

The Changing Face of Money in the 21st Century: Legal and Regulatory Implications for South Africa

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Abstract

Historically, the concept of money was closely tied to material goods and sovereign fiat currency. However, advances in technology, societal values and global economic systems are all contributing to the increasing transformation of the concept of money. The 21st century has, therefore, seen the digitalisation of value through developments such as mobile-based financial solutions, cryptocurrencies and central bank digital currencies (CBDCs). These developments challenge long-standing legal definitions and regulatory standards of money, especially in jurisdictions such as South Africa, where socio-economic inequality and financial progress must coexist. This article examines the conceptual and historical underpinnings of money in order to determine if the legal definition of money has changed in response to this evolution. It examines the conventional understanding of money, the emergence of digital currencies, and the consequences for the South African legal system. The article finds that although new forms of money have been accepted, the basic idea of money has not altered much. It concludes by offering various legal and policy interventions to the South African authorities for possible implementation in their regulatory responses to the ever changing face of money.

Keywords

21st century; Bitcoin; CBDCs; central bank digital currencies; cryptocurrency; currency; digitalisation; function of money; legal tender; medium of exchange; money; payment; regulation; South Africa; technology; theory of money.

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1 Introduction

For ages, the concept of money has served as a fundamental component of human society, promoting social cohesion, economic development and trade.¹ In the past, money has been thought of as a tangible form of exchange that is issued and controlled by a central authority in the form of coins or banknotes.² The emergence of decentralised systems and the introduction of digital technology have changed the global financial scene and put conventional ideas of money to the test. These developments have generated significant interest in South Africa regarding the changing legal and practical meanings of money as well as the regulatory frameworks required to control it. This article asks whether the legal definition of money has changed to reflect these developments and considers the ramifications for South Africa's financial future. The article specifically examines how South African regulatory authorities have reacted to the digital revolution and enquires if their strategies are consistent with the reinterpreted definition of money in a decentralised financial system.

This contribution is structured as follows. First, it delves into the concept of money generally, attempting to understand its origins. Second, the paper defines money or rather analyses different definitional propositions regarding what constitutes "money". Third, it explores the concept of legal tender in relation to the broader understanding of "money". Fourth, the contribution examines the role of social convention and trust in the acceptance of "things" as "money" even if the "things" are not regarded as legal tender by the state. Fifth, the paper explores the transformational dynamics of the 21st century in the broader concept of money through digital money disruptions. Sixth, the article zeros in on the South African context, examining the legal and regulatory framework relevant to the concept of money and the emerging legal implications. In order to address new issues with digital money, the article concludes by recommending important legislative and regulatory changes in South Africa.

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¹ See Harari *Sapiens* 153-154. Also see Einzig *Primitive Money*; Davies *History of Money* generally.

² See, generally, Jevons *Money and the Mechanism of Exchange*. Also see Gleeson *Legal Concept of Money* 28.

2 Theoretical foundations: understanding money

2.1 *The evolution of money through history*

Money is one of the timeless inventions in human history.³ It has been described as a "puzzle",⁴ indicating how difficult it is to understand.⁵ Anthropologists, economists, historians and jurists have all grappled with the question of the definition of "money".⁶ Not only have these various groups attempted to define money but they have also sought to answer many questions pertaining to it such as its purpose, value and philosophy.⁷ One of the questions that scholars have also attempted to answer concerns the origins of money. Views have differed in this regard depending on whether the question is being addressed from a legal, social, economic or historical perspective.⁸

Since the beginning of civilisation, people have always created payment systems to enable them to exchange some form of value.⁹ Evolving up to the present day, money has come a long way.¹⁰ Many artefacts are known to have functioned as money in human history. These range from skins,¹¹

³ See Haselgrove and Krmnicek 2012 *Annual Review of Anthropology* 235. Also see Mellor *Money* 2, who explains the significance of money in human history by noting that "Conceptions of money influence social and public policy". Societies communicate through money as well as through language - see Proctor *Mann on the Legal Aspect of Money* 5.

⁴ See Haselgrove and Krmnicek 2012 *Annual Review of Anthropology* 235-250 and Ingham 1996 *Review of Social Economy* 507-529. Parks *Medici Money* 12 even likened money to mysticism, which thrives on ritual. Also see Ecclesiastes 10:19, which says "money answers everything".

⁵ Mellor *Money* 1 notes that "money is one of the most slippery concepts to grasp. It is difficult to define, describe and explain. This is why it seems like magic, a thing of illusion and trickery, mystery and enigma."

⁶ See Proctor *Mann on the Legal Aspect of Money* 5; Vakhitov and Vakhitov 2003 *Rev Cent & E Eur L* 104. Also see Gleeson *Legal Concept of Money*; Jevons *Money and the Mechanism of Exchange* (1896) passim. The use of quotes around the term "money" or related concepts in this contribution is for emphasis of the term or phrases and is not intended to denote a colloquial meaning.

⁷ See generally Mellor *Money*; Simmel *Philosophy of Money*.

⁸ See Desan "Money as a Legal Institution" generally; Proctor *Mann on the Legal Aspect of Money*; Gleeson *Legal Concept of Money*; Jevons *Money and the Mechanism of Exchange*; Menger 1892 *Economic Journal* 255 and Mishkin *Economics of Money* passim.

⁹ See Szulczyk *Money* 15. Also see Weatherford *History of Money*; Davies *History of Money*; Harari *Sapiens*; Simmel *Philosophy of Money*; Desan *Making Money*; Parks *Medici Money* and Mellor *Money* passim.

¹⁰ See Goldbarsht and De Koker "From Paper Money to Digital Assets" 2.

¹¹ These became one of the earliest forms of money through the value they derived from their use as clothing. See Jevons *Money and the Mechanism of Exchange* 20; Einzig *Primitive Money* 164 et seq.

furs,¹² sheep, cattle¹³ and whales' teeth¹⁴ to cowrie shells.¹⁵ The notion of "money" therefore dates back to thousands of years ago where all commerce, at the time was based on some form of exchange.¹⁶ For example, as early as in 1519 the Aztecs used gold dust or cocoa beans as a medium of exchange.¹⁷

Despite the existence of clear evidence of the long history of money, there have been sharp disagreements regarding its origins among legal scholars, economists, sociologists and anthropologists.¹⁸ For instance, from a legal point of view, it has been argued that money is a creature of law and that any theory of money must deal with legal history.¹⁹ This view traces the origins of money from state authority and has been rejected by economists and social scholars alike. These latter groups have argued that money is not necessarily created by law. They assert that the law only gives restrictions on and recognition of what "money" should be regarded as legal tender in any given state.²⁰ It is also a strong view of social scholars that social acceptance creates money.²¹ This means "the more people there are who will accept a thing in payment, the more money-like that thing is."²²

¹² North American Indians used furs as a medium of exchange; see Jevons *Money and the Mechanism of Exchange* 20 *et seq*; Einzig *Primitive Money* 164 *et seq*.

¹³ Cattle and sheep were valuable forms of negotiable property during the pastoral state in human civilisation; see Jevons *Money and the Mechanism of Exchange* 21 *et seq*; Einzig *Primitive Money* 110 and Weatherford *History of Money* 21-22.

¹⁴ The Fijians are reported to have used these as substitutes for cowries; see Davies *History of Money* 34 *et seq*; Schulze 2004a *SA Merc LJ* 50; Jevons *Money and the Mechanism of Exchange* 25.

¹⁵ See Jevons *Money and the Mechanism of Exchange* 20 *et seq*. In ancient times cowrie shells were used in the East Indies and the West Coast of Africa as small money. Also see Schulze 2004a *SA Merc LJ* 50 for a brief discussion of the evolving nature of the concept of money.

¹⁶ See Jevons *Money and the Mechanism of Exchange* 2 *et seq*, who traces the origins of money and its function as a medium of exchange from barter.

¹⁷ See Harari *Sapiens* 148; Weatherford *History of Money* 17-21 and Einzig *Primitive Money* 175.

¹⁸ For the economic views on money, see Menger 1892 *Economic Journal* 239-255; Mishkin *Economics of Money* and Von Mises *Theory of Money* *passim*. For legal views on money, see Knapp *State Theory*; Gleeson *Legal Concept of Money*; Proctor *Mann on the Legal Aspect of Money*; Desan "Money as a Legal Institution" *passim*. For a historical account of money, see Weatherford *History of Money*; Davies *History of Money*; Harari *Sapiens* and Parks *Medici Money* *passim*. For an archaeological view on money, see Haselgrove and Krmnicek 2012 *Annual Review of Anthropology* 235-250. For a socio-philosophic view on money, see Simmel *Philosophy of Money* and Mellor *Money* *passim*.

¹⁹ See Knapp *State Theory* 1 and Desan "Money as a Legal Institution" 21.

²⁰ See Zelizer *Social Meaning of Money* 4; Mellor *Money* 5-6. Also see Menger 1892 *Economic Journal* 255, who argues that "money has not been generated by law. In its origin it is a social, and not a state-institution".

²¹ See Ingham 1996 *Review of Social Economy* 510, who argues that money is a creature of social relations.

²² Gleeson *Legal Concept of Money* 24. He further illustrates this view by pointing out that in a world where debts could be settled through exchanging cigarettes, for

Consequently, the origins of human civilisation marked the beginning of money. In other words, money is social in nature in its origins.²³ Thus, social scientists reject the view that money is a creature of law and the state.²⁴ They contend that the law only gives recognition to the existence of money but does not create it.²⁵ Through the law, money as a social institution has only been adjusted and perfected to meet the various needs of the ever-changing commercial world.²⁶ The social view of the origins of money is opposed by economists who trace the origins of money to the marketplace where barter trade²⁷ occurred.²⁸ The economists argue that individuals in the marketplace decide what goods are marketable and what should be traded for the goods as "money".²⁹

Despite the plausibility of these social and economic views of money and its origins, it should be noted that the acceptance of any chattel as "money" even if it is not essentially such creates problems for the law.³⁰ This is because contemporary legal theory sets clear parameters regarding what should be considered to be "money" and what should not.³¹ To resolve this apparent dispute, Gleeson argues that the law should accept that "between the class of things which are clearly money and the class of things which are clearly not money, there will appear a class of things which are treated as money."³² This is in recognition of the fluid nature of "money" from one society to another and from one generation to another. Significantly, it

example, then cigarettes could be regarded as "money" under the circumstances, despite their non-recognition by the law. See Mellor *Money 7*, who recognises other limited forms of social money, such as temple or tribute money in certain indigenous communities and in other particular locations such as the Bristol pound and Ithaca Hours.

²³ See Menger 1892 *Economic Journal* 255. Also see Ingham 1996 *Review of Social Economy* 510 *et seq.*

²⁴ See Menger 1892 *Economic Journal* 255.

²⁵ See Menger 1892 *Economic Journal* 255. For a contrasting view that emphasises the central role of law in the origins of money, see Knapp *State Theory* 1, who declares that "money is a creature of law. A theory of money must therefore deal with legal history."

²⁶ Menger 1892 *Economic Journal* 255.

²⁷ For criticism of the medium of exchange theory and barter as the origins of money, see Einzig *Primitive Money* 344-345, who argues that the medium of exchange theory and barter are "extreme" in suggesting that at a particular time a deliberate decision to adopt money was made. He argues that money came about as "an unconscious and gradual process." Also see Desan *Making Money* 27 *et seq.*

²⁸ See Menger 1892 *Economic Journal* 241 *et seq.* Jevons *Money and the Mechanism of Exchange* 3 notes that "the earliest form of exchange must have consisted in giving what was not wanted directly for that which was wanted."

²⁹ See Menger 1892 *Economic Journal* 255. Also see Jevons *Money and the Mechanism of Exchange* 13.

³⁰ Gleeson *Legal Concept of Money* 22.

³¹ Gleeson *Legal Concept of Money* 22.

³² See Gleeson *Legal Concept of Money* 25. See also Mellor *Money 7*; Einzig *Primitive Money* 29 *et seq.*

should be noted that the list of things becoming "money" is always growing.³³ It seems that money is always in a constant state of "originating" as a means of payment. Knapp aptly points this out by noting that, "there are means of payment which are not yet money; then those which are money; later still those which have ceased to be money."³⁴ This is in recognition of the constant changing nature of what constitutes "money" and acceptance of the fact that more "things" which are to be identified as "money" are yet to come. Perhaps an examination of the definition of money would give a clearer picture as regards its nature. Thus, the functional and legal definitions of money are considered next.

2.2 Functional and legal definitions of money

The functional approach to money, which is the approach championed by economists, defines money in terms of what it does.³⁵ This approach sees money not as a static entity but as a dynamic tool of economic facilitation. Obviously, this kind of definition tells all but is far from clear. It is common cause that one can do a lot of things with money but this does not adequately address the question of what is that "money" for which one can do numerous things. The functional approach is a true embodiment of the economists' ideas about money.³⁶ They define money through its functions in the market rather than its existence as an abstract entity.³⁷ From an economic perspective, "money" is the universal means of payment for goods or services. In this regard, it serves as a measure of the value of those goods or services as expressed in terms of particular monetary units of account of a given state.³⁸ In other words, money serves as a "measure and standard of value and a medium of exchange."³⁹ This is an economic definition of money that captures its functions in measuring and facilitating the exchange of value. Despite variations in the nature and forms of money from time immemorial up to the present day, the economic definition of money has not changed much.

³³ Such a list includes whale teeth, cowries, cattle, slaves, banknotes, cigarettes, credit cards and cryptocurrency; see Einzig *Primitive Money* 29 *et seq*; Davies *History of Money* 34 *et seq*; Schulze 2004a *SA Merc LJ* 50 and Loubser and Swart 1999 *Stell LR* 354.

³⁴ Knapp *State Theory* 2.

³⁵ Ingham 1996 *Review of Social Economy* 508. Mellor *Money* 1 begins with a quote from Hingston Quiggin *Survey of Primitive Money* to the effect that "Everyone, except an economist, knows what money means."

³⁶ See Menger 1892 *Economic Journal* 239-255; Mishkin *Economics of Money* 54 and Von Mises *Theory of Money* 29 *et seq*.

³⁷ See Mishkin *Economics of Money* 54; Von Mises *Theory of Money* 29 *et seq* and Jevons *Money and the Mechanism of Exchange* 13.

³⁸ See Loubser and Swart 1999 *Stell LR* 357; Mishkin *Economics of Money* 55.

³⁹ See Jevons *Money and the Mechanism of Exchange* 8.

By contrast, the legal approach seeks a definitional anchor that relies heavily on the state theory of money, in terms of which only chattels issued by the state under its laws may qualify as "money", and the value to be assigned to such money is fixed by law rather than through the value used in the production process.⁴⁰ Thus, money has been defined at law simply as "a Chartal means of payment".⁴¹ A means of payment has been described as "a movable thing which has the legal property of being the bearer units of value."⁴² Essentially, "money is an incorporeal value or purchasing power quantified by monetary units,"⁴³ or money is "that which passes freely from hand to hand throughout the community in the final discharge of debts."⁴⁴ In the strict legal sense, however, money is understood as chattels issued by the state under its laws and denominated with reference to a unit of account using the same state laws.⁴⁵ Under South African banking law, for example, only notes and coins issued by the central bank have these attributes of chattels.⁴⁶ This is a narrow view of money which restricts it to the concept of legal tender.⁴⁷ This approach binds the notion of money to statutory recognition and central bank issuance. In this regard, the power of central banks in the modern world of commerce to issue banknotes and coins is proof that the state theory of money is alive and has some merit.⁴⁸ However, with the advent of decentralised forms of finance such as Bitcoin in the 21st century, the state theory of money is being increasingly eroded. Central banks are attempting to counter this decentralisation through the issuing of central bank digital currencies (CBDCs).⁴⁹

⁴⁰ See Proctor *Mann on the Legal Aspect of Money* 16; Gleeson *Legal Concept of Money* 28 *et seq.*

⁴¹ See Knapp *State Theory* 38.

⁴² See Proctor *Mann on the Legal Aspect of Money* 43 *et seq.*

⁴³ See Knapp *State Theory* 38. Also see Loubser and Swart 1999 *Stell LR* 357.

⁴⁴ *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 781 quoting from Darling J in *Moss v Hancock* [1899] 2 QB 111 116.

⁴⁵ See Sharrock "Payment" 197. Also see Knapp *State Theory* 1; Proctor *Mann on the Legal Aspect of Money* 16.

⁴⁶ Section 15(1) of the *South African Reserve Bank Act* 90 of 1989 (the *SARB Act*) states that the monetary unit of the Republic is the rand and the cent, which is one hundredth part of the rand. Also see Pretorius 2004 *SA Merc LJ* 466-476.

⁴⁷ See Schulze 2004a *SA Merc LJ* 51 note 9; Loubser and Swart 1999 *Stell LR* 358. It should be noted that the concept of money may be wider than that of legal tender.

⁴⁸ See s 16 of the *SARB Act*, which provides that the central bank may make or cause to be made coins of the denominations and with the mass set out in Schedule 2, and s 17 of the same Act provides that bank coins and notes issued by the Reserve Bank qualify as legal tender. Also see Pretorius 2004 *SA Merc LJ* 468.

⁴⁹ See Parampathu 2024 *TLT* 328; Martino 2024 *Computer Law and Security Review* 2. For an expanded discussion on CBDCs in this piece, see para 5.2 below.

3 Legal tender and the boundaries of law

3.1 Defining legal tender

One of the most important roles of the state within the monetary system is to define what chattels are to constitute "legal tender".⁵⁰ Legal tender has been defined as money "the legislator has so defined in statutes which organise the monetary system."⁵¹ Rahmatian defines legal tender as money by the legal order of the state whereby banknotes or coins without any intrinsic value must be accepted in the settlement of debts and obligations.⁵² Similarly, McBride defines "legal tender" as the tender of payment that, by currency legislation, cannot be refused in the settlement of debts denominated in the same currency.⁵³ The *South African Reserve Bank Act* 90 of 1989 (*SARB Act*) recognises all notes and coins issued by the central bank as legal tender.⁵⁴ It therefore follows that chattels which are legal tender have the characteristics of money although not all money is legal tender.⁵⁵ It has been argued that only physical money in the form of banknotes and coins is legal tender while the expression "money" is a much wider concept that includes a variety of instruments.⁵⁶ This view, however, ignores the fact that legal tender is not only dischargeable through physical banknotes and coins but also through other means of payment such as electronic money (e-money).⁵⁷ Thus, it is submitted that payment through credit or debit cards should be regarded as acceptable legal tender in so far as the cards perform the role of banknotes and coins, albeit in a different form.

3.2 Legal tender and payments

One of the significant purposes of money is the discharge of credit obligations. In this regard a practical definition of money could be that which,

⁵⁰ See Proctor *Mann on the Legal Aspect of Money* 12 *et seq.* Also see Gleeson *Legal Concept of Money* 137, who notes that the term "tender" does not mean payment but a preliminary legal process towards the extinguishment of a debt.

⁵¹ See Proctor *Mann on the Legal Aspect of Money* 12 *et seq.*; Schulze 2004a *SA Merc LJ* 51.

⁵² Rahmatian 2018 *EBLR* 216.

⁵³ McBride 2007 *Reserve Bank of New Zealand Bulletin* 31.

⁵⁴ See s 10(1) of the *SARB Act*. However, not all of South African coins are regarded as a form of legal tender. There is debate to that effect. See Pretorius 2004 *SA Merc LJ* 468, who is of the view that Krugerrands in gold coins are legal tender regardless of the fact that they do not have a nominal value.

⁵⁵ See Schulze 2004a *SA Merc LJ* 51.

⁵⁶ See Proctor *Mann on the Legal Aspect of Money* 12; Schulze 2004a *SA Merc LJ* 51 and Mishkin *Economics of Money* 53.

⁵⁷ For a brief but expanded discussion of e-money in this contribution, see para 5.4 below.

by mere delivery, extinguishes payment obligations.⁵⁸ A question has been raised as to whether a person ought to receive payment only in the form of legal tender or in any form of money. This question seeks to answer the issue of what may constitute "money" for the purposes of discharging debts. It must be noted that even if certain chattels are recognised by law as legal tender they may still be regarded as not being "money".⁵⁹

Legal tender laws determine what money the creditor is obliged to accept in payment of debts.⁶⁰ The rationale behind legal tender laws is to provide that where a specific thing is offered in payment, such a thing must be treated as having value. In other words, legal tender laws do not force the creditor to accept a thing tendered in payment in the discharge of the debt owed to him.⁶¹ However, where a debtor offers to make payment in legal tender and a creditor rejects such an offer, he (the creditor) is estopped from suing for the debt as still owing.⁶² Where a creditor elects not to receive payment in certain forms of money, such money ceases to be "money" for them, whether it is legal tender or not.⁶³ A good example of this phenomenon is where sovereign currencies have been rejected in settlement of debts by debtors under contracts in countries such as Zimbabwe, Argentina and Germany.⁶⁴ Currencies in these countries remained legal tender even under conditions where market players had rejected them in the settlement of debts.⁶⁵ In this regard, legal tender laws help publicise the money a government of the day has chosen to issue and support.⁶⁶ Creditors may choose to protect themselves against legal tender laws by specifying a medium of payment acceptable to them under a contract. Creditors may also accept other forms of money which are not legal tender by providing for a unit of account in the contract that is different from that regarded as

⁵⁸ See Gleeson *Legal Concept of Money* 22. Also see Knapp *State Theory* 2, who declares that "all money, whether of metal or of paper, is only a special case of the means of payment in general."

⁵⁹ See Menger 1892 *Economic Journal* 255; Proctor *Mann on the Legal Aspect of Money* 24 *et seq.* On the significance of the social theory of money as a means of payment and its power in conferring the character of "moneyness" on money, see Proctor *Mann on the Legal Aspect of Money* 23; Ingham 1996 *Review of Social Economy* 510.

⁶⁰ Gleeson *Legal Concept of Money* 3.

⁶¹ Gleeson *Legal Concept of Money* 133-134.

⁶² See Gleeson *Legal Concept of Money* 126; Proctor *Mann on the Legal Aspect of Money* 31.

⁶³ Gleeson *Legal Concept of Money* 24.

⁶⁴ Gleeson *Legal Concept of Money* 24.

⁶⁵ Gleeson *Legal Concept of Money* 24.

⁶⁶ Desan *Making Money* 93.

legal tender by legislation.⁶⁷ Thus, a creditor is not forced to accept payment in legal tender if the creditor has elected not to be so paid.⁶⁸

It is possible for the legislature to declare as legal tender assets other than fiat money or banknotes and coins, for the settlement of debts.⁶⁹ Historical examples include a declaration in ancient Rome of the *datio in solutum necessaria*, under which debtors were entitled to settle their debts through the delivery of certain specified commodities, and during the French Revolution, when a similar provision was made.⁷⁰ This does not mean that the property so designated under the legal tender law becomes "money". An asset may be designated legal tender without its being money.⁷¹ For example, Krugerrands were indirectly described as legal tender in South Africa, even though they lacked a specific value by referencing to a unit of account. As such they were basically a commodity and not money.⁷²

In modern times there is a move away from the understanding of money as physical cash to other forms of money such as bank money and e-money.⁷³ The actual form of money used in the settling of debts is a function of contractual provisions that may specify the form of payment a creditor may accept.⁷⁴ The contract may specify that payment will be made through a credit card or through some other form of currency, in which case a debtor may not insist on paying using legal tender.⁷⁵ Creditors frequently accept bank transfers, credit cards, cryptocurrency and other emerging forms of payments that make commercial sense to them. These forms of payment are arranged, issued and administered by private players in the money market as opposed to state legal-tender laws.⁷⁶ However, states still retain legal-tender laws in the formal sense.

3.3 Legal tender and other forms of money

An opinion has been expressed on whether legal tender is just limited to banknotes and coins.⁷⁷ This view becomes pertinent in the advent of new

⁶⁷ See Goldberg 2009 <https://www.econstor.eu/bitstream/10419/96051/1/599987200.pdf> 4.

⁶⁸ Goldberg 2009 <https://www.econstor.eu/bitstream/10419/96051/1/599987200.pdf> 5.

⁶⁹ Gleeson *Legal Concept of Money* 133-134.

⁷⁰ Gleeson *Legal Concept of Money* 133-134. Also in 1783 in the US state of South Carolina the legislature declared property of every kind to be legal tender.

⁷¹ Gleeson *Legal Concept of Money* 133-134.

⁷² Proctor *Mann on the Legal Aspect of Money* 38.

⁷³ Proctor *Mann on the Legal Aspect of Money* 26.

⁷⁴ See Loubser and Swart 1999 *Stell LR* 363.

⁷⁵ See McBride 2007 *Reserve Bank of New Zealand Bulletin* 33; Konvisser 1997 *Harv J L & Tech* 330 fn 50. Also see Schulze 2004a *SA Merc LJ* 51; Gleeson *Legal Concept of Money* 24; *Marrache v Ashton* [1943] AC 311.

⁷⁶ See Proctor *Mann on the Legal Aspect of Money* 31.

⁷⁷ See s 10(1) of the SARB Act.

forms of payments such as e-money, digital currencies like Bitcoin⁷⁸ and CBDCs.⁷⁹ Legal tender has been identified as having two characteristics, namely, recognition by the state through legislation and acceptance by society.⁸⁰ However, acceptance by society is not necessarily a significant legal-tender requirement.⁸¹ State recognition through currency legislation suffices for money to be legal tender.⁸² Van Jaarsveld expresses doubt as to whether these attributes can be assigned to emergent forms of money such as e-money.⁸³ It is submitted that a more embracing definition of money should generally regard e-money as "money" and even legal tender.⁸⁴ This is pertinent not only for this contribution but also for the practical significance of modern realities of commerce in the digital age.⁸⁵ With further emergent forms of digital currencies such as CBDCs, this submission becomes even more relevant. CBDCs are not only digital forms of money similar to cryptocurrencies, but they are issued by central banks just like banknotes and coins.⁸⁶

4 The role of social convention and trust

Although the concept of money is largely discussed from economic and legal viewpoints, it should be noted that money is not solely a legal construct.⁸⁷ It also functions through the collective trust and acceptance of users. This phenomenon explains the success of bank-issued credit, which is not legal tender but is widely accepted, as well as the rise of mobile money globally, including in South Africa.⁸⁸ Trust and habit confer legitimacy upon forms of money that are yet to be sanctioned by statute.⁸⁹ This view largely hinges on the social theory of money, which appears to hold sway even in the modern technological era of new monetary innovations. Thus, the social

⁷⁸ See para 5.2 below regarding a brief discussion on bitcoin or cryptocurrency as "money".

⁷⁹ See para 5.3 below for a brief discussion of CBDCs as an emergent form of money.

⁸⁰ See Van Jaarsveld *Aspects of Money Laundering* 43. Also see s 10(1) of the *SARB Act* and para 3.1 above of this contribution.

⁸¹ As regards the need for the social acceptance of a thing for it to qualify as "money", see para 4 below of this article.

⁸² See para 3 above.

⁸³ See Van Jaarsveld *Aspects of Money Laundering* 43. As regards the tender of virtual currency, see Gleeson *Legal Concept of Money* 141 para 7.78.

⁸⁴ See para 5.4 below on an expansive view regarding the status of e-money as "money".

⁸⁵ The concept of money is increasingly expanding in the modern age to encompass anything that can carry monetary value or rights. See Proctor *Mann on the Legal Aspect of Money* 40 *et seq*; Mishkin *Economics of Money* 53; Desan "Money as a Legal Institution" 21 and Mellor *Money* 6-8.

⁸⁶ See Parampathu 2024 *TLT* 328; Martino 2024 *Computer Law and Security Review* 2. For a brief discussion of CBDCs, see para 5.3 below.

⁸⁷ See para 2.2 above.

⁸⁸ See Chitimira and Torerai 2023 *Juridical Tribune* 392; Lawack 2012 *Wash J L Tech & Arts* 318.

⁸⁹ See Mellor *Money* 6; Proctor *Mann on the Legal Aspect of Money* 23.

theory of money states that the public confidence of the people within a given state is necessary to create and recognise money as being such.⁹⁰ The theory places much emphasis on the "attitude of society rather than the state itself" in the recognition of what passes as "money".⁹¹ It is submitted that there are some merits in the social theory of money considering the role of money as a medium of exchange from historical times of barter to the modern era of coins and notes.⁹² As an illustration, Proctor captures the significance of this theory as follows:

There is no doubt that public acceptance and confidence are important criteria within the definition of money; people will enter into contracts in terms of money and accept payment in it because they are confident that other members of the same society will behave in like manner. This, in turn, leads to the view that anything is money if it functions as such.⁹³

In reinforcing Proctor's view, Davies notes that money must be understood in the social context where it exists besides the consideration of its economic aspects.⁹⁴ However, critics are of the view that the functional definition of money buttressed only by societal confidence may not be adequate.⁹⁵ This is because the theory negates the legal aspect of money in that states now have a monopoly in the issuance of coins and notes in jurisdictions across the world.⁹⁶ Thus, society alone has no power to sanction the issuance of currency.⁹⁷ However, in chaotic hyper-inflationary environments, communities have been known to stop recognising national

⁹⁰ See Proctor *Mann on the Legal Aspect of Money* 23 *et seq.* Also see Mellor *Money* 6, who argue that for money to "be trusted and treated as real people must believe in the magic that the numbers in their bank accounts represent real purchasing power or means of paying their obligations such as tax. The 'moneyness' of money reflects the trust people have in it, not the form and structure of the money itself."

⁹¹ See Proctor *Mann on the Legal Aspect of Money* 23; Ingham 1996 *Review of Social Economy* 510 notes that "money is socially produced in the sense that it does not occur naturally, and it also mediates and symbolises social relations" such as capital, wage and labour.

⁹² Also see Gleeson *Legal Concept of Money* 9, who proposes that "If money is that which society treats as money, determining what money is requires an assessment of social behaviour."

⁹³ See Proctor *Mann on the Legal Aspect of Money* 23.

⁹⁴ See Davies *History of Money* 1. Also see Ingham 1996 *Review of Social Economy* 510; Mellor *Money* 6-7.

⁹⁵ See Proctor *Mann on the Legal Aspect of Money* 24.

⁹⁶ The same monopoly may not apply in respect of money in general, especially with the advent of digital currencies such as bitcoin. See De Villiers and Sher 2015 *Without Prejudice* 59-60; Mitchell 2014 *Without Prejudice* 61-62; Nieman 2015 *PELJ* 1978-2000.

⁹⁷ See the state theory of money in Knapp *State Theory* generally. This is in contrast with both the orthodox and sociological view of money. See Menger 1892 *Economic Journal* 255, who argues that "money has not been generated by law, in origin it is a social, and not a state-institution." Also see Ingham 1996 *Review of Social Economy* 510; Mellor *Money* 6-7.

currencies even when the state insisted on their legality.⁹⁸ Consequently, the social theory of money possesses some realistic validity despite what the economic and legal theories of money provide.

5 The transformational dynamics of the 21st century

5.1 The rise of digital and decentralised money

Recent technological advancements have produced a multitude of value systems that challenge traditional definitions of money.⁹⁹ These include purely digital assets, decentralised peer-to-peer systems, and programmable financial contracts that operate without human intermediaries. These value systems are borderless, dematerialised and often independent of state authority.¹⁰⁰ While the traditional understanding of money as chattels, a medium of exchange, and a unit of account or a creature of law, gives a rough picture of what can be regarded as "money", it is incapable of explaining the "modern meaning of money" in the 21st century. This is because the concept of money is constantly changing.¹⁰¹ Therefore, the traditional view of money may be insufficient in understanding "money".

In the modern technological era, new forms of money are surfacing posing challenges to the understanding of money in the traditional model.¹⁰² It therefore follows that "money" should be regarded as an abstract rather than a physical concept.¹⁰³ New forms of payments and money such as digital currencies have since emerged and monetary laws may not be adequate in delineating the scope of what constitutes "money".¹⁰⁴ It is submitted that the modern meaning of "money" should be inclusive and broader than the exclusive and narrow understanding of it, which has to do

⁹⁸ See Proctor *Mann on the Legal Aspect of Money* 24-25, who notes that in Zimbabwe the social theory of money held sway in 2008 during a world record hyperinflation. The people rejected the Zimbabwean dollar even if it was the national currency and legal tender. The state had to demonetise its own currency in line with societal demands. The demonetisation of the Zimbabwean dollar occurred in 2015 long after its rejection by society in 2008. Also see Davies *History of Money* 19 *et seq*, who explains the rejection of the Hungarian currency by citizens of that state due to hyperinflation, in favour of the barter system, which was perceived as stable.

⁹⁹ Loubser and Swart 1999 *Stell LR* 354; Tuba 2014 *PELJ* 2271; Reddy and Lawack 2019 *SA Merc LJ* 1.

¹⁰⁰ Ncube and Kabwe 2023 *De Jure* 356.

¹⁰¹ See Schulze 2004a *SA Merc LJ* 51; Proctor *Mann on the Legal Aspect of Money* 40 *et seq* and Loubser and Swart 1999 *Stell LR* 357.

¹⁰² See Proctor *Mann on the Legal Aspect of Money* 40-42. Also see Harasta, Koci and Smerkl 2010 *Masaryk University Journal of Law and Technology* 191-204; Loubser and Swart 1999 *Stell LR* 357 and Baros 2014 *U Miami Bus L Rev* 202.

¹⁰³ See Proctor *Mann on the Legal Aspect of Money* 40-41; Mellor *Money* 6-7.

¹⁰⁴ See Proctor *Mann on the Legal Aspect of Money* 40-41; Schulze 2004b *SA Merc LJ* 703-715; Visser 1989 *SA Merc LJ* 190.

with banknotes and coins, for instance.¹⁰⁵ Whether an instrument to be used as a means of payment constitutes "money" or not must be determined on a case-by-case basis in line with banking practice and technological developments.¹⁰⁶ This is significant in that what constitutes "money" from time to time may change. New forms of money can emerge at any time and gain sufficient levels of acceptance within the business community and society in general.¹⁰⁷

5.2 Cryptocurrencies

Cryptocurrencies such as Bitcoin and Ethereum are decentralised digital assets created through cryptographic protocols.¹⁰⁸ Although they represent new and emerging forms of "money" they lack central issuing authorities and are not generally considered legal tender.¹⁰⁹ Their volatility, lack of consumer protection and ambiguous legal status pose complex challenges for regulators.¹¹⁰ Cryptocurrencies defy the state theory of money and the legal tender laws of any state, including South Africa, except in El Salvador and possibly other jurisdictions contemplating making it legal tender.¹¹¹ Bitcoin was designated as legal tender in El Salvador in September 2021.¹¹² Its acceptance in economic transactions, however, has not been entirely successful.¹¹³ It should be noted, though, that despite its lack of recognition as legal tender in many jurisdictions, including South Africa, cryptocurrency

¹⁰⁵ See *Elsinora Global Ltd v Healthscope Ltd (No 2)* [2006] FCA 18 para 55, where the Federal Court of Australia seems to approve of this broad approach to the meaning of money. Also see Loubser and Swart 1999 *Stell LR* 357.

¹⁰⁶ Proctor *Mann on the Legal Aspect of Money* 40-41. The development of technology has seen the development of other forms of money such as virtual or digital money, the most common of which is bitcoin. Virtual money functions more or less like real money in the real world; see Harasta, Koci and Smerkl 2010 *Masaryk University Journal of Law and Technology* 193. Baros 2014 *U Miami Bus L Rev* 202 defines virtual money as "unregulated digital currency that is issued and often controlled by its developers." As regards the debate about whether to call it virtual or digital currency, see Nian and Chuen "Introduction to Bitcoin" 6-7. In South Africa digital currencies such as bitcoin are not regulated and have no clear legal status. The SARB has warned those who transact in bitcoin to tread with caution since there is no guarantee of security or convertibility of value; see De Villiers and Sher 2015 *Without Prejudice* 59-60.

¹⁰⁷ Proctor *Mann on the Legal Aspect of Money* 29. This broad approach to the concept of money seemed to get the approval of the Federal Court of Australia in *Elsinora Global Ltd v Healthscope Ltd (No 2)* [2006] FCA 18 para 55. Also see Loubser and Swart 1999 *Stell LR* 357.

¹⁰⁸ Erasmus and Bowden 2020 *Obiter* 312; Ncube and Kabwe 2023 *De Jure* 366; Mellor *Money* 121.

¹⁰⁹ See Mellor *Money* 121.

¹¹⁰ Reddy and Lawack 2019 *SA Merc LJ* 18.

¹¹¹ See Goode and McKendrick *Commercial Law* 556; Parampathu 2024 *TLT* 288.

¹¹² See Alvarez, Argente and Van Patten 2022 https://www.nber.org/system/files/working_papers/w29968/w29968.pdf 1; Parampathu 2024 *TLT* 288.

¹¹³ See Alvarez, Argente and Van Patten 2022 https://www.nber.org/system/files/working_papers/w29968/w29968.pdf 3-4.

largely conforms to both the economic and social theories of money in the digital 21st century era.¹¹⁴ Thus, it has altered the face of both money and what constitutes legal tender in some states, such as El Salvador.¹¹⁵

Although cryptocurrencies are innovative, they still operate in a grey regulatory area in South Africa.¹¹⁶ In *Standard Bank of South Africa v South African Reserve Bank*¹¹⁷ the court explicitly states that cryptocurrency is not legal tender in South Africa. Unlike e-money, cryptocurrencies are not issued by banks, redeemable for cash, or backed by sovereign currency.¹¹⁸ Despite their lack of status as legal tender, cryptocurrencies are widely used in South Africa, and are popular.¹¹⁹ Their popularity, however, has also raised concerns about their use in money laundering.¹²⁰ South Africa has responded to this threat by registering crypto asset service providers (CASPs) with the Financial Intelligence Centre (FIC),¹²¹ and issuing guidelines under the Intergovernmental Fintech Working Group¹²² (IFWG).¹²³ The amendments in the *Financial Intelligence Centre Act 38 of 2001 (as amended) (FICA)* mandate customer due diligence, transaction monitoring, and the reporting of suspicious activities, which are now applicable to cryptocurrency transactions and exchanges after their designation as CASPs.¹²⁴

¹¹⁴ See Mellor *Money* 122.

¹¹⁵ See Alvarez, Argente and Van Patten 2022 https://www.nber.org/system/files/working_papers/w29968/w29968.pdf 1.

¹¹⁶ Reddy and Lawack *SA Merc LJ* 18.

¹¹⁷ *Standard Bank of South Africa v South African Reserve Bank* (047643/2023) [2025] ZAGPPHC 481 (15 May 2025) para 64.

¹¹⁸ Reddy and Lawack 2019 *SA Merc LJ* 18.

¹¹⁹ Ncube and Kabwe 2023 *De Jure* 356; Adelowotan 2024 *Business and Management Review* 78.

¹²⁰ Erasmus and Bowden 2020 *Obiter* 310; Ncube and Kabwe 2023 *De Jure* 356.

¹²¹ The FIC is the financial intelligence unit of South Africa, whose role is to combat money laundering in the country among other things.

¹²² The IFWG was established in 2016 as a collaborative body of South African financial regulators, namely, the National Treasury, the FIC, the FSCA, the National Credit Regulator, the SARB, the South African Revenue Service, and the Competition Commission. Its aim is to understand the growing role of fintech in order to proactively assess its associated risks and opportunities in the financial sector; see SARB Date Unknown <https://www.resbank.co.za/content/dam/sarb/what-we-do/fintech/documents/IFWG%20Frequently%20asked%20questions%20-%20updated.pdf>.

¹²³ See Ncube and Kabwe 2023 *De Jure* 356; Makuyana 2025 *Journal for Juridical Science* 165. See also IFWG 2020 https://www.ifwg.co.za/IFWG%20Documents/IFWG_CAR_WGPosition_Paper_on_Crypto_Assets.pdf.

¹²⁴ See Item 22 of schedule 1 of the *Financial Intelligence Centre Act 38 of 2001 (the FICA)*; Makuyana 2025 *Journal for Juridical Science* 165-166.

5.3 Central bank digital currencies

A 21st century development that is likely to further disrupt the discourse about money is the emergence of central bank digital currencies¹²⁵ (CBDCs). This is a novel form of money that embraces the technological developments of the modern era and the role of central banks in issuing money.¹²⁶ Thus, CBDCs incorporate the cryptocurrency element of being digital while at the same time negating the decentralisation of all blockchain-based currencies in that they depend on the regulatory powers of central banks.¹²⁷ Unlike cryptocurrencies, CBDCs are sovereign-backed, and may be designated as legal tender. CBDCs are usually meant to be the equivalent of the fiat currencies of the issuing state.¹²⁸ In this regard, they reflect a state's effort to counter the power of private players in the issuance of digital currencies such as Bitcoin.¹²⁹

Countries such as the Bahamas, Jamaica and Nigeria currently have active CBDCs.¹³⁰ Nonetheless, the legal tender status of the CBDC is still a question for ongoing debate with many jurisdictions still weighing their options for an appropriate design and what model of the CBDC to adopt.¹³¹ In South Africa the SARB has initiated the adoption of CBDCs through its Project Khokha, which has come in two phases.¹³² In the first phase, which was launched in 2018, the SARB published a paper titled *Project Khokha: Exploring the Use of Distributed Ledger Technology for Interbank Payments Settlement in South Africa*.¹³³ The paper was intended to explore the implications of using distributed ledger technology in the settlement of payments between banks in South Africa.¹³⁴ In the second phase, which came in 2022, the SARB, published another paper titled *Project Khokha 2:*

¹²⁵ Various terminologies such as "country-owned digital currency", "government-based cryptocurrencies" and digital government-backed cryptocurrency are often used in literature to refer to the same concept; see Jozipović, Perkušić and Mladinić 2024 *Pravni Vjesnik* 78.

¹²⁶ See Parampathu 2024 *TLT* 328.

¹²⁷ See Parampathu 2024 *TLT* 328; Martino 2024 *Computer Law and Security Review* 2.

¹²⁸ See Parampathu 2024 *TLT* 330.

¹²⁹ See Prates 2021 *Ohio St Bus LJ* 211; Martino 2024 *Computer Law and Security Review* 2.

¹³⁰ In October 2020 the Bahamas became the first country in the world to launch its CBDC, which is called the Sand Dollar; Nigeria launched its CBDC, called e-Naira, in 2021, while the Bank of Jamaica completed the trial of its CBDC called JAM-DEX in December 2021 and subsequently rolled it out via a mobile application called Lynk in July 2022; see Atlantic Council 2025 <https://www.atlanticcouncil.org/cbdctracker/>.

¹³¹ See Prates 2021 *Ohio St Bus LJ* 226.

¹³² Chitimira and Torerai 2023 *Juridical Tribune* 402.

¹³³ SARB 2018 https://www.resbank.co.za/content/dam/sarb/quick links/fintech/SARB_ProjectKhokha_20180605.pdf.

¹³⁴ SARB 2018 https://www.resbank.co.za/content/dam/sarb/quick links/fintech/SARB_ProjectKhokha_20180605.pdf.

Exploring the Implications of Tokenisation in Financial Markets, which *inter alia* proposed the design and operation of a wholesale CBDC in South Africa, while retail applications remain under study.¹³⁵ Of significance to the notion of CBDCs is that they have further revolutionised the concept of money in the 21st century by instituting the power of the state in the issuance of digital currencies. Although their future is still a subject for ongoing research, they have the potential to reconfigure the concept of legal tender as traditionally represented by banknotes and coins.¹³⁶

5.4 E-money

As the digital marketplace expands, driven by the proliferation of the internet, e-money or e-cash¹³⁷ has become an indispensable tool for electronic commerce, demonstrating consistent growth in its adoption.¹³⁸ E-money represents an innovative payment mechanism designed to enhance the efficiency of electronic commerce by facilitating faster, more secure, and anonymous transactions.¹³⁹ In its 2009 *Position Paper on Electronic Money* the SARB defines e-money as a digital representation of monetary value, constituting a claim against the issuer, which is stored electronically, issued upon the receipt of funds, widely accepted as payment, and redeemable for cash or bank deposits upon request.¹⁴⁰ The legal framework governing e-money in South Africa includes the *SARB Act*, the *National Payment System Act 78 of 1998 (NPSA)* and the *FICA*.¹⁴¹ While the *SARB Act* and the *NPSA* are central to the governance and operation of e-money, the *FICA* imposes anti-money laundering (AML) measures on financial institutions such as the verification of the identities of e-money users.¹⁴²

The classification of e-money as "money" and its potential status as legal tender remain debated.¹⁴³ Schulze regards e-money as "money" but not as legal tender.¹⁴⁴ Loubser and Swart, however, are of the view that e-money is not a new form of "money" due to the understanding of money under the state theory.¹⁴⁵ Despite lacking formal recognition as legal tender, e-money functions effectively as a medium of exchange and is increasingly accepted

¹³⁵ SARB 2022 <https://www.resbank.co.za/content/dam/sarb/publications/media-releases/2022/project-khokha2/Project%20Khokha%20%20Full%20Report%206%20April%202022.pdf>.

¹³⁶ See Prates 2021 *Ohio St Bus LJ* 226.

¹³⁷ Also known as mobile money, see Lawack 2012 *Wash J L Tech & Arts* 319.

¹³⁸ Loubser and Swart 1999 *Stell LR* 356; Schulze 2004a *SA Merc LJ* 53.

¹³⁹ Loubser and Swart 1999 *Stell LR* 354.

¹⁴⁰ SARB 2009 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf. Also see Reddy and Lawack 2019 *SA Merc LJ* 18; Schulze 2004 *SA Merc LJ* 53.

¹⁴¹ See Lawack 2012 *Wash J L Tech & Arts* 323.

¹⁴² Lawack 2012 *Wash J L Tech & Arts* 331.

¹⁴³ See Loubser and Swart 1999 *Stell LR* 368; Schulze 2004a *SA Merc LJ* 51.

¹⁴⁴ See Schulze 2004a *SA Merc LJ* 51.

¹⁴⁵ See Loubser and Swart 1999 *Stell LR* 368.

as a final means of payment in South Africa.¹⁴⁶ The legitimacy of e-money transactions rests on the explicit or implicit contractual agreement between the parties involved.¹⁴⁷

E-money systems are typically categorised into two types, namely, card-based and software-based.¹⁴⁸ In this regard, card-based systems employ smart cards to store value, while software-based systems rely on cryptographic protocols to secure digitally stored value without physical representation.¹⁴⁹ In paragraph 7 of its 2009 *Position Paper on Electronic Money*, the SARB specifies that, to operate legally, e-money products must either be issued by a bank or involve a partnership between a merchant and a bank.¹⁵⁰ Banks holding e-money deposits are obliged to redeem the electronic value for central bank currency at par upon demand.¹⁵¹ The SARB envisions e-money as a complementary alternative to physical currency in the long term.¹⁵² While e-money technologies have advanced significantly since their inception, the SARB adopts a cautious approach to avoid stifling innovation, opting to regulate e-money products as the landscape develops.¹⁵³

6 The South African monetary context

6.1 The legal foundation of money in South Africa

South Africa's monetary system is built upon two legally recognised pillars, namely, central bank money, which consists of banknotes and coins issued by the SARB, and commercial bank money represented by deposits recognised and regulated under the *Banks Act* 90 of 1994.¹⁵⁴ Only the former has the status of legal tender, although the latter dominates in value and volume. The SARB's primary objective, as outlined in the *Constitution of the Republic of South Africa* and the *SARB Act*, is to protect the currency's value and ensure balanced economic growth.¹⁵⁵ The central

¹⁴⁶ Loubser and Swart 1999 *Stell LR* 359; Schulze 2004a *SA Merc LJ* 53.

¹⁴⁷ Loubser and Swart 1999 *Stell LR* 358.

¹⁴⁸ Schulze 2004a *SA Merc LJ* 53.

¹⁴⁹ Loubser and Swart 1999 *Stell LR* 355; Schulze 2004a *SA Merc LJ* 53.

¹⁵⁰ SARB 2009 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf. See also Reddy and Lawack 2019 *SA Merc LJ* 18.

¹⁵¹ SARB 2009 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf.

¹⁵² SARB 2009 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf.

¹⁵³ SARB 2009 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf.

¹⁵⁴ Section 17(1) of the *SARB Act* explicitly states that "banknotes and coins issued by the Bank shall be legal tender within the Republic for the payment of any amount."

¹⁵⁵ See s 3 of the *SARB Act*; s 223 of the *Constitution of the Republic of South Africa*, 1996. Also see Van Niekerk and Van Heerden 2017 *THRHR* 637.

bank also oversees the effective functioning of South Africa's payment system.¹⁵⁶ While banknotes and coins are the only designated forms of legal tender, other types of "money" such as cryptocurrencies, e-money and CBDCs are also recognised in South Africa.¹⁵⁷ These are equally regulated by the SARB and other financial regulatory authorities, such as the FIC,¹⁵⁸ and the Financial Sector Conduct Authority (FSCA)¹⁵⁹ to the extent that they fall under the purview of these authorities.¹⁶⁰ For instance, cryptocurrencies, which are not legally considered "money" but crypto assets, fall under the regulatory authority of the FSCA. However, CASPs must register with the FIC as accountable institutions for AML purposes since cryptocurrencies have recently been designated as financial products.¹⁶¹ Outside the idea of emerging digital forms of money, the legal foundation of money in South Africa is based on the notion of banknotes and coins issued and recognised as legal tender by the SARB.¹⁶² This notion, however, is increasingly being challenged by emergent forms of "money". To address this fact, this contribution argues that proactive regulatory action should be adopted to quickly meet the demands of financial technology (fintech) innovations.

6.2 Challenges from emerging digital instruments

The widespread use of bank transfers, mobile payments and e-money systems in South Africa has exposed the limitations of a narrow legal-tender doctrine.¹⁶³ These instruments, while not legally designated as money, serve the same economic purposes and are often preferred in practice. Thus, a proactive regulatory stance is necessary to ensure that new forms of money do not operate unhindered to the detriment of consumers. To its credit the SARB and other relevant stakeholders have been proactively proffering regulatory solutions to new monetary innovations through position papers. For instance, it issued the 2009 *Position Paper on Electronic Money* outlining the status and modalities of using e-money in South Africa.¹⁶⁴ Additionally, as part of the IFWG the SARB issued a *Position Paper on*

¹⁵⁶ See s 10(1)(c) of the *SARB Act* and s 2 of the *National Payment System Act 78* of 1998 (the *NPSA*).

¹⁵⁷ Adelowotan 2024 *Business and Management Review* 78.

¹⁵⁸ As South Africa's financial intelligence unit, the FIC will always be interested in a transaction involving any form of "money" if such a transaction is suspected of being a money laundering activity; see s 3(1) of the *FICA*.

¹⁵⁹ The FSCA is the regulatory and supervisory body for CASPs in South Africa; see Makuyana 2025 *Journal for Juridical Science* 163.

¹⁶⁰ For example, in October 2022, the FSCA issued General Notice 1350 of 2022 in Government Gazette 47334, which classified crypto assets as financial products under s 1(h) of the *Financial Advisory and Intermediary Services Act 37* of 2002 (the *FAISA*). Also see Makuyana 2025 *Journal for Juridical Science* 164.

¹⁶¹ See Makuyana 2025 *Journal for Juridical Science* 165.

¹⁶² See s 10(1) of the *SARB Act*. See also s 2 of the *NPSA*.

¹⁶³ See Tuba 2014 *PELJ* 2271.

¹⁶⁴ SARB 2009 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf.

Crypto Assets, which explained the status of cryptocurrencies and CBDCs in the South African currency ecosystem, among other issues.¹⁶⁵

7 Legal and regulatory framework in South Africa

7.1 *The twin peaks regulatory model*

South Africa's financial sector is regulated through the Twin Peaks model introduced under the *Financial Sector Regulation Act 9 of 2017*.¹⁶⁶ The Twin Peaks regulatory model separates prudential supervision from market conduct regulation.¹⁶⁷ Thus, on the one hand there is the Prudential Authority, which is within the SARB and oversees systemic stability, while on the other hand there is the FSCA, which regulates market behaviour.¹⁶⁸ This structure aims to minimise regulatory arbitrage and enhance financial stability, with the SARB overseeing systemic risk and the FSCA protecting consumers and ensuring market integrity.¹⁶⁹

7.2 *Statutory strain under digital pressure*

The emergence of new forms of money and payment systems under the 21st technological revolution has brought pressure on the current regulatory framework. It should be noted in this regard that key statutes, including the *SARB Act*, the *NPSA*, the *FICA* and the *Consumer Protection Act 68 of 2008 (CPA)* were designed for a centralised monetary order.¹⁷⁰ Therefore, they struggle to accommodate the decentralised and programmable nature of digital currency, particularly where there is no identifiable issuer or intermediary.¹⁷¹

The South African regulatory authorities have made various interventions in response to the challenge of emerging digital forms of money. One recent attempt at adaptation is the FSCA's designation of cryptocurrency assets as financial products under the *Financial Advisory and Intermediary Services Act 37 of 2002 (FAISA)*, which necessitates licensing CASPs.¹⁷² In addition, the SARB on its part has also started fintech innovation projects such as Project Khokha, which is aimed at finding ideal regulatory solutions to the

¹⁶⁵ IFWG 2020 https://www.ifwg.co.za/IFWG%20Documents/IFWG_CAR_WGPosition_Paper_on_Crypto_Assets.pdf.

¹⁶⁶ Van Niekerk and Van Heerden 2017 *THRHR* 642.

¹⁶⁷ Van Niekerk and Van Heerden 2017 *THRHR* 642.

¹⁶⁸ Van Niekerk and Van Heerden 2017 *THRHR* 642.

¹⁶⁹ Van Niekerk and Van Heerden 2017 *THRHR* 642.

¹⁷⁰ Wherein the SARB was the sole issuer of banknotes and coins without other decentralised players being capable of issuing private "money" in the form of cryptocurrency, for example.

¹⁷¹ For instance, the *SARB Act* under s 10(1) does not recognise cryptocurrency as money while s 11 read with s 52 of the *Banks Act 94 of 1990* recognises forms of e-money issued only by banks and their partners, which may be non-banks.

¹⁷² See s 1(h) of the *FAISA*. Also see Makuyana 2025 *Journal for Juridical Science* 163.

CBDC experiment.¹⁷³ But it is argued that rather than being proactive or systemic, these efforts continue to be reactive and fragmented.

8 Emerging legal implications of new monetary forms

8.1 *The legal status of crypto assets*

The regulation and recognition of cryptocurrencies as "money" remain unsettled.¹⁷⁴ While CASPs in South Africa must now comply with registration and risk-management requirements, there remains no statutory recognition of cryptocurrencies as legal tender or an official means of payment.¹⁷⁵ This gap contributes to uncertainty in taxation, insolvency and consumer recourse.¹⁷⁶

8.2 *Central bank digital currencies and sovereignty*

While CBDCs present novel, innovative and possibly inclusive forms of money, they raise pertinent legal issues. For instance, without legislative amendment, the *SARB Act* cannot confer legal tender status on a digital rand since it is currently classified only as a financial product under the *FAISA*.¹⁷⁷ Furthermore, privacy and surveillance concerns intersect with data protection rights under the *Protection of Personal Information Act 4 of 2013 (POPIA)*. For example, the *POPIA* defines personal information broadly to include financial data such as bank account details, transaction records, and cryptocurrency wallet addresses, if they can identify an individual.¹⁷⁸ The *POPIA* also has implications for entities handling digital currency transactions, which must implement safeguards to protect personal data from breaches.¹⁷⁹ Thus, the design of CBDCs as a possible substitute for banknotes and coins must factor in these and other data protection issues that may arise. In this regard, the SARB initiative under the Project Khokha is a commendable starting point, particularly with a view to having a retail CBDC in the future.

¹⁷³ See, for example, SARB 2022 <https://www.resbank.co.za/content/dam/sarb/publications/media-releases/2022/project-khokha2/Project%20Khokha%202%20Full%20Report%206%20April%202022.pdf>.

¹⁷⁴ Erasmus and Bowden 2020 *Obiter* 310; Ncube and Kabwe 2023 *De Jure* 356; Reddy and Lawack 2019 *SA Merc LJ* 18.

¹⁷⁵ See item 22 of Schedule 1 of the *FICA*.

¹⁷⁶ Reddy and Lawack 2019 *SA Merc LJ* 18.

¹⁷⁷ Section 10(1) of the *SARB Act* 90 of 1989 recognises only banknotes and coins as legal tender, while the *FAISA* under s 1(h) recognises CBDCs as a crypto asset and a financial product.

¹⁷⁸ See s 1(b) of the *Protection of Personal Information Act 4 of 2013 (POPIA)*.

¹⁷⁹ See s 19 of *POPIA*.

8.3 Consumer protection and technological risk

Financial technologies and emerging digital forms of money increasingly evade the reach of existing laws.¹⁸⁰ For instance, as already noted, the *CPA* was crafted for identifiable providers and standard contracts, not for decentralised digital platforms.¹⁸¹ The result is a growing regulatory *lacuna* in which systemic risk and consumer vulnerability proliferate. While the *CPA* does not have a dedicated definition of "money", its broad interpretation of "consideration",¹⁸² "transaction"¹⁸³ and "financial services"¹⁸⁴ implies that digital money in its various forms such as e-money, prepaid credits¹⁸⁵ and possibly cryptocurrencies in commercial transactions may fall under its consumer protection framework. There is a need to clarify the reach of the *CPA* to digital money transactions in order to protect consumers of such financial products.

9 South Africa's legal gaps and risk landscape

The rapid evolution of money and other forms of digital payments has exposed several deficiencies in South African law.¹⁸⁶ In this regard, the SARB has acknowledged regulatory gaps concerning cryptocurrencies and digital payments. For instance, in its 2021 *Policy Paper on Crypto Assets*, issued under the IFWG banner, it highlighted that South Africa's legal framework was not fully equipped to handle the risks associated with crypto assets.¹⁸⁷ There is also no coherent or unified legal definition of money that encompasses digital instruments.¹⁸⁸ Regulatory mandates remain fragmented among different institutions, creating jurisdictional blind spots.¹⁸⁹ Moreover, key statutes do not reflect the realities of decentralised platforms or non-bank financial providers, leaving consumers with little protection.

¹⁸⁰ See Raskin and Yermack "Digital Currencies" 474; Omri 2013 *Mich L Rev* 50-53.

¹⁸¹ See Reddy and Lawack 2019 *SA Merc LJ* 18.

¹⁸² Section 1 of the *Consumer Protection Act* 68 of 2008 (the *CPA*).

¹⁸³ Section 1 of the *CPA*.

¹⁸⁴ Section 3(1) of the *CPA*.

¹⁸⁵ See s 43 of the *CPA*.

¹⁸⁶ See Ncube and Kabwe 2023 *De Jure* 355; Erasmus and Bowden 2020 *Obiter* 310.

¹⁸⁷ See IFWG 2020 https://www.ifwg.co.za/IFWG%20Documents/IFWG_CAR_WGPosition_Paper_on_Crypto_Assets.pdf.

¹⁸⁸ While cryptocurrencies are generally accepted and function as "money" within the South African financial system, they are legally not regarded as money; see para 5.2 above.

¹⁸⁹ See para 7 above.

10 Proposals for legal and regulatory reform

10.1 Enacting a digital assets law

South Africa should consider enacting a stand-alone Digital Assets Act that provides technology-neutral definitions of CBDCs and other types of crypto assets. Crucially, it must draw distinctions between assets used for payment, investment, governance or tokenised services. Such a statute should also introduce licensing tiers for custodial and non-custodial services, custody rules analogous to those for banks, and disclosure obligations. Significantly, this proposed legislation should avoid stifling innovation while preventing the abuse of regulatory ambiguity. The FSCA is properly placed to coordinate this law reform initiative since it has already undertaken various studies on crypto assets and is the current regulator.

10.2 Updating core financial statutes

This contribution submits that in the absence of an all-encompassing digital assets law, the current legislative corpus must be amended to modernise key legal definitions and expand its regulatory scope. In this regard the *SARB Act* should be revised to formally authorise the issuance of a retail CBDC and confer legal tender status on the digital rand. It must also enshrine data protection principles which preserve user privacy for low-value transactions while satisfying AML obligations for higher-risk transfers. The *FICA* framework should also be updated to bring decentralised exchanges and developers within its ambit. Commendably, efforts have already been made in this area by obliging CASPs to register with the FIC as accountable institutions. Nonetheless, the *FICA* should also broaden its designation of "accountable institutions" to encompass software developers of decentralised protocols, self-hosted wallet providers, and peer-to-peer intermediaries.

The *NPSA* should also be updated to explicitly recognise blockchain-based value transfer networks as payment systems. Legal certainty around the finality of settlement on decentralised ledgers must also be developed, including compatibility with netting and clearing mandates. The *CPA* should also be expanded to introduce a dedicated chapter on "digital financial services", with provisions ensuring cooling-off periods for crypto purchases, platform liability for misleading digital advertising, and redress mechanisms in the event of smart contract failure or protocol malfunction.

10.3 Institutional realignment and capacity building

The fragmented regulatory ecosystem requires central coordination and technical reinforcement. Therefore, a Joint Fintech and Digital Assets Taskforce comprising the SARB, the FSCA, and the FIC, for example, would be desirable. Such a formalised joint effort would be ideal to drive unified

supervision, data-sharing and risk assessments across institutional boundaries. It would also ensure that regulatory responses to new and emerging forms of money are uniform and give rise to minimal discord in terms of the governance and management of the associated risks.

10.4 Financial inclusion and consumer justice

Moreover, regulatory reform ought to be inclusive. Without adequate legal safeguards, marginalised consumers are disproportionately exposed to fintech risk. Creating interoperable identity systems that strike a balance between privacy and financial access should be another endeavour in financial inclusion. This would be crucial for integrating unbanked people into e-wallets and CBDC platforms once they become a reality in South Africa, especially for retail purposes.

10.5 International harmonisation

Given the cross-border nature of digital finance, South Africa should align its financial regulatory measures with evolving global norms. This includes adopting FATF's Travel Rule for crypto-asset transfers and promoting enforcement cooperation with international regulators. To its credit as of 30 April 2025 the FATF's Travel Rule is now effective in South Africa through the FIC's Directive 9.¹⁹⁰ In addition, as part of the harmonisation drive the SARB should adhere to the Bank of International Settlements (BIS) standards for CBDC design, to ensure interoperability and security.¹⁹¹ It should benchmark its Project Khokha with other seemingly successful CBDC initiatives such as the e-Naira in Nigeria, the JAM-DEX in Jamaica and the SandDollar in the Bahamas. In this regard the SARB should also engage other regional monetary players to ensure a seamless adoption of these emerging digital means of payment.

11 Conclusion

In the digital age the concept of money has evolved far beyond minted metal or paper currency. The new forms of money now encompass decentralised tokens, encrypted assets and programmable exchanges. This transformation has rendered traditional monetary definitions obsolete, challenging South Africa's historically robust but increasingly outdated legal framework. The emergence of cryptocurrencies, digital currencies and decentralised finance has disrupted the foundations of 20th century monetary laws and calls into question core legal assumptions. Money today is no longer just a medium of exchange, but a dynamic and abstract

¹⁹⁰ See FIC 2024 <https://www.fic.gov.za/wp-content/uploads/2024/04/DraftDirective-9-Travel-rule-relating-to-crypto-asset-transfers.pdf>. Also see Makuyana 2025 *Journal for Juridical Science* 166.

¹⁹¹ See BIS 2024 <https://www.bis.org/publ/othp88.htm>.

construct shaped by technological innovation and shifting economic behaviours.

To safeguard its monetary sovereignty and financial integrity while embracing innovation, South Africa should urgently reimagine its legal and regulatory approach. This entails moving beyond incremental updates to statutes and instead constructing a forward-looking, adaptive and inclusive legal architecture that anticipates disruption and accommodates diverse forms of value. The redefinition of money demands nuanced consideration of who may issue it, under whose authority, and with what regulatory oversight. A holistic framework must reflect not only economic and technical realities but also constitutional values, ensuring consumer protection and justice in the face of rapid change. South African law should therefore step out of the shadow of historical constructs and shape the evolving face of money with deliberate clarity.

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List of Abbreviations

AML	anti-money laundering
BIS	Bank for International Settlements
CASPs	crypto asset service providers
CBDCs	central bank digital currencies
CPA	Consumer Protection Act 68 of 2008
EBLR	European Business Law Review
FAISA	Financial Advisory and Intermediary Services Act 37 of 2002
FATF	Financial Action Task Force
FICA	Financial Intelligence Centre Act 38 of 2001
FIC	Financial Intelligence Centre
FSCA	Financial Sector Conduct Authority
Harv J L & Tech	Harvard Journal of Law and Technology
IFWG	Intergovernmental Fintech Working Group
Mich L Rev	Michigan Law Review
NPSA	National Payment System Act 78 of 1998
Ohio St Bus LJ	Ohio State Business Law Journal
PELJ	Potchefstroom Electronic Law Journal
POPIA	Protection of Personal Information Act 4 of 2013
Rev Cent & E Eur L	Review of Central and East European Law
SA Merc LJ	South African Mercantile Law Journal
SARB	South African Reserve Bank
SARB Act	South African Reserve Bank Act 90 of 1989
Stell LR	Stellenbosch Law Review

THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TLT	Transnational Legal Theory
U Miami Bus L Rev	University of Miami Business Law Review
Wash J L Tech & Arts	Washington Journal of Law, Technology and Arts