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**CRYPTOCURRENCIES – THE WAY FORWARD FOR INDIA
- A REPORT©**

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CRYPTOCURRENCIES – THE WAY FORWARD FOR INDIA

- A REPORT©

- N. S. Nappinai, Advocate, Supreme Court & Founder – Cyber Saathi

A. Background:

Blockchain:

‘Blockchain’, a fascinating technology innovation that is driven by two disruptive technologies – open source software and cryptography, each of which in themselves were path-breakers, grew wings thanks to ‘cryptocurrency’ and in particular, ‘Bitcoin’¹. The technology is capable of innumerable use cases each of which further innovates on the basic assumptions that form the bedrock of this evolving innovation:

- A dynamic distributed ledger:
 - that stores data in a secure manner through use of encryption technology. That it is stored at multiple nodes adds a further element of security;
 - which can be viewed privately or publicly (permissioned or permissionless) based on the access process structured to create the chain;

¹ Nappinai. N. S. (2017). “**Technology Laws Decoded**”. Published by LexisNexis (2017);



- which utilizes high-end cryptography to encrypt the data such that the data stored can be viewed and even edited without the original (previous version) being deleted or altered in any manner;
- each addition is verified using cryptography tools and each such verified and authenticated addition of data (which in cryptocurrency terms is referred to as ‘mining’, as the person whose verification is accepted gets paid through the cryptocurrency that is being authenticated by the miner) becomes the ‘block’ added to the chain of transactions (hence the name);
- entire history in a systematic frame is therefore available for verification;
- each such transaction is immutable. It cannot be reversed;
- code enabled ‘smart contracts’ affirm the transfer / transaction;
- with the authentication process being carried out through cryptography, the need for a central authority or middlemen is purportedly done away with;

Cryptocurrency

Bitcoin, the cryptocurrency that took the world by storm was launched in 2009 using blockchain as the underlying technology, by an, as yet unidentified founder, with the pseudonym ‘Satoshi Nakamoto’². Whilst this new toy gave rise to many others, it also almost died out. In or about 2013, it had a revival, which also has no bearing to its current valuation. Forbes opines that the reason for the sudden interest in 2013 in bitcoins was

² For a detailed discussion refer to the book on cyber laws titled “**Technology Laws Decoded**” by **N. S. Nappinai**. Published by LexisNexis (2017).



probably due to the Cyprus banking crisis that prompted customers to move their funds from regulated banks to cryptocurrencies that the Government would have no control over³. Investopedia traces the value of bitcoins from a mere \$0.08 in 2010, to “an all-time high of \$68,521” as of November 5, 2021⁴.

The launch of ‘bitcoin’ was intended as a payment mechanism for daily transactions. Hence the terminology ‘cryptocurrency’. However the unprecedented price rise does not appear to be pegged to adaptation or usage, as a payment mechanism but more as an investment instrument or opportunity. Investopedia’s claim that cryptocurrency or bitcoin in particular is now following a ‘different narrative’ i.e., “as a store of value and a hedge against inflation” appears ironic, given the volatility and inexplicable increase in valuation, particularly during the pandemic phase.

Cryptocurrencies are typically characterized by the following:

- there is no central authority issuing or backing a cryptocurrency or its value;
- there is invariably no intrinsic value to a cryptocurrency. Practically, the value appears to be market – driven and hence its volatility;
- cryptocurrencies, as with the underlying technology Blockchain, works through decentralized networks with no central authority validating transfers;

³ <https://www.forbes.com/sites/kitconews/2013/12/10/2013-year-of-the-bitcoin/?sh=1454e2aa303c>;

⁴ <https://www.investopedia.com/articles/forex/121815/bitcoins-price-history.asp>;



- the mining activity of cryptocurrencies refers to the validation of transactions and the payment consequently to the successful ‘miner’;
- transactions of cryptocurrencies are immutable and irreversible;
- there is some level of pseudonymity, though not complete anonymity for cryptocurrency transactions;
- transactions done through ‘crypto – exchanges’ purportedly provide additional levels of transparency but this again is case to case;

Usage of cryptocurrencies, particularly bitcoins for money laundering, ransomware and for illegal activities and transactions on the darknet have given rise to fear and concern over the unchecked growth of cryptocurrencies. The problems with respect to banning or regulating or a hybrid model has

Cryptocurrencies now abound (with about 10,000 cryptocurrencies or more now in circulation⁵) with many a private player wishing for similar success, as bitcoins.

Changes to regulatory frameworks and celebrity endorsements (such as those by Elon Musk making Dogecoin increase value) have increased volatility and trading in cryptocurrencies.

Members of the G20 published a request in June 2019 for a global regulatory framework for cryptocurrencies to be implemented to ensure uniformity across Nations⁶.

⁵ <https://www.investopedia.com/tech/most-important-cryptocurrencies-other-than-bitcoin/>; & Also refer: CoinMarketCap. "Cryptocurrencies." <https://coinmarketcap.com/>;



B. India's Crypto Journey so far:

The Reserve Bank of India (“RBI”) cautioned against the risks of Virtual Currencies via RBI’s Press release dated 24.12.2013⁷ wherein it stated: *“The creation, trading or usage of VCs including Bitcoins, as a medium for payment are not authorised by any central bank or monetary authority. No regulatory approvals, registration or authorisation is stated to have been obtained by the entities concerned for carrying on such activities. As such, they may pose several risks to their users, ...”*

Thereafter on 01.02.2017, the RBI via another Press release⁸ clarified that it had not *“given any licence / authorisation to any entity / company to operate such schemes or deal with Bitcoin or any virtual currency. As such, any user, holder, investor, trader, etc. dealing with Virtual Currencies will be doing so at their own risk.”*

On 05.04.2018, the RBI via another Press Release⁹ while setting out various developmental and regulatory policies measures Ring-fenced entities regulated by the RBI from providing services to individuals and businesses dealing with virtual currencies. Thereafter via Notification

⁶ <https://www.planetcompliance.com/the-g20-and-the-future-of-crypto-regulations-what-to-expect-from-the-coming-summit/>;

⁷ RBI Press Release dated 24.12.2013: <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/IEPR1261VC1213.PDF> ;

⁸ RBI Press Release dated 01.02.2017: <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR205413F23C955D8C45C4A1F56349D1B8C457.PDF> ;

⁹ RBI Press Release dated 05.04.2018: <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR264270719E5CB28249D7BCE07C5B3196C904.PDF> ;



dated 06.04.2018¹⁰, the RBI listed out the restriction of services whereby it stated” *“Such services include maintaining accounts, registering, trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts of exchanges dealing with them and transfer / receipt of money in accounts relating to purchase/ sale of VCs.”* The RBI it’s notification dated 06.04.2018 gave entities regulated by it which were already providing services to individuals / businesses dealing in virtual currencies a period of three months to exit such business relationship.

The Ministry of Finance via released a circular dated 29.12.2017¹¹ cautioned people against the risks involved in investing in virtual currencies and claiming the same to be like ponzi schemes. The circular stated: *“VCs are not backed by Government fiat. These are also not legal tender. Hence, VCs are not currencies. These are also being described as ‘Coins’. There is however no physical attribute to these coins. Therefore, Virtual ‘Currencies’ (VCs) are neither currencies nor coins. The Government or Reserve Bank of India has not authorised any VCs as a medium of exchange.”*

The Law Commission of India via Report No276¹² stated: *“Virtual Currencies (VC – also known as Cryptocurrency), etc. Stringent law(s) should be put in place to control Foreign Direct Investment and at the same time, to prevent money laundering, while also implementing necessary tax reforms.”*

¹⁰ RBI Notification dated 06.04.2018: <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI15465B741A10B0E45E896C62A9C83AB938F.PDF>;

¹¹ Ministry of Finance circular dated 29.12.2017: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=174985>;

¹² Law Commission of India Report no. 276: <http://lawcommissionofindia.nic.in/reports/Report276.pdf>;



In its report, the commission recognized Virtual Currency (VC- including crypto currency) as a means of payment along with other electronic money facilities like credit cards, debit cards and net banking. This was in line with the commission’s recommendation to regulate gambling so that restrictions could be prescribed on the amount one would be allowed to stake.

In *Internet and Mobile Association of India Vs. RBI*¹³ the Supreme Court of India struck down the RBI circular which directed entities regulated by the RBI to restrict and to stop servicing individual’s / businesses dealing in virtual currencies. The Hon’ble Court held that the same was ‘disproportionate’. The Hon’ble Court held that the RBI had taken a stand that it had not banned Virtual currencies while it had also failed to show how any entity regulated by it suffered any loss or adverse effect on account of the services provided to individual’s/business dealing in virtual currency. The Hon’ble Court held: “*When the consistent stand of RBI is that they have not banned VCs and when the Government of India is unable to take a call despite several committees coming up with several proposals including two draft bills, both of which advocated exactly opposite positions, it is not possible for us to hold that the impugned measure is proportionate.*” RBI did not deem fit to seek review of this decision despite some obvious fallacies in the decision.

¹³2020 SCC online SC 275. Available at: https://main.sci.gov.in/supremecourt/2018/19230/19230_2018_4_1501_21151_Judgement_04-Mar-2020.pdf;



C. Global trends

Whilst some countries (China for instance) have opted for an outright ban on cryptocurrencies, others such as USA, Singapore and Canada have opted to treat them as securities. The other end of the spectrum are those countries that have in fact permitted use of cryptocurrencies, as payment systems akin to legal tender. The following is a quick bird's eye view of the global regulatory framework:

Africa

Egypt, Algeria & Morocco deem cryptocurrencies to be illegal.

Nigeria: in 2017, the Central Bank of Nigeria banned cryptocurrency transactions through banking channels much as the RBI did in India. In 2021, Nigeria reaffirmed its position and continued this ban.

South Africa treats cryptocurrency as an intangible asset and categorically refuted any position as legal tender.

Asia

Japan has one of the most progressive regulatory regimes for cryptocurrencies, with its recognition of "Virtual Currency", as opposed to and distinct from Japanese Currency or fiat currencies. In late 2018, Japan also approved self-regulation for the crypto industry.



By contrast, **China** currently has one of the most restrictive environments in the world for cryptocurrency. China banned Cryptocurrency transactions in 2013, as well as ICOs and crypto exchanges in 2017. Reports indicate extensive use of Virtual Private Networks (VPNs) to circumvent these bans but despite the same the volume of transactions appear to have reduced drastically.

Europe

European Union (“EU”) States, especially smaller ones, appear to have a more liberal view towards Cryptocurrency.

Estonia not only is quite supportive but was purportedly planning the launch of its own national cryptocurrency named ‘Estcoin’ in or about 2018. However, Estonia refuted these reports i.e., of its intent to issue a national cryptocurrency but affirmed that ‘Estcoin’ was being considered as a ‘crypto token’ to enable its blockchain enabled ‘e-residency’ program¹⁴.

Switzerland and in particular the city of Zug, known as “Crypto Valley”, is liberal towards cryptocurrency usage and regulation. Zug reportedly started accepting bitcoins, as payment for city fees¹⁵. Swiss Economics Minister Johann Schneider-Ammann announced his goal in 2018 to make Switzerland the world’s first “crypto-nation”.

¹⁴ <https://www.cnb.com/2018/06/04/estonia-wont-issue-national-cryptocurrency-estcoin-never-planned-to.html>;

¹⁵ <https://www.coindesk.com/markets/2016/05/09/swiss-city-to-accept-bitcoin-payments-for-government-services/>;



North America

USA & Canada appear to have relegated cryptocurrencies to role of ‘securities’ and are regulating them as such at the Federal Levels. In the US, the SEC is the regulatory body dealing with cryptocurrency regulations and enforcement. Virtual currencies have been treated, as property rather than currency for taxation purposes.

Canada has unequivocally rejected the ‘currency’ aspect of crypto and treats it as a commodity. For taxation purposes, it treats cryptocurrencies, as a commodity and transactions in cryptocurrency are taxed accordingly, depending on the mode and manner of transaction and revenues generated therefrom¹⁶.

The above are illustrative trends with a lot more fluctuation in positions from absolute bans to acceptance as payment systems abound from different jurisdictions.

D. India – Way Forward

In November 2021, the Central Government has announced the possibility that a reworked Cryptocurrency Bill, 2021 may be tabled in parliament¹⁷. The issues that the Indian Government would have to take note of in formulating and implementing its intent are, briefly summed up hereunder.

¹⁶ <https://www.mondaq.com/advicecentre/content/3540/Bitcoin-Cryptocurrency-Taxation-in-Canada>;

¹⁷ <https://www.financialexpress.com/market/crypto-bill-2021-5-key-questions-about-crypto-ads-scams-taxes-more-answered-by-nirmala-sitharaman/2379040/>;



The following is clearly not an exhaustive list but indicates the issues and concerns to be addressed in the proposed cryptocurrency legislation:

1. ‘Cryptocurrency’ is a misnomer and cannot be Legal Tender:

One of the inalienable sovereign rights is the issuance of currency and its regulation and control. That currency which a Nation State issues is categorized as ‘Legal Tender’. Cryptocurrencies issued, circulated and moderated / controlled by private parties cannot therefore be categorized as legal tender (Nappinai. N. S. (2017)¹⁸).

There appears to be some confusion with respect to issuance of a digital currency by a Nation, as opposed to paper currency. For instance, even when reports surfaced of Estonia issuing its own cryptocurrency ‘Estcoin’, the objections against the same was the threat it posed to the adaptation and usage by Estonia of the Euro. In the case of Estonia, which is part of the European Union (“EU”) and consequently bound by the terms thereof, there is certainly distinction between the usage of Euro as the paper currency and of ‘Estcoin’, being still a digital currency issued by a Nation but not having the rights of legal tender or fiat currency.

The situation would be different in India, which is within its rights to issue the rupee either as paper currency or as digital currency, with slight modifications, if required, to existing legal frameworks. Any such digital currency would still be pegged to the paper currency and the value thereof would remain the same. Any other

¹⁸ Refer for a detailed discussion: Nappinai. N. S. (2017). Technology Laws Decoded. LexisNexis.



option or alternative (i.e., of either allowing cryptocurrencies issued by private entities to be used as legal tender or even allowing India's own 'fedcoin' (or sovereign issued cryptocurrency) value to be pegged differently than the paper currency) would gravely jeopardize economic interests and possibly National Interests of India.

2. Usage as a 'Payment System' not amounting to legal tender then becomes the next issue.

Payments & Systems Act, 2007 (as amended) and RBI circulars forms the bedrock of regulations pertaining to payment systems. Be it a bank or private players, when an instrument is being used for effecting payments, RBI becomes the regulator and that bank or entity, which RBI permits may issue instruments for facilitating payments. These could be in the form of credit or debit cards or digital wallets that facilitate digital payments.

Several stakeholders form part of the digital payments milieu including payment gateways, payment aggregators, NPCI and its UPI enabled payments being some significant developments. The legal position taken with respect to payment aggregators and RBI's role in UPI enabled payments appears specious but the same not being part of the present discussion are not delved into in detail herein.

Whether cryptocurrencies may be deemed to be payment instruments and allowed to be used for effecting payments, in



similar fashion to a digital wallet becomes the next issue to be addressed whilst deciding on a legal framework for cryptocurrencies.

Cryptocurrencies with their blockchain enabled process of maintaining each and every piece of data pertaining to the entire history of a block; with its characteristics of certainty, immutability and transparency may be considered a viable option for being utilized as a payment system.

All payment instruments are pegged to the legal tender of the Nation it operates within. If cryptocurrencies are to be treated as a payment system, the first issue therefore would be on whether it is pegged to a legal tender and the manner in which it is being done. Cryptocurrencies titled 'Stable Coins' for instance, attempts to remove the stigma of absence of underlying value for cryptocurrencies, by pegging it to a sovereign issued legal tender or currency such as the US Dollar or Euro. The name derives from the purported stability against volatility that such pegging to fiat currency is expected to give to 'Stable coins'.

Permitting, in a limited manner, such 'Stable Coins' may be a feasible option for India to explore. There are several issues to be resolved though before any such move is undertaken. There is likely to be a huge impact on banking processes and circulation of money, as Stable coins still seek to replace paper currencies and digital transactions through banking and permitted channels. There is also a lot of leveraging that it adapts to buttress its value through



arbitraging multiple currencies. Consequently, RBI's ability to regulate and stabilize the value of the Indian Rupee is bound to be affected. Issues of anonymity and misuse online remains with usage of Stable Coins. These are but some issues to be resolved apart from the fact that Stable Coins are also privately issued and hence subject to contractual terms that may have substantial impact on the digital payment frameworks.

Apart from this are other options that some Nations have explored with respect to underlying value, such as Japan. It is imperative to study these options before deciding even on limited exposure qua cryptocurrencies.

3. Regulation v. Ban:

Banning, as a construct immediately brings up authoritarianism and consequent resistance and opposition thereto. Regulation itself was considered a bad word by the crypto enthusiasts, who believed that their utopian dream of an unregulated world in ether was the best option.

India is faced with many questions when it evaluates the construct of a 'ban'. Changing this narrative to regulation may be a first step in diluting opposition and also to better explain and implement the process. For instance, when RBI says that only those entities that are registered with it and comply with the processes mandated, it can perform as a payment system. No one therefore believes or claims that all other entities are "banned" from being a payment



system. The narrative is automatically changed from a ban to permission. This is one option for India to explore, whilst emphatically reiterating that it does consider or permit cryptocurrencies to claim to be legal tender or a payment system.

Regulation then brings it to the next step of permitting any form of cryptocurrency within India, be it as a payment system or security, as is discussed hereunder. Understanding and delineating tokens from cryptocurrencies and deciding on whether tokens should be permitted? to what extent if any may tokens be permitted? can tokens be used as a payment system for instance within a blockchain? or to trade on? – these amongst others are questions that would have to be answered before deciding on regulatory frameworks.

China's example is oft quoted to explain why a ban may not be feasible. Yet China's step of banning cryptocurrencies and trading in them also indicates that whilst there may be circumventions, there would also be substantial reduction in any action violating the laws of the land. Deterrence has certainly worked in the China model. Any breach or violation may also be correlated to the authoritarian regime and the need for some sections of society to circumvent the same. This is not permission to violate but indicates the possibilities for the breach.

In any event, impossibility of enforcement is always a basis for evaluating either a legislation or order. Difficulty in enforcement is however not a ground. In case of cryptocurrencies, it may be more



the latter than the former. Hence evaluating the level of difficulty and using technology enabled processes along with a compliance framework may better assist in enforcing restrictions. For, restrictions in law, are permissible and not considered disproportionate.

4. Cryptocurrencies, as Securities:

Substantially, most Nations have taken this route of treating cryptocurrencies as Securities and regulating them as such. Doing so however raises many issues or concerns.

a. Underlying value of cryptocurrency:

Often, the very trading in cryptocurrencies creates the value. There is therefore no intrinsic value to the 'asset' traded and in fact, apart from existing in ether, there is no 'asset' class. There are intangible assets of course, such as those protected under copyrights, trademarks or patents. In each such instance, statutes provide them with a legal right and they are able to build intrinsic value pursuant thereto.

There are therefore arguments on crypto assets being built in similar fashion including creation of value. There is also the argument that a cryptocurrency is nothing but a transfer of value and not of money or payment. However, the issue to be addressed in each of these cases is of what exactly builds or forms such value. Where there is no answer to the



same except for trading or investments whereby legal tender gets converted to cryptocurrency, it becomes imperative to evaluate the sustainability of the same. Further in the case of bitcoins there is no accountability for such value considering that the promoter is still a pseudonym.

With many a cryptocurrency being floated and promoted, including through celebrity endorsements, the real issue would be of understanding the milieu and addressing the same. Mere fear or concern would not suffice to address these complexities.

b. Tokens v. cryptocurrencies:

Apart from addressing the issue of underlying value for cryptocurrencies, it is imperative to identify and delineate cryptocurrencies from tokens that may derive their value from underlying properties, assets or in its utility.

Tokens would also fall within the category of securities and may be addressed under the same regulatory framework. Hence it is imperative to decide on and then provide the regulatory framework for the same.

c. Tokens & Non – Fungible Tokens



Cryptocurrencies are characterized by their fungibility. This also adds the anonymity layer. NFTs have become the new rage with many virtual properties including crypto-kitties being sold, traded on and transferred through use of NFTs. Celebrities including sports persons have used the methodology of NFTs to create rights including on body parts such as a forearm, which may be used by owners of the NFTs to create endorsements, art or just create value using the means of trading.

Regulations for NFTs have become intrinsically intertwined with the cryptocurrency narrative and again, the structure, format and utilization of NFTs requires a deep – dive before deciding on a regulatory framework.

d. Cryptocurrency Exchanges, Crypto Funds, ICOs & other Derivatives

Crypto exchanges have contributed most to the exponential growth in value of cryptocurrencies and also for percolation of interest in and investments into cryptocurrencies globally. In India, it was this category of entities that were most affected by the RBI's Circulars of 2018 that injunctioned banks and payment systems from transacting for cryptocurrencies and also drove the narrative in the *IAMAI v. RBI* case. It was also this form of entity that benefitted



the most from the decision of the Supreme Court in the above case¹⁹.

Crypto Exchanges treat cryptocurrencies clearly, as securities and have been indulging in rampant trading and transactions. The money flow for and through such exchanges have prompted many small economies to make their territories very crypto friendly. The earnings and taxation benefits are touted as positive elements to support permissibility of cryptocurrencies within jurisdictions.

The issue before India would be, assuming it is willing to treat cryptocurrencies, as securities, would be to not only regulate the exchanges but also decide on what type of cryptocurrencies may be allowed to be traded. For instance, would India want the issuer of a cryptocurrency or token to be accountable for liquidity and recovery of value allegedly built into such a cryptocurrency or token? In what manner would such a legal framework be implemented? What are the thresholds that the regulator would wish to place or safety measures for investor protection? These are but some of the questions that would require to be addressed in the proposed legislation and regulatory framework.

The above would apply *pari passu* to other derivatives such as Crypto Funds, Neo Banking and creation of cryptocurrencies not only in ether but also anchored in ether

¹⁹ Supra;



For instance, there are proposals to use space as the location for launch of a global cryptocurrency such that it would defy regulations by any single Nation. These sovereignty defying possibilities have to be anticipated and addressed in advance.

Initial Coin Offerings or ICOs aped the Initial Public Offering concept. Again in the absence of a legal or regulatory framework, many have made hay and in some instances at the cost of investors. When the issue of dealing with cryptocurrency, as a security is being decided, each of these issues, concerns and possibilities have to be noted and addressed through a dynamic and sustainable legislation. All of this of course is if indeed India decides to allow for such transactions in crypto assets.

5. Blockchain *de hors* cryptocurrency

One of the arguments being raised is that the technology underlying cryptocurrencies cannot function without the help of cryptocurrency. It is indeed ironic and to some extent circular that cryptocurrency would not have existed had it not been for blockchain and now cryptocurrency is being touted as a necessary component of blockchain use cases.

Cryptocurrency itself is but a blockchain use case. That the payment mechanism for blockchain to work was built into the



process helped in the evolution of the permissionless and decentralized distributed ledger mechanism.

Most use cases rely on permissioned and private blockchain uses, which obviates the need for cryptocurrencies, as an incentive process for consensus frameworks. Tokens are the other means to make blockchain use cases function. This aspect is another concern that would have to be addressed in the proposed legislation so that the Government's stated intent of supporting the technology i.e., blockchain is supported even if the Government decides on banning or refusing to permit cryptocurrencies within India.

6. Taxation

Death and the taxman are constants in our lives or so the saying goes. It is irrelevant how the Government may decide to regulate or permit or ban cryptocurrencies. If there is income, gains or a transaction inviting indirect taxes, the same can and ought to be enforced. Even if the Government were to hold some transaction to be illegal the same does not stop the mandate for payment of or recovery of taxes. In such circumstances, even under the present circumstances taxation is permissible. Some instances are given to highlight the possibilities:

- a. Income tax in case of earnings through mining;
- b. Capital gains for trading gains;
- c. GST to be evaluated for crypto exchanges and traders;
- d. Gift and wealth tax in case of gifting or inheritance / holdings;



The above are some of the possibilities that the global regulatory frameworks also indicate such as those in Canada, USA or Singapore. These again may be clarified through regulatory mechanisms to ensure certainty and uniformity in its application. Again the proposed legislation may not be necessary for this purpose. Mere regulatory actions may suffice.

7. Who will Regulate?

Deciding who would bell the cryptocurrency cat may be a difficult decision to make. The first step for India would be to decide on its proposed course of action i.e., banning, regulation or a hybrid model for cryptocurrency. The next step would be to identify how and in what manner a legal or regulatory framework may be implemented.

RBI would indeed have primacy when it comes to regulating cryptocurrency, as a payment system. Even in terms of issuance, control and regulation of a National cryptocurrency would vest with RBI.

Dealing with cryptocurrency, as a security would entail regulation by the Securities & Exchange Board of India ('SEBI'). This would apply not only for trading but also for setting up of crypto exchanges or ICOs or other derivatives of cryptocurrencies.



Issues of cross border trading, foreign currency earnings, utilization of foreign currency for dealing in cryptocurrencies again would be under RBI's regulatory vision.

Depending on what and how cryptocurrency is being used other regulators may be involved. For instance, donations through cryptocurrency from foreign entities would still attract the provisions of Foreign Contribution Regulation Act, 1976 ('FCRA').

Hence a single regulator is not feasible if cryptocurrency is likely to continue in any form within India. Each regulator would have to evaluate the impact of cryptocurrencies and token within their framework and ecosystems to evaluate the regulatory framework needed.

8. Law Enforcement – PMLA, Anti – Terrorism Drugs & the Darknet:

Cryptocurrency usage in the darknet was substantially the basis for its creation i.e., to enable anonymous or pseudonymous usage without using a Government issued payment system. Today, from cybercrime itself creating need for cryptocurrencies, there are cybercrimes committed against cryptocurrencies too, such as the hacking and theft of cryptocurrencies from wallets etc., It is imperative to evaluate and apply existing laws to cope with such evolving threats from and to cryptocurrencies and also to identify and formulate additions where necessary. The fear of misuse alone



however would be a very specious basis for banning. The sovereign right argument is the better and stronger foundation for any such stringent action.

Law enforcement however requires to be better equipped to deal with the new forms of crimes involving cryptocurrencies.

9. Conclusion

Decisions on India's stand qua cryptocurrency cannot be unidimensional. It is nuanced and therefore outcomes and solutions also requires a nuanced approach. The narratives of banning have been equated to the 'off with their heads' syndrome, with the very stakeholders who are most affected, i.e., investors in cryptocurrency, being instigated to oppose any form of restraint or regulation.

Legal and regulatory frameworks also cannot be built on assumptions that wrongs will be righted later or in a staggered manner. Unfortunately, the first RBI circular cautioning investors was of 2013 and India is still grappling with the form, structure and its very position qua cryptocurrencies. Hence certainty, uniformity and a nuanced approach to law making would be the best next step for India. It is important that India takes a definitive stance, whatever that may be and do so immediately.
