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## Law and Inflation

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LAW AND INFLATION. By *Keith S. Rosenn*. Philadelphia: University of Pennsylvania Press. 1982. Pp. xxxix, 451. \$40.

In one of the months between August 1945 and July 1946 the rate of inflation in Hungary reached 42 quadrillion percent (17 digit inflation) (p. 373).<sup>1</sup> This startling fact is one of a number of world-ranging bits of information included in Professor Rosenn's<sup>2</sup> impressive study of legal questions related to inflation. Rosenn presents a great variety of data on how inflation has affected legal obligations during different eras and in different legal systems. He describes the ways these systems have addressed the problems inflation has wrought and uses comparative discussion as a platform from which to advocate partial indexation, which he believes would alleviate many of these problems.

Much of Rosenn's book compiles and popularizes data from esoteric sources. The book is based on a wide variety of English, Portuguese, Spanish, French, and German literature. The author also includes extensive Brazilian material drawn from his own field research. As a convenient reference, the book includes discussion of the various strands of thought on the subject that have appeared in domestic and world sources. It also provides legal analysis of issues upon which the original sources have focused only economic treatment. This volume is less helpful, however, where it concentrates on substantive economic controversy, rather than on legal analysis.

Professor Rosenn defines inflation generally as either a sustained rise in the general level of prices or a corresponding drop in domestic purchasing power of the national currency (p. 3). He redefines his subject within a legal framework as the impact of economic inflation on "monetary values [assigned] to rights and responsibilities" (p. 21).<sup>3</sup> This definition allows him to analyze, as one of two major concerns, the way in which inflation distorts the relative fairness of the legal system's distribution of monetary rights.

The book begins with three short, effective chapters introducing the problem of inflation. His summary of the debate on the causes of inflation is lucid and much more satisfying than his later treatment, which is more complex and repetitious.<sup>4</sup> The chapter on measuring inflation focuses on price indexes. It is a useful primer for readers new to the subject and lays a foundation for Rosenn's advocacy of indexation systems, a theme that later emerges as the book's predominant focus. Rosenn's discussion of the "value of money" is an excellent, though brief, historical review of political approaches to currency valuation, bringing readers from the medieval

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1. The average monthly rate of inflation during that period was 19,800 percent. P. 373.

2. Professor Rosenn is Dean of the University of Miami School of Law and is associated with the University's Law and Economics Center.

3. Unfortunately, he does not fully explain this redefinition, leaving it implicit. The book's lack of explicitness is a characteristic weakness.

4. Although one wishes that Professor Rosenn would make his apparent preference for the monetarist approach more explicit.

world to the twentieth century, and demonstrating the author's potential for lively and colorful writing.

The next major section deals with inflation-distorted contracts, especially long-term debt obligations. It explores possible statutory and judicial approaches to remedying distortion in both civil- and common-law systems. This lengthy section valuably catalogs the attempts civil- and common-law judges in various countries have made to remedy inflation distortions.<sup>5</sup> Judges have, in the author's view, grappled earnestly but unsuccessfully with inflation-distorted contract adjudication. Unfortunately, Rosenn does not discuss why the judges have been so unsuccessful. He merely uses this discussion of unsatisfactory judicial approaches as an introduction to his campaign for legislated indexation policies — a campaign that mounts throughout the book.<sup>6</sup> This section is well documented, but it meanders aimlessly due to its extensive reliance on lists of facts and observations. Compared with other sections, it is underanalyzed: its serious criticism of past and recurring practices should have been brought together, explained, and explored more fully.<sup>7</sup>

In general, Rosenn falls prey to the device of "labelling" as a critical mode. Readers not already schooled in the various debates Rosenn has collected will find his quick, truncated criticisms unsatisfactory. Nevertheless, readers may appreciate the book's feisty, combative flavor.

The next chapters discuss issues relating to monetary compensation for torts, breach of contract, and condemnation cases. The compensatory judgment chapter exemplifies fine analysis and makes valuable use of comparative material for more than encyclopaedic purposes. But the important international compensation chapter at times tries the author's ability to explain complex economic and legal relations. At one point the author completely misstates the windfall problem that may arise from the choice of date for post-judgment currency conversion (p. 283).<sup>8</sup> This backwards ex-

5. The author discusses such civil-law doctrines as *rebus sic standibus* (tacit agreement that contracts must be grounded in the circumstance obtaining at their making), *imprevisio* (annulment due to unforeseen changes in economic conditions), *geschäftsgrundlage* (foundation of the contract), good faith, and *laesio enormis* or *lesion* (gross price inadequacy). He also discusses impossibility, frustration of purposes, and the increasingly important commercial impracticability (common law and modern commercial law doctrines). Pp. 84-109.

6. Rosenn's case-in-point is the famous *Alcoa* case, in which a federal district judge rescued the enormous aluminum manufacturer from a loss of \$75 million by "rewriting" a long-term requirement contract devastated by the effects of precipitous increases in energy prices. *Aluminum Co. of America v. Essex Group*, 499 F. Supp. 53 (W.D. Pa. 1980). Ironically, given Rosenn's heavy push for indexation, the *Alcoa* controversy itself resulted from the failure of a carefully negotiated and professionally designed indexation agreement in the long-term contract to reflect the ultimate change in relative prices. 499 F. Supp. at 58-59.

7. For example, Rosenn calls courts that support nominalism "misguided" but he does not discuss why courts have doggedly adhered to this and other doctrines he has convinced the reader are patently absurd.

8. In examining the windfall problem, the author states:

Conversion at the exchange rate in effect on the day of breach or tort grants a windfall to the *breaching party or tortfeasor* if between the day of breach (or tort) and day of judgment the foreign currency in which damages are calculated (currency of account) has been devalued in relation to the currency of the forum. Conversely, the breach-date rule grants the *plaintiff* a windfall if between breach and judgment the currency of the forum has been devalued in relation to the currency of account. Conversion at the exchange rate in effect on the day of judgment has just the opposite effect. If, between breach and judgment, the

planation casts doubt on the accuracy of Professor Rosenn's many heroic attempts to reduce complex issues to comprehensible terms, and one hopes that the slip here is an isolated one.

In his last section Rosenn advocates legislative enactment of an indexical system — governing taxes, long-term debt instruments, annuities and insurance, judicial settlements, and perhaps other obligations, but, notably, not wages. Rosenn considers his proposal to be a modification of an earlier one by economist Milton Freidman,<sup>9</sup> which he supports with this remarkably bald yet bland appeal: "Friedman's proposal attracted widespread attention and controversy, but has yet to result in implementing legislation. Such legislation should be enacted, for Friedman's proposal is a sound one." (p. 393).

Rosenn does bolster his proposal by analyzing the economic experiences of moderately indexed Brazil, Finland, and Israel. He concludes that, in general, indexation's effects on inflationary distortions of legal obligations have been favorable. He notes, however, that the data on how it has affected the countries' actual economic inflation rate is "equivocal" (p. 396).

This finding points up an analytic problem in his overall presentation of his indexation argument. In adopting and modifying the Friedman proposal, Rosenn enters a controversy among economists that shows no signs of quick resolution, as Rosenn's own discussion indicates. His participation in the debate becomes so engrossing that it tends to diffuse his original focus on legal issues and to transform the work into a less original general economic policy analysis. Here the book's focus would have been better sustained had it analyzed the problems of implementing and interpreting indexation procedures within the legal system itself. Although Rosenn calls for a legislative policy requiring courts to index a variety of money judgments, he spends little time exploring this significant proposal.

Underanalysis and thematic inexplicitness plague Rosenn's book. The book appears to have two concerns. One is to survey and comment on the legal problems that arise when inflation distorts the value of rights and obligations expressed in monetary terms. Although the indexation theme may be rooted in some of these problems, it becomes transformed into the second of Rosenn's concerns: advocacy of comprehensive indexation as a means to remedy general economic inflation, the impact on legal relations being only one part of the question.

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currency of the forum has been devalued in relation to the currency of account, the day of judgment rule presents the *defendant* with a windfall. If, between breach and judgment, the currency of account has been devalued in relation to the currency of the forum, the day of judgment rule presents the *plaintiff* with a windfall.

P. 283 (emphasis added). In a recent telephone conversation with a member of the *Michigan Law Review's* Editorial Board, Dean Rosenn acknowledged that the quoted section states the propositions exactly backwards. As the author agreed, and as the book itself supports in its examples of the windfall problem on pages 282-85, conversion at breach-date rates grants a windfall to the *plaintiff* when the currency of account devalues and to the *defendant* when it appreciates in value. Conversely, judgment-date conversion presents a windfall to the *plaintiff* where the currency of the forum devalues and to the *defendant* when it appreciates in value between the date of breach and the date of judgment. Telephone interview with Keith S. Rosenn, Dean of the University of Miami School of Law (Feb. 14, 1983).

9. See, e.g., Friedman, *Using Escalators to Help Fight Inflation*, 90 FORTUNE, July 1974, at 94.

The two concerns may overlap. The economic impact of inflation may be manifested most pointedly within certain legally structured relationships such as long-term contracts, tax obligations, etc. Rosenn's indexation proposal, however, works at all possible levels — providing simple justice between parties, promoting economic rationality by businesses assessing their actual financial situations, and dampening inflation. The book contains more than enough material at each of these levels but it lacks a clear framework for understanding their relation to legal structures. In short, Rosenn gives the reader too much responsibility for drawing out key themes and assumptions.

The book also fails to set out clearly its theoretical assumptions. The author appears to rest much of his understanding of the inflation-related policy problems on a vague theory of political interests. Vested interests in the benefits of inflationary redistribution of wealth are seen to predetermine legal outcomes and choices of judicial doctrines, thus interfering with intellectually desirable solutions. But the interest groups are not identified. Rosenn merely alludes vaguely to debtors without discussing whether or not they are an organized class. His continuing hints that the state itself is the primary beneficiary of inflationary policies give rise to the greatest need for a more explicit exposition of the political theory that supports the legal practices he criticizes. In general, Rosenn seems to operate from a very strong state-society conflict model that can be inferred from many occasional statements and from his overall tone, but his model does not emerge with the clarity it should.

This is an unusually ambitious book. It covers a topic of wide dimensions, includes discussion of a vast body of historical experience, and draws upon extra-legal fields such as economic policy analysis. The portions of the book in which the comparative method is used to full effect are particularly interesting. Other parts of the book, such as those concerning inflation-related doctrinal controversies or indexing policies, may have relatively greater practical or intellectual appeal to others. Clearly the book is not a seamless web. The book will be best appreciated by those who read it selectively.<sup>10</sup>

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10. Rosenn's book has also been reviewed by Barnett, *Book Review*, 68 *A.B.A. J.* 844 (1982).