A INTRODUCTION

1 The law and contemporary problems

The law started to develop when the world was created. The study of law acquired a sense of intellectual and social respectability thousands of years ago. However, in the twentieth century a feeling prevails that the law has not adjusted itself to modern reality. Law as a mechanism of defence of our society is weaker than in the past. Many rules and concepts of law are outdated. Its development is slow and tends to be oriented to the past owing to the rule of precedents which applies in Anglo-Saxon countries. New problems are decided according to precedents solved many years previously when different circumstances prevailed. The development of other social sciences is much more dynamic and rapid than the development of law, even if all social sciences do not keep abreast with practical social and economic developments.

In fact two bodies of law exist. One the traditional body of the law included in precedents, textbooks and older statutes and the second the product of modern legislative activity intended to solve modern social and economic problems. However, modern legal research has not yet succeeded in unifying the two bodies of law through reconciling their different approaches.¹

2 The public policy and crisis problem

A basic coordinated and correlated concept of modern public policy has not yet been formulated by legal theory or social theory in general. The English doctrine of public policy which was basically adopted by the American law was developed in the nineteenth cen-

¹This problem is more fully discussed in E Hirschberg "Gold Value Clauses and Public Policy" Israel Law Review 1970 vol 5 155.
Out of the various traditional and special rules of law, a general concept of emergency law (a distinction being made between ephemeral and permanent) may be evolved. The crisis concept is only a different manifestation of the concept of public policy, interpreted differently during normal times as opposed to emergency periods. Different policies must be adopted in varying circumstances to prevent crises or to mitigate the effects of a crisis, depending on the relative nature of the crisis, and its magnitude and social effect. Orthodox legal theory recognizes only one form of crisis, the military-political, e.g. war. However, from time to time and more frequently in the recent past, the legislator adopts special laws designed to prevent economic, monetary and social crises, or to mitigate their effect.

3 Monetary law defined

Many lawyers treat monetary law as an obscure branch of commercial law. The traditional research classifies monetary law as part of the law of contracts. Monetary law deals with the attitude of the law toward changes in the value of money when the extent of legal rights is ascertained. Monetary terms are necessarily included in statutes, judgments, contracts, wills, and other legal documents. Therefore monetary law, in modern conditions when the value of money is unstable all over the world, should be treated as a branch of modern jurisprudence. Monetary law is one of the foundations of the whole edifice of the existing law. If the value of money were absolutely stable in time and space, monetary law would still have served as one of the foundations of jurisprudence, but it would have had only theoretical significance. However, the value of money has never been absolutely stable in history. There were certain periods of relative stability of the value of money, inter alia, the second part of the nineteenth century in Europe under the gold standard, but instability of the value of money was the rule rather than the exception.

However, since the end of world war I instability of the value of money has assumed modern all-encompassing dimensions, differing in degree if not in kind from the previous manifestations of the same phenomenon.

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20n public policy see Corbin On Contracts vol 6 A s 1375; Percy H Winfield “Public Policy and the English Common Law” 42 Harvard LR 76; Egerton v Brownlow 4 HLC 1. (1853) The case law on this subject is rather prolific and some cases will be discussed in a specific article about to be published.

3See Arthur Nussbaum Money In the Law 2nd ed Brooklyn 1950; FA Mann The Legal Aspects of Money 2nd ed Oxford University Press 1953.
Therefore monetary law at present should be classified as a branch of modern jurisprudence, and an important branch of it. It serves as a test case of the adjustment of law to modern contemporary reality.

As formerly stated, monetary law in its essence is a branch of emergency law. It deals with the crisis problem. However, monetary disequilibria and crises have become a fact of modern life. Therefore monetary law does not deal in fact with extraordinary phenomena, but with ordinary ones; the abnormal has become normal and must be treated accordingly.

B MONETARY PROBLEMS

1 Monetary problems in history

Monetary problems have always been the result of economic and political instability. Solon the Greek is believed to be the first statesman to carry out a devaluation of currency. During the period of fifty emperors in the third century AD in Rome, monetary instability prevailed, as the currency was continually debased. During the middle ages monetary problems and crises often happened. In the USA during the liberation war, continentals, paper money issued by the Continental Congress, almost lost their value. Assignats, paper money issued by the French revolutionary government during the French revolution, lost their value. The import of gold from the New World to Spain and Portugal decreased the value of precious metals and therefore money.

2 Monetary instability since the end of the first world war

During the last fifty years monetary instability has assumed modern dimensions. The economy has become money economy to a much greater degree than formerly. Almost everywhere the internal gold standard has been abandoned. Immediately after the first world war grave monetary crises erupted in Germany, Austria, Russia and other East and Central European countries. During the economic crisis which was triggered by the Wall Street crash in 1929, many competitive devaluations were carried out.

After the second world war monetary instability again started. The reason for this was that among the four objectives of public policy growth, full employment, internal stability of the value of money and external stability of the value of money, the two last-mentioned were treated as the least important.

3 Monetary instability since 1967

Since 1967 the two major reserve currencies of the world have been in difficulties. On 18 November 1967 the pound sterling was

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4See EL Hargreaves Restoring Currency Standards London 1926.
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devaluated. In March 1968 the two-tier system of gold price was established. In August 1971 the free convertibility of the dollar into gold among the Central Banks was temporarily stopped. Several European currencies and the Japanese yen have started to float against the USA dollar and the dollar was devalued in terms of gold. There is still no alternative to the dollar as the reserve currency of the free world. But once the confidence in the dollar has been undermined, it is very difficult to restore it. Therefore it is quite possible that we are heading for a new period of monetary instability.

C ECONOMIC AND SOCIAL CONSIDERATIONS

1 The new functions of government

Since 1945 a new approach to the functions of government has been adopted. We live in a welfare state period. The state has been interfering more actively than formerly in the free functioning of the economy. Modern government has assumed much greater responsibility for the welfare of its citizens. We live in a period of competition between the capitalistic and socialistic systems. The whole modern development since 1945 is overshadowed by Marx and Keynes. We live in a period of economic and social dynamism. As growth and full employment have become an article of faith, money has been consciously used as regulator of economic activity. Money has always served as regulator of economic activity, but the gold standard has functioned as an impersonal moderator. Since the gold standard has been abandoned monetary and fiscal policy have been consciously used to forward the economic and social policy of the government, but the result has been a continuous decrease of the value of money and balance of payments problems.

2 The economic dynamism

Under the capitalistic system money serves as a regulator of economic activity. It serves the same purpose but to a lesser degree under the socialistic system, which however, has more direct means of control at its command. In economic practice an element of friction and maladjustment prevails. Economic dynamism therefore brings changes in the value of money in its wake, even if there is some theoretical disagreement about this phenomenon. Since the last world war economic dynamism has prevailed due to unsatisfied wants and government intervention, and the value of money has decreased almost universally. The difference between the situation in underdeveloped

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6 See for example Paul Einzig Inflation London 1952; and Thorn and Quand The New Inflation NY 1959.
countries and developed countries has been one of degree rather than of kind.

Whenever economic dynamism in a certain country, either on the consumer’s or producer’s side (in this instance it is very widely defined to include consumption, investment and government), is out of step with world developments, the remedy of devaluation or revaluation is resorted to in order to correct balance of payments problems. The remedy again entails a change in the value of money. During the past fifty years several hundred devaluations have been carried out as well as several revaluations, the most recent in 1971.

3 The social dynamism

Two main kinds of inflation are known. The demand pull and the cost push inflation. The cost push inflation is mainly the result of pressure by organized labour for wage increases. Since the end of the second world war, a dynamic process of increase of standard of living on the part of organized labour has been going on. The wage earners want to increase their standards of living and to reach those of the middle class. They have made considerable progress in this direction. No inflation would have occurred if the demands for higher wages had been accompanied by a commensurate increase in productivity. But wages have risen more than the increase of productivity. Under full employment job discipline tends to be relaxed rather than otherwise. New investment intended to increase productivity depends on expectations concerning future consumer’s behaviour. This process on the part of wage earners can be reversed only by an economic crisis, and the cure may be worse than the disease.

4 The social dimension of economic dynamism

As a general rule it may be stated that economic dynamism entails social sacrifices. Economic change causes social change. Not every class benefits to the same degree from economic development and growth. Inflation affects certain classes more than others. The producers benefit from inflation at the expense of the consumers. Current revenues and expenses are affected, but parallel with current revenues, liquid savings and rights are gravely influenced. A distinction, however, must be made between current revenues and expenses and liquid savings. Current revenues and expenses are necessarily affected as a result of changes in the value of money; liquid savings are affected since the law adopts the approach that changes in the value of money are not taken into account when the extent of rights and obligations is ascertained. This phenomenon sometimes assumes a very severe form but it can always be perceived when changes in the value of money occur. Many mortgages, life insurance policies and bonds which were issued
twenty years ago in Israel are nearly valueless unless value clauses have been included in the obligations.

One of the by-products of inflation is that the social equilibrium is affected. Even though everyone tries to protect his relative standing in the community not everybody is able to succeed. The end result is strikes, social friction, social resentment and, in more severe cases, frustration. The world is in a period of change but social trends, which are the result of change, must be controlled and moderated otherwise they will assume unhealthy proportions and forms.

Many modern phenomena, like consumerism and ecology in the United States, are the result of abuses by the producers, but are none-theless generated by social tension and dissatisfaction with economic dynamism.

5 Inflation and resistance to inflation

As during the whole post-war period no economic crisis has occurred, the professional economists and the general public have gained a sense of security. They do not believe that an economic crisis will occur in the future. A general fear of inflation prevails but not one of economic crises.

As long as the fear of inflation motivates public opinion and the fight against inflation is a popular political issue, the government in a democratic country must give way, to a greater or lesser degree, to such pressure, which means that optimal growth is retarded. Moreover, the fear of inflation might motivate public opinion until the country is near the onset of an economic crisis and then it would be too late to adopt corrective measures. Government must therefore cope with the fear of inflation at its roots and moderate inflation, since this phenomenon more or less causes a resistance to it. Inflation may be moderated as concerns savings, through certain reforms in monetary law, and therefore the resistance to inflation may become a less potent force. The monetary law finds itself in a strategic position between inflation and resistance to inflation, but so long as its study is neglected it cannot fulfil its aim to assist modern society in coping with and solving contemporary problems.

D THE PRESENT APPROACH OF THE MONETARY LAW

1 The nominalistic principle

The existing law adopts the nominalistic solution, according to which a fiction of identity of value of monetary units prevails, i.e., a dollar is always a dollar, a pound sterling is always equal to a pound.
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sterling. However, this approach has not prevailed during the whole human history. Up to the XVI century a metallistic approach, developed by the Post Glossators was applied, according to which a debt must be repaid in the same coins having the same quality as those in which it was contracted. Only in the XVII century was the present approach adopted. This approach was adopted because it served the interests of absolute monarchs, who were debasing their coins and making a profit through doing so. The nominalistic approach bears till today an absolutist imprint. This approach pervades the whole modern law. Therefore the modern law has not adjusted itself to the solution of problems caused by changes of the value of money.

2 The justification of the nominalistic solution

According to FA Mann's opinion nominalism is based on the presumed intention of the parties who deal with each other according to the nominal value of money; it neither originates in public policy nor in public law. In our opinion however, nominalism was adopted to protect the public interests. The issuance of currency was the first nationalized industry in history. However, it was nationalized not to protect the interest of the public, but to forward the interests of the sovereign.

Many arguments are adduced in support of the nominalistic principle. First of all, it serves the interests of the government, which is the main debtor in the modern state. Secondly, the modern economy manages its system of credits and debits according to the nominal value of money. Any deviation from the nominalistic solution destroys the equilibrium between rights and obligations and interferes with the proper keeping of balance sheets, profit and loss accounts and other commercial documents.

The nominalistic approach, however, is not just; it is based on a fiction, as the value of a unit of currency before the devaluation is not equal to its value after devaluation.

E THE SUGGESTED REFORM OF THE MONETARY LAW

1 Unit of currency and unit of value

The gravest confusion in modern thinking on this problem was caused, in our opinion, by the approach that the term "dollar" has the

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7See Carolus Molinaeus Tractatus Contractuum et Usurarum 1546.
8See Eckstein Geldschuld und Geldwert Berlin 1932.
9See E Hirschberg Monetary Obligation and the Value of Money in print.
10Mann The Legal Aspect of Money 2nd ed Oxford 1953 66-70.
same connotation when it serves as medium of payment and as an abstract unit of economic value. A banknote is a chattel and all banknotes are always equal to themselves according to their denomination, notwithstanding the date of their issuance, as they are convertible into each other. However, when the term “dollar” appears in a contract its aim is abstract and not concrete. It serves as an abstract measure of value. Therefore, in the eyes of the law, a dollar as unit of value appearing in a contract made in 1950 should not have the same quality as a dollar of 1970. The obligation “to pay a hundred dollars” should be construed not as providing for delivery of a hundred banknotes but as the delivering of a hundred units of economic value, as included in the time of the contract in a hundred dollars.

This is only a problem of theoretical approach, but once this approach is adopted by legal theory the way will be clear for a far-reaching reform of monetary law.

2 The valoristic approach

During the last fifty years a novel approach to the value of money had started to develop. The essence of money is the purchasing power included in it. Therefore, a legal monetary obligation provides for delivery of units of purchasing power and not a nominal sum of units of currency. This is the valoristic approach. But the valoristic approach should be applied only if money loses its relative stability of value. The valoristic approach is more just than the nominalistic approach, but it is much more difficult to enforce in practice.

We believe that the valoristic approach should be adopted to long range obligations, ie obligations for the duration of ten years and more. Such obligations are nowadays severely affected by change of the value of money. They lose a large part of their value from their issuance till their maturity. In such a way savings are negatively affected. Prominent legal writers suggest that a remedy should be found for the problem of long range obligations affected by inflation.

3 Special problems

In Germany during the great inflations in 1923 a partial revaluation of obligations affected by the galloping inflation was carried out. We believe that in certain circumstances partial revaluations of monetary obligations should be carried out, especially in Israel and Latin American Countries.

12See E Hirschberg The Nominalistic Principle Bar Ilan University 1971 Ramat ban Israel.
13aCorbin On Contracts vol 6 s 1360; FA Mann loc cit 70.
We believe that the principle of freedom of contract, *ie* the freedom to include value clauses, should be upheld. Such freedom in the USA is only partial, as gold value clauses have been abrogated, and are in many cases only illusory.

The existing law recognizes several exceptions to the nominalistic solution. In cases of bilateral contracts for performance in the future damages for delayed payment may be claimed. Sometimes equitable reliefs are granted or refused in case of obligations affected by changes of the value of money. In the assessment of damages in cases of breach of contracts and in torts, account is taken up to a certain extent of changes of the value of money.¹⁴ In our opinion such exceptions should be further extended and more firmly based.

4 *A practical medium of reform*

The legislator should appoint a committee of experts to re-study and revise the whole body of monetary law in order to modernize it. The committee should study the basic approaches of monetary law and its operative rules in the light of present day economic and social requirements. In our opinion the whole body of this law does not correspond to modern requirements. But the reform should not be piecemeal. A large amount of preparatory work is necessary.

As long as the legislator does not take the initiative, a considerable body of academic research should be devoted to the basic approaches of monetary law. The monetary law at present is treated as lying on the borderline between law and economics and therefore its study is neglected both by lawyers and economists.

5 *Periodical revisions*

As a matter of policy, periodical revisions of social and economic policy should be carried out. The government should take into account the changes in the value of money which have occurred during the period which has passed since the last revision, and appropriate steps should be adopted to effect at least partial solutions.

F CONCLUSIONS

We believe that the whole monetary law has not adjusted itself to modern social economic conditions and requirements. The monetary law finds itself in a strategic position between inflation and resistance to inflation, but in its present position it does not assist modern society in the solution of contemporary problems. A far-reaching structural

¹⁴All these exceptions are discussed at length in E Hirschberg *The Monetary Obligations and the Value of Money* in print.
reform is necessary. The interest in monetary law which is not prac-
tically dormant should be revived on the academic and practical level.

The monetary law is an additional dimension of the problem of
financing growth and full employment, *i.e.*, of financing progress,
economic and social. It can not be left for long in its present unre-
formed state.

*A treaty, or, to speak more correctly, a negotiation ... is a cunning endeavors to obtain by
peaceful manoeuvre, and the chicanery of Cabinets, those advantages which a nation would
otherwise have wrested by force of arms, *in the same manner as a conscientious highwayman
reforms and becomes a quiet and praiseworthy citizen, contenting himself with cheating his
neighbor out of that property he would formerly have seized with open violence.*

WASHINGTON IRVING