

# STUDY Session 1

## Illegitimate Debt: Perspectives and General Definitions

### Overview Paper and Discussion Guide

*il·le·git·i·mate* adjective 1. Not carried out, made or constituted in accordance with the Law, or with Rules governing a specific activity, or with Social Norms and Customs 2. Not in accordance with accepted standards 3. Departing from the regular; Irregular 4. Inappropriate 5. Not legal or fair 6. Outlawed, Unlawful, Illicit 7. Unauthorized, Unwarranted 8. Not genuine; Spurious 9. Improper 10. Unacceptable \*\*\*

\*\*\*Culled from definitions of several dictionaries, leaving out references to illegitimate offspring

There have been many articles and discussions on illegitimate debt and odious debt and indeed we have come a long way on the issue. But this will be the first time that key debt campaigners from both the South and the North will be able to devote significant time for a focused, systematic and in-depth conversation with each other on the issue.

As debt campaigns from different countries, working under different political and economic conditions – we do not need to reach perfect consensus on very precise and detailed definitions of illegitimate debt. National campaigns may make tactical choices about points of emphasis and ways to bring forward cases and advance country campaigns.

However, as movements working together in a common global campaign, with joint initiatives in regional and international arenas addressing the general public, potential allies of the campaign, governments, as well as international institutions – it is important to work towards a more unified and coherent voice on the main lines of what constitutes illegitimate debt and key questions regarding the application and operationalization of the concept

The notion of illegitimate debt emanates from concrete experiences. Our work of defining and substantiating the concept of illegitimate debt are attempts to systematically describe, analyze, articulate and effectively these experiences.

The concept is not new. Debt campaigns and advocacy groups, from the South as well as from the North, have raised issues of illegitimacy since the 1980's, or even earlier, though in some cases other terms were used –onerous, fraudulent, odious, criminal, immoral, unjust debts....

There is a range of perspectives on the definition of illegitimate debt -- from the more radical definition and perspective of illegitimacy – that looks at debts not only in their specific and immediate circumstances, nature and consequences – but from a broader, historical and systemic analysis: to narrower and more easily empirically verifiable definitions of illegitimate debt There is consensus however, that illegitimacy is more than just legality. While there is

#### **BOX A A SUMMARY of ISSUES AS to WHAT RENDERS DEBT ILLEGITIMATE**

1. The harm caused to people, communities, and environment
2. The violation of human rights
3. The violation of Laws
4. The violation of basic notions and rules of fairness
5. The violation of public trust, and obligations of transparency and accountability, the principles of good governance
6. The violation of democratic principles
7. The use of coercion, deception, misrepresentation, manipulation
8. The exploitation of others' vulnerability, impoverishment and misfortune
9. The violation of basic assumptions of Public Contracts, ie Debt Contracts
  - That parties have the mandate and authority to enter enter in contract in behalf of the people
  - That parties have common obligation to be transparent and accountable to their citizens and that that the agreements must respect these obligation.
  - The agreement is for the benefit of the people in whose name they are contracting the agreement
  - The agreement, and the attendant terms and obligations should be fair and not grossly disadvantageous to one party
10. The violation of widely held ethical, social, political, legal, economic, environmental values, principles, standards and norms. – Many of which are articulated in international covenants and treaties that attest to the formal consensus and commitment among states to uphold them

support and resonance to be found in present laws (national and international), laws do not yet adequately cover and address all the issues being raised in the work on illegitimate debt. (discussion on Law and Illegitimate Debt in Study Session 3).

Boxes A and B contain an attempt at a bare synthesis and summary of the basic elements of the various definitions of Illegitimate debt that campaigns are using.

**Box B. CONDITIONS OR BASES FOR ILLEGITIMACY MAY BE FOUND in the FOLLOWING**

1. Circumstances surrounding the contraction of the debt (can be immediate, can also include broader, historical context)
2. The nature of the contracting parties – if they have the legitimate authority and mandate to contract loans in behalf of their people, if they are despotic, dictatorial regimes; this is where the issue of successor state becomes relevant, and the question of who determines the legitimacy of regimes and how these are determined
3. The relationship between the contracting parties and the relations of power which shapes the financial transactions and relationship
4. The terms and obligations of the contracts
5. The use of debts and access to credit as leverage to impose conditionalities; The impact and implications of conditionalities
6. How the funds were used and the impact of policies and projects financed by debts
7. The impacts and implications of huge debt servicing
8. The impact and implications of “dependence” on borrowing

## ISSUES FOR DISCUSSION

### 1. Considerations that go into how various groups define Illegitimate Debt

**Analytical and ethical starting point, and with the aim of movement-building for social transformation VERSUS Political viability as a starting point with the aim of building broad support and winning immediate political and tangible gains**

These two poles are neither conflicting nor exclusive. However, debates among debt campaigns on working definitions of illegitimate debt partly lies in the differences in the starting points and the goals they are emphasizing.

For many debt movements, the starting point is - What is our analysis of debt? What are our convictions about what is just and acceptable and what is not? And the very first goal would be empowering our people with this critical analysis, relating the issue to their experiences and mobilizing them, enabling them to visualize and aim for more comprehensive social transformation. For others, the emphasis maybe - what is a definition that is consistent with our analysis and yet viable and convincing

enough to promote among a broad audience, especially among policy-makers? And foremost in their minds may be - how do we take advantage of opportunities to win political and/or tangible gains.

The choice is not one over the other approach, of choosing between comprehensive definitions of illegitimate debt versus more narrow definitions. We can promote a comprehensive definition especially in movement building, in public education etc, and understand also that within certain arenas, for particular purposes, where a consensus has to be established among different actors and constituencies, the consensus will not be as comprehensive as what we on our own promote. Such arenas will include even debt audits which, after all, are supposed to be broadly participatory and therefore arenas where we will encounter a variety of views.

Legitimacy is a political condition, is contestable, and must be contested. It is a matter of what is true and what is just, as much as it is a matter of whose version of the truth, whose concept of justice prevails. In order to de-legitimize debt, the policies and practices and the institutions that in our view are illegitimate but nevertheless prevail and are “accepted” -- it is important to start with our analysis and convictions and build strong grassroots movements that carry these analyses and convictions, as it is also important to build broad support for what may be narrower definitions (for now) of illegitimacy but nevertheless still constitute a rejection of what is being imposed.

In dealing with the following issues for discussion -- the proposal is for us to try to answer them in two ways - The first is what do we believe and want to promote as ideas; And second is, what would we be willing to agree or prefer to propose in broader arenas, in arenas where we engage and challenge policy-makers

## **2. Illegitimacy of Debt VERSUS Specific Illegitimate Debts**

The differences in definitions are not only in terms of what makes specific debts illegitimate, there is a difference in terms of the subject itself - the Debt as a whole vs specific debts.

One view refers to the Illegitimacy of Debt - referring to the Debt as a whole, as well the system that has spawned this Debt and the state of "indebtedness" or debt domination (note: debt as a whole is different from debt per se). The judgment and conclusion of the illegitimacy of the Debt is based on systemic, historical, structural, political economy analysis and perspective.

From this perspective - because all debts were/are contracted in a system that exploits the South and the poor, were contracted based on unequal relations and using unjust power over the South, and because of impoverishment that is partly the consequence of a history of colonization etc - then all debts claimed from the South today (well, maybe just nearly all) are illegitimate.

This does not mean audits are not necessary, but audits are seen as exercises primarily to demonstrate this. This also does not mean the specific nature and circumstances surrounding each individual debt case are of no importance - but that the basis for the illegitimacy of specific debts goes beyond these.

Then there is the approach that refers to Illegitimate Debt as specific individual debts. Each individual debt has to be evaluated and shown to be illegitimate based on grounds that are empirically verifiable. Empirical evidence may be defined and measured in different ways, but would involve the question of indicators and evidence, and include the element of proximity and time - for instance the question of how far back in time can you go to establish causes and consequences and verify evidence?

## **3. Illegitimate to ask People of the South to Pay VERSUS Illegitimate for Lenders to Collect Payment**

When we say a debt is illegitimate we are saying that the debt is NULL, no longer VALID, it is not acceptable to treat it as a debt. But there are two not necessarily conflicting but very different meanings.

One is to say it is illegitimate to consider these as debts of the people of the South and it is unjust to ask the people of the South to pay for this debt.

The other is to say it is illegitimate and unjust for lenders to claim payment of these debts. The ju

While some of the bases of illegitimacy are common for these two (ex - whether the debt caused harm to people) - there are also some bases that would be different, or be given different weights.

For the first -- the judgment of illegitimacy primarily rests on the impact and implications of the debt to people. For the second -- the judgment of illegitimacy primarily rests on the extent to which lenders are responsible.

For example - if a project that was financed by debt caused grievous harm to people or to communities, and in addition was riddled with corruption - what major relevance would "prior knowledge of lender" have to the question of whether it is just to ask the citizens of the borrowing country to continue paying the debt?

On the other hand - in cases where it was clear that loans that were wasted primarily because of corrupt officials of the borrowing government, lenders can argue they were not primarily at fault and have the right to claim at least partial repayment.

How do we stand on the proposition that lender's prior knowledge or awareness of the harmful impact or questionable nature of debts is a requirement for deeming debts as illegitimate?

An important issue regarding these two approaches is the distinction between the people/citizens and the borrowing government. (Lenders do not make that distinction.) An interesting related question would be - while people should pay for the sins of their governments and government officials- how do we make these governments and government officials "pay?"

#### **4. Reviewing the Different Grounds for illegitimacy --**

We also have our debates and differences on the difference Grounds for Illegitimacy. The following count as the more contentious ones. (Note though that we seem to all agree that these grounds are to be taken in combination - lack of proof in one does not mean the debt is therefore legitimate).

##### **a. Illegitimacy based on Impacts of the Projects financed by the Loans**

Some questions --

- What is the nature and extent of "harm" that is enough grounds for illegitimacy? (Social, Economic, Environmental, Political etc)
- Is it enough to demonstrate that projects "did not benefit" the people
- What if certain projects were not proven to have caused immediate and clear harm, may in fact have produced some benefit to the citizens and community? How should this be measure up against other grounds for illegitimacy?

##### **b. Illegitimacy based on Impacts of Loan Conditionalities**

This discussion of course begins with our debates on defining what "Conditionalities" are. For the moment, perhaps we can begin with this definition -- Conditionalities are impositions by lenders that are not intrinsic to the financial transaction; it also includes tying the loan to the purchase of specific goods from specific suppliers. Some would also consider eligibility requirements that force borrowing countries to implement certain policies and determine spending priorities (in fact heavily influence the whole fiscal and budget program) -are part of "conditionalities."

Some questions --

- Is the presence of conditionalities (ie lender imposed conditions that are not intrinsic to the loan transaction) ground for illegitimacy?
- Or does it have to be demonstrated that the conditionalities are harmful, unfair and grossly disadvantageous to the people of the borrowing country?

##### **c. Illegitimacy based on the "unfair" and "grossly disadvantageous" terms of the loan**

- One of the arguments that have been used to illustrate illegitimacy is the floating interest rates, and the impact of the sudden increase of the rates (ex in the 1980s) -- What level and nature of interest rates would be ground for arguing illegitimacy?
- What other issues would come under this heading?

##### **d. Illegitimacy based on the illegitimacy of the contracting party - ie Authoritarian/Dictatorial regimes**

It is one of the assertions that loans extended to illegitimate regimes - ie regimens that do not have a democratic mandate, are dictatorial or authoritarian, or rule through force and tyranny - are illegitimate.

- "Who judges or decides whether a regime is illegitimate or not?" is a question often posed.

One answer is that - it is only the citizens of that country that can decide on the legitimacy of their government and they express this judgment by the historic act of ousting or overthrowing the regime.

A controversial proposal that has come up is for the establishment of independent third parties to determine whether certain regimes are illegitimate or not, for purposes of determine whether loans extended to these regimes are legitimate or not, or whether loans should be extended to these regimes. Do external entities have a right to make judgments on the legitimacy or governments, judgments which serve as basis for international policy of governments? Is this not similar to the question of whether another government or inter-governmental institutions can call for the invasion of another country or instigate the overthrow of a regime on the grounds that they consider this regime to be illegitimate? What, in any case, is the need for an external body?

- Is the illegitimacy of a regime enough basis to declare loans to this regime also illegitimate, or should there be other grounds or criteria?

### **c. Successor Debts – debts used to pay off illegitimate debt**

There is also the proposition that debts that have been used to pay illegitimate debts should also be considered illegitimate. This is very important for countries that are saddled with debts that were incurred specifically to pay of dictatorship debts.

**d. Illegitimacy based on the impact of debt service** -- “Debts which cannot be paid with impoverishing a country or causing harm to the people.”

For many South campaigns this is a very important part of the issue of illegitimate debt. Others argue that this belong to a different discourse, that of debt sustainability.

## **4. The difference between Illegitimate Debt and Odious Debt**

The concepts of Odious Debt and of Illegitimate Debt are not one and the same. Illegitimate debt is a broader concept that includes Odious debt.

As the definition of Odious Debt involves questions of international law - the suggestion is that this be discussed in Study Session 3.

## **5. Others ?**

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The discussions in Study Session 1 would naturally flow into more specific issues related to operationalizing the concept of Illegitimate Debt, the topic of Study Session 2. Thus, during the discussions in Session 1, points for further discussion in Session 2 should be noted.