The Nominalistic Principle

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A. Introduction

1. *Introductory.*

The period since the end of World War II is a period of instability of value of money to a higher or lesser degree.

In law a fictional stability of value of money prevails as the law almost all over the world applies the nominalistic solution according to which the value of money is presumed to be stable notwithstanding the objective economic reality.

The justification of the nominalistic solution is a legal theoretical problem to the discussion of which the following chapter is dedicated. However the problem in a period of instability of value of money has enormous practical significance. Changes of value of money through the medium of nominalistic solution cause enormous transference of purchasing power from party to party, from creditors to debtors and from class to class.

In modern legal theory three theoretical approaches prevail on the problem of the extent of monetary obligation, namely nominalism, metallism and valorism.

According to the nominalistic principle the extent of a monetary obligation is defined according to the sum of nominal unit, included in it. The law does not take account of changes of value, neither the external value in its relationships with foreign currencies nor the internal value as measured by its purchasing power. A day after devaluation and on the devaluation day itself, in fact, changes of value of money have taken place, however in the eyes of the law they are disregarded and stability of value of money is presumed.

This solution on the face of it appears to be unjust. Changes of value of money have taken place owing to devaluation and they are almost immediately perceived, when after devaluation a person buys foreign exchange from a bank. But courts of law are adamant, the factual changes of value are disregarded. One of the answers is that a person when making his contract has contracted to receive a certain amount of fungibles and in the same way as the law does not pay attention to the fact that certain commodities or services have increased or decreased in value during the contractual period, the law does not take account of changes of value of money. This answer is unsatisfactory in our opinion and will be further discussed. Money does not resemble commodities and services, and it is something distinct and unique.

2. *The nature and functions of money.*

Money is the ultimate abstraction of economic value. Its nature is not important but its functions are all important. In its nature paper banknotes irredeemable in gold or in silver, seem to be scraps of paper, but they are much more than this. They are exchangeable into all components of national wealth, according to a certain rate, i. e., a price of commodities and services in terms of money. Money is valuable, because it is a medium of exchange and a denomination of economic value. It is distinct and unique because owing to a very long development it has acquired the social function to serve as such. Money is *mensura* and not *mensuratum.* But itself in fact has no stability of value, therefore its proper functioning is impaired. It functions as a standard of economic value but the standard itself is flexible.

3. *The history of nominalism.*

The nominalistic principle was known in ancient Greece and Aristotle has already discussed it. In ancient Rome, Papinian and Paul also refer to it. The Post Glossators developed the distinction between the intrinsic and extrinsic value of money, but they preferred the metallistic approach which was the dominant principle during medieval times.

The change has occured by the time the book of *Carlus Molinaeus* was published *Tractatus contractuum et usurarum* 1546. Molinaeus is regarded today as the father

of modern nominalism (1). His opinions were adopted in France and were recognised by the courts although objections and opposition were encountered (2).

In the German States during the seventeenth century the nominalistic principle was adopted, but even there the development was slow, and during the eighteenth century the circular of Frederic the Great constituted a considerable retreat from this approach.

4. *Nominalism in Anglo–Saxon countries.*

In England the leading case which has prevailed till now is the case of *Gilbert v Brett Case de mixt moneys*(3). Gilbert of London has sold goods to Brett (of Drogheda in Ireland) for 100 pounds sterling in English legal money which should have been paid in Dublin. Before the date of payment Queen Elizabeth I by proclamation abrogated the former currency in Ireland and issued a new depreciated currency. The court held that payment in the depreciated currency was a good discharge of obligation.

This case is an express authority upholding the *nominalistic* principle. The debtor has to pay 100 pounds in any such money as the law provides as amounting to 100 pounds, at the date of payment. Since this authority the English Courts have never deviated from this principle. In England authorities expressly discussing the nominalistic principle are very scarce. Some dicta may be found in English cases (4) in which the basic principle of nominalism was enunciated, namely that the pound is equal to itself, disregarding its international changes of value, but no extensive discussion of this principle is to be found in these cases.

Mann maintains that the nominalistic principle is so deeply rooted in the consciousness of the public that no attempt has ever been made to object to it (5).

In the U.S.A. the nominalistic principle is also deeply rooted in public consciousness and in the decisions of the courts.

1. Tauber, *"Molinaeus Geldschuldlehre"* 1926.

2. Ernst Stampe, *"Zur Entstehung des Nominalismus"* Berlin 1932.

3. *Gilbert v Brett* (1604) Davis 18, 2 State Trials 114.

4. Scrutton L. J. *The Baarn* (No. 1) 1933 P. p. 251, 265; Denning L. J. In *Treseder–Griffin v Cooperative Insurance Co.* Ltd. 1956 2 Q.B. 127 at p.144.

5. Mann pp. 66–70.

The case of *Bates v U.S. (6)* was decided according to the nominalistic principle. Bates acquired securities before the devaluation in the U.S. and sold them after devaluation, making a profit. When capital gains tax was demanded of him, he claimed that his profits only reflected the depreciation of money. The court decided that he had to pay the tax, as the legal value of the dollar had not changed. *Dicta* supporting the nominalistic principle are included in other judgments (7). In contradistinction to the trends of depreciation in the value of money, appreciations in the value of money have sometimes occurred. When this has happened the debtor in a case demanded a decrease of the sum of the debt, but the court rejected this argument; as it had not found any authority which enabled it to do so (8).

Probably the greatest difficulty facing legal research of money is the fact that both from the point of view of principle and authority the nominalistic principle is not paid attention to in Anglo–Saxon countries.

B. Nominalism and metallism

1. Metallism.

During thousands of years metallic currency was in circulation. Only after the first world war, the use of paper currency inconvertible into gold has spread. According to the metallistic theory a unit of account is identical with a certain quantity of standard metal. The gold committee in Great Britain in the year 1810 found that the pound sterling as a measure of value was identical with a certain quantity of gold, and this in accordance with the intention of the legislator (9). This idea was expressed by the British statesman Sir Robert Peel as follows "Pound Sterling is a certain quantity of gold with a stamp which certifies to its weight and its fineness. And Jevons (10) a famous econimist, defined the unit of account as a certain quantity of a certain metal. A standard unit of account is, therefore according to this approach, a certain weight of standard metal.

The metallistic theory is the most important expression of the theory "of money as a commodity" side by side with other commodities a certain commodity exists which functions both as medium of exchange and as a measure of the value of other

6. 108 F (2d) p. 407.

7. Justice Holmes *Die Deutsche Bank Filiale Nurenberg v Humphrey* 272 U.S. 517 "obviously a dollar or a mark may have differente values at different times. But to the law that established it, it is always the same".

8. *Federal Land Bank of Omaha v. Wilmart* 218 Iowa 339.

9. Karl Olivecrona, *"The Problem of the Monetary Unit"*, Stockholm, 1957, p. 82.

10. Jevons, *"Money and the Mechanism of Exchanges"* (23rd ed), 1910 p. 67.

commodities and services. Money is a commodity, as it is equivalent to a certain metal from which it is coined, or which functions as its monetary cover. From the theoretical point of view many difficulties arise. Gold is a commodity, it itself is subject to the rules of supply and demand. If very large new deposits of gold were found, the price of gold and money would immediately decrease. If on the other hand many gold producers would stop production, as many of them had in fact done, the price of gold and money would increase. The precious metals have served as monetary cover mainly because they are scarce and their production is limited. Money is something different than gold and silver, the basic unit of account is abstract and not concrete. The gold standar and the gold cover served only as protection against abuses which in fact were and are made, under the managed currency. The post glossators have distinguished between the intrinsic value of money, i.e. its gold or silver substance and external value of money its exchange value against commodities and services. Even today the gold standard still functions to a limited degree. All world currencies are linked to the dollar, and dollar is still linked to gold (11) even after the establishment of the two tier system of gold price. But today it is understood that the remaining links with the metallistic standard are weak and subject to the discretion of monetary authorities.

In the metallistic theory no distinction is made between a unit of account and means of payment. The debts expressed in units of account express in fact a quantity of metal, as the unit of account is really a certain quantity of metal. A debt of 100 dollars is equivalent to a certain quantity of metal, in this case gold, as dollar is equivalent to a certain quantity of metal. The payment is performed through delivery of a certain sum of means of payment equivalent in value to a certain quantity of metal. Within the private law, during the medieval times, the metallic principle of currency has prevailed, namely a certain quantity of gold or silver was regarded as a subject matter of a debt. Frequently money was weighed when the payment was effected.

In view of this approach it was logical to require from the debtor to return the inner value of money even without express provision to this effect. In a circular of Friedrich the Great the King of Prussia it was provided that this is a basic principle of the law based on "Natural Justice" that every debtor has to return the debt in the same currency in which he has received the loan (12).

But this approach of medieval times was related especially to debts and did not amount to a general monetary theory.

11. Arthur Nussbaum *"Legal status of gold"* American Journal of Comparative Law", vol. 3. p. 360.

12. K. Helfferich *"Money"* traslated by Louis Infield, p. 43.

The dominant principle which prevailed during medieval times has released the creditor from dependency on monetary changes. The sum of the loan was returned to the creditor according to the metallic weight of the money in which the loan has been made.

There were many advantages in the metallic theory, both as a theory in respect of nature of currency and as a principle of private law. It creates an objective automatic measure of value. The control over the quantity of a currency in circulation is in the hands of impersonal element, a quantity of gold and silver, and therefore the possibility of abuse of power by government authorities, through the use of the immense economic power at their disposal, to issue means of payment and to control their quantity is severely limited. Therefore on the one side the danger of depreciation of money was not so great as during the period of managed currency and on the other hand the rule which has prevailed formerly that the sum must be returned in quantity of metal equivalent to the sum of money in which such loan was received, was a just solution between the private parties to the bargain.

The theoretical foundations of the metallic principle are shaky. Money is not a commodity, and it is not identical with gold even under the gold standard. Otherwise the bargain of selling gold for money would be meaningless. Gold would be exchanged for gold. The external value of money, its command over commodities and services is much more important than its intrinsic value. Gold coins when they are in circulation serve the function of money and not of gold pieces. The metallic theory is regarded as outdated and not adjusted to modern times.

2. *Valorism.*

Since Savigny a new approach to the extent of monetary obligation has started to develop. The valoristic approach is intended to replace both nominalism and metalism. During the Great German inflation many writers have started to attack the nominalistic approach. One of the representatives of this school Eckstein (13), has suggested that the valoristic approach should replace nominalism.

The Great German hyperinflation was the test case of the nominalistic principle and it was found wanting. Since then many efforts were made to overcome the difficulties which beset the valoristic approach. Up to a point they were successful at least on the theoretical level.

Valorism is a modern theoretical approach, which regards the extent of monetary obligation not as defined by a nominal sum of units of currency, but as defined by

13. Dr. Felix Eckstein *"Geldshuld und Geldwert"*, Berlin, 1932.

value included in such monetary units. In contradistinction to metalism which emphasises the metallic cover of currency, the valorism stresses the purchasing power of currency. Valorism disregards the metallic cover and takes account of the functional aim of currency, to serve as purchasing power. Both theoretical and practical problems make the application of the valoristic principle more difficult than the nominalistic solution. The valorism does not provide a simple solution to the problem of the extent monetary obligation and this in contradistinction to metallism and nominalism. The valoristic approach has still not been tested in practice, and it does not yet apply in the existing law. No legal system has found it necessary to apply it, but if present trends of changes of value of money continue, it is quite possible that it will be adopted.

However even devaluation, and even devaluation following depreciation by themselves afford no reason for the adoption of the valoristic principle. Only when the changes of value of money are so considerable that it is obvious that the nominalistic principle is unjust, then the nominalistic solution will be deviated from.

In the past, in periods of monetary crises, the metallistic principle has performed valuable service. In Germany during 1919–1924 one of the standards of revaluation was the gold mark. The courts and the legislator performed the revaluation *inter alia* through taking into account the value of debts in terms of gold marks. During the inflation in the American Civil war, in the years 1861–65, gold coins served as the standard of comparison. In the case of *Willard v Taylohe* (14) the American Supreme Court awarded specific performance on condition that the payment should be made in gold coins, as the parties originally contracted on the basis of gold coins, which were then in circulation and served as the only legal tender.

But during the periods mentioned, the connection with gold was intimate.

In our time there is no connection with gold either in theory or in fact, as the traditional gold standard has been abrogated a long time ago. Therefore even if metallistic ideas might perform a valuable service it is very difficult to revive them. It is safe to assume that in future monetary crises almost no use will be made of metallistic ideas, and use will be made of valoristic concepts and solutions.

If the metallic solutions have applied in the private law the problem of the impact of devaluation of currency on private legal obligation would have been easily solved. The change of value of money through the rate of exchange to the dollar and through it to gold would have been given effect to. Therefore the predevaluation debts would have been treated as more valuable. But this solution would not always be just. A party is presumed to be interested in the internal purchasing power, and this does not change in the same way and in the same measure as the

14. 75 U.S. 557.

external purchasing power. In a modern economy many prices do not change at all as the result of devaluation and many in a different rate, from each other and from the general level of prices. Side by side with imported goods and services, domestic goods and services are produced, the prices of which in theory should not change at all. Other commodities and services use imported components, and the added value of local production varies from commodity to commodity and from service to service. Sometimes after devaluation inflation develops induced by the devaluation and the general level of prices appreciates. As the changes are not uniform again a difficulty arises. Money has such an important function in our economy that no substitute to it can be easily found.

3. *Moneta imaginaria.*

In history many have endeavoured to create abstract stable money *"moneta imaginaria"*' namely abstract concept of value which is not influenced by the functions of currency and is intended to serve as a measure of value. An instance of such money is the Hamburgian Marco Banquo (15). In Hamburg a Gyrobank was established. A depositor who has deposited silver in the bank was credited with *"marco banquo"* which was equivalent to 8.43 gram of silver. Credit was extended to the customer in *marco banquo.* Such marco banquo was not used as means of exchange but only as measure of value in claims against the bank, and in claims between parties who have contracted on the basis of such measure of value.

During German inflation when revaluation was carried out, use was made of gold mark which was not in circulation and which has functioned only as abstract measure of value for revaluation. Its value was fixed according to its historic relationship to the dollar and to the depreciated mark (15a).

Many practical difficulties beset the way of such abstract notion of value. Through creation of imaginary money we again take recourse to metallic standards. During the German inflation the rate of exchange was influenced by irrelevant considerations on the bourse such as the prospects of German recovery.

15. Nussbaum, p. 234.

15a. The German revaluation is more fully discussed in my book *"The Nominalistic Principle"*, loc. cit. at pp. 96–127.

C. *The nature of nominalism.*

1. *The definition of the nominalistic principle.*

The nominalistic principle is a principle of the law of obligations which deals with the problem of the extent of a monetary obligation. This principle is usually summarized in the following way: a unit of currency is always equal to itself, a pound is equal to a pound, a dollar is always equal to a dollar, and so on, and neither external changes in the value of currency, namely the rate of exchange in relation to other currencies, nor internal changes of value of money are taken into account. Therefore a legal fiction is adopted; namely a presumption *juris* et de *jure* in respect of the identity of value of units of currency at different periods of time.

The nominalistic principle was defined in three possible ways (16).

1. Fictitiously a sum of units of currency has the same value as the same amount of gold coins.

2. According to the second approach it is presumed fictitiously that the value of currency does not change.

3. According to the third approach the value of money is not taken into account when the extent of monetary obligation is ascertained.

The third approach is generally accepted and this means that the value of money is not relevant so that payment of nominal sum is sufficient to discharge the debt.

There is a great deal of ignorance and misunderstanding concerning the nature of the nominalistic principle. Some even doubt whether it is a legal principle. Of course it is a legal principle because it is enforced in practice by courts of law when they ascertain the extent of monetary obligations. So long as the concept of "the rule of law" applies the nominalistic principle is a legal rule, otherwise being only a concept of political philosophy, courts of law would not have been entitled to apply it in practice.

The nominalistic principle has enormous practical importance in an era of instability of value of money. However, it still has not been discovered by contemporary legal and economic theoretical literature. The reason for this is disciplinary, monetary law lies on the borderline between law and economics. Therefore it is neglected by both lawyers and economists.

16. Dr. Felix Eckstein, *"Geldschuld und Geldwert"*, Berlin, 1932. p. 90.

The nominalistic principle has not yet been reformed by the legislator, notwithstanding that instability of value of money is the rule rather than the exception during the last fifty five years. The monetary policies of the governments during this period were often called by critics "an institutionalisation of expediency". As long range effects of such policies are not taken into account, the nominalistic principle and its effects has not yet become an object of legislative attention.

The legal sources of the nominalistic principle

2. Only in a few countries has the nominalistic principle originated in legislation, as in France whare it is adopted by section 1895 of the Code Napoleon. In Anglo Saxon countries the principle is part of the common law, as decided by such cases as *Gilbert v Brett (17).*

Mann (18) express the view that this principle formes part of the law of contract. According to the majority opinion of legal writers this principle belongs to the general law of obligations. It is *jus dispositivum* as the parties can contract out of it through the provision of value clauses. Mann is of opinion that it does not originate in public law nor in public policy, but is a principle of purely private law (19).

According to Mann the binding effect of the nominalistic principle originated in the intention of the parties. In the majority of cases the parties do not expect changes in the value of money. In other cases, even if they take such a possibility into account, it does not influence them to such a degree as to cause them to protect themselves through the inclusion of value clauses. The law does not permit the implying of terms which were not included or which were included but which were not clearly expressed. Therefore the parties are presumed to contract according to the nominal value of money (20). Professor Levontin (21) is of opinion that the doctrine is not materially different from the legal principles which regulate the supply of commodities and services. The creditor receives the same thing as was promised him. In the same way that a change of value of a commodity or a service does not affect the extent of an obligation, so an obligation to pay a sum of money (as chattels) is not affected by changes in the value of money during the contractual period. This opinion is not convincing. Money does not resemble commodities and services. It is abstract and not concrete. A banknote by itself when treated as a

17. (1604) Davis 18, 2 State Trials 114.

18. Mann, p. 63–64.

19.Ibid. p. 69.

20. Mann, p. 66.

21. Professor A. V. Levontin "Foreign money Loans; the rate of conversion", Israel law Review, vol. I. no. 2, pp.250, 256.

chattel is worthless, only when treated as money, it acquires value. Its value fluctuates, but it can be found out what its value is when we take into account the rate of exchange or the general level of prices in a certain economy. Money as a measure of value should not fluctuate it should be constant and therefore the general rules applying to chattels should not apply to money.

3. *The former foundations of the nominalistic principle.*

The state was interested in upholding the nominalistic principle mainly on account of fiscal considerations, i.e. the state used to discharge its obligations, received in good money, in depreciated money. But in such a way damage was caused only to its own creditors, a fact which would have deterred them from making a loan of money to the State. Therefore the state was interested that its own creditors should be able to discharge their obligations to their creditors in the same depreciated money as that in which the state discharged its debts to them and this was the reason for upholding the nominalistic principle (22).

The analysis of ancient authorities relating to the nominalistic principle like Molinaeus book and the case of *Gilbert v Brett*(23) leads us to the conclusion that the nominalistic principle had an absolute foundation based on the royal prerogative. The sovereign had a prerogative to coin money, on which his emblem was inscribed. This emblem endowed the coin with the quality of being the sovereign's property and entitled him to change the value of the money. The prerogative was understood in the same sense as ownership over the coin and absolute rule over it.

Pothier (24) maintained that coins belong to private citizens only as signs of th e value that the sovereign has provided that they should embody, therefore, if the sovereign has reached the conclusion that other coins should reflect the value of commodities, private persons are not entitled to keep the former coins. This was the approach which pervaded the monetary thought of the first nominalists and which guided the judges in the *Gilbert v Brett* case.

Some remnants of this approach may be percieved in the comparatively modern case of *Emperor* of *Austria* v *Louis* Kossuth (25). Louis Kossuth, a Hungarian refugee who has been the leader of Hungarian rebels during the revolution of 1848, had coined a new currency, which purported to be the Hungarian currency. The

22. Eckstein l. c. p. 13.

23. (1604) Davis 18, 2 State Trials 114.

24. *"Traité du contract de Pret de Consomption".*

25. *The Emperor of Austria v Day and Kossuth* 45 E. R. p. 869. and see also *Banco de Portugal v Waterlow and sons* (1932). A. 6 p. 452.

Emperor of Austria asked for an injunction against the coining of such currency and the court issued such injunction as asked. The Court pointed out that the Emperor of Austria made a profit out of the coining of currency and the issuing of a new currency into circulation would injure the Emperor's property rights.

4. *The modern foundation of the nominalistic principle.*

The theoretical foundations of the nominalistic principle are based on the prerogative of the State over currency. The currency is the creation of the law, arising out of the legislative activity of the State. The parties contract on the basis of the value of money as fixed by the law namely on the basis of the nominal value. From this point of view the theory of F.G.Knapp (26) is the theoretical foundation of modern nominalism. The State has the prerogative over money. This fact enables it to fix the amount of currency in circulation, its relationship to foreign currencies, and its relationship toward gold, as it deems fit. If a party contracts on the basis of a national currency, he contracts on the basis of the value fixed from time to time by the State.

This notion was the *ratio decidendi* of the decision in a leading case decided by the American Supreme Court (27) dealing with the legality of "legal tender". It has been said in it that a contract in respect of payment of money suffers from a *congenital infirmity,* as it is subject to the prerogative of Government authorities in respect of currency, and the obligations of the parties are subject to this prerogative (28). This view was severely criticised by the minority. Opinions appear in this judgment *inter alia* by Mr Justice Field, who explained that no substantial difference exists between contracts in respect of payment of money and contracts for the supply of commodities or contracts dealing with the purchase of land, and just as the Government does not interfere with such contracts it should not interfere with contracts in respect of the payment of money. The modern foundations of the nominalistic principle were developed in the nineteenth centruy when relative stability of the value of money has prevailed, and when the major countries were on the gold standard. There fore the nominalistic approach did not encounter serious opposition and resistance. Nowadays the circumstances have changed.

5. *The interests of the State in upholding the nominalistic principle.*

The view is widespread that the government is interested in upholding the nominalistic principle because any deviation from it has in itself an inflationary impact.

26. Georg Friedrich Knapp *"The State Theory of Money"* translated by Louis Infield, New York, 1924, discussed more fully in E. Hirschberg *"The Nominalistic Principle"* loc. cit. p. 15–27.

27. *Knox y Lee, Parker v Davies,* 79 U.S. 457.

28. Per Mr Justice Strong at p. 548.

But modern economic research has reached the conclusion that this argument is not well founded. Inflation is caused according to the monetary school of thought through the omissions or acts of commission of the Government through the increase of means of payment in circulation, either through the printing of banknotes and putting them into circulation or through the increase of banking credits to the public (29). Of course governments are not solely responsible for inflation, the contemporary economic literature is preoçcupied with the problem of velocity of circulation, which itself is one of the famous elements within the definition of the *"quantity theory of money".* It must be however pointed out that inflation occurs either as result of *pressure from above* moving from the side of the government and the national bank, or as the result of pressure from below i.e. the public which either increases its demand, the so called demand pull, for goods and services, or is pressuring for increase of wages and salaries, the so called cost push. In theory however the modern government is always able to counteract such pressure from below, by the adoption of appropriate policies. Such policies are often not adopted in practice for many reasons, which however have a bearing *on the will* of the government and not on *its ability* to adopt effective steps to counteract inflation, which usually once adopted are effective after a certain period of time.

A deviation from the nominalistic principle means only that means of payment are transferred from private persons to other private persons, but the total amount of means of payment does not thereby increase (30).

Government authorities may be interested in upholding the nominalistic principle for reasons of taxation, as the whole system of the revenues and expenses of the government is based on this principle, and any deviation from this principle may disrupt the whole system of fiscal management. But sometimes during hyperinflation the state organizes the system of taxation on a stable value basis, as happened in Germany during the Great inflation.

Frequently the government has a special reason to uphold the nominalistic principle, on occount of the national debt, as inflation decreases the national debt. An American writer (31) has maintained that the American inflation during the years 1939 to 1952 obliterated debts to the sum of 500 billion dollars and in consequence of this, purchasing power was transferred from households as nett creditors to the Federal Government as nett debtor.

29. G. L. Back, *Inflation* 1958, Irving Fisher *"Stable Money"* 1934.

30. Dawson and Coper *"Inflation in the North"* 33 Michigan L. R. p. 852.

31. G. L. Bach *"Inflation"* op. cit. p.28.

But the main interest of a modern State in upholding the nominalistic principle is based on considerations of the prestige of the national currency. Deviation from the nominalistic principle means admission in the judicial institutions of the State that the national currency has decreased in value.

All the reasons mentioned are weighty arguments for upholding the nominalistic principle. However these arguments are based on the public law approach and not on the private law approach. Within the field of monetary law the State is all powerful and it does not need assistance from the private law. On the contrary the dangers of abuse of power by government authorities in this field are so great, that checks and balances should be imposed to protect private rights.

6. *The legal tender legislation.*

One of the most frequent forms of interference of the State in the operation of nominalistic principle is the "legal tender" legislation. During the American Civil War in the years 1861–65 "Legal Tender" acts were enacted to strengthen the position of inconvertible paper money, which was issued by the Federal Government for financing the war. In this period an attempt was made to avoid this legislation, as being unconstitutional, but the attempt failed and the American Supreme Court upheld the legality of this legislation.

During the Great German inflation legal tender legislation was the last obstacle preventing deviation from the nominalistic principle till the German Supreme Court found that in the conflict between the principles of *Bona Fides* (Treu and Glauben) and legal tender legislation the principles of *Bona Fides* should be preferred (32).

In Israel according to section 3 of the Currency Ordinance (33) Israeli banknotes are legal tender for payment of the sum fixed in them for payment of every sum and for every purpose.

The legal tender laws do not purport to replace the nominalistic principle. Such enactments are technical enactments which do not define the extent of monetary obligations, but deal with the *modus* of discharge of debts, namely they impose a duty to receive the paper money at its face value.

The main reason for the enactment of the legal tender statutes, when gold coins were in circulation, has been to accord equal treatment to gold coins and inconvertible paper money. In our times, when gold coins are no longer in circulation, the importance of legal tender laws in much more limited and they may be deviated

32. R. G. Z. 107, 78; 28.11.1923.

33. O. G. 15, 1948 Supplement 1 p. 39.

from, as they do not deal with the extent of the monetary obligation but only with the problem of how the debt may be discharged after it was fixed.

7. *The principle of public policy.*

In the light of the many public interests in upholding the nominalistic principle, the problem arises, whether, instead of basing the principle on the intention of the parties, it may be based on the principle of public policy. Such attempts have been made with relation to the legality and validity of value clauses. Denning Lord Justicie, as he then was, has developed a new public policy rule in his judgment in *Treseder Griffin* (34) case. In this case he has held a gold value clause to be invalid and he has distinguished between this case and the *Feist* (35) case, in which a gold clause was treated as valid maintaining that *Feist* case was a case of international gold clause, and in *Treseder Griffin* (34) case it was a domestic gold clause. But a rule was already adopted that no new heads of public policy may be evolved beyond those already developed in decided causes (36).

The English courts are of opinion that the rules of public policy should not serve as guidelines for new decisions (37). In their opinion it is the function of the legislator to prescribe the rules of public policy, and the function of the court is to explain the law, and not to speculate what the requirements of public policy are.

Such a restrictive approach toward public policy (38) is incompatible with any attempt to base the nominalistic principle on it, as the common law has not evolved any independent principle of public policy supporting the validity of the nominalistic principle. The nominalistic principle is so important in practice that any attempt to validate it through a public policy doctrine must fail. It would be an attempt to enter through a back door when the front gate is completely opened for the legislator. The legislator has not intervened so far, but he can intervene whenever he deems it necessary. He probably will not encounter much resistance and opposition at least so long as a serious monetary crisis has not occured.

The public policy argument is a two edged sword. Many arguments can be adduced for the upholding of the nominalistic principle and many arguments can be adduced

34. *Tresreder Griffin v Cooperative Insurance Co. Ltd.* (1956). 2 Q.B. 127 at p. 149.

35. (1934) A. C. p. 161.

36. *Janson v Driefontein Mines Ltd.* (1902) A. C. p. 484 per Lord Haldane p. 491.

37. *Egerton v Earl Brownlow* (1853) 4 H.L.C. p. 123.

38. See *Thorsten Nordenfelt and the Maxim Nordenfeld Guns and Ammunition Co Ltd.* (1894) A.C. p. 535. *Continental Tyre and Rubber Co (Great Britain) Ltd v Daimler Co Ltd.* (1915). K.B. p. 893.

against it. The changes of value of money cause many economic and social disturbances and lead sometimes during hyperinflations to social upheavals. The middle classes are especially affected, and they are the most stable parts of the body politic. Savings are affected, as savings lose their value. The nominalistic solution, on the face of it is unjust. It creates a fiction and fictions especially when they are palpably untrue should not be tolerated.

D. *The theoretical foundations of nominalism*

1. *The intention of the parties.*

In Mann's opinion, which reflects the accepted view, the parties contract on the basis of the nominal value of money. The contract to pay a hundred pounds is an obligation through which a party undertakes to pay on the date of payment hundred pounds, and there is a meeting of minds, mutual understanding, that this is the proper meaning of the content of the promise to pay a hundred pounds. Does this opinion reflect the true intent of the parties?

We are testing the theoretical foundations of nominalism from the theoretical point of view. The accepted test of the law is the opinion of the *"reasonable man"*. Is the *reasonable man* in our time interested in a nominal sum of currency, or in the purchasing power included in such sum at the malking of the contract? The reasonable man is not a *"homo economicus"*, however he deals and copes in his daily life with economic problems in order to maintain his family and himself and he is interested in such problems. Being reasonable he is interested in preserving a certain standard of living, but for this he needs income, savings, or at least credit. All these concepts are expressed in terms of monetary units which represent purchasing power. The reasonable man is more interested in quality, units of purchasing power than in quantity, nominal sum of money. The nominal sum of currency is a *means for achieving an end not the end itself.*

This point is deduced empirically out of participating in litigation concerning monetary problems, advising on such problems and other means of testing public opinion. No formal field studies have been carried out on this problem, but I believe that the result would not have been different, once they were carried out. The public attitude toward devaluation and inflation reflects the same attitude. *In Mann's opinion the nominalistic solution is deduced from the presumed intention of the parties, in our opinion it has been imposed from above by monetary law.* In fact historical researches of the origins of nominalism prove that the nominalistic solution has been imposed at first from above by Kings and Princes who were interested in strengthening their control of coinage which was the first nationalised industry, but it was nationalised not to serve the interests of the public, but of the rulers. If the parties contract on the basis of the nominal value of money they do so

because this is the accepted legal solution and they have no other choice short of resorting to barter. However, the technical means, the contracting in terms of currency *defeats the real intentions of the parties.* Nominal units of currency are more efficient means of calculation and accounting, than units of purchasing power, but in our days through the use of indexes especially cost of living indexes purchasing power can be measured and even the courts apply such standards of value in litigation concerning value clauses.

The value of money has never been perfectly stable in history but in the modern period starting from the end of World War One changes of value are the rule rather than the exception. In our times through resorting to mass media of communication public opinion is keenly aware of monetary problems and crises, and there is probably no other so popular and absorbing topic of conversation in social gatherings, like the fact or the opinion that money is losing its value. The spread and popularization of banking business has made many people familiar with practical problems of money.

From the practical point of view the continued rule of the nominalistic principle may be justified by considerations of balance of convenience, from the theoretical point of view the assumption that this solution reflects the intentions of the parties is not justified.

In testing the theoretical foundations of nominalism resort must be made to abnormal circumstances like the Israeli reality during twenty five years of the existence of State of Israel. However, the abnormal has become normal all over the world, and the differences are of degree not of kind. Only in abnormal circumstances the real intentions of the parties come to the foreground, because in normal circumstances when money is relatively stable the parties are indifferent to legal niceties.

One of the arguments of the followers of nominalism is that the creditor is not affected by changes of purchasing power of money; he is always able to discharge his own debts according to the nominal value of currency, therefore payment in depreciated currency does not cause him any damage and the same applies to the creditor of the creditor.

This argument is artificial. It restricts the creditor to only one of the possible uses of money, even if in practice certain mitigation is made in his favour. There are many people who are nett creditors and some who are nett debtors.

2. *Unit of Account and Means of Payment.*

Even under the nominalistic standard the legal and economic literature has reached the conclusion that two different concepts are included within the concept of money:

a) A concept of an ideal unit of account like the dollar or pound sterling (39).

b) Concrete means of payment like banknotes and coins in which the ideal unit is incorporated.

When the ordinary means of payment are in fact cheques no means of payment are transferred from party to party. What is transferred are book credits in commercial banks.

This distinction between abstract units of account and concrete means of payment may assist us in the solution of our problem. Parties contract in terms of units of account. Nussbaum (40) points out that dollar is a name of value having the same connotation in the same period of time in the same society. The term unit of account therefore is only as intellectual and psychological abstraction. The unit of account serves first of all as a measure of value, the function of concrete means of payment is to serve as means of exchange.

The confusion in legal thought arises out of formal construction of the promise *"to pay a hundred pounds"*. To pay a hundred pounds means to deliver chattels in which a hundred pounds as units of account are incorporated. But this promise may be construed differently *to deliver such means of payment having the value in terms of purchasing power as hundred pounds' had at the time of the contract.*

Starting from the premise that the formal construction of the obligation is the right one, a similarity was found between rules regulating monetary obligations and commodities. In the same way as the party is obliged to deliver the quantity of commodity promised having the same quality, notwithstanding changes of value of the commodity during the contractual period the party has to pay i.e. deliver nominal means of payment at the time fixed for performance notwithstanding changes of value of money. However even from this point of view a difficulty arises. The party is obliged to deliver the quantity of commodity promised *having the same quality*, but has not money a dimension of quality? It has this dimension but it is external to it in terms of command over commodities and services. Is this external quality rellevant? Yes, because means of payment under the nominalistic approach have no inner value and no other use but as assuring command over other

39. Karl Olivecrona *"The problem of the monetary unit"* op. cit.

40. Nussbaum p. 40.

services and commodities. Money is not desired for its own sake but for the sake of what it is exchangeable into.

Monetary terms in contracts for *future performance* serve only as units of account. Through the use of units of account a valuation of the nonmonetary obligation is effected. As money serves as standard of value a bilateral contract does not call for exchange of commodity for commodity, but a standard of valuation is incorporated in the contract and the value of nonmonetary obligations is measured in terms of units of account. In contracts of loan the contract providés for return of value in consideration of value received.

In contract for immediate performance from the theoretical point of view the position is the same, but the distinction between units of account and means of payment is immaterial. Immediately after valuation performance through delivery of means of payment is effected.

Through the distinction between the two concepts, units of account and means of payment, we are able to give effect to the valoristic approach. Units of accounts function only as standard of value in contract. Their function is abstract and not concrete. Units of currency i.e. means of payment function as medium of exchange and both terms must not be necessarily synonymous.

The parties have incorporated within the contract the value of money which existed when the contract was made to define the extent of their rights and obligations. When the contract should have been performed the value of the nonmonetary obligation must again be ascertained to give effect to the original intention of the parties to receive value.

After the American Civil War 1861–65 the Southern currency has become completely valueless. The courts were compelled to carry out revaluation. The often adopted, according to statutes enacted by various states, the value of consideration on the date of the making of the contract as standard of revaluation.

In the leading cases *Thorington* v *Smith* (40) and *Effinger* v *Kenney* (41) the Supreme Court of United States has decided that the appropriate date for assessment of the extent of an obligation is the date of the contract between the parties. In fact the Supreme Court has adopted the distinction between units of account and means of payment in the circumstances of the Southern inflation.

The parties according to this approach enjoy supremacy over the bargain made by them and the approach that they have accepted the supremacy of an extraneous

40. 8 Wall (1868) 75 U.S. 1.

41. (1885) 115 U.S. 566.

power, namely the State over the bargain through its control over currency is fallacious.

The function of the State is to supply a service to the parties through providing for them a stable standard of valuation and if the standard is itself not stable it must not be blindly followed.

3. *The Functions of Money.*

The value of money lies in the fact that its supply is limited and the act of issuing currency by a Central Bank confers on currency its value (42). Money is distinct from commodities and services as it has no inherent value (all this according to the nominalistic approach) its only use is in serving as medium of exchange and a standard of valuation and comparison. In our society money affords an unlimited command over commodities and services because they are freely exchangeable into it.

The value of money lies in its economic function and not in its nature, therefore its value is external to it, it has representative quality, its value lies in what it reflects.

If we put all the national assets of a certain State on one side of a balance and on the other side the total amount of means of payment including demand deposits in commercial banks and excluding near moneys, *assuming velocity of circulation to be constant,* the result will reflect the value of money (In economic theory the famous equation MV PT is known as the quantity theory of money).

But the value of money changes according to the rules of supply and demand in the same way as the value of other commodities and services. Therefore a unit of currency has no absolute independent value.

From this analysis we deduce two important conclusions. One, money is not similar to commodities and services, it is something distinct and unique, and legal rules developed in the past relating to commodities and services such as rules relating to *risk taking* have no application to money from the theoretical point of view. Many legal approaches and concepts relating to money were developed during the time when the metallistic theory of money has prevailed which has treated money as a commodity. As the circumstances have changed, and the traditional Gold Standard has been abandoned, and units of currency are not coined from precious metals, nor are convertible into them, the traditional legal concepts and approaches to money must be revised. The effect of change must be taken into account.

Secondly, a unit of currency is always exchangeable into another unit of currency notwithstanding its time of issuance so long as it has not been recalled from circulation, but units of account appearing in contracts are abstract and serve only the aim of valuation, therefore units of account must not and should not be treated as having constancy of value because a term pound included in contract of 1950 has not the same meaning and the same economic function and value as a pound of 1972. Unit of account is not synonymous with a unit of currency even if in the last stage performance is effected through the delivery of units of currency.

42. *Banco de Portugal v Waterlow & Sons* Ltd (1932) A.C. p. 452.

4. *The Changes of Value of Money as an Act of God in Relation to Private Parties.*

One of the premises on which the nominalistic approach is based is that the parties accept the nominalistic solution because otherwise they would have contracted on the basis of value clauses *Out of this approach a general theory of risk taking has been developed.* The parties know that the value of money is not in fact stable, and if they contract in terms of money they must be taken to have assumed the risk of changes of value of money. The mere fact of living entails assumption of risks, however does it mean that all risks are necessary and unavoidable? Legal theory has developed the distinction between ordinary commercial risks and *Acts of God.* The party assumes such risks which are in his actual or presumed contemplation. The party must be an expert in his trade or profession and must contemplate ordinary risks entailed in its pursuit intelligently. A bargain may entail a profit or a loss and this is an ordinary incidence of economic activity.

If we start from the point of view that money is distinct from commodities and services we reach the conclusion that money as standard of value *should be stable,* there cannot be intelligent risk taking concerning the length of a meter, and the rules of *caveat emptor* do not apply when measurement is possible, and is in fact carried out. This is only a theoretical assumption however it may provide a guideline to the solution of practical problems.

People bargain in terms of money because they have no other practical choice. The problem of including value clauses entails many practical and theoretical difficulties. In many countries freedom of contract is severely restricted, and gold value clauses have been often abrogated. Our economy is a money economy based on mass production, resort to barter is impractical.

In our opinion changes of value of money must be treated as *Act of God* from the point of view of private parties. They are the result of high policy, of changes of the approaches of mass psychology, of social and economic trends. A distinction between great problems and small problems has been developed. Great problems are those problems which influence the society as a whole, small problems are the ordinary incidents of everyday life. People know something about great problems, they often have a small part in their creation, they may influence their solution as voters. However, their attitude to them is unintelligent and superficial, because the parties intended to maintain a certain relationship between the obligations of the parties and a certain equilibrium between them. Such an *equilibrium* was destroyed by inflation and therefore the routine answer of the nominalistic principle did not provide an adequate solution to the pressing problems of this period.

Such an analysis led the German writers to emphasize the nature of the bargain contracted by the parties and their aim to receive an economic value, one from the other, which bears a certain proportion to the economic value promised by the other party. Their conclusion was that the severe depreciation in the value of money had destroyed the equilibrium between the obligations of the parties to the bargain (41) to a most extreme degree. The aim of the parties had never been to make gifts one to the other, as was the final result. The parties could not have foreseen before the inflation such drastic changes in the value of money as had occured, or to foresee all the developments like the outbreak of the first World War, the defeat of Germany, demands for heavy reparations, the conquest of the Ruhr by the French, which had brought about and contributed to the inflation which then ensued. The conclusion of these writers was that the nominalistic solution should be deviated from in such circumstances, since this principle did not correspond to the requirements of the period and imposed on the parties risks beyond the risks undertaken by them, when the contract was made.

2. *The Principle of Treu und Glauben.*

Within section 242 of the German Civil Code, which deals with the performance of contracts, provision was included which required that the parties deal with each other honestly and truthfully. The legal writers, and afterwards the courts, reached the conclusion that the application of the nominalistic solution was incompatible with the principle of *Treu und Glauben.* Such an approach adopted by writers and afterwards by the courts was a typical approach of private law which emphasizes the obligation of the parties, *inter se,* and not the public and political aspects of the problem. The payment of a nominal sum cannot be regarded as a final discharge of the obligation between the parties *inter se* as this was not the intention of the parties (42). The leading case in the German Supreme Court on 28th November 1923 (43), in relation to the revaluation of mortgages was based on the principle of *Treu und Glauben* and the court decided that when a conflict arose between it and

41. Henle *Mark gleich Mark* 1923 J.W. 109; Hollander *Geldentwertung und Rechtsprechung.* J.W. 1923 p. 111; Markuse *Inwieweit rechnet das Geld heute noch zu vertretbaren Sachen,* J.W. 1923, p. 451.

42. Saar "Aufwerten" 1925 J.W. p. 588. Max Oppenheim *"Zwei folgen der Aequivalenztheorie"* D.J.Z. 1923 p. 427; Keller *"Geldentwertung und Schuldentilgung"* D.J.Z. 1923 p. 290; Abraham *"Rechtsnot"* D.J.Z. 1925 p. 693.

43. R.G.Z. 107, 78.

legal tender laws the principle of *Treu und Glauben* prevailed. The main problem was whether this obscure provision of the German Civil Code has justified this revaluation movement which had very important consequences. The answer was positive even if objections from many circles were voiced. In the opinion of many it was self evident that the parties to a contract did not foresee and could not foresee the sweeping and catastrophal inflation. Would they have foreseen it they would have agreed to revaluation. In fact the *Treu und Glauben* maxim was an equitable principle in substance and use was made of it when the circumstances had so required.

3. *Unjust Enrichment.*

One of the objections to the nominalistic solutions was based on the notion of unjust enrichment. Even if we assume that the nominalistic solution is justified, owing to considerations of public policy, it causes an immense transfer of purchasing power between the parties to a private transaction, a fact which causes the impoverishment of one party and the enrichment of the other party. As the German writers regarded this enrichment as unjustified they therefore regarded it as a case of unjust enrichment in law (44), notwithstanding the fact that, so long as the nominalistic principle prevailed, such enrichment was according to the law, namely in accordance with the nominalistic principle.

The meaning of this argument was that such enrichment was incompatible with the intentions of the parties to the bargain and incompatible with the accepted principles in respect of the acceptance of risks and against the principle of justice and equity. Therefore the nominalistic principle was regarded as "illegal" by the German writers.

Another opinion in respect of the nature of the bargain between the parties is that, even if the nominalistic principle, on account of public considerations, allows the party to retain the advantages accruing to him through the operation of inflation the considerations of justice *"Treu und Glauben"* do not allow him to retain such advantage and therefore the debt should be justly revalued.

All these considerations brought about the German revaluation which was the most extensive deviation in modern times from the nominalistic principle.

44. Dr. Karl Wahle, *"Das Valorisationsproblem in der Gesetzgebung und Rechtsprechung Mitteleuropas"* op. cit. Paul Gertman *"Die Aufwertungsfrage bei Geldforderungen, Hypotheken und Anleihen"* Berlin 1924, Dr. Julius Roller *"Geldentwertung, Rechtsprechung und Gesetzgebung"*, Wien 1924.

F. *The Main Social Objections to the Nominalistic Solution.*

1. *The Debtors and the Creditors.*

As the loss of value of money is not only as individual phenomenon but a social phenomenon because whole classes of individual find themselves in the same position, social effects of and attitudes to the nominalistic solution must be taken into account. Many social and political thinkers in the previous generation have welcomed inflation and the nominalistic solution as benefiting debtors at the expense of creditors. This attitude originated in the enmity to *rentiers.* Those who live by their exertions should benefit at the expense of the social parasites, who live from their savings and accrued liquid wealth. In fact in our society the creditors are the great mass of the population, the households, everybody except the very young have a certain amount of savings which are invested in a liquid form. The debtors are especially the corporations and the Government. The savings take the form of institutional savings like life insurance and participation in pension plans or individual form like bonds, mortages, fixed deposits in savings and commercial banks. Everybody saves up to a certain extent and rather limited extent to provide for emergencies, to finance extraordinary expenditures, to provide for old age, to finance college education, to buy a house for himself or his daughter in Israel and so on. Savings assure social and occupational mobility either from job to job or from place to place, provide an opportunity to overcome crises like illnesses and other temporary disabilities and provide a welcome cushion for the whole social and economic system.

Inflations and devaluations have an *income effect* and *wealth effect.* Wealth effect should be rather termed *savings effect* as the number of idle wealthy who are not voluntarily gainfully employed is small, in contradistinction to retired elderly persons. From the point of view of law this *savings effect* and such income effect which is prospectively fixed by long term contracts is relevant. The law cannot influence prospective wage or salary fixing or other price fixing after a monetary event has taken place, but through the nominalistic solution it has a very important bearing on savings through monetary obligations in contradistinction to outright ownership of objects having economic value like houses and other durable consumers goods and other forms of fixed wealth. The nominalistic solution has a very important bearing on institutional saving, on social security and on incomes fixed in monetary terms by law and statute.

2. *The Unjust Impoverishment.*

As formerly explained inflation, devaluation through the medium of the nominalistic solution cause enrichment and impoverishment of private parties. In economic

literature inflation is often treated as a form of indirect tax (45). However the benefit of a tax accrues to the government, part of the benefits of inflation accrue to other private parties, who often are stronger economically than those who lose by it.

In litigation two kinds of attitudes can be perceived. One, *the logical one,* found especially among professional risk takers, based on reasoning, on logical evaluation of prospects of litigation taking account of delays, loss of interest and the risk of changes of value of money. The second *emotional,* treating the right in issue as an extension of personality found especially among those whose occupation and employment does not entail personal risk taking. This attitude entails fighting at all costs and treating an adverse judgment as a denial of justice, a personal misfortune. The ordinary saver, whose savings are adversely affected by changes of value of money, adopts the emotional attitude. A wrong has been done to him, he is unjustly a loser. A saver especially if his savings were invested in fixed interest obligations, had not treated his savings as an object of commercial intercourse, the savings were his, his hard gained money, an extension of his personality and if they loose part of their value, owing to loss of value of money, a personal wrong han been inflicted upon him *causing resentment.* As this personal resentment is combined with other resentments of similar people who find themselves in the same position, a destructive emotional force originates. Against whom this destructive force is directed? Sometimes against the State itself like the resentment of many houseowners in Israel, who were adversely affected by rent restriction originally embodied in a statute enacted thirty years ago adopting the nominalistic standard of rents, even if several times partially revalued since this time. Sometimes against the system like in Germany during the Great Inflation 1920–24, and in many countries in Latin America in the modern period. Of course the majority of the resentful being middle aged do not erect barricades, but their sons do in a later period, being influenced directly or indirectly by the resentment and frustration of their parents during their youth. Many historians believe that the German Great Inflation paved the way for Hitler and all that followed.

But usually the resentment is directed against inflation and devaluation and loss of value of money. This force is a potent political force nowadays influencing the political establishment.

It must be borne in mind that emotional approaches are based upon and organized around intellectual concepts. The problem is *who is responsible* and in extreme circumstances *"who is the enemy"?* In ordinary circumstances a large part of the responsibility must be simply borne by the present legal solution which has not been at least partly reformed and adjusted to the modern requirements. If the emotional forces generated by the present solution would have been directed

45. Amotz Morag *"On Taxes and Inflation",* New York 1964.

toward reform of monetary law, at least partial reform, they would have served constructive purpose but otherwise they may be directed against useful institutions of our society, and cause crises and combine themselves with other destructive forces working against the established order. A society which is in a state of emotional and intellectual flux, like our modern society, cannot allow itself luxuries adopting outdated approaches, and not making the effort to adjust them to modern requirements.

It must be borne in mind that those who gain by the present solution are not particularly grateful to our society for awarding them inflation gains, but those who loose are resentful and often very much so. Many destructive forces are generated in modern society. They are the result of ideological approaches combined with emotional dissatisfaction. They are the result of breakdown of traditional values, concepts and mores. Our society is relatively instable owing to many contemporary approaches and phenomena and the pressures of modern reality. In such circumstances changes of value of money combined with a sweeping nominalistic solution destroy the remaining bastion of stability the approaches of the middle class. Our criticism in this section is not directed against the fact 'that' nominalism is not deviated from, this is our personal opinion that this should be done. But against the fact that on the intellectual level no attempt has been made to evaluate the social considerations for deviation from nominalism, partly or wholly taking all relevant factors into account. The problem in its modern setting is not novel, it has been with us for fifty five years, but modern thinkers and mass media of communication have not yet discovered it.

G. The Legal, Social and Economic Arguments for Upholding the Nominalistic Principle

1. *The Stability of Commercial Intercourse.*

The main advantage of the nominalistic principle is that according to it a unit of currency is of a standard and technical nature. The needs of a modern economy require standardization in use of terms. The modern economy is very efficient and highly elaborated, and it requires the closest cooperation in its operation. Deviation from the nominalistic principle means technical disturbance, which may interfere with the proper functioning of the economy.

The nominalistic principle in normal conditions creates stability and enables one to use foresight in respect of private rights and obligations. The unit of currency is stable in its value and therefore the parties know beforehand what is the extent of their rights and obligations.

Owing to this principle litigation before the courts is limited. When the extent of the right is known there is no need to apply to the courts.

The monetary obligation is regarded as a simple debt. A simple debt when it is included in a document in writing may be summarily enforced. The notion of "simple debt" means that it is easily understood and that it does not create difficulties. The reasons for its simplicity lies in the use of monetary terms in such contracts. The fact that the obligation is expressed in a sum of units of currency absolutely identifies the nature of the debt and its extent.

Immediately it is found that a debt is owed, a judgment is given according to the cause of action; the intention of the parties to the bargain is immaterial and there is no need to apply the cannons of construction.

From the point of view of the courts, monetary obligations are routine and technical obligations, and this is their main advantage from the point of view of the legal profession and the public.

Commercial and economic activity is carried on the basis of the nominal value of money and every deviation from this principle interferes with the proper carrying of such activity.

An institution or an enterprise is bound by an administrative routine which is difficult to change. The requirements of control and efficiency demand that such routine be based on a simple and easily understood foundation. A limited company, according to company laws only a public company, but according to income tax laws even private company and in fact every enterprise and economic unit of a certain size, draws up balance sheets and profit and loss acounts. Such documents are prepared according to the nominal value of currency, and any deviation from this principle means an interference with the ordinary routine according to which such documents are prepared.

When a customer deposits a certain sum as a deposit in a commercial bank, the bank immediately knows its rights and obligations towards the customer. The limits of the obligations of the bank are absolutely defined by the nominal sum of the debt, and the bank, when it carries out its activities, knows that it will never be obliged to return to the customer a higher sum, without taking account of changes of value and the fate of the currency. Therefore the bank does not need to take account of the fate of currency when it carries on its activity and it may therefore manage its affairs according to the nominal value of currency. This is the reason why the commercial banks in Germany during the revaluation were excepted from revaluation.

Similar rules apply to financial institutions, like investment and insurance companies; they too base their management routine on the nominal value of money.

Even private persons who are not required to comply with the routine of management and the need to prepare balance sheets and profit and loss accounts, base their management routine on the nominal value of money. They attempt to cover themselves, namely to set off against an obligation a right in another field of their activity. As the obligations are defined according to the nominal value of money so the rights too are defined according to the nominal value of money. However they often cannot be successful in their attempt to cover their obligations.

As all the units of an economic system are interrelated and interconnected, a deviation from the nominalistic principle creates a chain reaction, and interferes with the proper functioning of the economic system.

2. *The Needs of Continuity.*

The modern economy consists of big units which have concentrated in their hands a major part of the total economic activity of a society. Such units are managed bureaucratically according to guide lines and instructions given by the head office. The decisions are based on formal documents like balance sheets, profit and loss accounts, cash and inventory registers and many other commercial documents. All such documents are expressed in the nominal value of money.

Through the nominal approach a control and follow up is carried on and the developments of the economic unit are traced and through it the cooperation of the unit with suppliers, customers and creditors is ensured and contacts maintained with the public and with government bodies. In the balance sheets the price of acquisition of different components of the inventory appears according to its historic and nominal value, in the stock in trade registers the price of the acquisition of the stock in trade according to the nominal value.

Everyday commercial activity is carried out through set–offs which are made through credits and debits, which are based on the nominal value of money. Negotiable instruments, like cheques, bills of exchange, securities listed on the stock exchange, pass from hand to hand. All such instruments were issued according to the nominal value of currency. A deviation from the nominal value of currency interferes with stability and continuity and causes disturbances and litigation, and requires the making of manifold adjustments.

An example of a difficulty caused by inflation is the revaluation of the assets of companies which was authorized according to statute in Israel in order to adjust them to the new value of currency.

3. *The Public Considerations in Upholding the Nominalistic Principle.*

The difficulties caused to the public sector through any deviation from nominalism are more severe than the difficulties caused to the private sector. The public sector is managed according to statutes, regulations and orders which apply the nominal value of money. The discretion of the authority which manages this sector is as severely restricted as it is strictly controlled. The budget provides the framework of the financial activity of this sector, but the budget is based on the nominal value of money.

Deviation from nominalism disturbes the equivalence between expenses and revenues, and therefore causes disorder and interferes with the proper functioning of the public sector. We have already mentioned the obstacle, facing the taxation authorities and the management of the national debt of the State in case of deviation from nominalism.

The statues defining the jurisdiction of the courts in civil matters and which provide maximum limits of penalties in criminal matters are based on the nominal value of currency. In Israel the legislator was compelled several times to change the limits of the jurisdiction of magistrates' courts on account of inflation, and to increase the maximum penalties.

The common denominator of all the considerations is that, as the whole complicated structure of the modern economy and society is based on the nominal value of currency, every deviation from it requires readjustment and the establishment of a new order to replace the former order.

H. The Nominalistic Solution and Modern Reality.

1. *Monetary Problems Since the end of World War One.*

Since the end of World War One monetary problems beset the modern world. At first the monetary problems were the result of reconstruction in countries which have suffered from war as in France and revolution, in Soviet Russia. In Germany they were the result of political resistance to the "Versailles dictate", and imposition of terrible burden of reparations. In Eastern Europe like Poland, Hungary, Austria, they were the result of maladjustment to new reality, created by the Versailles pact. The problems in a greater part of Europe were similar although in a different setting. In the middle of the twenties the problems were overcome almost everywhere, Britain has returned to the gold standard and a short period of relative stability has ensued. This monetary stability has again been undermined by world economic crisis starting with the Wall Street crash in 1929. Britain has abandoned the gold standard in 1931, U.S.A. has devalued the dollar in the beginning of 1934 and an era of competitive devaluations has started combined with foreign exchange control.

Since the end of World War Two monetary instability continues. At first it was dictated by the necessities of reconstruction like in Germany in 1948 and the British devaluation of 1949. However the monetary problems have continued since almost everywhere in developed and underdeveloped countries alike, the distinction being of degree and not of kind. Monetary problems were the result of modern necessities and an attempt to solve the problem of underdevelopment in the underdeveloped countries and of an attempt to implement in practice the ideology of growthmanship and ensuring full employment. In Israel it was the result of an attempt to solve all the manifold problems of a new state encircled by ennemies, when the existing economic resources were not sufficient and inflationary financing had to be resorted to.

2. *The Analysis of the Past War Two Trend of Loss of Value of Money.*

Monetary problems during the interwars period were dictated by pressures of cruel necessity. The world was unprepared for crises which have erupted and attempts were made to alleviate them, which were often not effective. No conscious will to bring about changes of value of money has played a part in monetary problems of this period. No policymakers have consciously intended to cause loss of value of money during the past War Two period. However, they have consciously intended to promote growthmanship and full employment and were willing to run the risk of inflation and devaluation as necessary incidents of such policies. The prevailing political philosophies of growthmanship and Keynesianism have dictated practical policies which were consciously implemented. The risk of loss of value of money was treated as a necessary evil, and was disregarded to a greater or lesser degree. Only Britain was forced to adopt from time to time deflationary policies to protect the sterling and as a result of such policies, called *stop and go* policies British economy has developed more slowly than the economies of its European competitors like Germany, Italy and even France. However, even its deflationary policies adopted from time to time have not saved Britain from staginflation, inflation during economic stagnation, possibly as a result of cost push, wages prices spiral. Almost all West European countries have created welfare states, and a large part of G.N.P. was dedicated to welfare. Inflation in Europe and to a lesser degree in United States has become a fact of life.

However, since the Vietnam war the philosophy of growthmanship has come under attack from several directions at the same time. One of the issues was quality of life as against blind growthmanship. Resistance to inflation has become a potent political force playing an important part in elections campaigns like in U.S.A. in 1968, in West Germany in 1972, to give only two examples.

3. *The Arguments Against and for Inflation.*

The argument against inflation is simply this. The post was two inflation in developed countries (and in underdeveloped) has been the result *of attempting to do too much in too short a period of time.* Slow inflation is always evil from the point of view of fixed income earning classes, it interferes with the stability of value of money. Rapid inflation ruins everybody, the productive and unproductive classes. Economic literature attempts to find ways and means for assuring prosperity without inflation. So long as we live in imperfect society and our economy is imperfect, full employment is probably synonymous with a certain degree of inflation.

The case for inflation and growthmanship runs thus. Inflation is a necessary incident of economic and social dynamism. This dynamism has been forced upon us by the pressures of post war two realities. The single problem overshadowing all others in this period is *competition between the systems,* the capitalistic and the socialistic. The socialistic system has been established in Soviet Russia in 1917. The resistance to this system and the revolution against Bolshevic excesses has played a part in the development of Fascism in Italy and National Socialism in Germany and in political and social development in Eastern European countries during the interwars period. However, till the end of world war two Soviet Russia has been struggling and pioneering. Since the end of world war two it has become established, it is in, it has become a Super Power, it affords a standard of comparison for the man in the street and not only for those ideologically indoctrinated or emotionally frustrated. This reality of *competition between systems* dictates economic and social dynamism. The Marxists maintain that economic crisis is structural to our system, they wait for this opportunity in order to foment dissatisfaction with it. So long as economic and social dynamism prevails the danger of economic crisis is small. *We must run because we cannot afford to stand still.* The gnomes of Zürich may grumble, but they too are a part of the system, once inflation will stop and economic dynamism will cease all the old economic, social and political problems will reappear in an old or new setting. *Therefore inflation and loss of value of money is the lesser evil in the long run.*

4. *The Case Against and for Devaluation.*

Many grumble against devaluation as undermining the confidence in currency. Flight from currency is the result of this. People may believe in great ideals but they are petty about their money. If national interest dictates devaluation it should affect somebody else's interests and not my own. However in fact many benefit from devaluation and many loose from it. On the other hand no more effective way to cure balance of payments problems has been devised in modern times short of a very severe deflation, and an outright decreasing of general level of prices and incomes. Balance of payments problems reappear because the economic and social conditions are dissimilar. In some countries productivity is higher than in other countries. Wage push is different from country to country. In some countries unions are more militant than in others. In some countries manual workers, the so–called blue collar employees are more near to the achievement of their ideal of achievement of middle class standards of income and living. But economic rules continue to operate. Some countries produce more cheaply and therefore compete more effectively and therefore are blessed with balance of payments surpluses and some have balance of payments deficits.

Very often a timely devaluation even if a harsh remedy may be the lesser evil. Sometimes drastic cures must be adopted to cure economic ills, otherwise we live with an unsolved problem, which torments us.

5. *The Reform of Inflation and Devaluation Through the Channels of Monetary Law.*

Whatever may be said for the whole past war trend of loss of value of money and whatever is the case for inflation and devaluation, the phenomena of loss of value of money were too sweeping and too one sided. *An attempt should have been made to reform inflation and devaluation.* If inflation should become impractical in the future and devaluation becomes again the great unmentionable (as under Wilson's labour leadership in Britain in 1964–7) even if practical considerations dictate such policies owing to popular resistance to such measures, the policy makers would have themselves to blame, at least in part.

The impact of monetary measures on savings is unnecessary. Devaluation requires only adjustment of incomes especially wages, and they tend to adjust themselves to devaluation. At present creditors and debtors share unequally in inflation and devaluation losses, the whole loss falls on the creditors. "Equity means equality" is not only one of the maxima of equity, but an accepted tenet of popular psychology.

Many partial solutions may be found within monetary law, through the reform of the nominalistic solution, which is its cornerstone, to reform inflation and devaluation, and mitigate and alleviate their consequences and effects. Some such suggested reforms are the subject of an essay included in Part IV of this book. Many suggestions are included in other chapters of this study, like the freedom to include value clauses in private contracts.

The impact of monetary events and processes on private rights and obligations should be at least minimised. Such reforms would not only be just but in the long run more effective than the nominalistic solution in its present unreformed state. It is quite possible that other reforms may be suggested by economists, which however fall outside the scope of this book.

I. The Suggested Solution.

1. *The Nominalism and Value Clauses.*

One of the arguments of the followers of nominalism against every deviation from it is that such deviation is unnecessary, as private parties may protect themselves from any decrease in the value of money through the provision of value clauses.

In our opinion this argument is not well founded. The nominalistic solution should be tested from two points of view

a) Whether the nominalistic solution is well founded from the theoretical point of view.

b) Whether the nominalistic solution is necessary from the point of view of legal, social and economic considerations.

If the answer to both those questions is in the negative, the freedom to contract out of it cannot assit it. If the rule itself is not well founded the rule itself should be abrogated and the fact that exceptions are possible cannot save it.

The decrease in value of the national currency is a phenomenon which interferes with the whole public. When the decrease in value is such that relief is necessary, it is just and equitable to award relief to the whole public and not only to those who have included value clauses in their contracts.

The "protection of value" clause may be deceptive. When value clauses are widespread (as in the case of the gold clause) the legislator frequently intervenes and abrogates the value clauses. An example of such legislation is the joint resolution of both houses of Congress of 5 June, 1933, which abrogated all gold clauses in the United States.

The negative attitude of French law toward gold clauses and foreign currency clauses is well known. During the monetary disturbances which have occured in European and American States between the two World Wars, only two countries, Britain and Switzerland, did not interfere with gold clauses.

Whenever general relief is not granted the freedom to contract with reference to Value clauses may be very helpful and important, especially when nominalism applies in all its severity. Even in circumstances when deviation from the nominalistic principle is permitted, such deviation is limited to a special situation, but value clauses are effective in every situation even when depreciation of currency is not considerable. The attitude to value clauses is often negative, "why should some escape when others cannot". However the attitude to exceptions should be formed according to the attitude to the general rule. If the general rule is unjust the exceptions to it should be extended and not limited.

2. *The Theoretical Foundations of Nominalism.*

In our opinion the theoretical foundations of nominalism are not well founded if they are based on the intention of the parties, according to the approach of English law as expressed by Mann (49). The intention of the parties is not to receive a nominal sum of units of currency but the value included in it. Even when the parties contract on the basis of nominal value they aim to receive value, as the function of money is to serve as abstract purchasing power. In this money differs from other services and commodities in our society. A contract for payment of money does not resemble a contract of supply of commodities, in which the law demands from the party that he supply the same quantity having the same quality of a certain commodity. No private party may be regarded as being an expert on monetary changes. The considerations which influence the value of money are generally considerations of high policy, and even the people in charge of monetary policy, like managers of Central banks, frequently have no influence over its fate.

3. *The Conflict Between Requirements of Justice and the Needs of Economic Stability.*

The need of stability of economic intercourse *prima facie* supports the nominalistic solution. Such is the position in ordinary circumstances and even when there is an inconsiderable decrease of value of currency. But in our times changes in the value of money have happened and still happen which assume catastrophic proportions.

In such circumstances the stability of economic intercourse is undermined. It cannot remain stable when the parties know that the measure of value applied by them is itself not stable. There is an increase in the use of clauses which permit the parties to rescind the contract between them in certain events.

The parties prefer not to make long–term contracts. The inclination to limit credit increases, and the parties prefer to carry on their contracts on the basis of cash, as far as it is possible (50). Such is the situation in every inflation but especially in rapid inflation. The stability of economic intercourse is finally destroyed by inflation, and the operation of the nominalistic principle cannot restore the equilibrium The reality causes the different factors within the economy to modify their activity and routine of management.

49. Mann, p. 48.

50. John P. Dawson, *"Effects of Inflation on Private Contracts, Germany 1914–1924"* 33 Michigan L.R., p. 171.

Another argument supporting the upholding of the nominalistic principle is the need of foresight in respect of the rights and obligations of the parties.

From this point of view inflation destroys the established patterns of thought in respect of the extent of rights. The nominalistic view of the extent of rights is artificial and distinct from the economic reality, as money does not serve as a correct measure of value.

The parties know what are their rights and obligations but they know too that those rights have lost their original meaning and their extent has changed completely. The fate of their right was intimately connected with the fate of the currency.

In such circumstances private law has to decide whether to uphold strictly the nominalistic solution, or to acknowledge the fact that the reality has changed and therefore to proceed actively to revalue the rights and to restore their integrity.

Such an election is very difficult for the private law.

The first alternative means that the parties have to acknowledge that rights and obligations created by the private parties have lost their original meaning, and is an admission that private law is powerless to withstand the pressure of the economic reality. In such a situation private law renounces its principal aim, to adjust justly the rights of private persons, and becomes subservient to monetary policy, which becomes dominant.

The second alternative means admission that national currency does not serve any longer as a measure of value in relation to private rights and obligations, thus causing indirect injury to the prestige and status of the national currency.

In addition, private law has to interfere actively with private rights. Such activity entails in its wake interference with the most hallowed principles of private law, like the principles of finality of litigation, *"rea judicata"*, vested rights, restrictions of litigation and so on.

All these problems were prominent in the German revaluation during the great inflation.

Sulkowski (51), a Polish scholar, has expressed the opinion that the application of a nominalistic solution is justified only when changes in value of money are not considerable, but, whenever they exceed certain limits (limits which change according to times and circumstances) the nominalistic principle must be rejected as being contrary to the requirements of justice and equity.

51. E. S. Rashba, "Debts in Collapsed foreign currencies", Yale Law Journal vol 54, p. 1. p.30.

Corbin (52) too is of opinion that in relation to long–term contracts inflation causes grave hardship, as the gains and losses which arise out of inflation are out of proportion to the risks foreseen when the contracts were made. In his opinion the injured party is entitled to a remedy.

The common law in his opinion is flexible enough to award relief corresponding to the requirements of justice in every period.

4. *The Considerations of Public Law Which Support the Nominalistic Solution.*

Notwithstanding the fact that the nominalistic principle is a principle of private law, considerations based on public law are frequently brought forward to support it; such an attitude may be perceived in the dicta of Judges dealing with monetary law cases (53).

The public authorities are concerned with the fate of the national currency and its prestige. The government has a monopoly over the issuance of means of payment and therefore it is interested that such means of payment will be received by the public. It is interested too in upholding the value of the national currency. But the problem arises how far such considerations are relevant to private law.

With the exception of legal tender legislation governments do not interfere through legislation with the nominalistic principle. The considerations of public law serve only as arguments in favour of it.

The inflations since the first World War have occured in countries where the nominalistic principle was dominant. Lack of confidence in currency on account of political considerations, unlimited issue of means of payment, unrestricted banking credit interfere with the value of national currency, and the decrease in its value is the outcome of Government policy, both through acts of omission or commission. It is the outcome of powerful economic and political processes. The obstinate and strict observance of the nominalistic principle cannot overcome the inflation, and economic processes cannot be restrained by principles. When an inflation occurs it is not the public which is responsible for it. The responsibility for it must be assumed by a factor which has the control over currency, namely the Government, even if it is not solely responsible for it, because it is very often able to counteract it.

The State cannot confer on the national currency the function of serving as a measure of value, through legislation. Such a status is conferred on the currency

52. Corbin, "On Contracts", vol. 6 sec. 1360, p. 486.

53. Denning L. J. *Treseder Griffin v. Cooperative Insurance Co. Ltd.* (1956) 2 Q.B. p. 127.

through social process ("stychia") and when the value of currency is undermined, the use of other measures of value increases. The followers of niminalistic principle struggle against such use of other measures of value, and they maintain that it interferes with the value of national currency. In their opinion the upholding of the value of currency is the dominant consideration, and warrants applying unjust solutions to the relationships between private parties. Such an approach was adopted in particular in France, when all gold value clauses and foreign currency value clauses are held invalid and are regarded as being against public policy. Such approach is really a struggle against the effect and not against the cause. The undermining of the status of the national currency as a measure of value is the effect of inflation and not its cause.

Private law is not the proper place for upholding the prestige of the national currency, and its value. The function of private law is to do justice between private parties and when the value of currency decreases private law has to take such change into account. Its function is to acknowledge the change in economic reality which has been brought about through the decrease in the value of money and to find just solutions between the private parties in the new conditions.

The fact that private law recognizes that a decrease in the value of money has occured does not cause inflation and does not aggravate it, except in certain cases of cost push inflation and even this to a limited extent. It is only a recognition of a factual situation. The court cannot be the only place where no account is taken of a fact known to the whole public. A deviation from the nominalistic principle in such a situation does not interfere with the national currency and its value as its sole aim is to do justice among private parties. Even if there had been an interference with the national currency the aim to do justice among private parties should be preferred to the consideration relating to the fate of the currency. In fact such deviation does not cause damage to the national currency as the total amount of means of payment in circulation does not increase.

The considerations based on the public law approach must be treated cautiously as the subject matter of our discussion is a doctrine which belongs to private law.

5. *The Solution of Qualified Valorism.*

The right approach to the definition of the extent of a monetary obligation seems to us to be the valoristic approach. Only such an approach provides a satisfactory answer, as being in accordance with the intention of the parties to the problem, what is the aim of the parties to a monetary obligation. The parties are anxious to get the value included in the money and not a nominal sum. They are more interested in quality than in quantity.

Nevertheless in ordinary circumstances and when changes in the value of money are not considerable the presumption of identity of value of monetary units remains in force. The main advantage of the nominalistic principle lies in the fact that it provides a simple standard, and so long as the changes in value are not considerable there is no justification to deviate from this principle. However simple solution must not be necessarily preferred when it does not serve practical needs and requirements.

Even devaluation, and even devaluation following depreciation, by themselves afford no reason for the adoption of the valoristic solution. It all depends on the magnitude of change of value of money that has occured, and on the previous recent monetary history in the country in question. If the devaluation is carried out after a period of decline of the value of money when the total decline is considerable a relatively insignificant devaluation might be the last straw which justifies revaluation, or the adoption of the valoristic solution. On the other hand even a relatively serious devaluation when stability of value of money has prevailed before may not justify deviation from the nominalistic solution. But it must be kept in mind that usually devaluations occur after periods of inflation when instability of value of money has prevailed before the devaluation. This inflation was the reason of devaluation and their correlation was of cause and effect.

The changes in the value of money must be so considerable that it is obvious that the nominalistic solution is unjust. Changes of value of money should be measured by the cost of living index. The use of such an index makes it possible to compensate the party for the loss of the internal purchasing power of money. It does not compensate for the loss of the external purchasing power of money caused by devaluation but one measure of value is preferable to several as it limits extensive litigation even if in several cases hardship is caused.

In the past the metallistic concepts have performed valuable service during a monetary crisis. In our time there is no connection with gold either in theory or in practice, as the gold standard within the internal economy has been abrogated many years ago. Therefore even if metallistic ideas might perform a valuable service it is very difficult to revive them.

The use of cost of living index enables relative certainty to be achieved in respect of rights and obligations, and it limits litigation which was very widespread during to German revaluation. Its main advantage lies in the fact that it reflects the purchasing power of money better than other standards and this is the main attraction of money for private parties.

6. *The Distinction Between Kinds of Obligations.*

Not every kind of bargain is suitable for the adoption of the valoristic solution. Some bargains like the drawing of cheques on a current account with a bank requires the adoption of the nominalistic solution. Drawing a cheque on a current account with a certain bank has the same function as payment in cash from the standpoint of the economic aim of the bargain. Many lawyers are not aware of the economic definition of money which includes demand deposits in commercial banks.

On the other hand certain obligations like an obligation to pay maintenance or every bargain intended to provide a party with a means of subsitance according to a certain standard justifies the adoption of the valoristic solution. The bargain itself points out that even less considerable changes in the value of money should be taken into account, than in other bargains. Side by side with the distinction between kinds of bargains a distinction should be made from the point of view of the length of time involved.

From this point of view a distinction should be made between three kinds of bargain according to their duration.

a. Short–term transactions, namely everyday transactions which are the routine transactions of modern economy, for the duration of up to three years.

b. Medium–term transactions as contracts of supply, sale, contracting and so on, for the duration of from three to ten years.

c. Long–term transactions, as long–term credit, mortgages, bonds listed on stock exchanges; insurance contracts and life insurances, for the duration of ten years and more.

a) In respect of short–term transactions it must be pointed out that the value of money does not generally change from day to day; it is true however that during the German inflation, when it reached its climax, drastic changes have occured between the date of the contract and the date of performance. Further it is true that devaluation may occur during the duration of such contracts. Nevertheless relief in such transactions is not justified in the same measure as in other transactions.

In short–term transactions the need of stability of economic intercourse is more prominent, *inter alia* owing to the fact that they are so widespread.

b) In medium–term transactions the need for the adoption of a valoristic solution is more clear. The nature and extent of rights may change during the duration of such contracts. If an engineering contract was made in 1949 in Israel, the performance of which should take more than three years, the economic development would have transfermed the rights and the obligations of the parties by 1952. In such contracts the practical possibility of foresight of monetary changes is more limited than in the contracts of the first kind.

c) In long–term transactions, the extent of monetary change cannot be foressen. In such a case the necessity of awarding remedy is imperative.

In 1887 a life insurance contract was made in St. Petersburg and its monetary obligations were fixed in German marks. The premium was paid during the whole duration of the contract. In 1922 the insured died. The claim was filed when the German inflation had reached its climax. *The sum awarded was barely sufficient for the purchase of a packet of cigarettes.* The English court refused to award revaluation according to German law as the law which applied to the contract according to its construction was English law, which does not recognize the revaluation of debts.

The sum awarded was in extreme disproportion to the sums paid as premium and to the anticipations of the parties when the contract was made.

The value of un industrial bond issued by a French firm in 1917 for a period of 25 years does not reflect at maturity its value when it was issued.

The same applies to a mortgage made in Israel in 1938 for a duration of 20 years. The changes in the monetary and political sphere during the duration of long–term contracts are so frequent and so rapid that no relationship exists between the anticipations of the parties when the contract was made and at its maturity. The necessity for the adoption of the valoristic solution is most obvious in such cases.

We have classified obligations according to their duration. This distinction of up to three years, from three years to ten and from ten years onwards is relatively arbitrary. This distinction was not intended as an absolute criterion but as relative criterion in countries enjoying relative stability of money, like the U.S.A. However in many countries changes of value of money are more rapid, and a different standard must be adopted (54).

But even in stable countries, a distinction must be made between normal and abnormal times. During a period of three years, the duration of the Great German Inflation, a very severe change of value of money may take place. Therefore different standards must be adopted in abnormal times.

54. *Anderson v. Equitable Life Assurance Society of the United States* 42 T L R p. 302.

7. *Practical Suggestions for Reform.*

We believe that from the theoretical point of view the solution recommended by us, that of qualified valorism, is the right one. We believe further that it could and should be enforced in practice. However we are ready to admit that we live in an imperfect world. Therefore the right theoretical solution may not be accepted in practice in the short run. In such case such solution serves only as a standard of comparison, as a guideline pointing the way to the ideal solution. An eminently useful technical institution, money, instead of being controlled by us, rules us now in the field of monetary obligation.

The nominalistic solution is neither just in the period of instability of value of money nor effective in the long run, because it creates resentment and dissatisfaction which find their outlet in ordinary circumstances in resistance to inflation and devaluation. Of course the dissatisfaction with the nominalistic solution is not the only reason for resistance to inflation and devaluation. However the nominalistic solution has an important bearing on these phenomena and might be the factor which ensures victory to one of the forces. Ways and neans should be found to reform the nominalistic solution in order to reform inflation and devaluation. Both phenomena could become more human and more bearable, if reformed.

Whatever be the attitude to inflation and devaluation of their defenders and detractors both sides would probably agree that they could and should be reformed.

Some possible suggestions and solutions are included in various parts of this book. Other partial solutions may be devised. *A way may be found once there is a will to do so.* However, the most serious problem is that neither the legal profession nor practical and theoretical economists have yet discovered the study of monetary law. It is now a very much neglected branch of legal study owing to disciplinary considerations, attention is paid to it by a few experts notwithstanding its importance and topicality and the fact that it should be of interest to the whole legal profession.

As the problem of reform of this branch of the law is now a major problem of economic and social policy, the legislator will turn a deaf ear for any suggestions for reform except the most technical. A way for reform may be paved only through educating the professional and the general public opinion, and the necessary prerequisites for it are dissemination of knowledge and provoking thought. This is the aim of this book.

8. *Monetary Law and Economic Dynamism.*

From the disciplinary point of view each problem and issue is classified. However from the point of view of contemporary problems such classification is often misleading. The single most important issue facing the past world war two is the competition between the socialistic and free enterprise system. The systems are different from each other in almost every aspect, social, economic, moral, intellectual, political. An emotional and intellectual conflict prevails between them. However they may peacefully coexist providing that the rivarly prevailing between them finds its outlet in peaceful competition. Even if policies of thaw are adopted in the political sphere such policies only decrease the risk of shooting war, they have no bearing on the emotional and intellectual conflict which is structural to the existence of two completely different systems of social and economic organization.

On the problem of possibility and duration of peaceful competition economic dynamism has a very important bearing. So long as it prevails the danger of economic crisis is small, resources are created to cope with and solve social and economic problems. There is a large degree of correlation between economic dynamism and inflationary psychology. Such dynamism is dependent on mental attitudes, not the least among them the opinion that money will decrease in value in the future. Tenets of mass psychology, and public policy approaches generate such economic dynamism. *"It is the spirit that counts"* and the general atmosphere which are the motivating forces of economic dynamism. Resistance to inflation and *stop and go* policies through interference with economic optimism may in the long run undermine and even destroy economic dynamism. Continous growth may be replaced by *stop and go* policies and the British experience with such policies has not been happy.

Monetary law and its solutions have an important bearing on resistance to inflation and therefore on economic dynamism. Therefore monetary law and its solution have become in the modern setting one of the major contemporary problems, they being located in a strategic position between inflation and resistance to inflation, both being too sweeping and too extreme in their contemporary setting.

The solutions of monetary law should be tested from the point of view whether they contribute to human welfare or not. Whether they assist the present world in solution of contemporary problems. In our opinion the answer at present is still in the negative, so long as the nominalistic solution in its present unreformed state is accepted and applied in practice.

All the above does not decrease from its importance from the disciplinary point of view as a subject of great theoretical and practical importance, this only illuminates it from a different point of view which is often last sight of in disciplinary treatment.