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EXPROPRIATION, INFLATION, AND DEVELOPMENT†

KEITH S. ROSENN*

Eminent domain is an important developmental device for countries attempting to generate rapid growth within a free enterprise context. In Brazil and Argentina, however, spiraling inflation, combined with delayed compensation, often result in public confiscation of private property, thereby seriously undermining the confidence of private investors in the governments of both countries. In examining various measures designed to correct the problem, Professor Rosenn illuminates one aspect of the relationship between law and development.

Countries intent on rapid economic development are almost always severely handicapped in their attempts to mobilize sufficient investment resources. Domestic capital markets are generally inadequate to finance long-term development projects, such as electric generating plants or steel mills, and nationalistic political pressures may impose constraints upon foreign investment. Although some resources may be available from foreign investors and international lending agencies, much of the necessary investment must be raised domestically. However, a ready market for government bonds is often nonexistent, and expansion of tax revenues may be a short-range impossibility given notorious leakages in collection systems. Acquiescence to pressures to promote social justice by redistributing income in favor of impoverished lower classes tends to aggravate the problem. Upper and middle-class groups, particularly merchants and industrialists, are more able to save and invest, and redistribution of income from them to people with unfulfilled needs is likely to increase consumption and diminish private investment.

Some countries, most notably the Soviet Union and China, have achieved impressively rapid development and redistribution by coupling massive confiscation of private assets with detailed economic planning and enforced austerity. When tied to well planned development programs, confiscation has proven an effective meth-

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od of shifting income away from consumption and unproductive investment.[1] However, the use of intensive confiscation implies the abandonment of any semblance of a free market economy and foreign investment, a disregard for international obligations, and perhaps dictatorship. Most regimes are unwilling or unable to pay that price.

Engaging in disguised confiscation is another matter. Many countries which have rejected the overt confiscation policies of the socialist nations have been willing to appropriate developmental resources by cloaking confiscation in the garb of respectable legal doctrine. Land reformers have been particularly adept at packaging confiscatory components of redistribution schemes in the legalistic cellophane of restitution or social function of ownership.[2]

A major source of confiscation is inflation. A number of countries, particularly in Latin America, have tried to capture resources for development by increasing the size of the monetary pie—thereby buying time by creating the illusion of prosperity, and stimulating development by using the newly minted money to purchase needed goods and services. Inflation may be a useful device for rapidly increasing the aggregate level of productive investment,[3] but, should it become severe or chronic, its utility as a technique for marshalling investment resources dwindles. Various groups become increasingly sophisticated in their perception of the forced savings aspect of inflation and demand protection against it. Moreover, severe inflation soon distorts allocative efficiency, for investors channel their capital into urban land, inventory, or luxury apartments, instead of into basic industries.[4]

One significant form of disguised confiscation—which may be unintentional—arises when eminent domain proceedings are carried out during periods of inflation. The governments of developing nations tend to be slow in paying their obligations, for insufficient budgetary allocations are characteristic of underdeveloped economies. The tendency to under-finance government agencies increases during inflationary periods; realistic budgeting would require allowances for inflationary increments, but inclusion of such sums would be tantamount to a government's admitting its inability to control inflation.[5] The delay between the valuation of condemned

1. Bronfenbrenner, *The Appeal of Confiscation in Economic Development*, 3 ECON. DEV. & CULT. CHANGE 201 (1955); Bronfenbrenner, *Second Thoughts on Confiscation*, 11 ECON. DEV. & CULT. CHANGE 367 (1963). *But see*, Garnick, *"The Appeal of Confiscation" Reconsidered: A Gaming Approach to Foreign Economic Policy*, 11 ECON. DEV. & CULT. CHANGE 353 (1963).

2. Karst, *Latin-American Land Reform: The Uses of Confiscation*, 63 MICH. L. REV. 327 (1964).

3. W. BAER, INDUSTRIALIZATION AND ECONOMIC DEVELOPMENT IN BRAZIL 110 (1965); E. HAGEN, THE ECONOMICS OF DEVELOPMENT 325-29 (1968).

4. E. HAGEN, *supra* note 3, at 328.

5. W. BAER, *supra* note 3, at 83-84.

property and the effectuation of payment diminishes the real value of the compensation, particularly when the rate of inflation is above the legal interest rate.

This article will examine the operation of the eminent domain laws of Brazil and Argentina, two developing nations committed to maintaining private property rights, but plagued by inflation. Under inflationary conditions, the statutes of both countries have operated confiscatorily, and thus have severely strained the confidence of property owners and investors in the promises of both governments to protect private investment. Initially, the courts showed themselves remarkably insensitive to the fact that inflation undermined constitutional guarantees of private property; for more than twenty years of severe inflation the highest courts of both countries tenaciously clung to the premise that all pesos and cruzeiros, whether owed since 1945 or 1965, are equal. Governmental agencies were quick to exploit this chink in the juridical armor of private property, chalking up new records of bureaucratic dilatoriness in paying off eminent domain awards. Not until military revolutions of the mid-1960's brought to power societal groups disenchanted with inflation as a developmental strategy and committed to stimulating private investment did the courts act decisively to reduce the substantial confiscation accompanying the expropriation process.

In some ways this study is an institutional nonsuccess story, showing the breakdown of important aspects of the legal structure under the stress of severe inflation. It provides some evidence supporting the proposition that civil law judges are too narrowly and legalistically trained to make the complex socio-economic and political judgments so vital to effective judicial review. On the other hand, it also shows civilian judges behaving in the finest common law tradition in adapting legal rules to changed socio-economic conditions. Finally, this study explores several facets of the intriguing interrelationship between law and development.

I. INFLATION IN BRAZIL AND ARGENTINA

With the exception of a few brief periods, prices in Brazil have been spiraling upwards since colonial times.[6] However, the intensity of inflation increased dramatically during the rapid industrialization and urbanization that followed World War II. From 1940 through 1958, the cost of living index for Rio de Janerio increased about 14.7 percent each year.[7] Large budgetary deficits associated with the construction of Brasilia and the reckless abandonment of stabilization policies in 1958 shifted Brazil's inflationary machinery into high gear. From 1958 to 1963, Rio's cost of living index soared

6. *See* O. ÓNODY, A INFLAÇAO BRASILEIRA (1820-1958) (1960); P. FERREIRA, A INFLAÇAO 68-100 (2d ed. 1967).

7. Computed from the cost of living index for Rio de Janeiro prepared by the Fundação Getúlio Vargas and published in CONJUNTURA ECONÔMICA.

from 243 to 1507, reflecting a more than six-fold increase in consumer prices during those six years. By 1964 inflation had lurched into overdrive. The cost of living rose 92 percent; it almost certainly would have risen much higher had not a military-civilian coup toppled the Goulart regime in April 1964 and instituted a stabilization program. Today, after seven years of stabilization, the annual inflation rate has gradually declined to a little less than 20 percent.[8]

Argentina has also had a long inflationary history, starting with 19th century governments financing their expenditures by issuing new currency.[9] As in Brazil, inflation's intensity increased sharply after World War II, largely because the Perón regime financed vast increases in welfare programs and subsidies to state enterprises by expanding the supply of money and credit.[10] From 1940 to 1950, the cost of living index for Buenos Aires more than tripled; in the next decade, the index increased more than elevenfold. The average annual increase in the cost of living from 1960 to 1970 has been 23.3 percent.[11]

Thirty years of inflation have severely depreciated the currency of Argentina and Brazil, as is evidenced by a comparison of the exchange rates for the Argentine peso and the Brazilian cruzeiro with the U.S. dollar, which has itself depreciated considerably. In 1941, there were roughly 20 cruzeiros and 3.3 pesos to the dollar. Today one dollar will buy 6000 cruzeiros or 1000 pesos.[12]

II. THE LEGAL PROVISIONS GOVERNING EMINENT DOMAIN

A. *Constitutional Compensation Requirements*

Each of Brazil's six constitutions has provided private property guarantees. The constitutions of 1824, 1891, and 1937 permitted the

8. From 1965 to 1970 the average annual inflation rate was 33.8 percent. For 1971 the Fundação Getúlio Vargas reported that Rio's cost of living index rose by a little over 18 percent, the lowest rate of increase since 1958.

9. *See* A. FERRER, THE ARGENTINE ECONOMY 60-1, 117-19 (1967). However, between 1914 and 1929 Argentina experienced less inflation than the United States or Canada. C. DIAZ ALEJANDRO, ESSAYS ON THE ECONOMIC HISTORY OF THE ARGENTINE REPUBLIC 362 (1970).

10. *See* Alemann, *Economic Development of Argentina*, in ECONOMIC DEVELOPMENT ISSUES: LATIN AMERICA 1, 17-29 (Comm. for Economic Development Supplementary Paper No. 21, 1967).

11. Computed from the price index published in the International Monetary Fund, International Financial Statistics.

12. In 1967 Brazil adopted the new cruzeiro as its basic monetary unit. One new cruzeiro was equivalent to 1000 old cruzeiros. Decree-Law No. 1 of Nov. 13, 1965, as modified by Decree-Law No. 7 of May 13, 1966. In 1970 the adjective "new" was dropped. Argentina enacted a similar reform in 1969, making one new peso the equivalent of 100 old pesos. Law 18.188 of Apr. 15, 1969. To avoid confusion all cruzeiro and peso references in the text are stated in terms of the old currency. One should bear in mind that exchange rates in both countries were established artificially for much of this period.

taking of private property for public use only upon payment of "prior compensation."[13] The 1934 constitution added the requirement that compensation be "just."[14] The 1946 constitution added, further, that compensation be paid in cash.[15] Brazil's present constitution, promulgated in 1967 (and redrafted in 1969), provides:

> The right of property is guaranteed, except in case of expropriation for public necessity or utility or social interest, in which event prior and just compensation must be paid in cash, subject to the provisions of Article 161 permitting the expropriated party to accept government bonds with a monetary correction clause.[16]

Argentina's first constitution, promulgated in 1819, guaranteed the right to private property and permitted its taking for public use only upon payment of "just compensation."[17] However, the 1853 constitution, like the Brazilian constitutions of 1824, 1891, and 1937, required simply that compensation be "prior."[18] The 1853 constitution has remained in force, except from 1949 to 1956, when it was supplanted by a *Peronista* charter retaining the requirement of prior compensation.[19]

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13. BRAZILIAN CONST. art. 179(22) (1824):

> The right of property is guaranteed in all its plenitude. If the public welfare, legally verified, requires the use and employment of the property of a citizen, he shall receive prior compensation for its value. The law shall define the cases in which this unique exception shall apply and regulate the determination of compensation.

BRAZILIAN CONST. art. 72(17) (1891):

> The right of property is maintained in all its plenitude, except for expropriation for necessity or public utility upon prior compensation.

BRAZILIAN CONST. art. 122(14) (1937):

> The Constitution shall assure Brazilians and resident aliens the right to liberty, individual security, and property in the following terms:
>
> (14) the right to property except for expropriation for necessity or public utility, upon prior compensation. Its subject matter and its limits will be defined in the laws which regulate its exercise.

14. BRAZILIAN CONST. art. 113(17) (1934):

> The right of property is guaranteed, but it may not be exercised against the social or collective interest, as determined by law. Expropriation for necessity or public utility shall be effected in accordance with law, upon prior and just compensation.

15. BRAZILIAN CONST. art. 14, § 16 (1946):

> The right of property is guaranteed, except in the case of expropriation for necessity or public utility, or social interest, upon prior and just compensation in cash.

16. BRAZILIAN CONST. art. 153 (22) (1967). This article was amended Oct. 17, 1969.

17. ARGENTINE CONST. arts. 123 and 124 (1819).

18. ARGENTINE CONST. art. 17 (1853) provided:

> Property is inviolable, and no resident of the Nation may be deprived of property without a judgment based upon law. Expropriation for public utility must be authorized by law and is subject to prior compensation.

19. ARGENTINE CONST. art. 38 (1949) provided: "Expropriation for public utility must be authorized by law and is subject to prior compensa-

B. *The Statutory Framework of Eminent Domain*

The eminent domain statutes presently operative in Brazil and Argentina are, in basic detail, products of the Vargas and Peron dictatorships.[20] Both statutes set out judicial procedures for taking private property for public use upon payment of compensation to the condemnee. The expropriatory process in both countries is triggered by a governmental decree declaring that use of a particular property is of "public utility."[21] The judiciary in both countries is effectively precluded from determining independently whether the use to which the property will be put does benefit the public.[22] If there is neither a settlement nor institution of judicial action within a named period, the condemnation lapses.[23]

Despite considerable debate, it would appear that both Argentine and Brazilian law recognize retrocession, the right of the condemnee to repurchase if his property is not used for a public purpose. The right of retrocession was explicitly set out in 19th century eminent domain legislation, but both the Argentine and Brazilian Expropriation Laws omitted such provision. Nevertheless,

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tion."

Though the requirement of compensation was retained, the 1949 charter displayed a decidedly different attitude towards private property, emphasizing its social function.

20. Brazilian Decree-Law No. 3.365 of June 21, 1941 (hereinafter referred to as the Brazilian Expropriation Law); Argentine Law 13.264 of Sept. 17, 1948 (hereinafter referred to as the Argentine Expropriation Law).

21. Article 5 of the Brazilian Expropriation Law sets out a long list of generic uses which are declared to be of public utility. Whenever the taking of a particular property is desired, the executive issues a decree declaring that use of that property is of public utility.

In Argentina specific legislation declaring a particular use to be of public utility must be passed, but the designation of particular property required to carry out the objectives of the law is delegated to the executive. Argentine Expropriation Law, art. 2.

In neither country is the concept of "public utility" precise. Article 1 of the Argentine statute defines "public utility" as "including every case aimed at satisfying a requirement determined by social betterment." In Brazilian eminent domain law, condemnations are divided into two classes: "public utility" and "social interest." Typical public-work types of condemnation are considered to be of public utility. Agrarian reform or urban renewal condemnations, in which property may be redistributed for private use, is considered to be of social interest. Seabra Fagundes, *Brazil*, in EXPROPRIATION IN THE AMERICAS 49, 61 (A. Lowenfeld ed. 1971).

22. Article 9 of the Brazilian Expropriation Law forbids the judiciary from considering whether the use to which the property is to be put is actually of public utility. The Argentine courts have regarded the issue of public utility either as nonjusticiable, Provincia de Jujuy v. Ledesma Sugar Estates & Refining Co., 209 Fallos 35 (1947), or as reviewable only for extreme arbitrariness. Gobierno de la Nación v. Ingenio y Refinería San Martín del Tebacal, S.A., 209 Fallos 390 (1947). *See generally*, 4 S. LINARES QUANTANA, TRATADO DE LA CIENCIA DEL DERECHO CONSTITUCIONAL 142-153 (1956).

23. Article 14 of the Brazilian Expropriation Law sets five years; article 47 of the Argentine Expropriation Law sets two, five or 10 years, depending on the specificity of the expropriation designation.

the Argentine courts have upheld the right of retrocession on a constitutional basis.[24] Brazilian courts have applied Article 1150 of the Civil Code:

> The Federal Government (União), State, or Municipality shall offer the former owner the expropriated property at the price paid whenever the property is not being used for the purpose for which it was expropriated.

Though this code provision could be construed to permit the former owner to recover his property any time it ceases to be used for the purpose it was taken, Brazilian courts have restricted its application to cases in which the property is not used at all by the expropriator or is transferred unlawfully to a third party.[25] Moreover, the courts and commentators are divided on whether the former property owner's remedy should be recovery of his property or merely damages.[26]

The expropriation procedures of the two countries diverge in several important respects. In Argentina the expropriating agency may not offer the property owner more than 130 percent of tax appraisal value.[27] Since this figure is typically well below current market value, settlement offers are usually refused. In fact, the expropriating agency sometimes does not bother to make an offer.[28] In Brazil, on the other hand, the expropriator is required to make an offer, and it can be (though frequently it is not) reasonable. Hence, judicial proceedings in Brazil sometimes merely confirm prior settlements.

In Brazil, the judge appoints an expert appraiser, as may each party.[29] After hearing the advisory appraisals, the judge places a "just" value on the property, taking into consideration the tax appraisal value, acquisition price, earnings and loss thereof, state of repair, sales of comparable property in the last five years, and effect on the condemnee's remaining property.[30] After payment in cash or bonds,[31] the court orders title transferred.

24. Ortega, Juan de Dios et al. v. Dirección Gral. de Fabricaciones Militares, [1968-V] J.A. 240, 131 La Ley 152 (Sup. Ct. 1968).

25. Seabra Fagundes, *supra* note 21, at 73.

26. *Id.* 5 J. CRETELLA JUNIOR, TRATADO DE DIREITO ADMINISTRATIVO 169-72 (1st ed. 1968); R. BARCELLOS DE MAGALHAES, TEORIA E PRÁTICA DA DESAPROPRIAÇAO 276-305 (1968).

27. Argentine Expropriation Law, art. 13. In an often cited article, this provision has been misread as imposing a ceiling on awards of 130 percent of the tax appraisal value. Brisk, *Tax Evaluation as a Measure of Compensation for Expropriated Property in Argentina, Colombia and Guatemala,* 19 N.Y.U. INTRA. L. REV. 52 (1963). The ceiling is imposed only upon the offer.

28. Gordillo, *Argentina* in EXPROPRIATION IN THE AMERICAS, *supra* note 21, at 11, 35.

29. Brazilian Expropriation Law, art. 14.

30. Brazilian Expropriation Law, art. 27.

31. The price must normally be paid in cash. However, Article 32 of the Brazilian Expropriation Law originally permitted the legislature to

Prior to enactment of the present expropriation law, Argentina employed an appraisal procedure similar to Brazil's. Since 1948, however, the courts have utilized the services of a special Appraisal Tribunal (*Tribunal de Tasaciones*), which, despite its name, is more an administrative organ than a court. It is made up of 10 permanent members and, for eminent domain valuations, two ad hoc members, one representing each party.[32] The Appraisal Tribunal places an objective value on the property, taking into consideration

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authorize, in special cases, payment in negotiable bonds in accordance with the value at which they are traded on the day prior to the effectuation of payment. Decree-Law 3.532 of Aug. 21, 1941, art. 6, provided that compensation for property condemned pursuant to generalized urban plans should be paid half in cash and half in bonds, unless there was an allegation of urgency or the condemnee insisted on litigating, in which case the compensation was to be paid entirely in bonds. These provisions were later amended by Decree-Law 8.940 of Jan. 26, 1946, to permit compensation to be paid half in bonds and half in cash, or entirely in cash, at the option of the expropriating agency. In 1956 the law was again amended to eliminate the possibility of payment in bonds and to require payment in cash. Law 2.786 of May 21, 1956.

The courts insist that when compensation is paid in bonds, the relevant value is their market value and not nominal value. *E.g.*, Estado de Minas Gerais v. Pedro Miguel, Embargos 5.815, 142 R. For. 297 (1st Civ. Cham. M.G. 1949). Indeed, some condemnees preferred bonds, which were sold at a substantial discount, because they were accepted at face value for payment of certain taxes and tended to be delivered much sooner than cash. There appear to be no reported cases contesting the constitutionality of this form of compensation, though several commentators have expressed the opinion that bonds fail to satisfy the constitutional requirement that compensation be "prior." *E.g.*, S. PEREIRA, O PODER DE DESAPROPRIAR 158 (1948); Seabra Fagundes, *A Desapropriação no Direito Constitucional Brasileiro*, 120 R. For. 5 (1948); Barreto Filho, *O Adjustamento da Lei de Desapropriações a Constituição de 18 de Setembro de 1946*, 264 R. Trib. 26 (1957).

The present military government, which shows greater sensitivity to certain constitutional provisions than to others, was concerned about a constitutional challenge to payment of compensation for agrarian reform expropriations through the use of bonds. Institutional Act No. 9 of Apr. 25, 1969 amended article 157(1) of the 1967 constitution to permit expropriation of rural property upon payment of compensation in special bonds with an exact clause of monetary correction, redeemable in a maximum period of 20 years, and acceptable in payment of up to 50 percent of the rural property tax. This provision was essentially reiterated in the 1969 amendment to the constitution, but the use of bonds was limited to expropriation of *latifundios* (large estates). If, at some future date, Brazil engages in agrarian reform, as distinguished from legislating about agrarian reform, these bonds may become significant.

32. The 10 permanent members consist of three representatives of associations of architects, engineers, and contractors; two taxpayer representatives (designated by the Executive); one employee each from the Army Engineers, the National Mortgage Bank, the General Administration of Sanitary Works, and the Municipality of Buenos Aires; and the presiding officer, the Director of Real Property Administration or his designate. Decree 15.715/59, art. 14 of the Argentine Expropriation Law. The operations of the Appraisal Tribunal are discussed in 2 J. CANASI, TRATADO TEORICO PRACTICO DE LA EXPROPIACION PUBLICA 605-11 (1967).

its tax appraisal value, original cost, replacement cost, earnings, and sales of comparable property.[33] While the Act did not intend the valuation of the Appraisal Tribunal to be conclusive, it is in practice almost always accepted by the trial judge.[34] Moreover, a vote by the member representing either the condemnor or condemnee in favor of the Appraisal Tribunal's decision stops that party from subsequently challenging the decision.[35]

The compensation permitted under Brazilian law is more extensive than that allowed under Argentine law. Brazil permits indemnification for profits lost during the period when the condemnee should reasonably be able to acquire a comparable income-producing property.[36] In accordance with Article II of the Expropriation Law, Argentine courts have consistently excluded lost profits from compensable damages,[37] holding that the purpose of compensation is to give value for the condemned property and not to enable the condemnee to replace the condemned property with a similar asset.[38] While Brazil routinely permits the condemnee to recover his costs, appraisal fees, and attorney's fee,[39] Argentina allows recovery of these expenses only when the compensation award exceeds the condemnor's offer by at least 50 percent of the difference between the offer and the condemnee's demand.[40] Finally, in the catalogue of differences, Brazilian law permits compensation in the form of bonds, while Argentine law insists on payment in cash before the court will transfer title to the condemnor.[41]

C. *The Breakdown of Eminent Domain Provisions Under Inflationary Stress*

In theory, the expropriation laws of both Argentina and Brazil were designed to ensure that condemnees would receive the approximate economic equivalent of the assets taken from them.[42] However, in the context of chronic and severe inflation, neither statute has achieved that end. The statutory provisions that have most generated controversy involve "quick take" procedures, date of valuation, relation of compensation to appraisal values, restricting compensation to the amount specified in the pleadings, and legal interest rates.

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33. Gordillo, *supra* note 28, at 31.
34. *Id.* at 38.
35. Dir. Gral. de Ingenieros v. Musto, 56 La Ley 292 (Sup. Ct. 1949).
36. Seabra Fagundes, *supra* note 21, at 63-64.
37. *E.g.* Musso v. Gobierno Nacional, [1958-IV] J.A. 471 (Sup. Ct.).
38. *E.g.* Admin. General de Obras Sanitarias de la Nacion v. Torquinst y Bernal, 241 Fallos 73, [1959-III] J.A. 509, 92 La Ley 77, 86 (Sup. Ct. 1958); Gobierno Nacional v. Dumas, 47 La Ley 865, [1947-III] J.A. 174 (Sup. Ct.). This is the view adopted by most courts in the United States.
39. H. LOPES MEIRELLES, DIREITO ADMINISTRATIVO BRASILEIRO 506 (2d ed. 1966).
40. Argentine Expropriation Law, art. 28.
41. Gordillo, *supra* note 28, at 34-35.
42. *See id.* at 29; Seabra Fagundes, *supra* note 21, at 62.

1. THE "QUICK TAKE" PROCEDURES

The laws of both countries permit the expropriating agency to assume temporary possession pending judicial resolution of the quantum of compensation. Brazilian law provides for an ex parte hearing, in which the condemnor may assume possession of property subject to the building tax *(impôsto predial)* by alleging urgency and depositing 20 times the rental value, based upon the tax assessed in the year prior to the expropriation decree.[43]

While "quick take" proceedings, as the name implies, significantly speed the condemnation process, the procedure makes it unlikely that condemnees will receive an award commensurate with the value of their property. First, urban rentals have scarcely risen since emergency rent control legislation was adopted in 1941.[44] Second, inflation between the date of the tax assessment and the taking of possession quickly renders assessed value meaningless. Third, there is typically a substantial difference between real market value and the value assessed for tax purposes.[45] Finally, until 1956, even if the deposit equalled the property in actual value, condemnees could not use the deposit until their cases were settled. In the meantime, the value of the deposit, which remained in a government bank drawing only six percent annual interest, shriveled. This last problem was mitigated in 1956 when statutory amendments allowed condemnees to appropriate up to 80 percent of the deposit while a case was pending,[46] but the other drawbacks remain.

Practically every condemnation in Brazil is a "quick take" proceeding.[47] The growing number of "quick take" condemnations of residential property in São Paulo led the government to promulgate a 1970 decree providing an alternative procedure for residential property.[48] If the condemnee contests the offer (based upon

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43. Brazilian Expropriation Law, art. 15, as amended by Decree-Law 4.152 of Mar. 6, 1942.

44. *See* Rosenn, *Controlled Rents and Uncontrolled Inflation: The Brazilian Dilemma*, 17 AMER. J. COMP. L. 239 (1969).

45. *Id.*

46. Law No. 2786 of May 21, 1956, art. 6.

47. Alvim, *Desapropriação e Valor no Direito e na Jurisprudência*, 102 R.D.A. 42, 47 (1970).

48. The preamble to Decree-Law No. 1.075 of Jan. 22, 1970 is revealing:

> Considering that in the City of São Paulo the large number of expropriations in the residential zone threatens to render thousands of families homeless;
>
> Considering that the owners of residential buildings encounter difficulty under the present juridicial system in obtaining sufficient compensation during the pendency of the litigation to acquire a new home;
>
> Considering that the offer of the expropriation power, based upon the tax value of the property, is inferior to the real value determined in an evaluation in the expropriation proceeding;
>
> Considering finally that making the condemnee homeless causes a grave risk to national security, fermenting social agitation . . . .

the appraised value for tax purposes) within five days, the court must determine the provisional value of the property within 48 hours. If that sum is greater than the tax value, possession will be accorded only after deposit of half the provisional value. When the provisional value is less than twice the offer, the condemnee has the option of appropriating either 80 percent of the offer or half the provisional value.[49]

Under Argentine law, the expropriating agency may secure not only possession but also title to the property by depositing 130 percent of the assessed value with the court.[50] As in Brazil, assessed values have not kept pace with inflation. However, the owner may appropriate the entire sum without waiting for final compensation to be determined.[51]

2. DATE OF VALUATION

Brazil's expropriation law originally provided that valuation be contemporaneous with the issuance of the executive decree of public utility.[52] However, it was eventually recognized that the provision produced injustice in an inflationary economy, for there was frequently a lapse of many years between the decree and payment. In 1956, the legislature amended the statute to require that valuation be determined as of the date of the expert appraisal.[53] While this eased the problem somewhat, a lapse of several years between the expert appraisal and eventual payment remained common.

Until 1967, the relevant date for valuation in Argentina was the date of the transfer of possession.[54] The Argentine practice worked to the property owner's disadvantage whenever protracted

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The allegation that the situation constitutes a threat to national security should be taken with a grain of salt. It is there because the constitution accords the president the power to issue decree-laws where national security and public finances are concerned. BRAZILIAN CONST. art. 58(1).

49. Decree-Law No. 1.075 of Jan. 22, 1970, art. 5. The statute is silent as to how much can be appropriated if the provisional value is more than twice as great as the offer.

50. Argentine Expropriation Law, arts. 18 and 19.

51. Gordillo, *supra* note 28, at 34.

52. Article 26 of the Brazilian Expropriation Law originally stated: "In the valuing of compensation, which shall be contemporaneous with the declaration of public utility, the rights of third parties against the expropriator shall not be included."

53. Law 2.786 of May 21, 1956 amended art. 26 to read: "In the valuing of compensation, which shall be contemporaneous with the appraisal, the rights of third parties against the expropriator shall not be included."

54. Adm. Gral. de Obras Sanitarias de la Nacion v. Torquinst y Bernal, 241 Fallos 73, [1959-III] J.A. 509, 92 La Ley 77, 86 (Sup. Ct. 1958). When the Argentine Supreme Court reversed itself to permit adjustments for inflation in condemnation awards, it also moved the relevant valuation date forward from the day of dispossession to the day of the final decision. Provincia de Santa Fe v. Nicchi, [1967-IV] J.A. 115, 127 La Ley 162 (1967), discussed *infra* at notes 141-43 and accompanying text.

litigation or negotiation followed dispossession. Since possession could be obtained by deposit of a small fraction of the fair value of the property, the temptation to delay the final settlement while inflation whittled away the economic value of the balance of the compensation due was not always resisted.

3. THE PLEADINGS AS A LIMITATION ON COMPENSATION

It is a principle of civil law (termed *ultra petita* or *plus petición*) that a judge may not award one of the parties more than he asked for originally. This principle, embodied in Article 216 of the Argentine Code of Civil Procedure, has been utilized many times to reduce Argentine compensation awards.[55] For example, in *Manaut v. Munic. de la Ciudad de Buenos Aires*, the Supreme Court of Argentina limited compensation to the 1,200,000 pesos originally requested in 1957, although the lower courts had valued the property at 5,499,535 pesos as of 1960.[56] However, the Argentine Court has indicated that amendment of the pleadings would be possible were there an appreciable lapse between the filing of the condemnee's answer and the date of dispossession.[57]

4. INADEQUATE LEGAL INTEREST RATES

The eminent domain laws are confiscatory in part because the civil codes of Argentina and Brazil reflect the nominalist principles of the Napoleonic Code, which presume that, for the purpose of discharging legal obligations, the value of money remains constant. Hence, the drafters of the Argentine and Brazilian codes, operating on the assumption that the currency of their countries would remain stable, [58] provided legal interest as the sole remedy for damages resulting from delay in satisfying pecuniary obligations containing no stipulated interest rate.[59] Brazil's legal interest rate of

55. *E.g.*, Sconfienza v. Mun. de la Ciudad de Buenos Aires, 250 Fallos 226 (Sup. Ct. 1961).

56. 253 Fallos 412 (Sup. Ct. 1962).

57. Nacion Argentina v. Colombo, 249 Fallos 691 (Sup. Ct. 1961). *Cf.* Mun. de la Capital v. Cafora, [1965-III] J.A. 610 (Cam. Civ. Cap. Sala E 1964) where the court permitted an award greater than requested in the pleadings when the owner had left open in the pleadings the possibility of setting a higher amount.

58. The note to article 619 by Dr. Velez Sarsfield, drafter of the Argentine Civil Code, reveals this assumption plainly:

> We abstain from projecting laws to settle the much debated question regarding the obligation of the debtor, when there has been an alteration in the currency, because that alteration would have to be ordered by the national legislative body, an almost impossible occurrence . . . . If we had to legislate, supposing currency alterations, we would accept the article of the Austrian Code. [The referred to article states: "If the intrinsic value of money is altered, the person who received it must reimburse the full value which it had at the time of the loan."]

59. Article 622 of the Argentine Civil Code provides: "The debtor in default owes the interest agreed upon in the obligation since its falling

six percent per annum has not reflected real rates. The market, on occasion, has established interest rates higher than six percent per month.[60]

Although Argentina has not fixed a statutory legal interest rate, the courts determine legal interest in accordance with the current rates charged by the national or provincial banks.[61] While less negative than Brazil's statutory rate, this method also fails to reflect the actual costs of delayed payment.[62]

5. EXPROPRIATION OF CORPORATE SHARES

Both Argentina and Brazil permit the condemnation of corporate shares instead of the physical assets of the corporation. In such circumstances Argentina has valued corporate shares by expert appraisals, an approach apparently satisfactory to the former stockholders.[63] However, Brazil has on occasion utilized statutory formulas for share valuation that have seriously disadvantaged the condemnee. Thus, in 1944 the State of Minas Gerais expropriated all the stock of a French-owned bank operating within the state, and determined share value by dividing the net worth at the last published balance sheet by the number of shares outstanding. In an inflationary economy, corporate balance sheets must undergo frequent and sophisticated adjustments for book value to remain meaningful.[64] Not until twenty years later did Brazilian law begin to require such accounting adjustments.[65] Nonetheless, in what be-

due. If no interest has been agreed upon, the legal interest . . . is owed . . . ."

Article 1061 of the Brazilian Civil Code provides: "The loss and damages in obligations for payment in money consist of the interest for delay and costs . . . ."

Article 1062 provides: "The rate of interest for delay, when not agreed upon shall be six percent per annum."

60. In 1964 when inflation was at its peak in Brazil, the cost of borrowing money from credit and finance companies reached 117% annually. Simonsen, *Inflation and the Money and Capital Markets of Brazil*, in THE ECONOMY OF BRAZIL 113, 149 (H. Ellis ed. 1969).

61. Balestrini Hnos. v. Gobierno Nacional, 26 La Ley 685 (Sup. Ct. 1942); Provincia de Buenos Aires v. Roccatagliata, 90 La Ley 578, [1958-II] J.A. 41 (Sup. Ct. of B.A. 1957).

62. The interest rate charged by the Bank of the Nation has varied considerably. It jumped from 7% to 10% in May of 1959; in July of 1962 it jumped again to 15%. *See* 2 L. DE GASPERI, TRATADO DE DERECHO CIVIL 642 (1964).

63. J. CANASI, *supra* note 32, at 674-75.

64. J. BULHOES PEDREIRA, CORREÇAO MONETÁRIA DO BALANÇO (mimeo 1967); Rosenn, *Adaptations of the Brazilian Income Tax to Inflation*, 21 STAN. L. REV. 58 (1968).

65. Rosenn, *supra* note 64, at 81. In the year following compulsory monetary correction of the fixed assets of Brazilian corporations for income tax purposes, the capital of Brazilian firms increased by 6.4 trillion cruzeiros, of which 4.4 trillion were attributable to monetary correction. This meant that monetary correction of fixed assets amounted to 137 percent of the total capitalization of all Brazilian firms at the beginning of the year. *Id.* at 82.

came an international *cause célèbre*, a sharply divided Supreme Federal Tribunal sustained the constitutionality of the expropriation scheme, without commenting upon the inflation-induced distortions in the balance sheets of Brazilian corporations.[66]

III. JUDICIAL RESPONSES TO DISGUISED CONFISCATIONS

A. *Brazil's Tax Value Limitation on Compensation*

Although a valuation limit of 20 times the rental value had been part of Brazilian law for nearly a century, only an occasional court considered itself bound by the statute[67] as inflation began to accelerate during the early 1940's.[68] Most courts disregarded the limitation whenever it was considerably below the actual value of the property.[69] A variety of legal theories were devised to justify

66. União Sucrière de L'Aisne S.A. v. Estado de Minas Gerais, R.E. 38.644, 57 R.D.A. 262 (Supremo Tribunal Federal [hereinafter S.T.F.] *en banc* 1959). In another celebrated case, the state of São Paulo expropriated the shares of a railroad company. The shares were valued at their quoted price on the stock exchange prior to the expropriatory decree. This valuation technique disadvantaged the former shareholders because of the depressed state of Brazil's stock market and railroad industry. Heitor Friere de Carvalho v. Fazenda do Estado, R.E. 65.646, 97 R.D.A. 165 (S.T.F. *en banc* 1968).

The general weakness of Brazil's stockmarkets during this period is described in Poser, *Securities Regulation in Developing Countries: The Brazilian Experience*, 52 VA. L. REV. 1283, 1286-90 (1966). The problem of undervaluation of real net worth in market trading is discussed in Simonsen, *supra* note 60, at 152-55. The financial problems of the railroad industry are detailed in A. Abouchar, Diagnostic of the Transport Situation in Brazil, June, 1967 (Rio de Janeiro, mimeo).

67. Brazilian Expropriation Law, art. 27.

68. Vitor Jose Pereira de Morais v. Prefeitura do Distrito Federal, No. 3.702, 1 R.D.A. 80 (5th Cam. Trib. Apel. D.F. 1944); Alfredo Pantaleone v. Cia. Melhoramentos de Niteroi, No. 764, 2 R.D.A. 93 (1st Cam. Trib. Apel. Estado do Rio 1944); S. A. Indústrias Reunidas Tinguá de Malharia v. Prefeitura do Distrito Federal, No. 3.759, 1 R.D.A. 81 (5th Cam. Trib. Apel. D. F. 1944).

69. *See* Albino de Moura Mesquita v. Prefeitura do Distrito Federal, No. 4.054, 1 R.D.A. 109 (Trib. Apel. F.D. 1943). The declaration of public utility was issued in 1938, but the expert appraisal did not take place until several years later, setting the 1938 value of the building at Cr $311,-000.00. The maximum compensation permitted under Article 27, twenty times the 1937 rental value, amounted to Cr $295,680.00, and the trial judge awarded the condemnee a shade under that sum, even though the value of the building had risen to Cr $740,000.00. The appellate court reversed and ordered a new valuation without regard to the limits set by article 27 of the Expropriation Law. The court was explicit about the socio-economic facts underlying its decision:

> When it adopted the criterion of the building tax, the law sought a presumably stable basis in the relationship of the building tax to rental value.
>
> But one cannot consider as just and reasonable, nor even consistent with the spirit of the law, given the violent antagonism between the price of the rental and the value of the property, that the former prevail in suffocating detriment to the latter.
>
> What has happend at present is an increase in value for several

judicial nullification of the legislative norm. No court went so far as to declare Article 27 unconstitutional,[70] but most held that to apply it as written could offend the constitutional guarantee of "just compensation."[71]

Two other theories, also employed to prevent Article 27 from effecting partial confiscations were unjust enrichment[72] and incompatibility between Article 27 and other provisions of the Expropriation Law.[73] Although neither theory was doctrinally satisfying,[74] they allowed courts to obviate Article 27's confiscatory tendencies. Finally, in 1956, the legislature modified the law, deleting the offending provision.[75]

B. *Valuation as of the Date of the Decree*

Until 1956, when the provision was modified by the legislature to conform to judicial standards,[76] Article 26 of the Brazilian Expro-

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reasons: the population increase, housing shortage, currency depreciation, as well as the fact that the rental price cannot accompany this progressive rise because of the emergency laws prohibiting rent increases.

Hence, a flagrant disequilibrium between the rental price and the property's real value results. (1 R.D.A. at 110).

70. On the contrary, the Brazilian Supreme Federal Tribunal in several instances sustained the constitutionality of the statute. Prefeitura do Distrito Federal v. Luisa Deolinda de Andrade, R.E. 9.007, 8 R.D.A. 145 (1st Term S.T.F. 1945); Herculano Chaves Ritton et al. v. União Federal, No. 277, 22 R.D.A. 210 (Pleno T.F.R. 1949), *rev'd* R.E. 18.791, 154 R. For. 161 (2d Term S.T.F. 1951).

71. Prefeitura do Distrito Federal v. Cia. Predial Minas Gerais, R.E. 10.000, 111 R. For. 103 (1st Term S.T.F. 1946); Prefeitura Municipal do D.F. v. Laura Velho de Sousa Lima, R.E. 9.862, 108 R. For. 295 (1st Term S.T.F. 1946); João Pinheiro v. Prefeitura do Distrito Federal, 7.152, 111 R. For. 118 (5th Cam. Trib. Apel. D.F. 1946); Manuel Miranda Bastos v. Prefeitura do Distrito Federal, 4.935, 105 R. For. 70 (3rd Cam. Trib. Apel. D.F. 1945); José Dias v. Prefeitura do Distrito Federal, 2.276, 1 R.D.A. 85 (3rd Cam. Trib. Apel. D.F. 1943); Albino de Moura Mesquita v. Prefeitura do Distrito Federal, 4.054, 1 R.D.A. 109 (Apel. Trib. D.F. 1943).

72. Embargos R.E. 8.002, 170 R. Trib. 775 (S.T.F. 1945); R.E. 10.000, 111 R. For. 103 (1st Term S.T.F. 1946); Municipalidade de São Paulo v. Carolina Soares de Quirós, Embargos R.E. 6.185, 5 R.D.A. 168 (S.T.F. 1945); 1.724, 10 Direito 316 (5th C. Trib. Apel. D.F. 1942).

73. Espólio of Pires v. Prefeitura do Distrito Federal, 3.183, 1 R.D.A. 112 (5th Cam. Trib. Apel. D.F. 1943), *aff'd* Ação Recisória No. 150, 2 R.D.A. 674 (Trib. Apel. D.F. *en banc* 1945); Irmandade de São José v. Prefeitura do Distrito Federal, No. 3.970, 1 R.D.A. 106 (4th Cam. Trib. Apel. D.F. 1944); Celina Novo Pinheiro v. Prefeitura de Pôrto Alegre, 2.725, 105 R. For. 329 (3rd Cam. Civ. Trib. Apel. RGS 1945).

74. The argument of incompatibility between article 27 and the rest of the statute is a makeweight, the theory being that the statute requires the judge to value the property and article 27 reduces the judicial role to rote.

Unjust enrichment is a private law doctrine designed to prevent injustice in contractual or quasi-contractual relationships. Its use to nullify specific statutory norms in the public law area is unusual.

75. Law 2.786 of May 21, 1956.

76. *Id.*

propriation Law required that valuation be made as of the date of decree of public utility. As distinguished a jurist as Temistocles Calvancanti argued to the Supreme Federal Tribunal that "the five year period for completing the expropriation constitutes full assurance that only exceptionally will the increase in the value of the property reach and modify the value fixed at the time of the declaration of public utility."[77] Economic events, however, proved him wrong,[78] and the court rejected his argument.[79] Most lower courts decided that property should be valued at the date of the expert appraisal,[80] some holding that Article 26 had been revoked by Article 141, section 16, of the 1946 constitution, which required just and prior compensation.[81]

C. *Delay in Payment of Compensation*

The problem most perplexing to Argentine and Brazilian courts involves claims for compensation that have remained unpaid for many years. The juridical framework of eminent domain presupposed that the expropriating agency would effectuate payment for the property shortly after the price had been judicially determined. If, in exceptional cases, there should be delay, it would be compensated by legal interest. But the authors of this framework failed to foresee either the dramatic inflationary surge of the postwar years or the long delays by government agencies in discharging their financial obligations.

The reported cases reveal numerous instances in which property owners have remained uncompensated for lengthy periods, sometimes in excess of twenty years. Many of these cases involve "inverse" or "indirect" expropriation, where a government agency took possesson without troubling itself with the legal formalities.[82]

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77. Municipalidade de São Paulo v. Margarida Maria de Moura Queirós, R.E. 7.924, 12 R.D.A. 146, 149, D.J., Mar. 13, 1948, at 689 (S.T.F. 1946).

78. The wholesale price index, for example, rose from 21.5 in 1941 to 45.8 in 1946. Getulio Vargas Foundation, published in CONJUNTURA ECONÔMICA.

79. See Municipalidade de São Paulo v. Margarida Maria de Moura Queirós, R.E. 7.924, 12 R.D.A. 146, 149, D.J., Mar. 13, 1948, at 689 (S.T.F. 1946).

80. Fazenda do Estado v. Judite Aua Barbero, 66.166, 224 R. Trib. 242 (5th Cam. Civ. T.J.S.P. 1954); Sparapani v. Mun. de São Paulo, 18.236, 144 R. Trib. 677 (1st Cam. Trib. Apel. S.P. 1943); A.C. 1.852, 69 ARC. JUD. 129 (4th Cam. Trib. Apel. F.D. 1943); A.C. 9.569, 61 ARC. JUD. 120 (4th Cam. Trib. Apel. F.D. 1941).

81. *E.g.*, Dr. Ricardo Conto v. Fazenda do Estado, 48.921, 188 R. Trib. 237 (2nd Cam. Civ. T.J.S.P. 1950).

82. *E.g.*, Pineda de Gómez v. Municipalidad de la Capital, 106 La Ley 894 (CN Civ., Sala C 1962) (property taken unlawfully in 1931). In Afonso v. Dept. de Estradas de Rodagem, R.E. 64.020, 101 R.D.A. 188, 189 (S.T.F. *en banc* 1969), where the plaintiff was the victim of a 1960 indirect expropriation, Minister Aliomar Baleeiro noted: "We have in this term decided . . . cases of indirect expropriation in which the property owner waited more than 20 years for his payment."

Some are cases in which the government took possession and observed only some of the required procedures.[83] But most are cases in which the government took possession after depositing payment, the adequacy of which the owner contested.[84] In Brazil, where the date of valuation was that of the expert appraisal rather than dispossession, it was common practice (particularly in Rio de Janeiro and São Paulo during the 1940's and 1950's, when growth was extraordinarily rapid) for the government to permit the owner to retain possession while the condemnation process plodded through extended appeals. The government would then wait for eight to ten years before effectuating payment, which considerably improved its ability to pay. Occasionally, attorneys for the property owner were less than diligent in pushing for prompt payment, for the longer the delay between the offer and final court determination, the larger their fees.[85]

Property owners were harmed in three ways by these practices. First, their claims were based upon valuations which had taken place several years previously, and the pace of monetary depreciation quickly eroded those values. Second, the legal interest rate was well below the going interest rate in the financial market, so that anyone who had to borrow to replace his asset, had to pay a higher interest rate than he would collect on his claim against the government; and, anyone who wished to invest the proceeds of the compensation was deprived of the opportunity to earn a higher rate of return. Third, expropriating agencies exploited the situation, persuading condemnees to accept lower offers in lieu of extended litigation. Despite the Argentine Supreme Court's opposition[86] (reversed only in 1967 after a change in the court's personnel), and the intermittent opposition of the Brazilian Supreme Federal Tri-

83. Reposo v. União Federal, Embargos R.E. 54.221, 34 R.T.J. 91, 79 R.D.A. 215 (S.T.F. *en banc* 1965) (unlawful occupation by federal government in 1945, an expropriation proceeding in which there was a 1954 valuation based on 1945 prices, still unpaid in 1965); União Federal v. Cia. Viação São Paulo-Mato Grosso, 217 R. For. 100 (T.F.R. 1964) (unlawful, unilateral determination of compensation in 1943, followed by deposit in Bank of Brazil and taking of possession; as of 1964 the property owners had received no compensation whatsoever).

84. *E.g.*, Min. de Salud Pública de la Nación v. Tonello, 272 Fallos 88, [1969-II] J.A. 380 (Sup. Ct. 1968) (delay of 18 years in the Argentine courts); Compana Construtora Pan-Americana v. Municipalidade de São Paulo, 67.497, 397 R. Trib. 135 (5th Cam. Civ. T.J.S.P. 1968) (delay of 15 years because of a special appeal to the Brazilian Supreme Federal Tribunal); Concórdia Sociedade Imobiliária v. União Federal, R.E. 42.197, 41 R.T.J. 752 (S.T.F. 2d Term 1967) (delay of 17 years in the Brazilian courts).

85. R. BARCELLOS DE MAGALHAES, *supra* note 26, at 256-64, and cases cited therein.

86. Admn. Gral. de Obras Sanitarias de la Nación v. Torquinst y Bernal, 241 Fallos 73, [1959-III J.A.] 509, 92 La Ley 77 (Sup. Ct. 1958); Gobierno Nacional v. Dumas, [1947-III] J. A. 174, 47 La Ley 865 (Sup. Ct. 1947); Gobierno Nacional v. Iribarren de Olariaga, 49 La Ley 287 (Sup. Ct. 1947).

bunal[87] (reversed only in 1965 after legislative action), a few of the Argentine and Brazilian lower courts gradually developed theories and techniques to mitigate the confiscatory results of inflation. All were painted on the backdrop of constitutional requirements that prior and just compensation be paid whenever private property is taken for public use.

1. SUPPLEMENTARY TORT SUITS

In Brazil the most popular remedy was a tort action, alleging that the state's delay in paying compensation constituted negligence. Some of the state courts, principally in São Paulo, began to permit such suits by the mid-1950's, either ordering a new valuation or awarding damages measured by the difference between the original award and current value.[88]

However, a substantial number of courts rejected tort claims on the rationale that they contravened res judicata and the civil code

87. Picard v. União Federal, Embargos R.E. 51.670, 81 R.D.A. 220, 32 R.T.J. 484 (S.T.F. *en banc* 1964); *Súmula* No. 416 and cases cited therein.

88. Cases awarding damages: Estado da Guanabara v. Borges, R.E. 65.053, 101 R.D.A. 199 (1st Term S.T.F. 1969) (value set in 1953 still unpaid in 1969); Estado da Guanabara v. Paradas, 44.009, 13 R.J.G. 284 (4th Cam. Civ. T.J.G.B. 1965) (where compensation finally determined in 1952 was unpaid in 1965); Ferreira Dias v. Estado da Guanabara 41.147, 9 R.J.G. 326 (4th Cam. Civ. T.J.GB 1965) (state attempting to pay a 1948 valuation in 1964); Esteves v. Estado da Guanabara, 44.013, 12 R.J.G. 351 (7th Cam. Civ. T.J.GB 1965); Miranda v. Estado da Guanabara, 31.180, 206 R. For. 152, 9 R.J.G. 261 (2d Cam. Civ. T.J.GB 1964) (10 year delay in payment) *aff'd* 104 R.D.A. 221 (S.T.F. 1st Term 1969); Irene de Assis Carvalho v. Estado da Guanabara, 36.253, 12 R.J.G. 283 (4th Cam. Civ. T.J.GB 1964); Camanho da Costa v. Estado da Guanabara, 25.473, 9 R.J.G. 226, 296 R. Trib. 224 (6th Cam. Civ. T.J.GB 1963) (ten year delay in payment); Firmo Pinto Corrêa v. Municipalidade de São Paulo, Rec. de Rev. 109.939, 347 R. Trib. 271, 81 R.D.A. 222 (T.J.S.P. *en banc* 1962), *rev'd* in R.E. 52.226, D. J. of Aug. 8, 1963, apenso 149, p. 687; Municipalidade de Ribeirão Prêto v. Bartoli 112.968, 80 R.D.A. 158, 338 R. Trib. 146 (3rd Cam. Civ. T.J.S.P. 1962) (valuation occurred in 1947, the final judgment rendered in 1952, and payment made in 1958); Municipio de Araraquara v. Dosualdo, 85.609 (embargos), 296 R. Trib. 224, 63 R.D.A. 161 (2d Grupo Cam. Civ. T.J.S.P. 1959); Fazenda do Estado v. Donato Zolta, 92.277, 287 R. Trib. 299 (5th Cam. Civ. T.J.S.P. 1958), *aff'd* 10 R.T.J. 429 (1st Term S.T.F. 1959) (six year delay in payment); Camargo v. Municipalidade de São Paulo, 80.033, 266 R. Trib. 273 (4th Cam. Civ. T.J.S.P. 1957) (compensation finally determined in 1949 and paid in 1951 without interest).

Cases ordering a new valuation:

Tôrres v. Mun. de Curitiba, 107/58, 301 R. Trib. 619 (T.J. Paraná 1960) (six year lapse); 98.883, 303 R. Trib. 203 (3rd Cam. Civ. T.J.S.P. 1960) (lapse of more than two years); Dept. de Estradas de Rodagem v. Pelice, 78.461, R. Trib. 195 (1st Cam. Civ. T.J.S.P. 1957) (10 year lapse); Oliveira v. Fazenda do Estado, 63.866 (embargos), 223 R. Trib. 191 (3rd Grupo de Cam. Civis T.J.S.P. 1954) (reverses decisions refusing to allow revaluation after more than two years elasped without payment). 2 J. NORONHA & O. MARTINS, DA DESAPROPRIAÇAO NO SUPREMO TRIBUNAL FEDERAL 536 (1967) (1951 valuation in 1962).

provisions restricting damages for delay to legal interest.[89] Brazil's highest court regularly denied supplementary damage actions as incompatible with the civil code.[90] As Minister Candido Lobo of the Brazilian Supreme Federal Tribunal admitted, "[I]t may be unjust but it is not illegal, because the Civil Code (in Article 1061) covers the situation. . . ."[91]

2. THE DEBT OF VALUE

A number of Argentine and Brazilian courts, influenced by academic writers,[92] took the position that the compensation owed in an eminent domain proceeding constitutes a debt of value rather than a pecuniary debt.[93] A debt of value, sometimes called an adaptable debt, obliges the debtor to pay an economic value or to

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89. Municipalidade de São Paulo v. Levy Júnior, 141.803, 362 R. Trib. 168 (6th Cam. Civ. T.J.S.P. 1965); Muranyi v. Prefeitura Mun. de São Paulo, Agravo de Instrumento 34.713, 35 R.T.J. 510 (1st Term S.T.F. 1965); Municipalidade de São Paulo v. Rudge, 122.126, 348 R. Trib. 148 (2d Cam. Civ. T.J.S.P. 1963); Souza Campos v. Estado da Guanabara, 19.163, 5 R.J.G. 169 (1st Cam. Civ. T.J.GB 1962), *aff'd* R.E. 52.226 D.J. Aug. 8, 1963, apenso 149, at 687, 76 R.D.A. 238 (S.T.F.): Olímpia do Vale Pimental Caldas v. SURSAN, 20.663, 211 R. For. 150, 9 R.J.G. 205 (5th Cam. Civ. T.J.GB 1962) (valuation made in 1947, final judgment in 1952, and payment in 1958); Ramiro Ribeiro v. Estado da Guanabara, 21.719, 2 R.J.G. (2d Cam. Civ. T.J.GB 1962); Prefeitura Mun. de São Vicente v. Heirs of Medeiros, 103. 768, 310 R. Trib. 203 (5th Cam. Civ. T.J.S.P. 1961), *aff'd* 325 R. Trib. 147 (1961); Pereira Ramos v. Estado da Guanabara, 6.033 (embargos), 1 R.J.G. 165 (2d Grupo Cam. Civis GB 1961) (valuation in 1943 and payment not made until 1955); Municipalidade de São Paulo v. José Ferraz de Camargo, R.E. 40.317, 195 R. For. 129 (S.T.F. 2d Term 1959), *aff'd* 322 R. Trib. 711 (S.T.F. *en banc* 1959).

90. This line of decisions was enunciated as *Súmula* 416: "For delay in the payment of the expropriation price, complementary compensation in addition to interest is improper." The *Súmula,* instituted in 1964 by the Supreme Federal Tribunal, contains several hundred legal rules which have been laid down by the more or less continuous decisions of the court. The rules can be modified, though in constitutional matters six votes or more are needed.

91. Municipalidade de São Paulo v. José Ferraz de Camargo, R.E. 40.317, 195 R. For. 129, 132 (S.T.F. 2d Term, 1959).

92. *See* 26 PONTES DE MIRANDA, TRATADO DO DIREITO PRIVADO 299-300 (2d ed. 1959); E. BANCHIO, OBLIGACIONES DE VALOR 153-60 (1965).

93. Argentina: Mun. de la Capital v. van Rafelghem [1965-V] J.A. 538 (Cam. Civ. Cap., Sala A. Provincia de Buenos Aires v. Villa, Nicanor, [1965-III] J.A. 253 (1st Cam. Civ. y Com., Bahía Blanca 1965); Provincia Santiago del Estero, 112 La Ley 664 (1st Cam. Civ. y Com. Santiago del Estero 1963); Mun. de la Capital v. Taramasco, 112 La Ley 462 (CN Civ., sala F. 1963); Adm. Gral. de Obras Sanitarias de la Nación v. Torquinst y Bernal, 241 Fallos 73 [1959-III] J.A. 509, 92 La Ley 77 (Sup. Ct. 1958) dissenting opinion of Dr. Orgaz); Gardella v. Provincia de Buenos Aires, [1957-IV] J.A. 277 (2d Cam. Civ. y Com. de la Plata 1957).

Brazil: Firmo Pinto Corrêa v. Municipalidade de São Paulo, Rec. de Rev. 109.939, 347 A. Trib. 271, 81 R.D.A. 222 (Cam. Civ. de T.J.S.P. 1962); Mun. de Ribeirão Prêto v. Bartolo, 112.968, 338 R. Trib. 146, 80 R.D.A. 158 (3rd Cam. Civ. T.J.S.P. 1962).

fulfill the creditor's needs rather than to pay a particular pecuniary amount. Child support is the most common example: if the child's needs change, the support obligation may be revalued. Since debts of value are readjustable in accordance with variations in the purchasing power of the currency, the theory permits courts to eliminate much of the confiscation stemming from long delays and inflation.

But many courts explicitly reject the notion that a liquidated claim for compensation constitutes a debt of value.[94] As one court put it:

> Expropriation is a forced sale in which a judicial decision transforms the value of the property into money. It is not a support action in which the judgment . . . may be updated for variations in the value of the support . . . . In expropriation the property disappears and a sum of money, which the creditor may immediately collect, in the same manner as a promissory note, a mortgage, or any other pecuniary debt, appears.[95]

The inconsistency among courts illustrates that a basic difficulty with the concept of the debt of value is imprecision:

> There is no conceptual uniformity; the notion varies according to the exigencies of the monetary picture and . . . in accordance with the criteria which the writers prefer. . . .[96]

Nevertheless, if one admits the validity of the concept of a debt of value, claims resulting from eminent domain should certainly be encompassed. The debt of value is essentially a doctrinal invention to place the risk of monetary depreciation on the debtor in circumstances when it appears exceptionally just to do so. If the creditor never assumed the risk and is unprotected against it, it may be appropriate to place that risk on the debtor, who otherwise profits from being able to pay off his obligation in devalued currency. It is particularly appropriate to assign the risk to the debtor in the context of eminent domain, because the condemnee is an involuntary creditor, the delay is often caused by the condemnor, and the state can spread losses over the general public while the individual condemnee has no such prerogative.

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94. *E.g.*, Souza Campos v. Estado da Guanabara, 19.163, 5 R.J.G. 169 (1st Cam. Civ. T.J.GB 1962); Municipalidade de São Paulo v. José Ferraz de Camargo, R.E. 40.317, 195 R. For. 129 (2d Term S.T.F. 1959); Adm. Gral. de Obras Sanitarias de la Nación v. Torquinst y Bernal, 241 Fallos 73, [1959-III] J.A. 509, 92 La Ley 77 (Sup. Ct. 1958); Gobierno Nacional v. Dumas, [1947-III] J.A. 174, 47 La Ley 865 (Sup. Ct. 1947).

95. Souza Campos v. Estado da Guanabara, 19.163, 5 R.J.G. 169, 170 (1st Cam. Civ. T.J.GB 1962), *aff'd* R.E. 52.226, D.J. Aug. 8, 1963, apenso 149, at 687, 76 R.D.A. 238 (S.T.F. 1963).

96. O. GOMES, TRANSFORMAÇOES GERAIS DO DIREITO DAS OBRIGAÇOES 112 (1967).

3. UNJUST ENRICHMENT

A few courts have permitted supplementary compensation or revaluation on an unjust enrichment theory, despite the conceptual fuzziness in utilizing a private law doctrine in a public law case. These courts argue that, when delay is the result of government behavior, the state is unjustifiably enriched at the expense of condemnees.[97]

4. ABUSE OF THE POWER OF EMINENT DOMAIN

Supplementary compensation has been awarded to property owners by a few courts on the theory that failure to pay compensation owed for an unreasonably long period constitutes "abuse of a right" (*abuso de direito, abuso del derecho*).[98] Underlying *abuso de direito* is the notion that ". . . whoever, in exercising his (legal) right, . . . violates the principles of the economic and social purposes of the institution, producing a disequilibrium between the individual and collective interest, abuses that right."[99] One who misuses his rights is civilly liable for damages caused thereby. Analogues to this civil law concept can be found in the common law doctrines of nuisance or malicious use of process.

5. RESTITUTION

While, in theory at least, the failure to compensate is not grounds for securing return of the condemned property, Brazilian courts have occasionally permitted restitution.[100] Even the Supreme Federal Tribunal, confronted in 1964 with a case in which property was taken in 1940-41 pursuant to a voluntary settlement that the state never honored, permitted restitution to the estate of the former owners. The opinion of Minister Pedro Chaves reveals the ambivalence of a civilian judge torn between legalism and preventing injustice:

> [I]n theory this action is absolutely improper. The Judiciary really cannot order the restitution of possession which the Appellant himself delivered to the State via a

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97. Firmo Pinto Corrêa v. Municipalidade de São Paulo, Rec. de Rev. 109.939, 347 R. Trib. 271, 81 R.D.A. 222 (Cam. Civis de T.J.S.P. 1962); Ofélia de Oliveira v. Fazenda do Estado, 63.866 (embargos), 223 R. Trib. 191 (3rd Grupo Cam. Civ. T.J.S.P. 1954). *Contra:* Olímpia do Vale Pimental Caldas v. SURSAN, 20.663, 211 R. For. 150 (5th Cam. Civ. T.J.GB 1962).

98. Miranda v. Estado da Guanabara, 31.180, 206 R. For. 152, 9 R.J.G. 261 (2d Cam. Civ. T.J.GB 1962), *aff'd* 104 R.D.A. 221 (S.T.F. 1st term 1969) condemnation begun in 1948 and condemnee still uncompensated 21 years later); Ferreira Dias v. Estado da Guanabara, 41.147, 9 R.J.G. 326 (4th Cam. Civ. T.J.GB 1965).

99. Alvino Lima, *Abuso de Direito,* in 1 REPERTÓRIO ENCICLOPÉDICO BRASILEIRO 325 (1947).

100. *E.g.,* Mun. de São Bernardo do Campo v. Juiz do Direito de Santo André, 86.661, 275 R. Trib. 557 (Conselho Superior da Magistratura 1958).

> voluntary accord. . . . Hence, . . . the question has to be resolved by damages, which in accordance with the Civil Code would be interest for the delay.
>
> But in this case, with the inflation we are suffering, . . . if the proprietor were to receive interest for delay on the price set in the old accord of 1940-41, it would be a veritable Pyrrhic victory.[101]

Restitution is not always a feasible remedy, for the property may be incorporated into a public project from which it cannot readily be extracted. Moreover, restitution is likely to achieve only a rough measure of justice. In "quick take" cases, unless the former owner has been able to use the deposit, he will not be compensated for at least part of what his property should have earned during the period that possession rested with the condemnor.

6. MONETARY CORRECTION

a. *The Brazilian experience*

In July of 1964, Brazil's military regime enacted a revenue statute providing for retroactive monetary correction of back tax debts.[102] Monetary correction adjusts for declines in the purchasing power of the currency by multiplying original values by coefficients derived from price indices. On the theory that sauce for the goose is gravy for the gander, some Brazilian judges reacted to the new tax law by issuing condemnation judgments which stated that, if not paid within three months, the award would be subject to monetary correction every three months until paid. While the São Paulo Tribunal of Justice (the state supreme court) regularly reversed monetary correction decisions on the ground that statutory authorization was necessary,[103] the Guanabara Tribunal of Justice (the supreme court of the state that includes Rio de Janeiro) confirmed the awards,[104] occasionally modifying them to restrict monetary correction to that part of the award that the owner could not immediately appropriate.[105] Some Brazilian lower courts also used the principle of monetary correction in ordinary damage actions

101. Espólio de Adão de Oliveira v. Fazenda Publica do Estado do Rio de Janeiro, R.E. 55.077, D.J. of Sept. 3, 1964, at 675.

102. Law No. 4.357 of July 16, 1964, art. 7. This statute was later modified to exclude the period prior to July 17, 1964 from the incidence of monetary correction. Law No. 4.862 of Nov. 29, 1965, art. 15.

103. *E.g.*, Municipalidade de São Paulo v. Levy Jũnior, 141.803, 362 R. Trib. 168 (6th Cam. Civ. T.J.S.P. 1965).

104. SURSAN v. Estado de Fernades, R.E. 60.628, 98 R.D.A. 176 (1st Term S.T.F. 1969); Casanova v. Estado da Guanabara, 41.362, 10 R.J.G. 282 (8th Cam. Civ. T.J.GB 1965); Reis v. SURSAN, 42.185, 10 R.J.G. 286 (3rd Cam. Civ. T.J.GB 1965); Gusmão v. SURSAN, 41.318, 10 R.J.G. 282 (4th Cam. Civ. T.J.GB 1964).

105. Soares Ribeiro v. SURSAN, 42.739, 10 R.J.G. 287 (4th Cam. Civ. T.J.GB 1965).

brought because of the failure to pay condemnation awards promptly.[106]

Before 1965, the Supreme Federal Tribunal refused to affirm monetary correction, holding that the task of correcting injustices arising from the government's slow-paying habits in eminent domain cases is best left to the legislature:

> The lack of a legal criterion would drag out expropriatory actions eternally. The payment of compensation depends on budgetary resources, which are, as a rule, insufficient. Whenever the budgetary allowance is insufficient, we would have to order another appraisal, and the expropriation suits would never end. What is needed is for the legislature to establish a practical and just criterion, which may ultimately be monetary correction.[107]

The court's refusal to permit inflation adjustments in eminent domain cases is puzzling, since it did not require legislative approval before making inflation adjustments in other areas.[108] One commentator has suggested that the court acted differently, depending upon whether the judgment debtor was a private party or the state, reflecting "the legitimate concern of Brazilian judges with not depleting public funds, oft-times feeling constrained from increasing the responsibilities of the Federal Government and the States, without an explicit, prior law. . . ."[109]

One result of the 1964 military coup d'ètat that ousted the Goulart regime was the delegation of considerable power to a group of technocratic economists and engineers headed by Roberto Campos and Eugênio Gudin. Campos and Gudin attempted to attain development goals without inflation, providing necessary resources through taxation, private savings and investment. Reforms were made in the tax system, and programs introduced to stimulate the development of a capital market that would both increase private savings and channel them into productive forms of investment.[110] Instead of trying immediately to eliminate inflation, a strategy they considered disastrous to economic growth, the Brazilian planners introduced a gradual stabilization program.[111] One technique

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106. Espólio de Israel Steinberg v. Estado da Guanabara, 45.081, 13 R.J.G. 308 (8th Cam. Civ. T.J.GB 1965) (13 year delay in paying an award).

107. Rodolphe Picard v. União Federal, R.E. 51.670 (embargos), 32 R.T.J. 484, 81 R.D.A. 220 (S.T.F. *en banc* 1965) (vote of Minister Victor Nunes Leal).

108. *See* J. CHACEL, M. SIMONSEN, & A. WALD, A CORREÇAO MONETÁRIA 200 (1970).

109. *Id.* at 223.

110. *See* D. Trubek, *Law, Planning and the Development of the Brazilian Capital Market: A Study of Law in Economic Change,* 72-73 N.Y.U. INST. OF FINANCE BULL. (April 1971).

111. This program and its results are analyzed in M. SIMONSEN, INFLAÇAO: GRADUALISMO X TRATAMENTO DE CHOQUE (1970).

in this effort was legislation permitting the use of monetary correction in numerous areas, including income taxes, government bonds, rents, credit instruments, and construction contracts.[112]

It was in this context that the legislature, in June of 1965, passed Law 4.686, providing for monetary correction of condemnation awards. The statute was extraordinarily brief. A single sentence was added to the Brazilian Expropriation Law, providing: "After the lapse of more than a year from the date of valuation, the judge or court, prior to final decision, shall determine monetary correction of the value set."[113] Like much legislation of the era, (during which economists and engineers tried their hands at writing statutes) this cryptic amendment wins no prize for draftmanship. It has generated an enormous amount of litigation,[114] for it leaves open such important questions as: Which decision is the final one? Does the law apply retroactively? Does it apply to cases on appeal? Are deposited funds also subject to monetary correction? Which coefficients of monetary correction should be applied? There were also constitutional challenges to the new law, contending that it violated constitutional restrictions on increasing governmental expenditures without presidential authorization, res judicata and acquired rights, and the Brazilian analogue of equal protection.[115]

The Supreme Federal Tribunal, however, upheld the constitutionality of monetary correction in eminent domain cases.[116] The court's attitude to disguised confiscation showed a marked change from its earlier stance. As Minister Evandro Lins observed:

> Rather than being unconstitutional, Law 4.686/65 came to correct an unconstitutionality, so to speak, implicit in what was happening. The just price of the property condemned was not being paid because of the delays in judicial actions and the inflationary spiral.[117]

The answers given by the courts to the other problems raised by Law 4.686 have not been as clear cut, though the majority seem to agree that monetary correction applies to pending cases, including those on special appeal.[118] Initially, several courts, applying the

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112. *See generally* J. CHACEL, *supra* note 108.

113. Law No. 4.686 of June 21, 1965.

114. *See* Moniz de Aragão, *A Correção Monetária na Desapropriação*, 23 REV. DE DIR. DA PROCURADORIA GERAL 83 (1970). The cases are collected in Ferraz, *Desapropriação: Indicações de Doutrina e Jurisprudência*, 22 REV. DE DIR. DA PROCURADORIA GERAL 344, 416-25 (1970).

115. *See* J. CHACEL, *supra* note 108, at 226-27.

116. União Federal v. Joaquim Farias Badke, R.E. 64.440, 406 R. Trib. 340 (1st Term S.T.F. 1968); União Federal v. Pedro Inácio de Paiva Tavares, R.E. 63.329, 45 R.T.J. 344 (S.T.F. *en banc* 1968); União Federal v. Otávio Alves Ribeiro, R.E. 63.268, 45 R.T.J. 795 (3rd Term 1968).

117. Vote of Minister Evandro Lins in R.E. 63.329, 45 R.T.J. at 346.

118. *Súmula* 475 and cases cited therein. Early case law permitted retroactive application of the statute. However, Law No. 5.670 of July 2,

civil law principle of *ultra petita*, refused to grant monetary correction unless the request was included in the pleadings,[119] but recently the trend has been to grant monetary correction *ex officio* if it was not requested by the condemnee.[120] And the proposition that monetary correction is to be applied to the 20 percent of the deposit that cannot be appropriated by the condemnee in "quick take" proceedings has been firmly established.[121]

Monetary correction is now being applied to all cases where there is a delay of more than a year between valuation and payment, provided the judgment has not been executed.[122] Even when the compensation is deposited, the Supreme Federal Tribunal, reversing its earlier position, permits the former owner to bring a separate action for damages resulting from delay in payment.[123] The lower courts routinely convert separate damage suits into successful requests for monetary correction.[124]

While many courts interpreted the term "final decision" in the statute to refer to the date that the decision became nonappealable, and a few courts held that it referred to the date at which calculation of the compensation was made *(liquidação)*,[125] the Supreme Federal Tribunal adopted the position that "final decision" occurs at the permanent transfer of title following verification that payment has been made.[126] Most of the judicial interpretations of

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1971, which prohibits calculation of monetary correction for periods antedating the law instituting it, was designed to change this result. Its constitutionality has recently been upheld by the Supreme Federal Tribunal.

119. *E.g.*, Companhia Imobiliária e Mercantil Anchieta v. Fazenda do Estado, R.E. 61.144, 97 R.D.A. 161, 47 R.T.J. 745 (2d Term S.T.F. 1968) and cases cited therein.

120. Novaes v. Prefeitura Mun. de Belo Horizonte, R.E. 62.224, 58 R.T.J. 98 (2d Term S.T.F. 1971); União Federal v. Cunha, R.E. 63.316, 99 R.D.A. 233 (S.T.F. 1969); União Federal v. Ferreira, R.E. 63.218, 98 R.D.A. 174 (*en banc* S.T.F. 1968); União Federal v. Gonçalves Salles S.A., R.E. 63.343, 94 R.D.A. 112 (2d Term S.T.F. 1968)

121. Apel. Civ. 52-272, 20 R.J.G. 368 (7th Cam. T.J.GB 1967); Apel. Civ. 49.843, 19 R.J.G. 301 (2d Cam. Civ. T.J.GB 1966); Municipalidade de São Paulo v. José Carbone, 113.481, 7 Rev. Dir. Pub. 290 (Trib. de Alçada Civ. S.P. 1968). One case, holding monetary correction should be applied to the entire deposit, was reversed. Apel. Civ. 48.855, 18 R.J.G. 335 (8th Cam. T.J.GB 1966), *rev'd* in 20 R.J.G. 248 (4th Group de Cam Civs. 1967).

122. Ignez Corrêa Constantino v. Prefeitura Municipal de São Paulo, R.E. 65.395, 231 R. For. 75, 52 R.T.J. 711 (S.T.F. *en banc* 1969).

123. Universidade do Estado da Guanabara e Estado da Guanabara v. Boudroux, R.E. 66.807, 100 R.D.A. 117 (1st Term S.T.F. 1969); Estado da Guanabara v. Borges, R.E. 65.053, 101 R.D.A. 199 (1st Term S.T.F. 1969).

124. Embargos 46.726, 20 R.J.G. 227 (3rd Grupo Cam. Civ. T.J.GB 1967); Embargos 47.962, 20 R.J.G. 235 (1st Grupo Cam. Civ. T.J.GB 1967); Soares Nunes v. Estado da Guanabara, 47.912, 14 R.J.G. 266 (8th Cam. Civ. T.J.GB 1966).

125. The cases are collected in Ferraz, *supra* note 114, at 418-21.

126. Ignez Corrêa Constantino v. Prefeitura Mun. de São Paulo, R.E. 65.395, 231 R. For. 75, 52 R.T.J., 711 (S.T.F. *en banc* 1969) and cases cited therein.

Law 4.686 are eminently sensible. Adoption of any date other than that of payment as the cut-off date for monetary correction would have encouraged the government to continue its dilatory payment practices. Even so, monetary correction can be an endless round robin. In Rio de Janeiro and São Paulo, the state agencies do not have budgetary appropriations sufficient to pay off all the final judgments against them.[127] After issuance of the *precatório* (a letter of remittitur sent by the judge to the president of the court requisitioning payment against the public treasury), the property owner must wait his turn to satisfy his judgment until funds become available.[128] The new budgetary appropriations should include provision for payment of outstanding *precatórios*, but some will languish for more than a year before funds are received. Monetary correction will then have to be made again, appeals may be taken from the calculation, and the process will go on indefinitely—or until the property owner agrees to an unsatisfying compromise.

b. *The Argentine experience*

The principle of monetary correction has not taken hold in Argentine legislation as it has in Brazil. Though tax laws have permitted sporadic assets revaluations,[129] Argentine governments have generally tried to control inflation rather than to develop devices enabling the country to live with inflation. Hence, the Argentine courts have had to wrestle on their own with the problems of adjustments for monetary depreciation.

The diverse opinions of the Federal Chamber of Appeals of La Plata in *Administración Gral. de Vialidad Nacional v. Fojticova de Feith* illustrate the complexity and perplexity of the problem.[130] With a lag of two years and ten months between the appraisal and the decision, the court decided to ignore the supreme court (the amount in controversy was too small to appeal the case to that august body) and permit an inflation adjustment. The vote of Judge Fernández del Casal was based upon a curious parallel to

127. In February of 1971 there were some 1880 eminent domain judgments awaiting payment in the city of São Paulo. These were being paid at the rate of two per day, a pace requiring the bulk of the condemnees to wait more than a year. Arruda Campos, *Nem previo nem justo*, O Estado de São Paulo, Feb. 28, 1971, at 10.

128. In Olímpia do Vale Pimental Caldas v. SURSAN, 20.633, 221 R. For. 150 (5th Cam. Civ. T.J.GB 1965), where the *precatório* remained unpaid for several years, the court observed:

> It is incomprehensible how the budget of the administrative entity responsible for the payment does not contain sufficient funds to cover it. One can admit the possibility of an insufficiency in the corresponding budget, but not in the following budget, whose funds result from the sum of verified obligations. This is incomprehensible even if the chronological order of the obligations has not been complied with.

129. Law 15.272 of Feb. 4, 1960, and Law 17.335 of July 10, 1967.

130. 108 La Ley 685 (*en banc* 1962).

monetary correction. He determined first that the percentage rise in the official cost of living index during the interval was about 60 percent (actually it was closer to 69 percent); then he calculated that the percentage increase permissible, if one applied the 25 percent per year revaluation coefficient for real assets set out in the capital gains tax law, would be 70 percent; third, he determined that the amount of currency in circulation during two years and seven months of the interval had increased 75 percent (he did not possess data for the whole period); and finally, that the means of payment during two years and five months of the interval (again an insufficient data problem) had increased 68 percent. Throwing the four percentages into the hopper, Dr. Fernández del Casal forged a 70 percent increase in the value of the property.

Judge Mallea refused to apply monetary correction because it lacks "precision and an objective legal basis," preferring to order a new appraisal. Judge Esteves saw no reason to disregard supreme court holdings. Nor did he see any reason to grant the condemnee an immunity from inflation when others had to bear it. Judge Rivarola objected to the inconvenience involved in remanding for a new appraisal and concurred with Dr. Fernández del Casal on the ground that the most prudent index for revaluation is the 25 percent annual figure established for real estate for the purpose of the capital gains tax. Judge Masi concurred in the opinions of Dr. Fernández del Casal and Dr. Rivarola.

Only two of the coefficients employed by Dr. Fernández del Casal are appropriate adjustment mechanisms for monetary depreciation. Without a figure for the velocity of circulation, figures based on an increase in the currency in circulation or the means of payment are not meaningful indicators of the decline in purchasing power.[131] A 25 percent annual adjustment is a useful approximation of the decline in the purchasing power of money for 1960 to 1966, when the wholesale price index and the cost of living index increased an annual average of 25 and 22 percent respectively. However, the percentage increases in these indices were not uniform, with the cost of living index varying from a high of 32.3 to a low of 13.5 percent, and the wholesale price index varying between 30.4 and 8.3 percent. The particular dates involved can make a substantial difference.

In June of 1966, a coup ousted the Illia regime.[132] The successor Onganía government, influenced by the Brazilian example, attempted to end the practice of obtaining resources for development through inflation. The new rulers tried to acquire necessary re-

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131. *See* KALDOR, *Monetary Policy, Economic Stability and Growth,* in 1 ESSAYS ON ECONOMIC POLICY 128-29 (1964). The limited utility of increases in money supply in explaining the Argentine inflation is plainly demonstrated in C. DIAZ ALEJANDRO, *supra* note 9, at 367-68.

132. *See generally* P. RANIS, FIVE LATIN AMERICAN NATIONS: A COMPARATIVE STUDY 139-43 (1971).

sources through taxation and by stimulating domestic and foreign private investment. These strategies impelled the government to demonstrate its willingness to protect private property interests. Impending confiscations of foreign oil interests were forestalled, and settlements arranged.[133]

After ousting President Illia, the military insurgents removed all provincial governors and vice-governors, dissolved the national and provincial legislatures, and changed the entire membership of the supreme court. One byproduct of the change in personnel was a change in court policies. The new justices did not follow the precedents denying compensation for monetary depreciation between the date of dispossession and that of final decision. In *Provincia de Santa Fe v. Nicchi,* the newly reconstituted court unanimously held:

> [I]n order to maintain inviolate the principle of just compensation in the face of continued depreciation of the currency, the value of the expropriated property must be fixed on the day of the final decision, assuming that the property is then transferred and that payment follows that decision without appreciable delay. If it were not so, it would then be necessary to protect the right of the condemnee to compensation for the harm resulting from the unjustified delay. . . . [I]t follows nonetheless that one cannot automatically and indiscriminately apply to all kinds of expropriations an index which corrects for currency devaluation. For purposes of compensation, [the court] must keep in mind the nature and the alternative uses of the expropriated property, whose value does not always increase—even in periods of inflation—but rather sometimes decreases.[134]

Recognizing that this might require a new expert appraisal at each stage of every case, the court instead suggested that lower courts themselves revalue, taking into account increases in the cost of living and other factors affecting the property's actual value.[135]

In subsequent cases, the court made its standard more specific. It decided to operate with the rule of thumb that Argentine property values increased 20 percent a year to 1968 and 8 percent a year thereafter.[136] Unfortunately, this standard has a decided tendency to understate the extent of currency depreciation.

Unlike the Brazilian courts, the Argentine Supreme Court applies the principle of revaluation only to those cases in which the condemnee explicitly requested an allowance for monetary depre-

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133. The story of Argentine oil dispute is recounted in 2 A. CHAYES, T. EHRLICH, & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 809-74 (1969).

134. [1967-IV] J.A. 115, 115-16, 127 La Ley 164 (1967).

135. *Id.* at 116.

136. Canale v. Prov. de Rio Negro, [1970-VIII] J.A. 520 (Sup. Ct. 1970); Gobierno Nacional v. Rosito, [1970-V] J.A. 217 (Sup. Ct. 1969).

ciation in the pleadings.[137] This formalistic requirement works hardship on the many condemnees whose pleadings were filed before the supreme court reversed the long line of cases denying inflation adjustments.

The court has also refused to apply the principle of revaluation in retrocession cases. In the "leading case" (an expression Argentine jurists use in English), *Ortega v. Dirección Gral. de Fabricaciones Militares*,[138] the court reversed a decision of the Federal Chamber of Tucuman that had conditioned retrocession of property expropriated in 1951 upon repayment of the present value of the property (16.817.304 pesos) rather than the sum paid by the condemnor in 1951 (463.256 pesos). The supreme court limited the former owner's payment to what he had originally received, plus improvements made in the meantime, about five percent of its present value. The court's rationale—that the state cannot reap an economic benefit out of its failure to fulfill an obligation—is unconvincing. Once the decision to take monetary depreciation into account has been made, it should be applied universally. Unless the former owner himself suffered a partial confiscation at the time of condemnation, a consideration not alluded to in the opinion, there is little point in bestowing a windfall upon him because of a change in the needs or plans of the state.[139]

IV. APPRAISING JUDICIAL EFFORTS

Confiscation of private property occurs when inflation joins with delay to produce payments considerably below the property's market value. The courts have done much to counteract confiscatory procedures and statutes, by permitting supplementary damage actions, by characterizing compensation as a debt of value, by restitution, monetary correction and revaluation. However, there is still room for improvement. In practice, neither Brazilian monetary correction nor Argentine revaluation assures complete protection of eminent domain awards from inflationary erosion.

A. *The Problems With Monetary Correction in Brazil*

Monetary correction suffers four drawbacks. First, if a condemnee is considered to have received adequate compensation only when the award for his condemned property is sufficient to enable

137. Piernini v. Gobierno de la Nación, 126 La Ley 786 (Sup. Ct. 1967); Pérez v. Consejo de Reconstrucción de San Juan, 133 La Ley 371 (Sup. Ct. 1968).

138. [1968-V] J.A. 240, 131 La Ley 153 (1968).

139. The contrary viewpoint is advanced by one of the leading Argentine commentators on expropriation. Canasi, *La Retrocesión en la Expropiación Pública y la Actualización del Valor del Bien Que Se Devuelve, por Effecto de la Desvalorización Monetaria, su Improcedencia*, 131 La Ley 152 (1968).

him to purchase a similar asset, then monetary correction often provides inadequate compensation, for it does not always give the condemnee that option. To achieve monetary correction, Brazilian courts use coefficients derived from the general price index, a weighted average of the wholesale price index, the cost of living index for the state of Guanabara, and the construction cost index for Guanabara. If real property values rise more slowly than the general price index, the former owner will be able to replace his asset with funds to spare; if, however, real property values rise more rapidly, compensation will be insufficient to meet the costs of comparable property. Though no reliable data has been accumulated on the relation of real estate prices to the general price index,[140] there is reason to suspect that real estate prices have risen more rapidly. It would be more sensible for the court to employ an index of real property values in the locale of the condemnation, rather than the general price index, which excludes land values—but no usable index exists. Revaluation on a case-by-case basis would reflect the value of the property most accurately, but it is impractical and further lengthens the already dilatory condemnation process. Moreover, the parties would then be able to relitigate the accuracy of each new appraisal, thus lengthening the process once again.

Second, courts ought to abandon the 80 percent limitation on the amount of the deposit that can be appropriated by condemnees in "quick take" cases. There is, in Brazil, no realistic possibility that compensation will ultimately be below the tax appraisal value. Indeed, the disparities between tax appraisal and market value are so great that a thorough modification of the "quick take" provision is in order. Decree-Law No. 1.075 of 1970, which provides an alternative method of fixing provisional value for residential property, is an improvement, but it should be extended to commercial property as well, and the deposit should be increased to 100 percent of provisional value.[141] The condemnee should be able to appropriate at least 80 percent immediately. Possible prejudice to either party could be minimized by requiring that the deposit be made in a monetarily corrected bank account.[142]

Third, disturbed by the sizeable judgments resulting from monetary correction of long unpaid eminent domain awards,

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140. A study made by the Getulio Vargas Foundation concludes that, from 1959 to 1963, real estate values in Rio de Janeiro rose less rapidly than the inflation rate. *Inflação e Investimentos em Imóveis*, 19 CONJUNTURA ECONÔMICA 63 (May 1965). But the study was based upon examination of statements made in registered sales and must be regarded with skepticism, for values in deeds were routinely understated to reduce tax burdens. *See* Rosenn, *supra* note 64, at 93-94.

141. *See* notes 47 to 49 *supra* and accompanying text.

142. Brazilian banks have been utilizing monetarily corrected accounts since authorized by Law No. 4.728 of July 14, 1965, art. 28.

Brazil's Congress on July 2, 1971, enacted Law No. 5.670, denying application of monetary correction to periods predating legislation specifically authorizing its use. The effect of this recent statute is to prevent monetary correction from going back further than June 1965 in eminent domain cases. This law is a regrettable regression toward sanctioning disguised confiscations.

As applied by the courts, monetary correction suffers from a final problem. Though nothing in the monetary correction statute denies correction on awards whose payment has been delayed less than a year, the Supreme Federal Tribunal has so construed the law.[143] Since prices continue to rise by about 20 percent each year in Brazil, a delay of a few months makes a sizeable difference in the amount of compensation owed.

Despite these drawbacks, monetary correction succeeds in narrowing the gaps caused by inflation. Monetary correction is designed to compensate the property owner, not for appreciation in real property values, but for depreciation in the purchasing power of money. While it may deprive a condemnee of the option of investing in similar real estate, limiting the return on his investment to a real interest rate of six percent, it is, nevertheless, an efficient, manageable and relatively fair way for courts to deal with wealth transfers in an unstable currency situation. Given the limitations of Brazilian price indices, the general price index is a fairly satisfactory measure of monetary depreciation, though in recent years it has suffered from a tendency to understate the actual inflation rate.

B. *The Problems With Revaluation in Argentina*

While the problems of Brazilian courts arise in the context of corrections for monetary depreciation, the drawbacks of the Argentine revaluation scheme occur because it corrects for property appreciation. The Argentine Supreme Court now holds that the aim of compensation in eminent domain cases ought to be to enable the condemnee to replace his condemned property with a comparable asset.[144] Shifting the valuation date forward from dispossession to the time of the initial court decision was a significant step in achieving this end, but the court soon found that judges are ill-equipped to use the multifactoral analysis employed in *Nicchi* with-

143. The cases are collected in Ferraz, *supra* note 114, at 416-17.

144. Provincia de Santa Fe v. Nicchi, [1967-IV] J.A. 115, 127 La Ley 164 (1967), where the court stated:

> Expropriation, as legislated in our National Constitution, is an institution conceived to reconcile public and private interests. And such reconciliation does not occur if the latter are substantially sacrificed to the former and if the owner is not compensated for the loss of his property, *i.e.*, offered an economic equivalent that permits him, if possible, to acquire another property similar to the one he loses . . . .

out ordering a new expert appraisal for each case. To simplify the task, courts developed rules of thumb, but in so doing they have tended to err on the side of lower payments. The coefficients chosen to correct for monetary depreciation have been lower than those derived from wholesale or consumer price indices, and there has been little uniformity among courts in their selection; thus the percentage increase for monetary depreciation has varied with the forum.[145]

It would be preferable for Argentine courts to adopt the principle of monetary correction used in Brazil. Since, short of a new appraisal at each step, there is no convenient way to correct for property appreciation, the courts should instead correct for monetary depreciation, which requires only a comparison over time of general price levels.

Further improvement would result from modification of the Argentine Expropriation Law to permit condemnors to make realistic offers. Limiting the offer to 130 percent of the tax appraisal value, ostensibly to lessen corruption, is unworkable in an economy in which inflation has become chronic. Finally, the adoption of a provisional, summary valuation procedure for "quick take" cases would substantially reduce prejudice to property owners.

C. *A Proposal: Invalidation of the Taking*

By judicious construction of statutes, courts can force potentially confiscatory laws into a more equitable mold. However, it is impossible for courts to enact positive programs. The most likely solution to the problems caused by delayed payments of compensation must come not from the judiciary but from the legislative bodies of Argentina and Brazil.

Delays could be substantially reduced by a statute voiding the condemnation whenever the award is not paid within 30 days of final judgment.[146] Of course, the Brazilian bureaucracy, traditionally in a state of confusion and financial distress, will not easily meet the requirement, but effective enforcement of the statute would hasten the process between final judgment and payment in many cases. Nor would the proposed statute resolve the problem of delay between institution of suit and final judgment. This could

145. *Compare* Provincia de Buenos Aires v. Villa, [1965-III] J.A. 253 (1st Cam. Civ. y Com. Bahía Blanca 1965) where the court revalued a 1952 award by multiplying it times a factor of nine (drawn from its hat), whereas use of the cost of living index would have required multiplication by a factor of 16, *with* Provincia of Jujuy v. Scaro, [1970-V] J.A. 781 (Sup. Ct. of Jujuy 1969) where the court accepted a 25% revaluation coefficient to update a 1962 valuation, and Gobierno Nacional v. Rosito, [1970-V] J.A. 217 (1969), where the supreme court updated a 1956 valuation with an annual cumulative increase of 20% until mid-1968 and 8% thereafter.

146. This is the solution adopted by CAL. CIV. PRO. CODE §§ 1251 and 1252 (West 1954).

be mitigated somewhat if Brazil's mandatory appeal requirement were scrapped, but the heart of the problem lies in clogged court dockets and in civil procedures that afford a veritable arsenal of dilatory weapons.

V. IMPLICATIONS FOR LAW AND DEVELOPMENT

Eminent domain is a legal tool vital to developing and developed countries alike, but is particularly important to a country bent upon rapid economic development within a free enterprise framework. It is impossible to construct the infrastructure necessary for development without taking some private property for public use. Neither comprehensive social reforms, such as urban renewal or land reform, nor even mundane projects like roads or power plants would be possible without liberal use of the power of eminent domain.

Moreover, eminent domain functions as a mechanism for transferring economic resources from the private to the public sector for developmental projects. Its taxing potential was clearly demonstrated by the post-World War II experience of Argentina and Brazil. Because governmental agencies were able to expropriate property for a small fraction of its real value, the building of roads, hospitals, and similar projects was able to proceed with relatively modest inputs of scarce governmental resources.

The risk of expropriation, coupled with rent controls, also promoted development efforts by shifting investment preferences away from land and into more productive channels, such as manufacturing and commerce. Many countries find that the inflationary financing of development backfires, because potentially productive investment tends to be sidetracked into real estate as a hedge against inflation. In neither Argentina nor Brazil was real property nearly as attractive a money bank as it would have been had condemnation awards approximated market values.

However, despite these advantages, the confiscatory component of the expropriation process has pernicious long-range effects on the development process. The choice by private parties to save and invest is crucial to any sustained development effort in a free enterprise economy, but investment choices are greatly influenced by the degree of security felt by the potential saver or investor. By ignoring the constitutional and statutory provisions that promised prior and just compensation, Argentine and Brazilian governments undermined the confidence of domestic and foreign investors in the willingness of their legal systems to protect private holdings. The initial reactions of Argentine and Brazilian judiciaries to confiscations wrought by inflation and delay were scarcely more comforting. Though lower courts did try to prevent wealth deprivations, the Argentine Supreme Court and the Brazilian Supreme Federal Tribunal did not intervene to require adequate compensation for

condemnees until military takeovers brought new groups into power. The failure of the legal structure to protect private property discouraged investment, both domestic and foreign, and contributed to the general deterioration of the investment climate and the flight of capital that occurred in both countries prior to 1965.

In countries dedicated to extensive social change, political circumstances may dictate engaging in substantial amounts of selective confiscation through eminent domain in order to break down structural barriers to development. Comprehensive land reform programs or extensive nationalization of public utilities could not be carried out on any significant scale if prompt, adequate and prior compensation were required. In such circumstances, the techniques of disguised confiscation have had considerable utility, promoting a sense of security in the recipients of redistributed land and relieving international pressures.[147] But the expropriations described in the preceding pages have not taken place in the context of large-scale agrarian reform or extensive nationalization of basic industries. They usually involved the taking of relatively small parcels of urban land in order to construct discrete public works. While a few of the condemnees were wealthy speculators or capitalist giants, many were bourgeois homeowners and businessmen. Some were impoverished by the irresponsible behavior of their governments. Payment of adequate compensation would have increased the cost of public works; it would have given the condemnees a protection against inflation that other social groups did not share. However, the sums involved were hardly so staggering that the state could not afford to pay them. Nor was there political justification for requiring this economic class to subsidize public works.

Statutes provoke behavior supporting development only when they are enforceable. Partly because government authorities disregard the law—for example, by evading judgments against them in eminent domain proceedings—a general disregard for law has plagued both Argentina and Brazil.[148] The damage was perhaps most apparent in taxation, the evasion of which had become a national pastime prior to the military coup.[149] Widespread tax evasion aggravated governmental fiscal problems, forcing even heavier reliance on inflationary financing.

147. *See* Karst, *supra* note 2, at 369-71.

148. The fifth consideranda clause of the Statute of the Argentine Revolution of June 28, 1966 states that "[T]he permanent violation [of the full force of law] has been one of the principal causes of the evils afflicting the Republic."

For an analysis of the disregard for law in Brazil, *see* Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AMER. J. COMP. L. 514 (1971).

149. *See* C. DIAZ ALEJANDRO, *supra* note 9, at 386; Rosenn, *supra* note 64, at 73.

The breakdown of the formal legal structure produced even more serious roadblocks to development. The loss of legitimacy by constitutionally elected governments, which has resulted in lengthy periods of rule by military fiat, has been a severe blow to social and political development in both countries. And the progressive incapacity of formal legal procedures to promote social interdependence and to redistribute wealth severely handicapped the developmental efforts of civilian governments in Argentina and Brazil.

To succeed, development requires an institutional structure that guarantees meaningful equality before the law and protects legitimate long-term expectations. The redirection of the Argentine and Brazilian political and legal machinery to prevent inflation from turning eminent domain proceedings into disguised confiscations is an important step in that direction.