

12-1-1992

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### Recommended Citation

Lynn Berat, *The Courts and the Economy in a New South Africa: A Call for an Indexation Model*, 15 B.C. Int'l & Comp. L. Rev. 1 (1992), <http://lawdigitalcommons.bc.edu/iclr/vol15/iss1/2>

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# The Courts and the Economy in a New South Africa: A Call for an Indexation Model†

Lynn Berat\*

## INTRODUCTION

Since the 1980s, the South African economy has been in a parlous state. The value of the rand, South Africa's currency, has declined precipitously in international markets.<sup>1</sup> At home, an ever greater number of blacks have entered a shrinking job market each year.<sup>2</sup> Unemployment has reached new heights.<sup>3</sup> At the same time, South Africa has experienced many of the inflationary problems—albeit in a milder form—that have long plagued the economies of many Latin American countries.<sup>4</sup> Such inflation has made life even more difficult for the estimated 30.3 million blacks comprising approximately 86 percent of the population.<sup>5</sup> Not surprisingly, an unprecedented rise in crime has accompanied the growth of South Africa's economic woes.<sup>6</sup>

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<sup>1</sup> Compare foreign exchange rates, N.Y. TIMES, July 1, 1981, at D12 with foreign exchange rates, N.Y. TIMES, Oct. 10, 1991, at D17.

<sup>2</sup> See generally SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, SURVEY OF RACE RELATIONS IN SOUTH AFRICA (1980–1990 editions). The word “black” in this Article refers to those who, until recently, were classified by the government as African, Asian, and Coloured.

<sup>3</sup> For example, a survey conducted in the Grahamstown and Port Elizabeth areas in 1984 found the level of unemployment close to 40 percent. By 1988, the Institute for Social and Economic Research at Rhodes University reported that the figure for Grahamstown had risen to between 60 and 70 percent. UPROOTING POVERTY: THE SOUTH AFRICAN CHALLENGE 91 (Francis Wilson & Mamphela Ramphele eds., 1989).

<sup>4</sup> See generally *id.* at 249–53.

<sup>5</sup> LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 243 (1990).

<sup>6</sup> See, e.g., Audrey D'Angelo & Daniel Simon, *Muggings Drive Off Tourists*, CAPE TIMES, July 19, 1991, at 2.

Now, as both the government and leading anti-apartheid groups such as the African National Congress (ANC)<sup>7</sup> struggle for a way out of the socio-economic morass created by more than forty years of National Party rule,<sup>8</sup> the problem of salvaging and revitalizing the economy demands attention. There is, however, little agreement on the nature of a post-apartheid economy. While general statements of principle abound,<sup>9</sup> concrete ideas are few.<sup>10</sup> The future role of the judiciary in South Africa is an additional source of uncertainty.<sup>11</sup> Will the judges be willing or, indeed, permitted to consider economic questions? Even if they do address them, will they be reluctant to interfere with government policy or will they pursue a conservative policy, striking down parliamentary economic policy they believe unduly interferes with financial agreements? The resolution of these issues will determine South Africa's course well into the next century.

One solution for some of South Africa's difficulties would be for the country to adhere to a system of indexation by adjusting the face value of savings accounts, mortgage debts, and other financial instruments so that they keep pace with inflation. Such a system has worked particularly well in Brazil. The influence of U.S. jurisprudence, however, in the South African legal community might cause South African courts to block parliamentary attempts to introduce indexation.

This Article proposes that South Africa adopt a system of indexation. Part I briefly examines current South African views about the economy and the role of the judges. Part II explores the success of the Brazilian model during its formative decades of the 1970s and 1980s. Part III discusses the Gold Clause deci-

<sup>7</sup> The African National Congress is described in TOM LODGE, *BLACK POLITICS IN SOUTH AFRICA SINCE 1945* 1-3, 26-28, 77-84, 298-303 (1983).

<sup>8</sup> The National Party first came to power in 1948 with the slogan "apartheid." The Party is described in THOMPSON, *supra* note 5, at 162, 187-88, 190, 198, 207, 223-26, 234, 237.

<sup>9</sup> See, e.g., African National Congress, *A Bill of Rights for a Democratic South Africa—Working Draft for Consultation* as prepared by the Constitutional Committee of the African National Congress, arts. 10-11, *reprinted in* MONITOR (Dec. 1990).

<sup>10</sup> See, e.g., David Porteious, *Bank Nationalization in South Africa: Implications and Alternatives*, paper presented at the Yale University Southern African Research Program, Fall 1990 (on file with the Yale University Southern African Research Program, New Haven, CT).

<sup>11</sup> The role of the judiciary is described in Lynn Berat, *A New South Africa?: Prospects for an Africanist Bill of Rights and a Transformed Judiciary*, 13 *LOY. L.A. INT'L & COMP. L. REV.* 467 (1991).

sions and reveals how Brazilian attitudes toward its government's economic role in society have differed from U.S. norms. This section further specifies how Brazilian ideas would clash with South African judges influenced by U.S. conservatism. Finally, this Article suggests how, even with economic conservatives on the bench, the South African courts could permit the development of a structural analogue to the Brazilian system.

### I. THE SOUTH AFRICAN DEBATE: THE ECONOMY AND THE ROLE OF THE JUDGES

The South African legal system has been characterized by intense rule-making and little respect for human rights. Indeed, the legislature has never adhered to the rule of law with regard to blacks.<sup>12</sup> Only by abrogating black rights has the white-minority regime been able to ensure its survival. Particularly since the ruling National Party came to power in 1948, the government has continually enlarged its arsenal of security legislation. Furthermore, since 1983, the government has concentrated ever greater powers in the hands of the executive.<sup>13</sup> Underlying this executive-minded behavior has been an obsession with legalism—the view that such laws, no matter how draconian, are just, simply because they are laws.

The all-white and nearly all-male South African judiciary, which has been reluctant to challenge the executive, has helped reinforce this obsession with legalism. Supporters of legalism maintain that the proper role of the judiciary in a system of parliamentary supremacy is to declare the law and not to make it.<sup>14</sup> The judges' task is only to see that the manner of promulgation was procedurally correct and that executive action was taken "in terms of" the legislation.

In practice, however, this positivistic justification has been an excuse for the generally conservative judges, many of whom support the ruling National Party, to lend approval to the underlying

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<sup>12</sup> Lynn Berat, *Harmonizing Competing Ethnonationalisms?: A Bill of Rights for a New South Africa*, 19 J. POL. SCI. 90 (1991).

<sup>13</sup> See generally Lynn Berat, *Conscientious Objection in South Africa: Governmental Paranoia and the Law of Conscription*, 22 VAND. J. TRANSNAT'L L. 128, 158–76 (1989); Lynn Berat, *Doctors, Detainees and Torture: Medical Ethics v. the Law in South Africa*, 25 STAN. J. INT'L L. 499, 528–31 (1989).

<sup>14</sup> Dion Basson, *Judicial Activism in a State of Emergency: an Examination of Recent Decisions of the South African Courts*, 3 S.A. J. HUM. RTS. 42–43 (1987).

moral assumptions of the legislation they are called upon to construe. South African jurist M.G. Cowling has argued that "within the framework of legislative supremacy, the positivistic approach to judicial decision-making provides an extremely convenient cloak behind which judges can hide their 'inarticulate major premises' by attributing inequitable results to the legislation."<sup>15</sup> According to Cowling, these premises are the "underlying motives, perceptions, [and] political outlook[s] that mould a judge's interpretation of the law as it is envisioned by the legislature."<sup>16</sup> In the South African case, it is not implausible to suggest that, for many judges, such premises include beliefs in white domination and continued hegemony, the need to preserve state security, and fear of communism.

The unhappy result of the judiciary's captivity to such views has been that instead of protecting human rights, the courts—especially the Appellate Division, South Africa's highest court—have routinely upheld the draconian will of the executive.<sup>17</sup> In many cases, the courts have deferred to the executive's authority in matters concerning state security.<sup>18</sup> Such decisions are made routinely at the expense of the black majority.

Certain members of the South African legal community have criticized this judicial conservatism. Some South African scholars have suggested that more liberal judges should resign in an effort to underscore the proposition that, under present conditions, it is inappropriate to speak of an independent judiciary.<sup>19</sup> Such scholars have also called for a redefinition of the role of the judiciary and have argued that South Africa should adopt a bill of rights to free judges from the constraints of legislative supremacy.<sup>20</sup> According to this view, the entrenchment of a bill of rights

<sup>15</sup> M.G. Cowling, *Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premise*, 3 S.A. J. HUM. RTS. 180, 189 (1987).

<sup>16</sup> *Id.*

<sup>17</sup> See generally Etienne Mureinik, *Pursuing Principle: The Appellate Division Under the State of Emergency*, 5 S.A. J. HUM. RTS. 60 (1989).

<sup>18</sup> See, e.g., Omar v. Minister of Law and Order, 1987 (3) SA 859 (A) (discussing audi alteram partem rule); Fani v. Minister of Law and Order (ECD Case No. 1840/1985, unreported) (discussing audi alteram partem rule); Bill v. State President, 1987 (1) SA 265 (W) (discussing audi alteram partem rule). In the Appellate Division case, Omar included the appeals in Fani and Bill.

<sup>19</sup> See generally Raymond Wacks, *Judges and Injustice*, 101 S.A.L.J. 266 (1984); John Dugard, *Should Judges Resign?—A Reply to Professor Wacks*, 101 S.A.L.J. 286 (1984).

<sup>20</sup> Cowling, *supra* note 15, at 196.

would not only protect individual rights and freedoms but also serve to promote the institutional integrity of the judiciary.<sup>21</sup>

As progressive scholars have sought enactment of a bill of rights, conservative members of the politico-legal establishment also have turned their attention toward that goal. Conservative interest, however, springs not from their desire to nurture the rule of law in a non-racial democratic state but from their perception that the days of white minority rule are numbered. They view a bill of rights as the best way to safeguard property and minority rights. With such disparate views, it is not surprising that disagreements over what form such a document should take are profound.

As a political battle rages over the economic structure of a post-apartheid South Africa, both sides make much of the concept of economic rights. Many aligned with the broad coalition of anti-apartheid groups known as the Mass Democratic Movement believe that any proposed bill of rights must guarantee, or at least not obstruct, the economic redistribution that must follow the abolition of the apartheid state. Without such redistribution measures, the members of the white community will simply substitute their current racially-defined supremacy with an economically-defined one. Such economically-defined supremacy would reflect their already superior economic status, a status acquired at the expense of blacks.<sup>22</sup> Moreover, the guarantee of certain minimal economic standards will be the only way of giving meaning to blacks' newly-secured political rights. As black advocate Ernest Moseneke contends: "[t]he right to development . . . is probably more crucial than the right to vote; not as a favour which somebody hands out, but a right that you can claim and enforce . . . anything less than that is going to in effect perpetuate the present system."<sup>23</sup>

For many blacks, capitalism, as practiced in South Africa, and civil liberties, as propounded by the government and interpreted by the judiciary, are wedded in a conspiracy of oppression. This conspiracy is aimed at preserving and perpetuating inequality in

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<sup>21</sup> C. Weeramantry, *The Constitutional Reconstruction of South Africa: Some Essential Safeguards*, 3 LESOTHO L.J. 1, 16 (1987).

<sup>22</sup> Dennis Davis, *Legality and Struggle: Towards a View of a Bill of Rights for South Africa*, in *A BILL OF RIGHTS FOR SOUTH AFRICA* 179 (Johan Van der Westhuizen & Henning Viljoen eds., 1988).

<sup>23</sup> Ernest Moseneke, *quoted in, Panel Discussion, A BILL OF RIGHTS FOR SOUTH AFRICA*, *supra* note 22, at 149.

economic relations. In this context, the ANC is not so much concerned with individual property rights as it is with the enormous concentration of monopoly capital in a few huge white-controlled corporations and holding companies. Drawing from the 1955 Freedom Charter,<sup>24</sup> ANC draft constitutional guidelines, proposed in 1989, emphasized the need to vest the state "with the right to determine the general context in which economic life takes place and define and limit the rights and obligations attaching to the ownership and use of productive capacity."<sup>25</sup> The document distinguished between individual property owners and the collective wealth of corporations. Accordingly, the draft constitutional guidelines envisioned that "[p]roperty for personal use and consumption shall be constitutionally entrenched"<sup>26</sup> while privately-owned companies and transnational corporations "shall be obliged to co-operate with the state in realizing the objectives of the Freedom Charter in promoting social well-being."<sup>27</sup>

The government, in contrast, has not offered any solutions capable of satisfying both whites and blacks and has favored maintaining the status quo protecting existing white property rights. This preference manifested itself in the South African Law Commission's (Commission) 1989 *Working Paper on Group and Human Rights*.<sup>28</sup> The Commission, established in 1973 by an Act of Parliament, consisted of members of the judiciary, the legal profession (including academic lawyers), the magistrates' bench, and officials of the Department of Justice. Its mandate was "to investigate and make recommendations on the definition and protection of group rights in the context of the South African constitutional set-up and the possible extension of the existing protection of individual rights as well as the role the courts play or should play . . . ."<sup>29</sup> The Commission stressed that economic rights should be protected only "in the negative sense that legis-

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<sup>24</sup> On June 26, 1955, three thousand delegates of all racial groups met at Kliptown, near Johannesburg, and adopted a Freedom Charter which, among other things, stipulated that "South Africa belongs to all who live in it, black and white . . . ." The text of the Charter is reprinted in THOMAS KARIS & GWENDOLYN CARTER, 3 FROM PROTEST TO CHALLENGE 205 (1977).

<sup>25</sup> AFRICAN NATIONAL CONGRESS, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA (1989), cl. (O).

<sup>26</sup> *Id.* at cl. (T).

<sup>27</sup> *Id.* at cl. (P).

<sup>28</sup> See generally S.A. L. COMM., PROJECT 58: GROUP AND HUMAN RIGHTS (1989) [hereinafter S.A. L. COMM. REP.].

<sup>29</sup> *Id.* at Introduction, 4.

lation and executive acts shall not infringe them. A bill of rights is not the place for enforcing positive obligations against the state.”<sup>30</sup>

A number of white legal scholars have justified this resistance to constitutional guarantees of economic redistribution, questioning judicial competence to deal with such matters. Legal scholar M.G. Cowling and Natal Judge John Didcott contend that the judiciary is ill-equipped to deal with issues of economic policy.<sup>31</sup> A bill of rights, in their view, should be free of economic standards to which the central government would be bound and the judiciary obliged to review. As to property rights, they insist that the judges be neither spoilers of economic redistribution nor rubber stamps for arbitrary expropriation. They are determined that there be a neutral bill of rights to act as shield and not a sword. This neutrality is crucial, they maintain, because South African judges are neither qualified nor in possession of the resources and enforcement capabilities necessary to adjudicate issues arising out of economic restructuring.<sup>32</sup> Such questions, they argue, are really “political” problems and not germane to jurisprudential deliberation.

Unfortunately, these observers fail to explain why the judges would be ill-equipped to pass on such matters. One possible explanation appears in the Commission report’s distinction between positive and negative rights.<sup>33</sup> Substantive rights seek to prevent the state from infringing upon individual liberties, while economic rights seek to compel the state to fulfill an obligation. Thus, it is for the judges to determine that the state has acted arbitrarily and not that it has failed to comply with minimal economic guarantees.

This argument, however, is unpersuasive. If the judges can ascertain whether the state has abrogated fundamental freedoms such as freedom of the press or speech, they can just as easily determine whether the government has failed to strive for the minimum standards enshrined in the constitution. To suggest that these are political problems not appropriate for adjudication

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<sup>30</sup> *Id.* at § 9.1.

<sup>31</sup> John Didcott, *Practical Workings of a Bill of Rights*, in *A BILL OF RIGHTS FOR SOUTH AFRICA*, *supra* note 22, at 60; Cowling, *supra* note 15, at 179.

<sup>32</sup> Cowling, *supra* note 15, at 179.

<sup>33</sup> S.A. L. COMM. REP., *supra* note 28, at 9.1.



is to engage in perpetuating the positivist myth upon which the South African judiciary has relied for decades.

While the debate about the economy and the role of the judiciary rages on, those on both sides would do well to consider the implications of their positions. If the judges are unwilling to interfere with government policy, would they continue to show such deference to parliamentary policy interfering with existing financial agreements? This issue certainly would materialize if the South African government, in an attempt to control inflation and to raise the funds necessary to reverse the effects of economic apartheid, adopted a system of indexation similar to that of Brazil.

## II. THE BRAZILIAN MODEL

Beginning in the late 1950s, Brazil adopted a system of indexation, thereby adjusting for inflation the face value of government debt securities, tax liabilities, and certain private debt instruments. This system was designed to alleviate the destabilizing effects of inflation on investment patterns by guaranteeing investors a return on the purchasing power of their original investment as opposed to the nominal currency value of that investment. The government also intended the indexation system to help fund its operations in two ways. First, indexation would make government debt securities more attractive to investors in Brazil's inflationary economy. Second, indexation would eliminate the incentive for taxpayers to delay payment of their taxes. Brazilian indexing has been the subject of numerous studies, particularly in the United States. These studies have examined indexation's application to wages, realty, rental and mortgage markets,<sup>34</sup> corporate income taxation,<sup>35</sup> damage awards for tort victims,<sup>36</sup> and eminent domain compensation.<sup>37</sup> The system, however, is not widely known in South Africa.

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<sup>34</sup> George Lefcoe, *Monetary Correction and Mortgage Lending in Brazil: Observations for the United States*, 21 STAN. L. REV. 106 (1968); Keith Rosenn, *Controlled Rents and Uncontrolled Inflation: The Brazilian Dilemma*, 17 AM. J. COMP. L. 239 (1969).

<sup>35</sup> Keith Rosenn, *Adjusting Taxation of Business Income for Inflation: Lessons from Brazil and Chile*, 13 TEX. INT'L L.J. 165 (1978); Keith Rosenn, *Adaptation of the Brazilian Income Tax to Inflation*, 21 STAN. L. REV. 58 (1968) [hereinafter Rosenn, *Adaptation*].

<sup>36</sup> KENNETH KARST & KEITH ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 496-509 (1975).

<sup>37</sup> Keith Rosenn, *Expropriation in Argentina and Brazil: Theory and Practice*, 15 VA. J. INT'L

A few types of indexation existed in Brazil prior to 1964 when the Brazilian military removed João Goulart's populist government. There were semi-automation adjustments for progressive tax brackets,<sup>38</sup> indexation of the capital base upon which the Brazilian excess profits tax was levied,<sup>39</sup> indexation of some rental agreements,<sup>40</sup> and indexation of certain financial operations of some public and semi-public institutions.<sup>41</sup> Pursuant to a 1957 law authorizing the issuance of Brazilian Treasury obligations "in order to finance the nation's deficits and combat inflation," the government contemplated giving some treasury paper a "guaranty clause against the eventual devaluation of [Brazilian] currency, in accord with indices to be released by the National Economic Council."<sup>42</sup> The government, however, never used the authority granted by the 1957 law.<sup>43</sup>

Once the Goulart government fell, the military installed several of Brazil's leading economists in positions where they were expected to restructure the country's private and governmental financial systems.<sup>44</sup> Part of this restructuring included monetary correction of government obligations and tax arrears. Article 1 of Law No. 4,357 of July 16, 1964 (1964 Law) authorized Brazil's executive branch to issue treasury obligations, later called Obrigações Reajustáveis do Tesouro Nacional (ORTNs), with varying maturities and a fixed rate of interest calculated as a percentage of the adjusted principal amount.<sup>45</sup> The value of the principal was to be "periodically adjusted in accordance with the variations in the purchasing power of the national currency."<sup>46</sup> The law directed the Ministry of Finance to announce new nominal values

L. 277 (1975); Keith Rosenn, *Expropriation, Inflation and Development*, 1972 WIS. L. REV. 845.

<sup>38</sup> Law No. 4,140 of Sept. 21, 1962; Law No. 3,898 of May 19, 1961. All Brazilian papers referred to in this Article are reprinted in COLLECAO DAS LEIS.

<sup>39</sup> Law No. 4,242 of July 17, 1963; Law No. 3,470 of Nov. 28, 1958, art. 56; Law No. 2,862 of Sept. 24, 1956.

<sup>40</sup> JULIAN CHACEL ET AL., 1 INVESTIMENTOS PRIVADOS E INFLACAO: A EXPERIENCIA BRASILEIRA 92 (1970).

<sup>41</sup> Decree No. 1,120 of June 12, 1962; Decree No. 786 of Mar. 1962; Decree No. 787 of Mar. 12, 1962, CHACEL ET AL., *supra* note 40, at 65.

<sup>42</sup> Law No. 3,337 of Dec. 12, 1957, arts. 1, 4.

<sup>43</sup> WALTER NESS, A INFLUENCIA DA CORRECAO MONETARIA NO SISTEMA FINANCEIRO 47 (1977).

<sup>44</sup> ROBERTO DE OLIVEIRA CAMPOS & MARIO SIMONSEN, A NOVA ECONOMIA BRASILEIRA 41 (1974).

<sup>45</sup> Law No. 4,357 of July 16, 1964, art. 1.

<sup>46</sup> *Id.* art. 1, § 1.

each quarter,<sup>47</sup> authorized the public to use bonds for tax payments thirty days after reaching maturity,<sup>48</sup> and gave the Minister of Finance the requisite authority to place and redeem the bonds.<sup>49</sup> The law exempted the nominal gain from the revaluation of the principal from taxation.<sup>50</sup> Finally, it stated that allocations necessary to service the interest and to amortize principal payments would be included in the national budget.<sup>51</sup>

The Brazilian system, with its frequent rule changes, has become the foundation for key areas of modern Brazilian finance. Indeed, the general purpose of monetary correction may be inferred from the face of the 1964 statute and the relevant financial background. Prior to 1964, the Brazilian Treasury was only sporadically successful in placing its obligations. This limited success resulted principally because obligations available in 1962 generally bore only 6 or 7 percent interest<sup>52</sup> at a time when the Brazilian rate of inflation was considerably higher, and the public's confidence in the government's promise to repay was low. Most pre-1964 borrowing was accomplished by compulsory loans,<sup>53</sup> yet significant unfinanced budget deficits remained. The pre-1964 market would not justify expectations of a spontaneous market for fixed-interest public debt with ordinary terms. Thus, the government apparently intended the promise of a positive return to make possible a market for Brazilian public debt, and thereby permit financing of the budgetary deficit.

Nevertheless, much of the early subscription to the ORTNs was involuntary. Indeed, 73 percent of the ORTNs placed in 1964 were either involuntary subscriptions or alternatives to taxation.<sup>54</sup> By 1966, only 17 percent of the subscriptions were involuntary or alternatives to taxation, and by 1974 this figure had fallen to 3 percent.<sup>55</sup> Still, various Brazilian governmental instrumentalities, commercial banks, which were permitted to hold a portion of their reserves as ORTNs, and insurance companies, which were required to invest a portion of their reserves in

<sup>47</sup> *Id.* art. 1, § 2.

<sup>48</sup> *Id.* art. 1, § 4.

<sup>49</sup> *Id.* art. 1, § 6.

<sup>50</sup> *Id.* art. 1, § 7.

<sup>51</sup> *Id.* art. 1, § 8.

<sup>52</sup> Law No. 4,069 of June 11, 1962; Law No. 2,977 of Nov. 28, 1956.

<sup>53</sup> CHACEL, *supra* note 40, at 282.

<sup>54</sup> On alternatives to taxation, see *supra* notes 47-49 and accompanying text.

<sup>55</sup> M. SILVA, A DIVIDA DO SETOR PUBLICO BRASILEIRO 58 (1976).

ORTNs, have continued to hold a very large portion of the ORTNs issued. Accordingly, the market for ORTNs has remained less than fully spontaneous.<sup>56</sup> Even so, the indexation system has allowed the government to finance a major portion of its deficit by public and quasi-public borrowing instead of by printing money or borrowing from the Brazilian central banking authorities.

Article 7 of the 1964 Law required readjustment of the nominal value of tax arrears and other debts to the government not paid during the quarter in which they were due. As with the ORTNs, there was no detailed exposition of the means of calculating the value; the debts were required to "have their value adjusted in accord with variations in the purchasing power of the national currency."<sup>57</sup> Article 7 also allocated administrative responsibility for the calculation of monetary correction of tax arrears and ORTNs, and mandated that coefficients of monetary correction be published quarterly in the *Diario Oficial*.<sup>58</sup> If judicial or administrative action suspended collection of a tax payment, then reevaluation would be necessary. Nevertheless, if tax payment was eventually required, any required return of the sum deposited would be subject to revaluation unless the amount in question had been appropriately deposited in cash.<sup>59</sup> Article 7 also provided that all then-existing percentages and interest penalties that were due the government because of any delay in making a payment would be assessed as a percentage of the new, revalued debt.<sup>60</sup>

In addition, article 7 indexed tax arrears, including money in arrears on the effective date of the law. This retroactive indexation of tax arrears was met with criticism<sup>61</sup> and subsequently was eliminated.<sup>62</sup> Prior to 1964, delay of tax payment often was profitable because penalties and interest were small in relation to inflation. From 1962 until the new law became effective, the penalty for non-payment was 10 percent for each half year of delay, with an additional monthly interest charge of 1 percent.<sup>63</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> Law No. 4,357 of July 16, 1964, art. 7.

<sup>58</sup> *Id.* art. 7, § 1.

<sup>59</sup> *Id.* art. 7, § 2.

<sup>60</sup> *Id.* art. 7, § 6.58.

<sup>61</sup> CHACEL, *supra* note 40, at 106-07.

<sup>62</sup> Law No. 4,682 of Nov. 29, 1965, art. 15.

<sup>63</sup> Rosenn, *Adaptation*, *supra* note 35, at 70. At the same time, the Banco Brasil issued

Thus, when prices were rising at approximately an 80 percent annual rate in 1963, the full annual cost for nonpayment of taxes was substantially less than the rate of inflation. Ordinary corporate planning during those years involved financing the enterprise through delay in tax payment.<sup>64</sup> Monetary correction of tax arrears may have increased tax revenues by destroying much of the incentive to delay tax payment in an economy subject to chronic inflation.

After receiving authorization to issue ORTNs in July 1964, the government promulgated laws permitting indexation of various instruments used by private parties and local governments. Adjustments under these laws were tied to the change in nominal value of the ORTN.<sup>65</sup> The instruments included corporate bonds,<sup>66</sup> certain types of insurance,<sup>67</sup> bank certificates of deposit,<sup>68</sup> real estate letters,<sup>69</sup> housing rentals,<sup>70</sup> various long-term loans,<sup>71</sup> some mortgages,<sup>72</sup> and state and municipal bonds.<sup>73</sup> Through legislation enacted in June 1977, for all but a few financial obligations, the government withdrew the authority to use any index other than one based upon the nominal variations in the ORTN.<sup>74</sup> By the terms of the June 1977 statute, previous provisions authorizing the use of another index became void; the ORTN index immediately was substituted for any other index unless the transaction fell into one of the statutory exceptions.<sup>75</sup> Thus, the ORTN index had become the hub of Brazil's financial system.

The 1964 Law provided that the value of ORTNs would be adjusted "in accordance with the variations in the purchasing

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short-term instruments that financed foreign trade; they carried an annual return of approximately 55 percent. CAMPOS & SIMONSEN, *supra* note 44, at 121.

<sup>64</sup> J. Bulhoes, *Financial Recuperation for Economic Expansion, in THE ECONOMY OF BRAZIL* 162 (1968).

<sup>65</sup> J. BULHOES PEDREIRA & M. RIBEIRO DA CRUZ, *MANUAL DA CORRECAO MONETARIA DAS DEMONSTRACOES FINANCEIRAS* 28 (1978).

<sup>66</sup> Law No. 4,728 of July 14, 1965.

<sup>67</sup> Law No. 5,488 of Aug. 27, 1968; Decree No. 73 of Nov. 21, 1968.

<sup>68</sup> Law No. 4,728 of July 14, 1965.

<sup>69</sup> *Id.* art. 45, § 6.

<sup>70</sup> Law No. 6,146 of Nov. 29, 1974.

<sup>71</sup> Law No. 4,728 of July 14, 1965.

<sup>72</sup> Law No. 4,380 of Aug. 21, 1964, amended by Law No. 4,728 of July 14, 1965, art. 26.

<sup>73</sup> CONSTITUCAO art. 69, § 2 (1967).

<sup>74</sup> Law No. 6,423 of June 23, 1977.

<sup>75</sup> *Id.*

power of the national currency.”<sup>76</sup> The 1964 Law did not indicate the method by which the table of coefficients—the means by which the index is calculated—would be determined; it indicated only which governmental body would establish the indices.<sup>77</sup> Since 1964, the government has altered the method of calculation several times. These changes have been applied both to ORTNs already in circulation and to private obligations tied to the nominal value of the ORTN. Such changes in the methods of calculation have not necessarily benefited the government. If the aggregate debt due the government exceeded the aggregate bond and other debt owed by the government at the time of an index change, then the government actually could lose revenue by redefining the rules of indexation. In addition, to the extent that the reordering of the index affected private obligations, the government’s revenues were not affected directly at all.

Originally, the government based the monetary correction coefficients upon the change in average wholesale prices in one quarter of the year compared to prices in the previous quarter, with a delay of an additional quarter until the coefficients would become effective.<sup>78</sup> Thus, an adjustment scheduled to take effect in July was based on average wholesale prices in January, February, and March, as compared to the average wholesale prices in October, November, and December of the previous year. In October 1969, the government adopted a three month moving average, also with a three month delay.<sup>79</sup> Then, in May 1976, when the government expected a decrease in the rate of inflation, it altered the indexed calculation so that the delay would be only one month instead of three.<sup>80</sup> This change effectively decreased the monetary correction adjustment as the rate of inflation decreased.

In October 1969, the government eliminated price changes in exports from the index. Retaining the price of exported goods actually overcompensated for the “variation in the purchasing power of the national currency,”<sup>81</sup> as long as the weighted average price of exported items rose more quickly than that of domestic items. The government was paying its domestic creditors more

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<sup>76</sup> Law No. 4,357 of July 16, 1964, art. 1, § 1.

<sup>77</sup> *Id.* art. 7, § 1.

<sup>78</sup> Decree No. 1,281 of July 24, 1973.

<sup>79</sup> CHACEL, *supra* note 40, at 113.

<sup>80</sup> NESS, *supra* note 43, at 42.

<sup>81</sup> Law No. 4,357 of July 16, 1964.

than they needed to regain their former purchasing power. Thus, the government weighted the index appropriately to offset the effect of that portion of an item that was exported.<sup>82</sup>

In December 1972, the rate of inflation in Brazil decreased. The government again responded by modifying the index, which had been based entirely upon previous inflation, so that a government estimate of the expected rate of inflation for the ensuing year would receive nearly equal weight with past inflation.<sup>83</sup> For some time, the government did not publicly reveal the formula indicating the weight of past and expected inflation. Thus, buyers and sellers of indexed instruments tied to the ORTN bought and sold while accepting the risk of recalculation. At the end of 1973, the government sought to have a monetary correction index of approximately the same percentage as its goal for inflation for that year—no more than 12.0 percent. It abandoned the weighted formula, which would have resulted in monetary correction of 14.3 percent, and adjusted the index to 12.8 percent. The government alleviated long-run distortions by compensating upward revisions in the index during the first quarter of 1974.<sup>84</sup>

In March 1974, the rate of inflation began to accelerate and the government eliminated its estimate of inflation as a component of the index. Inclusion of a realistic estimate would have increased the applicable monetary correction due bondholders. In May 1976, however, when inflation was again expected to decelerate, the government once more included a weighted rate of expected inflation in the index.

In 1975, the government decided to eliminate from the monetary correction index what many viewed as inflationary accidents. Although it did not announce specific criteria for determining whether a price rise was fortuitous, such increases included those due to seasonal fluctuations, droughts and frosts, and price rises in oil mandated by the Organization of Petroleum Exporting Countries (OPEC).<sup>85</sup> The effect was substantial. In August 1975, the index rose 2.85 percent before and 1.37 percent after being cleansed of inflationary accidents. The domestic wholesale price index, the previous basis for ORTN adjustments,

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<sup>82</sup> *Inflacao, Correcao Monetaria e Indices de Precos*, CON. ECON. 91-92 (Sept. 1975) [hereinafter *Inflacao*].

<sup>83</sup> NESS, *supra* note 43, at 42.

<sup>84</sup> *Id.* at 42-43.

<sup>85</sup> *Inflacao*, *supra* note 82, at 91-92.

rose 13 percent during the second half of 1975; when inflationary accidents were eliminated, it rose 11.1 percent. Two factors explain why the government faced only limited criticism that the government would have greater difficulty in placing its bonds.<sup>86</sup> First, the government promised a 4 percent per annum limit on the total percentage variation due to such changes. Second, the technical literature provided support for the macroeconomic desirability of eliminating price increases in imports from some aspects of national indexation plans. A rise in an import's price is, in effect, an external "tax" which lowers an entire nation's standard of living. From the standpoint of both fairness and efficiency, no single group should bear the burden of this national tax.

In mid-1976, the government dampened the index directly. It would figure into the ORTN index only 80 percent of that part of the wholesale price index that exceeded a 15 percent annual rise in prices. Additionally, at that time, many viewed full indexation as an unjustified inflationary accelerator, therefore the government generally discontinued public sales of new issues of ORTNs. Consequently, for several years thereafter, there were only certain compulsory and regulated sales, sales under special circumstances, and sales upon redemption of maturing ORTNs.

The financial community's perception of the Brazilian government's discretion to alter the basis of calculating the ORTN index affected both the value of the ORTN and the value of all obligations tied to ORTN adjustments. Several leading commentators, including the Brazilian Minister of Finance, stated that during the 1960s some lenders avoided long-term loans, including those with monetary correction, because the rules were in flux. More specifically, "[s]ome sensed the risk that in the long-term the rules of monetary correction would change before the redemption of a long-term obligation."<sup>87</sup> By 1975, the government sold ORTNs to a regulated market or to those who apparently accepted the larger macroeconomic standards of the index.

Although such rule changes might have had some adverse effect on the capacity of the government to place the ORTNs, they did not undermine the market as a whole. The Brazilian financial public, which consists largely of government instrumen-

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<sup>86</sup> *Id.* at 93.

<sup>87</sup> CHACEL, *supra* note 40, at 113.



talities and regulated purchasers, now apparently expects that the government will make only those changes that are technically justified. Thus, Brazilian indexation represents an effort to entrench legally certain aspects of the mixed economy. Its success resulted in the creation of a substantial and sophisticated financial system in less than two decades.

South Africa faces many of the same economic problems that have beset Brazil and other Latin American countries. Unemployment and crime rates are high. At the same time, double digit inflation jeopardizes the financial well-being of individuals and corporations alike. Thus, economic stability and expansion are threatened. The relative success of Brazil's system of indexation in helping the country to overcome many of these obstacles makes it a model for a future South Africa.

Nevertheless, despite the appropriateness of indexation, if the South African bench is occupied by conservative judges, there may be resistance to any direct continuing role of the state in setting the terms of financial agreements. Conservative judges, enamored of certain aspects of U.S. Supreme Court jurisprudence, might try to interfere with government attempts to create a system similar to Brazil's. In support of their position, they might rely on the Gold Clause jurisprudence of the U.S. Supreme Court.

### III. THE UNITED STATES AND THE GOLD CLAUSE DECISIONS

Brazilian indexation raises legal issues similar to those raised by the congressional Gold Resolutions of 1933<sup>88</sup> which were the subject of the famous U.S. Supreme Court Gold Clause decisions of 1935.<sup>89</sup> In the Gold Clause cases, the U.S. Supreme Court, construing the Due Process Clause, the Takings Clause, and the Contracts Clause, recognized limitations on the government's ability to alter the terms of financial agreements. The indexation system as practiced in Brazil, with its adjustments of principal balances and its frequent changes in the indexing formula, effectively permits such government changes to contracts. In South Africa, the nature of a new constitution is not yet certain, but

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<sup>88</sup> Act of May 12, 1933, ch. 25, § 43(b)(1), 48 Stat. 52; Joint Resolution of June 5, 1933, 48 Stat. 112 (codified at 31 U.S.C. § 463 (1970)), *repealed by* Act of Oct. 28, 1977, Pub. L. No. 95-147, 91 Stat. 1227.

<sup>89</sup> *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935).

various proposals make it likely that the document will contain clauses similar to those at issue in the Gold Clause cases.<sup>90</sup> If the high court in a new South Africa were to rely on Gold Clause decision reasoning,<sup>91</sup> it might establish constitutional limits on direct revaluation of private and governmental debt by the government. Given the influence of U.S. Supreme Court jurisprudence in South Africa, such a result is a real possibility.

Before the stock market crash of 1929, which plunged the country into the Great Depression, the United States had promised to pay certain of its obligations in gold coin. In the early 1930s, Congress enacted legislation abrogating those gold clauses. A Joint Resolution of June 5, 1933 provided that all obligations requiring payment in gold were against public policy and all obligations requiring payment in gold could be discharged by payment in legal tender. The obligations which were affected included those of the United States itself as well as those of private parties.<sup>92</sup> In March 1933, the Secretary of the Treasury required that all privately held gold coin and bullion be delivered to him.<sup>93</sup>

Numerous suits were brought challenging the Gold Clause resolutions and seeking payment according to the terms of the bonds. The case of *Norman v. Baltimore & Ohio R.R.* is representative.<sup>94</sup> When Congress adopted the Gold Clause resolutions, there were approximately \$75 billion in obligations outstanding similar to those described earlier.<sup>95</sup> Norman C. Norman owned a \$1,000, 4 1/2 percent bond dated February 1, 1930 and issued by the Baltimore & Ohio Railroad. The bond provided that payment of principal and interest "will be made . . . in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930."<sup>96</sup> A \$22.50 coupon

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<sup>90</sup> Clauses similar to the Contracts, Due Process, and Takings Clauses are all being discussed as part of the South African constitutional debate. See, e.g., African National Congress, *Constitutional Guidelines for a Democratic South Africa*, reprinted in 5 S.A. J. HUM. RTS. 129 (1989); *Inkatha Freedom Part Annual General Conference Refines Positions & Policies*, 3 S.A. UPDATE 1 (1991).

<sup>91</sup> For discussions of the Gold Clause decisions, see John Dawson, *The Gold Clause Decisions*, 33 MICH. L. REV. 648 (1935); Henry Hart, *The Gold Clause in United States Bonds*, 48 HARV. L. REV. 1057 (1935).

<sup>92</sup> 48 Stat. 13 (1933) (codified at 31 U.S.C. § 463 (1976)), repealed by Act of Oct. 28, 1977, Pub. L. No. 95-147, 91 Stat. 1227.

<sup>93</sup> Emergency Banking Relief Act of 1933, Ch. 1, § 2, 48 Stat. 1.

<sup>94</sup> 294 U.S. 240 (1935).

<sup>95</sup> *Id.* at 313.

<sup>96</sup> *Id.*

of that bond was payable on February 1, 1934. Norman presented the coupon, demanded payment in gold, did not receive it, and then sued the railroad in New York courts for \$38.10, a sum he claimed was the equivalent in legal tender of the 22.5 gold dollars. The railroad pleaded that the various acts of Congress prevented it from paying in gold and required only that payment be made in legal tender of \$22.50. The state courts entered and affirmed judgment for \$22.50 in legal tender.<sup>97</sup>

The U.S. Supreme Court, in an opinion by Chief Justice Hughes, held that Congress could suspend private obligations to repay in gold coin. Hughes, however, distinguished private gold obligations from government gold obligations, holding that the attempted abrogation of the government's gold obligations was unconstitutional. The Court wrote that it was within congressional power to regulate the country's currency and establish its monetary system. Congress, in exercising this power over currency, could thus alter or impair parties' rights under private contracts, without unconstitutionally depriving them of property. It is therefore possible that the United States could adopt an index to determine the nominal value of its obligations and then alter the method by which the index was calculated. United States courts, however, could use the rationale of the Gold Clause decisions to strike down that alteration as unconstitutional.<sup>98</sup>

Nonetheless, South African courts, using the logic of the Gold Clause decisions, might not strike down indexing provisions similar to Brazil's. Unlike the investors in the Gold Clause cases, investors buying bonds subject to such an indexing scheme would know that the government retains the discretion to alter the index. Thus, if the South African government retained such discretion, a court might not find the reasoning of the Gold Clause cases dispositive.

In *Perry v. United States*,<sup>99</sup> John Perry owned a \$10,000 Fourth Liberty Loan, 4 1/2 percent gold bond, which had been issued by the United States in 1918. The bond read: "[t]he principal and interest hereof are payable in United States gold coin of the present standard value."<sup>100</sup> The bond was called for redemption

<sup>97</sup> *Id.* at 292-95.

<sup>98</sup> For a full discussion of the Supreme Court's treatment of retroactive legislation, see Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

<sup>99</sup> 294 U.S. 330 (1935).

<sup>100</sup> *Id.*

on April 15, 1934 and Perry presented it on May 24, 1934 for payment of 10,000 gold dollars of the weight and fineness of a 1918 gold dollar. Upon the refusal of the United States to pay, Perry demanded an equivalent payment in gold or \$16,931.25, which he calculated as the equivalent value in legal tender. The United States refused to pay in gold and would not pay more than \$10,000 in legal tender. Perry brought suit in the Court of Claims, which certified the following question to the Supreme Court: Did the Gold Clause entitle Perry to receive "an amount in legal tender currency in excess of the face amount of the bond?"<sup>101</sup> This question was particularly important because as of May 31, 1933, government obligations totalling approximately \$21 billion had similar gold clauses.

Chief Justice Hughes wrote the majority opinion, indicating that the Gold Clause "was intended to afford protection against loss . . . by setting up a standard or measure of the Government's obligation."<sup>102</sup> The promise "was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment."<sup>103</sup> The Court concluded that Congress could not use its constitutional power to regulate the value of money as a means for directly altering the terms of its obligations. The U.S. contractual obligations were no less binding than the obligations of individuals. To exercise its constitutional power to issue public debt,<sup>104</sup> Congress needed the sovereign capacity to bind itself to a contract, including the one with Perry to pay 10,000 gold dollars of the present value. Thus the Court concluded, to the extent that the Gold Clause resolutions attempted to abrogate the government's contract with Perry, they were unconstitutional.<sup>105</sup>

Having enunciated a firm principle that the Constitution prohibits Congress from abrogating its contracts, the Supreme Court refused to give Perry more than the legal tender for the \$10,000 face amount of the bond. The Court held that the damages done to Perry by the government's breach of the bond's terms were nominal. When Perry presented his bond for redemption in gold coin, the export of gold was prohibited without a Treasury license

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<sup>101</sup> *Id.* at 346-47.

<sup>102</sup> *Id.* at 348.

<sup>103</sup> *Id.* at 349.

<sup>104</sup> *Id.* at 354.

<sup>105</sup> *Id.*

and gold could not be used for payment of private debts. Under executive orders prohibiting the private ownership of gold, Perry was not entitled to own more than a trivial amount of gold unless he received a Treasury license or was subject to another special exemption. There was no legal private market for the gold which the Court had decided he was otherwise entitled to have.<sup>106</sup> The government's obligation to pay in gold was intended only to protect Perry against depreciation in the dollar's purchasing power and, given the interim deflation, payment in gold would have given Perry more in real terms than he could have reasonably expected at the time of purchase.<sup>107</sup> Hence, a substantial element of unjust enrichment would have occurred if Perry were paid in gold.

The general thrust of *Perry*—that a sovereign can bind itself to contracts—appears rooted in the belief that the government, having entered the market to borrow, should be treated like any other borrower. The specific, dispositive holding—that Perry should not get gold dollars of the promised weight and fineness—was based on a finding that unforeseeable events such as economic collapse, substantial deflation, and government actions affecting the gold market would have worked substantial unjust enrichment.

*Norman*<sup>108</sup> is distinguishable from *Perry*. In *Norman*, congressional reordering of private obligations was acceptable. Congress has the authority to regulate the currency and establish the monetary system of the country. Thus, the *Norman* Court determined that because Congress, in exercising its power over currency, may alter or impair the rights of parties under private contracts, there was no deprivation of property without due process of law. In contrast, the *Perry* Court held that the United States had no constitutional power to abrogate its obligations incurred in the exercise of its power to borrow upon the credit of the government.<sup>109</sup> Therefore, it was liable for damages in the event of breach.

In *United States Trust Co. v. New Jersey*,<sup>110</sup> the Court applied the Contract Clause<sup>111</sup> to strike down a state's attempt to vary legis-

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<sup>106</sup> *Id.* at 358.

<sup>107</sup> *Id.* at 342–44.

<sup>108</sup> See *supra* notes 94–97 and accompanying text.

<sup>109</sup> See *supra* notes 100–08 and accompanying text.

<sup>110</sup> 431 U.S. 1 (1977).

<sup>111</sup> U.S. CONST. art. I, § 10, cl. 1.

lation that was interpreted as forming part of a bondholder's security.<sup>112</sup> The Court cited *Perry* as support for applying a harsher standard of review under the Contract Clause to a state's action concerning its own obligations than to a state's action affecting only private obligations.<sup>113</sup> It also announced a dual constitutional standard for testing New Jersey's attempt to vary the bond's security: (1) the action had to be a reasonable, unforeseen exercise of the state's police power; and (2) there had to be no less restrictive alternatives available to implement the state's goals. Because New Jersey failed to meet this dual standard, the legislation was inconsistent with the Contract Clause.<sup>114</sup>

In *Norman*, the Supreme Court carefully distinguished private contracts from government contracts, declaring that a private contract dealing with a matter that Congress could regulate constitutionally must bend to the act of Congress.<sup>115</sup> Congress had enacted the Gold Clause legislation in the exercise of its authority "to coin money, regulate the value thereof, and of foreign coin."<sup>116</sup> The Court thus held the legislation to be reasonably related to a valid congressional function.<sup>117</sup>

Later decisions also upheld retroactive legislation affecting private contracts. The Court rejected the argument that a retrospective application of the legislation would violate a party's rights to due process of law. In *Fleming v. Rhodes*,<sup>118</sup> for example, the Court reviewed price control legislation allowing the Truman Administration to enjoin eviction proceedings where the leased properties were subject to price controls. The landlords in question obtained eviction orders before the legislation was enacted. The administrator later sought to enjoin actual eviction after the enactment. The district court held that such action to enjoin previously acquired "vested rights" violated the Fifth Amendment's guarantee of due process. The Supreme Court reversed on the grounds that:

[f]ederal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the

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<sup>112</sup> 431 U.S. 1 (1977).

<sup>113</sup> *Id.* at 26, n.25.

<sup>114</sup> *Id.* at 29-32.

<sup>115</sup> *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 306-11 (1935).

<sup>116</sup> *Id.* at 303.

<sup>117</sup> *Id.* at 311.

<sup>118</sup> 331 U.S. 100 (1947).

subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it . . . . Immunity from federal regulation is not gained through forehanded contracts.<sup>119</sup>

Thus, the Supreme Court has established a preference, in certain instances, for retroactive legislation.

#### IV. THE APPLICABILITY OF THE GOLD CLAUSE CASES TO INDEXATION IN SOUTH AFRICA

In a post-apartheid South Africa beset by inflation and myriad other economic problems, a conservative approach by judges might damage investor confidence in ways that would be detrimental to the long-term health of the economy. By refusing to allow the state to have a continuing direct role in establishing the terms of financial agreements, the courts would prevent the government from being able to shield investors from inflation. The absence of such a shield would discourage not only corporate investment, but also investment by members of the nascent black middle class which must grow and thrive if South Africa is to cast off its apartheid legacy. Accordingly, it seems most appropriate for a system to be developed which would allow even courts following the logic of the Gold Clause decisions to permit Brazilian-style indexation. Such indexation is suited to the needs of a developing country like South Africa. It should encompass private contracts and public obligations.

As for private contracts, while unforeseen direct revaluation of U.S. debts collided with the Constitution under *Perry*,<sup>120</sup> reordering private obligations did not under *Norman*.<sup>121</sup> *Norman* stands for the proposition that the Constitution does not impede congressional reordering of previously-negotiated contracts. Thus, if private parties depended upon a U.S. Department of Labor index, Congress constitutionally could legislate a change in the index. This legislation would apply to previously-negotiated contracts if the change was reasonably related to a constitutional end, such as the Commerce Clause or Legal Tender Clause. Similarly, in a new South Africa, if private parties relied on a Department of Manpower index, Parliament could legislate

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<sup>119</sup> *Id.* at 107.

<sup>120</sup> See *supra* notes 99–107 and accompanying text.

<sup>121</sup> See *supra* notes 94–97 and accompanying text.

a change in the index. This legislation would apply to previously-negotiated contracts if the change was reasonably related to a constitutional end such as the economy.<sup>122</sup> Parliament might view this change and implement it as nothing more than a price control with some retroactive effect. Parliament could make such changes every few months with minimal efforts. Investors might continue to purchase such indexed assets knowing that Parliament, perhaps by then having delegated the readjustment function to the Executive, could continue legislating the index directly or through its delegate. Such a system would not be materially distinguishable from that of Brazil. The scheme could begin on a voluntary basis and become compulsory as its popularity increases. One way to help ensure such popularity would be to avoid frequent changes in the indexation formula that might create uncertainty in the minds of investors.

With regard to the indexation of public obligations like ORTNs, South Africa could adopt an index to determine the nominal value of its obligations and later unexpectedly try to alter the method by which the index was calculated. Following *Norman*,<sup>123</sup> however, a court might strike down such an alteration as unconstitutional. This need not be the case. The government should statutorily define its indexing formula and reserve the right to alter the index as circumstances require. By explicitly retaining the discretion to make adjustments, the government would make it less likely that a court would find the logic of *Norman* dispositive. Thus, South Africa would be able to implement an analogue of the Brazilian system.

#### CONCLUSION

For some years, the South African economy has been in poor condition. Among its other woes, the country has suffered from a milder version of the inflationary problems experienced by Latin American countries such as Brazil. If South Africa is to create a new, more equitable society for itself, a post-apartheid government will have to conquer daunting economic difficulties. This will not be an easy task. There is little agreement about what shape the new South African economy should take and particularly what the role of the judges in construing state involvement

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<sup>122</sup> See, e.g., *supra* note 9.

<sup>123</sup> See *supra* notes 94–97 and accompanying text.



in the economy should be. It would seem that a system of indexation modeled along the lines of Brazil's system would be especially attractive in South Africa. Conservative judges following the logic of the U.S. Supreme Court in the Gold Clause decisions, however, might seek to prohibit any direct continuing role for the state in setting the terms of financial agreements. Nevertheless, analysis reveals that even with economic conservatives on the bench, the South African courts could permit the development of a structural analogue to the Brazilian system and thus create a system of indexation.