious debt. (Suppose, for example, that a loan is made in good faith by Bank Z to the government of Y. The government, without Z's knowledge at any time, uses the loan to buy arms and terrorise its population. It would seem unjust towards the people to make them pay the bill for the arms used against them.) However, by introducing the good faith condition, we make the

22 See Howse (n 9) 10, for a description of the Cuban case.

23 The issue of creditor's awareness has been included by many legal scholars, including Sack.

case of odious debts much more compelling, while at the same time set a threshold high enough that it would still yield the result that a big portion of debts are odious.

When do loans fail to satisfy the 'good faith' condition? The 'good faith' condition is not satisfied when lenders know, or should have known, that funds are being or could plausibly be misdirected away from public purposes. This can happen even if the intentions of public officials are opaque to the lenders. Lending without restrictions to autocratic regimes with a bad record of corruption, authoritarianism and oppression against their own citizens cannot be considered to be a 'good faith' loan, as lenders can or should be 'on notice' that these governments might be acting outside their competence. Lending funds to such regimes is parallel to the domestic example of lending funds to a well- known crook who borrows in the name of a neighbour for purposes that are totally unclear. Lenders should be aware that since these kinds of governments are prone to corrupt uses of funds, they will likely use the funds incurred in that specific transaction for illegitimate purposes.

Something similar could be said about corrupt governments of democratic regimes. Although public officials of these governments are authorised to borrow in the name of the state, it is clear that, occasionally, they can abuse their authority by borrowing funds for illegitimate purposes. A public official of a democratic country might ask for funds for purposes such as building dams or bridges for a suspiciously high price, or for building a private airport for his family. If lenders are aware of this situation, or if there are clear indications that this could happen, and they still lend, their entitlement to recover funds from successor governments ought to become much weaker. This is because lending money to an organisation or state when it is not clear whether or not its representatives are acting within their mandate is something that lenders do at their own risk. The risks involved when lending are twofold. First, there is a risk of default; that is, that the borrower will not repay the debt. Second—and this is the kind of risk that is most relevant for the topic of odious debt—there is the risk of corruption; that is, the risk that the borrower is overstepping its authority as an authorised agent. The risk involved here is that the lender might not be able (and will not be entitled) to recover the funds from the party incurring the loan. In order to avoid this, lenders should verify the purposes for which the client is borrowing. If they fail to do this, and it turns out that the client steals the money, or uses it for purposes that exceed his or her authority, a third party cannot plausibly be held liable for the debt, for he or she was not even a party in the transaction.

It is quite possible that a lender does not know what will happen with the money exactly; and that his loan ends up, indirectly, opening up the budget to spend money for corrupt purposes (say, bank B gives a loan to country A to build a school—a legitimate purpose. However, this opens up budget to buy arms to oppress a minority somewhere else, or allows the dictator to divert funds to his Swiss accounts). Is the loan odious? The question is crucial. Critics of odious debts can argue that since it is impossible in practice to distinguish lending for odious purposes from lending for acceptable purposes, annulling some transactions as odious and not annulling others would be arbitrary. Another way to put it is that money is *fungible*

and, because of that, it will be very difficult to find a direct connection between the loan and the corrupt use of funds.

On the account I am putting forward, however, if it happens to be the case that a loan is *indirectly* related to corrupt spending, it will be impossible, or very hard, to predict beforehand that this will happen. Thus, the good faith condition will not be violated. Still, under my version of the account, the set of debts that will fall under the category of 'odious' is potentially huge. Any government with a clear pattern of corruption or oppression, or any suspicious borrowing, will be enough to put the lender on notice and thus in violation of the good faith condition. More about this point will be said in the 'feasibility' section.

The issue of lack of knowledge of lender is even more complicated from an intergenerational perspective. Even if there are no indications that funds will be misused, and public officials spend for purposes for which they are authorised, it is not clear why future generations would be bound by them. After all, they do not and cannot consent to any loan incurred by previous governments, for the simple reason that they did not even exist at the time the loan was taken. Here, however, I do not develop an account of the reasons why obligations can be inherited from one generation to the other. Instead, my approach is a negative one: I claim that, under the conditions mentioned earlier, debts are *not* binding for the population of the generation in which loans were incurred; and, since they are not binding for that specific generation, they will not be binding for the subsequent generation either. This is because a given generation cannot inherit a non-binding debt from a previous one. Suppose a lender is aware that there are suspicious circumstances around a specific transaction, still decides to lend, and afterwards the funds are embezzled by officials. It would be unfair to make the people of the generation in which funds were stolen pay the debt back; and it would *also* be unfair to make the people of future generations pay the money back. The state, in this case, should not be burdened with the debt at any point. Similarly, in private law, individuals cannot inherit debts that were fraudulently incurred by third parties in the name of the deceased.

In sum, loans fail to pass the 'good faith' test when the *purposes* for which the loans are incurred are, or should be, suspicious to lenders. This condition applies to both democratic and autocratic regimes. Lenders cannot claim innocence when officials borrow for purposes that suggest that funds might be misused. Although these officials might generally be authorised to borrow in the name of the state, they cannot overstep their authority by using the funds for corrupt purposes. Therefore, such loans should not be binding on the state.

The two conditions under which debts are odious, as defined so far, can be better understood if we look at a similar—although not strictly analogous—scenario at the domestic level. A customer, whom I will refer to as 'the rogue', borrows money from a bank in the name of a third person. The rogue customer is an authorised agent, but uses the money he obtains from the bank for personal benefit (for example, he buys himself a car or a trip to Eastern Europe for his daughter). Moreover, the agent acts in a way that is visibly suspicious, as he suggests in many different ways, before borrowing, that he will spend those funds for purposes that exceed his

authority as an agent. After a while, the bank attempts to recover the loan and interest payments, but the third party in whose name the loan was incurred is the one that the bank considers liable, not the rogue customer who benefitted from it. The injustice of this situation is obvious. The 'rogue', although authorised to borrow, was acting outside his mandate, and deceived the third party about the purposes of the loan. Moreover, he acted in ways that suggested that the loan was intended for illegitimate purposes. Why, then, would the third party be considered responsible for repaying the loan? It seems clear that the debt should not be binding on the third party, and that the rogue who actually incurred the loan is the one who should be liable for it. This would be so, even if the rogue has dropped out of sight or has declared personal bankruptcy so that nothing can be recovered from him.

Cases like these have a clear resolution in *private law*. In private law, if a lender ignores visible indications that an authorised agent will exceed his mandate, and still lends, he will not be entitled to claim repayment of the debt from the third party (provided, of course, that the borrower ends up in fact using these funds for purposes that exceeded his mandate). The lender, after all, had the opportunity to check whether or not the agent was acting outside his authority, and decided to ignore indications that the agent was going to act corruptly. And even if the lender *did* check diligently whether the agent was acting outside his competence, and still lent, he would still not be entitled to claim repayment from the third party either. Since the borrower was the one who defrauded the lender, the person in whose name the loan was taken out is not a party to the transaction. The loan, in other words, was at lender's risk. This idea is reflected in legal systems. Under US law, for example, the investors bear the burden of checking whether the agent is exceeding his or her authority. Buchheit, Gulati and Thompson show this point very clearly. They state that,

> where a corporate officer signs a guarantee for a debt for which the corporation is not receiving any benefit, the duty of diligence in ascertaining whether an agent is exceeding his authority devolves on those who deal with him and not on his principal.[24]

This is what positive law says, but it is also morally the best way to set things up. The third party is innocent and the lender is not, so the responsibility for the loss should fall on the lender.

4. EXAMPLES

There are many historical examples of odious debts, as defined so far. Under Mobutu Sese Zeko, Zaire accumulated over $12 billion in sovereign debt, and Mobutu diverted a big portion on these funds to his personal account (his assets reached $4 billion in the mid-1980s) and to his efforts to retain power, such as payments to cronies and military expenses.[25] Also, by the 1990s, capital flight from Zaire amounted to around $12 billion dollars, which is exactly the amount of money that

24 Buchheit, Gulati and Thompson (n 11) 39.

had been borrowed from the international community. There are compelling reasons to believe that a significant portion of those funds originated from borrowed money, which would show that funds from loans were not used for public purposes.[26] The debt generated during the Apartheid-era in South Africa can also be considered odious. The apartheid regime borrowed internationally, spent a large share of its budget on military and police repression of the Black majority, and left the new democratic regime that took power in 1994 with about $23 billion in debt.[27] Many other cases, such as Haiti under Duvalier, warrant serious attention.[28] Also, examples of odious debts are not limited to cases in which cruel dictators pocketed gains for their own private bank accounts, or to oppress their population. There is an economic process which is very relevant for the odious debt topic, both because of its impact, and because it is not usually cited as an example of odious debts: nationalisation of debts. By 'nationalisation of debts' I mean the process of transforming private debt into public debt, usually in return for some personal favour or bribe to the public official. Nationalisation of debt can be considered a case of corruption but, unlike many cases, it has a massive and devastating effect on the population, as it usually binds entire generations.[29] In all the above mentioned examples, the conditions for odiousness were satisfied: funds were used for purposes for which public officials were not authorised, and lenders were or could have been aware of this—in fact that circumstances surrounding the loan were visibly suspicious. Coercing successor regimes into repaying these debts, thus, involves a clear injustice.

5. FEASIBILITY OF THE ACCOUNT

Once we have agreed on the ideal conditions under which debts are odious, we need to make the theory *usable*. That is, we need to be able to apply it to distinguish debts that would be valid from debts that would not be. There are two possible ways of proceeding here: the *ex post* approach and the *ex ante* approach. On the former,

25 The Financial Times reported the $4 billion figure as the estimate of the US Department of the Treasury and the International Monetary Fund. A Financial Times investigation found that Mobutu's wealth peaked at this value: Jimmy Burns, Michael Holman, and Mark Huband, 'Mobutu Built a Fortune of $4 Billion from Looted Aid' *Financial Times* (12 May 1997), cited in Center for Global Development, 'Preventing Odious Obligations A Report of the Working Group on the Prevention of Odious Debt, 2. <http://www.cgdev.org/files/1424618_file_Odious_Debt_FINAL_web.pdf> accessed 18 July 2015.

26 The connection between borrowed funds and capital flights, and how this would prove that a big portion of the debt of Zaire is odious, has been shown in the following paper by Leonce Ndikumana and James K Boyce, 'Congo's Odious Debt: External Borrowing and Capital Flight in Zaire.' (1998) <http://www.peri.umass.edu/fileadmin/pdf/ADP/Congo_s_Odious_Debts.pdf> accessed 17 July 2015.

27 The World Bank estimates South African sovereign debt to be $23.4 billion at end of 1995: cited in Center for Global Development (n 25) vii.

28 A good source of information on possible cases can be found at the website of Probe international Foundation: <http://journal.probeinternational.org/odious-debts/>.

29 For a complete and detailed description of nationalisation of debts in Argentina (a process which generated a debt of around 25 billion dollars to the country), see D Azpiazu, E Basualdo, and M Khavisse, *El Nuevo Poder Economico Argentino En La Argentina de los Anios 80* [The New Economic Power in the 1980s Argentina] (Siglo XXI Editores Argentina, 2004).

we can try to establish whether debts incurred so far have been odious, and then claim that current and successor governments are entitled to repudiate them. So the account would apply retroactively. On the latter, we would discuss the conditions under which lending should occur from now on, and possibly institutional reforms to prevent odious debts. Here I will not favour one of the approaches, but will discuss how each of them would look like.

In practical terms, adopting the *ex post* approach would involve analysing the history behind each of the debts and seeing whether or not the proposed conditions have been violated. This is something that an international body, yet to be created, can do. If it is the case that these conditions have been violated, the debtor state will be morally entitled to repudiate its debts. This view raises an immediate concern: lenders in the past did not do anything illegal by lending to corrupt regimes, as there was not any legal restriction in place to lend. Is not it then unfair to tell them that they are not entitled to repayment? After all, they have not broken any established law. My response to this potential objection is the following. Certainly, lenders in the past did not do anything *illegal* by lending. The problem, rather, is that they have been acting *immorally* by enforcing debts that are not morally binding. By the time that, say, lenders lent to dictator Suharto in Indonesia, they knew that Suharto was extremely corrupt (this information was publicly available), and now they know, as they try to enforce the debts, that their funds were used for non-authorised purposes.

So, indeed, states cannot claim that lenders acted illegally in the past, as no laws were violated. States, and other agents, however, can argue that they have no moral obligation to repay their debts, on the grounds that the conditions I mentioned earlier have been violated.

We can also discuss how the *ex ante* approach would look like. A promising step in this direction, which follows from the transactional approach proposed earlier, would be to analyse loans individually and separately, and see if the good faith condition is satisfied. If it can be established that the purpose of the loan is unclear or suspicious, the lender(s) will be put 'on notice'. If the lender still lends, and the funds end up being misused, the lender will not be entitled to enforce repayment of the debt. There is a parallel with private law here. Legal systems specify that whenever there are clear indications that an agent is overstepping its authority in that specific transaction, and lenders do not do due diligence, the principal cannot be bound for the debt, after the loan is misused.

Putting lender on notice is something that some international body (also to be created) can do, after tracking and identifying non acceptable borrowing. 'Non acceptable' can mean here that the government did not publicly explain the details of the loan, that the government has a very poor record of corruption or oppression and is thus prone to act corruptly in the future, or that the government is openly borrowing to advance its corrupt agenda.

In order to determine that a loan is not acceptable, the yet-to be created international body can rely on widely accepted and minimal definitions of human rights and corruption, and then see whether the loan will potentially be connected to violation of basic human rights, or to a corrupt purpose. Definitions of human rights

and corruption are both provided by organisations that are widely and internationally recognised by the international community as legitimate. Relying on widely accepted definitions of human rights and corruption is necessary, in light of obvious and clear normative disagreements on how to interpret them. The point that we should rely on such widely accepted definitions becomes more persuasive when we see that in many cases the states in which violations of human rights occur voluntarily endorse these definitions and the organisations that interpret them.

If the loan does not pass the 'test', and there are clear indications that it is related to human rights violations or corruption, the international body will inform the lender that the loan will be at its own risk. If the lender is on notice, and still decides to lend, it will not be entitled to recover the funds from successor regime, after they are used by public officials for non- authorised purposes. This kind of policy will generate extra cautions for lenders, and it will single out bad lending from good one.

This proposal also implies that it will be necessary to determine whether or not the officials have acted corruptly, after the loan is misused. This is something that the same international agency or domestic courts can do. The proposed reform requires not only the creation of some specific institution, but also amendment of current international law. Under current international law, lenders face no risk: if the state they lend to defaults on its debt, it automatically grants lenders the right to recover the loan. International law thus punishes states which default on their debts, regardless of the circumstances in which these loans were originated.

There is also a practical aspect that needs to be solved (and that has been addressed earlier in the article): fungibility. Government cash flows are complex, and it is often hard to find a clear connection between the loan and the embezzled or misused money. A lender might lend to government Y, government Y might use the money for some legitimate purpose for which it was going to spend money anyway (eg, build a hospital), and this can open up the budget for other corrupt purposes. How does the account propose to deal with cases like these? Given that it has to be possible for lenders to be on notice beforehand that something may go wrong with the loan, the account does *not* apply to cases in which there is not a clear connection between the loan and the corrupt use of the loan. However, the *ex ante* approach I am proposing here will serve as a disincentive to lending that *is* clearly connected to non-authorised purposes. This approach depends, of course, on showing empirically that there is a clear connection between the funds which have been borrowed and those that were misused. I assume that such connection can be made.

Clearly more needs to be said about the feasibility of my account. Here I hopefully offer the first steps in that direction.

6. IMPLICATIONS OF THE ACCOUNT

One of the implications of the account is that, contrary to what many (not all) legal scholars and global justice theorists believe, it is not the *nature* of the government

(ie, whether democratic or autocratic) that make debts non-binding. Debts incurred by democratically elected governments can be odious for the state, while debts incurred by autocratic regimes are not necessarily odious for the state.[30] This is because both kinds of governments can, in principle, be ruled by public officials that overstep their authority. Thus, the set of debts that should be considered odious is potentially very big. A democratic government, although elected by the population in open and free elections, can in principle incur in odious debts if public officials clearly act outside their mandate, as when there is a bribe involved. Cases like these are not rare at all.

The claim that what makes a debt odious is the fact that rulers spent money for illegitimate purposes also has implications for how we should assess the debts of countries ruled by autocratic governments. Popular belief is that debts incurred by autocratic governments are not binding because these governments are not authorised to rule in the name of the people. However, it is not the fact that rulers are autocratic that should be morally relevant for the case of debts, for it is very common that despite lack of authorisation to rule, despotic governments occasionally do things that can count as being within the acceptable role of public officials, such as strengthening the health system of the country, enforcing traffic laws and securing borders. Whenever that happens, there are no clear grounds on which to consider a debt odious. Although finding examples of autocratic rulers acting in accordance with public purposes might be hard, it is of course possible that such thing occurs.[31]

How can autocratic governments bind? From a moral point of view, if there is not any fraud involved in the transaction itself (for example the government convincingly shows that the money will be used for a purpose that does not count as non-authorised—such as building a public school at a normal price—and subsequently uses the funds for those purposes), people should bear the burden of the debt. In general, loans involve promises, and unless there is some reason to declare the promise invalid, the burden of fulfilling that promise should fall on someone. In the typical case of odious debts, where the autocratic/corrupt government embezzles the funds, the burden should fall on the autocratic/corrupt government and not on the citizens, as they are the ones who committed fraud. But when the autocratic ruler borrows for acceptable purposes (or, at least when it is not clear that those purposes are not acceptable), and the lender lends in good faith, there does not seem to be any fraud involved. On balance, the burden of fulfilling the promise seems to fall on the state. If the state refused repayment, lenders would have lost their (good faith) loans, while the state would have received funds that were spent for legitimate public purposes. But why should lenders have to bear

30 The idea that autocratic governments can also make binding agreements has also been apparently reasonable for judges. The Tinoco brothers from Costa Rica incurred odious debts when they borrowed funds from the Royal Bank of Canada and used them for personal purposes. Chief Justice William Taft, who declared these debts odious, agreed that a de facto Government is capable of binding the state to international obligations. Despite this, Taft emphasised the fact that the debt in question was neither a valid public debt, nor in the public interest.

31 See Robert Howse (n 9) 10.

the losses of a loan that did not involve any kind of fraud? Overall, this seems unfair to them. The central point, then, is that lack of authorisation to rule is not what makes a debt odious, but rather *how* money is spent.

An upshot of the fact that both democratic and autocratic governments can incur in odious debts is that the problem is much more pervasive than some scholars and readers might think. On the account I am proposing, *all* debts incurred for illegitimate purposes (both by autocratic and democratic regimes) would be considered odious. Given the fact that all kinds of governments have acted outside their mandate, the set of odious debts would be bigger than on the view that circumscribes the problem of odious debts to autocratic regimes. It should be added that if a debt is odious, interest payments associated with debts are also odious (and interest payments attached to loans for poor countries are usually extremely high because there is a risk premium attached to them). We should conclude that the problem of odious debts is massive.

7. THE CONSEQUENTIALIST CHALLENGE

We are now in a position to consider a possible objection to the account developed so far. Such objection would say that basically *all* debts should be considered binding, as the consequences of declaring a portion of them odious would have devastating consequences. The reasons why they would say this are twofold. First, lenders would be reluctant to provide loans in the future, out of fear of states repudiating their payments; and this would lead to higher interest rates, or to lenders not lending at all. Second, given that my proposal applies retroactively, the whole financial system would suffer substantial damage, they would say, as all states affected by odious debts can potentially repudiate their debts. Allowing countries to repudiate their debts will, ultimately, end up *harming* poor countries instead of helping them, because poor countries would no longer have access to the loans that they need so much. So, on this view, *there are good reasons to force someone to pay debts that are not theirs*, as the overall consequences of doing so far outweigh the fact that some debts might have a spurious origin.

This objection, however, is weak. In the first place, the *only* risk that lenders face is that *non-authorised* borrowing will be declared odious. Normal borrowing will be repaid normally. If lenders single out non-authorised borrowing and separate it from normal borrowing, the financial system can keep working normally. My feasibility proposal should be useful for the purpose of separating bad borrowing from good one. Similarly, at the domestic level, it would not be true that the general interest rates would be higher, just because the portion of citizens who have been defrauded will refuse to pay off debts incurred in their name. What would follow, rather, is that the lending system would adapt to rules that restrict lending to agents who do not borrow fraudulently.

Second, although the account does indeed apply retroactively, it does not follow that its application will lead to states *choosing* to repudiate repayments of debts. Even where a strong moral argument exists for repudiation of some or all debt based on

considerations of odiousness, a transitional regime may well prefer to negotiate a voluntary adjustment in obligations with its creditors or even to continue to repay the debt. Argentina is a possible example here. Although a big portion of its debts are arguably odious, the government never actually disputed the moral legitimacy of the debts. In this country, occasional defaults were due to lack of funding rather than to indignation with the lending system.

However, another aspect of my account is crucial here. Even if it were true that the consequences of repudiating debts would be negative overall, this would have no bearing on the issue of whether or not debts are *binding*. Considerations of prudence are inappropriate in this context; we should focus on the *justice* of the debts. And, as stated earlier, the justice of debts does not depend on any consequentialist notion of what is binding (eg, the fact that it advances the public interest, or that the government benefits the population), but rather on the notion that the government is acting within its legitimate mandate.

8. CONCLUSION

Debts are a problem of justice when lending transaction between agents and states take place under certain circumstances. These circumstances are not related to the nature of regimes, but with the purpose for which the loan is used, and with the fact that lenders are aware of these purposes.

More specifically, a debt is not binding for a state, I argue, when lenders are aware that borrowed funds will be used by officials for purposes which are incompatible with the duties that those public officials have. Examples of these include violation of basic human right and corruption.

It follows that, given the fact that governments of all natures (both autocratic and democratic) often fail to meet these minimum standards, a huge portion of the debts of debtor countries is not binding. Billions of dollars are involved in this kind of massive injustice. The more details we know about countries' past history of borrowing, the more we know that odious debts are not isolated cases. The problem becomes even more pervasive when we see that the international community considers not only current debts, but also *all* debts inherited by future generations, binding for states. Any theory of global justice that considers itself reasonable cannot afford to ignore this grave moral wrong.