



Strathmore University

Law School

**CONSUMER PROTECTION IN THE REALM OF DECENTRALISED VIRTUAL
CURRENCIES: A
COMPARATIVE ANALYSIS OF SOUTH AFRICA AND KENYA'S REGULATORY
APPROACHES.**

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By

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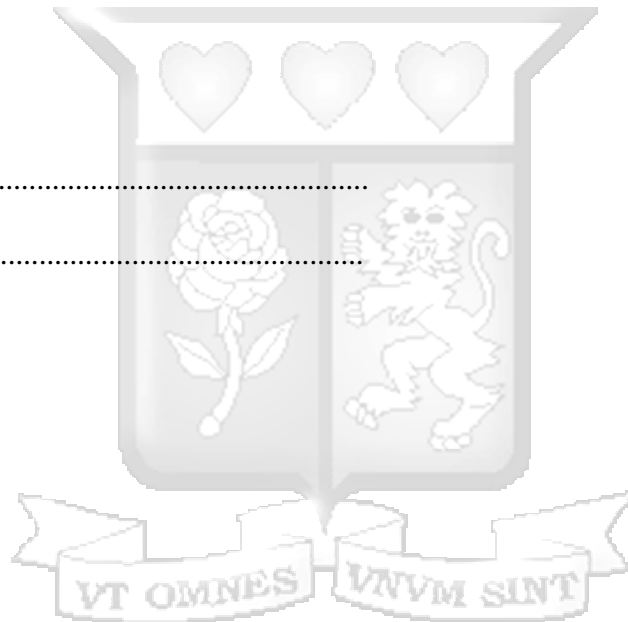
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Declaration

I, KOECH IVY KNIGHT JEPKEMOI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

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[Supervisor's Name]

List of Abbreviations

DVC- Decentralised Virtual Currency

SARB- South Africa Reserve Bank

IT- Information Technology



List of legal Instruments

South Africa

Financial Institutions (Protection of Funds) Act (No. 28 of 2001)

Financial Intelligence Centre Act (No. 38 of 2001)

Electronic Communication and Transactions Act (No. 25 of 2002)

Financial Advisory and Intermediary Services (No. 37 of 2002)

Regulations of Interception and Provision of Communication-Related Information Act (2002)

Consumer Protection Act (No. 68 of 2008)

Financial Markets Act (No. 19 of 2012)

Protection of Personal Information Act (No. 4 of 2013)

Kenya

Constitution of Kenya (2010).

Competition Act (No.12 of 2010).

Central Bank of Kenya Act (No.10 of 2010).

Consumer Protection Act (2012)

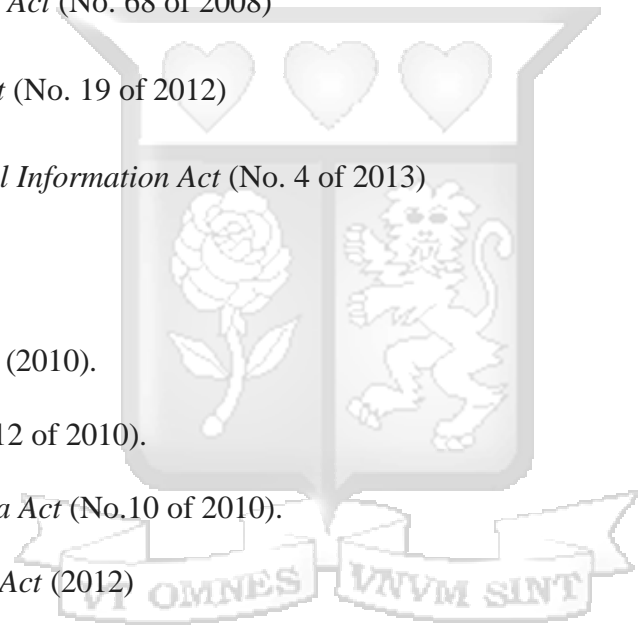
Money Remittance Regulations (2013).

Banking (Amendment) Act (No. 25 of 2016).

Capital Markets Act (No. 15 of 2018).

Computer Misuse and Cyber Crimes Act (No 5. of 2018).

Data Protection Act (No. 24 of 2019).



List of Cases

Scheme Ltd v West Bromwich Building Society (1998) The United Kingdom House of Lords.

Lipisha Consortium Limited & Another v Safaricom Limited (2015) eKLR

Wiseman Talent Ventures Limited v Capital Markets Authority (2019) eKLR

Altcoin Trader Ltd v Neil John Basel (2022), High Court of South Africa



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Abstract

Innovations in technology have evolved in different fields that exist. The financial world has witnessed a disruption introduced by virtual currencies such as Bitcoin, Litecoin and Ethereum. They have emerged as digital representation of financial value alongside fiat currencies. Virtual currencies operate on blockchain technology, allowing for peer-to-peer transactions without central government intermediaries, such as central banks. Despite their increasing popularity in Kenya, the decentralised nature of these virtual currencies has posed a great challenge in terms of consumer protection and in terms of investment security. The study's aim is to investigate the risks and regulatory challenges posed by virtual currencies, by comparing the approaches adopted by Kenya and South Africa. The interest of the comparison is that both countries have had the need to find a regulatory solution in order to mitigate the risks that come with DVCs. This study will use the conceptual framework called the libertarian- public interest. The choice of the concept is determined by the fact that it combines the libertarian idea of disruptive innovation and public interest, which is the foundation of consumer protection.

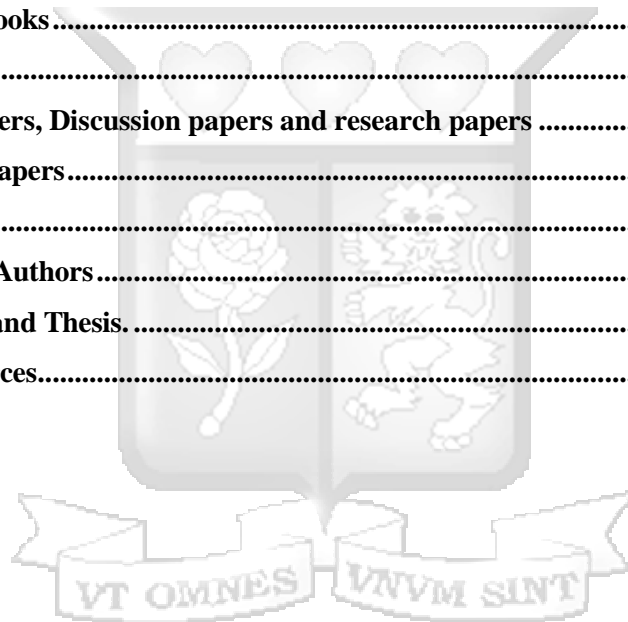
Through a qualitative, desk-based methodology, the study will analyse the distinct nature of decentralised virtual currencies, including their major characteristics such as anonymity and fraud risks. The study will use data from primary sources such as the Constitution of Kenya to relay the rights of consumers, and the various statutes of the selected countries under the scope of approach and decisions of courts in matters related to disruptive technology. Further, the study will utilise the secondary sources such as books, scholarly articles, reports from renowned financial organisations and research papers to bring out the general approaches. The research hopes to demonstrate the appropriate regulatory approach that would balance the disruptive nature of DVCs and the protection of its consumers.



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1.0. INTRODUCTION

1.1 Background.

In economic terminologies money has always been viewed as a unit of account, a mode of payment, and a medium of exchange.¹ Its legitimised source of value is established by society through a shared understanding of what is considered an acceptable form of payment, rather than being reliant on the tangible elements involved.² More often than not money is used in its physical form by use of banknotes and coins and is backed by sovereign debts, also known as *fiat* currency or hard assets such as gold. However, as money, markets, and finance have evolved, they have had a crucial relationship with technology.³ This has led to the financial technological innovation of virtual currency.

Virtual currency has been defined as a digital depiction of value, which is neither issued by a central bank or governmental body, nor inherently linked to traditional fiat currencies, but functions as a medium of exchange and can be electronically transferred, stored, and traded.⁴ Virtual currencies can be broadly categorised into two distinct forms: centralised and decentralised. Centralised virtual currencies are rooted on traditional financial systems and are typically overseen by a central administrator, who acts as the currency issuer. In contrast, Decentralised Virtual Currencies (DVCs), emerged as a response to the global financial crisis of 2007-2009, a period where public trust in traditional banking institutions was severely eroded.⁵ An individual or group operating under the pseudonym Satoshi Nakamoto took this opportunity and introduced Bitcoin, with the intent of supplanting the conventional role of banks and establishing a more transparent, equitable, and efficient payment system.⁶

¹ Desan C, *Making Money: Coin, Currency, and the Coming of Capitalism*, Oxford University Press, London, 2014, 1.

² Eatwell J, Milgate M, Newman P and Palgrave R, *The New Palgrave: A Dictionary of Economics*, Macmillan, Stockton Press, London, New York, 1987.

³ Baldwin J, 'In digital we trust: Bitcoin discourse, digital currencies, and decentralised network fetishism', 4 *Palgrave communications*, 1, 2018, 2.

⁴ European Banking Authority, *EBA Opinion on Proposal by EU Commission Regarding Virtual Currencies And 4AMLD*, 2016, 1.

⁵ Ross E, 'Nobody Puts Blockchain in a Corner: The Disruptive Role of Blockchain Technology in the Financial Services Industry and Current Regulatory Issues' 25 *Catholic University Journal of Law and Technology*, 2, 2017, 5.

⁶ Ross E, 'Nobody Puts Blockchain in a Corner: The Disruptive Role of Blockchain Technology in the Financial Services Industry and Current Regulatory Issues', 5.

DVCs, exemplified by Bitcoin, have replaced the central administrator with a distributed ledger system known as the "blockchain."⁷ This blockchain technology serves to authenticate and record transactions in a decentralised manner. This method ensures the integrity of the transaction ledger, a function that is traditionally maintained by a central authority, through the application of cryptographic principles and mechanisms.

In Kenya, cryptocurrency has become a household name due to its growth in popularity and use. In the first part of 2020, there was a 199% increase in cryptocurrency trading of virtual currency⁸ and by the end of the year Kenya was ranked first globally for peer-to-peer cryptocurrency trading, and fifth worldwide for total cryptocurrency activity.⁹ Furthermore, Kenya is reported as one of the countries that holds the largest amount of DVCs, at an approximate of 163.3 billion Kenyan Shillings.¹⁰ The evidence shows the increased use of cryptocurrency by the citizens who can either be categorised as an investor or a trader. Therefore, for the purpose of this case can be termed as consumers.

Similarly, in South Africa over the years, there has been an increased use of decentralised virtual currency. For instance, there are approximately 550,000 – 650,000 South African active cryptocurrency users, 60,000 of whom invested in cryptocurrencies in 2018.¹¹ Moreover, at the outset, South Africa has hosted five 'Blockchain Africa' conferences since 2015, offering training on bitcoin and blockchain technology under the training institute of The Blockchain Academy.¹² However, its increased use has also paved the way for its accompanying risks. These risks were first highlighted in the South Africa's Reserve Bank (SARB) 'Position Paper on Virtual Currencies' and the notice issued by National Treasury in 2014, which include the use of cryptocurrency as both a tool and target for traditional financial crimes, and cybercrimes.¹³ The recent case of a Bitcoin exchange company, called BTC Global, which

⁷ Corporate Finance Institute Team, 'Virtual Currency' Corporate Finance Institute, 2022 <https://corporatefinanceinstitute.com/resources/cryptocurrency/virtual-currency/> on 22 February 2023.

⁸ Crypto Guru, 'Bitcoin Adoption in Africa Is Setting All-Time Highs Every Week', 1 July 2020 <https://bitcoinke.io/2020/07/africa-p2p-volume-gains/> on 22 February 2023.

⁹ Crypto Guru, 'Kenya Ranked Top 5 in the World on Global Cryptocurrency Activity', 14 September 2020 <https://bitcoinke.io/2020/09/kenya-top-5-globally/> on 22 February 2023.

¹⁰ Kenyan Wall Street, 'Kenya among the few countries in the world with highest per capita holding of Bitcoin', 8 October 2019

[Kenya among the few countries in the world with highest per capita holding of Bitcoin - Citi - Kenyan Wallstreet](https://www.wallstreetkenya.com/kenya-among-the-few-countries-in-the-world-with-highest-per-capita-holding-of-bitcoin-citi-kenyan-wallstreet) on 22 February 2023.

¹¹ S Beckbessinger & S Dingle 'Research Report: South Africans, Cryptocurrencies and Taxation', May 2018, <https://www.blockchainacademy.co.za/wp-content/uploads/2018/09/SA-Cryptocurrencies-Research-Report.pdf> on 31 August 2023.

¹² Shandu S, 'Acta Criminologica' 32 *Southern African Journal of Criminology*, 2, 2019, 46, 50-57.

¹³ Shandu S, 'Acta Criminologica' 46, 50-57.

defrauded South African investors of 1 billion Rand¹⁴, is clear evidence that the use of cryptocurrencies for illicit activities within South Africa is on the horizon. Other risks include terrorist financing, circumvention of exchange controls, the increase of undetected illicit financial flows, tax evasion, and market integrity.¹⁵

As a result of the increasing risks and increased use of DVCs by citizens, regulatory bodies have attempted to regulate them. However, the decentralised and disruptive nature of the decentralised virtual currencies has left the regulatory bodies in a dilemma: whether there is a need for it to be regulated and if so, should it be incorporated in the existing regulatory system to cover it or create a whole new regulatory system. This is because the nature of cryptocurrency does not allow them to be categorised under any existing financial regulation, as legally, cryptocurrencies do not qualify as fiat currency, legal tender, electronic money, or securities.¹⁶

1.2 Statement of Problem.

Article 46 of the *Constitution of Kenya (2010)* provides for the rights of consumers, where the parliament is tasked with the duty to enact legislation to protect their economic interest. Further, the *Consumer Protection Act, 2012* provides a detailed mechanism in compliance with the constitutional provisions. However, the consumers of virtual currencies face risks resulting from the fact that DVCs, by nature, are not regulated. This is because their decentralised character is a claim against any centralised regulation as the field of DVCs is deemed to be self-regulated. Nonetheless, the risks such as fraud, financial terrorism, money laundering and the existence of pyramid schemes typical to the cryptocurrency industry, seem to warrant some form of regulatory protection of the consumers. Therefore, the main problem is whether it should be regulated. If yes, which type of regulation and if not, what approach can be taken to protect the consumers.

¹⁴ M Toyana 'South Africa investigates R1bn Bitcoin Ponzi scam' Money web, 25 May 2018 <https://www.moneyweb.co.za/news/companies-and-deals/south-africa-investigates-80m-bitcoin-scam/> on 30 August 2023.

¹⁵ Crypto Assets Regulatory Working Group, *Consultation Paper on Policy Proposals for Crypto Assets*, 2019, 6.

¹⁶ Crypto Assets Regulatory Working Group, *Consultation Paper on Policy Proposals for Crypto Assets*, 2019, 21.

1.3 Main Aim

Taking into account the decentralised nature of virtual currencies, the main aim of this study is to find an approach that will protect the interest of the consumers against the multifaceted risks posed by the disruptive character of virtual currencies.

1.4. Research Objectives

1. To analyse the unregulated nature of DVCs, from the point of view of the legal framework on consumer protection both in Kenya and South Africa.
2. To examine court jurisprudence in matters of consumer protection in the face of the risks posed by the decentralised virtual currencies.
3. To present the findings and give recommendations on the best mechanism that Kenya can adopt to protect the interest of the consumers and adapt the nature of decentralised virtual currencies.

1.5 Research Questions.

1. From the point of view of legal consumer protection, to what extent can there be a compatibility between regulation and decentralised virtual currencies: and how does Kenya's approach compare to South Africa's?
2. What kind of jurisprudential standards have been set by Kenyan and South African courts in the determination of cases regarding DVCs?

1.6 Hypothesis.

The research is premised on the hypothesis that while it is understandable for decentralised virtual currencies to remain so, they pose too high a risk to the consumers and, therefore, some form of protection should be devised.

1.7 Justification

The literature that exists in the field of DVCs, so far, mostly focuses on the problem of criminal activities surrounding virtual currencies. There seems to be a gap in knowledge when it comes to a legal approach to understanding the technicalities of the self-regulatory nature of DVCs.

This research hopes to contribute to the existing knowledge, by exploring those technicalities from the point of view of the law and hopefully offer insight on regulatory improvement.

1.8 Conceptual Framework: The Libertarian- public Interest concept of regulation.

This conceptual framework that analyses the objectives of the research is made up of the public interest concept and the minimal intervention concept of innovation. The first concept coined by Deegan¹⁷, consists of the idea that governments have a duty of encompassing public interest when preparing regulations. This concept will be used to analyse virtual currencies from the perspective of public interest. While the second concept coined by Arnold, proposes that government intervention should be minimised in matters of freedom of innovation.¹⁸ The research applies the concept to examine the level of intervention required in terms of DVCs as a disruptive technology.

1.9 Literature Review

Most literature, on the regulation of decentralised virtual currencies, have focused on assessing the gap of the omission to regulate criminal activity related to virtual currencies, on matters of anti-money laundering, and combating the financing of terrorism.¹⁹ The literature consequently proposes the legal recognition and adoption of a regulatory framework, so as to support the recognition of virtual currencies²⁰ and improve security. The latter can be achieved by ensuring the that illegitimate use and application of cryptocurrencies is less attractive and downright painful for any offenders²¹ and lastly to boost investor confidence.²² Although Kibwage has somehow touched on this research topic by reviewing the consumer protection laws in Kenya, to try and encompass DVCs²³, she does not dive into the technicalities of the self-regulatory nature of DVCs.

¹⁷ Deegan C and Unerman J, *Financial Accounting Theory*, 2nded, McGraw-Hill Higher Education, Berkshire, 2011, 73.

¹⁸ Arnold G, 'Libertarian Theories of the Corporation and Global Capitalism' 48 *Journal of Business Ethics* 2, 2003, 156.

¹⁹ Munyua A, 'The model of regulation for virtual currencies in Kenya' unpublished LLM Thesis, University of Nairobi, 2021, 5.

²⁰ Samora M, 'The Regulation of Virtual Currencies in Kenya' Unpublished LLM Thesis, University of Nairobi, 2019, 3.

²¹ Kamau C, 'The cryptocurrency Market in Kenya: A Review of Awareness and Participation by the Youth', 12 *Journal of Asian Business Strategy* 1, 2022, 1.

²² Kamau C, 'The cryptocurrency Market in Kenya: A Review of Awareness and Participation by the Youth', 1.

²³ Kibwage C, 'Consumer Protection in Kenya in the age of decentralised virtual currency' Unpublished LLM Thesis, Strathmore University, 2021, 3.

1.9.1: On Decentralised Virtual Currency as a Disruptive technology

Limba and Stankevicius define disruptive technology as an innovation that is technologically straightforward, comprised of readily available components assembled in a product structure that is often simpler than preceding methodological approaches.²⁴ They further contend that disruptive technology is an innovative use of “technology” in management, marketing and investment transforming inputs into higher value products or services.²⁵ Christensen and Bower subsequently offer a more straightforward interpretation of disruptive technology, defining it as any technology that plays a critical role in a disruptive innovation.²⁶ Treinovskis provides a contemporary definition, characterising it as an economic process that clash with legal regulations.²⁷

The integration of information technology (IT) into platform-based systems has cultivated ecosystems that yield inventive derivative products, causing a disturbance in the established norms of conventional market structures.²⁸ Blockchain, is the latest disruptive innovation that has caught scholars’ attention.²⁹ It functions as a decentralised, digital ledger that enables direct peer-to-peer transfers of various forms of value, ranging from digital currency to tangible assets like commodities and land titles without necessitating an intermediary.³⁰ To conceptualise the swift progression of blockchain technologies, swan categorizes activities into three groups: digital payment systems, cryptocurrency contracts facilitating advanced value transfers, and the broader application of blockchain in areas like government, health, science, arts and culture.³¹

Given the potential negative consequences of technological disruption, there exists an absence of global agreement on DVCs posing societal threat.³² Advocates including developers,

²⁴ Limba T, Stankevicius A, ‘Cryptocurrency as Disruptive Technology: Theoretical Insights’ 6 *Entrepreneurship and Sustainability Issues* 4, 2019, 2069.

²⁵ Limba T, Stankevicius A, ‘Cryptocurrency as Disruptive Technology: Theoretical Insights,’ 2069.

²⁶ Christensen C and Bower J, ‘Customer Power, Strategic Investment and Failure of Leading Firms’ 17 *Strategic Management Journal* 3, 1996, 5.

²⁷ Treinovskis J and Amosova J, ‘Some Aspects of Criminal Environmental Impact on Sustainable Entrepreneurship Activities’ 4 *Entrepreneurship and Sustainability Issues* 1,2016, 19.

²⁸ Kazan E, Tan C and Lim E, ‘Towards a Framework of Digital Platform Disruption: A Comparative Study of Centralised and Decentralised Digital Payment Providers’ 25th Australian Conference on Information Systems, Auckland, 8-10 December 2014,1.

²⁹ Baker J, White P, Adams P, Mentako J, Ha D and Green S, ‘Blockchain as a disruptive technology for business: A systematic review’ 51 *International Journal of Information Management* 102029, 2020,1.

³⁰ Baker J, White P, Adams P, Mentako J, Ha D and Green S, ‘Blockchain as a disruptive technology for business: A systematic review,’2020,1.

³¹ Swan M, *Blockchain: Blueprint for a New Economy*, 1st ed, O’ Reilly Media, Sebastopol, 2015, 5.

³² Limba T, Stankevicius A, ‘Cryptocurrency as Disruptive Technology: Theoretical Insights,’ 2069.

entrepreneurs, and technology enthusiasts assert that blockchain holds the capability of reshaping the current economic, legal, political, and cultural landscape.³³ Conversely, sceptics contend that the concept and its implementations remain vague and uncertain.³⁴ Scientists and researchers recognize it as an enhanced alteration, shifting from dependence on a sole custodian towards achieving a system-wide consensus through ongoing accumulation of conceptual proof of work.³⁵ Nevertheless, they also highlight the potential disruptive consequences.

As the above literature shows there are different perceptions of the implications of disruptive technology in the context of any possible regulatory framework.

1.9.2: On Consumer protection issues raised by Decentralised virtual currencies.

Ponsford argues that DVCs introduce substantial and distinctive challenges related to consumer protection, particularly due to their heightened transactional anonymity in contrast to conventional financial exchanges.³⁶ A May 2014 report reiterated these concerns, emphasizing that the anonymity risk arises from the fact that, peer-to-peer bitcoin transactions do not mandate the disclosure of user identity information, hence, providing participants a degree of anonymity.³⁷ Moreover, software can encrypt and anonymise computer network communication, further concealing the identities of transaction parties,³⁸ which could lead the currency to be used for criminal purposes.³⁹ As Scott asserts, the anonymity makes it difficult for it to be facilitated within a consumer protection framework and measures, such as anti-

³³ Baker J, White P, Adams P, Mentako J, Ha D and Green S, 'Blockchain as a disruptive technology for business: A systematic review,'2020,1.

³⁴ Baker J, White P, Adams P, Mentako J, Ha D and Green S, 'Blockchain as a disruptive technology for business: A systematic review,'2020,1.

³⁵ Baiyere, A, Donnellan, B, Hevner, A, Smith, C, and Stikeleather, J, 'Disruptive Innovations and IT: Wicked yet Empowering combination' Thirty Sixth International Conference on Information Systems, Puerto Rico, 13-15 august 2015,4.

³⁶ Ponsford M, 'A Comparative Analysis of the Bitcoin and other Decentralised Virtual Currencies: Legal Regulation in the People's Republic of China, Canada, and the United States' 29 *Hong Kong Journal*, 9, 2015,33.

³⁷ United States Government Accountability Office (USGAO), *Report to the Committee on Homeland Security and Governmental Affairs, U.S. Senate, Virtual Currencies: Emerging Regulatory, Law Enforcement, and Consumer Protection Challenges*, May 2014, 9.

³⁸ United States Government Accountability Office (USGAO), *Report to the Committee on Homeland Security and Governmental Affairs, U.S. Senate, Virtual Currencies: Emerging Regulatory, Law Enforcement, and Consumer Protection Challenges*, May 2014, 10.

³⁹ Reuben Grinberg, 'Bitcoin: An Innovated Alternative Digital Technology, 4 *UC Science and Technology Journal* 159, 2012,168- 176.

money laundering (AML) or know-your-customer (KYC) policies, because they are not inherent to the system.⁴⁰

DVCs also raise additional consumer protection apprehension outside of the potential for loss in connection with a payment or transfer,⁴¹ a difficulty in reversing transactions⁴², where if they are sent to the wrong public address via “fat-finger” errors, the consumers are not insured.⁴³ Since the nature of DVCs transactions does not admit any recourse, it has been proved to create consumer risk as it eliminates the traditional credit card protections for purchasers.⁴⁴

On the other hand, disintermediation presents notable consumer vulnerabilities, notably the potential for fraudulent activities, particularly in the absence of an effective regulatory legal framework. significant consumer risks, such as fraud, in the absence of a functional regulatory legal regime.⁴⁵ Many have expressed a concern that the DVCs operate independently from any governmental authority; it lacks the safeguards necessary to ensure consumer safety or the prevention of fraud.⁴⁶ Another recurring issue is how to engender sufficient consumer trust and confidence in a new form of payment service considering the fact that it is considered a new and disruptive technology.⁴⁷

On the contrary, the prediction of the evolution of DVCs stated that public ledger currency platforms will tend to lead to the emergence of the same kinds of firms, with the same kinds of regulatory and consumer protection issues, as have traditionally existed in the financial services sector.⁴⁸ However as we have seen this is not the case, as DVCs have a unique and distinct nature, the consumer protection issues that have been raised have also been slightly different as compared to the traditional financial exchanges.

⁴⁰ Scott D, 'Cryptocurrency Regulations and Enforcement in the U.S' 45 *Western State Law Review* 1, 2017,1.

⁴¹ Tu K and Meredith M, 'Rethinking Virtual Currency Regulation in the Bitcoin Age' 90 *Washington Law Review* 1, 2015, 333.

⁴² Hill A, 'Bitcoin: Is Cryptocurrency Viable?' Unpublished CMC Thesis, Claremont McKenna College, Claremont, 2014, 1 and 2.

⁴³ Scott D, 'Cryptocurrency Regulations and Enforcement in the U.S,'1.

⁴⁴ Tu K and Meredith M, 'Rethinking Virtual Currency Regulation in the Bitcoin Age,' 333.

⁴⁵ Pflaum I and Hateley E, 'A Bit of a Problem: National and Extraterritorial Regulation of Virtual Currency in the Age of Financial Disintermediation' 45 *Georgetown Journal of International Law* 1, 2014, 1169.

⁴⁶ Tu K and Meredith M, 'Rethinking Virtual Currency Regulation in the Bitcoin Age,' 314.

⁴⁷ Bollen R, 'The Legal Status of Online Currencies: Are Bitcoins the Future?' 'Regulations and Corporate Governance Conference, Melbourne Business School, 2016, 37.

⁴⁸ Evans D, 'Economic Aspects of Bitcoin and other Decentralised Public ledger Currency Platforms' University of Chicago Coase- Sandor Institute for Law and Economics, Working Paper Number 685, 2014, 17 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424516 on 7 March 2023.

In summary the surveyed literature indicates that there are two divergent positions: the recognition of DVCs as non-regulatory in nature and the recognition of the risks that it poses to the consumers.

1.10 Methodology

This study will generally be desk-based and qualitative in nature. It will therefore rely on primary sources such as The Constitution to relay the rights of consumers, and the various statutes of Kenya and South Africa such as the Capital Markets Act 2012 and Financial Markets Act 2019 respectively. The study will also use secondary sources such as books, journal articles, working papers from renowned financial organisations, chapters in books and research reports. For the first research objective, a deductive research approach will be employed to analyse the unregulated nature of decentralised virtual currencies within the legal framework of consumer protection in both Kenya and South Africa. For the second objective, I intend to conduct a critical analysis of the jurisprudence that has been set by Kenyan and South African courts on matters of risks that arise due to decentralised virtual currencies. Finally, in my last Research Objective, I will use a deductive approach, which will be in accordance with the results from the analysis made.

1.11 Limitations of the research

There exists the challenge of finding court jurisprudence regarding DVCs. This is because there is a relatively small number of cases that have been decided in the specific jurisdictions of Kenya and South Africa. Therefore, the researcher will use the provided cases to analyse the trajectory taken by the courts.

1.12 Chapter Breakdown

Chapter one will form the first chapter of this study. It features, among others, the background, problem statement, the research objectives and research questions, the conceptual framework, literature review as well as the methodology and the justification of the research.

Chapter two discusses the conceptual framework, which will entail expounding on the libertarian-public interest concept of regulation to analyse the problem stated.

Chapter three will examine the research objective concerning legal framework on consumer protection both in Kenya and South Africa in order to analyse the unregulated nature of the decentralised virtual currency.

Chapter four analyses the objective of addressing the jurisprudence of the courts in Kenya and in South Africa in determination of matters of consumer protection in the face of the risks posed by the decentralised virtual currencies.

In the final chapter, the research will present findings, subsequent recommendations and the conclusions of the research.



2.0. CONCEPTUAL FRAMEWORK

This study will be examined using the public interest concept of regulation and the minimal intervention concept of innovation. The former is based on the idea that governments have a duty of encompassing public interest when enacting regulations, and the latter proposes that there should be minimal intervention by the government in order to protect the freedom of innovation.

2.1 The public interest concept of regulation

According to Feintuk, the concept of public interest is deemed to be a central aspect of regulatory intervention.⁴⁹ Public interest in this case is described as those concerns which people have in common as members of the public.⁵⁰ On the other hand, regulation means the control of behaviour through the setting and enforcing of standards, a jurisdiction of the government, as it is the only body that possesses the sanctioning mechanism of law.⁵¹ Deegan therefore proposes that governments have a duty to encompass public interest in the enactment of regulations.⁵² These regulations will then wholesomely benefit the society as opposed to special skewed interest.⁵³

Public interest should be provided for in the rules and standards that regulatory agencies are empowered to enforce, as clearly and unambiguously as possible.⁵⁴ Specific public interest, which is complementary to public interest, in trying to understand it, the question that needs to be answered is for whose benefit this regulation is undertaken?⁵⁵ The specificity of the interest depends on the concrete group that benefits from the area/sector to be regulated. In this case they are the participants of DVCs economy, particularly the consumers. Since the first objective of this research examines the legal framework on consumer protection, the concept will be used to analyse the protection of consumers from the perspective of public interest, with the aim of finding out whether such provisions could be applied to consumers and investors of DVCs.

⁴⁹ Feintuk M, *'The Public Interest' in Regulation*, Oxford University Press, New York, 2004, 290.

⁵⁰ Barry B, *Political Argument*, 1ed, Routledge Revivals, London, 2010, 195.

⁵¹ Adler M, 'Regulation and the public interest' 39*Acta Juridica Hungarica* 3, 1998, 181.

⁵² Deegan C, *Financial Accounting Theory*, 73.

⁵³ Deegan C, *Financial Accounting Theory*, 73.

⁵⁴ Baldwin R, 'Governing with Rules: The Developing Agenda. 'In: Richardson G and Genn H, *Administrative Law and Government Action: the courts and alternative mechanisms of review*, Oxford University Press, New York, 1994, 165.

⁵⁵ Michael E and Jennifer L, 'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis,' 6 *Journal of Law, Economics, and Organization* special issue, 1990, 172.

2.2 The minimal intervention concept of innovation in terms of disruptive technology

This concept is based on the libertarian approach to emerging technologies, which embraces the presumption of freedom and acknowledges that emerging technologies have uncertainties, risks, and costs, but believes that the benefits and discovery, outweigh the costs.⁵⁶ In the interest of freedom, Arnold urges that government intervention in matters of innovation be minimised.⁵⁷ This is a reaction to the 'precautionary principle', which has been accepted by most regulatory authorities and is based on the idea that the release of new products should be slowed or prevented entirely when the safety implications are unknown or uncertain.⁵⁸ From this perspective, DVCs can be considered as an emergent technology, specifically a disruptive technology, in the sense that it bypasses the regulatory nature of centralised systems, making the libertarian approach plausible.

'Disruptive Technology' can be termed as an innovation that goes beyond improving existing products; it seeks to tap unforeseen markets, create products to solve problems consumers don't know that they have, and ultimately to change the face of the industry.⁵⁹ Pouliot posits that innovations are believed to emerge out of catallaxy, a concept that states that only out of chaos and disorder can the true equilibrium or order be discovered.⁶⁰ DVCs fall into this category because they have evolved into a powerful technology, with an extraordinary governance theory known as automated governance through code.⁶¹ It is in stark contrast to the traditional financial system, which is built on a centralised intermediary.

The study will employ this concept to investigate the level of intervention required in the case of DVCs as a disruptive technology when analysing the objectives in regard to the compatibility between regulation and decentralised virtual currencies.

⁵⁶ Feeney M, 'A libertarian Vision For technology' libertarianism.org, 31 May 2020
[A Libertarian Vision for Technology | Libertarianism.org](#) on 6 March 2023.

⁵⁷ Arnold G, 'Libertarian Theories of the Corporation and Global Capitalism' 48 *Journal of Business Ethics* 2, 2003, 156.

⁵⁸ Feeney M, 'A libertarian Vision For technology' libertarianism.org, 31 May 2020
[A Libertarian Vision for Technology | Libertarianism.org](#) on 6 March 2023.

⁵⁹ Katyal N, 'Disruptive Technologies and the Law' 102 *Georgetown Law Journal* 1685, 2014, 1.

⁶⁰ Pouliot F, 'Catallaxy: The Origins of Bitcoin', *Innovation and Spontaneous Order* 19 September 2017
<https://medium.com/@francispouliot/catallaxy-the-origins-of-bitcoin-and-innovation-93dbc3190eac> on 6 March 2023.

⁶¹ Reijers W & Coeckelbergh M, 'The Blockchain as a Narrative Technology: Investigating the Social Ontology and Normative Configurations of Cryptocurrencies' *Philos Technol*, 3 October 2016, 103.
<https://link.springer.com/article/10.1007/s13347-016-0239-x#citeas> on 6 March 2023.

3.0 DVCs AND LEGAL REGIME IN KENYA AND SOUTH AFRICA.

This chapter undertakes an in-depth examination of the legal framework of Kenya and South Africa to find out whether there has been an attempt at regulating DVCs or not. This is because while South Africa has been deemed to be the fastest country in Africa to respond to technological advances, Kenya tends to follow the South African model. The analysis encompasses an exploration of the legislative intricacies and nuances inherent in the two jurisdictions, aiming at discerning the extent of compatibility between existing regulations and the evolving DVC ecosystem. The chapter entails a discussion on the nature of DVCs, consumer protection in DVCs from the perspective of the legal framework of Kenya and South Africa.

3.1 Nature of decentralised virtual currencies.

3.1.1 What they are and how they work.

They consist of a blockchain method of verifying transactions independently of a central authority.⁶² The process of verifying a set of transactions, in a block, is achieved by means of solving a complex cryptographic computation conducted by the network's nodes.⁶³ The blocks are collected on a public ledger, called "Blockchain", which is stored on each network participant's computer. The block creation process, in turn, rewards the solver of the computational challenge with the network's inherent currency.⁶⁴ It is then bought and sold through virtual currency exchanges and is stored in an electronic wallet also known as an e-wallet.⁶⁵ In brief DVCs are a digital representation of value that is neither issued by a central bank or public authority, nor necessarily attached to fiat currencies. Instead, it is self-regulated through the verification of transactions within the network's nodes. However, this sense of self-regulation still leaves the consumers susceptible to risks, as it focuses mostly on the verification of transactions.

⁶² Ponsford M, 'A Comparative Analysis of the Bitcoin and other Decentralised Virtual Currencies: Legal Regulation in the People's Republic of China, Canada, and the United States,'33.

⁶³ Glaser F and Bezenberger L, 'Beyond Cryptocurrencies - A Taxonomy of Decentralised Consensus Systems' European Conference on Information Systems, Completed Research Paper Number 57,2015, 2 https://aisel.aisnet.org/ecis2015_cr/57/ on 11 October 2023.

⁶⁴ Glaser F and Bezenberger L, 'Beyond Cryptocurrencies - A Taxonomy of Decentralised Consensus Systems,'2.

⁶⁵ North American Securities Administration Association, 'Informed Investor Advisory: Virtual Currency' NASAA, 2018 <https://www.nasaa.org/44848/informed-investor-advisory-cryptocurrencies/> on 22 February 2023.

3.1.2 The distinct features

A unique characteristic of the transaction under DVCs is that it is anonymous and private. Anonymity can be observed in two ways, firstly, there is nothing that connects organisations or persons to the accounts acknowledged in the transactions, and secondly, the wallet is difficult to trace back to its owner.⁶⁶ As a result, the entities in the cryptocurrency transactions are not explicitly announced by name, but by usage of a Cryptocurrency address.⁶⁷

On the other hand, there is variance in valuation due to the lack of a fixed monetary value assigned to it. The currency has no intrinsic worth; rather, its value is determined by the amount of money that a buyer is willing to pay.⁶⁸ These distinct features set apart DVCs from the traditional financial system and emphasise the decentralised nature as well as its new model of speculation. So far, such features are defined within the technological realm rather than in the law.

3.2 Consumer Protection in DVCs

In a legal context, a consumer is defined as an individual or entity to whom specific goods or services are marketed, one who engages in transactions with a supplier in the ordinary course of the supplier's business, a user of particular goods, or a recipient of specific services.⁶⁹ This definition encompasses both natural persons and legal entities. It aptly captures the essence of a consumer's role within the realm of DVCs, where a consumer is legally recognized as an entity, whether natural or artificial. A consumer can also be understood as a person who engages in the acquisition of virtual currencies for purposes such as peer-to-peer disbursements, investment and speculative holdings, or the purchase of virtual or tangible goods and services from designated vendors.⁷⁰

⁶⁶ Daniele G and Olayinka T, 'Advantages of Bitcoin: Decentralised, Peer-to-Peer, Cryptocurrency' Stanford University, 2010 <https://cs.stanford.edu/people/eroberts/cs201/projects/2010-11/DigitalCurrencies/advantages/index.html#> on 20 November 2023.

⁶⁷ Daniele G and Olayinka T, 'Advantages of Bitcoin: Decentralised, Peer-to-Peer, Cryptocurrency' Stanford University, 2010 <https://cs.stanford.edu/people/eroberts/cs201/projects/2010-11/DigitalCurrencies/advantages/index.html#> on 20 November 2023.

⁶⁸ Griffiths M, 'Virtual Currency Businesses: An Analysis of the Evolving Regulatory Landscape' 16 *Texas Tech Administrative Law Journal* 303, 2015, 307.

⁶⁹ *Consumer Protection Act* (2012).

⁷⁰ Kibwage C, 'Consumer Protection in Kenya in the age of decentralised virtual currency' Unpublished LLM Thesis, Strathmore University, 2021,3.

The decentralised and speculative character of DVCs has given rise to certain risks, notably encompassing fraud, money laundering, and cyber hacking, which have implications for consumers. Within the dynamic landscape of the DVCs marketplace, various stakeholders, including consumers, coin offerors, miners, coin inventors, and virtual currency exchanges. They each play distinct and vital roles in the success of this emerging venture.⁷¹ Among these stakeholders, consumers hold particular significance, not only as the primary users of DVCs but also as the most vulnerable participants, vulnerable in the sense that the risks that they are susceptible to are insurmountable.

Given the vulnerabilities created by the nature of DVCs for consumers, it falls upon legislators to assume the responsibility of safeguarding the rights of consumers and the public in general. The duty of the legislator regarding the new means of transaction can be analysed through the concept of public interest of regulation. According to this concept, legislators are obligated to incorporate the welfare of the general public as a primary consideration in the formulation of regulatory measures.

3.3 Legal Framework in Kenya

The domestic legal framework on consumer protection and digital payment system discussed in this chapter consists of the *Constitution of Kenya 2010*, *Central Bank of Kenya Act 2010*, *Consumer Protection Act 2012*, *Competition Act 2012*, *Money Remittance Regulations 2013*, *Banking (Amendment) Act 2016*, *Capital Markets Act 2018*, *Computer Misuse and Cyber Crimes Act 2018*, and *Data Protection Act 2019*. The subsequent sections undertake an examination of the legislative framework concerning consumer protection and digital payment systems. This analysis delves into the comprehensive evaluation of whether these legal provisions are applicable to DVCs and whether they can be effectively utilised to ensure the protection of consumers engaging with DVCs.

3.3.1 Consumer protection regulatory framework.

The *Constitution of Kenya 2010 (COK)* extensively provides for a comprehensive set of rights and freedoms to be enjoyed by the Kenyan citizens. The main right applicable to DVCs is the right afforded to consumers, which include: a right to information necessary to ensure the enjoyment of full benefit from goods and services; the right to protection of their economic

⁷¹ Financial Action Task Force, *Virtual Currencies – Key Definitions and Potential Anti Money Laundering/Counter Terrorist Financing Risk*, June 2014, 5.

interests and to compensation resulting from any loss from faulty goods and services offered by either public entities or private persons.⁷² The constitution puts the onus on parliament to ensure enactment of consumer protection legislation.⁷³ According to the public interest concept of regulation, such laws should be enacted in accordance with the public interest skewed for the specific sectors.

The fundamental assurance of consumer rights is enshrined in the *Consumer Protection Act, 2012*, where while not explicitly addressing DVCs, acknowledges the significance of online agreements.⁷⁴ This legislation mandates the comprehensive disclosure of agreement-related information and the provision of a copy to the consumer, affording them the opportunity to accept or decline said agreement.⁷⁵

The *Competition Act, 2012* holds a similar role as the *Consumer Protection Act, 2012*, which is to protect the rights of the consumers across all fields. Specifically for digital finance, where DVCs fall under, the issuers and movers of DVC are prohibited against unconscionable conduct.⁷⁶

The *Data Protection Act's, 2019* primary objective is to manage the handling of personal data and provide for the enforcement of rights.⁷⁷ Financial services, by and large, require the collection of a variety of personal data, which can subsequently be stored or transferred within the system. In the case of DVCs, transaction records are inherently stored on a publicly accessible ledger, a feature designed to enhance transparency but one that introduces potential risks due to the inclusion of diverse personal information pertaining to users.⁷⁸

The emphasis on disclosure, transparency, and prevention of unconscionable conduct, within these legislative frameworks, reflects a commitment to fostering public interest. The application of consumer protection laws and the acknowledgment of online agreements in the digital era exemplify a proactive approach to address the evolving landscape of financial services, including DVCs. Based upon the perspective of the public interest concept of

⁷² Article 46, *Constitution of Kenya* (2010).

⁷³ Article 46(2), *Constitution of Kenya* (2010).

⁷⁴ Section 2, *Consumer Protection Act* (2012): An internet Agreement is a consumer agreement formed by text based internet communication.

⁷⁵ Section 31(1), *Consumer Protection Act* (2012).

⁷⁶ Section 56, *Competition Act* (No.12 of 2010).

⁷⁷ *Data Protection Act* (No. 24 of 2019).

⁷⁸ Kibwage C, 'Consumer Protection in Kenya in the age of decentralised virtual currency' Unpublished LLM Thesis, Strathmore University, 2021,3.

regulation, countries are justified to regulate the usage of DVCs so as to protect the consumers from the inherent risks that come with it.

3.3.2 Digital payment system regulatory framework.

The *Central Bank of Kenya Act* 2010 established the Central Bank of Kenya (CBK) with authority over the Kenyan currency and related matters.⁷⁹ It defines currency as banknotes and coins issued by the CBK, making them the sole legal tender in Kenya.⁸⁰ In December 2015, the CBK directed its initial focus toward DVCs, as evident from the issuance of a public notice cautioning against engagement in DVCs.⁸¹ The CBK explicitly communicated its firm stance, asserting that DVCs, grounded in cryptographic frameworks, did not hold legal tender status within the jurisdiction of Kenya.⁸² The CBK went as far as listing the specific risks that are inherent to the users.⁸³ Consequently, DVCs are not recognized as legal tender, as they are not issued by the CBK or foreign bodies. The CBK is the sole authority that approves legal tender and oversees payment systems as well as digital financial products regulation.⁸⁴ For any central regulatory authority, the independence of DVCs which hinges on reducing transaction costs and eliminating trust requirements remains a problem as it results in irreversibility of transactions, making seeking redress for unfulfilled services challenging.⁸⁵

The *Money Remittance Regulations*, 2013 requires the licensing of institutions engaging in offering money remittance services or remittance of any representation of monetary value without the creation of accounts in the payer or payee's names.⁸⁶ Additionally, the said entities are subject to strict compliance with anti-money laundering regulations⁸⁷, characterised by a broad scope inclusive of blockchain technology and trade institutions. However, as Scott asserts, the anonymity that exists with DVCs makes it difficult for it to be facilitated within

⁷⁹ Section 4, *Central Bank of Kenya Act* (No.10 of 2010).

⁸⁰ Section 2, *Central Bank of Kenya Act* (No.10 of 2010).

⁸¹ Central Bank of Kenya, *Public Notice: Caution to the public on Virtual Currencies such as Bitcoin*, 2015.

⁸² Samora M, 'The Regulation of Virtual Currencies in Kenya' Unpublished LLM Thesis, University of Nairobi, 2019, 3.

⁸³ Central Bank of Kenya, *Public Notice: Caution to the public on Virtual Currencies such as Bitcoin*, 2015.

⁸⁴ Okonjo J, 'The Impact of Convergence of Mobile Telecoms and Financial Services on Regulation of Mobile Telecoms' Published LLM Thesis, University of Warwick, December 2013.

⁸⁵ Kibwage C, 'Consumer Protection in Kenya in the age of decentralised virtual currency' Unpublished LLM Thesis, Strathmore University, 2021, 10.

⁸⁶ Section 4, *Money Remittance Regulations* (2013).

⁸⁷ Section 37(1), *Money Remittance Regulations* (2013).

measures, such as anti-money laundering (AML) or know-your-customer (KYC) policies, because they are not inherent to the system.⁸⁸

The *Banking (Amendment) Act* 2016 governs the conduct of various financial institutions as defined within the Act other than the Central Bank of Kenya.⁸⁹ Financial institutions are required to obtain licensing and provide information through reporting.⁹⁰ Their business conduct on trading and investments is restricted⁹¹ to ensure protection of the whole system as well and consumers.

The *Capital Markets Act*, 2018 empowers the Capital Markets Authority (CMA) to oversee and ensure fair and efficient dealings of the Kenyan capital markets.⁹² The Act further grants the authority to regulate the use of electronic commerce while trading securities.⁹³ The securities, as per the act, encompass a wide range of financial instruments such as shares, debt instruments, rights options, futures relating to assets or property, depository receipts and asset backed securities.⁹⁴ The comprehensive scope of this definition provides the flexibility for cryptocurrencies to be classified as securities within this regulatory framework.

The primary objective of the *Computer Misuse and Cyber Crimes Act*, 2018 is to address offences relating to computer systems. The Act established the National Computer and Cyber Crimes Coordination Committee⁹⁵, which is responsible for advising the government on issues relating to cybercrime, blockchain technology and critical infrastructure and frameworks.⁹⁶ The Act expressly prohibits activities such as deceitful manipulation of electronic data⁹⁷ and computer-related fraud⁹⁸ in online transactions and actions. The act is relevant as it addresses some of the risks that have been raised under DVCs. Within the framework delineated in Part V of the Act, there is recognition of the utilisation of international collaboration to mitigate and prosecute offences, irrespective of an individual's domicile.⁹⁹ This provision effectively

⁸⁸ Scott D, 'Cryptocurrency Regulations and Enforcement in the U.S,' 1.

⁸⁹ Section 2, *Banking (Amendment) Act* (No. 25 of 2016).

⁹⁰ Section 27-31, *Banking (Amendment) Act* (No. 25 of 2016).

⁹¹ Section 12, *Banking (Amendment) Act* (No. 25 of 2016).

⁹² Section 11, *Capital Markets Act* (No. 15 of 2018).

⁹³ Section 11(3)(c), *Capital Markets Act* (No. 15 of 2018)

⁹⁴ Section 2, *Capital Markets Act* (No. 15 of 2018).

⁹⁵ Section 4, *Computer Misuse and Cyber Crimes Act* (No 5. of 2018).

⁹⁶ Section 6, *Computer Misuse and Cyber Crimes Act* (No 5. of 2018).

⁹⁷ Section 38, *Computer Misuse and Cyber Crimes Act* (No 5. of 2018).

⁹⁸ Section 26, *Computer Misuse and Cyber Crimes Act* (No 5. of 2018).

⁹⁹ Kibwage C, 'Consumer Protection in Kenya in the age of decentralised virtual currency' Unpublished LLM Thesis, Strathmore University, 2021, 15.

addresses the transnational character inherent in transactions and engagements involving DVCs.

In summary, the examination of regulations governing DVCs within the concept of public interest underscores both positive and negative aspects. While some regulatory bodies are proactive in addressing legal tender and securities classifications, challenges arise in reconciling DVCs' anonymity with anti-money laundering measures. *The Banking (Amendment) Act, 2016* exhibits a commitment to safeguarding the financial system, yet potential limitations exist in navigating the complexities of emerging technologies. Overall, the analysis reflects a delicate balance between regulatory oversight and the inherent challenges posed by the unique features of DVCs. The public interest concept, as elucidated by Feintuk, remains central but necessitates nuanced considerations for effective and equitable regulatory interventions in the evolving landscape of DVCs.

3.4 Legal Framework in South Africa.

The legal framework on consumer protection and digital payment system discussed in this chapter consists of the *Financial Institutions (Protection of Funds) Act 2001*, *Financial Intelligence Centre Act 2001*, *Electronic Communication and Transactions Act 2002*, *Regulations of Interception and Provision of Communication-Related Information Act 2002*, *Financial Advisory and Intermediary Services Act 2002*, *Consumer Protection Act 2008* , *Financial Market Act 2012* and *Protection of personal Information Act 2013*. The subsequent sections undertake an examination of the legislative framework, specifically focusing on consumer protection and the digital payment system. Likewise, the analysis will assess the applicability of these legal provisions to DVCs, scrutinising their effectiveness in safeguarding consumers involved in transactions with DVCs.

3.4.1 Consumer protection regulatory framework.

The *Electronic Communication and Transactions Act 2002* addresses consumer protection in electronic transactions, including a broad range of financial services without setting restrictions on the precise types of financial services covered.¹⁰⁰ Therefore, leaving room to infer its application to DVCs as they offer similar services. The legislation requires detailed

¹⁰⁰ Section 42, *Electronic Communication and Transactions Act* (No. 25 of 2002) (South Africa).

information to be provided to customers, specifically addressing the legal standing of internet entities.¹⁰¹

The *Consumer Protection Act 2008* is the general provision that delineates specific standards and criteria pertaining to the safeguarding of consumers interest and rights.¹⁰² Furthermore, it aims to elevate the quality of information accessible to consumers while promoting continued legislative support. The act is relevant to DVCs as it provides for general consumers.

The *Protection of Personal Information Act 2013* is concerned with the broader aspects of data security and privacy in the context of online transactions.¹⁰³ Conversely, the *Regulations of Interception and Provision of Communication-Related Information Act 2002* is oriented towards the prevention of unauthorised disclosure of users' private information.¹⁰⁴

Observably, there is an absence of explicit regulations expressly tailored for DVCs. Nonetheless, the scrutiny conducted above indicates the potential extension of the existing regulatory framework to encompass DVCs. Consequently, in the context of public interest, the regulatory landscape primarily addresses general public interest rather than specifically tailored considerations for distinct public interests.

3.4.2 Digital payment system regulatory framework.

The *Financial Institutions (Protection of Funds) Act, 2001* imposes obligations on individuals handling assets held in trust by financial institutions, which can include funds or properties.¹⁰⁵ The comprehensive definition of trust property within this legislation provides a broad framework that encompasses DVCs. The Act mandates that these individuals adhere to principles of good faith, exercise due care and diligence, and refrain from utilising such assets or funds for any unethical advantages.¹⁰⁶ However, the Act does not mandate the imposition of regulatory approval or registration prerequisites for the mentioned financial institutions.¹⁰⁷

¹⁰¹ Section 43(1), *Electronic Communication and Transactions Act* (No. 25 of 2002) (South Africa).

¹⁰² *Consumer Protection Act* (No. 68 of 2008) (South Africa).

¹⁰³ *Protection of Personal Information Act* (No. 4 of 2013) (South Africa).

¹⁰⁴ *Regulations of Interception and Provision of Communication-Related Information Act* (2002) (South Africa).

¹⁰⁵ *Financial Institutions (Protection of Funds) Act* (No. 28 of 2001) (South Africa).

¹⁰⁶ Section 2, *Financial Institutions (Protection of Funds) Act* (No. 28 of 2001) (South Africa).

¹⁰⁷ Meiring I, Itzikowitz A and Gunning E, *Blockchain and Cryptocurrency Regulation: South Africa*, 1ed, Global legal Insights, 2019, 436.

The *Financial Intelligence Centre Act*, 2001 places anti-money laundering responsibilities on financial institutions, including tasks like verifying the identity of clients, keeping records, and reporting specific transactions to the Financial Intelligence Centre.¹⁰⁸ It requires all individuals to report illicit proceeds, suspicions of money laundering, or support for terrorist activities.¹⁰⁹ The reporting obligations, however, apply only to cash transactions that satisfy certain thresholds, and DVCs are not specifically included in the definition of cash.¹¹⁰

The *Electronic Communication and Transactions Act*, 2002 encompasses the entirety of electronic transactions, inclusive of financial services.¹¹¹ Significantly, this legislative framework does not impose constraints on the specific categories of financial services it covers, thereby establishing a broad scope that can readily encompass DVCs.

The *Financial Advisory and Intermediary Services Act*, 2002 presides over the regulation of financial advisory services within the South African jurisdiction.¹¹² The primary criterion for investigation under this Act is the use of financial product and the subsequent provision of financial advice.¹¹³ It is noteworthy that the definition of a financial product, as outlined in the Act, does not explicitly incorporate direct mention of DVCs.

The *Financial Markets Act*, 2012 establishes the regulatory structure governing securities within the South African context.¹¹⁴ Notably, the Act's definition of securities excludes DVCs, as none of the provided definitions align with their unique characteristics.¹¹⁵ Additionally, the securities enumerated in the Act are associated with a single issuer against whom consumers can assert claims, a situation that diverges significantly from the decentralised nature of DVCs.¹¹⁶

In examining South African regulations through the lens of the public interest concept, the regulatory landscape for DVCs emerges as both dynamic and intricate. While the *Financial*

¹⁰⁸ Schedule 1, *Financial Intelligence Centre Act* (No. 38 of 2001) (South Africa).

¹⁰⁹ Section 29, *Financial Intelligence Centre Act* (No. 38 of 2001) (South Africa).

¹¹⁰ Section, *Financial Intelligence Centre Act*: Cash includes, firstly coin and paper money of South Africa or of another country that is designated as legal tender and that circulates as, and is customarily used and accepted as, a medium of exchange in the country of issue; and secondly travellers' cheques.

¹¹¹ Section 42, *Electronic Communication and Transactions Act* (No. 25 of 2002) (South Africa).

¹¹² Section 1, *Financial Advisory and Intermediary Services* (No. 37 of 2002) (South Africa): Financial service means the furnishing of advice and/or the rendering of intermediary services in respect of a financial product.

¹¹³ Kibwage C, 'Consumer Protection in Kenya in the age of decentralised virtual currency' Unpublished LLM Thesis, Strathmore University, 2021, 30.

¹¹⁴ *Financial Markets Act* (No. 19 of 2012) (South Africa).

¹¹⁵ Section 1, *Financial Markets Act* (No. 19 of 2012) (South Africa).

¹¹⁶ Meiring I, Itzikowitz A and Gunning E, *Blockchain and Cryptocurrency Regulation: South Africa*, 433.

Markets Act, 2012 and Financial Advisory and Intermediary Services Act, 2002 lack explicit provisions for DVCs, the *Electronic Communication and Transactions Act, 2002* offers a flexible scope that accommodates them in electronic transactions. The *Financial Institutions (Protection of Funds) Act, 2001* provides a broad framework but lacks specific requirements for decentralised entities like DVCs. Notably, the *Financial Intelligence Centre Act, 2001* introduces anti-money laundering measures but falls short in explicitly integrating DVCs into its definition of cash transactions, revealing a nuanced regulatory landscape with both positive and negative implications for consumer and investor protection in the DVC economy.

3.5 Findings and Conclusion

To establish an order of the findings is presented in 4 categories namely, Kenya's approach to Consumer protection, Kenya's legal framework, South Africa's Approach and Regulatory initiatives and conclusion. The examination sheds light on Kenya's reliance on information paradigm approach, South Africa's recognition of DVCs and the need for effective regulation to protect consumers, in the face of emergence of DVCs.

3.5.1 Kenya's Approach to Consumer Protection of DVCs

In the absence of specific laws to protect the consumers of DVCs, Kenya's Central Bank resorted to caution the public regarding the risks and extensively excluded itself from liability. This is known as the information paradigm approach to consumer protection. It consists of the provision of information to the consumers who then become responsible for their action. It is based on the 'average consumer benchmark' where the average consumer is assumed to be reasonably informed and unwilling to take risks. However, this approach is not absolute and efficient because it requires consumers to be familiar with a high ability to process technical information whose scope would be way beyond their specialisation without dedicating much attention to the real functioning of consumer behaviour. The fact that the approach still leaves consumers susceptible to high risks proves its inefficiency.

3.5.2 Kenya's Legal Framework Trajectory

Kenya's legal framework as observed, currently lacks explicit provisions or recognition for DVCs. Nevertheless, there exist regulations such as *Money Remittance Regulations, 2013*, *Banking (Amendment) Act, 2016*, *Capital Markets Act, 2018* and *Computer Misuse and Cyber Crimes Act 2018*, which tries to encompass DVCs in its interpretation. While issuing warnings

against such currencies is judicious in the initial phases, a more proactive approach becomes imperative as their adoption and utilisation continue to rise. However, the creation of the Capital Markets Authority and interpretation by courts are a step toward fulfilling their role of protecting the specific interest of the consumers.

3.5.3 South Africa's Approach and Regulatory Initiatives

Thirdly, in contrast, regulatory bodies in South Africa, including the South African Reserve Bank (SARB), formally recognize DVCs as an emerging financial innovation. They advocate for their integration into the regulatory framework where deemed appropriate, with a suggestion to enact necessary provisions. South Africa's current approach involves both an expansive interpretation of existing legal structures and the potential inclusion of ongoing regulatory developments, exemplified by initiatives like the draft *Conduct of Financial Institutions Bill (CoFI Bill)* and the *2020 Financial Markets Review*. While South Africa possesses a robust legal framework for financial activities, the challenge lies in the intricate process of expanding and redefining existing laws, necessitating significant coordination among regulatory bodies and potential impacts on established financial services.

3.5.4 Conclusion

Lastly, the existing regulatory structure, if employed effectively, proves to be efficient in safeguarding consumer interests. However, a significant obstacle lies in the resistance of the emerging digital currency to regulatory oversight. Despite this resistance, it is important to acknowledge the substantial consumer base associated with DVCs, warranting protective measures through legislative intervention. Therefore, a need for a certain degree of regulation arises to ensure the protection of consumer rights and interests.

4.0 JURISPRUDENCIAL STANDARDS OF KENYA AND SOUTH AFRICAN COURTS ON DVCs.

The ascent and growing prevalence of DVCs has introduced unprecedented complexities in the legal landscape, prompting an interest to inquire about the jurisprudential standards governing consumer protection. In regard to DVCs, this chapter will scrutinise and assess the judicial precedents established by courts in Kenya and South Africa. The main objective being to discern and assess the efficacy of the legal framework regarding consumer protection amid the risks posed by DVCs. The selection of the cases is determined by the fact that they are the only cases that have been adjudicated by Kenyan and South Africa's courts regarding DVCs.

4.1 Cases within Kenyan Jurisdiction.

This section covers two cases, *Lipisha Consortium Ltd & Another v Safaricom Ltd (2015)* and *Wiseman Talent Ventures Limited v Capital Markets Authority (2019)*.

4.1.1 *Lipisha Consortium Ltd & Another v Safaricom Ltd (2015)*

In this case, the petitioners, Lipisha Consortium Limited which offers mobile payment services and Bitpesa limited, a third party contracted by Lipisha Consortium dealing in bitcoin trading, filed a petition against Safaricom Limited, a publicly listed company and the largest mobile phone service provider in Kenya. The dispute arose from a commercial agreement between the parties related to mobile payment automation services, particularly Safaricom and the 1st petitioner regarding the use of Safaricom's Mpesa service.¹¹⁷

The petitioners argued that Safaricom unjustly suspended their services on November 12, 2015, without prior notice.¹¹⁸ Which then affected 24,485 customers who utilised their 'Lipisha Enterprise' for mobile payment automation.¹¹⁹ They maintained that the suspension was based on false accusations by the respondent that Lipisha was involved in trading bitcoin.¹²⁰ The petitioners contended that Safaricom's actions violated their constitutional rights, including the right to fair administrative action under Article 47, the right to property under Article 40, and consumer rights under Article 46.¹²¹ Furthermore, the petitioners claimed that the Respondent caused the 1st Petitioner to terminate their contract with the 2nd Petitioner before finally

¹¹⁷ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 1.

¹¹⁸ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 2.

¹¹⁹ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 2.

¹²⁰ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 2.

¹²¹ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 2.

restoring the services to the 1st Petitioner.¹²² They argued that the respondent's actions exposed them to multiple civil suits.

The respondents contended that the petition was an abuse of the court process, as the dispute was purely commercial and governed by the terms of the Mpesa Pay Bill Agreement and private law.¹²³ This was based on the fact that the dispute was arbitrable, as per the agreement, hence the petitioners were in breach of the commercial agreement. They accused the petitioners of handing over services to a third party without due diligence, posing a threat to Safaricom's regulatory compliance to the 'Know Your Customer' standards.¹²⁴

The respondent also claimed that the second petitioner was dealing in bitcoin without the required license from the Central Bank of Kenya, violating the Money Remittance Regulations 2013.¹²⁵ As the 2nd petitioner was still conducting the bitcoin business through the respondent's system, the Respondent contended that it has the right to also protect its own business by terminating any such illegality.¹²⁶ Safaricom asserted its obligation to report suspicious activities to the Central Bank and accused the petitioners of intentionally or unintentionally violating local and international laws.

The court, in its decision, preliminarily held that Safaricom had the authority to suspend services with or without notice, as per clause 10 of the contractual agreement.¹²⁷ The court acknowledged the highly regulated nature of the money transfer business conducted by the respondent. Therefore, emphasised the need for strict adherence to regulatory frameworks, especially concerning potential money laundering.¹²⁸

Regarding the bitcoin-related allegations, the court expressed a preliminary view that dealing in bitcoin constituted money remittance business, subject to approval by the Central Bank of Kenya.¹²⁹ Since "Money remittance business" is defined under regulation 2 of the Money Remittance Regulations 2013 to mean a service for the transmission of money or any representation of monetary value without any payment accounts being created in the name of

¹²² *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 2.

¹²³ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 2.

¹²⁴ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 2.

¹²⁵ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 3.

¹²⁶ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 3.

¹²⁷ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 11; *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998) The United Kingdom House of Lords.

¹²⁸ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 11.

¹²⁹ *Lipisha Consortium Limited & Another v Safaricom Limited (2015)* eKLR, 12.

the payer or the payee.”¹³⁰ The court substantiated the respondent's objection regarding the failure of the second petitioner to secure approval from the Central Bank of Kenya in the form of a licence.¹³¹ The court dismissed the application for conservatory orders, suggesting that the matter was better suited for resolution through arbitration, as agreed upon by the parties.¹³²

In conclusion, the court dismissed the application with costs awarded to Safaricom, emphasising the need for a deeper examination of the case during the substantive hearing.¹³³ The court suggested that the parties pursue resolution through arbitration, highlighting the importance of regulatory compliance in the regulated mobile payment industry.¹³⁴

4.1.1.1 Analysis.

This case illustrates an interplay between the public interest concept of regulation and the concept of minimal intervention of innovation, exposing an existing dilemma surrounding consumer protection within the DVC realm.

The CBK’s issuance of a warning regarding DVCs, coupled with a clear stance on not regulating them, shows a commitment to the public interest.¹³⁵ It signifies an effort to protect consumers by offering guidance on potential risks associated with DVCs, which goes hand in hand with the emphasis of the public interest concept on addressing concerns common to the public.¹³⁶ However, the issuance of warnings can be seen as a minimal intervention, focusing on education over stringent regulation.¹³⁷

Conversely, the court indicates a proactive regulatory stance in embodying the public interest concept. Through emphasising on Bitpesa’s bitcoin-related business to be categorised as a money remittance business, subject to the CBK oversight. The court seems to take a bold step by trying to incorporate DVCs into the existing regulatory framework.¹³⁸ This move signifies

¹³⁰ *Lipisha Consortium Limited & Another v Safaricom Limited* (2015) eKLR, 12.

¹³¹ *Lipisha Consortium Limited & Another v Safaricom Limited* (2015) eKLR, 12.

¹³² *Lipisha Consortium Limited & Another v Safaricom Limited* (2015) eKLR, 13.

¹³³ *Lipisha Consortium Limited & Another v Safaricom Limited* (2015) eKLR, 13.

¹³⁴ *Lipisha Consortium Limited & Another v Safaricom Limited* (2015) eKLR, 13.

¹³⁵ Central Bank of Kenya, *Public Notice: Caution to the public on Virtual Currencies such as Bitcoin*, 2015.

¹³⁶ Barry B, *Political Argument*, 195.

¹³⁷ Arnold G, ‘Libertarian Theories of the Corporation and Global Capitalism,’ 156.

¹³⁸ Flesner C, ‘Disruptive Technology Disrupted Law? How the digital revolution affects (Contract) Law’ in Franceschi A (ed), *European Contract Law and the Digital Single Market*, Cambridge University Press, Oxford, 2016, 26.

an interventionist approach, demonstrating the court's commitment to protecting consumers within a regulated framework. The court's move can also be described as an attempt to define the business according to the nature of the transactions, which in law can be translated into a money remittance business and hence regulated under the *Money Remittance Act, 2013*. Lastly, the court's nuanced acknowledgment of risks underscores its commitment to balancing innovation with the imperative of preventing potential harm.

4.1.2 Wiseman Talent Ventures Limited v Capital Markets Authority (2019).

Wiseman Talent Ventures is a Kenyan based company that engaged in cryptocurrency trading through a platform known as Kenicoin. The company sought an Interlocutory Injunction against the respondent, Capital Markets Authority (CMA) an institution that governs financial services.¹³⁹ The applicant argued that cryptocurrencies are not securities and hence fall outside the regulatory mandate of the CMA.¹⁴⁰ The fact that the respondent issued a warning over Kenicoin's potential fraud. The warning led to a fall of Kenicoin's shares, which was detrimental to Wiseman Talent Ventures' share capital.¹⁴¹ This came as a shock to the applicant as they had not received any complaint from any member of the public.

The respondent, however, asserted its regulatory authority, citing Section 12A of the *Capital Markets Authority Act, 2012*, which empowers it to issue guidelines and notices for the regulation of capital market activities.¹⁴² The respondent applied the Howey Test, used by the United States Supreme Court case to classify cryptocurrency as securities. The Howey test contains four ingredients; the existence of investment of money, the expectation of profit from investment, the investment of money in a common enterprise and profits that come from the efforts of a promoter or third Party.¹⁴³

The court considered three key issues: whether to grant an injunction to the applicant, the regulatory mandate of the Kenyan legal system concerning cryptocurrency, and whether cryptocurrency should be regulated in Kenya. Influenced by the Howey case and the absence of a comprehensive legal regime to regulate emerging markets on cryptocurrency, the court affirmed the respondent's regulatory authority and action in cautioning the public against

¹³⁹ *Wiseman Talent Ventures Limited v Capital Markets Authority (2019)* eKLR, 2.

¹⁴⁰ *Wiseman Talent Ventures Limited v Capital Markets Authority (2019)* eKLR, 2.

¹⁴¹ *Wiseman Talent Ventures Limited v Capital Markets Authority (2019)* eKLR, 2.

¹⁴² *Wiseman Talent Ventures Limited v Capital Markets Authority (2019)* eKLR, 3.

¹⁴³ *Wiseman Talent Ventures Limited v Capital Markets Authority (2019)* eKLR, 5; *Securities Exchange Commission (SEC) v W.J Howey (1946)*, The Supreme Court of the United States.

Kenicoin.¹⁴⁴ It further emphasised the need for regulation to protect consumers and investors in the absence of a specific regime regulating cryptocurrency.¹⁴⁵

The court concluded that the applicant failed to establish a prima facie case, and the balance of convenience favored protecting the public through regulatory measures.¹⁴⁶ Consequently, the application was dismissed, and costs were awarded to the defendant.¹⁴⁷

4.1.2.1 Analysis.

According to the public interest concept, regulations are viewed as a necessity in safeguarding societal interest against the risks posed to its consumers of a specific product.¹⁴⁸ In this case the court acknowledges the risks that exist with the use of DVCs and hence explicitly recognizes the need for regulatory intervention in order to protect the interest of the consumers/investors. It goes ahead to categorise DVCs as securities in regard to the Howey Test, therefore, suggesting that DVCs fall in the regulatory ambit of the Capital Markets Authority.

By the court emphasising the need for regulatory measures, it acknowledges the disruptive potential of DVCs, and therefore tries to mitigate it.¹⁴⁹ The court's approach determined that while innovation should be promoted, it should not come at the expense of consumer and investor safety.

In comparison to the court's decision in the case of Lipisha Consortium, the courts seem to gravitate away from uncertainty and minimal intervention in the regulation of DVCs to a clearer stance on the need of regulation. The court effects the functional approach to consumer protection, which involves assessing how established legal principles can be adapted to tackle emerging challenges, offering a means to promptly resolve legal ambiguities without hastily introducing new regulations.¹⁵⁰ The key assumption is that although blockchain is a new technology, the tasks it enables are not always unfamiliar to the legal system.¹⁵¹

¹⁴⁴ *Wiseman Talent Ventures Limited v Capital Markets Authority* (2019) eKLR, 9.

¹⁴⁵ *Wiseman Talent Ventures Limited v Capital Markets Authority* (2019) eKLR, 11.

¹⁴⁶ *Wiseman Talent Ventures Limited v Capital Markets Authority* (2019) eKLR, 11.

¹⁴⁷ *Wiseman Talent Ventures Limited v Capital Markets Authority* (2019) eKLR, 11.

¹⁴⁸ Feintuk M, *'The Public Interest' in Regulation*, Oxford University Press, 290.

¹⁴⁹ Katyal N, 'Disruptive Technologies and the Law,' 1.

¹⁵⁰ Flesner C, 'Disruptive Technology Disrupted Law? How the digital revolution affects (Contract) Law,' 26.

¹⁵¹ Koulouri M, 'Blockchain Technology: An Interconnected Legal Framework for an Interconnected System' 9 *Journal of Law, Technology and Internet* 1, 2018,7.

4.2 Case within South Africa’s Jurisdiction: *Altcoin Trader Ltd v Neil John Basel (2022)*.

This section discusses the case of *Altcoin Trader Ltd v Neil John Basel (2022)*, as it is the only DVC related case that has been adjudicated by South African courts.

The defendant, Altcoin, who conducts business as an online cryptocurrency trading platform, entered into a written agreement premised on its terms and conditions with the respondent, Basel, during or about 2017.¹⁵² As a result of the agreement the respondent was allowed to be a user of the defendant’s platform and hence traded cryptocurrencies on the platform.¹⁵³

On the 11th of May 2019 an unknown person gained access to the respondent’s profile on the defendant’s platform.¹⁵⁴ The unknown perpetrator bought and sold the cryptocurrencies of the defendant in a manner which was completely different from the known respondent’s trading patterns in that he/she bought cryptocurrencies at a higher value and sold the same at a significantly lower value.¹⁵⁵

The defendant argued that the respondent's claim lacked a cause of action, citing an exclusion clause in the agreement that absolved Altcoin Trader from liability for losses resulting from trading on its platform. “Trading on our site could result in financial gain or loss! Trading by means of buying or selling Crypto Coins cannot be reversed! Altcoin Trader will not be liable for any loss whatsoever resulting in trading on our site”.¹⁵⁶

The judge dismissed the defendant’s argument, ruling that the respondent's particulars of claim were specific enough to maintain a cause of action based on the agreement. The court judged it a matter for the trial Court to determine whether the exclusionary clause absolves the excipient under the circumstances of the case.¹⁵⁷ This is because it will have the advantage of considering and interpreting the parties' agreement in the light of the facts presented to it.¹⁵⁸

The judge stated the need for a holistic interpretation of the agreement, considering its context and purpose.¹⁵⁹ The court held that the exclusionary clause should not be narrowly interpreted,

¹⁵² *Altcoin Trader Ltd v Neil John Basel (2022)*, High Court of South Africa, 2.

¹⁵³ *Altcoin Trader Ltd v Neil John Basel (2022)*, High Court of South Africa, 2.

¹⁵⁴ *Altcoin Trader Ltd v Neil John Basel (2022)*, High Court of South Africa, 2.

¹⁵⁵ *Altcoin Trader Ltd v Neil John Basel (2022)*, High Court of South Africa, 2.

¹⁵⁶ *Altcoin Trader Ltd v Neil John Basel (2022)*, High Court of South Africa, 6.

¹⁵⁷ *Altcoin Trader Ltd v Neil John Basel (2022)*, High Court of South Africa, 9.

¹⁵⁸ *Altcoin Trader Ltd v Neil John Basel (2022)*, High Court of South Africa, 9.

¹⁵⁹ *Altcoin Trader Ltd v Neil John Basel (2022)*, High Court of South Africa, 7.

and the term "trading" should be understood in the context of buying and selling cryptocurrencies on the platform.¹⁶⁰ In conclusion, the court dismissed the defendant's exception and punitive costs were ordered against the defendant for what the court deemed an abuse of the legal process.¹⁶¹

4.2.1 Analysis.

The judge's insistence on an extensive interpretation of the agreement demonstrates an understanding of the specific issues created by disruptive technologies, particularly DVCs. Through the lens of consumer protection, the concept of public interest is weaved into the decision-making process. As the broader translation of the agreement provides a cushion to the consumer of the DVC, hence preserving public interest.

The judge appears to be aware of the concerns involved with DVCs, such as transaction anonymity and the difficulty of reversing transactions.¹⁶² Furthermore, the emphasis on a trial court's evaluation of the exclusionary clause's impact on consumer safety is consistent with the broader regulatory aim of preserving public interest.¹⁶³

As this is the only case that has been taken to court concerning DVCs, it can be observed that in South Africa the Financial regulatory bodies are playing a major role in regulatory matters regarding DVCs compared to the courts. In 2021 and 2022, a combined effort between the SARB and the Financial Sector Conduct Authority (FSCA) among other institutions produced a consultation paper to offer a regulatory framework for the sector.¹⁶⁴ This strategic approach is characterised by a functional use of minor reforms, signifying the implementation of subtle adjustments within existing legal paradigms. Notably, these adjustments involve the refinement of definitions, terminologies, and the broadening of the applicability of extant regulations to accommodate the evolving landscape of new technologies.¹⁶⁵ This regulatory stance was further reinforced in October 2022, as the FSCA categorically designated crypto assets as a

¹⁶⁰ *Altcoin Trader Ltd v Neil John Basel* (2022), High Court of South Africa, 8.

¹⁶¹ *Altcoin Trader Ltd v Neil John Basel* (2022), High Court of South Africa, 10.

¹⁶² Scott D, 'Cryptocurrency Regulations and Enforcement in the U.S,' 1.

¹⁶³ Feintuk M, 'The Public Interest' in Regulation, 290.

¹⁶⁴ IFWG Crypto Assets Regulatory Work Group, 'Crypto assets brought into South Africa's regulatory purview', 11 June 2021, 3

<https://cointelegraph.com/learn/cryptocurrency-regulations-in-south-africa> on 24 November 2023.

¹⁶⁵ Katyal N, 'Disruptive Technologies and the Law,' 1685.

"digital representation of value," thereby subjecting them to the regulatory purview of the FSCA.¹⁶⁶

4.3 Conclusion.

The analysis of Kenya's jurisprudence has established that the courts have opted for the commitment to public interest shown by the efforts to protect the consumers of DVCs. Consumer protection has been established in two ways: by offering guidance on potential risks, and by attempting to incorporate DVCs into the existing regulatory framework. Incorporation is achieved through definitions in accordance with the nature of DVCs and their transactions. It is evidenced by the courts' categorising Bitpesa's bitcoin related business as money remittance on the ground that their nature, in the case of Lipisha Consortium, fits the description of money transfer transaction. In the case of Wiseman Ventures, the court categorised DVCs as securities from the perspective of the Howey test borrowed from the US Supreme Court Case.

Jurisprudential analysis of South African courts has demonstrated an understanding of the risks posed by DVCs and therefore attempts to protect the consumer through the evaluation of the impact of the interpretation of the clauses, as affirmed in the case of Altcoin Trader limited.

Comparatively, while Kenyan courts have played a major role in trying to include DVCs in the existing regulations as a mode of consumer protection, South African courts have taken a more silent role as evidenced by the existence of one case over the years. Alternatively, South African financial regulatory institutions have taken the same course as Kenyan courts in consumer protection. This has been done through extending the existing regulations to cover DVCs and making minor reforms such as definitions to incorporate DVCs.

¹⁶⁶ Section 1(h), *Financial Advisory and Intermediary Services Act* (2002) (South Africa).

5.0 FINDINGS, RECOMMENDATIONS AND CONCLUSION.

This conclusive chapter establishes a comprehensive review of the findings presented in the preceding chapters and makes recommendations based on the findings. It presents a conclusion and further demonstrates a basis for the hypothesis made initially.

5.1 Findings

From the point of view of consumer protection, the study aimed at evaluating whether DVCs should be regulated or not. Parliament has been given a mandate of enacting laws to protect the economic interest of consumers under Article 46 of the *Constitution of Kenya (2010)*. However, the decentralised nature of DVCs poses several risks to the consumers as it is, in principle, a self-regulated innovative currency.

The first objective of the research was to analyse the unregulated nature of DVCs, from the point of view of the legal framework, on consumer protection, both in Kenya and South Africa. In the analysis of the objective, the study sought to answer the question of the extent to which there can be compatibility between existing regulation and DVCs, including a comparison of Kenya's to South Africa's approach. Examination of the objective led to four findings.

Firstly, Kenya's legal framework lacks explicit provisions for DVCs, however, there is an attempt to incorporate DVCs in the existing regulations such as the mandatory licensing under *Banking (Amendment) Act, 2016*. In comparison, the legislator in South Africa, in the spirit of advocating for integration into the regulatory framework, has made expansive interpretations of existing laws and ongoing regulatory developments like the draft *Conduct of Financial Institutions Bill (CoFI Bill)*, highlighting a more proactive stance.

Thirdly, Kenya employed the information paradigm approach to consumer protection, by cautioning consumers, however, it was deemed inefficient as it leaves consumers vulnerable to risks. On the other hand, South Africa's functional and reformative approach safeguards the consumers in the sense that the legislator is freer in creating specific laws for DVCs. Lastly, despite the potential efficacy of the existing regulatory framework in safeguarding consumer protection in both Kenya and South Africa, the resistance of DVCs to oversight poses a significant obstacle. Such an obstacle underscores the need for legislative intervention to protect consumer rights amid the growing DVC consumer base.

The second objective of the research examined courts' jurisprudence in matters of consumer protection in the face of the risks posed by DVCs. The study responded to the question of the kind of jurisprudential standards that have been set by Kenyan and South African courts in the determination of cases regarding DVCs. First the study found that the Kenyan courts have attempted to safeguard DVC consumers through guidance on potential risks and incorporation of DVCs into existing regulatory framework by categorising them matching the nature of their functions and definitions.

Secondly, South African courts demonstrate an understanding of the risks posed by DVCs. However, they did not get into the substantive issues such as the regulation categorisation of DVCs. Therefore, in comparison, Kenyan courts have played an active role in the protection of DVC consumers, while South African courts, with only one documented case, have assumed a more reserved role. From the regulatory perspective, Kenya and South Africa are similar because their currency regulatory bodies expand existing regulations and refine definitions to incorporate DVCs into the existing regulatory framework.

5.2 Recommendations.

In accordance with the public interest concept of regulation, prioritising the welfare of the public, particularly consumers, is paramount. Given the trajectory observed in the regulatory efforts of Kenya and South Africa concerning DVCs, of attempting to incorporate DVCs into the existing regulations, reflects a prudent step forward. The heightened risks confronting consumers necessitate an assertive response, emphasising the imperative for Kenya to safeguard consumers. Especially considering the intricate nature of DVCs, including challenges related to anonymity, not seamlessly accommodated within existing legislation.

Consequently, the Capital Markets Authority (CMA) should endeavor to formulate DVCs targeted regulations by borrowing a leaf from South Africa and establish standards for DVC businesses, employing a principle-based approach to ensure effective consumer protection. Principle based approach in this case involves using broadly stated standard principles that must be met to achieve a certain goal and its breach leads to disqualification from operation. This can be used to regulate the specific aspects of DVCs such as anonymity which is not compatible with measures such as anti-money laundering (AML) or know-your-customer (KYC) policies in the existing regulatory framework. Moreover, a new independent body can be created to regulate DVCs through establishing guidelines, industry organisations and code of conduct for market participants to operate businesses within the ecosystem.

5.3 Conclusion.

The research proceeded from the hypothesis that while it is understandable for decentralised virtual currencies to remain so, they pose too high a risk to the consumers and, therefore, some form of protection should be devised. The study affirms the hypothesis on multiple fronts. The literature review illuminated specific consumer vulnerabilities, encompassing security breaches, cyber-attacks, and fraud such as Ponzi schemes and money laundering. Despite initial regulatory hesitancy characterised by a 'wait and see' approach, the escalating use of DVCs has exposed numerous consumers to the risks. Consequently, regulatory bodies and courts have responded by attempting to incorporate DVCs into existing frameworks. In summary, notwithstanding its classification as a disruptive technology warranting minimal government intervention, the magnitude of risks to consumers and the large consumer base, necessitates its regulation.



BIBLIOGRAPHY

List of Books

Desan C, *Making Money: Coin, Currency, and the Coming of Capitalism*, Oxford University Press, London, 2014.

Eatwell J, Milgate M, Newman P and Palgrave R, *The New Palgrave: A Dictionary of Economics*, Macmillan, Stockton Press, London, New York, 1987.

Deegan C and Unerman J, *Financial Accounting Theory*, 2nded, McGraw-Hill Higher Education, Berkshire, 2011.

Swan M, *Blockchain: Blueprint for a New Economy*, 1sted, O' Reilly Media, Sebastopol, 2015.

Feintuk M, *'The Public Interest' in Regulation*, Oxford University Press, New York, 2004.

Barry B, *Political Argument*, 1ed, Routledge Revivals, London, 2010

Meiring I, Itzikowitz A and Gunning E, *Blockchain and Crypto currency Regulation: South Africa*, 1ed, Global legal Insights, 2019, 436.

List of Chapter in Books

Baldwin R, 'Governing with Rules: The Developing Agenda.' In: Richardson G and Genn H, *Administrative Law and Government Action: the courts and alternative mechanisms of review*, Oxford University Press, New York, 1994, 165.

Flesner C, 'Disruptive Technology Disrupted Law? How the digital revolution affects (Contract) Law' in Franceschi A (ed), *European Contract Law and the Digital Single Market*, Cambridge University Press, Oxford, 2016, 26.

List of Journals

Ross E, 'Nobody Puts Blockchain in a Corner: The Disruptive Role of Blockchain Technology in the Financial Services Industry and Current Regulatory Issues' 25 *Catholic University Journal of Law and Technology*, 2, 2017.

Baldwin J, 'In digital we trust: Bitcoin discourse, digital currencies, and decentralised network fetishism', 4 *Palgrave communications*, 1, 2018.

Shandu S, 'Acta Criminologica' 32 *Southern African Journal of Criminology*, 2, 2019.

Arnold G, 'Libertarian Theories of the Corporation and Global Capitalism' 48 *Journal of Business Ethics* 2, 2003.

Kamau C, 'The cryptocurrency Market in Kenya: A Review of Awareness and Participation by the Youth', 12 *Journal of Asian Business Strategy* 1, 2022.

Limba T, Stankevicius A, 'Cryptocurrency as Disruptive Technology: Theoretical Insights' 6(4) *Entrepreneurship and Sustainability Issues*, 2019.

Christensen C and Bower J, 'Customer Power, Strategic Investment and Failure of Leading Firms' 17 *Strategic Management Journal* 3, 1996.

Treinovskis J and Amosova J, 'Some Aspects of Criminal Environmental Impact on Sustainable Entrepreneurship Activities' 4 *Entrepreneurship and Sustainability Issues* 1, 2016.

Baker J, White P, Adams P, Mentakof J, Ha D and Green S, 'Blockchain as a disruptive technology for business: A systematic review' 51 *International Journal of Information Management* 102029, 2020.

Ponsford M, 'A Comparative Analysis of the Bitcoin and other Decentralised Virtual Currencies: Legal Regulation in the People's Republic of China, Canada, and the United States' 29 *Hong Kong Journal*, 9, 2015.

Reuben Grinberg, 'Bitcoin: An Innovated Alternative Digital Technology, 4 *UC Science and Technology Journal* 159, 2012.

Scott D, 'Cryptocurrency Regulations and Enforcement in the U.S' 45 *Western State Law Review* 1, 2017.

Tu K and Meredith M, 'Rethinking Virtual Currency Regulation in the Bitcoin Age' 90 *Washington Law Review* 1, 2015.

Pflaum I and Hateley E, 'A Bit of a Problem: National and Extraterritorial Regulation of Virtual Currency in the Age of Financial Disintermediation' 45 *Georgetown Journal of International Law* 1, 2014.

Michael E and Jennifer L, 'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis,' 6 *Journal of Law, Economics, and Organization* special issue, 1990.

Arnold G, 'Libertarian Theories of the Corporation and Global Capitalism' 48 *Journal of Business Ethics* 2, 2003.

Katy N, 'Disruptive Technologies and the Law' 102 *Georgetown Law Journal* 1685, 2014.

Griffiths M, 'Virtual Currency Businesses: An Analysis of the Evolving Regulatory Landscape' 16 *Texas Tech Administrative Law Journal* 303, 2015, 307.

Koulouri M, 'Blockchain Technology: An Interconnected Legal Framework for an Interconnected System' 9 *Journal of Law, Technology and Internet* 1, 2018,7.

List of Working papers, Discussion papers and research papers

Evans D, 'Economic Aspects of Bitcoin and other Decentralised Public ledger Currency Platforms' University of Chicago Coase- Sandor Institute for Law and Economics, Working Paper Number 685, 2014, 17 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424516

Glaser F and Bezenberger L, 'BeyondCryptocurrencies - A Taxonomy of Decentralised Consensus Systems' European Conference on Information Systems, Completed Research Paper Number 57,2015, 2 https://aisel.aisnet.org/ecis2015_cr/57/ on 11 October 2023.

List of Conference papers

Kazan E, Tan C and Lim E, 'Towards a Framework of Digital Platform Disruption: A Comparative Study of Centralised and Decentralised Digital Payment Providers' 25th Australian Conference on Information Systems, Auckland, 8-10 December 2014.

Baiyere, A, Donnellan, B, Hevner, A, Smith, C, and Stikeleather, J, 'Disruptive Innovations and IT: Wicked yet Empowering combination' Thirty Sixth International Conference on Information Systems, Puerto Rico, 13-15 august 2015.

Bollen R, 'The Legal Status of Online Currencies: Are Bitcoins the Future?' 'Regulations and Corporate Governance Conference, Melbourne Business School, 2016.

List of Reports

European Banking Authority, *EBA Opinion on Proposal by EU Commission Regarding Virtual Currencies And 4AMLD*, 2016.

S Beckbessinger & S Dingle 'Research Report: South Africans, Cryptocurrencies and Taxation', May 2018

<https://www.blockchainacademy.co.za/wp-content/uploads/2018/09/SA-Cryptocurrencies-Research-Report.pdf>

Crypto Assets Regulatory Working Group, *Consultation Paper on Policy Proposals for Crypto Assets*, 2019.

United States Government Accountability Office (USGAO), *Report To the Committee on Homeland Security and Governmental Affairs, U.S. Senate, Virtual Currencies: Emerging Regulatory, Law Enforcement, and Consumer Protection Challenges*, May 2014.

Financial Action Task Force, *Virtual Currencies – Key Definitions and Potential Anti Money Laundering/Counter Terrorist Financing Risk*, June 2014, 5.

List of Institutional Authors

Central Bank of Kenya, *Public Notice: Caution to the public on Virtual Currencies such as Bitcoin*, 2015.

List of Dissertation and Thesis.

Munyua A, 'The model of regulation for virtual currencies in Kenya' unpublished LLM Thesis, University of Nairobi, 2021.

Samora M, 'The Regulation of Virtual Currencies in Kenya' Unpublished LLM Thesis, University of Nairobi, 2019.

Kibwage C, 'Consumer Protection in Kenya in the age of decentralised virtual currency' Unpublished LLM Thesis, Strathmore University, 2021.

Hill A, 'Bitcoin: Is Cryptocurrency Viable?' Unpublished CMC Thesis, Claremont McKenna College, Claremont, 2014, 1 and 2.

Okonjo J, 'The Impact of Convergence of Mobile Telecoms and Financial Services on Regulation of Mobile Telecoms' Published LLM Thesis, University of Warwick, December 2013.

List of Internet Sources

Corporate Finance Institute Team, 'Virtual Currency' Corporate Finance Institute, 2022

<https://corporatefinanceinstitute.com/resources/cryptocurrency/virtual-currency/>

Crypto Guru, 'Bitcoin Adoption in Africa Is Setting All-Time Highs Every Week', 1 July 2020

<https://bitcoinke.io/2020/07/africa-p2p-volume-gains/>

Crypto Guru, 'Kenya Ranked Top 5 in the World on Global Cryptocurrency Activity', 14

September 2020 <https://bitcoinke.io/2020/09/kenya-top-5-globally/>

Kenyan Wall Street, 'Kenya among the few countries in the world with highest per capita holding of Bitcoin', 8 October 2019 [Kenya among the few countries in the world with highest per capita holding of Bitcoin - Citi - Kenyan Wallstreet](#)

M Toyana 'South Africa investigates R1bn Bitcoin Ponzi scam' Money web, 25 May 2018 <https://www.moneyweb.co.za/news/companies-and-deals/south-africa-investigates-80m-bitcoin-scam/>

Feeney M , 'A libertarian Vision For technology' libertarianism.org, 31 May 2020 [A Libertarian Vision for Technology | Libertarianism.org](#)

Pouliot F, 'Catallaxy: The Origins of Bitcoin', Innovation and Spontaneous Order' 19 September 2017 <https://medium.com/@francispouliot/catallaxy-the-origins-of-bitcoin-and-innovation-93dbc3190eac>

Reijers W & Coeckelbergh M, 'The Blockchain as a Narrative Technology: Investigating the Social Ontology and Normative Configurations of Cryptocurrencies' Philos Technol, 3 October 2016 <https://link.springer.com/article/10.1007/s13347-016-0239-x#citeas>

North American Securities Administration Association, 'Informed Investor Advisory: Virtual Currency NASAA,2018 <https://www.nasaa.org/44848/informed-investor-advisory-cryptocurrencies/>

Daniele G and Olayinka T, 'Advantages of Bitcoin: Decentralised, Peer-to-Peer, Cryptocurrency' Stanford University,2010 <https://cs.stanford.edu/people/eroberts/cs201/projects/201011/DigitalCurrencies/advantages/index.html#>

IFWG Crypto Assets Regulatory Work Group, 'Crypto assets brought into South Africa's regulatory purview', 11 June 2021

<https://cointelegraph.com/learn/cryptocurrency-regulations-in-south-africa> on 24 November 2023.

