

The Liability of Cryptocurrency Exchanger under Indonesian and Malaysian Anti-money Laundering and Terrorism Financing Act

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Keywords: Cryptocurrency, Liability, Financing, Money Laundering, Terrorism.

Abstract: Globalization and digitization require faster and more efficient payment method to enhance business operation. A new type of digital asset and payment called cryptocurrency was introduced in 2009 along with its ledger called blockchain. Some states acknowledge cryptocurrency as an alternative currency by allowing its usage through the stipulation of rules and regulation; while the others stated the other way around. This research employs a normative legal research based on statutory, conceptual, and comparative approach. By comparing Indonesian and Malaysian law, this paper concludes that both states recognized cryptocurrency as an asset or property. Hence, its usage as currency is deemed as illegitimate. However, in regard to the liability of cryptocurrency exchanger, both states have different measures. While Indonesia incorporate the liability under general act, Malaysia has already specified or directly address cryptocurrency in their Anti-Money Laundering and Terrorism Financing Act.

1 INTRODUCTION

Rapid and uncontrolled information, communication, and technology development have created challenges in the form of loopholes in existing laws, economic development, political and social stability, even racial well-being. The existing loopholes lead to instability, uncertainty, and conflict. This is the exact situation concerning cryptocurrency within the past nine years.

In 2018, many states have acknowledged Bitcoin (cryptocurrency) as a payment method either through a written regulation or simply through acceptance. However, it could be said that there is no less countries against it due to several reasons. Some states see cryptocurrency as another form of transaction method which able to enhance business transaction's efficiency. However, this new technology also come with risk or threat especially related to its semi-anonymity. The exploitation of cryptocurrency's semi-anonymity and decentralized nature to conduct money laundering, terrorism financing, and tax evasion is the most stereotype reason to forbid cryptocurrency's usage amongst all.

The purpose of this study is to analyze whether cryptocurrency can be considered as property or not in accordance with Indonesian and Malaysian law.

Additionally, it explores cryptocurrency exchanger's legal standing and liability based on Indonesian and Malaysian Anti-Money Laundering and Anti-Terrorism Financing Law

2 MATERIALS AND METHODS

This study uses a normative legal method. In order to grasp a thorough understanding of the legal issues, this paper uses statute, conceptual, and comparative approach in analyzing and identifying the nature of cryptocurrency as property and the liability of cryptocurrency exchanger in both states. The comparison is subjected to Indonesian and Malaysian law or statute. Literature and news are used as the supplementary source to strengthen the argument.

3 RESULTS AND DISCUSSION

3.1 The Nature of Cryptocurrency

Cryptocurrency is a virtual monetary unit and therefore has no physical representation (Berentsen & Schar, 2018). Hardwin (2014) assumed that

Cryptocurrency is a developed payment alternative tools in transaction as the substitutions of Bank Product. Hence, cryptocurrency could not deprive the role of Bank as Intermediary Institution or money as legitimate medium of exchange.

Today, 500 types of cryptocurrencies were registered and listed in Bitcoin.com. Bitcoin, Ripple, Litecoin, Ethereum, Dash, and Dogecoin are six amongst them. Although Bitcoin was first introduced in 2009, there is still unsettled debate among experts regarding its and other cryptocurrencies' nature.¹ It is due to the fact that cryptocurrency is being used as a means of payment, investment, and security. In other words, cryptocurrency's nature is determined based on its usage and institution regulating it.

As a currency, cryptocurrency does not have an intrinsic value; its price is volatile and mostly relies on the user's future expectation (Bakar, Rosbi, & Uzaki, 2017; Berentsen & Schar, 2018). Furthermore, cryptocurrency has various transfer value because it does not geographically bound unless it is centralized and regulated by the state itself, for example is the usage of eChiemgau in Germany (Lee & Low, 2018).

Unlike government-run fiat currency which price can be stabilized by adjusting the money supply, cryptocurrency's price cannot be maintained in such a way. Moreover, cryptocurrency is not fully accepted by the public and is not guaranteed by the government. This make cryptocurrency does not fulfill the requirement of a payment tool (Bakar, Rosbi, & Uzaki, 2017; Danella, 2015) especially as it does not have legal tender status (Yusof & Al-Harthy).² Not to mention that under Islamic law perspective, which adhered and referred by Indonesia and Malaysia, Bitcoin is not a currency because of Gharar (uncertainty based on no underlying authority) (Bakar, Rosbi, & Uzaki, 2017; Noor & Pratiwi, 2018). Government in Indonesia represented by Futures Exchange Supervisory Board (BAPPEBTI) has set up future perspective for establishing cryptocurrency status as commodity or property in the upcoming decree (Lubomir Tassev, 2018).

Thus, cryptocurrency is closer to financial asset or property than to currency. This statement is supported by both expert opinions and legislation.

According to Article 499 of Indonesian Civil Code (1847), property is every goods and rights which can be subject to ownership right. It includes tangible and intangible goods, movable and immovable goods, as

well as consumable and non-consumable goods. The process of obtaining the property has to be made under legitimate title and lawful legal conducts or else the owner would not protected by law. Meanwhile, under Section 3 of Act 613 on Malaysia Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AML/TF) (2015) or Section 130B of Act 574 on Malaysia Penal Code (2015), property is defined as "assets of every kind ... or legal documents or instruments in any form, including electronic or digital...". From the stipulation above, it can be concluded that both states recognized cryptocurrency as an asset or property rather than currency. The like provision is reflected in Central Bank of Malaysia Act 2009, Part III Section 20 Central Bank of Malaysia Act 1958 and Article 1 Number 2 Juncto Article 21 Law Number 7 Year 2011 on Indonesia Currency.

Mufti Muhammad Abu-Bakar (2018) in his paper emphasized that there are two attributes to consider something as property; those are *first*, it is desirable for human beings and *second*, it is capable of being stored for use at the time of necessity. Prof. Shawn Bayern as cited by J. Dax Hansen and Joshua L. Boehm (2017) stated that Bitcoin (cryptocurrency) does not fit neatly into classical property categories; however, it is a new kind of asset in a meaningful sense. He assessed it based on its functional perspective in order to avoid arbitrary and unfair outcomes (Hansen & Boehm, 2017). Kevin O' Leary, a Canadian Businessman, Founder of O'Leary Fund and Softkey also agree on deciding that Bitcoin is an asset because it has its own inherent value based on what people will pay for it (Montag, 2017).

It is undeniable that cryptocurrency, Bitcoin for instance, is valuable to its holder. The fact that it is an important economic right to those who participate in the network justifies the criminalization of its theft. Russia's Justice Minister, Alexander Kononov emphasized that if cryptocurrency was not considered as property, then its theft would not be a criminal offense as the object of the crime does not exist (Tassev, 2018).

Someone who wants to own cryptocurrency (e.g. Bitcoin), can earn it through mining; purchasing; or exchanging it with fiat money to cryptocurrency through exchangers, marketplaces, or traders; and/or get a payment in cryptocurrency for goods delivered or services s/he provided. Bitcoin in someone's Bitcoin Wallet, shall be deemed as personal property owned by the holder of that digital wallet. Those who

¹ Some economists have explained bitcoin and other cryptocurrencies as somewhere between currency, commodity, and financial asset

² "legal tender" status can only be issued by authorized national body such as Bank Indonesia and the Central Bank of Malaysia.

own such property shall have the right of ownership; which under Article 528 jo. 548 (Indonesian Civil Code, 1847) includes the right to bequeath, enjoyment, and to defend its possession.

Although cryptocurrency does not have a physical form, it is still valuable because earning cryptocurrency through mining is not easy and purchasing them with cash is not cheap either. From the explanation above, it is justifiable to conclude that cryptocurrency should be treated as intangible and movable personal property.

3.1.1 Liability of Exchanger

Blockchain is a data file that carries the records of all past transactions using cryptocurrency, including the creation of new units (Berentsen & Schar, 2018). The first block of Bitcoin blockchain, block #0 was created in 2009; and in the first quarter of 2018, block #494600 was added (Berentsen & Schar, 2018). In other words, blockchain is a network consists of database equipped with built-in security and internal integrity. Its security system is trustable as it utilized proof mechanism on all the connected networks called “*Decentralized Trustless Transactions*” (Melanie Swan, 2015). There are three parties involved in a blockchain or cryptocurrency transaction.³ This paper will use “user” as a person who obtains cryptocurrency to purchase and/or from selling goods or services (end user). The second party is “exchanger”, a person who engaged as a business in the exchange of cryptocurrency for real currency, funds, or other virtual currency. The third party is “administrator”, a person who engaged as a business in issuing or putting the cryptocurrency into circulation. S/he also has the authority to redeem or withdraw it from circulation. Both exchanger and administrator are money transmitter if they accept and transmit a convertible virtual currency; or buys or sells convertible virtual currency (Department of the Treasury Financial Crimes Enforcement Network, 2013).

For example, in a Bitcoin blockchain, Satoshi Nakamoto is the administrator. While Ana and Ahmad, are the users who bought or exchange their money for Bitcoin in Happycoins, who is an exchanger in South East Asia region. It could be said that blockchain is such a sophisticated technological invention that promotes free of double spending problem, decentralized network without third party interruption, and lower transaction costs. Even so, it

is not free of risk especially to the parties. Due to its pseudo-anonymity, it is possible for Ana (the user) to purchase drugs and weapons or for Ahmad to offer criminal services. In some cases, it is possible for Happycoins (the exchanger) to be caught as the facilitator of money laundering or terrorism financing. The example can be seen in BTC-e case where BTC-e, an exchanger, was fined for facilitating ransomware, dark net drug sale (Anti Money Laundering Centre, 2017; Troeller, 2016 - 2017). That is why this paper will focus on the exchanger’s liability based on the anti-money laundering and anti-terrorism financing act (AML/TF act).

The jurisdiction in processing exchanger’s crime and/or liability is not strictly limited to national law. It is possible for the perpetrator to be trialed under international or other national law if the crime s/he committed affecting other states. In this case, extraterritorial jurisdiction based on active and passive nationality principle, protective principle, and universal jurisdiction as well as the form of responsibility referred into two various such as Individual Responsibility and Command Responsibility (Respondeat Superior) may apply.

3.1.2 Liability under Indonesian Law

According to Ronald Waas, using cryptocurrency in a transaction broke three laws, namely Indonesian Currency Law, Indonesian Banking Law, and Information and Electronic Transaction Law in regard to its appliances (Tempo.co, 2014). He added that Indonesia Central Bank will not strictly prohibit its usage. Cryptocurrency transaction and business do not comply with the stipulation of Bank Indonesia Regulations Number 18/40/PBI/2016 on Payment Transaction Management and Number 19/12/PBI/2017 on Finance Technology Management. These regulations clearly prohibit every Payment System Service Provider (PJSP) to use Virtual Currency. If they insist to carry it out, then Central Bank would revoke their license. To emphasize their intention, Indonesia Central Bank made a Press Conference Number 20/4/Dkom on Virtual Currency and stated that they do not recognize any cryptocurrency as currency and pointed out its weaknesses in protecting its consumers. However, in order to avoid vacuum of law while tackling and preventing illegal use of cryptocurrency, Indonesia government may impose Act Number 8 Year 2010 on Prevention and Eradication of Money Laundering and

³ These are the adaptation of User, Exchanger, and Administrator from the Department of the Treasury Financial Crimes Enforcement Network’s Guidance No. FIN-2013-G001 issued on

March 18, 2013 regarding the *Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*

Act Number 9 Year 2013 on the Prevention and Eradication of Terrorism Financing towards exchanger.

Under Indonesian law (Act Number 8 Year 2010 on the Prevention and Eradication of Money Laundering, 2010; Act Number 9 Year 2013 on the Prevention and Eradication of Terrorism Financing, 2013), exchanger is obliged to practice “know your customer” (KYC) principle; report suspicious transaction⁴; keep the user’s identity record and documents for at least five years; as well as to refuse and cut any ties with shady users or those who do not want to comply with the terms and conditions. The KYC principle must incorporate at least the user’s identification, verification, and transaction monitoring. If they fail to do so and their user(s) is identified as conducting money laundering and/or terrorism financing through cryptocurrency, then they will be held liable for accepting and exchange the money into cryptocurrency. Exchangers cannot claim that they did not know and use it as their excuse because it could be said that by doing so, they are fulfilling their business’ goal and objective.

When a personal exchanger violated those obligations, they might be held liable for maximum twenty years imprisonment and ten billion rupiah under **Anti-Money Laundering Act (2010)**. In case the user used the exchanged cryptocurrency for terrorism financing, then the exchanger will be held liable for assisting terrorism financing and will be punished for maximum fifteen years imprisonment and one billion rupiah (Act Number 9 Year 2013 on the Prevention and Eradication of Terrorism Financing, 2013). Meanwhile if the exchanger is a corporation, according to Article 7 of Anti-Money Laundering Act (2010) and Article 8 of Anti-Terrorism Financing Act (2013), the maximum fine is one hundred billion rupiahs with the possibility of additional administrative sanction. If they neglect their obligation to report suspicious transaction, then, under Article 13 of Anti-Terrorism Financing Act

(2013) they can be fined for approximately one billion rupiah.

3.1.3 Liability under Malaysian Law

Malaysia’s Finance Minister II, Datuk Seri Johari Abdul Ghani said that the central bank (Bank Negara Malaysia (BNM)) will not impose a blanket ban on cryptocurrencies. However, it will ensure digital currency exchanges (DCEs) comply with requirements to conduct customer due diligence and report suspicious transactions to the authorities (**Kumar, 2018**). BNM then issued Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6) (BNM/RH/PD 030-2) as an additional guideline for Act 613 on Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. The Anti-Money Laundering and Anti-Terrorism Financing Act (2015) stipulated that exchangers are obliged to: *first*, register and licensed by the government.⁵ *Second*, conduct risk profiling towards their customers.⁶ *Third*, conduct customer due diligence (CDD).⁷ *Fourth*, keep and maintain those records for a period of at least six years. If the fourth obligation is not fulfilled, the exchanger shall be liable to a fine not exceeding RM 3 million or 5 years imprisonment at most. The risk profiling shall comply with the Penal Code to prevent any supporting conducts by using, possessing, dan/or sharing cryptocurrency as property in facilitating the commission of terrorism.

Had they fail to conduct CDD and it is identified that their past customer was conducting money laundering, according to Section 4, they will be held liable for a maximum 15 years of imprisonment and a fine of not less than five times the sum or value of the proceeds of an unlawful activities or RM 5 million (whichever is higher) (Act 613 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, 2015).

⁴ A transaction might be considered suspicious if (1) it does not have a clear economical and business reason; (2) it uses a relatively big sum of money and/or do it repeatedly; and (3) user or customer’s transaction outside his/her habit and out of ordinary.

⁵ The exchangers are expected to comply with the provisions of the Companies Act 2016 [Act 777] including the requirement to be incorporated or registered

⁶ The Profiling Risk mentioned in the Guideline is related to the Customer Risk, Geographical Location, the Product or Service, and any informations suggesting that the customer is of higher risk. Along with Profiling Risk, Reporter shall implied the Customer Due Diligence in Identify, Verify, Identify the Beneficial Owner, Understand and Obtain the Purpose the Business Relationship. Due Diligence by Reporter could be implemented as On Going certain

legal conduct such as doing Transaction Screening if there is reasons to suspect for the purpose (See Section 9.5.1)

⁷ Section 16 (3) of Malaysia AML/CFT stipulates that the exchanger as the reporting institution shall (1) ascertain the identity, representative capacity, domicile, legal capacity, occupation or business purpose of their customer; (2) verify the document, data or information using reliable means; (3) verify the identity and authority of a customer in the opening of an account, the conduct of any transaction or the carrying out of any activity; (4) take reasonable steps to obtain and record information about the true identity of any person on whose behalf an account is opened or a transaction or activity is conducted; and (5) take reasonable steps to verify the identity of natural persons who own or exercise effective control over a customer who is not a natural person.

Section 87 of AML/TF Act (2015) further stated that if the exchanger is a body corporate or an association of persons, then, under *Respondeat Superior* Principle; the director, controller, officer, or partner, or those who were involved in the management shall be held liable unless he proves that the offence was committed without his knowledge or consent and that he took all reasonable precautions to prevent the damages.

4 CONCLUSION

From the research, it is concluded that; *firstly*, cryptocurrency is a property due to the absence of legal tender and government legitimation. However, it has not clearly stipulated or fully regulated in a separated legislation. *Secondly*, under Malaysian law, cryptocurrency exchanger are protected and supervised under Anti-Money Laundering and Anti-Terrorism Financing Law. b Hence, if they fail to conduct *Know-Your-Customer* and Prudential principle or intentionally neglecting their responsibility, they can be punished for maximum three million ringgit fines and/or five years imprisonment. On the other hand, under Indonesian law, although it is prohibited to use cryptocurrency in economic transaction, the ownership itself is not clearly regulated or prohibited yet. However, in order to avoid vacuum of law, Anti-Money Laundering and Anti-Terrorism Financing Law shall be used. According to these Acts, the exchanger may be punished for maximum twenty years of imprisonment and/or ten billion rupiah fines.

SUGGESTION

Cryptocurrency is not a usual property that fits in the traditional groups of property that were known and regulated under property law. Hence, a new and elaborated rules or regulation regarding cryptocurrency is needed to accommodate the placement of cryptocurrency as a property so that their owner can be fully protected. It is due to the fact that the use of cryptocurrency is not only related to the citizens' private rights, but also affecting national monetary and security system.

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