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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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All correspondences are addressed to:

The Editor-in-Chief

Kampala International University Law Journal,
School of Law,
Kampala International University,
P.O. Box 20000 Kampala,
Uganda.

valentine.mbeli@kiu.ac.ug

Tel: (+256) 0706970595

Website: www.kiulj.kiu.ac.ug

Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide a platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

VALENTINE T. MBELI (Ph.D)

Editor-in-Chief.

e-mail:valentine.mbeli@kiu.ac.ug

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THE LEGAL FRAMEWORK ON DIGITAL COMMERCE IN NIGERIA: THE BAN OF CRYPTOCURRENCY AND ITS EFFECTS ON HER FINANCIAL SPACE

OGUNWANDE, OMOLABAKE* & OGUNDARI, ENOBONG**

Abstract

In the era of the digital revolution and the transformation of e-commerce, much of commerce-related activities have been digitized. Cryptocurrency is one of the latest additions which provides seamless transfers of liquid monies virtually. Worried with the problems associated with its operations, owing to the detached or impersonal method of dealings in the not-so-physical way cryptocurrency is transferred throughout the globe. The Central Bank of Nigeria announced a ban on cryptocurrency in the country. It is against this backdrop that this study examines the current legal regime regulating the use and operation of cryptocurrency and the impact of the same on the sustainability of cryptocurrency, particularly, in a monolithic economy. The article concludes on the way out of the perceived quagmire.

Keywords: Digital currency, Cryptocurrency, Legal Framework, Financial space, Nigeria

Introduction

On Friday, 5th of February 2021, the Central Bank of Nigeria (CBN), through its letter directed at all deposit money banks, non-bank financial institutions and other financial institutions referred to its earlier circular issued on 12 January 2017 where the apex bank had cautioned all deposit money banks (DMB), non-bank financial institutions (NBFIs), other financial institutions (OFIs) and members of the public on the risk associated with transactions in cryptocurrency.¹

In the same 5th of February 2021-dated letter,² the CBN further to the directive on the circular called the attention of regulated institutions that dealing in cryptocurrencies and facilitating payments for cryptocurrency exchanges is henceforth prohibited in Nigeria. Flowing from the above, CBN directed regulated institutions listed above to identify persons and or entities transacting in or

* Law Librarian, Osun State University, Osogbo, Ifetedo Campus, Osun State, Nigeria. Email: omolabake.ogunwande@uniosun.edu.ng

** PhD (Law), Lecturer, Obafemi Awolowo University, Ile-Ife, Osun State, Nigeria. eogundari@oauife.edu.ng

¹ Central Bank of Nigeria (2021) Letter to all Deposit Money Banks, Non-Bank Financial Institutions and other Financial Institutions, dated 5th of February, 2021.

<<https://www.cbn.gov.ng/Out/2021/CCD/Letter%20on%20Crypto.pdf> >accessed 23rd May, 2021.

² Ibid.

operating cryptocurrency exchanges within their systems and ensure that such accounts are closed immediately.

News of the CBN's decision to prohibit banks from facilitating crypto-related transactions through the banking system has since been greeted by mixed reactions on social media with the tech and digital market and other stakeholders³ condemning the policy as a deliberate attempt by the government to impoverish young Nigerians who have been able to create wealth for themselves through crypto trading.⁴

Following the outburst on social media, the CBN gave a press release on 7th February 2021⁵ therein the apex bank announced its major reasons for banning transactions on cryptocurrencies hinge on the potential risk of loss of investments, money laundering, terrorism financing, illicit fund flows and criminal activities. These reasons are only reasonable as the cryptocurrency market is not regulated and can be manipulated in many ways.

Some have also noted the lack of policy cooperation between financial regulators in Nigeria because the Securities and Exchange Commission (SEC) had only a few months ago proposed a new set of rules that will regulate crypto-token or Cryptocurrency investment when the character of the investment qualifies as securities transactions. Flowing from this, SEC did a press release clarifying that the regulator was not in any contradiction with CBN but rather engaged with the CBN with the agreement to continue to work together to further analyze, and better understand the identified risks to ensure that appropriate and adequate mitigants are put in place to secure and fortify the nation's financial sector.⁶ SEC has also by the press release stated that it had put on hold the assessment of all persons (and products) seeking admittance into the SEC Regulatory Incubation Framework who are affected by the CBN letter of 5th February 2021.⁷

The entire situation equally attracted the attention of the Nigerian Senate which thereafter mandated its Committees on Banking, Insurance and Other Financial

³ Erezi Dennis, 'Atiku Tackles CBN, calls for reversal of Ban on Cryptocurrencies', (*Guardian*, 6th of February, 2021) <<https://guardian.ng/news/nigeria/national/atiku-tackles-cbn-calls-for-reversal-of-ban-on-cryptocurrencies/>> accessed 23rd May, 2021 Sahara Reporters, 'Ben Bruce, Other Condemn CBN for Closing all Cryptocurrency Accounts' (Sahara Reporters 5th February, 2021). <<http://saharareporters.com/2021/02/05/ben-bruce-others-condemn-cbn-closing-all-cryptocurrency-accounts/>> accessed 1st April, 2021.

⁴ Ade-Rufus Adedayo, 'Government just wants us to suffer- reactions train CBN's directive to close crypto accounts', (*The Cable*, 5th of February, 2021). <<https://www.thecable.ng/govt-just-wants-us-to-suffer-reactions-trail-cbns-directive-to-close-crypto-accounts/>> accessed 1st April, 2021.

⁵ Torinmo Salau, 'Nigeria's Crackdown on Bitcoin Echoes Global Crypto Conundrum', (*Aljazeera*, 25th March, 2021) <<https://www.aljazeera.com/economy/2021/3/25/nigerias-crackdown-on-bitcoin-echoes-global-crypto-conundrum>> accessed 23rd May 2021); News Agency of Nigeria, 'Revisiting CBN on Cryptocurrency Transactions', *Guardian Newspaper*, 4th April, 2021. <<https://guardian.ng/features/revisiting-cbn-ban-on-cryptocurrency-transactions/>> accessed 1st April, 2021; Steve Kaaru, 'Nigeria SEC working with Central Bank to lift Digital Currency Ban', (*COINGEEK*, 20th of April, 2021) <<https://coingeek.com/nigeria-sec-working-with-central-bank-to-lift-digital-currency-ban/>> accessed 1st April, 2021.

⁶ Security and Exchange Commission (SEC), 'Press Release on Cryptocurrency', (SEC, 11th of February, 2021 <<https://sec.gov.ng/press-release-on-cryptocurrencies/>> accessed 2nd of June, 2021.

⁷ Ibid.

Institutions, ICT and Cybercrimes and Capital Market to invite the Governor of CBN as well as the Director General of the SEC to brief it on the recent ban on cryptocurrency in the country. It explained that the information that would emanate from the briefings from the two regulatory bodies would assist the Senate to determine the opportunities and threats of the cryptocurrency on the nation's economy and security.⁸

Conceptual Definitions :Cryptocurrency

Cryptocurrency or virtual currency is a cryptographically protected, decentralized and digital currency used as a means of exchange. It is the name given to a system that uses cryptography to allow the secure transfer and exchange of digital tokens in a distributed and decentralised manner.⁹ Due to the development of new technologies and innovations, the rate of use of virtual currency is rapidly increasing throughout the globe, replacing not only cash payments and payments by bank transfer but also electronic cash payments.

Among the best-known representatives of cryptocurrencies are Bitcoin, Litecoin and Ethereum. Legal scholars have not yet reached a consensus regarding the nature and legal status of virtual currency. Virtual currency possesses the nature of obligations, rights as well as property rights, since it may be both a means of payment and a commodity. Depending on the country, the approach to cryptocurrencies may be different. Today there is already an international cryptocurrency community that does not have a single coordinating centre. Only progressive jurisdictions and State regulation of cryptocurrency activity will allow the creation of the conditions that will ensure the implementation of legitimate and safe cryptocurrency relations.¹⁰ It is also viewed as any form of currency that only exists digitally, that usually has no central issuing or regulating authority but instead uses a decentralized system to record transactions and manage the issuance of new units, and that relies on cryptography to prevent counterfeiting and fraudulent transactions.

The Cambridge dictionary defined cryptocurrency as a “*digital currency produced by a public network, rather than any government, that uses cryptography to make sure payments are sent and received safely*”.¹¹ From the above definitions, there are various technologies upon which cryptocurrency stands and a sound understanding of them would help in fully knowing what cryptocurrency is all about. These include cryptography, blockchain technology, coins, virtual currency etc.

⁸Sunday Aborisade, ‘Senate Summons Emeziele, SEC DG over Cryptocurrency ban’, (PUNCH, 12th February, 2021) Retrieved from <<https://punchng.com/senate-summons-emefiele-sec-dg-over-cryptocurrency-ban/>> accessed 25th of May, 2021; News Agency of Nigeria, ‘Senate Summons CBN Governor, DG SEC over Cryptocurrency’. (THE NATIONS, 11th of February), 2021. Retrieved from <<https://thenationonline.ng/senate-summons-cbn-governor-dg-sec-over-cryptocurrency-ban/>> accessed 12th of May, 2021.

⁹ Paul Vigna & Michael J. Casey, *The Age of Cryptocurrency: How Bitcoin and Digital Money are Challenging the Global Economic Order*, (St. Martin’s Press, 2015) p. 1.

¹⁰ Irina Cvetkova, ‘Cryptocurrencies Legal Regulation’, (2018) 5(2) *BRICS Law Journal*, 128–15, 133

¹¹ <<https://dictionary.cambridge.org/dictionary/english/cryptocurrency>> Accessed 17th May, 2021.

Douglas Stinson defines cryptography as the practice and study of techniques for secure communication in the presence of third parties¹². It can also be described as the art of writing and solving codes¹³. These definitions are central to modern cryptography as computer codes and algorithms are written in such a way around computational hardness assumptions,¹⁴ making such algorithms and codes hard to break by third parties, therefore, making them computationally secure. Meanwhile, a decentralized network or decentralized computing is a computer network where the nodes (computers) within the network function as a separate authority with independent decision-making power regarding how it interacts with other systems¹⁵. The network shares data and processing power among nodes through connected servers. The fundamental principle of a decentralized network is that all nodes are independent and connected. Since each node is independent, every one of them can set its own rules regarding data and workload availability¹⁶.

Blockchain Technology

Blockchain is a decentralized ledger of all transactions across a peer-to-peer network¹⁷. With blockchain, various transactions can be carried out without the interference of a third party, regulatory body or clearing party. Blockchain technology is being considered for use in several sectors, from encrypting patient information in the health sector to voting during elections to ensure votes are not duplicated. Likewise, transactions of cryptocurrency can be made from one person to another. However, no physical currency moves under this transaction.

With the brief explanation above of the technology that drives cryptocurrency, it may be defined as “a digital currency secured by cryptography”.¹⁸ It is a medium of exchange, created and stored electronically in the blockchain, using encryption techniques to control the creation of monetary units and to verify the transfer of funds.¹⁹ In the cryptocurrency ecosystem, cryptocurrency is referred to as a coin or token. Although these names are sometimes used interchangeably, they are two different types of cryptocurrencies. A coin is a unit of value or digital asset that is

¹² Douglas R. Stinson, *Cryptography: Theory and Practice*, (3rd edn), Chapman and Hall/CRC, 2005)

¹³ The Oxford English Dictionary, (3rd edn), Oxford University Press.

¹⁴ Computational hardness assumption is a hypothesis that a particular problem will not be able to be solved efficiently by a computer.

¹⁵ Lisa S. Goldman, Cryptocurrency: The Pros and Cons of Centralized vs. Decentralized Exchanges <https://www.berdonllp.com/cryptocurrency-the-pros-and-cons-of-centralized-vs-decentralized-exchanges/> Accessed 17th May, 2021.

¹⁶ Ibid.

¹⁷ PWC, ‘Making sense of Bitcoin, Cryptocurrency and Blockchain’ <https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html> accessed 17th May, 2021.

¹⁸ Paul Vigna & Michael J. Casey, *The Age of Cryptocurrency: How Bitcoin and Digital Money are Challenging the Global Economic Order*, (St. Martin’s Press, 2015) p. 1

¹⁹ PWC, ‘Making sense of Bitcoin, Cryptocurrency and Blockchain’ <https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html> accessed 17th May, 2021.

native to a blockchain²⁰. It is a means of exchange used within a blockchain to enable the participants' exchange value. So, for example, a cryptocurrency like Bitcoin operates and functions on the Bitcoin blockchain to exchange value. Coins function like regular money and are used solely for monetary purposes like purchasing goods and services. A token on the other hand does not have its blockchain. Rather it is an asset built on top of an existing blockchain, which can replicate such functionality.

Another thing to note is that coins are usually used for payments. However, while a token can be used for payments and can be used as a unit of value it has more uses like utility tokens that are used to access products and services. Thus, when one creates a token on a blockchain, the asset or the functionality will usually be exchanged, sold or bought with the native coin of the blockchain where the token resides. Startups and companies have decided to take advantage of the creation of tokens on blockchains and are generating their assets. An example of such is Ethereum's²¹ smart contract functionality. By building decentralized applications on top of Ethereum, companies are creating their tokens for various purposes.

Relationship between Cryptocurrency, Digital Currency, and Virtual Currency

Distinguishing the differences among these concepts is apt in having sound knowledge of what cryptocurrency entails, as is usual, they are used interchangeably generally. As opined by CPIM,²² digital currencies are assets with zero intrinsic value, whose value is determined by the forces of demand and supply as in other commodity money like gold. They are not a liability of any entity and are not backed by any authority of the State. Their current value is dependent on the future expectation of being exchanged for goods, services or a certain amount of sovereign currency.

On the other hand, Baron et al see the virtual currency as a digital representation of value that is accepted by people as a means of payment, although, it is neither issued by a public authority nor necessarily attached to a fiat currency. Electronic money was *“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”*²³.

²⁰ Rob Massey, (et al), 'Initial Coin Offering A new paradigm' <https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/risk/deloitte-blockchain-initial-coin-offering.pdf> accessed 23rd May, 2021.

²¹ Ethereum is a cryptocurrency platform (native blockchain) that allows users to create smart contracts. It is an open source decentralized cryptocurrency platform that is programmable meaning the blockchain can be modified for various purposes from financial services to applications. The coin used on the Ethereum blockchain is called Ether.

²² Committee on Payments and Market Infrastructures (CPIM). Digital currencies. *Bank for International Settlements* (2015). <<https://www.bis.org/cpmi/publ/d137.pdf>> accessed 23rd May, 2021.

²³ European Central Bank (2012, October). *Virtual currency schemes*.

Mandeng²⁴ described cryptocurrencies as private, digital, de-nationalized, unreserved, floating rate, and convertible monies. Bitcoin, the most popular among other cryptocurrencies has assumed several names among other, including digital currency, digital cash, virtual currency, electronic currency and as cryptocurrency.

Currency as a legal tender is accepted as a unit of account, store of value and medium of exchange.²⁵ Historically, money originated through public enterprises in the ancient Mesopotamian temples and palaces as standardized weight and also assisted in the development of internal accounting for recognition of credits and debits and as an instrument of taxation²⁶. According to Davies²⁷ money predated minting for about 3000 years. Considering the development of money in Egypt, it became clear that the State plays important role in establishing the appropriate measure of value for accountability. Cowries, Fijian whales' teeth, Yap stones, Wampum, cattle and metallic currencies were the earliest form of money in existence and thereafter, notes were issued as money but in each instance, the State played important roles such as determining the value of the currency and administrative control²⁸.

Bank notes were introduced by China in the 10th Century and in Europe in the 18th century, later in the 19th century, they gained legal tender status. Before the establishment of the Central Bank, Private Banks of Issue were involved in rapidly conducting and facilitating monetary transactions. Each country later established a central bank to regulate bank note issuance, address proliferation and promote stability²⁹.

Similarly, in the history of recording business transactions, the financial industry had always experienced a gradual transition from one era to the other. There had been three major phases so far, beginning with pre-paper, paper and electronic. The pre-paper era was the oldest when different materials such as bones of animals, clay, wall, line dates, papyrus, bullae, cuneiform, charcoal sticks, plant stems, feathers and other physical materials served as means of capturing and recording business transactions.³⁰ The ancient practice became gradually outdated when the

<<http://www.ecb.int/pub/pdf/other/virtualcurrencyschemes201210en.pdf>> accessed 23rd May 2021.

²⁴Mandeng, O.J., Cryptocurrencies, Monetary Stability and Regulation: Germany's Nineteenth Century Private Banks of Issue. *Ousmène Jacques Mandeng Lse Institute of Global Affairs*. (2018).

²⁵Gaudamuz, A., & Marden, C. (2015). Blockchains and Bitcoin: Regulatory responses to Cryptocurrencies. *First Monday*, 20(2).

²⁶Forstater, M. (2005). Taxation and Primitive Accumulation: The case of Colonial Africa', DOI:10.1016/S0161-7230(04)22002-8 accessed 23rd May 2021.

²⁷Davies, G., *A History of Money from Ancient Times to the Present Day*, (3rd Edn), University of Wales Press Cardiff, 2002).

²⁸Henry, J.F., 'The Social Origins of Money: The case of Egypt' *European Journal of Political Economy*, (2004) 14, 407-432.

²⁹Mandeng, O.J., Cryptocurrencies, Monetary Stability and Regulation: Germany's Nineteenth Century Private Banks of Issue. *Ousmène Jacques Mandeng Lse Institute of Global Affairs*. (2018).

³⁰Akinyemi, B., Okoye, A.E., & Izedonmi, F., 'History and Development of Accounting in Perspective', *International Journal of Sustainable Development Research*, (2015) 1(2), 14-20.

paper was invented around 100 BC³¹. During the second phase, financial transactions were recorded first in the three main books comprising the journal, the ledger, and the cashbook with the help of merchants and scribes in the days of the Italian Monk, Luca Pacioli, the inventor and father of the double entry system of accounting. Since then, the paper had been in use until the introduction of computers. Although paper as the medium for recording accounting information had not been eradicated even with the advent of computers, most accounting procedures were automated to appropriate the host of benefits offered using computers³². The use of paper was gradually overtaken by computer spreadsheets and other application software which are still being used. The move from paper to computer spreadsheets and other application software is seen by many researchers as encompassing the third industrial revolution (digitization).

However, the arrival of cryptocurrency which has its root in cryptographic technology with an online distributed ledger appears to be introducing the finance industry into another phase (fourth) of development which incredibly is a combination of both the Central Bank's function as well as accounting functions as it produces and manages the supply of virtual currency as well as producing and managing the record of transactions simultaneously³³. This technology is indeed a pointer to the fact that we have moved to the era of the fourth industrial revolution.

Cryptocurrency as a Legal Tender

According to the Central Bank of Nigeria Act 2007, only the apex bank has the sole right to issue legal tenders of any kind in Nigeria³⁴ and no other person or authority can issue tokens which are likely to pass as legal tender in Nigeria³⁵. Consequently, on 12th January 2017, the Central Bank of Nigeria (CBN) issued a Circular³⁶ stating that because transactions with cryptocurrencies or virtual currencies are almost untraceable making them susceptible to abuse by criminals and terrorists, there is a need to protect the integrity of the Nigerian financial system, therefore, pending the release of legislation or regulation guiding the use of virtual currencies CBN advised that:

1. Banks and other financial institutions must not use, hold or trade and transact in any way with virtual currencies.

³¹ Zhangmingwu, P.J., 'Review on the Debate of Paper History During Recent 30 Years in China', *Journal of the International Association of Paper Historians*, (2011) 15(2), 34-45.

³² Nkuah, J.K., Frederick, A.K., & Asamoah, K., 'The Correlation between Accounting Systems of Small and Micro Enterprises and Tax Revenue Assessment in Ghana' *Journal of Education and e-Learning Research*, (2015) 2(1),1-12.

³³ Zheng, Z., Xie, S., Dai, H., Chen, X., & Wang, H., 'An Overview of Blockchain Technology: Architecture, Consensus, and Future Trends', *IEEE 6th International Congress on Big Data*, (2017) 557-564.

³⁴ Central Bank of Nigeria Act, S. 2(b).

³⁵ Central Bank of Nigeria Act, S. 17.

³⁶ Circular to Banks and Other Financial Institutions on Virtual Currency Operations in Nigeria

<<https://www.cbn.gov.ng/Out/2017/FPRD/AML%20January%202017%20Circular%20to%20FIs%20on%20Virtual%20Currency.pdf>> accessed 23rd May, 2021.

2. Customers who are virtual currency exchangers must comply with the relevant anti-money laundering and combatting the finance of terrorism (“AML/CFT”) provisions;
3. Banks and Financial Institutions can discontinue their relationship with the currency exchanger if they are not satisfied with their AML/CFT framework;
4. The CBN reiterated that cryptocurrency is not a legal tender and that anyone who uses it transacts at his own risk.

Based on the above, whilst the CBN recognizes cryptocurrency and its impact on the financial sector, it warns users that there is no legal redress when used as a legal tender and transactions are made at the user’s peril.

In examining whether cryptocurrency is an asset or not, under the Nigerian legal framework the Investment and Securities Act 2007 will be a great tool. In the case of *Nkwocha v. Governor Anambra State & Ors.*³⁷ the property was defined to mean ownership or title and sometimes the res over which ownership may be exercised. An intangible property, which is also referred to as incorporeal property describes something which a person or corporation can have ownership of and can transfer ownership to another person or corporation, but has no physical substance e.g., stock options.

In finance, a financial asset is a non-physical asset that derives its value from a contractual right or an ownership claim³⁸. Therefore, securities such as shares and bonds are regarded as financial assets. The regulatory framework for securities in Nigeria is governed by the Investment and Securities Act 2007 (“ISA”) and the Rules and Regulations of the Security and Exchange Commission 2013. The ISA defines ‘security’ as

- debentures, stocks or bonds issued or proposed to be issued by a government;
- debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate;
- right or option in respect of any such debentures, stocks, shares, bonds or notes; or
- commodities futures, contracts, options and other derivatives.

This definition of securities in the ISA includes those securities which may be transferred utilizing any electronic mode approved by the Securities and Exchange Commission (SEC) and which may be deposited, kept or stored with any licensed depository or custodian company as provided under the ISA³⁹.

³⁷ (1984) 1 SCNLR 634.

³⁸ James Chen, ‘Financial Asset’ <<https://www.investopedia.com/terms/f/financialasset.asp>> accessed 25th June 2020.

³⁹ Investment and Securities Act, S. 315.

The inference that may be drawn from the foregoing provisions may be that cryptocurrency can be used freely as a form of security in Nigeria but this appears not to be the case. In 2017, the SEC as the apex regulatory body for investments and securities in Nigeria took the position that none of the persons, companies or entities promoting cryptocurrencies had been authorized or recognized by it to provide any investment in Nigeria and it warned the general public of the risk in investing in cryptocurrencies.

However, In September 2020, the Securities and Exchange Commission (SEC) released a statement of intent, where it recognized cryptocurrency as securities to be registered with the Commission. It stated “virtual crypto assets are securities unless proven otherwise. The burden of proving that the crypto assets proposed to be offered are not securities and therefore not under the jurisdiction of the SEC is placed on the issuer or sponsor of the said assets.” It defined crypto asset as *“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 in any jurisdiction. A Crypto Asset is – neither issued nor guaranteed by any jurisdiction and fulfils the above functions only by agreement within the community of users of the Crypto Asset; and Distinguished from Fiat Currency and E-money.”*

Where it is decided that cryptocurrencies be classified as a currency, CBN will rightly exercise regulatory control, otherwise, not. There are also tax considerations that arise from a classification, either way. For instance, if bitcoin or other cryptocurrencies are considered property, this classification may trigger sales tax obligations. This was reiterated by the Federal High Court in the case of *Vodacom v FIRS*,⁴⁰ where it was suggested that payments/royalties arising from transacting in intangibles are subject to tax treatment.

Also, a classification as an intangible property will take bitcoins (and other cryptocurrencies) out of the Exclusive Legislative List in the Nigerian constitution – not being legal tender- and provide state governments with the legislative competence to regulate cryptocurrencies. From a property rights perspective, this classification of bitcoin establishes it as a definite form of property over which a specific title can be exercised. A “currency” classification will however be considered in law as a mere claim for value.

Impact of The Ban On Cryptocurrency Transactions In Nigeria By The Cbn

The implications of the CBN's letter are not farfetched. It shows a radical shift from its stance in its earlier 2017⁴¹ and 2018⁴² circulars where it merely warns and tells

⁴⁰ (2019)LCN/13556(CA).

⁴¹ CBN 2017 Circular on Crypto

<<https://www.cbn.gov.ng/out/2017/fprd/aml%20january%202017%20circular%20to%20fis%20on%20virtual%20currency.pdf>> accessed on the 9th February 2021.

banks to only dissociate those customer accounts that fail to provide verifications to aid Anti Money Laundering (AML)/ Countering Financing of Terrorism (CFT) controls and reiterates that cryptocurrencies are not legal tender respectively, thus, creates a different impact than its past releases on cryptocurrencies such as:

a. Banks Closing down accounts related to Cryptocurrencies:

The CBN's directive places all DMBs⁴³, NBFIs⁴⁴ and OFIs⁴⁵ on strict prohibition from dealing with entities that have cryptocurrency trading embedded in their systems and operate an account with these institutions. Thus, the new rules ask banks to identify *“persons and or entities transacting in or operating cryptocurrency exchanges within their systems and ensure that such accounts are closed immediately.”*⁴⁶ It is also difficult to use any Nigerian bank-issued debit or credit card or other payment systems to carry out cryptocurrency transactions as payment systems like Flutterwave put out a notice to its customers that in line with the CBN's directive their services will no longer be extended to support cryptocurrency use in Nigeria. Thus, users of virtual currency Exchanges like Binance may have to pay for the virtual visa card available on the Exchange's platform.⁴⁷ The implication of this is that the policy makes virtual transactions most difficult.

b. Small and Medium Enterprises (SMEs) and E-Commerce Channels:

Some SMEs use cryptocurrencies like bitcoins to trade, especially for exports, and drop shipping amongst others. For these transactions, the use of cryptocurrency as against the use of coins and physical cash is highly preferred because it is an easier way of moving cash without the hassles as well as changing from one currency to another⁴⁸. The banks having begun to close such accounts, whose funds will be trapped till the banks are ready to make them available to them.

c. Increase in P2P Trading:

Suffice us to state that the CBN circular does not criminalize trading in cryptocurrencies as it only places a ban on DMBs, NBFIs and OFIs from facilitating

⁴² CBN 2018 Press Release on Crypto
<<https://www.cbn.gov.ng/out/2018/ccd/press%20release%20on%20virtual%20currencies.pdf>> accessed on the 9th February 2021.

⁴³ Deposit Money Banks

⁴⁴ Non-Bank Financial Institutions

⁴⁵ Other Financial Institutions

⁴⁶ CBN 2017 Circular on Crypto

<<https://www.cbn.gov.ng/out/2017/fprd/aml%20january%202017%20circular%20to%20fis%20on%20virtual%20currency.pdf>> accessed on the 9th February 2021.

⁴⁷ <<https://techcabal.com/2021/02/05/cryptocurrency-exchanges-regulation/>> accessed on the 11th February 2021.

⁴⁸ Rashmi Priya Sharma & Arabinda Sharma, 'Using Crypto Currency and Associated Advantages and Disadvantages', *International Journal of Economics & Finance Research & Applications* (2018) Vol. 2, Issue 2. 17-22.

such virtual currency trading⁴⁹. With this, there could be a shift to the P2P mode of trading which involves individuals who are on the same blockchain platform selling to each other and money being sent to the seller's bank account. When a policy like the CBN's directive was implemented in Kenya, P2P trading in the Kenyan crypto market witnessed an all-time high⁵⁰. This speculation may hold for Nigeria as several exchanges have begun to tell their customers to boycott bank transfers and use the P2P feature on their platforms for instance Binance announced the addition of NGN FIAT/NGN⁵¹ pair to its P2P platform in Nigeria to allow users to buy and sell their NGN fiat balance on Binance with zero fees for Nigerian Naira using bank transfers and other payment modes⁵².

d. Lack of Inter-Agency Harmony

The SEC had clarified that there were no contradictions or inconsistencies between the SEC Statement on Digital Assets and their Classification and Treatment of September 11, 2020, and the Central Bank of Nigeria (CBN) Circular of February 5, 2021, the CBN circular has halted any programs or initiative by SEC revolving round virtual currency exchanges. Besides, such inconsistency in the activities of inter-agencies does not suggest that there is a friendly and predictable climate for businesses to thrive in the country. It could, therefore, potentially discourage both foreign direct and portfolio investments in Nigeria.

Recommendations

While it is understandable the reasons behind the decision of the CBN to ban in Nigeria the use of cryptocurrency, especially in light of current happenings of high untraceable cyber-crimes in the country, thereby wrecking many honest hard-earned workers and establishments through fraud, many stakeholders see the decision as despotic and irrational. Given that there's no law in Nigeria that outrightly criminalizes cryptocurrencies, a lot of people see no need for the CBN to deny banking access to the entire cryptocurrency industry. This brings about a need for the CBN to look at the implication of this policy holistically and reconsider its position, especially given the fact that there is a potential growth of Nigeria's burgeoning cryptocurrency industry, which accounts for the world's second-largest Bitcoin trading volume and the 8th country with the highest adoption of cryptocurrency in the world.

⁴⁹https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=video&cd=&cad=rja&uact=8&ved=2ahUKEwjCgJOe3d_uAhWxURUIHcJRDokQrtwIwA3oECAIQAg&url=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DxHjpYVgDrXg&usq=AOvVaw2v20XG7lQzmaxlrdtByjX – VIDEO Channels TV. accessed 1st June 2021.

⁵⁰ Fan Fang (et al), 'Cryptocurrency Trading: A Comprehensive Survey' https://www.researchgate.net/publication/340172901_Cryptocurrency_Trading_A_Comprehensive_Survey Accessed 17th May 2021.

⁵¹ Nigerian Naira Fiat (NGN Fiat). Fiat money is that type of currency not backed up by gold or silver. It is usually declared to be a legal tender by a decree of a government, in this case the Nigerian government. <https://www.ig.com>

⁵² This program allows users to buy and sell their NGN fiat balance on Binance with zero fees for Nigerian Naira [NGN] using bank transfers and other payment modes. <https://binancemagazine.com/2021/02/11/binance-adds-ngn-fiat-pair-as-users-rush-top2p-platforms/> accessed 1st June 2021.

Similarly, some countries regulate exchanges — local or foreign — being used by their citizens and the laws that apply to them usually depend on how cryptocurrencies are classified. Taking a cue from these countries, one will recall that the Nigerian Securities and Exchange Commission (SEC), set up the Fintech Roadmap Committee to develop a framework for the regulation of Virtual Financial Assets and their exchanges in Nigeria among other things. One of the intentions of the Committee is to determine how cryptocurrencies will be adopted in the country using case studies from countries like Malta, the USA, and the UK. Given this, it is clear that the Regulators themselves, as with other countries, view cryptocurrency as a property rather than an exchange.

Meanwhile, Section 43 of the 1999 Constitution of the Federal Republic of Nigeria gives the right to acquire and own properties, and as such citizens can deal with cryptocurrency, being a property. We, therefore, opine that there is no better time for the CBN to work with the Securities Exchange Commission to put together a framework and structure around raising funds through Initial Coin Offerings (ICO) and other uses of cryptocurrency rather than a total ban on it.

Equally, the Federal Inland Revenue Service (FIRS) of Nigeria can start taxing gains from digital currencies, being digital assets. It will give the tax-to-GDP ratio a boost⁵³. The Nigerian Government should look towards establishing a regulatory environment that is conducive to innovation and growth, to take advantage of the opportunities available, which can be achieved by ensuring the regulatory systems are principle-based and technology-neutral, and that regulators such as CBN, consider the importance of enabling innovation and investment when interpreting and enforcing regulations⁵⁴.

The Draft National Blockchain Strategy released by the Federal Ministry of Communications and Digital Economy, while admitting that there is no regulatory or legal framework for cryptocurrency in Nigeria, believes that there is a promising future for blockchain in Nigeria due to the adoption of blockchain by various Nigerian start-ups for numerous purposes. According to the Blockchain Strategy,⁵⁵ *"Blockchain has the potential to completely transform traditional models in several sectors both private and public. By promoting blockchain adoption and providing an enabling environment, new business models will spring up to open opportunities for businesses that will drive investments in a market such as Nigeria."*

⁵³ Awosanya Yinka (2021) 'The Crackdown on Cryptocurrency: Why Nigerians should switch sides', (Techpoint 2021) <<https://techpoint.africa/2018/04/11/cryptocurrency-nigeria-should-switch-sides/>> accessed 1st June 2021.

⁵⁴ NITDA (2021) 'National Blockchain Adoption Strategy: Streamlining into a digital future' <<https://nitda.gov.ng/wp-content/uploads/2020/10/DRAFT-NATIONAL-BLOCKCHAINADOPTION-STRATEGY.pdf>> accessed 15th May, 2021.

⁵⁵ <https://www.proshareng.com/news/%20BLOCKCHAIN%20&%20CRYPTOS/Regulating-Cryptocurrency-and-Initial-Coin-Offerings--The-Nigerian-Perspective---Part-2/53382>. accessed 1st June 2021.

It is therefore recommended that the draft policy is adopted and implemented, to be able to benefit from the potential advantages of full adoption of cryptocurrency in the economy.

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