**CRYPTOCURRENCY: IS STATE REGULATION NECESSARY?**

**BY**

**YASH JAIN**

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**NEW LAW COLLEGE, BVP, PUNE**

**yashjain5447@gmail.com**

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**ABSTRACT**

Cryptocurrency such as Bitcoin and Ethereum are decentralized unit systems, digital currencies are not dependent on a thirdparty and don’t need an issuer, thus they rely on the peer-to-peer network. Coupled with the privation of regulatory guidelines ad their exceptional technical aspect creates a pool of complications and also opens up and area for the research. The Blockchain concept is the reflection of the changing views and demands of the society in terms of systems working based on trust, specifically the legal framework. This article begins with an introduction to blockchain and explains their technical and mixed characteristics. Further goes into the deep to explain the rise of cryptocurrency in India, their respective risk which they hold, and the methods towards obtaining the cryptocurrency. Towards the end of the article, it deals with the Howey test and the current regulatory mechanism and laws prevalent in the USA and India and the best practices for crypto funds generation.

KEYWORDS: Bitcoin, Blockchain, Cryptocurrency, Ethereum, currency

**INTRODUCTION**

Cryptocurrencies are generated with a process that is known as ‘mining’ which isa mathematical process by nature, i.e., hash function. Cryptocurrency mining is a process in which the transaction taking places between users are being verified and are added into the blockchain public ledger.[[1]](#footnote-2) The process of crypto mining is also accountable for the introduction of new coins in the existing circulation and it is also one of the key elements that allow cryptocurrency to work as a peer-to-peer network. A ‘miner’ who has the required specific hardware is responsible for the processing of the transaction. By proceeding to every next set, it keeps on getting challenging to decipher, and thus it is assumed that the supply will be constant.In modern times, we observe that if the supply ceases to be constant and there is an increase in the demand then it will be leading towards the increase in the prices.[[2]](#footnote-3)

Through solving the puzzle, i.e., hash function, authentication of a transaction is done by the node (computers) that receives it. As a reward for the authentication done by each network of nodes, in exchange, they receive a certain amount of cryptocurrencies. For the recordation of each transaction, there is a digital book of accounts called ‘Ledger’ is maintained, now this ledger can be bifurcated into two types: Centralized or Decentralized. Centralized Ledger is when there only one party who is in complete control of the database and software. Decentralized Ledger is that kind where the database or software is not in control of a single party and is managed by the network of nodes[[3]](#footnote-4). As soon as the verification of the transaction is completed, a ‘blockchain’ is established. Blockchain is established after the process where a block is added to the chain undergoing the verification through thousands of nodes that conducts the verification and then it is stored as a unique record. Each block comprises a hash function, data of the previous transaction, and also the data of the previous block[[4]](#footnote-5).

After the formation of the Bitcoin, this can be merchandised in exchange for a regular currency prevailing in the current exchange market rate, and the money generated is transferred into the purchaser/buyer’s account which comprises two keys. A private key is used in decoding the bitcoins that have been transferred to the account of the buyer. Private Key is only owned by the purchaser. The financier can also use his public key for encoding the payments[[5]](#footnote-6). In that instance, a ‘Fork’ is installed which is used to install more or less modification in the software. Blockchain is called a fork when it is ‘diverged into two paths forward’; it can be a hard fork which is software validating following the old rules will render news as invalid. Soft fork on the other instance can is considered and be recognized as a valid way though there is a change in rules. Therefore, forks can be used to either improving or upgrading the existing one or it may be used also in the creation of a rival blockchain[[6]](#footnote-7).

The intrinsic value of the block itself reflects the value of the blockchain, i.e., the size of the users of blockchain or technological merits. The value can also be determined based on the underlying assets which are dependent on the performance of goods and services in the entrepreneurial sector. Initial Coin Offering (ICO) is a process through which tokens are placed in the public domain which is quite similar in nature with the initial public offering[[7]](#footnote-8), IPO in the international market. The major difference between the cryptocurrency market as compared to the traditional market is that the Initial Public offering i.e., shares are issued to the public in a limited and specific amount, whereas the in the crypto market, the size of the unit keeps on rowing as the mining process grows and continuously is in process[[8]](#footnote-9).

**THE RISE IN INDIA**

In the year 2013, bitcoin started to gain some momentum, and crypto trading started to become a feasible option for many investors across the countries. Many businesses begin to accept bitcoin as a mode of payment, a vintage era pizza shop called colonial in Worli area of Mumbai became the first restaurant service in India to accept bitcoin and the latest one added in the list is an eatery in Bangalore named "suryawanshi"[[9]](#footnote-10).Within a short period, cryptocurrency exchanges begin to boost up within the country. Pioneers like Btex India, unicorn, and insecure began offering cryptocurrency exchange and trading services in India. Over time others like koinex, zebpay, and bitcoin India were also added in the list.

On 8th November 2016, PM Modi announced Demonetization policy stating that "Rs 100 and Rs 500 notes of Mahatma Gandhi series will no longer be a legal tender with effect from the stroke of midnight hour" this move by the government demonetizing 86% of countries paper currency had a devastating effect all across the country, now people with large piles of unaccounted money requires new means of holding such money without losing them in the form of tax or indulging in government scrutiny. Bitcoin came in as a ray of sunshine for them and people started buying bitcoins in huge numbers to retain their money, this helped them circumventing what would have been considerable taxes if they had tried to retain their wealth through the banking system.[[10]](#footnote-11)

The 2016 demonetization may have acted as a catalyst in the growth of the cryptocurrency market but soon it turned out to be a false narrative. Despite the vast population of India, it contributes only 2% of the total cryptocurrency market capitalization. The reason for such a cameo by the world's 5th largest economy can be attributed to high cryptocurrency prices and rigid RBI- led government regulations. The bitcoin price in India is relatively higher by as much as 5 to 10% compared to the global average; as a consequence of this participation of India in crypto- trading at international crypto- exchange platform is for namesake only. Also from time and again RBI has been consistent in warning its citizens of the risk associated with cryptocurrency. On the other hand, the Indian government hasn't banned cryptocurrencies; it's just that they haven't exactly been endorsing it. The coming government policies and market conditions will reveal the direction in which the crypto market will move as far as India is concerned[[11]](#footnote-12)

**THE IDEA OF TRUST IN CRYPTOCURRENCY**

For reference, our focus is on Bitcoin and Ethereum.

**Bitcoin –** Bitcoin was introduced in 2008 by Satoshi Nakamoto who then published a white paper called “Bitcoin: A Peer-to-Peer Electronic Cash System” and later on implemented the said software.[[12]](#footnote-13)The element of complete and utter trust towards the Bitcoin technology is not present as there is an absence of a centralized unit that will regulate or monitor or control it. This factor also gives a surface to a problem of double-spending; in this case, it is problematic to avert the public from spending the same cryptocurrency twice for an item.To eradicate the lack of trust towards the Bitcoin, they follow a method called ‘Proof-of-Work’, in which there is a requirement to solve a mathematical algorithm function and that too in a specific time spam. There is also another method to resolve the issue of trust i.e., ‘Timestamp Server’ performs the job by ‘taking a hash from the block of items that are to be timestamped and then that is widely published, as in newspaper such as Usenet Post. The timestamp method proves that there must the existence of the data at a particular time, to get the hash.[[13]](#footnote-14)

**Ethereum –**Ethereum is a program that is complete “a decentralized platform that operates smart contracts: That are applications that are heavily programmed and they work exactly according to the programming without the possibility of issues like downtime, censorship, fraud or third-party interference”.Ethereum is fueled by the cryptocurrency called Ether, which can be either bought, gifted or acquired through the process of voluntary validation of transactions onto the network. Ethereum is another kind of blockchain, it deals with a concept that is much wider than the issue of trust i.e., Issue of having an agency for the regulation of the blockchain. Smart Contracts are used to make it decentralized, however, in 2016, Decentralized Autonomous Organization (DAO) was unfortunate and discovered a hack in the ‘smart contracts’ which had an error that cost them a loss of 50 Million Dollars. Since such a contract is a ‘One-way road’ the only remedy for this was to use the method called ‘Fork’, Thereby it was done by splitting the Ethereum classic, that continues to work in a way that, the original Ethereum blockchain continue to run side by side the fork. That created the Ethereum Hard Fork (ETH).[[14]](#footnote-15)[[15]](#footnote-16)

**COST, RISKS, AND CHALLENGES INVOLVED**

* Controlling Cost

Controlling cost is a phenomenal cost that occurs only due to when a person expressively stimulates the blockchain and its general operation. The occurrence of an event where a single party controls the blockchain is quite erratic, in a decentralized setup of blockchain as there is no existence of an intermediary. However, in reality, the controlling cost can occur based on many instances and is based upon a party, if they exert any control, whether such control involves cost i.e., diverting the cryptocurrency towards his agents or themselves and this ultimately leads to an abuse of the other token holders.

* Technological Risk

Blockchain technology allows distributed shared ledgers to hold permanent records in a safe and authenticated manner thus ensuring that the transactions can never be altered. Though, Blockchain technology is also exposed to the risk of bugs, influences, coding error, viruses, hacking, and cyber-attacks.The risk of obsolete technology is a new risk consideration for financial assets and has traditionally been associated with hardware or software[[16]](#footnote-17).

* System Risk

Blockchain is a complex system comprising of several technical jargon which is quite grim for any common investor to comprehend, hence leading to less-informed investors. There is another systemic risk that is with regards to ‘fork’ being generated with a new currency and that sitting on top of the original blockchain stakeholders. The third rick is regarding the ‘stickiness’ of the smart contracts, i.e., rigid contracts and their terms which makes them extremely difficult for any alteration.[[17]](#footnote-18)

* Security Threats

It will be a gold mine for hackers and malicious users as they can generate as much virtual currency as they please if they can break through the system and crack the method of virtual currency creation. It is important to remember that as technology becomes more sophisticated, so do hackers. Exchanges are essentially so vulnerable to hacks because they centralize the risk, so further decentralization can be an option in the pursuit for maximum security[[18]](#footnote-19).

* Impact on Real Monetary System

Since there is some type of virtual currency systems that are connected with the real world monetary system, they possess a threat towards the demand and supply chainof a real-world monetary system. Considering an example, Enabling or empowering the user to purchase goods and services both in real-world as well as in the virtual world with the virtual currency as a monetary exchange. This will be reducing the demand for real money significantly. Users will start using virtual money more often, rather than using real money which will increase the demand and usage of virtual money and resulting in sabotaging the real money demand and supply chain. On the other hand, some of the platform allows users to exchange their virtual currency with real-world currency, hence, increasing the demand on the real-world currency. These fluctuations make an impact on the real monetary system.[[19]](#footnote-20)

**OBTAINING AND GENERATING CRYPTOCURRENCY**

Since there is no standard virtual currency across the digital medium, but there are some methods of generating virtual currencies-

* Pay- for cryptocurrency method- This method enables all the adult users and gamers above 18 years of age to buy cryptocurrency using real money or its equivalent in the real monetary system such as debit, credit cards or E-payment system such as pay-pal[[20]](#footnote-21).
* Offer- based method- Many of the online users or gamers are not financially sound to pay with a cash option for cryptocurrency. this offer based method allows users no matter whether they are adults or minors to earn cryptocurrency by watching advertising videos, participating in surveys & signing up for the trial subscription. This method is considered as one of the safest and easiest ways of earning cryptocurrency.
* Loyalty-based method- In this method, the customers or gamers are rewarded points and credits by the commercial companies & game operators for their loyalty and support, these points and credits are in the form of cryptocurrency and it stays as long as the customer stays with the provider. These points are redeemable towards future purchases; these are also exchangeable with vouchers, discounts & gifts[[21]](#footnote-22).
* Self-effort/ mining- base method- This method is used for the most widely used cryptocurrency the bitcoin. It is a system of generating virtual money in peer to peer networks. When pseudonym Satoshi Nakamoto[[22]](#footnote-23) created the algorithm he set a finite limit on the numbers of bitcoin that will ever exist i.e. 21 million, unlike most other bitcoin currencies emitted by network peers, network nodes operate sophisticated software on their computers to overcome complicated mathematical puzzles and therefore acquire bitcoins or electronic coins. These virtual coins can be stored in local digital wallets in user devices and thus are fully controlled and managed by them alone.

**WHETHER THESE ARE STOCK CONTRACTS? - HOWEY TEST**

By sec 2(1) of Securities Act, 1993 of the US, which lays down the definition of securities and it, comprises ‘Invest Contracts’. The case which laid down the precedent regarding the test of whether a particular transaction can be considered as an ‘investment contracts or not i.e., ‘SEC v. WJ Howey CO.[[23]](#footnote-24) The particular test is ivied into four-folds:

1. Investment in monetary terms (later on interpreted together with other consideration as well)
2. Under a Common inventiveness.
3. Backed up with an expectation of profits.
4. Efforts of others are also included.

There are three different ways enlisted for the courts to determine whether an investment is under a common enterprise. Under the horizontal commonality, bitcoin fund is not to be polled together into one entity, like it is done for the stocks of a company. Though there is no place where funds are polled together, so, in this instance, the investors bear the risks and enjoy the rewards of their investments. The vertical commonality is not the one that is ever satisfied as there exists no ‘direct relation in between the promoter and investor, as promoter’s success or failure is not co-related with the investor’s profit or losses’. At the end of the day, the broad vertical commonality is also not fulfilled, as investors in bitcoin contracts do not depend on the promoter's managerial skills and determinations. In addition to these instances, the profits are also not dependent upon the determination, skills, or efforts of others as the capacity to mine, control, buy and sell one’s coins stays with the investor itself. Hence, as a result of this Bitcoin end up not satisfying the Howey Test[[24]](#footnote-25).

There is the non-existence of any comprehensive federal regulation towards virtual currencies. All of the security laws and various other forms of regulation and rules in the cryptocurrency system are subject to international laws and also to the policy theory.There would also be a combination of globalization and federal law, free markets, and government oversight, as well as capitalism and communism.Problems concerning the extraterritorial jurisdiction of States also come into consideration. The rationalization for implementing the securities laws to blockchains here is to ensure mandatory public disclosure, consequently protecting vulnerable investors by eliminating the asymmetric information between them and the offerors. This makes an impact on ensuring the standardization and sets-up a predetermined benchmark, which acts as a guide for investors, thus making a more cumulative decision rather than just providing them with raw data.[[25]](#footnote-26) One of the several benefits of the regulations is that there are corporate governance and transparency in the system.

This abets the policy-making to reach a position of contradiction. There is, on the one hand, investor security, which is the primary goal of the securities regulations, and, on the other hand, the prospect of restricting innovation and technological developments, consequently hindering the expansion of start-ups leveraging bitcoins to raise capital, through tedious transparency and licensing requirements.[[26]](#footnote-27) Cryptocurrencies impose significant political restrictions, along with making them subject to the laws and regulations of the securities exchange commission (SEC) [Regulatory Body Enforcing Securities Law in the USA] the core element of the blockchain system that is to disengage the intervention of states and regulations, is now vanished. SEC would be ultimately extending its jurisdiction to ascertain power over the private markets[[27]](#footnote-28).

**EXISTING SUPERVISORY APPARATUS IN INDIA**

Nonetheless in the current scenario, there is no supervisory framework prevailing that is governing the regulation of bitcoins, yet it has not been declared as an illegal activity if someone is transacting with them. The Serious Fraud Investigating Office [SFIO] held under the jurisdiction of the Ministry of Corporate Affairs has been engaged in the process of accumulation of data regarding the usage of bitcoin in the corporate industry. Due to the versatile nature of cryptocurrencies thus leading to difficulty in the classification of it into a computer program or derivative or as a security or as goods and services or as a currency[[28]](#footnote-29). If it is considered to be classified as a good or as a service, it would be drawing the implication posed under the GST Act. If it is to be considered as a currency it shall have to satisfy the conditions and requirements of the Foreign Exchange and Management Act [FEMA], 1999 to be stated as a currency. Foreign currency shall also have to satisfy the conditions and shall also fall under the definition as laid down by the RBI Act and it also must be accepted legally as a currency unit in some country. If the Bitcoins are classified as a currency then there will be no tax implication present. Furthermore, cryptocurrencies are computer programming expressed as code through coding and give rise to interoperating them as computer programs, thereby making them fall under the eligibility criteria of Copyrights Acts, 1957[[29]](#footnote-30).

SEBI regulated traditional securities market is tremendously impulsive in terms of its nature. Likewise, the impulsive nature of the cryptocurrency forms the impression that they are also a kind of securities and derivatives. The definition of securities is laid down under the sec.2 (h) of Securities Contracts and Regulations Act (SCRA) of 1955. The central idea is that it shall be allotted by an ‘issuer’. All of the other securities are issued by a centralized authority and also by an issuer, whereas, on the other hand, cryptocurrency is not allotted by and the issuer or somebody or any authority, hence making it a decentralized unit. Thus, unless and until the cryptocurrency doesn’t start getting allotted by the central government, cryptocurrency will not fall under the ambit of the definition of securities. The derivative is a type of contract that is supposed to hedge risks and then derives the value from an underlying asset. They don’t possess an independent value. Cryptocurrency is not be said as a contract per se and thus they are independent, hence they are also not to be covered under the definition of derivatives as well.[[30]](#footnote-31)

In an attempt to counteract the enforcement of securities law and not to be referred to as an investor, issuers focused on channeling the interest of the purchaser to that of customers who are only secured by contractual rights. Returns are broken down into assets and are popularized by websites.Certain precautions must be taken by stakeholders, such as never sharing keys digitally via e-mail, downloading, etc. Handling keys with a secure electronic wallet and minimizing trading approval are some other means of ensuring investor security.[[31]](#footnote-32)

**CONCLUSION**

Concerning the enormous uncertainty prowling around regarding the use of cryptocurrency, the legislators and the courts all over the around are yet to make a unique policy regarding the same. The challenges that are faced to render it under the scope of securities regulation and the risk that is involved with the investment in cryptocurrency are thereby discussed. There is an ever-rising need in India to deciphering the nature of cryptocurrency and classification of them into the currency, securities or commodity or under any other definition in order of deciding tax implication for the same.

There is a need for a constant balance between the adequate regulation of the market and also ensuring a decentralized platform. Another challenge that needs the due attention of the regulators is the hindering of the growth of entrepreneurs who could have raised much more capital in the ease with the wider usage of cryptocurrency. Existing public enthrallment and growing demand, regulators are expected to adopt the framework of the legislation accordingly to the associated risks.

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