

Virtual Currency as a Modern Financial Tool: Current Problems of Legal Regulation

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Abstract

The article analyzes the problems of using virtual currency and determining its legal status. The features of the legislation of foreign countries regulating the turnover of virtual currency have been considered. The main changes in civil law in the field of determining the ownership of the cryptocurrency have been studied and the conclusion has been made about the need for its criminal legal protection. The study proposes innovation in the form of consolidation in the criminal law theory of virtual currency as a subject of theft. The results of the study can contribute to the development of civil and criminal legislation on virtual currency, as well as the resolution of problems arising from its application.

Keywords

Cryptocurrency, Finance, Theft, Internet, Means of Payment.

Introduction

Over the centuries-old history of its development, money as a universal financial means and an irreplaceable instrument of the market has found its expression in various forms (commodity money, coins, and banknotes, records on a bank account, and electronic wallet). Society is in constant search for new methods of payment and forms of money in the modern world, in conditions when economic turnover does not stand still, to facilitate and accelerate the exchange of goods. The expansion of innovative technologies in the field of financial regulation has led to the emergence of a new variety of funds – virtual currency or cryptocurrency, which has gained worldwide popularity in the last decade. It is fair to say that cyberspace is unique and exists regardless of geographic and national boundaries (Kucherov, Khavanova, 2017).

Today, almost all countries in the world are actively involved in the development and formation of a national cryptocurrency.

The legal status of virtual currency, a new financial instrument, is not defined, and legal responsibility for actions associated with its illegal use is not fixed.

There is a wide list of approaches in the legal doctrine developed by science to determine the legal nature of cryptocurrency as an object of legal regulation. This study is aimed at developing a common understanding of virtual currency within the framework of Russian legislation, using the experience of several foreign countries.

Methods

In the course of the study, we used methods of analysis, synthesis, and generalization (for identifying the advantages and risks of cryptocurrency in the modern world and features of its legal nature and legislative regulation). We also used classification and comparative legal method (for analyzing the norms of Russian legislation, comparing them with foreign, and classifying individual foreign states that regulate the basics of cryptocurrency turnover in their legislation), the system method (for compiling the research materials into a logically coherent system), and induction and deduction (for determining the current problems of legal regulation of cryptocurrency values in Russian law and developing ways to eliminate them).

Results

The phenomenon of cryptocurrency has gained global popularity and become a profitable investment for many reasons: universal accessibility for Internet users, a settlement without the participation of intermediaries in the form of banks, a sharp rise in the rates of cryptocurrencies, and the possibility of earning money (the so-called "mining"). Modern cryptocurrency has become a real-life financial instrument that is in no way inferior to other types of monetary systems: the total annual market capitalization of cryptocurrencies averages 213 billion US dollars per year (the main part – 111 billion US dollars – falls on bitcoin) (Ivantsov et al., 2019).

The convenience of calculations, the anonymous nature of the participants, and the absence of a state monopoly on the issue made the cryptocurrency a rather expensive asset in the property of the owner. Unlike a generally accepted e-wallet, which requires an actual transfer of money to a certain currency (for example, through a bank), cryptocurrency is focused on the vast Internet network and is in no way connected to one of the existing conventional currencies.

Another distinctive feature of a cryptocurrency, which multiplies its value in the system of economic relations, is due to its trust value, which, unlike traditional money, is determined by supply and demand, as well as the belief in its purchasing power on the part of Internet users. In other words, the offer for a cryptocurrency cannot be controlled, since the volume of its emission is predetermined in the network protocol (Kirillova et al., 2020).

Thus, cryptocurrency, on the one hand, acts as a qualitatively new stage in the development of monetary instruments (the payment unit itself takes on a digital form), and, on the other hand, is characterized by legal uncertainty, which is because, unlike its predecessor in the form of electronic money, the cryptocurrency is expressed not in national currency but a new currency unit and is not someone's obligation.

For this reason, the legal regime that establishes the features of the circulation of electronic and non-cash money cannot be applied to virtual currency since they are officially equated to elements of the monetary system and are considered as one of the types of fiat currency (Klyuchnikova et al., 2018).

In the vast majority of modern developed countries, regulation of this issue has been developing for more than five years. Two leading international organizations — the FATF and the OECD are involved in this process (Levashenko et al., 2019).

Considering the experience of legal regulation of cryptocurrency, it should be pointed out that there is no unified legislative position on this issue (Kochergin et al., 2020). Standards and recommendations in this area have not yet been developed due to the novelty of public relations on the turnover of virtual currency in international law. Most international regulators have taken a wait-and-see position and still prefer to observe the development of the cryptocurrency industry, without taking action to legalize it (Dolgieva, 2019). In this regard, even though currently it is not recognized as a legal means of payment in any foreign country, all modern states that use cryptosystems can be classified into several groups:

1. Countries that impose a strict ban on the issuance and circulation of cryptocurrencies (Vietnam, Ecuador, Thailand, Bolivia, Bangladesh). The legislation of these states equates any type of cryptocurrency to monetary surrogate, referring to the fact that it does not have the status of a legal tender.
2. Countries that have defined a permissive civil law regime that recognizes cryptocurrency as an object of civil legal relations of various nature:

- a) virtual currency as intangible property/goods is recognized as an object of property rights, which is subject to double taxation (USA, UK);
- b) virtual currency acts as a means of payment, which is exempt from VAT (Germany, Japan, Australia, Belarus).

This position regarding the legal regulation of the status of virtual currency is considered the most common and is supported by most modern states.

3. Countries with a so-called "half-hearted" approach. China can be singled out among such states, in which the Central Bank allows transactions with crypto money selectively, only for individuals, while prohibiting financial institutions from making them. Regarding the legal status of the cryptocurrency, China denies the existence of its monetary properties, considering it as an asset. Besides, the state has introduced a strict ban on the activities of cryptocurrency exchanges (Kuznetsov, 2018).

Despite the cautious position of several countries regarding the recognition of the legal status of cryptocurrencies, the vast majority of world states that are faced with the turnover of cryptocurrencies on their territory, in a legal sense, react to this phenomenon following business trends and the functioning of national tax standards (Saksonova, Kuzmina-Merlino: 2019).

Discussion

Russian lawmakers have attempted to determine the legal status of cryptocurrencies. In March 2016, the Ministry of Finance of the Russian Federation published a draft Federal Law "On Amendments to Certain Legislative Acts of the Russian Federation", which defines in its norms the term "monetary surrogate", and, as a consequence, a draft Federal Law "On Amendments to the Criminal Code Of the Russian Federation and the Criminal Procedure Code of the Russian Federation", proposing to include Article 187.1 "Turnover of Monetary Surrogate" in the Criminal Code of the Russian Federation.

However, these acts were not adopted and became the object of criticism of many researchers and practitioners. Also, the interpretation of the concept of "Monetary surrogate" proposed in the framework of the draft law did not agree with the essence of virtual currency. Experts agreed on the impossibility of equating the concepts of "cryptocurrency" and "monetary surrogate".

The correctness of this statement can be illustrated by an example from judicial practice, better known as the case of "colions". Shlyapnikov printed a large circulation of certain banknotes – colions (with an exchange rate of 1 colion to 50 rubles), which could freely circulate on the territory of one of the villages as proper payment for goods, works, and services. In making the decision, the court stated that these notes are not legal tender due to unreliability, reduced liquidity, and inability to maintain purchasing power. Also, the Central Bank is recognized as the only subject of money issue on the territory of the Russian Federation. After that, Shlyapnikov released non-cash colions on the Emercoin blockchain, and the prosecutor's office no longer considered these actions illegal. Thus, neither the legislator nor the court practice recognizes virtual currency as a monetary surrogate.

Considering the principle of dispositiveness, due to the absence of a direct legislative ban on the use of cryptocurrency in the Russian Federation, it can rightly be attributed to the objects of civil rights, the nature and essence of which is not defined either in the civil law doctrine or in the norms of law.

However, the question is which of the objects of civil legal relations should include virtual currency. According to the main provisions of the legislation, objects of civil rights were recognized as: things, including cash and documentary securities, other property, including non-cash funds, book-entry securities, property rights; results of work and rendering of services; protected results of intellectual activity and means of individualization equated to them (intellectual property); intangible benefits (Torrubia et al., 2001).

Analyzing these categories, it should be noted that cryptocurrency cannot be considered an object due to the lack of a note in the form of material expression. It is inappropriate to associate cryptocurrency with the category "other property". It is believed that such a civil legal category by its nature is interpreted too broadly and makes it possible to bring almost any unsettled legal relationship under it.

It is also impossible to recognize the cryptocurrency as the result of work or the provision of services due to the actual absence of a mandatory component. Virtual currency cannot be considered as the result of intellectual activity because it is a consequence of the functioning of software protocols and not the creative activity of a person. The last group of objects – intangible goods – also does not agree in any way with cryptosystems due to the lack of connection with the human personality. In other words, the category "property

rights" is the closest in its characteristic features to a virtual currency (cryptocurrency) (Liu et al., 2017).

In Russia, digital rights are officially classified as objects of civil rights. Digital rights are recognized as "obligatory and other rights named as such in the law, the content and conditions of implementation of which are determined following the rules of the information system that meets the characteristics established by law" (Baranov, 2018).

Most modern researchers who analyzed this legislative definition concluded that it is an unreasonably broad interpretation.

Thus, a detailed analysis of its main features allows concluding that digital rights can include virtually any rights enshrined in digital terms. Along with virtual currency, digital rights can also include points accumulated by the client of a bank, as well as the balance of a mobile phone (Konobeevskaya, 2019).

It is believed that the establishment of such a universal, broad interpretation of digital rights in civil law is reasonable because, given the constant development of digital technologies, the number of such examples will only increase.

If the civil legislator has solved the problem of legal uncertainty of the status of virtual currency, then in criminal law such a flaw still needs its unconditional elimination. The fact is that the attractiveness of cryptocurrency has a downside because this type of currency is increasingly becoming the object of illegal interest. This problem is not unique to Russia but global. Thus, according to the Main Police Department of Japan in 2017, cryptocurrencies were stolen in the amount equivalent to 6.3 million US dollars, or 662.4 million yen. Since the beginning of 2018, about 22 fraudulent schemes using digital financial assets have been implemented in the world. The damage associated with the theft of cryptocurrencies is about 1.36 billion US dollars (Korennaya, Tydykova, 2019).

The contradictory nature of the virtual currency, as well as the gradation of the structure of criminal legislation based on the criterion of the object of criminal law protection, raises doubts about the qualification of the actions of the perpetrator associated with illegal access to the wallet with cryptocurrency and their subsequent illegal withdrawal.

Considering the trend of interconnection and unity of branches of the legal system, in particular, Russian, the legislator's attribution of cryptocurrency to the objects of civil legal relations (namely, to the category of digital rights) should find its logical reflection in criminal law regulations. However, cryptocurrency cannot be recognized as a protected

object of criminal legal relations, which is more idealized. It is most closely related to such the category of the subject of a crime, which is an element of the material world, directly influenced in the process of criminal encroachment. In this regard, it seems most correct to believe that cryptocurrency can be the subject of, in principle, any theft (Dolgieva, 2018).

According to its characteristics, the virtual currency fully meets the features of the object of theft that are available in the criminal law doctrine. Thus, its economic (cost) content is expressed in the existence of a certain exchange rate of cryptocurrencies to official currencies, as well as in the ability to use it as a means of payment for ordinary goods or services.

A legal sign is manifested in the fact that any wallet with cryptocurrency funds belongs to a certain person, which means that it is a stranger to the attacker. Concerning the physical attribute, the modern legal doctrine admits that, due to the rapid development of the information space, not all objects of property rights have a material nature. This is evidenced by the recognition in judicial and investigative practice of non-cash funds as the subject of theft, despite the absence of a physical sign. The existence of a physical attribute in a virtual currency is also indicated by the fact that it has its special form — a digital code.

Analyzing the above, it should be concluded that it is necessary to recognize in the modern criminal law doctrine of cryptocurrency (virtual currency), which civil law classifies as digital rights, as the subject of theft for purposes. Such a novelty will allow eliminating the contradictions between criminal and civil legislation in terms of recognizing objects of civil rights as the subject of embezzlement and will also make it possible to give a proper criminal legal assessment of a huge number of illegal actions that occur daily in the virtual space and bring the perpetrators to justice.

Another aspect of the problem raised comes down to the fact that the use of virtual products of digitalization of the market, including cryptocurrencies, not only opens up new advantages and prospects for the socio-economic development of any state but also significantly expands the possibilities for committing criminal acts (Dorofeeva et al., 2019; Khabrieva, 2018). According to the opinion expressed by the FATF (Financial Action Task Force on Money Laundering), the further use of cryptocurrency outside the legal field of criminal legislation may lead to anonymous financing of terrorism (Jamkhedkar, Heileman, 2009).

The need to ensure legal protection of virtual currency is due to a significant increase in crime in this area. The lack of control and, as a result, the impossibility of tracking cryptocurrency has turned it into the main means of payment for illegal transactions in drug trafficking, weapons, terrorist activity, etc.

This issue is particularly acute for the world community after realizing that with all the obvious advantages of the new product of digitalization of the economy, one must not forget about the criminal risks of its use. According to experts, an average of 3-4 billion euros is "laundered" through cryptocurrency every year. Its "criminal geography" is very diverse: the virtual currency is actively used in money laundering, financing extremist and terrorist associations, and even in the sexual exploitation of children on the Internet. This refers to the so-called "blockchain crime". A world-famous example of such crime can be the sensational story of the international online store Silk Road, where one could buy drugs all over the world, paying for the purchase with bitcoins (Wu et al., 2010).

The need to establish a separate corpus delicti that provides for liability for illegal actions concerning cryptocurrency has long been overdue in law enforcement practice. If the issue of cryptocurrency theft can be resolved based on the previously stated arguments, then the criminal legal qualification of the activities of cryptocurrency platforms is not based on the law. Therefore, investigative authorities often come to a dead end when trying to qualify crimes related to cryptocurrency.

The norms of criminal law in their outdated tools are not able to protect new forms of economic relations. However, from a logical point of view, it is impossible to establish a criminal-legal ban for illegal use of digital currency without a corresponding consolidation of the rules of its legal turnover within the framework of regulatory legislation (administrative, civil, tax). Following the basic legal principles, it is impossible to punish for non-declaration and illegal circulation of cryptocurrency without defining the legal basis for its legal circulation.

There are numerous discussions around the legal regulation of the crypto industry, which allows concluding that it is premature to establish criminal liability measures for its illegal use.

A positive example of the legal regulation of cryptocurrency relations can be the experience of several foreign countries, which, having established the rules for the legal turnover of virtual currency, laid the foundations of regulatory legislation in this area. Special attention should be paid to the experience of countries that have developed and

implemented a licensing procedure for activities related to operations with cryptocurrencies. Such a permissive measure allows participants of the "crypto exchange" to earn money on the promising and growing market of virtual money while being under the control of the state.

For example, in Germany, where bitcoin is recognized as an official means of payment, it is necessary to obtain a license to conduct commercial operations with this type of cryptocurrency. A similar regime is established in Canada, Luxembourg, and Spain. In the USA, the activities of such companies are subject to licensing at the state level (Washington, New York, California, New Hampshire).

Japan, which occupies a leading position in the legal regulation of digital currency, has established a complex licensing procedure in this area. Issuing licenses is carried out by the Financial Services Agency (FSA), which imposes several requirements on companies applying for it (to the organizational form, authorized capital, personnel, IT system, etc.).

Conclusion

Cryptocurrency, as an economic and legal phenomenon that has gained wide global popularity, is characterized by many problems associated with its legislative regulation. The novelty of the virtual currency has given rise to the existence of many positions on its legal status.

Civil legislation equated virtual currency to digital rights, referring them to a group of property rights that act as objects of civil law relations. The prevalence of criminal attacks committed in the modern world against virtual currency has led to the need for its inclusion in the list of objects of theft within the framework of criminal law theory.

Since criminal law cannot independently determine the legal regime and limits of legitimate cryptocurrency turnover, to introduce new objects in the field of criminal protection in the future, it is necessary to resolve existing contradictions between branches of law and review the existing criminal tools.

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