

# ‘MEDIEVAL’ LAW IN ‘MODERN’ TECH: BAILMENT AND INDIAN CRYPTO EXCHANGES

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*Cryptocurrencies have become increasingly popular in India. To transfer and store their cryptocurrencies, users rely on platforms or applications known as crypto exchanges. However, the exact contours of the legal relationship between the users and the exchanges remain unclear. Other jurisdictions have classified this relationship in a variety of different ways such as a trust, debtor-creditor relationship or even creating new innovative concepts like control-based proprietary interest. However, this paper argues that considering the Indian contractual framework, this relationship can be best classified as a bailment. The paper also attempts to provide a normative justification for this claim by highlighting its utility in scenarios where crypto exchanges go insolvent.*

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## I. INTRODUCTION

Due to the recent innovations in technologies like artificial intelligence (‘AI’) and genome editing, it seems that the mid-2010s interest in blockchain and cryptocurrency has died down and people have moved over to the next proverbial shiny toy.<sup>1</sup> However, cryptocurrency

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<sup>1</sup> Petar Radanliev, *The Rise and Fall of Cryptocurrencies: Defining the Economic and Social Values of Blockchain Technologies, assessing the Opportunities, and defining the Financial and Cybersecurity Risks of the Metaverse*,

(‘crypto’) still has tremendous implications for global finance, specifically through its potential to improve payments and enhance financial security.<sup>2</sup> With this in mind, one has to see how India addresses cryptocurrency regulation.

The use of existing laws to deal with technologies like crypto has become an issue. During the recent G20 summit, the Indian finance minister highlighted that any action on crypto needs to be global.<sup>3</sup> While a global legal framework could be better suited for crypto to fulfil its purpose as a currency, the important question remains: What next for India? Other common law jurisdictions, like the UK, the USA, and New Zealand, have expressed their plans on a specific framework for crypto.<sup>4</sup> Furthermore, highlighting the dynamic nature of crypto regulation, just two months after the summit, the UK released a comprehensive report on crypto assets.<sup>5</sup>

To briefly contextualise the domestic developments in regulating crypto. The Cryptocurrency and Regulation of Official Digital Currency Bill’s objective was to prohibit all private cryptocurrencies with some exceptions. It was to be introduced in the winter session of the 2021 Parliament.<sup>6</sup> However, more details regarding the bill including its content are not public. Then in April 2022, the Ministry of Electronics and Information Technology issued directions to mandatorily report all cybersecurity incidents including incidents regarding virtual digital assets and crypto exchanges.<sup>7</sup> The Finance Bill 2022, is also an important development that defines virtual digital assets and is discussed in Part III. Later in March 2023, the Ministry of Finance through its notification brought entities involved in transactions of virtual digital assets under the

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SSRN (2023), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4535880](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4535880) (Last visited on May 1, 2024). This article highlights the fall in interest over cryptocurrency, which indicate that it peaked during Covid. In contrast, genome editing and Artificial Intelligence as per google trends are currently at their peak popularity with a value of 97 and 100 respectively, see GOOGLE TRENDS, *Artificial Intelligence*, available at <https://trends.google.com/trends/explore?date=all&q=%2Fm%2F0mkz&hl=en-US> (Last visited on May 1, 2024).

<sup>2</sup> Tobias Adrian & Tommaso Mancini-Griffoli, *Technology Behind Crypto Can Also Improve Payments, Providing a Public Good*, INTERNATIONAL MONETARY FUND BLOG, February 23, 2023, available at <https://www.imf.org/en/Blogs/Articles/2023/02/23/technology-behind-crypto-can-also-improve-payments-providing-a-public-good> (Last visited on February 2, 2024); WORLD ECONOMIC FORUM, *Is cryptocurrency the future of finance? Here's what a new study shows*, November 11, 2022, available at <https://www.weforum.org/agenda/2022/11/cryptocurrency-us-midterms/> (Last visited on February 2, 2024).

<sup>3</sup> THE HINDU, *India G20 Presidency Aims to Develop Common Framework to Deal with Crypto Risks: FM Nirmala Sitharaman*, April 11, 2023, available at <https://www.thehindu.com/business/Economy/india-g20-presidency-aims-to-develop-common-framework-to-deal-with-crypto-risks-fm-nirmala-sitharaman/article66723749.ece> (Last visited on August 10, 2023).

<sup>4</sup> RESERVE BANK OF NEW ZEALAND, *The Future of Money: Private Innovation*, December 2022, <https://www.rbnz.govt.nz/-/media/project/sites/rbnz/files/consultations/future-of-money/fom-private-innovation.pdf> (Last visited on August 25, 2023); LAW COMMISSION OF UNITED KINGDOM, *Digital Assets: Final Report* (Law Com No. 412, 2023) available at <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/06/Final-digital-assets-report-FOR-WEBSITE-2.pdf> (Last visited on May 2, 2024) (‘Digital Assets’); *Fact Sheet: President Biden to Sign Executive Order on Ensuring Responsible Innovation in Digital Assets*, March 9, 2022, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/> (Last visited on August 25, 2023).

<sup>5</sup> *Id.*

<sup>6</sup> PRS INDIA, *Parliament Session Alert: Winter Session: November 29, 2021 – December 23, 2021*, available at [https://prsindia.org/files/parliament/session\\_track/2021/session\\_alert/Parliament\\_Session%20Alert\\_Winter%20Session%202021.pdf](https://prsindia.org/files/parliament/session_track/2021/session_alert/Parliament_Session%20Alert_Winter%20Session%202021.pdf) (Last visited on March 8, 2024).

<sup>7</sup> Ministry of Electronics and Information Technology, No. 20(3)/2022-CERT-In (April 28, 2022).

purview of the Prevention of Money Laundering Act, 2002.<sup>8</sup> Then in June 2023, the RBI in its report highlighted the risks associated with virtual digital assets.<sup>9</sup> Notably, the Central Board of Direct Taxes in a circular defined exchanges as any person that operates an application or platform for transferring virtual digital assets ('VDAs'), which matches buy and sell trades and executes the same on its application or platform.<sup>10</sup> Therefore, what is apparent is that current attempts to regulate cryptocurrency in India have been disjointed.

However, all these developments underscore the growing need for a domestic framework due to their increasing presence in all sorts of transactions.<sup>11</sup> In this paper, the author focuses on a specific relationship, particularly when the crypto-exchanges act as custodians and hold assets for buyers. The issue arises when these exchanges go insolvent: what remedy and claim does the buyer have? In light of this issue, the author argues that the relationship between the buyer and the major crypto-exchange platforms in India in such scenarios is one of bailment.<sup>12</sup> This argument, *firstly* illustrates how the relationship between exchanges and buyers is a bailment, and *secondly*, highlights why it should be a bailment.

To explain with an analogy: think of one bitcoin as a mail, and crypto wallet as your inbox. A person 'X' has a public email account, and that email account has an inbox (wallet) where they receive or send mail (bitcoin). The email account i.e., username is the 'public key'. There is also a password for the email account; this 'password' is known as a private key. Now, bitcoin is stored in the wallet. However, the exchange also has access to a private key for every wallet which they can use to access your bitcoins. So, the question is, who owns Bitcoin? Or better yet what is the relationship between the exchange and X? Answering this question through the current Indian legal framework is the focus of this paper.

The scholarly literature on bailment in India is extremely sparse and does not address whether crypto can be bailed or not.<sup>13</sup> The literature on crypto in India does not focus on the relationship between users and crypto exchanges.<sup>14</sup> However, in other jurisdictions, like the

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<sup>8</sup> See The Prevention of Money Laundering Act, 2002, §2(1)(sa)(vi); Ministry of Finance, Virtual digital assets under PMLA, 2002, Notification No. CG-DL-E-07032023-244184, (Notified on March 7, 2023).

<sup>9</sup> Reserve Bank of India, *Chapter III: Regulatory Initiatives in the Financial Sector*, June 28, 2023, available at <https://rbi.org.in/scripts/PublicationReportDetails.aspx?ID=1239> (Last visited on March 8, 2024).

<sup>10</sup> VDAs, broadly, as defined in §2(47A) of the Finance Bill, 2022, refer to any information, code, token, or number that provides a digital representation of value. Central Board of Direct Taxes, *Guidelines for removal of difficulties under sub-section (6) of section 194S of the Income-tax Act, 1961*, Circular No. 13/2022 (Issued on June 22, 2022).

<sup>11</sup> DELOITTE, *Blockchain technology in India Opportunities and Challenges*, April 2017, available at <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/strategy/in-strategy-innovation-blockchain-technology-india-opportunities-challenges-noexp.pdf> (Last visited on February 1, 2024).

<sup>12</sup> In common law jurisdictions this relationship is seen as a "trust", because of the common law idea that only tangible property can be bailed, see Louise Gullifer et al., *Client-Intermediary Relations in the Crypto-Asset World*, University of Cambridge Faculty of Law Research Paper No. 18/2021 (September 23, 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3697946](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697946) (Last visited on May 20, 2024). However, the author argues in Section III.1 that this does not hold in India.

<sup>13</sup> Chandan Maheshwari, 'Amitabha Dasgupta' on *Product Liability, Unwarranted Remitting to Civil Court, and Lost Contents of Lockers*, Vol. 10(9) IJCLP, 157 (2022); Sharad Bansal, *Taj Mahal Hotel v. United India Insurance Co. Ltd.: Re-Aligning the Focus on Consumer Protection Act*, Vol. 8(8) IJCLP, 118 (2020).

<sup>14</sup> Carol R. Goforth, *It's Raining Crypto: The Need for Regulatory Clarification When It Comes to Airdrops*, Vol. 15(2) INDIAN JOURNAL OF LAW AND TECHNOLOGY, 32 (2019); Rakesh Kumar Sehgal & R. L. Koul, *Crypto*

UK, the USA, Australia, New Zealand, etc., there is some literature. Some scholars argue that crypto cannot be bailed and the relationship can be better classified as a trust.<sup>15</sup> The recent UK Law Commission in their chapter dedicated to such relationships also took a similar stance.<sup>16</sup> However, other scholars argue that crypto assets can be bailed, and the relationship can be classified as a bailment, though contingent on the specificities of a nation's contract law.<sup>17</sup> This article places itself within this academic debate. The contribution of this article to the existing scholarship is to add certainty to the ambiguous classification of the relationship between crypto exchanges and users in India.

Therefore, to this end, in Part II, the author demonstrates how Indian crypto exchanges act as custodians. This is depicted through user agreements of some prominent Indian crypto exchanges. In Part III, the author argues that the relationship between the exchange and the buyers can be best characterised as a bailment. The author shows how this relationship fulfils all the essentials of bailment. Then in Part IV the author evaluates how different jurisdictions have classified this relationship or commented upon the bailment of crypto assets. Finally, in Part V, the author uses a hypothetical based on case law to emphasise the practical advantages of bailment over the current ambiguous classification in cases of crypto-exchange insolvency.

## II. CRYPTO CONFUSION: CONUNDRUM OF CRYPTO-EXCHANGES

In India, crypto exchanges provide storage services for crypto assets.<sup>18</sup> The five biggest crypto exchanges are Wazir, CoinDCX, ZebPay, Unocoin, and Coinswitch Kuber.<sup>19</sup> Evaluating their user agreements can illuminate some common themes about the storage of crypto in India. This is represented through the table given below.

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*Currencies: Addressing Vulnerability, Legitimacy and Governance Perspective*, Vol. 6(1) GNLU L. REV., 166 (2019); Jaideep Reddy, *The Case for Regulating Crypto-Assets: A Constitutional Perspective*, Vol. 15(2) INDIAN JOURNAL OF LAW AND TECHNOLOGY, 379 (2019).

<sup>15</sup> Kelvin FK Low & Ernie GS Teo, *Bitcoins and other cryptocurrencies as property?*, Vol. 9(2) LAW, INNOVATION AND TECHNOLOGY, 235 (2017); Gullifer, *supra* note 12; Janis Sarra & Louise Gullifer, *Crypto-Claimants and Bitcoin Bankruptcy: Challenges for Recognition and Realization*, Vol. 28(2) INTERNATIONAL INSOLVENCY REVIEW, 233 (2019).

<sup>16</sup> Digital Assets, *supra* note 4, Chapter 7.

<sup>17</sup> Adam J. Levitin, *Not Your Keys, Not Your Coins: Unpriced Credit Risk in Cryptocurrency*, Vol. 101(4) TEXAS LAW REVIEW, 877 (2023) ('Levitin'); Matteo Solinas, *Investors' Rights in (Crypto) Custodial Holdings: Ruscoe v Cryptopia Ltd (in Liquidation)*, Vol. 83(1) MODERN LAW REVIEW, 1 (2020).

<sup>18</sup> Vikram Subburaj, *Crypto assets trading in India: A beginner's guide*, LIVE MINT, December 30, 2021, available at [https://www.livemint.com/market/cryptocurrency/crypto-assets-trading-in-india-a-beginner-s-guide-11678894358618.html#:~:text=is%20a%20must-](https://www.livemint.com/market/cryptocurrency/crypto-assets-trading-in-india-a-beginner-s-guide-11678894358618.html#:~:text=is%20a%20must-Centralized%20exchanges%20can%20be%20your%20real%20sentinels%20as%20you%20enter,also%20have%20two%20factor%20authentication)

[Centralized%20exchanges%20can%20be%20your%20real%20sentinels%20as%20you%20enter,also%20have%20two%20factor%20authentication](https://www.livemint.com/market/cryptocurrency/crypto-assets-trading-in-india-a-beginner-s-guide-11678894358618.html#:~:text=is%20a%20must-Centralized%20exchanges%20can%20be%20your%20real%20sentinels%20as%20you%20enter,also%20have%20two%20factor%20authentication) (Last visited on August 10, 2023).

<sup>19</sup> *Want to Invest in Cryptocurrencies? Check Out India's Top Cryptocurrency Exchanges*, THE TIMES OF INDIA, November 15, 2021, available at <https://timesofindia.indiatimes.com/business/cryptocurrency/blockchain/want-to-invest-in-cryptocurrencies-check-out-indias-top-cryptocurrency-exchanges/articleshow/87710905.cms> (Last visited on August 20, 2023) (The factors for choosing these five crypto exchanges have been elaborated upon in the conclusion).

1) Name of Crypto-Exchange	2) Are storage services offered?	3) In whose custody is crypto stored	4) Is the relationship between buyer and exchange defined	5) Does the agreement provide clarity regarding ownership of crypto	6) Do they charge withdrawal fees	7) Does the exchange have some sort of control over crypto
Wazir X <sup>20</sup>	Yes	Exchange	Independent contractor	No	Yes	Yes
Coin-DCX <sup>21</sup>	Yes	Third-Party Services	Custodian	Yes, the buyer is the owner	Yes	Yes
ZebPay <sup>22</sup>	Yes	Exchange	Service Provider	Yes, the buyer is the owner	Yes	Yes
Unocoin <sup>23</sup>	Yes	Exchange	Not mentioned	No	Yes	Yes
Coin switch <sup>24</sup>	Yes	Third-Party Services	Not mentioned	Yes, the buyer is the owner	Yes	Yes

Some queries about the table and its contents are addressed here.<sup>25</sup> Question two is important as it highlights that in India the major crypto exchanges provide storage. This is relevant, as generally crypto exchanges do not provide storage.<sup>26</sup> Question three illustrates how exactly each exchange stores crypto. Question four demonstrates the ambiguity existing in classifying the relationship between exchanges and users. Question five highlights why the relationship cannot be a trust: no transfer of ownership.<sup>27</sup> Question six is important as it underscores the fact that user's access to their crypto is not absolute. The reason is that they have to pay some amount to withdraw their crypto.

<sup>20</sup> WAZIRX, *User agreement*, August 1, 2023, available at <https://s3.ap-south-1.amazonaws.com/wrx-assets/WazirXUserAgreement.pdf?v1> (Last visited on August 10, 2023).

<sup>21</sup> COINDCX, *Terms of Use*, available at <https://coindcx.com/assets/pdf/Terms-of-use.pdf> (Last visited on August 10, 2023).

<sup>22</sup> ZEBPAY, *Terms of Use*, available at <https://zebpay.com/otc-legal-privacy#terms-of-use> (Last visited on August 10, 2023).

<sup>23</sup> UNOCOIN, *Terms of Use*, available at <https://unocoin.com/in/policy/termsfuse/> (Last visited on August 10, 2023).

<sup>24</sup> COINSWITCH, *Terms of Use*, available at <https://coinswitch.co/terms-of-use> (Last visited on August 10, 2023).

<sup>25</sup> The author has chosen these particular questions about the working of crypto exchanges in India because all of these questions either highlight the persisting ambiguity (Q. 3,4, & 5) or aid in bailment analysis as they correlate to some conditions of bailment. [Q. 2(purpose), Q. 6(possession), Q. 7(control)].

<sup>26</sup> S. Hasan Hussain & T. B. Sivakumar, *Cryptocurrency Methodologies and Techniques* in THE DATA-DRIVEN BLOCKCHAIN ECOSYSTEM: FUNDAMENTALS, APPLICATIONS, AND EMERGING TECHNOLOGIES, 26 (Alex Khang, Subrata Chowdhury, and Seema Sharma, CRC Press 1st edn., 2022).

<sup>27</sup> This argument will be explored in Part IV.C in greater depth.

Question seven uses the term ‘control’ in a broad sense. Control here signifies that the exchange has the power to freeze the assets, manage the wallets, or store crypto offline.<sup>28</sup> To clarify, here the author is not claiming that control is defined as these parameters. Rather, the purpose of this question is to highlight some functions/powers that the crypto exchanges can exercise over the assets due to which one can colloquially say that they have ‘control’ over it. How the term ‘control’ has been interpreted by the judiciary is discussed in later parts, particularly Part III.B.<sup>29</sup> Now having addressed the preliminary queries, let’s analyze the table.

This illustrates some prominent differences in the treatment of crypto by exchanges in India: characterization of relationships, some firms have classified their relationship as a custodian and some as a service. However, firms have refused to characterise their relationship.<sup>30</sup> This irregular classification of relationships by different firms makes the relationship in general ambiguous.

But there are some major commonalities. *Firstly*, all exchanges offer storage. *Secondly*, all of them charge withdrawal fees; storage is a service the buyer is paying for. *Finally*, all the exchanges exercise some ‘control’ over the assets. From these conclusions, in the next section, the author argues that the relationship between buyers and major crypto exchanges in India is best characterised as a bailment.

### III. BAILMENT BASICS: HOW CRYPTO-EXCHANGES ARE BAILEES

Bailment refers to the delivery of goods by A to B for some purpose, provided after the purpose, B returns the goods. However, analysing §148 of the Indian Contract Act, 1872 (‘ICA’), we can find some essential conditions required for a relationship to be considered as bailment.<sup>31</sup> The essentials are.<sup>32</sup>

1. Presence of ‘good’;
2. Delivery of that good to another person;
3. For a purpose; and
4. Return when that purpose is over.

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<sup>28</sup> Control, as highlighted later, essentially means giving powers that are consequential to the contract. However, as the focus of this section is workings of Indian crypto exchanges, the author is using the term ‘control’ here in a general sense.

<sup>29</sup> See *infra* Part III.B on “Delivery of Goods (Possession)”.

<sup>30</sup> Broadly, the nature of classifying this relationship as custodian seems to align with the bailment argument that the author is making. The reason being that in bailment, the bailee acts also as the custodian. Further, classifying this as an independent contractor or service provider that provides storage aligns with the bailment argument. As ultimately, the exchange is providing storage either as a service or through contractual means. However, an important aspect that highlights further scope for research is that these exchanges while providing storage also provide other services like facilitating transactions. It may be interesting to explore how their other contractual services affect their relationship *vis-à-vis* consumers.

<sup>31</sup> The Indian Contract Act, 1872, §148.

<sup>32</sup> Also, these essentials can be reached by breaking down the section itself. S.148 says “A “bailment” is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. See Pollock & Mulla, THE INDIAN CONTRACT & SPECIFIC RELIEF ACTS, §148, 2 (16th edn., 2021).

In this section, the author will argue that all of these requirements are met in the context of the relationship between crypto-exchange and buyer.

### A. GOODS

The ICA does not define ‘good’. The author argues that to interpret ‘good’, one has to refer to the Sale of Goods Act, 1930 (‘SOGA’). The reason being the intertwined relationship between the two legislations. To elaborate, as the Law Commission highlights that before SOGA, the law of sale of goods in India was governed by the now repealed Chapter VII of the ICA which followed principles of English Common Law.<sup>33</sup> There the ICA, through the now repealed §76 defined goods as meaning and including every kind of moveable property. However, this was repealed with the arrival of SOGA, which was also codification of the existing English principles.<sup>34</sup> The SOGA defined goods in a manner similar to erstwhile §76 of the ICA as every movable property other than money or actionable claims.<sup>35</sup> Further relationship between SOGA and ICA is also underscored by §2(15) of SOGA which states that any term not defined in SOGA but defined in ICA shall have the same meaning.<sup>36</sup> Finally, in *Kannambra Nayar v. P.N. Krishna Pattar*,<sup>37</sup> the Madras High Court held that ‘goods’ in ICA have the same meaning as in SOGA. The reasoning offered by the High Court is based on the historical context of the two legislations.<sup>38</sup> Therefore considering the intertwined relationship between the two legislations, the terms in ICA like ‘goods’ have to be given a similar meaning.

Cryptocurrency is not classified as money for two reasons. *First*, the Indian Government classifies cryptocurrencies under the broad umbrella of VDAs and taxes them accordingly.<sup>39</sup> VDAs have been defined in §2 (47A) of the Finance Bill, 2022. They broadly refer to any information, code, token, or number that provides a digital representation of value.<sup>40</sup> With it either functioning as a store of value or unit of account or having promise/representation of having inherent value. What is important is that the definition specifically excludes both Indian currency and foreign currency. Therefore, virtual digital assets are not money or currency.

*Second*, the Supreme Court (‘SC’) in *Internet & Mobile Association. of India v. RBI* analogised crypto as intangible property.<sup>41</sup> Therefore, the next question is, is crypto a movable property? The General Clauses Act, 1987, defines movable property as everything that is not immovable.<sup>42</sup> Broadly, immovable property is defined as things that have some connection with the land; therefore, crypto does not fall under immovable property.<sup>43</sup>

Further, case laws have also broadly interpreted intangible articles to be goods under the SOGA. The question of whether an article is good has arisen on numerous occasions

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<sup>33</sup> LAW COMMISSION OF INDIA, *Sales of Goods Act*, Report No. 8, 4 (March, 1958).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, §2(3).

<sup>36</sup> The Sale of Goods Act, 1930, §2(15).

<sup>37</sup> *Kannambra Nayar v. P.N. Krishna Pattar*, AIR 1943 Mad 74, ¶430.

<sup>38</sup> *Id.*

<sup>39</sup> The Finance Bill, 2022, §115BBH.

<sup>40</sup> *Id.*, §2(47A).

<sup>41</sup> *Internet & Mobile Association of India v. RBI*, (2020) 10 SCC 274, ¶138.

<sup>42</sup> The General Clauses Act, 1897, §3(36).

<sup>43</sup> *Id.*, §3(26).

before the SC. The Court in *Vikas Sales Corporation v. Commissioner of Commercial Taxes*,<sup>44</sup> while interpreting the General Clauses Act, held that movable property consists of both incorporeal and corporeal properties. The Court has held that software, and electricity are goods under SOGA.<sup>45</sup> The Court in *BSNL v. Union of India* ('BSNL') held that electromagnetic waves are not goods.<sup>46</sup> The Court here analysed all the above precedents and laid down the test to determine what constitutes a good. It requires (a) utility, (b) capability of being bought and sold, and (c) capability of being transmitted, transferred, delivered, stored, and possessed.<sup>47</sup> However, the limbs of this test are independent. To elaborate, if an article fulfils any one of the conditions, then it can be classified as a good.<sup>48</sup>

Crypto fulfils all three requirements. Firstly, it has utility. Utility, according to BSNL, refers to something being consumed so that it can be extinguished.<sup>49</sup> According to the Court, electromagnetic waves were not capable of being extinguished. To elaborate, in BSNL the Court considered electromagnetic waves to travel through space from one point to another, though they can be channelled through cables, fibres, or tubes.<sup>50</sup> However, cryptocurrencies are different from this. Cryptocurrencies or Non-Fungible Tokens ('NFTs') represent some value in monetary terms. This value can be consumed and extinguished in multiple ways. A person can sell all their crypto and it can be said that they have 'consumed' their crypto by exchanging it for currency. Or a person's crypto can lose all its monetary value, and it can be said that they have extinguished their crypto.

An argument could be made that cryptocurrencies are primarily an asset. When an asset is sold, it cannot be said that its value is extinguished. Likewise, when the value of an asset goes to zero, this cannot be equated to consumption in any meaningful sense, nor can it be said an asset has been extinguished for the same reason. Therefore, cryptocurrencies do not have any utility.

The author argues that *first*, by selling an asset like cryptocurrencies, its value is consumed so that it is extinguished. To analogise, the BSNL test was utilised by the Bombay High Court in *Sodexo SVC India (P) Ltd. v. the State of Maharashtra*.<sup>51</sup> In a nutshell, the issue here was whether food vouchers that can be traded at a few particular outlets constituted goods. These vouchers, similar to crypto, represented some monetary value. Regarding the utility of these vouchers, the High Court held that this condition was fulfilled as they have value and can be exchanged for food. However, the decision was overruled by the SC.<sup>52</sup> The primary reason was that the vouchers came into the purview of RBI Policy Guidelines, but the utility portion of the High Court was not overruled. Therefore, the purpose of highlighting the above litigation is that

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<sup>44</sup> *Vikas Sales Corporation v. Commissioner of Commercial Taxes*, [1996] 102 STC 106, ¶19.

<sup>45</sup> *Tata Consultancy Services v. State of Andhra Pradesh*, (2005) 1 SCC 308, ¶27; *Commissioner Madhya Pradesh v. Madhya Pradesh Electricity Board, Jabalpur*, 1970 AIR 732, ¶¶8-10.

<sup>46</sup> *Bharat Sanchar Nigam Ltd. v. Union of India*, (2006) 3 SCC 1, ¶¶71, 92(A).

<sup>47</sup> *Id.*, ¶62.

<sup>48</sup> V. Niranjan & Prateek Chaddha, *BSNL v. Union*, (2006) 3 S.C.C. 1 *Current Developments*, Vol. 19(1) NATIONAL LAW SCHOOL OF INDIA REVIEW, (2007).

<sup>49</sup> *Bharat Sanchar Nigam Ltd. v. Union of India*, (2006) 3 SCC 1, ¶63.

<sup>50</sup> David Gilles & Roger Marshal, *TELECOMMUNICATIONS LAW*, (London Butterworths, 2<sup>nd</sup> edn., 1997).

<sup>51</sup> *Sodexo SVC India (P) Ltd. v. State of Maharashtra*, (2015) 16 SCC 479, ¶22.

<sup>52</sup> *Id.*, ¶¶17-18.



the utility requirement can be read as being fulfilled when a commodity or asset is sold for its equivalent value.

*Second*, one need not focus on the value of an asset to fulfil the utility requirement. Here, crypto transaction has to be considered as a process of extinction-creation.<sup>53</sup> To elaborate, here a crypto is considered as a notional quantity unit. This unit is created by the combination of participant's software usage and data. The implementation of this necessarily ensures that the functionality of that crypto as a notional quantity unit is extinguished and re-created by a transfer operation.<sup>54</sup> Therefore, a transaction of crypto can be said to extinguish it. Thus, fulfilling the utility criteria.

It is also worth highlighting the second and according to the Court more 'basic' reason in BSNL. Here, the Court said that the subscriber to a telephone service does not intend to purchase or obtain any rights in electromagnetic waves.<sup>55</sup> Whereas in crypto the opposite is true. The person intends to get some rights in the crypto or purchase it. However, after giving the above reasons, the Court in BSNL cautioned that it cannot be anticipated how technology would develop in the future, and in the present case, no one argued that electromagnetic waves were capable of being possessed.<sup>56</sup> Therefore, it seems that the Court in BSNL understood that the analysis of whether new technologies are 'goods' has to be done without any preconceived notions about the technology.

*Secondly*, the presence of crypto exchanges is a testament to the fact of their marketability. Similarly, as crypto exchanges indicate, they are transmissible and stored through blockchains.<sup>57</sup> Finally, as the author would argue in Part III.2, they are capable of being possessed.

However, the Chhattisgarh High Court in *Achinto Chakraborty v. Chairman* ('Achinto'), while interpreting sections related to bailment, held that 'goods' must refer to tangible movable property.<sup>58</sup> An argument can be made that the Chhattisgarh High Court in Achinto should be considered over other Supreme Court decisions due to Achinto being in the specific context of bailment. However, this is rebuttable. The reason for this is that the Court in Achinto has not sufficiently justified its stance. It offered no reasons why 'goods' in bailment must refer to tangible property. The court simply took the definition as a given without referring to any other legislation or distinguishing the SC's verdicts in the context of bailments.

Another reason why Achinto does not appear sound is due to the existence of pledges. Pledge, as defined in §172 of the ICA, is a type of bailment for security.<sup>59</sup> The SC recently, in *PTC (India) Financial Services Ltd. v. Venkateswarlu Kari* ('PTC'), held that dematerialised

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<sup>53</sup> Digital Assets, *supra* note 4. Though, a problem with this argument would be regarding the essentials of bailment as it is creating a new object post-transfer. Therefore, the extinction-creation argument and its rebuttal are elaborated more in Part IV.B.

<sup>54</sup> *Id.*

<sup>55</sup> *Bharat Sanchar Nigam Ltd. v. Union of India*, (2006) 3 SCC 1, ¶64.

<sup>56</sup> *Id.*, ¶65.

<sup>57</sup> EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY, *Blockchain and Crypto Assets*, available at [https://www.eiopa.europa.eu/browse/digitalisation-and-financial-innovation/blockchain-and-crypto-assets\\_en#how-does-it-work](https://www.eiopa.europa.eu/browse/digitalisation-and-financial-innovation/blockchain-and-crypto-assets_en#how-does-it-work) (Last visited on October 2, 2023).

<sup>58</sup> *Dr. Achinto Chakraborty v. Chairman & Managing Director, State Bank of India*, 2017 SCC OnLine Chh 1589, ¶13.

<sup>59</sup> The Indian Contract Act, 1872, §172.

shares could be pledged.<sup>60</sup> Its rationale was that delivery of possession for pledging can be physical or, in cases like dematerialised shares, be constructive.<sup>61</sup> To elaborate, a pledge is the bailment of goods as security for payment of a debt or performance of a promise. If in §172, the pledge, a subset of bailment can include intangible goods, there is no reason why goods in §148 should be read narrowly. Rather, a restrictive reading of §148 would lead to conflict between bailment and its subset, pledge.

Also, we have to appreciate the facts and issues in *Achinto*. The issue was regarding the banker's right of lien as provided under §171 of the ICA.<sup>62</sup> This means bankers may retain any goods bailed to them as a security for a general balance of account. The Court in *Achinto* said that as bailment includes only tangible movable goods, therefore, a deposit in a current account is not bailment, thus, the right of lien would not be applicable.<sup>63</sup> In *Achinto*, while mentioning that goods refer to tangible movable goods, in the very next line it relied on SOGA to say goods means any other movable property than actionable claims and money.<sup>64</sup>

It appears that the Court intended to make it clear that money or deposit in the current account is not a bailment. However, the question is, was it required to read goods in bailment restrictively if SOGA clearly excludes money from goods and was also relied upon? As mentioned above the Court also did not offer any reasons for its interpretation of goods. It makes more sense to read *Achinto*'s interpretation of goods in bailment as being limited to issues of current account or bank deposits. The benefit of such an interpretation is that it harmonises SOGA and ICA, which *Achinto* itself was attempting to do by relying on them together.

Even if assume that *Achinto* cannot be read narrowly, it appears that there are two ways to make sense of the above decisions; first, generally, SOGA includes intangible goods, a bailment is an exception to the general definition, and pledge (species of bailment) is an exception to bailment. *Second* and less convoluted, SOGA, bailment, and pledge cover intangible goods. The author argues that the second reasoning is better simply because it is less convoluted and in line with all decisions bar *Achinto*. The reason is that though *Achinto* is a bailment-specific decision, the concept of pledge is itself a type of bailment. With the pledge, being a species allowing intangible goods, it makes intuitive sense that bailment being the genus would also allow intangible goods. One may argue that a pledge is a specific type of bailment that allows for intangible good. However, this is not how the statute defines the relationship between pledges and bailment. It defines it as a bailment as a security for payment of debts.<sup>65</sup> Therefore it cannot be said that only pledge allows intangible goods. To conclude, crypto falls under movable property and satisfies the first essential of bailment, which is to be a 'good'.

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<sup>60</sup> PTC (India) Financial Services Ltd. v. Venkateswarlu Kari, (2022) 9 SCC 704, ¶72.

<sup>61</sup> *Id.*, ¶92.

<sup>62</sup> The Indian Contract Act, 1872, §171.

<sup>63</sup> Dr. Achinto Chakraborty v. Chairman & Managing Director, State Bank of India, 2017 SCC OnLine Chh 1589, ¶17.

<sup>64</sup> *Id.*, ¶13.

<sup>65</sup> The Indian Contract Act, 1872, §172.

## B. DELIVERY OF GOODS (POSSESSION)

§149 of the ICA states delivery of goods can be ‘anything’ but needs to have the effect of giving the *possession* of goods to the bailee.<sup>66</sup> Anything is an extremely broad term. Thus, the question is: Is it possible to transfer the possession of crypto? However, before answering this question, a fundamental question needs to be answered. Namely, what does possession mean and what are its essentials in the context of bailment?

### 1. MEANING AND ESSENTIALS

Possession can be either actual or constructive, but it needs to be exclusive.<sup>67</sup> Actual possession refers to actually giving the property to a bailee, e.g. giving a pencil to someone. Whereas constructive possession refers to acts akin to giving car keys to the valet. Due to the intangible nature of crypto, actual possession is not relevant. But what constitutes constructive possession? Pollock and Mulla argue that the essential test for constructive possession is whether one has ‘control’ over the actual good.<sup>68</sup> In *Asaram v. Hyderabad Government*, the High Court held that the person in control of the good is the possessor.<sup>69</sup>

Now, ‘control’ is not defined anywhere in the context of bailment. However, generally, a three-judge bench of the SC in *Corporation of Nagpur City v. Ramchandra*, held that it has a wide ambit; but includes the vesting of powers that are consequential to the purpose of the contract.<sup>70</sup> This means that to have control over something entails having powers vested in you that are necessary to reach the goal.

Broadly, based on the case laws that the author highlights below, there are two understandings of possession: a) Possession is ‘Control’; b) Possession is intent to possess combined with control.<sup>71</sup> The intent of possession is a factual inquiry.<sup>72</sup> Both interpretations find judicial support. However, most of them are not in the specific context of bailment under §148 and §149.<sup>73</sup> Nonetheless, the Courts sometimes consider the meaning of the term in general. Thus, they are helpful.

In cases like *Morvi Mercantile Bank Ltd. v. Union of India* (‘Morvi Mercantile’),<sup>74</sup> *Lallan Prasad v. Rahmat Ali* (‘Lallan Prasad’),<sup>75</sup> and *Taj Mahal Hotel v. United India Insurance Co. Ltd.* (‘Taj Mahal Hotel’),<sup>76</sup> while specifically dealing with the ICA, the SC used the terms ‘control’ and ‘possession’ interchangeably. The SC has used the terms interchangeably while

<sup>66</sup> The Indian Contract Act, 1872, §149.

<sup>67</sup> *Amitabha Dasgupta v. United Bank of India*, (2021) 14 SCC 177, ¶7; *Atul Mehra v. Bank of Maharashtra*, 2002 SCC OnLine P&H 272, ¶18.

<sup>68</sup> POLLOCK & MULLA, *supra* note 32, §172, 3.

<sup>69</sup> *Asaram v. Hyderabad Government*, 1951 SCC OnLine Hyd 72, ¶7.

<sup>70</sup> *Corpn. of Nagpur City v. Ramchandra*, (1981) 2 SCC 714, ¶4.

<sup>71</sup> In USA, the preferred approach is b) control + intent to possess, see Edward R. Cohen, *Finders Cases Revisited*, Vol. 48(4) TEX. L. REV., 1001 (1970); Stephen J. Dannhauser, *Constitutional Protection of an Individual's Private Books and Record's*, Vol. 40 BROOK. L. REV., 1067 (1974).

<sup>72</sup> Jiabin Lai, *Possession of Cryptoassets*, Vol. 41 JOURNAL OF BUSINESS LAW, 4 (2023).

<sup>73</sup> Indian Contract Act, 1872, §.148-9.

<sup>74</sup> *Morvi Mercantile Bank Ltd. v. Union of India*, (1965) 3 SCR 254, ¶6.

<sup>75</sup> *Lallan Prasad v. Rahmat Ali*, (1967) 2 SCR 233, ¶9.

<sup>76</sup> *Taj Mahal Hotel v. United India Insurance Co. Ltd.*, (2020) 2 SCC 224, ¶20.

adjudicating on other legislations.<sup>77</sup> This view is supported by the Madras High Court, which explicitly rejected ‘intention of possession’ as a requirement.<sup>78</sup>

On the other hand, the SC in *Superintendent and Remembrancer of Legal Affairs v. Anil Kumar Bhunja* has relied on the common law distinction that possession is control combined with the intent to possess.<sup>79</sup> The Customs Tribunal in *Vodafone Essar Ltd. v. Commissioner of Central Excise* (‘Vodafone Essar Ltd’),<sup>80</sup> has also followed the distinction. In the context of the Narcotic Drugs and Psychotropic Substances Act of 1985, High Courts have held that the intent to possess is essential along with control.<sup>81</sup> Patna and Sikkim High Court have also taken similar views on different legislations.<sup>82</sup>

The author argues that the second approach is better for three reasons. *First*, in the cases like *Morvi Mercantile*, *Lallan Prasad*, and *Taj Mahal Hotel*; the meaning of the term ‘possession’ was not the central issue. They mentioned the terms in the passing. While in cases like *Vodafone Essar Ltd*, the meaning of possession was a central issue, due to the lack of Indian authorities dealing with this issue; the tribunal placed reliance on common law jurisprudence. Therefore, the point is that the SC, in those cases, has conflated the terms without justification. Whereas the tribunal in *Vodafone Essar Ltd*, where the case was contingent on the definition of possession, offered substantive reasons.

*Second*, the intention to possess is a vital requirement in contracts of bailment. The reason is that §148 mentions that delivery is for some purpose, and there is a contract that places an obligation to return it after completion of the purpose.<sup>83</sup> Now, this contract can be implicit or explicit.<sup>84</sup> But contracts as per §15 require free consent.<sup>85</sup> While interpreting §15, §148, and §149, the Madras High Court held that for a valid bailment, there needs to be a ‘conscious acceptance’ by the bailee.<sup>86</sup> The author argues that the ‘intent to possess’ of bailee is a necessary pre-condition to conscious acceptance. If the bailee does not have the intent to possess, there cannot be any question of them giving their acceptance to the contract of bailment.

*Third*, conflating possession with control gives no proper answer to the central query of what possession is or what its requirements are. It further muddles things, as we are moving from one vague term to another. This leads to a lack of conceptual clarity. The second approach also includes ‘control’, however, it is also qualified with the factual query of ‘intent to possess’. However, even then, it can be criticised as it is also vague. Nonetheless, it is better than

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<sup>77</sup> D.N. Singh v. Commissioner of Income Tax, Central, Patna, 2023 SCC OnLine SC 646, ¶62; Abdul Rahim v. Sk. Abdul Zabar, (2009) 6 SCC 160, ¶24.

<sup>78</sup> Pachiripalli Satyanarayana v. State, 1952 SCC OnLine Mad 233, ¶97; Wahib Basha v. State, 1960 SCC OnLine Mad 50, ¶128.

<sup>79</sup> Superintendent and Remembrancer of Legal Affairs v. Anil Kumar Bhunja, (1979) 4 SCC 274, ¶13.

<sup>80</sup> Vodafone Essar Ltd. v. Commissioner of Central Excise, 2018 SCC OnLine CESTAT 9131, ¶7.2.

<sup>81</sup> Pentapati Venkata Satyanarayana Murthy v. State, 1999 SCC OnLine AP 89, ¶¶17-18; Kalekhan v. State of M.P., 1989 SCC OnLine MP 244, ¶18.

<sup>82</sup> Tikait Thakur Narayan Singh v. Nawab Saiyid Dildar Ali Khan, 1924 SCC OnLine Pat 120, 929; Sailajananda Pandey v. Lakhichand Sao, 1949 SCC OnLine Pat 87, ¶12; State of Sikkim v. Dilli Prasad Sharma, 2016 SCC OnLine Sikk 74, ¶42.

<sup>83</sup> The Indian Contract Act, 1872, §148.

<sup>84</sup> Emperor v. Ghanshamdas, 1927 SCC OnLine Sind JC 35, ¶7.

<sup>85</sup> The Indian Contract Act, 1872, §15.

<sup>86</sup> Appa Rao v. Salem Motors and Salem Radios and Electricals, 1954 SCC OnLine Mad 348, 459.

only ‘control’, as the additional qualification of intent to possess increases clarity. This reasoning, though consequentialist, is relevant when considering commercial transactions that hinge around the meaning of terms like possession.

To refer back to the initial question, in the context of bailment, the essentials of possession would be an intention to possess the good, control over the good, and exclusive possession of the good. The following section will demonstrate that crypto meets these requirements.

## 2. CRYPTO CONTEXT

Having laid down the meaning and essentials of possession, the author argues that crypto fits into the essentials of possessions. Similar to how possession of keys gives possession of the car, the possession of private keys can be considered possession of crypto. The author argues that crypto exchanges ‘possess’ the assets through their access to private keys.

*First*, dealing with the intention to possess. The exchanges have the intention to possess, this is a factual query. As seen in the previous section, all the crypto exchanges provide storage facilities for assets. All the exchanges except CoinDCX and Coinswitch store crypto themselves. In the case of CoinDCX, they also store it themselves, however, it is stored offline by using offline wallets from other companies. Whereas, Coinswitch relies on other exchange’s third parties to store their assets. However, despite transferring crypto later, they still had the initial intention to possess it, though their purpose later is different: to store it with a third party.

*Second*, control; as mentioned, an indicator of control is giving powers that are consequential to the contract. In this scenario, the purpose is the storage of crypto. All the exchanges, through their access to private keys, have adequate power to store crypto. Therefore, considering the purpose of the contract, the exchanges have control.

Finally, exclusive possession: In crypto, access to private keys determines the possession. The exchanges have access to private keys along with the user. However, the author argues that the exchange has exclusive possession. The reason is that when buyers withdraw their crypto, there are a lot of conditions, like the maximum amount that can be withdrawn, withdrawal fees, etc. Usually, buyers are prohibited from withdrawing all of their crypto at once.

Whereas the exchange has access to crypto without restrictions.<sup>87</sup> Comparing the two keys, the exchange appears to have a ‘better key’ as compared to the buyer. The exchange appears to have exclusive possession, whereas the buyer seems to have a sort of contractual claim until they fulfil all the conditions. The Punjab High Court adopted similar reasoning in *Atul Mehra v. Bank of Maharashtra*.<sup>88</sup> Here, the Court was dealing with exclusive possession of bank lockers. It held that just because the customer can use a locker with limitations does not equate to joint possession, rather the Bank can always open the locker with a ‘master key’. Thus, the Bank has

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<sup>87</sup> Levitin argues that while there may be limitations with what an exchange can do with the private keys through their user agreements, the private keys nonetheless remain with the exchange. And as private keys can be used by anyone who can access them, the exchanges do have the power to transact cryptocurrencies of its users. *See* Levitin, *supra* note 17.

<sup>88</sup> *Atul Mehra v. Bank of Maharashtra*, 2002 SCC OnLine P&H 272, ¶22.

the exclusive possession.<sup>89</sup> To clarify, the author is not analogising the relationship of exchanges and users' crypto with banks and deposits.<sup>90</sup> Rather, the purpose of the case is to illustrate that the entity with the better/master key has exclusive possession. Therefore, to conclude crypto fulfils the requirement of being possessed.

### C. PURPOSE AND RETURN

The purpose requirement is easily fulfilled as the buyer is delivering the goods for the storage of crypto. Now, §171 of the ICA states that bailee can hold the goods, until remuneration.<sup>91</sup> In the crypto scenario, the exchange holds the goods till they have not been remunerated. Here, the remuneration is the withdrawal fee that is charged by exchanges. After the payment of withdrawal fees, exchanges return the crypto to the buyer. Hence, the requirement of return after accomplishing the purpose is also completed.

To conclude, through this section, the author has argued that the relationship between crypto exchanges and buyers is a bailment. To show this, the author highlighted how all the essentials of the bailment are satisfied. In the next part, the author analyzes how different jurisdictions have approached the question of the bailment of crypto assets.

## IV. GLOBAL PERSPECTIVES: EVALUATING OTHER JURISDICTIONS

The concept of bailment is unique to the common law; therefore, in this subsection, the author focuses on common-law countries.<sup>92</sup> Other than bailment there are broadly three major approaches advocated or used throughout the globe, namely trust, control, and debtor-creditor relationship.

### A. BAILMENT

In the USA, recently, the landmark *Lummis-Gillibrand Responsible Financial Innovation Bill* was introduced in the Senate.<sup>93</sup> The Bill stipulates that other than an agreement to the contrary, the relationship will be a bailment. Also, it cannot be classified as a trust or fiduciary relationship unless the custodian provides 'substantial discretionary services' like investment advice, etc. Further, in cases like *Harper v. Rettig*, the New Hampshire District Court has held that if the users' crypto is entrusted to an exchange, it will be considered a bailment.<sup>94</sup> In *Harper*, the user has entrusted their Bitcoin to an exchange, Coinbase.<sup>95</sup> It meets the requirement of the bailment as here there is a good (bitcoin), there is delivery/possession of good (Coinbase), it is for a purpose (storage) and the user can ask it to be returned. Also, states like Wyoming classify

<sup>89</sup> However, in this case, the claim of bailment was rejected as there was no evidence on the record to prove that the jewellery was kept in the locker at the time when the robbery took place.

<sup>90</sup> The argument of the relationship being classified as a bank account with deposits is addressed in Part IV.D.

<sup>91</sup> The Indian Contract Act, 1872, §171.

<sup>92</sup> In civil law countries, rather than bailment, the concept of 'deposit' is used, see Michael H. Rubin, *Bailment and Deposit in Louisiana*, Vol. 35(4) LOUISIANA LAW REVIEW (1975).

<sup>93</sup> The Lummis-Gillibrand Responsible Financial Innovation Act, 2023, §705 (U.S.A.).

<sup>94</sup> *Harper v. Rettig*, 2023 U.S. Dist. LEXIS 92295, 2023 DNH 066P, F.Supp.3d (United States District Court, D. New Hampshire).

<sup>95</sup> *Id.*, though in this particular case, as the IRS had seized account details rather than bitcoin, the bailment analysis was not dealt in great detail.

custody of crypto assets as bailment.<sup>96</sup> Similar bills are in discussion in states like Nevada and Idaho.<sup>97</sup>

### B. CONTROL-BASED PROPRIETARY INTEREST

The UK, as mentioned earlier, has recently released a Law Commission report on digital assets.<sup>98</sup> One of the questions it seeks to answer is whether can crypto be bailed. The report gave two reasons why crypto cannot be bailed, stating *first*, that bailment can be only of tangible assets as they are capable of being possessed. But they conceded that this could be changed through law reforms. The *second* reason was that the crypto token transferred to a ‘bailee’s control’ would be a different object than the pre-transfer object.

The objects here refer to crypto and it means that the crypto that one sends to the store would be different than what one receives after the bailment. This would go against the bailment’s understanding that the object keeps its identity throughout the transfer process ensuring that a bailor’s title is not extinguished. The theoretical basis for this argument is the ‘extinction/creation argument’, where some technical aspect (i.e., code for simplicity) changes every time crypto is transferred. However, as per the Law Commission, there is also another competing argument namely the ‘persistent object’ argument.<sup>99</sup> It essentially means despite transfers, it remains a ‘notional quantity’. Ultimately, the Law Commission concludes that there is no correct analysis, however, it acknowledges several consultants demonstrated why the persistent object is more accurate. Further, the Law Commission acknowledges that, even if it does create a new object, the concept of bailment itself can be modified to be thought of as an imposition of a set of duties over bailee.<sup>100</sup>

The report accepts that the relationship between users and crypto-exchange can be custodial in nature.<sup>101</sup> To classify such relationships, it advocated a concept parallel to bailment: ‘control-based proprietary interest’. The key difference is that the bailee here does not possess the crypto but rather only controls it, as intangible assets cannot be possessed. The rationale for this was that this would prevent disturbing the well-established contours of bailment in common law.

The author argues that both of the reasons given by the Commission are inapplicable in the Indian context. First, crypto is capable of being bailed in India. The author argues that the Law Commission’s ‘control-based proprietary interest’ carves out an artificial distinction between possession and control in custodial relationships. To clarify, the author does not suggest that there is no distinction between the two concepts. But, specifically in a custodial relationship like bailment,<sup>102</sup> if a person exercises ‘control’ over good, that is as good as possession. In Part III.2, the author argued that possession refers to the intent to possess and control. Here, the author is arguing that in a custodial relationship, where there is an intent to possess, the exercise of control translates to possession, which is the case with ‘control-based proprietary interest’.

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<sup>96</sup> The Wyoming Legislature SF0125, 2024, §1 (U.S.A.).

<sup>97</sup> The Nevada Legislature AB324, 2023 (U.S.A.); Idaho Legislature House Bill no. 181, 2021 (U.S.A.).

<sup>98</sup> Digital Assets, *supra* note 4.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* This however depends on terms of contract. As it can also be non-custodial, if exchanges have superior title.

<sup>102</sup> AO Austen-Peters, CUSTODY OF INVESTMENTS: LAW AND PRACTICE, (Oxford University Press, 2000).

Let's assume that possession of crypto is not practically or legally possible. However, this does not necessarily mean that a person cannot have intent to possess. Intent to possess being a factual query can arise, though unlikely, without a capacity to possess. To give an example: A warehouse owner may want to store goods from X for some consideration. However, at the given time, A simply may not have the capacity to store the goods. Further, even if something cannot be legally possessed, for instance, illicit drugs/liquor there can be intent to possess. Through this example, the author aims to highlight that intent to possess can arise even if possession is not possible.

A rebuttal might be that the author is assuming the possibility of a good being theoretically capable of being possessed. To elaborate, in the above illustration, the goods were still theoretically capable of being possessed. Therefore, the argument would be if goods are theoretically not capable of being possessed then intent of possession cannot arise.

However, the issue with this argument, specifically regarding crypto is it assumes its conclusion. It cannot be said that the intangibility of crypto makes it incapable of being possessed.<sup>103</sup> The reason is that electronic trade documents being similarly intangible can be possessed.<sup>104</sup> This example is relevant as here the law commission acknowledges intangibles are capable of being possessed. Therefore, when the author refers to the possibility of being possessed it refers to practically/legally possible. The Law Commission also appears to be using possession in this when it states its main reason as being the "legal concept of possession is nonetheless bound up with tangibility".<sup>105</sup> This demonstrates that the only reason why possession is not possible is because it appears to not be legally possible.

Now, coming back to the Law Commission's 'control-based proprietary interest'. The Law Commission submits that a custodian would have control over the crypto but not possession. But in a custodial relationship, the custodian necessarily has the intent to possess the crypto. The reason is that the custodian offering storage/custody services is proof of their intent to possess. The Law Commission agrees that the custodian has control over the goods. Therefore, the question the author would like to pose is, what is the difference between the Law Commission's 'control-based proprietary interest' and possession in a custodial relationship? The author says none and the law commission essentially used a euphemism for possession. A speculative reason why the Law Commission did this could be similar to bailment: not wanting to extend the meaning of possession in common law. However, as shown by PTC in Part III.1, possession of intangible goods is possible in India, but the possession would be constructive.

The second reason is that the object that would be given to users would not be the same object that the users deposited. The author has highlighted how the Law Commission itself acknowledges that this argument can be challenged on two grounds. However, *in arguendo*, the author ties it into a practical aspect of crypto exchange and attempts to rebut it. Here, the argument would be that exchanges sometimes combine one user's crypto with others in a single online crypto

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<sup>103</sup> Jason Rubin, *Can't See It, Can't Hold It: Do You Control It? A 21st Century Approach to Bitcoin Possession*, Vol. 28(2) WIDENER L. REV., 209 (2022); Joao Marinotti, *Possessing Intangibles*, Vol. 116(5) Nw. U. L. Rev., 1227 (2022).

<sup>104</sup> The Electronic Trade Documents 2023, §3(1). (U.K.) Though law commission has attempted to distinguish this with crypto, however for the purposes of the paper it shows that intangibility of an object is not a barrier for its possession.

<sup>105</sup> Digital Assets, *supra* note 4.



wallet owned by the exchange.<sup>106</sup> Then, when the user requires their crypto, the exchanges randomly allocate them any crypto stored in the wallet, which may not necessarily be the one that they deposit.<sup>107</sup>

This is also inapplicable in India, at least for the five crypto-exchanges the author highlights. The agreements of these five exchanges are vital for this point. WazirX, Zebpay, and Unocoin seem to avoid this issue by providing users with a wallet to store crypto rather than pooling it into a collective wallet.<sup>108</sup> Drawing back to the initial analogy, as bitcoins (mails) are stored in the user's wallet (inbox), the user is getting the same object that they initially stored. Coinswitch provides storage services by depositing to third-party exchanges or third-party custodians.<sup>109</sup> For CoinDCX, funds are stored in a cold storage (offline wallet) rather than a single online wallet.<sup>110</sup>

Further, Unocoin and CoinDCX go beyond acting as an exchange and providing storage.<sup>111</sup> Unocoin offers a lending service, but it keeps users crypto as collateral. However, Unocoin needs the consent of the user for lending services. Therefore, Unocoin's initial relationship can be that of bailment, and if the user provides, it can turn into a relationship akin to debtor-creditor. However, CoinDCX has the discretion to 'deploy' assets of one person for 'various' purposes. CoinDCX presents a unique case. However, if we scrutinise the agreements, it seems that even CoinDCX cannot deploy the assets of the user without their consent.<sup>112</sup> Therefore, unless there is an agreement to the contrary, Indian crypto exchanges give the same goods back. Thus, the reasons are inapplicable in India.

### C. TRUST-BASED APPROACH

The UK Law Commission also advocated trust for classifying these relationships.<sup>113</sup> Further, a lot of cases throughout the world have classified this relationship as a trust. The High Court of Justice of England and Wales, in *AA v. Persons Unknown*, held that the relationship was a constructive trust due to difficulty in possession of intangibles.<sup>114</sup> Similarly, the New Zealand High Court's landmark decision *Ruscoe v. Cryptopia* ('Ruscoe') classified this relationship as trust.<sup>115</sup> The reasoning of the Court was fact specific. The terms and conditions of Cryptopia themselves stated that the relationship was a trust. Further, the agreement stated that the

<sup>106</sup> Levitin, *supra* note 17.

<sup>107</sup> *Id.*

<sup>108</sup> WAZIRX, *supra* note 20; ZEBPAY, *supra* note 22; UNOCOIN, *Risk Warning*, available at <https://unocoin.com/in/policy/riskwarning> (Last visited on February 2, 2024).

<sup>109</sup> COINSWITCH, *supra* note 24.

<sup>110</sup> COINDCX, *Security*, available at <https://coindcx.com/blog/security/> (Last visited on February 2, 2024).

<sup>111</sup> COINDCX, *supra* note 24; UNOCOIN, *supra* note 23.

<sup>112</sup> The definition of digital assets we can find some contradictions. The definition includes Non-Fungible Tokens. While accepting ownership of the user, it still gives itself the discretion to deploy the assets. There appears to be a conflict between the terms of the contract. A way to harmoniously interpret these conditions could be to narrowly read CoinDCX's discretion to deploy the assets. This means there is discretion to decide how the goods will be deployed after obtaining the consent for deployment like Unocoin. CoinDCX first needs to obtain the user's consent specifically for the deployment of assets.

<sup>113</sup> Digital Assets, *supra* note 4.

<sup>114</sup> *AA v. Persons Unknown*, Re Bitcoin, [2019] EWHC 3556, ¶3 (Queen's Bench Division Commercial Court of England and Wales).

<sup>115</sup> *Ruscoe v. Cryptopia*, [2020] 2 NZLR 809, ¶¶3-4 (The High Court of New Zealand).

crypto of all the users may be pooled together. The Court in *Ruscoe* relying on the New Zealand Trusts Act, 2019, held that three essentials of trust namely: intention, object, and subject matter, were fulfilled.<sup>116</sup>

Similarly, the Singapore International Commercial Court in *B2C2 Ltd v. Quoine Pty Ltd.* classified the relationship as a trust.<sup>117</sup> However, in classification as trust, there are some requirements. The above-mentioned case was appealed before the Singapore International Court of Appeal in *Quoine Pte Ltd v. B2C2 Ltd*, where the Court said that due to lack of certainty in intention, trust cannot be inferred.<sup>118</sup> Similarly, the Hong Kong Court in *Gatecoin Limited (in liq)* held that though there can be trust, it requires language, which indicates it.<sup>119</sup>

However, the author argues that this relationship cannot be classified as trust in India. Trust is defined in §3 of the Indian Trust Act of 1882.<sup>120</sup> Trust is an obligation annexed to the ownership of property. It necessarily requires a transfer of ownership. Also, as highlighted in the above case laws, trust requires specific intention by both parties. Based on the user term agreements of the crypto exchanges highlighted in Part II, no such intention and transfer of ownership is visible. The reason is that none of them claim ownership of the property. Most of them accept the ownership of the user. The other exchanges are ambiguous about ownership. Thus, in the absence of a specific intention, the relationship in India cannot be construed to be a trust.

#### D. DEBTOR-CREDITOR RELATIONSHIP

The UNIDROIT draft principles on digital assets, specifically Principle 10 are particularly important.<sup>121</sup> It propounds the principle of ‘custody’. It has been functionally defined to be a scenario where a person maintains a digital asset on behalf of a client that gives the client protection against the insolvency of the custodian.<sup>122</sup> This covers relationships between users and exchanges.<sup>123</sup> Per the Second Working Group Meeting of the principles, custody here covers multiple legal characterisations like bailment and trusts.<sup>124</sup> This aligns with the broader argument, the author is making through this paper.

However, UNIDROIT also lists illustrations of non-custody agreements.<sup>125</sup> Of particular interest is illustration seven, namely the agreement for delivery of digital assets.<sup>126</sup> The reason why this is important is that it envisages a scenario where an exchange incurs an obligation to deliver a certain quantity of crypto to the client because it has received the asset or procured it

<sup>116</sup> *Id.*, ¶166; Andrew Butler, EQUITY AND TRUSTS IN NEW ZEALAND, 4.2.1 (Thomson Reuters, 2<sup>nd</sup> edn., 2009).

<sup>117</sup> *B2C2 Ltd v. Quoine Pty Ltd.*, [2019] SGHC(I) 03, ¶142 (Singapore International Commercial Court of the Republic of Singapore).

<sup>118</sup> *Quoine Pte Ltd v. B2C2 Ltd*, [2020] SGCA(I) 2, ¶148 (The Court of Appeal of Singapore).

<sup>119</sup> *Gatecoin Limited (in liq)*, [2023] HKCFI 914, ¶¶41, 68-71 (The High Court of the Hong Kong Special Administrative Region).

<sup>120</sup> The Indian Trusts Act, 1882, §3.

<sup>121</sup> UNIDROIT, PRINCIPLES ON DIGITAL ASSETS AND PRIVATE LAW (2023), available at <https://www.unidroit.org/wp-content/uploads/2024/01/Principles-on-Digital-Assets-and-Private-Law-linked.pdf> (Last visited on May 2, 2024) (‘UNIDROIT’).

<sup>122</sup> *Id.*, ¶10.1.

<sup>123</sup> *Id.*, ¶10.2.

<sup>124</sup> UNIDROIT, 2<sup>nd</sup> Working Group Meeting, Study LXXXII – W.G.2 – Doc. 2: Revised Issues Paper (rev. 1) 44.

<sup>125</sup> UNIDROIT, *supra* note 121, ¶10.13.

<sup>126</sup> *Id.*, ¶10.20.

for the client. One may argue that Indian crypto exchanges resemble this scenario more than custody. UNIDROIT classifies this relationship as like a bank account rather than bailment. The draft draws an analogy between a current account in a Bank *vis-à-vis* an exchange holding crypto.<sup>127</sup> Essentially, it suggests a borrower-lender relationship between the exchange and the user, as the exchange is under an agreement to deliver the asset. However, the author argues that this analogy is not tenable in India, the reason being there are material differences in banks holding a current account and exchanges holding crypto in India.

A current bank account is not considered a bailment as the banker does not necessarily return the same thing delivered to it when it accepts the amount from an account holder.<sup>128</sup> However Indian crypto exchanges as per user term agreements do not lend users deposited crypto to someone else. As elaborated further in Part III.4(A), generally the user in Indian exchanges gets the same crypto that was deposited. To substantiate further, the key term in this illustration is “certain quantity of a given digital asset”.<sup>129</sup> The author argues that this is what makes it non-custodial. In the illustration, the exchange is concerned with the quantity of the crypto to be delivered rather than which particular crypto to be delivered. To elaborate, the exchange here delivers the quantity of crypto to the user that they had received rather than giving back the same crypto that users had deposited. Therefore, as exchange returns the same crypto, unlike a bank current account suggested by UNIDROIT.

Therefore, to conclude, through this subsection, the author analysed the different ways this relationship has been categorised throughout the globe. Considering these different classifications, the author argued why the relationship should still be considered a bailment in India. But even if the relationship is like a bailment, the question is why does it matter? In the next section, the author will try to answer this question.

## V. BAILMENT BENEFITS: WHY IT MATTERS?

In this section, the author highlights the need to characterise the relationship between the buyer and the exchange as a bailment. The author argues that this is beneficial for buyers and also does not adversely affect the exchange. For this, the author uses a hypothetical scenario based on real case law, namely *Ruscoe*.<sup>130</sup>

Imagine you are using the crypto exchange ‘X’, to buy and store your bitcoins. X stores most of its crypto offline; however, some are stored online. One day, its online storage is hacked, and all online crypto is stolen. Deciding that the losses were too much, the very next day, the directors of X filed for bankruptcy. Now you are distressed about your Bitcoin. To figure out your rights, you refer to the user agreement, but that is vague. Now, you, along with other users, file a case before the High Court to determine your position in insolvency proceedings.

Now, there are two scenarios. First, due to the vague nature of the relationship, you would, at best, be classified as an ‘unsecured creditor’ having no secured interest in the property.

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<sup>127</sup> *Id.*

<sup>128</sup> *Devendrakumar Lalchandji v Gulabsingh Nekhesingh*, AIR 1946 Ngp 114, ¶2.

<sup>129</sup> UNIDROIT, *supra* note 121, ¶10.20: “A fintech firm or a financial institution, such as a dealer, an exchange, or a trading platform, may incur an obligation to *deliver a certain quantity of a given digital asset* to a client because it has received the asset from the client or because it has acquired the asset in the primary or secondary market for the client”.

<sup>130</sup> *Ruscoe v. Cryptopia*, [2020] 2 NZLR 809, (The High Court of New Zealand).

This means that as per §53 of the Insolvency and Bankruptcy Code ('IBC'), you would be paid from the estate remaining after costs of resolution, secured creditors, and employees of X.<sup>131</sup>

However, if it is considered as a bailment, then §18 of the IBC would be applicable.<sup>132</sup> It says that goods that are bailed are not a part of the bailee's estate. If the goods are sold, then §154 of the ICA would apply; bailee making unauthorised use of goods bailed, and bailee would be liable.<sup>133</sup> In *State of Gujarat v. Memon Mahomed Haji Hasam*, the Government, as a bailee, sold the goods.<sup>134</sup> The Court granted the bailor a decree ordering the government to either return the vehicle or the price. Similarly in the *State of Tripura v. Bina Choudhary*, some parts of a vehicle under the custody of the Forest Department were stolen.<sup>135</sup> The Department was liable to pay compensation as the vehicle could not be returned. This illustrates that Bailee can be liable if bailed goods under their care are stolen.

The above scenario grants the buyer the position of a decree holder, that can be enforced against the exchange before the moratorium.<sup>136</sup> On the other hand, if the goods are not sold, then the bailor has the remedy to intervene, even after the moratorium.<sup>137</sup> The bailor here can recover their goods upon payment of the lien.

There might be one scenario, where it can be difficult for bailors to obtain their goods. Namely when bailed goods are stolen/sold and a decree is not imposed before the moratorium. Due to the nascent stage of the current insolvency procedure, there are no case laws on it. However, the author argues that this scenario is unlikely. The reason is the issue of delays affecting the timeline of corporate insolvency and resolution proceedings ('CIRP'). CIRP is plagued by delays at almost every step.<sup>138</sup> Most significantly for even admission of the application, where fourteen-day timelines have been prescribed, the average number of days taken is 133 days.<sup>139</sup> Though this scenario might pose difficulties, based on the current insolvency regime in India, the bailor is more likely to obtain a decree before the moratorium.

Therefore, this classification of bailment is desirable for buyers for two reasons. *First*, it makes their relationship more certain than the vague classifications in user agreements. *Second*, it grants buyers more remedies while pursuing their claims. Further, it does not adversely affect the crypto exchanges in India. The reason is that none of them claim to own the assets bought by the buyer. Therefore, ideally, it should not adversely affect them if they are claimed by their actual owners during insolvency proceedings. Thus, this classification would just make what was

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<sup>131</sup> The Insolvency and Bankruptcy Code, 2016, §53.

<sup>132</sup> *Id.*, §18.

<sup>133</sup> The Indian Contract Act, 1872, §154.

<sup>134</sup> *State of Gujarat v. Memon Mahomed Haji Hasam*, AIR 1967 SC 1885, ¶2.

<sup>135</sup> *State of Tripura v. Bina Choudhary*, (2007) 7 SCC 52, ¶6, this is a case where there was not an explicit bailment, however, Scholars like Mulla have treated this case to be an example of Bailments other than under contract *see* POLLOCK & MULLA, *supra* note 32, §148, 6.

<sup>136</sup> *Subhankar Bhowmik v. Union of India*, 2022 SCC OnLine Tri 208, ¶14; The Insolvency and Bankruptcy Code, 2016, §14.

<sup>137</sup> *KEC International Ltd. v. Bhuvan Madan*, 2020 SCC OnLine NCLT 19738, ¶8; *Weather Makers (P) Ltd. v. Parabolic Drugs Ltd.*, 2019 SCC OnLine NCLT 25970, ¶18.

<sup>138</sup> Neeti Shikha & Urvashi Shahi, *Assessment of Corporate Insolvency and Resolution Timeline*, IBBI RESEARCH INITIATIVE RP-01/2021, February 2021.

<sup>139</sup> *Id.*

implicit, explicit, while giving buyers better claims in courts, without adversely affecting the crypto exchange.

## VI. CONCLUSION

In this paper, the author has argued that the relationship between prominent crypto exchanges in India and buyers can and should be characterised as a bailment. By making this claim, the author has attempted to reduce the ambiguity surrounding the relationship between crypto exchanges and users in India. However, there remains scope for further research on this issue.

*First*, the number of crypto exchanges in India seems to be on the rise. In this paper, the author focuses on the five crypto exchanges in India. The factors due to which the author has chosen these particular exchanges are their high trading volumes that are frequently used by media outlets and firms to analyse Indian crypto market,<sup>140</sup> and their large user base ranging from twenty-five lakhs to a few crores.<sup>141</sup> Further, popular media outlets highlighting these exchanges as ‘top’ and ‘best’ in India also did play a role.<sup>142</sup> However, the focus on five crypto exchanges is a limitation of this paper, necessitated by the rising numbers of crypto exchanges in India.

*Second*, the majority of the literature on this issue, and the author, have attempted to classify the relationship using general common law concepts like bailment, trust, and debtor-

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<sup>140</sup> Debangana Ghosh, *Top Indian crypto exchanges see a 207% surge in trading volumes in March as Bitcoin soars*, MONEY CONTROL, March 29, 2024, available at <https://www.moneycontrol.com/news/technology/top-indian-crypto-exchanges-see-a-207-surge-in-trading-volumes-in-march-as-bitcoin-soars-12542271.html> (Last visited on May 2, 2024); Vinod Mahanta, *Indian crypto exchanges record higher trading volumes after FIU action on global exchanges*, ECONOMIC TIMES, January 05, 2024, available at <https://economictimes.indiatimes.com/markets/cryptocurrency/crypto-news/indian-crypto-exchanges-record-higher-trading-volumes-after-fiu-action-on-global-exchanges/articleshow/106579830.cms?from=mdr> (Last visited on May 2, 2024).

<sup>141</sup> Shivangini, *CoinSwitch becomes first Indian cryptocurrency trading platform with 2 crore registered users, after Bitcoin surges*, LIVEMINT, March 06, 2024 available at <https://www.livemint.com/market/cryptocurrency/coinswitch-becomes-first-indian-cryptocurrency-trading-platform-with-2-crore-registered-users-after-bitcoin-surges-11709715943055.html> (Last visited on May 2, 2024); UNOCOIN, ‘Unocoin’, available at <https://unocoin.com/in/> (Last visited on May 2, 2024); COINDCX, *CoinDCX Witnesses a Phenomenal 2000% Surge in Crypto Deposits as Investors prioritize Compliance & Security*, available at <https://coindcx.com/blog/announcements/coindcx-witnesses-a-phenomenal-2000-surge-in-crypto-deposits/#:~:text=Over%201.4%20crore%20Indian%20users%20trust%20CoinDCX%20for%20their%20crypto%20investments> (Last visited on May 2, 2024); ZEBPAY, *Markets*, available at <https://zebpay.com/in/markets/chz> (Last visited on May 2, 2024); WAZIRX, *About*, available at <https://wazirx.com/blog/about/> (Last visited on May 2, 2024).

<sup>142</sup> ECONOMIC TIMES, *Best Crypto Exchanges & Apps in India for 2024*, April 25, 2024 available at <https://economictimes.indiatimes.com/markets/cryptocurrency/best-crypto-exchanges-apps-in-india-for-2024/articleshow/109582290.cms?from=mdr> (Last visited on May 2, 2024); BUSINESS STANDARD, *Top 4 Crypto Exchanges for Indian Users*, April 15, 2024, available at [https://www.business-standard.com/content/specials/top-4-crypto-exchanges-for-indian-users-124040800135\\_1.html](https://www.business-standard.com/content/specials/top-4-crypto-exchanges-for-indian-users-124040800135_1.html) (Last visited on May 2, 2024); TIMES OF INDIA, *A ready guide for selecting the top crypto exchange in India*, April 01, 2024, available at <https://timesofindia.indiatimes.com/business/india-business/a-ready-guide-for-selecting-the-top-crypto-exchange-in-india/articleshow/108932590.cms> (Last visited on May 2, 2024); HINDUSTAN TIMES, *Top 5 Crypto Exchanges in India in 2024*, March 27, 2024 available at <https://www.hindustantimes.com/brand-stories/top-5-crypto-exchanges-in-india-in-2024-101703956535803.html> (Last visited on May 2, 2024); This can arguably be marketing by these exchanges, but it probably has worked and enhanced their popularity as evidenced by their high trading volumes and user bases. In sum the incessant referring of these exchanges as best makes it more likely that a beginner would start their crypto transactions through one of the mentioned exchanges.

creditor. However, there remains scope to classify this relationship using specific domestic legislation. Particularly in India, one can attempt to interpret the SEBI, RBI regulations, and rules to impart clarity.

*Finally*, the normative justification for the author's argument is the utility of bailment in scenarios of crypto-exchange insolvency. Broadly this classification adds more certainty to the relationship between exchange and buyers. Further, during crypto-exchange insolvency this classification grants buyers more remedies while pursuing their claims. However, as highlighted above, the literature and jurisprudence on bailment in India is scarce. Due to this, the exact implications of classifying a relationship as a bailment in insolvency proceedings are not very clear. Therefore, how the argument of classifying an exchange as a bailee would play out in an actual insolvency proceeding remains to be seen.