REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No.528 of 2018

INTERNET AND MOBILE ASSOCIATION OF INDIA **.... Petitioner**

Versus

RESERVE BANK OF INDIA **... Respondent**

WITH

Writ Petition (Civil) No.373 of 2018

J U D G M E N T

V. Ramasubramanian, J.

1. THE STORY LINE:

1.1. Reserve Bank of India (hereinafter, "**RBI**") issued a "***Statement on Developmental and Regulatory Policies"*** on April 5, 2018, paragraph 13 of which directed the entities regulated by RBI (i) not to deal with or provide services to any individual or business entities dealing with or settling virtual currencies and (ii) to exit the relationship, if they already have one, with such individuals/ business entities, dealing with or settling virtual currencies (VCs).

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Date: 2020.03.04 13:32:29 IST
Reason:

1.2. Following the said Statement, RBI also issued a circular dated April 6, 2018, in exercise of the powers conferred by Section 35A read with Section 36(1)(a) and Section 56 of the Banking Regulation Act, 1949 and Section 45JA and 45L of the Reserve Bank of India Act, 1934 (hereinafter, "**RBI Act, 1934**") and Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007, directing the entities regulated by RBI (i) not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies and (ii) to exit the relationship with such persons or entities, if they were already providing such services to them.

1.3. Challenging the said Statement and Circular and seeking a direction to the respondents not to restrict or restrain banks and financial institutions regulated by RBI, from providing access to the banking services, to those engaged in transactions in crypto assets, the petitioners have come up with these writ petitions. The petitioner in the first writ petition is a specialized industry body known as '*Internet and Mobile Association of India*' which represents the interests of online and digital services industry. The petitioners in the second writ petition comprise of a few companies which run online crypto assets exchange platforms, the shareholders/founders of these companies and a few individual crypto assets traders. It must be stated here that the individuals who are some of the petitioners in the second writ petition are young high-tech entrepreneurs who have graduated from premier educational institutions of technology in the country.

Contents of the impugned Statement and Circular of RBI:

1.4. The Statement dated 05-04-2018 issued by RBI, impugned in these writ petitions, sets out various developmental and regulatory policy measures for the purpose of (i) strengthening regulation and supervision (ii) broadening and deepening financial markets (iii) improving currency management (iv) promoting financial inclusion and literacy and (v) facilitating data management. Paragraph 13 of the said statement which falls under the caption "**currency management**" deals directly with virtual currencies and the same constitutes the offending portion of the impugned Statement. Therefore, paragraph 13 of the impugned Statement alone is extracted as follows:

> ***13. Ring-fencing regulated entities from virtual currencies***
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> *Technological innovations, including those underlying virtual currencies, have the potential to improve the efficiency and inclusiveness of the financial system. However, Virtual Currencies (VCs), also variously referred to as crypto currencies and crypto assets, raise concerns of consumer protection, market integrity and money laundering, among others.*
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> *Reserve Bank has repeatedly cautioned users, holders and traders of virtual currencies, including Bitcoins, regarding various risks associated in dealing with such*

virtual currencies. In view of the associated risks, it has been decided that, with immediate effect, entities regulated by RBI shall not deal with or provide services to any individual or business entities dealing with or settling VCs. Regulated entities which already provide such services shall exit the relationship within a specified time. A circular in this regard is being issued separately.

1.5. The Circular dated 06-04-2018 deals entirely with virtual currencies and the prohibition on dealing with the same. This Circular is statutory in character, issued in exercise of the powers conferred by (i) the Reserve Bank of India Act, 1934 (ii) the Banking Regulation Act, 1949 and (iii) the Payment Settlement Systems Act, 2007. This Circular in its entirety is reproduced as follows:

Prohibition on dealing in Virtual Currencies (VCs)

Reserve Bank has repeatedly through its public notices on December 24, 2013, February 01, 2017 and December 05, 2017, cautioned users, holders and traders of virtual currencies, including Bitcoins, regarding various risks associated in dealing with such virtual currencies.

2. In view of the associated risks, it has been decided that, with immediate effect, entities regulated by the Reserve Bank shall not deal in VCs or provide services for facilitating any person or entity in dealing with or settling VCs. 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.

3. Regulated entities which already provide such services shall exit the relationship within three months from the date of this circular.

4. These instructions are issued in exercise of powers conferred by section 35A read with section 36(1)(a) of

Banking Regulation Act, 1949, section 35A read with section 36(1)(a) and section 56 of the Banking Regulation Act, 1949, section 45JA and 45L of the Reserve Bank of India Act, 1934 and Section 10(2) read with Section 18 of Payment and Settlement Systems Act, 2007.

2. THE SETTING

2.1. The Statement dated 05-04-2018 and the Circular dated 06-04-2018 of RBI, impugned in these writ petitions, were a culmination of a flurry of activities by different stakeholders, nationally and globally, over a period of about 5 years. Therefore, it is necessary to see the setting in which (or the backdrop against which) the impugned decisions of RBI were posited. While doing so, it will also be necessary to take note of the developments that have taken place during the pendency of these writ petitions, so that we have a close-up as well as aerial view of the setting.

2.2. It was probably for the first time that RBI took note of technology risks in changing business environment, in their Financial Stability Report of June 2013. Paragraph 3.60 of this report noted that globally, the use of online and mobile technologies was driving the proliferation of virtual currencies. Therefore, the report stated that those developments pose challenges in the form of regulatory, legal and operational risks. Box 3.4 of the said report dealt specifically with virtual currency schemes and it started by ***defining virtual currency as a type of unregulated digital money, issued and***

controlled by its developers and used and accepted by the members of a specific virtual community. It was declared in Box 3.4 of the said report that *"the regulators are studying the impact of online payment options and virtual currencies to determine potential risks associated with them"*.

2.3. In June 2013, the Financial Action Task Force (hereinafter, "**FATF**"), also known by its French name, *Groupe d'action financière*, which is an inter-governmental organization founded in 1989 on the initiative of G-7 to develop policies to combat money laundering, came up with what came to be known as "New Payment Products and Services Guidance" (NPPS Guidance, 2013). It was actually a Guidance for a Risk Based Approach to Pre-paid cards, Mobile Payments and Internet-based Payment Services. But this Guidance did not define the expressions 'digital currency', 'virtual currency', or 'electronic money', nor did it focus on virtual currencies, as distinct from internet based payment systems that facilitate transactions denominated in real money (such as Paypal, Alipay, Google Checkout etc.). Therefore, a short-term typologies project was initiated by FATF for promoting fuller understanding of the parties involved in convertible virtual currency systems and for developing a risk matrix.

2.4. On 24-12-2013, a Press Release was issued by RBI cautioning the users, holders and traders of virtual currencies about the potential financial, operational, legal and customer protection and security related risks that they are exposing themselves to. The Press Release noted that the creation, trading or usage of VCs, as a medium of payment is not authorized by any central bank or monetary authority and hence may pose several risks narrated in the Press Release.

2.5. On 27-12-2013, newspapers reported the first ever raid in India by the Enforcement Directorate, of 2 Bitcoin trading firms in Ahmedabad, by name, *rBitco.in* and *buysellbitco.in*. This was stated to be India's first raid on a Bitcoin trading firm and the second globally, after Federal Bureau of Investigation of the United States of America conducted a raid in October of the same year.

2.6. Thereafter, a report titled "Virtual Currencies – Key Definitions and Potential AML/CFT Risks" was issued in June 2014 by FATF, highlighting, both legitimate uses and potential risks associated with virtual currencies. What is of great significance about this FATF report is that it defined 2 important words. ***The FATF report defined 'Virtual currency' as a digital representation of value that can be traded digitally and functioning as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but not having a legal tender status.*** The FATF report also defined ***'Cryptocurrency'*** to mean ***a math-based, decentralised convertible virtual currency protected by cryptography by relying on public and private keys to transfer***

value from one person to another and signed cryptographically each time it is transferred.

2.7. Again, in June 2015, FATF came up with a “Guidance for a Risk Based Approach to Virtual Currencies”, which suggested certain recommendations, as follows:

A. Countries to identify, assess and understand risks and to take action aimed at mitigating such risks. National authorities to undertake a coordinated risk assessment of VC products and services that:

(1) enables all relevant authorities to understand how specific virtual currency products and services function and impact regulatory jurisdictions for Anti Money Laundering (‘AML’ for short)/Combating the Financing of Terrorism (‘CFT’ for short) treatment purposes;

(2) promote similar AML/CFT treatment for similar products and services having same risk profiles.

B. Where countries are prohibiting virtual currency products and services, they should take into account among other things, the impact a prohibition would have on local and global level of money laundering/terrorism financing risks, including whether prohibition would drive such payment activities underground, where they will operate without AML/CFT controls.

2.8. The FATF submitted a report in October 2015 on "Emerging Terrorist Financing Risks". The report was divided into four parts, under the captions (i) introduction (ii) financial management of terrorist organisations (iii) traditional terrorist financing methods and techniques and (iv) emerging terrorist financing threats and vulnerabilities. Even while acknowledging in part 3 of the report that the traditional methods of moving funds through the banking sector happens to be the most efficient way of movement of funds for terrorist organisations, the report acknowledged the emergence of new payment products and services in part 4 of the report. The report took note of different methods of terrorist financing, such as self-funding, crowd funding, social network fund raising with prepaid cards etc. Coming to virtual currencies, the report noted the following:

> *"Virtual currencies have emerged and attracted investment in payment infrastructure built on their software protocols. These payment mechanisms seek to provide a new method for transmitting value over the internet. At the same time, virtual currency payment products and services (VCPPS) present ML/TF risks. The FATF made a preliminary assessment of these ML/TF risks in the report Virtual Currencies Key Definitions and Potential AML/CFT Risks. As part of a staged approach, the FATF has also developed Guidance focusing on the points of intersection that provide gateways to the regulated financial system, in particular convertible virtual currency exchangers.*
>
> *Virtual currencies such as bitcoin, while representing a great opportunity for financial innovation, have attracted the attention of various criminal groups, and may pose a*

risk for TF (terrorist financing). ***This technology allows for anonymous transfer of funds internationally. While the original purchase of the currency may be visible (e.g., through the banking system), all following transfers of the virtual currency are difficult to detect**. The US Secret Service has observed that criminals are looking for and finding virtual currencies that offer: anonymity for both users and transactions; the ability to move illicit proceeds from one country to another quickly; low volatility, which results in lower exchange risk; widespread adoption in the criminal underground; and reliability.*

Law enforcement agencies are also concerned about the use of virtual currencies (VC) by terrorist organisations. They have seen the use of websites affiliated with terrorist organisations to promote the collection of bitcoin donations. In addition, law enforcement has identified internet discussions among extremists regarding the use of VC to purchase arms and education of less technical extremists on use of VC. For example, a posting on a blog linked to ISIL proposed using bitcoin to fund global extremist efforts." (emphasis supplied)

In support of the above conclusions, the report also indicated a case study, which concerned the arrest of one Ali Shukri Ameen, who admitted to have had a Twitter account with 4000 followers. He claimed to have used his Twitter handle to provide instructions on how to use a virtual currency to mask the provision of funds to ISIL. In an article, the link to which he tweeted to his followers, it was elaborated how jihadists could utilize the virtual currency to fund their efforts. (It must be noted that the report also took note of how prepaid cards and other internet-based payment services could also be used for terror financing).

2.9. The Bank of International Settlements (hereinafter, "**BIS**") which is a body corporate established under the laws of Switzerland, way back in the year 1930 pursuant to an agreement signed at Hague on 22-01-1930 and owned by 60 Central Banks of different countries including RBI, has several committees, one of which is "Committee on Payments and Market Infrastructure" (CPMI). This committee started taking note of digital currencies, while dealing with innovations in retail payments. This committee formed a sub-group within the CPMI Working Group on Retail Payments, to undertake an analysis of digital currencies. On the basis of the findings of the sub-group, CPMI of BIS submitted a report in November 2015 on Digital currencies. ***The sub-group identified three key aspects relating to the development of digital currencies one of which was that the assets featured in digital currency schemes, typically have some monetary characteristics such as being used as a means of payment, but are not backed by any authority***. In Note 1 under the Executive Summary of the said report, it was stated as follows: "although ***digital currencies typically do have some, but not all the characteristics of a currency, they may also have characteristics of a commodity or other asset. Their legal treatment can vary from jurisdiction to jurisdiction***." (emphasis supplied) Paragraph 4 of the said report dealt with the "implications for central banks, of digital currencies and their underlying decentralized payment mechanisms". In the said paragraph, the report indicated that *"digital currencies represent a technology for settling peer to peer payments without trusted third parties and may involve a non-sovereign currency"*. Though the report stated that ***the impact of digital currencies on the mainstream financial system is negligible as at that time, some of the implications indicated in the report may actually materialize if there was widespread adoption of digital currencies***. Two risks were noted in the report and they were consumer protection and operational risks. But in so far as distributed ledger technology is concerned, the report was positive. However, ***the report cautioned that a widespread substitution of bank notes with digital currencies could lead to a decline in central banks' non-interest paying liabilities and that if the adoption and use of digital currencies were to increase significantly, the demand for existing monetary aggregates and the conduct of monetary policy could be affected***. Nevertheless, the report stated that at present, the use of private digital currencies is too low for these risks to materialize.

2.10. In December 2015, the Financial Stability Report of RBI was issued, and it included a chapter on "Financial Sector Regulation". The same dealt with the challenges posed by technology-based innovations such as virtual currency schemes. In Box 3.1 of the said report, it was indicated that ***though the initial concerns***

over the emergence of virtual currency schemes were about the underlying design, episodes of excessive volatility in their value and their anonymous nature which goes against global money laundering rules rendered their very existence questionable. However, the report noted that the regulators and authorities need to keep pace with developments, as many of the world's largest banks started supporting a joint effort for setting up of private blockchain and building an industry-wide platform for standardizing the use of technology.

2.11. In December 2016, the Financial Stability Report of RBI came. It took note of the rapid developments taking place in Fin Tech (financial technology) globally and exhorted the regulators to gear up to adopt technology (christened as RegTech). Paragraph 3.22 of the said report identified the establishment of regulatory sandboxes[1] and innovation hubs for testing new products and services and providing support/guidance to regulated as well as unregulated entities. The report also noted that fast paced innovations such as virtual currencies have brought risks and concerns about data security and consumer protection on one hand and far reaching potential impact on the effectiveness of monetary policy itself on the other hand. The report took note of the fact that many central banks around the

[1] Regulatory sandbox refers to live testing of new products/services in a controlled/test regulatory environment.

world, had already started examining the feasibility of creating their own digital currencies, after fretting over them initially.

2.12. In January 2017, the Institute for Development and Research in Banking Technology (IDRBT) established by RBI in 1996 as an institution to work at the intersection of banking and technology submitted a Whitepaper on “Applications of blockchain technology to banking and financial sector in India”. While dealing with the applications of blockchain technology in chapter 3, the whitepaper also enlisted the advantages and disadvantages of digital currency. While the advantages indicated were (i) control and security, (ii) transparency and (iii) very low transaction cost, the disadvantages indicated were risk and volatility.

2.13. On 01-02-2017, RBI again issued a Press Release cautioning users, holders and traders of virtual currencies. Closely on the heels of this Press Release, the Government of India, Ministry of Finance, constituted, in April 2017, an Inter-Disciplinary Committee comprising of the Special Secretary (Economic Affairs) and representatives of the Departments of Economic Affairs, Financial Services, Revenue, Home Affairs, Electronics and Information Technology, RBI, NITI Aayog, and State Bank of India. The task of the Committee was to (i) take stock of the status of VCs in India and globally, (ii) examine the existing global regulatory and legal structures and (iii) suggest measures for dealing with VCs. The

Committee was mandated to submit a report within 3 months.

2.14. The report of the Inter-Disciplinary Committee was submitted on 25-07-2017 and it contained certain recommendations which are as follows:

> *(i)* ***A very visible and clear warning should be issued through public media informing the general public that the Government does not consider crypto-currencies such as bitcoins as either coins or currencies****. These are neither a legally valid medium of exchange nor a desirable way to store value. The Government also does not consider it desirable for people to use or invest in something which has no real underlying asset value.*
>
> ***(ii) A very visible and clear warning should be issued, through public media, advising all those who have been offering to buy or sell these currencies, or offering a platform to exchange these currencies, to stop this forthwith.***
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> *(iii)* ***Those who have bought these currencies in good faith and are holding these should be advised to offload these in any jurisdiction*** *where it is not illegal to do so.*
>
> *(iv)* ***All consumer protection and enforcement agencies should be advised to take action against all those who, despite these warnings****, indulge in buying/selling or offering platform for trading of these currencies, since the presumption would be that it is being done with illegal, fraudulent or tax evading intent.*
>
> *(v)* ***If the Government agrees with the above recommendations, a committee should be constituted*** *with members from DEA, RBI, SEBI, DoR, DoLA, Consumer Affairs, and MeitY, to suggest whether any further actions, including legislative changes, are required to make possession, trade and use of crypto-currencies expressly illegal and punishable.*

(vi) ***Finally, it is clarified that none of the above recommendations are meant to restrict the use of blockchain technology*** *for purposes other than that of creating or trading in crypto-currencies.*

2.15. In August 2017, Securities and Exchange Board of India (SEBI) established a 10-member advisory panel to examine global fintech developments and report on opportunities for the Indian securities market. The goal of the new Committee on Financial and Regulatory Technologies was to help prepare India to adopt fintech solutions and foster innovations within the country.

2.16. On 02-11-2017, the Government of India constituted a committee chaired by the Secretary (Department of Economic Affairs) and comprising of Secretary, Ministry of Electronic and Information Technology, Chairman, SEBI and Deputy Governor, RBI (Inter-Ministerial Committee) to propose specific actions to be taken in relation to VCs.

2.17. At that stage, two persons, by name, Siddharth Dalmia and Vijay Pal Dalmia came up with a writ petition in WP (C) No.1071 of 2017 under Article 32 of the Constitution of India seeking the issue of a writ of mandamus directing the respondents to declare as illegal and ban all virtual currencies as well as ban all websites and mobile applications which facilitate the dealing in virtual currencies. Similarly, another person, by name, Dwaipayan Bhowmick came up with a writ petition in WP (C) No.1076 of 2017, seeking the issue of a writ of mandamus directing the respondents to regulate the flow of Bitcoin (crypto money) and to constitute a committee of experts to consider the prohibition/regulation of Bitcoin and other crypto currencies. On 13.11.2017, this Court ordered notice in both the writ petitions.

2.18. Around the same time, namely, November 2017, the Inter-Regulatory Working Group on Fintech and Digital Banking, set up by RBI, pursuant to a decision taken by the Financial Stability and Development Council Sub-Committee way back in April 2016, submitted a report. This report, in paragraph 2.1.3.2, dealt with Digital Currencies. ***It defined 'digital currencies' to mean digital representations of value, issued by private developers and denominated in their own unit of account.*** The Report also stated that ***"digital currencies are not necessarily attached to a fiat currency, but are accepted by natural or legal persons as a means of exchange."***

2.19. Thereafter, RBI issued another Press Release dated 05-12-2017 reiterating the concerns expressed in earlier press releases. The Government of India, Ministry of Finance also issued a statement on 29-12-2017 cautioning the users, holders and traders of VCs that they are not recognized as legal tender and that the investors should avoid participating in them.

2.20. On 01-02-2018, the Minister of Finance, in his budget speech said that the Government did not consider crypto currencies as legal tender or coin and that all measures to eliminate the use of these currencies in financing illegitimate activities or as part of the payment system, will be taken by the Government. However, he also said that the Government will explore the use of blockchain technology proactively for ushering in digital economy.

2.21. The Central Board of Direct Taxes (CBDT), by an Office Memorandum dated 05-03-2018, submitted to the Department of Economic Affairs, a draft scheme proposing a ban on cryptocurrencies. But the draft scheme advocated a step-by-step approach, as many persons had already invested in cryptocurrencies. The scheme also contained an advice to carry out legislative amendments before banning them.

2.22. In the wake of a meeting of G-20 Finance Ministers and Central Bank Governors that was scheduled to be held in mid-March 2018, the Financial Stability Board[2] (FSB) sent out a communication dated 13-03-2018. It was indicated in the said communication that as per the initial assessment of FSB, crypto assets did not pose risks to global financial stability, as their combined global market value even at their peak, was less than 1% of global GDP. But the report also noted that the initial assessment was likely to change and that

[2] FSB was established by G-20 in April 2009, as a successor to the Financial Stability Forum founded in 1999 by G-7 Finance Ministers and Central Bank Governors.

crypto assets raised a host of issues around consumer and investor protection as well as their use to shield illicit activity and for money laundering and terrorist financing.

2.23. The communique issued by G-20, after the meeting of its Finance Ministers and Central Bank Governors on March 19-20, 2018 also acknowledged that ***technological innovation including that underlying crypto assets, has the potential to improve the efficiency and inclusiveness of the financial system and the economy more broadly***. But it also noted that ***crypto assets do raise issues with respect to consumer and investor protection, market integrity, tax evasion, money laundering and terrorist financing. Though crypto assets lacked the key attributes of sovereign currencies, they could, at some point, have financial stability implications***. Therefore, the communique resolved to implement FATF standards and to call on international standard-setting bodies to continue their monitoring of crypto assets and their risks.

2.24. On 02-04-2018, RBI sent an e-mail to the Government, enclosing a note on regulating crypto assets. It was with reference to the record of discussions of the last meeting of the Inter-Ministerial Committee on virtual currency. This note examined the pros and cons of banning and regulating cryptocurrencies and suggested that it had to be done, backed by suitable legal provisions.

2.25. Immediately thereafter, the Statement dated 05-04-2018 and the Circular dated 06-04-2018, impugned in these writ petitions came to be issued by RBI. It appears that at around the same time (April 2018), the Inter-Ministerial Committee submitted its initial report, (or a precursor to the report) along with a draft bill known as ***Crypto Token and Crypto Asset (Banning, Control and Regulation) Bill, 2018.***[3]

2.26. But in the meantime, a few companies which run online crypto assets exchange platforms together with the shareholders/ founders of those companies and a few individual crypto assets traders came up with the first of the writ petitions on hand, namely WP (C) No. 373 of 2018, challenging the aforesaid Statement dated 05-04-2018 and Circular dated 06-04-2018. On 01-05-2018 this writ petition was directed to be tagged along with the writ petitions WP (C) Nos. 1071 and 1076 of 2017 which sought a ban on or regulation of cryptocurrencies.

2.27. On 11-05-2018, all the three writ petitions, namely WP (C) Nos. 1071 and 1076 of 2017 and 373 of 2018, came up for hearing. At that time, it was pointed out that a few High Courts were also seized of writ petitions concerning cryptocurrencies. Therefore, this Court gave liberty to RBI to move appropriate applications for

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[3] The fate of the 2018 Bill is not known but a fresh bill called '***Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019'*** has been submitted.

transfer of all those cases to this Court.

2.28. Accordingly, RBI came up with transfer petitions and the transfer petitions were taken on Board on 17-05-2018 and a direction was issued that no High Court shall entertain any writ petition relating to the impugned Circular dated 06-04-2018. This Court also passed an interim order on 17-05-2018 permitting the petitioners in WP (C) No. 1071 of 2017 to submit a representation to RBI with a further direction to RBI to deal with the same in accordance with law.

2.29. In the meantime, the Internet and Mobile Association of India came up with the second of the writ petitions on hand, namely WP (C) No. 528 of 2018 and notice was ordered in the said writ petition on 03-07-2018. While doing so, this Court issued a direction to RBI to dispose of the representation, if any, already submitted by the Association. Accordingly, RBI considered the representation and issued two communications dated 06-07-2018 and 09-07-2018.

2.30. On 23-07-2018, SEBI sent its comments on the 2018 Bill, to the Department of Economic Affairs. Their primary objection to the Bill was that they are not best suited to be the regulators of crypto assets and tokens.

2.31. Next came the Annual Report of RBI for the year 2017-2018. It contained a separate Box II.3.2 on “Cryptocurrency: Evolving challenges”. The relevant portion of the same reads as follows:

"Though cryptocurrency may not currently pose systemic risks, its increasing popularity leading to price bubbles raises serious concerns for consumer and investor protection, and market integrity. Notably, Bitcoins lost nearly US$200 billion in market capitalisation in about two months from the peak value in December 2017. As per the CoinMarketCap, the overall cryptocurrency market had nearly touched US$800 billion in January 2018.

The cryptocurrency eco-system may affect the existing payment and settlement system which could, in turn, influence the transmission of monetary policy. *Furthermore, being stored in digital/electronic media – electronic wallets – it is prone to hacking and operational risks, a few instances of which have already been observed globally. There is no established framework for recourse to customer problems/disputes resolution as payments by cryptocurrencies take place on a peer-to-peer basis without an authorised central agency which regulates such payments. There exists a high possibility of its usage for illicit activities, including tax avoidance. The absence of information on counterparties in such peer-to-peer anonymous/ pseudonymous systems could subject users to unintentional breaches of anti-money laundering laws (AML) as well as laws for combating the financing of terrorism (CFT) (Committee on Payments and Market Infrastructures – CPMI, 2015).* ***The Bank for International Settlements (BIS) has recently warned that the emergence of cryptocurrencies has become a combination of a bubble, a Ponzi scheme and an environmental disaster, and calls for policy responses (BIS, 2018).*** *The Financial Action Task Force (FATF) has also observed that cryptoassets are being used for money laundering and terrorist financing. A globally coordinated approach is necessary to prevent abuses and to strictly limit interconnections with regulated financial institutions.*

On a global level, regulatory responses to cryptocurrency have ranged from a complete clamp down in some jurisdictions to a comparatively 'light touch regulatory approach'. The Securities and Exchange Commission (SEC) *and the Commodity Futures Trading Commission (CFTC) have emerged as the primary regulators of cryptocurrencies in the United States, where these assets like most other jurisdictions, do not enjoy the legal tender status. Asian countries have experienced oversized concentration of crypto players – Japan and South Korea account for the biggest shares of crypto asset markets in the world. In the case of Bitcoins, half of transactions worldwide are carried out in Japan. In September 2017, Japan approved transactions by its exchanges in cryptocurrencies. China's exchanges hosted a disproportionately large volumes of global Bitcoin trading until their ban recently. […]*

Developments on this front need to be monitored as some trading may shift from exchanges to peer-to-peer mode, which may also involve increased usage of cash. Possibilities of migration of crypto exchange houses to dark pools/cash and to offshore locations, thus raising concerns on AML/CFT and taxation issues, require close watch." (emphasis supplied)

2.32. In this background, all the four writ petitions namely WP (C) Nos. 1071 and 1076 of 2017 (seeking a ban) and WP (C) Nos. 373 and 528 of 2018 (challenging the indirect ban) came up for hearing, along with the transfer petitions, on 25-10-2018, when this Court was informed that the Union of India had already constituted a committee and that this Inter-Ministerial Committee was deliberating on the issue. Therefore, the writ petitions were adjourned to enable the Committee to come up with their recommendations.

2.33. It appears that the Committee so constituted, submitted a report on 28-02-2019 indicating the action to be taken in relation to virtual currencies. A bill known as "Banning of Cryptocurrency and

Regulation of Official Digital Currency Bill, 2019" had also been prepared by then to be introduced in the Lok Sabha. To this report of the Committee, is appended, the minutes of the discussions of the Committee in the meetings held on 27-11-2017, 22-02-2018, and 09-01-2019. The contents of the report of the Inter-Ministerial Committee dated 28-02-2019, can be well understood only if we look at the Record of Discussions of the meetings of the Committee. The Record of Discussions held on 27-11-2017 shows that the ***Inter-Ministerial Committee was of the initial view that the banning option was difficult to implement and that it can also drive some operators underground, encouraging the use of such currencies for illegitimate purposes***. But it was generally agreed in the said meeting that VCs cannot be treated as currency. However, ***in the meeting held on 22-02-2018, the Deputy Governor, RBI made an initial intervention and argued in favour of using the banning option***. Eventually, the other members of the Committee agreed, and it was resolved in the said meeting that a detailed paper on the option of banning VCs, including a draft law could be prepared and submitted by RBI and CBDT. It was also resolved to prepare a detailed paper within Department of Economic Affairs on options of regulating crypto assets. Following the same, it was resolved in the next meeting held on 09-01-2019 that a Standing Committee should be constituted to revisit certain issues. Eventually, the Inter-Ministerial Committee submitted the aforesaid report dated 28-02-2019. The key aspects of this report are:

i. Virtual currency is a digital representation of value that can be digitally traded and it can function as a medium of exchange and/or a unit of account and/or a store of value, though it does not have the status of a legal tender.

ii. Initial Coin Offerings (hereinafter, "**ICO**") are a way for companies to raise money by issuing digital tokens in exchange for fiat currency or cryptocurrency, but there is a clear risk with the issuance of ICOs as many of the companies are looking to raise money without having any tangible products. In the year 2018, as many as 983 ICOs were issued, through which funds to the tune of USD 20 billion were raised.

iii. Virtual currencies are accorded different legal treatment by different countries, which range from barter transactions to mode of payment to legal tender. Countries like China have imposed a complete ban.

iv. The mining of non-official virtual currencies is very resource-intensive requiring enormous amounts of electricity which may prove to be an environmental disaster.

v. They may also affect the ability of the Central Banks to carry out their mandates.

vi. China has not only banned trading in cryptocurrencies but also used its firewall to ban crypto currency exchanges. China even blocked crypto currency focused accounts from WeChat and crypto-currency related content from *Baidu*. However, Chinese traders use VPNs to circumvent these bans.

The report dated 28-02-2019 of the Inter-Ministerial Committee finally made certain recommendations which included a complete ban on private cryptocurrencies.

2.34. It is important to note here that ***the report of the Inter-Ministerial Committee dated 28-02-2019 not only recommended a ban, but also specifically endorsed the stand taken by RBI to eliminate the interface of institutions regulated by RBI from crypto currencies***.

2.35. As a matter of fact, the issue of the impugned Circular by RBI was even taken note of by the Financial Stability Board (of G-20), in a document titled 'Crypto Assets Regulators Directory', submitted to G-20 Finance Ministers and Central Bank Governors in April 2019. While acknowledging the fact that RBI does not have a legal mandate to directly regulate crypto assets, this Directory indicated that with a view to ring fence its regulated entities from the risks associated with VCs, RBI has issued the impugned Circular.

2.36. In a report released in June 2019 under the caption ***'Guidance for a risk-based approach to Virtual Assets and Virtual Asset Service Providers', FATF*** reiterated a risk-based approach advocated in FATF 2012 and 2015 recommendations. At the same time, ***this Guidance recognized that a jurisdiction has the discretion to prohibit VA activities and VASPs in order to support other policy goals not addressed in the Guidance such as consumer protection, safety and soundness or monetary policy***. But the Guidance also suggested that countries which prohibit VA activities or VASPs should also assess the effect that such prohibition may have on their money laundering and terrorist financing risks.

2.37. It is also relevant to note here that the Government was conscious of the impugned Circular issued by RBI. This can be seen from the answer provided by the Minister of State in the Ministry of Finance, on 16-07-2019 in response to a question raised in the Rajya Sabha (Unstarred question no. 2591). While answering in the negative, the question whether the Government had banned cryptocurrencies in the country, the Minister of State added that RBI has been issuing advisories, press releases and circulars.

2.38. On 22-07-2019, the Report of the Inter-Ministerial Committee, recommending a ban, along with the draft of the Bill "Banning of Crypto currency and Regulation of Official Digital Currency Bill 2019", was hosted in the website of the Department of Economic Affairs. Therefore, on 08-08-2019, the first two writ petitions namely WP (C) Nos. 1071 and 1076 of 2017 were delinked and adjourned to January 2020, since, the prayers made in these two writ petitions (seeking a ban) appeared substantially answered.

2.39. Thereafter, the present writ petitions were taken up for hearing and this Court passed an interim direction on 21-08-2019, directing the Reserve Bank of India to give a detailed point-wise reply to the representations dated 29-05-2018 and 30-05-2018. The reply already given by RBI to the representations dated 29-05-2018 and 30-05-2018 was found by this Court to be inadequate and hence this direction. Accordingly, RBI gave a detailed point-wise reply on 04-09-2019 and 18-09-2019. Thereafter, the present writ petitions were taken up for hearing.

3. FLASHBACK

3.1. The archeological excavations carried out at the (world wide web) sites, reveal that this digital currency civilization is just 12 years old (at the most, 37 years). But these excavations became necessary since virtual currencies, known by different names such as crypto assets, crypto currencies, digital assets, electronic currency, digital currency etc., elude an exact and precise definition, making it impossible to identify them as belonging either to the category of legal tender solely or to the category of commodity/good or stock solely.

3.2. Any attempt to define what a virtual currency is, it appears, should follow the *Vedic* analysis of negation namely *"neti,*

neti". Avadhuta Gita of Dattatreya says, ***"by such sentences as 'that thou are', our own self or that which is untrue and composed of the 5 elements, is affirmed, but the sruti says 'not this not that'."***[4] The concept of *Neti Neti* is an expression of something inexpressible, but which seeks to capture the essence of that to which no other definition applies. This conundrum will squarely apply to crypto currencies and hence this flashback, into its genesis, so that its DNA is sequenced.

3.3. Though the idea of digital cash appears to have been first introduced by David Lee Chaum, an American Computer Scientist and Cryptographer way back in 1983 in a research paper and was actually launched by him in 1990 through a company by name Digicash, the company filed for bankruptcy in 1998, with Digicash becoming Digi-crash. But the actual story of creation of cryptocurrencies began, in a more scientific way, according to Nathaniel Popper, the New York Times journalist,[5] in 1997, when a British *Cypherpunk*[6] by name Adam Back released a plan called *hashcash,* which claimed to have solved some of the problems that stalled the digital cash project. But this program had its shortcomings. Another *Cypherpunk* by name Nick Szabo, came up

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[4] *tattvamasyādivākyena svātmā hi pratipāditaḥ*
neti neti śrutirbrūyād anṛtaṁ pāñcabhautikam-

[5] From his book "*Digital Gold: Bitcoin and the inside story of the Misfits and Millionaires Trying to Reinvent Money*".

[6] Cypherpunk is an activist advocating widespread use of strong cryptography and privacy enhancing technologies, as a route to social and political change. This word was added to the Oxford English Dictionary in November 2006.

with a concept called *bitgold*, which attempted to solve *hashcash*'s shortcomings. Soon, an American by name Wei Dai came up with something called *b-money*. Hal Finney, another American created his own option. But all of them had a common goal, which, as revealed by Adam Back was as follows:

> ***"What we want is fully anonymous, ultra low transaction cost, transferable units of exchange. If we get that going... the banks will become the obsolete dinosaurs they deserve to become."***

3.4. But all these experiments continued to hit roadblocks, until the emergence of Satoshi Nakamoto (who still remains anonymous) in the world of netizens. It appears that Satoshi sent an e-mail in August 2008 to Adam Back attaching a white paper prepared by him on what was called 'Bitcoin'. The gist of what Satoshi stated in his paper is indicated in simple terms, for the understanding of the common man, by Nathaniel Popper, in his book as follows:

> *"Rather than relying on a central bank or company to issue and keep track of the money – as the existing financial system and Chaum's DigiCash did – this system was set up so that every Bitcoin transaction, and the holdings of every user, would be tracked and recorded by the computers of all the people using the digital money, on a communally maintained database that would come to be known as the blockchain.*
>
> *The process by which this all happened had many layers, and it would take even experts, months to understand how they all worked together. But the basic elements of the system can be sketched out in rough terms, and were in Satoshi's paper, which would become known as the*

Bitcoin white paper.

According to the paper, each user of the system could have one or more public Bitcoin addresses – sort of like bank account numbers – and a private key for each address. The coins attached to a given address could be spent only by a person with the private key corresponding to the address. The private key was slightly different from a traditional password, which has to be kept by some central authority to check that the user is entering the correct password. In Bitcoin, Satoshi harnessed the wonders of public-key cryptography to make it possible for a user – let's call her Alice again – to sign off on a transaction, and prove she has the private key, without anyone else ever needing to see or know her private key.

Once Alice signed off on a transaction with her private key she would broadcast it out to all the other computers on the Bitcoin network. Those computers would check that Alice had the coins she was trying to spend. They could do this by consulting the public record of all Bitcoin transactions, which computers on the network kept a copy of. Once the computers confirmed that Alice's address did indeed have the money she was trying to spend, the information about Alice's transaction was recorded in a list of all recent transactions, referred to as a block, on the blockchain. […]

The result of this complicated process was something that was deceptively simple but never previously possible: a financial network that could create and move money without a central authority. No bank, no credit card company, no regulators. The system was designed so that no one other than the holder of a private key could spend or take the money associated with a particular Bitcoin address. What's more, each user of the system could be confident that, at every moment in time, there would be only one public, unalterable record of what everyone in the system owned. To believe in this, the users didn't have to trust Satoshi, as the users of DigiCash had to trust David Chaum, or users of the dollar had to trust the Federal Reserve. They just had to trust their own computers running the Bitcoin software, and the code Satoshi wrote,

> *which was open source, and therefore available for everyone to review. If the users didn't like something about the rules set down by Satoshi's software, they could change the rules. People who joined the Bitcoin network were, quite literally, both customers and owners of both the bank and the mint."*

3.5. ***That Satoshi and the Cypherpunks who participated in the initial experiments developed Bitcoin as an alternative to conventional currency, to counter the problems of debasement of currency by central agencies, was made clear by Satoshi himself*** when he said: *"The root problem with conventional currency is all the trust that's required to make it work. The Central Bank must be trusted not to debase the currency but the history of fiat currencies is full of breaches of that trust."*

3.6. What attracted people to Satoshi's proposal, was the fact that while Central Banks had no restraints in unlimited printing of money, thereby devaluing all savings and holdings, the Bitcoin software had rules to ensure that the process of creating new coins would stop after 21 million were out in the world. When Martti Malmi, a student at the Helsinki University of Technology, joined hands with Satoshi to improvise the project and to market it, he formulated the philosophy in the following words:

> ***"Be safe from the unfair monetary policies of the monopolistic Central Banks and the other risks of centralized power over a money supply. The limited inflation of Bitcoin system's money supply is***

distributed evenly (by CPU power) throughout the network, not monopolized to a banking elite."

3.7. Therefore, it is beyond any pale of doubt that irrespective of the metamorphosis (or gene mutation) it has undergone over the years, bitcoin, the Adam or Manu of the race of cryptocurrencies, was developed as an alternative to fiat currency. Keeping this birth chart of virtual currencies in mind, let us now see how the petitioners are aggrieved by the impugned decisions of RBI, the grounds on which they challenge the same and the justification sought to be provided by RBI.

4. BACKGROUND SCORE (of the petitioners)

4.1. The theme of the song of the petitioners in one of the writ petitions, as fine-tuned by Shri Ashim Sood, learned Counsel, can be summarized as follows:

I. RBI has no power to prohibit the activity of trading in virtual currencies through VC exchanges since:

(i) Virtual currencies are not legal tender but tradable commodities/digital goods, not falling within the regulatory framework of the RBI Act, 1934 or the Banking Regulation Act, 1949.

(ii) Virtual currencies do not even fall within the credit system of the country, so as to enable RBI to fall back upon the Preamble to the RBI Act 1934, which gives a mandate to RBI to operate the currency and credit system of the country to its advantage.

(iii) Neither the power to regulate the financial system of the country to its advantage conferred under Section 45JA, nor the power to regulate the credit system of the country conferred under Section 45L of the RBI Act, 1934 exercisable in public interest and upon arriving at a satisfaction, is so elastic as to cover goods that do not fall within the purview of the financial system or credit system of the country.

(iv) The power to issue directions "in the public interest" conferred under Section 35A(1)(a) of the Banking Regulation Act, 1949 and the power to caution or prohibit banking companies against entering into any particular transaction conferred under Section 36(1)(a) do not extend to the issue of blanket directions that would deny access by virtual currency exchanges, to the banking services of the country, as the expression "public interest" appearing in a particular provision in a statute should take its colour from the context of the statute.

(v) The power conferred upon RBI under Section 10(2) of the Payment and Settlement Systems Act, 2007 to issue guidelines for proper and efficient management of payment systems and under Section 18 of the said Act to lay down policies relating to the regulation of payment systems and to give directions pertaining to the conduct of business relating to payments systems, exercisable in public interest upon being satisfied, is also not applicable to virtual currency exchanges, as the services rendered by them do not fall within the definition of the expression "payment system" under Section 2(1)(i) of the said Act.

II. Assuming but not admitting that RBI has the power to deal with the activities carried on by VCEs, the mode of exercise of such power can be tested on certain well established parameters. They are –

(i) application of mind/satisfaction/relevant and irrelevant considerations

(ii) Malice in law/colorable exercise of power

(iii) M.S. Gill reasoning

(iv) Calibration/Proportionality

III. All other stake holders such as the Department of Economic Affairs of the Government of India, Securities and Exchange Board of India, Central Board of Direct Taxes, etc., have actually recognized the positive and beneficial aspects of cryptocurrencies as digital assets and the Distributed Ledger Technology from which crypto currencies emanate and hence have recommended only a regulatory regime, but RBI has taken a contra position without any rational basis.

IV. Many of the developed and developing economies of the world, multinational and international bodies and the courts of various countries have scanned crypto currencies, but found nothing pernicious about them and even the attempt of the Government of India to bring a legislation banning crypto currencies, is yet to reach its logical end.

V. RBI should have taken into account the fact that the members of Petitioner association have taken necessary precautions including avoiding cash transactions, ensuring compliance with KYC norms, of their own accord and allowing peer-to-peer transactions only within the country.

VI. RBI has not applied its mind to the fact that not every crypto currency is anonymous. The report of the European Parliament also classified VCs into anonymous and pseudo-anonymous. Therefore, if the problem sought to be addressed is anonymity of transactions, the same could have been achieved by resorting to the least invasive option of prohibiting only anonymous VCs.

VII. It is a paradox that blockchain technology is acceptable to RBI, but crypto currency is not.

VIII. The benefit of the rule of judicial deference to economic policies of the state is not available to RBI, as the impugned Circular is an exercise of power by a statutory body corporate and is neither a legislation nor an exercise of executive power. In any case, there is no deference in law to process but only to opinion emanating from the process. No study was undertaken by RBI before the impugned measure was taken and hence, the impugned decisions are not even based upon knowledge or expertise.

IX. While regulation of a trade or business through reasonable restrictions imposed under a law made in the interests of the general public is saved by Article 19(6) of the Constitution, a total prohibition, especially through a subordinate legislation such as a directive from RBI, of an activity not declared by law to be unlawful, is violative of Article 19(1)(g). Whether a directive would tantamount to "regulation" or "prohibition", depends upon the impact of the directive.

4.2. The contentions of the petitioners in the other writ petition (WP (C) No. 373 of 2018), as set to tune by Shri Nakul Dewan, learned Senior Counsel, are:

I. The immediate effect of the impugned Circular is to completely severe the ties between the virtual currency market and the formal Indian economy, without actually a legislative ban on the trading of VCs, thereby promoting cash and black-market transactions.

II. The impugned Circular fails to take note of the difference between various VC schemes such as closed VC schemes, unidirectional flow VC schemes and bidirectional flow VC schemes and unreasonably differentiates between unidirectional flow schemes and bidirectional flow schemes, by targeting only bidirectional flow schemes.

III. VCs do not qualify as money, as they do not fulfill the four characteristics of money namely medium of exchange, unit of account, store of value and constituting a final discharge of debt and since RBI has accepted this position, they have no power to regulate it.

IV. Considering the fact that historically, money as understood in the social sense and money as understood in the legal sense, are different, the courts in different jurisdictions such as USA and Singapore have understood VCs to be akin to money or funds at times or as commodities/intangible properties at other times.

V. The impugned Circular is manifestly arbitrary, based on non-reasonable classification and it imposes disproportionate restrictions.

VI. A decision to prohibit an article as *res extra commercium* is a matter of legislative policy and must arise out of an Act of legislature and not by a notification issued by an executive authority.

4.3. In addition to the aforementioned legal contentions, Shri Nakul Dewan learned Senior Counsel also submitted that as a result of the impugned Circular, the virtual currency exchange (VCE) run by one of the petitioners in one writ petition was shut down on 30-

03-2019, the VCE run by another petitioner became non-operational, though their website still opens and the VCE run by yet another petitioner by name Discidium Internet Labs Pvt. Ltd., not only became non-operational, but an amount of Rs. 12 crores lying in their account also got frozen. However, one VCE by name CoinDCX alone survives, by operating on a peer-to-peer (P2P) basis.

4.4. In support of their respective contentions, Shri Ashim Sood and Shri Nakul Dewan, the learned counsels, relied upon a number of decisions of this court and other courts. We shall refer to them when we take up their contentions for analysis.

5. SCRIPT (of RBI)

5.1. RBI has filed counter-affidavit in one of these writ petitions, covering the entire gamut. But the response of RBI to the contentions of the petitioners is available not only in the counter-affidavit, but also in some communications issued by them pursuant to certain interim directions issued by this court.

5.2. For instance, this Court passed an interim direction on 21-08-2019, after hearing lengthy arguments, directing the Reserve Bank of India to give a detailed point-wise reply to the representations dated 29-05-2018 and 30-05-2018. Pursuant to the said interim direction, RBI gave a detailed point-wise reply on 04-09-2019 and 18-09-2019. Therefore, RBI's stand in these cases has to be culled out not only from the counter-affidavit but also from the orders passed/replies issued to the representations of the writ petitioners, during the pendency of these writ petitions.

5.3. In brief, the response of RBI to the issues raised by the petitioners, as articulated by Shri Shyam Divan, learned Senior Counsel, can be summarized as follows:

(i) Virtual currencies do not satisfy the criteria such as store of value, medium of payment and unit of account, required for being acknowledged as currency.

(ii) Virtual currency exchanges do not have any formal or structured mechanism for handling consumer disputes/ grievances.

(iii) Virtual currencies are capable of being used for illegal activities due to their anonymity/pseudo-anonymity.

(iv) Increased use of virtual currencies would eventually erode the monetary stability of the Indian currency and the credit system.

(v) The impugned decision of RBI is legislative in character and is in the realm of an economic policy decision taken by an expert body warranting a hands-off approach from the Court.

(vi) The impugned decision is within the range of wide powers conferred upon RBI under the Banking Regulation

Act, 1949, the Reserve Bank of India Act, 1934 and the Payment and Settlement Systems Act, 2007.

(vii) No one has an unfettered fundamental right to do business on the network of the entities regulated by RBI.

(viii) The impugned decisions do not violate any of the rights guaranteed by Articles 14, 19 and 21 of the Constitution of India.

(ix) The impugned decisions are not excessive, confiscatory or disproportionate in as much as RBI has given three months' time to the affected parties to sever their relationships with the banks. This is apart from the repeated cautions issued to the stakeholders by RBI through Press Releases from the year 2013.

(x) The ambit of the 2013 press release was much wider than just consumer protection. RBI cautioned users, holders and traders of VCs about the potential financial, operational, legal, customer protection and security related risks they were exposing themselves to.

(xi) The host of material taken note of by RBI in their reports, the reports of the committees to which RBI was a party and the cautions repeatedly issued by RBI over a period of 5 years, would demonstrate the application of mind on the part of RBI. They also demonstrate that RBI did not proceed in haste but proceeded with great care and caution. Therefore, the satisfaction arrived at by them was too loud and clear to be ignored. The standard for considering the impugned Circular, is the existence of material and not the adequacy or sufficiency of such material.

(xii) In any case, there is no complete ban on virtual currencies or on the use of distributed ledger technology by the regulated entities.

(xiii) The impugned decisions were necessitated in public interest to protect the interest of consumers, the interest of the payment and settlement systems of the country and for protection of regulated entities against exposure to high volatility of the virtual currencies. RBI is empowered and duty bound to take such pre-emptive measures in public interest and the power to regulate includes the power to prohibit.

(xiv) The impugned decisions were necessitated because in the opinion of RBI, VC transactions cannot be termed as a payment system, but only peer-to-peer transactions which do not involve a system provider under the Payments and Settlement Systems Act. Despite this, VC transactions have the potential to develop as a parallel system of payment.

(xv) The KYC norms followed by the VCEs are far below what other participants in the payments and monetary system follow. In any case, KYC norms are ineffective, as the inherent characteristic of anonymity of VCs does not get remedied.

(xvi) Cross-border nature of the trade in VCs, coupled with the lack of accountability, has the potential to impact the regulated payments system managed by RBI. A large constituent of the VC universe does not hold membership of the Petitioner association or is not even accountable for their acts but is material and instrumental in driving the VC trade.

(xvii) RBI or any other Government authority would not be able to curtail, limit, regulate or control the generation of VCs and their transactions, resulting in ever-present and inevitable financial risks.

6. UNFOLDING OF THE PLOT

6.1. In the light of the above factual matrix and the rival contentions, let us now see how the plot before us, unfolds.

I. No Power at all for RBI (Ultra vires)

6.2. The first ground of attack revolves around the power of RBI to deal with, regulate or even ban VCs and VCEs. The entire foundation of this contention rests on the stand taken by the petitioners that VCs are not money or other legal tender, but only goods/commodities, falling outside the purview of the RBI Act, 1934, Banking Regulation Act, 1949 and the Payment and Settlement Systems Act, 2007. In fact, the impugned Circular of RBI dated 06-04-2018 was issued in exercise of the powers conferred upon RBI by all these three enactments. Therefore, if virtual currencies do not fall within subject matter covered by any or all of these three enactments and over which RBI has a statutory control, then the petitioners will be right in contending that the Circular is ultra vires.

6.3. Hence it is necessary (i) first to see the role historically assigned to a central bank such as RBI, the powers and functions conferred upon and entrusted to RBI and the statutory scheme of all the above three enactments and (ii) then to investigate what these virtual currencies really are. Therefore, we shall divide our discussion in this regard into two parts, the first concerning the role, powers and functions of RBI and the second concerning the identity of virtual currencies.

Role assigned to, functions entrusted to and the powers conferred upon RBI as a Central Bank

6.4. The Reserve Bank of India was established under Act 2 of 1934 for the purpose of (i) regulating the issue of bank notes, (ii) keeping of reserves with a view to securing monetary stability in the country and (iii) operating the currency and credit system of the country to its advantage. The role of a central bank such as the Reserve Bank in an economy is to manage (i) the currency (ii) the money supply and (iii) interest rates. The unique feature of a central bank is the monopoly that it has on increasing the monetary base in the state and the control it has in the printing of the national currency. The central bank virtually functions as "a lender of last resort" to banks suffering a liquidity crisis.

6.5. Historians trace the rise of modern central banks to the establishment of the Bank of England under a Royal Charter granted on 27-07-1694 through the Tunnage Act, 1694. The establishment of this bank in 1694 was not actually for stimulating the economy but for financing the war that England had with France. The currency crisis of 1797 and the creation of a ratio between the gold reserves held by the Bank of England and the notes that the bank could issue, under the Bank Charter Act, 1844 brought huge changes in the way the central bank was supposed to function.

6.6. In so far as India is concerned, the functions of a central bank were originally conferred upon the Imperial Bank of India, established in the year 1921, under the Imperial Bank of India Act, 1920. The reason why and the manner in which the Imperial Bank was established, is quite interesting to see. At the time when the

British Crown took over the control of the territories in India, after the Sepoy Mutiny of 1857, there were three Presidency Banks, one in Calcutta, another in Bombay and the third in Madras. All these three banks established respectively in 1809, 1840 and 1843, were authorized to issue notes up to certain specified limits. But this privilege was withdrawn in 1862 under the Paper Currency Act, which vested the sole right to issue notes with the Government of India.

6.7. The question of absorption of the three Presidency Banks into a central bank came up for consideration on and off. Though the Chamberlain Commission, known as the Royal Commission on Indian Finance and Currency, appointed in 1913, felt the need for setting up a central bank, the proposal did not materialize. But after the First World War, the Presidency Banks themselves favoured an amalgamation. Therefore, the Imperial Bank of India Bill providing for the amalgamation of all the three Presidency Banks was passed in September 1920 and came into effect in January 1921. The trend of setting up central banks gained momentum internationally, after the International Financial Conferences held at Brussels in 1920 and at Genoa in 1922.

6.8. But the maintenance of an overvalued exchange rate to help British exporters, gave rise to a clash between the colonial administration and Indian business interests. The Congress sought devaluation and hence a Royal Commission was set up in 1925 to examine the matter. This Royal Commission on Indian Currency and Finance, also known as Hilton Young Commission (to which Dr. B. R. Ambedkar also contributed a statement), recommended the creation of a strong Central Bank for India in 1926. Though a bill known as the Gold Standard and Reserve Bank of India Bill, 1927 to give effect to the recommendations was introduced in the Legislative Assembly, it was withdrawn on 10-02-1928. From 1930 onwards, the question of establishing a Reserve Bank received fresh impetus, when Constitutional reforms for the country were undertaken.

6.9. The White Paper on Indian Constitutional Reforms, presented in March 1933, assumed that a Reserve Bank, free from political influence, would have to be set up and should already be successfully operating before the first Federal Ministry was installed.

6.10. Subsequently, a Departmental Committee (hereinafter referred to, as "**the India Office Committee**") was appointed in London by the India Office, which submitted a report dated 14-03-1933. This report was followed up by the appointment of the "London Committee", which endorsed the India Office Committee's view that the Reserve Bank should be free from any political influence.

6.11. Therefore, a Bill drafted on the basis of the recommendations of the London Committee was introduced in September 1933. In 1934, the Bill was passed. The Reserve Bank of India commenced operations as the country's central bank on 01-04-1935. Under the Reserve Bank (Transfer of Public Ownership) Act, 1948, the bank was nationalized.

6.12. Once the historical background of the creation of RBI is understood, it will be easy to appreciate its role in the economy of the country and the functions and powers exercised by it statutorily.

6.13. As the Preamble of the RBI Act suggests, the object of constitution of RBI was threefold namely (i) regulating the issue of bank notes (ii) keeping of reserves with a view to securing monetary stability in the country and (iii) operating the currency and credit system of the country to its advantage.

6.14. In fact, the original Preamble of the Act contained only three paragraphs. But paragraphs 2 and 3 of the Preamble were substituted with 3 new paragraphs by Act 28 of 2016. Paragraphs 2 and 3 of the original Preamble and paragraphs 2 to 4 substituted in 2016, are presented in a tabular column as follows:

Paragraphs 2 and 3 as they originally stood	Paragraphs 2 to 4 now substituted
AND WHEREAS in the present disorganisation of the monetary systems of the world it is not possible to determine what will be suitable as a permanent basis for the Indian monetary system; BUT WHEREAS it is expedient to make temporary provision on the basis of the existing monetary system, and to leave the question of the monetary standard best suited to India to be considered when the international monetary position has become sufficiently clear and stable to make it possible to frame permanent measures;	AND WHEREAS it is essential to have a modern monetary policy framework to meet the challenge of an increasingly complex economy; AND WHEREAS the primary objective of the monetary policy is to maintain price stability while keeping in mind the objective of growth; AND WHEREAS the monetary policy framework in India shall be operated by the Reserve Bank of India;

6.15. It may be observed from the newly substituted paragraphs that ***RBI is now vested with the obligation to operate the monetary policy framework in India***. An indication of the primary objective of the monetary policy is provided in paragraph 3 which says that ***the maintenance of price stability is the prime objective even while the objective of growth is to be kept in mind***. Paragraph 2 recognizes the necessity to have a modern monetary policy framework to meet the challenge of an increasingly complex economy.

6.16. Therefore, it is clear that after the amendment under Act 28 of 2016, the very task of operating the monetary policy framework has been conferred exclusively upon RBI.

6.17. Though the expression "monetary policy" is not defined in the Act, an entire chapter under the title "Monetary Policy" containing Sections 45Z to 45ZO was inserted as Chapter IIIF. The provisions of this chapter are given overriding effect upon the other provisions of the Act, under Section 45Z. Under Section 45ZA(1), the central government is empowered to determine the inflation target in terms of the consumer price index, once in every 5 years, in consultation with RBI. The policy rate required to achieve the inflation target is to be determined by a Monetary Policy Committee, constituted under Section 45ZB.

6.18. The object of establishment of RBI is also spelt out in Section 3(1). It says that "***a bank to be called the Reserve Bank of India shall be constituted for the purpose of taking over the management of the currency from the Central Government and of carrying on the business of banking in accordance with the provisions of this Act***".

6.19. Chapter III of the Act enlists the central banking functions of RBI. Section 17 authorizes RBI to carry on and transact several kinds of businesses listed therein, one of which, referred in sub-section (15) is the making and issue of bank notes. Section 20 which forms part of Chapter III, obliges RBI (i) to accept monies for account of the central government (ii) to make payments up to the amount standing to the credit of its account and (iii) to carry out its exchange, remittance and other banking operations ***including the management of the public debt of the Union.*** Under Section 21, the central government is obliged to entrust all its money, remittance, exchange and banking transactions in India with RBI. ***Under Section 22(1), RBI has the sole right to issue bank notes in India*** (however, the central government has the power under Section 28A(2) to issue Government of India notes of the denominational value of Rs. 1/-). It may also issue currency notes of the Government of India, on the recommendations of the Central Board, for a period fixed by the central government. ***Sub-section (2) of Section 22 goes one step further by stipulating that on and from the date on which Chapter III comes into force, the central government shall not issue any currency notes.***

6.20. Section 26(1) makes every bank note a legal tender at any place in India in payment, which is guaranteed by the central government. Since a bank note issued by RBI is a legal tender guaranteed by the central government, the central government is also vested with the power under sub-section (2) of Section 26 to declare any series of bank notes of any denomination, to cease to be legal tender. But this can be done only on the recommendation of the Central Board of Directors of RBI.

6.21. Under Section 38, the central government is prohibited from putting into circulation any rupees, except through RBI.

Similarly, RBI is also prohibited from disposing of rupee coin otherwise than for the purpose of circulation.

6.22. Chapter IIIB which contains provisions relating to non-banking institutions (NBFCs) receiving deposits and financial institutions, contains two important provisions, one in Section 45JA and another in Section 45L. Sub section (1) of Section 45JA reads as follows:

> ***45JA**. Power of Bank to determine policy and issue directions.— (1) If the Bank is satisfied that, in the public interest or to regulate the financial system of the country to its advantage or to prevent the affairs of any non-banking financial company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the non-banking financial company, it is necessary or expedient so to do, it may determine the policy and give directions to all or any of the non-banking financial companies relating to income recognition, accounting standards, making of proper provision for bad and doubtful debts, capital adequacy based on risk weights for assets and credit conversion factors for off balance-sheet items and also relating to deployment of funds by a non-banking financial company or a class of non-banking financial companies or non-banking financial companies generally, as the case maybe, and such non-banking financial companies shall be bound to follow the policy so determined and the direction so issued.*

6.23. It may be seen that the aforesaid provision uses certain words similar to those found in paragraph 1 of the Preamble. While paragraph 1 of the Preamble speaks about the power of RBI to operate the currency and credit system of the country to its advantage, Section 45JA speaks about the power of RBI to regulate the financial system of the country to its advantage.

6.24. The salient feature of Section 45JA is that it empowers RBI, both (i) to determine the policy and (ii) to give directions to all NBFCs in respect of certain matters. ***The concerns sought to be addressed by Section 45JA(1) are (i) public interest (ii) financial system of the country (iii) interests of the depositors and (iv) interests of NBFCs***.

6.25. Section 45L addresses yet another concern namely, the regulation of the credit system of the country to its advantage. Section 45L reads as follows:

> ***45L.*** *Power of Bank to call for information from financial institutions and to give directions.—*
> *(1) If the Bank is satisfied for the purpose of enabling it to regulate the credit system of the country to its advantage it is necessary so to do, it may—*
> *(a) require financial institutions either generally or any group of financial institutions or financial institution in particular, to furnish to the Bank in such form, at such intervals and within such time, such statements, information or particulars relating to the business of such financial institutions or institution, as may be specified by the Bank by general or special order;*
> *(b) give to such institutions either generally or to any such institution in particular, directions relating to the conduct of business by them or by it as financial institutions or institution.*
> *(2) Without prejudice to the generality of the power vested in the Bank under clause (a) of sub-section (1), the statements, information or particulars to be furnished by a financial institution may relate to all or any of the following matters, namely, the paid-up capital, reserves or other liabilities, the investments whether in Government*

securities or otherwise, the persons to whom, and the purposes and periods for which, finance is provided and the terms and conditions, including the rates of interest, on which it is provided.
(3) In issuing directions to any financial institution under clause (b) of sub-section (1), the Bank shall have due regard to the conditions in which, and the objects for which, the institution has been established, its statutory responsibilities, if any, and the effect the business of such financial institution is likely to have on trends in the money and capital markets.

6.26. It may be seen that the phrase “credit system of the country to its advantage”, as found in paragraph 1 of the Preamble, is repeated in sub-section (1) of Section 45L. The only difference between the two is that ***paragraph 1 of the Preamble speaks about the operation of the credit system, while Section 45L (1) speaks about regulation of the credit system***. While exercising the power to issue directions conferred by clause (b) of sub-section (1) of Section 45L, ***RBI is obliged under sub-section (3) of Section 45L to have due regard to certain things, one of them being “the effect the business of such financial institution is likely to have on trends in the money and capital markets”***.

6.27. Chapter IIID of the Act contains provisions for the regulation of transactions in derivatives, money markets or securities, etc. The expression “money market instruments” is defined in clause (b) of Section 45U as follows:

45U(b) *"money market instruments" include call or notice money, term money, repo, reverse repo, certificate of* *deposit, commercial usance bill, commercial paper and such other debt instrument of original or initial maturity up to one year as the Bank may specify from time to time;*

6.28. Section 45W empowers RBI to determine the policy relating to interest rates or interest rate products and to give directions in that behalf to all or any of the agencies dealing in securities, money market instruments, etc., for the purpose of regulating the financial system of the country to its advantage. Section 45W(1) reads as follows:

> ***45W.*** *Power to regulate transactions in derivatives, money market instruments, etc.—(1) The Bank may, in public interest, or to regulate the financial system of the country to its advantage, determine the policy relating to interest rates or interest rate products and give directions in that behalf to all agencies or any of them, dealing in securities, money market instruments, foreign exchange, derivatives, or other instruments of like nature as the Bank may specify from time to time:*
>
> *Provided that the directions issued under this sub-section shall not relate to the procedure for execution or settlement of the trades in respect of the transactions mentioned therein, on the Stock Exchanges recognised under section 4 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).*

6.29. It is important to note that Section 45W(1) contains merely an illustrative list of transactions. This is seen by the use of the expression "other instruments of like nature" appearing in the above provision.

6.30. A careful scan of the RBI Act, 1934 in its entirety would show that ***the operation/regulation of the credit/financial***

system of the country to its advantage, is a thread that connects all the provisions which confer powers upon RBI, both to determine policy and to issue directions.

6.31. RBI Act, 1934 is not the only Act from which RBI derives its powers. The Banking Regulation Act, 1949 is also a source of power for RBI to do certain things. This can be seen from the Statement of Objects and Reasons for the Banking Regulation Act, 1949. One of the main features of the Bill as indicated in the Statement of Objects and Reasons was "widening the powers of RBI so as to enable it to come to the aid of the banking companies in times of emergency".

6.32. Section 5 of the Banking Regulation Act, 1949 which contains the interpretation clause defines the expression "banking policy" under clause (ca) of Section 5. This definition reads as follows:

> ***5(ca)*** *" banking policy" means any policy which is specified from time to time by the Reserve Bank in the interest of the banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, the volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources;*

6.33. Since Banking Regulation Act, 1949 was issued after the RBI Act, 1934 and the nationalization of RBI, Section 5(ca) borrows certain words such as "interest of the banking system" and "interest of the monetary stability" and "economic growth" from the RBI Act, 1934.

6.34. Section 8 of the Banking Regulation Act, 1949 prohibits a banking company from directly or indirectly dealing in the buying or selling or bartering of goods. The Explanation to Section 8 also defines the word "goods", for the purposes of Section 8. Section 8 reads as follows:

> ***8*** *- Prohibition of trading –*
> *Notwithstanding anything contained in section 6 or in any contract, no banking company shall directly or indirectly deal in the buying or selling or bartering of goods, except in connection with the realisation of security given to or held by it, or engage in any trade, or buy, sell or barter goods for others otherwise than in connection with bills of exchange received for collection or negotiation or with such of its business as is referred to in clause (i) of sub-section (1) of section 6:*
> *PROVIDED that this section shall not apply to any such business as is specified in pursuance of clause (o) of sub-section (1) of section 6.*
> *Explanation.--For the purposes of this section, "goods" means every kind of movable property, other than actionable claims, stocks, shares, money, bullion and specie, and all instruments referred to in clause (a) of sub-section (1) of section 6.*

6.35. ***Section 21 empowers RBI to determine the policy in relation to advances to be followed by banking companies. The determination of policy may be in (i) public interest (ii) interests of depositors or (iii) interests of the banking policy***. Once a policy is determined by RBI under Section 21(1), all banking companies are bound to follow the policy.

6.36. No company can carry on banking business in India unless it holds a license issued by RBI. Under Section 22(1), RBI has power to issue license, subject to certain terms and conditions as it may think fit to impose.

6.37. Every banking company is obliged under Section 27(1) of the Banking Regulation Act, 1949 to submit to RBI, monthly returns in the prescribed form, showing its assets and liabilities. RBI is conferred with powers under Section 29A even to call for information about the affairs of any associate enterprise of a banking company. Under sub-section (2) of Section 29A, RBI can even cause an inspection of any associate enterprise of a banking company. A power to conduct special audit of a banking company's accounts is also conferred upon RBI under Section 30(1B).

6.38. Section 35A of Banking Regulation Act, 1949 empowers RBI to issue directions to banking companies. Such directions are binding on the banking companies. The directions under Section 35A may be issued (i) in public interest (ii) in the interest of banking policy (iii) to prevent the affairs of the banking company from being conducted in a manner prejudicial to the interests of the depositors or of the banking company itself and (iv) to secure the proper management of the banking company. Section 35A(1) reads as follows:

***35A**. Power of the Reserve Bank to give directions.—(1) Where the Reserve Bank is satisfied that—*
(a) in the public interest; or
(aa) in the interest of banking policy; or
(b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company; or
(c) to secure the proper management of any banking company generally, it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

6.39. Section 35AA and Section 35AB, inserted by the Amendment Act 30 of 2017 (pursuant to the enactment of Insolvency and Bankruptcy Code, 2016), empowers RBI respectively (i) to issue directions to any banking company to initiate insolvency resolution process, if so authorized by the central government and (ii) to issue directions to any banking company for the resolution of stressed assets.

6.40. Section 36(1)(a) empowers RBI to caution or prohibit banking companies against entering into any particular transaction or class of transactions. Section 36(1)(a) reads follows:

***36.** Further powers and functions of Reserve Bank.—(1) The Reserve Bank may—(a) caution or prohibit banking companies generally or any banking company in particular against entering into any particular transaction or class of transactions, and generally give advice to any banking company;*

Part IIA and IIAB of the Banking Regulation Act, 1949 confers powers upon the Reserve Bank (i) under Section 36AA to remove managerial or other persons from office (ii) under Section 36AB to appoint additional directors and (iii) under Section 36ACA to order the supersession of the board of directors.

6.41. For a long time, RBI drew its powers only from the aforesaid 2 enactments, namely RBI Act, 1934 and the Banking Regulation Act, 1949. But with the passage of time, as the industrial economy grew and several banking companies came into existence and a need to fast track paper-based cheque processing increased, the banks came together to set up clearing houses. The clearing houses developed the procedure of netting (arriving at the multilateral net settlement). But with the advent of technology, new payment systems such as MICR clearing, Electronic Funds Transfer Systems, cash-based payment systems, RTGS (real time gross settlement) etc. became popular. The development of multiple payment systems, which operated only in the realm of contracts among various stakeholders, did not have a legislative sanction. Therefore, an Act known as the Payment and Settlement Systems Act, 2007 was enacted with the object of providing for the regulation and supervision of payment systems in India and to designate RBI as the authority for that purpose.

6.42. It is seen from the Statement of Objects and Reasons of the Bill that RBI is empowered to regulate and supervise various payment and settlement systems in India including those operated by non-banks, card companies, other payment system providers and the proposed umbrella organization for retail payments. The Act further empowers RBI to (i) lay down the procedure for authorization of payment systems (ii) lay down the operation and technical standards for payment systems (iii) issue directions and guidelines to system providers (iv) call for information and furnish returns and documents from the service providers (v) audit and inspect the systems and premises of the system providers (vi) lay down the duties of the system providers and (vii) make regulations for carrying out the provisions of the Act.

6.43. Section 2(1)(i) defines a "payment system". The Section reads as follows:

> ***2(1)(i)*** *"payment system" means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange;*
>
> *Explanation.- For the purposes of this clause, "payment system" includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations;*

6.44. Under Section 3 of the Payment and Settlement Systems Act, 2007 RBI is the designated authority for the regulation and supervision of payment systems under the Act.

6.45. Chapter III of the Act deals with "authorisation of payment systems". Section 4(1) of the Payment and Settlement Systems Act, 2007 provides that any person other than RBI seeking to commence or operate a payment system shall take authorization from the Reserve Bank in that regard. Section 4(1) reads as follows:

> ***4.*** *Payment system not to operate without authorisation.—*
> *(1) No person, other than the Reserve Bank, shall commence or operate a payment system except under and in accordance with an authorisation issued by the Reserve Bank under the provisions of this Act:*
> *Provided that nothing contained in this section shall apply to—*
> *(a) the continued operation of an existing payment system on commencement of this Act for a period not exceeding six months from such commencement, unless within such period, the operator of such payment system obtains an authorisation under this Act or the application for authorisation made under section 7 of this Act is refused by the Reserve Bank;*
> *(b) any person acting as the duly appointed agent of another person to whom the payment is due;*
> *(c) a company accepting payments either from its holding company or any of its subsidiary companies or from any other company which is also a subsidiary of the same holding company;*
> *(d) any other person whom the Reserve Bank may, after considering the interests of monetary policy or efficient operation of payment systems, the size of any payment system or for any other reason, by notification, exempt from the provisions of this section.*

6.46. Chapter IV of the Act specifies the regulatory and supervisory powers of RBI. Under Section 10, RBI is empowered to prescribe certain standards and guidelines for the proper and efficient management of the payment systems. The Section reads as follows:

> ***10.*** *Power to determine standards.—(1) The Reserve Bank may, from time to time, prescribe—*
> *(a) the format of payment instructions and the size and shape of such instructions;*
> *(b) the timings to be maintained by payment systems;*
> *(c) the manner of transfer of funds within the payment system, either through paper, electronic means or in any other manner, between banks or between banks and other system participants;*
> *(d) such other standards to be complied with the payment systems generally;*
> *(e) the criteria for membership of payment systems including continuation, termination and rejection of membership;*
> *(f) the conditions subject to which the system participants shall participate in such fund transfers and the rights and obligations of the system participants in such funds.*
> *(2) Without prejudice to the provisions of sub-section (1), the Reserve Bank may, from time to time, issue such guidelines, as it may consider necessary for the proper and efficient management of the payment systems generally or with reference to any particular payment system.*

6.47. Section 11 of the Act provides that any change in the system which would affect the structure or the operation of the payment system would require prior approval from the Reserve Bank. Section 11 reads as follows:

> ***11.*** *Notice of change in the payment system.—(1) No system provider shall cause any change in the system which would affect the structure or the operation of the payment system without—*
> *(a) the prior approval of the Reserve Bank; and*
> *(b) giving notice of not less than thirty days to the system participants after the approval of the Reserve Bank:*
> *Provided that in the interest of monetary policy of the country or in public interest, the Reserve Bank may permit the system provider to make any changes in a payment system without giving notice to the system participants*

under clause (b) or requiring the system provider to give notice for a period longer than thirty days.
(2) Where the Reserve Bank has any objection, to the proposed change for any reason, it shall communicate such objection to the systems provider within two weeks of receipt of the intimation of the proposed changes from the system provider.
(3) The system provider shall, within a period of two weeks of the receipt of the objections from the Reserve Bank forward his comments to the Reserve Bank and the proposed changes may be effected only after the receipt of approval from the Reserve Bank.

6.48. Section 17 empowers RBI **to issue directions to a payment system or a system participant, which, in RBI's opinion is engaging in any act that is likely to result in systemic risk being inadequately controlled or is likely to affect the payment system, the monetary policy or the credit policy of the country.** The Section reads as follows:

17. *Power to issue directions.—Where the Reserve Bank is of the opinion that,—*
(a) a payment system or a system participant is engaging in, or is about to engage in, any act, omission or course of conduct that results, or is likely to result, in systemic risk being inadequately controlled; or
(b) any action under clause (a) is likely to affect the payment system, the monetary policy or the credit policy of the country,
the Reserve Bank may issue directions in writing to such payment system or system participant requiring it, within such time as the Reserve Bank may specify –
(i) to cease and desist from engaging in the act, omission or course of conduct or to ensure the system participants to cease and desist from the act, omission or course of conduct; or
(ii) to perform such acts as may be necessary, in the opinion of the Reserve Bank, to remedy the situation.

6.49. Section 18 of the Payment and Settlement Systems Act, 2007 further empowers RBI **to issue directions to system providers or the system participants or any other person generally, to regulate the payment systems or in the interest of management or operation of any of the payment systems or in public interest**. The Section reads as follows:

> ***18.*** *Power of Reserve Bank to give directions generally.— Without prejudice to the provisions of the foregoing, the Reserve Bank 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.*

6.50. Thus, the RBI Act, 1934, the Banking Regulation Act, 1949 and the Payment and Settlement Systems Act, 2007 cumulatively recognize and also confer very wide ***powers upon RBI (i) to operate the currency and credit system of the country to its advantage (ii) to take over the management of the currency from central government (iii) to have the sole right to make and issue bank notes that would constitute legal tender at any place in India (iv) regulate the financial system of the country to its advantage (v) to have a say in the determination of***

inflation target in terms of the consumer price index (vi) to have complete control over banking companies (vii) to regulate and supervise the payment systems (viii) to prescribe standards and guidelines for the proper and efficient management of the payment systems (ix) to issue directions to a payment system or a system participant which in RBI's opinion is engaging in any act that is likely to result in systemic risk being inadequately controlled or is likely to affect the payment system, the monetary policy or the credit policy of the country and (x) to issue directions to system providers or the system participants or any other person generally, to regulate the payment systems or in the interest of management or operation of any of the payment systems or in public interest.

6.51. Having taken note of the role of RBI as a central bank in the economy of the country, the functions entrusted to them and the powers conferred upon them under various statutes, let us undertake the exercise of fixing the identity of virtual currencies.

Fixing the identity of VCs

6.52. As we have stated in Part 3 of this judgment, the exact identity of virtual currencies eludes precision. Some call it an exchange of value, some call it a stock and some call it a good/commodity. There may be no difficulty in accepting the divergence of views, if those views are not driven by fear of regulation. But if someone presents it as currency to a regulator of stock market and presents it as a commodity to a regulator of money market and so on and so forth, the definition will not merely elude a proper molecular structure but also elude regulation. This is where the problem of law lies. George Friedman, the founder and Chairman of Geopolitical Futures LLC, an online publication, aptly summarized this dilemma as follows: ***"Bitcoin is neither fish nor fowl…But both pricing it as a commodity when no commodity exists and trying to make it behave as a currency, seem problematic. The problem is not that it is not issued by the Government nor that it is unregulated. The problem is that it is hard to see what it is***."

6.53. It is now universally accepted that ***Satoshi envisioned a digital analog to old-fashioned gold, a new kind of universal money that could be owned by everyone and spent anywhere***. It was designed to live with a cleverly constructed de-centralized network without central authority. Satoshi himself defined it as "***a new electronic cash system that's fully peer-to-peer, with no trusted third party***."

6.54. It is true that though, at its birth, it was conceived of only as an alternative to money, crypto currencies assumed different shapes, different shades and different utility values over the past decade and more. Several international monetary agencies/watchdogs are dabbling to find out what these are and they are also divided in their opinion. For instance, in a report submitted on 22-01-2019 to the International Monetary Fund (IMF), by Jeffrey Franks, Director of its Europe Office, under the title 'Cryptocurrencies and Monetary Policy', it is pointed out as follows:-

> *1. Money has evolved over time, to meet customary demands, but its basic functions such as (A) retaining a store of value; (B) acting as means of payment and (C) acting as a unit of account, have all remained the same.*
> *2. There are four basic characteristics of a crypto currency like bitcoin, they are (A) digital in nature (B) private (C) global and (D) run on an autonomous and de-centralized algorithm.*

6.55. According to the said report, there are four factors which lie behind the rise of crypto currencies. They are: (1) the development of blockchain technology (2) concerns about conventional money and banking, that arose out of the sub-prime mortgage crisis in 2008 and the unconventional monetary policies/quantitative easing (3) privacy concerns and (4) political views about the role of the Government.

6.56. The IMF report says that crypto currencies perform poorly in terms of the three basic functions of currencies. While the store of value increased 2000% from January 2017 to December 2017, there was also a fall during the year 2018. As means of payment, the acceptance of crypto currencies, according to the IMF report is very low and a few companies such as Microsoft, Dish network etc. have begun to accept crypto currencies for limited transactions. As a unit of account, so far, no goods or services are priced in crypto currencies.

6.57. On its potential impact on the monetary policies of governments, the IMF report says the following:-

> ***"But in the future, large crypto currencies holdings could complicate monetary policy management"***

Eventually the conclusions reached in the report are as follows:-

- *Crypto currencies today do not do a good job at fulfilling the main functions of money.*
- *They may be favored by some for ideological, technological or monetary policy reasons.*
- *The blockchain technology they use does have some important advantages in controlling fraud and maintaining privacy.*
- *But they also open up avenues for tax evasion and criminal activity.*

6.58. The petitioners claim that today virtual currency is not money or other legal tender, but good/tradable commodity and hence RBI has no role in regulating/banning the same. RBI has also taken a stand that VCs are not recognized as legal tender, but they seek to justify the impugned decisions, on the ground that VCs are capable of being used as a medium of exchange. Therefore, it is necessary to see how VCs were defined (i) by regulators in different jurisdictions and (ii) by the governments and other statutory authorities of various countries, through statutory instruments and non-statutory directives and (iii) by courts of different jurisdictions.

<u>DEFINITION OF VCs – BY REGULATORS</u>

S. No.	Regulator	Definition of Virtual Currency
1.	International Monetary Fund[7]	VCs are digital representations of value, issued by private developers and denominated in their own unit of account.[8] VCs can be obtained, stored, accessed, and transacted electronically, and can be used for a variety of purposes, as long as the transacting parties agree to use them. The concept of VCs covers a wider array of "currencies," ranging from simple IOUs (I owe you) of issuers (such as Internet or mobile coupons and airline miles), to VCs backed by assets such as gold,[9] and "cryptocurrencies" such as Bitcoin. As digital representations of value, VCs fall within the broader category of digital currencies. However, they differ from other digital currencies, such as e-money, which is a digital payment mechanism for (and denominated in) fiat currency. VCs, on the other hand, are not denominated in fiat currency and have their own unit of account. VCs fall short of the legal concept of currency or money. At present, VCs do not completely fulfill the three economic roles associated with money: high price volatility of VCs limits their ability to serve as a reliable store of value; the current small size and limited acceptance network of

[7] *Virtual Currencies and Beyond: Initial Considerations*, IMF Staff Discussion Note, Dong He *et al.*, page 7, 16, 17 (January 2016) (*available at* https://www.imf.org/external/pubs/ft/sdn/2016/sdn1603.pdf, last accessed on 27-02-2020) – presented by IMF Managing Director, Christine Lagarde, presented at the World Economic Forum (https://www.ccn.com/imf-director-talks-up-virtual-currencies-and-blockchain-tech/, last accessed on 27-02-2020).
[8] Given the fast evolving nature of the industry, a universal definition has yet to emerge and could quickly change as the VC ecosystem continues to transform.
[9] This type of VCs is backed by the combination of existing tangible assets or national currencies and the creditworthiness of the issuer.

		VCs significantly restricts their use as a medium of exchange; as of now, there is little evidence that VCs are used as an independent unit of account.
2.	Financial Action Task Force	**June 2015:**[10] Virtual currency is a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor, is a valid and legal offer of payment) in any jurisdiction. It is not issued nor guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency. **October 2018:**[11] Virtual Asset – A virtual asset is a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations. For the purposes of applying the FATF Recommendations, countries should consider virtual assets as "property," "proceeds," "funds," "funds or other assets," or other "corresponding value."
3.	European Central Bank	**2012:**[12] A virtual currency is a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community. This definition may need to be adapted in future if fundamental characteristics change.

[10] *Guidance for a Risk-Based Approach – Virtual Currencies*, FATF, page 26 (June 2015) *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf (Last accessed on 27-02-2020).

[11] *Glossary of the FATF Recommendations* (updated on October 2018) *available at* https://www.fatf-gafi.org/glossary/u-z/ (Last accessed on 27-02-2020).

[12] *Virtual Currency Schemes*, European Central Bank, page 13 (October 2012) *available at* http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf (Last accessed on 27-02-2020).

		2017:[13] Absent a universally accepted definition, 'virtual currencies' can be defined as digital representations of value which, despite not being issued by a central bank or another comparable public authority, nor being 'attached', subject to certain exceptions, to a *fiat* currency, are voluntarily accepted, by natural or legal persons, as a means of exchange, and which are stored, transferred and traded electronically, without a tangible, real-world representation. This definition of 'virtual currencies' captures decentralised, peer-to-peer VCs – as distinct from E-money or Internet (software)-based payment schemes, which merely facilitate transactions denominated in *fiat* money or in central bank-issued digital currencies – which, while devoid of legal tender status, fulfil, at least to some extent, all three traditional functions of money by way of agreement within their user community. This definition does not, however, extend to centrally-issued digital currencies, such as the central bank digital currencies under consideration, at the time of writing, in several jurisdictions. **European Banking Authority** in 2014:[14] VCs are defined as a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a FC, but is used by natural or legal persons as a means of exchange and can be transferred, stored or traded electronically.
4.	European Securities and Markets Authority[15]	Crypto-asset: A type of private asset that depends primarily on cryptography and Distributed Ledger Technology (DLT) or similar technology as part of their perceived or inherent

[13] Phoebus Athanassiou, *Impact of Digital Innovation on the Processing of Electronic Payments and Contracting: An Overview of Legal Risks*, Legal Working Paper Series, No. 16, European Central Bank (October 2017) *available at* https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp16.en.pdf?344b9327fec917bd7a8fd70864a94f6e (Last accessed on 27-02-2020).

[14] *EBA Opinion on 'virtual currencies'*, page 11, 13 (July 2014) *available at* https://eba.europa.eu/sites/default/documents/files/documents/10180/657547/81409b94-4222-45d7-ba3b-7deb5863ab57/EBA-Op-2014-08%20Opinion%20on%20Virtual%20Currencies.pdf (Last accessed on 27-02-2020).

[15] Advice - *Initial Coin Offerings and Crypto-Assets* (January 2019) *available at* https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf (Last accessed on 27-02-2020).

		value…Crypto-asset additionally means an asset that is not issued by a central bank.
5.	Financial Conduct Authority, United Kingdom[16]	Cryptoassets are a cryptographically secured digital representation of value or contractual rights that is powered by forms of DLT and can be stored, transferred or traded electronically. While cryptoassets can be used as a means of exchange, they are not considered to be a currency or money, as both the Bank of England and the G20 Finance Ministers and Central Bank Governors have previously set out. They are too volatile to be a good store of value, they are not widely accepted as a means of exchange, and they are not used as a unit of account.
6.	Internal Revenue Service, Department of Treasury, USA	**2014:**[17] "virtual currency" may be used to pay for goods or services, or held for investment. Virtual currency is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. Convertible VC is treated as property for U.S. federal tax purposes. General tax principles that apply to property transactions apply to transactions using virtual currency. VC is not treated as currency that could generate foreign currency gain or loss for U.S. federal tax purposes. **2018:**[18] Virtual currency, as generally defined, is a digital representation of value that functions in the same manner as a country's traditional currency.
7.	Securities and Exchange	Bitcoin has been described as a decentralized, peer-to-peer virtual currency that is used like

[16] *Guidance on Cryptoassets*, Consultation Paper, CP 19/3, Financial Conduct Authority, page 7 (January 2019) *available at* https://www.fca.org.uk/publication/consultation/cp19-03.pdf (Last accessed on 27-02-2020) and *Guidance on Cryptoassets*, Feedback and Final Guidance to CP 19/3, Policy Statement, PS19/22 (July 2019) *available at* https://www.fca.org.uk/publication/policy/ps19-22.pdf (Last accessed on 27-02-2020).

[17] *IRS Virtual Currency Guidance: Virtual Currency is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply* (March 2014) *available at* https://www.irs.gov/newsroom/irs-virtual-currency-guidance (Last accessed on 27-02-2020) and https://www.irs.gov/pub/irs-drop/n-14-21.pdf (Last accessed on 27-02-2020).

[18] *IRS reminds taxpayers to report virtual currency transactions* (March 2018) *available at* https://www.irs.gov/newsroom/irs-reminds-taxpayers-to-report-virtual-currency-transactions (Last accessed on 27-02-2020).

	Commission, USA	money – it can be exchanged for traditional currencies such as the U.S. dollar, or used to purchase goods or services, usually online. *Unlike traditional currencies, Bitcoin operates without central authority or banks and is not backed by any government.*[19] Speaking broadly, crypto currencies purport to be items of inherent value (similar, for instance, to cash or gold) that are designed to enable purchases, sales and other financial transactions. They are intended to provide many of the same functions as long-established currencies such as the U.S. dollar, euro or Japanese yen but do not have the backing of a government or other body.[20]
8.	Commodity Futures Trading Commission, USA	Section 1a(9) of the Act (US Commodity Exchange Act) defines "commodity" to include, among other things, "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(9). The definition of a "commodity" is broad. *See, e.g., Board of Trade of City of Chicago v. SEC,* 677 F. 2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.[21]
9.	Financial Crimes Enforcement Network, Department of Treasury, USA[22]	Virtual currency is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction. This guidance addresses "convertible" virtual currency. This type of virtual currency either has an equivalent value in real currency, or acts as a substitute for real currency.

[19] *Investor Alert: Bitcoin and Other Virtual Currency-Related Investments* (May 2014) *available at* https://www.sec.gov/oiea/investor-alerts-bulletins/investoralertsia_bitcoin.html (Last accessed on 27-02-2020).

[20] Chairman Jay Clayton, Statement on *Cryptocurrencies and Initial Coin Offerings* (December 2017) *available at* https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11 (Last accessed on 27-02-2020).

[21] *In the Matter of: Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan, CFTC Docket No. 15-29.* 2015 WL 5535736 (September 17, 2015) *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf (Last accessed on 27-02-2020).

[22] *Guidance - Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies* (March 2013) *available at* https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf (Last accessed on 27-02-2020).

10.	Canada Revenue Agency (CRA)[23]	Cryptocurrency is a digital representation of value that is not legal tender. It is a digital asset…that works as a medium of exchange for goods and services between the parties who agree to use it. CRA generally treats cryptocurrency like a commodity for purposes of Income Tax Act. Any income from transactions involving cryptocurrency is generally treated as business income or as a capital gain, depending on the circumstances. Virtual currency is digital asset that can be used to buy and sell goods or services. Cryptocurrency is a blockchain-based, virtual currency. When cryptocurrency is used to pay for goods or services, the rules for barter transactions apply for income tax purposes. A barter transaction occurs when any two persons agree to exchange good or services and carry out that exchange without legal currency. Virtual currency can also be bought or sold like commodity. [24]

DEFINITIONS UNDER STATUTORY ENACTMENTS AND NON-STATUTORY DIRECTIVES OF GOVERNMENTS

S. No.	**Country**	**Statutory Enactment/ Non-Statutory Directive**	**Section/ Article defining VC**
1.	Japan	Payment Services Act, 2009	Article 2(5): The term **"Virtual Currency"** as used in this Act means any of the following: (i) property value (limited to that which is recorded on an electronic device or any other object by electronic means, and excluding the Japanese currency, foreign currencies, and Currency-Denominated Assets; the same applies

[23] *Guide for cryptocurrency users and tax professionals* (Last modified on 27 June 2019) *available at* https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html (Last accessed on 27-02-2020).
[24] *Virtual Currency* (Last modified on 26 June 2019) *available at* https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency.html (Last accessed on 27-02-2020).

			in the following item) which can be used in relation to unspecified persons for the purpose of paying consideration for the purchase or leasing of goods or the receipt of provision of services and can also be purchased from and sold to unspecified persons acting as counterparties, and which can be transferred by means of an electronic data processing system; and (ii) property value which can be mutually exchanged with what is set forth in the preceding item with unspecified persons acting as counterparties, and which can be transferred by means of an electronic data processing system. 2019 amendment to this Act (to come into force from April 2020) uses the term "crypto assets (*angoshisan*)" in place of the term "virtual currency". The 2019 Amendment added crypto assets to the term "financial instruments" for the purposes of defining underlying assets of the derivative transactions subject to derivative regulations under the FIEA (Financial Instruments and Exchange Act), and therefore the same regulations applicable to other derivative transactions under the FIEA will apply to crypto asset derivative transactions. These regulations include certain conduct regulations, such as the notice requirement prior to trading, and prohibitions on making false statements, providing conclusive judgements, and engaging in uninvited solicitation.

2.	Malta	Virtual Financial Asset Act, 2018	Article 2(2): "virtual financial asset" or "VFA" means any form of digital medium recordation that is used as a digital medium of exchange, unit of account, or store of value and that is not - (a) electronic money; (b) a financial instrument; or (c) a virtual token; "virtual token" means a form of digital medium recordation whose utility, value or application is restricted solely to the acquisition of goods or services, either solely within the DLT platform on or in relation to which it was issued or within a limited network of DLT platforms.
3.	Canada	Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, 2002[25]	Section 1(2): **virtual currency** means (a) a digital representation of value that can be used for payment or investment purposes that is not a fiat currency and that can be readily exchanged for funds or for another virtual currency that can be readily exchanged for funds; or (b) a private key of a cryptographic system that enables a person or entity to have access to a digital representation of value referred to in paragraph (a).
4.	Bahamas	Payment Instruments (Oversight) Regulations, 2017	No specific legislation for crypto currencies. But according to Central Bank, Bahamas the regulations which provide a framework for a system of national electronic payment services, apply to crypto currencies. Article 2(1): electronic money or e-money means electronically stored monetary value as represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions and which is accepted as a means of

[25] As amended in June 2019, which amendment is yet to come into force.

			payment by persons other than the issuer, and includes monetary value stored magnetically or in any other tangible or intangible device (such as SIM card or software). A Bill is under consideration that would bring virtual currencies within the ambit of proceeds of crime legislation (Proceeds of Crime Bill, 2018). Clause (2) of the Bill defines: "virtual currency" as a digital representation of value which can be digitally traded and functions as – (a) a medium of exchange; (b) a unit of account; or (c) a store of value, that does not have legal tender status or carry any security or guarantee in any jurisdiction. "currency or money" means coin and paper money of any jurisdiction that is designated as legal tender or is customarily used and accepted as a medium of exchange, including virtual currency as a means of payment.
5.	Estonia	Money Laundering and Terrorist Financing Prevention Act, 2017	Section 3(9): cryptocurrencies (virtual currencies) are value represented in digital form that is digitally transferable, preservable, or tradable and that which natural persons or legal persons accept as a payment instrument, but that is not the legal tender of any country or funds (banknotes or coins, scriptural money held by banks, or electronic money).
6.	Latvia	Law on Prevention of Money Laundering and Terrorism and Proliferation Financing, as amended in 2017	Section 1 (2^2): **virtual currency** - a digital representation of value which can be transferred, stored or traded digitally and operate as a means of exchange, but has not been recognised as a legal means of payment, cannot be recognised as a banknote and coin, non-cash money and electronic money, and is not a monetary value accrued in the payment instrument which is used in the cases referred to in Section 3,

			Clauses 10 and 11 of the Law on the Payment Services and Electronic Money;
7.	Liechtenstein	Due Diligence Act, 2009	Article 2(1)(l): **Virtual currencies** shall be understood to be digital monetary units, which can be exchanged for legal tender, used to purchase goods or services or to preserve value and thus assume the function of legal tender.
8.	Israel	Supervision of Financial Services Law, 5776-2016	Section 11A (7) defines financial asset. Financial asset includes virtual currency.[26]
9.	Jersey (Crown dependency)	Proceeds of Crime (Miscellaneous Amendments) (Jersey) Regulations 2016	Article 4(4): 'Virtual currency' means any currency which (whilst not itself being issued by, or legal tender in, any jurisdiction) – (a) digitally represents value; (b) is a unit of account; (c) functions as a medium of exchange; and (d) is capable of being digitally exchanged for money in any form. Article 4(5): For the avoidance of doubt, virtual currency does not include any instrument which represents or stores (whether digitally or otherwise) value that can be used only to acquire goods and services in or on the premises of, or under a commercial agreement with, the issuer of the instrument.

[26] Regulation of Cryptocurrency Around the World – Israel, Report of The Law Library of Congress, Global Legal Research Center (June 2018) *available at* https://www.loc.gov/law/help/cryptocurrency/world-survey.php#israel (Last accessed on 27-02-2020).

10.	Mexico	Financial Technology Institutions Law, 2018 (Chapter on Virtual Assets)	It defines virtual assets as representations of value electronically registered and utilized by the public as a means of payment for all types of legal transactions, which may only be transferred electronically.[27]
11.	Austria	Ministry of Finance	Treats virtual currency as 'other intangible commodity'.[28]
12.	Czech Republic	Vice Governor, Czech National Bank	Treats virtual currency as 'commodity'.[29]
13.	Germany	German Federal Financial Supervisory Authority	The Authority qualifies virtual currencies as "units of account" and therefore, "financial instruments". But bitcoin is considered to be crypto token by German Bundesbank (because it does not fulfil the typical functions of a currency).[30]
14.	Luxembourg	Minister of Finance	Recognized before the Parliament that crypto currencies are actual currencies.[31]

[27] Regulation of Cryptocurrency Around the World – Mexico, Report of The Law Library of Congress, Global Legal Research Center (June 2018) *available at* https://www.loc.gov/law/help/cryptocurrency/world-survey.php#mexico (Last accessed on 27-02-2020).

[28] Regulation of Cryptocurrency Around the World – Austria, Report of The Law Library of Congress, Global Legal Research Center (June 2018) *available at* https://www.loc.gov/law/help/cryptocurrency/world-survey.php#austria (Last accessed on 27-02-2020).

[29] Regulation of Cryptocurrency Around the World – Czech Republic, Report of The Law Library of Congress, Global Legal Research Center (June 2018) *available at* https://www.loc.gov/law/help/cryptocurrency/world-survey.php#czech (Last accessed on 27-02-2020).

[30] Regulation of Cryptocurrency Around the World – Germany, Report of The Law Library of Congress, Global Legal Research Center (June 2018) *available at* https://www.loc.gov/law/help/cryptocurrency/world-survey.php#germany (Last accessed on 27-02-2020).

[31] Regulation of Cryptocurrency Around the World – Luxembourg, Report of The Law Library of Congress, Global Legal Research Center (June 2018) *available at* https://www.loc.gov/law/help/cryptocurrency/world-survey.php#luxembourg (Last accessed on 27-02-2020).

15.	Slovakia	Ministry of Finance, Slovakia published guidance	Virtual currencies must be treated as "short term financial assets other than money".[32]
16.	European Union	European Union's Directive 2018/843 of 30 May 2018 (5th Anti-Money Laundering Directive)[33]	Article 3(18): 'Virtual Currencies' means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically.
17.	United Kingdom	HM Revenue & Customs, UK[34]	Cryptoassets (or 'cryptocurrency' as they are also known) are cryptographically secured digital representations of value or contractual rights that can be: • transferred • stored • traded electronically HMRC does not consider cryptoassets to be currency or money. Cryptocurrencies have a unique identity and cannot therefore be directly compared to any other form of investment activity or payment mechanism.[35]

[32] Regulation of Cryptocurrency Around the World – Slovakia, Report of The Law Library of Congress, Global Legal Research Center (June 2018) *available at* https://www.loc.gov/law/help/cryptocurrency/world-survey.php#slovakia (Last accessed on 27-02-2020).
[33] European Union's Directive 2018/843 *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN (Last accessed on 27-02-2020).
[34] Policy paper, *Cryptoassets: Tax for Individuals* (December 2019) *available at* https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals (Last accessed on 27-02-2020).
[35] Policy paper on Revenue and Customs Brief 9 (2014): Bitcoin and other cryptocurrencies, HM Revenue & Customs (March 3, 2014) *available at* https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies (Last accessed on 27-02-2020).

		Bank of England[36]	The first part of the word 'crypto', means 'hidden' or 'secret' reflecting the secure technology used to record who owns what, and for making payments between users. The second part of the word, 'currency,' tells us the reason cryptocurrencies were designed in the first place: a type of electronic cash. But cryptocurrencies aren't like the cash we carry. They exist electronically and use a peer-to-peer system. There is no central bank or government to manage the system or step in if something goes wrong.
18.	United States of America	New York [BitLicense Regulation (23 CRR-NY 200)]	Section 2(p): *virtual currency* means any type of digital unit that is used as a medium of exchange or a form of digitally stored value. Virtual currency shall be broadly construed to include digital units of exchange that: have a centralized repository or administrator; are decentralized and have no centralized repository or administrator; or may be created or obtained by computing or manufacturing effort. *Virtual currency* shall not be construed to include any of the following: (1) digital units that: (i) are used solely within online gaming platforms; (ii) have no market or application outside of those gaming platforms; (iii) cannot be converted into, or redeemed for, fiat currency or virtual currency; and (iv) may or may not be redeemable for real-world goods, services, discounts, or purchases; (2) digital units that can be redeemed for goods, services, discounts, or purchases as part of a customer

[36] *What are cryptoassets (cryptocurrencies)? available at* https://www.bankofengland.co.uk/knowledgebank/what-are-cryptocurrencies (Last accessed on 27-02-2020).

			affinity or rewards program with the issuer and/or other designated merchants or can be redeemed for digital units in another customer affinity or rewards program, but cannot be converted into, or redeemed for, fiat currency or virtual currency; or (3) digital units used as part of prepaid cards;
		North Carolina [Money Transmitters Act (§ 53-208.42)]	Virtual currency– A digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account, or a store of value but only to the extent defined as stored value under subdivision (19) of this section, but does not have legal tender status as recognized by the United States Government.
		Connecticut [General Statutes of Connecticut, Sec. 36a-596]	“Virtual currency” means any type of digital unit that is used as a medium of exchange or a form of digitally stored value or that is incorporated into payment system technology. Virtual currency shall be construed to include digital units of exchange that (A) have a centralized repository or administrator; (B) are decentralized and have no centralized repository or administrator; or (C) may be created or obtained by computing or manufacturing effort. Virtual currency shall not be construed to include digital units that are used (i) solely within online gaming platforms with no market or application outside such gaming platforms, or (ii) exclusively as part of a consumer affinity or rewards program, and can be applied solely as payment for purchases with the issuer or other designated merchants, but cannot be converted into or redeemed for fiat currency.

		Florida [Florida Money Laundering Act (Fla. Stat. § 896.101)]	(2) (j) "Virtual currency" means a medium of exchange in electronic or digital format that is not a coin or currency of the United States or any other country.
		Illinois [Digital Currency Regulatory Guidance (2017)][37]	A digital currency is an electronic medium of exchange used to purchase goods and services. A digital currency may also be exchanged for money. A digital currency, by nature of its properties detailed below, is distinct from money.
		Louisiana [Consumer and Investor Advisory on Virtual Currency by Office of Financial Institute (2014)][38]	Virtual currency is an electronic medium of exchange that does not have all the attributes of real or fiat currencies. Virtual currencies include cryptocurrencies, such as Bitcoin and Litecoin, which are not legal tender and are not issued or backed by any central bank or governmental authority. Virtual currencies are: • not backed by the United States or any other national government; • not insured by the Federal Deposit Insurance Corporation or any governmental agency; • not backed by any physical commodity, such as gold or silver; and • not legal tender for debts. Virtual currencies have legitimate purposes and can be purchased, sold, and exchanged with other types of virtual currencies or real currencies like the U.S. dollar. This can happen through various mechanisms such as exchangers, administrators, or

[37] *Digital Currency Regulatory Guidance*, Illinois Department of Financial and Professional Regulation (June 13, 2017) *available at* https://www.idfpr.com/Forms/DFI/CCD/IDFPR%20-%20Digital%20Currency%20Regulatory%20Guidance.pdf (Last accessed on 27-02-2020).
[38] Office of Financial Institutions, State of Louisiana, *Consumer and Investor Advisory on Virtual Currency* (August 2014) *available at* http://www.ofi.state.la.us/SOCGuidanceVirtualCurrency.pdf (Last accessed on 27-02-2020).

			merchants that are willing to accept virtual currencies in lieu of real currency.
		Michigan [Michigan Department of Treasury Guidance (January 2015)][39]	Convertible virtual currency is a digital representation of value that has an equivalent value in real currency, such as the United States Dollar (USD), and/or acts as a substitute for real currency. A prominent example of convertible virtual currency is Bitcoin, a form of e-currency that has been around since 2008.
		Washington Uniform Money Services Act (RCW 19.230.0 10)	"Virtual currency" means a digital representation of value used as a medium of exchange, a unit of account, or a store of value, but does not have legal tender status as recognized by the United States government. "Virtual currency" does not include the software or protocols governing the transfer of the digital representation of value or other uses of virtual distributed ledger systems to verify ownership or authenticity in a digital capacity when the virtual currency is not used as a medium of exchange.
		Wyoming Wyoming Money Transmitter Act [W.S. 40-22-102(a)]	(xxii) "Virtual currency" means any type of digital representation of value that: (A) Is used as a medium of exchange, unit of account or store of value; and (B) Is not recognized as legal tender by the United States government.

6.59. It may be seen from the contents of the tables given above that there is unanimity of opinion among all the regulators and the governments of various countries that though virtual currencies have

[39] *Virtual Currency*, Treasury Update published by the Tax Policy Division, Michigan Department of Treasury (Vol. 1(1), November 2015) *available at* https://www.michigan.gov/documents/treasury/Tax-Policy-November2015-Newsletter_504036_7.pdf (Last accessed on 27-02-2020).

not acquired the status of a legal tender, they nevertheless constitute digital representations of value and that they are capable of functioning as (i) a medium of exchange and/or (ii) a unit of account and/or (iii) a store of value. The IMF, the FATF, the European Central Bank, the Financial Conduct Authority of the United Kingdom, the Internal Revenue Service of the United States, Department of Treasury and the Canadian Revenue Authority treat virtual currencies as digital representations of value. The European Central Bank went a step further by describing a virtual currency as a type of unregulated digital money. The Internal Revenue Service of the United States, Department of Treasury has recognized that a virtual currency can function in the same manner as a country's traditional currency. The Securities and Exchange Commission, USA also recognizes that virtual currencies are intended to perform many of the same functions as long-established currencies such as US dollar, Euro or Japanese Yen. Yet another wing of the United States Department of Treasury namely Financial Crimes Enforcement Network calls virtual currency as a medium of exchange that operates like a currency in some environments, though it may not have all the attributes of a real currency.

6.60. The Bank of International Settlements, as pointed out in Part 2 of this judgment, got a sub-group within the Committee on Payments and Market Infrastructure (CPMI) to undertake an analysis of digital currencies. In a report submitted by them in November 2015, this sub-group recognized that though the use of private digital currencies was too low at that time for certain risks to materialize, the widespread substitution of bank notes over a period of time, with digital currencies, could lead to a decline in non-interest paying liabilities of central banks and that the conduct of the monetary policy could be affected.

6.61. Similarly, the state of Liechtenstein considers virtual currencies as digital monetary units which can be exchanged for legal tender and also be used to purchase goods or services, thereby assuming the character of a legal tender. The German Federal Financial Supervisory Authority treats virtual currencies as units of account and consequently as financial instruments. Luxembourg has taken an official position that crypto currencies are actual currencies. Some of the states in the Unites States of America have passed laws recognizing virtual currencies as electronic medium of exchange.

6.62. It is clear from the above that the governments and money market regulators throughout the world have come to terms with the reality that virtual currencies are capable of being used as real money, but all of them have gone into the denial mode (like the proverbial cat closing its eyes and thinking that there is complete darkness) by claiming that VCs do not have the status of a legal tender, as they are not backed by a central authority. ***But what an article of merchandise is capable of functioning as, is different from how it is recognized in law to be. It is as much true that VCs are not recognized as legal tender, as it is true that they are capable of performing some or most of the functions of real currency.***

6.63. The word "currency" is defined in Section 2(h) of the Foreign Exchange Management Act, 1999 (hereinafter, "**FEMA**") 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.***" The expression "currency notes" is also defined in Section 2(i) of FEMA to mean and include cash in the form of coins and bank notes. Again, FEMA defines "Indian currency" under Section 2(q) to mean currency which is expressed or drawn in Indian rupees, but which would not include special bank notes and special one rupee notes issued under Section 28A of the RBI Act. But RBI has taken a stand in paragraph 24 of its counter-affidavit that VCs do not fit into the definition of the expression "currency" under Section 2(h) of FEMA, despite the fact that FATF, in its report on June 2014 on "Virtual Currencies: Key Definitions and Potential AML/CFT Risks" defined virtual currency to mean *"digital representation of value that* *can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status."* According to the report, ***legal tender status is acquired only when it is accepted as a valid and legal offer of payment when tendered to a creditor***.

6.64. Traditionally 'money' has always been defined in terms of the 3 functions or services that it provides namely (1) a medium of exchange (2) a unit of account and (3) a store of value. But in course of time, a fourth function namely that of being a ***final discharge of debt or standard of deferred payment*** was also added. This fourth function is acquired by money through the conferment of the legal tender status by a Government/central authority. Therefore, capitalizing on this fourth dimension/function and drawing a distinction between money as understood in the social sense and money as understood in the legal sense, it was contended by Shri Nakul Dewan, learned Senior Counsel, with particular reference to the book '***Property Rights in Money' by David Fox*** and the decision of the Queen's Bench in ***Moss v. Hancock***[40] and the decision of the US Supreme Court in ***Wisconsin Central Ltd v. United States,***[41] that so long as VCs do not qualify as money either in the legal sense (not having a legal tender status) or in the social sense (not being widely accepted by a huge population as a medium of exchange), they

[40] (1899) 2 QB 111
[41] 585 US ___ 2018, 138 S. Ct. 2067 (2018)

cannot be treated as currencies within the meaning of any of the statutory enactments from which RBI draws its energy and power.

6.65. But ***we do not think that RBI's role and power can come into play only if something has actually acquired the status of a legal tender. We do not also think that for RBI to invoke its power, something should have all the four characteristics or functions of money***. ***Moss v. Hancock*** (supra), itself a century old decision (1899), relies upon the definition of 'money' as given by F. A. Walker in his treatise 'Money, Trade and Industry' (actual title of the book appears to be 'Money in its relation to Trade and Industry'), published in 1879 to the effect that *"money is that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or the credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities."*

6.66. But that 1879 definition cannot be accepted as perfect, final and everlasting, in modern times. Cross border transactions and technological advancements have removed many shackles created by old concepts (except perhaps those created by law courts). This fact has been recognized in the dissent of Breyer, J., in ***Wisconsin***

Central (supra) when he says "...***what we view as money has changed over time. Cowrie shells once were such a medium but no longer are... our currency originally included gold, coins and bullion, but after 1934, gold could not be used as a medium of exchange... perhaps one day employees will be paid in Bitcoin or some other type of currency***". In the linguistic sense, Oxford English Dictionary has already included "***property or possessions of any kind viewed as convertible into money" within the definition of money***. Therefore, Breyer, J., points out in his dissent *"So, where does this duel of definitions lead us? Some seem too narrow; some seem too broad; some seem indeterminate. The result is ambiguity"*. He therefore concluded that stock options given to employees constitute money remuneration for the services rendered. But the majority proceeded on the basis that when the law was enacted, the term 'money' was not used in an expansive sense.

6.67. Neither the RBI Act, 1934 nor the Banking Regulation Act, 1949 nor the Payment and Settlement Systems Act, 2007 nor the Coinage Act, 2011 define the words 'currency' or 'money'. But FEMA defines the words 'currency', 'currency notes', 'Indian currency' and 'Foreign currency'. We have taken note of these definitions. Interestingly, Section 2(b) of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 ***defines money to include a cheque, postal order, demand draft, telegraphic transfer or money***

order. Clause (33) of Section 65B of the Finance Act, 1994, inserted by way of Finance Act, 2012 defines 'money' to mean "***legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler cheque, money order, postal or electronic remittance or any other similar instrument, but shall not include any currency that is held for its numismatic value".*** This definition is important, for ***it identifies many instruments other than legal tender, which could come within the definition of money.***

6.68. The Sale of Goods Act, 1930 does not define 'money' or 'currency' but excludes money from the definition of the word 'goods'. The Central Goods and Services Tax Act, 2017 defines 'money' under Section 2(75) to mean "***the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler cheque, money order, postal or electronic remittance or any other instrument recognised by RBI, when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value."***

6.69 In ***CIT v. Kasturi & Sons Ltd.,***[42] a question arose as to whether the replacement by the insurer, of an article destroyed by one of the perils as against which coverage is provided, would be taken to be “money” within the meaning of Section 41(2) of the Income Tax Act, 1961. This court held that the word “money” used in Section 41(2) has to be interpreted only as actual money or cash and not as any other thing or benefit which could be evaluated in terms of money.

6.70. In ***Dhampur Sugar Mills Ltd. v. Commissioner of Trade Tax,***[43] this court was concerned with the question whether the adjustment of price of molasses from the amount of license fee would amount to sale within the meaning of the U.P. Trade Tax Act, 1948. The argument advanced was that an exchange or barter cannot be said to be a sale. After referring to the phrase “cash, deferred payment or other valuable consideration”, this court pointed out that ***“money is a legal tender, but cash is narrower than money***.” This is for the reason that in contradistinction to cash, deferred payment or other valuable consideration would also come within the meaning of money, for the purpose of the Act.

6.71. Just as the very concept of ‘money’ or ‘currency’ has changed over the years, and different jurisdictions and different statutes have adopted different definitions of ‘money’ and ‘currency’,

[42] (1999) 3 SCC 346
[43] (2006) 5 SCC 624

depending upon the issue sought to be addressed, the concept of VCs have also undergone a sea of change, with different regulators and statutory authorities adopting different definitions, leading to diametrically opposite views emerging from courts across the spectrum. Let us now see how courts in other jurisdictions have grappled with the definition of the word 'virtual currency'.

6.72. The Securities and Exchange Commission (SEC) of the United States of America prosecuted a person by name Trendon Shavers, who was the founder and operator of Bitcoin Savings and Trust (BTCST), for soliciting illicit investments in Bitcoin related opportunities from a number of lenders, defrauding them to the tune of 700,000 BTC in funds. While SEC contended that Bitcoin investments were securities, Shavers contended that Bitcoin is not money and hence, not 'securities'. But the Sherman Division Eastern District Court of Texas opined in ***SEC v. Trendon Shavers,***[44] that: *"It is clear that bitcoin can be used as money. It can be used to purchase goods or services and as Shavers stated, used to pay for individual living expenses. The only limitation of bitcoin is that it is limited to those places that accept it as currency. However, it can also be exchanged for conventional currencies such as the US dollar, euro, yen and Yuan. Therefore, bitcoin is a currency or form of money…"*

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[44] Case No. 4: 13-Cv-416 (August 6, 2013)

6.73. In ***United States v. Ulbricht,***[45] the United States District Court, Southern District, New York was concerned with the defendant's motion to dismiss four counts namely (i) participation in a narcotics trafficking conspiracy (ii) a continuing criminal enterprise (iii) computer hacking conspiracy and (iv) money laundering conspiracy, for which the Grand jury returned indictment. The allegation against the defendant was that Ulbricht engaged in these offences by designing, launching and administering a website called Silk Road, as an online marketplace for illicit goods and services. According to the prosecution, Bitcoin was used to launder the proceeds. The website was available only to those using Tor (abbreviation for 'The Onion Router'), a free and open source software and a network that allows anonymous, untraceable internet browsing. Payments were allowed only through Bitcoin. Opposing the money laundering charge, Ulbricht contended that the use of Bitcoin did not involve a legally cognizable financial transaction. But the court held *"Bitcoins carry value-that is their purpose and function-and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it US dollars, euros or some other currency"*.

6.74. The decision in ***Ulbricht*** (supra) was closely followed by another decision of the same court in ***United States v. Faiella.***[46] This was also a case where the defendants were charged with the

[45] 31F. Supp. 3d 540 (2014)
[46] 39F. Supp. 3d 544 (2014)

operation of an underground market in the virtual currency bitcoin via the website Silk Road. Faiella moved the District court to dismiss count one of the indictments namely that of operating an unlicensed money transmitting business in violation of a particular statute. The contention of the defendant was (i) that Bitcoin does not qualify as money (ii) that operating a Bitcoin exchange does not constitute "transmitting" of money and (iii) that he is not a money transmitter. While rejecting the motion, the court held *"bitcoin clearly qualifies as money or funds under the plain meaning definitions. Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value and is used to conduct financial transactions."* The decision in ***Trendon Shavers*** (supra) was relied upon.

6.75. While the district courts of USA took the view that virtual currency can be used as money, the Commodity Futures Trading Commission (CFTC) took a view in ***In re Coinflip, Inc***,[47] that virtual currencies are "commodities". This was in relation to the initiation of public administrative proceedings to determine whether the defendant was engaged in violation of the provisions of Commodity Exchange Act and the Commission's Regulations by operating an online facility named Derivabit offering to connect buyers and sellers of Bitcoin option contracts. Interestingly, the defendant admitted an offer of settlement in anticipation of administrative proceedings.

[47] CFTC Docket No. 15-29 dated 17-09-2015

6.76. Within a week, another entity, by name, TeraExchange LLC also submitted an offer of settlement before CFTC ***In the matter of TeraExchange LLC***.[48] CFTC reiterated even in that case that Bitcoin is a commodity under the relevant statute. Another Bitcoin exchange, by name Bitfinex, also conceded the position, before the CFTC when public administrative proceedings were sought to be initiated against them. In the order accepting the offer of settlement, delivered on 02-06-2016 ***In the matter of BFXNA Inc***, ***d/b/a BITFINEX***,[49] CFTC recorded that Bitcoin and other virtual currencies are commodities under the relevant provisions of the statute.

6.77. In ***United States v. Murgio,***[50] which was also before the US District Court, S.D. New York, the defendant was charged with operating Coin.mx, as an unlicensed money transmitting business. The government alleged that Murgio and his co-conspirators attempted to shield the true nature of his Bitcoin exchange business by operating through several front companies, to convince financial institutions that Coin.mx was just a members-only association of individuals interested in collectable items. Count one of the indictments was the alleged conspiracy in the operation of an unlicensed money transmitting business, punishable under 18 U. S. C. § 1960. Under Section 1960, a business must (i) transfer on behalf

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[48] CFTC Docket No. 15-33 dated 24-09-2015
[49] CFTC Docket No. 16-19 dated 02-06-2016
[50] 209 F. Supp. 3d 698 (2016)

of public, (ii) funds and (iii) in violation of licensing and registration requirements, to qualify as an unlicensed money transmitting business. The court concluded that Bitcoins are funds within the plain meaning of the term, as the word “funds” would mean pecuniary resources, generally accepted as a medium of exchange or means of payment. Interestingly, the defendant’s contention that Bitcoin is a commodity as held by CFTC was rejected by the court.

6.78. However, despite the opinion of other District courts in four previous cases, the United States District Court, Eastern district of New York held in a preliminary hearing for injunctive relief, in ***Commodity Futures Trading Commission v. Patrick McDonnell*** [51] (Memorandum and order), that virtual currencies are commodities within the meaning of the Commodity Exchange Act. But it is seen from the order that there was no ‘currency versus commodity’ debate in the entire order.

6.79. A similar view was taken by United States District Court, District of Massachusetts in ***Commodity Futures Trading Commission v. My Big Coin Pay, Inc. et al.***,[52] holding that since there is futures trading in virtual currencies, they constitute ‘commodity’ within the meaning of the Statute.

[51] 18-Cv-361 dated 03-06-2018
[52] 18-Cv-10077-RWZ dated 26-09-2018

6.80. ***State of Florida v. Michell Abner Espinoza***,[53] is an interesting case which came up before the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. In that case, a Detective of the Miami Police department teamed up with a Special Agent of the Miami Electronic Crimes Task Force of the United States Secret Service to initiate an investigation into virtual currencies. After getting in touch with a person who advertised the sale of Bitcoins in an online platform run by a peer-to-peer Bitcoin exchange by name *Localbitcoins.com*, the team organized an undercover operation in December 2013/January 2014. The Detective offered to pay for the Bitcoins through stolen credit cards and when the transaction was about to take place, the offeror was arrested. He was charged with one count of unlawfully engaging in money services business and 2 counts of money laundering. The defendant filed motions for dismissal and the State filed motions for striking out those motions. While allowing the defendant's motion to dismiss all the 3 counts on the ground that the court will be unwilling to punish a man for selling his property to another, when his action falls under a statute that is so vaguely written that even legal professionals have difficulty finding a singular meaning, the court ruled as follows:

> *"Nothing in our frame of references allows us to accurately define or describe Bitcoin……. Bitcoin may have some attributes in common with what we commonly refer to as*

[53] F 14-2923 decided on 22-07-2016

> *money, but differ in many important aspects. While Bitcoins can be exchanged for items of value, they are not a commonly used means of exchange. They are accepted by some but not by all merchants or service providers. .... With such volatility they have a limited ability to act as a store of value, another important attribute of money. This court is not an expert in economics, however it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is equivalent of money. The Florida Legislature may choose to adopt statutes regulating virtual currency in future. At this time, however, attempting to fit the sale of Bitcoin into a statutory scheme regulating money services businesses is like fitting a square peg in a round hole"*

6.81. But the decision of the Circuit Court was appealed to the ***Third District Court of Appeal, State of Florida***. By an opinion rendered on 30-01-2019, reported as ***State of Florida v. Michell Abner Espinoza***[54] the Court of Appeal reversed the decision of the Circuit Court and held, after referring to the June 2014 Report of FATF titled "Virtual currencies: key definitions and potential AML/CFT risks" that ***given the plain language of the Florida statutes governing money service businesses and the nature of bitcoin and how it functions, Espinoza was acting both as a payment instrument seller and engaging in the business of a money transmitter***. The Court of Appeal pointed out that the definition of a "payment instrument" included *"a cheque, draft, warrant, money order, travelers' cheque, electronic instrument or other instrument, payment of money or monetary value, whether or not*

[54] 264 So. 3d 1055 (2019)

negotiable". The phrase "money services business" was defined in the statute to include any person who acts as a payment instrument seller. Since the expression monetary value means a medium of exchange, whether or not redeemable in currency, the court concluded that VCs are payment instruments and hence a person dealing with the same is in money services business. Though Bitcoin does not expressly fall within the definition of "currency" found in the statute, the court concluded that Bitcoin would certainly fall under the definition of a payment instrument. The Court of Appeal took note of the fact that several restaurants in the Miami area accepted Bitcoins as a form of payment and hence Bitcoin functions as a medium of exchange. (What is important to note about this decision is that it dealt with a penal statute. This is why the Circuit court followed the cautionary approach, not to allow a citizen to be prosecuted on the basis of conjectures about what is a money services business. But the Court of Appeal found on fundamentals that the business concerned a payment instrument and that therefore, there was no ambiguity.)

6.82. In a completely different context, the Singapore International Commercial Court ruled in ***B2C2 Ltd. v. Quoine Pte Ltd.***,[55] that virtual currency can be considered as property which is capable of being held on trust. The case arose out of a dispute

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[55] [2019] SGHC (I) 3

between a person who traded in virtual currencies and the VC Exchange platform on which he traded. The dispute revolved more around the breach of contract and breach of trust than around the identity of virtual currencies. It was in that context that the court opined that crypto currencies satisfied the definition of 'property' as provided by the House of Lords in ***National Provincial Bank v. Ainsworth***[56] to the effect that it must be *"definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability"*. The court further noted that *"crypto currencies are not legal tender in the sense of being a regulated currency issued by a government but do have the fundamental characteristic of intangible property as being an identifiable thing of value"*. The decision of the Commercial Court was appealed to the Court of Appeal. While dismissing Quoine's appeal on breach of contract claim, but allowing it on breach of trust claim, the Court of Appeal held in ***Quoine Pte Ltd v. B2C2 Ltd***[57] that though crypto currencies are capable of assimilation into the general concepts of property, there are difficult questions as to the type of property that is involved. Therefore, the Court of Appeal did not take a final position on the question, since it felt that the precise nature of the property right involved, was not clear.

[56] [1965] 1 AC 1175 at 1248
[57] [2020] SGCA (I) 02

6.83. In a very recent decision, in ***AA v. Persons Unknown & others Re Bitcoin***,[58] the English High Court ruled that Bitcoin is property. But this decision was on the basis of the definition adopted by UK Jurisdictional Taskforce of the Law Tech Delivery Panel, in its "Legal Statement on the Status of Cryptoassets and Smart Contracts", that crypto assets constitute property under English law. The facts out of which this decision arose, were peculiar. The IT system of a Canadian insurance company was hacked through a malware called *Bitpaymer*, which encrypted all the data of the company. A ransom equivalent of US $ 950,000 in Bitcoin was demanded by the hackers for decryption. After negotiations through a specialist intermediary by name Incident Response Company, the insurance company paid the ransom into a wallet and retrieved the data with the decryption tools provided by the hackers. Thereafter the insurance company engaged the services of a blockchain investigation outfit known as *Chainalysis Inc.*, which found that of the total of 109.25 Bitcoins transferred as ransom, 13.25 Bitcoins (worth approximately US $ 120,000 at the time) had been converted into an untraceable fiat currency. The remaining 96 Bitcoins had been transferred to a "wallet" linked to a Virtual Currency exchange known as Bitfinex (registered in the British Virgin Islands). The insurance company then sued the VC Exchange before the High

[58] [2019] EWHC 3556 (Comm)

Court and sought ancillary disclosure orders to know the identity of persons who held the Bitcoins in the wallet of the exchange. The company also sought a proprietary injunction. Interestingly, the Court agreed to hear the application in private and protect the identity of the insurer which got hacked, for they feared retaliatory copycat attacks. The core issue before the court was whether crypto currencies constituted a form of property capable of being the subject matter of a proprietary injunction. After referring to Fry L.J's statement in ***Colonial Bank v. Whinney***,[59] that all things personal are either in possession or in action and that the law knows no third category between the two and also after referring to the four classic criteria for property, [namely they are (i) definable; (ii) identifiable by third parties; (iii) capable in their nature of assumption by third parties; and (iv) capable of some degree of permanence] set out by Lord Wilberforce in ***National Provincial Bank v. Ainsworth*** (supra), Bryan, J held in ***AA v. Persons Unknown*** that virtual currencies are neither choses in action (not embodying a right capable of being enforced in action) nor choses in possession (being virtual and incapable of being possessed). However, the court ruled that VCs can still be treated as property, by applying the 4 criteria laid down in ***National Provincial Bank*** and Law Tech Delivery Panel's Legal Statement, though it did not constitute a statement of the law. Bryan

[59] [1885] 30 ChD

J. was convinced that the statement's detailed legal analysis of the proprietary status of cryptocurrencies was “compelling” and should be adopted by the court. Thus, ***what prevailed with the court was the definition provided by Law Tech Delivery Panel’s UK Jurisdiction Task Force, which, unlike RBI, did not enjoy a statutory status, but was only an industry-led government backed initiative***.

6.84. The ruling of the European Court of Justice in ***Skatteverket v. David Hedqvist***,[60] was with particular reference to the identity of virtual currencies. ECJ was in this case asked to decide a reference from Supreme Administrative Court, Sweden on whether transactions to exchange a traditional currency for the ‘Bitcoin’ virtual currency or vice versa, which Mr. Hedqvist wished to perform through a company, were subject to value added tax. The opinion of the court was to the effect that:

(i) Bitcoin with bidirectional flow which will be exchanged for traditional currencies in the context of exchange transactions cannot be categorized as tangible property since virtual currency has no purpose other than to be a means of payment.

(ii) VC transactions do not fall within the concept of the supply of goods as they consist of exchange of different means of payment and hence, they constitute supply of services.

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[60] Case C-264/14 dated 22-10-2015

(iii) Bitcoin virtual currency being a contractual means of payment could not be regarded as a current account or a deposit account, a payment or a transfer, and unlike debt, cheques and other negotiable instruments (referred to in Article 135(1)(d) of the EU VAT Directive), Bitcoin is a direct means of payment between the operators that accept.

(iv) Bitcoin virtual currency is neither a security conferring a property right nor a security of a comparable nature.

(v) The transactions in issue were entitled to exemption from payment of VAT as they fell under the category of transactions involving ***'currency [and] bank notes and coins used as legal tender'***.

(vi) ***Article 135(1)(e) EU Council VAT Directive 2006/112/EC is applicable to non-traditional currencies i.e., to currencies other than those that are legal tender in one or more countries in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment.***

The court accordingly concluded that virtual currencies would fall under this definition of non-traditional currencies.

6.85. Thus (i) depending upon the text of the statute involved in the case and (ii) depending upon the context, ***various courts in different jurisdictions have identified virtual currencies to belong to different categories ranging from property to***

commodity to non-traditional currency to payment instrument to money to funds. While each of these descriptions is true, none of these constitute the whole truth. Every court which attempted to fix the identity of virtual currencies, merely acted as the 4 blind men in the *Anekantavada* philosophy of Jainism,[61] (theory of non-absolutism that encourages acceptance of relativism and pluralism) who attempt to describe an elephant, but end up describing only one physical feature of the elephant.

6.86. RBI was also caught in this dilemma. Nothing prevented RBI from adopting a short circuit by notifying VCs under the category of ***"other similar instruments"*** indicated in Section 2(h) of FEMA, 1999 which defines 'currency' to mean *"all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers' cheque, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments as may be notified by the Reserve Bank."* After all, promissory notes, cheques, bills of exchange etc. are also not exactly currencies but operate as valid discharge (or the creation) of a debt only between 2 persons or peer-to-peer. Therefore, it is not possible to accept the contention of the petitioners that VCs are just goods/commodities and can never be regarded as real money.

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[61] According to this doctrine, truth and reality are perceived differently from different points of view and no single point is the complete truth.

6.87. Once we are clear about the above confusion, and once it is accepted that some institutions accept virtual currencies as valid payments for the purchase of goods and services, there is no escape from the conclusion that the users and traders of virtual currencies carry on an activity that falls squarely within the purview of the Reserve Bank of India. ***The statutory obligation that RBI has, as a central bank, (i) to operate the currency and credit system, (ii) to regulate the financial system and (iii) to ensure the payment system of the country to be on track, would compel them naturally to address all issues that are perceived as potential risks to the monetary, currency, payment, credit and financial systems of the country.*** If an intangible property can act under certain circumstances as money (even without faking a currency) then RBI can definitely take note of it and deal with it. Hence it is not possible to accept the contention of the petitioners that they are carrying on an activity over which RBI has no power statutorily.

6.88. In ***Keshavlal Khemchand & Sons Pvt. Ltd. v. Union of India***,[62] this court pointed out that "*Reserve Bank of India is an expert body to which the responsibility of monitoring the economic system of the country is entrusted, under various enactments like the RBI Act, 1934, the Banking Regulation Act, 1949."* Therefore, (i) in the teeth of the statutory scheme of these enactments (ii) from the way

[62] (2015) 4 SCC 770

different courts and regulators of different jurisdictions have treated VCs and (iii) from the very characteristics of VCs, it is clear that they have the potential to interfere with the matters that RBI has the power to restrict or regulate. Hence, we have no hesitation in rejecting the first contention of the petitioners that the impugned decision is *ultra vires.*

6.89. It was argued that the Preamble of the RBI Act speaks only about the role of RBI in operating the currency and credit system of the country to its advantage and that since virtual currencies may not form part of the credit system of the country as they are not recognized as currency, the invocation of the provisions of RBI Act was out of context.

6.90. But as pointed out elsewhere, RBI is the sole repository of power for the management of the currency, under Section 3 of the RBI Act. RBI is also vested with the sole right to issue bank notes under Section 22(1) and to issue currency notes supplied to it by the Government of India and has an important role to play in evolving the monetary policy of the country, by participation in the Monetary Policy Committee which is empowered to determine the policy rate required to achieve the inflation target, in terms of the consumer price index. ***Therefore, anything that may pose a threat to or have an impact on the financial system of the country, can be regulated or prohibited by RBI, despite the said activity not***

forming part of the credit system or payment system. The expression “management of the currency” appearing in Section 3(1) need not necessarily be confined to the management of what is recognized in law to be currency but would also include what is capable of faking or playing the role of a currency.

6.91. It is ironical that virtual currencies which took *avatar* (according to its creator Satoshi) to kill the demon of a central authority (such as RBI), seek from the very same central authority, access to banking services so that the purpose of the *avatar* is accomplished. As we have pointed out elsewhere, the very creation of digital currency/ Bitcoin was to liberate the monetary system from being a slave to the central authority and from being operated in a manner prejudicial to private interests. Therefore, the *ultra vires* argument cannot be accepted when the provision of access to banking services without any interference from the central authority over a long period of time is perceived as a threat to the very existence of the central authority. Hence, we hold that RBI has the requisite power to regulate or prohibit an activity of this nature.

<u>If at all, the power is only to regulate, not prohibit</u>

6.92. The next contention that if at all, RBI is conferred only with the power to regulate, but not to prohibit, as seen from the express language of Section 45JA of the RBI Act, does not appeal to us. In ***Star India Pvt. ltd. v. Dept. of Industrial Policy and***

Promotion and Ors.,[63] this court opined that the word "regulate" has a very broad meaning including the power to prohibit. The following passage from ***K. Ramanathan v. State of Tamil Nadu***[64] was quoted in ***Star India*** (supra)*:*

> *19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word "prohibit". This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word "regulation" cannot have any inflexible meaning as to exclude "prohibition". It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.*

6.93. The contention that the power to prohibit something as *res extra commercium* is always a legislative policy and that therefore the same cannot be done through an executive fiat, omits to take note of the crucial role assigned to RBI in the economic sphere. It is true that in ***Godawat Pan Masala Products IP Ltd. & Anr v. Union***

[63] (2019) 2 SCC 104
[64] 1985 (2) SCC 116

of India,[65] it was held that ***whether an article is to be prohibited as res extra commercium, is a matter of Legislative policy and must arise out of an Act of legislature and not by a mere executive notification***. But we must remember that in ***Khoday Distilleries Ltd. v. State of Karnataka***,[66] while dealing with prohibitions on alcohol it was held that what articles and goods should be allowed to be produced, possessed, sold and consumed is to be left to ***the judgment of legislative and executive wisdom***.

6.94. In any case, the projection of the impugned decisions of RBI as a total prohibition of an activity altogether, may not be correct. The impugned Circular does not impose a prohibition on the use of or the trading in VCs. It merely directs the entities regulated by RBI not to provide banking services to those engaged in the trading or facilitating the trading in VCs. Section 36(1)(a) of the Banking Regulation Act, 1949 very clearly empowers RBI to caution or prohibit banking companies against entering into certain types of transactions or class of transactions. The prohibition is not per se against the trading in VCs. It is against banking companies, with respect to a class of transactions. The fact that the functioning of VCEs automatically gets paralyzed or crippled because of the impugned Circular, is no ground to hold that it tantamount to total prohibition. So long as those trading in VCs do not wish to convert

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[65] (2004) 7 SCC 68
[66] (1995) 1 SCC 574

them into fiat currency in India and so long as the VCEs do not seek to collect their service charges or commission in fiat currency through banking channels, they will not be affected by this Circular. Admittedly, peer-to-peer transactions are still taking place, without the involvement of the banking channel. In fact, those actually buying and selling VCs without seeking to convert fiat currency into VCs or vice-versa, are not affected by this Circular. It is only the online platforms which provide a space or medium for the traders to buy and sell VCs, that are seriously affected by the Circular, since the commission that they earn by facilitating the trade is required to be converted into fiat currency. Interestingly, the petitioners argue on the one hand that there is total prohibition and argue on the other hand that the Circular does not achieve its original object of curtailing the actual trading, though it cripples the exchanges. If the first part of this submission is right, the latter cannot be and if the latter part is right, the former cannot be.

6.95. The reliance placed in this regard by the petitioners on the decision of this court in ***State of Rajasthan v. Basant Nahata***[67] may not be appropriate. The said decision arose out of a challenge to the constitutional validity of Section 22A of the Registration Act, 1908 inserted by way of State Amendment by the State of Rajasthan. By the said amendment, the state government was conferred with

[67] (2005) 12 SCC 77

unbridled powers to declare by notification in the official gazette, the registration of any document or class of documents as opposed to public policy. In exercise of the power so conferred, the state government issued notifications declaring the registration of an irrevocable power of attorney or a power of attorney to be in force for more than a certain period, authorizing the attorney to transfer any immovable property, as opposed to public policy. This court found that the delegation made by Section 22A was uncanalised and unguided. In addition, the court found that a transaction between two persons capable of entering into contract, which does not contravene any statute, would be valid in law and that when the State of Rajasthan did not make such transactions illegal, it cannot strike at the documents recording such transactions. The court held that Section 22A cannot control the transactions which fall outside the scope of the Act, through a subordinate legislation.

6.96. But the said decision is of no assistance to the petitioners, since none of the provisions of the RBI Act or the Banking Regulation Act are under challenge before us. The delegation itself is not in question before us. Unlike the Registration Act, Section 36(1)(a) of the Banking Regulation Act, 1949 empowers RBI to specifically target transactions. Moreover, RBI's role in the economy of the country is not akin to the power of any other delegate.

6.97. While holding that price fixation may normally be a legislative act, this court pointed out in ***Union of India & Anr v. Cynamide India ltd. & Anr***:[68]

> *"…with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'. … The distinction between the two has usually been expressed as 'one between the general and the particular'. '**A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'**. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases'."* (emphasis supplied)

6.98. On the effect and force of delegated legislation, this court held in ***St. Johns Teachers Training Institute v. Regional Director, NCTE***:[69]

> *"The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature.".*

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[68] (1987) 2 SCC 720
[69] (2003) 3 SCC 321

Similar views were expressed in ***Udai Singh Dagar v. Union of India***,[70] when the court held: *"...a legislative Act must be read with the regulations framed. A subordinate legislation, as is well known, when validly framed, becomes a part of the Act."*

6.99. Law is well settled that when RBI exercises the powers conferred upon it, both to frame a policy and to issue directions for its enforcement, such directions become supplemental to the Act itself. In ***Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India***,[71] this court followed the decisions in ***State of U.P. and Ors v. Babu Ram Upadhya***[72] and ***D.K.V. Prasada Rao v. Govt. of A.P.***[73] to hold that Rules made under a statute must be treated as if they were contained in the Act and that therefore they must be governed by the same principles as the statute itself. Useful reference can also be made in this regard to the following observations in ***ICICI Bank Ltd v. Official Liquidator of APS Star Industries Ltd***:[74]

> *"40. When a delegate is empowered by Parliament to enact a policy and to issue directions which have a statutory force and when the delegatee (RBI) issues such guidelines (policy) having statutory force, <u>such guidelines have got to be read as supplement to the provisions of the BR Act, 1949</u>. The "banking policy" is enunciated by RBI. Such policy cannot be said to be ultra vires the Act."* (emphasis supplied)

[70] (2007) 10 SCC 306
[71] (1992) 2 SCC 343
[72] AIR 1961 SC 751
[73] AIR 1984 AP 75
[74] (2010) 10 SCC 1

6.100. In his treatise on Administrative Law, Durga Das Basu[75] states:

> *The scope of judicial review is narrowed down when a statute confers discretionary power upon an executive authority to make such rules or regulations or orders 'as appear to him to be necessary' or 'expedient', for carrying out the purposes of the statute or any other specified purpose.* ***In such a case, the check of ultra vires vanishes for all practical purposes inasmuch as the determination of the necessity or expediency is taken out of the hands of the Courts and the only ground upon which Courts may interfere is that the authority acted mala fide or never applied his mind to the matter, or applied an irrelevant principle in making a statutory order***. (emphasis supplied)

6.101. In ***Jayantilal Amrit Lal Shodhan v. F.N. Rana***,[76] the majority pointed out that there can be no assumption that the legislative functions are exclusively performed by the legislature, executive functions by the executive and judicial functions by the judiciary alone. The court indicated that the Constitution has not made an absolute or rigid division of functions between the three agencies of the state and that at times the exercise of legislative or judicial functions are entrusted to the executive. A very important observation made by the Constitution Bench in ***Jayantilal*** (supra) was as follows:

> *".....in addition to these quasi-judicial and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character and in certain instances, powers are*

[75] Ch. 4, Pg. 121, 6th Edition, 2004
[76] AIR 1964 SC 648

exercised which appear to partake at the same moment of legislative, executive and judicial characteristics."

6.102. In ***Shri Sitaram Sugar Co. Ltd. & Anr v. Union of India & Ors***,[77] the Constitution bench of this court held that whether an order is characterized as legislative or administrative or quasi-judicial or whether it is a determination of law or fact, the judgment of the expert body entrusted with power is generally treated as final and the judicial function is exhausted when it is found to have "warrant in the record" and a rational basis in law.

6.103. It must be pointed out that the power of RBI is not merely curative but also preventive. This is acknowledged by this court in ***Ganesh Bank of Kurunwad Ltd. & Ors v. Union of India & Ors.***,[78] where it was held that RBI has a right to take pre-emptive action taking into account the totality of the circumstances.

> *"It is not that when there is a run on the bank then only RBI must intervene or that it must intervene only when there are a good number of court proceedings against the bank concerned. RBI has to take into account the totality of the circumstances and has to form its opinion accordingly."*

6.104. The impugned Circular is intended to prohibit banking companies from entering into certain territories. The Circular is actually addressed to entities regulated by RBI and not to those who do not come within the purview of RBI's net. But the exercise of such a power by RBI, over the entities regulated by it, has caused a

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[77] (1990) 3 SCC 223
[78] (2006) 10 SCC 645

collateral damage to some establishments like the petitioners', who do not come within the reach of RBI's net.

6.105. The power of a statutory authority to do something has to be tested normally with reference to the persons/entities qua whom the power is exercised. The question to be addressed in such cases is whether the authority had the power to do that act or issue such a directive, qua the person to whom it is addressed. While persons who suffer a collateral damage can certainly challenge the action, such challenge will be a very weak challenge qua the availability of power.

6.106. Apart from the provisions of the RBI Act, 1934 and the Banking Regulation Act, 1949, the impugned Circular also refers to the power under Section 18 of the Payment and Settlement Systems Act, 2007. In order to buttress their contention regarding the availability of power to regulate, the petitioners refer to the definition of the expression "payment system" under Section 2(1)(i) of the said Act and contend that VCEs do not operate any payment system and that since the power to issue directions under Section 18 is only to regulate the payment systems, the invocation of the said power to something that does not fall within the purview of payment system, is arbitrary.

6.107. But Section 18 of the Payment and Settlement Systems Act indicates (i) what RBI can do (ii) the persons qua whom it can be done and (iii) the object for which it can be done. In other words, Section 18 empowers RBI (i) to lay down policies relating to the regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and (ii) to give such directions as it may consider necessary. These are what RBI can do under Section 18. Coming to the second aspect, the persons qua whom the powers under Section 18 can be exercised are (i) system providers (ii) system participants and (iii) any other person generally or any such agency. The expression "system provider" is defined under Section 2(1)(q) to mean a person who operates an authorized payment system. The expression "system participant" is defined in Section 2(1)(p) to mean a bank or any other person participating in a payment system, including the system provider. Other than the expressions 'system provider' and 'system participant', Section 18 also uses the expressions 'any other person' and 'any such agency'.

6.108. It is true that the purposes for which the power under Section 18 can be exercised, are also indicated in Section 18. They are (i) regulation of the payment systems (ii) the interest of the management and operation of any payment system and (iii) public interest.

6.109. As we have pointed out elsewhere, the impugned Circular is primarily addressed to banks who are "system participants" within the meaning of Section 2(1)(p). The banks certainly have a system of payment to be effected between a payer and a beneficiary, falling thereby within the meaning of the expression payment system.

6.110. It may also be relevant to take note of the definition of the expressions "payment instruction" and "payment obligation" appearing in clauses (g) and (h) of subsection (1) of Section 2 which read as follows:

> ***2(1)(g)*** *"payment instruction" means any instrument, authorisation or order in any form, including electronic means, to effect a payment,—*
> *(i) by a person to a system participant; or*
> *(ii) by a system participant to another system participant;*
> ***2(1)(h)*** *"payment obligation" means an indebtedness that is owned by one system participant to another system participant as a result of clearing or settlement of one or more payment instructions relating to funds, securities or foreign exchange or derivatives or other transactions;*

6.111. Therefore, in the overall scheme of the Payment and Settlement Systems Act, 2007, it is impossible to say that RBI does not have the power to frame policies and issue directions to banks who are system participants, with respect to transactions that will fall under the category of payment obligation or payment instruction, if not a payment system. Hence, the argument revolving around Section 18 should fail.

II. Mode of exercise of power:

Satisfaction/Application of mind/relevant and irrelevant considerations

6.112. That takes us to the next question whether the power was exercised properly in a manner prescribed by law. The argument of Shri Ashim Sood, learned Counsel for the petitioner is that assuming that RBI has the requisite power under Section 35A(1) of Banking Regulation Act, 1949 to do what it has done, the necessary sine qua non is the "satisfaction". Section 35A(1) of the Banking Regulation Act, 1949 as well as Section 45JA and 45L of the RBI Act, 1934 empower RBI to issue directions "if it is ***satisfied***" about the existence of certain parameters. Satisfaction can be arrived at only by (i) gathering facts (ii) sifting relevant material from those which are irrelevant and (iii) forming an opinion about the cause and connection between relevant material and the decision proposed to be taken. In respect of each of these requirements, the learned Counsel relied upon certain judicial precedents.

6.113. But we do not think that in the facts of the present case, we could hold RBI guilty of non-application of mind. As a matter of fact, the issue as to how to deal with virtual currencies has been lingering with RBI from June 2013 onwards, when the Financial Stability Report took note of the challenges posed by virtual currencies in the form of regulatory, legal and operational risks. The

Financial Stability Report of June 2013 led to a press release dated 24-12-2013 cautioning the users, holders and traders of virtual currencies about the potential financial, operational, legal and consumer protection and security related risks associated with virtual currencies. Then came the Financial Stability Report of December 2015 which raised concerns about excessive volatility in the value of VCs and their anonymous nature which went against global money laundering rules rendering their very existence questionable. The Financial Stability Report of December 2016 also took note of the risks associated with virtual currencies qua data security and consumer protection. The report also recorded concerns about far reaching potential impact of the effectiveness of monetary policy itself. Therefore, the report suggested RegTech to deal with FinTech.

6.114. IDRBT, established by RBI to work at the intersection of banking and technology submitted a white paper in January 2017, which enlisted the advantages as well as disadvantages of digital currencies. This white paper was taken note of by RBI in the Financial Stability Report of June 2017. In the meantime, RBI issued a press release on 01-02-2017 once again cautioning the users, holders and traders of virtual currencies.

6.115. The sub-committee of the Financial Stability and Development Council took a decision in April 2016, pursuant to which RBI set up an Inter-Regulatory Working Group on FinTech and Digital Banking. This Working Group submitted a report in November 2017, after which RBI issued a third press release on 05-12-2017. Thereafter RBI also sent a mail on 02-04-2018 to the central government, enclosing a note on regulating crypto assets. To be fair to RBI, even this note examined the pros and cons of banning and regulating crypto currencies.

6.116. All the above sequence of events from June 2013 up to 02-04-2018 would show that RBI had been brooding over the issue for almost five years, without taking the extreme step. Therefore, RBI can hardly be held guilty of non-application of mind. If an issue had come up again and again before a statutory authority and such an authority had also issued warnings to those who are likely to be impacted, it can hardly be said that there was no application of mind. For arriving at a "satisfaction" as required by Section 35A(1) of Banking Regulation Act, 1949 and Section 45JA and 45L of RBI Act, 1934, it was not required of RBI either to write a thesis or to write a judgement.

6.117. In fact, RBI cannot even be accused of not taking note of relevant considerations or taking into account irrelevant considerations. RBI has taken into account only those considerations which multinational bodies and regulators of various countries such as FATF, BIS, etc., have taken into account. This can be seen even from the earliest press release dated 24-12-2013, which is more elaborate than the impugned Circular dated 06-04-2018. The press release dated 24-12-2013 reads as follows:

RBI cautions users of Virtual Currencies against Risks

The Reserve Bank of India has today cautioned the users, holders and traders of Virtual currencies (VCs), including Bitcoins, about the potential financial, operational, legal, customer protection and security related risks that they are exposing themselves to.

The Reserve Bank has mentioned that it has been looking at the developments relating to certain electronic records claimed to be "Decentralised Digital Currency" or "Virtual Currency" (VCs), such as, Bitcoins, litecoins, bbqcoins, dogecoins etc., their usage or trading in the country and the various media reports in this regard.

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, including the following:

- *VCs being in digital form are stored in digital/electronic media that are called electronic wallets. Therefore, they are prone to losses arising out of hacking, loss of password, compromise of access credentials, malware attack etc. Since they are not created by or traded through any authorised central registry or agency, the loss of the e-wallet could result in the permanent loss of the VCs held in them.*
- *Payments by VCs, such as Bitcoins, take place on a peer-to-peer basis without an authorised central agency which regulates such payments. As such, there is no established framework for recourse to customer problems / disputes / charge backs etc.*
- *There is no underlying or backing of any asset for VCs. As such, their value seems to be a matter of speculation.*

Huge volatility in the value of VCs has been noticed in the recent past. Thus, the users are exposed to potential losses on account of such volatility in value.

- *It is reported that VCs, such as Bitcoins, are being traded on exchange platforms set up in various jurisdictions whose legal status is also unclear. Hence, the traders of VCs on such platforms are exposed to legal as well as financial risks.*
- *There have been several media reports of the usage of VCs, including Bitcoins, for illicit and illegal activities in several jurisdictions. The 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.*

The Reserve Bank has also stated that it is presently examining the issues associated with the usage, holding and trading of VCs under the extant legal and regulatory framework of the country, including Foreign Exchange and Payment Systems laws and regulations.

6.118. When a series of steps taken by a statutory authority over a period of about five years disclose in detail what triggered their action, it is not possible to see the last of the orders in the series in isolation and conclude that the satisfaction arrived at by the authority is not reflected appropriately. In any case, pursuant to an order passed by this court on 21-08-2019, RBI has given a detailed point-wise reply to the representations of the petitioners. In these representations, the petitioners have highlighted all considerations that they thought as relevant. RBI has given its detailed responses on 04-09-2019 and 18-09-2019. Therefore, the contention that there was no application of mind and that relevant considerations were omitted to be taken note of, loses its vigour in view of the subsequent developments.

Malice in law/colorable exercise

6.119. Drawing our attention to a reply given by RBI dated 26-04-2017 to a query under the Right to Information Act, and the reply given by Minister of State for Finance in response to a question raised in the Lok Sabha (Unstarred Question No. 2113) on 28-07-2017, wherein RBI took a position that they had no power to freeze the accounts either of defaulting companies or of shell companies, it was contended by Shri Ashim Sood, that the impugned Circular goes contrary to the position so taken officially, as the Circular has the effect of closing the accounts of VCEs and that therefore it was hit by arbitrariness and caprice.

6.120. But the above argument arises out of a misconception about the purport of the impugned Circular. The impugned Circular does not order either the freezing or the closing of any particular account of a particular customer. All that the impugned Circular says is that RBI regulated entities shall exit the relationship that they have with any person or entity dealing with or settling VCs, within three months of the date of the Circular. The regulated entities are directed not to provide services for facilitating any person or entity in dealing with or settling VCs. Some of the petitioners herein are individuals and companies who run virtual currency exchanges. In case they have other businesses, the impugned Circular does not order the closure of their bank accounts relating to other businesses. The prohibition under paragraph 2 of the impugned Circular is with respect to the provision of services for facilitating any person or entity in dealing with or settling VCs. This prohibition does not extend either to the closing or the freezing of the accounts of the petitioners in relation to their other ventures.

6.121. Taking clue from the averment contained in the counter-affidavit of RBI to the effect that "VCs are outside the ambit of the central authority's effective sphere of control and management" and also referring to the stand taken by RBI in their letter dated 04-09-2019 to the effect that "neither VCs nor the businesses involved in providing VC based services come under the regulatory purview of RBI", it was contended by Shri Ashim Sood that the impugned Circular is a colourable exercise of power and tainted by malice in law, in as much as it seeks to achieve an object completely different from the one for which the power is entrusted. ***State of Punjab & Anr v. Gurdial Singh & Ors***,[79] ***Collector (District Magistrate) Allahabad & Anr v. Raja Ram Jaiswal***,[80] and ***Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors***[81] are relied upon in this regard.

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[79] (1980) 2 SCC 471
[80] (1985) 3 SCC 1
[81] (2010) 9 SCC 437

6.122. But the above contention is completely misconceived. There can be no quarrel with the proposition that RBI has sufficient power to issue directions to its regulated entities in the interest of depositors, in the interest of banking policy or in the interest of the banking company or in public interest. If the exercise of power by RBI with a view to achieve one of these objectives incidentally causes a collateral damage to one of the several activities of an entity which does not come within the purview of the statutory authority, the same cannot be assailed as a colourable exercise of power or being vitiated by malice in law. To constitute colourable exercise of power, the act must have been done in bad faith and the power must have been exercised not with the object of protecting the regulated entities or the public in general, but with the object of hitting those who form the target. To constitute malice in law, the act must have been done wrongfully and willfully without reasonable or probable cause. The impugned Circular does not fall under the category of either of them.

6.123. The argument that the invocation by RBI, of 'public interest' as a weapon, purportedly for the benefit of users, consumers or traders of virtual currencies is a colourable exercise of power also does not hold water. Once it is conceded that RBI has powers to issue directions in public interest, it is impossible to exclude users, consumers or traders of virtual currencies from the coverage. In fact, the repeated press releases issued by RBI from 2013 onwards indicate that RBI did not want the members of the public, which include users, consumers and traders of VCs, even to remotely think that virtual currencies have a legal tender status or are backed by a central authority. Irrespective of what VCs actually do or do not do, it is an accepted fact that they are capable of performing some of the functions of real currencies. Therefore, if RBI takes steps to prevent the gullible public from having an illusion as though VCs may constitute a valid legal tender, the steps so taken, are actually taken in good faith. The repeated warnings through press releases from December 2013 onwards indicate a genuine attempt on the part of RBI to safeguard the interests of the public. Therefore, the contention that the impugned Circular is vitiated by malice in law and that it is a colorable exercise of power, cannot be sustained.

6.124. Relying upon (i) the decision in ***Meerut Development Authority v. Assn. Management Studies & Anr***,[82] wherein it was held that the term "public interest" must be understood and interpreted in the light of the entire scheme, purpose and object of the enactment (ii) the decision in ***Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi & Anr***,[83] wherein it was held that the term "public interest" does not have a rigid meaning and takes its colour from the statute in which it occurs (iii) the decision in ***Utkal***

[82] (2009) 6 SCC 171
[83] (2012) 13 SCC 61

Contractors & Joinery (P) Ltd. & Ors v. State of Orissa & Ors,[84] wherein it was held that the words of a statute take their colour from the reason for it and (iv) the decision in ***Empress Mills v. Municipal Committee, Wardha***,[85] wherein it was held that general words and phrases must usually be construed as being limited to the actual object of the Act, it was contended that the expression 'public interest' appearing in Section 35A(1)(a) of the Banking Regulation Act, 1949, cannot be given an expansive meaning.

6.125. But the said argument does not take the petitioners anywhere. As we have indicated elsewhere, the power under Section 35A to issue directions is to be exercised under four contingencies namely (i) public interest (ii) interest of banking policy (iii) interest of the depositors and (iv) interest of the banking company. The expression ***"banking policy" is defined in Section 5(ca) to mean any policy specified by RBI (i) in the interest of the banking system (ii) in the interest of monetary stability and (iii) sound economic growth. Public interest permeates all these three areas.*** This is why Section 35A(1)(a) is invoked in the impugned Circular. Therefore, we reject the argument that the impugned decision is a colorable exercise of power and it is vitiated by malice in law.

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[84] (1987) 3 SCC 279
[85] (1958) SCR 1102

M. S. Gill Reasoning

6.126. The impugned Circular cannot be assailed on the basis of ***M. S. Gill***[86] test, for two reasons. First is that in ***Chairman, All India Railway Recruitment Board v. K. Shyam Kumar & Ors***,[87] this court held that MS Gill test may not always be applicable where larger public interest is involved and that in such situations, additional grounds can be looked into for examining the validity of an order. This was followed in ***PRP Exports & Ors v. Chief Secretary, Government of Tamil Nadu & Ors***.[88] In ***63 Moons Technologies ltd. & Ors v. Union of India & Ors***,[89] this court clarified that though there is no broad proposition that MS Gill test will not apply where larger public interest is involved, subsequent materials in the form of facts that have taken place after the order in question is passed, can always be looked at in the larger public interest, in order to support an administrative order. The second reason why the weapon of MS Gill will get blunted in this case, is that during the pendency of this case, this court passed an interim order on 21-08-2019 directing RBI to give a point-wise reply to the detailed representation made by the writ petitioners. Pursuant to the said order, RBI gave detailed responses on 04-09-2019 and 18-09-2019. Therefore, the argument based on MS Gill test has lost its potency.

[86] M S Gill v. The Chief Election Commissioner, (1978) 1 SCC 405
[87] (2010) 6 SCC 614
[88] (2014) 13 SCC 692
[89] (2019) SCC Online SC 624

Calibration/Proportionality

6.127. The next argument is that the impugned measure is extreme and that it will not pass the test of proportionality. For the purpose of convenience, we shall take up this argument together with the argument revolving around Article 19(1)(g) while dealing with the reasonableness of the restriction.

III. Wait and watch approach of the other stakeholders

6.128. The argument that other stakeholders such as the Enforcement Directorate which is concerned with money laundering, the Department of Economic Affairs which is concerned with the economic policies of the State, SEBI which is concerned with security contracts and CBDT which is concerned with the tax regime relating to goods and services, did not see any grave threat and that therefore RBI's reaction is knee-jerk, is not acceptable. Enforcement Directorate can step in only when actual money laundering takes place, since the statutory scheme of Prevention of Money Laundering Act deals with a procedure which is quasi-criminal. SEBI can step in only when the transactions involve securities within the meaning of Section 2(h) of the Securities Contracts (Regulation) Act, 1956. CBDT will come into the picture only when the transaction related to the sale and purchase of taxable goods/commodities. Every one of these stakeholders has a different function to perform and are entitled to have an approach depending upon the prism through which they are obliged to look at the issue. Therefore, RBI cannot be faulted for not adopting the very same approach as that of others.

IV. Light-touch approach of the other countries

6.129. The argument that most of the countries except very few like China, Vietnam, Pakistan, Nepal, Bangladesh, UAE, have not imposed a ban (total or partial) may not take the petitioners anywhere. The list of countries where a ban similar to the one on hand and much more has been imposed discloses a commonality. Almost all countries in the neighborhood of India have adopted the same or similar approach (in essence India is ring fenced). In any case, our judicial decision cannot be colored by what other countries have done or not done. Comparative perspective helps only in relation to principles of judicial decision making and not for testing the validity of an action taken based on the existing statutory scheme.

6.130. There can also be no comparison with the approach adopted by countries such as UK, US, Japan, Singapore, Australia, New Zealand, Canada etc., as they have developed economies capable of absorbing greater shocks. Indian economic conditions cannot be placed on par. Therefore, we will not test the correctness of the measure taken by RBI on the basis of the approach adopted by other countries, though we have, for better understanding of the complexities of the issues involved, undertaken a survey of how the regulators and courts of other countries have treated VCs.

V. Precautionary steps taken by petitioners

6.131. The next contention of the petitioners is that the VC exchanges run by them have already put in place certain best practices such as (i) avoidance of cash transactions (ii) enhanced KYC norms and (iii) confining their services only to persons within India. Therefore, it is contended that all the issues flagged by RBI have already been addressed and that therefore, there was no necessity to disconnect the trade from the regular banking channels. But the fact of the matter is that enhanced KYC norms may remove anonymity of the customer, but not that of the VC. Even ***the European Parliament***, in the portion of its report relied upon by Shri Ashim Sood ***accepts that the adequacy of mandatory registration of users (as a less invasive measure), whether or not of fully anonymous or pseudo anonymous crypto currencies depends on the users' compliance with the registration requirement***. After pointing out that compliance will partly depend on an adequate sanctioning toolbox in the event of breach, the report wonders whether it is at all possible outside of the context of randomly bumping into it, at least when fully anonymous VCs are concerned. In any case, we are not experts to say whether the safety valves put in place could have addressed all issues raised by RBI.

VI. Different types of VCs require different treatments

6.132. Drawing our attention to a Report by the European Parliament under the caption 'Cryptocurrencies and Blockchain', released in July 2018, it is contended by Shri Ashim Sood, learned Counsel for the petitioners that all virtual currencies are not fully anonymous. While some, such as Dash and Monero are fully anonymous, others such as Bitcoin are pseudo-anonymous. Therefore, it is contended that banning transactions only in fully anonymous VCs could have been a better and less intrusive measure. An identical argument is advanced by Shri Nakul Dewan learned Senior Counsel for the petitioners, with reference to a report of October 2012 of the European Central Bank on "Virtual Currency Schemes". According to the said Report, Virtual Currency schemes can be classified into three types, depending upon their interaction with traditional real money and real economy. They are (i) closed virtual currency schemes basically used in an online game (ii) virtual currency schemes having a unidirectional flow (usually an inflow), with a conversion rate for purchasing the virtual currency which can subsequently be used to buy virtual goods and services, but exceptionally also to buy real goods and services and (iii) virtual currency schemes having a bidirectional flow, where they act like any other convertible currency with two exchange rates (buy and sell) which can subsequently be used to buy virtual goods and services as well as real goods and services.

6.133. Let us first deal with Shri Nakul Dewan's submission. In the very same ***October 2012 Report of the European Central Bank, it is accepted that virtual currencies (i) resemble money and (ii) necessarily come with their own dedicated retail payment systems.*** These two aspects are indicated in the Report to be covered by the term "Virtual Currency Scheme".

6.134. But the entire premise on which the petitioners have developed their case is that they are neither money nor constitute a payment system. Therefore, if the Report of the European Central Bank is to be accepted, it should be accepted in total and cannot be selectively taken.

6.135. The examples provided in the October 2012 Report of the European Central Bank show that there are VC Schemes set up by entities such as Nintendo, in which consumers can purchase points online by using a credit card or in retail stores by purchasing a Nintendo points card which cannot be converted back to real money. The Report also shows that one VC by name Linden Dollars is issued in a virtual world called "Second life", where users create *avatars* (digital characters), which can be customized. Second life has its own economy where users can buy and sell goods and services from and to each other. But they first need to purchase Linden dollars using fiat currency. Later they can also sell Linden dollars in return for fiat currency. Therefore, it is clear that the very same virtual currency can have a unidirectional or bidirectional flow depending upon the scheme with which the entities come up. Moreover, the question whether anonymous VCs alone could have been banned leaving the pseudo-anonymous, is for experts and not for this Court to decide. In any case, the stand taken by RBI is that they have not banned VCs. Hence, the question whether RBI should have adopted different approaches towards different VCs does not arise.

VII. Acceptance of DLT and rejection of VCs is a paradox

6.136. It was argued that the acceptance of the Distributed Ledger Technology and the rejection of VCs is actually a contradiction in terms. This argument is based upon the various reports, both of RBI and of the Inter-Ministerial Group, to the effect that DLT is part of FinTech.

6.137. The above contention, in legal terms, is about the irrationality of the impugned decision. But there is nothing irrational about the acceptance of a technological advancement/innovation, but the rejection of a by-product of such innovation. There is nothing like a “take it or leave it” option.

VIII. RBI’s decisions do not qualify for Judicial deference

6.138. It is contended by Shri Ashim Sood, learned Counsel for the petitioners that the impugned Circular does not have either the status of a legislation or the status of an executive action, but is only the exercise of a power conferred by statute upon a statutory body corporate. Therefore, it is his contention that the judicial rule of deference as articulated in ***R.K. Garg v. Union of India***,[90] ***BALCO Employees' Union (Regd.) v. Union of India & Ors***,[91] and ***Swiss Ribbons Pvt. Ltd. & Anr v. Union of India & Ors***,[92] will not apply to the decision taken by a statutory body like RBI. If, a legislation relating to economic matters is placed at the highest pedestal, an executive decision with regard to similar matters will be placed only at a lower pedestal and the decision taken by a statutory body may not even be entitled to any such deference or reverence.

6.139. But given the scheme of the RBI Act, 1934 and the Banking Regulation Act, 1949, the above argument appears only to belittle the role of RBI. RBI is not just like any other statutory body created by an Act of legislature. It is a creature, created with a mandate to get liberated even from its creator. This is why it is given a mandate – (i) under the Preamble of the RBI Act 1934, to operate the currency and credit system of the country to its advantage and to operate the monetary policy framework in the country (ii) under Section 3(1), to take over the management of the currency from the central government (iii) under Section 20, to undertake to accept

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[90] (1981) 4 SCC 675
[91] (2002) 2 SCC 333
[92] (2019) 4 SCC 17

monies for account of the central government, to make payments up to the amount standing to the credit of its account and to carry out its exchange, remittance and other banking operations, including the management of the public debt of the Union (iv) under Section 21(1), to have all the money, remittance, exchange and banking transactions in India of the central government entrusted with it (v) under Section 22(1), to have the sole right to issue bank notes in India and (vi) under Section 38, to get rupees into circulation only through it, to the exclusion of the central government. Therefore, RBI cannot be equated to any other statutory body that merely serves its master. It is specifically empowered to do certain things to the exclusion of even the central government. Therefore, to place its decisions at a pedestal lower than that of even an executive decision, would do violence to the scheme of the Act.

6.140. On the primary question of switching over to judicial "silent mode" or "hands off mode", qua economic legislation, it is not necessary to catalogue all the decisions of this court such as *State of Gujarat & Anr v. Shri Ambica Mills Ltd. & Anr,*[93] *G.K.Krishnan v. Tamil Nadu,*[94] *R. K. Garg v. Union of India* (supra), *State of M.P. v. Nandlal Jaiswal,*[95] *P.M. Ashwathanarayana Setty v. State of Karnataka,*[96] *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of*

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[93] (1974) 4 SCC 656
[94] (1975) 1 SCC 375
[95] (1986) 4 SCC 566
[96] (1989) Supp (1) SCC 696

India (supra), *T. Velayudhan v. Union of India*,[97] *Delhi Science Forum v. Union of India*,[98] *Bhavesh D. Parish v. Union of India*,[99] *Ugar Sugar Works ltd. v. Delhi Administration & Ors*,[100] *BALCO Employees' Union (Regd.) v. Union of India* (supra), *Govt. of Andhra Pradesh & Ors v. P. Laxmi Devi*,[101] *Villianur Iyarkkai Padukappu Maiyam v. Union of India*,[102] *D.G. of Foreign Trade v. Kanak Exports*,[103] *State of J & K v. Trikuta Roller Flour Mills Pvt. Ltd.*,[104] and *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*,[105] as the entire history of the doctrine of deference from *Lochner Era* has been summarized by this court in ***Swiss Ribbons Pvt. Ltd. v. Union of India*** (supra). In fact, even the learned Counsel for the petitioners is *ad idem* with the learned Senior Counsel for RBI that economic regulations require due judicial deference. The actual argument of the learned Counsel for the petitioners is that such deference may differ in degree from being very weak in respect of the decision of a statutory authority, to being very strong in respect of a legislative enactment.

6.141. But as we have pointed out above, RBI is not just any other statutory authority. It is not like a stream which cannot be greater than the source. The RBI Act, 1934 is a pre-constitutional

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[97] (1993) 2 SCC 582
[98] (1996) 2 SCC 405
[99] (2000) 5 SCC 471
[100] (2001) 3 SCC 635
[101] (2008) 4 SCC 720
[102] (2009) 7 SCC 561
[103] (2016) 2 SCC 226
[104] (2018) 11 SCC 260
[105] (2019) 8 SCC 416

legislation, which survived the Constitution by virtue of Article 372(1) of the Constitution. ***The difference between other statutory creatures and RBI is that what the statutory creatures can do, could as well be done by the executive. The power conferred upon the delegate in other statutes can be tinkered with, amended or even withdrawn. But the power conferred upon RBI under Section 3(1) of the RBI Act, 1934 to take over the management of the currency from the central government, cannot be taken away***. The sole right to issue bank notes in India, conferred by Section 22(1) cannot also be taken away and conferred upon any other bank or authority. RBI by virtue of its authority, is a member of the Bank of International Settlements, which position cannot be taken over by the central government and conferred upon any other authority. Therefore, to say that it is just like any other statutory authority whose decisions cannot invite due deference, is to do violence to the scheme of the Act. In fact, all countries have central banks/authorities, which, technically have independence from the government of the country. To ensure such independence, a fixed tenure is granted to the Board of Governors, so that they are not bogged down by political expediencies. In the United States of America, the Chairman of the Federal Reserve is the second most powerful person next only to the President. Though the President appoints the seven-member Board of Governors of the Federal

Reserve, in consultation with the Senate, each of them is appointed for a fixed tenure of fourteen years. Only one among those seven is appointed as Chairman for a period of four years. As a result of the fixed tenure of 14 years, all the members of Board of Governors survive in office more than three governments. Even the European Central Bank headquartered in Frankfurt has a President, Vice-President and four members, appointed for a period of eight years in consultation with the European Parliament. World-wide, central authorities/banks are ensured an independence, but unfortunately Section 8(4) of the RBI Act, 1934 gives a tenure not exceeding five years, as the central government may fix at the time of appointment. Though the shorter tenure and the choice given to the central government to fix the tenure, to some extent, undermines the ability of the incumbents of office to be absolutely independent, the statutory scheme nevertheless provides for independence to the institution as such. Therefore, we do not accept the argument that a policy decision taken by RBI does not warrant any deference.

IX. Article 19(1)(g) challenge & Proportionality

6.142. The next ground of attack is on the basis of Article 19(1)(g). Any restriction to the freedom guaranteed under Article 19(1)(g) should pass the test of reasonableness in terms of Article 19(6). It is contended by the petitioners that since access to banking is the equivalent of the supply of oxygen in any modern economy, the denial of such access to those who carry on a trade which is not prohibited by law, is not a reasonable restriction and that it is also extremely disproportionate. It is further contended that the right to access the banking system is actually integral to the right to carry on any trade or profession and that therefore a legislation, subordinate or otherwise whose effect or impact severely impairs the right to carry on a trade or business, not prohibited by law, would be violative of Article 19(1)(g). Reliance is placed in this regard on the decisions of this court in (i) ***Md. Yasin v. Town Area Committee***,[106] where it was held that the right under Article 19(1)(g) is affected when "in effect and in substance", the impugned measures brought about a total stoppage of business, both, in a commercial sense and from a practical point of view, even though there was no prohibition in form and (ii) ***Bennett Coleman & Co. v. Union of India***,[107] where this court held that the impact and not the object of the measure will determine whether or not, a fundamental right is violated. It is further contended, on the strength of the decision in ***Md. Faruk v. State of Madhya Pradesh & Ors***,[108] that the imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition and that when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of

[106] (1952) SCR 572
[107] (1972) 2 SCC 788
[108] (1969) 1 SCC 853

the right alone may ensure the maintenance of the general public interest, lies heavily upon the state. It was held in the said decision that a law which directly infringes the right guaranteed under Article 19(1)(g) may be upheld only if it is established that it seeks to impose reasonable restrictions in the interest of the general public and a less drastic restriction will not ensure the interest of the general public.

6.143. The parameters laid down in ***Md. Faruk*** are unimpeachable. While testing the validity of a law imposing a restriction on the carrying on of a business or a profession, the court must, as formulated in ***Md. Faruk***, attempt an evaluation of (i) its direct and immediate impact upon of the fundamental rights of the citizens affected thereby (ii) the larger public interest sought to be ensured in the light of the object sought to be achieved (iii) the necessity to restrict the citizens' freedom (iv) the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public and (v) the possibility of achieving the same object by imposing a less drastic restraint.

6.144. There can also be no quarrel with the proposition that banking channels provide the lifeline of any business, trade or profession. This is especially so in the light of the restrictions on cash transactions contained in Sections 269SS and 269T of the Income Tax Act, 1961. When currency itself has undergone a metamorphosis over the centuries, from stone to metal to paper to paperless and we have ushered into the digital age, cashless transactions (not penniless transactions) require banking channels. Therefore, the moment a person is deprived of the facility of operating a bank account, the lifeline of his trade or business is severed, resulting in the trade or business getting automatically shut down. Hence, the burden of showing that larger public interest warranted such a serious restriction bordering on prohibition, is heavily on RBI.

6.145. In the counter-affidavit filed in WP (C) No. 528 of 2018, RBI has raised 2 fundamental objections in this regard. The first is that corporate bodies/entities who have come up with the challenge are not ‘citizens’ and hence, not entitled to maintain a challenge under Article 19(1)(g). This objection may hold good in respect of the writ petition filed by Internet and Mobile Association of India, which is described by them as a not-for-profit association of corporate entities who are in the trade. But this objection may not hold good in respect of the other writ petition, as the companies running VC exchanges have not come up alone. The shareholders and promoters have come up with the second writ petition along with those entities and hence the challenge under Article 19(1)(g) cannot be said to be not maintainable.

6.146. The second objection of RBI is that there is no fundamental right to purchase, sell, transact and/or invest in VCs and that therefore, the petitioners cannot invoke Article 19(1)(g). But this contention is liable to be rejected outright for two reasons namely, (i) that at least some of the petitioners are not claiming any right to purchase, sell or transact in VCs, but claiming a right to provide a platform for facilitating an activity (of trading in VCs between individuals/entities who want to buy and sell VCs) which is not yet prohibited by law and (ii) that in any case the impugned Circular does not *per se* prohibit the purchase or sale of VCs. This is why it is contended by the learned Counsel for the petitioners, that what is hit by the impugned Circular is not the actual target. The actual target of the impugned Circular, as seen from various communications and committee reports that preceded the same, is the trade in VCs. The object of hitting at trading in VCs, is to ensure (i) consumer protection (ii) prevention of violation of money laundering laws (iii) curbing the menace of financing of terrorism and (iv) safeguarding of the existing monetary/payment/credit system from being polluted. But hitting the target directly, is not within the domain of RBI and hence the impugned Circular purportedly seeks to protect only the regulated entities, by ring-fencing them. In the process, it has hit VC Exchanges and not the actual trading of VCs, though as a consequence, the volume of transactions in VCs (perhaps through VCEs alone) is stated to have come down. People who wish to buy and sell VCs can still do so merrily, without using the medium of a VC Exchange and without seeking to convert the virtual currencies into fiat currency. It is in this context that the contention revolving around Article 19(1)(g) has to be examined.

6.147. In order to test the validity of the impugned action on the touchstone of Article 19(1)(g), we may have to understand the fundamental distinction between (i) the purchase and sale of virtual currencies by and between two individuals or entities and (ii) the business of online exchanges that provide certain services such as the facility of buying and selling of virtual currencies, the storing or securing of the virtual currencies in what are known as wallets and the conversion of virtual currencies into fiat currency and vice versa. The buying and selling of crypto currencies through VC Exchanges can be by way of hobby or as a trade/business. The distinction between the two is that there may or may not exist a profit motive in the former, while it would, in the latter.

6.148. Persons who engage in buying and selling virtual currencies, just as a matter of hobby cannot pitch their claim on Article 19(1)(g), for what is covered therein are only profession, occupation, trade or business. Therefore hobbyists, who are one among the three categories of citizens (hobbyists, traders in VCs and VC Exchanges), straightaway go out of the challenge under Article 19(1)(g).

6.149. The second and third categories of citizens namely, those who have made the purchase and sale of VCs as their occupation or trade, and those who are running online platforms and VC exchanges can certainly pitch their claim on the basis of Article 19(1)(g). Technically speaking, the second category of citizens cannot claim that the impugned decision of RBI has the effect of completely shutting down their trade or occupation. Citizens who have taken up the trade of buying and selling virtual currencies are not prohibited by the impugned Circular (i) either from trading in crypto-to-crypto pairs (ii) or in using the currencies stored in their wallets, to make payments for purchase of goods and services to those who are prepared to accept them, within India or abroad. As a matter of fact, reports/articles in online journals suggest (i) that a few eateries such as Kolonial, a vintage themed pizzeria in Mumbai's Worli area, Suryawanshi restaurant in Indiranagar, Bengaluru and Suri Andhra Mess in Taramani, Chennai were accepting payments in virtual currencies (Mumbai and Chennai eateries are now closed and the one in Bangalore has stopped accepting) and (ii) that there are few intermediaries which accept payments in Bitcoins for gift cards which in turn facilitate online shopping from popular sites.

6.150. An important aspect to be taken note of is that virtual currencies cannot be stored anywhere, in the real sense of the term, as they do not exist in any physical shape or form. What is actually stored is the private keys, which can be used to access the public address and transaction signatures.

6.151. The software program in which the private and public keys of those who own virtual currencies is stored, is called a ***digital wallet***. There are different types of wallets namely (i) ***paper wallet*** which is essentially a document that contains a public address for receiving the currency and a private key which allows the owner to spend or transfer the virtual currencies stored in the address (ii) ***mobile wallet***, which is a tool which runs as an app on the smartphone, where the private keys are stored, enabling the owner to make payments in crypto currencies directly from the phone (iii) ***web wallet***, in which the private keys are stored on a server which is constantly online (iv) ***desktop wallet***, in which private keys are stored in the hard drive and (v) ***hardware wallet***, where the private keys are stored in a hardware device such as pen drive.

6.152. All the above types of wallets except the desktop wallet allow a great degree of flexibility, in that they can be accessed from anywhere in the world. For instance, paper wallets are printed in the form of QR codes that can be scanned, and a transaction completed by using the private keys. Similarly, mobile wallets run as an app on the smartphone and hence they allow a person to use the crypto currency stored in the wallet for buying anything, even while travelling abroad, provided the vendor accepts payments in crypto currencies. Paper wallets and mobile wallets can also be used to draw fiat currency from virtual currency ATMs available in countries like

USA, Canada, Switzerland, etc.

6.153. In other words, most of the wallets except perhaps desktop wallet, have great mobility and have transcended borders. Therefore, despite the fact that the users and traders of virtual currencies are also prevented by the impugned Circular from accessing the banking services, the impugned Circular has not paralyzed many of the other ways in which crypto currencies can still find their way to or through the market.

6.154. Persons who have suffered a deadly blow from the impugned Circular are only those running VC exchanges and not even those who are trading in VCs. Persons trading in VCs, even now have different options, some of which we have discussed above (wizards may have many more options). But the VC exchanges do not appear to have found out any other means of survival (at least as of now) if they are disconnected from the banking channels.

6.155. In all cases where legislative/executive action infringing the right guaranteed under Article 19(1)(g) were set at naught by this court, this court was concerned with a ban/prohibition of an activity. The question of the prohibited/banned activities having the potential to destabilize an existing system, did not arise in those cases. The pleadings contained in the first writ petition filed by the Association, would show that three companies who are members of the Internet and Mobile Association of India, had a combined total of approximately 17 lakhs verified users throughout India. These companies held a combined total of approximately Rs. 1365 crores of user funds in trust. The approximate monthly transaction volume of just these three companies was around Rs. 5000 crores. Even according to the petitioner, the crypto asset industry is estimated to have a market capitalization of approximately 430 billion US dollars globally. India is estimated to contribute between 2 and 10% based on varied estimates. It is admitted in WP (C) No. 373 of 2018 that the total number of investors in Indian crypto market was approximately 20 lakhs and the average daily trade volume was at least Rs. 150 crores, at the time when the writ petition was filed. Therefore, if a central authority like RBI, on a conspectus of various factors perceive the trend as the growth of a parallel economy and severs the umbilical cord that virtual currency has with fiat currency, the same cannot be very lightly nullified as offending Article 19(1)(g).

6.156. But nevertheless, the measure taken by RBI should pass the test of proportionality, since the impugned Circular has almost wiped the VC exchanges out of the industrial map of the country, thereby infringing Article 19(1)(g). On the question of proportionality, the learned Counsel for the petitioners relies upon the four-pronged test summed up in the opinion of the majority in ***Modern Dental***

College and Research Centre v. State of Madhya Pradesh.[109] These four tests are (i) that the measure is designated for a proper purpose (ii) that the measures are rationally connected to the fulfillment of the purpose (iii) that there are no alternative less invasive measures and (iv) that there is a proper relation between the importance of achieving the aim and the importance of limiting the right. The court in the said case held that a mere ritualistic incantation of "money laundering" or "black money" does not satisfy the first test and that alternative methods should have been explored.

6.157. Let us now see whether the impugned Circular would fail the four-pronged test. In fact, the Privy Council originally set forth in ***Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing***,[110] only a three-fold test namely (i) whether the legislative policy is sufficiently important to justify limiting a fundamental right (ii) whether the measures designed to meet the legislative objective are rationally connected to it and (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective. These three tests came to be known as *De Freitas test*. But a fourth test namely "the need to balance the interests of society with those of individuals and groups" was added by the House of Lords in ***Huang v. Secretary of***

[109] (2016) 7 SCC 353
[110] [1999] 1 AC 69

State for the Home Department.[111] These four tests were more elaborately articulated by the Supreme Court of United Kingdom in ***Bank Mellat v. HM Treasury (No. 2)***.[112]

6.158. ***Bank Mellat*** (supra) is an important decision to be taken note of, as it concerned almost an identical measure by which Her Majesty's Treasury restricted access to the UK's financial markets by a major Iranian commercial bank on account of its alleged connection with Iran's nuclear program. This was done by the Treasury by way of a direction under Schedule 7 of the Counter Terrorism Act, 2008, requiring all persons operating in the financial sector not to have any commercial dealings with Bank Mellat. Schedule 7 of the Act dealt with "terrorist financing and money laundering". This Schedule 7 has several parts, Part 1 providing "conditions for giving a direction", Part 2 indicating the "persons to whom a direction may be given", Part 3 laying down the requirements that may be imposed by a direction, Part 4 containing "procedural provisions and licensing", Part 5 dealing with enforcement and information powers, Part 6 dealing with civil penalties, Part 7 listing out the offences and Part 8 containing supplemental provisions. Paragraph 14 of Schedule 7 of the said Act enables the Treasury to issue general directions, to all persons or a description of persons operating in the financial sector. But certain procedural safeguards

[111] [2007] UKHL 11
[112] [2013] UKSC 39

are provided in paragraph 14(2) as well as paragraph 9(6). Under paragraph 14(2), a general direction issued to persons operating in the financial sector, must be laid before the Parliament and will cease to have effect if not approved by a resolution of each House of Parliament before the end of 28 days. Under paragraph 9(6), the requirements imposed by a direction, either in the form of customer due diligence or in the form of ongoing monitoring or in the form of systematic reporting or in the form of limiting or ceasing business, should be proportionate, having regard to the advice given by the Financial Action Task Force or having regard to the reasonable belief that the Treasury has about the risks of terrorist financing or money laundering activities or the development of radiological, biological, nuclear or chemical weapons. In addition to these procedural safeguards, Section 63 of the aforesaid Act provided for a remedy to a person affected by any such decision of the Treasury, to apply to the High Court or in Scotland, to the Court of Session. Section 63(3) specifically recognized the application of the principles of judicial review, to the applications filed against such measures.

6.159. It is in the context of those specific statutory prescriptions for judicial review available in UK (unlike in India) that Bank Mellat challenged the Treasury's decision. The challenge was both on procedural and substantive grounds. By a majority of 6 to 3, the Supreme Court of the United Kingdom allowed the appeal of the

Bank on procedural grounds. On the substantive grounds, the appeal of the Bank was allowed by a majority of 5 to 4.

6.160. Lord Reed who wrote a dissent both on the procedural grounds and the substantive grounds, traced the history of the doctrine of proportionality as follows:

> *68. The idea that proportionality is an aspect of justice can be traced back via Aquinas to the Nicomachean Ethics and beyond. The development of the concept in modern times as a standard in public law derives from the Enlightenment, when the relationship between citizens and their rulers came to be considered in a new way, reflected in the concepts of the social contract and of natural rights. As Blackstone wrote in his Commentaries on the Laws of England, 9th (1783), Vol 1, p 125, the concept of civil liberty comprises "natural liberty so far restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". The idea that the state should limit natural rights only to the minimum extent necessary developed in Germany into a public law standard known as Verhältnismäßigkeit, or proportionality. From its origins in German administrative law, where it forms the basis of a rigorously structured analysis of the validity of legislative and administrative acts, the concept of proportionality came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. From the latter, it migrated to Canada, where it has received a particularly careful and influential analysis, and from Canada it spread to a number of other common law jurisdictions.*
>
> *69. Proportionality has become one of the general principles of EU law, and appears in article 5(4) of the Treaty on European Union ("TEU"). The test is expressed in more compressed and general terms than in German or Canadian law, and the relevant jurisprudence is not always clear, at least to a reader from a common law tradition. In R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others (Case C-331/88) [1990] ECR*

I-4023, the European Court of Justice stated (para 13):

"The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

The intensity with which the test is applied – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker - depends upon the context.

70. As I have mentioned, proportionality is also a concept applied by the European Court of Human Rights. As the court has often stated, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see eg Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35, para 69). The court has described its approach to striking such a balance in different ways in different contexts, and in practice often approaches the matter in a relatively broad-brush way. In cases concerned with A1P1, for example, the court has often asked whether the person concerned had to bear an individual and excessive burden (see eg James v United Kingdom (1986) 8 EHRR 123, para 50). The intensity of review varies considerably according to the right in issue and the context in which the question arises. Unsurprisingly, given that it is an international court, its approach to proportionality does not correspond precisely to the various approaches adopted in contracting states.

71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute *their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. Those are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.*

72. The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80 has been influential:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

De Freitas was a Privy Council case concerned with fundamental rights under the constitution of Antigua and

Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8 to 11 that an interference with the protected right should be necessary in a democratic society (eg Jersild v Denmark (1994) Publications of the ECtHR Series A No 298, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected.

73. The De Freitas formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in R v Oakes [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in R (Aguilar Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621, para 45.

74. The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the *objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in De Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.*

75. In relation to the third of these criteria, Dickson CJ made clear in R v Edwards Books and Art Ltd [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (Illinois Elections Bd v Socialist Workers Party (1979) 440 US 173, 188 189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in Alberta v Hutterian Brethren of Wilson Colony [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic *means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).*

6.161. Despite the fact that the Iranian bank succeeded by a greater majority on procedural grounds and by a thin majority on the substantive grounds, a common thread is seen, both, in the opinion of the majority and in the opinion of the minority. Firstly, it was agreed even by the majority that cases which lay in the areas of foreign policy and national security were once regarded as unsuitable for judicial scrutiny, but they have been opened up by the express terms of the 2008 Act, because they may engage the rights of designated persons or others under the European Convention on Human Rights. Therefore, ***there was unanimity of opinion that any assessment of rationality and proportionality must recognize that the nature of the issue required the Treasury to be allowed a large margin of judgment.*** Even Lord Sumption who wrote the lead judgment for the majority agreed that "***the making of Government and legislative policy cannot be turned into a judicial process***". An interesting statement made by Blackmun J in ***Illinois Elections Bd v. Socialist Workers Party***[113] was quoted by Lord Reed in his dissent which reads "***a judge would be unimaginative indeed if he could come up with something a little less drastic or a little less restrictive in almost any***

[113] (1979) 440 US 173

situation and thereby enable himself to vote to strike legislation down”. In essence, there was unanimity of opinion on the fact that a margin of appreciation should certainly be allowed to the decision-maker. But on the ground of proportionality, the majority struck down the ban imposed by the UK Treasury. The highlights of the decision, as formulated by the court itself, read as follows:

(i) The essential question before the court was whether the interruption of Bank Mellat’s commercial dealings in the UK bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its nuclear weapons programmes.

(ii) For the majority, there were two particular difficulties with the direction, namely (a) it did not explain or justify the singling out Bank Mellat; and (b) the justification was not one which Ministers advanced before Parliament, and was in some respects inconsistent with it.

(iii) The risk, according to the majority, was not specific to Bank Mellat but an inherent risk of banking, and the risk posed by Bank Mellat’s access to those markets was no different from that posed by other comparable banks.

(iv) Singling out Bank Mellat, according to the court, was arbitrary and irrational, and disproportionate to any contribution which it could rationally be expected to make to the direction’s objective.

(v) By contrast, the minority were satisfied that, in view of the wide margin of appreciation given to the Treasury in these matters, the direction was rationally connected to the objective and was proportionate.

6.162. We cannot and need not go as far as the majority had gone in ***Bank Mellat***. U.K. has a statute where standards of procedure for judicial review are set out and the majority decision was on the application of those standards. But even by our own standards, we are obliged to see if there were less intrusive measures available and whether RBI has at least considered these alternatives. On the question of availability of alternatives, the July 2018 report of the European Union Parliament (titled 'Cryptocurrencies and Blockchain') is relied upon by Shri Ashim Sood. The relevant portion (in paragraph 5.4) reads as follows:

> *"In this respect we also note that some cryptocurrencies that are now on the market, such as Dash and Monero, are fully anonymous, whereas others, such as Bitcoin and the like are pseudo-anonymous, basically meaning that if great effort is made and complex techniques are deployed, it is possible for authorities to find out users' identities. These fully anonymous cryptocurrencies are designed to stay in the dark and outside of the scope of authorities. After AMLD5 (Fifth Anti-Money Laundering Directive of the European union) this will no longer be possible to the fullest extent: the cryptocurrency users that want to convert their cryptocurrency into fiat currency via a virtual currency exchange or hold their portfolio via a custodian wallet provider, will be subject to customer due diligence. But, as aforementioned, there is still a whole world outside of these new obliged entities under AMLD5. It goes without saying that this may sound particularly interesting for criminals seeking for new ways to launder money, finance terrorists or evade taxes. If a legislator does not want to outright ban these cryptocurrencies - and for not imposing*

such a ban a good argument is that cash is also fully anonymous and lawful - the only way to find out who uses them is to require users to register mandatorily. ***For reasons of proportionality it could then be considered to make the registration subject to a materiality threshold.”*** (emphasis supplied)

6.163. The discussion in paragraph 5.7 of the July 2018 Report of the European Union Parliament also addresses the issue as to whether it is best to introduce an outright ban for some aspects linked to some crypto currencies. This paragraph reads as follows:

5.7. “Is it not best to introduce an outright ban for some aspects linked to some cryptocurrencies?
The question arises whether some aspects relating to some cryptocurrencies should not just be banned and criminally sanctioned. To mind come the mixing process attached to Dash's feature PrivateSend and Monero's RingCT, stealth addresses and Kovri-project. In essence, these features are designed to make cryptocurrency users untraceable. But why is such degree of anonymity truly necessary? Would allowing this not veer too far towards criminals? Imposing a ban for such aspects surrounding cryptocurrencies that are aimed at making it impossible to verify their users and criminally sanctioning these aspects seems to be in line with the Council's conclusions of April 2018 on how to respond to malicious cyber activities, under which that the use of ICT for malicious purposes is unacceptable. Whatever the answer may be, we must again avoid being naive: even if a ban would be imposed, how do we detect a breach, given that the purpose of the object of the ban just is to obscure identities? ***Nevertheless, it would be worthwhile to consider introducing a ban. If authorities then bump into the prohibited activities, they have a legal basis for prosecution, insofar not yet available. Possibly, imposing a ban could also have a deterrent effect.*** *Of course, again there is the tension with data protection, but arguably in the balance of things the interest of authorities and society to more effectively combat money laundering, terrorist financing*

and tax evasion via well-defined specific bans outweighs the interest of persons desiring to hide their identities completely. In any event, imposing a ban should always be focused on specific aspects facilitating the illicit use of cryptocurrency too much. ***We are not in favour of general bans on cryptocurrencies or barring the interaction between cryptocurrency business and the formal financial sector as a whole, such as is the case in China for example. That would go too far in our opinion. As long as good safeguards are in place protecting the formal financial sector and more in general society as a whole, such as rules combating money laundering, terrorist financing, tax evasion and maybe a more comprehensive set of rules aiming at protecting legitimate users (such as ordinary consumers and investors), that should be sufficient."***
(emphasis supplied)

6.164. Thus, the ***ultimate recommendation made by the European Union Parliament in the paragraph extracted above, is not to go for a total ban of the interaction between crypto currency business and the formal financial sector as a whole***. Obviously, RBI did not consider the availability of alternatives before issuing the impugned circular. But by an interim direction, issued on 21-08-2019 this court directed RBI to give a detailed point-wise reply to the representations of the petitioners. Pursuant to the said order, RBI gave a reply dated 04-09-2019. In the reply, RBI has dealt with every one of the contentions of the petitioners. The relevant portion reads as follows:

*"**Firstly, the RBI has not prohibited VCs in the country**. The RBI has directed the entities regulated by it to not provide services to those persons or entities dealing in or settling VCs. The risks associated with VCs that are*

highlighted by the RBI stands mitigated so far as the entities regulated by it are concerned. Thus, the RBI been able to ring fence the entities regulated by it from being involved in activities that pose reputational and financial risks along with other legal and operational risks. For example, VCs have been used to defraud consumers in a Rs. 2000 crore scam in India whereby users were assured returns upon their investment in GainBitcoin and were paid their return in another form of VC, whose value was much lower than that of GainBitcoin.

We do not agree that the Circular has the effect of forcing members to do deal in cash. The Circular neither directs nor encourages any dealing with respect to VCs at all. After the issuance of the Circular, some of the IAMAI member VC exchanges have been operating peer to peer VC exchanges. In P2P transfers, while the exchange provides a portal to match the orders of a seller and buyer, the consideration would flow directly from the buyer to the seller without the exchanges being an intermediary for this leg of the trade. The exchanges would only act as the intermediary for the storing the VCs till the time the transfer of the consideration from the buyer to the seller is complete. In other words, the exchanges act as an escrow agent for the transaction between the buyer and the seller. The buyers in the P2P transaction transfer the consideration directly to the seller's bank account. In any case, the capital flight problem mentioned by the petitioner is not new and existed even before the issuance of the Circular. As mentioned earlier, the IAMAI VC exchanges allowed their customers to transfer VCs to foreign wallet addresses, even before the issuance of the Circular, exposing the customers to the risks of violating FEMA, AML/CFT guidelines.

The issues highlighted by IAMAI have been considered by the RBI. The RBI, as the banking and financial regulator of Indian markets, assessed the risks and benefits arising from the exponential and increasing use of VCs. The potential adverse impact of VCs on the banking sector and the digitization of the Indian payments industry, on account of the inherent nature of VCs, is lowered as a *result of the Circular. The RBI stepped in as part of its duty to carryout preventive oversight to ensure that the banking system was not a casualty on account of the growth in VC trading. The Circular became all the more necessary as the use and trade through VCs continued to grow despite multiple cautions issued by the RBI. Further, the public should not lose faith in the Indian digital payments ecosystem as a consequence of any impact of VCs given its intrinsic nature. The focus of the digital payments in India will be defeated should the usage of VCs result in implications. Any unpleasant experience in using VCs can affect the public's trust in electronic payment systems in general.*

It is in this context that the RBI had highlighted some of the possible ways to enforce the prohibition on VCs in the RBI Representation, which are as follows:

(i) Initial Coin Offerings ("ICOs") ought to be prohibited and VC asset funds may to be allowed to be set-up and/or operated within the legal jurisdiction of India as also perform such transactions in India. ICOs that were in the nature of multi -level marketing or pyramid schemes can be banned;

(ii) The FEMA and its regulations can be enhanced to prevent and track remittances for the purpose of investing in VCs which are flowing out of the country under the LRS;

(iii) Enforcement agencies can take punitive action against entities/establishments that accept VCs as a medium of payment, as and when these agencies are faced with such instances; and

(iv) Regulators can issue warnings to the public and educated the public to the extent possible.

One must also be alive to the issue faced by the country. India is not a safe haven free from any external intrusions and terror attacks. India is plagued by the menace of cross border terror financing and money laundering. While laws have been enacted to counter terror financing and money laundering activities, the Government cannot permit anything which would facilitate or have the potential to facilitate such nefarious and illegal acts to incubate in the *country. Any possible avenues which facilitate anonymous cross border fund transfer have to be acted upon swiftly and stringently dealt with. It is an admitted fact that VCs have been used to purchase illegal and illicit goods ranging from guns and ammunition to drugs. Therefore, the RBI's measures under the Circular become all the more necessary. With the Circular coming into effect, the banking system and the RBI's regulated entities would not be facilitating persons looking to obtain VCs for illegal trades. Th additional measures taken by the RBI by way of the Circular were necessary as, despite multiple cautions, 5 million Indian users engaged in VC trades of INR 1 billion daily."* (emphasis supplied)

6.165. In Annexure B to their second response dated 18-09-2019, RBI has also dealt with every one of the additional safeguards proposed by one of the writ petitioners, by name, Discidium Internet Labs Pvt, Ltd. and demonstrated as to how these safeguards may not be sufficient to ring fence the regulated entities:

Safeguards proposed by petitioners	Response of RBI
Development of a dashboard and central repository	The technology and concept of a dashboard that is accessible by all the relevant government authorities is yet to be tested in India and cannot guarantee that the same will enable authorities to mitigate risks in relation to VCs, particularly the ones arising out of cross border transactions or illegal and nefarious activities. Such a development would require the association of various government authorities at different levels with implications on the roles and responsibilities of other regulatory / enforcement agencies and cannot be implemented by the RBI alone. Therefore, even assuming that the proposed structure is adequate enough, its implementation will entail other authorities to formulate the appropriate rules or directions in their jurisdictions, which is

	beyond the RBI's control. In any case, for such a development to come into existence, the Government will need to formulate and establish appropriate rules governing the nitty gritty of the same. In addition, VCs are difficult to monitor as their opaque nature makes it difficult to gather information and monitor their operations. Moreover, asserting jurisdiction over a particular VC transaction or market participant may prove challenging for national regulators in the light of the cross- border reach of the technology.
Formation of a self-regulatory organization and **Restricting trade of crypto-assets to white listed addresses**	Issuance and management have been a function solely of the sovereign / central bank and a collection of private entities cannot be trusted to perform this role. Moreover, when such VCs become widely used, the central bank's ability to control the money supply in the economy could get adversely impacted. In fact, implications of VCs vis-a-vis consumer protection, data privacy and security were also highlighted. It was also acknowledged that there are several uncertainties around the VC, particularly with respect to how the VC is secured, the extent to which there are measures to prevent and respond to the dramatic shifts of value; and the characterization of the sellers of such a VC. Additionally, it was recognized that there can be implications on the US monetary policy as another 'currency' not under the government control can adversely impact the Federal Reserve's monetary policy as the Federal Reserve would lose its monopoly on controlling inflation and inflation targeting though manipulating cash in the system.
Adoption of Aadhar based electronic KYC	Electronic KYC is currently permitted only for banks for individuals desirous of receiving any benefit or subsidy under any scheme notified under Section 7 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies Benefits and Services) Act, 2016 or if an individual voluntarily uses his/her Aadhaar number for identification purpose. Moreover, the adoption of Aadhaar based electronic

	KYC may not be sufficient to address the risks stated by the RBI in the Press Releases. This is because for the RBI to issue norms/measures that sufficiently resolves and/or mitigated the stated risks of dealing in VCs, it has to be privy to the technicalities of the various types of VCs, their characteristics and difficulties and drawbacks. There is still a high level of uncertainty and ambiguity surrounding VCs. Regulators around the world are still in fact contemplating how to regulate initial coin offerings and how to tax them. The RBI is keeping a close tab on all such developments including the regulatory stand taken by each jurisdictions across the world and will consider implementing the same to the extent of its jurisdiction and in line with the policy framework that will be adopted by the Government of India in relation to VCs.
Mandatory capitalisation requirement	DILPL has failed to set out the benefit or security provided by the proposed mandatory capitalisation requirements. In the absence of any benefits prescribed by DILPL, the RBI has to rely upon conjecture and surmises to assume the purported benefits of this suggestion. Notably, the fact that certain jurisdictions prescribe mandatory capitalisation requirements does not necessarily make the suggestion beneficial or implementable in India. The only benefit which a reasonable person may assume is that the VC exchanges will have to be of a minimum prescribed size and value. However, the mandatory capitalisation requirement of VC exchanges would not reduce the inherent risks involved in VCs. VCs transactions would continue to be anonymous and untraceable. The mandatory capitalisation requirement does not reduce the use of VCs in nefarious activities and illegal cross-border transactions. Further, the mandatory capitalisation requirement does not provide any security or benefit to the monetary and banking system from the risks associated with VCs.

	Pertinently, the suggestion includes prescribing a mandatory capitalisation requirement in VCs itself. Given the instability and price fluctuations of VCs, the RBI rejects any suggestion of providing a security or capitalisation requirement in VC itself. Additionally, the suggested mandatory capitalisation requirement would also not reduce the risks to consumers arising not only from fraud but also from the possible loss of value given the fluctuations and manipulation VCs' value.
Insurance of crypto-assets	Firstly, Indian Insurance service providers are not governed by the RBI. Insurance providers come within the regulatory jurisdiction of the Insurance Regulatory and Development Agency ("**IRDA**"). Therefore, the RBI cannot assume jurisdiction over insurance providers by directing them to formulate tailored insurance policies for VC exchanges. It is for the purpose of such regulatory aspects, that the Inter-Ministerial Committee was constituted to study VCs. Accordingly, the RBI had, at that time, forwarded a copy of the Representation to the Inter-Ministerial Committee for their due consideration. Secondly, Indian insurance providers, as mandated by the IRDA, take a cautious approach to the insurance policies offered by them. Therefore, the insurance providers may not, either *suo moto* or on account of IRDA's directions, offer insurance policies to protect VCs. Further, this cautious approach includes various limitation or exclusion of liability clauses. Therefore, the insurance policies may not provide adequate cover in the event of any value degradation, loss or theft of VCs. Moreover, the highly speculative and fluctuating value of VCs is a risk which ought not to be borne by the insurance providers, who are already suffering from the various financial frauds in the Indian monetary and banking system.
Formation of an investor	DILPL suggests setting up an investor protection and education fund, for which the VC exchanges would

protection and education fund	transfer all proceeds earmarked towards their corporate social responsibility ("**CSR**") obligations under the Companies Act, 2013. This suggestion, as per the RBI, would not protect the customers as claimed by Discidium as the steps would be insufficient to provide adequate cover to customers. Notably, Discidium has not suggested that it create any additional buffer for the education and protection of its customers but instead, has merely suggested that VC exchanges transfer its existing legal obligations to create a fund which would purportedly benefit customers. Despite best efforts made to educate customers, the inherent risks in VCs would still remain. It is reiterated that VCs transactions would remain anonymous and open to facilitating illegal activities. It is unlikely that the education of customers would change the intent of nefarious customers, who would continue to conduct illicit transactions through VCs. The anonymous nature of VCs cannot be disputed. The transactions in VCs are anonymous due to the pseudonymous address or user handle. For instance, the reportedly largest transfer of Bitcoins, worth nearly USD 1 billion,[114] took place as recently as September 2019, was between anonymous accounts. Even if the exchanges try to mitigate the risks of cyber-attacks by subscribing to insurance products, the risks are likely to spread to sectors other than banking. Further, the utilisation of CSR funds is not regulated or governed by the RBI. Therefore, implementation of this suggestion would require other authorities to formulate necessary rules or directions, which is beyond the RBI's control and would depend on the final law passed by the Parliament based on the currently pending draft Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019.

[114] https://www.vice.com/en_in/article/bjwjpd/someone-just-moved-a-billion-dollars-in-bitcoin-and-no-one-knows-whywhich; last accessed on September 12, 2019.

6.166. Though at the time when the impugned Circular was issued, RBI has not obviously addressed many of the issues flagged by the writ petitioners, RBI did in fact consider the issues raised by the petitioners, pursuant to the order passed by this court on 21-08-2019. RBI has also analyzed in Annexure B to the reply dated 18-09-2019 extracted above, the additional safeguards suggested by the petitioners, to see if the purpose of the impugned measure can be achieved through less intrusive measures. While exercising the power of judicial review we may not scan the response of RBI in greater detail to find out if the response to the additional safeguards suggested by the petitioners was just imaginary.

6.167. But at the same time we cannot lose sight of three important aspects namely, (i) that RBI has not so far found, in the past 5 years or more, the activities of VC exchanges to have actually impacted adversely, the way the entities regulated by RBI function (ii) that the consistent stand taken by RBI up to and including in their reply dated 04-09-2019 is that RBI has not prohibited VCs in the country and (iii) that even the Inter-Ministerial Committee constituted on 02-11-2017, which initially recommended a specific legal framework including the introduction of a new law namely, Crypto-token Regulation Bill 2018, was of the opinion that a ban might be an extreme tool and that the same objectives can be achieved through regulatory measures. Paragraph 7 of the 'Note-precursor to report' throws light on the same and hence it is reproduced as follows:

> *"**Options***
> *7. The Committee has considered various approaches to achieve the objectives and notes:*
>
> *Achieving the objectives by doing nothing*
> *i. Issuing warnings may prevent unsophisticated consumers from dealing in VCs but it would not deter VC service providers or those raising funds through Initial Coin Offerings (ICOs), mis-sell or run Ponzi schemes.*
> *ii. The recourse available to customers would be inadequate.*
> *iii.Persons who provide VC services without necessary fit and proper criteria including capital and technology would continue to pose a heightened risk.*
>
> *Achieving the objectives through banning*
> *i. Consumer protection is a key concern but a ban might be an extreme too to address this. There are many things/activities that may be harmful but they are not all banned. Problems related to information asymmetry, concerns around market risks, law enforcement or threat to financial system cannot be adequately addressed through a ban.*
> *ii. A ban would make dealing in VCs illegal but simultaneously it might decrease the ability of the law enforcement agencies and regulators to track and stop illegal activities.*
> *iii.Ver few countries have actually banned VCs. A ban might not be in-step with India's position as an important centre of Information Technology services.*
>
> *Achieving the objectives by regulating*
> *i. Penalizing entities or persons who do not opt for regulation under this Act and may choose to operate illegally may continue to be difficult."*

6.168. The Crypto-token Regulation Bill, 2018 initially recommended by the Inter-Ministerial Committee contained a proposal (i) to prohibit persons dealing with activities related to crypto tokens from falsely posing these products as not being securities or investment schemes or offering investment schemes due to gaps in the existing regulatory framework and (ii) to regulate VC exchanges and brokers where sale and purchase may be permitted.

6.169. The key aspects of the Crypto-token Regulation Bill, 2018, found in paragraph 13 of the 'Note-precursor to report' shows that the Inter-Ministerial Committee was fine with the idea of allowing the sale and purchase of digital crypto asset at recognized exchanges. Paragraph 13 (iii) & (vii) of the 'Note-precursor to the report' reads as follows:

> *13. Key aspects are summarised below:*
> *(i)…*
> *(ii)…*
> *(iii) The sale and purchase of digital crypto asset shall only be permitted at recognised exchanges.*
> *(iv)…*
> *(v)…*
> *(vi)…*
> *(vii) The registry of all holdings and transactions on the recognised exchanges shall be maintained at recognised depositories.*

6.170. But within a year, there was a volte-face and the final report of the very same Inter-Ministerial Committee, submitted in February 2019 recommended the imposition of a total ban on private crypto currencies through a legislation to be known as "Banning of Cryptocurrency and Regulation of Official Digital Currency Act, 2019”. The draft of the bill contained a proposal to ban the mining, generation, holding, selling, dealing in, issuing, transferring, disposing of or using crypto currency in the territory of India. At the same time, the bill contemplated (i) the creation of a digital rupee as a legal tender, by the central government in consultation with RBI and (ii) the recognition of any official foreign digital currency, as foreign currency in India.

6.171. In case the said enactment (2019) had come through, there would have been an official digital currency, for the creation and circulation of which, RBI/central government would have had a monopoly. But that situation had not arisen. The position as on date is that VCs are not banned, but the trading in VCs and the functioning of VC exchanges are sent to comatose by the impugned Circular by disconnecting their lifeline namely, the interface with the regular banking sector. What is worse is that this has been done (i) despite RBI not finding anything wrong about the way in which these exchanges function and (ii) despite the fact that VCs are not banned.

6.172. As we have pointed out earlier, the concern of RBI is and it ought to be, about the entities regulated by it. Till date, RBI has not come out with a stand that any of the entities regulated by it namely, the nationalized banks/scheduled commercial banks/co-operative banks/NBFCs has suffered any loss or adverse effect directly or indirectly, on account of the interface that the VC exchanges had with any of them. As held by this court in ***State of Maharashtra v. Indian Hotel and Restaurants Association***,[115] there must have been at least some empirical data about the degree of harm suffered by the regulated entities (after establishing that they were harmed). It is not the case of RBI that any of the entities regulated by it has suffered on account of the provision of banking services to the online platforms running VC exchanges.

6.173. It is no doubt true that RBI has very wide powers not only in view of the statutory scheme of the 3 enactments indicated earlier, but also in view of the special place and role that it has in the economy of the country. These powers can be exercised both in the form of preventive as well as curative measures. But the availability of power is different from the manner and extent to which it can be exercised. While we have recognized elsewhere in this order, the power of RBI to take a pre-emptive action, we are testing in this part of the order the proportionality of such measure, for the determination of which RBI needs to show at least some semblance of any damage suffered by its regulated entities. But there is none. 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

[115] (2013) 8 SCC 519

not possible for us to hold that the impugned measure is proportionate.

7. CLIMAX

7.1. Therefore, in the light of the above discussion, the petitioners are entitled to succeed and the impugned Circular dated 06-04-2018 is liable to be set aside on the ground of proportionality. Accordingly, the writ petitions are allowed and the Circular dated 06-04-2018 is set aside. The Statement dated 05-04-2018, though challenged in one writ petition, is not in the nature of a statutory direction and hence the question of setting aside the same does not arise.

7.2. There is still one more issue left. It is the freezing of the account of Discidium Internet Labs Pvt. Ltd., which is petitioner no. 6 in WP (C) No. 373 of 2018. This company seems to have had an amount of Rs. 12,05,36,667.83/- in current account no. 3677101984 with the Central Bank of India, Worli, Mumbai. When the petitioner made a request on 21-05-2018 to close the account and issue a demand draft, the Central Bank replied that they had referred the matter to their higher authorities/regulators. Therefore, petitioner no. 6 has come up with an application in I.A. No. 110424 of 2019 for appropriate directions.

7.3. RBI has filed a reply to this application conceding that it had not directed the bank to freeze the account. It is specifically stated in paragraph 12 of the affidavit-in-reply of RBI that they did not issue any direction to the Central Bank of India to freeze the account. However, RBI has taken a stand that the prayer for release of the amount does not arise out of or incidental to the main writ petition.

7.4. But we think that the lukewarm response of RBI in this regard is wholly unjustified. Admittedly, the activities carried on by the petitioner no. 6 were not declared as unlawful. It is the positive case of RBI that they did not in fact freeze the accounts of petitioner no. 6. Therefore, RBI is obliged to direct the Central Bank of India to defreeze the account and release the funds. Hence, RBI is directed to issue instructions forthwith to the Central Bank of India, Worli branch, to defreeze the current account no. 3677101984 of petitioner no. 6 in WP (C) No. 373 of 2018 and to release the funds lying in the account to the company together with interest at the rate applicable. There will be no order as to costs.

7.5. Before drawing the curtains down, we are bound to record, as in every artistic display, our appreciation for the skillful manner in which Shri Ashim Sood, learned Counsel, led the attack on the impugned Circular, but for which, the climax could not have had a nail biting finish.

..................................J
(Rohinton Fali Nariman)

..................................J
(Aniruddha Bose)

..................................J
(V. Ramasubramanian)

New Delhi
MARCH 04, 2020.