LEGAL PRINCIPLES IN MONETARY AND CREDIT POLICY

BY

CARSTEN SMITH

Professor of Law,
University of Oslo

1. Legal science has a proud past as the parent discipline of many social sciences. But also in the relation between academic professions there may arise a generation gap. As in the case of other generation conflicts, the causality is apt to be complex. Often, however, a prominent feature is an inability of legal science to renew itself. One of the social sciences which has sprung from legal science in the academic life of a number of countries is economics. This paper is a modest contribution to the attempts to diminish a science gap by means of the following raids in the border area between legal science, on the one hand, and political economy and economic policy, on the other.

Economic policy in Norway, as in the other Nordic countries, has developed from a mainly liberalistic attitude in the period before the second world war to a markedly planned economy with considerable state enterprise during the postwar period. Today the Nordic countries have a mixed economy which is strongly internationally orientated. A legal discussion must be based on this reality. The following account runs across the juridical map like a slalom track, passing partly through the law of contract, partly through administrative law (particularly its substantive part), and partly—as regards foreign-exchange issues—through the section of international law dealing with the institutionalized cooperation in economic fields. Considering that the economy of the society is mixed, with powerful public instruments, and that the national economy has substantial international ties, a breaking down of the old subject-dividing barriers erected through juridical systematization is essential to the formation of a realistic attitude towards legal problems. If this essay should be found to have any value, it will probably be on account less of the analysis of the separate legal issues than of the attempted juxtaposition of problems.[1]

[1] Against this background, the aim of the paper will be to discuss general principles rather than to deal with the legal circumstances surrounding specific problems.

2. Monetary policy was previously often confined to the field of activity of the nation's bank of issue. This policy thus consisted in the main of the instruments at the disposal of the note-issuing bank, that is to say, first and foremost, changes in the discount rate, open-market operations and short-term credit transactions. Today monetary and credit policy is something much more comprehensive. The main characteristic of monetary and credit policy is that it influences the three interconnected economic factors: the liquidity position, the credit supply, and the loan-financed demand. The central questions are the quantitative regulation of the aggregate volume of credit and the qualitative ranking of credit for various purposes. This can be achieved partly through regulation of the public sector, including a possible state bank system, and partly by exerting influence on the liquidity and lending activity of the private credit institutions.

Again, monetary and credit policy is only a part of the total economic policy. The state's financial policy is normally regarded as the primary economic measure in the sense that the annual parliamentary budget is the governing mechanism which outlines the main trends of the economic development, whereas the monetary and credit policy enters into the picture as a supplement and a balancing corrective in relation to the financial policy. In any case, however, it must be noted that monetary and credit policy occupies an increasingly central place in modern economy. "Monetary policy, once relegated to the trivial task of pegging some unimportant interest rates and facilitating routine financial transactions, has re-emerged as a major component of economic policy."[2] In many countries a change in this direction took place at the beginning of the 1950s, and some have spoken of a renaissance of monetary and credit policy later in that decade and in the 1960s.[3]

One characteristic feature of monetary and credit policy is

[2] Milton Friedman, *The Optimum Quantity of Money and Other Essays*, 1969, p. VI.

[3] The central work on more recent Norwegian monetary and credit policy is the *Innstilling fra den penge- og kredittpolitiske komité av 1960* (Report from the Monetary and Credit Policy Committee of 1960) (submitted 1963). This report represented the experts' preparatory work for the Monetary and Credit Policy Act of 1965, which is discussed later in the text. The chairman of the committee was the then vice chairman of the board of directors of the Bank of Norway, Knut Getz Wold, who was later appointed governor and chairman of the board of directors of the Bank.

that down through the ages it has been considered to be a field for specialists. John Kenneth Galbraith formulates this point in *The Affluent Society*:[4]

> Decisions on monetary policy had always been taken *in camera* and communicated to the public only by actions—movements in the interest rate or increases or decreases in central bank portfolios. A learned literature developed which was privy to the mystery and which speculated on the motives behind various moves. Its authors came to have a stake in the policy they interpreted. They belonged to a select few who understood. Outshining them, only, were those who were privy and really knew. Such was the charm of this policy that this affection was easily translated into claims for its effectiveness which, in fact, did invade the supernatural. Monetary policy was graced by effects not only mysterious but magical.

But the magic circle has been burst open in this field also. Such things happen in the best of professions. Gnaeus Flavius the Roman, in his day, stole the legal formulas of the pontefical college and made them accessible to the people. At the present time, we are witnessing a development where monetary and credit policy has emerged from being the property of the financial world to become an important matter for parliament and government. Control of credit supply gives control of goods, services and other forms of real resources. The stipulations concerning the volume of credit and the allocation of credit are important for the distribution of the wealth in society.

An expression of this fact is the introduction of a separate credit budget within the framework of the Norwegian national budget, where quantitative targets are set for the total credit development as well as for the credit increase of the various groups of finance institutions and markets.[5]

The reader may ask what this has got to do with jurists and legal principles.

During the last century and at the beginning of this one the jurists of my home country displayed a committed attitude

[4] John Kenneth Galbraith, *The Affluent Society,* 2nd ed. 1969, p. 198.

[5] Whereas the state (parliamentary) budget, when adopted, is a binding decision of Parliament authorizing state expenditure, the national budget (including the credit budget) is a report (white paper) on the economic situation and on the policy of the Government.

towards monetary and credit theories.[6] However, as a general characterization of the more recent developments it may be said that the jurists have to a considerable extent left the more fundamental questions on the monetary and credit system to the economists, and, shortening their lines, have withdrawn to the private-law sector of credit issues. The results have been what one might expect. One effect is that the ideas of the former liberalistic period have to some extent been granted a prolonged life span within our property law. Another aspect is that the jurists have not felt sufficient responsibility for our more general legislation on monetary matters. In part this is probably due to a wish to avoid politically controversial questions. In this connection there is reason to emphasize that the legal character of a question is not diminished by the fact that the issue is also so important from a social point of view as to become an object of political dispute. Legal exclusiveness is secured only in fields that in a social context are comparatively uninteresting.

3. The Norwegian monetary and central-bank legislation offers clear evidence of the juridical stagnation referred to above. In this legislation one would expect to find established some of the more important principles for the economic system. Instead we are faced with a discouraging example of how legislation can lose touch both with economic realities and with the prevailing legal situation. Our general monetary act still dates from 1875 and our Central Bank Act from 1892, and both statutes have in the main retained their original features. The monetary act shows its colour already in the opening section, which states that gold is the foundation of the monetary system of the realm, and that the value of the monetary unit, the krone, corresponds to a weight of about 0.4 gramme of fine gold. Both parts of this statement are incorrect.

Formally, as a legal point of departure, the link with gold

[6] Within this field we find already in the first part of the last century fundamental theses by the pioneers of our modern legal science, like A. S. Ørsted, *Betragtninger over Danmarks nuværende Pengevæsen* (Comments on Denmark's present monetary system), and A. M. Schweigaard, *Om Norges Bank og Pengevæsen* (On the Bank of Norway and the Norwegian Monetary System). And an important trend in Norwegian economics is further marked throughout the last century and at the beginning of this one by prominent legal names such as those of Aschehoug and Morgenstierne, who were the leading constitutional-law authors of their times.

is still of importance in our legislation in two respects, namely as regards the principle of the central bank's duty of note redemption and as regards the rules on the quantity of notes in circulation.

To take first the obligation of redemption in gold, the legal situation in this country is almost farcical. The duty has been no more than suspended by virtue of a royal decree of 1931, the authority for this decree being a statutory provision to the effect that the King (i.e. the Government) may decide "in especially dangerous circumstances" that the central bank's redemption of the notes be "temporarily postponed".[7] This description is undeniably beginning to look somewhat strained —a situation which has been permanent since 1931 is to be regarded as a temporary measure, and the most prosperous economic period in our history is to be subsumed under the label "especially dangerous circumstances". It has been maintained in the domestic discussion that the decree of 1931 has lost its validity since the statutory conditions can no longer be said to be fulfilled. But this assertion has hardly been taken wholly seriously—its consequences being politically out of the question. It may, however, certainly be said that from a legal point of view the situation is very unfortunate, particularly as the political authorities, as will be shown later on, have drawn further consequences from this old decree concerning the determination of the international value of the Norwegian currency.

With regard to the requirements on gold as cover for the note issue, the present difference between the gold stock and the note circulation in Norway is many times larger than what the statute prescribes.[8] According to the Central Bank Act permission may be granted under "especially extraordinary circumstances" to exceed the prescribed maximum note issue on certain defined conditions. In recent years it has not even been found possible to comply with the conditions of this safety valve, and they have simply been disregarded. A thin veil of legitimacy has been thrown over this state of affairs by the argument that the only sanction stipulated by the law is a liability to pay interest at a progressive, penal rate by the central bank to the Ministry of Finance, which in the circumstances has

[7] Act on the Bank of Norway 1892, sec. 7.

[8] Act on the Bank of Norway 1892, sec. 9. The rules mentioned in the following part of the text are laid down in secs. 10–11 of this act.

found it appropriate not to demand payment of this interest. In the other Nordic countries the legal conscience is assuaged with more or less frequently renewed decisions on the volume of the note circulation in the formally correct way—by joint decisions of the central bank and the ministry of finance, by parliamentary decisions or by statutory amendments. Although in principle a procedure, when stipulated, certainly ought to be obeyed, one may ask whether a complicated procedure such as that involved in a statutory amendment does not, when realistically viewed, appear in the present context as a relic of times gone by. The economists no longer consider the amount of note circulation to be a central factor in monetary policy. To the extent that the amount of money influences price developments, it is first and foremost the various means of payment created by the banking system which represent the active factor, whereas the note circulation adapts itself in a relatively passive manner. The jurists, too, should now cut down to size this once cardinal question. Frequent statutory amendments or other kinds of successive decisions by parliament or government in step with the expansion of the note circulation seem superfluous. The gold assets of a central bank are now supposed to be used only as a means of adjusting the country's balance of payments. It should be possible today without serious misgivings to release the note issue completely from the old legal ties and leave the regulation of its volume entirely to the central bank, without any statutory maximum, under the control inherent in the regular consultations of the central bank with the political authorities and the opportunity of criticism possessed by these authorities.

A Norwegian legislative draft of 1953 departed from the system of a statutory maximum requirement for the note circulation and instead proposed that Parliament should fix a ceiling for the note circulation, but with authority for the Government to give temporary permission for the limit to be exceeded when Parliament was not in session. In this way there would have been introduced a relatively flexible system which at the same time incorporated a mechanism whereby the national assembly would have an occasion for an assessment of the economic situation whenever the question was raised of increasing the note issue. However, today it may with justification be maintained that the supply of information on economic matters to Parliament has in the meantime become so regular, by virtue of the various reports from the administration on matters of monetary and credit policy, that we can take a step further and also abandon such a special mechanism linked to the note circulation.

In Norway work has been started on tidying up the legal situation in this field.[9] The draft of 1953 for a new monetary and central-bank act did not receive enough political support to lead to a Government bill. A new law commission, broadly composed of economists and jurists from parliament, administration, the banking community and the academic world, is now at work on a second round.[1]

4. In the drama of monetary and credit policy, the legal subjects—or power groups—that play the leading parts are the political authorities, the central bank and the private credit institutions. I will comment upon some of the legal relations between these actors.

The central bank (or the note-issuing bank) was the kingpin of the classical monetary and credit policy.[2] The major legal problem in this regard may be said to be the question of the bank's legal autonomy.[3]

[9] Both the Danish and Swedish monetary legislation was partially revised by virtue of new acts at the beginning of the 1970s. Finnish law acquired realistic legislation through the monetary reform at the beginning of the 1960s.

[1] As the author of the present paper is a member of this commission, it may be appropriate to mention that the opinions expressed in this paper are those of the author and not necessarily those of the commission.

[2] There may be certain difficulties when defining a central bank, but there is no need to go further into these. These banks may be said to be "central" both in the sense that they mainly operate in relation to the banking system only, fulfilling some general functions for this system, and that they are in a central position between the political authorities and the banking sector.

[3] The main works on the Nordic central banks are N. Rygg, *Norges Banks historie* (The history of the Bank of Norway) vol. 1 (1918), vol. 2 (1954), and *Norges Bank i mellemkrigstiden* (The Bank of Norway in the interwar period), 1950, Knud Erik Svendsen et al., *Dansk pengehistorie* (Danish monetary history), vols. 1–3 (1968) and Sven Brisman et al., *Sveriges Riksbank* (The Bank of Sweden), vol. 1 (1918), vol. 2 (1919), vol. 3 (1920), vols. 4–5 (1931). Among other major literary contributions may be mentioned Gunnar Jahn et al., *Norges Bank gjennom 150 år* (The Bank of Norway during 150 years), 1966, and Nils Meinander, *Penningpolitik under etthundrafemtio år* (Monetary policy during one hundred and fifty years), 1962. These books do not, however, contain much discussion of the legal problems. As far as the legal analysis is concerned, one should in the first place mention Sven Arntzen, *Norges Banks rettslige stilling i forhold til regjering og storting* (The Bank of Norway's legal position in relation to Government and Parliament), 1958, and Erik Brofoss, "Sentralbankens statsrettslige og forvaltningsrettslige stilling" (The central bank's constitutional-law and administrative-law position), in 74 *Statsøkonomisk tidsskrift* 1960, pp. 1 ff.

Differing opinions have been voiced in this connection. At one extreme it has been maintained that a central bank must have the power to make *independent decisions* even in conflict with the opinion of the political authorities. At the opposite extreme there is the view that under a parliamentary form of government the central bank should in reality be no more than the "extended arm" of the Ministry of Finance and consequently a purely *executive organ* as regards monetary matters for the current economic policy of the Government.

The classical system, also when seen from an international point of view, has been to link monetary policy to a note-issuing bank in an independent position. It has been usual to arrange for this issuing bank to have specific decision-making organs separate from the political ones and give it the authority to act on its own within a wide framework, preferably laid down by statute. This system has its legislative background in historical experience showing that political interference with the monetary system has often had unfortunate consequences, particularly since the political organs, under the pressure of immediate demands, may feel tempted to resort to inflationary measures.

The Act on the Bank of Norway (Norges Bank) of 1892 is formulated in accordance with this traditional pattern.[4] The Bank is a separate legal subject with organs of its own that are clearly distinct from the political and central administrative authorities. According to the act the independent activities permitted to the Bank organs extend to matters of monetary policy. Thus, the Bank has an explicit right to lend money, to discount bills and to sell securities. Nowhere in the act is it stated that the Bank's management has to obey instructions from other authorities as regards these dispositions, or that other bodies have a right to alter the Bank's decisions.

One may say that this system implies that confidence in professional expertise is given preference over confidence in political decisions.[5]

[4] The legislation on the central banks in the other Nordic countries dates from the 1920s and 1930s and has thus been brought a generation further up to date than the Norwegian statue. But the acts in these countries, too, have not been thoroughly revised since the days of the gold standard were definitely over. The act of the central bank of Iceland is a lonely teenager in this regard, having been passed in 1961.

[5] A satirical expression of such a view is given in a drawing in the Danish humour magazine "Klods-Hans", where the central bank director at the time,

In this century there has in many countries been a development, partly as the result of struggles, towards a greater political influence.[6] The Finnish central bank, however, appears, to an outside observer, to have suffered from this tendency only to a relatively small degree. A few years ago the bank's governor, Mr Klaus Waris, described the Bank of Finland as "in fact a practically autonomous body in the machinery of state".[7] The position in the other Nordic countries, on the other hand, is at present somewhat different.

The Norwegian discount policy may serve as an illustration in this respect. I will first give a few glimpses from the parliamentary debates of the interwar period.[8]

In 1923 Christopher Hornsrud, a member of Parliament who some years later became our first socialist premier, raised an interpellation about the position of the Government in connection with an increase of the discount rate by the Bank of Norway. The then non-socialist premier and finance minister, Abraham Berge, replied as follows: "The increase of the discount rate which has taken place was unknown to me until I saw it in a newspaper. It has occurred without anyone's having discussed it with the Ministry of Finance, and I believe this has been the case with every increase of the discount rate .... All the time the Bank of Norway has existed it has been quite

Marcus Rubin, stands covered with decorations in front of a mirror saying: "Mirror, mirror on the wall—who is finest in this bank?" And the mirror replies: "Bank directors five in all—and you are finest in the rank".

[6] "More than a century ago, Mr. Gladstone, when he was Chancellor of the Exchequer, observed that the Bank had ... developed a detached, independent and even hostile attitude towards the government ... and he went on to complain bitterly that the Bank persisted in this attitude ... to such an extent that he had to fight the Bank on these grounds. That fight of Mr. Gladstone's has not been completely resolved even in 1970." *First Report from the Select Committee on Nationalised Industries (session 1969–70) Bank of England*, 1970, p. lxxviii.

[7] 35 *Bank of Finland, Monthly Bulletin* no. 12 (1961), p. 6. From an economic standpoint the position may, however, perhaps be considered to be different. Thus it has been maintained that, in consequence of the credit policy of the Finnish Government, the Bank of Finland has a somewhat smaller space for manoeuvre than have the majority of central banks in countries suitable for comparison. Erik Dahmén, *Ekonomisk utveckling och ekonomisk politik i Finland* (Economic development and economic policy in Finland), 1963, p. 132.

[8] There were intense debates also in other Nordic countries. For this period, see, *inter alia*, Karin Kock, *Kreditmarknad och räntepolitik 1924–1958* (Credit market and interest policy 1924–58), vol. 1 (1961), pp. 112 ff., on the Swedish discussion, and Knud Erik Svendsen et al., *op. cit. supra*, pp. 212 ff., on the amendments of the Danish Central Bank Act.

consistently maintained that the two elements, the Government —primarily the Ministry of Finance—and the Bank of Norway, ought to operate separately and quite independently of each other. . . . The Bank of Norway, which . . . is the only body that can regulate the discount-rate policy in this country, has thus considered it to be necessary to undertake this drastic measure. . . . I cannot, therefore, say anything on the question whether the Ministry might agree or disagree with the Bank of Norway, because . . . the Ministry lacks the foundation for pronouncing an independent judgment on that question."[9] This was playing right into the hands of the opposition. Hornsrud referred ironically to the fact that the assembly had for several days debated the question of whether a section of railway line should go via Rena or via Elverum, two small neighbouring towns. "The entire parliamentary apparatus was brought into operation to decide that issue . . . . But it seems that this question of the discount rate is no concern of the state authorities."[1] And another opposition member complained that, although the country's prime minister and finance minister "belongs to a party . . . having at its disposal all the experts in the financial and economic field . . ., here comes the Minister of Finance and has no opinion at all".[2]

In later debates the differences were further accentuated and the tone became sharper.[3] On the one hand, some maintained *that* the Bank's liberty to organize its discount-rate policy was in conformity with international practice and the "centuries of experience" acquired by national banks, and *that* in all countries where the government has had influence on the national note-issuing bank the results of this interference have been bad. "Even if the Bank of Norway should happen to make mistakes now and again, it would be ten times worse if the national bank were to be subjected to the influence of Government and Parliament." On the other hand, there were those who held (1) this question could not be regulated if treated only from a monetary point of view, and that other social considerations had also to be taken into account, (2) the central

[9] *Stortingsforhandlinger* (Parliamentary Debates) 1923, vol. 7, p. 3730.
[1] *Op. cit.*, pp. 3732–3.
[2] *Op. cit.*, p. 3739.
[3] See especially *op. cit.* 1923, pp. 3993 ff.; 1924, pp. 2560 ff.; 1924 pp. 2893 ff.; 1926, pp. 90 ff. and 123 ff. For the principal quotations, see *op. cit.* 1924, p. 2914; 1926, p. 93; 1926, p. 128; 1926, p. 129.

bank must not dictate to the state, for they were like two horses hitched to the same waggon and had to pull together in the same direction, and (3) Parliament not only had a right, but was also obliged to have an opinion as to the soundness of the Bank's discount policy. A new non-socialist Minister of Finance, Arnold Holmboe, maintained again the standpoint on the part of the Government that the political authorities were outsiders in this connection, and outsiders could not pronounce an expert judgment. And this time Mr Hornsrud went all out: "Should Norway's Parliament and the parliamentary financial committee be mere outsiders and intruders with regard to questions like these? And should the honourable finance minister as such also be an outsider with regard to a question like this on the national discount policy? In that case, I do not understand who are the proper authorities—in that case there exists in fact no proper authority. In that case, it has been established that the Bank of Norway is 'a state within the state', it is an independent institution which is answerable neither to God nor to man for what it is doing."

It could hardly be put more strongly than that.

Another characteristic statement is, as emphasized by Mr Hornsrud, that in the national assembly they were in the habit of discussing "all things". And he fired away with the following words: ". . . we even take up court decisions and . . . criticize and pass judgment upon the judges . . . . That is how the natural metabolism of society functions . . . . However, the board of the Bank of Norway can with a single stroke of the pen shift . . . millions of kroner from the borrowers to the lenders. Are we not to be allowed to have an opinion on that?" The Minister of Finance, on the other hand, maintained "that this is just a case where one should say what people once used to say—*Principiis obsta*: resist from the beginning—otherwise things will start sliding on the downward path . . .".

After the forming of an administration by the Labour Party the roles were exchanged. To a question about the Government's attitude to an increase of the discount rate in 1936 the Social Democratic finance minister, K. O. Bergsvik, had to reply that the question had been discussed by the Government, that the Government held the unanimous opinion that the discount rate ought *not* to be increased, and that this view had been made known to the Bank of Norway, but that the result still was only a short postponement of a planned rate increase, which was enforced despite the opposite standpoint of the Government. And the finance minister added: "As will be known, the Bank of Norway holds, by virtue of legislation and regulations, the power and the responsibility as far as the discount rate is concerned . . .".[4]

As regards the time up to the end of the interwar period, one may, on the basis of prevailing state practice, draw the conclusion that the Bank of Norway had the sole competence as regards the Bank's instruments of monetary policy.[5] The next question, then, is whether this position has been reduced in the postwar period.

The British Radcliffe Report—one of the most important documents of recent times on monetary and credit policy—referring to the relation between the central bank and the government, states that this "is not easy to describe in formal language with any great precision".[6] The same could also be said of the corresponding circumstances in Norway. It is hard to describe the prevalent legal situation in a precise manner, partly because the sources of law in this field are vague, and partly because the principles of legal assessment to be applied here are somewhat uncertain.

In 1946 the Bank's governor, Gunnar Jahn, said in his annual speech that it was a matter of course that a note-issuing bank cannot and should not carry out a policy which is at variance with that which has been decided by parliament and government. And the further development may be summarized by the key words: from central-bank dominance to governmental engagement.

Since the second world war, Norway has conducted a very special policy as regards the discount rate. It is characterized by a lack of application of this instrument: there have been only two changes in the discount rate, in 1955 and 1969. And the circumstances surrounding these two increases are so obscure as to make legal assessment difficult. The 1955 increase has been held to show how the central position of the note-issuing bank in monetary policy has been undermined in the postwar period. It has been mentioned that the discount-rate in-

[4] *Op. cit.* 1937, pp. 47 ff., at p. 48.

[5] This source material also comprises other instruments, particularly the attitude as regards the Bank's use of open-market operations.

[6] *Report of the Committee on the Working of the Monetary System,* Cmnd. 827 (1959), para. 761, p. 271.

crease was described and was generally viewed as a Government measure, on a par with other measures taken by the Government at that time with a view to curtailing investments and curbing inflationary tendencies. This appeared evident from *inter alia* the facts that Parliament was informed of the discount increase in a report by the finance minister on the economic policy of the Government, that the chairman of the parliamentary finance committee referred to the rate increase among the Government measures, and that the Prime Minister emphasized that the Government was in favour of the increase.[7] On the other hand, in the Government's presentation of its restrictive measures, the finance minister made a clear distinction between the Bank of Norway's rate increase and the Government's own measures.[8] And from the subsequent parliamentary debate it appears that the raising of the discount rate was to some extent also conceived of as being something different from the Government measures. As the first opposition member to speak, Professor Erling Petersen, said: "Today the policy of low interest and money abundance is doomed. It fell to the Bank of Norway to pronounce the sentence . . .".[9] As regards the 1969 increase, this constituted part of a package solution containing credit-policy measures on the part of the Government, a fact that serves to underline the extent of governmental involvement. On the other hand, care was taken this time to have it formally stressed that what led to the rate increase was the Bank of Norway's decision.[1]

One may ask whether, in the assessment of the competence in dispute, emphasis should not be laid on the responsibility which the Government has taken on as a consequence of more recent legislation on credit policy. Special mention must be made here of a comprehensive act of 1965 on authority to regulate monetary and credit relations. This act authorized the

[7] Arntzen, *op. cit. supra*, pp. 14–15.
[8] *Stortingsforhandlinger* 1955, vol. 7, p. 182.
[9] *Op. cit.*, p. 256.
[1] Probably the most sensational incident concerning the relationship between central bank and government in the Nordic countries in more recent years was the course of action adopted at the Swedish discount-rate increase in 1957. This measure was decided without information being given to the Government. The public debate became heated. The chairman of the board of directors of the bank (who in Sweden is not also the governor of the bank) had to submit his resignation at the request of the Government. See Karin Kock, *op. cit. supra*, vol. 2. pp. 472 ff.

use of several new instruments of credit policy, and will be dealt with further below. However, what must be underlined in this connection is the situation as regards competence. Whereas the Central Bank Act of 1892 vests the authority in the independently organized central bank, the new act places the implementation of the new instruments of credit policy in the hands of the Government and reduces the role of the central bank to that of being an expert advisory organ. In principle, however, the central bank has the same authority to make independent resolutions under the new act as before, i.e. as regards the instruments of monetary and credit policy authorized in the old act, primarily loans to the private bank sector, fixing of the discount rate, open-market operations, and investment of the official foreign-exchange reserves. And this view is strengthened by the fact that the instruments of the central bank were to some extent the subject of detailed discussion in the *travaux préparatoires* of the new act on credit policy without this leading to any formal change in relation to the old Central Bank Act.

It is clear that when attempting to reach a conclusion concerning the present legal position of the Bank of Norway, as regards its autonomy or dependence, it is necessary to undertake a *total evaluation* of the development involving a shifting of the centre of gravity in the decision-making process towards the Government, not merely in formal respects, but also by reason of the fact that the Government's level of ambition in economic policy has continually been rising. It may further be asserted with considerable conviction that, when one is moving in a field where no clear legal sources exist, it will be most in harmony with present legal methods to allow *real considerations* to be decisive and that one should therefore not allow formal views rooted in earlier social conditions to dislodge a conception more reflective of modern developments. However, although the authority of the central bank has not during the postwar period been clearly maintained as an exclusive competence, there is not, on the other hand, any government practice which is *irreconcilable* with the principle of this exclusive competence. The central legal issue will then be whether a mere non-use of this administrative-law power may lead to a lapse of authority. It is difficult to find clear grounds for assessing how marked such a passivity must be in order to be considered legally relevant. The present power situation should probably, against this background, be characterized as uncertain. According to ordinary principles of legal method there is, however, reason to require a fairly long-lasting passivity, possibly combined with a changed legal opinion, if we are to draw the conclusion that a decision-making power authorized in statutory form has legally vanished. The author's view is that one should probably keep to the traditional solution when the question is put as a pure issue of current law.[2] If so, this implies that the Bank of Norway still has legal power to decide on a discount-rate change, or on any other of the Bank's monetary or credit measures, without the approval of the Government (the ministries of finance or commerce)—even though such a move probably would mean a death sentence with regard to the remainder of the Bank's exclusive competence.

Thus, there remains an important problem of *legal policy* within this field—as there may be in the other Nordic countries as well—i.e. whether or not there is reason to go one step further and bring the central bank under a more secure political control by the Government.

The Nordic countries constitute an area where the classical system of an independent central bank still has a certain foothold. But there is, in an international perspective, a tendency in more recent central-bank legislation towards a stronger accentuation of the position of the political authorities. One finds here that varying legal patterns are being applied, including various forms of governmental representation in the organs of the central bank.[3] The crucial question, however, will be whether the government should be allowed to give instructions to the central bank.

Discussion of this question inevitably ends up in general social and political issues.[4] On the one hand, there is the con-

[2] This is in the main in conformity with the conclusion of Arntzen, *op. cit. supra*. Brofoss, *op. cit. supra,* does not expressly take a standpoint on this question, but seems on the whole to be set against such a legal autonomy of the central bank. The present governor of the Bank of Norway seems to adhere to the old attitude in this regard, as he is opposed to a statutory authority for governmental directives, see below.

[3] On the legal organization of the central banks in various countries, see, *inter alia*, Hans Aufricht, *Comparative Survey of Central Bank Law,* 1965, especially pp. 89 ff., Valery Janssens et al., *Eight European Central Banks,* 1963, and Leo Schuster, *Zentralbankpolitik und Bankenaufsicht in den EWG-Staaten,* 1967, especially pp. 61 ff.

[4] In a lecture after the Swedish discount rate was raised in 1957, the Swedish professor Erik Lindahl emphasized three arguments for a certain

sideration of the effectiveness of a uniform national economic policy. On the other, one can maintain a more pluralistic state philosophy with a greater weight on decentralization. In addition, one meets historical tradition. But one may ask why monetary and credit policy in modern society should be protected and nursed by independent experts to a greater extent than are all the other important problems we are facing.

In a lecture in 1972 our present central bank governor, Knut Getz Wold, spoke against the idea of inserting an "instruction clause" in a new central bank act.[5]

> It is difficult to see the need for any such clause. . . . What is its purpose to be? Should the Ministry of Finance instruct Norges Bank on the advice it should give the Ministry of Finance? Should the Ministry of Finance instruct Norges Bank on the advice it should give the Ministry of Commerce in the field of foreign-exchange policy? Should the Ministry of Finance instruct Norges Bank about granting loans to a specific enterprise in Northern Norway, an authority which would even exceed that which the Ministry has vis-a-vis the state banks and their boards of directors?

This reasoning does not go to the centre of the issue. First, it should hardly be necessary to mention that in this country one cannot be instructed with regard to expressions of *opinion*. The field of application of Government instructions will in that case be the *decisions* of the central bank. Secondly, one should hardly reduce the problem by referring to a rather minor decision like granting loans to a specific enterprise, which, however, is a kind of transaction somewhat outside the main central-bank functions. The field of application of Government instructions will in actual practice have to cover major decisions, such as the lending conditions to the banking sector or the management of the foreign exchange reserve assets. With regard to the reference to the state banks one may observe that the question of the present competence of the Gov-

independence of the central bank. First, the central bank can slow down the inflationary development. Secondly, the people will have greater confidence in the value of the money if the central bank has the task of acting as guarantor of this value. Thirdly, the independence is in conformity with an old national tradition. See *Riksbankens ställning och uppgifter* (The Central Bank's position and duties), 1957, pp. 10–11. The significance of these arguments has, however, been strongly questioned.

[5] *Norges Bank's co-operation with the Government, the financial community, and international banks and institutions,* XLIII Norges Bank Economic Bulletin (1972), pp. 149 ff., at p. 158.

ernment in relation to these banks is somewhat uncertain, but that it seems to be a rather common opinion in political quarters that these banks ought to be subjected to Government directives.

The independence of the central bank today should not be primarily regarded as meaning independence of government directives. Such directives will at any rate be quite exceptional. The main point, in my opinion, is *the extent of the powers* delegated to the central bank, by virtue of statute or governmental decree. As a principle of legal policy I should like to emphasize that, when the legal subordination of the central bank to the government is established, there is less ground for hesitation concerning comprehensive central-bank powers. A fight against an instruction clause will therefore probably not be in the interest of the functioning of the central-bank apparatus in the long run. More energy should rather be spent on the procedural question of *how* an instruction by the government may be issued, in order to secure that information on the opinion of the central bank shall be conveyed to the legislature when there is a conflict of views between government and bank.

Even though the central banks are being more or less deprived of their independent status when it comes to monetary-policy *decisions,* they will still be able to perform an important role by virtue of their expertise. Our former central bank governor, the father of the Norwegian planned economy, Erik Brofoss, has sketched this model: The special position of the central bank as a public-law subject is dependent on its having a claim to be asked for advice, on its having a right independently to take initiatives and present proposals, on its being entitled to criticize the resolutions and measures of the political organs, and on its being able to present its views and proposals in public and also to defend them—as it has been expressed in the British debate—"up to the point of nagging".[6]

5. A central bank will in the case of a large number of monetary- and credit-policy issues appear as an intermediary, as a credit-policy "relay station", in the relationship between the political authorities and the private credit institutions. I shall now proceed to deal with the direct relation between the au-

[6] Quoted from Brofoss, *op. cit. supra,* p. 31.

thorities and the private credit institutions, including the banks.[7]

In the Nordic countries we have a series of public-law provisions which regulate the activities of the various credit institutions, thus influencing the possibilities of the granting of credit. First, through the years there has developed a set of safety rules concerning the capital and the assets management of the credit institutions—*inter alia* the rules in banking legislation on the relation between the net capital and various obligations of the banks and on their liquidity. However, these provisions have primarily been motivated by safety considerations, and even if to some extent they put various restrictions on the granting of credit, they are of only limited significance as regards credit policy, if for no other reason than that these norms do not create instruments for *varying* regulation of the granting of credit.

With regard to further legal regulation based on credit-policy considerations, there are features of a certain interest to be narrated from Norwegian law. This is so partly because for several years we practised a more extensive *system of cooperation* between the authorities and the private credit institutions than—so far as I know—has been effected in other countries, partly because a few years ago, following a bitter struggle between the very groups mentioned, we acquired a more comprehensive body of *regulative legislation* in this sector than is to be found in neighbouring countries at any rate, and partly because we now are witnessing the planning of what is perhaps a unique *legal transformation* of all commercial banks.

The immediate postwar years may be characterized as the *period of latency* for monetary and credit policy. But after political interest in this sector of economic policy had been revived, there occurred the second act of the development, i.e. the *period of cooperation* in the years 1950–65. The questions of monetary and credit policy were in this period mainly solved through *agreements* between the authorities and the credit institutions. These so-called credit agreements

[7] The concept "credit institution" is used in a wide sense. It can hardly be said to have clear-cut boundaries. In connection with new Norwegian legislation from 1970 on investment corporations, there arose an extensive debate as to whether these corporations are to be regarded primarily as credit institutions or as representatives of the investors. A discussion like this is in my opinion largely futile, as the investment corporations have both these functions.

were concluded in a Joint Consultation Council, which was composed of representatives of the Ministry of Finance, the Bank Inspectorate and the Bank of Norway from the public sector, and the associations of the commercial banks, the savings banks and the insurance companies from the private sector. It is true that the agreements so concluded between the authorities and the credit institutions were widely held not to be legally binding. Formally, they consisted merely of guidelines which mainly took the form of requests to the private credit institutions. In fact, however, the lines of guidance expressed in these credit agreements were considered as binding for the credit institutions. The credit agreements were in part very comprehensive documents and contained norms regarding the fixing of the credit volume, the ranking of the various credit purposes, and other current questions of credit-policy interest.

In 1963 a proposal was put forward for a permanent statute on credit-policy instruments.[8] During the following two years the relation between the prevailing agreement system, on the one hand, and legislation on governmental powers, on the other, became the subject of an intensive debate, which centred on the legal-source issue of whether the credit policy should primarily be regulated through agreements or through legislation.

A *majority* among the draftsmen maintained during the preparatory work that the agreement system could not be regarded as a lasting alternative to a more comprehensive credit-policy legislation. In any case it must fall to the *political authorities* to carry the *responsibility* for the economic policy. For those authorities the determining consideration must therefore be whether the current monetary and credit policy is in conformity with *their goals*. If there is no agreement as to which measures are necessary or appropriate for the attainment of the targets, or if, despite such agreement, some untoward development should occur, e.g. an unintended credit expansion, then the evaluation of the political authorities must be decisive. This means, however, that these authorities must at all times have access to *instruments* making it possible to influence the volume and the composition of the credit supply. On the basis of this fundamental standpoint, draft legislation containing

[8] See the Report from the Monetary and Credit Policy Committee of 1960, mentioned above, section 2 note 3.

comprehensive governmental powers was submitted by the majority of the law revision committee.

A *minority* regarded the agreement system as a preferable alternative to a more comprehensive policy-instrument legislation. A combination of the two systems was rejected on the grounds that a statute authorizing governmental powers would make negotiations between the parties illusory, as one party—i.e. the political authorities—would have it in its power to force through the result it wanted. On a closer weighing of the relative advantages of the agreement approach and the legislation approach, it was urged in favour of the agreement system that it is *elastic*, that agreements have a greater *appeal to loyalty* than directives do, and that agreements can to a greater degree than directives be formulated as *collective* obligations for the credit institutions; the last-mentioned argument owes its significance to the fact that the Norwegian credit system, being decentralized, needs a differentiation of the policy instruments.

The majority line was victorious at the passing of the credit-policy statute of 1965 authorizing the regulation of monetary and credit conditions.[9] This at the same time meant that the agreement system in its previous form collapsed, as the private credit institutions withdrew their representatives from the co-operation. And so we come to the third act of the development: the *period of directives* in the years 1965–70.

The 1965 credit-policy statute has a general character in that it applies to all forms of credit institutions. And it authorizes a comprehensive arsenal of instruments.

A central objective of the act is the regulation of the liquidity of the private banking sector. The most important measure in this respect consists of various forms of *requirements of reserves* for banks, compelling the private-sector banks to have deposits in the central bank (or to have other statutorily defined holdings), thus entailing a drawing off of liquidity. These measures apply to both the commercial banks and the savings banks. The requirements comprise, in the first place, *ordinary liquidity reserves*; these are calculated on the basis of the total liabilities of the bank in question and may go up to 25 per cent for the commercial banks and 40 per cent for the savings banks.

[9] For a translation into English of this statute, see Leif Eide, *The Norwegian monetary and credit system* (1973), *Norges Banks skriftserie* (Bank of Norway's publication series) no. 1, pp. 49 ff.

Next, the requirements comprise the *deposits against foreign liabilities* aimed at drawing off the increase in the banks' deposits and loans from abroad; these special deposits may even be stipulated at 100 per cent of this increase. Finally, the reserve requirements include the *supplementary reserves*, calculated on the basis of the increase in lending by the banks, thus being intended to reduce not only the lending capacity of the banks but also their willingness to lend. The ratio for the supplementary reserves may likewise amount to up to 100 per cent. The extent of these reserve requirements may be varied according not only to the type of bank (commercial or savings), but also to the bank's total resources, the lending purposes, and the bank's geographical location. The latter method of variations is introduced as an element in the nation's regional policy. Another important instrument is the *compulsory investment in bonds*, a duty imposed on banks, life insurance companies, and various pension funds and schemes, whereby these institutions may be obliged to keep holdings of Norwegian bearer bonds up to a maximum varying from 30 to 60 per cent of their total resources. The effect of this is both a regulation of liquidity and a channelling of credits. There is, further, authorization for a *direct regulation* of the volume of lending activities for companies and foundations whose object it is to grant or negotiate credit, for stipulating the maximum rate of *interest and commission* for the various kinds of loans, and for a *control of issues* whereby the issuing of bearer bonds and loans otherwise granted jointly by several lenders requires governmental consent.

With the benefit of hindsight it may, in my opinion, be asserted that from the *point of view of legal principle* the new statute represented a step forward and brought about a clarification. In this connection, three points may be emphasized. The credit-policy instruments here concerned intervene in the dispositions of the individual credit institution, and they have further effects for both commercial enterprises and private persons. It may therefore justifiably be maintained that these measures are to such an extent substantive law that the authority to apply them ought to be established by formal law according to ordinary legislative procedure. Furthermore, the previous credit agreements implied a certain deviation from common principles of parliamentary liability, as the Government was made responsible for a credit policy outlined by a board, where the representative of the Ministry of Finance was only one of a number of members, and where he did not even occupy the chair. Finally, the act meant that credit policy really became regulated by legally binding norms.

This Credit Policy Act is a piece of pure governmental-power legislation. It does not draw up any substantive guidelines for credit policy, i.e. it does not say anything about the *goals* of economic policy, but gives the Government the authority to apply the above-mentioned *instruments* on the basis of its assessment of the economic situation. In the *travaux préparatoires* it was described as emergency-powers legislation. Most of the powers have, however, now been used. By a trick of fate it was the non-socialist coalition Government—which sprang from the parties which had strongly opposed the act—which actually came to apply these powers; it found, too, that it had to do so on a considerable scale. Today all the instruments of the statute have been activated with the exceptions of deposits against foreign liabilities and interest regulation. Moreover, the national unity of the credit policy has been broken and a geographically selective use has been made of the reserve requirements as a measure of regional policy.

In 1970 a new situation arose over the question of cooperation in this area. The authorities and the credit institutions came together again to create new permanent cooperative organs. Two consultative bodies were established to serve both as sources of mutual information and as a discussion forum for the authorities and the organizations of the private financial institutions on matters of monetary and credit policy. The Credit Policy Liaison Committee consists of members of the staffs of the various governmental and private-sector institutions represented, whereas the Credit Policy Advisory Council consists of representatives of the management of the institutions concerned. The Committee, which meets fairly frequently, has been instructed to discuss current questions concerning the implementation of monetary and credit policy and to prepare the matters to be discussed by the Advisory Council. The mandate of the latter, as the central organ, is to discuss major problems as regards the formulation and implementation of monetary and credit policy, especially in connection with the preparation of the Government's reports to Parliament on economic policy. The Ministry of Finance, the Bank of Norway, the two banking associations (for the commercial banks and the savings banks respectively), and the association of the life insurance companies are represented on both bodies.

Against this background we seem to have entered the fourth and present act of the development, namely the *period of a combined system*. The application of statutory powers on the part of the administration has been combined with an extensive use of consultations with the private credit institutions, a procedure which might further develop into a certain revival of elements of the credit agreements. It was this line of a combination of legislative measures and limited agreements that the majority of the expert committee drafting the Credit Policy Act of 1965 favoured on grounds of principle, whereas the minority described it as "the worst solution". Should a future development along this line take place, it is also probable that we shall see a revival of our former debate of principle concerning the ranking of governmental directives and credit agreements as policy instruments. The foregoing are but predictions. What can be said with certainty, however, is that, through these cooperative organs, a new shifting of authority from the central bank to the Government has occurred, inasmuch as nowadays the position of chairman of the Credit Policy Advisory Council is not held by the governor of the Bank of Norway, as it was during the years 1950–65 in the time of the Joint Consultation Council, but by the finance minister. As a conclusion at this stage it may be inferred that the political authorities, and primarily the Government, today dominate the credit-policy scene in Norway.[1]

This domination is, however, only relative. The present act of the development may prove to be rather short and (comparatively) sweet from the point of view of the private credit institutions. The next and fifth act of the development will probably be the *period of deprivatization*. For several years the Norwegian Labour Party has maintained that the commercial banks should be transformed into public institutions as a step in the democratic evolution. In a decision of the national

[1] In 1973 a new act on the regulation of the credit supply was passed in Denmark, conferring wide powers upon the minister of economics subject to prior consultation with the central bank. The minister may regulate the activities of the various banks and other financial institutions by way of limitations of the volume of new credits, either the total volume of credit of the individual institution or the credit for specific purposes. The minister may furthermore prescribe that the institutions shall keep specified liquid assets in certain ratios to various parts of their activities.

congress of the party in May 1973 this principle was formulated as follows:

> The private commercial banks should be turned into social institutions in the form of foundations. Parliament should appoint a majority of the members of the Council of the bank, give guidelines for the Council's election of the board of directors and stipulate general directives for the board's activities. Parliament should make a decision of principle on this point. On this basis a comprehensive report should be prepared with the aim of finding the best way to carry through the changes. The intention is to take the first practical steps during the four-year period in order to put the reform into effect.

Following the general election in the autumn of 1973 the present Labour administration was formed. It set up a working group in the Ministry of Finance to prepare a draft of a parliamentary report on how to democratize the banking system, and in that connection, how to organize the commercial banks institutionally and juridically.

This report is due to be presented to Parliament during the spring of 1974. Therefore, it is probable that, by the time the present paper appears in print, the political struggle over such a legal amendment will be in full swing. The parties are already about to take up their positions. The Social Democratic party now in office will primarily justify this new offensive by claiming the social necessity of stronger political control over the granting of credit, and especially over the channelling of credit to different purposes. The party will, however, abstain from proposing complete nationalization, on the grounds that it wishes to preserve a certain decentralization of the credit system and a competitive relation between the banks. On the part of the Opposition, supported by spokesmen of the commercial banks themselves, it is maintained that such a step must necessarily lead to increased centralization, more bureaucracy and a weakening of competition within the banking system. It is also questioned whether the banks can obtain sufficient liable working capital when the share capital is eliminated. Moreover, it is maintained that the international competitive ability of Norwegian banks will be endangered, because an untried organization pattern may create insecurity and at the same time impair the efficiency of the decision mechanism of the Norwegian banks. Certain constitutional issues are also likely to crop up, first and foremost the question of the limits of the Constitution as regards the claim for compensation in case of expropriation.

The outcome will depend on a political trial of strength. In theory at least, there are possibilities of intermediate solutions. The private credit institutions may perhaps quote with some confidence a well-known line from our national epic *Peer Gynt,* where the eponymous hero is advised not to worry, since "you never die in the middle of the fifth act".

6. One of the powers of regulation in the present field which the Norwegian Government has not applied during recent years is, as stated, the authority to stipulate the maximum rate of interest. Yet *interest policy* is, of course, a central sector within monetary and credit policy in this country as in others. During the whole postwar period the political authorities have aimed at keeping interest low. Norwegians have therefore viewed the developments in other European countries with mixed feelings—dominated by pleasure or apprehension according to the beholder's basic economic tenets.

The *legal* starting point in our country is still an act of 1888 on the freeing of interest rates, in which Norway followed the general trend of abrogating maximum-interest legislation that characterized the period of economic liberalism. Since that time no particular maximum interest has been stipulated by law, except in the years 1940–53, when there was direct official fixing of various interest rates.[2] Rules on interest rates were formulated in the more recent credit agreements between the authorities and the associations of the private credit institutions, but these agreements were, as already stated, not legally binding. The legal restrictions on the interest rate that are current are merely those that follow from the general rules of the law of contract that there must be a balanced relationship between contractual performances. The interest rates of the banks are regulated by a number of mutual agreements—on maximum deposit rates and minimum lending rates—some on a nationwide basis and some applying locally within the area of the capital but having a normative effect on the rest of the country as well.

[2] In 1953 a new temporary act on interest was passed, but the statutory powers regarding interest regulation remained unactivated right up to the incorporation of this act in the more comprehensive Credit Policy Act of 1965, whose powers to regulate lending interest have not been activated either.

With regard to the intervention of the political authorities, there has in the first place been introduced the partial and indirect interest regulation arising from the fact that the Ministry of Finance makes its consent to issues of bearer bonds and certain other loans dependent on conditions concerning the interest level. But the two most important elements of the interest policy are the discount rate of the central bank and the "interest declarations" of the Government.

The leading interest rate in the credit market is still the central bank's discount rate, to which the other interest rates are to a considerable extent tied by means of agreements or on the basis of practice. There has, however, lately been a change in this respect that is of legal interest. The discount rate is traditionally the rate applied in the rediscounting activities of the central bank. But in this country the discount rate no longer performs this function. Following a disagreement with the private banking system on certain aspects of the prevailing rediscounting practice, the Bank of Norway in 1963 gave up rediscounting. And as for loans granted by the Bank of Norway to other credit institutions, the discount rate is used as an interest rate only in case of short-term liquidity loans. In 1965 an elaborate system, since further refined, was introduced whereby barriers are set up by means of successively rising interest rates if the banks decide to use the lending facilities offered by the central bank as a basis for credit expansion.[3] Other lending also takes place on the basis of an interest rate higher than the discount rate, at least to some extent, as the Bank of Norway seeks to adapt itself to the rates applied within the private banking sector for corresponding types of loans. This means that the discount rate has largely lost its character of a business condition. Consequently, it is no longer entirely a *real* interest rate, but is tending to become solely a *proclaimed* quantity, the purpose of which is to influence the credit market, partly through its function as a signal, and partly more directly through the lending rates on loans which are contractually geared in a definite ratio to the discount rate.

One may ask whether this change has legal consequences. In the first place, one may put the question whether this form

[3] The present rules for the Bank of Norway's liquidity loans to banks have been in force since 1971; for a translation into English of these rules see Leif Eide, *op. cit. supra*, p. 55. A similar system has been applied by other Nordic central banks also.

of stipulating the discount rate does not require a special statutory authority when the fixing becomes an authoritative decree having direct effect on the economic distribution between social groups.[4] Then one may ask for how long the contractual discount clauses will remain unaffected by the change. The discount clauses in loan contracts may be regarded as a form of index clauses with the discount rate as an index of the interest level. And a natural presupposition is that the basis of calculation for the index will not be altered. Quite strong arguments may be adduced in support of the view that a breach of implied conditions is involved when the basic quantity alters its character and is no longer anchored in the fact that it is primarily an expression of the central bank's own business practice.[5] There has, however, so far been some reluctance to enter into a closer discussion of these problems.

As for the position of the Government, the fact is that, even though it has not made use of its power under the Credit Policy Act for limitation of the loan interest, it has in recent years given expression to its wish to carry responsibility for the development of interest by issuing so-called "interest declarations". These are declarations as to the interest level which the Government's policy aims at establishing, and the declarations contain announcements of the appropriate interest rate for a large number of credit transactions. These declarations have not, however, been given in the form of directives. Consequently they are not legally binding on the contracting parties in the credit market, but must, from a legal point of view, be characterized solely as recommendations. They are political declarations, acting by virtue of their political strength.

Seen from a legal point of view, this means that Norwegian

[4] The Bank of Norway's power to decide its discount rate has no direct basis in the legislation, but follows from the Bank's power to stipulate its conditions for credit transactions. As a consequence of the development towards a purely "signalling" function the legal foundation is giving way in this respect. However, according to general constitutional-law principles, such decisions probably still fall outside of the kind of interference with the property-law relations of the citizens being comprised by the principle of legality—i.e. the principle saying that rules affecting rights and liberties of the citizens (substantive law) regularly require statutory form (formal law)—since the citizens are not obliged to keep to the discount rate. But in any case it would be most satisfactory from a legal-policy point of view to establish an unambiguous authority reflecting the latest development.

[5] It should also be mentioned that the Bank of Norway does not itself wish a discount-rate change to have so great an effect on interest rates in various long-term loan contracts as it could have according to the assumed connection.

interest policy exists in a strange land of mists. Today this policy is primarily conducted through two legally dubious mechanisms, one being a discount-rate stipulation, where the rules on fixing are unclear and where the legal effects of the fixing are uncertain, the other consisting of recommendations from the Government that lack any legal content. This form of direction has certain political advantages. Professor Ole Myrvoll, who was our Minister of Finance for many years, once stated in expressive terms his opinion that finance objects are by their very nature ill-suited to ordinary legal regulation. "This is not a case of well-defined goods and services, but of a 'jelly-like' mass of mutual claim and debt relations in different forms and of varying degrees of liquidity. This quality of the object of regulation greatly impedes a quantitative regulation or an interest regulation ... the amount of claims and debts will show a tendency to slide into the unregulated forms and ... the control connected with quantity and price regulation will become complicated and often illusory.[6]

But even if a more politically-based direction gives greater elasticity and entails less administrative control than does the application of a legal system of norms, such arrangements give rise to certain doubts from the point of view of legal policy. Law is not economics alone. The jurist must have a register of value factors that comprises more than purely economic considerations. This combination of legal directives in certain sectors of the nation's credit policy and purely political recommendations on other points—where directives were possible—implies that the political authorities do not fully accept the limits they themselves draw up through their legal provisions. One of the consequences of this system is that the private credit institutions meet with criticism from the political authorities even where they keep within the limits of the authorities' own legal regulation. This is not considered to be altogether fair. And it may be questioned whether such an arrangement will in the long run enhance the respect accorded to the functions of the legal provisions in this field.

7. So far the political authorities have mainly been spoken of as a uniform concept. But within the state authorities, in Nor-

[6] Report from the Monetary and Credit Policy Committee of 1960, *op. cit. supra*, p. 139.

way as elsewhere, a dualism will be found. The usual mechanism for economic policy is that the *Government* draws up the lines subject to its responsibility to Parliament. But precisely with regard to monetary and credit policy *Parliament* has maintained that it has a special task on account of its relations with the central bank. This view has its own special traditions in the Nordic countries.[7] Thus, according to the older Norwegian conception, the central bank is the bank of the national assembly.[8] In more recent times, however, there has occurred a shifting of weight towards the Government in this respect as well. But this has met with opposition. Such opposition could be clearly observed already during the preparation of the act of 1892 on the Bank of Norway, inasmuch as the proposal that the chairman of the Bank's board should be appointed by the King aroused so much resistance in Parliament that the bill was defeated at its first presentation. From the postwar period a statutory amendment of 1949 as to the treatment of the annual report of the Bank of Norway provides an illuminating example of how opposition may be provoked by even minor legal innovations.

Previously the Bank had to submit its annual report direct to Parliament. Under the amendment the report was instead to be sent to the Ministry of Finance for presentation to the King and thereafter, with possible remarks by the Government, be communicated to Parliament. But then the Opposition issued a call to arms on constitutional grounds. One of our leading jurists, Sjur Lindebraekke, speaking for the Opposition, explained.[9]

> The main point is that . . . that the national bank must be an independent institution, notably in the sense that it must be inde-

[7] Thus as to the Bank of Sweden, the board of the Bank has stated that internationally the Bank "is unique in being not only the oldest Bank in the world but also one which has retained its distinctive form of organization virtually unaltered throughout its history, having from the very beginning been owned by and linked to the nation's parliament" (quoted from Paul Lindblom, *The Bank of Sweden Tercentenary Fund,* 1968, p. 12.) The same principle has also been pregnantly expressed in Finnish legislation, according to which the Bank of Finland operates "under the guarantee and protection of the parliament".

[8] This view was probably strengthened in the 19th century, on the ground that Parliament was a more nationalistic state organ than the Government, and Parliament feared an economic amalgamation with Sweden during the period of Norwegian-Swedish union.

[9] *Stortingsforhandlinger* 1949, vol. 8, pp. 384–5.

> pendent in relation to the Government, as part of Parliament's ability to scrutinize and to follow the Government's financial dispositions. What is decisive is not the Bank of Norway's independence as such . . .. What is the crux of the matter is the Bank's clear independence in relation to the Government and the Bank's equally clear dependence in relation to this assembly, to Parliament. This is the basic principle which is being broken by the proposal presented here . . ..

Several other prominent opposition jurists also brought forward arguments of constitutional principle. One even went so far as to bring in the *travaux préparatoires* of the Constitution. The leader of the Norwegian Conservative Party, Carl Joachim Hambro, considered the constitutional objections to be so obvious as not to need the help of jurists in pointing them out, as each member of the national assembly could "according to his personal attitude and his own discretion see clearly" that the aim of the amendment was to restrict Parliament's opportunities of supervising the nation's monetary system.[1]

The general opinion now seems to be, however, that this question of the relation between Parliament and Government is hardly of a constitutional character. It is a question of legislative policy, admittedly of a fundamental nature, but it is one where the constitutional provisions do not prescribe any definite solution. There are also certain indications that the attitude of Parliament in matters of this kind is about to change. With regard to the other state-owned banks, Parliament has in recent years adopted a far more indifferent attitude. In the various state banks, established for more specialized purposes, the usual system has previously been that Parliament has elected the chairman and vice chairman of the board. But when the State Bank for Agriculture was established in 1965, it was decided that the entire board should be appointed by the Government, on the grounds that a single instance could more easily judge which interests ought to be represented, and this decision was approved by the national assembly without demur.[2] There is reason to presume that the trend towards the precedence of the Government will continue in this field also.

[1] *Op. cit.*, p. 401.

[2] There seems to have been only one representative (Mr Hans Borgen) who expressed an objection on grounds of principle, but he too went no further than to refer to traditional practice and to the consideration of showing "the same deference" for the agricultural bank as for the other state banks. See *Stortingsforhandlinger* 1964–65, vol. 8, p. 138.

Another point within the state's own legal sphere that may deserve greater attention in times to come is that of the institutional innovations in the form of various public councils and committees which were developed in the 1950s and the 1960s. These exert a considerable real influence, and have parallels in several other countries. From Norwegian practice the following two bodies may be mentioned as examples: the Foreign Exchange Council, which submits recommendations on matters of exchange control and other questions of significance in our foreign-exchange policy, and the Capital Issues Committee, which submits recommendations on permits to issue bearer bond loans.[3] In both groups of cases the powers of the administration are very considerable. Thus, when deciding the question of permission to float loans, an assessment is made both of the contract terms (including the interest rate), the volume of credit, and the purpose of the loan. These influential bodies are, however, merely administratively-established agencies with no special statutory regulation of their activities. One may ask whether the credit-policy problems have not assumed such proportions in modern society that steps should be taken to give the procedure of these bodies a more permanent structure laid down by statute.[4]

8. An appendix to the debate on monetary law in recent years which has given rise to considerable dispute is that of *gold clauses* in loan agreements.[5]

This question, which in most countries belongs to the legal history of the interwar period, was brought to the fore in Norwegian law in consequence of an action by a group of French owners of old Norwegian governmental and state-bank bonds containing gold clauses. The Norwegian act of 1923 prohibiting such clauses still exists in its original version as a temporary moratorium connected with the suspension of the gold redemption. The choice of an act of moratorium was caused by consti-

[3] This Capital Issues Committee is usually named the "section 15 committee" after the source of the authority of governmental capital issues control.

[4] In Finland an "economic council" with the responsibility of conducting the long-range economic-policy planning was established by an act of 1966. More detailed rules are laid down by governmental decree. This might possibly serve as a model of legal technique.

[5] On gold clauses in general, see Arthur Nussbaum, *Money in the Law,* 1950, pp. 223 ff.

tutional doubts in relation to older gold clauses, which were precisely those aimed against. It was believed that support could be found in the somewhat dubious constitutional-law reasoning that art. 95 of the Constitution states that no postponements of payments must be granted "after the new general code has come into operation". When the Constitution was adopted in 1814 this provision was based on the presumed future establishment of a general civil code—a task which Norwegian jurists have never managed to fulfil—and then a hundred years later the antithetical interpretation was offered that, so long as this codification did not materialize, the legislator might freely grant postponement of payments. In most countries the disputed constitutional issues in this connection were ventilated in the 1930s, reaching a dramatic climax in the USA Supreme Court in 1935 in the case of *Norman* v. *The Baltimore and Ohio Railroad Company*. In this case, one of the most exciting in the history of this court during the bitter controversy with the Roosevelt administration, by a 5-4 majority the Court recognized as constitutional the abrogation of the gold clause in the Joint Resolution of 1933. In Norway the development that occurred was somewhat out of phase. This was partly due to the fact that the French state on behalf of its bondholders brought an action against the Norwegian state before the International Court of Justice at The Hague, where, however, no decision on merits was reached, because the Court, for decidedly formal reasons, considered itself to be without jurisdiction in the case. After this roundabout journey the corresponding question was not brought before our Supreme Court until a decision of 1962 in a joint session of the divisions of the Court. The problem here was the relation to the constitutional prohibition against giving statutory laws retroactive force.[6] The Supreme Court found it to be decisive that the gold-clause abrogation was adequately justified by the very peculiar monetary-policy conditions prevailing at the time of the passing of the statute in 1923. Thus there arose the historically strange situation that in the days of the affluent society a legal issue is decided on the basis of a dramatic description of the economic crisis of the 1920s. Despite all the legal energy spent in this field, it is now probably time to consider these questions as being rather secondary seen from a monetary policy point of view.

[6] 1962 N. Rt. 369.

If it is no longer possible to apply gold clauses, the lenders will, however, look for other ways of avoiding the nominalistic principle that a krone is a krone, or a pound a pound.

One way that is open is a stipulation in a *foreign currency*.

Following the decisions in 1931, whereby different European countries left the gold standard at different times, we experienced in Norway an unexpected development involving multiple-currency bonds, as Norwegian creditors made a considerable exchange-rate profit by claiming payment in a currency still based on the gold standard. There were reactions against this unexpected profit, and in 1933 there was passed, as a supplement to the suspension provisions, an act concerning claims stipulated in more than one currency.[7] This act states that where a claim is stipulated in Norwegian kroner as well as in a foreign currency, a Norwegian creditor can only demand payment of the agreed amount of Norwegian kroner. This provision, which on the face of it sounds reasonable, has, however, unfortunate consequences. It implies that *the creditor* carries the risk of changes in the rates of exchange in case of loans of this kind, and it is consequently not in harmony with related legal norms on claims in foreign currencies. For when payment of an obligation stipulated in a foreign currency has to take place in Norwegian kroner, it is the *general* rule in Norwegian law—laid down in the Promissory Notes Act of 1939—that, on the contrary, *the debtor* has to carry this exchange-rate risk. This means that Norwegian lenders will in the case of foreign-currency loans be in a different position according to whether or not the claim is specified in Norwegian kroner as well as in the foreign currency. In case of *pure* foreign-currency loans, Norwegian lenders will bypass the special act of 1933, and thus the exchange-rate risk, by making stipulations exclusively in foreign currency, and this notwithstanding the fact that these loans, according to our general rules, can normally be repaid in Norwegian kroner. This lack of harmonization involves considerable insecurity and undeniably also a favouring of contracting parties who are adepts in this special technique.

As long as the act of 1933 remains valid in its present form, it constitutes a difficulty when negotiating loans from the foreign to the Norwegian credit market. It will thus be doubtful to what extent Norwegian credit institutions (public as well as

[7] On this question, see my article in *Lov og rett* 1967, pp. 241 ff., at pp. 242–3.

private) can negotiate loans with a foreign lender (including the international bond market) and further loans on the Norwegian market, without the risk of exchange-rate fluctuations being entirely imposed on the credit institution in question as an intermediary—if Norwegian kroner are mentioned in the loan documents. There are several variations of multiple-currency bonds on the market, and the conspicuousness of the multiple-currency character of one bond may be greater than that of another. In my view, the act of 1933 ought to be given a restricted scope and should be applied only to those multiple-currency bonds in which *a definite* amount in kroner has been stipulated. But this conclusion cannot be drawn with certainty on the basis of existing legal sources, which are very scarce. The *travaux préparatoires* of this act consist in part of confidential parliamentary documents that were not released until this year. A study of these documents may give new data on interpretation and thereby provide a certain clarification.

While the issue just discussed is a Norwegian specialty, the question of what position should be adopted as regards the various forms of *real-value clauses* is an international problem that will be of great consequence in the time to come. In the Nordic countries, interference has so far been restricted to gold clauses, whereas other protective clauses against currency depreciation, such as index clauses, have been accepted only subject to ordinary court revision. The prominent British scholar in the field of monetary law, F. A. Mann, has characterized this dualistic attitude as one that "certainly does not disclose consistency of thought".[8] Such clauses have gradually become quite common in several kinds of contractual relations. How far one should proceed in the direction of prohibitive rules in this field is a complex problem which also, when approached, will prove to be politically controversial. In this connection I will confine myself to making a general comment. One must probably accept it as a fact that, where index clauses are becoming widespread in a society, they will tend to become unacceptable, partly because they can contribute to the creation of social discrepancies and partly because they may aggravate an already existing inflationary development. This means, further, that when, in a society where such clauses are common, monetary instability is developing a natural reaction

[8] F. A. Mann, *The Legal Aspect of Money*, 3rd ed. 1971, p. 162.

will be to declare such clauses invalid, as was done with gold clauses in the interwar period. This in turn implies, however, that the index clauses will lose their value in the very situation in which they were to give proof of precisely this value. It would be unfortunate if we were to land in such a situation, partly because real-value clauses should be considered perfectly justifiable at least within certain limited spheres (such as payment claims pursuant to various building contracts) and partly because to introduce general prohibitions in this respect would almost be to invite evasions. Such views would indicate that this is a field where, in economically stable periods, endeavours should be made to pass legislation which is suited to stand the test when these problems become, as they may, seriously urgent. In my country I have advocated that a legislative assessment of these questions should be undertaken and that concrete measures should be adopted as soon as possible, before such clauses are so widely spread that the problems involved become really comprehensive. I believe that this is a more important issue of property law than are several of those now being given priority in Nordic legislation efforts.[9]

9. If we extend our view, we begin to discern the outlines of a specialized, but global, field of law. I refer to international economic law, which primarily covers the international organizations of economic cooperation and the law connected with these, and—more specifically with a view to foreign-exchange problems—international monetary law. Whether one should regard foreign-exchange policy as part of monetary and credit policy, or as a special sector of economic policy, is a terminological (systematic) question only. It is a real point, however, that the legal issues of foreign-exchange policy, hitherto almost unknown territory to the majority of jurists, have in the last few years suddenly become current problems of extreme importance.[1]

First, a few words on the national rules in this field.

The monetary system of Norway is still linked to gold as re-

[9] In Finland the problem has been subjected to debate, and through stabilization legislation of 1968 rules invalidating a great number of index clauses have been established.

[1] In view of the fact that in recent years this sector has undergone several crises, it should be mentioned that the present paper was completed at the beginning of 1974.

gards the par value of the krone. According to the Bretton Woods Convention on the International Monetary Fund, to which all the Nordic countries have adhered, each member state must declare to the Fund a value for its monetary unit. For the time being Norway has announced a value for the krone corresponding to a weight of just above 0.1 gramme of fine gold. The reality of this stipulation of value lies in the *relative* effect, i.e. the fixing of value *relations* between the various currencies, which implies an establishing of foreign-exchange rates. As mentioned, however, the Norwegian monetary act still lays down a value for the krone that is slightly above 0.4 gramme gold, whereas we are thus internationally bound to maintain a quite different value. Consequently we are here facing the legal anomaly that our legal sources contain two widely differing definitions of the value of the monetary unit. It is quite obvious that in this case precedence must be given to the international rule at the expense of the statutory rule. Certain difficulties may certainly arise as to the reasoning for this result considering the dualistic constitutional-law concept—prevailing in Norwegian traditional legal doctrine also—pursuant to which the national legal norm is given precedence in cases of conflict between internal law and international law. The justification must in that case be sought, if one adheres to this doctrine, in the consideration that there is no *actual* conflict between the two sets of rules owing to the suspension of redemption in gold and the connected legislation against gold clauses. The provision of the old monetary act will not today in practical application conflict with the internationally declared value. If, as I myself should prefer, one pursues a more monistic view of the relation between international law and internal law and presumes that the harmonization of national and international rules should be undertaken according to the ordinary principles of legal method, the reasoning may quite simply be that the old statutory rule no longer has sufficient strength to take precedence over the newer value definition established on the basis of the current economic situation. Older legal forms can hold their own to only a limited extent against new economic realities. Here the statutory provision is particularly antiquated while at the same time the economic reality is quite unequivocal as a result of the international declaration of value.[2]

[2] See further on these questions of principle my article in 12 *Sc.St.L.*, pp. 151 ff. (1968).

If the stipulation of the international value is *changed*, so resulting in a devaluation or a revaluation, the obsolete Norwegian legislation gives rise to a question of competence, namely whether this change of value should be expressed by way of a statutory amendment, in view of the value stipulation already incorporated in the legislation. The real effect of this standpoint would be that a change of parity could take place only through a decision in statutory form ("formal law").[3]

This conclusion has not, however, been drawn. In Norwegian practice the reasoning has been as follows. As a consequence of the suspension of redemption in gold the par value in the monetary act cannot be considered to have any effect, but is for all practical purposes a dead letter. Therefore, a change in the par value does not presuppose a statutory decision. And it has accordingly further been assumed that the administration could enforce parity changes on its own. That means that the view has been followed that the value provision of the legislation is void in so far as the administration has been considered to be quite unobligated by this provision.[4] One might pinpoint this by saying that we have sought the authority for changing the par value in the decision of 1931 on a temporary suspension of redemption in gold. One sees here how the old legal safety valve on permission to suspend the gold standard "under especially dangerous circumstances"—which is almost forgotten—is in fact a fundamental provision as regards our monetary system.

In the Norwegian draft bill of 1953 it was proposed to include the current international par value in the act, on the grounds that a change of this value is such an important matter that it ought to be undertaken by Parliament by way of a formal statutory decision. At the same time, however, it is stated in the *travaux préparatoires* that for practical reasons it would not be possible to establish this procedure as an absolute rule.[5] Cases may occur where an immediate decision is

[3] On the question of the relation between the executive and legislative power in this respect, with special reference to German law, see Wolfgang P. Hoffman, *Rechtsfragen der Währungsparität*, 1969.

[4] The postwar decisions on new krone values (par values or central rates) have not even been made in the form of a Royal decree, but merely by way of resolutions of the ministries of finance or commerce.

[5] *Innstilling om Lov om Pengevesenet og Norges Bank* (Report on Act on the Monetary System and the Bank of Norway), 1953, pp. 57–8.

necessary. Moreover the matter as a whole is of such a delicate nature that it may prove difficult to deal with it in advance in Parliament. A supplementary provision has therefore been proposed, to the effect that the King (i.e. the Government) may, in urgent cases and after the Bank of Norway has had the opportunity to give its advice, make a temporary decision on a change. In the event of such a decision the question must subsequently be submitted to Parliament as soon as possible. In my opinion the value definition ought to be removed entirely from the legislation, which should instead give the Government power to stipulate this value.[6] In view of their nature, these matters ought to be dealt with quickly and secretly, and so are not suited to being discussed by the national assembly.[7] The Government's decision is of course subject to *ordinary parliamentary control.* But once a parity change has taken place—although it may be said to be temporary—then Parliament is in fact bound, and subsequent discussion of a statutory amendment will be rather unreal.

We have in principle, from a *national-law* standpoint, complete control of our foreign economy when applying the rules in question or enforcing other monetary measures. In relation to *international law,* too, the starting point is that the individual state has "monetary sovereignty". As the Hague Court once pronounced in a well-known passage, it is "a generally accepted principle that a state is entitled to regulate its own currency".[8] Through a more recent creation of international rules, however, we have become bound to a considerable extent. Among the more fundamental ties must be mentioned especially the Bretton Woods Convention on the International Monetary Fund, which represented the first major step towards a development of international law in this sphere.[9]

In 1970, when the Fund celebrated its 25th anniversary, it

[6] This would be in conformity with the system that is most common, viewed in a comparative-law perspective. See, e.g., Henri Guisan, "Quelques aspects du droit monétaire contemporain", in *The Present State of International Law* 1973, pp. 263–4. Thus, according to the Finnish monetary act of 1962, a Nordic statute expressly regulating this question, the Government decides "on recommendation by the Bank of Finland", as to the "international basic value" of the mark (sec. 2 of the act).

[7] Thus in the Finnish monetary act a confidential treatment of the case is explicitly prescribed.

[8] *Serbian and Brazilian Loan case.* Series A, nos. 20–1, at p. 44.

[9] Articles of agreement of the International Monetary Fund of Dec. 27, 1945 (hereinafter cited as the IMF agreement).

enjoyed widespread recognition of its contribution towards the economic growth of the member countries. Today, the entire international monetary system which has been constructed around the Fund is in the throes of a profound crisis.

The IMF agreement, with the structures subsequently added, involves a legally regulated system consisting of, *inter alia*, par values, convertibility and various kinds of drawing rights. I shall make some comments on certain legal aspects of these essential elements of the system.[1]

All member states have in the first place an obligation to maintain their own monetary unit at a *stable par value*. The concrete meaning of this is that each state declares a par value to the Fund, and is bound to see to it that all transactions taking place within its own territory do not depart from the exchange rates thus established, exept for a small permitted fluctuation margin, as a rule 1 per cent either way.[2] Each state may choose for itself which instruments it will use to comply with this obligation. The most common method is central-bank intervention in the money market by selling or buying currency if the rates of exchange threaten to exceed the permitted fluctuation margin. Consequently, this par-value system is a system of fixed exchange rates. The member states are under obligation to avoid fluctuating ("floating") rates, i.e. rates varying beyond the intervention margins.

The member states are further obliged not to undertake any *change* in the par value "except to correct a fundamental disequilibrium".[3] Even in these cases an established procedure must be followed. The state concerned must submit a proposal to and consult with the Fund. Provided the change does not exceed 10 per cent of the initial par value, the Fund can raise no objection. If, however, the change goes beyond this, the consent of the Fund is required. It has been debated whether a state has a free hand to implement a revaluation within the framework where a previous devaluation was carried out, or vice versa, but is seems established that the free 10 per cent is given only in order to adjust the primary stipulation

[1] These comments do not call for many citations. Among the literature to which the author is indebted mention may be made in particular of a number of articles by Joseph Gold, published *inter alia* in the *International Monetary Fund Pamphlet Series*.

[2] IMF agreement, art. IV, sec. 4.

[3] IMF agreement, art. IV, sec. 5.

and is consequently definitely consumed. If a member state carries through a change of value despite objections by the Fund, sanctions may be applied: the state will no longer be allowed to use the resources of the Fund and may be excluded from membership.[4]

The Nordic countries have previously used in full their quotas of the initial 10 per cent where they had national freedom of action in regard to the monetary units. The position for these countries is accordingly that the Fund must consent to any further parity change, the consequence being that they are subjected to a considerable limitation of sovereignty as to monetary matters.

When President Nixon on August 15, 1971, declared that the US dollar would go "off gold", this side of the international payment system crumbled. This American decision could hardly be considered illegal. The former convertibility between dollar and gold, for official foreign holders of dollars, was based on an internal executive decision, which did not create any international-law obligation. Under the wording of the IMF agreement neither the United States nor any other nation is under an obligation to provide free convertibility of its currency to gold. It may be argued that the general obligation regarding exchange stability, according to which each member undertakes "to collaborate with the Fund to promote exchange stability" and "to maintain orderly exchange arrangements with other members", should have prevented the United States from abandoning convertibility, as in the prevailing situation this measure was almost certain to have a disruptive effect on the existing exchange stability.[5] This general obligation is, however, probably too vague to impose a unique convertibility duty upon the United States.[6] On the other hand the reaction by a number of other countries, including the Nordic states, to this American measure was contrary to the express wording of the Convention, as they chose to let the rate of the dollar float downwards, i.e. they suspended the lower limit of intervention and left the rate to be determined by the market forces. But it would nevertheless be unrealistic to consider this reaction as a breach of the treaty obligation to

[4] IMF agreement, art. IV, sec. 6.
[5] IMF agreement, art. IV, sec. 4 (a).
[6] For a discussion see, e.g., James R. Atwood *et al.*, "Legal problems of international monetary reform", 20 *Stamford Law Review* 1968, pp. 985–7.

avoid floating rates. Taking into account the factual situation on the foreign-exchange market, it would have been impossible for any single state to carry through an effective intervention by the central bank. The doctrine of *clausula rebus sic stantibus* or considerations of a similar character should therefore constitute sufficient grounds for a justification of the floating of the currencies which, at a first glance, appears illegal.

The reason why the crisis did not prove too painful, from a legal point of view, seems to lie primarily in a feature of the IMF agreement which may be characterized as a legal anomaly.[7] With regard to *parity changes* that have not obtained the requisite consent from the Fund, there is a special provision in the treaty on the "effect of unauthorized changes" Under this clause the member state in question *automatically* loses the right to use the Fund's resources, including the important drawing rights, until such time as the Fund decides to lift this sanction.[8] Where, on the other hand, it is a question of the legal violation represented by the *floating currency rates*, there are no specific treaty provisions. Consequently, this situation comes within the ordinary system of sanctions of the treaty, according to which the Fund on its own discretion may *decide* whether sanctions are to be applied. But as opposed to the case of an illegal change of par value, the sanction does not take effect as an automatic legal consequence. This may be considered rather strange, as in a sense the floating rates represent a *graver* breach of the treaty—which is constructed upon the main principle of fixed rates in order to attain stability—than does the breach constituted by non-recognized parity changes. The legal position is probably to be explained on the basis of the fact that at the preparation of the treaty the problem of the unauthorized changes of par value played a prominent part, whereas at that time little interest was paid to the floating rates. But the fact that the law is as it is, possibly because of some oversight on the part of the legal experts at that time, has probably helped to alleviate the crisis, as it has been possible to avoid making the problem of sanctions a chief subject.

[7] See on this question, though the work in question was published before the 1971 crisis, Joseph Gold, "Unauthorized changes of par value and fluctuating exchange rates in the Bretton Woods system", in 65 *American Journal of International Law* 1971, pp. 113 ff.

[8] IMF agreement, art. IV, sec. 6.

At present we still live under a "temporary regime" established by a decision of the Fund dated December 18, 1971.[9] Until new permanent par values have been stipulated in accordance with the IMF agreement, the member states may declare "central rates" for their currencies. In this period the member states may at the same time apply intervention margins of 2.25 per cent on either side of the declared central rate. The Nordic countries have made use of this opportunity to stipulate a central rate with these wider intervention margins.

As the lifetime of this "temporary" regime has been extended in consequence of a lack of political determination, a number of questions of interpretation have arisen concerning the relation between the par-value concept and the central-rate concept. With regard to legal documents applying the term par value or similar expressions, one has to put the question of construction whether the new central rate should replace the par value, which has not formally been abandoned but has in almost every respect lost its significance. This interpretation must, it is true, be undertaken relative to the individual text and its special history. But taking into account that, where a member state has communicated such a rate to the Fund, the central rates have in fact replaced the par values, and taking into account that the state in question does not adjust the par value to the new realities during this regime, there should now be an almost overwhelming reason for recognizing the central rate as equivalent to a par value in relation to a text drafted before the beginning of the crisis in 1971. This point of view should be given effect both as regards various kinds of official documents and private contracts.

This temporary regime has, however, also been greatly watered down, resulting in a reduced effect of the central rates as well. This has been caused by the recently renewed and widespread practice of floating currencies. In February 1973 the US dollar was devalued by 10 per cent. This measure brought about a new structure in the foreign-exchange relations, where a pattern consisting of four main groups of currencies was developed: first, currencies that retained their gold values, which in fact implied a revaluation by 11.1 per cent in relation to the dollar; secondly, currencies that accompanied the dollar downwards with a 10 per cent devaluation; thirdly, currencies

[9] IMF Executive Board Decision no. 3463 - (71/126).

that adopted an intermediate position and devalued by less than 10 per cent, and fourthly, currencies which the state authorities decided to float. The latter group was soon to be enlarged. Shortly after the US devaluation, new speculative attacks on the dollar commenced. Most official exchange markets closed at the beginning of March. The outcome of this crisis was, as far as Western Europe is concerned, that six EEC countries, viz. Belgium, Denmark, France, Luxembourg, the Netherlands and West Germany, decided on a common float. It was decided that the maximum margin of exchange-rate fluctuation between their currencies should still not exceed 2.25 per cent, in accordance with the EEC common margins system of 1972, but that their central banks should no longer be under obligation to intervene in order to keep the US dollar within definite margins of fluctuation. This meant that the "EEC snake" was no longer confined to the "IMF tunnel" but was released from this tunnel. Norway and Sweden announced to the Fund that they would join this arrangement. Britain, Ireland and Italy chose to continue to let their currencies fluctuate outside the EEC margins. Though at the same time they declared that they would participate in the common float as soon as possible, they have not yet done so. In 1974 France also withdrew from the common system.

This general flight into fluctuation implies that the central rates now have no more than a restricted significance, because a rate stipulation will have a meaning only when it is connected with defined intervention margins. A value declaration for a currency (be it a par value or a central rate) and the fluctuation limits are two inseparable elements of a system. Without a defined value as a starting point the fluctuation margins have no significance at all. On the other hand, without some fluctuation limits there is no substance to a declared value of a currency. This means that the central rates today have effect only in relation to the rather limited number of currencies which maintain an intervention system with defined margins. With regard to the last Norwegian revaluation (November 1973) of 5 per cent, this measure implied an effective change of value merely in relation to the currencies included in the EEC snake. For Norway continued to maintain a maximum margin of 2.25 per cent for rates in exchange transactions in their official market between the Norwegian krone and these currencies. But in relation to all other currencies, including the US dollar, the

Norwegian krone was still a floating currency—a fact that often seemed to be overlooked when discussing the significance of the revaluation.

This tendency to float currencies also gives rise to serious problems of interpretation, as various legal documents in the period prior to 1971 were drafted on the basis of the then existing system of fixed exchange rates. Thus in various kinds of multiple-currency loans this new situation may give the creditors an unreasonable profit unless the contracts are so construed as to take sufficient account of the change in a fundamental presupposition. In such a situation, it should be a leading principle of interpretation to assign a more dominant role to the intention of the parties and the various real considerations, including the equitable division of risks between the contracting parties, than would follow from a purely linguistic analysis of the words of the contract.

When the last Norwegian central rate was communicated to the Fund in November 1973, the rate of the krone was declared to be "equal to SDR 0.14553, corresponding to 0.129328 gramme of fine gold". For the first time since the monetary act of 1873 the value of the krone was not defined directly in terms of gold, as the SDR, the new international special drawing right which will be discussed below, had by then been introduced as the primary unit of measurement. This is a milestone in monetary law.

The future of the international exchange-rate policy is somewhat obscure. Many proposals have been launched. Some of them are grouped together under the name "crawling pegs", and imply the possibility of a raising or lowering of the rates by a definite percentage per time unit, e.g. per month, so that the maximum total change in the course of a year would amount to, e.g., 2–3 per cent. In this way it would be possible to achieve a gradual adjustment of the rates and avoid jumplike devaluations and revaluations. There seems, however, to be general political agreement on a return to a system based on fixed par values as a general principle.[1] According to the outline

[1] Already at the annual meeting of the International Monetary Fund in 1971, the then Norwegian Minister of Commerce, Mr Per Kleppe, stated as spokesman of all the Nordic countries that "priority must, in our view, be given to a speedy return to effective par values or official exchange rates with agreed intervention margins". *Summary Proceedings, Annual Meeting 1971, International Monetary Fund* (1971), p. 87. At the 1973 meeting the Swedish

of reform submitted at the 1973 annual meeting of the board of governors of the International Monetary Fund the exchange-rate mechanism will remain based on "stable but adjustable" par values, and countries should not make inappropriate par-value changes.[2] On the other hand, countries should, whether in surplus or deficit, make appropriate par-value changes promptly. Changes in par values will continue to require Fund approval. Further considerations will be given to whether or not there should be simplified procedures, under appropriate safeguards, for small par-value changes. At the same time, however, it is admitted that in the present situation a rather large measure of floating is unavoidable and may even be desirable. According to the outline of reform, countries may adopt floating rates in particular situations, subject to Fund authorization, surveillance, and review. Authorization to float will relieve a country of its obligation to observe the maximum margins in relation to their parities. There will be further study of the possibility both of defining in advance particular situations in which countries may adopt floating rates and of developing a code of conduct for this situation. A constructive management of a floating regime has been spoken of.

Where the mutual *convertibility* of the currencies is concerned, the Fund Convention contains rather complex rules on this concept. The main principle is that the member states must avoid restrictions on transfers concerning *current* international transactions and avoid *discriminatory* currency arrangements.[3] As members of the OECD, the Nordic countries have also assumed regional liberalization obligations with regard to capital movements. The capital code of the OECD, however, permits the making of reservations as to the individual items, and Norway has done this *inter alia* for various forms of investments. Within the national legal sphere, the liberalization is effected by application of the internal rules on foreign-exchange regulation. The Norwegian act of 1950 on foreign-exchange regulation is one of the most extensive governmental-power statutes of Norwegian legislation, giving as it

Minister of Commerce, Mr Kjell-Olof Feldt, reaffirmed as Nordic spokesman, "our strong support for parities which in general are stable". *Summary Proceedings* (1973), p. 101.

[2] *Summary Proceedings, Annual Meeting 1973, International Monetary Fund* (1973), pp. 355 ff., at pp. 359–60.

[3] IMF agreement, art. VIII, secs. 2–3.

does the Ministry of Commerce complete legal control of all currency transactions. The adjustment to the growth of international duties in this area is then made through successive modifications in the application of these governmental powers.

But even more fascinating to the mind of the jurist at the present time are the problems concerning regulation of *international liquidity*. In this area it is important to get away from obsolete systems by way of a new international creation of law.

Hitherto the principal international reserve asset has been gold. For that reason vast holes in the ground have been dug at enormous cost in South Africa and other places, whereafter the gold extracted has been transported to other vast holes in the ground at Fort Knox or other bank vaults. From a realistic point of view it should not make the least difference whether these lumps of gold are left in one hole or in the other. The aim must be a system of rights and duties freed from this gold connection.

This problem has been brought right to the fore by recent events. There are two particular facts which deserve mentioning. First, there is now a widespread understanding that it is rather absurd to let an incidental factor such as the world's gold production play a decisive part in determining the growth of global liquidity. Secondly, the currency crises of recent years have reduced the confidence in the pound sterling and the dollar as reserve currencies, i.e. currencies which the central banks of the various countries have primarily used in addition to gold as their reserve assets.

So the time has obviously come for the development of an international system whereby the increase of international liquidity can be deliberately managed with a view to adapting this volume to the circumstances of world trade at any time. In this connection, a number of extensive plans have been launched, especially well known being those associated with the name of the American expert Professor Triffin, which go a long way in the direction of an international central bank. It is a matter of specific legal interest today to examine the growing embryo of a more expansive system that can already be discerned in the drawing rights of the Fund.[4]

[4] The state-organized system for securing international liquidity was during the 1960s supplemented by a system of "swap" agreements between the central banks, which are bilateral or multilateral agreements on mutual rights

The original IMF agreement already authorized a system of drawing rights. The treaty established a capital for the Fund, which has since been increased several times. It is based on quotas for each member state. Originally, one fourth of a country's quota was to be paid in gold, whereas the remaining three fourths were to be placed at the disposal of the Fund in the currency of the member state. This capital is the property of the Fund. However, under certain conditions the members may draw on these resources. That means that a member state may purchase the currencies of other member states from the Fund against payment in its own currency. A qualitative condition is that the state in question shall be able to show evidence of difficulties necessitating such support. There are also quantitative restrictions on these transactions. However, the effecting of these transactions up to certain amounts (within the gold *tranche*) is almost automatic, and the rights may thus be placed by the individual member on an equal footing with liquid reserve assets. In return, each state has a duty to the Fund to make available its own currency within the scope of its subscription. A member must undertake, further, to repurchase amounts of its own currency that have been sold by it to the Fund. These drawing rights are often described as short-term credits granted by the Fund. It would be more accurate to speak of a sale of a country's own currency against a duty of repurchasing.

In 1969 there came into operation an additional system based on a new principle. This new form of drawing right is known as the *special drawing right* (SDR).[5] The allocation of SDRs is intended to be made in such a way as to satisfy the long-term and global need to supplement the reserve assets

to short-term credits. At present Norway is party to several such agreements. The contracting party is the Bank of Norway, a fact which gives rise to interesting constitutional-law perspectives with regard to the relation between bank contracts and treaty regulations. If the *state* concludes an agreement, this requires the entire apparatus, comprising the conclusion of the treaty, approval of parliament and subsequent ratification. In this case, however, the whole matter is simply a relation directly between the *central banks*, albeit normally after consultations with the governments. Seen from a practical point of view, this justifies the question of whether the democratic element of the decision-making process will be sufficiently safeguarded, and, seen from a theoretical point of view, it contributes towards a construction of a material treaty concept.

[5] See, especially, Joseph Gold, *Special Drawing Rights, Character and Use*, 1970, with further references. Norway accepted this arrangement in 1968. The administration of all drawing rights was in 1969 transferred from the Ministry of Commerce to the Bank of Norway.

of national monetary authorities. These rights are not subject to any duty of repurchasing (reconstitution) provided their utilization is kept within certain limits. An allocation of SDRs will thus have the effect of increasing the monetary reserve assets of each recipient without reducing the reserves of other states, and so will bring about a net addition to international liquidity. The utilization of these drawing rights is conditional on the existence of a need on the part of a participant state, this need to be assessed by the Fund. The procedure is that the Fund designates another participant to whom the state in need is then entitled to sell its SDRs. In return for the SDRs, the transferor state will receive an equal value of currency convertible in fact from the transferee state. This is the fundamental point. The basis of the SDR's character as an international means of payment is the other member states' obligation to accept it and exchange it for convertible currency. These drawing rights thus appear as a form of conditional rights. On materialization of the condition, i.e. when the Fund designates a transferee state, the transferor state has a *right of sale,* and the transferee state a *duty of purchase.* There exists, in other words, a kind of international *contracting duty.* The sanction connected with this obligation is severe. Should a designated transferee fail to perform its obligation to accept a transfer of SDRs, it will face the serious penalty of a suspension of the right to use its own SDRs. The designation is based on a system of guidance administered by the Fund, whereby, after having assessed the payment balance and other elements of the economic position of the countries, the Fund designates, within a quantitative limitation, the states to whom the drawing rights can be transferred. In this respect, also, the SDR includes a certain international element that goes beyond this bilateral nexus between the transferor and the transferee state, inasmuch as the Fund itself has, in undertaking the necessary designation, a duty to ensure that a participant will be able to use its SDRs.

This mechanism does not represent any sale of currency on the part of the Fund. What the Fund makes available is merely a definite number of SDRs. Therefore there is no need for any prior contribution of gold or currency on the part of the members. Once the SDRs have come into circulation—so far three allocations have been made—they may continue to be transferred back and forth between the countries. But these sales and purchases will *not* involve a cessation of the drawing rights. They will not, like credits, cease to exist on repayment. They have, like a monetary unit, a defined value determined by gold weight, which implies that they enjoy an effective guarantee of maintenance of their gold value. But the intrinsic contracting duty of the SDRs makes them, from a legal point of view, superior even to gold as monetary reserves, since there exists no general international legal obligation to buy gold with convertible currency.

In various connections there have been discussions of the exact nature of special drawing rights. Thus in a recently published thesis Mr M. R. Schuster poses the following questions:[6]

> From the legal aspect the following three issues will be examined: (*a*) are drawing rights money or credit? Assuming that they are in fact money, (*b*) are they a form of international legal tender? and (*c*) do they constitute international fiat money?

After having discussed these questions, the author draws the following conclusion:[7]

> ... definitive pronouncement on whether special drawing rights are a supranational currency, or international legal tender, or international fiat money cannot be made.... Indeed, all that can be stated with certainty at this point is that special drawing rights are *sui generis* in the law.

Although there is hardly reason to object to this conclusion, there may be grounds for warning against the presentation of the question *per se*. Analyses of this kind represent a dead end. They can hardly contribute either to the legal-theoretical understanding, or to the legal-dogmatic interpretation, or to the legal-political debate.

First, the SDR does not correspond to any physical object. The SDR is a legal concept which—like many other legal concepts—ties together a series of legal conditions and legal effects. One cannot, therefore, say that the SDRs "are" something beyond the sum total of these legal effects. Secondly, analogies from former concepts in national legal systems cannot give any contribution of significance when interpreting the individual provisions on the SDR, partly because this new concept has its

[6] M. R. Schuster, *The Public International Law of Money*, 1973, pp. 200–1.
[7] *Op. cit.*, p. 204.

basis in a treaty system which is essentially different from the older national monetary legislation and partly because domestic legal creations such as "money" and "credit" are not unambiguously defined but are subject to discussion as regards the more definite contents. Thirdly, a debate on what SDRs "are" will hardly be of any advantage from a practical point of view. The discussions that were held during the preparation of the SDR system as to whether the new instrument was a "unit", whether it was "money", etc., appear on the whole to have been a negative factor during the negotiations. Admittedly, a great deal of learned analysis was brought to bear on the subject, but this was an impediment rather than an aid when it came to reaching the necessary compromises as a basis of the treaty text. This is more than likely also to be the case in the future debate on the further development of the SDR system.

Inherent in the structure of the SDR there is, however, at any rate a possibility of a further development of an international legal system of rights and duties fulfilling several monetary-law functions. According to the 1973 outline of reform, the SDR will become the principal reserve asset, and the role of gold and reserve currencies will be reduced.[8] What will happen to gold now in this connection is maybe what happens to the old generals, they do not die but slowly fade away. The SDR will also be the *numéraire* in terms of which par values will be expressed, a principle that Norway, as mentioned, has already adhered to. Allocation of SDRs will be made in such a way as to ensure that the volume of global reserves is adequate. The effective yield on the SDR should be high enough to make it attractive to acquire and hold but not so high as to make countries reluctant to use the SDR when in deficit. Consideration will be given to revising the rules governing the use of the SDR with a view to relaxing existing constraints.[9] Moreover, consideration will be given to the problem of establishing a link between assistance to developing countries and SDR allocations.[1]

The world's monetary system is now in a period of transition. The coming reform will probably include not only the exchange-rate mechanism, the rules on convertibility and a

[8] *Summary Proceedings, Annual Meeting 1973, International Monetary Fund* (1973), p. 363.
[9] *Op. cit.*, p. 364.
[1] *Op. cit.*, pp. 366–7.

further development of the SDR but also connected problems such as measures concerning disequilibrating capital flows. Such a reform will greatly assist the advance of the international monetary system from the status of being merely "a half-planned, half-unplanned amalgam" of national monetary systems.[2] Although these issues are highly specialized, they have at the same time the greatest practical significance. At the 1971 annual meeting of the board of governors of the International Monetary Fund, the British Chancellor of the Exchequer, Anthony Barber, concluded his statement with the following words, which may also give the real perspective to a legal discussion on these problems.[3]

> ... we know that our decisions vitally affect the employment and the well-being, the hardship or the prosperity, the happiness or the misery, of millions of people throughout the world. If I were to say that our decisions are a matter of life and death it might seem to some of my colleagues from the developed countries of the Western world a mere cliché. To my colleagues from the Third World the life and the death are only too apparent.
>
> We must succeed.

10. Finally, a few concluding remarks.

This account has in the main kept to the body of rules binding in or for the Norwegian state. Were we to go outside this limitation, we should among other things encounter the entire EEC legal order with its principles on liberalization of the movement of capital and the progressive coordination of monetary policies of the member states. These principles have played a considerable role also in the current Norwegian debate on economic policy, especially as an issue in the Common Market debate prior to the negative 1972 referendum.[4] The very rules in the sphere of monetary and credit policy—and the plans that have been launched for a further development of EEC law in this field—were central, in the sense that in some quarters they were considered to be particularly positive and in others they were regarded as possibly the most negative

[2] Frank A. Southard in XVI *International Financial News Survey* 1964, p. 113.

[3] *Summary Proceedings, Annual Meeting 1971, International Monetary Fund* (1971), p. 35.

[4] On the legal issues in the Norwegian EEC debate, see my article in 17 *Sc.St.L.*, pp. 275 ff. (1973).

factor when assessing the question of Norway's joining the European Communities.

But even after the opposition of the majority of the Norwegian population to EEC membership has been made clear, Norwegian monetary and credit policy will be greatly influenced by the principles adopted in other countries of Western Europe. Thus Norway, like Sweden, has joined the European common margins system. An authoritative and far-reaching expression of this interdependence was recently given by our Prime Minister, Trygve Bratteli, when speaking in January 1974 of the oil crisis. Discussing the enormous increase in the income of the oil-producing countries that could be foreseen and the consequences of this increase, the Prime Minister stated:[5]

> The amounts one now will risk having included in the international monetary system are of an entirely different dimension from what the monetary policy authorities have so far had to cope with. . . . There is in the present situation a danger of large-scale speculative buying up of economic enterprises and real resources by the oil countries themselves or by institutions receiving this capital for administration. There is also a danger that the industrialized countries will separately, and without coordination, defend themselves against this stream of money and the payment problems that lie behind it. Western Europe and other industrialized countries are here facing the task of working out a common monetary and foreign-exchange policy of greater scope than has till now been envisaged.

This task also calls for legal tools.

This essay represents merely a groping attempt to draw some lines through many scattered points. Continuing this sketching, one may visualize the outlines of a new legal discipline. This is, however, a question of pure systematics. The real point is that jurists should say, like Askeladden, the successful boy of numerous Norwegian folk tales, that if we want to be in on things, we must be on the move. It is true that legal science has, as was pointed out at the beginning of this paper, been the parent discipline of several social sciences. At the same time, however, this proud past includes a negative aspect. Precisely where the developments take great strides forward, there appears a tendency towards the creation of new professional

[5] Information from the Norwegian Ministry of Foreign Affairs (*UD-informasjon*) no. 4/1974 (stencil), p. 21.

sectors—economics, sociology, political science, criminology. And in a short time the continued upward orbit of these new disciplines means a weakening of the connection with their legal origin. The Norwegian legal scholar Ragnar Knoph used to talk about the breadth of outlook one might have from a mental aeroplane. To use a more up-to-date metaphor, one might say that legal science has functioned like a booster space rocket in relation to the other social sciences. But we must make sure that this metaphor does not become too apt. It is urgent that we should aim at the development of a monetary and credit law properly based on the realities of modern economic policy. Otherwise there is the risk that the law and the legal thinking in this sector of society will float off downwards like an expended booster on its final course.