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Araştırma Makalesi

WHAT CHANGED IN PERSONAL DEBT ENFORCEMENT SINCE ANCIENT TIMES?

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Abstract

Debt default has various adverse effects on the parties of a loan transaction, namely the debtor, lender, market, and society. Many mechanisms have been developed for debt enforcement since ancient times. Unfortunately, the sanctions used in enforcement, especially for personal debts, have always been quite harsh. This paper evaluates the instruments used in personal debt enforcement. It presents that some sanctions used in ancient societies are still utilized in modern economies. While the traditional insolvency regulations focused only on protecting the lender by disregarding the humanitarian aspect, current laws also aim at the relief of defaulted individuals. Although there is no more death penalty and slavery, and are too few imprisonment practices today, the ancient instrument of seizing assets is still an essential sanction with some exemptions. Debt bondage is also not employed nowadays. However, confiscating the individuals' future income may be considered a modern form of debt bondage.

Keywords: Debt Bondage, Enforcement of Personal Debt, Personal Debt Default, Sanctions for Default.

ANTİK ÇAĞLARDAN BU YANA KİŞİSEL BORÇ İCRASINDA NE DEĞİŞTİ?

Öz

Bir borç işleminde karşılaşılan temerrüdün gerek borç alan ve veren taraflar ve gerekse piyasa ve toplum üzerinde olumsuz etkileri vardır. Antik çağlardan bu yana söz konusu borçların icrası için çok çeşitli yöntemler geliştirilmiştir. Maalesef bu araçlar, özellikle kişisel borçlar için kullanılanlar, oldukça sert olagelmıştır. Bu çalışmada kişisel borç icrasında kullanılan araçlar değerlendirilmiş ve antik toplumlarda kullanılan araçların bazılarının bugün de kullanılmaya devam ettiği ortaya konulmuştur. Eski

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temerrüt düzenlemeleri konunun insani boyutunu göz ardı ederek sadece alacaklıları ve piyasayı korumayı amaçlamışken, modern yasalar, aynı zamanda, borçluların bu durumdan kurtulmalarını da gözetmektedir. Her ne kadar artık borç yüzünden ölüm ve kölelik gibi cezalar verilmiyor ve hapis cezasına çok nadir rastlanıyorsa da antik dönemlerin aracı olan borçlunun varlıklarının haczedilmesi, bazı istisnalarla, bugünün de ana yaptırım aracıdır. Günümüzde artık borç köleliği de başvurulan bir yöntem olmaktan çıkmıştır. Bununla birlikte, borçluların gelecekteki gelirlerinin haczedilmesi borç köleliğinin yeni bir formu olarak görülebilir.

Anahtar Kelimeler: Borç Köleliği, Borç Temerrüdünün Yaptırımı, Kişisel Borç İcrası, Kişisel Temerrüt.

INTRODUCTION

Borrowing has always been a remedy resorted to by human beings to get out of financial trouble since ancient times. Although there have also been charitable lenders that did not request any interest for the loan, most borrowings were interest-based. However, the legitimacy of interest has been controversial along with the known history due to its claimed negativities, such as being an income received without working, increasing the gap in wealth distribution, causing economic instability (Visser & McIntosh, 1998), wealth transfer from borrowers to lenders (Rougeau, 1996), and tendency to inflation (Lawal, 2016), guiding the capital owners to selfishness, inhumanity, and avarice (Farooq, 2012), overburdening the consumers with debt (Durkin, 1993), and decreasing the tendency to entrepreneurship (Sharawy, 2000). Besides these problems, it was asserted that the consequences of interest-based transactions might be fatal for low-income borrowers because lending at interest is benefiting from the poor (Visser & McIntosh, 1998) and causes a form of slavery (Erdem, 2018).

Although it is more difficult for the needy to pay the loan back, they have to bear higher interest rates due to being riskier than others (Lewison, 1999). However, the problem caused by interest-based loans is not only the burden of increased borrowing costs. Specifically, a high amount of debt, whether it is borrowed at interest or not, not only causes troubles for the loan and labor markets, public revenues, and judicial systems but also has adverse implications on the health, housing, education, welfare, employment, income, and social participation of the debtors and their families (Heuer, 2014).

Nevertheless, the trouble is tolerable as long as the debt is paid off. The main concern is about the case of default. The sanctions used for personal debt enforcement have always been quite harsh. Since poor people are more likely to go into default, such sanctions have usually been applied to them. More importantly, the consequences of debt default have been far more destructive for the needy.

The sanctions are not employed just for each overdue debt. If restructuring of debt accompanied by a payment plan convinces the lender, the maturity may be extended. The commitment of an appropriate guarantor, who vouches for the

payment, may also lead to an extension. In such cases, the amount of debt after the restructuring is expected to be higher than the original amount. The excess is considered compensation for the delayed payment. However, when there is not much hope of receiving all the debt back, the lenders may consent to a far smaller amount than the remaining total by considering that it is better than receiving nothing. Nevertheless, if the debtor ultimately defaults, the instruments are used.

The issue of personal debt enforcement in modern economics is studied in many aspects, such as the consequences of over-indebtedness, the economic and social effects of debt defaults on the debtors, lenders, society, and the market, the balance among the purposes of debt enforcement, the legal structure and procedures of enforcement, and the power and responsibilities of the parties, especially of the administrative authorities. However, this paper merely evaluates the instruments used in personal debt enforcement since ancient times. Section two summarizes the sanctions imposed on the defaulters by old societies. Section three evaluates the evolution of personal debt enforcement by comparing the past and present sanctions. And finally, the last section concludes the findings.

PERSONAL DEBT ENFORCEMENT IN THE PAST SOCIETIES

The lenders have used various instruments to warrant the return of the loan. Pledges such as realty, moveable, and even people were used to compensate the credit in case of default. Besides, the defaulters were punished by imprisonment for being criminals. Moreover, the debt law allowed the lenders to kill the defaulted debtors in the ancient Roman Republic (Graeber, 2011). A different punishment was practiced in ancient Egypt. The court was receiving a commitment from the defaulter to discharge the debt until a fixed date. Otherwise, a penalty of a hundred blows was imposed on the debtor for not meeting the commitment (Lorton, 1977). Such punishments might have been a deterrent for the debtors, who did not worry enough about paying their debts back.

On the other hand, religions also developed principles that enforce the discharging of debt. In ancient Assyria, the dishonest defaulted debtors were excommunicated (Levinthal, 1918). According to the Hindu Law in medieval India, for example, the one who did not pay the debt back would be reborn as the lender's servant, horse, or ox (Graeber, 2011). There were similar beliefs also in Buddhism (Sharma, 1965). In Christianity, unpaying a debt is considered a sin that will be punished by God for being a kind of theft (Berggren, 1997). According to Islamic jurisprudence, a loan transaction is a form of contract, and it is a religious obligation to honor the agreement by repaying the debt on time (Yusoff et al., 2019). Therefore, defaulting is considered a crime, and the provided collateral or the debtor's other possessions may be liquidated (Fozia & Jamshaid, 2019).

Debt enforcement has not merely been provided by the religiosity of individuals, of course. There have been various earthly instruments used

prevalently that may be classified into four groups: Imprisonment, pecuniary compensation, seizing properties, and debt bondage and slavery.

Imprisonment

The oldest loan transactions recorded are of the Sumerians. A law released the prisoners sentenced for insolvency in the twenty-fourth century BC, implying that the defaulters were imprisoned (Vincent, 2014). Imprisonment was also utilized in ancient Egypt to punish the defaulters in the eighth century BC. A relatively newer practice was observed in medieval England. Prisons exclusive for the defaulted debtors were utilized in the thirteenth century (Graeber, 2011). The defaulters had imprisonment risk also in Norway till the end of the nineteenth century (Poppe, 2008).

The imprisonment utilized against debt in England was not considered a punishment as it was for the crimes. It was a sanction to force the debt payment and could be terminated by paying the loan off or making an agreement on a redemption scheme. The agreement could be between the creditor and the debtor or friends of the debtor (Cohen, 1982).

Pecuniary Compensation

In ancient Egypt, the debtors who failed to discharge their debt were swearing at a court to pay it until a fixed date. The punishment for oath-breaking was a double payment of the loan as an additional penalty of a hundred blows (Lorton, 1977). Similarly, in Pre-Islamic Arabia, the maturity of defaulted debt, which could be due to either a borrowed loan or a commercial transaction (Gül, 2017), was extended against an excessive increment in debt, such as doubling or tripling it (Uludağ, 1988).

Seizing Properties

The defaulted debtor's property could be seized and sold to others to compensate for the receivable in China. In Babylonia, besides pledging people, the loans were secured by possessions such as land, houses, and doors that were allowed to be seized in case of default (Homer & Sylla, 2005). At the end of the sixteenth century BC, when most of the population of Athens became debtors, prohibition of slavery for debt was prohibited by law (Vincent, 2014), and it was stated that the loans should have been secured by cargoes, pawns, and real estate (Homer & Sylla, 2005). In general, Medieval Indian law allowed to pledge land, gardens, and houses for borrowing. However, the lenders could not sell out the pledge until a specified date, and the debtors had the chance to get their possessions back by clearing the debt in that period (Sharma, 1965).

Debt Bondage and Slavery

The debt could be secured by family members and slaves in ancient Mesopotamia (Graeber, 2011). Specifically, in periods of bad harvest, the poor

could not pay their debts and lost their lands, becoming tenants of lenders. Moreover, the children became servants of the lenders (Houston, 2008). The assets and other things used to secure the loans in Babylonia were documented in detail. Lending was made against a pledge of people such as wives, bondwomen, children, and slaves, besides other assets. However, in some periods, such slavery was limited to three years (Homer & Sylla, 2005).

In ancient Athens, slavery due to insolvency was common. When a large part of its population were debtors at the end of the sixteenth century BC, many debts had been wiped off, debt slavery had been prohibited, and the debtors enslaved for unpaid loans had been freed by a legal arrangement (Vincent, 2014).

The main instrument used to secure the loans was slavery in Rome at the beginning of the fifth century BC. The defaulters were sold in foreign geographies. Twelve Tables, the Roman Law, took effect in the middle of the century and stated that the defaulted debtors should have been allowed an additional thirty days for payment. If the loan could still not be paid, the lender was free to seize and fetter the defaulter but had to feed him (Homer & Sylla, 2005).

Riba is considered the same as interest by mainstream Islamic jurisprudence. Before its prohibition by Islam in the seventh century, the lenders were enslaving the defaulters against the debt.

The default of debt was among the reasons for slavery in ancient India. Afterward, the practice changed in the early medieval period as the defaulter's obligation to work for the lender until the clearance of the debt. The successors of the debtor were also responsible for the payment of the debt, such that, in some cases, the time to meet such liability could take several generations (Sharma, 1965).

The consequences of default were similar in many other regions of the world. In Southeast Asia, for example, the main reason for slavery was debt during the fifteenth to eighteenth centuries. The insolvent debtors became the slaves of lenders. Some of these defaulters could be sold as commodities, while others were debt peons who worked for the lender until the debt was discharged (Boomgaard, 2009). In the sixteenth century, the defaulter and his family could be sold as slaves in West Africa (Graeber, 2011).

THE EVOLUTION OF SANCTIONS USED FOR PERSONAL DEBT DEFAULT

Regarding its consequences for the lender and debtor, the debt default is not only about economics; it is also relevant to social, political, and cultural issues (Kilborn et al., 2014). Therefore, a reasoned treatment of such cases would serve the purpose more, especially in modern economies prone to systemic financial troubles.

Hence, the authorities of almost all systems regulate the enforcement of personal debt in various aspects. Prevalently, the present relevant laws are similar to the traditional ones. However, despite the emphasis of the old insolvency regulations on protecting the lenders' rights and the market by disregarding the humanitarian aspect, the current laws also consider the relief of individuals by focusing on rehabilitation (Kilborn et al., 2014; Heuer, 2014). Such a policy is beneficial not only for the suffering debtors but also for the whole society. Although the regulations on personal default are made within the general insolvency laws in many countries today, the procedures of personal debt enforcement are usually defined to be simpler than the ones for the bankruptcy of corporations. On the other hand, some other countries have legislated separate laws for personal default (Kilborn et al., 2014).

Considering the nature of the instruments used in personal debt enforcement, the sanctions employed in the past and present are effective, at least in either of the two channels. The consequence of debt default may be a punishment to deter, indemnification, or both.

Exogenous factors may cause personal default, such as fatal diseases, accidents, natural disasters, or economic crises that are impossible to control. In such cases, the disincentive sanctions may motivate the debtors to hedge against unforeseen problems. More importantly, the deterrence of sanctions may be effective on the defaults caused by debtors' laxity, slackness, ineptitude, or bad intentions. The death penalty for the defaulted debtors, an odd punishment in ancient Rome, might be an extreme example of deterrent sanctions.

Imprisonment, on the other hand, could have been a deterrent sanction that motivated the debtors to avoid defaulting. Although it was not employed as a punishment and was possible to get out by paying the loan off, before the abolishment of imprisonment for debt in the nineteenth century in England, for example (Cohen, 1982), the ones who could not manage to pay the debt did many years in prison. In such cases, the policy was described as "relief was not for debtors, but from debtors" (Tabb, 1995). When the imperativeness of the sanction did not work for the ones with dead loans, it served the opposite of the purpose by making it impossible for the debtor to find the required funds.

Today, the consideration regarding punishment for debt has changed. The prevalence of such sanctions has been diminished due to the loss of the importance of deterrence (Gessner et al., 1978). The current regulations on personal debt do not purpose to punish the defaulters (Reifner et al., 2003). Instead, some shaming (White, 2009) and other social sanctions employed by others are effective in some countries. The adverse social results of getting into default may be effective in society longer than the legal sanctions (Armour, 2004). In the United States, the names of the defaulters are made public, for example (White, 2009). Besides, the defaulters may face some restrictions during the period of insolvency, such as a ban

on voting, standing for election, involving in the management of a corporation, and traveling (Armour & Cumming, 2008).

The pecuniary compensation for going into default may also be a deterrent for the debtors. It is so, especially as it was practiced in ancient Egypt by doubling the debt that was not paid till the new date determined by a court or in pre-Islamic Arabia by increasing the debt excessively for an extension of the due date. However, considering its excessiveness, the increment of debt in such sanctions is not plausible to be regarded as the payment made against the loss for rescheduling. It seems to be compensation much higher than the loss, which arises from the lender's opportunistic attitude. More importantly, the increased debt that much, presumably, could rarely be paid off in practice. Hence, such a sanction might have mostly been a transition stage before the last phase of debt bondage or slavery.

On the other hand, seizing the property of defaulted debtors has been used as the main compensatory enforcement instrument since ancient times. Disregarding whether it was offered as collateral in the loan agreement or not, the defaulter's real estate and movables have been used to compensate for the receivable. Any asset possible to use or liquidate could be utilized for indemnification. Lands, houses, doors, household furniture, vehicles, animals such as horses, donkeys, cattle, sheep, goats, hand tools, agricultural instruments, commodities, jewelry, and intellectual property rights have been frequently used to clear the debt. Most of these assets are still in the scope of confiscation.

However, although their contribution to giving a new opportunity to debtors is limited (Kilborn et al., 2014), some exemptions from seizure are defined to prevent the defaulters from falling below the subsistence level in line with the current rehabilitation policy. Hence, the debtors are kept integrated into society (Reifner et al., 2003). Furthermore, by this means, there may be a possibility for an employed debtor with income to pay the remaining debt in the future.

Generally, the houses where their families live are the debtors' most valuable assets. Nevertheless, such houses are exempted from seizure in some countries. In some other economies, the defaulted debtors are entitled to use their dwellings for a fixed period before liquidation. Another exemption is for cars. When a car is the only vehicle used on the way to the workplace, it may be exempted not to cause the debtors to lose their jobs. Household furniture, professional books, and professional equipment may also be exempted from seizure for similar reasons (Kilborn et al., 2014).

The future income of the defaulters, such as salary, wage, pension, and termination indemnity, is also an essential source used in debt collection. However, the principles of protecting the debtor from falling below the subsistence level and keeping the debtor able to repay the remaining debt have implications on the rules of such income confiscation in many economies. Thus, some portion of the

debtor's future income is exempted. The rate of exemption varies by the type of income and country.

Even though the institutionalization of exemptions for humanitarian reasons is relatively new, there have been similar approaches in the past. In Islam, for example, the lenders are advised to renounce as a charity or at least to grant a delay to the debtors who have difficulty in repayment. Even so, according to Islamic jurisprudence, any lender has the right to receive the loan back, but is not allowed to confiscate the debtor's house, kitchenware, personal clothes, or professional equipment used for subsistence (Mevdudi, 1996).

As a contemporary example, in Türkiye, the equipment used in physical work, the indispensable household goods, the land, animals, and equipment of the farmers that are indispensable for subsistence, the equipment of craftspeople, the food and fuel sufficient for the debtor's family for two months, a house appropriate for the debtor, and student scholarship are exempted from confiscation (*Enforcement and Bankruptcy Law of Türkiye No:2004, 1932*). In Northern Ireland, another example, clothes, furniture, and equipment of the debtor's family living in the same household, the tools used for trade to the value of £200, and any properties defined by any other provision are exempted (Law Reform Commission, 2009).

Regarding the confiscation of future income, some portion of wages or salaries required for the subsistence of the debtor's family is exempted in many countries. The exempted part is defined as either a ratio or a fixed amount. For example, the allowed ratio of salary or wage to confiscate is one-quarter in Türkiye (Yavaş, 2009) and one-fifth in Italy. Up to 90% of the minimum wage is exempted in the Netherlands, while a minimum amount that meets basic needs is exempted in Spain and Sweden (Reifner et al., 2003). However, the confiscation of non-exempted future income is usually allowed for a fixed number of years. This period is 8-10 years in France, six years in Germany, and three years in the United Kingdom (White, 2009). On the other hand, the pension is fully exempted in Türkiye but is partly exempted in Germany and Switzerland (Topuz, 2016).

The seizure of assets that are not exempted is only possible for the debtors that possess any. If the debtor does not have enough properties, the debt is compensated by confiscating the debtor's future income. However, the defaulters with no income or income not higher than the subsistence level are a problem for both the lenders and the market.

The developed remedy for such cases was debt bondage or slavery of the debtors in old societies. The debtor had to work for the lender until the discharge of the debt in some of those societies. In some cases, the members of the debtor's family and his successors also were obliged to pay the remaining debt by working as debt peons. In some other societies, the debt was compensated by selling the debtor, his wife, bondwomen, or children as slaves.

In modern times, although slavery or bondage due to debt is not utilized anymore, there are still harsh penalties, such as forced labor (Poppe, 2008). The situation of a debtor obliged to work to pay the debt off is not much different from peonage (Gross, 1990).

The Twelve Tables in Ancient Rome stated that the lenders could seize the defaulted debtors but had to feed them (Homer & Sylla, 2005). Similarly, present laws do not allow the confiscation of a specified part of the defaulters' income required for subsistence. Although humanitarian concerns are influential in the emergence of such regulations, by this means, the debtors are also kept able to work and continue to pay their remaining debt. From a different point of view, the modern type of default management, namely the seizure of future income with exemption, may be regarded as a contemporary form of slavery in which the debtors take care of their daily bread themselves (Eyerici, 2021).

CONCLUSION

Debt default has adverse implications for each debtor, lender, market, and overall economy. The pre-modern practices of the management of defaulted debt had primarily aimed at protecting the lender by collecting the receivables. Thus, quite harsh sanctions were used in debt enforcement, such as seizing properties, pecuniary compensation, imprisonment, debt bondage, slavery, and even the penalty of death.

Unlike the old practices, the regulations of the modern era also consider the humanitarian aspect of the problem and aim for the rehabilitation and relief of the defaulted debtors. Today, in the enforcement of debt, the death penalty and slavery are not used anymore, and imprisonment is rarely practiced. Instead, property seizure is still an essential enforcement instrument in various institutionalized forms. However, contrary to the old approach, there are exemptions from confiscation that help the debtor's family maintain their lives. Similarly, some portion of the debtor's future income required for subsistence is also exempted.

On the other hand, debt bondage is also not allowed today. However, since any obligation of the debtor to work against the debt is similar to peonage, the current practice of the confiscation of future income with an exemption may be a modern type of slavery.

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