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Constitutional challenges to a complete cryptocurrency ban in India

The need then is to regulate, not ban, experts say

Geetika Srivastava | New Delhi February 17, 2021 Last Updated at 06:10 IST



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Mastercard, Bank of New York Mellon, Tesla — these are some of the world's biggest firms that have jumped aboard the crypto train. India, however, has decided to go a different route and plans to introduce a law banning trade in all cryptocurrencies — except for those issued by the government itself.

While legal experts agree with Minister of State for Finance Anurag Thakur when he says that existing laws to deal with cryptos are inadequate, they are divided over the constitutionality of a blanket ban. "I imagine we will see a constitutional challenge or two before the ink dries on the draft," says Mathew Chacko, partner, Spice Route Legal.

In 2018, the Reserve Bank of India (RBI) had issued a circular banning the provision of banking services to any entity using cryptocurrencies. This put an end to all crypto exchanges functioning in the country, even though

such a ban was not completely explicit. The Supreme Court (*Internet and Mobile Association of India vs RBI*), however, struck the circular down on grounds of proportionality.

Some legal experts say the fate of the Bill (Cryptocurrency and Regulation of Official Digital Currency Bill, 2021) hangs on the very same legal principle. The Doctrine of Proportionality entails that any public authority must maintain a sense of proportion between the goal it wants to achieve and the means it employs to achieve it. The SC, in *IAMAI*, stated the RBI had not looked into any “alternate or less intrusive measures”. Experts say the same may also be said about the Centre, and point out that the lack of consultations before introducing the ban may go against the government.

The need then is to regulate, not ban, they add.

Lawyers also say the differentiation between public and private cryptos is vague and confusing. “At present, there is no clear definition of what may constitute a ‘private’ crypto currency. Would Bitcoin and Ethereum be considered public cryptocurrencies as they are based on an open blockchain? That’s a question left unanswered,” says Dinkar Kalra, author of *Cryptocurrencies in India: Not Illegal, But Not Quite Legal*.

Among the reasons for the Centre’s hesitance towards cryptos is the apprehension that entities would use it to launder money or for terror financing schemes. “However, if the government wants to place a complete ban, it would have to bear the heavy burden of proving that most usage of crypto is for such schemes, which is almost an impossible task, given that many respectable institutions and businessmen have now invested (in it),” says Kalra.

“It is the equivalent of saying that the internet is nothing but email,” adds Anirudh Rastogi, partner at Ikigai Law, which represented crypto exchanges in *IAMAI*.

The S C Garg Committee on cryptocurrencies had earlier raised various concerns around such assets, holding the same view of a blanket ban. Among the issues raised was that cryptos do not have any of the benefits of fiat currency; and that they have a degree of pseudoanonymity.

To this, Jaideep Reddy, leader, Nishith Desai Associates, says the mere fact that a technology has a value-transfer role does not mean it has to be a fiat currency, such as in the case of gold or even a loyalty points system, which can coexist with other legal tender. To the issue of pseudoanonymity, he adds that law enforcement has been successfully able to trace offenders by analysing blockchain and de-anonymising transactions.

A matter of rights

There are multiple constitutional rights associated with cryptocurrencies, Reddy says. These include the right to trade in cryptos under Article 19 of the Constitution, which was recognised in the *IAMAI* case; the right to property, especially since the apex court has previously recognised crypto assets as “intangible property”; the right to free speech and expression, citing that US courts have previously said that the encryption software in its source code form must be protected by the First Amendment; and the right to equality guaranteed under Article 14 of the Constitution, which says no decision of the government can be arbitrary. Even though these rights are subject to “reasonable restrictions” under the Constitution, he says they must not be disproportionate in order for them to qualify the legal test.

In creating a Central Bank Digital Currency and banning all others, the Centre may be accused of being arbitrary, say lawyers.

Not all agree that the Supreme Court may strike down a blanket ban in its entirety. “To what extent can a court interfere in what the legislature in its wisdom has prohibited is a wait-and-watch game,” says Arjun Kant, principal lawyer at Arkadian Legal.

Dhruv Suri, partner, PSA Legal, adds, “My sense is that the government will eventually have to come up with a regulatory framework, given the impact of the financial instrument, because we cannot afford to lose the race in adopting the currency vis-à-vis other countries.”

Industry players are also thinking on similar lines.

“This doesn’t change the inevitability of crypto but forces Indians to miss out on the greatest wealth-creating opportunity in the last 10 years,” says Darshan Bathija, CEO of crypto exchange Vault. “It risks Indian entrepreneurs sitting on the side while the world changes the way money will work in the 21st century.”