

---

# **FINDING EQUILIBRIUM: CRYPTOCURRENCY AND PUBLIC POLICY**

---

Celine Mathew, IPR Legal Associate (Law Office of Rahul Dev)

## **ABSTRACT**

The growth of computer technology and the growing importance of economic globalization during the COVID-19 pandemic has drastically evolved the global economic policy. This policy has incorporated the circulation of electronic money and digital assets extensively due to the growth of these instruments in the present-day financial market. However, while this development is prosperous what we often fail to understand is that the idea of Innovation prospers based on domestic public policy. An effective public policy with a fair and equitable enforcement mechanism aligns technical innovation with human flourishing. And while the debate over legal restrictions stifling innovation, continues, the necessity of legal protection is very essential. When a legal structure is put in place, it is done so with careful consideration given to the scope of the subject matter. After a law is introduced, another aspect to consider is that the law does not go beyond what is required and all government actions must be limited to the set standards of the law.

## **CIRCULATION OF CRYPTOCURRENCY**

To guarantee that a country's economy stays strong, its central bank governs the percentage of money that stays in circulation. The amount of money circulating in a nation's economy influences both micro and macroeconomic tendencies. At the micro-level, a big supply of available and easy money implies more expenditure by individual entities and by companies. People have a simpler time obtaining special loans, car loans, or residential mortgages, and businesses find it easier to maintain the financing. At the macroeconomic level, the quantity of money spreading in an economy influences aspects like Gross Domestic Product (GDP), all-around development, interest rates, and unemployment rates. The central banks are inclined to regulate the amount of money in circulation to accomplish monetary goals and affect financial strategies. This is significantly different for cryptocurrencies.

Cryptocurrency is a virtual asset that employs cryptography to secure financial transactions. It includes features like decentralized operation and control, anonymity, which can be a threat to public safety in the future. In circulation, however, no matter how considerable the technical qualities of money are, the same must disseminate to become “Currency”. Accordingly, people care to accept currency if it can be tangibly acquired, and since cryptocurrencies are digital assets this circulation is problematic. The macroeconomic interpretation is how to get more money to disseminate to facilitate the market. New cryptocurrencies face this difficulty in acute form. Many new cryptocurrencies have adopted a method known as “airdrop” where the companies initially provide a considerable percentage of their fresh cryptocurrency to users who already deal in another cryptocurrency, such as those with Ethereum accounts. These participants circulate the token initially to introduce the cryptocurrency. The most common technique in 2017 was the Initial Coin Offering designed on equity market Initial Public Offerings.<sup>1</sup>

## **NEED FOR AN ENFORCEMENT FRAMEWORK**

Today the technology has been used for many criminal and national security threats against the United States. For instance, cryptocurrency is used to trade lethal drugs on the dark web, leading to a drug pandemic that slew over 67,000 citizens in 2018. Similarly, some terrorist

---

<sup>1</sup> EY Research: Intial Coin Offerings (ICOs), December 2017

groups have lobbied in cryptocurrency, running various social media campaigns. Thus, multiple attempts have been made worldwide to safeguard the legalities surrounding cryptocurrencies such as the U.S. Attorney General's Cyber-Digital Task Force that was published in an attempt to improve the understanding of the public safety and national security obstacles that these technologies present.<sup>2</sup> Individuals that use cryptocurrency, need to recognize their legal responsibilities and take cryptocurrency exchanges seriously so that users are protected at all times and potential pieces of evidence are preserved.

### **THE THREAT WE FACE**

Since, "Virtual Currency" is a digital coin or currency, and is used as a medium of exchange, it can be digitally transferred, and used for payment. It is a "Virtual Asset" that is distinct from traditional currencies, securities, and other financial assets. An extension to this is, "Cryptocurrency". They are mostly decentralized, lack a central administrator or central bank, and depend on intricate algorithms, Blockchain systems, and peer-to-peer users. Cryptocurrency can be exchanged directly or through an intermediary because its storage is linked to an individual "Wallet," which is identical to a virtual account. These Wallets create public and private keys for each user that can be housed in multiple forms, such as tangible, hardware wallets, software wallets, desktop wallets, mobile wallets, paper wallets, or online accounts. A Blockchain system allows users to cryptographically trace every transaction. A new transaction is informed to its participants on the network related to the payment (Mining) and the currency can fluctuate in their degree of anonymity subject to the public or nonpublic nature of the Blockchain. Subsequently, the transaction once approved by users is added to the Blockchain, with each block possessing the recounted transactions in chronological order.

On the other hand, crimes related to cryptocurrency, are not novel. Perpetrators can exploit cryptocurrency unlawfully, and use them directly to commit crimes. Since cryptocurrency can help users avoid detection, felons have used them as a way to fund criminal activities such as child exploitation, terrorist fundraising, illegal drug peddling, facilitating sophisticated ransomware, blackmail, etc. Felons use cryptocurrency to buy and sell illicit items, and encourage the exchange of counterfeit identification documents or personal information like stolen credit card numbers, via the dark web. It also allows them to buy and sell items that are

---

<sup>2</sup> U.S. Department of Justice, Report of the Attorney General's Cyber Digital Task Force, October 2020

subsequently used for unlawful conduct, including raw supplies to assemble drugs or explosives. Further, criminal extortion schemes use cryptocurrency as a payment method to enable blackmailing, without demanding physical cash or risk bank accounts. They can attack an individual's computer or server with malicious software called Ransomware, that encrypts or blocks valuable data till the target victim concedes to pay a definite amount. Criminals also use this software to obtain and threaten to dispense confidential data or carry out "Virtual Kidnappings" where dupes are deceived into believing that a family member has been kidnapped.

Yet another way that criminals use Cryptocurrency is to raise funds. For example, bitcoin aided in the monetization of child exploitation material<sup>3</sup>. Though community data on terrorist use of cryptocurrency is restricted, the terrorist networks have directed fundraising schemes through crowdsource outlets to avoid stopgaps constructed into the global banking system. In August 2020, the US Department of Justice declared that the largest confiscation of cryptocurrency for terrorism was conducted after undoing terrorist financing operations concerning the al-Qassam Brigades, al-Qaeda, and ISIS. These groups used cryptocurrency and social media to raise funds for terror movements. They can use cryptocurrency to hide and promote financial activities and launder their illicit proceeds. Money laundering transpires when a person conducts a financial transaction for a criminal offense, made substantially easier when the conveyance takes place anonymously, through cryptocurrency. International criminal organizations and drug cartels use cryptocurrency to hide financial activities and to transmit great sums of money across borders without supervision. Unlicensed or unregistered business transitions provide an avenue of laundering and the potential difficulties in tracking cryptocurrency transactions can also facilitate tax evasion.

Lastly, apart from offering a way to commit old crimes through new methods, cryptocurrency platforms have themselves become the victim of criminal activity. Thus, to protect the integrity of cryptocurrency technology, more needs to be done to combat criminal activity on digital exchanges and platforms.

---

<sup>3</sup> The International Centre for Missing & Exploited Children and Standard Chartered, Cryptocurrency and the Trade of Online Child Sexual Abuse Material, February 2021

## INDIA'S LAWS AND REGULATIONS

In 2020, a landmark Supreme Court judgment decreed that the prohibition was unconstitutional and nullified the ban, permitting exchanges to reopen. RBI's 2018 circular established that all its subordinate offices and organizations cannot market virtual currencies or offer any assistance for the same. This demonstrates the Indian government's notions that the concept of virtual and cryptocurrency is suspicious. Also, establishments that were offering such aids were warned to depart the trade, which not just led to falling trade gaps, but also numerous exchanges closing. However, in 2020, the Supreme Court removed the prohibition to restore India's virtual currency ecosystem after its 2018 stalemate.

The Three-Judge Bench determined that while the RBI has the authority to assume pre-emptive policies, it is not upheld by the proportionality to the obstacle dealt with by such a prohibition. In this background, the court's outlook on the finer issues concerning virtual currencies has more connotation than its declaration of setting aside the circular. The court, thus was to determine three distinct issues i.e., if virtual currencies are equivalent to money, if RBI had the authority to legislate issues associated with virtual currencies and whether this circular was a reasonable exercise of this authority.

**Tangible Money:** It was maintained that virtual currencies are not equivalent to money, but are commodities that do not come within the realm of RBI's authority. However, by understanding the circulation of 'Money' and its characterizations in other legislative jurisdictions, the court laid out a reasonable practical strategy. If an incorporeal asset can run under definite conditions then RBI can certainly monitor it. This understanding of the court leaves the legal nature of cryptocurrencies ambiguous.

**RBI's Authority over Virtual Currency:** The RBI did not ban all transactions in virtual currencies, but rather directed their organizations to not assist those committed in the exchange of virtual currencies. As a result, cryptocurrency cannot be salvaged for fiat currency and the association between the unconventional economy of cryptocurrency and the national economy is severed, making virtual tokens inapt, and in effect, amounting to a prohibitive directive. However, the court concluded that the RBI is only instructing entities that it is empowered to govern. It is not forbidding all exchange in virtual currencies, even if made almost irrelevant. Further, the extent of the RBI's authorities expands to governing possible threats to the economy, even if the activity is not part of the credit payment system.

## **Present Legislation**

In the past, RBI and the Ministry of Finance have time and again determined that virtual currencies are not valid tenders and do not possess regulatory authorization. Companies that indulge do the same at their own risk. Apart from the 2018 circular issued by the RBI, a Committee was established in 2019 by the Ministry of Finance to investigate the difficulties of virtual currencies. In its attempts to develop a strong statutory structure for such currency, it recommended that all isolated cryptocurrencies must be prohibited in India. Likewise, the Committee formulated a draft Bill prohibiting cryptocurrency wherein it cited two primary standards through which cryptocurrencies generate money. First, via Initial Coin Offerings, where digital tokens are published in exchange for other assets, and second, by utilizing it as a way of exchange or payment.

## **International Regulation**

The absence of reliable international guidelines for anti-money laundering rules or those that battle the illegal funding of terrorism through virtual assets is a big challenge. The Financial Action Task Force (“FATF”) was developed in the global regulatory space to set the global standard-setter for AML/CFT standards.<sup>4</sup> The FATF is a transnational association that was initiated in 1989 by the G7 ministers of its members. It aimed to establish specific standards that facilitate effective execution of legal, regulatory, and operational procedures for battling money laundering, terrorist funding, propagation of weapons of mass destruction, and different connected threats to the integrity of the global monetary system. As a standard-setting and policymaking organization, the FATF operates to generate the technical understanding essential to bring about domestic legislative and regulatory modifications, which are envisioned to be coordinated across jurisdictions.

The FATF Recommendations and Virtual Asset Guidance have been acknowledged as the international principles for contending money laundering, terrorist funding, and the propagation of weapons of mass destruction. FATF member states are accountable for executing the recommendations at the domestic level for acquiescence by the private sector. This lays the groundwork for a synchronized international reaction directed at challenging these threats to the integrity of the international financial system. United States is instituting

---

<sup>4</sup> International Monetary Fund, *available at* : <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism> (last modified July 14, 2021)

member of the FATF and, while retaining the FATF presidency, made it a priority to control VASPs for AML/CFT. The U.S. designation to the FATF is commanded by the Department of the Treasury's Office of Terrorist Financing and Financial Crimes and comprises the Department of Justice as a fundamental interagency member.

### **Upcoming Legislative Action**

The Indian administration is now examining the introduction of a different bill called the "Cryptocurrency and Regulation of Official Digital Currency Bill, 2021" ("New Bill") which is identical to its earlier versions, however, aims to prohibit isolated cryptocurrencies in India with specific anomalies to improving the underlying technology and exchange of cryptocurrency, and offer a structure for establishing an authorized digital currency which will be published by the RBI. The New Bill understands the grey area of cryptocurrency legislation prohibiting all private cryptocurrencies.

The RBI in its authority recommended the people to dissect the probable abuse of private cryptocurrencies in any commercial field. However, if the New Bill necessitates an extensive embargo on cryptocurrencies, it will result in cryptocurrency investors capitalizing on cryptocurrency through unmonitored exchanges. Additionally, the purpose of initiating legislation concerned with virtual currency/ cryptocurrency is to streamline the method of exchanging and clenching in a safer technological climate. Nonetheless, even with the beginning of state-owned cryptocurrency governed by the RBI, the obstacles affected in the investment and holding of cryptocurrency shall stay the same.

Moreover, previously in March 2021, as per the latest revisions to the Schedule III of the Companies Act, 2013, the Government has authorized that from the recent financial year, the corporations publish their interests in cryptocurrencies. That is to say, the corporations have to now publish their revenue or expenses on cryptocurrency or virtual currency transactions, the holding, their deposits, advances, exchange, or investment. This action has been greatly appreciated by the individuals working in the crypto sector, as this opens the door for all Indian corporations to include Crypto on their balance sheets.

## **CONCLUSION**

Based on the above, the inference that can be safely drawn is that clarity is absent concerning cryptocurrency laws in India. Well-defined cryptocurrency legislation for crypto trading commerce, blockchain technology, investors, and those engaged in such areas is the need of the hour. It is intriguing to point out that the advantages of cryptocurrency were brought out in the Draft National Strategy on Blockchain, 2021, disclosed by the Ministry of Electronics and Information Technology. Thus, prohibiting universal virtual currency which has influenced several countries is not the best feasible remedy for the growth of India. The administration must take an important step towards governing cryptocurrency to preserve the enthusiasm of investors and the general public.