Introduction

Every year for many years, we have been spending more than we earn. Every year, we have to borrow to make up the difference, so, each year, the debt gets bigger and bigger and each year we have to set aside more money to pay the interest on that debt . . . For the last ten years, all of the taxes we collect have had to be used to service that debt. So, before we can pay one teacher or nurse or policeman, before we can patch one pothole, before we can put one bottle of medicine in our hospitals or provide one school lunch for a needy child, we have to borrow more money, piling up the debt even further and the cost of servicing that debt even higher. (Prime Minister of Jamaica, Bruce Golding, January 13, 2010.)

Debt in itself is not typically regarded as evil. Rather, it can be quite helpful – enabling you to delay repayment for luxuries enjoyed today, or to bring to life a business plan that otherwise you would not be fiscally capable of. But should you over-borrow and delay on repayments, then debt can quickly turn ugly – especially if your loan incorporates an interest component. Where debt obligations become too burdensome, you can seek relief, if you are an individual or corporation, through bankruptcy and insolvency regimes. But sovereigns that borrow are in a different position. In the sovereign debt context, the doctrine of *pacta sunt servanda* (pacts must be respected) reigns supreme. Other than this general rule, there are no other laws nor formal rules in dealing with sovereign debt or consequential defaults. What this means is that sovereigns who over-borrow have no recourse to bankruptcy or insolvency regimes by force of law. Rather, the existing system mandates that all sovereign debts are enforceable in perpetuity – from government to government, generation to generation, without regard to factors such as a nation’s ability to repay, fairness, or other non-economic considerations.

Where, like Jamaica, a country spends more than it earns, it must either seek debt relief from its creditors, or enter into new loans to pay outstanding debt. The law does not provide relief. Many poor countries in Africa, Latin America, and Asia have spent recent decades servicing debt, and continue to do so. Like Jamaica, they are caught in a perpetual debt cycle. The International Monetary Fund (IMF) lists debts that cannot be repaid to foreign lenders as a main cause of poverty for a country.¹

The issue of public debt cannot be separated from that of poverty

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reduction and human development since it forces a government to spend more on debt service than on serving its people. Pakistan, a country with only 54 per cent literacy and where 38 per cent of small children are underweight, spent nearly $3 billion servicing debts in 2009 – three times what the government spends on health care. Indonesia, where 60 per cent of the population lives on less than $2 a day, spends more than $2.5 million an hour servicing its $151 billion debt. And the debt stock just keeps growing. The debt owed by the developing to the developed world has grown from $70.2 billion in 1970 to $579.6 billion in 1980, to $3.7 trillion in 2010.

Yet countries themselves do not acquire debt: the leaders that run them do. And where there is blatant irresponsibility on the part of the borrower and the lender in a sovereign debt arrangement to the detriment of the sovereign debtor’s citizens, universal precepts of justice and morality suggest that the strict rule of *pacta sunt servanda* should be modified so that innocent citizens of future generations are not unfairly saddled with repressive debt. Given that much of the existing debt stock of developing countries was lent during the 1960s and 1970s to unsavory regimes, or corrupt leaders, or for projects which did nothing to benefit ordinary people and which, in fact, served to increase corruption and improper patronage, it is argued that sovereign debt should not always have to be repaid.

The doctrine of ‘odious debts’ seeks to address these concerns. The doctrine, in essence, purports to deny creditors who lend to borrower governments knowing that borrowed funds will not be used in the interests of the borrowing country’s citizens the ability to seek repayment for such loans. Accordingly the doctrine seeks to inject ethical considerations into the sphere of international finance. Moreover, it does not limit itself to the insolvency context; rather, it generally demands more responsible borrowing and lending decisions by sovereigns and commercial lenders who lend to sovereigns alike. It therefore has the potential to prevent citizens from being unfairly lumbered with foreign debt. However, as it currently stands,

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1 Other causes are low levels of education, investment and savings; inadequate health care and nutrition; economic instability, including high inflation and currency volatility; high budget deficits that contribute to high interest rates; wars, coups, political instability, and corruption, lack of a strong, impartial judiciary and the rule of law; inefficient, uncompetitive and corrupt financial systems; and protectionist policies that discourage trade. See ‘What causes poverty?’ *Washington Times*, April 22, 2002: B11 (quoting the IMF).
3 Ibid, p. 6.
4 Ibid, p. 3.
the doctrine is still evolving, with commentators and scholars still giving shape to its fundamental objectives and *modus operandi*. This book seeks to contribute to the doctrine's evolution into law.