
DAO OR NEVER: THE MISSING SEBI PLAYBOOK ON TOKEN REGULATION

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ABSTRACT

Decentralised Autonomous Organisations (“DAOs”) represent a radical departure from conventional organisational structures. Their heterodox features, which range from token-based membership models to autonomous operations, pose significant challenges for legal recognition and regulation. While jurisdictions like the European Union, Canada, and the USA have experimented with frameworks that treat DAOs as limited liability companies and their tokens as securities, the Indian legal regime remains underdeveloped. Section 2(h) of the Securities Contracts (Regulation) Act, 1956 limits the scope of what may be subject to recognition as “securities”. This gap creates regulatory uncertainty and exposes participants to liability and financial risks. Comparative analysis reveals that foreign regulators have adopted flexible approaches. The paper argues that India must similarly recalibrate its securities framework to accommodate decentralised digital assets and balance innovation with investor protection. The paper attempts to identify common regulatory themes across jurisdictions and delineate gaps in the Indian framework to propose a reimagined, substance-driven definition of securities as a potential path toward effective regulation of DAO tokens.

Introduction

Decentralised Autonomous Organisation (“**DAOs**”) are organisations that fall outside the contours of conventional organisational structures. One of the most significant contributions of the corporate form of business organisation to commercial operations had been the reduction of agency costs that characterised other forms of organisation such as partnerships. The introduction of delegated management and investor ownership minimised the costs associated with conflicts between and within the management and the shareholders.¹ A few decades ago, perhaps the existence of an entity which eliminates agency costs altogether would have been far-fetched; even more so, the existence of an entity that eliminates one of the parties responsible for agency problems altogether, viz, the management or the directors. The advent of Decentralised Autonomous Organisations has made this far-fetched imagination a reality today.

DAOs are based on blockchain technology, a decentralised, distributed ledger maintained by a peer-to-peer network. A more precise definition characterises a DAO as organisations run by rules encoded in smart contracts on a blockchain.² Scholars such as De Filippi and Wright distinguish between DAOs with human decision-making and those controlled entirely by code, and view them as operating with varying levels of autonomy on a spectrum.³ Much like a normal blockchain transaction, DAOs validate transactions through network consensus rather than a central authority. The decentralised governance models used by DAOs envision a form of decision-making that is distributed across network participants and exercised through a programmable code.⁴ Thus, unlike a traditional company, regardless of the nature of the transaction, wholly encoded DAOs are normally not subject to approval of a central authority or board of directors.

Furthermore, DAOs can function indefinitely if they can fund the underlying object through digital tokens. It can be structured to integrate multiple smart contracts that create systems with

¹ John Armour, Henry Hansmann & Reinier Kraakman, *The Essential Elements of Corporate Law*, Oxford Legal Studies Research Paper No. 20/2009 (2009), <https://ssrn.com/abstract=1436551>.

² Carlos Santana, Laura Albareda, “Blockchain and the emergence of Decentralized Autonomous Organizations (DAOs): An integrative model and research agenda”, *Technological Forecasting and Social Change*, Volume 182, 2022, <https://www.sciencedirect.com/science/article/pii/S0040162522003304>.

³ PRIMAVERA DE FILIPPI & AARON WRIGHT, *BLOCKCHAIN AND THE LAW: THE RULE OF CODE* (Harv. Univ. Press 2018), <https://www.jstor.org/stable/j.ctv2867sp>.

⁴ Jungsuk Han, Jongsub Lee & Tao Li, *A Review of DAO Governance: Recent Literature and Emerging Trends* (Eur. Corp. Governance Inst., Finance Working Paper No. 1044/2025, 2024), <https://ssrn.com/abstract=5074046>.

enhanced capabilities making use of collective intelligence. This allows users to work on and manage decentralized protocols for projects, raise funds, make investments or provide governance solutions to interested groups.⁵ Regardless of the application, most DAOs require the issuance and distribution of tokens. While these tokens may resemble the securities issued by traditional companies in some cases, the unique characteristics of DAOs require a reassessment of the assumptions underlying traditional securities analyses.⁶

Given their sharp departure from the conventional means of organisation, DAOs represent a novel organisational structure. Situating such corporate structures within the existing legal framework is imperative in order to address the legal implications of creating and sustaining DAOs. Additionally, in the absence of a potential legislation on the horizon, creative use of the existing framework helps guard those engaged in the use of DAO tokens against its possible dangers. For this purpose, this research paper shall first delineate the contours of a DAO, followed by an assessment of the plausible challenges posed by their proliferation across jurisdictions with specific focus on the Indian legal landscape and concluding with an analysis of their position within the said landscape. The primary object of this paper lies in navigating the fate of such tokens within the Indian landscape. To facilitate a comprehensive analysis, the authors shall also draw upon the experience and responses from foreign jurisdictions including Canada, European Union and the USA.

Murky Waters of DAO Regulation

While DAOs have been likened to the corporate form of business organisation, their nature defies traditional understanding of a company. The heterodoxy of such organisations is reflected in their membership structures, operations and legal obligations. As explained in the preceding section, their operations hinge on smart contracts, which are self-executing pieces of code that enforce rules and execute actions when specific conditions are met. The nature of DAO organisation introduces ambiguities into their legal status and recognition in most jurisdictions. Coupled with their inherent unincorporated status, this can expose members and founders to legal risks, particularly with respect to liability and interactions with the physical

⁵ Amhaz, Rabih & Bobenrieth, Cédric & Marz, Marlene. (2024). "Impact of Decentralized Autonomous Organizations (DAO) on Society 5.0" pg. 1-16

⁶ World Law Group, Canada: Securities Law Considerations for Decentralized Autonomous Organizations (Feb. 6, 2023), <https://www.theworldlawgroup.com/membership/news/whose-efforts-are-they-anyway-securities-law-considerations-for-decentralized-autonomous-organizations> (last visited Aug. 25, 2025).

world.⁷ DAOs have not been universally recognised as legal entities. This is especially true for India, where the regulatory landscape with respect to such organisations remains obsolete and virtually stagnant.⁸

Jurisdictional variations in corporate organisation affect the manner and precise form of recognition accorded to DAOs. Within the USA, legislation has been introduced in Wyoming, recognising DAOs as limited liability companies (“LLCs”). In March 2024, Wyoming further advanced DAO recognition by introducing a new category called “decentralised unincorporated nonprofit associations”, which grants DAOs legal existence, contract capabilities, court appearance rights, tax management, and limited liability protection.⁹ In Hong Kong, a company limited by guarantee offers a structure that aligns somewhat with DAO principles, as it does not involve shareholders and does not distribute profits, though it does involve appointed directors who owe fiduciary duties.¹⁰

Some authors have also argued for partnerships as the default form of recognition in the absence of voluntary incorporation. In a general partnership, partners share control and decision-making responsibilities. DAOs operate on a similar principle but use decentralised voting mechanisms and smart contracts. DAO members, or “token holders,” have voting rights and influence over actions, akin to how partners in a traditional partnership participate in decisions.¹¹ To address the risks associated with an unincorporated organisation, many DAOs consider using legal wrappers, a formal legal structure that surrounds its operations. A legal wrapper facilitates activities such as opening bank accounts, entering into contracts, and interacting formally with third parties¹² but they may nonetheless be subject to regulatory scrutiny typical for incorporated entities, including securities regulation in some cases.

⁷ *Sarcuni v. bZx DAO*, No. 22-cv-618-LAB-DEB, 2023 WL 2657633, at *1 (S.D. Cal. Mar. 27, 2023); Owen Gaffney & Allan Goodman, Class Action Lawsuit Highlights Importance of Legal Wrappers for Decentralized Autonomous Organizations, Goodmans LLP (June 14, 2022), <https://www.goodmans.ca/insights/article/class-action-lawsuit-highlights-importance-of-legal-wrappers-for-decentralized-autonomous-organizations> (last visited Sept. 6, 2025).

⁸ V.C. Mathews Mansha Bhatia <<https://foxmandal.in/ip-rights-in-the-emerging-world-of-daos-in-india/>> August 20, 2024

⁹ Thomson Reuters, Securities Law: Practical Law U.K., “Practical Law Securities—Overview,” (subscription content), available at <https://uk.practicallaw.thomsonreuters.com/w-042-8374> (last visited Aug. 29, 2025).

¹⁰ Companies Ordinance (Cap. 622) § 9 (H.K.).

¹¹ Maury Shenk, Sven Van Kerckhoven & Jonas Weinberger, The Crown, the Market and the DAO, 6 Stan. J. Blockchain L. & Pol’y 244 (2023), <<https://stanford-jblp.pubpub.org/pub/crown-market-and-dao/release/1>>.

¹² Owen Gaffney and Allan Goodman, “Class Action Lawsuit Highlights Importance of Legal Wrappers for Decentralized Autonomous Organisations” Client Updates 14 June 2022 <<https://www.goodmans.ca/insights/article/class-action-lawsuit-highlights-importance-of-legal-wrappers-for-decentralized-autonomous-organizations>>last accessed 25 August 2025.

Beyond Incorporation: DAO Tokens

Most DAOs operate on a token-based membership model where membership is facilitated through the issuance of tokens. DAO tokens are digital assets, bought in exchange of consideration that is often digital such as Ether,¹³ which may be used as a mechanism for incentivisation, which can be exchanged for cryptocurrency or employed to exercise voting rights within the organisation. Since a DAO can be used for many different reasons, the tokens utilised may vary in terms of their functions.¹⁴ On one end of the spectrum are investment DAOs that explicitly pool resources for investment in various endeavours; on the other end are community-oriented DAOs like knowledge-based cooperatives. Such DAOs are typically permissionless, which allows members to trade their tokens on the open market if they wish to exit. Several DAOs, however, continue to maintain conventional corporate incentivisation models reflected in a share-based and permissioned membership process where prospective members are required to submit proposals and demonstrate their value to the DAO. Membership shares in these DAOs represent both voting power and ownership, with the possibility of redeeming shares for a proportionate share of the treasury upon exit. An instance of this model is most accurately manifested in *MolochDAO*, which focuses on funding Ethereum projects.¹⁵

A typical DAO structure can be understood functionally as an ordinary corporation with two classes of shares: first, “governance tokens”, which function like common shares with typical voting rights, and second, “treasury tokens”, which function like non-voting preferred shares, giving their holders a claim against the assets held in the DAO’s treasury. In most DAOs, any tokenholder may submit a proposal that, if approved by the requisite number of tokenholders, will automatically be implemented. Furthermore, as DAOs operate as a collection of smart contracts that should, in principle, be available to all members, the DAO platform provides members with greater transparency regarding the operations and actions of the DAO.¹⁶

¹³ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207, 117 SEC Docket 745 (July 25, 2017), <https://www.sec.gov/files/litigation/investreport/34-81207.pdf> (last visited Aug. 25, 2025).

¹⁴ Jongho Lee & Alexandre Fricotté, DAO Token Transferability: Property, Contract, and Technology, *Eur. J. Risk Reg.* 1 (2024), <https://doi.org/10.1017/err.2024.93> (last visited Aug. 25, 2025).

¹⁵ MolochDAO, Project Grants, <https://molochdao.com/project-grants/> (visited Sept. 6, 2025).

¹⁶ *Supra* n. 6.

Taming of the Token: A Cross-Cross-Jurisdictional Analysis of Token Regulation

In 2017, after years of regulatory interlude, DAOs came to be subjected to the intense scrutiny of market regulators across jurisdictions. In order to understand what propelled said scrutiny, a careful look at the manner and structure of the tokens is required. The US Securities and Exchange Commission (“SEC”) assessed DAO tokens based on the “Howey Test” to determine and conclude that the tokens constituted “securities” within the US federal law.¹⁷ However, several challenges underlie the mechanical extension of the American classification to other jurisdictions and a careful examination of the means employed by different regulators is imperative to build a more holistic understanding and criterion.

Canada

The Canadian Securities Administrators (“CSA”) have been making strides in the regulation of DAO tokens. In early 2017, the CSA created a regulatory sandbox and issued several Staff Notices. The most pertinent ones among the several Staff Notices, include SN 46-307 which was issued in response to the early popularity of initial coin and token offerings (“Offerings”) in Canada as well as globally.¹⁸ It emphasised on the unique nature of every Offering and a case based assessment which would involve an assessment of the economic realities of the transaction with the objective of investor protection. The Staff Note further noted that regardless of their nomenclature, Offerings could be considered “securities” as defined in Canadian securities legislation.¹⁹

Within the Canadian jurisprudence, the definition of “security” is an investment contract which entails the existence of an investment of money in a common enterprise with the expectation of profit, derived significantly from the efforts of others. Against this interpretation, while DAOs satisfy the first two requirements in most cases, significant complexities mar the fulfilment of the latter two, which ultimately depend on an assessment of the nature of the DAO. Even in instances where the token holders harbour an expectation of profit, the last prong may be further complicated by a high degree of involvement by the individuals who purchase or otherwise receive DAO tokens.

¹⁷ “Framework for ‘Investment Contract’ Analysis of Digital Assets,” U.S. Securities and Exchange Commission (FinHub), Apr. 3, 2019, <https://www.sec.gov/files/dlt-framework.pdf> (last visited Aug. 25, 2025).

¹⁸ CSA Staff Notice 46-307, Cryptocurrency Offerings (Canadian Securities Administrators Aug. 24, 2017).

¹⁹ *Supra* n18.

Subsequently, the CSA issued SN 46-308, which provided greater clarity on when an Offering may involve an offering of securities, and issues relating to Offerings structured in multiple steps.²⁰ The note reiterated two scenarios where an Offering may involve a distribution for the purposes of applicable securities laws: *first*, where the Offering involves the distribution of an investment contract, and/or *second*, where the Offering and/or the tokens issued are securities under one or more of the other enumerated branches of the definition of security or may be a security that is not covered by the non-exclusive list of enumerated categories of securities. Several examples were laid down to illustrate the characteristics of a DAO token and its implications for securities law analysis. One of the most pertinent ones related to a representation on the part of the management of possessing specific skills or expertise likely to increase token value as an indication of a common enterprise due to the reliance of token holders on management, along with an expectation of profit.²¹ Another illustration suggested that where tokens are distributed to users for free, the distribution would probably fall beyond the definition of a “security” since it does not involve an investment of money.²²

European Union

Law in the European Union (“EU”) distinguishes between crypto assets that are considered “financial instruments” as defined in Markets in Financial Instruments Directive 2014 (“MiFID”)²³ and those covered by the new The Markets in Crypto Assets Regulation (“MiCA”)²⁴ regulation that has been recently propounded to regulate crypto assets. The European Securities and Market Authority has clarified that if a token gives holders rights analogous to shares, bonds or other securities, it should be treated as a “transferable security” under MiFID II.²⁵

Thus, tokens with an underlying characteristic of equity or debt remain governed by EU securities law and have to adhere to the restrictions provided under the prospectus and trading

²⁰ CSA Staff Notice 46-308, *Securities Law Implications for Offerings of Tokens* (Canadian Securities Administrators June 11, 2018).

²¹ *Supra* n20.

²² *Supra* n20.

²³ Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments.

²⁴ Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

²⁵ European Securities and Markets Authority, *Guidelines on the Conditions and Criteria for the Qualification of Crypto-Assets as Financial Instruments*, ESMA Doc. ESMA75453128700-1323 (Mar. 19, 2025) [hereinafter ESMA Crypto-Assets Guidelines], ¶¶ 13, 51, 5.2.

rules,²⁶ not MiCA. If a DAO token is not a financial instrument i.e., a pure utility or payment token, it falls under MiCA's "crypto-asset" regime and will be governed by the same as MiCA explicitly carves out tokens that qualify as financial instruments.²⁷ In short, the EU would regulate a DAO token as a security if it confers equity or debt rights; otherwise, MiCA's rules for utility tokens or stablecoins might apply. Hence, the EU has actively regulated DAO tokens in whatever shape and form and has not left them untouched.

United States

On July 25, 2017, the US SEC released its Report of Investigation²⁸ into "The DAO", an unincorporated decentralised autonomous organisation created by Slock.it UG. The Report highlighted that whether an asset is recognised a "security" depends on its substance rather than form. The SEC examined whether the tokens issued by "The DAO" constituted "securities" under US federal law, specifically the Securities Act of 1933 and the Securities Exchange Act of 1934.²⁹ The SEC relied on the test laid down by the US Federal Court in *SEC v. W.J. Howey Co.*,³⁰ as reaffirmed in *SEC v. Edwards*,³¹ to conclude that the tokens issued by "The DAO" were investment contracts, and therefore securities.

The ratio of the Federal Court of in the former case, now commonly known as the "Howey Test", laid down the means of identifying assets that are investment contracts. The test posited that where as asset constituted an investment of money in a common enterprise with an expectation of profit that is derived from the efforts of a third party, it qualified as an investment contract.³² Since investors contributed Ether in a common enterprise with a reasonable expectation of profits derived primarily from the managerial and entrepreneurial efforts of Slock.it, its founders, and curators, "The DAO" fulfilled the test. More recently, the SEC concluded its case against Ripple Labs, leaving in place a \$125 million fine and an injunction

²⁶ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

²⁷ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the Prospectus to Be Published When Securities Are Offered to the Public or Admitted to Trading on a Regulated Market, and Repealing Directive 2003/71/EC, 2017 O.J. (L 168) 12.

²⁸ U.S. Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017), <https://www.sec.gov/files/litigation/investreport/34-81207.pdf> (last visited Sept. 6, 2025).

²⁹ Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1) (2025); Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C. § 78c(a)(10) (2025).

³⁰ 328 U.S. 293 (1946).

³¹ 540 U.S. 389 (2004).

³² *SEC v. W.J. Howey Co.* 328 U.S. 293 (1946).

barring sales of XRP tokens to institutional investors.³³ The dispute began in 2020 when the SEC sued Ripple for selling unregistered securities. In 2023, Judge Analisa Torres ruled that XRP sales to institutional investors fell under securities laws, though public exchange sales did not.³⁴ Attempts by both Ripple and the SEC to reduce the fine and lift the injunction were rejected. With the appeals dismissed, the penalty remains.³⁵ The SEC, under the more crypto-friendly Trump administration, has also dropped suits against Binance, Coinbase, and Kraken.³⁶ Hence, in practice, many ICO tokens have been deemed securities by the SEC while purely utility or governance tokens often evade that label. Any DAO token sold for profit in the USA is therefore likely a security that triggers registration and disclosure obligations.

Indian Tryst with DAO Tokens

The Indian position in relation to DAO tokens and other digital assets remains precarious in light of the absence of specific regulations. DAO tokens might be subject to SEBI oversight, though no dedicated legislation exists. Cases like *SEC v. W. J. Howey Co.*³⁷ and *SEC v. Ripple*³⁸ highlight evolving approaches globally but domestically, the regulation of cryptocurrencies in India, or the attempt thereof is a good starting point in the journey to trace the regulation of digital assets such as those offered by DAO tokens regulated by securities regulators in mature jurisdictions.

The digital assets landscape has evolved significantly since the Supreme Court struck down the blanket ban imposed by the RBI on cryptocurrency operations in 2018 ban in *Internet and Mobile Association of India v. RBI*.³⁹ The government has since introduced taxation measures, classifying cryptocurrencies as Virtual Digital Assets subject to a 30 per cent tax on gains and a 1 per cent TDS on transactions⁴⁰ but the inadequacy of the framework has been echoed by the Supreme Court, which recently observed that the crypto-related laws in India are

³³ Jonathan Stempel, SEC Ends Lawsuit Against Ripple, Company to Pay \$125 Million Fine, Reuters (Aug. 8, 2025), <https://www.reuters.com/legal/government/sec-ends-lawsuit-against-ripple-company-pay-125-million-fine-2025-08-08/>.

³⁴ SEC v Labs Inc, U.S. District Court, Southern District of New York, No. 20-10832.

³⁵ Ripple Labs, Inc., Bradley Garlinghouse, and Christian A. Larsen and U.S. SECURITIES AND EXCHANGE COMMISSION - , Litigation Release No. 26369 / Aug. 7, 2025, accessed: <https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26369>.

³⁶ Jonathan Stempel, SEC Ends Lawsuit Against Ripple, Company to Pay \$125 Million Fine, Reuters (Aug. 8, 2025), <https://www.reuters.com/legal/government/sec-ends-lawsuit-against-ripple-company-pay-125-million-fine-2025-08-08/>.

³⁷ *Supra* n32.

³⁸ Securities & Exch. Comm'n v. Ripple Labs, Inc., 682 F. Supp. 3d 308 (S.D.N.Y. 2023).

³⁹ *Internet & Mobile Assn. of India v. RBI*, (2020) 10 SCC 274.

⁴⁰ Finance Act, 2022 (India) (inserting §§ 115BBH, 194S into the Income Tax Act, 1961).

“completely obsolete” and urged the government to bring clarity, in response to which, the Ministry of Finance has prepared a discussion paper on regulation.⁴¹ This section of the paper attempts to explore the gaps in the recognition and regulation of DAO tokens in India, specifically in the manner contemplated by jurisdictions such as the USA and Canada.

The extensive regulatory framework of the Indian market regulator, SEBI would only govern DAO tokens if they fall within the definition of “securities” under Section 2(h) of the Securities Contracts (Regulation) Act, 1956 (“**the SCRA**”). The provision defines securities to include

“ 1. shares, scrips, stocks, bonds, debentures, debenture stock, or other marketable securities of a like nature in or of any incorporated company or other body corporate; derivatives; units or any other instrument issued by a collective investment scheme; security receipts as defined under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; units or instruments issued under a mutual fund scheme or Government securities; such other instruments as may be declared by the Central Government to be securities; and rights or interests in securities.”

The instruments expressly covered under Section 2(h) of the SCRA share a common characteristic: each represents an underlying asset or a legally enforceable claim, such as debt, equity, pooled investments, or receivables. For instance, shares embody ownership and voting rights, debentures signify debt claims, and units of mutual funds or collective investment schemes represent pooled capital backed by identifiable assets.

DAO tokens, by contrast, typically do not carry such underlying financial assets. Instead, they represent units of participation in a decentralised organisation and are usually issued through token offerings akin to the Initial Coin Offerings (“**ICOs**”) characteristic of cryptocurrencies to raise funds. Their value often derives from speculative demand and the future prospects of the project, rather than from a legally enforceable claim against the issuer.

Residual Category: “Other Marketable Securities of Like Nature”

At first glance, DAO tokens might be argued to fall within the residual category of “other marketable securities of a like nature.” This category is intended to cover instruments not specifically enumerated under Section 2(h) but which share the fundamental attributes of

⁴¹ Shailesh Babulal Bhatt v. State of Gujarat, SLP (Crl.) No. 4036 of 2025 (India).

securities. However, Indian courts have imposed two key requirements for an instrument to qualify as such, which include: marketability and corporate issuance based on the contents of Section 2(h) of the SCRA. The former presupposes free transferability of the instrument, while the latter requires that the instrument must originate from an incorporated company or body corporate.

DAO tokens in most profit-based DAOs are transferable across blockchain-based trading platforms that may be restricted by the DAO contract, much like restrictions on the transfer of shares by the Articles of Association of a company.⁴² However, transferability alone is insufficient. The statutory scheme of the SCRA, reinforced by judicial precedent, demands that securities be tied to an incorporated entity or a recognised corporate framework. This poses a significant challenge to the regulation of DAO tokens within the extant framework, potentially exposing investors or token holders to financial risks and precarity.

Judicial Interpretation of “Marketable Securities”

Section 2(h) provides an inclusive definition of “securities.” Judicial interpretation has emphasised that, for shares of a public limited company to fall within this definition, they must meet the requirement of being marketable. Thus, the judicial understanding of “securities” under Section 2(h) rests firmly on the criterion of free transferability, derived from both statutory interpretation and the dictionary meaning of marketability.⁴³ The term “marketable,” however, has not been defined in the SCRA. Courts have therefore turned to authoritative dictionaries, such as Black’s Law Dictionary, which equate marketability with saleability.⁴⁴

The Supreme Court in *Bhagwati Developers (P) Ltd. v. Peerless General Finance & Investment Co. Ltd.*,⁴⁵ clarified that the essence of marketability lies in the attribute of free transferability. The Court explained that even if, at a given time, there are no buyers for listed shares, this does not strip them of their marketable character. What matters is the legal right of shareholders to transfer their shares at will, subject only to limited statutory restrictions. Conversely, where

⁴² Lee J, Fricotté A. DAO Token Transferability: Property, Contract, and Technology. *European Journal of Risk Regulation*. Published online 2024:1-17. doi:10.1017/err.2024.93

<<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/dao-token-transferability-property-contract-and-technology/98A0BD8814A1472C962F635397E33036>>

⁴³ *Bhagwati Developers (P) Ltd. v. Peerless General Finance & Investment Co. Ltd.*, (2013) 9 SCC 584.

⁴⁴ Black's Law Dictionary 6th ed.; Oxford English Dictionary, Vol. 1, at 1728, as cited in *Bhagwati Developers (P) Ltd. v. Peerless Gen. Fin. & Inv. Co. Ltd.*, (2013) 9 SCC 584, ¶ 20.

⁴⁵ (2013) 9 SCC 584, ¶ 20–22.

legislation restricts the transfer of shares to a specific class of persons or imposes onerous conditions, such instruments lose their marketable quality. On this reasoning, the Court held that shares of a public limited company, even if not listed on a stock exchange, are nevertheless “securities” within the meaning of Section 2(h) SCRA, since they retain the essential element of free transferability. The Court in this decision approved earlier precedents such as *East Indian Produce Ltd. v. Naresh Acharya Bhaduri*,⁴⁶ and *B.K. Holdings (P) Ltd. v. Prem Chand Jute Mills*,⁴⁷ while distinguishing *Dahiben Umedbhai Patel v. Norman James Hamilton*.⁴⁸

Need for Corporate Framework

For a digital token or coin to qualify as a “security”, it must not only be marketable but also be issued by an incorporated company or body corporate. This requirement flows from the language of the statute, which ties securities to instruments traceable to a legally recognised corporate issuer. The concept of “body corporate” is expansively defined under Section 2(11) of the Companies Act, 2013,⁴⁹ to include companies incorporated both in India and abroad. Thus, securities may be issued not only by domestic companies but also by foreign incorporated entities, provided they meet the definitional requirements.

However, this statutory framework reveals a crucial limitation when applied to blockchain-based fundraising. Many tokens, including those issued through token offerings, are created and circulated by unincorporated associations such as DAOs. These entities are code-based, existing outside the formal corporate structure envisaged by Indian law. Since the SCRA predicates the concept of securities on issuance by an incorporated body, coins or tokens generated by such unincorporated ventures fall outside the definitional fold of Section 2(h).⁵⁰

Applying these principles, “asset coins” or tokens that explicitly confer debt or equity claims could, in theory, resemble securities under Section 2(h), provided they are both marketable and issued by a body corporate. DAO tokens, however, are not backed by legally enforceable claims against a corporate issuer. Instead, they represent governance or participatory rights within a decentralised ecosystem, which Indian courts are unlikely to equate with traditional securities.

⁴⁶ (1988) 64 Comp Cas 259 (Cal).

⁴⁷ (1983) 53 Comp Cas 367 (Cal).

⁴⁸ (1985) 57 Comp Cas 700 (Bom).

⁴⁹ The Companies Act, No. 18 of 2013 (India).

⁵⁰ Aishwarya Singh, Prospects of Regulation of Initial Coin Offerings by SEBI, IndiaCorpLaw (Aug. 20, 2018), <https://indiacorplaw.in/2018/08/20/prospects-regulation-initial-coin-offerings-sebi/> (last visited Aug. 24, 2025).

Evidently therefore, DAO tokens cannot be categorised as “other marketable securities of a like nature” under the SCRA. This creates a regulatory gap which leaves investors vulnerable to risks such as fraud, manipulation, and lack of recourse in the absence of an identifiable issuer.

Conclusion

While disruptive technology tends to make its presence felt, law is slow to change, especially in the Indian context. If policy response to cryptocurrency³ is any indication, a legal overhaul in response to the technology predating DAOs is unlikely in the near future. Any attempt at regulating such organisations and the tokens issued by them would therefore be regulated within the extant framework.

As has already been discussed, DAOs may not be driven by a profit motive alone. Depending on the nature of the DAO in question and the extent of its focus on profit, the scalability of its functions may propel the transferability of DAO tokens. Such transferability may further prompt the formation of secondary markets for tokens,⁵¹ which would necessitate regulation. The American experience with “The DAO” is a case in point. Given the state of the still-developing Indian economy, however, effective regulation would require balancing innovation with investor protection.⁵² The proactive measures adopted by the Canadian regulators, along with the judicial creativity of American courts, offer insights into the plausible means by which such a balance may be struck. While varied, the regulators have a discernible common scheme that the Indian policy would do well to refer to, especially in light of the numerous gaps in the domestic framework.

Within India, Section 2(h) of the SCRA provides for a very restrictive interpretation of “securities,” a formulation which excludes digital assets issued by decentralised or unincorporated entities. By contrast, the United States adopts a more flexible approach through the *Howey Test*,⁵³ which emphasises investment in a common enterprise with an expectation of profits from the efforts of others, rather than restricting the inquiry to incorporated issuers. This substance-over-form approach allows American courts to bring digital assets and ICO offerings which resemble token offerings within securities regulation where circumstances justify it,

⁵¹ *Supra* n23.

⁵² Alex Travelli, India’s Economy Slows Down Just When It Was Supposed to, N.Y. Times (Jan. 21, 2025), <https://www.nytimes.com/.../indian-economy-rupee>.

⁵³ *Supra* n32.

such as in the case of *SEC v. Shavers*,⁵⁴ wherein Bitcoin was held to satisfy the “Howey Test”.⁵⁵

However, reliance on American jurisprudence is not without challenges. The Howey Test has been inconsistently applied, and the concept of “*common enterprise*” may not neatly fit DAO frameworks. Moreover, given the pre-digital origins of the test, it may lack the requisite nuance to fully capture the complexities of blockchain-based markets.⁵⁶

In India, the limitation of Section 2(h) hinders the ability of SEBI from effectively regulating crypto-assets, despite evidence of fraud and insider trading in crypto exchanges. While digital asset markets differ from traditional stock exchanges, investor protection remains equally necessary. A temporary solution could involve borrowing elements of the U.S. framework, particularly the Howey Test, to assess digital assets on a case-by-case basis. While these principles may provide interim guidance, India ultimately requires its own framework.⁵⁷ A redefined, substance-based definition of securities, one that expressly accommodates tokenised offerings, would enable SEBI to safeguard investors while supporting innovation in digital markets.

The precise form of regulation must account for the spectrum of autonomy and structures amongst DAOs. The degree of autonomous governance structures, increased transparency and direct participation must act as a key differentiator in any legal analysis. For example, theories regarding shareholder liability that assume a more passive involvement by shareholders may be challenged under certain structures. Similarly, increased participation by shareholders, together with greater transparency regarding the DAO’s operations, may mitigate the need for certain legal protections otherwise provided to shareholders.

⁵⁴ Securities and Exchange Commission v. Shavers et al, No. 4:2013cv00416 - Document 23 (E.D. Tex. 2013).

⁵⁵ Cassels Brock & Blackwell LLP, *SEC Declares Bitcoin and Ether as Non-Securities* (June 14, 2018), <https://cassels.com/insights/sec-declares-bitcoin-and-ether-as-non-securities/>.

⁵⁶ Harsh N. Dudhe & Pranay Bhardwaj, Digital Assets and the Case to Redefine “Securities” Under Indian Law, *IndiaCorpLaw* (June 27, 2022), <https://indiacorplaw.in/2022/06/27/digital-assets-and-the-case-to-redefine-securities-under-indian-law/> (last visited Aug. 20, 2025).

⁵⁷ *Supra* n54.