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# Judge Made Law Under a Civil Code

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# JUDGE MADE LAW UNDER A CIVIL CODE*

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The purpose of modern codification is to regulate in a complete, systematic, clear, and accurate way a given area of legal relations. The sought-after ideal is that a solution to *all* problems and conflicts arising in such given area be found within a set of rules arranged in a rational way, free of gaps, overlappings, contradictions, obscurity and ambiguity. The ideal is to eliminate the chaos of isolated rules—many of them operating as mere survivors of the dead weight of tradition, while others operate as occasional answers to concrete requirements—and to substitute for them a harmonic whole of rules, whose attributes of completeness, systematic consistency, accuracy, and clarity render it easy to apply.

The existence of this attitude among legislators explains why, at the time of the enactment of the first modern codes, proposals were made and statutes were passed prohibiting the judges from interpreting the new provisions.[1] By means of this simple and deceptive device, the legislator tried to prevent the judges from destroying the rational perfection of the code under the pretense of extracting the "true" meaning of the texts and adapting them to the varied and shifting requirements of practice. But what these proposals apparently failed to understand is that which this writer calls the *myth of codification, i.e.*, the illusory hope of giving once and for all a complete, rational, clear, and precise solution to all problems and conflicts arising in the vast area of private relations. Certainly, this was not an attitude shared by the jurists charged with drafting the famous *Code Civil.*

The modern codification movement, started at the end of the eighteenth century, found its acme of perfection in the napoleonic codification, particularly in the French *Code Civil* of 1804 which today is still known by the name of its inspirer. One of the redactors of the *Code Civil*, Portalis, wrote in his Preliminary Report on the draft:

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1. *See* Cueto-Rua, *The Future of the Civil Law*, 37 LA. L. REV. 645, 655 n.25 (1977).

> The needs of society are so varied, social intercourse is so active, men's interests are so multifarious, and their relations so extensive, that it is impossible for the legislator to provide for everything. It is then, to the course of decision (*la jurisprudence*) that we leave: (1) rare and extraordinary cases which cannot enter into a reasonable legislative plan; (2) details too variable and contentious to occupy the legislator; and (3) all those objects which it would be a useless effort to anticipate, or of which premature anticipation would be dangerous.[2]

These cautious reflections, which have been recalled in Professor Julius Stone's translation,[3] are a good introduction to the subject of this article.

This writer will attempt to summarize the ways in which the courts of Argentina, facing the legislator's passivity, fought to reduce, in the field of everyday private relations, some of the terrible effects of a rampant inflation that has become the world's highest. This article will deal with the means and methods used by Argentine judges to tone down the consequences of the depreciation of the currency, and it will address the efforts of judges to attain that goal under a Civil Code that, according to the current construction, gave an unrestricted legislative support to the so-called nominalistic principle and constituted an insurmountable obstacle to the valid efforts of courts to attain that goal.[4]

In Argentina the first effects of inflation were felt in the late 1940's. During this period there prevailed the generalized conviction that the problems arising from inflation could not be solved—in any measure at all—by the judges. It was believed that their interference in such delicate matters would result in a clear trespass into areas alien to their competence, information and ability and might only serve the purpose of creating chaos in the field of general economy and public finance. To the extent that such problems could be solved through law, it was thought that they called for legislative action and could not be settled by the courts.[5] However, the legislator did not take these problems into account or, if he did, considered them in a belated and very incomplete manner.

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2. *See* J. PORTALIS, *Discours Préliminaire sur le Projet de Code Civile*, in DISCOURS, RAPPORTS ET TRAVAUX INEDITS.

3. *See* J. STONE, THE PROVINCE AND FUNCTION OF LAW 150-51 (1950).

4. *See* F. TRIGO REPRESAS, OBLIGACIONES DE DINERO Y DEPRECIACIÓN MONETARIA (1978); L. GURFINKEL DE WENDY, DEPRECIACION MONETARIA (1977); A. MORELLO & A. TROCCOLI, LA REVISION DEL CONTRATO (1977); M. RISOLIA, LA DEPRECIACION MONETARIA Y EL REGIMEN DE LAS OBLIGACIONES CONTRACTUALES (1960).

5. Mónico v. Grau y Mora SRL, 71 LA LEY 759 (1953); Pacheco Santamarina de Bustillo v. Café Paulista, 70 LA LEY 399 (1953).

The rules of the Civil Code (according to the construction then in fashion) that were a major obstacle in that field for the possible action of the course of decisions (*la jurisprudence*) were not modified. They have not been amended until the present day, in spite of the fact that the inflationary flood has reached the three-digit level in the last four or five years.[6]

In order to appreciate in its proper context the function performed by the Argentine courts in this domain, it is necessary to supply some background information.

The Argentine Civil Code was the work of one man: Dalmacio Vélez Sarsfield, an outstanding jurist and a gifted public servant. In four years of intense labor he prepared the whole draft. Congress passed the enacting legislation in 1869 without debate, in deference to the prestige of the drafter.[7] The Code has a definite "doctrinaire" penchant. Most of its 4,000-odd sections carry footnotes, some of them extensive. The footnotes indicate sources, mention discarded alternative solutions, or comment on those adopted by the drafter. With additions and partial amendments, the Code has been governing the area of civil relations in Argentina since its enactment. Extensive amendments were not introduced until 1968;[8] however, most of the original provisions remained unchanged. The 1968 amendment did not modify those provisions which, according to some of its most influential promoters, prevented action by the judges in the struggle against the consequences of inflation.

The Argentine Civil Code makes a distinction between obligations arising from contracts and those belonging to the field of delicts and quasi-delicts. Among the contractual obligations, the Code makes a distinction between those whose object is to give a sum of money and those which have some other object: *i.e.*, obligations to give specified things, obligations to give unspecified things, obligations to give a quantity of things, obligations to do or not to do.

Chapter IV of Title VII of Book II deals with obligations to pay a sum of money. They are a species of the genus "obligations of giving." The first article of Chapter IV, devoted to the obligations to give sums of money, sets forth that such obligations are regulated "by the provisions governing obligations to give unspecified and

6. The annual cost of living increase reached 347.5% in 1976 and was far over 100% in 1979.

7. *See* A. CHANETON, HISTORIA DE VELEZ SARSFIELD (1937); P. MARTINEZ, DALMACIO VELEZ SARSFIELD Y EL CODIGO CIVIL ARGENTINO (1916).

8. *See* G. BORDA, LA REFORMA DE 1968 AL CODIGO CIVIL (1971); J. LLAMBIAS, ESTUDIO SOBRE LA REFORMA DEL CODIGO CIVIL (1971).

nonfungible things (*i.e.*, things indicated only by their species) and obligations to give non-individualized things."[9] An obligation to give a quantity of things is an obligation to give things that can be counted, weighed, or measured.[10] In performance of such obligations, the obligor must give, at the place and time agreed upon, a quantity of things of the kind and quality named in the obligation.[11] Article 619, which is the specific provision for obligations to give sums of money, sets forth that "if the debtor's obligation is to deliver certain quantity of a certain kind of legal tender, the debtor fulfills his obligation by giving the designated kind. . . ."[12] This provision establishes the so-called nominalistic principle. If a person undertakes to pay to another $1,000, on January 1st, 1981, he fulfills his obligation by delivering on that date one thousand units of the money, even though in the intervening time the purchasing power of the currency has undergone modifications. Among the sources of Article 619 of the Argentine Civil Code, Vélez Sarsfield mentions Article 1895 of the French Code and Article 2884 of the Code of Louisiana of 1825.[13] What happens if the debtor defaults? The solution is found in Article 622: The delinquent debtor owes the interest agreed on in the obligation, from its maturity. If no interest has been agreed upon, he owes the interest established by law; if there is no applicable provision, he owes the interest determined by the judge. The source of this article is Article 1153 of the Code Napoleon in its original wording.[14] Vélez Sarsfield's footnote reads: "The interest of the money . . . corresponds to the damages the delinquent debtor should pay."

The consequences of default in the performance of obligations to give sums of money are not the same as the consequences attending default in the performance of other contractual obligations. The extent of the redress in that area is also different from that established

9. C. CIV. art. 616 (Argen.) (writer's trans.).

10. C. CIV. art. 606 (Argen.) (writer's trans.).

11. C. CIV. art. 607 (Argen.) (writer's trans.).

12. C. CIV. art. 619 (Argen.) (writer's trans.).

13. It corresponds to article 2913 of the present Louisiana Civil Code, included in the chapter treating the loan for consumption or mutuum. *See* LA. CIV. CODE art. 2913.

14. *Dans les obligations qui se borment au payement d'une certaine somme, les dommages et intérets résultants du retard dans l'exécution ne consistent jamais que dans la condamnation aux intérets fixés par la loi; sauf les régles particuliéres au commerce et au cautionnment. Ces dommages et interéts sont dus sans que le créancier soit tenu de justifier d'aucune perte. Ils ne son dus que du jour de la demande, excepté dans les cas ou la loi les fait courir de plein droit.*

*Le créancier auquel son débiteur en retard a causé, par sa mauvaise foi, un préjudice indépendant de ce retard, peut obtenir des dommages et intérets distincts des intérets moratoires de la créance.*

C. CIV. art. 1153 (Fr.).

by the Code in the field of obligations arising from delicts and quasi-delicts.

Title III of Book II, Division I, is headlined "Of damages and interest in the obligations not having sums of money as an object." This section begins with a definition of damages and interests: they are "the value of the loss suffered, and of the profit not made by the creditor due to the non-fulfillment of the obligation."[15] If the default is in good faith, the redress will cover only those damages that are a direct and immediate consequence of the failure to perform the obligation.[16] Conversely, if the debtor is in bad faith, redress will cover also those consequences which are not immediate. In either case, good or bad faith of the defaulting debtor, the court may allow recovery of moral damages according to the nature of the event which gives rise to the liability and the circumstances of the case.[17]

In the field of delicts and quasi-delicts the obligation to redress is extensive. It covers losses and interest as well as moral damages.[18] If possible, things shall be returned to their former state; otherwise, a compensation in money shall be established.[19] Damages cover not only the loss actually sustained, but also the profit from which the victim has been deprived.[20] The debtor is answerable not only for the immediate consequences of his act or omission, but also for the consequences which, though not immediate, he has foreseen or could have foreseen by exercising due care.[21] In the event of wanton acts, the obligor may be answerable even for consequences that are merely contingent.[22]

Such traits of the law of delicts and quasi-delicts support the statement that the Argentine Civil Code has adopted the "principle of integral redress." The concept of "integral redress" also is used generally in the field of contractual liability. In this domain there is, however, a single exception: the obligation whose object is to give a sum of money. With an obligation of this kind, the redress is limited to the payment of interest, which is awarded as a substitute for the damages actually sustained by the creditor. However, if the debtor was able to pay but deliberately abstained from doing so (*i.e.*, when he failed to perform out of ill will), the rationale of the orthodox construction is that article 622, the provision that restricts redress to

15. C. Civ. art. 519 (Argen.) (writer's trans.).
16. C. Civ. art. 520 (Argen.) (writer's trans.).
17. C. Civ. art. 522 (Argen.) (writer's trans.).
18. C. Civ. art. 1078 (Argen.) (writer's trans.).
19. C. Civ. art. 1069 (Argen.) (writer's trans.).
20. C. Civ. art. 1069 (Argen.) (writer's trans.).
21. C. Civ. art. 904 (Argen.) (writer's trans.).
22. C. Civ. art. 905 (Argen.) (writer's trans.).

interest in obligations having as an object a sum of money, does not contemplate the case of malicious default; it refers only to mere default. Thus, there is a legislative gap that must be filled by resorting to analogy[23] to the malicious default of contractual obligations not having a sum of money as an object.[24] The debtor of a sum of money who maliciously fails to pay it in due course must compensate all damages that the creditor might suffer, to the same extent that the debtor of an obligation not having a sum of money as an object must redress the damages.

The preceding version of the system of civil liability in the Argentine Civil Code serves to illustrate the kinds of legal obstacles the courts had to surmount in order to find equitable solutions to the multiple problems created by a growing inflation and compounded by the absence of effective legislative remedies.

The courts began to resolve these economic problems by resorting to a distinction drawn in German legal theory: the distinction between "debts of money" and "debts of value."[25] That distinction resembles, although is not identical to, the traditional distinction in the Argentine Civil Code between obligations having as an object a sum of money and the remaining obligations. In the debts of money, money operates *in obligatione* (in the obligation) as well as *in solutione* (for the payment). What is due is a *quantum*, and what is paid is the amount of money due. In the debts of value, what is due is a profit or an abstract value. Money is not *in obligatione*; but it is *in solutione* if the default is not remedied in kind. When there is no compensation in kind, money is paid, not because money was originally due, but because it represents all other values.[26] The most important kinds of debts of value are the obligation to redress the damage caused by an unlawful act and the obligation to redress the damage arising from the non-performance of a contractual obligation, the object of which does not consist of a sum of money.

When problems created by the depreciation of the currency began to appear with more frequency, Argentine courts repeatedly employed the distinction between debts of value and debts of money. In the case of debts of value, the courts adhered to the principle of integral redress. In order to determine the sum to be paid

23. C. CIV. art. 16 (Argen.) (writer's trans.).

24. C. CIV. art. 520-21 (Argen.) (writer's trans.).

25. *See* A. NUSSBAUM, DERECHO MONETARIO NACIONAL E INTERNACIONAL 161 (A. Schoo ed. 1954); A. NUSSBAUM, TEORIA JURIDICA DE DINERO 235 (S. Serral trans. 1929); K. LARENZ, DERECHO DE OBLIGACIONES 138 (S. Briz trans. 1958). *See also* T. ASCARELLI, SAGGI GIURIDICI (1949).

26. *See* A. ALTERINI, *Improcedencia del reajuste de las deudas dinerarias*, in 29 JURISPENDENCIA ARGENTINA 673-74 n.n. 3 & 5 (1975).

by the debtor as redress, the courts found it necessary to take into account the effective purchasing power of the sum of money at the time of the decision; otherwise, there would be inadequate redress for the damages actually sustained. Thus, the principle of integral redress requires that the depreciation of the currency be taken into account. The debtor does not owe money; he owes a profit or a value which is not satisfied if the consequences of depreciation are not compensated.

Although the distinction between debts of money and debts of value has been criticized by distinguished law professors,[27] it has survived the criticisms and has served the purpose of unifying the course of decisions. Obligations not having as an object the giving of a sum of money—to use the old terminology of Argentina's Civil Code—remained acceptably protected from the consequences of inflation due to the use of the concept of debt of value. The system of the Civil Code was not incompatible with the use of this conceptual device; on the contrary, the Code gave adequate support to the use of such a device, although under the garb of a different language.

Argentine judges found it difficult to sit back and impassibly watch, and even to support, the conduct of the delinquent debtor of an obligation of money who saw his profits increase at the creditor's expense in direct proportion to the duration of the delay. If all the debtor had to pay as redress for the delayed payment was a certain rate of interest, the unscrupulous or simply careless debtor preferred not to pay on time, but to delay the proceedings and to use in the meantime the money of his creditor to whom he would deliver, in the end, debased money. This consisted of an amount nominally equal to the sum he should have paid on the date the obligation matured, plus default interest calculated at a rate always inferior to the debasing effect of inflation. Unwarranted and protracted litigation proliferated, causing an additional load on the courts; and there seemed to be no solution other than legislative action.

However, the legislature did little to help. The Civil Code amendment of 1968 added a second paragraph to article 622, which had provided that the delinquent debtor for a debt of money must pay only default interest as damages. The new paragraph provided that in case of malicious procedural misconduct with a view to delay the performance of an obligation to pay sums of money, the court may impose on the defendant, as an accessory penalty, payment of interest that, together with the compensatory and default interest, may add up to two and a half times the rate charged by the official banks for ordinary transactions. Amendments to the procedural law

27. *See, e.g.*, J. RAY, *Obligaciones de valor y de dinero*, in LA LEY 1975-B-1122.

introduced rules penalizing the malicious conduct of the debtor-defendant, but these rules were not effective in putting an end to dilatory tricks.[28]

The solution had to be found elsewhere; a "construction" of articles 619 and 622 of the Civil Code was needed that would allow the courts to update debts of money, at least after maturity. Distinguished jurists[29] advocated the following solution:

> Pursuant to the nominalistic principle, in the case of an obligation to pay an amount of money, a *peso* is always equal to a *peso*, whatever the variations of the purchasing power of that currency. But this principle applies only if the debtor does not default. Until the maturity of the obligation, *i.e.*, until the moment of its timely performance, the debtor fulfills the obligation by delivering as many units of the currency agreed upon as those he undertook to pay, though at the moment of payment these units may have—due to the inflation—a purchasing power substantially inferior. This is required by the nominalistic principle which governs the performance of the obligation; however, that principle does not apply to the non-performance of the obligation. In case of default, the general principles of civil liability which call for integral redress should apply. Therefore, the delinquent debtor, including the debtor of an obligation to give a sum of money, is responsible vis-a-vis his creditor for all damages resulting from the default. Among such damages is the loss of value of the currency which has taken place between the event of default and the date of effective payment. Put more simply, the rule is that debts of money are not updated or "indexed" if the debtor performs in time; they are updated only in the event of default and only from that moment. This happens under general rules of civil liability to which the nominalistic principle must yield in cases of default.

Many judges adopted this course of action, as it seemed to provide the needed remedy. A distinguished legal scholar who, as a writer and a judge had consistently held the opposite view, expressed astonishment at the general near-sightedness—including his own—that for such a long time had prevented lawyers from seeing something so simple and obvious.[30]

But was this solution compatible with the system of the Civil

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28. *See* FED. CODE CIV. & COM. P. art. 45 (Argen.).

29. *See, e.g.*, A. BUSTAMANTE, TEORIA GENERAL DE LA RESPONSABILIDAD CIVIL 195 (1973).

30. G. BORDA, *Las deudas de dinero y la desvalorización monetaria*, in LA LEY 1975-C-794.

Code? A negative answer to this question has been asserted. The Civil Code has no general system of civil liability; it has at least two: one governing contractual liability and the other governing the liability not arising from a contract. A closer scrutiny reveals three systems, because the rules on contractual damages do not constitute a homogeneous set. There are rules applicable to all obligations arising from contracts that do not have as an object the giving of a sum of money, and there is a special and different system for those arising from a contract for the giving of a sum of money. Even if it were true that the nominalistic principle refers only to the performance of an obligation to pay a sum of money, failure to perform the obligation does not remit to a general system of civil liability; the debtor's non-performance remits to the special system of default of obligations having as an object a sum of money. This system consists of a single article in the Argentine Civil Code: article 622. Article 622 provides that in case of default, the debtor must pay only default interest in lieu of reparation of the damage actually sustained.[31] This special regime consisting of a sort of tariff-redress operates for the benefit of the creditor as well as of the debtor: for the former, because it relieves him of the burden of proving the damages, a burden which concerns the creditor in all other areas of civil liability; for the latter, because he knows from the start with certainty the consequences of non-performance. Moreover, the interest that the debtor pays and the creditor receives as a consequence of the debtor's default represents the cost for the creditor of obtaining the money elsewhere; thus, the redress is necessarily equal to the damage.

This interpretation of the Code, supported by one of the most distinguished Argentine jurists,[32] prevented the "debt of value" solution from receiving general endorsement by the courts. Some judges preferred instead to compensate for the depreciation by establishing a rate of default interest high enough to attain that goal,[33] a device *prima facie* consistent with the wording of Article 622. But, this solution was hampered by the maximum ceiling on compensatory and default interest and the penalties for malicious misconduct included in the 1968 amendment to Article 622. Other courts resigned themselves to confess their impotence before what they considered the clear text of the law; and, at the same time that they refused to

31. C. CIV. art. 622 (Argen.) (writer's trans.).

32. J. LLAMBIAS, *¿ Hacia la indexación de las deudas dinerarias?, in* 63 *EL DERECHO* 871.

33. *See* O. BARBERO, *Desvalorizacion de la moneda. Deuda dineraria. Intereses*, in 29 JURISPURDENCIA ARGENTINA 265 (1975); J. BUSTAMANTE ALSINA, *Indexación de las deudas de dinero*, in LA LEY 1975-D-585, 588-90; J. RAMIREZ, *Depreciación de la moneda. Tasa de interés variable para superar la distinción deudas de valor-deudas de dinero*, in JURISPRUDENCIA ARGENTINA, DOCTRINA 362 (1974).

"index" the debts of money past due, the courts insisted on the necessity of an immediate legislative solution.

The legislature failed to take remedial action, in spite of the fact that by the middle of 1975, inflation turned into hyper-inflation; there were months when the rate of monetary depreciation exceeded thirty percent.[34] The different divisions of the Appellate Civil Court of the Capital District and the Commercial Appellate Court added to the economic chaos by applying disparate criteria.

In order to resolve the situation, the courts resorted to a remedy provided by the procedural laws; a full court was convened. When there are disparate criteria on a question of law among two or more divisions of the same appellate court in such a way that inconsistent decisions are rendered, all the divisions of the court must sit *en banc* to unify their views. This results in a *plenary decision.*[35] The Federal Civil and Commercial Code of Procedure provides that the construction of a law as established in a plenary decision shall be binding on all the divisions of the same court and on the inferior judges. The legal doctrine so established can be modified only through another plenary decision.[36]

Both the Civil Appellate Court and the Commercial Appellate Court of the Capital District convened the full courts in order to establish a criterion for deciding whether money debts should or should not be updated. The solutions reached by both courts were, by and large, coincident; however, the attitudes of the members were not so harmonious. In both cases the plenary decisions were reached by majority, not by unanimity, and not all the judges who voted in the same manner did so for the same reasons. In the plenary decision of the Civil Appellate Court,[37] for example, the majority held that "a debt of money must be revalued in relation with the monetary depreciation in case that the debtor has incurred default."[38] It took the court sitting *en banc* over three years to reach

34. This situation existed in March, 1976.

35. *See* C. COLOMBO, COMERCIAL DE LA NACIÓN, ANOTADO Y COMMENTADO 613 (1969).

36. FED. CODE CIV. & COM. P. art. 303 (Argen.).

37. La Amistad SLR v. Iriarte Roberto Co., LA LEY 1977-D-1. The commercial plenary decision had been reached on April 13, 1977.

38. LA LEY 1977-B-186. The plenary decision of the Commercial Appellate Court, in its official wording, stated:

> In case of default of an obligation to give a sum of money, if the creditor, on account of the loss of purchasing power of the currency, is damaged to an extension manifestly not compensated by the interest contemplated by Art. 622 Civil Code, he shall receive, provided he has claimed it in proper time, an additional sum to cover the aforesaid damage. This solution shall be applied unless a different one be required by particular statutory norms.

*Id.*

this decision. The writer will deal only with those arguments of the judges of the Civil Appellate Court specifically addressed to overcoming the obstacles created by the rule of the Argentine Civil Code concerning the failure to perform obligations having as an object a sum of money. Such arguments show the way the Argentine judges, facing special circumstances, made law *under* a Civil code.

*First Argument*: Article 622, restricting redress in case of default of a debt of money to payment of legal interest, is based on the presupposition of the non-existence of an acute inflation. If the presupposed state of affairs does not occur, Article 622 is no longer applicable. The vacuum left by the inapplicability of the "tariff system" of redress must be filled, by analogy, through the application of the principle of integral redress that underlies the general system of contractual liability in the Argentine Civil Code, as opposed to the special one dealing with money debts. Therefore, the mere default of a money obligation, even if it is not malicious, gives rise to the obligation to redress the damages actually brought about by the default. Those damages are the equivalent of the loss in the purchasing power of the currency which took place between the date of maturity and the date of effective payment.

*Second Argument*: In adopting the solution of Article 622—restriction of redress to the payment of interest—the Argentine legislature in 1869 followed Article 1532 of the Code Napoleon but toned down the rigidity of the Napoleonic model which had expressly excluded any other redress in *all* cases.[39] The less rigid Argentine solution was not considered an obstacle for setting aside the limitation in special cases such as malicious noncompliance. Once the absence of rigidity in the Argentine provision is thus shown, it becomes more plausible to accept the thesis that its applicability depends on the existence of certain conditions, *e.g.*, a minimum degree of monetary stability.

The first argument is the stronger of the two, the second one being merely corroborative. The reasoning introduces a tacit general condition of monetary stability to which the system of redress (pertaining to money obligations) is subordinated. Justice Holmes has stated, in a different context, that it is always possible to imply a condition. The reasonableness of implying a condition in the law depends on the existence of good reasons to restrict the area of application of a rule or set of rules. In the case presented, it is as if one said: "No doubt, this is what the law-maker intended to fix as damages for failure to perform debts of money, but he did so having in mind a situation of normality which is now absent, and

39. See note 14, *supra*.

whose absence justifies a departure from what has been established." This construction does not create an exception *within* a given rule, but fixes *external* limits of applicability of the rule, thus creating an opportunity for the application of other provisions.

When judges act in this way, the result of their decisions may fairly be called "judge-made law." And if they do so while dealing with a civil code that allegedly regulates all situations falling within its scope, the result of such acts of judicial creation can reasonably be described as judge-made law *under* a Civil Code. The solution reached by Argentine courts hints at some central traits of the civil law, as opposed to the common law. These characteristics of a Civil law system are quite often misunderstood by common-law lawyers. For example, courts operating under a codified system are not passive mouthpieces of the codes, but active participants in a joint and creative effort to keep those bodies of rules alive. Also, a civil code, if properly drafted and construed, not only offers a good guide to fill its own gaps, but also is of great help in the necessary and difficult task (typically performed by courts) of making explicit the implied conditions which restrict the scope of its own rules. Paradoxical as it may seem, a good civil code, in the hands of good judges, can even provide the ground to overcome its own unavoidable limitations.

While the Argentine courts sitting *en banc* were following their slow procedures to reach a plenary decision, substantial changes were taking place in the Argentine political scene. As a consequence, in April, 1976, the entire composition of the Supreme Court changed. After a short while, cases were brought before the highest court challenging the constitutional validity of judgments in which the claims to update debts of money past due had been upheld or dismissed. In a series of cases, the Supreme Court ruled that in the updating of debts of money, the creditor's constitutional right of property is at stake in the sense that property would be taken from him without compensation if, on default, the debtor could be released of his obligation by paying with debased money. The Supreme Court invoked principles of commutative justice in reaching these decisions. The Court also recognized that the updating does not actually change the terms of the original economic relation between the parties; rather, it only attempts to maintain this relation by preserving the purchasing power of the currency initially contemplated by the parties.[40]

40. *Vieytes de Fernández J. v. Provincia de Buenos Aires*, LA LEY 1976-D-241, is the leading case.

However, the argument has been advanced that if the analysis of the Supreme Court is correct and the constitutional guaranty of property is at stake, there is no reason to limit the updating of debts of money to cases of default and only to the extent of the depreciation suffered thereafter.[41] This argument leads to the conclusion that *all* money debts must be updated whether there is default or not, and that the updating must cover *all* the depreciation which has taken place from the execution of the agreement, with the exception of special cases. If the Supreme Court were to take this additional step that seems to be implicit in the decisions already rendered, then it would no longer be appropriate to describe the situation in terms of judge-made law *under* a Civil Code, but possibly in terms of judge-made law *over* a Civil Code. But the step has not yet been taken, and this writer does not believe that the Court will extend the principle to this extreme.

The fight of Argentine courts, if conceived as a struggle against inflation, was a lost cause before it began. Inflation cannot be curbed through judicial action, however persistent, courageous, and wise. Courts can act only on the *effects* of inflation at the level of interpersonal relations, not on its causes. Courts can only set themselves to the task of trying to tone down, at that level, gross injustice and immorality. In the Argentine case, they have accomplished this goal with serious misgivings. One may always question whether, in using the poor equipment of judge-made law to reduce injustice by indexing debts, the courts are not contributing to perpetuate the very cause whose effects they are trying to suppress.

41. *See* G. BIDART CAMPOS, *La indexación de las deudas dinerarias como principio constitucional*, in 72 EL DERECHO 697.