

Cryptocurrencies and digital assets: Issues and challenges from the inheritance law perspective

by
Mohd Yazid bin Zul Kepli
Tajul Aris Bustami

Abstract

Cryptocurrency is a new asset class that estate planning lawyers are seeing more in their clients' portfolios as digital assets including Bitcoin, Ethereum, XRP, Bitcoin Cash and Litecoin gain more popularity worldwide. The fast adoption of digital assets into the financial portfolio of Malaysians, the majority of whom are Muslims, requires an analysis of its future implications to wealth and estate management, including after death. This study reveals issues and challenges related to cryptocurrencies and digital assets from the inheritance law perspective in Malaysia. As Malaysia is a commonwealth country with a Muslim-majority population, in addition to English common law, the Islamic inheritance law perspective is included. This study explores related challenges including illegal platforms and operators, unauthorized access, hacking, and other real problems like difficulty in identifying deceased's cryptocurrency account and missing passwords. Results suggest that the current legal, shariah and regulatory framework is not adequate to properly protect the interest of the public and some suggestions and recommendations are included.

INTRODUCTION¹

When Bitcoin was launched in 2009, there was no competition in the realm of digital currency, better known as cryptocurrency. As of September 2021, over 10,000 different cryptocurrencies can be traded in various cryptocurrency exchanges, with a total market capitalization of around USD2 trillion. These cryptocurrencies do not necessarily shares the same nature and characteristics, making one-size blanket regulation challenging. Scholars have warned that In solving cryptocurrency inheritance issues, the functional features of the cryptocurrencies must be taken into consideration.²

Cryptocurrency can be divided into coins and tokens, both with different functions. Coins are originally intended as a form of currency while tokens are programmable assets that provide for the creation and execution of smart contracts. Tokens are usually created via Initial Coin Offering (ICO) with share some similarities with share offering. Against this background, it is understandable that regulating cryptocurrency is a challenging task.

However, cryptocurrency expert, Richard Aikens warned that cryptocurrency is not outside the ambit of law:

‘Although the originators of cryptocurrencies and many of its users would like to imagine that they are outside national and international regulatory control and criminal

¹ This research is funded by the FRGS Research Grant entitled ‘Developing a new legal and regulatory framework for cryptocurrencies businesses in Malaysia (FRGS/1/2019/SSI10/UIAM/02/10)’

² Oleksandr Omelechuk, Inna Iliopol and Snizhanna Alina, ‘Features of inheritance of cryptocurrency assets’ (2021) *Revista de Derecho*, Vol. 10 (I), pp. 103-122.

law, that cannot be so. So do issues of whether or how cryptocurrencies and trading with them might be taxed.’³

It is estimated that over one million people or 3.1% of Malaysia’s total population owns cryptocurrency in 2020.⁴ However, only 2% of Malaysia’s 30 million population has adequate knowledge about cryptocurrencies.⁵ The lack of knowledge will lead to failure to adopt a proper cryptocurrency inheritance strategy among the holders and beneficiaries. Furthermore, the lack of adequate law on digital inheritance can worsen the matter. Digital inheritance refers to the process of handing over digital assets⁶ like cryptocurrencies and their associated rights to beneficiaries. Many new issues and challenges from the inheritance law perspective can be seen in such cases.

Despite the occasional price explosions and new all-time-high (ATH)⁷ for cryptocurrencies like Bitcoins, the level of cryptocurrency adoption among the public at large is still largely low, with just around 2% to 4% of the world community possessing some sort of cryptocurrency. This also shows that the true potential of cryptocurrency is still largely untapped.

The first blockchain-based cryptocurrency, Bitcoin was created on 3 January 2009 when one Satoshi Nakamoto mined the starting block of the blockchain, also called the genesis block. 13 years after Bitcoin was first introduced to the world, the vision of its founder, Satoshi Nakamoto to offer an alternative monetary system based on peer-to-peer⁸ blockchain technology instead of reliance on a centralized system like banknotes printed by central banks and governments, failed to be materialized.

The world population was reluctant to trust and use blockchain technology as the foundation of their monetary system and preferred to rely on traditional trusted third parties like the central banks and authorities. Banknotes and online banking remain as the preferred method of payment. Instead of relying on cryptocurrencies like Bitcoin to make payments, the next revolution in finance turns out to be mobile payments like Alipay, Apple Pay, Google Pay, Samsung Pay, Square, and PayPal mobile. It seems that the world population still prefers to trust and rely on known third parties to manage their financial transactions and is skeptical to rely on cryptocurrencies as an alternative. Although some 18,000 businesses worldwide accept some form of cryptocurrencies, this is too small to make any notable differences.

Instead of becoming the new monetary system, cryptocurrency evolves into something else. It evolves into a digital asset, albeit a very speculative and volatile one. The Securities Commission Malaysia defines “digital assets” to include “digital currencies”, a new asset class for investment, and “digital tokens”, an alternative fundraising mechanism for companies.

³ Richard Aikens, ‘Foreword’ in David Fox and Sarah Green (eds), *Cryptocurrencies in Public and Private Law* (Oxford University Press 2019)

⁴ ‘Malaysia’ via <https://triple-a.io/crypto-ownership/>

⁵ ‘Digital currencies gaining interest with Malaysian investors’ (*The Malaysian Reserve* 28 April 2020) via <https://themalaysianreserve.com/2020/04/28/digital-currencies-gaining-interest-with-malaysian-investors/>

⁶ For this paper, the terminology “digital assets” will be used in line with Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019, which widened the scope of the Capital Market and Services Act 2007 to cover blockchain-based “digital assets” as the umbrella term for “digital currencies” and “digital tokens”.

⁷ ‘All-Time High (ATH)’ refers to the highest price that a digital asset like cryptocurrency has reached since its listing or inception.

⁸ A peer-to-peer (P2P) system is a decentralized platform whereby more than one individual interacts directly with each other, without using an intermediary e.g., trusted third party like bank.

Instead of using cryptocurrency as a medium of payment, most owners of cryptocurrencies prefer to see them as digital assets. This is also the approach adopted by most regulators. Securities Commissions in many countries have issued guidelines requiring cryptocurrency exchanges to apply and have a valid license, and an anti-money laundering and counter financing of terrorism framework are now in place to monitor cryptocurrencies.⁹

As more people embraced digital assets like cryptocurrency, many new challenges arise as noted during the G20 Finance Ministers and Central Bank Governors Meeting in Fukuoka, Japan on 9 June 2019:

“While crypto-assets do not pose a threat to global financial stability at this point, we remain vigilant to risks, including those related to consumer and investor protection, anti-money laundering, and countering the financing of terrorism.”¹⁰

For Muslim communities, the shariah aspect is another essential factor in deciding whether to include this new and interesting digital asset into their financial portfolio. In simple words, if the Muslim experts and scholars said that cryptocurrency is forbidden in Islam, many Muslims will shy away from cryptocurrency, due to religious sensitivity and reasons.

In the beginning, many Muslim scholars are reluctant to embrace cryptocurrency due to many reasons.¹¹ Negative media coverage that regularly associates money laundering, scams, and criminal activities to cryptocurrency was not helpful.

In Malaysia, the Shariah Advisory Council of the Bank Negara Malaysia (SAC) is the final arbiter on all Shariah matters related to Islamic finance. The mandates of the SAC are provided under section 52 of the Central Bank of Malaysia Act 2009. On the other hand, the Shariah Advisory Council (SAC) for the Securities Commission was formed on 16 May 1996, being an upgrade of the former Islamic Instrument Study Group (IISG) which was formed in 1994.¹² The purpose of the SC's SAC is to advise the Commission on matters related to the Islamic capital market and to function as a reference centre for Islamic capital market issues.¹³ Some of the members in the Shariah Advisory Council (SAC) for the Securities Commission are also members of the Shariah Advisory Council of Bank Negara Malaysia (SAC).

The Shariah Advisory Council of the Securities Commission in 2020 has clarified that trading cryptocurrencies using licensed cryptocurrency exchanges in Malaysia is permissible from the shariah perspective. In addition, the Securities Commission has also required cryptocurrency exchanges to have licensed before they operate and has subjected them to stringent vetting to protect customers' and investors' interests. The clarify provided in the shariah and legal framework in Malaysia has, to a certain extent, instilled confidence in cryptocurrency trading among Muslim investors. Luno Malaysia, the biggest licensed cryptocurrency exchange in Malaysia has reached the size of US1 billion in 2 years of operation, with many Muslim customers and investors participating.

⁹ International regulator like the Financial Action Task Force (FATF) has issued guidelines like 'Guidance for a risk-based approach: Virtual currencies - 2015' via <https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf>

¹⁰ 'FATF focus on virtual assets' via [https://www.fatf-gafi.org/publications/virtualassets/documents/virtual-assets.html?hf=10&b=0&s=desc\(fatf_releasedate\)](https://www.fatf-gafi.org/publications/virtualassets/documents/virtual-assets.html?hf=10&b=0&s=desc(fatf_releasedate))

¹¹ For detail, see 'Chapter 11 Cryptocurrency from the shariah perspective' in Mohd Yazid bin Zul Kepli and Nur Adlin Hanisah binti Shahul Ikram, *Cryptocurrency and Digital Assets Law in Malaysia* (Sweet & Maxwell 2020)

¹² 'Shariah Advisory Council' via <https://www.sc.com.my/development/icm-v2/shariah-advisory-council>

¹³ 'Shariah Advisory Council' via <https://www.sc.com.my/development/icm-v2/shariah-advisory-council>

The associate dean of executive education and e-learning at INCEIF, Dr. Ziyaad Mohamed suggested that there are diverse views on the permissibility of cryptocurrency but noted that the potential for cryptocurrencies in Islamic finance is massive:

“For example, digital coins can represent various sustainable development projects through a cooperative scheme. By investing in these coins, investors can diversify their portfolios with investments that not only give them returns but also make a difference in people’s lives... From a shariah perspective, I think this is the ultimate goal — leveraging new technologies to benefit all parties in a legitimate, *halal* manner. This, I think, is the future of cryptocurrencies.”¹⁴

Increased cryptocurrencies adoption by the public is not without issues and challenges. There are many issues and challenges related to cryptocurrency from the inheritance law perspective.

This study reveals issues and challenges related to cryptocurrencies and digital assets from the *faraid* and inheritance law perspectives in Malaysia. Related challenges including illegal platforms and operators, illegal mining, and practical problems like identification of accounts and missing passwords are all analyzed. This study also explored the gap in the legal and regulatory framework in Malaysia, particularly in Islamic inheritance law. Results suggest that the current shariah, legal and regulatory framework is not adequate to properly protect the interest of the public, and some specific areas that need improvement were identified.

THE LEGAL FRAMEWORK

In Malaysia, cryptocurrencies are regulated by the Securities Commission Malaysia and the Bank Negara Malaysia/Central Bank of Malaysia. On 6 December 2018, a joint statement was issued by both explain the regulatory approach in Malaysia with digital currencies and digital tokens. The digital assets mentioned in the statement refer to digital currencies and digital tokens. The statement elaborated as follow:

‘SC will regulate issuances of digital assets via initial coin offerings (ICO) and the trading of digital assets at digital asset exchanges in Malaysia. Regulations are currently being put in place to bring digital assets within the remit of securities laws to promote fair and orderly trading and ensure investor protection. ICO issuers and digital asset exchanges which are involved in the issuance or dealing of digital assets with a payment function will need to comply with relevant BNM laws and regulations relating to payments and currency matters. In addition, ICO issuers and digital asset exchanges are subject to SC’s Guidelines on Prevention of Money Laundering and Terrorism Financing.’¹⁵

The division of responsibilities between the SC and BNM in Malaysia is clear. In a press statement, SC and BNM responded to the allegation of policy confusion and explained the different roles of the BNM as overseer of payment systems and the SC as the regulator of the capital market.¹⁶

¹⁴ Khairani Afifi Noordin, ‘Islamic Finance: Is cryptocurrency halal?’ (*The Edge Markets* 6 September 2018) via <https://www.theedgemarkets.com/article/islamic-finance-cryptocurrency-halal>

¹⁵ Joint Statement on Regulation of Digital Assets in Malaysia (06 Dec 2018) via <https://www.bnm.gov.my/-/joint-statement-on-regulation-of-digital-assets-in-malaysia>

¹⁶ ‘BNM and SC’s Joint Response on "Policy confusion over cryptocurrencies"’ via <https://www.bnm.gov.my/-/bnm-and-sc-s-joint-response-on-policy-confusion-over-cryptocurrencies->

In Malaysia, digital assets can fall within the boundaries of different regulators. Even though the regulation of digital assets like cryptocurrency mostly falls under the purview of the Securities Commission of Malaysia (SC), BNM still requires reporting institutions to comply with requirements specific to reporting under the Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA) and BNM's guidelines entitled 'Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6)'.

The regulators in Malaysia have taken a gradual approach in regulating digital assets in Malaysia. In 2019, the SC has issued guidelines requiring all platforms involving in cryptocurrencies trading to be registered with SC, and only licensed digital asset exchanges are allowed to operate. There are currently 4 digital asset exchanges in Malaysia; Luno Malaysia Sdn. Bhd., MX Global Sdn Bhd, SINEGY Technologies (M) Sdn. Bhd. And Tokenize Technology (M) Sdn. Bhd.

In early 2020, the SC issued framework to allows alternative fundraising using digital tokens using a registered Initial Exchange Offering (IEO) operator. In the same year, the SC issued 'Guidelines on Digital Assets' which regulates the trading of digital assets in Malaysia. The general approach adopted by the SC is to ensure strong investor protection while avoiding unnecessary barriers to innovation. IEO and Digital Asset Custodian were both regulated by the guidelines.

The approach adopted by regulators in Malaysia like the SC and BNM seems to be more conservative if compared to other jurisdictions like Singapore, Thailand, and the Philippines that adopted a more proactive approach to promoting themselves as innovation-friendly jurisdictions. In Malaysia, the priority seems to ensure the protection of public interest by preventing or reducing scams and other harmful activities. However, the current arrangement and approach between SC and BNM in regulating digital assets can also 'lead to regulatory fragmentation and pose a challenge in the form of monitoring risks and oversight of the overall digital asset ecosystem.'¹⁷

CHALLENGES WITH CRYPTOCURRENCIES AS DIGITAL ASSETS FROM THE PERSPECTIVE OF INHERITANCE LAW

Inheritance law, also called the law of succession refers to the legal framework regulating the devolution of property upon the death of the owner. In certain jurisdictions including the United States, the term probate law is also frequently used.

Some Muslim-majority countries like Malaysia adopted a dual system whereas the common law system is applied alongside the Shariah law. However, the Shariah law is only applicable to Muslims in Malaysia. The dual systems resulted in the creation of civil courts and Shariah courts. Generally, the regimes for succession in Malaysia can be divided into two – one for the Muslims and one for the non-Muslims. The succession of Muslim estate in Malaysia is regulated and governed by the *faraid* law (a branch of the Islamic law that deals with inheritance) whereas non-Muslims estates are governed by the will, statutory rules of intestacy, and sometimes a combination.

¹⁷ 'ICMR: Perspectives Development of the Digital Asset Ecosystem: Malaysia's Approach' via <https://www.icmr.my/wp-content/uploads/2021/01/ICMR-Perspectives-Digital-assets.pdf>

Concerning the inheritance of Muslims' properties, a symbiosis relationship can be seen between the civil court and the Shariah court. In Malaysia, the determination of the rights and the heirs' portion of a deceased's inheritance is based on the provisions of the Shariah laws. Accordingly, the Shariah court will issue a *faraid* certificate that clarifies who gets what.

The Faraid Certificate can be defined as 'an official declaration containing the description regarding the valuation of the deceased's inheritance and the entitled heirs who are Muslim as well as their entitled parts of the inheritance after the *faraid* calculations are verified and issued by the Syariah Court by the powers bestowed by the law'.¹⁸

The valuation of the inheritance/estate for Faraid Certificate application is essential as this determines which Court will oversee the order; the Syariah Lower Court or the Syariah High Court. For the application of Faraid Certificate registered at the Syariah Lower Court, the total estate value must not exceed one hundred thousand ringgit (RM100,000.00) while for the application of Faraid Certificate registered at the Syariah High Court, the total estate value must exceed one hundred thousand ringgit (RM100,00.00).

Cryptocurrency is a very volatile digital asset. The price of a single unit of cryptocurrency like Bitcoin can swing from around RM40,000 to almost RM300,000 in a short period. Thus, even determining the correct court to apply for Faraid Certificate can be difficult to settle.

On the other hand, many of the challenges related to cryptocurrencies from the Islamic inheritance law perspective are similar to those faced under conventional inheritance law although there are some unique challenges as well. Below are some of the many challenges of cryptocurrencies as digital assets from the perspective of inheritance law

- *The lack of law to protect cryptocurrency inheritance*

There is a lack of a comprehensive legal framework on cryptocurrency at the international level. Due to the urgent threats associated with money laundering and terrorism financing activities, international standard setters, and regulators like the Financial Action Task Force (FATF) has been issuing guidelines or standard on AML/CFT for countries to adopt. However, the level of adoption between countries varies.

Outside the anti-money laundering and counter financing of terrorism framework, things were even more fragmented. There is no uniformity at the global level in defining digital assets, the legality or illegality of such assets, the need for licensing of the trading platform, the procedure or guidelines for mining cryptocurrency, cryptocurrency taxation, and much more.

In many countries, there are no particular estate planning or specific succession law provisions on digital assets including cryptocurrency. One issue is whether cryptocurrencies are considered to have inheritable value, thus becoming part of the inheritance and transferable. A more pressing problem occurs when the lawful beneficiaries and estate administrators do not possess the private keys or means to access the deceased's cryptocurrencies. In the absence of a clear legal framework, many beneficiaries will be deprived from their rights.

In addition, the lack of consistency between countries in approaching digital assets can be troublesome. For example, Ecuador has issued legislation recognizing bitcoin as a legal tender.

¹⁸ 'Managing *faraid* application' via <https://www.malaysia.gov.my/portal/content/27709>

In China, despite the general ban on cryptocurrency trading, recent court cases have shown recognition of cryptocurrency as a legitimate personal asset.

It is essential to have a comprehensive legal framework regulating cryptocurrency inheritance as the number of cryptocurrency investors and holders consistently increases. For example, there should be a clear law clarifying the legal status of digital assets kept in a personal digital wallet which can include hot and cold wallets. There should be clarity on the legal consequences of accessing a deceased's cryptocurrency account without legal and proper authorization. It is noted that even countries with cryptocurrency regulation in place, still normally lack proper legislation on cryptocurrency inheritance.

Currently, there is a serious lack of a legal framework to protect cryptocurrency inheritance in Malaysia. There exists a real need to pass a law protecting cryptocurrency inheritance. In comparison, China has passed a new comprehensive civil code that expands the scope of inheritance rights to include cryptocurrency, such as bitcoin. The "Civil Code of the People's Republic of China" was voted and passed on during the third session of the 13th National People's Congress (NPC).

Wang Chen, vice chairman of the Standing Committee of the National People's Congress, explained during the session that:

'The compilation of the civil code is an important component of the plans of the Communist Party of China (CPC) Central Committee with Comrade Xi Jinping at the core for developing the rule of law.'

The scope of inheritance has been expanded under the new civil code to include virtual assets, such as bitcoins. In addition, several Chinese courts have recognised digital assets like Bitcoin and Ethereum to be legit properties protected by law e.g. Shanghai No.1 Intermediate People's Court has ruled that bitcoin is an asset protected by law. However, it should be noted that this decision was before the complete ban of China government on cryptocurrency in 2021.

In some countries including Spain, legislation on digital inheritance is being developed e.g., Art. 7 of the draft Charter on Digital Rights provides for the right of individuals to inherit digital assets and rights must be recognized.¹⁹

- *Circumvention of inheritance law and faraid*

From the Shariah context, it is noted that cryptocurrency, in its current form, can be used to circumvent or bypass *faraid* (Islamic inheritance law). For example, someone might possess a significant amount of bitcoin in his cold wallet. Instead of letting the bitcoin become part of his inheritance property upon his death, the dead person might instruct his lawyer to give his bitcoins to certain beneficiaries or strangers, in contravention with Islamic inheritance law.

- *Problems with digital inheritance software and third-party platform*

¹⁹ Iryna Davydova, Larysa Didenko and Viktoriya Tomina, 'Legal nature and inheritance of virtual property in Ukraine and the world: current status, problems, prospects' (2021) *Revista de Derecho*. Vol. 10 (II), pp. 19

Nowadays there are many third-party platform and software that provides for cryptocurrency inheritance services. The modest operandi can seem to be simple, but many legal implications follow. Some of this software and the third-party digital platform allow for the transfer of cryptocurrencies from the deceased account to the beneficiaries in the event of death or after a long period of inactivity.

This understandably caused a lot of problems from the legal perspective since such automatic transfer can be in contradiction with Islamic inheritance law and deprived the lawful beneficiaries of their rightful shares.

For example, a digital platform like TrustVerse enables investors to manage their cryptocurrency inheritance by enabling access to the digital assets using smart contracts, programmed with life scheduling services that automatically reach out to beneficiaries if there was inactivity in the platform for a certain period. Other examples include DigiPulse and Safe Haven.

The situation is better in cases involving a license, digital assets exchanges (DAX) like Luno Malaysia. This is because the approach adopted by such a licensed entity will be the same as the approach of other financial institutions like banks. The beneficiaries simply need to get a court order or declaration confirming that there are the rightful heirs to the digital asset in the account.

- *Problems in identifying crypto assets*

One of the biggest problems with the digital asset is in identifying the digital asset of a deceased who died without a clear will or strategy on his cryptocurrency inheritance. The total number of bitcoins in market circulation at the time of writing is around 18 million bitcoins. The bitcoin protocol allowed for the total creation of 21 million bitcoin, estimated to be in the year 2140. Currently, an estimate of 4 million bitcoin is believed to be dormant and cannot be accessed due to the death of the holders. It is also possible that the holders were still alive but lost access to the account due to missing private keys.

Digital property cannot vest with the deceased's estate administrator if it cannot be identified and accessed. There is currently around 18.5m Bitcoin in existence, and it is estimated that around 20 percent of these (worth around \$140bn) are 'lost' online, according to the cryptocurrency data firm Chainalysis.

In western countries, there are many new cases where couples fight for matrimonial assets in a form of cryptocurrency during proceedings for separation. There are many cases where former spouses alleged that their ex-partner hide the existence of digital assets like cryptocurrency which was obtained during the marriage.

There is a need to have a specific legal provision punishing spouses that give false information or declaration concerning their assets during separation which include digital assets like cryptocurrencies.

Currently, tax authorities in many countries are attempting to identify and track cryptocurrency exchanges. Cointracker explained that tax authorities in a jurisdiction like the United States are using various tools to track cryptocurrencies transactions and enforce tax compliance:

‘Tax authorities such as the IRS, ATO, CRA, HMRC, and others use a variety of techniques to track cryptocurrency transactions and enforce tax compliance. For starters, the IRS has subpoenaed domestic and international cryptocurrency exchanges such as Coinbase and Bitstamp for user transaction information. This has to lead to at least tens of thousands of cryptocurrency users’ transaction information being shared directly with the tax authorities. In addition, tax authorities, like the IRS, use data analytics tools such as Chainalysis and Palantir to pinpoint cryptocurrency users and tie their identity from a regulated cryptocurrency exchange to their off-exchange wallets and transactions (including multiple layers removed from the exchange). The IRS and other tax authorities also partner and share data with other governmental bodies, academic institutions, and international governments to share information about cryptocurrency usage.’²⁰

In reality, despite the use of such tools, the identification of digital assets are still largely difficult.

- *Problems in accessing crypto assets*

The identification of digital assets like cryptocurrency is not necessarily enough to enable access or control of such assets. This is different from other assets like money saved in a banking account. For example, concerning money saved in the banking account of a deceased, the administrator of the estate normally would face no problem in getting access and control over the money, if there is a court order. The same situation can be extended to digital assets saved in licensed cryptocurrency exchanges.

However, due to the nature of cryptocurrency, the owners or holders of cryptocurrency can keep his or her cryptocurrency outside cryptocurrency exchanges e.g., in a cold wallet, etc. To get access and control the digital assets, in most cases private keys are needed. In their simplest form, private keys can be understood as the password that enables access to digital assets. Normally, for those holding cryptocurrency outside cryptocurrency exchanges, the only way to access it is via a private key — typically a 64-digit passcode.

In the realm of cryptocurrency, the public key is not confidential as most blockchains are transparent in nature and open to public inspection. In a way, the public key is comparable to an email address. These addresses can be known to the public but access to the account is only possible by two parties; the creator of the email network and those who know the password to the email. The situation is different with cryptocurrencies like Bitcoin as the private key is only known to the holder of the Bitcoin. If the owner loses his private key, he will lose access to the digital asset. In simple words, if the private key is lost, the administrator of the estate will not be able to get access to the digital asset.

It must be noted that even with access to digital assets, there are several legal considerations including the law that prohibit unauthorized access to people’s online accounts (including crypto wallets) even when they are dead. A clearer law provision on access to digital assets is needed.

- *Problems and challenges in selling digital assets*

²⁰ Chandan Lodha and Shehan Chandrasekera, ‘The Authoritative 2020 Guide to Cryptocurrency Taxes’ (CoinTracker 16 December 2019) via <https://www.cointracker.io/blog/crypto-tax-guide>

There are many complicated legal issues associated with the selling of digital assets from the inheritance law perspective. Cryptocurrency is a very volatile digital asset, and the price movement can be very extreme. Clarity is needed on the power of the administrator of the estate to sell the digital assets of the deceased, particularly on the timing. A clearer legal framework is also needed to determine the consequences of unlawful selling digital assets of others without authorization from the criminal law perspective e.g. whether it is considered as criminal breach of trust, theft, unauthorized access to other's computer (hacking), or combinations, etc.

- Problems and challenges related to the use of will

In Malaysia, the Wills Act 1959 defines a will as:

‘A declaration intended to have the legal effect of the intentions of a testator concerning his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody, and tuition of any child’.²¹

The Wills Act 1959 only applies to the States of Peninsular Malaysia.²²

When a non-Muslim dies in Malaysia, one of two things would likely happen to his assets:

1. If he had a will, they'd be distributed to whomever he legally designated to be his successor(s).
2. If he didn't have a will, a decedent (typically a spouse) would apply for probate, and then his state would've designated an administrator to dole them out according to a formula.

In the case of a Muslim, the division of his inheritance will be subjected to the division of inheritance as provided under Islamic inheritance law. There exists a limitation to property in that he can only give away a maximum of 1/3 of his property using a will. The remaining 2/3 must still go to the beneficiaries. This is sometimes circumvented by using certain instruments like *hibah Amanah*, etc.

A will stipulates who gets what, but it generally doesn't include a comprehensive list of a deceased person's assets. It's the job of an executor — someone designated in a will, or appointed by a court — to track everything down. Traditional investments (say, savings accounts at a bank) are relatively easy to find, access, and delegate with a death certificate and other legal documentation. But digital assets like cryptocurrency poses its own challenges.

For those using the services of licensed cryptocurrency exchanges in Malaysia, the situation is much simpler. The digital assets will be dealt with using a similar process to other properties like shares etc. - A certified copy of the death certificate. The cryptocurrency exchanges normally just require the Grant of Probate (appointing an Executor) or Letters of Administration (appointing an Administrator, in cases where there is no will), a certified copy

²¹ Section 2(1) of the Wills Act 1959

²² Section 2(2) of the Wills Act 1959

of the Executor's/Administrator's identification document, and proof of address of the Executor / Administrator to proceed.

However, the situation is more complicated with unlicensed cryptocurrency exchanges. For example, in its blog, Binance, a well-known cryptocurrency exchanges, warned as follow:

‘Many smaller/new exchanges are frequently intended to be an exit scam from the beginning. They collect some deposits and run away with your funds. For this same reason, stay away from “non-profitable” exchanges or exchanges offering 0 fees, heavy rebates, and/or other negative profit incentives. If their target isn’t proper business revenues, then your funds may very well be their only target. Proper security is expensive and requires funding from a sustainable business model. Don’t skimp on security when it comes to your funds. Large profitable exchanges have no motive to perform exit scams. When you already run a profitable and sustainable billion-dollar business, what incentives would you have to steal a few million and live in hiding and fear?’²³

The warning was ironic as Binance itself was operating illegally in Malaysia. The Securities Commission Malaysia (SC) in July 2021 announced enforcement actions against Binance for operating illegally without a license.²⁴ Binance entities have been ordered by the SC to disable the Binance website, cease all media and marketing activities, and restrict Malaysian investors from accessing Binance’s Telegram group.²⁵

The situation is not unique to Malaysia. Enforcement actions were also taken by the central bank of Lithuania, the securities commissions of various jurisdictions including Hong Kong, Italy, Thailand, Canada’s Ontario province, and Brazil.²⁶ In addition, the Japanese Financial Services Agency, UK Financial Conduct Authority, and the US Justice Department and Internal Revenue Services have also taken actions against Binance’s operations in their respective countries.²⁷

In light of this development, an important legal issue arises. Can the beneficiaries in Malaysia successfully inherit the digital assets of a deceased who invested in such an illegal, albeit popular platform. Will the court assist in their claim? Will the use of legal instruments like Will help? These issues remain unresolved.

- Taxation issues

In Malaysia, cryptocurrency is recognised as part of the digital economy and is taxable under the new tax regime. According to the Inland Revenue Board of Malaysia/Lembaga Hasil Dalam Negeri Malaysia (LHDNM)’s website:

²³ ‘Keep Your Crypto #SAFU (CZ’s Tips)’ (Binance 25 February 2020) via <https://www.binance.com/en/blog/421499824684900429/Keep-Your-Crypto-SAFU-CZs-Tips>

²⁴ Sections 7(1) and 34(1) of the Capital Markets and Services Act 2007 require all DAX operators to be registered as Recognized Market Operators (RMO) by the SC before operating a Digital Asset Exchanges.

²⁵ ‘SC takes enforcement actions on binance for illegally operating in Malaysia’ via <https://www.sc.com.my/resources/media/media-release/sc-takes-enforcement-actions-on-binance-for-illegally-operating-in-malaysia>

²⁶ ‘Cheryl Poo, ‘SC clamps down on Binance for illegal operations in Malaysia’ (The Edge Markets 30 July 2021) via <https://www.theedgemarkets.com/article/sc-clamps-down-binance-illegal-operations-malaysia>

²⁷ ‘Cheryl Poo, ‘SC clamps down on Binance for illegal operations in Malaysia’ (The Edge Markets 30 July 2021) via <https://www.theedgemarkets.com/article/sc-clamps-down-binance-illegal-operations-malaysia>

'Digital economy is a term used to refer to any economy that relies on digital technology. Any commercial transactions that are done using digital technology, including data search, promotion, and advertisement, or delivery of supply of services, even when the payment and delivery associated with the transaction is done offline. Based on the definition of the digital economy, this type of business operation is not limited to online sale and purchase but also the followings: ... (14) digital currency: sale and purchase, and the creation of digital currency e.g., Bitcoin, Ripper, Ethereum, etc by seller, buyer and/or miner.'²⁸

The Inland Revenue Board of Malaysia has clarified that active cryptocurrency investors are required to declare their gains for annual income tax. However, hobbyists, etc are exempted. In Malaysia, cryptocurrency is viewed as an asset by the Malaysian tax authorities, who "have mentioned that capital gains tax will be important to deal with the taxation of cryptocurrencies, intangibles and other digital assets in the future".²⁹

From the inheritance law perspective, issues can arise when the deceased failed to declare his digital assets and failed to pay the required taxes on the cryptocurrency. In other countries, there can also be issues related to inheritance tax. Currently, Malaysia does not have any form of the death tax, estate duty or an inheritance tax. However, some countries do have inheritance tax. For example, when bitcoins are passed to an heir in a US inheritance, they are subject to a different tax rule than usual. The U.S. Internal Revenue Service (IRS) treats bitcoin as property.

The situation can be compared to the United Kingdom. In the recent policy paper 'Cryptoassets: tax for individuals', HMRC confirms that cryptoassets will be liable for inheritance tax on the death of the holder and capital gains tax on valid disposal. The policy paper sets out that while an individual is a UK resident, HMRC will treat their beneficially owned cryptoassets as located in the UK for tax purposes. This means inheritance tax will be due on their crypto, along with the other assets in their estate before a grant of probate can be obtained by the estate administrator.

From the perspective of inheritance law, the failure of a deceased to pay his tax on his cryptocurrency can be an issue.³⁰ In addition, due to the nature of cryptocurrency, determining the correct jurisdiction to pay cryptocurrency tax can be challenging. The issue of double taxation must be avoided.

CONCLUSION

This study analyzed the legal framework in Malaysia regarding cryptocurrency inheritance. The analysis suggested that the approach adopted by the regulators in Malaysia like the Bank Negara Malaysia and the Security Commission towards digital assets like cryptocurrency is generally sound and practical. Various measures were put in place to ensure the protection of

²⁸http://www.hasil.gov.my/bt_goindex.php?bt_kump=5&bt_skum=2&bt_posi=4&bt_unit=1&bt_sequ=3&cariw=

²⁹ Tan Zhai Yun, 'TheWall: Profited from trading bitcoin? Find out if you need to pay taxes' (*The Edge Malaysia* 1 March 2021) via <https://www.theedgemarkets.com/article/thewall-profited-trading-bitcoin-find-out-if-you-need-pay-taxes>

³⁰ See Kateryna Solodan, 'Legal Regulation Of Cryptocurrency Taxation in European Countries' (2019) *European Journal of Law and Public Administration*, Vol. 6.1, 64-74.

public and investors' interest. However, in relation to cryptocurrency inheritance law, much need to be done.

This study revealed various issues and challenges related to cryptocurrencies and digital assets from the inheritance law perspective in Malaysia. As Malaysia is a commonwealth country with Muslim-majority population, in addition to English common law, the Islamic inheritance law perspective is included. This study explores related challenges including illegal platform and operators, unauthorized access, hacking and other real problems like difficulty in identifying deceased's cryptocurrency account and missing passwords.

The study concluded that under the current framework, many issues will arise soon related to cryptocurrency inheritance. This is mostly due to lacuna in law in numerous issues discussed throughout the study. The result suggested that the current legal, shariah and regulatory framework is not adequate to properly protect the interest of the public. Better clarity is needed in relation to the legal status of digital inheritance software and online platform, the identification of crypto assets. In addition, problems, and issues in accessing and selling crypto assets must also be solved.