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A CALL FOR REGULATION OF ESTATE ADMINISTRATION OF CRYPTOCURRENCY IN MALAYSIA

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ABSTRACT

The positive acceptance of cryptocurrency by the public indicates their interest and enthusiasm for cryptocurrency. Nevertheless, the regulatory overlay related to cryptocurrency is still at its infancy level, posing challenges to its estate administration upon the death of the owner of a cryptocurrency, which will lead to its disappearance

and loss as it becomes impossible to be inherited. Hence, in light of this undesirable possibility, this paper aims to analyze the legal and Shariah issues on the estate administration of cryptocurrency from the perspectives of Malaysian laws and Shariah. This paper examined doctrinal research by examining relevant legal provisions, Shariah rulings, fatwa, cases, and non-legal literature on estate administration. This paper concludes that there is a lacuna in the estate administration of cryptocurrency as its regulatory framework is still new and evolving. Therefore, the legal and Shariah issues highlighted in this paper may provide some important policy implications for regulators and policymakers to fulfil the lacuna in the estate administration of cryptocurrency in Malaysia.

Keywords: Cryptocurrency, digital asset, estate administration, legal, Shariah.

INTRODUCTION

In light of the rapid advancement of information and communication technology (ICT), the first cryptocurrency, Bitcoin, was introduced by Nakamoto (2008) in a whitepaper entitled '*Bitcoin: A Peer-to-Peer Electronic Cash System*' in October 2008. The paper explains that Bitcoin is a digital currency that is a purely peer-to-peer version of electronic cash that allows online payments to be sent directly from one party to another party without going through a financial institution using cryptography as security.

Cryptocurrency is derived from the word 'crypto', which denotes to the encryption or cryptography that the instrument is built on and then added to a blockchain, whereas 'currency' refers to the recognition amongst its users as a medium of exchange or store value, as represented by the ownership of coins or tokens (Mahomed & Ramadili Mohd, 2017). According to Joshi (2015), cryptocurrency is within the definition of a digital asset, which is any property that can be found in digital format. This is supported by Zul Kepli and Shahul Ikram (2020), who define cryptocurrency as a type of digital asset – anything of value that exists in a digital format and comes with the right to use it, not currency or money. Over time, cryptocurrency has become a digital asset with financial value and is gradually being used as means of payment around the world, such as in the United States (US), Canada, and the United Kingdom (UK) (News18, 2021).

It is crucial to highlight that due to its financial value, public interest and enthusiasm in cryptocurrency have exploded recently. It was reported that the number of global crypto users reached 221 million in June 2021 (Crypto.com, 2021), and Malaysia was ranked seventh out of twenty-seven countries with the highest cryptocurrency ownership rate globally (Sooi, 2022). In addition, Luno Malaysia Sdn Bhd reported that the number of owners of cryptocurrency in its digital asset exchange increased from 180,000 in 2020 to more than 300,000 in 2021 (Zainul Aberdi, 2021). The prevalence of digital currency among its users has compelled regulators to explore and respond to public concerns, especially regarding its inheritance. For example, the public is concerned about the fate of cryptocurrencies and whether they will be inherited by their legal heirs.

Without an appropriate law to address on estate administration of cryptocurrency, a huge financial loss will occur such as in the case of the death of Gerald Cotton, the co-founder and chief executive officer (CEO) of Canadian Exchange, QuadrigaCX. His sudden death prevented anyone from accessing the 190 USD million in his cryptocurrency fund because he was the only one who knew the private key of his cryptocurrency wallet, causing QuadrigaCX to face financial difficulties and eventually declare bankruptcy (Copeland, 2019). Moreover, there is also fear of the loss of cryptocurrency due to identity theft after the owner dies if proper estate administration of cryptocurrency is not in place (Beyer & Nipp, 2019). As of August 2020, 319 identity theft cases were reported by Cybersecurity Malaysia's Cyber999 with a total of 517 cases in 2020 (Experian, 2021).

The case, such as the death of Gerald Cotton and identity theft, motivates this study to consider the estate administration of cryptocurrency in Malaysia from legal and Shariah perspectives since the regulation of cryptocurrency is still at its infancy level and most developing cryptocurrency regulatory frameworks are based on their uses as a payment, investment, derivative, and tax instrument (Ehret & Hammond, 2021). Furthermore, it is worth highlighting that the issue of frozen estates in Malaysia remains unsolved and continues to grow, for example, from RM60 billion in 2016 to RM70 billion in 2020 (Haque', 2020). Also, the Accountant General's Department of Malaysia (AGD) managed a huge number of unclaimed monies, amounting to RM8.75 billion in 2019 (Othman, 2020).

THE LEGAL VIEWS ON CRYPTOCURRENCY

Historically, before money came into existence, transactions were conducted through a barter system, which includes trading goods or services for other goods or services. Even though the system is simple and easy to be executed, in practice, it is challenging and complicated as it requires a coincidence of wants and the divisibility of exchange items to allow the demand for money to emerge (Ogachi et al., 2021).

Money is created to solve difficulties related to the barter system. Trust is the basis for people who are typically willing to take whatever is referred to as money and believe that the other party will do the same in exchange for products and services (Ogachi et al., 2021). It is defined according to three (3) key functions: (i) as a unit of account, (ii) as a store of value, and (iii) as a means of exchange (Jevons, 2017). There are several forms of money used throughout the history of mankind such as commodities, metallic money, and fiat money. Commodity, however, posed some issues such as transportation expense and difficulty, storage costs, and variations in the quality of money where debtors would particularly find it attractive to use low-quality commodities to settle their obligations which led to undesirable outcomes for creditors. Eventually, metallic money came to dominate as money over other commodities, such as gold and silver, that are more homogenous, durable, and divisible. The coinage system allowed for the standardisation and certification of metal currency. It also gave the sovereign power the option to produce coins with intrinsic worth below their nominal or facial value. For the money that was backed by the commodities, representative money, frequently printed on paper, was a physical token that was redeemed for actual goods of the same species. However, the money is no longer used when the gold standard was abandoned at the outbreak of World War I (Menger, 1982). Fiat money, like metal coins and banknotes, is known as cash. It has legal tender status, which means that its value derives from a government decision. Originally, fiat money had no intrinsic value and was not redeemable. However, the money has become scriptural because most of the money is now exchanged electronically (Cunha et al., 2017).

The evolution of money continues. Several new digital initiatives have started to question the conventional institutional limitations of money by exploiting the current wave of financial technology

developments (Fintech). The launch of cryptocurrency based on blockchain technology was a crucial breakthrough in the immediate aftermath of the financial crisis in 2008. This innovation creates the first peer-to-peer electronic cash that runs without the intermediary of any financial organization by capitalizing on the enormous development in the performance of new ICTs over the past decades (Peneder, 2021). The characteristics of cryptocurrency in simple terms are (i) decentralized online currency which is independent of the control of the government and intermediaries, (ii) the use of blockchain technology in creating cryptocurrency prevents double spending, (iii) the participants in cryptocurrency transactions can be anonymous, and (iv) the new coins are made from Hash cash style proof-of-work (Shrivastava, 2020; Zul Kepli & Shahul Ikram, 2020). The invention of cryptocurrency has triggered intense debate from a legal perspective and led to different regulations across the world (Zul Kepli & Shahul Ikram, 2020).

Berg and Potts (2019) argue that Bitcoin automates trust with blockchain and distributes ledger technologies (DLTs), rather than eliminating it. In theory, Bitcoin is intended to fulfil all three (3) functions of money. Nevertheless, due to its extremely volatile exchange rate in comparison to other currencies, its money functions are greatly hindered in practice. As a result, many people view Bitcoin as an object of speculation rather than useful money (Weber, 2018).

Ehret and Hammond (2021) compiled a compendium of cryptocurrency regulations by country (refer to Table 1). Based on the compendium, there are three (3) views on the legality of cryptocurrency among regulators throughout the world. The first view is that cryptocurrency is legal. It is because, despite that cryptocurrency is not a legal tender, its security, commodity, and virtual or digital asset result in the income from cryptocurrency being subject to the taxation of a country. The second view is that cryptocurrency is illegal, hence banned from its use for payment. The third view is undecided because no decision has yet been decided on its legality because of significant concerns about the regulations of cryptocurrency due to that cryptocurrency is not a legal tender and has failed to fulfil the function of money as a medium of exchange, a unit of account, and store of value.

Table 1

The Views of the Regulators from Various Countries on the Legality of Cryptocurrency

The regulators that viewed the cryptocurrency is mostly legal.	The regulators that viewed the cryptocurrency is mostly illegal.	The regulators that have some concern on the legality of the cryptocurrency
1. Argentina	1. Algeria	1. Ecuador
2. Australia	2. Bangladesh	2. India
3. Austria	3. Bolivia	3. Hong Kong
4. Bailiwick of Guernsey	4. China	4. Peru
5. Bailiwick of Jersey	5. Egypt	5. Russia
6. Belgium	6. Iran	6. Saudi Arabia
7. Bermuda	7. Iraq	7. Singapore
8. Brazil	8. Morocco	
9. Bulgaria	9. Oman	
10. Canada	10. Qatar	
11. Chile	11. Turkey	
12. Colombia		
13. Czech Republic		
14. Denmark		
15. El Salvador		
16. Estonia		
17. Finland		
18. France		
19. Germany		
20. Greece		
21. Hungary		
22. Indonesia		
23. Ireland		
24. Isle of Man		
25. Italy		
26. Japan		
27. Latvia		
28. Lithuania		
29. Malaysia		
30. Mexico		
31. Netherlands		

(continued)

The regulators that viewed the cryptocurrency is mostly legal.	The regulators that viewed the cryptocurrency is mostly illegal.	The regulators that have some concern on the legality of the cryptocurrency
32. New Zealand		
33. Norway		
34. Philippine		
35. Poland		
36. Portugal		
37. South Korea		
38. Spain		
39. Sweden		
40. Switzerland		
41. Taiwan		
42. Thailand		
43. United Arab Emirates		
44. United Kingdom		
45. United States		
46. Uruguay		

Source: Ehret and Hammond (2021), Sparkes (2021), and Gautam (2022)

To date, El Salvador is the only country that has legally recognised cryptocurrency as a legal tender to alleviate El Salvador’s economic problems. The implementation of cryptocurrency as a legal tender in El Salvador requires no bank access, dealing with the issue that almost seventy per cent of El Salvador’s citizens do not own a bank account. Also, cryptocurrency enables quick and cheap payment across borders as El Salvador’s citizens have to pay high transaction costs when sending money home from abroad accounts (Sparkes, 2021).

Meanwhile, there are countries that view cryptocurrency as legal, yet legally consider cryptocurrency as legal tender in their countries. Most countries issue warnings about the risks of cryptocurrency and subject cryptocurrency to anti-money laundering laws in order to avoid financing and terrorism crime.

For example, the Australian authorities are controlling the movement of cryptocurrency in order to prevent the illegal use of cryptocurrency for terrorism funding (Moorthy, 2018). In Australia, cryptocurrency is viewed as an asset and in regulating the asset, it must follow the country’s existing Know Your Customer (KYC) policy and comply

with Australia's Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act).

Cryptocurrency is also recognized as a commodity and not a legal tender in the Czech Republic. The Czech National Bank (CNB) authorizes Czech banks to offer cryptocurrency-related services, but with strict compliance with the country's Anti-Money Laundering (AML) regulations. In Estonia, cryptocurrency is recognized as a virtual currency and as one of the payment methods.

As of December 2021, the Estonia government had approved draft legislation that will amend the Estonian Anti-Money Laundering Act, with the aim to mitigate the risks related to financial crime and to build guidelines under the Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Provider by the Estonian Financial Action Task Force (FATF) (Corbett, 2022).

Japan is the most progressive country that regulates cryptocurrency. As of April 2020, they had created self-regulatory bodies for cryptocurrency established under the Japanese Payment Service Act (PSA) which are the Japanese Virtual Currency Exchange Association (JVCEA) and the Japan Security Token Offering (STO) Association. Even though Japan has not considered cryptocurrency as a legal tender, cryptocurrency is recognized as a crypto-asset and regulated under the Japanese Payment Service Act (PSA) and Financial Instruments and Exchange Act (FIEA). Like other countries, Japan regulates that cryptocurrency must comply with Japanese anti-money laundering requirements as provided under their Act on Prevention of Transfer of Criminal Proceeds (Global Legal Group, 2022).

In Malaysia, the Central Bank of Malaysia (BNM) issued an official statement that cryptocurrency is not recognized as a legal tender, hence not regulating it as the country's effort to supervise and monitor cryptocurrency (Bank Negara Malaysia, 2014). Nevertheless, in 2017, the BNM officially issued a policy paper 'Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6)' to re-regulate cryptocurrency in Malaysia. All reporting institutions, either from Malaysia or outside Malaysia, are to abide by the Malaysian Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA) as mentioned in Paragraph 4.2 of Sector 6. Cryptocurrency is then legally recognized as securities pursuant to the issuance of Capital Market and Services (Prescription of Securities) (Digital Currency and Digital Token)

Order 2019 by the Securities Commission of Malaysia (SC). The digital asset exchange (DAX) providers are subject to the Guideline on Recognized Markets (Revised in 2020) and the Capital Markets and Services Act 2007 (CMSA 2007).

The second view on the illegality of cryptocurrency is due to the danger and irreparable damages and transaction risks associated with cryptocurrency. For instance, Turkey's Central Bank bans cryptocurrency because they recognize the danger in the new practice of cryptocurrency that involves fraud; thereby, it cannot be used as a medium of payment (Erkoyun, 2021). Similarly, the Bolivian Central Bank bans all related transactions to cryptocurrency with justification to protect the public from risks, fraud, and swindles and to avoid the risk of creating economic losses (Margulies, 2022). The Central Bank of Iran also bans the trading of cryptocurrency due to money laundering and terrorism financing concerns. Due to the same reason, a new law on cryptocurrency is regulated by prohibiting Iranians from holding cryptocurrency of not more than 10,000 euros (Freeman, 2022). Also, the government of Iran bans the mining of cryptocurrency in Iran due to heavy energy consumption that affects its energy infrastructure (Haghdoost & Shahla, 2021).

The third view on the legality of cryptocurrency leads to changes in laws on cryptocurrency. For example, in Russia, earlier in 2020, the legal status of cryptocurrency was given by imposing tax against it and prohibiting its use as a medium of payment and investment. Nevertheless, in 2021, the law changes, resulting in Russian civil servants being banned from owning any crypto asset. The Central Bank of Russia also bans cryptocurrency investment due to the President of Russia's prompt warning on criminal activities related to cryptocurrency (Gautam, 2022). Although the Central Bank of Russia has launched the trial of their Central Bank Digital Currency (CBDC) named 'Digital Ruble', they propose a complete ban on all cryptocurrencies with the justification that cryptocurrency menaces the Russian monetary system. This seems to be contrary to the view of the Russian Ministry of Finance which suggests that imposing a cryptocurrency regulatory framework would be beneficial to the country (Bhattacharjee, 2022).

THE SHARIAH ARGUMENTS ON CRYPTOCURRENCY

In Islam, the definition of *mal* or property is neither explained clearly in the Al-Quran nor Sunnah of Prophet Muhammad. Thus,

its definition varies according to Islamic scholars or jurists. *Mal* or property is a term used linguistically to refer to everything that may be owned or possessed and is valuable to humans (Abu-Bakar, 2018). *Mal* is everything that is deemed desirable by humans, and they wish to acquire and store it (Al-Qaradawi, 2000). It also can be referred to as everything which is owned by humans, whether it is a corporeal (*ayn*) or a usufruct (*manfa'ah*) like gold, silver, animals, and plants as well as riding a vehicle or living in a house. And if otherwise, it cannot be considered as *mal*, including a bird in the sky, a fish in the water, and unidentified treasures inside the earth.

The majority of Islamic jurists, namely Maliki, Shafi'e, and Hanbali, view everything, whether tangible or intangible, can be considered as *mal* under certain conditions. Az-Zuhayly (2010) explains that most jurists view *mal* as something which has value and damages can be specified if it is destroyed. Hanafi jurists also view everything desirable for human beings and capable of being stored for the time of necessity as *mal*. However, they also believe that *mal* is only restricted to corporeal and physical things, and therefore incorporeal things such as rights and benefits cannot be considered *mal* (Abu-Bakar, 2018). Nevertheless, contemporary Hanafi jurists regard non-tangible things such as rights and benefits as valuable according to custom (*urf*), then can be considered as *mal* (Usmani, 2015). Rahmani (2010) states that everything can be considered as *mal* if it fulfils the following attributes: (i) it is permissible and lawful in Shariah (*mutaqawwam*), making illegal and prohibited things according to Shariah are not considered *mal*; (ii) it is capable of being owned and possessed; (iii) it is useful and beneficial; and (iv) it is automatically regarded as *mal* if the custom (*urf*) deems such thing as *mal*.

As for money, Shariah scholars refer to money as something which fulfils the attributes, namely (i) medium of exchange; (ii) unit of account, and (iii) store of value (Usmani, 2015). Money in Shariah law is a medium for exchange and to make a profit and interest by dealing with money is prohibited. The only permissible profit is generated from the exchange of goods or services with money or when different currencies are exchanged. Ibn Qayyim (1973) explains that money is created to enable the transactions of things, not because it is desired in and of itself. This differentiates money from commodities since it has no intrinsic use and purpose like commodities (Ibn Taymiyah, 1995).

The definite form of money in Islam is not defined in the Quran but the use of gold (*dinar*) and silver (*dirham*) by previous society is explained in surah Al-Imran, verse 75 (3:75), and surah Yusuf, verse 20 (12:20). Some traditional Islamic scholars such as Al-Mawardi, Abu-Ubayd, Al-Ghazali, Ibn Khaldun, and Al-Maqrizi view that money as *dinar* and *dirham* (Yuneline, 2021). In a different view, contemporary Islamic scholars categorize money into two (2) types, namely natural money and customary money. Natural money is the category of currency designed to be used as a means of exchange and possess monetary value such as *dinar* and *dirham*. On the other hand, customary money is money that is initiated specifically to serve as money and a medium of exchange that is acknowledged by people in custom. It can be divided into two (2), either commodity money or fiat money. Though the earlier refers to money that has inherent value and can be used for other purposes, it lacks intrinsic moneyness (*thamaniyyah*). Meanwhile, the latter refers to government-issued paper money that lacks intrinsic value or moneyness (*thamaniyyah*) (Abu-Bakar, 2018).

Cryptocurrency has attracted the attention of Shariah scholars, and they have conducted new research and adopted different opinions to decide on its legality from a Shariah perspective (Billah, 2019). The opinions of Shariah scholars are divided into two: prohibition and permissibility. The first view is on the prohibition of cryptocurrency. This view is issued by national fatwa councils from countries such as Egypt (*Dar al-Ifta' Al-Misriyyah*), Palestine (*Dar al-Ifta' Al-Palestiniyyah*), Kuwait, Turkey, and Indonesia (Billah, 2019; Che Rani & Salleh, 2019). The prohibition of cryptocurrency by some national fatwa councils is because cryptocurrency is not a payment instrument accepted by the public and does not fulfil the characteristics and conditions of the currency. Also, the transaction using cryptocurrency may contain the elements of uncertainty (*gharar*) and gambling (*maysir*). The sale and purchase of cryptocurrency are categorised as unknown sales (*bay' al-majhul*) and uncertainty sales (*bay' al-gharar*) as the transactions do not comply with Shariah. As a result, it is ideal to be utilized for unlawful transactions such as money laundering and gambling and has high volatility that can bring danger (*khatar*) and harm (*darar*) to its users (Che Rani & Salleh, 2019). This drives national fatwa councils such as *Dar al-Ifta' Al-Misriyyah* to prohibit the use of cryptocurrency for sale and purchase transactions, leases, and other transactions. The reasons for prohibition can be summarised as follows:

- i. Cryptocurrency is not subject to surveillance by any centralized authority.
- ii. It is against the centralized financial system in any country.
- iii. It is used as a medium to escape from the authority to carry out prohibited activities.
- iv. Cryptocurrency is widely used for drugs, money laundering, and funding armed gangs and terrorists.
- v. The transaction used is completely online electronic currency trading which is not centralized and has no physical form.
- vi. This transaction contains elements of unknown (*jahalah*) (Che Rani & Salleh, 2019; Streets, 2018).

In contrast, the second view is issued by the Mufti of South Africa and renowned experts in Islamic finance such as Mohd Daud Bakar. They believe that cryptocurrency is permissible according to Shariah and can be used in Islam (Che Rani & Salleh, 2019; Bakar, 2019). This view unanimously agrees that cryptocurrency has value (*mutaqawwim*) and price, therefore can be considered an asset (*mal*). The proponent views the permissibility of cryptocurrency based on the following justifications:

- i. Based on the legal maxim, the original is permissible (*al-asl ibahah*), therefore cryptocurrency is permissible unless there is a clear proposition that mentions its prohibition.
- ii. Cryptocurrency is a valuable asset (*mal mutaqawwim*) because the public accepts it due to its value.
- iii. There is no legal basis that money is only valid if it is issued by the authority.
- iv. Cryptocurrency replaces physical currency even though it is not issued by any government.

This viewpoint rebuts the first ground of the prohibition of cryptocurrency due to its fluctuating value, arguing that this also occurs with fiat money and stocks and it should not interfere with the price (*thamaniah*) of cryptocurrency. The proponent also argues the prohibition of cryptocurrency due to the absence of an authoritative body to issue a cryptocurrency should not be the ground for its prohibition as the absence of an authoritative body will not interfere with the value of cryptocurrency since a cryptocurrency depends on technology. As a result, this ground should not limit the law as a whole in allowing or disallowing the use of cryptocurrency (Bakar, 2019).

Further, Bakar (2019) opposes the view on the prohibition of cryptocurrency on the ground that it is not a payment instrument accepted by the public. He opines this should be assessed by a methodology in Islamic jurisprudence (*usul fiqh*) such as custom (*'uruf*) where any currency accepted and recognized by a public or a country at the international level is a currency that in accordance with Shariah law. This is the most suitable method and procedure to be used in current dealings (*muamalah*) when there is no explicit revelation and text. Meanwhile, the International Islamic Fiqh Academy (IIFA) whose opinion – particularly in the matter of Islamic finance – often carries important weight issues Resolution 237 (8/24) on electronic currency, particularly on cryptocurrency, but postpones the Shariah ruling due to uncertainties of the accurate definition of cryptocurrency, whether cryptocurrency is a product, a benefit, or an investment asset or digital asset (The International Islamic Fiqh Academy, 2019; El Maknoui & Sadok, 2021).

ESTATE ADMINISTRATION IN MALAYSIA

The locus for estate administration in Malaysia depends on the religious status of the deceased, the types of the estate (movable or immovable), the value of the estate (small estate or non-small), and the deceased death (testate or intestate). These factors shall determine the administrative bodies responsible for administering the deceased estate in Malaysia, either the Civil High Court, the Estate Distribution Division, or the Public Trust Corporation (Amanah Raya Berhad). The jurisdiction of the Shariah Court is limited to the issuance of *far-aid* certificates and any Order on any issue of *hukm syara'* related to the deceased's estate as conferred in List II, Schedule 9 of the Federal Constitution, which established the jurisdiction of Shariah Court to handle matters related to Islamic law in relation to inheritance and shall apply only to Muslims (Md Said et al., 2021).

The jurisdiction of the Estate Distribution Division in estate administration only covers small estates which refer to estates consisting entirely of immovable estates or a mix of immovable and movable estates whose value is not more than RM2 million (Md Azmi & Mohammad, 2011). In contrast, Amanah Raya Berhad has jurisdiction in the estate administration of movable estates valued at less than RM600,000, as provided under Section 17 of the Public

Trust Corporation Act 1995. Meanwhile, the Civil High Court has authority in the estate administration of non-small estates valued at more than RM2 million and movable estates valued at more than RM600,000. In addition to that, the Civil High Court has the exclusive authority to issue the Grant of Probate, a grant under the seal of the Court authorizing the executor named therein to administer the estate of the testator if the deceased left a lawful bequest, regardless of its monetary value (Ab. Aziz et al., 2014).

Halim et al. (2013) review the different procedures of estate administration in Malaysia. They found that except for the Shariah Court, other administrative bodies have the power to appoint a personal representative prior to the deceased's estate can be processed for distribution to the legal heirs. The appointment of a personal representative is governed by the Probate and Administration Act 1959. Raman (2018), Halim and Mohd Noor (2015), and Sidhu (1998) agree that a personal representative is a person entrusted with the highest level of trust and honesty in fulfilling his legal obligation to administer the deceased's estate to the process is completed. Once the letter of representation is issued, the personal representative may proceed with his duties as follows:

- i. To uphold the rights and beneficial interest of the beneficiaries in the deceased's estate by gathering, transmitting, converting, and settling the debt and liabilities of the deceased; and
- ii. To allot the balance of the deceased estate to his lawful beneficiaries (Halim, 2018).

The Probate and Administration Act 1959 also empowers personal representations with powers while carrying his duties as follows:

- i. Power to dispose property as stated in Section 60 of the Probate and Administration Act 1959.
- ii. Power to enter into a contract as provided in Section 72 of the Probate and Administration Act 1959.
- iii. Power to appropriate as provided in Section 74 of the Probate and Administration Act 1959.
- iv. Power to appoint a trustee to a minor's property as provided in Section 75 of the Probate and Administration Act 1959.
- v. Power to postpone distribution as provided in Section 77 of the Probate and Administration Act 1959.

One of the personal representative's duties is transmitting the deceased estate and in exercising this duty, the personal representative needs to oblige the specific law or regulation that governs the asset. For instance, the process of transmission of land, including acquiring any estate, share, and interest in land following to the death of the registered proprietor, is essential to the administration of the deceased estate as no personal representative is capable of executing any transfer in respect of any land, share, or interest until his name is registered therein, as provided in Section 346 (5) National Land Code 1965 (Halim, 2018).

Similarly, the process of transmission of intangible estates, such as shares, must comply with the laws and regulations provided in the Companies Act 2016, where in the event of the death of a shareholder, the personal representative will have a legal right to the shares, resulting in his shares to be transmitted to the personal representative by the operation of law as stated in Section 109 of the Companies Act 2016. This provision also requires that the transmission be registered for the personal representative to be legally recognised as having the title to the share. Halim et al. (2013) highlights that the rights of a personal representative on the shares transmitted to him are limited to each company's memorandum and article of association. Hence, in performing the duty as a personal representative, specific laws and regulations governing the kind of estate must comply.

METHODOLOGY

In order to achieve the objective of this study, doctrinal legal research methodology was conducted. The data was collected by a library-based approach. The primary data of the study were collected from Acts, Orders, Guidelines, Court cases, *Fatwas*, and Shariah rulings. This article analyzed relevant legislations relating to estate administration and cryptocurrency, namely the Probate and Administration Act 1959, the Capital Market and Services Act 2007 (Act 671), Capital Market and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019, and Guideline on Recognized Market 2015 (Revised 2020). International and local *fatwa* from the Fatwa Committee of Perlis and Perak, and Shariah resolutions issued by the Shariah Advisory Council, Security Commission Malaysia were also

collected from the official website of the respective bodies of issuing *fatwa* and rulings. Court cases were collected from an online database, the Current Law Journal (CLJ). Moreover, the secondary data of the study were collected from appropriate sources such as textbooks, journal articles, and reputable websites. To conclude, in this study, both primary and secondary data were critically and analytically scrutinized using the content analysis approach.

THE FINDINGS AND DISCUSSION

The emergence of cryptocurrency based on blockchain technology has prompted different views from regulators and scholars about its legal and Shariah status. This study found that the legal and Shariah discussion should be extended to its inheritance and administration due to several issues with regard to the estate administration of cryptocurrency.

(1) Cryptocurrency as a Digital Asset

Defining whether cryptocurrency is a digital asset or *mal* is crucial since it is the essence of inheritance, as mentioned in the hadith narrated by Abu Huraira that the Prophet Muhammad said that ‘If somebody dies (among the Muslims) leaving some property, the property will go to his heirs (Sahih Bukhari, Volume 8, Book 8, Number 755). Referring to the International Monetary Fund (IMF), digital assets are well-defined as a ‘digital representation of value, made possible by advances in cryptography and distributed ledger technology. They are denominated in their own units of account and can be transferred from peer to peer without an intermediary. ‘In other words, cryptocurrency is a digital asset according to the International Monetary Fund and it is an asset that exists virtually and is intangible (He, 2018).

Ehret and Hammond (2021) state that Malaysia is one of the countries that legally recognized cryptocurrency as a digital asset pursuant to the issuance of Capital Market and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 by the Securities Commission Malaysia (SC). Nevertheless, this Order defines digital assets as either digital currency or tokens that are prescribed as securities for the purpose of securities laws only. The terms are

defined in Regulation 2 Capital Market and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019.

2. In this Order –

‘Digital currency’ means a digital representation of value that is recorded on a distributed digital ledger whether cryptographically-secured or otherwise, that function as a medium of exchange and is interchangeable with any money, including through the crediting or debiting of an account; and

‘Digital token’ means a digital representation that is recorded on a distributed digital ledger whether cryptographically- secured or otherwise.

In addition to that, in order for cryptocurrency to be legally recognized as digital assets, as defined in the Order, it must be issued by the legally registered Digital Asset Exchange (DAX) operator, as provided in the Guidelines of Recognized Markets 2015 (Revised 2020) issued by the SC, pursuant to Section 377 of the Capital Markets and Services Act 2007 (CMSA 2007), and must be read together with subdivision 4, division 2 of part II of CMSA 2007. However, it must be considered that the production of cryptocurrency can also be done by self-mining in several ways such as the following:

- a) Installation of a special programme on a computer with sufficient video card power.
- b) Installation of special equipment and the creation of ‘farm.’
- c) Powerful computer stations to ensure the smooth operation of the system.
- d) Enter ‘pool’ – a server that unites a certain number of devices into a single whole, with subsequent division of cryptocurrency in proportion to performance, depending on the power of the equipment (Shovkhalov & Idrisov, 2021).

Nevertheless, when the definition of digital currency and digital token, as provided in Regulation 2 Capital Market and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019, is read together with the Guidelines on Recognised Markets 2015 (Revised 2020), it implies that the self-mining cryptocurrency in Malaysia is not within this definition. This study analyzed that there is a lacuna in the definition of digital assets in Malaysia as the definition is limited

to the digital assets issued by the registered DAX, as mentioned in Capital Market and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019, and does not extend to self-mining cryptocurrency. As a result, self-mining cryptocurrency may not be legally considered a digital asset and may not be inherited by the owner's legal heirs.

This study also found that although the Capital Market and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 does not regulate self-mining cryptocurrency, as of to date, there is no specific law enforced in Malaysia on banning the production of self-mining cryptocurrency. It is reported that illegal cryptocurrency in Malaysia is due to operations related to stealing electricity power and the miner can be charged under Section 427 of the Penal Code and Section 37(3) of the Electricity Supply Act 1990 (Chen, 2022).

This study viewed that a comprehensive specific law on cryptocurrency in Malaysia is still not available because the Malaysian government is taking a cautious step in regulating cryptocurrency by considering its consequences to financial industry players, internet intermediaries, and consumers (Ismail Nawang & Abd Ghani, 2021). As the regulations of cryptocurrency across countries vary and are developing, the Malaysian government is also gradually regulating cryptocurrency. This is to not hinder the innovation of cryptocurrency in Malaysia and in the effort to adopt blockchain technology by the year 2025 (Malaysian Industry-Government Group for High Technology (MIGHT), 2019).

In short, this study agrees with the view of Zulhuda and Sayuti (2017) that the government in Malaysia has taken a minimalist approach to regulating cryptocurrency in Malaysia. To conclude, regulating a comprehensive and specific law requires in-depth research on the use of cryptocurrencies by considering their working operation and associated risks.

(2) Cryptocurrency as an Asset (*mal*)

Issues with cryptocurrency can also be seen from the Shariah view. In Malaysia, the Shariah view defines cryptocurrency as a *mal*. The Shariah Advisory Council (SAC) of SC issues a resolution that both digital currency and digital tokens are recognised as *mal* according

to Shariah under the category of '*urudh*', based on the opinion of Ibn Qudamah and Bujairimi. Ibn Qudamah interprets '*urudh*' as a *mal* along with other currencies such as plants, animals, lands, and others. Bujairimi opines that '*urudh*' is anything that is exchanged with currency. However, this resolution is applied and limited to digital assets that are regulated by the SC and are not applicable to digital assets outside the jurisdiction of SC. Further, the SAC of SC resolves that only investment and trading in digital assets that fulfil Shariah requirements as set by the SAC of SC and are traded on registered DAX are permissible. Thus, the definition of cryptocurrency as a *mal* is debatable because this resolution is not extended to self-mining cryptocurrency, which is not issued by the registered DAX and falls outside of the jurisdiction of the SC.

Also, in Malaysia, the position of Islamic laws in Malaysia is in a unique position since it is construed in the Federal Constitution that Islamic laws are under the state jurisdiction and matters as stipulated in List II, Schedule 9 of the Federal Constitution, including Muslim inheritance. The Islamic law of inheritance only applies to properties that are Shariah-compliant. As a result, Salam and Rasban (2021) emphasise the importance of identifying the permissibility of property under Shariah because this determines the status of legal heirs' inheritance. With respect to that, the fatwa on cryptocurrency from every state in Malaysia is substantial to determine the inheritance of cryptocurrency by Muslims.

To date, only two (2) states have issued a *fatwa* on cryptocurrency and those are *fatwa* issued by the Fatwa Committee of Perlis in 2018 and the Fatwa Committee of Perak in 2021. Both *fatwa* unanimously agreed that the use of cryptocurrency is permissible according to *syara*'. However, this study notes that the permissibility of cryptocurrency in the *fatwa* issued by the Fatwa Committee of Perak is similar to the Shariah resolution by the SAC of SC, as the permissibility only applies if cryptocurrency is used through a registered and licensed DAX operator with the authority of Malaysia, which is SC. On the other hand, the *fatwa* issued by the Fatwa Committee of Perlis does not limit its permissibility to the cryptocurrency issued by the registered DAX. However, it specifies that this permissibility will become a prohibition if the government bans the use of cryptocurrency in the country, as well as becoming illegal under Shariah on the basis of public interest to avoid harm, as per the assessment of *ulil amri*.

Based on the Shariah resolution by the SAC of SC and the *fatwa* issued by the Fatwa Committee of Perak and Perlis, it can be argued that the unstandardised limitation of the permissibility of cryptocurrency can cause confusion among the public and Muslims, especially when it comes to the inheritance, thereby contributing to the complexity of estate administration processes, particularly when involving with the judgment of the Shariah Court. This may result in a lengthy procedure that eventually delays estate distributions to the Muslims' legal heirs, adding substantial losses and reversing the country's economic (Md. Azmi et al., 2011).

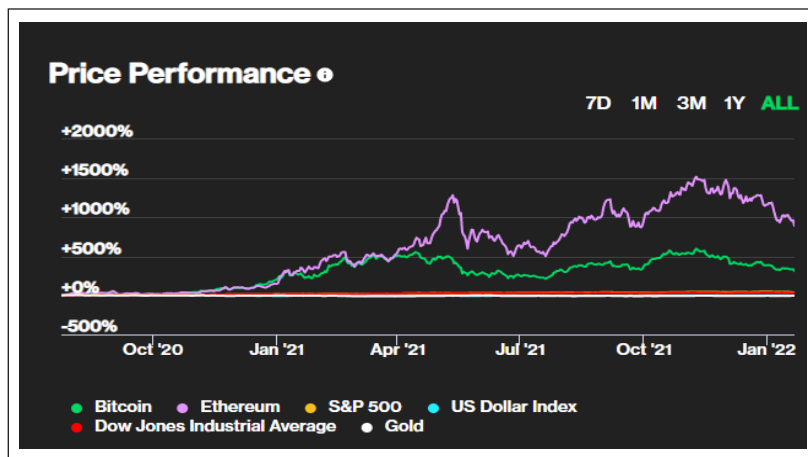
(3) The fluctuation Value of Cryptocurrency in Determining the Jurisdiction of Estate Administration Bodies

Cuervo et al. (2019) highlight that cryptocurrency is highly volatile, exposing investors and crypto-trading platforms to material market risk. Hajric and Greifield (2021) report that cryptocurrency is still prone to big fluctuation based on the past five (5) years of movements from the year 2017 to 2021.

The high volatility of cryptocurrency is displayed through its performance. For instance, as of 22 January 2022, Bitcoin recorded more than two standard deviations from its average in either direction 23 times in 2017, compared to 19 times in 2021 in the price performance of cryptocurrency (Bitcoin, 2022) (see Figure 1). The price of one (1) Bitcoin increased by 5.59 percent to \$13,755.02 on 31 October 2020. On the same day, the price of one (1) Ethereum was -6.02 at \$387.35. The price of both cryptocurrencies increased on 31 January 2021 and 30 April 2021. The price of Bitcoin escalated 155.61 per cent to \$33,297.89 on 31 January 2021 and 326.33 percent to \$55,537.13 on 30 April 2021. Also, Ethereum's price rocketed 223.33 percent to \$1,332.65 on 31 January 2021 and 570.51 percent to \$2,763.65 on 30 April 2021. However, the price of Bitcoin and Ethereum dropped on 31 July 2021, with the price of Bitcoin decreasing to \$ 41,719.60 and the price of Ethereum to \$2,488.06. Nevertheless, the price increased again in October 2021 at 369.96 percent (\$61,221.32) for Bitcoin and 939.1 percent (\$4,283.13) for Ethereum. The price eventually weakened on 31 January 2022, when the price of Bitcoin was \$37,715.25 and Ethereum was \$2,539.47.

Figure 1

Price Performance of Cryptocurrency as of 22 January 2022



Source: (Bitcoin, 2022)

Based on Figure 1, the current study is concerned with the jurisdiction of estate administration bodies when it comes to the estate administration of cryptocurrency in the near future, since the law and regulation of the estate administration of cryptocurrency in Malaysia are still silent on the subject. This concern was driven by the case of *Robert Ong Thien Cheng v Luno Pte Ltd & Bitx Malaysia Sdn Bhd* [2020] 1 LNS 2194.

In this case, the Appellant converted RM300,228 to 10.70163257 units of Bitcoin, cumulatively bringing his total Bitcoin balance in his LUNO wallet to 11.31844657. Later, he requested to withdraw 11.3 Bitcoin, and the First Respondent erroneously transferred extra 11.3 Bitcoins to the Appellant's registered Bitcoin account after having transferred the initial 11.3 Bitcoins on the same day, requiring the Appellant to return those 11.3 Bitcoins to the First Respondent. The Appellant refused and insisted to return in the form of cash of RM300,000 to the First Respondent but it was rejected by the First Respondent as the value of the Bitcoin is unstable. Based on this case, this study views that the fluctuating price of cryptocurrencies can lead to a dispute of the case, particularly when it involves the price of a cryptocurrency. Hence, without specific laws or regulations that spell out the monetary or asset jurisdiction for the estate administration

of cryptocurrency in Malaysia, there would be chaos in the estate administration of cryptocurrency relating to the fluctuation value of cryptocurrencies that is highly volatile.

(4) The power and duties of personal representatives in the estate administration of cryptocurrency

Apart from the issue of the fluctuating value of cryptocurrency, cryptocurrency is also highly exposed to fraud and identity theft (Mali & Prakash, 2020). Beyer and Griffin (2011) express their apprehension about the loss of digital assets due to identity theft. Cuervo et al. (2019) report that several crypto-trading platforms and wallet providers, including large and well-known firms, were hacked, resulting in the loss of clients and stolen tokens, with the largest loss incident involving several hundred million US dollars per incident. As a result, providers are bankrupt, and investors are at a loss. Also, Malaysia Computer Emergency Response Team (2020) revealed that the statistic of cybercrime, such as identity theft, in Malaysia is at a frightening level where 7,593 online fraud cases were reported in the year 2020.

As a result, the current study highlights that specific law and regulation on the estate administration of cryptocurrency is required, particularly on the duty of the personal representative. This study notes that none of the stipulations in Capital Market and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 has mentioned the transmission of cryptocurrency. In addition, Regulation 5 of Capital Market and Service (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 clearly mentions that a digital currency and digital token are not share, debenture, or unit trust.

‘Digital currency and digital tokens are not share, etc.

5. For the purpose of securities laws, a digital currency and digital token that are prescribed as securities under this Order that is offered or traded on or through a recognized market is not –

- (a) A share in or debenture of, a body corporate or an unincorporated body; or*
- (b) A unit trust scheme or prescribed investments scheme.*

This study views that the above stipulation indicates that the law of transmission of shares, debentures, or trust to a personal representative

upon the death of the shareholder cannot be applied in the event of the death of the owner of a cryptocurrency.

This study opines that the transmission of cryptocurrency to a personal representative must be carefully done in order to avoid fraud and identity thefts that can cause injustice and loss to legal heirs. This issue must be given serious attention since the concept of anonymity is applied in a cryptocurrency system, where the transaction performed in this system are anonymous and the identities of individuals and products traded are kept confidential (Shovkhalov & Idrisov, 2021). The tendency of fraud caused by a personal representative is higher in the absence of specific laws and regulations for the estate administration of cryptocurrency.

CONCLUSION

Due to its popularity and financial value, the number of cryptocurrency users is increasing. Although the ownership of cryptocurrency in Malaysia is still in its infancy, the trend shows that it is significantly increasing from time to time. In the near future, the issue of inheritance of cryptocurrency and its estate administration will arise following the death of its owners, particularly due to the increased number of cryptocurrencies (Genders & Steen, 2017). Among the crucial issues that might be disputed is the definition of cryptocurrency which determines the inheritability of cryptocurrency in Malaysia. So far in Malaysia, the definition of cryptocurrency comprises cryptocurrency issued by legally registered DAX pursuant to Guidelines on Recognised Markets 2015 (Revised 2020). This study viewed that cryptocurrency in Malaysia can be acquired by self-mining or from the registered DAX. The validity of the inheritance of cryptocurrency may be questioned if it is a self-mining cryptocurrency as it is not within the legal definition of cryptocurrency. However, there is no specific provision on its illegality. This study suggests a regulation of a specific definition of cryptocurrency that relates to inheritance in Malaysia.

Similarly, it is important to determine the definition of cryptocurrency according to the Shariah perspective. In the case of Malaysia, fatwas on the permissibility of cryptocurrency are issued by two (2) state fatwa committees, which are Perlis and Perak. This study notes the

different scope of the permissibility of cryptocurrency given by respective state fatwa committees and believes that this may cause confusion to Muslims when it comes to the issue of inheritance.

Apart from that, the fluctuating price of cryptocurrency also may cause disputes in determining the jurisdiction of estate administration of cryptocurrency if there is no specific provision to regulate this issue. This issue will eventually cause another delay in the distribution of the estate of cryptocurrency to heirs.

Another crucial issue highlighted in this study is the exposure to identity theft. The power and duties of a personal representative in the transmission estate of cryptocurrency may lead to the identity theft of cryptocurrency, resulting in loss to legal heirs if there is no specific provision on it. In addition, the risk of identity theft and fraud is high because of the applied concept of anonymity in the working operation of cryptocurrency.

In view of the issues highlighted and discussed in the current study, researchers urge the development of specific laws and regulations for estate administration in accordance with the *maqasid* Shariah on the protection of *mal*, so that it can be distributed accordingly to legal heirs as provided by Shariah.

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