Princeton Legal Journal Forum

Volume 1 Fall 2021

FORUM

El Salvador's Bitcoin Law: Contemporary Implications of Forced Tender Legislation

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Background

From the invention of paper money in 7th century China to the FDR administration's decision to drop the gold standard in 1933, money has constantly evolved in unexpected, even unsettling ways. Just as a world without paper money, or even without credit cards, seems unimaginable today, it's no wonder that the future of money lies in some new technology, namely Bitcoin. First minted in 2009, Bitcoin has soared to new popularity in the past couple of years. This monetary evolution, even revolution, was made possible due to advancements in technology and shifts in consumer perspective and has inspired regulatory and legislative innovations which pose interesting and novel legal challenges dealing with freedom of exchange and contract. A fascinating backdrop for these challenges lies in the context of El Salvador's Bitcoin Law.

On September 7, 2021, El Salvador became the first country to adopt Bitcoin as legal tender with the passage of that nation's so-called "Bitcoin Law", which placed Bitcoin alongside the U.S. dollar as El Salvador's official currency. (An important distinction, however, is that while both the U.S. dollar and Bitcoin are legal tender in El Salvador, only Bitcoin is *forced* legal tender). This meant that all Salvadoran businesses must accept Bitcoin as a means of transaction, taxes are payable in Bitcoin, and the government can now distribute subsidies in Bitcoin. To accompany this law, El Salvador rolled out a supporting network of 200 Bitcoin ATMs, introduced a new digital bitcoin wallet app called Chivo, and distributed $30 worth of Bitcoin to every citizen to kickstart the change.

I. Pros and Cons

Proponents of the new Bitcoin Law in El Salvador, such as President Nayib Bukele, say that Bitcoin will give the 70% of Salvadorans without bank accounts access to financial services, and help "reduce the fees they pay to send and receive remittances." One in every four Salvadorans live abroad, and with the exception of Haiti, El Salvador is the country most reliant on remittances in the Western Hemisphere, accounting for almost three of every 10 dollars, or nearly $6 billion, in El Salvador's economy. In fact, many advocate for the use of crypto in developing countries, arguing that the prevailing global financial system serves wealthy countries and individuals best.

On the other hand, less developed economies are more vulnerable to Bitcoin's notorious volatility and lack of regulation by a central bank. Soon after El Salvador announced that they would be adopting Bitcoin as forced legal tender, the International Monetary Fund (IMF) paused negotiations for the 1.3 billion dollar assistance package to tackle the country's debt and allow for sustainable public spending taking issue with lack of transparency and environmental costs of cryptocurrency. In a reactionary blog post to El Salvador's consideration of making Bitcoin a legal tender, IMF cited legal issues including the lack of wide accessibility, a necessary component of a legal tender, due to inconsistent internet access and technological inequities. Just over 50% of El Salvador's population has internet access, making a legal tender, especially a forced tender, that relies on internet access untenable for much of the population and calling into question who politicians and legislators really had in mind when developing the Bitcoin Law. Within the country, there is a notable lack of support for the law, with a poll by the Universidad Centroamericana Jose Simeon Canas finding that 67.9% of Salvadorans were not in support of the decision to adopt Bitcoin as a legal tender due to both a lack of trust in Bitcoin (8 out of 10 respondents) and a lack of understanding of how to use the new technology (9 out of 10 respondents).

II. Article 7 of El Salvador's Bitcoin Law

Despite the notable complexity, both technologically and legally, of adopting Bitcoin as a forced legal tender, El Salvador's Bitcoin Law, and Article 7 which enforces the legal tender, is incredibly brief. According to Article 7, "Every economic agent must accept bitcoin as payment when offered to him by whoever acquires a good or service." In other words, paying with and accepting Bitcoin is not only legal, but its acceptance as payment is compulsory. Policy aside, experts have also argued that forced tender, such as that prescribed by Article 7, is legally unsound as it contradicts the freedom of exchange and contract. Dror Goldberg, an expert on the history of compulsory tender laws, expands upon this claiming that "As [forced tender legislation's] practical implication has typically been to force producers to part with all their produce for paper, it can also be a severe violation of property rights. It is a rule that penalizes passive behavior. It is, or should be, a controversial rule, unlike a rule prohibiting counterfeiting of money." Even the U.S. dollar is not a *forced* tender in El Salvador. Most countries, including the United States, conscious of forced tenders' restriction on personal freedoms do not have forced tender laws (ex. "Credit only" businesses may refuse to accept cash without legal repercussions).

III. Historical Perspective

While forced tender legislation may seem like a new issue, or at least newly relevant, it in fact has a rich and relevant history. In his 2016 article *Forced money: legal development of a criminal economic rule*, Goldberg argues that forced tender legislation not only infringes upon the freedom of exchange and contract but also represents economic authoritarianism. Tracing the transportation and translation of legal tender laws from Revolutionary to Napoleonic France, the Ottoman Empire, British Cyprus, British Palestine, and Israel, Goldberg concludes that forced legal tender was able to take hold in these instances due to the presence of struggling economies, weak governments, and legislators in favor of economic authoritarianism. As the COVID-19 Pandemic has reversed El Salvador's previously declining inflation rates, economic growth and direct foreign investment remain chronically low, and weak government institutions have proven to be especially vulnerable to corruption, the country certainly fits the trends Goldberg identified in his research. Interestingly, and unanticipated by Goldberg's historically-oriented analysis, Bitcoin is a symbol not of the state itself but of its future, of the inter- or even a-national tech hub that President Bukele and legislators hope El Salvador will become. Thus, the "symbolic implications on sovereignty" that Goldberg notes are characteristic of forced tender laws are even more devious in the case of El Salvador where Bitcoin is not stamped with the visages of current or previous Heads of State but is rather the digital face of a disembodied blockchain network. Symbolically then, if Bitcoin's notorious volatility leads to a drastic downturn in value, it may be shoved off as a failure of technology rather than the laws and leadership of El Salvador. As Goldberg states, "Accepting the state's money against one's will is a symbolic obedience to the state," yet in the case of El Salvador, accepting Bitcoin as forced tender is an obedience to a technological future that as of now, and without the help of the government, will leave many Salvadorans behind.

IV. Domestic and Foreign Response

The initial rollout of Bitcoin in El Salvador was far from smooth, complete with thousands taking to the streets of El Salvador to protest and technical issues making the Chivo wallet app unusable and its cash inaccessible. There was even a 10% fall in the value of Bitcoin compared to the U.S. dollar on the day it was made legal tender in the country—and has since seen more declines in its value. While Bukele is selling the rollout as a success, claiming that a third of Salvadorans are using Chivo, it is possible that a majority of that demographic is simply using the app for the $30 incentive from the government. In fact, according to The Financial Times, one of El Salvador's largest banks reported that Bitcoin constituted less than 0.0001% of its daily transactions in early September. Other media outlets also noted excessively long lines at ATMs with people rushing to convert their Bitcoin to more trusted cash.

Despite the general lack of popularity and ease of use for the Salvadoran public, El Salvador has projected an Insta-worthy image of technological advancement to appeal to young entrepreneurs. TIME describes a sleek launch party where primarily English-speaking crypto fans and social media influencers, even YouTuber Logan Paul, celebrated the law. Bukele, apparently, wants these festivities to last and has promised permanent residency to those who spend three Bitcoin (about $125,000) in the country. Bukele has also pointed out that the legal tender status of Bitcoin, rather than simply an investment asset, in El Salvador allows foreigners moving to El Salvador to avoid the capital gains tax on any profits made as a result of Bitcoin's value fluctuations. In a tweet of about the same length as Article 7 itself, he further advertises "Great weather, world class surfing beaches, beach front properties for sale" as reasons that crypto entrepreneurs should move to El Salvador. Given the subsidization by the government and foreign facing nature of the incentives, the adoption of Bitcoin as forced tender seems more like a get-rich-quick economy-boosting gambit than a true attempt to systematically improve the lives and financial well being of El Salvadoran citizens. This is dangerous as, while it's uncertain if the average El Salvadoran citizen will benefit as much as the tech-savvy international, forced tender ensures they will bear the brunt of the risk regardless.

The IMF and more importantly the majority of El Salvadoran citizens aren't the only ones discontent with the Bitcoin Law. Notably, the deputy of the leading opposition party in El Salvador, Farabundo Marti National Liberation Front (FMLN), has filed a suit regarding the constitutionality of the Bitcoin Law. Even some crypto enthusiasts take issue with Bitcoin as legal tender, not necessarily because it undermines the rights of citizens but more so because it arguably undermines the legitimacy of cryptocurrency in general. Cryptocurrency in its decentralized state was created exactly to exist outside of government controls so its adoption and potential regulation by governments such as El Salvador seems to defeat the purpose. While not directly related to the Bitcoin Law, the U.S. recently released a memo expressing concern over the September 3rd decision "which authorized immediate presidential re-election in contravention of the Salvadoran constitution." This decision seems to confirm the authoritarian trend in El Salvador evident in economic authoritarianism of forced tender and Article 7. The adoption of Bitcoin as legal tender, which some fear will soon completely replace the U.S. dollar, could also reduce the potential effect of U.S. economic sanctions in the case of future more authoritarian decisions.

Conclusion

As the potential for more regulation over and integration of Bitcoin into the mainstream U.S. economy looms large, other countries may prove to be important case studies pertaining to the feasibility and legality of the transition to digital dollars. While countries such as China have notably increased regulations before declaring all crypto transactions illegal, other countries, or at least their leadership as seen in the case of El Salvador, have embraced the crypto movement. Although the concerns arising from Bitcoin as forced legal tender should extend to its role in El Salvador and certainly not be limited to the potential impact on our own country, Goldberg's observation that "The young United States knew forced money laws from its own Revolution, but continuing it in peace was incompatible with the values of a free-market democracy" should no longer be taken for granted.