

## Common Law S4 Ep 14: Mitu Gulati Episode Transcript

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**Risa Goluboff:** Today on Common Law: odious debt with UVA law professor Mitu Gulati.

**Mitu Gulati:** When you make people who got their independence after fighting a bloody war pay for their freedom, I don't think you need to be all that scholarly to think that this is pretty stinky.

[THEME MUSIC UP, THEN UNDER]

**Risa Goluboff:** Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean.

[THEME MUSIC OUT]

**Cathy Hwang:** And I'm Cathy Hwang, a professor at UVA Law.

**Risa Goluboff:** Cathy is one of four professors at the law school who are partnering with me this season to serve as co-host for a few episodes. That's why we're calling our season Co-Counsel. Our co-counsel includes scholars of constitutional law and governmental structure, law and psychology, and privacy and technology, to name a few of their interests.

**Cathy Hwang:** And as your co-host, we also get to help you choose some scholars to interview and what topics to focus on, which is pretty fun.

**Risa Goluboff:** Totally. And so you're bringing your own expertise as a corporate law scholar and an expert on contracts and mergers and acquisitions to the table.

**Cathy Hwang:** Yes.

**Risa Goluboff:** Which brings us to today's show.

**Cathy Hwang:** We're going to talk to our colleague UVA Law professor Mitu Gulati, who is one of the world's leading experts on sovereign debt. He'll be talking today about odious debt that Haiti paid to France. So this is debt that Haitians paid to compensate colonists for their own freedom from slavery, which is mind-boggling. Mitu co-wrote this paper on the subject, and he argues that Haiti deserves compensation, possibly tens of billions of dollars. Mitu and his co-authors also argue that the case illustrates larger issues in the sovereign debt context. And we hope to explore a lot of those things today.

[THEME MUSIC IN]

**Risa Goluboff:** We'll be right back with UVA law professor Mitu Gulati.

[THEME MUSIC UP, THEN UNDER AND OUT]

**Cathy Hwang:** Mitu, thanks for joining us.

**Mitu Gulati:** Thank you for including a little sovereign debt in between all of that constitutional law stuff you do.

[LAUGHING]

**Risa Goluboff:** We are very happy to have you here. And, you know, I would be remiss if I didn't mention you are a fellow podcaster as well, and you host a very cool podcast covering contracts, sovereign debt, and more, called "Clauses and Controversies." Little shoutout.

**Mitu Gulati:** Yay!

[LAUGHING]

**Cathy Hwang:** So Mitu, I thought we could start today by talking just a little bit about how this debt was incurred. Tell us what exactly happened in Haiti.

**Mitu Gulati:** So Haiti got independence from France in 1804 after a bloody revolution, but the story didn't end there. Twenty years later, in 1825, the French sent a negotiating party, so happened to be negotiating with a whole armada of gunboats pointed at the Haitian Capitol. And the story of the Haitian independence debt is that negotiation that took place under the shadow of those gunboats. The

French said to Haiti, look, we will recognize you as a nation finally, but you owe us for all of that property that you took away from the French colonists and in particular for the slaves who became free. And we have calculated the numbers. You owe us 150 million francs. And this was in 1825. And that is the Haitian independence debt that Haiti took almost a hundred years to pay.

**Cathy Hwang:** So you call this an "odious debt" and that has a specific scholarly meaning. Can you tell us a little bit more about that?

**Mitu Gulati:** Oh, I don't think you need to be all that scholarly to think that this is pretty stinky. When you make people who got their independence after fighting a bloody war, pay for their freedom and freedom from slavery that already in the international community, by 1825, it was fairly well-recognized that the slave trade was just pure evil. And at that point to impose this debt, sort of let's just say a teeny-weeny bit immoral, and that's at the heart of the idea of odious debt.

**Risa Goluboff:** Where does the Haitian story fit in odious debt scholarship? Is this considered odious debt by the standards that currently exist for defining that term?

**Mitu Gulati:** So the Haitian independence debt does not currently fit within almost any of the discussions of odious debt.

**Cathy Hwang:** Interesting.

**Mitu Gulati:** That literature, for whatever reason, is firmly grounded in the idea that for a debt to be odious, you have to have a corrupt leader, an odious leader who then cooperates with lenders who know that the odious leader is taking the money and using it for purposes that are not for the benefit of the people, but central is the really odious leader. And we don't have that in this story because the Haitian leader at that time, you know, may have had some faults, but he was certainly not odious. The lenders, the creators of the debt, the French were the ones who were the bad guys. So it doesn't fit the literature, but I think it's as stinky as you get. So it should be in the literature.

**Risa Goluboff:** You're suggesting a change to that, right?

**Mitu Gulati:** Yes — that's a part of our goal. This came to the fore in the modern era in about 2003, 2004 during the George Bush administration,

the second George Bush administration, when the U.S. went into Iraq. and Iraq had about a hundred billion dollars or thereabouts of debt that Saddam had incurred primarily among other things to build statues of himself, buy arms, that he then used to kill a variety of Iraqi citizens by a sort of poison gas that he used against the Kurds. Pretty odious. And George Bush was very enamored of this idea that these debts were immoral, and that the U.S. Should help Iraq avoid them. So with the support of the U.S. administration for a fleeting moment of time, there was a lot of encouragement to resuscitate the idea that there might be a legal doctrine of odious debts under international law. Now it turned out later that people like Dick Cheney, you know, pushed George Bush aside and said, no, we're not doing any of this because we have too many odious debts of our own, so this would be awfully inconvenient for us.

**Risa Goluboff:** Meaning we are the creditors in too many odious debts ...

**Mitu Gulati:** Mm-hmm.

**Risa Goluboff:**... and we wouldn't want to give up those debts, getting them repaid.

**Mitu Gulati:** Turns out that the U.S. has a long history of supporting some fairly odious regimes, including in Haiti. Remember the Duvaliers.

**Risa Goluboff:** If you succeed in redefining odious debt so that the definition is broad enough to include this Haitian debt, how broad does that go, and do you see this as fairly unique or do you see this as really representative of a pretty systematic, post-colonial problem that we haven't necessarily dealt with or maybe we have dealt with? I don't even know.

**Mitu Gulati:** This is unique in the sense that this is a very specific amount of money that was imposed as a debt by the French, with very good arguments as to why it was illegally imposed as per the law of that time. But there are lots and lots of these. King Leopold, Congo, uh, the Belgians then subsequently impose the debts of Leopold that he incurs on the markets on the Congo, which is, I mean, that's maybe competing with the Haitian independence debt in odiousness, but those are much harder to find nice legal hooks. And as lawyers, we like legal hooks. You know, we are little people.

[LAUGHING]

**Risa Goluboff:** So tell us about the legal hooks in the Haitian context. Right? Are there avenues, what do they look like for Haiti to recover what it paid to France?

**Mitu Gulati:** So, France has a number of treaties with Caribbean nations that arguably would allow the camel's nose in, in terms of finding a place that might be willing to hear it. Then there's the question of the statute of limitations and whether it has expired. But President Hollande acknowledges the debt not that long ago. And last we looked, it was within the relevant statute of limitations that he acknowledged the debt. Subsequently his advisers do say, "No, no, no, we didn't mean legal, we meant moral." But hey, as far as the lawyer is concerned, you acknowledged the debt, it restarts. And then the third big question, I think in some ways, this is the hardest, but most fun question for a lawyer and Risa I'll turn this to you, is whether imposing this debt in 1825 really was illegal. So saying, look, we're going to re-enslave you, unless you pay us 150 million. Was that legal at the time? I think, you know what? We can find some international law writers who would say it wasn't legal. We could probably find the vast majority of practice in the United States that said, nah, slavery was well and good. I would think that the fact that the French had gunboats pointing at the Haitian capital at the same time that they imposed this debt would be duress under any body of law. But I've heard people who know about this say, no, that was routine you pointed gunboats and got people to enter into contracts.

**Risa Goluboff:** Which do you think is doing more work, the gunboats that are really threatening re-enslavement and recolonization, or the refusal to recognize Haiti as a sovereign nation.

**Mitu Gulati:** So I have to confess, against interest, that I suspect that the recognition was doing more of the work. You know, even now countries put all sorts of conditions on recognition, which are in effect payments. The U.S. has its own culpability. And that is because Haiti was not recognized by the U.S. in 1825. The U.S. refused to recognize it because the U.S. was afraid that recognizing a country born out of the slave revolution would encourage slaves to revolt within the U.S. So you could ask the question, well, Haiti has to incur this debt because in large part its big neighbor that it was doing most of its trading with, would not recognize it as a nation. Of course there is also the U.S. occupation of

Haiti starting in 1915, that goes on for 20 years, and thousands of people are brutally massacred.

**Cathy Hwang:** You and your coauthors actually try to estimate the real price of the debt for Haiti. What did you come up with?

**Mitu Gulati:** So 150 million francs in 1825. It's hard to figure out how, how much it would be worth 175 years later. So we did a bunch of calculations. One was just adjust for inflation, and see what the value of it would be today. That's in the tens of billions. And that's actually what most people do is they talk about it in terms of, you know, 20 to 30 billion that would be due today. But that's not how, in any financial transaction, if we went to court, we would actually calculate this. Instead, you would say, like, what would happen to the money if it was invested in some kind of sovereign wealth fund or some kind of basic investment fund, and put in a real rate of return. And then once you do that, then it goes up to around 300 billion.

**Cathy Hwang:** Yikes.

**Mitu Gulati:** And even that is very conservative.

**Risa Goluboff:** Why is that still conservative?

**Mitu Gulati:** Well, because probably the real cost to Haiti was not that it didn't get to take this 150 billion in 1825 and put it into some, you know, nice little account and some New York bank where they would earn 3%. Instead, the real cost is how did it hurt Haitian growth to have to pay back this debt over a hundred-year period, and to make that estimation, really need to look at the growth rates of countries near Haiti with similar conditions, but that did not have this kind of colonial debt that was imposed on them. Then you really get staggering numbers, including from institutions like the IMF that said, I think in 1945, which is early for the IMF, that Haiti's just – has suffered for too long, under this huge debt. And they just can't grow, and, you know, now ... My level of outrage really gets accentuated.

**Cathy Hwang:** This is really interesting. So Mitu, you and I have talked about this before a bit, and one thing that really stuck out to me in our previous conversation was you said, if you talk to people in Haiti, everybody knows about this. This is like a really important and ingrained

part of being Haitian is like, we have this awful debt that we're all paying back. So it's something that each individual Haitian citizen feels as well.

**Mitu Gulati:** It is. I came to this topic both because I have a connection to the Caribbean, and so Haiti is near and dear to me. But also because I have a very dear friend, Guy Charles, with whom I taught a class and Guy told the story in class about how his grandparents and other elderly Haitians he knew still remember the songs they would have to sing in school about the debt that needed to be paid to the French. This is truly astonishing.

**Cathy Hwang:** Mitu you actually also talked to lawyers who considered bringing a claim, you know, about 20 years ago, what did they say?

**Mitu Gulati:** Well, I think they were a lot more optimistic than I am, but, you know, that's understandable. They were the lawyers who were actually designing the claim. So in 2003, 2004 President Aristide was in power. And if you remember, President Aristide was quite progressive, he had his faults, but he wanted to bring some recompense for the Haitian independence debt. And his lawyers in Miami, immigration law firm, a lawyer named Ira Kurzban, who is just wonderful, put together this team of international law scholars. So this was academics. That's always a shock to me that anybody cares what academics think.

[LAUGHING]

**Mitu Gulati:** And they dug through the history and they thought that a claim could be brought under a treaty based on violations of international law of 1825. And they were about to bring the claim. They even have a press conference in Port-au-Prince about the claim that they were going to bring. And coincidentally, Aristide is overthrown around the same time. And the claim is never brought because the subsequent Haitian government, some might say, learn the lesson and never speak about it again.

**Risa Goluboff:** Are you implying it was not coincidental, the overthrow of Aristide?

**Mitu Gulati:** Let us just say many other people have not implied, but said so explicitly.

**Cathy Hwang:** Gotcha.

**Mitu Gulati:** Can I, with your indulgence, turn to a modern instance that might give us some hope?

**Cathy Hwang:** Yes!

**Risa Goluboff:** Please.

**Mitu Gulati:** This is the story of the Chagos archipelago. I've probably pronounced that wrong. Bunch of islands, I think.

**Cathy Hwang:** Archipelago.

**Risa Goluboff:** I would say archipelago.

**Mitu Gulati:** Archipel ... Something like that ... it's a big word.

**Risa Goluboff:** Your pronunciation is excellent. I think wrong, but excellent.

[LAUGHING]

**Mitu Gulati:** So the Chagos Islands, very beautiful, lots of good scuba diving in the Indian Ocean, used to be part of the nation of Mauritius. Mauritius was a British colony. When Mauritius was given independence in the 1960s by the British government – I think Harold Wilson was prime minister at the time – he said to them, we want Chagos because we need to give it to the Americans to have a military base there. I think maybe the British had already given Chagos and particularly, uh, Diego Garcia, the island where the seventh fleet sails out of, to the Americans. And they didn't want to have to kick the Americans out. Post-World War II stuff. And so Wilson said, if you think you're going to get independence without giving us Chagos, think again. And Mauritius caved. To my great shock and amazement, three international tribunals over the past couple of years have ruled that the islands-slash-archipelago belong to Mauritius and this was improper. It was taken under duress. Now, this is amazing on so many different levels. The idea that international tribunals would rule for a little country, a little country of brown people like me against the U.S. and the UK, that it would rule that property was taken by duress, when there is a military base? It's astonishing, but it happened. It has happened in multiple tribunals. Now that's a lot less duress than was imposed on the Haitians.

**Risa Goluboff:** Why three different tribunals? Have they actually gotten their stuff back and is that why there are so many tribunals because though there have been determinations that they should get their stuff back, they haven't actually?

**Mitu Gulati:** Aaah, I was wishing you would not pop my bubble.

[LAUGHING]

**Mitu Gulati:** They haven't gotten diddly squat, as you might guess. The U.S. and the UK have basically said, yeah, thank you, and glad you got all those decisions from all those courts. We don't recognize any of those decisions. We're not giving you back squat. But they got some decisions and rule of law and all of that, that don't we teach our students that there's the rule of law and the Americans ...

[LAUGHING]

**Mitu Gulati:** ... and the UK, we, we believe in the rule of law. And so we'll do what is consistent with the rule of law. I mean, I'm being a little sarcastic, but that is the public discourse of the lawyers who are trying to help Mauritius which is every time the UK in particular, goes on a pedestal and talks about the need for other countries to comply with the rule of law, they bring out this and they're like, eh, yes, we believe in rule of law. We, we hope you can comply with the rule of law. I don't know if that ever works. Does it?

**Risa Goluboff:** That's a question for the international lawyers among us.

[LAUGHING]

**Cathy Hwang:** Which would be you, Mitu.

**Mitu Gulati:** But Risa will tell us.

**Risa Goluboff:** Pass.

[LAUGHING]

**Risa Goluboff:** Is the Chagos example an example of odious debt? Are they using that language when they go to these tribunals, or is it based in a different conception of the harm?

**Mitu Gulati:** It is not using the language of odious debt. I do not think – and this is an interesting question – that Mauritius has, as yet, demanded compensation for its property having been taken for so long. That will come, but that has not, as yet, been articulated. Right now, it's just, you know, as a condition of our being given independence, you took our stuff from us, give it back.

**Risa Goluboff:** Yep.

**Mitu Gulati:** So one question that we have not handled and it was just too complicated for us to handle, you know, we have a small team.

**Risa Goluboff:** We, you mean you and your co-authors?

**Mitu Gulati:** My co-authors. Yeah. I just hang around, my co-authors do the work.

[LAUGHING]

**Mitu Gulati:** But maybe the two of you can give us answers, so I'm going to ask the two of you another question. Most people think about this problem in terms of the amount of money. I think, uh, for political reasons, given the amount of hate mail that I have received from supporters of Marine Le Pen, because of my talking about this debt, that there's not that much political support from the far right in France for any payments. But I do wonder whether it's a mistake to think about monetary payments to countries like Haiti, where it's fairly plausible that the money would just get stolen. But what about instead, giving them more visas, more infrastructure development in terms of educational opportunities, maybe deporting fewer of them. There have got to be other ways to craft remedies, and I do wonder whether, you know, we have ideas from the civil rights context or, you know, our own history in the U.S. about better ways to craft remedies for the ills of the past. But I throw that to you because it's a very difficult question. We thought about it and we decided we can't talk about it.

**Risa Goluboff:** I thought you were asking both of us, but now it sounds like you've really asked me.

[LAUGHING]

**Cathy Hwang:** I'm just going to hide in my book. Like I, I didn't hear my name being called.

[LAUGHING]

**Risa Goluboff:** I'm not sure that we have done such a great job of identifying, productive forms of redress. Although, I would say that in part that's because we haven't been as self-aware as we should probably be about the nature of the harms in the first instance, right? So the forms of redress have to match the harms. And the first thing you have to do is identify the harms properly. And I'm not sure we've ever done that. But when you talk about visas, or are you talking about non-deportation – not that I'm opposed to those things – but I would think that a brain drain would not be something that would be so useful for Haiti, right? Unless you're talking about people getting visas to come and you want to think about investment in Haiti, right?

**Mitu Gulati:** I'm not sure. I'm not convinced that that's the right way to think about it. But I think you're asking a really good question that has been asked a lot in the history of development, which is: Who is owed the recompense? Is it the current people on the ground who are suffering, who would be desperate to have any opportunity to earn more?

**Risa Goluboff:** Yeah, that's a fair response.

**Mitu Gulati:** I don't really know. And also the economics of where development money comes from. I think for many countries like Haiti, they're so completely dependent on people being able to go to more developed countries, earn, and send money back in remittances.

**Risa Goluboff:** Yeah.

**Mitu Gulati:** But I think you're asking a hard, hard question as an immigrant, I, I think, you know, visas for people who are desperate to come and willing to risk life and limb would sure help.

**Risa Goluboff:** So you're saying, well, what is Haiti but the people who are there and who is owed, but those people? And we don't have to compensate them by making them stay, right? We can compensate

them by allowing them to go. And that raises the question: What is a nation? What is a country? How do you think about that compensation? And I think that's an absolutely fair and important question to ask.

**Cathy Hwang:** Mitu, I like your idea of offering visas and the opportunity to do something else, right, in part, because I think anecdotally, even in thinking about, you know, my parents are immigrants, even in thinking about immigrants, first-generation immigrants in general, like so many people come to places like the U.S. to study with the intention of going back to their home countries, whether in two years or five years or 10 years ... Some stay and some go, and I think just allowing each person to have that option to stay or to go. Having thought about it for three minutes, that makes sense to me, and I will spew that just like I do in the classroom.

**Mitu Gulati:** Yes! One of the most valuable assets I possess is the ability to go anywhere. The whole world is open to me, holding an American passport. That access — to be able to take what assets I have, what intellectual property I have and go anywhere in the world, and seek employment or seek opportunities — that's something that the poorest do not have. If the world community could give the poorer nations that kind of access as Cathy, as you said, options, more options. I mean, now only the rich have options. I think that would be a much better and fairer world.

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**Cathy Hwang:** Mitu, thank you so much for joining us. This was really, really interesting, informative, important, fascinating work.

**Risa Goluboff:** I really enjoyed this conversation.

**Mitu Gulati:** It was a great pleasure. I hope I can come back many times. This was just too short. That's my only complaint.

**Risa Goluboff:** Join us for our next episode with Mitu Gulati ...

**Cathy Hwang:** In this season in Mitu Gulati law ...

**Mitu Gulati:** I love it.

**Risa Goluboff:** Thanks Mitu. Take care.

**Mitu Gulati:** Thank you guys.

[THEME MUSIC UP, THEN UNDER AND OUT]

**Cathy Hwang:** I thought that was really, really interesting. I have actually talked to Mitu about this a couple of times, and I feel like I learn something new every time.

**Risa Goluboff:** I agree, and I didn't know very much about the Haitian debt and I certainly didn't know very much about the odious debt doctrine or the odious debt movement and how the Haitian debt would interact with that.

**Cathy Hwang:** It's super interesting, right? The fact that you don't know about it as a historian, and I don't know about it as a business law person is exactly the problem and I think why this is such an important project to be working on.

**Risa Goluboff:** Yes, I agree a hundred percent and the way Mitu talks about it, right, raises such interesting questions about the relationship between the moral and the legal, the relationship between the social movement and the legal doctrine. And, you know, this is something I think a lot about in my own scholarship, right? What's the relationship between what goes on within official legal processes and, you know, what's going on outside of those processes, among academics and how academics define things and why they define them that way and how those definitions change. And then also in the context of social movements and political movements, and when, and how, and why do changes in the way public discourse is occurring, make their way into, actual legal outcomes. And then of course, the next question, which is enforcement, right, which he was talking about in the Chagos example. Even if legal doctrines change or you get particular legal outcomes, that's still a whole step away, as the international lawyers would tell us quite readily, from actually finding enforcement mechanisms.

**Cathy Hwang:** One of the most interesting things he said was, it's almost not about like who would win or not win in a litigation. It's just finding a forum that will hear these cases and starting to present the evidence and the evidence will cause the offending party, the perpetrator, to pay up just because, I mean, I think the evidence is really bad.

**Risa Goluboff:** Right, and what he's talking about there and getting into a forum, right, is really bargaining in the shadow of the law, right, the idea that once you're in the forum, you'll come to the settlement table. It's not necessarily that you'll get an outcome, but you will get some coercion, uh, you know, to go back to that idea, right? You'll get some pressure to actually come to the bargaining table.

**Cathy Hwang:** You got to bring your own gunboats.

**Risa Goluboff:** I hope there are no gunboats involved.

**Cathy Hwang:** Are there gunboats anymore? It seems very 1800s.

**Risa Goluboff:** It does. It's a 19<sup>th</sup>-century kind of thing, but there are modern analogs that we hope stay away.

**Cathy Hwang:** The threat of litigation and public shaming in a public forum.

[THEME MUSIC IN]

**Risa Goluboff:** That's right. That's exactly right. And, you know, one's behavior in the community of nations, right, which obviously — what norms are. This is again, a major theme in international laws, relationship between norms and law and force, which I think is what we've been talking about from the beginning from 1804 and 1825, right through to today.

**Cathy Hwang:** Absolutely.

[THEME MUSIC UP, THEN UNDER]

**Cathy Hwang:** That's it for this episode of Common Law and our fourth season. If you'd like to learn more about Mitu Gulati's work on odious debt, visit our website at [Common Law Podcast dot com](http://CommonLawPodcast.com). There you'll find all four seasons of our podcast, links to our Twitter feed and more.

**Cathy Hwang:** I'm Cathy Hwang.

**Risa Goluboff:** And I'm Risa Goluboff. Thanks so much for joining us for this season of Common Law.

[THEME MUSIC UP, THEN UNDER]

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