

BILL WATCH 33/2019

[4th July 2019]

Monetary Policy and the Rule of Law

SI 142 of 2019 [\[link\]](#) – the Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019, to give it its full name – declared that the Zimbabwe dollar should be the sole legal tender in Zimbabwe for all transactions. Other currencies, specifically US dollars, British pounds, South African rand and Botswana pula, are no longer legal tender.

Since SI 142 was published government officials have made it clear that they believe it is now a criminal offence for storekeepers to price their goods in US dollars or any other foreign currency, and for anyone to use foreign currency rather than Zimbabwe dollars in any transaction carried out in this country. Thus the Governor of the Reserve Bank is reported to have told a parliamentary committee:

“There are many tools of enforcing Statutory Instrument 142 of 2019, including the Bank Use Promotion and Suppression of Money Laundering Act (Chapter 24:24), which was approved by the Parliament of Zimbabwe, the Financial Intelligence Unit (within the central bank), and members of the police force who are already seized with the matter to ensure that at least there is compliance and indeed enforceability of this matter.

“Enforcement is very possible and they have already started doing so to ensure that all local payments are made in the Zimbabwe dollar, and that payments offshore are done in US dollars.”

And the National Police Spokesman is reported as saying:

“The ZRP (Zimbabwe Republic Police) warns all those who are charging commodities in United States dollars that they risk being arrested as the law will be applied without fear or favour. Members of the public should report such people to any nearest police station.”

Is the Use of Foreign Currency Criminal?

It needs to be asserted strongly that, contrary to what the Governor of the Reserve Bank said, it is not a criminal offence to use foreign currency in transactions within Zimbabwe or to price goods in a foreign currency. There are several reasons for this assertion:

1. SI 142 may be invalid

At least two cases have been filed in the High Court challenging SI 142 of 2019 on the ground that it is *ultra vires* the Reserve Bank of Zimbabwe Act, under which it was purportedly made. There is substance in these challenges.

The multi-currency system was introduced in 2009 by the Finance (No. 2) Act, 2009, but it was done in rather an odd way. Section 17 of the Act first amended the Reserve Bank of Zimbabwe Act so as to insert a new section 44A which gave the Minister of Finance power to make regulations prescribing that tenders

of payment in specified foreign currencies would be legal tender in Zimbabwe. However, section 17 of the Finance Act then confused matters by adding a further provision stating that British pounds, US dollars, South African rand and Botswana pula “shall be deemed to be legal tender” as if the new section 44A were already in force and the Minister had made regulations under it.

As a result, the multi-currency system was not introduced by regulations made under section 44A of the Reserve Bank of Zimbabwe Act. It was introduced by the Finance (No. 2) Act itself, which deemed the Minister to have made the appropriate regulations. Under our law Ministers cannot make regulations amending or repealing Acts of Parliament, and it is arguable by enacting SI 142 the Minister has repealed the Finance Act’s declaration of foreign currencies as legal tender – which he cannot do.

2. SI 142 does not ban the use of foreign currency

Even if it is valid, SI 142 does not expressly state that foreign currencies cannot be used in transactions or to price goods. Instead it provides that the Zimbabwe dollar is the sole legal tender in Zimbabwe for all transactions. As we said in our Bill Watch 32 of 24th June 2019 [\[link\]](#):

“Legal tender” means a currency which, if offered in payment of a debt, discharges the debt unless the creditor and the debtor have specifically agreed otherwise. So if a debtor owes a creditor \$20, say, the debtor can normally repay the debt by offering \$20 in RTGS dollars (because they are legal tender). If however the parties have agreed that the debt should be repaid in US dollars, then the debtor must repay it in those dollars. ... [SI 142] does not specifically forbid contracts that require payments to be made or calculated in a foreign currency, so if shopkeepers mark their prices in US dollars, for example, or insist on payment in that currency there is nothing to stop them doing so.”

3. SI 142 does not create any criminal offences

There is no provision in SI 142 of 2019 stating that the use of a foreign currency rather than Zimbabwe dollars is a criminal offence. There could not be any such provision because sections 44A and 64 of the Reserve Bank of Zimbabwe, under which the SI was made, do not allow the Minister to create criminal offences — or, to put it more precisely, the sections do not provide expressly for criminal offences and, in the absence of such a provision, the Minister cannot create them.

4. No other law makes it an offence to use foreign currency

If SI 142 of 2019 does not criminalise the use of foreign currency, is there any other law that does? No, there isn’t.

The Reserve Bank Governor mentioned the Bank Use Promotion and Suppression of Money Laundering Act [actually it was amended extensively six years ago and is now called the Bank Use Promotion Act], but that Act does not deal with foreign currency. It prohibits traders and other business people from hoarding or trading in cash and provides for the confiscation of cash illegally

held. “Cash” however is defined in the Act as meaning “bank notes and coins of any currency that is ... designated as legal tender in Zimbabwe”. If Zimbabwe dollars are, as the government claims, the sole legal tender in this country then bond notes and coins are the only “cash” to which the Bank Use Promotion Act can apply.

The Rule of Law

The statements made by the Governor of the Reserve Bank and the Police are therefore wrong. But they are not just wrong – they are dangerously wrong because they may lead to serious violations of the rule of law.

The rule of law is an elastic concept but fundamentally it means that people’s rights and obligations must be determined by laws rather than by individuals or groups of individuals exercising an arbitrary discretion. From this fundamental concept several principles are derived, among them the following:

- No one is above the law. State officials, and even the State itself, are subject to the law and must act in accordance with the law.
- Laws must be certain, i.e. clear and definite. People must be able to establish relatively easily the content of a law and the extent of their rights and duties under it.
- Crimes must be clearly defined and reasonably limited in scope. People must know what they can and cannot do.

The statements made by the Governor of the Reserve Bank and the Police violate these principles because:

- They misstate the effect of the law, leading the public to believe that storekeepers and others are committing crimes when they are not.
- They encourage the Police to arrest people for conduct which is in fact lawful. Any such arrests will be illegal and may leave the police officers concerned liable to pay heavy damages.

What should be done?

If the Minister of Finance and the Governor of the Reserve Bank want to outlaw the use of foreign currency as a medium of exchange in Zimbabwe, then they must do it properly. That is to say:

1. They must work out precisely and in detail what they want to achieve.
2. With the aid of their legal advisers, they must establish what the existing law says on the subject. This is not as easy as it sounds, because our statute books are littered with old rules and regulations which are still legally in force even though they may have outlived their purpose.
3. They must then work out which laws need to be enacted, repealed or amended in order to achieve the new policy goals.
4. Next they must get laws drafted so as to give effect to their new policies while observing the precepts of the rule of law mentioned above.
5. And finally, the Minister must approach Parliament to enact the new laws.

Why Parliament? Because when laws pass through Parliament they are subjected to scrutiny and debate. Stakeholders, such as businesses and members of the public are given an opportunity to express their views when laws are referred to the appropriate parliamentary committees. And there is the further point that the Constitution makes Parliament, not the Executive, responsible for enacting laws. Separation of powers is one of the main principles derived from the rule of law.

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