
CRYPTOCURRENCY AS WAGES AND SALARY

Arundhati Kale, 4th Year Law Student, Vivekananda Institute of Professional Studies, GGSIPU

ABSTRACT

In today's increased globalisation, integration of cultures and migration of workers has risen. In such a backdrop, employers have come up with salary schemes which remunerate in foreign currency, attract and hire an international workforce (often at a much cheaper pay cheque than what is domestically furnished). This has made employers seek a neutral alternative (a.k.a cryptocurrency) to enable easy conversion for their employees. Further, it is to be noted that cryptocurrencies aren't tied to a particular state or bank. This independence and decentralisation makes cryptocurrency a very attractive alternative for international payments and as reserve currencies where a single labour market can be created with workers being paid in a single form without linking the money to an existing system. Thus, it eliminates multiple transfers and reduces difficulties for employees located abroad.

This write up aims to analyse the following aspects;

- A. The current position in India with respect to payment of salaries and wages in crypto;
- B. Are crypto payments as salary mechanism possible under the Indian Legal Framework;
- C. Present issues with using cryptocurrency as remuneration
- D. Possible roadmaps ahead.

Part A presents a sketch of the current framework in India in the backdrop of lack of any regulations being formulated; domestic tech startups and offshore tech companies have resorted to loopholes to circumvent the stringent laws. Part B attempts to fit crypto in the salary structure of an employee and defines the concept of wages. This concept is then compared with existing laws on wages and salary across the world; Part c highlights the major setbacks which cryptocurrency would face if used as remuneration and salary mechanism, primarily encompassing price fluctuations and the lack of legal recognition. It also describes the problems which arise even if crypto currency is declared as a legal tender. Lastly, Part D proposes some possible solutions and considerations which may come up in the near future.

What Is The Position In India?

India is currently trying to adopt a robust approach towards blockchain; at the same time, it is wary of the risks presented by the unregulated, highly volatile crypto assets. The RBI time and again issues warnings and cautionary notices for investors and active players of this industry while the government is in the process of formulating regulations conducive for blockchain to grow not only as a market, but also for startups and companies looking to dabble in the tech. Several companies look forward to paying their employees in crypto assets but the law in India is yet to adapt. The Payment of Wages Act 1936 does not provide for payment of salaries in means other than the legal tender.¹ Section 6 of the Act states that “All wages shall be paid in current coin or currency notes or in both”. It may be understood that the lawmakers did not foresee that the modes of payment of wages would have such a complex evolution, especially when it is seen that the act primarily provides for working class labourers, who have little knowledge and means to understand, apply and accept newer methods.

¹ Payment of Wages Act 1936, https://labour.gov.in/sites/default/files/ThePaymentofWagesAct1936_0.pdf (Last visited 08 April 2022)

Regardless, a large part of the workforce today is desirous of digital money as a means of remuneration and new age tech firms are using loopholes and workarounds to pay them. This suits both parties; employers make use of the ease, speed and uniformity of transactions while employees boost their investment portfolios in anticipation of a bullish trend and subsequently, an appreciated value of their coin. In the backdrop of the vague existing laws and the uncertain cautionary attitude of the government and central bank, companies have resorted workarounds to pay their employees within the present legal framework, mainly via two methods²;

- A. Setting up and registering their entities offshore in crypto friendly jurisdictions (at present, jurisdictions like Wyoming, Dubai, Saint Vincent and the Grenadines, Singapore, UK are some of the places);
- B. Ensuring rupee can be converted into a crypto coin and be displayed on paper as a rupee transaction;

Many pay their employees salaries in crypto and draw a salary slip in rupee.

Crypto as a Salary Mechanism under the Indian Legal Framework

Sec 2(h) of Minimum Wages Act defines wages as “all remuneration capable of being expressed in terms of money...”. It goes on to list out the items which fall outside the definition of “wages”, such as house accommodation, electricity allowance, water allowance, medical attendance, travel allowance, gratuity payable on discharge, any service explicitly excluded by general or special order of government etc. In contrast to Brazilian laws³, The Act considers cost of living allowance and “cash value” of concessions on essential commodities or an all inclusive, blanket rate (which allows for everything; basic rate, cost of living allowance, cash of the concessions) while fixing minimum wage rate. The Equal Remuneration Act 1976 also defines remuneration as basic wage or salary payable to an employee either in cash or in kind⁴. Value is ascribed to a crypto token via freeplay of market forces; they are worth what people are willing to pay for them in the market. This varies from national currencies, which gain their value via enactments (making them into legal tender). Thus, we see crypto being expressed in money terms (crypto may be seen as an in-kind payment as well, depending upon the type of

² The Economic times: Many Indian Techies get paid in crypto economictimes.indiatimes.com/technology/many-indian-techies-get-paid-in-crypto-say-its-faster-and-easier/ (Last visited on 08 April 2022)

³ PwC, Brazil: New labour law reform may provide opportunities to reduce mobility costs [pwc.com/people-organisation/publications/assets/pwc-brazil-new-labor-law-reform.pdf](https://www.pwc.com/people-organisation/publications/assets/pwc-brazil-new-labor-law-reform.pdf) (last visited at 08 April 2022)

⁴ Section 2(g) of The Equal Remuneration Act 1976

cryptocurrency used). At present, stable coins are the closest in terms of characteristics of traditional money; they peg their market value to some external asset such as a national currency or gold. For eg. Tether (USDt) is a stable coin where 1 USDt is equal to \$1. Employers in India primarily use Tether as a form of currency, rather than an asset which. Even if cryptocurrency is considered as an “in kind” payment, Section 11 of the Minimum Wages Act of 1948 allows for payment of wages in kind, either wholly or partially, subject to the authorisation of the government. On the face of it, it does not seem that crypto violates the basic postulates for what constitutes as salary or wages.

When read in reference with current global trends in labour laws, crypto’s potential to fit in with Indian laws becomes more evident. The Fair Labour Standards Act, for example, requires the payment of salaries and wages to be paid in currencies that have been issued by a government, so-called fiat currencies⁵; an employer is said to be in violation if he acts to the contrary. But it is speculated that bonus payments may be allowed in cryptocurrency, since “bonuses”, while included in income tax, is considered as a form of supplementary income (and not regular salary/wages) by the IRS (supplementary income is paid in addition to wages and includes severance pay, commission, compensation etc)⁶. In India, the term bonus is not defined, but it is understood as any financial sum given over and above regular wages or salary. The idea behind paying bonuses is to include employees in the company’s profit or simply as a token of recognition of work done by them. The Payment of Bonus Act 1965 provides mandatorily for a minimum bonus to be paid to employees. Such obligation is to be carried even if the employer has incurred losses⁷. In cases of a blockchain startup (or any company diving into the crypto space), who tend to launch their own coin in hopes of its appreciation, their profits would first be visible in their tokens; it would be a slightly tedious task to convert the crypto profits into cash (and also poor marketing of their coin) when seen against the option to divide the crypto profits as-is to their employees’ crypto wallets. International crypto companies are presently hiring engineers and back-end developers in India as contractors and paying them in cryptocurrencies to accelerate their adoption and bypass local taxes and laws

⁵ SHRM: Restrict Payment in Cryptocurrency to Bonuses: shrm.org/resourcesandtools/legal-and-compliance/employment-law/payment-in-cryptocurrency. (last visited on 08 April 2022)

⁶ Should Bonuses Be Separate or Come in Payroll Checks? <https://smallbusiness.chron.com/should-bonuses-separate-come-payroll-checks-56235.html> (Last visited on 08 April 2022)

⁷ Section 10 of Payment of Bonus Act 1965 states; every employer shall be bound to pay to every employee in respect of the accounting year commencing on any day in the year 1979 and in respect of every subsequent accounting year, a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees, whichever is higher, whether or not the employer has any allocable surplus in the accounting year.

regarding cross-border payments⁸. The above obligation is more easily met and in the scenario where India frowns upon payment of salaries in crypto, the option of paying bonuses in crypto becomes available. Employees today also prefer partaking any amount payable to them in crypto.

Issues with using Cryptocurrencies as Remuneration

Legal Tender Clause:

One of the most acute problems while using crypto as a remuneration is that in most countries, cryptocurrency has not been adopted as a legal tender. Most countries have their own separate regulations for payment of wages for employees. In Brazil,⁹ items like cost of living allowance, meal allowance (only if not paid in cash), bonuses, daily travel, awards, health and dental assistance, reimbursement of medical expenses (including glasses, prosthetics, etc) are not considered as part of an employee's salary, even if customarily paid. Reform in The Consolidation of Labour Laws allows employers the discretion to pay awards and bonuses which can be furnished in either cash or "kind". Thus, as a standard practice, it becomes imperative to have any crypto currency payment avenue authorised by the employee (written and signed) to avoid legal sanctions. MP Luizão Goulart, a Brazilian congressman, proposed a bill to legalise cryptocurrency as a form of payment for workers employed in both the private and public sector.¹⁰ This enables employees to request their employers to receive their remuneration in cryptocurrency, provided such payments are made only under a mutual agreement between employer and employee. The approval of the bill may imply cryptocurrency being legalised and accepted as a legal tender. According to the bill;

"The limits of the percentage of payment (remuneration) in cryptocurrencies will be of the worker's free choice. Any imposition by the employer will be prohibited"

⁸ The Economic times: Many Indian Techies get paid in crypto economictimes.indiatimes.com/technology/indian-techies-get-paid-in-crypto-say-it-s-faster-and-easier (Last accessed on 08 April 2022)

⁹ PwC, Brazil: New labour law reform may provide opportunities to reduce mobility costs [pwc.com/pwc-brazil-new-labor-law-reform.pdf](https://www.pwc.com/pwc-brazil-new-labor-law-reform.pdf) (Last accessed on 08 April 2022)

¹⁰ Brazilian MP Proposes Bill to Legalise Crypto Payments to Public and Private Sector Employees: gadgets.ndtv.com/cryptocurrency/brazil-mp-cryptocurrency-salaries-in-bitcoin-legal-tender-draft-bill (Last accessed on 08 April 2022)

Also see: Brazilian federal deputy proposes crypto payment option for workers cointelegraph.com/brazilian-federal-deputy-proposes-crypto-payment-option-for-workers (Last accessed on 08 April 2022)

Besides employee's free choice, Goulart's bill envisages a consensus between the workers and the employers to set the percentages of remuneration in crypto and fiat via alternative payment offers and platforms. It would also solve the "cash" problems which the governments face during remuneration. India may weigh options from the US (as explained above), Brazil or even El Salvador, who legalised crypto and accepts it as a legal tender, to draft out policies for employee remuneration, keeping in mind the tax liability.

But declaring cryptocurrency as a legal tender is problematic. One of the basic requirements of money is stability. Crypto is a highly volatile, high fluctuating market which derives its value from the market forces of demand and supply. Even though they attribute their value to an asset or currency (eg; x number of bitcoins value at x dollars), in a scenario, such as the one presented by presented by El Salvador¹¹(which used U.S. dollar as its legal tender), having two legal tender poses confusion. It does not provide an incentive for employees to transact in crypto if its value is expected to increase in the future. On the flip side, if the value of cryptocurrency falls, employees would not want to accept or receive cryptocurrency¹². Additionally, keeping track of the real time value of a crypto on a 24 hour basis (since transactions with crypto have expanded; it is now possible to shop and even buy daily essentials or a cup of coffee with crypto) is not feasible.

Price Fluctuation

A fairly obvious outcome of a highly volatile market becomes a significant remuneration conundrum; the crypto market, like the share market, is subject to price fluctuation. A token's value is ascribed to the market forces of demand and supply. In China¹³, this problem gets highlighted when employers need to comply with the Minimum Wage Ordinance (Cap 608) which provide for a minimum wage at an hourly rate for certain employees, main persons with disabilities¹⁴, when they choose to pay wages in cryptocurrency; an employee may be set to receive an amount of token that initially meets or exceeds the minimum wage requirement, but

¹¹ El Salvador becomes the first country to use Bitcoin as Legal tender [livemint.com/news/world/el-salvador-becomes-first-country-to-use-bitcoin-as-legal-tender](https://www.livemint.com/news/world/el-salvador-becomes-first-country-to-use-bitcoin-as-legal-tender) (Last accessed on 08 April 2022)

¹² IMF urges El Salvador to remove Bitcoin as legal tender: [bbc.com/news/world-latin-americaEl%20Salvador](https://www.bbc.com/news/world-latin-americaEl%20Salvador) (Last visited on 08 April 2022)

¹³ Paying employees in cryptocurrency in Hong Kong: legal considerations [onc.hk/paying-employees-in-cryptocurrency-in-hong-kong-legal-considerations](https://www.onc.hk/paying-employees-in-cryptocurrency-in-hong-kong-legal-considerations) (Last visited on 08 April 2022)

¹⁴ International Labour Organisation: Minimum Wage Ordinance (cap 608) <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89650/103045/F-1305281900/CHN89650.pdf> (Last visited on 08 April 2022)

the value/price of the token falls and the employee ends up receiving less than his payroll or even the minimum wage. The fluctuation in the value of cryptocurrencies according to the market implies that a fixed number of tokens would value less (or more) on a given day. Thus, in the scenario where crypto is treated as wages, if the exchange rate of crypto to fiat falls below the minimum wage (when crypto is converted to fiat), employers may incur potential legal liability. The problem further worsens if the number of tokens payable to an employee is fixed in the contract. As stated above, transacting with crypto in everyday life becomes difficult.

Possible Roadmaps

One way to compensate employees in India (besides the above stated bonus method) would be if certain crypto currencies are classified as securities. The US Securities and Exchange Commission advised practitioners to apply the *Howey Test*¹⁵ (*SEC v. W.J. Howey*), when determining whether an issuer's tokens would be considered securities under the Securities Act of 1933. As per the test laid down by the supreme court, the test is to consider the investment's substance instead of form, i.e. Circumstances surrounding the digital asset while determining whether such investment is a security or not and the manner in which it is offered, sold, or resold (which includes secondary market sales). Generally, employees receive shares and stocks of their company as remuneration. If such an employee stock option plan is legally allowed to be paid out as part of employee remuneration scheme, then cryptocurrencies, if classified as securities, would also be covered under this ambit. In practice, tech companies today have created an "Employee Token Option Plan" which functions on the same ethos as Esops. The equivalent to classic restricted stock (RS) in the world of blockchain and cryptocurrencies are restricted tokens (RT). Once granted by an employer, the recipient is eligible to acquire the company tokens immediately, which makes the recipient the legal owner of the tokens, with all legal entitlements (e.g. including voting and dividend rights, in the case of payments tokens). Despite being the legal owner of the tokens, restricted tokens are usually subject to specific conditions like performance targets or milestones between the grant and vest dates, commonly referred to as the "vesting period". Should the recipient not meet these

¹⁵ The Securities Law also encompasses under its purview investment contracts i.e Investment Contracts are classified as a broad category of security under Securities Act 1933. *Howey Test* determines what qualifies as an "investment contract". An Investment contract exists if "there is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from efforts of others."

restrictions or terminate employment in advance of the vesting date, such tokens can be reclaimed by the employer, based on the ICO plan.¹⁶

Declaring cryptocurrency as a legal tender would be counter productive. It would undermine the Rupee and its value and it lacks stability in value. On a hypothetical note, if legalised, then two possible avenues may be thought of

- A. Creating an inbuilt mechanism on the crypto payment platform which instantly derives the current value of against the Rupee and remits accordingly;
- B. Setting a fixed average value of tokens on a daily or weekly basis to induce price stability. (This approach would make crypto identical to the securities and stock market i.e. a regulated market, which is against the basic ethos and purpose of blockchain and crypto.)

An alternative option would be to pay employees in a manner which would enable them to have both currency and crypto; the amount of Rupee currency paid could be just above the minimum wage law requirements while the remaining amount may be paid out in cryptocurrency. Employers that provide any compensation in the form of cryptocurrency should have the recipient employees sign written agreements confirming their assent to the arrangement, specifying which party is responsible for any exchange or broker fees, and informing the employees about and disclaiming employer responsibility for the potential risks that may flow from receiving their pay in cryptocurrency (e.g., tax consequences, volatility risks, lost private keys or passwords, or lack of federal financial protections for deposits held in crypto wallets, such as FDIC protections).

¹⁶ Huff, Tyler on Token awards: The new era of equity-based compensation [kpmg/ch/en/blogs/home/posts/2021/05/token-awards-new-era-of-equity-based-compensation](https://www.kpmg.com/au/en/issuesandinsights/articlespublications/token-awards-new-era-of-equity-based-compensation) (Last visited on 08 April 2022)