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***Marko Dimitrijević*[*], LL.D.,**
Assistant Professor,
Faculty of Law, University of Niš

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STATE IMMUNITY FOR ECONOMIC ACTIVITIES: EXAMPLE OF AN ODIOUS PUBLIC DEBT[**]

Abstract: *The subject matter of analysis in this paper are the essential features of an odious public debt (loan) in contemporary monetary law. In this context, the first part of the paper focuses on the concept and basic functions of the public debt in the theory and practice of monetary management, where the author discusses the basic principles of public borrowing that ensure timely servicing of overdue monetary obligations and support fiscal responsibility and credibility of public loan subscribers. The second part of the paper deals with the concept of an odious public debt emission and its correlation with the state immunity for undertaking economic activities, which are indisputable in the field of fiscal and financial sovereignty but it raises the issue of responsibility of the public monetary agents (central banks and public debt management agencies) for the harm they may cause to others in their work. In particular, the analysis focuses on the need for a more extensive use of the doctrine of odious public debt as a means of protecting the creditors from subscribing to the so-called "odious" bonds of dictatorial state regimes. The author also points to the need for establishing an international judicial forum which would have the authority to prevent the effects of an odious public debt in a timely manner by ensuring an early detection of mala fides by the debtor state or extend the necessary period for examining such intentions prior to the conclusion of the contract. In the author's view, this is a vital condition for the effective operation of credible public debt management policies.*

Keywords: *monetary law, monetary management, odious public debt, monetary sovereignty, lex monetae.*

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[*] markod1985@ prafak.ni.ac.rs

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1. Introduction

In practice, public debt management policy has long been treated as a separate segment of fiscal and monetary policy.[1] This understanding started from the monetary and fiscal functions of the public loan and the postulates of the so-called "time consistency theories", which emphasize the fact that public loan funds are a specific form of capital available to the public in addition to cash and government bonds (Currie, Dethier, Togo, 2020: 22-65). Nowadays, due to the conditions observed in modern market economies, it is considered that public loan management policy should be viewed as an independent segment of macroeconomic policy. This trend began in the late 1980s in *New Zealand's* monetary legislation, when the government realized that the goals set by the law on fiscal responsibility would not be realized without special normative regulation of public loan management.

In the contemporary monetary law, responsibility for the consequences of public debt management policy is excluded from the competence of the central bank, due to the elimination of any conflict of interest arising from the conflict of monetary tasks and debt refinancing, aimed at protecting the interests of the state (debtors) and creditors (legal entities) in an optimal way. Nevertheless, in reality, governments very often ask the central bank to grant a loan to refinance debt (Dimitrijević, 2019: 70-71). The reasons why the central bank can deviate from the ban and accept its share in public debt management are related to the affirmation of its new task in preserving general financial stability (Dimitrijević, Golubović, 2020: 2-3).

2. The technique of concluding a public debt contract

In monetary law literature, it is stated that the public loan agreement belongs to the category of so-called "incomplete contracts". The reason why the contracting parties may withdraw from the contract is related to the problem of limited rationality and costs that include future unforeseen costs, where many of these costs are not recognized or determined by the court in potential fiscal and monetary disputes (Posner, Choi, Gulati, 2011: 2). In this respect, Posner makes a distinction between the costs of *responsible* and *irresponsible* states. The first category includes costs caused by natural disasters, wars, and unpredictable economic crises, due to which the governments of those countries are no longer able to repay the loan. The second category of costs includes those

1 A public loan is the most common and most important form of public debt based on contractual grounds. Also, there are forms of public debt that are based on non-contractual (other) grounds (such as gifts, reparations for war damages, torts, and others), but they do not have a prominent significance in the area of monetary law.

caused by the governments of irresponsible countries, either intentionally or by gross negligence, although such differences do not matter much in practice for creditors of a public loan.

The public loan agreement must be concluded in a way that encourages the payment of the due loan in the responsible countries, with clearly defined conditions for the value restructuring of the loan in irresponsible countries (regardless of which country is in the role of the debtor). Namely, public loan agreements are concluded in a way that should minimize the costs of creditors who seek to exploit the property of debtors in the sense of opportunistically reducing the burden of their debt. Creditors in court proceedings can also demand the settlement of their claims from property located outside the monetary jurisdiction of the debtor state, which means that one of the decisive factors influencing the creditor's will is the awareness of political risk (i.e. the reputation of the debtor state public loan agreements and conscientious repayment). The problem with the burden of repaying the public loan is accompanied by the phenomenon of aliquot loss of social welfare, which occurs as a consequence of fiscally irresponsible debtor countries. In such circumstances, creditors often agree to restructure the debt, which also means leaving free space for the debtor state to strengthen its production (or to implement tax reform), to generate enough income to continue repayment. The creditor agrees to that because, in such a scenario, the loss is smaller than in case of declaring a fiscal moratorium where the state cannot pay the due obligations.

However, creditors must take into account the degree of readiness debtors show in concluding new "more favorable loans" because, in this way, they can send a signal to other future debtors about the flexibility of contractual elements of public loan that have the character of *essentalia negotii*, which may ultimately mean circumventing such contractual clauses that must be respected. Hypothetically, in cases where the state has a larger number of public loan creditors, their *ex-post* bidding for a better share in loan repayment and collection delays may occur, which may initiate high lobbying costs; for this reason, debtor states can rely on "safe" creditors who readily agree to refinance the debt even when the state has enough money to pay due to financial obligations. Of course, the original public loan agreement and the new more favorable agreement for the debtor can never be substitutes (similarly, in the so-called "karsts theory" in microeconomics, it is considered that a used and new car cannot be substituted), at least not for a creditor already facing certain loan refinancing costs.

The technique of drawing up a public loan agreement implies two important issues: the problem of execution of the contract (inability of the responsible states to make the payment of due obligations or their refusal), and the problem

of new negotiation (the costs of an aliquot loss of an aliquot part of social welfare observed in fiscally irresponsible states, to keep the loan agreement in force) (Posner, Choi, Gulati, 2011: 4-6).

The problem of contract execution is especially emphasized in international financial and capital transactions, where the creditor is always able to initiate proceedings before domestic court against the unscrupulous debtor; but, in those circumstances, the debtor can invoke his immunity (because he is a subject of public law). In these cases, the debtor state excludes its property (facilities of consular and diplomatic missions) from the principal of the debt before foreign courts, due to the operation of legal fiction which is located on the territory of the domestic state. Execution of contractual obligations by debtors must not be based only on the fear of litigation but also on the loss of reputation in the context of macroeconomic (in)stability and consistency in (non)fulfillment of contractual obligations. The loss of a good or bad reputation can significantly affect the negotiating position of a particular country in concluding new public loan agreements.

When it comes to the problem of new negotiations, the factors that affect its frequency in practice are related to the efficiency of the debtor state government, the position of the opposition, local political factors, and turmoil, as well as the citizens' support of the ruling coalition. The creditor usually cannot determine whether the debtor stops paying due to the real impossibility and risk of causing civil unrest, or whether it is a matter of intentional prolongation of due obligations. Moreover, sometimes the government can "intentionally" cause such riots, which can have the direct consequence of delaying or suspending the repayment of a public loan while providing a credible justification for such behavior because the priority of every state is to protect its citizens and the public order. The interests of the public loan creditor may be further jeopardized if the debtor (in the meantime) borrows from international monetary or financial organizations, where assistance is aimed at developing infrastructure projects that, as a rule, last a long time and carry a high risk of realization.

The risk and consequences of late public loan repayment affect not only the creditor country and the debtor country but also third countries (reputable central and commercial banks of those countries, as well as citizens) which may or may not own loan bonds. spillovers of negative externalities (crises) to their economies. The overall result may be the effect of congestion on international financial flows. Due to all the above, the costs of negotiations include not only the direct costs of new negotiations but also indirect ones, which are reflected in the greater rigidity of the contracting parties to reach consensus on new repayment terms due to anticipated macroeconomic uncertainties.

3. The concept of public debt in international monetary law

When comparing private debt (credit) agreements and public debt agreements, it can be noted that the legal position of the contracting parties is quite specific in terms of legal protection. The state in the role of the debtor is particularly vulnerable because it cannot find protection under the existing rules and regulations on bankruptcy (which is reserved and written exclusively for private debtors) from hostile actions of foreign creditors, nor does it allow the state the right to participate in financial reorganization arising from a bankruptcy situation supervised by a competent judicial authority. The state, as the bearer of monetary sovereignty, cannot be the subject of both domestic and foreign regulations on bankruptcy proceedings. In circumstances when a public loan is granted to a state by natural persons in the role of a creditor, the state must fulfill its due financial obligations, and cannot invoke judicial protection in case of consequences of impending bankruptcy (as this rule applies only to sovereign debtors). Of course, the application of this rule does not exclude the need to adopt an international rulebook on the consequences of bankruptcy on sovereign debtors, which the IMF tried to do in 2002 by considering the Sovereign Debt Restructuring Mechanism, which did not receive the necessary political support. This shows that the legal and economic consequences of the bankruptcy of the debtor state are far more serious than the consequences of the bankruptcy of private debtors. The practice of comparative monetary law shows that states have limited legal protection in this area. Namely, the creditor of a public loan in a court dispute that is conducted due to the impossibility of settling the due monetary obligations of the debtor state may invest and use very limited legal remedies.

Although most monetary legislations in the world accept the postulates of the theory of limited sovereignty (meaning that the state cannot enjoy immunity for all economic activities it undertakes, especially when it comes to negligent borrowing outside monetary jurisdiction), state property still enjoys privileged legal treatment. This primarily refers to fixed capital assets in the form of diplomatic and consular missions, which enjoy protection under statutory and customary international law, while the assets of central banks and state-owned enterprises outside domestic monetary borders are treated in the same way as all other state assets (without privileges). U.S. monetary law, unlike European monetary law, supports compromise dispute resolution between debtors and public loan creditors; it was first evident in a 1984 lawsuit, when the federal government intervened due to a large number of creditors' claims against a debtor member state. For that reason, it is very important to work on creating conditions that do not violate the starting (equal) positions of the negotiating parties, bringing one or the other party to a privileged position.

4. Legal principles of public borrowing

The issue of public borrowing in international monetary law is exhaustively regulated by contractual clauses that can be classified into *four* groups: public debt contract execution clauses, clauses of new negotiations on the conditions of public debt (paid and unpaid),clauses that prevent competition between public debt creditors, and clauses restricting violent takeovers of claims (Posner, Choi, Gulati, 2011: 7-17).

a) The basic ways to reduce the risk of repayment of a public loan concern the shortening of the maturity of collection bonds and the practice of borrowing in foreign currency. Consequently, creditors of "risky countries" are always more interested in issuing short-term bonds that can be collected with a high degree of security. The debtor and the creditor may entrust the jurisdiction to resolve disputed elements of contractual obligations to domestic or foreign courts (Lastra, Bucheit, 2014: 2-3). Debtor states prefer the jurisdiction of domestic courts because of the possible preference for the debtor's obligations, while creditors prefer the jurisdiction of foreign courts based in London or New York to provide conditions for a fair and equitable trial. Such behavior of the creditor may be justified by avoiding the risk that exists if the trial takes place before a domestic court because the state can initiate a change in national law that is applied by the court *ex officio*, in favor of the state creditor, which we can fully agree with.

In addition to the court settlement of disputes from public debt agreements, it is possible to determine alternative ways of resolving disputes. Arbitration is quite common in the practice of international monetary law. However, arbitration clauses do not always have to successfully solve the problem of contract execution because the arbitrator's decisions are not legally binding. In practice, these decisions are respected due to the strength of moral authority resulting from the fact that decisions are made by an expert body that acts *de lege artis* and that the parties themselves have voluntarily chosen it on their free will. Certainly, in the area of international monetary obligations, this may not always be the case, given that it is a matter of public finances as an important reflection of monetary sovereignty.

In practice, foreign creditors can also use *cross-default clauses* that transfer obligations from one contract to another in case of an inability to fulfill the original contract, or *acceleration clauses* that accelerate the collection of future receivables due to the occurrence of events previously provided for in the public contract loan (Golubović, 2012: 157).

b) The new negotiation clauses are aimed at giving a certain gratis period to the debtor state regarding the obligation to pay a public loan, especially in periods of recession when such consideration of special circumstances by the debtor is

a good signal of understanding his position. Within these contractual clauses, we distinguish between those related to the modification of conditions and methods of payment and the so-called other modifications.

The change in payment terms depends on which country is in the role of the issuer of public loan bonds; for example, if the state of *New York* is in the role of the issuer, the change is allowed if there is the consent of 50-75% of the votes of public loan shareholders. In Great Britain monetary law, 50% of the votes is required when voting on the first change of payment clauses, and 75% of the votes is needed in the second change of payment clauses. Such a majority is in the interest of protecting all creditors (both minority and majority); so, it is necessary to reach a consensus on changes in the essential conditions of the contract.

The collective action clauses are particularly relevant in EU monetary law. These clauses are defined in the ESM Agreement, which requires all Member States to include this clause in newly issued securities with longer maturities from 1 January 2013. The purpose of this clause is to enable the creditors with the largest share to change the terms of the bonds (in terms of debt restructuring), while this clause also binds minority creditors. This clause is consistent with the clauses that exist in *Anglo-Saxon* and *Anglo-American* monetary law, primarily the aggregation clause, which implies that all government payers are given equal attention when concluding a public loan agreement. However, the aggregation clause is also in the function of protecting minority creditors, and requires the existence of a qualified majority to change the terms of loan repayment in the circumstances when the debtor is insolvent (Dimitrijević, 2015: 311-313). The collective action clause mechanism has practically enabled the participation of the private sector in the policy of public loan management in the circumstances when the state experiences a fiscal moratorium or is on the verge of bankruptcy. These clauses are particularly effective in resolving the problem of stagnation in a new negotiation that has its opportunity costs embodied in the time, money, and psychological expenses of the negotiator. The condition for their application is the consent of all creditors on the existence of common interest. If there is no support from at least one creditor, it cannot be applied in practice. For this reason, it is necessary to establish a qualified majority model, which must be determined optimally (neither too low nor too high). It is usually determined in the range of 19-75%, with the proviso that individual creditors may request mandatory meetings to vote on such decisions. A well-known form of the aggregation clause that is often used in practice is the so-called "*Pari-Passou clause*", which requires that every creditor must be treated equally.

c) The meaning of clauses that restrict competition among creditors of a public loan is that individual creditors enjoy *ex-ante* priority in the collection of their

claims and *ex-post* requests for various forms of payment. The most commonly used clause in this context is the *negative pledge clause*, which prohibits the state issuing public loan bonds from securing the financial interests of future creditors, before securing payment of the current public loan identically. If there were no such clauses, the creditors would not be put in an equal position because the privileged creditors would charge interest before the start of a possible lawsuit and avoid numerous transaction costs. The problem with the application of these clauses is reflected in the fact that some creditors enjoy the priority of payment. This can best be seen in the example of the IMF, which provides financial support to member states in the circumstances when it is necessary to protect their national interests. Some monetary law theorists believe that the clause has an anachronistic character and refers only to a narrow set of situations in which creditors have been historically subordinated, as was the case with earlier local laws that allowed domestic creditors to take precedence over foreign creditors. Today, it is considered that this contractual clause prohibits any form of granting legislative advantages to a certain category of creditors.

A distinction is usually made between two types of these clauses: *the ranking equally clause*, which guarantees the same treatment of all bonds, and *the priority payment clause*, where all bonds are treated equally in terms of payment method. Lately, the so-called *pro-rata clause* explicitly regulates that all bonds must be treated as equal and paid based on the settlement of due debts in installments.[2]

d) *Clauses that restrict risk-taking behavio*r are aimed at preventing those actions of the debtor state that may jeopardize its solvency towards current creditors if the states decide to invest in risky investment ventures for which they expect a return in the future. This may occur not only in countries with a "bad" reputation in debt relations, but also in countries with a "good" reputation, renowned for their responsibility and conscientiousness in fulfilling overdue debts. In the circumstances when the state declares a fiscal moratorium, as a form of the formal declaration of will on the impossibility of paying due obligations (which, as a rule, precedes bankruptcy), it may be suspended from the IMF but the question of conscientious creditors compensation arises.[3] One of the ways to avoid these risks is reflected in the increasingly common creditors' position that the debtor state must be a member of the IMF, which implies certain standards in the field of fiscal and monetary policy that must be observed in conducting sound public finances. This condition is symbolically called the "IMF clause", but we can see that *per se* it is not a guarantee of the existence of a moderate risk for the public

2 Such privileged debt collection regimes are only temporary and their specific duration is decided by the majority of public loan creditors.

3 A decision of the shareholders with at least 25% of the votes is required in order to collect on such a basis.

loan creditor. Namely, in the conditions of the global financial crisis, it has become clear that membership in international monetary organizations is not a sufficient protection from economic shocks, but it certainly provides a greater degree of predictability in resolving such problems than in the circumstances when there is no membership. In practice (thus far), it has not happened that the IMF has excluded any of the member states, but the restrictive measures are reduced to the absence of application of the rules (which means that the mentioned clause has a minimized factual scope in the creditors interests). The contracts of public loan creditors, which determine the list of sovereign bonds, have a similar function.

Throughout history, special payment funds have been created, by which creditors wanted to protect their interests. These funds first began to be used in international monetary law during the 1700s in *Great Britain*. They were managed by a special agent who had contractual powers to do so. According to this system, the debtor state paid interest in a certain percentage amount until the end of the year, in the periods determined by the fund manager (but according to the lottery system). Debtors very often tried to conclude a loan refinancing agreement due to the impossibility to repay the principal, wanting only to repay the interest, which the creditors at the time usually did not agree to. The purpose of the fund was to ensure that the issuer would pay a proportional part of the principal together with each interest, but in such a way that the principal is repaid at the end of the mandate. Here, we can undoubtedly notice the logic of the provisions on debt amortization which protects creditors from insolvent debtors.

At this point, it is necessary to draw attention to the consequences of the inflation policy pursued by the debtor state. Namely, inflation can sometimes be intentionally caused and motivated by the interests of debtor countries, given the well-known rule that the position of debtors improves due to inflation flows, while the position of creditors deteriorates due to increasing the difference between nominal and real value, which if drastic (hyperinflation) makes the public debt ratio meaningless. As a result, creditors today resort to the requirement that the debt is denominated in one of the stable currencies (usually US dollar). However, debtor countries can also manipulate tax policy instruments and impose tax obligations on foreign creditors (which is rarely used in practice today) or use the GDP clause, which is used by *Argentina*. According to this clause, the debtor pays a higher interest rate in case of an increase in gross domestic product, where it is perceived that the increase in GDP is inherent in responsible debtors (although this is a relatively rebuttable assumption). This becomes a particularly problematic contract criterion if the condition is related to the so-called “creative accounting techniques”, which are a great challenge for the monetary legislator because these actions are neither legal nor illegal

(in terms of their nature). Because of that, the impossibility of accurate legal classification prolongs the adequate legal consequences.

5. State position in odious public debt management

The concept of an odious public debt (loan) has long been limited to cases in which the state borrows from the private sector by abusing the public trust enjoyed by government officials (Gelpern, 2007: 82-86). However, these traditional notions about the contracting parties of an unscrupulous public loan are today a relic of the past, as states increasingly borrow from public law collectivities. Based on such understanding, it follows that only domestic public loans would bear the sign of potential negligence of the debtor state, but the fact is that these elements also exist in foreign public loans (where creditors are also international monetary and financial institutions).

The doctrine of the negative public loan was developed by *Alexander Sack* in 1927, who believed that an odious public loan must meet the following conditions: the so-called despotic rule (i.e. the absence of representation and information of one part of the public opinion on the registration of the loan), the absence of general utility for citizens, and knowledge of previous elements by the loan creditor.

The existence of these elements is crucial because they raise the question whether the state bears responsibility for the damage it caused to its citizens and foreign creditors during the registration of the odious public loan. According to the classical settings of state sovereignty, the state as a subject of public law enjoys immunity to undertake economic activities on its territory; although this is not disputable in the field of fiscal and financial sovereignty, the question is: what about monetary sovereignty? We think that the behavior of the state must be subjected to the rules of law indemnification in case of causing intentional and negligent damage to the creditors of the public loan (Dimitrijević, 2018: 100). In that sense, the central bank as the supreme monetary institution can be subject to these rules, which have been (unjustifiably) reserved for private loans for a very long time, because in conditions of hyperinflation and collapse of the monetary system, due to uncontrolled expansion of credit by commercial banks, the central bank does not (always) perform its control function in a legally valid manner.

Monetary law theorists must keep on urging for a wider use of the odious public debt doctrine, as a tool for protecting creditors from subscribing to the bonds of dictatorial state regimes (Gentile, 2010: 174). One of the mechanisms that enable this is the creation of an international judicial forum that would have the responsibility to timely prevent the consequences of unscrupulous public loans by early detection of such bad intentions in the debtor state or extension

of the period necessary to examine such intentions. This could be the task of a specialized international court, or such an intention would be revealed by insisting on accepting special conditions from accessory commercial loans, as a result of which the creditors would reject the offer to conclude the contract. An effective mechanism can also be the public announcement of potential contract conditions and market practices related to the conclusion of contracts, where deviations from generally accepted rules could be interpreted as a signal for a form of behavior that deviates from the envisaged conscientious borrowing.

When it comes to the implications of state immunity on current and potential economic activities, there are various studies in the monetary literature. The case law in this regard is uneven and does not provide enough material to establish some universal elements of state responsibility. Therefore, it is emphasized that cooperation with the private sector is necessary because, from their practice, a comparative method can also identify certain facts necessary to take a unified position on the existence of state responsibility for the undertaken economic activities. Comparing public and private sector activities can alleviate dilemmas in determining the scope and limits of state responsibility, assuming that the state's business morale is still far higher than that of private companies (Stetser, 2000: 294). Of course, this assumption is rebuttable and stems from the distinction between private and public goods, where the motive for satisfying public goods is to meet general social needs. The doctrine of odious public debt excludes such altruistic motives of states that know how to play their citizens when they are in the role of creditors. For example, in the US monetary legislation until 1952, at the suggestion of the Secretary of State, state immunity could be granted or denied for certain instruments, but the reasons for such recommendations were shrouded in "a veil of secrecy" and were widely criticized in public. As a result, it was not possible to harmonize legislative practice but to deepen political opportunism. However, in 1952, the State Department supported the position on full state immunity, referring to the practice of other states, especially in the part concerning the responsibility for issuing municipal bonds (Immunity of Foreign Governmental Instrumentalities, 1984: 176-182).

6. Public debt restructuring in international monetary law

When the legislator tends to create optimal conditions for the sustainability of public debt (in the long run), in practice, it refers to a combination of appropriate structural reforms that are combined with certain financial measures and fiscal consolidation (Padoan, Sila, Noord, 2013: 311). However, these measures are applied when the maturity of the current public loan has already occurred, which means that they enable the solution of such problems only with future public

loans. For that reason, the debtor state tries to change the debt restructuring technique, which changes some of the elements of the already concluded contract (increases the number of installments, reduces the interest rate, extends the repayment period, etc.). In theory, there is no single position regarding the legal nature of the restructuring procedure, so it can be interpreted as a form of statutory change or as a new contractual solution (Sedlak, 2005: 1483-1484).

Unlike the IMF, which tried unsuccessfully to introduce a Public Debt Restructuring Mechanism, the United States imposed a *collective action clause* as a sufficient mechanism for securing creditors, given that their share in the Fund is the largest. Considering that debt restructuring also changes its redistributive effects, monetary law theorist must pay much more attention to this problem. The flexibility of public debt financing and the availability of various funds by international organizations has somewhat minimized the effects of the problem because, compared to some earlier historical periods, such a variety of means to solve the problem did not exist. However, the accelerated development of the financial market has given complexity to the technique of debt restructuring; therefore, efforts to find the optimal legal solution must continue because the collective action clause cannot be a *panacea* for all monetary problems in modern economies.

The problem with public debt, according to some authors, is that debt exists in a conceptual space that is realized at the very border of public law and politics. This means that in good times the contractual nature of public debt is emphasized, but in bad times its political characteristics are always preferred. Thus, courts in proceedings initiated by creditors to protect their claims must perform an expansive regulatory function by enabling creditors to protect their property and free it from negative externalities (Thomas, 2017: 25-41). Namely, the author starts from the fiction that public debt is a kind of commodity and that the creditor should enjoy his property without any restrictions. Such a position was also confirmed in the case of *Argentina against NSM* (hedge fund of minority creditors in the Cayman Islands). In 1994, Argentina started issuing bonds based on an agreement signed in New York on the establishment of a fiscal agency. Later, the Argentina government validated the debt on a unilateral basis and offered creditors new bonds with lower interest rates, which the NSM did not agree to and initiated civil proceedings to settle its claims.

Contemporary monetary law re-examines the classical assumptions about the intertemporal burden of public lending. A growing number of theorists believe that the use of a public loan does not imply the transfer of the actual burden of repayment to future generations. In support of such a stance, when deciding on borrowing, governments derive purchasing power from individuals and legal

entities, i.e. domestic or foreign financial institutions (Buchanan, 1984: 2-7). Such derivation of the purchasing power of the government is associated with certain opportunity costs because the creditors of the loan could alternatively use their funds for other profitable activities. However, unlike the indebtedness of the public sector with additional taxation, where there is currently an increase in the actual (total) tax burden, this burden remains temporary when using a public loan,, i.e. it is most prominently felt by former generations of creditors since the funds were borrowed in the initial period. This implies that a public loan *per se* (as opposed to taxation) does not create an increased tax burden, but rather that the burden is a consequence of the government policy on the amount and structure of planned public expenditures.

The use of a public loan leaves certain obligations for future generations, but these obligations cannot be treated as aggregate real burdens because they are mutually exclusive (primarily in the case of a domestic public loan). This stems from the fact that, although future generations of taxpayers repay borrowed funds by paying taxes, funds from the same tax revenues are returned to them through the payment of interest rates held by domestic public loan creditors. The consequence of this treatment is that the intertemporal burden imposes an obligation on future bondholders to only make mutual transfers, which cannot be compatible with the loss of resources during the initial period of loan registration (Dornbuch, Draghi, 2004: 5-6). A public loan agreement is not a gratuitous legal transaction and, in that sense, it is necessary to make a distinction between the primary and secondary burden of a public loan. The primary burden is not passed on to future generations because it implies a direct waiver of funds when deciding to subscribe to a loan. The secondary burden of a public loan is conditioned by certain variables, the most significant of which is the distribution of loan instruments. If there are no differences between taxpayers and owners of loan bonds, there will be no substantial transfer of funds; but, if they are not the same persons, the real costs will be borne by the so-called "net taxpayers", while the real benefits will be "net bondholders". Unlike the primary burden, which cannot be transferred to future generations, the secondary burden can be passed on, which is why the government must take care when deciding on the use of the loan. In structuring a public loan, care must be taken that the loan has a short maturity and that the bonds are indexed or denominated in foreign currency. In addition to the risks that arise in the financial market, governments must take into account operational and credit risks, as well as settlement risks (Colignon, 2011: 539-560).

7. Conclusion

To avoid the consequences of financial and economic crises, the modern policy of public loan management increasingly emphasizes the use of bonds that are price-indexed (as opposed to bonds with a fixed profit) because the income from the aforementioned bonds increases in times of inflation. As the financial derivatives market has developed rapidly in recent decades, countries such as France and Germany (through their public loan management agencies) have paid special attention to the benefits and costs of using swaps to reduce borrowing costs.The goals of the optimal public loan management policy are aimed at creating conditions for the sustainability of the loan that can be viewed in a static and dynamic context. In practice, the much more commonly used concept of static sustainability starts from the limitations set by the rules of fiscal and financial convergence, while sustainability in a dynamic sense refers to the results of the implementation of fiscal policy measures with the existing economic environment. The existence of fiscal rules is a necessary but not a sufficient condition for achieving the sustainability of public lending, as a result of which economic policymakers must take timely action following changes in macroeconomic conditions. The sustainability of public lending in a dynamic sense is conditioned by its intertemporal effects. These effects are reflected in the fact that the burden of financing a public loan is distributed to future generations.

References

Buchanan, J. (1999). *Public Principles of Public Debt A Defense and Restatement* (*The Collected Works of James M. Buchanan).* Vol. 2. Indianapolis: Liberty Fund.

Colignon, C. (2011). Fiscal Policy and the Sustainability of Public Debt in Europe. *International Economic Review*. 53 (2). 539-560.

Currie, E., Dethier, J. J., Togo, E. (2003). *Institutional Arrangements for Public Debt Management*. Washington: World Bank Policy Research Paper No. 3021, 22-65.

Dimitrijević, M. (2018). *Institucije međunarodnog monetarnog pr*ava. Niš: Centar za publikacije Pravnog fakulteta.

Dimitrijević, M., Golubović, S. (2020). About Central Bank Responsability in Contemporary Monetary Law. *TEME*. XLIV, 1-16.

Димитријевић, М. (2015). Управљање јавним дугом: Правно-економске последице по положај државе као дужника. *Зборник радова Правног факултета у Нишу*. 70, 311-328.

Димитријевић, М. (2019). О неким закономерностима у односу монетарних (банкарских) финансија и монетарног права. *Зборник радова Правног факултета у Нишу*. 83, 61-76.

Dornbusch, R., Draghi, M. (2004). *Public Debt Management: Theory and History*. New York: Cambridge University Press.

Gelpern, A. (2007). Odious, Not Debt. *Law & Contemporary Problems.* 70, 81-114.

Gentile, C. M. (2010). The Market for Odius Debt. *Law & Contemporary Problems.* 73, 151-174.

Голубовић, С. (2012). *Фискална правила у Европској монетарној унији*: Ниш: Студентски културни центар.

Lastra, M. R., Bucheit, L. (2014). *Sovereign Debt Management*: Oxford: Oxford University Press.

Padoan, P. C., Urban, S., Noord, P. V. D. (2013). The Sovereign Debt Crisis in Europe: How to Move from Bad to Good Equilibrium?. In L. Paganetto (ed.). *Public Debt, Global Governance, and Economic Dynamism*. Munich: Springer.

Posner, E. A., Choi, S. J., Gulati, M. G. (2011). *Political Risk and Sovereign Debt Contract*. University of Chicago Law & Economy Olin Research Paper 583-Public Law and Legal Theory Working Paper No. 370, 1-35.

Sedlak, J. (2005). Public Debt Restructuring: Statutory Reform or Contractual Solution?. *University of Pennsylvania Law Review*. 152, 1483-1515.

Stestser, V. G. (2000). The Immunities of the States and Governement Economic Activities. *Law & Contemporary Problems.* 73, 293-316.

Thomas, D. (2017). Sovereign Debt as a Commodity: A Contract Law Perspective. *Osgoode Hall Law Journal*. 54(2), 21-47.

University of Chicago Law Review Editors (1957). Immunity of Foreign Governmental Instrumentalities – Comments. *The University of Chicago Law Review*. Univesristy of Chicaco Press, 25 (1), 176-182.

Др Марко Димитријевић,
Доцент Правног факултета,
Универзитет у Нишу

ОДГОВОРНОСТ ДРЖАВЕ ЗА ЕКОНОМСКЕ АКТИВНОСТИ: ПРИМЕР УПИСА НЕСАВЕСНОГ ЈАВНОГ ДУГА

Резиме

У савременом монетарном праву, одговорност за последице политике управљања јавним дугом изузета је из надлежности централне банке, због елиминисања сваког сукоба интереса који би произашли из колизије монетарних задатака и рефинансирања дуга, а све у циљу заштите интереса државе (дужника) и повериоца (физичких и правних лица) на оптималан начин. Разлози због чега централна банка може одступити од забране финансирања и прихватити свој удео у управљању јавним дугом везани су за афирмацију њене улоге у очувању финансијске стабилности. Концепт несавесног јавног дуга (зајма) дуго се времена ограничавао на случајеве у којима се држава задужује код приватног сектора и то злоупотребом јавног поверења које државни званичници уживају. Ипак, ова традиционална схватања о уговорним странама несавесног јавног зајма данас представљају реликт прошлости, јер се државе све више задужују код јавноправних колективитета. На основу оваквих схватања проистиче да би само домаћи јавни зајмови носили предзнак потенцијалне несавесности државе дужника, али чињеница је да и ти елементи постоје и код иностраних јавних зајмова (где су повериоци и међународне монетарне и финансијске установе). Када се говори о импликацијама државног имунитета на текуће и потенцијалне економске активности, у монетарној литератури постоје различите студије. Судска пракса у том погледу је неуједначена и не пружа довољно материјала за утврђивање неких универзалних елемената државне одговорности. Стога се истиче да је неопходна сарадња са приватним сектором, јер се из њихове праксе упоредним методом, такође, могу препознати одређена факта неопходна за заузимање јединствених ставова о постојању државне (не) одговорности за предузете економске активности.

Кључне речи: *монетарно право, монетарно управљање, несавесни јавни дуг, монетарни суверенитет, lex monetae.*