«СУДДІВСЬКЕ ЗНАХОДЖЕННЯ» ПРАВОВОЇ ПРИРОДИ КРИПТОВАЛЮТИ*

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ПАВЛО БАРТУСЯК
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Анотація. У статті розкриваються правова природа та властивості феномену криптовалюти через аналіз та порівняння зафіксованих у судових актах результатів «суддівського знаходження» права. Автором виявлено, що судове право різних юрисдикцій йде шляхом пізнання природи біткойна (й інших криптовалют) як явища, що володіє базовими правовими властивостями грошей. Встановлено, що суддями у переважній більшості для характеристики криптовалюти використовуються такі визначення, як: децентралізована валюта; актив, що виконує функції засобу обміну та/або міри вартості; анонімна цифрова валюта; віртуальна валюта; актив, що виконує функції засобу платежу; цифрова продукція; анонімізована система розрахунків; нетрадиційні гроші тощо. Автором показано, що криптовалюти (у тому сенсі як їх тлумачить судове право) володіють атрибутивними якостям, котрі притаманні антропосоціокультурним феноменам: криптовалюти є буттєво укоріненими, мають спонтанний і водночас процесуальний характер, із локальних феноменів динамічно трансформуються у всезагальне явище, виступають природним способом саморегуляції, розподілу, перерозподілу та обміну благ у суспільстві між представниками його передусім приватного сектора. Автором обґрунтовано фундаментальне значення «суддівського знаходження» правової природи та властивостей криптовалют, котре полягає у тому, що у ньому синтезується воєдино плюралістична природа обох надважливих феноменів суспільного життя – права та грошей: криптовалюти, як феномени, що володіють якостями грошей, виступають об'єктами (предметами) фактичних життєвих відносин, у яких ставиться питання про право. Тим самим у статті ще раз підтверджено повну достовірність та обґрунтованість одного із найголовніших теоретико-методологічних висновків Є. Ерліха, зроблених ним понад століття тому – висновку про поліонтологічну природу права, яке за жодних обставин не вичерпується позитивним право, а тому не може бути зведене лише до позитивних правових норм.

Ключові слова: метод суддівського пізнання права; природа права; правова природа криптовалют (біткойна); правові властивості криптовалют (біткойна).

«JUDICIAL FINDING» OF THE LEGAL NATURE OF CRYPTOCURRENCY*

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* В основу назви статті покладено квінтесенцію назви незавершеної роботи Є. Ерліха «Теорія суддівського знаходження права» [1].

* The article heading is based on the quintessence of the title of the Eugen Ehrlich's unfinished work «The Theory of Judicial Finding of Law» [1].

Abstract. In the current article the legal nature and properties of the cryptocurrency phenomenon are disclosed through the analysis and comparison of the results of «judicial finding» of law that are recorded in the judicial acts. The author reveals, that judicial law of the different jurisdictions goes on the path of recognition of the bitcoin's (and other cryptocurrencies) nature as the phenomenon that possesses the basic legal properties of money. It is established, that judges in the predominant majority use the following definitions for the characteristic of cryptocurrency: a decentralized currency; an asset that serves as a means of exchange and/or a measure of value; an anonymous digital currency; a virtual currency; an asset that serves as a means of payment; a digital production; an anonymized settlement system; a non-traditional money, etc. The author shows, that cryptocurrencies (in that sense in which they are interpreted in judicial law) have attributive properties that are inherent for the anthroposociocultural phenomena: cryptocurrencies are existentially rooted, they have a spontaneous and at the same time procedural character, they dynamically transformed into the universal phenomenon from the local phenomena, cryptocurrencies act as a natural way of self-regulation, distribution, redistribution and exchange of goods in society between its representatives, primarily in the private sector. The author substantiates the fundamental sense of the «judicial finding» of the legal nature and properties of cryptocurrency, which consists in the synthesis of the pluralistic nature of both crucial phenomena of social life – law and money: cryptocurrencies, as the phenomena that possess the qualities of money, act as the objects (subjects) of the factual life relations in which the question about the law raises. Thereby in the article it is once and again confirmed the full reliability and validity of one of the main Eugen Ehrlich's theoretical and methodological conclusions, which he made more than a century ago – the conclusion about the poly-ontological nature of law, which is under no circumstances limited to the positive law and therefore cannot be narrowed to the positive legal norms..

Keywords: method of the judicial finding of law; nature of law; legal nature of cryptocurrency (bitcoin); legal properties of cryptocurrency (bitcoin).

Problem statement. American science-fiction author Neal Stephenson in the book named «Cryptonomicon» describes such a plot: a group of mathematical programmers trying to create the world's first cryptocurrency (completely electronic money protected by the most advanced methods of cryptography) faces with the resistance of the world governments and large business players. The novel was written in 1999 and the first cryptocurrency (bitcoin) appeared ten years later in 2009, although the main principles of its spreading were laid out a year earlier [2, 19].

Here is a widespread technical explanation of what a cryptocurrency is: «it is a cryptographically protected and decentralized digital currency, information about the transaction in which is introduced and stored in blockchain». In turn, a bitcoin is a peer-to-peer payment system or the world's first cryptocurrency. The substance of bitcoin consists in the peer-to-peer payment system based on the blockchain technology. Blockchain, thereby, is a distributed database of transactions, which is formed on the basis of consensus among participants of the distributed system of bitcoin [3, 10].

The value of the bitcoin currency arises in the process of mining through the solving of cryptographic puzzles using the computing capabilities of the computer or specialized devices serving the bitcoin network. By means of mining the processing of the transactions (authorization, monitoring, collection, handling and storage of information) and the issuance of the new coins in the bitcoin network are carried out, while the decentralization and security of the network from external attacks are achieved [3, 12].

These entirely specialized definitions show what cryptocurrency is from the point of view of the specialists in the field of cryptography, information technologies, miners themselves, but are the above concepts sufficient to describe adequately their legal nature, in other words, the properties of cryptocurrency?

From the time of the first cryptocurrency of bitcoin emergence (2009 year) all of them became the super-speculative phenomena: in January 2017 the price of bitcoin varied within 1 thousand dollars per unit, and in November of that year its price increased by 8 times and continued to grow until mid-December 2017, where the record was set at about 20 thousand dollars per one bitcoin, and after that there was a turbulent fall in price to 6–8 thousand dollars per unit (as of February 2018) [4]. A similar volatility is observed in other cryptocurrencies, in particular, in the largest by volume after bitcoin: Etherium, Ripple, Bitcoin Cash, Cardano [5], etc.

Thus, in less than 10 years cryptocurrencies have become a significant factor that essentially affects the tendencies on the modern financial markets and on the social life in general. For example, bitcoin, bursting in the life plans of an insignificant circle of like-minded people, has become one of the most desirable assets, which popularity can be compared with the general recognition of gold or other precious metals. As of February 2018 the bitcoin's capitalization is about $ 130 billion [5] that is four times more than

the revenue part of the Ukrainian budget for the whole 2018 (about $ 32 billion). The rampant evolvement of cryptocurrencies (as of February 2018, there are over 1500 of them [6]) is naturally culminated in the fact that they penetrate into an increasing number of social relations – civil, criminal, financial (tax), etc.

Cryptocurrencies, in particular, the most famous and the largest in terms of volume of them that is bitcoin appertain to the new and practically unexplored phenomena in the legal science. In fact, for almost ten years (the first block of bitcoin was generated in 2009) legislators in different countries permanently solve the dilemma – to regulate the cryptocurrency business by the legislation or not. When they choose the first option, then the field for manoeuvres turns out to be quite wide – from the legislative limitations and prohibition of the cryptocurrencies earning (mining) (China, Bangladesh) to the liberalization of the cryptocurrency business and even to the permission of cryptocurrency settlements (Switzerland). Despite this the nature of the cryptocurrency phenomenon by itself is still left out of the legislators` attention, because by the legislative direction they just allow or restrict various operations with cryptocurrency.

There is completely different situation with the judicial institutions that have to formulate one or another way of interpretation of the nature of cryptocurrency phenomenon everywhere in the world in the process of solving specific life affairs, because their decisions affect on the fate of an entirely concrete persons. Judicial institutions with their vision of the nature of cryptocurrency show the social cross-section of the perception of these complex phenomena. Therefore, the current scientific exploration is devoted to the investigation of the number of significant judicial acts of various judicial jurisdictions, each of which brings its own grain of sense to the general idea of the nature of cryptocurrency.

The degree of scientific development of the issue is still pointed by the initiating character. The insignificant number of the recently emerged publications about the legal nature of the cryptocurrency phenomenon rather contain the initial generalizations and evaluations of the factual material and launch its scientific systematization and classification. Therein the estimative judgements about the certain properties of cryptocurrency are expressed [7; 8; 9; 10; 11]. There are no specialized scientific studies on the above-mentioned problem.

The purpose of the article consists the ascertainment of the legal nature of cryptocurrency by studying the relevant foreign and domestic case law, which in turn is the result of «judicial finding» of the nature of such phenomenon . This purpose is specificated in the tasks of the study that is the identification of the most apparent legal properties from the substance of the cryptocurrencies.

Study methodology. The aforementioned purpose and specific tasks of the study based on our approximate and the most common knowledge of the social and existential nature of cryptocurrency can be solved with a variety of methods. The most productive of them for the exploration of the nature of existential phenomena in science is undoubtedly the practical philosophy [12, 116]. However, there is not enough available scientific evidence to apply this method. Scientists, who are going to investigate the phenomenon of cryptocurrency, have to deal mainly with the life facts, in other words, social facts. Therefore, much more productive for cognition of the legal nature of cryptocurrency, in comparison with practical philosophy, here could be the sociological method of Eugen Ehrlich [13, 501]. Still, for its effective applying there is no available critical number of relevant life facts and their initial generalization at the present time.

Furthermore, Eugen Ehrlich by himself in original way warned us: «For new scientific purposes we always need new methods» [14, 434]. As shown in special studies, he made the genuine revolution in the methodology of legal cognition in the late XIX – early XX century and substantiated a number of paradigmatically new methods of scientific knowledge of the nature of law [13, 483–519; 15, 383–391]. One of these methods is the method of judicial finding of law that based on the direct penetration of judges in the living law by examining specific cases [1]. This particular method we have taken as the basis for preparation of this article. Along with this, we used the method of functional analysis and the comparative legal method. All of the above-mentioned cognitive instruments are unionized by a peculiar metamethod, which is the anthroposociocultural approach to the cognition of the nature of cryptocurrency [16, 6–32].

Presentation of basic material of the study. One of the first who began to react on the unknown phenomenon of cryptocurrency were the courts. They are in the overwhelming majority thrown into a situation of legislative vacuum regarding these phenomena. Therefore, when exercise justice judges are forced to make decisions based on the analogy of legislation and law, or to rely on their own «legal feeling». When we turn to the provisions of Ukrainian legislation, then we find, for example, that the Law of Ukraine «On the Judicial System and Status of Judges» directly stipulates: «Courts shall administer justice proceeding from the Constitution and laws of Ukraine and on the basis of the rule of law» [17, art. 6].

The presence of gaps in the normative regulation of the new social relations is the eternal problem of justice. That is why, in most cases judges have to show creativity, in other words, to produce a judicial law. One of the first who pointed out on the existence of judicial law as one of the components of the pluralistic nature of law and disclosed the mechanism of the free finding of this law was the Professor of the Law Faculty of the Chernivtsi Imperial University of the late XIX – early XX centuries Eugen Ehrlich. At the beginning of the XX century he wrote, that prevailing school of juristic science treated the judicial decision as a logical syllogism in which a legal proposition was the major premise; the matter litigated, the minor; and the judgment of the court, the conclusion. This, according to Eugen Ehrlich, presupposed that every judgment was preceded in time by a legal proposition. However, as he noted, historically this was wrong, since at the very beginning of the evolution of justice the jurisdiction of the courts had included only certain specific relations of domination or possession, custom or contract on the violation of which it had been indicated by the plaintiff. On that basis judge found the appropriate norm: the judge's decision-making was not grounded on the legal proposition [14, 210].

According to Eugen Ehrlich, the judge thought only about the concrete, but not the abstract one. In particular, he wrote: «Despite the lack of legal propositions the norm chosen by the judge was not voluntary. The judge has always borrowed this norm from the established legal facts (from his own knowledge or through the provided evidence), relying on customs, relations of dominance and possession, on the will, and especially on contracts. The legal norms were created in accordance with the facts, and the question about the fact in the case was inseparable from the question of law» [14, 210].

Judicial law, in such a manner, were produced from life and from casusses by judges themselves. That is why it is now, same as before, productive concept of the free finding of law by Eugen Ehrlich. He, in particular, observes that at the each stage of development society acts in the same way as a judge-lawyer. Each legal proposition appears from the social substance, but the judge-lawyer eventually forms it. According to Eugen Ehrlich, the free finding of norms should proceed only from the internal order of social unions, where on the basis of these norms it is refused, rewarded or reimbursed losses in the process of settlement claims. The whole «subordinate order», on his opinion, is predetermined to surround by the protection against attacks and dangers all the internal unions that are constantly created by new practices, domination and conditions of possession [14, 245–246].

According to Eugen Ehrlich, the free finding of law by the judge-lawyer is impossible tabula rasa, because «the balance of forces in the society, the social representations about common interests, the social perception of justice indicate to him what he must generalize and unify, which norms he should find for the dispute, what he should protect against attack and dangers, what should be the values for him, where self-created internal order of unions should be cancelled or suspended in its action by the means of the state and society» [14, 245–246].

Oleksiy Stovba in turn from the standpoint of philosophy, in particular, phenomenology and fundamental ontology, draws attention to the interrelation between law and justice. He notes that law, which everyone is seeking, is the most controversial thing. «It is suitable for law – he writes – the well-known expression of St. Augustine in relation to the concept of time: «If no one asks me, I know what it is. If I wish to explain it to him who asks, I do not know». However, law is something so close to us in our being that the feeling of its loss can attract us to search it and make this pursuit the deal of the whole our life» [18, 147].

Oleksiy Stovba reasonably observes that the loss/lack of law particularly makes itself felt. As he notes, the usual practice is that legislation sometimes has nothing to do with the law, and therefore does not regulate the relevant factual circumstances that have become the basis for the case or does not contain a solution that is adequate to the situation. Because of this, according to Oleksiy Stovba, for the administration of justice it is not just permissible, but also necessary sometimes to be beyond the scope of the legislation [18, 147]. He adds that justice can be interpreted as a variation of law-finding activity [18, 149].

The result of his reflection on the nature of law and justice is the conclusion that law as an entity is a peculiar answer to the question «who is who» in the legal situation: who obeyed the order, thereby becoming «punishable», and who on the contrary behaved himself legally valid, in other words, according to his mode of how-being. That is why Oleksiy Stovba summarizes, that law is the fundamental and ontological basis of the justice. On his opinion, law, taken in this perspective, appears to be the answer to the question «how» and «who» to be in a particular context. «In contrast to this so-called law (I), the law (II) or rather the law as an entity (positive law in the broadest sense of the word – legislation, contract, etc.) – he resumes – is only an instrument for filling the «emptiness», caused by the violation of law (I)» [18, 152].

As it is shown from the above-mentioned judicial law arises as a separate component of the ontologically pluralistic nature of law, and justice, in turn, is an unceasing process of finding «answers» to questions posed by law. This is brilliantly confirmed by all the experience of justice, including the first initial practice of reviewing cases, where the subject of the dispute are cryptocurrencies and speaking more properly the social relations on regards of them. In the case «SEC vs. Trendon Shavers and Bitcoin Savings and Trust» the U.S. federal judge of Texas Amos Mazzant ordered Bitcoin Savings and Trust and its owner Trendon Shavers to pay a combined $40.7 million after the Securities and Exchange Commission established that the company, which sold investments using the virtual currency, was a financial pyramid (Ponzi scheme – P.B.) [19]. It is important that the court in this case found, that the conversion of the bitcoin units were the investments. In addition, in the descriptive part of a judgment it is determined that «Bitcoin is a decentralized digital currency that may be used to purchase goods and services online, or traded on online exchanges for conventional currencies, including the U.S. dollar» [19].

A number of cases in the United States concerned the purchase of drugs by means of bitcoins. For example, in the case «U.S. v. Faiella» Robert Faiella was found guilty and convicted of unlicensed money transmitting businesses (under § 18 1960 U.S.C.) [20]. From December 2011 to October 2013 Robert Faiella sold bitcoin for cash to users of Silk Road, a website that by the time authorities closed it had $200 million in drug sales. In this case the court found that «Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions» [20].

One more case «United States v. Ulbricht» also referred to the purchase of drugs through the Internet using cryptocurrency. In the above case the court appointed: «Transactions on Silk Road exclusively used Bitcoins, an anonymous but traceable digital currency» [21].

The case «United States v. Brown» dealt with the blackmail of US presidential candidate M. Romney in 2012. The lawbreakers demanded a deposit on the designated account of $ 1 million in bitcoins – «virtual, sovereign-free currency» [22] – for non-disclosure of the compromising information about him, in particular, the tax data. In another case «United States v. Lord» the court considered bitcoin as «decentralized form of online currency that is maintained in an online-wallet» [23].

The following two cases are important in view of the court's attempts to determine in the bitcoin nature its money properties. In the first case «United States v. Petix» the court established: «...Bitcoin is not «money» as people ordinarily understand that term. Bitcoin operates as a medium of exchange like cash but does not issue from or enjoy the protection of any sovereign; in fact, the whole point of Bitcoin is to escape any entanglement with sovereign governments. Bitcoins themselves are simply computer files generated through a ledger system that operates on blockchain technology…Like marbles, Beanie Babies, or Pokémon trading cards, bitcoins have value exclusively to the extent that people at any given time choose privately to assign them value. No governmental mechanisms assist with valuation or price stabilization, which likely explains why Bitcoin value fluctuates much more than that of the typical government-backed fiat currency» [24].

It should be noted that the characterization of bitcoin in the aforementioned judicial act is very close to that of what sociologist Victor Vakhshtayn writes about. He observes that the nature of cryptocurrency and other virtual currencies illustrates an important thesis of the everyday life sociology: there are no more «money in general», «things in general» and «actions in general» so far as each object, action or event must be considered in the context of the world to which they belong. All of these phenomena are concrete historical social constructs that have anthroposociocultural nature [2, 28].

Regarding the aforementioned phenomena, the American philosopher and legal sociologist John Searle at the very beginning of his work «The Construction of Social Reality» in the section «The Metaphysical Burden of Social Reality» notes: « ... there are portions of real world, objective facts in the world, that are only facts by human agreement. In a sense there are things that exist only because we believe them to exist. I am thinking of things like money, property, governments, and marriages. Yet many facts regarding these things are «objective» facts in the sense that they are not a matter of your of my preferences, evaluations, or moral attitudes» [25, 1]. John Searle points out that such facts belong to institutional facts, because they require the human institutions for their existence [25, 2]. That is why, in his opinion, a type of things is money only if people believe it is money, something is property only if people believe it is property. As John Searle concludes, all institutional facts are ontologically subjective, even though in general they are epistemologically objective [25, 63]. These institutional facts, according to John Searle, are social constructs, because they are created in the process of social construction of reality. Cryptocurrencies, therefore, by their nature, can and should be classified as social constructs.

The result of such understanding of the bitcoin nature by the court was the following conclusion: «...Because Bitcoin does not fit an ordinary understanding of the term «money» Petix cannot have violated Section 1960 (18 § 1960 U.S.C.) in its current form» [24]. It is to be recalled that the § 18 1960 U.S.C. is referred to the prohibition of unlicensed money transmitting businesses. Out there the term «unlicensed money transmitting business» means a money transmitting business, which affects interstate or foreign commerce in any manner or degree and... (C.) involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity» [26].

But two months earlier another American court accepted the cardinally different judgment in the case «United States v. Murgio». There the court established: «When a term goes undefined in a statute, courts give the term «its ordinary meaning». The ordinary meaning of «funds» according to Webster's Dictionary, is «available pecuniary resources»… «Pecuniary» is defined as «taking the form of or consisting of money. And «money», in turn, is defined as «something generally accepted as a medium of exchange, a measure of value, or a means of payment» [27].

In the same case, the court turned to the study of several positions of other US courts regarding the concept of «money» and «funds» and in light of the consensus as to the term's ordinary meaning, the court concluded that «funds» for the purposes of § 18 1960 U.S.C. means pecuniary resources, which are generally accepted as a medium of exchange or a means of payment. According to the court opinion, applying that definition here it is clear that bitcoins are funds within the plain meaning of that term. Bitcoins can be accepted «as a payment for goods and services» or bought «directly from an exchange with a bank account». They therefore function as «pecuniary resources» and are «used as a medium of exchange» and as «a means of payment» [27].

Interesting additional information on the more detailed and deeper understanding of the legal nature of the cryptocurrency contains a special analytical article «E-Cash 2.0», published in the authoritative edition «The Economist» on February 19, 2000. In this material all the subjects, who showed the largest and most stable interest to the digital money, cryptocurrency primarily, at that time was divided into three qualitatively different among themselves social groups: the consumers (owners of new money that can be used for paying for goods and services, repaying debts, saving as a value and even accumulating with extraordinary risks in the long run); the traders (sellers/buyers of goods, services, currency, securities, etc.); the issuers (producers of digital money, who can use digital money for their own needs and for sale) [28].

In the aforementioned article, particular attention was paid to the fact that the common feature of issuers, traders and consumers of digital money is their affiliation to the private-commercial sector of society, and, therefore, their needs in the field of digital money and the requirements to their properties are determined by the private interests of such social groups. As a result, it is not surprising that the benefit criterion was a decisive factor in the formation of specific requirements for digital money and their peculiar properties. It is called among the latter: the full anonymity and privacy of digital money, guaranteed by their storage only in the memory of computers and by the private nature of the issue; the absolute liquidity of digital money, provided by the funds transferring through the channels of computer networks directly between payers and recipients without any intermediators; the maximum cheapness of operations with digital money, which is ensured by the decentralization and private nature of the issue and by the absence of any interests and commissions [28].

In the European Union the most important in the context of the interpretation of the bitcoin nature is the judgment of the European Court of Justice in the case «Sweden v. Hedqvist» dated October 22, 2015, No. C-264/14 (Skatteverket v David Hedqvist). This judgement was delivered at the request of the Swedish authorities, which entered into a dispute with the citizen of the country David Hedqvist. The entrepreneur wanted to open an official sales service for bitcoins. However, the Swedish authorities and David Hedqvist had disagreements about the understanding of the bitcoins nature. In particular, the question was posed as follows: what is bitcoin by its nature – the currency or good that should be taxed on the value added tax (hereinafter referred to as «VAT» – P.B.)? Swedish Revenue Law Commission insisted, that exchange transactions of traditional currency for the «bitcoin» virtual currency or vice versa should have to be subject to VAT. David Hedqvist disagreed with that, considering the bitcoin as currency, the conversion operations of which are not subject to VAT.

As a result of the trial, the Fifth Chamber of the European Court of Justice came to the following conclusions about the nature of bitcoin:

1. «…The virtual currency does not have a single issuer and instead is created directly in a network by a special algorithm. The system for the «bitcoin» virtual currency allows anonymous ownership and the transfer of «bitcoin» amounts within the network by users who have «bitcoin» addresses. A «bitcoin» address may be compared to a bank account number» (p. 11);
2. «...Virtual currencies differ from electronic money, in so far as, unlike that money, for virtual currencies the funds are not expressed in traditional accounting units, such as in euro, but in virtual accounting units, such as the «bitcoin» (p. 12);
3. «...the «bitcoin» virtual currency… which will be exchanged for traditional currencies in the context of exchange transactions, cannot be characterised as «tangible property» within the meaning of Article 14 of the VAT Directive, given that… virtual currency has no purpose other than to be a means of payment» (p. 24);
4. «The «bitcoin» virtual currency, being a contractual means of payment, cannot be regarded as a current account or a deposit account, a payment or a transfer. Moreover, unlike a debt, cheques and other negotiable instruments referred to in Article 135(1)(d) of the VAT Directive, the «bitcoin» virtual currency is a direct means of payment between the operators that accept it» (p. 42);
5. «Transactions involving non-traditional currencies, that is to say, currencies other than those that are legal tender in one or more countries, in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions» (p. 49);
6. «...it is common ground that the «bitcoin» virtual currency has no other purpose than to be a means of payment and that it is accepted for that purpose by certain operators» (p. 52);
7. «...Article 135(1)(e) of the VAT Directive (provides the VAT exemptions for a number of transactions – P.B.) covers the supply of services such as those at issue in the main proceedings, which consist of the exchange of traditional currencies for units of the «bitcoin» virtual currency and vice versa, performed in return for payment of a sum equal to the difference between, on the one hand, the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his clients» (p. 53) [29].

From the aforecited sections of the judgment of the European Court of Justice in the case «Sweden v. Hedqvist» it is clear that this court actually established the existence of a number of properties of money in the bitcoin nature and consequently recognized transactions of its exchange on traditional currencies such that are not subject to VAT.

In the Russian Federation decisions of the courts on disputes over the legal nature of cryptocurrency are mainly aimed at recognizing the cryptocurrency payments as inappropriate form of settlement, or even on recognition the cryptocurrency as prohibited asset on the territory of Russian Federation. A kind of such judgement was the decision of the Sixth Arbitration Court of Appeal in Khabarovsk in 2015, according to which the cryptocurrency was not recognized as a monetary instrument and, consequently, inappropriate form of settlements [30]. The Singapore company Magna Trading Ltd argued, that individual entrepreneur Abramov had borrowed her money for the payment of real estate, but did not return the loan, so the company applied to the court for a refund. Entrepreneur Abramov argued, that he returned the loan by means of a transfer in cryptocurrency. The loan amount was $ 5,000,000 and it was dispensed in cash. After the trial the court designated: «...arguments about the return of the funds, borrowed by Abramov under the loan agreement, but not in the form of cash, received in the amount of $ 5 million, but in the form of cryptocurrency (virtual money) ... do not confirm the fact of payment of funds to the defendant» [30].

In another case concerning bankruptcy the Arbitration Court of the Tyumen region expressed its position regarding the status of cryptocurrency. Thus, in the court session the debtor, who appealed for recognition as a bankrupt, explained, that all the credit money was directed to the mining of cryptocurrency. The court did not endorse such a statement and the bankruptcy proceedings were terminated with the following formulation: «...taking into account the explanation given by the debtor in the session of the court about the use of credit funds for the cloud mining, the court considers it necessary to point out that the debtor deliberately committed an increase in payables to banks for the purpose of conducting transactions in cryptocurrency (bitcoin), the turnover of which is prohibited on the territory of Russian Federation (the article 27 of the Federal Law № 86–FZ «On the Central Bank of the Russian Federation» dated on July 10, 2002) and therefore he cannot be recognized by the court as bona fide» [31].

In addition, we should note, that the abovementioned article of the Federal Law refers to the fact that the official monetary unit (currency) of the Russian Federation is the ruble, and the issue of any other monetary units or quasi-money (monetary surrogates) shall be prohibited in the Russian Federation [32, art. 27].

A somewhat different position was expressed in the autumn of 2015 by the Arbitration Court of the Vologda region, which accepted for consideration the case about the bankruptcy of an individual entrepreneur. When considering issues related to bankruptcy and in the process of searching for the bankruptcy assets, the court equated cryptocurrency with electronic money. In the list of documents confirming the material status of the debtor the financial manager demanded information about the balances on electronic accounts. The order of the court contains the whole list of relevant documents and data: «... Electronic funds include, for example, «PayPal», «Yandex.Money», «Money@Mail.ru», «Webmoney», «QIWI», as well as various cryptocurrencies: Bitcoin, Litecoin» [33].

In Ukraine, the courts have focused their attention on defining the nature of cryptocurrency when considering mainly civil and criminal cases. In one of such cases, the courts of two instances gradually determined what the bitcoin was not, without clearly stating their position on the properties of it. The Darnytsky District Court of Kyiv considered in detail the agreement on which the calculation was made in cryptocurrency and found it to be the mine contract, but not an agreement on the provision of services (as the parties called it), «since cryptocurrency is not a currency, but a digital production» [34]. On the opinion of this court, the service contract stipulates the provision of a service for a fee, which should be made by cash (payment) means, but not in bitcoins. In the judicial decision it is stated, that the payment in cryptocurrency is the exchange of the programs by all appearances, and therefore for the controversial legal relations in this case the provisions of the contract of mines (barter) are applicable [34].

The Kyiv Court of Appeal upheld the conclusions of the court of the first instance and indicated, that the payment instrument on the territory of Ukraine is the hryvnia. Moreover, according to this court, in compliance of the instructions of the National Bank of Ukraine, cryptocurrency is a monetary surrogate that has no ensured value, and the sale and purchase of cryptocurrency have signs of financial pyramids. The Court of Appeal found the agreement concluded between the parties of the dispute as the void contract, since the contract of the provision of services implies the settlements in payment means that is hryvnias or foreign currency. In the view of all aforementioned the court came to the conclusion that it could not oblige the defendant to convey something intangible to the plaintiff and therefore refused to satisfy the claim [35].

It should be noted, that the panel of judges of the Court of Appeal rejected the appellant's reference to the fact that bitcoin digital products were property rights as unreasonably, since they were not based on the norms of the current legislation: «...The property rights are acknowledged any rights related to property other than the right of property, including rights that are constituent parts of the right of property, as well as other specific rights and claims. Bitcoins do not have any characteristics of property rights» [35]. In addition, the Court of Appeal admitted, that bitcoin was not a thing in the meaning of art. 179 of the Civil Code of Ukraine and had no signs of the material world. Also, in the opinion of the court, bitcoin is not a product and the order of circulation of the bitcoin virtual currency/cryptocurrency is not regulated normatively [35].

In a number of the court resolutions in criminal cases it was recognized, that the issue and circulation of the bitcoin cryptocurrency on the territory of Ukraine is prohibited in accordance with part 2 of art. 32 of the Law of Ukraine «On the National Bank of Ukraine». Such is, in particular, the resolution of the investigating judge of the Svyatoshinsky District Court of Kyiv on August 3, 2017, which granted the permission to the investigator for the search and seizure of things (including computers) and documents (case about the forgery of bank documents) [36]. The same formulation was contained in the resolution of the investigating judge of the Desniansky district court of Chernihiv on January 14, 2015 on the temporary access to things and documents in criminal proceedings (case about the fictitious entrepreneurship) [37].

The court order of the Kyiv Court of Appeal dated October 26, 2016 states, that the cryptocurrency bitcoin was used in the financing mechanism of the terrorist organizations of the DPR and LPR (part 3 of art. 258-5 of the Criminal Code of Ukraine). It is also noted, that bitcoin is the anonymized settlement system, the property of which is «the impossibility of identification of the users and owners of electronic wallets of payment systems and the inability of blocking them» [38].

The essential role for the further development of judicial practice in the field of taxation of transactions with cryptocurrencies has the decision of the Kharkiv Regional Administrative Court on October 13, 2016 on the claim of the Limited Liability Company «Edinarcoin» to the Main Department of the State Fiscal Service in the Kharkiv region, regarding the cancelling of two items of individual tax advice,

concerning the virtual currency of Aitibicoin and E-dinarcoin respectively. In support of the claim the plaintiff indicated, that he applied to the Main Department of the State Fiscal Service in the Kharkiv region with requests for tax advisory services on the taxation of VAT for transactions with virtual cryptocurrencies Aitibicoin and E-dinarcoin. The tax authority for these requests reported, in particular, that transactions with the virtual currency E-dinarcoin are subject to VAT [39].

The plaintiff considered these individual tax advices as such that did not disclose to the full extent the root of the matter and asked the court to cancel them. In the process of resolving the dispute the Kharkiv Regional Administrative Court separately noted: «The European Court of Human Rights in the case «Hedqvist v. Sweden» by its decision on October 22, 2015 ruled, that operations with bitcoins and other virtual currencies in the European Union should not be subject to value added tax. In this way the court equates virtual currencies with traditional currencies in terms of taxation. After the judgement of the court operations on the exchange of traditional currencies on bitcoins should be exempted from value added tax, as the EU rules prohibit the collection of such tax for the currency, banknotes and coins exchange transactions. The judgement of the European Court also withdraws the question about the assigning of virtual currency to the certain type of assets» [39].

Since the judgments of the European Court of Human Rights are sources of law in Ukraine, the court interpreted this argument in favour of the plaintiff. In accordance with the art. 17 of the Law of Ukraine «On Execution of Judgments and Application of Practice of the European Court of Human Rights» dated February 23, 2006, when considering cases by the courts of Ukraine, the Convention and the practice of the European Court should be used as sources of law [40]. The court of appeal left the decision unaltered. However, it turned out, that the judgment of the European Court of Human Rights in case «Hedqvist v. Sweden» used by the Ukrainian court in the reasoning part of the decision does not really exist, but in fact there is the judgment of the European Court of Justice in case «Sweden v. Hedqvist» about which we have mentioned earlier.

Conclusion. Initially it should be noted, that judicial law of the different jurisdictions goes on the path of recognition of the bitcoin's (and other cryptocurrencies) nature as the phenomenon that possesses the basic legal properties of money. A quite number of the courts and judges reached such conclusions in the process of considering the administrative, financial and criminal cases.

However, the courts and judges dealing with civil or commercial cases involving cryptocurrencies have not yet found a sufficient degree of universality of them – they were considered as inappropriate (unlawful) form of settlement, money surrogates or prohibited (unlawful) assets. On the other hand, the judicial law in the predominant majority uses the following definitions for the characteristic of cryptocurrency: a decentralized currency; an asset that serves as a means of exchange and/or a measure of value; an anonymous digital currency; a virtual currency; an asset that serves as a means of payment; a digital production; an anonymized settlement system; a non-traditional money, etc.

It can be resumed, that cryptocurrencies, without any exception, have attributive properties that are inherent for the anthroposociocultural phenomena: cryptocurrencies are existentially rooted, they have a spontaneous and at the same time procedural character, they dynamically transformed into the universal phenomenon from the local phenomena, cryptocurrencies act as a natural way of self-regulation, distribution, redistribution and exchange of goods in society between its representatives, primarily in the private sector. At the same time, cryptocurrency possesses certain specific properties e.g. its full anonymity and privacy, absolute liquidity of cryptocurrency, and maximum cheapness of operations with cryptocurrency.

The fundamental sense of the abovementioned interpretation of the legal properties of cryptocurrency by the courts and judges consists in the synthesis of the pluralistic nature of both crucial phenomena of social life – law and money: cryptocurrencies, as the phenomena that possess the qualities of money, act as the objects (subjects) of the factual life relations in which the question about the law raises. Thereby it is again confirmed the full reliability and validity of one of the main Eugen Ehrlich's theoretical and methodological conclusions, which he made more than a century ago – the conclusion about the poly-ontological nature of law, which is under no circumstances limited to the positive law and therefore cannot be narrowed to the positive legal norms.

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