

The legal nature of bond notes in Zimbabwe

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Abstract

The legal field of money and currency is one of the most complex fields of law. Issues of creation of money and its regulation have largely been left to sovereign nations with little interference at international level. As a result, almost all nations across the world have each their own currencies which they regulate to be acceptable in those nations as legal tender, unit of account and store of value or wealth.

The economic meltdown encountered in Zimbabwe led to the government of this country introducing various monetary measures in an attempt to deal with the currency crisis experienced as a result thereof. Bearer cheques were introduced first but that did not solve the crisis. In 2009, the Government introduced multi currencies which were dominated by the United States dollar (US\$) and later legally demonetised its own currency, namely the Zimbabwe dollar in 2015. It seemed as if the currency crisis had been resolved until early 2016, when the country began experiencing severe cash shortages, despite its cash economy. In an endeavour to mitigate the cash crisis, the Government, through its central bank, announced the introduction of bond notes. The bond notes are said to be not a return of the local currency but are surrogate to the US\$. This posed the question which was interrogated in this study: To what extent are bond notes effectively regulated in Zimbabwe and regarded as legally acceptable payment in Zimbabwe and other countries?

Key words

1. Bond notes
2. Currency
3. Central bank
4. International Monetary Fund
5. Money
6. Regulation
7. US\$

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LIST OF ABBREVIATIONS

CMA	Common Monetary Area
FSB	Financial Stability Board
IMF	International Monetary Fund
RBZ	Reserve Bank of Zimbabwe
SADC	Southern African Development Community
UN	United Nations
US\$	United States dollar
WB	World Bank
ZW\$	Zimbabwe dollar

Chapter 1 – Introduction and problem statement

1.1 Introduction

The legal field of money and currency is a complex one. Almost every country in the world has its own currency which it regulates and recognises as money for the fulfilment of various obligations, such as medium of payment in exchange for various goods, unit of account and as a measure of value or wealth. There are various theories which have been advanced to try and determine what money is. Governments have indeed come up with various policies and legislation to regulate their monetary affairs. There are even measures which have been taken at international level, albeit at a minimal extent, to ensure intergovernmental cooperation in the monetary field, especially regarding exchange control measures and balance of payments for the smooth flow of trade among nations. There is indeed a separation between the domestic and foreign money obligations and how each of them is dealt with.

1.2 Problem statement

Zimbabwe has been battling a severe economic crisis for nearly two decades. This economic crisis led to the fall of the Zimbabwe dollar such that, in about 2003, money in its ordinary sense was no longer being used but had been replaced by bearer cheques which had a limited time span. In 2009, inflation worsened which led the country to discard the use of its own currency for both local and international monetary transactions¹ and to adopt the multi-currency regime.² The United States dollar (hereinafter the US\$), the South African rand and the Botswana pula, among others, formed the basket of currencies being utilised.³ However, transactions for Government and for all other purposes were denominated in US\$. With the fall of the South African rand in 2015, the US\$ became the major trading currency and became highly in demand to the extent that the country, which is a cash economy, ran out of US\$ bank notes. Government also

¹ It is not certain whether other foreign banks were still accepting the Zimbabwe dollar for forex exchange purposes where a Zimbabwean traveller would want to exchange the Zimbabwe dollar for the South African rand, as an example, in a South African bank. For local transactions, people started what was called "burning" of currencies as confidence in their own currency was lost.

² *Finance Act 2 of 2009 sec 17(2).*

³ *Finance Act 2 of 2009 sec 17(2).*

started to promote the use of plastic money (electronic transactions, where people were encouraged to make use of debit cards for day to day transactions). This, however, did not mitigate the challenges but the demand for cash actually exacerbated as it was introduced too late. In order to mitigate the cash shortages, Government introduced the bond notes in late 2016. The bond notes are said not to be the reintroduction of the local currency discarded in 2009 but will work as surrogate currency and has the same value as the US\$. The bond notes are reportedly backed by a US\$ 200 million loan facility from China through Afrexim bank.⁴

According to Proctor,⁵ monetary sovereignty is one of the attributes of a modern state under international law. Zimbabwe has discarded the use of its own currency and adopted the multi-currency regime. There are however uncertainties regarding this arrangement. Firstly, it is not clear whether Zimbabwe ceases to be a sovereign state and is now part of the states whose currencies it adopted. Secondly, it is not clear whether, in terms of international law, a country can use another country's currency in its local transactions as if it was its own currency and if so, whether there are any measures that should be adopted by that country to formalise the use of such currency. If such measures do exist, it is not certain whether Zimbabwe adopted them.

Proctor says,⁶

The right to regulate the monetary system resides with the State; and the obligation of other States to recognize that monetary system can only apply where the relevant money has been created under the legal authority of the first state.

Zimbabwe regulated its monetary system through the amendment of the Reserve Bank of Zimbabwe Act⁷ to pave the way for the introduction of the bond notes. The central bank, i.e. the Reserve Bank of Zimbabwe, maintains that the bond note is a surrogate currency which is at par with the US\$. In its monetary policy⁸, it maintains that the bond

⁴ Reserve Bank of Zimbabwe 2016 www.rbz.co.zw/assets/press-statement---measures-to-deal-with-cash-shortages---04-may-2016.pdf (accessed 31 May 2017) 5-6; Mpofu 2016 "Legality of bond notes questioned" *The Standard*, 7 Oct. <https://www.theindependent.co.zw/2016/10/07/legality-bond-notes-questioned> (accessed 31 May 2017).

⁵ Proctor *Mann on the Legal Aspect of Money* 12.

⁶ Proctor *Mann on the Legal Aspect of Money* 14.

⁷ [Chapter 22:05].

⁸ Reserve Bank of Zimbabwe 2016 www.rbz.co.zw/assets/press-statement---measures-to-deal-with-cash-shortages---04-may-2016.pdf (accessed 31 May 2017).

note was introduced to enable the smooth flow of local transactions while the individuals' bank accounts will be reflected in US\$.

In order to determine the legal nature of bond notes, the following aspects need to be considered: the provisions of international law regarding the regulation of a country's monetary policy by reference to another country's currency; whether it is permissible to make a law that allows the making of currency that is surrogate to another country's currency; standards, if any, that are used to determine the value of a country's currency, the obligations of other countries to recognize the bond notes as Zimbabwe's own currency; and finally whether the bond notes can be used to discharge any payment obligations internationally.

These complex aspects require a look at the laws and policies adopted by Zimbabwe and the relevant international law in order to understand the context in which the bond notes operate and the status which it is to be accorded both locally and at international level.

1.3 Research purpose

The aim of this research was to analyse the policy and legislative measures adopted by Zimbabwe in the introduction of multi currencies as a starting point and the steps leading to the introduction of bond notes. The research also sought to interrogate the international law provisions regarding monetary measures and any obligations member countries have, if any, in the regulation of monetary affairs to understand if what Zimbabwe did was in tandem with international law. The legal nature of bond notes was analysed against the domestic legislation and provisions of international law to determine what exactly are they under the legal aspects of money and the extent to which they are regulated.

1.4 Research methodology

The research was conducted by way of literature review. The following sources were consulted: legislation, monetary and fiscal policy statements, international treaties and conventions, journal articles, textbooks as well as internet sources. A qualitative approach was used.

1.5 Outline of the research

Chapter 1 introduces the problem statement and the direction that the research undertook.

Chapter 2 starts by discussing the various theories of money. This is to determine the essential features of what constitutes money at both local and international level. After the discussion on the theories of money, the focus then shifts towards an in-depth analysis of the provisions of the Reserve Bank of Zimbabwe Act⁹. The monetary policies announced since 2009 are also referred to. The aim of this analysis was to have an appreciation of the legislation regulating currency in Zimbabwe and understand whether the Zimbabwe dollar was legally demonetized when the multi-currency regime was introduced. It was also to understand whether the bond notes serve any purpose in terms of the theories propounded therein and the legal aspects therefor.

Chapter 3 focuses on the roles of the International Monetary Fund, the World Bank and other international financial institutions in the regulation of currency and whether there are any standards that member countries must meet in terms of their currencies to be accepted and recognised in the international legal arena. The purpose of this analysis was to determine whether the bond notes can be recognised as money under international law and be used to fulfil any international monetary obligations that Zimbabwe may have.

Chapter 4 then turns on the legal nature of bond notes, that is, to what extent they are legislated and what their status is pursuant to the discussions in the preceding chapters and whether they qualify as local currency which can be used to discharge payment obligations or not.

Chapter 5 is the conclusion, summing up the findings of the research as well as coming up with any recommendations based on the findings from Chapters 2 to 4.

⁹ [Chapter 22:15].

1.6 Currency crisis

A currency crisis is a situation wherein serious doubt exists as to whether a country's central bank has sufficient foreign exchange reserves to maintain the country's fixed exchange rate.¹⁰ Currency crisis is a type of financial crisis which is associated with an economic crisis. Government policy is usually the cause of currency crisis and such a crisis usually leads to a change in the government as it usually has political ramifications.¹¹ There have been various generation models which have been propounded to explain various currency crises. The first-generation model occurs when investors foresee that a government is running an excessive deficit, causing it to run short of liquid assets or harder foreign currency which it can sell to support its currency at the fixed rate. Investors are willing to continue holding the currency as long as they expect the exchange rate to remain fixed, but they flee the currency *en masse* when they anticipate that the peg is about to end.¹² The second generation model occurs when doubts about whether the government is willing to maintain its exchange rate peg lead to multiple equilibria, suggesting that self-fulfilling prophecies may be possible, in which the reason investors attack the currency is that they expect other investors to attack the currency.¹³ The third generation model occurs when self-fulfilling panics that hit the financial intermediaries, force liquidation of long run assets, which then "confirms" the panics.¹⁴

It is not clear as to which generation model the currency crisis in Zimbabwe can be placed under. The issue is not interrogated further as it is not the main subject of the discussion herein. What is clear, however, is the fact that what led to the crisis occurring were the economic policies which were adopted by the Zimbabwe government. This can be supported by the fact that the currency crisis did not lead to a change in government and neither was the central bank governor replaced during the 2003-2008 period of

¹⁰ Anon date unknown https://en.wikipedia.org/wiki/Currency_crisis.

¹¹ Anon date unknown https://en.wikipedia.org/wiki/Currency_crisis.

¹² Anon date unknown https://en.wikipedia.org/wiki/Currency_crisis.

¹³ Anon date unknown https://en.wikipedia.org/wiki/Currency_crisis.

¹⁴ Anon date unknown https://en.wikipedia.org/wiki/Currency_crisis.

hyperinflation. Currency crises have been traditionally viewed as punishment for governments that have mismanaged the economy or lack credibility.¹⁵

¹⁵ Aghion, Bacchetta and Banerjee 2001 *European Economic Review* 1122.

Chapter 2 – Theories of money and the role of the State in the Regulation of currency

2.1 Introduction

There are a few theories that have been advanced on what money is. These theories are based on the role played by various institutions in influencing money within a state territory. These theories are discussed in this chapter as an introduction and thereafter, the focus is turned to the events that occurred in Zimbabwe because of the economic and financial meltdown leading to the introduction of the bond notes. As can be noted, there is no legally accepted definition of money.¹⁶ However, currency is very important to a nation as it expresses the nation's sovereignty.¹⁷ As such, the steps taken by Zimbabwe were analysed to see how it exercised its sovereign powers.

2.2 Theories of money

2.2.1 The State Theory

The theory puts emphasis on the role that the State plays in the issuing of currency and of its regulation. The state plays a very important role for money to be legally recognised within a territory. According to Voet, money as such affords use and ownership not so much by its substance as by its amount, and this amount is so fixed by public authority that it alone and no other is to be looked at in the spending of it and in commercial dealings among people.¹⁸ For money to be recognised within a territory, it must have been issued under the law of the State, denominated by reference to a unit of account to serve as the universal means of exchange in the State of issue.¹⁹ The first proponent of this theory is G F Knapp who was of the opinion that only chattels issued by the legal authority of the State could acquire the character of money, and the value of such is fixed by law, and not by reference to the value of materials used in the production of such

¹⁶ Proctor *Mann on the Legal Aspect of Money* 6, 8–9.

¹⁷ Baltensperger and Cottier *The Role of International Law in Monetary Affairs* 358.

¹⁸ Fox 2013 *The Journal of Legal History* 142.

¹⁹ Proctor *Mann on the Legal Aspect of Money* 15.

money.²⁰ Hence in a situation where money is issued contrary to statutory requirements then it will be regarded as illegal money.²¹ The state has the power to create a new medium of exchange and may pronounce that such new medium of exchange shall be legal tender even for pre-existing debts.²² It is within the prerogative of the State to introduce two or more currencies as legal tender of such State. The State chooses the unit of account in which the various money things will be denominated.²³ According to this theory, money cannot lose its character by custom or by any other means except if the State which issued it enacts legislation which demonetises it.²⁴

It is against the State theory that the measures taken by Zimbabwe in the demonetisation of the Zimbabwe dollar, the introduction of multi-currencies and recently the introduction of bond notes be analysed to evaluate whether it was within its prerogative to take such measures. However, the State theory does not address all the issues to do with money hence there are other theories as well and these are briefly explained immediately below.

2.2.2 The Societary Theory

This theory places emphasis on the role of commercial life or the confidence of the people in the creation and recognition of money. It is also important when looking at the historical background on the origins of money in that money existed before State interference.²⁵ The State only intervened to regulate and recognise that which was already in existence. The theory is also of value in the context of money as a means of payment²⁶ and the willingness of traders to accept it as legal tender. This theory best explains what happened in Zimbabwe in the period 2008-2009. During this period hyperinflation reached such unprecedented levels that local traders began to use foreign currencies as a medium of exchange even though such conduct violated exchange control regulations.²⁷ The country later had to suspend the use of the Zimbabwe dollar obviously

²⁰ Proctor *Mann on the Legal Aspect of Money* 16.

²¹ Eder 1934-1935 *Cornell Law Quarterly* 58.

²² Eder 1934-1935 *Cornell Law Quarterly* 68.

²³ Wray, *Credit and State Theories of Money* 12.

²⁴ Proctor *Mann on the Legal Aspect of Money* 22.

²⁵ Proctor *Mann on the Legal Aspect of Money* 23.

²⁶ Proctor *Mann on the Legal Aspect of Money* 24.

²⁷ Proctor *Mann on the Legal Aspect of Money* 25.

because people had lost confidence in it and they were not accepting it for day to day transactions.²⁸

Thus, in terms of the Societary Theory the power of the State to create money is limited because the confidence of the people and the cooperation of the trading community are necessary to complete money.²⁹ This theory best describes the events in Zimbabwe which led to the adoption of the multi-currencies and the subsequent demonetisation of the Zimbabwe dollar. Even though the State moved in to regularise the use of foreign currencies as legal tender for local transactions the move was a response to society behaviour. Thus, the society also plays an important role in the acceptance of money that would have been issued by the State. The theory can also explain the acceptance of virtual currencies which are not backed by any central bank but are proving to be widely popular worldwide. It is important to note at this early stage that the introduction of bond notes was as a response of the State to avert the society's high demand of the US\$ bank notes and the reason why it was not made the currency of Zimbabwe because of the people's lack of confidence in the local currency.

2.2.3 The Institutional theory

In addition to noting the traditional functions of money as a measure of value, a store of value and as a means of payment³⁰, the institutional theory also notes the reducing role of notes and coins in the modern times.³¹ A monetary system can exist without physical cash as in the case of debit and credit cards. In that regard the institutional theory is to the effect that money consists in the main, to a claim against the issuing central bank³² and in addition also includes the credit balance of sight deposits made by the public with commercial banks.³³ Proctor sums all this up by saying the following:

The theory thus has the following practical consequences:

- (a) the principal objective of the central bank must be the achievement of price stability;

²⁸ Proctor *Mann on the Legal Aspect of Money* 25.

²⁹ Eder 1934-1935 *Cornell Law Quarterly* 60.

³⁰ Proctor *Mann on the Legal Aspect of Money* 25.

³¹ Proctor *Mann on the Legal Aspect of Money* 26.

³² A return to the State theory.

³³ Proctor *Mann on the Legal Aspect of Money* 27

- (b) the central bank must have the functional capacity to achieve price stability through its market operations;
- (c) the central bank must have autonomous decision-making processes, so that political pressures cannot influence or dilute its primary objective;
- (d) given that commercial bank money is also 'money' for the purposes of the definition, the central bank must be able to influence the content of relevant legislation, including the regulatory framework applicable to banks and the financial infrastructure; and
- (e) the central bank must oversee payment systems in order to ensure that scriptural money is a fully reliable mode of payment.³⁴

It will be against the Institutional theory that the role played by the Reserve Bank of Zimbabwe (RBZ) will be analysed in the monetary policies adopted and the legislation in force and the measures adopted to introduce multi-currencies as well as the subsequent introduction of the bond notes which is the main subject of this discussion.

Having briefly looked at the theories of money as a starting point, focus is now turned to the role of the Reserve Bank of Zimbabwe (RBZ) on monetary policy and financial stability and a brief historical background in the monetary affairs of Zimbabwe which led to the introduction of bond notes.

2.3 The role of the Reserve Bank

As already discussed, central banks play a pivotal role in the creation and regulation of money in terms of the Institutional theory. Generally, all central banks have the role of formulating monetary policy and maintaining financial stability.³⁵ Monetary policy is to be distinguished from fiscal policy which deals with the levels of government spending and issues to do with borrowing and regulation and collection of taxes which is under the direct control of the government itself through the Treasury/ministry of Finance. Regarding monetary policy and financial stability, the functions of the RBZ are:³⁶

- to regulate Zimbabwe's monetary policy;
- to achieve and maintain the stability of the Zimbabwe dollar;
- to foster the liquidity, solvency, stability and proper functioning of Zimbabwe's financial system;
- to formulate and execute the monetary policy of Zimbabwe;

³⁴ Proctor *Mann on the Legal Aspect of Money* 28.

³⁵ Proctor *Mann on the Legal Aspect of Money* 94.

³⁶ In terms of section 6(1)(a), (b), (c), (f), (g) and (j) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*].

- to act as banker and financial adviser to, and fiscal agent of, the State;
- to participate in international organizations whose objective is to pursue financial and economic stability through international monetary co-operation.

These functions are to be exercised independently by the Reserve Bank, that is, without interference from the government or other agency.³⁷ It is important to note that the function of achieving and maintaining the stability of the Zimbabwe dollar is currently not being exercised by the RBZ because the currency has been discarded and currently there is no Zimbabwe dollar to maintain. The RBZ also acts as lender of last resort in fulfilling its function of fostering liquidity, and stability in the financial system.

It is as a result of the functions enunciated above that saw the RBZ play a crucial role in the introduction of bond notes. There was a liquidity problem that needed to be resolved and the RBZ had to devise ways and means of solving it. Whether the measures adopted have achieved their objective to resolve the monetary problems bedevilling Zimbabwe is another issue. What is imperative is that the RBZ was within its mandate when it announced the introduction of bond notes.

2.4 Historical overview of the Zimbabwe economic and financial meltdown

As has already been discussed in the previous chapter, Zimbabwe has been battling an economic crisis for nearly two decades. The economic crisis led to a financial crisis, more particularly a currency crisis. In September 2003 the Reserve Bank of Zimbabwe (RBZ) started printing bearer cheques instead of the ordinary bank notes that people know.³⁸ This was a way by the RBZ to address the problem of high inflation. The bearer cheques were to have a limited time span, but however, at times they ended up being circulated beyond their expiry date.³⁹ Problems worsened during the 2008 – 2009 period which led to people losing confidence in their own currency, the Zimbabwe dollar (ZW\$). The result was that people started using foreign currencies as a medium of payment even though this was illegal in terms of the Reserve Bank of Zimbabwe Act.⁴⁰ The government

³⁷ Section 6(2) of the Reserve Bank of Zimbabwe Act [Chapter 22:15].

³⁸ Anon 2003 [news.bbc.co.uk/2/hi/business/3116716.stm](https://www.bbc.co.uk/2/hi/business/3116716.stm); Anon date unknown https://en.wikipedia.org/wiki/Banknotes_of_Zimbabwe.

³⁹ Anon 2006 <https://www.theindependent.co.zw/2006/04/28/bearer-cheques-outlive-expiry-date>.

⁴⁰ [Chapter 22:15] before the Act was amended it was illegal to deal in foreign currency without a license.

responded in November 2008 by pronouncing the country's 2009 budget in US\$. In terms of section 17(2) of the Finance Act⁴¹, the tender of the US dollar, the South African rand and the Botswana pula was deemed to be legal tender as from 1 February 2009. The same Act inserted section 44A of the Reserve Bank of Zimbabwe Act⁴² which gave the Minister of Finance the power to prescribe the currency of any other country to be legal tender in Zimbabwe. Prior to this amendment, the legal tender of Zimbabwe was, in terms of sections 41 and 44 of the Reserve Bank of Zimbabwe Act, the Zimbabwe dollar. It was an offence to exchange or deal in foreign currency without the permission of the Reserve Bank. With this amendment, legal tender in Zimbabwe comprised the Zimbabwe dollar, the US dollar, the South African rand and the Botswana pula.

Although the Zimbabwe dollar was still legal tender during this period (that is, 2009 when the multi-currency regime was introduced) it fell into disuse because people were no longer accepting it as payment.⁴³ However, because legally the Zimbabwe dollar had not been demonetised, it was just suspended for at least a year because there was nothing to hold and support its value.⁴⁴

As time went on the RBZ in various pronouncements later introduced more foreign currencies into the basket of currencies which were to be legal tender in Zimbabwe and also later announced the demonetisation of the Zimbabwe dollar in 2015. The British pound, Chinese yuan, Euro, Indian rupee, Japanese yen and Australian dollar were also added to the basket of currencies which were to be accepted as legal tender in Zimbabwe.⁴⁵ So currently there are nine foreign currencies which are recognised as legal tender in Zimbabwe. This, however, did not lessen the demand for the US\$ by the public. This was also exacerbated by the fact that the US\$ is an international reserve currency and that government transactions were and are still being denominated in US\$.

There was no smooth transition from the Zimbabwe dollar to multiple currencies. There were cases before the courts which had been instituted before the introduction of the

⁴¹ Nos 2 and 5 of 2009

⁴² [*Chapter 22:15*]

⁴³ Reference can be made to the Societary theory discussed above.

⁴⁴ Anon 2009 news.bbc.co.uk/2/hi/Africa/799588.stm-12-04-2009.

⁴⁵ Anon 2015 www.financialgazette.co.zw/multiple-currencies-greshamlaw-in-zim/Jan 15, 2015.

multiple currencies and courts were faced with resolving such disputes. When the government introduced the multi-currency regime as legal tender in Zimbabwe from 2009, it did not provide that such multiple currencies were to be used to settle pre-existing debts. It was now the duty of the courts to resolve. Therefore, there is a need to briefly discuss what the principle of nominalism says to understand how courts dealt with monetary claims which were brought during the transition period.

2.4.1 The principle of nominalism

At the heart of the State theory of money lies the principle of nominalism. The principle is to the effect that the intrinsic value of money cannot have any effect upon the value of money or the extent of monetary obligations. Monetary obligations are not liable to adjustments based on factors which are extraneous to the monetary system or unit of account. Thus, where the State issues a currency and establishes its unit of account, such represent their own independent value in terms of the domestic legal system despite any external factors which may have an economic impact upon that currency.⁴⁶ Thus according to the principle the unit of account of the Zimbabwe dollar was not affected by the hyperinflation of the 2003 – 2008 era. Where a party owed an obligation to pay Zimbabwe dollar (ZW\$) 1000 that obligation was discharged by the tender of ZW\$1000 despite its value at the time of discharge.

This principle was used by the Zimbabwean courts to decide on various cases on monetary obligations during the 2008-2009 era of hyperinflation and the subsequent introduction of multi currencies. In various cases the courts disregarded the theory of valorism. Valorisation applies when money loses its relative stability of value and its applicability is premised on the supposed intention of the parties to secure economic value in their contractual relations.⁴⁷ Thus where valorism is applied the amount of the obligation would be adjusted to reflect the reduction in the purchasing power of money between the date when the obligation was incurred and the date when it falls due. This theory has been rejected and nominalism still takes precedence. Thus, according to nominalism the creditor of a sum of money bears the risk that the purchasing power of

⁴⁶ Proctor *Mann on the Legal Aspect of Money* 257.

⁴⁷ Proctor *Mann on the Legal Aspect of Money* 258.

money owed by the debtor will have fallen by the time the date of payment arrives whilst the debtor bears the converse risk.⁴⁸ Nominalism protects neither the debtor nor the creditor.

A few cases can be highlighted to show that the principle of nominalism was applied in Zimbabwe and probably still applies. In *Radar Investments (Pvt) Ltd T/A Radar Metal Industries v K.A. Agencies and Distributors (Pvt) Ltd*⁴⁹, plaintiff's claim was for the return of a trailer. At the time the evidence was heard in 2006, the value of the trailer was estimated at ZW\$9,5 million. In his judgment which was handed down in 2009, Ndou J took judicial notice of the fact that the Zimbabwean dollar was no longer in use and that the court had to strive to arrive at an equitable remedy based on recent valuation. The court had to find a way of obviating the problem created by this intervening event. He, Ndou J, ordered defendant to pay the plaintiff "the current market value of a similar trailer". This case serves to confirm that a debt has to be fulfilled by the current nominal value of the currency existing at the time.

In another case, *Blake and Others v Tabs-Avon Lighting (Pvt) Ltd*⁵⁰, Cheda J refused to give default judgment in US dollars in a matter in which Plaintiff had lent the Defendant a sum of ZW\$300 million dollars. The Plaintiff had argued that judgment in foreign currency was more likely to express his loss. The judge observed that since the contract would have been unlawful had it been entered into in foreign currency, the court would be enforcing an illegality if, out of financial sympathy, it awarded judgment in foreign currency. The judgment was also based on the fact that even though the ZW\$ had fallen into disuse, legally it was still the official currency of Zimbabwe. Also, in the introduction of multi currencies there was no provision that the multi currencies would be used to fulfil pre-existing debts.

In a more recent case, *Cotton Company of Zimbabwe Ltd v Barclays Bank Ltd*⁵¹, a case which dealt with the repayment of a sum of US\$ money that was deposited with the

⁴⁸ Proctor *Mann on the Legal Aspect of Money* 261.

⁴⁹ *Radar Investments (Pvt) Ltd T/A Radar Metal Industries v K.A. Agencies and Distributors (Pvt) Ltd* HB 72-2009.

⁵⁰ *Blake and Others v Tabs-Avon Lighting (Pvt) Ltd* HB 9-09.

⁵¹ *Cotton Company of Zimbabwe Ltd v Barclays Bank Ltd* HH 745-16.

respondent as security for a Zimbabwe dollar (ZW\$) loan that was extended to the applicant during the Zimbabwe dollar era. The applicant sought to discharge its debt towards the respondent by tendering a one trillion ZW\$ note dated 2008 on the reliance of a notice published in the Zimbabwe government gazette of 2015 on the demonetisation of the Zimbabwe dollar.⁵² Chigumba J held that notes and coins issued before 2008 were demonetized without compensation, whereas those issued after 2008 were the subject of compensation as propounded in Statutory Instrument 70 of 2015 (Reserve Bank of Zimbabwe (Demonetization of Notes and Coins) Notice, 2015). The court held that the tendering of a one trillion ZW\$ note was not a discharge of the debt.

2.4.2 The relevant legislative provisions leading to the introduction of multi-currencies and subsequent demonetization of the Zimbabwe dollar

As already indicated, the Finance Act⁵³ led to the insertion of sections 42B and 44A of the Reserve Bank of Zimbabwe Act.⁵⁴ Section 42B is not of immediate relevance to the discussion at hand. However, this is referred to later. Section 44A is relevant. It provides as follows:

44A Legal tender of foreign currencies

The Minister may, in regulations made under section 64, prescribe that, subject to such conditions as may be specified in the regulations, a tender of payment in any currency other than Zimbabwean currency shall be legal tender in all transactions or in such transactions as may be specified in the regulations.

It is this section which gave legitimacy to the use of foreign currencies as legal tender for local transactions in Zimbabwe. Important to note is the fact that this section does not demonetise the Zimbabwe dollar. Rather it gives the Minister power to prescribe other currencies as legal tender in Zimbabwe in addition to the Zimbabwean currency. It is this section that was used to prescribe the US\$, the South African Rand and the Botswana Pula as legal tender in Zimbabwe. Later the Australian dollar, Indian rupee, Chinese Yuan,

⁵² Reserve Bank of Zimbabwe (Demonetisation of Notes and Coins) Notice, 2015.

⁵³ Nos 3 and 5 of 2009.

⁵⁴ [Chapter 22:15].

Japanese yen, British pound and the Euro were added to the basket of currencies by the Minister relying on the provisions of section 44A.

2.4.2.1 The demonetisation of the Zimbabwe dollar

The Zimbabwe dollar was still the official currency of Zimbabwe in 2009 although it had fallen into disuse. This led to its suspension for at least a year.⁵⁵ However, a year turned into two, three and so on. The official demonetisation of the Zimbabwe dollar was done in 2015.⁵⁶ In terms of Statutory Instrument 70 of 2015, the demonetisation was divided into two categories: The Zimbabwe dollar bank notes issued before 2008 which were demonetised without compensation and those bank notes issued after 2008 which were the subject of compensation at an exchange rate determined by the Central Bank.

2.4.2.2 The introduction of bond notes

As has already been noted from the above discussion, the fact that Zimbabwe recognises nine foreign currencies as legal tender did not improve the cash situation. In fact, the demand for cash, particularly the US\$, has been increasing which caused a strain on the Central Bank which can only import the US\$ and cannot print them as it is not Zimbabwe's own currency. The bond coins were first introduced in 2015 as a way of solving small change problems. They had no legal backing. In May 2016 after the issue of cash shortages began to worsen, the Reserve Bank of Zimbabwe announced that it was going to introduce bond notes.⁵⁷ These also were not legally backed which led to a lot of noise in the media with the public resisting such a move as it was felt that this was a re-introduction of the Zimbabwe dollar through the back door. There were even some court challenges wherein the legality of bond notes was challenged.⁵⁸

In order to avoid the bond notes having to find no legal backing since they were being resisted by the people, the executive arm of government used the Presidential Powers

⁵⁵ Anon 2009 news.bbc.co.uk/2/hi/Africa/799588.stm-12-04-2009.

⁵⁶ SI 70-2009 (Demonetisation of Notes and Coins Notice 2015).

⁵⁷ Reserve Bank of Zimbabwe 2016 www.rbz.co.zw/assets/press-statement---measures-to-deal-with-cash-shortages---04-may-2016.pdf.

⁵⁸ *Mutanda and Another v The President and Others* HH 747-16.

(Temporary Measures) Act⁵⁹ to issue the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank Act and Issue of Bond Notes) Regulations, 2016.⁶⁰ It is important to note that the Presidential Powers (Temporary Measures) Act is a controversial piece of legislation in that it fails to respect the separation of powers doctrine. Be that as it may, that is the Act which was used to give legal effect to the bond notes. These regulations inserted section 44B into the Reserve Bank of Zimbabwe Act.⁶¹ The section 44B as provided in the regulations was crafted as follows:

44B legal tender of bond notes and coins

1. The Minister may by notice in statutory instrument prescribe that a tender of payment of bond notes and coins issued by the Bank that are exchangeable at par value with very specified currency other than Zimbabwean currency prescribed as legal tender for the purposes of section 44A shall be legal tender in all transactions in Zimbabwe to the same extent as that prescribed currency.
2. Section 42 shall apply to bond notes prescribed under subsection (2) as they apply to "banknotes."

The regulations provide as follows:

Issuance of bond notes and validation of bond coins

3. (1) The issuance by the bank of-
 - a) the bond notes referred to in the following subsections; and
 - b) the bond coins in circulation before the promulgation of these regulations;Shall be deemed to have been prescribed by the Minister in terms of section 44A (1) of the principal Act as inserted by these regulations.
- (2) There is hereby issued by the Bank in terms of section 44B (1) of the principal Act as inserted by these regulations bond notes in such units they shall be specified by the Bank and whose design, form and material shall be determined by the Bank and notified to the public.
- (3) The tender payment of bond notes issued by the Bank shall be legal tender in all transactions as if each unit of bond note is exchangeable for one United States dollar.
- (4) Every one hundredth part of unit of a bond note shall be deemed to be equivalent to and exchangeable for one United States cent.

⁵⁹ [Chapter 10:20].

⁶⁰ SI 133 of 2016.

⁶¹ [Chapter 22:15].

What is important to note from the quoted section is the fact that not only does it validate the bond notes, it also has a retrospective effect in that it gives legal recognition to the bond coins which were already in circulation. The way in which the section is formulated is such that the bond notes cannot really be said to be currency as they are surrogate to any currency which may have been pronounced legal tender in terms of section 44A of the Reserve Bank of Zimbabwe Act.⁶² An analysis of subsection (1) of section 44B reveals that the bond notes can be placed at a par value with any of the recognised foreign currencies in Zimbabwe, besides Zimbabwe currency. As the situation stands right now, Zimbabwe has no local currency. The regulations do not define what “bond notes” and “bond coins” are except that bond notes are to be treated as bank notes in terms of section 42 of the Reserve Bank of Zimbabwe Act.⁶³ Section 42(1) provides as follows:

In this section—

“banknote” includes any banknote which has at any time been legal tender in Zimbabwe.

This means that a reference to section 42 in the regulations is intended to give legal tender status to the bond notes. It is only the Reserve Bank of Zimbabwe that has the authority to issue bond notes and coins. It is quite clear also from the section that these bond notes and coins do not qualify as Zimbabwe’s own currency. Previously, Zimbabwe’s currency was referred to as the Zimbabwe dollar. The government indeed exercised its sovereign power in terms of the State theory of money to introduce a surrogate currency called “bond” and avoided reintroducing the local currency. Section 3(3) are the regulations and they provide that the bond notes are at par value with the US\$.

The regulations, particularly the section introducing the bond notes and legalising the bond coins was poorly drafted such that it was quickly substituted by Act 1 of 2017 which is clearer in the sense that it at least attempts to define what a bond note is. This section is discussed in detail in Chapter 4, when the legal nature of bond notes is analysed.

⁶² [Chapter 22:15].

⁶³ [Chapter 22:15].

2.4.2.3 Excursus: challenge to bond notes

Not long after the publication of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank Act and Issue of Bond Notes) Regulations, 2016 was there a challenge in the High Court on the legality of bond notes. In *Mutanda and Another v The President and Others*⁶⁴ the applicants brought an application to the High Court on an urgent basis arguing among other issues that the inserted section 44B was itself *ultra vires* the Reserve Bank of Zimbabwe Act in that while section 41 of that Act empowered the Bank to make bank notes and other legal tender, the bond note is only a mirror of a bank note and is not itself a bank note. The legality issues raised by the applicants were not fully argued in court as the matter was dismissed on a technicality in that, Chiweshe JP, held that the matter was not urgent. It remains to be seen what the decision of the court would be on the issues raised by the applicants that the bond note is not a bank note but a mirror of the bank note.

2.5 Conclusion

The above discussion shows the role which is played by the state in the regulation of the currency within the area that it exercises its sovereign powers. It shows that the issue of currency regulation remains the prerogative of the state concerned. Money is an important aspect in expressing national sovereignty hence provision of currencies and monetary services play a major role in the discussion of monetary affairs and their regulation.⁶⁵ A stable currency is important to a country's trade relations with other countries and also for betterment of the citizens' livelihood. The issue of monetary policies and currency management have remained one of the prerogatives of formal independent decision-making by national central banks.⁶⁶ Zimbabwe has exercised its prerogative powers in a rather unusual manner. After discarding its own currency in 2009, it went on to regulate that nine foreign currencies will be accepted as legal tender for local transactions. It is not clear what impact this has on its relations with those countries

⁶⁴ *Mutanda and Another v The President and Others* HH 747-16.

⁶⁵ Baltensperger and Cottier "The Role of International Law in Monetary Affairs in International Law" 358.

⁶⁶ Baltensperger and Cottier "The Role of International Law in Monetary Affairs in International Law" 358.

whose currencies it preferred to others as legal tender. The factors which were considered in legalising nine currencies as legal tender in Zimbabwe are beyond the scope of this work.

Even though it is within the prerogative of the state to issue and regulate currency, the role that the society plays in influencing monetary policy cannot be underestimated. As has been seen from the above discussion, it was the behaviour of the society which led to the discarding of the Zimbabwe dollar and its later demonetisation by the government. It was also the public outcry and the policy makers' knowledge that people loathe the return of the local currency which led to the introduction of bond notes and not the return of the local currency. When the bond notes were later introduced, the enabling legislation was formulated in such a way so that it cannot be regarded as Zimbabwe's own currency.

Whether international best practices allow for what Zimbabwe did is not clear and needs further discussion. The next chapter focusses on the regulation of monetary and financial affairs under international law.

Chapter 3 – Regulation of monetary affairs under International Law

3.1 Introduction

The international monetary system is regarded as a global public good for the delivery of international currency (or currencies) and external stability.⁶⁷ International financial law is based on a network of standard-setting bodies and soft-law instruments.⁶⁸ There is generally no hard rules in the international financial and monetary law as it is believed that the area is self-regulatory. It consists of a set of rules, policies and institutional agreements which regulate key dimensions of the balance of payments position of each country as well as exchange rates; monetary reserves and global liquidity; transferability and convertibility of currencies; international payments systems; international capital flows; and global, regional and bilateral arrangements.⁶⁹ In this chapter, the focus is on monetary reserves and global liquidity, the transferability and convertibility of currencies as well as global, regional and bilateral surveillance arrangements. These issues are important to determine whether there are guidelines that should be complied with in introducing a new monetary regime within a territory.

The first point of departure is the Bretton Woods institutions and their role in the international regulation of financial and monetary affairs. In this regard, there will be a discussion of the roles of the International Monetary Fund (IMF) and the World Bank (WB) in relation to their articles of agreement. Thereafter, the role of the G.20 and the Financial Stability Board (FSB) is looked at as these are the new bodies which emerged in the new global financial architecture after the 2007-2009 global financial crisis. Their relationship with the Bretton Woods institutions is analysed. The role of the Southern African Development Community (SADC) as it is closer to home and Zimbabwe is a member of this organisation is also discussed. A discussion of optimum currency area is also discussed to see where it fits in under international monetary regulation.

⁶⁷ Viterbo *International Economic Law and Monetary Measures* 21.

⁶⁸ Viterbo *International Economic Law and Monetary Measures* 7.

⁶⁹ Viterbo *International Economic Law and Monetary Measures* 7.

3.2 The International Monetary Fund (IMF)

3.2.1 Background

The IMF was founded in 1944 at a United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, United States of America.⁷⁰ The IMF is therefore a specialised agency of the United Nations (UN). It is one of the two Bretton Woods institutions which were established at the end of World War II. The other institution is the International Bank for Reconstruction and Development (IBRD) popularly known as the World Bank. The IMF's main function was to oversee the par-value system as set at Bretton Woods. The par-value system was a system of fixed yet adjustable exchange rates having as its basis the US\$, which was itself convertible to gold at the exchange rate of 35US\$ per ounce.⁷¹ Each member state was duty-bound to peg its national currency at a par value against gold or the US\$ and to limit the exchange rate fluctuations within a one per cent spread above or below parity.⁷² The par value system was discarded in 1971 by the United States and this led to currencies floating freely.⁷³ After the collapse of the par value system the IMF has focused largely on surveillance which is done with the cooperation of member states.

3.2.2 The IMF Articles of Agreement

It was on the premise that money was no longer the preserve of States' domestic jurisdiction and that exchange rates were properly matters of international concern that the IMF Articles of Agreement were drafted.⁷⁴ The purposes of the IMF as set out in the articles of agreement may be summarised as follows: to promote international monetary cooperation, to facilitate international trade and the creation of employment for economic growth, to establish a multilateral system of payments, to remove foreign exchange restrictions, to restore currency convertibility, and to offer financial assistance to member

⁷⁰ Viterbo *International Economic Law and Monetary Measures* 57.

⁷¹ Viterbo *International Economic Law and Monetary Measures* 59.

⁷² Viterbo *International Economic Law and Monetary Measures* 59; Blanco and Carrasco 1999 *Transnat'l L. & Contemp. Probs* 68.

⁷³ Viterbo *International Economic Law and Monetary Measures* 65; Blanco and Carrasco 1999 *Transnat'l L. & Contemp. Probs* 73-74.

⁷⁴ Viterbo *International Economic Law and Monetary Measures* 59.

states.⁷⁵ The relevant purposes to the topic at hand are now discussed in detail with reference to the provisions of the rest of the articles in order to have a clear understanding of the role of the IMF and whether there are any rules in the setting up of new currencies. The issues are promotion of international monetary cooperation, establishment of multilateral systems of payments and restoration of currency convertibility.

i The promotion of monetary cooperation

First and foremost, it is important to keep in mind that when the IMF was established monetary stability was to be based on the gold exchange rate or the US\$. As already noted this was discarded in 1971 and currencies could float freely. In enhancing its purpose of monetary cooperation, the IMF requires every member,

to seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions.⁷⁶

This means that a member in its economic policies must adopt measures which ensure that its monetary system is stable to avoid disrupting other members' economic stability. Thus a member is obliged to notify the IMF of its exchange rates arrangements.⁷⁷ Such arrangements include cooperative measures wherein members maintain the value of their currencies in relation to the currency or currencies of other members.⁷⁸ The IMF determines par values after taking the following factors into consideration: stability of world economy; price movements and rates of expansion in the members' economies; sources of liquidity; arrangements for intervention and treatment of imbalances.⁷⁹ Members are to establish par values of their currencies in accordance with the provisions of Schedule C of the IMF articles of agreement. Gold or a currency are no longer the

⁷⁵ article 1.

⁷⁶ article iv, section 1(ii).

⁷⁷ article iv, section 2(a).

⁷⁸ article iv, section 2(b)(iii).

⁷⁹ article iv, section 4.

common denominator for establishing par value and domestic social or political policies shall not influence the IMF's decision with regard a member's proposal of a par value.⁸⁰

It is imperative to note that the bond note is pegged at par value with the US\$. This is a monetary peg adopted by Zimbabwe. A monetary peg involves the fixing of the value of one currency in terms of another.⁸¹ This is not prohibited under customary international law and is permissible in terms of the IMF Articles of Agreement. There is no positive obligation to notify the country of the reference currency, even though diplomatically it would be prudent to do so.⁸² A country can still determine the value of its currency using the par value system. The IMF has the overall function of monitoring the members' exchange arrangements and adopt specific principles for members to follow.⁸³

ii Establishment of multilateral systems of payments

A member's central bank is a depository for the IMF's holdings of its currency.⁸⁴ Thus the role of central banks is recognised even under international law. The currency referred to is the member's own currency and not currencies of other countries. As a way of establishing multilateral systems of payments, no member is allowed to impose restrictions on the making of payments and transfers for current international transactions except with the approval of the IMF.⁸⁵ The US\$ can be treated as a freely usable currency. This may explain why in the adoption of the multi currencies in Zimbabwe, the US\$ became the dominant currency in the basket of currencies. A freely usable currency is defined as:

A member's currency that the Fund determines (i) is, in fact, widely used to make payments for international transactions, and (ii) is widely traded in the principal exchange markets.⁸⁶

A member is thus allowed to use a freely usable currency in its international systems of payments. The Articles of Agreement are silent on whether a freely usable currency can

⁸⁰ Schedule C, section 4

⁸¹ Proctor *Mann on the Legal Aspect of Money* 596.

⁸² Proctor *Mann on the Legal Aspect of Money* 597

⁸³ article iv, section 3(a) and (b).

⁸⁴ article xiii, section 2(a).

⁸⁵ article viii, section 2(a).

⁸⁶ article xxx(f).

also be used for local transactions in member countries. In Zimbabwe, the bond note is only legal tender for local transactions while for international payments, the US\$ is used. It is even used in the denomination of individuals' bank accounts thus it is the unit of account.

iii Restoration of currency convertibility

The IMF recognises that a member can have more than one currency in its territories. Members are, however, obliged to avoid discriminatory currency arrangements or to use multiple currency practices.⁸⁷ A member using multiple currencies should seek the IMF's approval even though this should be avoided by members.⁸⁸ Zimbabwe adopted the multiple currency regime and maintains that it will continue with the system until the economy stabilises.⁸⁹ This is contrary to the provision of the IMF articles of agreement. As a member, Zimbabwe is obliged to adhere to the regulatory provisions of the IMF. However, the currencies being used in Zimbabwe are not its own local currencies but foreign currencies of other member countries. The bond note introduced in 2016 is pegged at par value with the US\$. Zimbabwe chose the US\$ to other currencies that it has adopted. However, this cannot be a discriminatory practice contemplated in article viii, section 3.

The IMF articles of agreement do not contain provisions on what requirements are needed for a member to have its own local currency. There is a definition of a freely usable currency based on the criteria laid down as discussed above. From the discussion above it follows that it is within a country's prerogative to determine what currency it should use and what name to give to it. The IMF only discourages the use of multiple currencies in one country. Furthermore, after the collapse of the par value system of pegging currencies the major role of the IMF has been that of surveillance which is done with the cooperation of the member concerned. There are no measures put in place or contained in the Articles of Agreement on how members who fail to comply with the provisions therein are to be dealt with.

⁸⁷ article viii, section 3.

⁸⁸ article viii, section 3.

⁸⁹ 2016 Reserve Bank of Zimbabwe Mid-Term Policy Statement.

3.3 The World Bank

As already mentioned above, the World Bank is one of the institutions established at the Bretton Woods Conference in 1944. At that time, it was called the International Bank for Reconstruction and Development (IBRD). It is thus also a specialized agency of the United Nations (UN) just like the IMF. The World Bank falls under the purview of the Economic and Social Council (ECOSOC) and is an observer in many UN bodies like the General Assembly.⁹⁰ The World Bank consists of the IBRD and the International Development Association (IDA) which provides long-term loans at no interest to least developed countries for the financing of anti-poverty programmes.⁹¹ There are three other institutions which form the World Bank group and these are the International Finance Cooperation (IFC), the International Centre for Settlement of Disputes (ICSD) and the Multilateral Investment Guarantee Agency (MIGA). While the IMF's main aim was promotion of monetary measures and international payments systems among nations, the IBRD's mission was to foster economic growth, assisting in the reconstruction of war-torn Europe and the transition to a peace-time economy.⁹² However, the World Bank has since evolved from its reconstruction mandate and turned to the promotion of economic and social progress through project lending and support to private foreign investments.⁹³ The work of the World Bank and the IMF are thus complimentary although they have different roles. The World Bank mainly aims at promoting economic growth and poverty reduction and has no impact in monetary measures. As such nothing much on the role of the World Bank impacts on the subject at hand.

3.4 The new Global Financial Architecture

With the fall of the gold par value system in the 1970s, there emerged a new global financial architecture that was characterised by the emergence of standard-setting bodies

⁹⁰ The World Bank *A Guide to the World Bank* 31.

⁹¹ Viterbo *International Economic Law and Monetary Measures* 70; Blanco and Carrasco 1999 *Transnat'l L. & Contemp. Probs* 78.

⁹² Viterbo *International Economic Law and Monetary Measures* 60.

⁹³ The World Bank *A Guide to the World Bank* 3; Viterbo *International Economic Law and Monetary Measures* 60.

and the recommendations of the various 'Gs' being groups of various leading countries in the international economic set up.⁹⁴ The present global financial architecture as emerged beginning of the 1970s thus comprises of a number of institutionalized and semi-institutionalized bodies which make soft-law regulations concerning global financial governance. This is done by several technocrats and officials who meet to set standards for the financial markets wherein members are expected, or commit themselves, to comply.⁹⁵ These institutions lack legal personality as they are not formed by any legislative instrument hence have no power to make binding legislation which is the reason why they make recommendations and commitments.

The present global financial architecture is structured in the following manner: macroeconomic policy and financial coordination is done through the G-20 in coordination with the IMF; financial stability, international-standard setting and coordination is the responsibility of the Financial Stability Board which works in cooperation with the various standard setting bodies.⁹⁶ However, implementation is to be done at domestic level as these institutions have no law enforcement authority as they are not formed by a convention or treaty body. The activities of the G-20 and the Financial Stability Board are now discussed *infra* to understand how the present financial and monetary affairs are regulated at international level, if at all.

3.4.1 G-20

After the collapse of the par-value system, a range of informal groups of developed economies, that is G.5, G.6, G.7, G8 and G10, were at the fore front in discussing cross-border finance.⁹⁷ G.10 central bank governors started meeting at the Bank for International Settlements (BIS)⁹⁸ as the Committee on Banking Regulations and Supervisory Practices (now known as the Basel Committee for Banking Supervision

⁹⁴ Viterbo *International Economic Law and Monetary Measures* 101.

⁹⁵ Baker 2009 *Global Governance* 197.

⁹⁶ Arner and Buckley 2010 *Melb. J. Intl L* 187.

⁹⁷ Arner and Buckley 2010 *Melb. J. Intl L* 198.

⁹⁸ The Bank for International Settlements was established in 1930 after World War 1 by an international treaty called The Hague Agreements of 1930. Its headquarters is in Basel Switzerland and its mission is to serve central banks in their mandate of monetary and financial stability. BIS date unknown <https://www.bis.org/about/history.htm?m=1%7C4%7C445>.

(BCBS)), one of the various standard setting bodies formed to encourage financial cooperation and coordination.⁹⁹ In the late 2008 during the 2007-2009 global financial crisis, coordination shifted to G.20 with its focus being economic and regulatory responses. The G.20 started in 1999, as an expansion of G.7¹⁰⁰, with meetings of finance ministers and central bank Governors from G.20-member countries. The G.20 comprises of nineteen countries and the European Union.¹⁰¹ The G.20 meetings at the level of heads of state and government were as a result of the 2008 financial crisis.¹⁰²

Since their first meeting of the heads of state and government in 2008, the G.20 leaders have been issuing communiques on various economic and financial issues discussed at these meetings. In their first declaration as a response to the 2008 financial crisis, five principles were espoused to guide reforms for the world financial stability:¹⁰³

- I. Strengthening transparency and accountability;
- II. Enhancing sound regulation;
- III. Promoting integrity in financial markets;
- IV. Reinforcing international cooperation; and
- V. Reforming financial architecture.

There was going to be an action plan for each of the principles for enforcement purposes. In the declaration, the G.20 also committed to advancing the reform of the Bretton Woods Institutions so that they could more adequately reflect changing economic weights in the world economy. The leaders also committed to refrain from competitive devaluations and to promote a stable and well-functioning international monetary system backed by IMF assessments. Because of the work of the G.20 the membership of the FSB was broadened after its establishment replacing the Financial Stability Forum (FSF).¹⁰⁴ Following the November 2008 summit there was more coordination between the IMF and the FSB with

⁹⁹ Arner and Buckley 2010 *Melb. J. Intl L* 198.

¹⁰⁰ Giovanoli 2009 *N.Y.U J Intl L & Pol* 103.

¹⁰¹ The countries are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom and the United States of America (https://www.G20.org/Webs/G20/EN/G20/Participants/participants/_node.html).

¹⁰² G20 date unknown https://www.g20.org/Webs/G20/EN/G20/History/history_node.html

¹⁰³ G20 2008 http://www.g20.org/Documents/g20_summit-declaration.pdf.

¹⁰⁴ Warner and Buckley 2010 *Melb. J. Intl L* 209.

the former's role of surveillance being strengthened whilst the later concentrated on standard setting.¹⁰⁵

In the April 2009 summit of the G.20 heads of state, the communique released after the summit reiterated that "a global crisis requires a global solution"¹⁰⁶ and the leaders pledged, among other issues, to reject protectionism and promote global trade and investment.¹⁰⁷ The leaders also committed to refrain from competitive devaluations and to the promotion of a stable and well-functioning international monetary system backed by the IMF.¹⁰⁸ The G.20 met again in September 2009 at the Pittsburgh summit where it was reviewing the commitments made at the London summit and declared that the commitment to repair the global financial systems and the global flow of capital had worked.¹⁰⁹ The G.20 leaders, however, reiterated that the fact that there was a sense of normalcy should not lead to complacency hence they agreed to meet in 2010 twice and once thereafter.¹¹⁰ Since then the G.20 have been meeting and issuing communiqués wherein various issues affecting the global economy have been discussed with recommendations being made. The most recent of the G.20 summits was held in Hamburg, Germany on 7 and 8 July 2017. In their latest communique, the G.20 leaders reaffirmed their commitment to international economic and financial cooperation to further strengthen growth and safeguard against downside risks.¹¹¹ The leaders also reiterated that monetary policy will continue to support economic activity and ensure price stability, consistent with central banks' mandates.¹¹²

Even though the G.20 does not represent all the countries of the world, its recommendations are of persuasive force as they impact other organisations such as the IMF, the World Bank and the Financial Stability Board. Non-members are expected to comply with the regulatory recommendations made by the G.20. It is because of the G.20 that the IMF Special Drawing Rights (SDRs) were reviewed and that the IMF role of

¹⁰⁵ Warner and Buckley 2010 *Melb. J. Intl L* 210.

¹⁰⁶ G20 2009 <<http://www.g20.org/Documents/final-communique.pdf>>.

¹⁰⁷ G20 2009 http://www.g20.org/Documents/FinDepsIFIAnnexDraft_02_04_09-1615_Clean.pdf.

¹⁰⁸ G20 2009 http://www.g20.org/Documents/FinDepsIFIAnnexDraft_02_04_09-1615_Clean.pdf.

¹⁰⁹ G20 2009 <http://www.g20.utoronto.ca/2009/2009communique0925.html>.

¹¹⁰ G20 2009 <http://www.g20.utoronto.ca/2009/2009communique0925.html>.

¹¹¹ G20 2017 <https://www.g20.org/gipfeldokumente/G20-leaders-declaration.pdf>.

¹¹² G20 2017 <https://www.g20.org/gipfeldokumente/G20-leaders-declaration.pdf>.

surveillance was reaffirmed. As such the G.20 is a major player in the present global financial architecture and non-members are expected to respect this.

3.4.2 Financial Stability Board (FSB)

The Financial Stability Board (FSB) was established by the G.20 in 2009. It replaced the Financial Stability Forum (FSF) which had been established by the G.7 in 1999 to coordinate and promote the system of international standards.¹¹³ The purposes of the FSB are to promote international financial stability through coordinating national financial authorities and international standard-setting bodies as they work toward developing strong regulatory, supervisory and other financial sector policies¹¹⁴, improve market functioning and reduce systemic risk.¹¹⁵ The FSB, however, has no legal personality under international law as it is not established in terms of any Treaty or Convention and thus has no power to make any regulations. This is the reason why it can only make recommendations which can be enforced at the will of the individual member and non-member states. In 2013, the FSB was established as a not-for-profit association in terms of Swiss law thus vesting itself with legal personality.¹¹⁶ Its seat is at Basel, Switzerland.

The FSB work in collaboration with international standard setting bodies like the Basel Committee on Banking Supervision (BCBS) (as it just coordinates and promote the international standards but does not make the standards itself), the IMF and the G.20 which was key in its establishment. One of the standards which the FSB seeks to promote is the Code of Good Practices on Transparency in Monetary and Financial Policies (MFP)¹¹⁷ which was adopted by the IMF Interim Committee in 1999.¹¹⁸ According to the FSB:

The case for transparency of monetary and financial policies is based on two main premises. First, the effectiveness of monetary and financial policies can be strengthened if the goals and instruments of policy are known to the public and if the authorities can make a credible commitment to meeting them. In making available more information about monetary and financial policies, good transparency practices promote the potential efficiency of markets. Second, good governance calls for central banks and financial

¹¹³ Warner and Buckley 2010 *Melb. J. Intl L* 202.

¹¹⁴ FSB date unknown www.fsb.org/about.

¹¹⁵ Warner and Buckley 2010 *Melb. J. Intl L* 202.

¹¹⁶ FSB date unknown www.fsb.org/about/history.

¹¹⁷ FSB 2000 http://www.fsb.org/2000/08/cos_990701/.

¹¹⁸ IMF date unknown <http://www.imf.org/external/np/mae/mft/code/index.htm>.

agencies to be accountable, particularly where the monetary and financial authorities are granted a high degree of autonomy... Monetary and financial policies are interrelated and often mutually reinforcing, with the health of the financial system affecting the conduct of monetary policy and vice versa.¹¹⁹

It is for these reasons why the FSB works in conjunction with the IMF to promote the said code. The FSB thus plays an important role in the regulation of monetary and financial affairs at international level even though it is registered in terms of the Swiss law and not an international treaty. The FSB enforces its recommendations on a voluntary basis by the members. The role of central banks is also emphasised.

3.5 Financial and monetary regulation under SADC¹²⁰

SADC is a regional organisation consisting of 14-member states of the Southern and Central African continent.¹²¹ It is a community of nations established to coordinate cooperation among the member states in various areas of development. Under the SADC there is a protocol which deals with cooperation among member states in the area of finance and monetary affairs called the Protocol on Finance and Investment.¹²²

The objectives of the protocol include the fostering of harmonisation of the financial and investment policies of the State Parties in order to make them consistent with objectives of SADC and ensure that any changes to financial and investment policies in one State Party do not necessitate undesirable adjustments in other State Parties, achieving and maintaining macroeconomic stability and convergence within the region, co-operating and co-ordinating amongst State Parties in collaboration with Central Banks on exchange control policies and establishing a framework for co-operation and co-ordination amongst Central Banks on payment, clearing and settlement systems.¹²³ In order to ensure the realisation of these objectives, the Protocol creates a Committee of Central Bank Governors (CCBG) consisting of the Governor of the central bank of each state party

¹¹⁹ Anon 2000 http://www.fsb.org/2000/08/cos_990701/.

¹²⁰ SADC stands for Southern African Development Community.

¹²¹ The member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe (<http://www.sadc.int/member-states>).

¹²² SADC Protocol on Finance and Investment, 2006 available at http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf.

¹²³ article 2.

which meets once a year and reports to the Committee of Ministers of Finance and Investment.¹²⁴

In terms of monetary and fiscal cooperation, each state party is obliged to formulate transparent, consistent and sustainable fiscal and monetary policies which minimise negative spill-over effects into other State Parties.¹²⁵ This means that a State Party bound by this Protocol will have to have regard to the effects of its monetary and fiscal policies on other State Parties. It should not have regard to its interests alone because there should be cooperation and this is obviously the reason why there is an oversight committee of Senior Treasury Officials responsible for the implementation of these provisions which reports to the Committee of Ministers.¹²⁶ There is a Peer Review Panel responsible for monitoring macroeconomic convergence and State Parties are under an obligation to report to this Panel of their macroeconomic convergence programs.¹²⁷

With regards exchange control State Parties are mandated to establish framework for cooperation and coordination in respect of current account transactions and capital and financial account transactions.¹²⁸ There should also be cooperation and coordination among member States with regard to the issue of exchange control.¹²⁹ Zimbabwe is obliged to cooperate with other Member States as it is party to this Protocol. There is a SADC Exchange Control Committee established for the purposes of achieving the objectives of exchange control among Member States.¹³⁰ The issue of monetary policy formulation and implementation is left to individual member states but there are principles which member states have to adhere to in their policy formulations and these include adoption of price stability as the primary objective of the central banks, contribution to the pursuit of financial stability, clear central bank legislation, discouragement of central bank lending to government or its political subdivisions and

¹²⁴ articles 17(b) and 19 of the Protocol.

¹²⁵ Annex 2, article 4.

¹²⁶ Annex 2, article 6.

¹²⁷ Annex 2, article 7.

¹²⁸ Annex 4, article 2(a).

¹²⁹ Annex 4, article 3.

¹³⁰ Annex 4, article 4.

making good unrealised exchange losses or gains in each financial year to facilitate orderly execution of monetary and exchange rate policies.¹³¹

3.6 Optimum Currency Area

An Optimum Currency Area (OCA) is a geographical region where countries within a specific region agree to share or have a single currency to maximise economic efficiency.¹³² Countries may decide to enter into bilateral or multilateral agreements where they agree to the use of a common currency within their respective countries and their dealings. This is done to promote regional integration. The following criteria are often cited for successful currency union to exist:¹³³

- Labour mobility across the region.
- Openness with capital mobility and price and wage flexibility across the region.
- A risk sharing system such as an automatic fiscal transfer mechanism to redistribute money to areas/sectors which have been adversely affected by the first two characteristics.
- Participant countries have similar business cycles.
- Production diversification
- Homogeneous preferences
- Commonality of destiny ("Solidarity")

There are several common monetary areas, most which do not qualify to be OCAs because they cannot satisfy the above listed criteria, with the most successful and popular being the European Union monetary area headed by the European Central Bank and which uses the euro in all the member countries. There is a single monetary policy for all member states which use the single currency.

Closer to Zimbabwe is the Common Monetary Area (CMA) comprising of South Africa, Lesotho, Namibia and Swaziland. The rand is the common currency which the members of the CMA use although the other members besides South Africa use their own national currencies which are pegged at par to the rand.¹³⁴ Thus the CMA does not qualify to be an OCA also due to the fact that other members also have their own currencies and have

¹³¹ Annex 5, article 4.

¹³² Anon date unknown https://en.wikipedia.org/wiki/Optimum_currency_area.

¹³³ Anon date unknown https://en.wikipedia.org/wiki/Optimum_currency_area.

¹³⁴ Wang *et al*/2007 <https://www.imf.org/external/pubs/ft/wp/2007/wp07158.pdf>.

their own central banks which deal with monetary policy in their respective countries. Article 2 of the CMA Multilateral Agreement allows the smaller countries to issue their own currencies and these currencies are to be backed by foreign assets. The CMA differs from the other monetary unions such as the European Monetary Union (EMU) in that there is no central bank although the South African Reserve Bank has major influence.¹³⁵ The CMA is based on a free trade area with high capital mobility. In the CMA, there is no formal mechanism for fiscal transfers to cushion the impact of asymmetric shocks on members.

The discussion on optimum currency area was necessary to show that there are measures that a group of countries can adopt to regulate their monetary affairs under international law. Even though almost all monetary unions do not meet all criteria for an optimum currency area there are some which do have a single currency such as the EMU. The CMA has no single currency but has a dominant currency, the rand, which is legal tender in all member states. Were Zimbabwe to join the CMA it will have to adopt the rand as legal tender and in addition peg its own local currency at par to the rand.

3.7 Conclusion

It is clear from the discussion above that after the collapse of the par value system as espoused in the IMF Articles of Agreement, there has not been any firm legal mechanism regulating currencies. Even after the 2007- 2009 global financial crisis, the regulatory bodies which emerged such as the G.20 and the FSB did not focus much on monetary regulation but on the issue of capital markets and prevention of money laundering and prevention of terrorism financing. Though the IMF and the World Bank still exist, their mandates have shifted since their formation in 1944. The IMF now focuses on surveillance which takes place usually with the consent of the member seeking to utilise its resources. The G.20 sought to revive these Bretton Woods institutions and it seems now as if they are given more legitimacy by the G.20 and not by their own Articles of Agreement.

¹³⁵ Wang et al 2007 <https://www.imf.org/external/pubs/ft/wp/2007/wp07158.pdf>.

The institutions which emerged in the new global financial architecture are not representative of the majority of the countries of the world, but those unrepresented countries are still expected to comply with their recommendations.¹³⁶ There are various soft law rules which have been made in the international financial law but none relate to the issue of currency regulation which has been left to the discretion of the various states concerned. The G. 20 in its various communiqués that it issues after every meeting of the heads of state and government expresses the need for transparent monetary measures. The role of central banks in these measures is affirmed.

The SADC Protocol on Finance and Investment touches on the need for transparency on monetary and fiscal policy measures but does not go any further as to whether there should be any guidelines on currency adoption. Nation states can also come together under the auspices of regional integration and agree to the use of a single currency within the member states as has happened in the EMU and to a limited extent the CMA. Where such arrangements are made the autonomy of the member states in the formulation of monetary policies may be limited.

From the discussion above, it can thus be concluded that Zimbabwe was not in violation of any international law provisions when it adopted the bond notes. From the par value system as espoused by the IMF, a country's currency was to be pegged according to gold or the US\$. The bond notes are pegged at the par value with the US\$ and hence this can mean that Zimbabwe has reverted to the discarded system in its regulation of the bond notes. However, from the enabling legislation the bond notes cannot be seen as Zimbabwe's own currency. There is therefore a need to analyse the law and what the central bank said to understand the legal nature of the bond notes. This is the focus of the next chapter.

¹³⁶ Viterbo *International Economic Law and Monetary Measures* 129.

Chapter 4 – The legal nature of bond notes

4.1 Introduction

From the discussion in the previous chapters, it is now undeniably settled that the prerogative to regulate a nation's currency lies with the nation concerned. According to the state theory of money as already discussed, the state's sovereign powers include the issuing of a currency, giving it legal tender, choosing an exchange rate and the power to allow the use of national or foreign currencies within national borders.¹³⁷ A nation is allowed to exercise these sovereign powers without other states' interference except limited circumstances under international law where a nation should not formulate financial and monetary policies which result in negative spill overs to other nations. Zimbabwe has exercised its sovereign powers through enacting a law introducing bond notes and pegging them at par value with the US\$. However, it is the Central Bank's contention that the bond note is not a local currency but is surrogate to the US\$. There is therefore a need to analyse the law regulating the bond notes to ascertain what its legal nature is and to what extent it is regulated.

In this chapter, the focus is on the provisions of the Reserve Bank of Zimbabwe Act¹³⁸ relating to the introduction of bond notes, the issue of fiat money and virtual currencies, currency convertibility and currency manipulation to have an appreciation of where exactly bond notes fall under the legal aspects of money.

4.2 The Reserve Bank of Zimbabwe Act

The Reserve Bank of Zimbabwe Act is the Act which gives the Central Bank (that is, the RBZ) powers to issue bank notes and coins for legal tender purposes. It was the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank Act and Issue of Bond Notes) Regulations, 2016¹³⁹ which led to the amendment of the Reserve Bank of Zimbabwe Act by the insertion of a new section 44B. However, the wording in the

¹³⁷ Viterbo *International Financial Law and Monetary Measures* 150.

¹³⁸ Reserve Bank of Zimbabwe Act [*Chapter 22:15*] (hereinafter the Reserve Bank of Zimbabwe Act).

¹³⁹ *Statutory Instrument 133 of 2016*.

Regulations was slightly changed by the Finance Act¹⁴⁰ as already noted in Chapter 2 and the discussion is based on the current provisions legalising the bond notes. Section 44B provides as follows:

44B Legal tender of bond notes and coins

(1) In this section, “bondnote” means a unit of legal tender whose par value in relation to the United States dollar is backed by a guarantee extended to the Reserve Bank by one or more international financial institutions.

(2) The Minister may by notice in a statutory instrument prescribe that a tender of payment of bond notes and coins issued by the Bank that are exchangeable at par value with any specified currency other than Zimbabwean currency prescribed as legal tender for the purposes of section 44A shall be legal tender in all transactions in Zimbabwe to the same extent as that prescribed currency.¹⁴¹

Subsection (1) starts by defining what a bondnote is. Firstly, it explains that the bond note is legal tender. The legal tender status means the bond notes may be used as a medium of exchange that is for the purchase of goods and payment for services. It then further explains that the bond note is backed by a guarantee extended to the Reserve Bank of Zimbabwe by one or more international financial institutions and that it is this guarantee which gives value to the bond note to be at par with the US\$. According to the statement that was issued by the Reserve Bank of Zimbabwe Governor, the bond notes are backed by a US\$200 million loan facility from Afreximbank.¹⁴² The fact that the section makes provision for one or more financial institutions to guarantee the issuance of bond notes means that the number of bond notes issued may be increased based on further guarantees extended to the Reserve Bank of Zimbabwe.

Subsection (2) provides that the bond notes may be exchangeable with any specified currency prescribed as legal tender for the purposes of section 44A of the Reserve Bank of Zimbabwe Act. Section 44A was introduced in 2009 to make way for the use of foreign currencies as legal tender in Zimbabwe. A bond note is legal tender in Zimbabwe as if it is payment in US\$ as provided for in the Presidential Powers (Temporary Measures)

¹⁴⁰ 1 of 2017.

¹⁴¹ This is the latest version of section 44B as inserted by Act 1 of 2017. The version as contained in the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank Act and Introduction of Bond Notes) Regulations, 2016 has slightly different provisions as already discussed in Chapter 2.

¹⁴² Reserve Bank of Zimbabwe 2016 www.rbz.co.zw/assets/press-statement---measures-to-deal-with-cash-shortages---04-may-2016.pdf.

(Amendment of Reserve Bank and Issue of Bond Notes) Regulations, 2016. Section 3(3) of the Regulations provides that each unit of bond note shall be exchangeable for one US\$. The surrogacy of the bond notes thus emanates from the fact that the bond notes are issued to act as substitute for any specified currency in terms of section 44A. According to the regulations, the specified currency is the US\$. Bond notes are bank notes as they are issued to be legal tender by the Reserve Bank. This may answer the issue that was raised in the *Mutanda* case (discussed in Chapter 2) that the bond note is not a bank note but a mirror of a bank note, although not satisfactorily because the bond note is meant to work as a representation of the US\$ notes.

Legal tender is not the only attribute of a currency. It must also be a unit of account and a store of value or wealth and must be exchangeable with other currencies. Even though the bond note is legal tender in Zimbabwe, it is not a unit of account and neither is it a store of value or wealth. This is because the law giving recognition to the bond notes has only given legal tender status but not all the attributes of money. Even though chattels which are legal tender have the quality of money, not all money is necessarily legal tender.¹⁴³ Regarding unit of account, consistent with the State theory of money, the unit of account is whatever the national legislator states it to be.¹⁴⁴ From the way the legislation was crafted it is clear that the bond notes were not intended to be a unit of account, but only to serve as a medium of payment where there is need for physical cash. The country can only issue the number of bond notes up to the value supported by the loan which is US\$200 million. A unit of account is a completely abstract and independent concept which cannot be further explained by relating it to some other concept or measure of value.¹⁴⁵ The bond notes do not meet this definition hence cannot serve as a unit of account.

4.3 Fiat money versus virtual currencies

¹⁴³ Proctor *Mann on the Legal Aspect of Money* 74.

¹⁴⁴ Proctor *Mann on the Legal Aspect of Money* 81.

¹⁴⁵ Proctor *Mann on the Legal Aspect of Money* 81.

4.3.1 Fiat money

A fiat currency is a monetary system where the medium of exchange is untethered from any underlying measure of wealth or commodity.¹⁴⁶ It is accepted to have a certain value in terms of its purchasing power unrelated to the value of the material from which it is made or the value of any cover which the bank may be required to hold.¹⁴⁷ Fiat money has its history in war and economic difficulties. The origins of money indicate that it was backed by gold or silver. This means that the bank notes issued by any central bank could be redeemed or exchanged for the gold equivalent. This is referred to as the convertibility of money. As countries ran out of those natural resources which were used to back money, for example, in the United States of America when they wanted to fund their wars government passed legislation to print more money that was not gold backed that was assigned some value by legislation.¹⁴⁸ After the war there was a return to the gold standard. Even the formation of the IMF saw a monetary system backed by the gold standard.¹⁴⁹ This system was discarded in the 1970s as already discussed in the previous chapter.

The state plays a pivotal role in the acceptance of fiat money and where state power is at play notions of cooperation, reciprocity or efficient commercial exchange are not required.¹⁵⁰ Fiat money is a means of government to maintain power. When a government introduces a currency and demands tax in that form of currency that currency will effectively become the base medium in society. In most countries, the printing of fiat money is the preserve of the country's central bank. Like most countries, Zimbabwe gives the authority to print and issue money to its Central Bank. Fiat money is in the form of notes and coins given various values.

In Zimbabwe, when the country discarded its own currency for multi currencies which were dominated by the US\$, it can be said the government had no control especially of how the economy was to operate. It could not print any money. When the cash shortages

¹⁴⁶ Dahdal 2013 *J Peace Prosperity & Freedom* 49.

¹⁴⁷ Proctor *Mann on the Legal Aspect of Money* 71.

¹⁴⁸ Anon 1898 *Annals of the American Academy of Political and Social Science* 58.

¹⁴⁹ Viterbo *International Financial Law and Monetary Measures* 67.

¹⁵⁰ Dahdal *J. Peace Prosperity and Freedom* 50.

began, the country had no means of averting them as they could not print more money. It had no authority to do so. The introduction of the bond notes saw the return of government control although to a limited extent. Fiat money floats freely and it is not backed by any gold or other precious metals. In the case of Zimbabwe, however, the bond notes are surrogate to the US\$ and the government cannot print more than the number which is backed by the loan facility. The bond notes are not a store of value or a measure of wealth or unit of account. They are only legal tender. The government demands tax in US\$ and individuals' bank accounts are denominated in US\$. It can be said that the bond notes are redeemable for US\$.¹⁵¹

4.3.2 Virtual currencies

Virtual currencies also known as cryptocurrencies can be defined as decentralised peer-to-peer payment systems that are digital representations of value and can be transferred, stored and traded electronically.¹⁵² According to the US Treasury Department, virtual currency is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency which points to the absence of legal tender status in any jurisdiction.¹⁵³ The development of virtual currencies is highly connected to the increase in internet use.¹⁵⁴ They are called virtual in the sense that they are developed and traded in cyberspace. They are distinguished from electronic money in that now there are ATMs and even debit cards for some famous virtual currencies like bitcoin.¹⁵⁵ Today there are 1263 virtual currencies on the market.¹⁵⁶ Electronic money is defined as:

Monetary value represented by a claim on the issuer which is stored in an electronic device and accepted as a means of payment by undertakings other than the issuer.¹⁵⁷

¹⁵¹ As stated in the policy document on the introduction of bond notes titled 'Notice on Export Bonus Scheme which is supported by Bond Notes' available on www.rbz.co.zw.

¹⁵² Lee *et al* 2015 *Bus. L. Int'l* 22.

¹⁵³ Dibrova 2016 *Social and Behavioural Sciences* 44.

¹⁵⁴ European Central Bank Report 2012.

¹⁵⁵ Lee *et al* (2015) *Bus. L. Int'l* 21.

¹⁵⁶ Anon 2017 <https://coinmarketcap.com/all/views/all/>.

¹⁵⁷ Proctor *Mann on the Legal Aspect of Money* 50.

Thus, even though virtual currencies are produced electronically, they do not qualify under the definition of electronic money because a person cannot have physical possession of the virtual currency like bitcoin. A person can have possession of a virtual currency through a special code or password.

Virtual currencies differ from fiat money in that they are not created by any legislation and they do not have a central authority like a bank supporting their existence and their issue is carried out by a distributed network.¹⁵⁸ The transaction in a virtual currency dealing between buyer and seller is encrypted which makes it pseudonymous as the user's identity is recorded on a public ledger.¹⁵⁹ It is this pseudonymity, together with efficiency and the decentralisation nature, which makes the trading in virtual currencies attractive to consumers and criminals alike. Virtual currencies are valued in US\$ or any other conventional currency like the South African rand. Since virtual currencies are not issued under any legislative authority there is a need to understand how they are created and how they are valued.

The example of bitcoin was used as it is the most popular virtual currency today. Bitcoins are created or "mined" in Bitcoin parlance through the solving of complex mathematical equations using sophisticated computers.¹⁶⁰ The system is designed in such a way that each new equation will be more difficult to solve as compared to the previous one so as to control the rate at which new Bitcoins are created.¹⁶¹ This is similar in fiat money world where governments introduce measures to control inflation by limiting the value of money that can be printed. Users then install Bitcoin wallets on their computer or mobile phone, which generates a unique address and a public and private encryption "key" that verifies transactions.¹⁶²

Although virtual currencies have been associated with criminal activities, their popularity has continued to grow such that in 2013 the first Bitcoin ATM was established in the

¹⁵⁸ Lee *et al* 2015 *Bus. L. Int'l* 22.

¹⁵⁹ Lee *et al* 2015 *Bus. L. Int'l* 22.

¹⁶⁰ Lee *et al* 2015 *Bus. L. Int'l* 24.

¹⁶¹ Lee *et al* 2015 *Bus. L. Int'l* 24.

¹⁶² Lee *et al* 2015 *Bus L. Int'l* 24.

United States and investor support so enthusiastic such that at onetime Bitcoin traded at a higher price than gold.¹⁶³ However, this was for a brief period as the price significantly fell soon after.¹⁶⁴ This has raised concerns over the stability of virtual currencies which are not backed by any central bank. As at 04 December 2017, 12:33 one bitcoin was trading at US\$11,277.82.¹⁶⁵ The price shifts from time to time but it is around this rate. However, this kind of concern is also present in fiat money in that although it is backed by a central bank, it floats freely without being backed by any commodity such as gold hence it is also susceptible to inflation.

Besides being associated with criminal activities and concerns over the stability of virtual currencies, there are also other shortcomings of virtual currencies. There is the issue of cybersecurity in that if a person loses the "key" that verifies transactions then it means that the "money" is lost. There is also the issue of hacking of the system like what happened with MtGox which used to handle the majority of Bitcoin transactions after its system had been hacked resulting in the loss of thousands of Bitcoins.¹⁶⁶ Virtual currencies are also volatile in their exchange rate.

Despite these shortcomings and security concerns, virtual currencies, especially Bitcoin, are gaining popularity and other big shops are now accepting virtual currencies as a medium of payment. Virtual currencies can be traded from anywhere in the world and hence they are like a world currency albeit unregulated.

The bond notes do not qualify under the definition of virtual currencies at all as they are issued by a central bank and are regulated as legal tender in Zimbabwe even though they are not a unit of account or a store of value or wealth. They are also not "mined" or created using mathematical equations.

¹⁶³ Lee *et al* 2015 *Bus L. Int'l* 25.

¹⁶⁴ Lee *et al* 2015 *Bus L. Int'l* 25.

¹⁶⁵ Anon 2017 <https://www.coindesk.com/price/>.

¹⁶⁶ Lee *et al* 2015 *Bus L. Int'l* 25.

4.4 The convertibility of currency

Generally, all currencies are convertible to other currencies. As already indicated after the collapse of the monetary system envisaged by the IMF Articles of Agreement, gold is no longer the common denominator of currencies and the external value of the US\$ is no longer maintained in relation to gold. Previously before the fall of the gold value, convertibility referred to the exchange of money for gold or other precious metals. The discussion in this section centres on the convertibility of a currency into other currencies.

According to Gold,¹⁶⁷ there are three criteria that a currency should meet in order to be convertible: if it can be used without restriction of a currency for any purpose; if it can be exchanged for any other currency without restriction of a currency character; and if it can be used or exchanged at its par value, or at a rate of exchange based on the par value or at some legal rate of exchange or at a rate defined in any other way considered desirable. Gold, however, goes to further state that a currency does not necessarily have to meet all the criteria in order to be convertible. Using the criteria expounded by Gold, the bond notes are now examined to determine whether they are a currency that is convertible.

- (i) Whether the bond note can be used without restriction of a currency character. As already discussed for a currency to qualify as money it must be legal tender in the country of issue, a unit of account and a store of value or wealth. The bond note is already restricted in its use in that although it is legal tender, it is not a unit of account or a store of value or wealth. Thus, it does not meet the first criterion. However, this does not mean that it is not convertible.
- (ii) Whether the bond note can be exchanged for any other currency without restriction of a currency character. According to the way bond notes are intended to work, they will be legal tender in Zimbabwe as if they were US\$. This is only in Zimbabwe and not outside the borders of Zimbabwe. For trade purposes the US\$ and other foreign currencies which are legal tender in Zimbabwe are used. Those who are in trade will have to get permits from the

¹⁶⁷ Gold 1979 *J. Int'l L. & Econ.* 242.

Reserve Bank of Zimbabwe to obtain permission to take out foreign currencies. This means that there are restrictions on the use of bond notes. No persons can enter into trade agreements and agree on the bond notes as the medium of payment if it involves cross border trade. Therefore, the bond notes do not meet the second criterion. Even locally the prices of goods are not denominated in bond notes as the base unit although traders are obliged to accept bond notes as if they were US\$.

- (iii) Whether the bond note can be used or exchanged at its par value. According to the enabling legislation, the bond notes are valid in Zimbabwe at the same value as the US\$. There are indeed other countries which have adopted the same stance as Zimbabwe as to peg their currencies at par with the US\$.¹⁶⁸ However, in some instances this did not work because of economic dynamics. The bond note cannot be taken out of Zimbabwe and be expected to work or serve as Zimbabwe's reserve currency at the IMF. The situation on the ground also shows that the pegging of the bond notes at the same value as the US\$ is only on paper as different prices are payable for goods depending on the legal tender that a person will be using.¹⁶⁹ In that regard it is safe to conclude that the bond note is not a convertible currency as it does not meet any one of the criterion laid down by Gold.

There is a need to examine the exchange control legislation of Zimbabwe to appreciate what measures or restrictions are in place regarding the convertibility of bond notes. Countries impose exchange control regulations or restrictions as a way of controlling the movement of capital or payments. Before looking into the exchange control regulations imposed by Zimbabwe it is important to note that as a member of the IMF Zimbabwe must adhere to the provisions of the IMF Articles of Agreement. Under the Articles of Agreement, a member is free to control capital transfers as long as it does not interfere with payments and transfers for current international transfers.¹⁷⁰ According to the

¹⁶⁸ Malaysia did this during the Asian crisis.

¹⁶⁹ Mhlanga 2017 <https://www.thestandard.co.zw/2017/06/04/shops-using-multiple-pricing-system/>.

¹⁷⁰ Article VIII sections 2, 3 and 4.

Reserve Bank of Zimbabwe, the bond notes were introduced as a measure to control the movement of capital. Article VIII (2)(b) of the IMF Articles of Agreement is not aimed at the promotion of trade without qualification, it is intended to ensure a measure of respect for the right of a member State to control its own financial affairs.¹⁷¹

It is important to take cognisance of the fact that exchange control laws are mandatory in their application within a territory of the State which imposes them.¹⁷² Thus Zimbabwe's exchange control regulations will be applicable only in Zimbabwe. Like any other country Zimbabwe has exchange control regulations. These exchange control regulations are not meant to set the rate of exchange but rather to maintain order as to who should deal in foreign currency and what requirements are to be met for one to qualify as an exchange control dealer. Zimbabwe maintains a liberal exchange control regime like most other countries wherein the rate of exchange is regulated by market forces. There is the Exchange Control Act¹⁷³ (the Act) whose main purposes are to confer powers and impose duties and restrictions in relation to gold, currency, securities, exchange transactions, payments and debts, and the import, export, transfer and settlement of property and any other matters incidental thereto.¹⁷⁴ In terms of section 2 of the Act there are regulations which have been promulgated by the President and these are the Exchange Control Regulations, 1996¹⁷⁵ and Exchange Control (General) Order, 1996.¹⁷⁶

The Exchange Control Regulations, 1996 and Exchange Control (General) Order, 1996 deal with issues such as who is an authorised dealer, requirements to deal in gold and foreign currency, issues for the control of payments in and outside Zimbabwe and the holding of foreign currency accounts. The regulations are amended from time to time and what is interesting to note is that both were last amended in 2005. One would have expected them to have been amended at least in 2009 to make provision for the fact that Zimbabwe adopted multi currencies as legal tender and in 2016 when the bond notes

¹⁷¹ Proctor *Mann on the Legal Aspect of Money* 424.

¹⁷² Proctor *Mann on the Legal Aspect of Money* 421.

¹⁷³ [Chapter 22:05].

¹⁷⁴ This is in terms of the long title of the Act.

¹⁷⁵ *Statutory Instrument 109 of 1996*.

¹⁷⁶ *Statutory Instrument 110 of 1996*.

were introduced. With regards bond notes, however, according to the policy documents published by the Reserve Bank of Zimbabwe, the bond notes are an export incentive scheme.¹⁷⁷

On the website of the Reserve Bank of Zimbabwe, the base of the exchange rate is that of the major currencies against the US\$ and not the bond notes.¹⁷⁸ Thus the bond notes are not the local currency of Zimbabwe as other countries would determine the rate of exchange against their own currency but in the case of Zimbabwe this is not the case. According to the policy documents as issued by the Reserve Bank of Zimbabwe those who receive the export bonus incentives in bond notes can exchange them for US\$ and any other foreign currency.¹⁷⁹

4.5 Currency manipulation

A system or policy whereby a country devalues its currency in a way that will increase its exports and restrict imports to gain an unfair competitive advantage over other countries is referred to as currency manipulation. The term currency manipulation is very popular in the monetary dispute between China and the United States of America.¹⁸⁰ The devaluation of a country's currency is not unlawful under international customary law.¹⁸¹ The problem arises when this is done to obtain an unfair competitive advantage over other countries. In terms of article IV(1) of the IMF Articles of Agreement members are obliged to:

avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members.¹⁸²

There is no definition of currency manipulation in the IMF Articles of Agreement. However, the IMF executive board in 2007 adopted Decision on Bilateral Surveillance over

¹⁷⁷ Reserve Bank of Zimbabwe 2016 www.rbz.co.zw.

¹⁷⁸ www.rbz.co.zw (as of 11 November 2017).

¹⁷⁹ Reserve Bank of Zimbabwe 2016 www.rbz.co.zw.

¹⁸⁰ Proctor *Mann on the Legal Aspect of Money* 605; Yu 2013 *Pac. McGeorge Global Bus. & Dev. L.J* 578.

¹⁸¹ Pettis 2011 *J. Int'l Bus. & L.* 284.

¹⁸² Article IV(1)(iii).

Member's Policies¹⁸³ to provide clarification on the provisions of article IV(1)(iii). It provides in paragraph 2(a) and (b) of Annex to the Decision that:

manipulation of the exchange rate is only carried out through policies that are targeted at - and actually affect - the level of an exchange rate ... manipulation may cause the exchange rate to move or may prevent such movement' and a member is deemed to be in violation of Article IV(1)(iii) if the IMF determines both that 'the member is engaged in a [currency policy] for the purpose of securing fundamental exchange rate misalignment in the form of an undervalued exchange rate and the purpose of securing such misalignment is to increase net exports.

In summing up these provisions Jung defines currency manipulation as:

an illegal currency undervaluation implemented by an IMF member state, targeted at gaining unfair competitive advantage over other IMF members by increasing the net export of the implementing state.¹⁸⁴

Turning back to the bond notes, the government of Zimbabwe through its Reserve Bank has pegged its bond notes at the same value as the US\$ which is generally not prohibited. A country is allowed under the IMF Articles of Agreement to peg its currency in terms of another currency. From the discussions of what amounts to currency manipulation there should be an undervaluation which results in the member undervaluing its currency having an unfair competitive advantage over other member states in terms of global trade. In the case of bond notes, looking at the rate of Zimbabwe's economy one can say the bond notes are actually over valued and not undervalued. Hence there was no manipulation of currency in the issuing of the bond notes and their pegging to be at par with the US\$. The bond notes were introduced as a measure of protecting the country's foreign currency reserves.

4.6 The obligations of other countries to recognise bond notes as Zimbabwe's currency

Since Zimbabwe exercised its sovereign powers to introduce bond notes which are surrogate to the US\$ according to the enabling legislation, there is need to establish what

¹⁸³ IMF 2007 International Monetary Fund
www.imf.org/en/News/Articles/2015/09/28/04/53/pnO769.htm#decision (accessed on 10 November 2017).

¹⁸⁴ Jung 2012 *Manchester J. Int'l Econ.* L 194.

obligations other countries, especially Zimbabwe's trading partners, have with respect to the bond notes. As Proctor alludes, the obligations of other states to recognise a country's monetary system applies where the relevant money has been created under the legal authority of the first state.¹⁸⁵ The bond notes are issued under the legal authority of Zimbabwe. In terms of the enabling legislation they are legal tender, that is they can be used as a medium of payment in Zimbabwe, but they are not a unit of account neither are they a store of value or wealth. Officially, Zimbabwe has no currency. The bond note can be said to be an unsound currency in that even though it can serve as medium of payment in Zimbabwe, it is not a unit of account and neither is it a store of value. Persons entering into trade agreements in Zimbabwe cannot use the bond notes as the base unit of account. Other states are therefore, not obliged to recognise the bond notes as Zimbabwe's own currency.

4.7 Conclusion

What are bond notes? This evasive question is what the discussions in this chapter and the previous ones were trying to answer. It does not seem as easy as it may sound. From the discussion had above the bond notes although legal tender in Zimbabwe, are not a unit of account and neither are they a store of value or wealth. Even though it qualifies under the category of fiat money in that it is issued by the state under legal authority and pegged at par with the US\$ which is not prohibited under customary international law, it is not a sound currency as it cannot be used for international (and to some extent local) trade purposes. It is surrogate to the US\$ in Zimbabwe. It can be substituted for other currencies in Zimbabwe for legal tender purposes thus it is exchangeable to other currencies. The introduction of the bond notes does not amount to currency manipulation in that the value of the bond notes has not been under-valued and neither does it affect other IMF members' balance of payments or global trade in an uncompetitive manner. The bond notes are thus regulated to the extent that they are legal tender in Zimbabwe, but not a local currency hence no obligation on other countries to recognise them as Zimbabwe's own currency for trade purposes.

¹⁸⁵ Proctor *Mann on the Legal Aspect of Money* 14.

Chapter 5 – Conclusion and recommendations

5.1 Introduction

This research set out to interrogate the extent to which bond notes in Zimbabwe are legally regulated and the functions which they serve in the monetary legal arena. In order to determine the answer to the research question, various issues related to monetary regulation were discussed. The research thus also set out to look at the rules and regulations which are there for the setting up of a currency that works within a nation and to determine whether these were followed in the case of Zimbabwe. After the discussions and findings in the previous chapters, it is imperative to conclude the research and make recommendations to the legal problem faced by Zimbabwe regarding monetary issues and to put the bond notes where they belong in relation to monetary affairs. This chapter is the overall conclusion wherein the findings of each chapter are summarised and a few recommendations are provided as a way forward.

5.2 Summary of chapters

The aim of Chapter 1 was to introduce the problem giving rise to the research. Having explained the problem, the researcher continued to give an outline of the way the research was going to be structured as well as the research methodology. In order to understand the issues being interrogated in the research, there was a brief explanation of what currency crisis is, just to have an appreciation from the beginning what the main issue being pursued in the research was.

Chapter 2 started by giving a brief explanation of the various theories of money in an attempt to explain what money is in the legal sense. The reason for this was to have an appreciation of what requirements there are for chattels to be accepted as money without any question. Thereafter, a brief background of the economic challenges faced by Zimbabwe was given to understand how the bond notes came to be introduced. The principle of nominalism was also discussed to find out whether it also applies to Zimbabwe, even during the period of hyperinflation. It then concluded by a finding that Zimbabwe was within its prerogative to introduce the monetary measures and regulatory framework when it introduced multi currencies, discarded its own currency and later introduced the bond notes. However, the chapter did not look at the requirements of monetary regulation at international level.

Chapter 3 went on to discuss the role of the IMF in monetary regulation as well as the World Bank and the SADC. It also discussed the new global financial architecture that emerged after the collapse of the par value system in order to have an appreciation of the current global players in the international monetary and financial regulation. It found that today the G20 together with the IMF and the FSB are key players in the field of financial and monetary regulation although they do not make hard law but only recommendations. The recommendations which are made by these bodies have very little impact on the way countries regulate and deal with their monetary affairs. The recommendations are to be effected at the domestic level by the individual members and non-members at their own discretion. The issue of what an optimum currency area is was also discussed in this chapter as a way of understanding monetary arrangements that can be made by various countries as a region. The chapter concluded by a finding that the regulation of monetary affairs remains the prerogative of individual countries.

After the findings in Chapters 2 and 3, the focus was then turned to the legal nature of bond notes in Chapter 4. The first point of departure was a discussion of the Reserve Bank of Zimbabwe Act in order to understand the regulatory framework of the bond notes. In this chapter, the issue of fiat money and virtual currencies was also discussed to find out where bond notes fall. Currency convertibility was also discussed in order to determine whether the bond notes are convertible. The chapter also discussed currency manipulation to determine whether the pegging of the bond notes to be at par with the

US\$ amounts to manipulation of Zimbabwe's currency. Having found that the bond notes are not a currency per se in that they do not fulfil other functions of money such as a store of value and a unit of account, there was a discussion as to what obligations other countries had regarding the recognition of bond notes. It was concluded that, since it is not a currency *strictu sensu*, then other countries have no obligation to recognise it as such.

Having made the above observations, there is need to find a way forward, since Zimbabwe's monetary problems are far from being resolved. A few recommendations are made as part of the conclusion.

5.3 Recommendations

5.3.1 Acceptance of virtual currencies

Virtual currency has been found to be money without any backing from a central bank. Virtual currencies can be attributed to the Societary theory of money in that they are accepted by various organisations and they have also gained worldwide recognition. There are big shops like in United States of America and South Africa where virtual currencies like bitcoin are accepted as a means of payment. As already discussed in the previous chapter there are bitcoin ATMs in the United States of America and bitcoin debit cards. This shows the level of acceptance of virtual currencies, particularly bitcoin in that part of the world. The problem with this recommendation is that virtual currencies are not backed by any central bank and thus government cannot make fiscal policy measures using the virtual currency as a unit of account. Besides the virtual currencies are also measured or valued in terms of fiat money like the US\$ and the South African rand. Also, the virtual currencies are more popular in countries which are advanced technologically. In the case of Zimbabwe, it is still behind in terms of technology hence only a few people can have access to virtual currencies. However, the few who can access virtual currencies can be allowed to utilise them and this way the pressure for fiat money can be eased.

5.3.2 Introduce its own currency

Even though the bond note can fall under the category of fiat money in that it was issued under the legal authority of the Zimbabwe government, it is not a sound currency in that the law limits its functions as money in the traditional sense of the uses of money. The law is also clear that the bond note is not Zimbabwe's currency. The government still demands tax in US\$ or other currency under the multi-currency regime. Although it has been pegged at the same value, as the US\$ it is still a surrogate currency to the US\$. This is different from what transpired in Malaysia during the Asian crisis where Malaysia pegged its currency to the US\$. In the case of Zimbabwe, the bond notes are not a local currency but an export incentive scheme in order to bring in more foreign currency.

To solve the cash crisis, the country can introduce a new currency which will have all the attributes of money and peg it at the same value with the US\$. As already established in the previous discussions, monetary pegs are allowed under international law. The IMF Articles of Agreement do not prohibit such pegs. Instead of relying on a surrogate currency where it is limited as to the number of bond notes it can issue, it can introduce its own currency that floats like other currencies but peg it to the US\$ or any other stable currency that it can choose.

5.3.3 Join a monetary union

Joining the CMA may prove to be a solution to the monetary problems facing Zimbabwe. A common monetary union is an agreement wherein member states agree to use a common currency. This is done to promote regional integration. Zimbabwe's biggest trading partner is South Africa and already there is the Common Monetary Area (CMA) consisting of South Africa, Swaziland, Lesotho and Namibia where the rand is legal tender in all member states. The rand already forms part of the basket of currencies which are recognised as legal tender in Zimbabwe. By joining the CMA, it can then peg its currency at par to the rand should it decide to introduce a local currency as recommended above. This may prevent hyperinflation which led to the fall and demonetisation of the Zimbabwe dollar. It will be to the advantage of Zimbabwe for it to join the CMA because the rand is a stable currency and South Africa is the most developed economy in the Southern African region. Also, the fact that Zimbabwe's biggest trading partner is South Africa means that

it will be easier to effect international payments. The central bank's autonomy in this regard will be limited, however, the advantages will outweigh this little shortcoming.

5.4 Final conclusions

Zimbabwe has organised its monetary system in such a manner that it has no local currency. The bond notes are not Zimbabwe's local currency. Even though they are issued under the authority of Zimbabwe government in accordance with the State theory they are not a sound currency because they do not have all the attributes of money. The Societary theory of money remains relevant to the case of Zimbabwe because it was the resistance of the people which led to the government stalling the reintroduction of the local currency as people still have no confidence in it. Internationally, the measures adopted by Zimbabwe in the introduction of bond notes are not a violation of any law. Regulation of monetary affairs remains the prerogative of the country concerned. This is the case especially following the collapse of the par value system in the early 1970s. There are no hard and fast rules under international law regarding monetary measures that can be introduced by the state. The IMF Articles of Agreement prevents the adoption of policies that can result in negative spill overs to other members. The measures adopted by Zimbabwe have not affected any other members hence it is not in violation of any international law.

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