



Presentation by

Vijay Pal Dalmia, Advocate
Supreme Court of India & Delhi High Court
Partner Vaish Associates Advocates

Email id: vpdalmia@vaishlaw.com

Mobile No.: +91 9810081079

Linkedin: <https://www.linkedin.com/in/vpdalmia/>

Facebook: <https://www.facebook.com/vpdalmia>

Twitter: @vpdalmia

Current News

Blockchain & Cryptocurrencies

<https://www.hindustantimes.com/business/govt-to-ban-cryptocurrencies-make-way-for-india-s-own-digital-currency-101637682873353.html>

<https://timesofindia.indiatimes.com/business/india-business/govt-lists-bill-in-winter-session-to-ban-all-private-cryptocurrency/articleshow/87877213.cms>

Govt to ban cryptocurrencies, make way for India's own digital currency. There's a fine print


A Lok Sabha bulletin released on Tuesday said The Cryptocurrency & Regulation of Official Digital Currency Bill, 2021, will "allow for certain exceptions to promote the underlying technology of cryptocurrency and its uses."



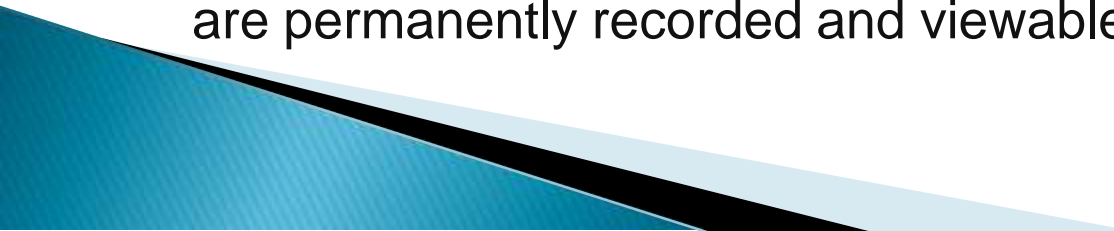
NEW DELHI: The government on Tuesday listed the Cryptocurrency and Regulation of Official Digital Currency Bill for introduction during the winter session of [Parliament](#), which will seek to "prohibit all private cryptocurrencies" but provide for certain exceptions "to promote the underlying technology" and "its uses".

The proposed bill — which will also put in place a framework for [Reserve Bank of India](#) (RBI) to create an official digital currency — comes amid a raging debate over whether the government should ban private cryptocash or regulate them like shares and bonds.

Blockchain & Cryptocurrencies

- ▶ Blockchain is a Technology and is a blessing to the world.
 - ▶ Blockchain is a revolution.
 - ▶ Cryptocurrencies like BITCOINS, Ethereum and Dogecoin etc. are based on Blockchain.
 - ▶ Cryptocurrencies are based on Blockchain.
 - ▶ Blockchain & Cryptocurrencies are TWO different things.
- 

What is Blockchain?

- Blockchain is a type of shared database that differs from a typical database in the way it stores information; blockchains store data in blocks that are then linked together via cryptography.
 - As new data comes in it is entered into a fresh block. Once the block is filled with data it is chained onto the previous block, which makes the data chained together in chronological order.
 - Different types of information can be stored on a blockchain but the most common use so far has been as a ledger for transactions.
 - In Bitcoin's case, blockchain is used in a decentralized way so that no single person or group has control—rather, all users collectively retain control.
 - Decentralized blockchains are immutable, which means that the data entered is irreversible. For Bitcoin, this means that transactions are permanently recorded and viewable to anyone.
- 

Blockchain

- ▶ There are no specific laws relating to Blockchain in India.
- ▶ Under the Indian laws Blockchain is governed by the general laws of India including laws relating to contracts.
- ▶ Blockchain Technology is being adopted practically by all, i.e. Government and Private Parties including Banks.

Blockchain Applications

Money transfers, Financial exchanges, Lending Insurance, Real estate,
Secure personal information

Voting, Government benefits, Securely share medical information

Artist royalties, Non-fungible tokens (NFT), Logistics and supply chain
tracking, Secure Internet of Things networks, Data storage


Cryptocurrencies



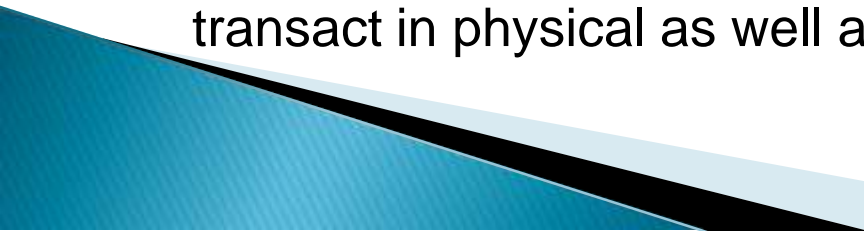
?Cryptocurrencies?

- ▶ Cryptocurrencies/Crypto Assets/ Cryptos are not FIAT currencies.
- ▶ Fiat Currency is different from Cryptocurrencies.
- ▶ Virtual Currencies like Bitcoins are not legal currencies or fiat currency, issued by any Government, and in fact, these are not a currency at all.
- ▶ Virtual Currencies like Bitcoins are nomenclature for various “computer algorithms”, which are being used to generate codes by private parties and traded over the internet.
- ▶ Most of the currencies in the world including the currency of India i.e. rupee, are Fiat currencies. Fiat money is the currency that a government has declared to be legal tender, but which may not be backed by any physical commodity like Gold.


Cryptocurrencies Explained

- ▶ The prices of such currencies are
 - arbitrary
 - without any backing of any government and geographical restrictions.
 - ▶ Virtual Currencies like Bitcoins are
 - State Free,
 - Border Free and
 - Control Free.
 - ▶ removes the need of a trusted third party such as a governmental agency, bank, etc.
 - ▶ A Virtual Currency like Bitcoin, is a stateless digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank like the Reserve Bank of India, rendering it immune from government interference.
- 

Cryptocurrencies Explained

- ▶ Unlike a dollar or rupee, Virtual Currencies like Bitcoins have no physical form, and are not a legal tender, and are not backed by any government or any other legal entity, and their supply is not determined by a central bank.
 - ▶ The Virtual Currencies like Bitcoins, are private, and there are no traditional financial institutions involved in transactions.
 - ▶ The networks of Virtual Currencies like Bitcoins, are completely decentralized, with all parts of transactions performed by the users of the system.
 - ▶ Unlike fiat currencies, whose value is derived from regulation or law and underwritten by the state, illegal Virtual Currencies like Bitcoins, derive their value from the simple principles of supply and demand, as these have no intrinsic value or backing, and their value depends entirely on what people are willing to trade for them.
 - ▶ Unlike usual forms of currency, it is in virtual form and may be used to transact in physical as well as online transactions.
- 

Cryptocurrencies Explained

- ▶ Bitcoin first appeared in January 2009, the creation of a computer programmer using the pseudonym Satoshi Nakamoto. His invention is an open source (its controlling computer code is open to public view), peer to peer (transactions do not require a third-party intermediary such as PayPal or Visa), digital currency (being electronic with no physical manifestation).
- 


Indian Legislations–Impact

At the moment, there is no express law that classifies virtual currencies as a good, service, security, commodity, derivative or currency


Some of the laws which have a direct bearing on the legal aspects relating to illegal Virtual Currencies like Bitcoins, are as under:

- ▶ **The Constitution of India, 1950;**
 - i. Reserve Bank of India Act, 1934,**
 - ii. The Foreign Exchange Management Act, 1999 (“FEMA”);**
 - iii. The Reserve Bank of India Act, 1934 (“RBI Act”);**
 - iv. The Coinage Act, 1906 (“Coinage Act”);**
 - v. The Securities Contracts (Regulation) Act, 1956 (“SCRA”);**
 - vi. The Sale of Goods Act, 1930 (“Sale of Goods Act”);**
 - vii. The Payment and Settlement Systems Act, 2007 (“Payment Act”).**
 - viii. Indian Contract Act, 1872 (“Contract Act”).**

Cryptocurrencies and Constitution of India

- ▶ Entry 36 and 46 of List I of the Seventh Schedule of the Constitution states that the Central Government shall have the power to legislate in respect of currency, coinage, legal tender, foreign exchange and bills of exchange, cheques, promissory notes and other like instruments respectively,
- 

Cryptocurrencies and Reserve Bank of India (RBI)

- ▶ The Reserve Bank of India (RBI), which was established on April 1, 1935 in accordance with the provisions of the Reserve Bank of India Act, 1934, and since its nationalization in 1949, the Reserve Bank is fully owned by the Government of India.
 - ▶ The prime purpose of the establishment of the Reserve Bank of India as per its Preamble was to regulate the issue of Bank Notes and keeping of reserves with a view to secure monetary stability in India and generally to operate the currency and credit system of the country to its advantage.
- 

Cryptocurrencies and Reserve Bank of India (RBI)

- ▶ Section 22 of the [Reserve Bank of India Act, 1934](#) mandates that the RBI shall have the sole right to issue bank notes in India, and may, issue currency notes of the Government of India, and the provisions of this Act shall be applicable to bank notes, unless a contrary intention appears, and apply to all currency notes of the Government of India issued either by the Central Government or by the RBI in like manner as if such currency notes were bank notes.
- ▶ Accordingly, Virtual Currency like Bitcoin are not bank notes, as such is not legal tender in India and further, no such Virtual Currency like Bitcoin has not been notified by the RBI.

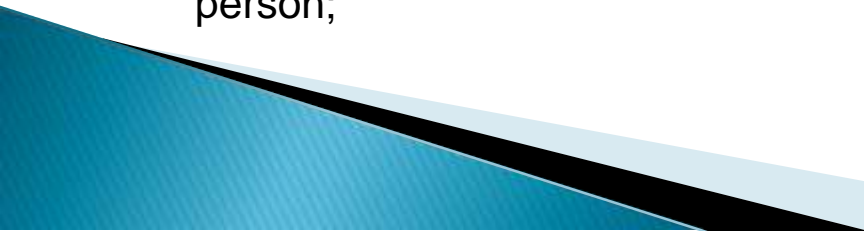
Currency

- ▶ The term 'Currency' has been defined under Section 2(h) of the Foreign Exchange Management Act, 1999 to include all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank.
- ▶ It is clear that Bitcoin is not similar to any of the instruments mentioned in the definition, especially digital or virtual currencies. Section 2(m) of The Foreign Exchange Management Act, 1999, 'foreign currency' has been defined as any currency other than Indian currency.
- ▶ Under Section 2 (q) of FEMA, "Indian currency" means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934 (2 of 1934).
- ▶ Virtual Currencies like Bitcoin have not been designated by the government to be a legal tender, hence the same does not fall into the definition of currency.

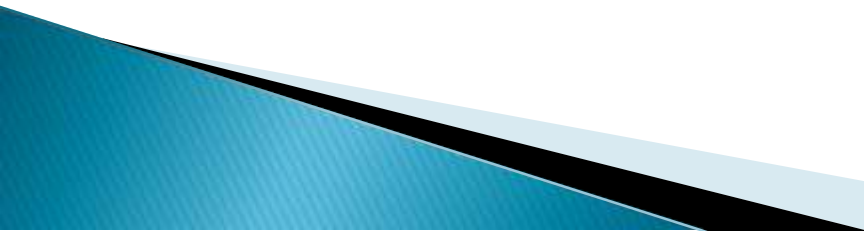
FEMA

- ▶ Under Section 2(i) of The Foreign Exchange Management Act, 1999 (FEMA), “currency notes” means and includes cash in the form of coins and banknotes, and this definition does not include Crypto Currency like Bitcoin, which are not issued either under the Coinage Act or Reserve Bank of India Act, 1934.


FEMA

- ▶ Under Section 3 of The Foreign Exchange Management Act, 1999, no person shall:
 - ▶ deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;
 - ▶ make any payment to or for the credit of any person resident outside India in any manner;
 - ▶ receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner. Explanation. For the purpose of the above, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorized person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorized person;
 - ▶ enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person. Explanation. - For the purpose of this clause, “financial transaction” means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt. deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;
- 

The Payment and Settlement Systems Act, 2007

- ▶ Under Section 18 of The Payment and Settlement Systems Act, 2007, RBI may, if it is satisfied that for the purpose of enabling it to regulate the payment systems or in the interest of management or operation of any of the payment systems or in public interest, it is necessary so to do, lay down policies relating to the regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and give such directions in writing as it may consider necessary to system providers or the system participants or any other person either generally or to any such agency and in particular, pertaining to the conduct of business relating to payment systems.
 - ▶ Under Section 19 of the Payment and Settlement Systems Act, 2007, every person to whom a direction has been issued by the Reserve Bank under this Act shall comply with such direction without any delay.
 - ▶ Reserve Bank of India has a wide power to lay down a policy regarding the usage of Virtual Currency like Bitcoin and issue any directions to any person, including Bitcoin Operators to ban or control the operation of Bitcoins in India..
- 

Securities Contracts (Regulation) Act, 1956

- ▶ The term “securities” has been defined under Section 2(h) of the Securities Contracts (Regulation) Act, 1956 to include:
 - shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or another body corporate;
 - derivative;
 - units or any other instrument issued by any collective investment scheme to the investors in such schemes;
 - security receipt as defined in clause (zg) of section 2 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- 


Securities Contracts (Regulation) Act, 1956

- ▶ units or any other such instrument issued to the investors under any mutual fund scheme;
- ▶ any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;
- ▶ Government securities;
- ▶ such other instruments as may be declared by the Central Government to be securities; and
- ▶ rights or interest in securities.
 - All of the above instruments have an underlying capital asset, however there is no underlying asset in relation to illegal Virtual Currencies like Bitcoins.
- ▶ virtual currencies are unlikely to attract regulations relating to securities.

Contract Act, 1872

- ▶ Section 23 of the Indian Contract Act, 1872, defines what consideration and objects are lawful, and what is not.
- ▶ The consideration or object of an agreement is lawful, unless, it is forbidden by law, or is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.
 - In each of these cases, the consideration or object of an agreement is said to be unlawful.

PMLA

- ▶ Obligations of Banking Companies, Financial Institutions and Intermediaries under Section 12 of the Prevention of Money Laundering Act, 2002 (PMLA) for anti-money laundering actions for reporting the transactions, are required to be complied with.
- 

KYC

- ▶ In the trade of Virtual Currencies like Bitcoins, (“Know Your Customer”) KYC Norms are also required to be followed.
- ▶ The Know Your Customer (KYC) Guidelines have been published by the RBI, as updated up to September 02 2016.
 - https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=11566
- ▶ Know Your Customer norms / Anti-Money Laundering Standards/ Combating of Financing of Terrorism /Obligation of banks under PMLA, 2002
 - https://m.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?Id=4354&Mode=0
- ▶ KYC Norms are the norms which have been set by the RBI that require banks to continuously monitor their customers' transactions, keep an up-to-date record of their identity, and take steps simply in case any of the transactions of a customer break from his or her usual pattern of behavior.
 - <https://www.mondaq.com/india/money-laundering/1025468/anti-money-laundering-legislation-in-india>
- ▶ Technically, KYC norms do not apply to crypto exchanges.

Companies (Acceptance of Deposits) Rules, 2014 (Deposits Rules)

- ▶ “Deposit” means an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period or otherwise, either in cash or in kind or in the form of a specified service, with or without any benefit in the form of interest, bonus, profit or in any other form.
- ▶ “Deposit” includes any receipt of money by way of deposit or loan or in any other form, by a company,
- ▶ Many cryptocurrencies involve the acceptance of money or other tokens.
- ▶ Companies Act and the Companies (Acceptance of Deposits) Rules, 2014 (Deposits Rules) specify when the receipt of money, by way of deposit or loan or in any other form, by a company would be termed a deposit, and also provides certain exemptions from its applicability.
- ▶ Any amount received in the course of business as an advance for the supply of goods or services would not be a deposit if such advance is appropriated against the supply of such goods or services within a period of 365 days.
- ▶ If a company is deemed to be accepting deposits, a variety of compliance steps under the Companies Act and its rules, along with RBI regulations, would be triggered.
 - <http://ebook.mca.gov.in/Childwindow1.aspx?pageid=18773&type=RU&ChildTitle=Chapter>
 - <https://egazette.nic.in/WriteReadData/2019/209476.pdf>

Cryptocurrencies as Commodities

- ▶ IF CRYPTOCURRENCIES ARE CLASSIFIED AS COMMODITIES, OPERATING AN EXCHANGE FOR TRADING SUCH VIRTUAL CURRENCIES MAY BE REGULATED AS A COMMODITIES EXCHANGE, WHICH CAN HAVE IMPLICATIONS UNDER INDIA'S REGULATION ON INWARD FOREIGN DIRECT INVESTMENT (FDI), THAT IS, THE CONSOLIDATED FDI POLICY CIRCULAR OF 2017 (FDI POLICY) AND THE FOREIGN EXCHANGE MANAGEMENT (TRANSFER OR ISSUE OF SECURITY BY A PERSON RESIDENT OUTSIDE INDIA) REGULATIONS, 2017.
- ▶ PRESENTLY CRYPTOCURRENCIES CAN NOT BE REGULATED AS COMMODITIES.

- https://dpiit.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17_1.pdf
- <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11161&Mode=0>

FDI in Cryptocurrencies

- ▶ Foreign exchange into and outside India is regulated under the Foreign Exchange Management Act, 1999 (FEMA).
- ▶ Dealing in cryptocurrencies including import and export are subject to import and export regulations under FEMA.
- ▶ Cross border transitions of cryptos like sending cryptos to exchanges outside India or bringing cryptos to Indian exchanges from exchanges out of India, will be it by FEMA.
- ▶ On Import of cryptocurrencies “Master Direction – Import of Goods and Services” apply. https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10201
- ▶ On Export of cryptocurrencies “Foreign Exchange Management (Export of Goods & Services) Regulations, 2015” apply. https://www.rbi.org.in/scripts/BS_FemaNotifications.aspx?Id=10256

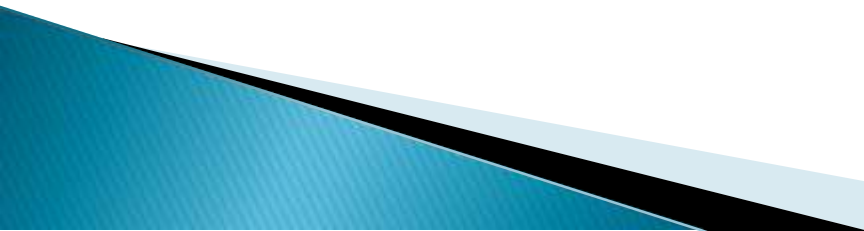
Taxation of Cryptocurrencies

Direct & Indirect Tax

- https://www.mondaq.com/india/tax-authorities/1023174/taxation-of-cryptocurrencies-in-india#_ftn9

- ▶ Any transaction involving cryptocurrency can be analyzed from two viewpoints - income and expenditure.
- ▶ The nature of the transaction nature and parties to the transaction would decide if it may be taxable under the Income Tax Act, 1961, or The Central Goods and Services Tax Act 2017, and other laws.

Cryptocurrency & Direct Tax

- ▶ Currently there is no certainty regarding the taxation of cryptocurrency nor any disclosure requirement about the income earned issued by the Income Tax Department.
 - ▶ If cryptocurrency is considered as 'currency', it would not be susceptible to tax under the IT Act.
 - ▶ If cryptocurrency is considered as goods/property, then it would be either covered within the charging provision of 'Profit and Gains from Business and Profession' or 'Income from Capital Gains', depending upon its use for business/profession or not.
 - ▶ The ambit of the word 'income' is not restricted to the words 'profits' and 'gains' and anything which can appropriately be designated as 'income' is liable to be taxed under the IT Act, unless expressly exempted.
- 

Cryptocurrency & Direct Tax

► Treatment under the head 'Capital Gains'

- Sec 2(14) of the IT Act defines a capital asset as "property of any kind held by the assessee whether or not connected with his business or profession". This definition of 'capital asset' provided is widest in itself and covers all kinds of property except those expressly excluded under the Act. Therefore, any gains arising out of the transfer of cryptocurrency may be considered as capital gains, if they are held for investment.

► Taxability under 'Profit and Gains from Business and Profession'

- The tax treatment of cryptocurrencies when held as 'stock in trade' is not the one which faces major difficulties as the issues arising while treating it as capital gains do not arise when such cryptocurrencies are held in furtherance of business activity.
- Under Sec 2(13) of the IT Act, the definition of 'business' is inclusive, and comprises of "trade, commerce or manufacture or any adventure or concern of such nature."¹¹ Moreover, any continuous activity like trade in cryptocurrencies is included within this definition, and profits realized are taxable thereunder, chargeable under Sec 28 of the IT Act.
- The profits may not necessarily be in the form of money, they are taxable even if they are 'in-kind'.

Vaish Associates Advocates

Contact Us

New Delhi

1st, 9th & 11th floors, Mohan Dev Building, 13 Tolstoy Marg, New Delhi - 110001, India
Phone:- +91-11-42492532

Vijay Pal Dalmia, Advocate
Supreme Court of India & Delhi High Court
Partner Vaish Associates Advocates

Email id: vpdalmia@vaishlaw.com
Mobile No.: +91 9810081079

LinkedIn: <https://www.linkedin.com/in/vpdalmia/>
Facebook: <https://www.facebook.com/vpdalmia>
Twitter: @vpdalmia

Mumbai

106, Peninsula Center, (Behind Piramal Chambers-
Income-tax Office) Dr S.S. Rao Road, Parel, Mumbai-
400012, India
mumbai@vaishlaw.com
Phone: +91-22-42134101

Bengaluru

Unit No. 305, 3rd Floor
Prestige Meridian-II, Building No. 30
M.G. Road, Bengaluru - 560001 (India)
bangalore@vaishlaw.com
Phone: +91 80 40903588/89