

## Detangling The Muddled Status Of Cryptocurrency In India

written by Sindhuja Kashyap | June 7, 2021



Virtual Currencies ("VC") and other mediums of cryptocurrency have witnessed an increase of interest from among their users and traders in the past year wherein millennials and gen-z are finally ready to take chances with the cryptocurrency market with the intent to generate gains. However, despite the increasing interest Indians have shown in VCs, the Reserve Bank of India has on several occasions in its capacity as the regulator of the financial market, displayed an attitude of cynicism towards the concept of cryptocurrency. This article focuses on tracing the journey of VCs in India through the years and its current legal standing in the nation as of the date of publication of this article.

### The Dawn of VC - Status of Cryptocurrency

The VC debate sparked off when a case was filed before the Supreme Court<sup>[1]</sup> seeking to regularise the use of VCs in the country. The Supreme Court directed the RBI and the other concerned ministries to elucidate their standpoint of VCs and enact a bill in furtherance to their stance.

### Admonitory Notices for Public

On December 24, 2013, RBI issued a public notice cautioning the users, holders, and traders of VCs, about the potential financial, operational, legal, customer protection and security-related risks.<sup>[2]</sup> Further, RBI clarified that while there was no approval/permit obtained by entities carrying out activities of creation, trade or usage of VCs, the use of VCs as a medium for payment was not authorised per se by any authority as well. RBI highlighted a few especially important risks that were involved in dealing with VCs, namely:

- Since VCs are digital assets, they are more prone to risks or losses arising out of hacking, malware, compromised credentials etc. Since the digital forms/wallets in which such VCs are stored are not per se regulated/traded/stored at any government or government-recognised platforms, any loss of such credentials along with VCs related to that account cannot be recovered.
- Due to VCs and their trading platforms being unregulated, disputes/issues related to such platform are also unestablished.
- Due to the volatility in the value of VCs, users are more exposed to higher potential risks than usual.
- VCs being traded on various platforms are subject to varied, unclear legal

jurisdictions. Therefore, the traders/users are not only exposed to financial risks but legal risks as well.

- Absence of information of counterparties in such peer-to-peer anonymous/pseudonymous systems could subject the users to unintentional breaches of anti-money laundering and combating the financing of terrorism (AML/CFT) laws.

Therefore, on the aforementioned grounds, RBI cautioned the public against using/trading VCs.

On February 01, 2017[3], RBI further advised that it had not issued any licence/permits to any entity for the purpose of operating any scheme or deal with VCs. Therefore, any person dealing with VCs shall be doing it at their own risk. This was further reiterated by RBI vide its public notice published on December 05, 2017[4].

On realising the mushroom growth of the usage and trading of VCs in the country, RBI released a sternly worded and prohibitive circular dated April 06, 2018[5] wherein RBI stated that with immediate effect, entities regulated by the RBI were verboten from dealing in and/or providing services for facilitating any person/entity dealing with or settling VCs.

Broadening the scope of restrictions imposed by RBI, the circular clarified that the restricted services included 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. Further, it was stated that RBI-regulated entities already providing such services shall terminate relationships with any entities who deal in cryptocurrencies within 3 months from the date of the circular.

Tussle Before the Court

The Circular dated April 06, 2018, was challenged before the Supreme Court in the case of *Internet and Mobile Association of India v. Reserve Bank of India*[6] where the authority of the RBI to issue such a circular was challenged. It was also alleged that RBI was violating the right to practice any trade under Article 19(1)(g) of the Indian Constitution.

The Supreme Court, while analysing the evidence and arguments submitted before it, clarified that while a cryptocurrency did not essentially qualify as a legal tender to be regulated by RBI still constituted as digital representations of value and had the potential of becoming a store of value, act as a unit of account and be a medium of exchange. Therefore, in the opinion of the apex court, RBI had the power to regulate cryptocurrencies. However, on the question of the validity of the circular, the apex court also stated that the RBI failed to provide substantial empirical data on the actual harm suffered by entities regulated by RBI on account of such cryptocurrencies. Therefore, the Circular was set aside on March 04, 2020.

Present Legal Validity of VCs

Post the circular being set aside by the Apex Court, the validity of cryptocurrencies is still ambiguous. While it is not per se banned or prohibited, the same is neither regulated in the country. On March 26, 2021, vide a circular<sup>[7]</sup>, the Ministry of Corporate Affairs had amended the Schedule III of the Companies Act, 2013 wherein as part of *Additional Information under the heading General Instructions for Preparation of Statement of Profit and Loss under Part II- Statement of Profit and Loss*, the companies are now mandated to also provide the following details related to cryptocurrencies or

VC:

*“(xi) Details and status of Cryptocurrency or Virtual Currency:*

*Where the Company has traded or invested in Cryptocurrency or Virtual Currency during the financial year, the following shall be disclosed: -*

*(a) profit or loss on transactions involving Cryptocurrency or Virtual Currency*

*(b) amount of currency held as at the reporting date,*

*(c) deposits or advances from any person for the purpose of trading or investing in Cryptocurrency/ virtual currency.”*

The abovementioned disclosure requirements came into effect from April 01, 2021, and it gives a hint as to the attempts made thus far to regulate VCs in the country.

Further, on May 31, 2021, RBI issued yet another clarificatory circular<sup>[8]</sup> directing the regulated entities to not place reliance on the circular dated April 06, 2018, wherein they were prohibited from dealing in or providing services to people dealing in VCs. However, to ensure caution, the RBI advised the regulated entities to continue carrying out customer due diligence processes in line with standard governing regulations such as Know Your Customer (KYC), AML, CFT and obligations of regulated entities under the Prevention of Money Laundering Act, (PMLA), 2002 in addition to ensuring compliance with relevant provisions under the Foreign Exchange Management Act (FEMA) for overseas remittances.

Further, the Government of India has also proposed the *Cryptocurrency and Regulation of Official Digital Currency Bill, 2021*,<sup>[9]</sup> (“Bill”) which aims to create a facilitative framework for the creation of the official digital currency to be issued by the RBI. Further, the Bill aims to prohibit all private cryptocurrencies in India while simultaneously aiming to permit certain exceptions to promote the underlying technology of cryptocurrency and status of cryptocurrency its uses.

#### Conclusion

On the above analysis, it is clear that the exact legal stance of the Government and the authorities are yet unclear and ambiguous. While they intend to regulate and prohibit it due to its volatile nature and unclear legal jurisprudence, they also intend to ensure that the citizens are safeguarded from the potential risks that it embeds in itself. The draft Bill aims to prohibit cryptocurrency in the country but keeping in view the rising ballyhoo around the trading of such virtual currency and its influence in the western market, it will be interesting to see how long Indian regulators can keep the citizens untouched by its influence with this draft Bill.

Further, while there seems to have been a lot of speculation around the legal validity of the trading platforms dealing in VCs, it would be safe to say for now that under no law such platforms are barred or prohibited from their functioning. However, they may soon face the wrath of the Bill and lead them to revise the status of their existence in the country.

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- <sup>[1]</sup> Dwaipayan Bhowmick v. Union of India & Ors. Writ Petition (Civ.) No. 1076/2017
  - <sup>[2]</sup> [https://rbi.org.in/Scripts/BS\\_PressReleaseDisplay.aspx?prid=39435](https://rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=39435)
  - <sup>[3]</sup> <https://rbi.org.in/scripts/NotificationUser.aspx?Mode=0&Id=11243#>
  - <sup>[4]</sup> Writ Petition (Civil) No.528 of 2018
  - <sup>[5]</sup> [https://mca.gov.in/Ministry/pdf/ScheduleIIIAmendmentNotification\\_24032021.pdf](https://mca.gov.in/Ministry/pdf/ScheduleIIIAmendmentNotification_24032021.pdf)

- [6] <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=12103&Mode=0>
- [7] <http://loksabhadocs.nic.in/bull2mk/2021/29012021.pdf>
- [8] Status Of Cryptocurrency

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