

CRISIS OF LEGALITY OF CRYPTO CURRENCIES IN INDIA

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***A**bstract—Recent announcements by finance minister for imposing 30% tax on income from crypto and proposed bill to regulate crypto currency has raised reasonable doubts regarding the legality of crypto currency in India. However unregulated and unrestricted operations in crypto trade, even after Supreme Court judgement raised a fair presumption as no illegality is there in crypto operations. This article is intended to investigate into the legality and illegality of crypto currency trade in this backdrop. Furthermore, constitutionality of crypto currency will also be looked into while investigating into legality.*

Keywords: CryptoCurrency, Digital Cash System, Intangible Currency, Virtual Currency, Block Chain, Distributed Ledger Technology.

Post covid in these financially difficult times crypto currency has been talk of point for a while and it's been a burning issue with in legal and economic fraternity. Crypto currency is gaining massive popularity slowly but steady. "India has become one of the biggest markets in Asia for crypto currencies and one of the fastest growing in the world. Broadly presuming at least 15 to 20 million population of Indians hold crypto, which amounts to approximate \$ 6 billion."¹

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¹ Prof. Dr. Robby Houben and Alexander Snyers, University of Antwerp, Research Group Business & Law, Belgium; Legal Context and Implications for Financial Crime, Money Laundering and Tax Evasion, Euro. Parl. <<https://www.europarl.europa.eu/cms-data/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf>>. (Accessed on 5 March 2022).

Presently crypto is present almost in 95% world, however there is no central as well as authorised agency across the world to issue the crypto. There are nearly 5000 types of crypto issued by private stakeholders.

India is having most young working professional away from traditional currency and opting more and more plastic, digital and crypto currency. They are going crazy to invest in this rapidly growing market. These comparatively naïve professionals are attracted towards this under the influence of social media apart from the media influencers, stars and cricketers etc.

There are almost 15 crypto currencies by private plyers are in existence. Out of many Bitcoin is the arguably most popular among them. Presently discussions have gone far away from issues such as who is investing in crypto, who is gaining massive profits or who got bankrupt, but only two legal issues remined surfaced.²

First being the recent proposal for making law for crypto currencies, and second is that central government has proposed to levy 30% income tax on the income from crypto currency. All this has raised reasonable doubts in terms of following questions;

- a. Is crypto currency legal in India?
- b. If not, is it illegal?
- c. If not, both then where does it to be placed;
- d. Constitutionality of crypto currency;

So, it is important to investigate these questions. This article investigates around these questions and having special focus upon Indian crypto currency scenario. However before investigating into these questions, it is equally important to understand crypto currency.

I. WHAT IS CRYPTO CURRENCY?

Crypto currency is actually a mode for financial transactions, just as Rupee or Dollar. Only difference is that it is intangible or virtual currency, which can't be touched or seen. It is sometimes known as digital currency, and solely online based transactions with absolutely no middle man.³

² Sou-Jie van Brunnersum; Why is the Indian Government Cracking Down on Cryptocurrency? DW (7-3-2022); <<https://www.dw.com/en/why-is-the-indian-government-cracking-down-on-cryptocurrency/a-60148889>>. (Accessed on 10 March 2022).

³ Manas Tiwari "Will Bitcoin and Cryptocurrency Replace Rupees and Dollars in Future? It's Complicated", *India Today* (7-3-2022) <<https://www.indiatoday.in/technology/talking-points/story/will-bitcoin-and-cryptocurrency-replace-rupees-and-dollars-in-future-it-s-complicated-1805414-2021-05-21>>. (Accessed on 10 March 2022).

It is a kind of digital cash system attached to private computer chain and based upon highly sophisticated algorithm. “Digital cash is a system of purchasing cash credits in relatively small amounts, storing the credits in your computer, and then spending them when making electronic purchases over the Internet.”⁴

For the transactions of this currency, the technology used is known as block chain. “Blockchain is a system of recording information in a way that makes it difficult or impossible to change, hack, or cheat the system. A blockchain is essentially a digital ledger of transactions that is duplicated and distributed across the entire network of computer systems on the blockchain. Each block in the chain contains a number of transactions, and every time a new transaction occurs on the blockchain, a record of that transaction is added to every participant’s ledger. The decentralised database managed by multiple participants is known as Distributed Ledger Technology (DLT). Blockchain is a type of DLT in which transactions are recorded with an immutable cryptographic signature called a hash.”⁵

Mostly youth is attracted to crypto currency as it is extremely easy to get crypto currency, and equally easy to sell them off without external interference. There are 24/7 private crypto exchanges to facilitate crypto exchange into tangible currency. Noteworthy is that no bank or other financial institutions are involved in it.

A general misconception is that the buyer of a Crypto currency purchases the Crypto currency as well as the copyright in that Crypto currency. Ownership of an crypto currency does not necessarily correlate with ownership of the copyright to the digital asset that the token represents. Consequently, a digital asset is merely a proof of ownership that is separate from a copyright. So in essence, an crypto transaction is similar in many ways to a license in which the buyer has only a limited bundle of rights resulting from the sale, which rights would include the right to display the crypto and ultimately to sell it. Governments and IP-rights consortiums must still define legal frameworks recognizing transactions conducted using blockchain. While blockchain technology provides the means for keeping a record of the property holder, we still rely on traditional mechanisms to enforce owners’ rights, especially when contracts are not upheld.

“The Union Budget 2022 proposed to classify cryptos as virtual digital assets (VDA). Even as crypto has been specified as assets, tax treatment is not

⁴ Tech Target Contributor, Techtargert; (8-3-2022) <

⁵ <

like other assets. As per the new crypto tax rule, an individual has to pay a flat 30 percent tax on income earned from transfer of cryptocurrencies and other virtual digital assets, including NFTs.”⁶

II. IS CRYPTO ILLEGAL IN INDIA?

At present there is no regulation or any ban on the use or trading of crypto currency in India. Although government of India is worried about constantly growing crypto trading and interest of young investors in it. RBI also raised its concerns before government of India as this virtual currency can destroy Indian economy. Reserve bank of India has issued directives on 6th April 2018 for not to carry any further crypto currency business or any co-operation to wards crypto currency business to all banks and financial institutions regulated by it.⁷

After this it was widely assumed the perhaps Government of India is planning to ban crypto currency. In consequence, Internet and mobile association of India filed a petition in Supreme Court on the ground of unnecessary interference by RBI and asking to issue writ for RBI to withdraw the said circular.⁸ The Supreme Court has lifted any such direction/circular. However, during the hearing RBI has said that crypto currency is not a legal tender, thus banks and other financial institutions has been advised to stay away from crypto currency business. But SC has seen this as unnecessary as central government has not enacted any law declaring ban over crypto currency. Thus, crypto currency can not be seen as illegal tender.

On 16 July 2019 state finance minister while answering a question in parliament said that crypto currency is not ban in India.⁹“...“Whether the government has taken note about the prevalence of cryptocurrency in the country and if any action is being taken against the persons who are responsible for running the cryptocurrency in the market?” Responding to this, minister of state for finance Anurag Thakur had said ‘No.’ “Presently, there is no separate law for dealing with issues relating to cryptocurrencies,” Thakur added and went on to say that all concerned government departments and law enforcement agencies, such as RBI, enforcement directorate and income tax authorities take action as per the relevant existing laws. So, the Indian government has not banned cryptocurrency in India. “Further, in view of the risks and dangers

⁶ Rajeev Kumar, Crypto Tax Filing in India: Key Points Explained, *Financial Express*; (25-8-2022); <<https://www.financialexpress.com/digital-currency/crypto-tax-filing-india-guide-fy-2022-2023-key-implications-rules-date-points-explained/2548477/>>.

⁷ RBI circular DBR.No.BP.BC.104/08.13.102/2017-18 dated April 6, 2018.

⁸ *Internet and Mobile Association of India v. RBI*, 2018 SCC OnLine SC 3554.

⁹ Suprita Anupam “No, India Hasn’t Banned Cryptocurrency, Says Govt” INC42”, (8-3-2022); <<https://inc42.com/buzz/dharmapuri-srinivas-has-the-govt-banned-cryptocurrency-officially/>>. (Accessed on 22 March 2022).

associated with cryptocurrencies, government and RBI have been issuing advisories, press releases and circulars to the public,” Thakur added....”¹⁰

This way it is clear that investment and trading in crypto currency are not illegal in India but are unregulated and that unregulated part is what is bothering the government, but as the crypto space as well about no central authority regulated it. The government may still not to very sure about the how the tame this wild animal.

III. IS CRYPTO CURRENCY LEGAL IN INDIA?

It was anticipated enticed by the growth of crypto currency that central government will either ban or regularised the crypto currency in India. Finance minister on 1st February 2022 has announced during the budget speech, that;

1. “Income from the transfer of any virtual digital assets such as crypto will be taxed at the rate of 30%”,¹¹
2. “The gift of virtual digital assets will also be taxed in the hands of the reciver”,¹²
3. “Loss from the virtual digital asset cannot be setoff against any other income”,¹³
4. “To capture the transaction details, TDS will be provided on payment made in relation to the transferor of a virtual digital asset at the rate of 1% with 29% to be paid later”,¹⁴

By announcing all this it has been assumed that central government is going to recognise the crypto currency, or at least getting it in from backdoor. “However, government have no such intentions by imposing income tax. As chief of income tax department has said that they do not decide upon the legality of transaction. Income tax department and income tax act only concerns

¹⁰ *Ibid.*

¹¹ Sneha Kulkarni “Budget 2022 Levies 30% Tax and TDS on Cryptocurrency Assets”, *Economic Times* (9-3-2022) <<https://economictimes.indiatimes.com/wealth/tax/budget-2022-levies-30-tax-and-tds-on-crypto-assets/articleshow/89267756.cms?from=mdr>>. (Accessed on 15 March 2022).

¹² Shishir Shina; Receiver of Virtual Digital Assets as Gift to Pay Tax on Market Rate, *The Hindu* (9-3-2022); <<https://www.thehindubusinessline.com/money-and-banking/receiver-of-virtual-digital-asset-as-gift-to-pay-tax-on-market-value-cbdt/article64965989.ece>>. (Accessed on 18 March 2022).

¹³ <<https://www.taxmann.com/post/blog/taxation-of-virtual-digital-asset/>> (Accessed on 14 March 2022).

¹⁴ <<https://www.aninews.in/news/business/crypto-tax-india-imposes-30-per-cent-tax-on-income-from-digital-assets20220201171709/>>. (Accessed on 23 March 2022).

with the transaction generating income tax. Only income generation is sufficient for tax imposition.”¹⁵

As far as income from crypto currency at the rate of 30% is concerned, crypto is considered an asset just like real estate, stock, gold etc.; which may be called digital asset. As it is 30% of the income on the income from lottery, gambling, horse racing or betting etc.; since crypto is also like nature thus 30% rate is proposed. Because of this nature crypto investors will not be able to claim deductions to reduce the tax liability. For the calculation of taxes purchasing price of Crypto currency will be considered. Losses from crypto currencies cannot be offset against income from other sources such as real estate, salary etc; nor can losses be carried forward to future years.

The finance minister announced in Budget 2022, “tax on crypto income is a great move forward by India for 3 reasons - firstly, this move recognises crypto as a legitimate asset class and crypto trading as a legitimate activity. Secondly, clarity on tax will bring more people into the crypto industry, so it will boost industry growth. Thirdly, a well-regulated crypto eco-system will create the right environment for innovation.”¹⁶

Imposing taxes does not mean that central government has legalised it. RBI has already stated before supreme court that it cannot be presumed legal as valid currency generation and minting of coins can only be performed by the authorised government agency, whereas crypto is issued by private sectors.

“Finance minister Nirmala Sitaraman has also stated in parliament that crypto could not be considered currencies. Finance minister further asserted that the term crypto currency is not a correct term. For the purpose of taxation there will be legalised as asset class and not as currency.”¹⁷

Finance secretary TV Somanathan also asserted that crypto assets are assets whose value will be determined between two people. You can buy gold, diamond or even crypto but that will not have the value authorisation by the government.

¹⁵ Shubham Batra; How Modi Govt has Given Legal Sanction to Cryptocurrencies in India, Through the Backdoor; The Print; (9-3-2022) <<https://theprint.in/economy/how-modi-govt-has-given-legal-sanction-to-cryptocurrencies-in-india-through-the-backdoor/818755/>>. (Accessed on 11 March 2022).

¹⁶ Sneha Kulkarni; Budget 2022 Levies 30% Tax and TDS on Cryptocurrency Assets, *Economic Times* (9-3-2022) <https://economictimes.indiatimes.com/wealth/tax/budget-2022-levies-30-tax-and-tds-on-crypto-assets/articleshow/89267756.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst>. (Accessed on 23 March 2022).

¹⁷ <https://www.business-standard.com/budget/article/crypto-not-currencies-as-they-are-not-issued-by-the-central-bank-fm-122020101744_1.html>. (Accessed on 25 March 2022).

Thus, it is clear that in India crypto currency is not a valid tender. However, there is no prohibition on its trading. No doubt it comes under the sphere of taxation but you cannot go to bank and get it converted into rupee. You cannot pay through it in hotels, restaurants, malls etc. you cannot force anyone to accept crypto currency towards settlements, but it can be exchanged through exchanges.

IV. THE CONSTITUTIONALITY OF CRYPTO

The guarantee in Art. 19(1)(g) extends to practice any profession or to carry on any occupation, trade or business. Article 19(1)(g) uses four different expressions so as to make the guarantee in Art. 19(1)(g) as comprehensive as possible and to include all avenues and modes through which a person earns his livelihood. Nevertheless, Art. 19(1)(g) protects only such activities which are of a commercial or a trading nature. Any activity not regarded as trade or business falls outside the purview of this protection. This means that the validity of a law regulating any such activity need not be decided upon by the yardstick of reasonableness and public interest as laid down in Art. 19(6). Thus, a judicial technique to promote rigorous government control of some activities is to refuse to characterise them as trading or commercial activities because of considerations of public morality, public interest, or their harmful and dangerous character.¹⁸

While RBI, being State under Article 12, completely prevented which indirectly prohibiting the trade of crypto, the supreme court in *INTERNET AND MOBILE ASSOCIATION OF INDIA Vs RESERVE BANK OF INDIA*,¹⁹ stated that in order to test the validity of the impugned action on the touchstone of Article 19(1)(g), it need to be understood the fundamental distinction between

- i. the purchase and sale of virtual currencies by and between two individuals or entities and
- ii. the business of online exchanges that provide certain services such as the facility of buying and selling of virtual currencies, the storing or securing of the virtual currencies in what are known as wallets and the conversion of virtual currencies into fiat currency and vice versa;

There is no doubt true that RBI has very wide powers not only in view of the statutory scheme of the 3 enactments indicated earlier, but also in view of the special place and role that it has in the economy of the country. These powers can be exercised both in the form of preventive as well as curative measures. But the availability of power is different from the manner and extent to which it can be exercised.

¹⁸ M.P. Jain *Indian Constitutional Law*, 7th edn.

¹⁹ *Internet and Mobile Association of India v. RBI*, 2018 SCC OnLine SC 3554.

Therefore, RBI directive on prohibiting crypto trade is to be set aside on the ground of proportionality.

V. THE GREY AREA

Crypto currency is currently falls under the grey area in India. It is neither legal nor illegal. Union minister of state for finance Bhagwat Karad has stated in council of states that crypto is not legal in India. He told both the both the Government and the RBI have not given any recognition to crypto, therefore they are not legal in India. On the other hand, by the Supreme Court judgement trading of crypto is not illegal.

Thus, nothing is clear about the legality of crypto, it is neither fully legal nor illegal; it seems it fall in grey area.

VI. WHY GOVERNMENT IS WORRIED?

Central government is worried due to crypto because;

1. This market is very volatile and massive risk is involved in it. So, government is worried for the welfare of investors;
2. Government wants crypto investment to be diverted towards productive investments;
3. In crypto investment is done beyond banking system, management of this is very difficult, as no agency is there to regulate it;
4. Crypto's value is very unpredictable. Its value is decided by the demand and supply between buyer and seller. Because of it there is massive ups and downs;
5. Most of the country does not validate it in the form of currency. There is a big question mark as to the validity it;
6. There is a great lack of transparency which may lead to funding to anti India activities;
7. There is uncertainty over the inheritance and succession over the crypto;
8. There is no legal personality to burden with the legal responsibilities;

VII. WHAT GOVERNMENT IS DOING?

RBI along with central government is issuing warnings for people, telling them it is a very slippery road. After lot of efforts Union Government has

constituted an inter-ministerial committee on November, 2017 for study the crypto currency matter and report the findings.²⁰

Committee has presented its report in 2019. On the basis of this report, finance ministry has drafted the 'Draft banning of crypto currency and regulation of official digital currency. As per the draft;

1. Crypto currency issued by the private sector will be prohibited;
2. There will be imprisonment upto 10 years for treading of crypto;
3. There will be fine upto 3 times of the money involved;
4. Suggestion for RBI to issue its crypto currency;

VIII. CONCLUSION

Although crypto presents a less expensive and heavy returns business strategy, however there are many associated problems with crypto; such as too much privacy, lack of transparency, unstable valuation system etc; due to all this it would be very difficult to see it as legal tender, but following can be done by central government in this regard;

1. Just like share market there must be a similar exchange regulator;
2. Instead of legal tender it must be considered a class of assets;
3. There must be a strict regime else it would start funding anti social and anti India activities;
4. It must be brought under GST;
5. People must be made aware of this and cautioned for the risk associated;
6. There must be increased coordination among all the attack holders and digital currency experts;
7. A strong and transparent system must be developed;
8. To structure crypto currency global and collective strategy is required;
9. Indian government must issue its own digital currency which can compete with crypto;

²⁰ Subhash Chandra Garg *Report of the Committee to Propose Specific Actions to be Taken in Relation to Virtual Currencies*, Department of Economic Affairs, Ministry of Finance New Delhi, India (10-3-2022) <<https://dea.gov.in/sites/default/files/Approved%20and%20Signed%20Report%20and%20Bill%20of%20IMC%20on%20VCs%2028%20Feb%202019.pdf>>. (Accessed on 5 March 2022).

The Government of India; is in talks and discussing extensively with many stakeholders regarding crypto regulation. The government is constantly monitoring the crypto sector.

If Indian government legislate to brings out a crypto currency bill in parliament, crypto will be legal tender. However, a crypto legislation is enacted, even then the fine print will decide all the aspects of the cryptocurrency ecosystem, that will bring legality to crypto or not.

The bill has already reportedly evolved from prohibiting all private cryptocurrencies to allowing cryptocurrencies to be used as an asset. Therefore, uncertainty around several aspects of the crypto ecosystem remains and will be determined by the law.²¹

It is not clear when the government will introduce the bill. The finance minister, responsible for introducing the bill in parliament, has refused to announce a time frame, saying consultations are ongoing. Only the cryptocurrency issued by the Reserve Bank of India (India's central bank) – i.e., the digital rupee – will be a legal currency or legal tender. In other words, you could buy groceries only with the digital rupee and not ether, bitcoin or any other cryptocurrency.

²¹ Amitoj Singh; “Making Sense of India’s New Crypto Rules”, Coindesk; (11 March 2022); <<https://www.coindesk.com/policy/2022/02/21/making-sense-of-indias-new-crypto-rules/#:~:text=Only%20the%20cryptocurrency%20issued%20by,bitcoin%20or%20any%20other%20cryptocurrency>>.