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Smart Contract on a Crypto Assets in the Civil Law and Common Law Jurisdictions: Implementation of Best Practices

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Abstract

The article is devoted to the analysis on a crypto assets smart contract in the civil law and common law jurisdictions and the implementation of the best practices into Ukrainian law. It is argued that the essence of a crypto assets smart contract is that it is a self-executing contract which is represented and executed by a computer program, remains unchanged and unstoppable after the creation of this contract, and its terms are included in the internal functions of a decentralized database which is not controlled by the databases of the parties to the contract or third parties. It is noted that a cryptoasset smart contract, like any contract, may be declared invalid if the will to conclude it does not meet the conditions for the validity of this transaction, regardless of the form in which this transaction is concluded, as in this case in the form of a computer code. It is also stated that the terms of a cryptoasset smart contract must be specific (clear, unambiguous), feasible (objective), legitimate, and capable of automation (no evaluative terms, such as “reasonable time,” may be used), exist within the blockchain platform (on which cryptoassets are currently transacted) and not involve obtaining and confirming information from outside (in this regard, the terms of force majeure are not specified in the smart contract). The study applies dialectical, comparative legal, formal and logical, and systemic and structural methods of scientific knowledge. It is proved that a smart contract is a contract which is represented and executed by a computer program, the components of which are a computer code, some or all of the terms of this contract which are fulfilled upon the occurrence of predefined events, are stored in an electronic register system which records the result of execution of this program, and the contract itself cannot be changed and is executed in accordance with the programmed instructions of the computer program. The author concludes that the determination of the person who is legally liable when a smart contract fails to perform the programmed function depends on the terms of the smart contract, and in their absence, the provisions of applicable law regarding the legal consequences of non-performance of the contract and liability for such non-performance should be used.

Keywords: blockchain, distributed ledger technology, smart contract, crypto assets, computer code, decentralized database.

1. Introduction

Relevance of the study. Modern digital assets law is characterised by the rapid development of the market and legal regulation of crypto assets which are traded based of smart contracts. These contracts differ significantly from traditional contracts due to the peculiarities of the distributed ledger technology and the intangible nature of crypto assets as a type of digital property.

The absence of clear legal provisions on crypto asset smart contracts necessitates defining the concept and legal nature of these contracts, the specifics of the terms and conditions and performance of this type of smart contract, and liability for failure to perform these transactions, considering the best practices of their application in different jurisdictions.

The analysis and evaluation of scientific works shows that both Ukrainian and foreign researchers have paid attention to the problems of crypto asset smart contracts. Among domestic scholars, it is worth noting the works of O. A. Baranov, I. Veres, D. Zadobriuk, A. Navgorodsky, K. Nekit, L. Mamchuk, O. Nedybalyuk, A. M. Ivanov, V. O. Shmyg. The works of such foreign scholars as Lauren Scholz, Nick Szabo, Max Raskin, Darko Radić, Dejan Pilipović, Gilcrest Jack, Arthur Carvalho, Jelena Mamut, Mateja Durović, Franciszek Lech, Darko Radić, Dejan Pilipović, Tom Allen, Robin Widdison, Matthew McMillan, Sara Green are also quite important. However, despite the abundance and development of doctrine in this area, there are a significant number of problematic issues that require further research and resolution.

The purpose of this study is to highlight the conceptual legal provisions on the concept and legal nature of a smart contract for crypto assets, and to study the foreign experience of legal regulation of relations under a smart contract, its terms and conditions, and liability for non-performance of this contract with a view to implementing the best practices into Ukrainian law.

For this purpose, the author examines: (1) the concept of a smart contract; (2) a crypto asset smart contract as a legally binding contract; (3) types of smart contracts; (4) and legal regulation of a crypto asset smart contract in common law and civil law jurisdictions; (5) legal nature of a crypto asset smart contract; (6) terms; (7) conclusion, cancellation, amendment and termination of a crypto asset smart contract; (8) performance of a crypto asset smart contract; (9) and liability for breach of these contracts.

Methods. The study applies dialectical, comparative legal, formal logical and other methods of scientific cognition. In particular, the dialectical method was used to identify the existing approaches to the concept of a crypto asset smart contract. The comparative legal method was used to study the application of this contract in different jurisdictions. Formal-logical and system-structural methods determined the methodological basis for analysing the elements of a smart contract, its conclusion, refusal, amendment and termination, performance and liability for breach of this transaction.

2. Results

2.1 *The concept of a smart contract*

The idea and concept of a smart contract was first proposed by Nick Szabo in 1996, who considered a smart contract as a self-executing computer program capable of implementing the content of the contract, using mathematical algorithms to automatically execute transactions as soon as a pre-stipulated condition is met (Szabo, 1996).¹

¹ Nick Szabo, "Smart contracts: Building Blocks for Digital Markets," EXTROPY: The Journal of Transhumanist Thought, no. 16 (1996). Access:

The legal doctrine offers three main approaches to the concept of a smart contract, in particular as:

(1) a technical phenomenon – a piece of software code known as a software agent, created to perform certain tasks in the event of predefined conditions.

A certain modification of this approach is to understand the smart contract as a digital protocol for transmitting information (which is encrypted) that uses encrypted mathematical algorithms to automatically execute a transaction (contract) as soon as a specified condition occurs. In this regard, the automatic execution of a contract is made possible by a computer code that ‘translates’ the legal text (contract terms) into an operating programme [Raskin, 2017];² or

(2) as a legal smart contract – an automated and enforceable agreement. Automated through a computer, although some parts may require human intervention and control. Enforceable either through judicial enforcement of rights and obligations or through execution protected by computer code from unauthorised access (Clack, C., Bakshi, V. & Braine, L. (2016, revised March 2017);³ or

(3) as a combination of ‘two different models of a smart contract, namely as a technical phenomenon (“software code”) that does not replace the agreement, but only automates its execution and a “legal smart-contract” containing the terms of the agreement sufficient to replace it in full or in part (it is an analogue of a written form of a transaction, a type of electronic transaction or a transaction in digital form) (Stark, 2016;⁴ Clack, Bakshi, Braine, 2016; Nekit, 2020).⁵

The Ukrainian literature substantiates approaches to the legal nature of a smart contract that generally repeat or modify the above approaches. Thus, supporters of understanding a smart contract as a software code believe that this code is implemented in a computerised transaction protocol that fulfils the terms of the contract (Navgorodskyi, 2020).⁶ Proponents of the contractual nature of a smart contract consider it as “an automated system for the execution of a contract concluded in another form” (Mamchur & Nedybalyuk, 2018),⁷ or as “an innovative form of contracts, the conclusion, execution and termination of which takes place using networked

http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html.

² Max Raskin, “The Law and Legality of Smart Contracts,” *Georgetown Law Technology Review*, vol. 1:2 (2017): 309.

³ Clack, C., Bakshi, V. & Braine, L. (2016, revised March 2017). *Smart Contract Templates: foundations, design landscape and research directions*.

https://www.researchgate.net/publication/305779577_Smart_Contract_Templates_foundations_design_landscape_and_research_directions_CDClack_VABakshi_and_LBraine_arxiv160800771_2016.

⁴ Stark, J. (2016). *Making sense of blockchain smart contracts*. Access:

<https://www.coindesk.com/markets/2016/06/04/making-sense-of-blockchain-smart-contracts/>.

⁵ Clack, C., Bakshi, V. & Braine, L. (2016, revised March 2017). *Smart Contract Templates: foundations, design landscape and research directions*. Access:

https://www.researchgate.net/publication/305779577_Smart_Contract_Templates_foundations_design_landscape_and_research_directions_CDClack_VABakshi_and_LBraine_arxiv160800771_2016.

⁶ Navhorodskyi, A. (2020, November 25). *Smart contract: How to regulate blockchain technology in Ukraine?* My Right. Access: <https://moe-pravo.com.ua/publications/smart-kontrakt-yak-vregulyuvaty-tehnologiyu-blokchejn-v-ukrayini/>.

⁷ Mamchur, L., & Nedybalyuk, O. (2018). Civil-law realities of permissibility of using a smart-contract in contractual relations. *History and Law Journal*, (2), 90-94. Access: <https://evnuir.vnu.edu.ua/handle/123456789/16037>.

computer software and/or hardware and software that are interconnected with physical or digital objects, with or without human participation” (Baranov, 2017).⁸

A smart contract is proposed to be a contract written in the form of a computer code that can be concluded, amended or terminated only with the help of a certain computer program and blockchain technology that allows transactions to be carried out without the intervention of financial institutions. Therefore, the parties to a smart contract need to choose an environment for concluding this type of agreement. Typically, Ethereum, as well as Polkadot, Ripple, and Tron, are such environments (Zadobryuk, 2022).⁹

The simplest example of a smart contract is a vending machine. When you put money into the machine and select a product, it starts dispensing that product. If you do not put enough money in, the product will not be dispensed, and its transfer to the exit window will be interrupted. This is the most common simplified scheme underlying the idea of smart contracts [4]¹⁰.

In the doctrine of Ukrainian law, three approaches to the concept of a smart contract are proposed, as:

(1) “a software code (implemented in a computerised transaction protocol that fulfils the terms of the contract (Navgorodskyi, 2020),...¹¹ the will of the subject is expressed by special technical means in the form of a software code),”

(2) “an automated system for the performance of a contract concluded in another form” (Mamchur, 2018),¹² or

(3) “an innovative form of contracts, the conclusion, execution and termination of which takes place with the use of networked computer software and/or hardware and software that are interconnected with physical or digital objects, with or without human intervention” (Baranov, 2017).¹³

The proposed approaches to the concept of a smart contract do not comply with the legislative concept of an electronic document (Article 3 of the Law of Ukraine On Electronic Commerce¹⁴ or recognise a smart contract as a method of automatic execution of previously concluded contracts and exclude the understanding of a smart contract as an independent type of

⁸ Baranov, O. A. (2017). The Internet of Things (IoT): Legal issues in the application of smart contracts. *Information and Law*, (4), 26–40. Access: [https://doi.org/10.37750/2616-6798.2017.4\(23\).273096](https://doi.org/10.37750/2616-6798.2017.4(23).273096).

⁹ Zadobryuk D. What are smart contracts and what are the principles of their operation? 22.11.2022. [Electronic resource]. Access: <https://lexinform.com.ua/yuridychna-praktyka/shho-take-smart-kontrakty-i-yaki-pryntsyipy-yih-roboty/>.

¹⁰ Smart contracts - are they really contracts and are they really “smart”. 22.04.2018. Access: https://protocol.ua/ua/smart_kontrakty_chi_spravdi_dogovori_ta_chi_diysno_rozumni/.

¹¹ Navgorodskyi A. Smart contract: how to regulate blockchain technology in Ukraine? Access: <https://www.pravoconsult.com.ua/smartkontrakt/> (Date of access: 12.08.2020).

¹² Mamchur L., Nedybalyuk O. Civil and legal realities of admissibility of using a smart contract in contractual relations. *Historical and legal journal*. 2018. No. 2 (12). P. 90-94. P. 92.

¹³ O. A. Baranov, Internet of Things (IoT): legal issues of using smart contracts. *Information and law*. 2017. No. 4(23). P. 26-40. Access: http://ippi.org.ua/sites/default/files/5_7.pdf. (Date of access: 12.08.2020)

¹⁴ According to Clause 3 of Art. 3 of the Law of Ukraine On Electronic Commerce, an electronic form of information presentation is considered to be the documentation of information, which enables it to be reproduced in a visual form suitable for human perception. Accordingly, by means of software code, the parties cannot perceive the terms on which they have reached an agreement.

contract,¹⁵ or provide for the need to introduce another separate form of transaction – an innovative one, in addition to the already provided oral and written ones – electronic.

In this regard, it is important to identify the special features inherent in a smart contract, which usually include encryption and storage of data in the blockchain, autonomous execution of the contract, recording of the entire process of contract execution and the ability to read data (Radić, 2020).¹⁶

One of the defining features of a smart contract is that this contract is based on blockchain technology or a distributed database, which has the following characteristics: a blockchain is a data structure in the form of a list of linked blocks, each of which contains a link to the previous block; cryptography is used;¹⁷ the principle of decentralisation is characteristic; it is a public database of all transactions between the parties to smart contracts in the blockchain network (Veres, 2020).¹⁸

Ukrainian law does not provide for the concept of blockchain or distributed ledger technology. Blockchain and DLT are essentially an analogue or element of the system for ensuring the turnover of virtual assets provided for by the Law of Ukraine On Virtual Assets, which means a software or hardware and software system for the exchange of electronic data that ensures the identification and turnover of virtual assets (paragraph 11 of part 1 of Article 1 of the Law) (Law of Ukraine On Digital Assets).¹⁹

The draft law On Cryptocurrency Circulation in Ukraine No. 7183 of 06.10.2017 defines the blockchain system as a decentralised public register of all cryptocurrency transactions conducted by a cryptocurrency transaction entity (Bill On Circulation of Cryptocurrency in Ukraine).²⁰

Another characteristic feature of a smart contract is the special procedure for its “creation”, which involves formalising the terms of the contract in electronic form (converting its terms and conditions, compiling it into a program code) and publishing it on the blockchain (by executing a transaction at a special address, which is confirmed by the smart contract’s own address, which can be used by other users to interact with it).

One of the stages of creating a smart contract is to write a code that will serve as an algorithm for actions when the parties begin to fulfil their obligations. ‘A smart contract may sound like this: “When Person 1 pays Person 2 the amount of 100 ETH (Ethereum) for a certain item, Person 1 will receive this item in the following way.”

¹⁵ However, a smart contract is a transaction that can be aimed not only at the fulfilment of existing contractual obligations, but also at their occurrence.

¹⁶ Darko Radić, Dejan Pilipović, SMART CONTRACT – CHALLENGES AND PERSPECTIVES 111–140: p. 117–119. International Scientific Conference of Special Importance: “Transformative Technologies: Legal and Ethical Challenges of the 21st Century” 07–08 February 2020, Banja Luka Conference Proceedings Međunarodni naučni skup od posebnog značaja: “Transformativne tehnologije: pravni i etički izazovi XXI vijeka”, 07–08. februar 2020, Banja Luka Zbornik radova Banja Luka, 2020. godine.

¹⁷ Data that is stored in the blockchain is considered cryptographically secure. Any attempt to change the contents of a block invalidates the unique references that point to its location in the chain.

¹⁸ Veres I. Legal nature of a smart contract // *Entrepreneurship, economy and law*. 2020. № 9. 15:18. P.15.- Access: xpgp-journal.kiev.ua/archive/2020/9/4.pdf.

¹⁹ Law of Ukraine On Digital Assets, dated February 17, 2022, No. 2075-IX. [Electronic resource]. Access: <https://zakon.rada.gov.ua/laws/show/2074-20#Text>.

²⁰ Bill On Circulation of Cryptocurrency in Ukraine, No. 7183 dated 06.10.2017. Access: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62684 (Date of access: 12.08.2020).

Of course, smart contracts can be different, for example, there is such a type as a “safe” when a smart contract does not provide access to assets until a certain date (Zadobryuk, 2022).²¹

The relationship between the parties can be formalised in one of two ways: the code either completely replaces a regular contract or is an integral part of such a contract. This is the so-called built-in or internal model. Sometimes the terms legal smart contract and smart contract code are used to describe these models (Nekit, 2022).²²

The distinctive features of a crypto asset smart contract are due since it is a computer program, which is a computer code, all the terms of this contract and the result of its execution are recorded and stored in the electronic blockchain register (Tech in Asia Indonesia, 2020; Endramanto et al., 2021).²³

At the same time, the computer programme confirms and fulfils the terms of the smart contract upon the occurrence of predefined events, and the smart contract itself, after being encoded and entered in the blockchain, cannot be changed and is executed in accordance with the programmed instructions of the computer instruction.

In this regard, smart contract shall be a legally binding bilateral agreement, in which some or all of the contractual obligations are defined in and/or performed automatically by computer program upon the occurrence of predefined events, stored in the blockchain electronic registry system, in which the result of the program execution is recorded in the electronic registry, and the contract itself cannot be changed and is executed in accordance with the programmed instructions of the computer program.

2.2 Smart contract as a legally binding contract

A crypto asset smart contract, regardless of the existence of special provisions on smart contracts in the applicable law, should be treated as a legally binding contract if the mandatory requirements of the laws, such as agreement, consideration, essential terms, formality requirements/compliance with formalities (form of the contract, conclusion of the contract), and conditions of validity, are met.

Within the meaning of Part 1 of Article 626 of the Civil Code of Ukraine, a cryptoasset smart contract is an agreement of the parties if this agreement is aimed at establishing, changing or terminating civil rights and obligations. A crypto asset smart contract meets this requirement, as the agreement of the parties is usually aimed at transferring ownership of crypto assets.

Pursuant to Article 509(1) of the Civil Code of Ukraine, a crypto asset smart contract is legally binding if it is supported by a provision, which means that one party (the debtor) is

²¹ Zadobryuk, D. What are smart contracts and what are the principles of their operation? 22.11.2022. - Access: <https://lexinform.com.ua/yuridychna-praktyka/shho-take-smart-kontrakty-i-yaki-pryntsypy-yih-roboty/>.

²² See, Nekit K. G. Advantages and disadvantages of smart contracts as grounds for the emergence of property rights. Access: <http://visnyk-psp.kpi.ua/article/view/229494/228501> (Date of access: 16.04.2022); Smart contracts and distributed ledger – a legal perspective. ISDA Linklaters Whitepaper. August 2017. P. 5–6.

²³ See, Tech in Asia Indonesia - Komunitas Online Startup di Asia. [Online]. Available: <https://id.techinasia.com/smart-contract-dankontroversinya> [Accessed: 14-Jan-2020]; Vian Endramanto, Agri Adriel Bororing, Anak Agung Istri Krisna Gangga Dewi, Gunawan Wang, Sfenrianto, Applying Smart Contract in Indonesian E-Commerce. International Journal of Advanced Trends in Computer Science and Engineering. 2021. Volume 10, No. 5. 3020:3022.

obliged to perform a certain action (transfer crypto assets, pay money, etc.), and the other party (the creditor) has the right to demand that the debtor fulfil its obligation.

According to part 1 of Article 638 of the Civil Code of Ukraine, a crypto asset smart contract is concluded if the parties have agreed on all material terms of the contract. The essential terms of this agreement include the terms of the subject matter of the agreement (transfer of ownership of crypto assets, etc.), other terms and conditions that are defined by law as essential or necessary for this type of agreement (placement of a computer program with an algorithm for concluding and/or executing an agreement in the blockchain system, price of the crypto asset, etc.), as well as all those terms and conditions on which at least one of the parties must agree (term of the agreement, etc.).

The provisions of part 1 of Article 639 of the Civil Code of Ukraine give grounds to conclude that a crypto asset smart contract may be concluded in any form, unless the requirements for the form of the contract are established by law.

Subject to the provisions of part 2 of Article 639 of the Civil Code of Ukraine, if the parties agree to enter into a smart contract using information and communication systems, in which all contractual terms are defined and executed automatically by means of a computer program implemented in blockchain technology, the smart contract is deemed to be concluded in writing from the moment it is provided in this form.

For the purposes of part 1 of Article 640 of the Civil Code of Ukraine, a smart crypto asset contract, in which certain contractual obligations are defined and/or performed automatically by a computer program, is concluded from the moment the person who sent the offer to enter into the contract receives a response on acceptance of this offer.

Pursuant to Article 627(1) ('Freedom of contract') and Article 640(2) ('Moment of contract conclusion') of the Civil Code of Ukraine, if, in accordance with a civil law act or the terms of the contract, the conclusion of a crypto asset smart contract also requires the transfer of money, transfer of other property or performance of another action, the smart contract is concluded from the moment the relevant property is transferred or a certain action is performed.

Pursuant to Article 640(3) of the Civil Code of Ukraine, a crypto asset smart contract, in which certain contractual obligations are defined and/or performed automatically by a computer program, is concluded in writing and is subject to notarisation, is considered to be concluded from the date of such notarisation.

As agreement may be made orally or in writing (electronic form) and smart contracts are distributed ledger technologies-based bilateral transaction represented by a computer program, certain or all terms of which are defined and/or fulfilled automatically by computer program, smart contracts are subject to the provisions of applicable law (for example, the Article 205 (1) of the Ukrainian CC) on the written (electronic) form of an agreement.

2.3 Types of smart contracts

Currently, there are 5 types of forms of smart contracts that have different functions and applications including basic token contracts (SAFT, 2023),²⁴ crowd sale contracts

²⁴ SAFT (Simple Agreement for future Tokens): The Ultimate Guide + Free Template. January 26, 2023. Access: <https://legalnodes.com/template/simple-agreement-for-future-tokens>.

(Crowdsales. OpenZeppelin),²⁵ mintable contracts (What is mintable?),²⁶ refundable contracts (Refundable contract),²⁷ and terminable contracts²⁸ (Business-law Thu and Name, 2020).²⁹

Of the five types of forms, four of which are types of smart contracts that are commonly used in the sale and purchase of cryptocurrencies (Business-law Thu and Name, 2020).³⁰

Whereas Terminable Contract is a form of smart contract that can be used for blockchain systems in buying and selling goods online and executing blockchain programs in financial services.

The use of smart contracts in the online marketplace specifically as an electronic contract agreed by the parties, which then the electronic contract is recorded in the blockchain system (Novera, 2020).³¹

The use of smart contracts aims to make online trading easier, more efficient and secure, and is one of the technologies that has the potential to support economic growth in countries (Business-law Thu and Name, 2020).³²

²⁵ Crowdsales are a popular use for Ethereum; they let you allocate tokens to network participants in various ways, mostly in exchange for Ether. They come in a variety of shapes and flavors. (See, Crowdsales. OpenZeppelin. Access: <https://docs.openzeppelin.com/contracts/2.x/crowdsales>).

²⁶ Mintable is a collection of smart contracts that enable everyday users to create digital items on the blockchain. (See, What is mintable? Access: <https://docs.mintable.app/ethereum-version/basics/what-is-mintable>) Mintable tokens are minted via smart contracts supported by smart contract platforms like Ethereum. (See, What is a Mintable Token? 29/04/2022. Access: <https://www.certik.com/resources/blog/42yeLemkn7XOxODi8LkNp9-what-is-a-mintable-token>).

²⁷ Refundable contracts are legally binding agreements that include a promise by the provider to pay an entrance free refund or repurchase the resident's interest in a continuing care retirement community. (See, Refundable contract definition. Access: <https://www.lawinsider.com/dictionary/refundable-contract>).

²⁸ Terminable contracts are contracts that can be terminated by one or both parties under certain conditions.

²⁹ See, Business-law Thu and Name*, "MENGENAL KONTRAK ELEKTRONIK, CLICK-WRAP AGREEMENT DAN TANDA TANGAN ELEKTRONIK," Business Law. [Online]. Available: <https://business-law.binus.ac.id/2017/03/31/mengenalkontrak-elektronik-click-wrap-agreement-dan-tandatangan-elektronik/>. [Accessed: 14-Jan-2020]; Tech in Asia Indonesia - Komunitas Online Startup di Asia. [Online]. Available: <https://id.techinasia.com/smart-contract-dankontroversinya> [Accessed: 14-Jan-2020]; Vian Endramanto, Agri Adriel Bororing, Anak Agung Istri Krisna Gangga Dewi, Gunawan Wang, Sfenrianto, Applying Smart Contract in Indonesian E-Commerce. International Journal of Advanced Trends in Computer Science and Engineering. 2021. Volume 10, No. 5. 3020:3022.

³⁰ Business-law Thu and Name*, "MENGENAL KONTRAK ELEKTRONIK, CLICK-WRAP AGREEMENT DAN TANDA TANGAN ELEKTRONIK," Business Law. [Online]. Available: <https://business-law.binus.ac.id/2017/03/31/mengenalkontrak-elektronik-click-wrap-agreement-dan-tandatangan-elektronik/>. [Accessed: 14-Jan-2020]

³¹ See, Novera, A. & Utama, M. "Kedudukan E-Contract di Indonesia", 2014 Available: <http://repository.usu.ac.id/bitstream/handle/123456789/59409/Chapter%20II.pdf;sequence=3>; business-law Thu and Name*, "MENGENAL KONTRAK ELEKTRONIK, CLICK-WRAP AGREEMENT DAN TANDA TANGAN ELEKTRONIK," Business Law. [Online]. Available: <https://business-law.binus.ac.id/2017/03/31/mengenalkontrak-elektronik-click-wrap-agreement-dan-tandatangan-elektronik/> [Accessed: 14-Jan-2020].

³² Business-law Thu and Name*, "MENGENAL KONTRAK ELEKTRONIK, CLICK-WRAP AGREEMENT DAN TANDA TANGAN ELEKTRONIK," Business Law. [Online]. Available: <https://business-law.binus.ac.id/2017/03/31/mengenalkontrak-elektronik-click-wrap-agreement-dan-tandatangan-elektronik/>. [Accessed: 14-Jan-2020]

The UK Law Commission Report on Smart contracts provides for three different forms that smart contracts can take, namely: (1) natural language contract with automated performance; (2) hybrid contract; (3) solely code contract.

Natural language contract with automated performance is a natural language contract in which the performance of some or all of the contractual obligations is automated by a piece of code deployed on a distributed ledger. The code itself does not record any contractual obligations but is merely a tool employed by the parties to perform those obligations.

Natural language contract with automated performance provides for negotiations and terms in natural language, and its performance is carried out by code. A hybrid smart contract is a combination of code and natural language. The terms of a hybrid contract could be primarily written in code with natural language terms employed to add certain provisions (for example, governing law and jurisdiction clauses and dispute resolution mechanisms). In addition, the terms of a hybrid contract could be primarily written in natural language and include, by reference, just one or two provisions written in code. Hybrid smart contract provides for negotiations in natural language, terms in natural language and code and its performance is carried out by code.

The relationship between the code and the natural language elements is relevant.

Solely code contract is a contract that consists of code. No natural language version of the agreement exists. The parties agree the code and it executes on a distributed ledger. Alternatively, one party does all the coding and makes the program available on a distributed ledger where anyone with access to that ledger can run it. Solely code contract provides for negotiations in natural language and/or code, terms in code, and its performance is carried out by code.

The UK Law Commission initial view is that this type of contract is likely to present the most challenges from a contract law perspective, in terms of determining whether and when a legal contract is formed, and how that contract can be interpreted [UK Law Commission's Smart Contracts Summary, 2020]³³.

2.4 Legal regulation of smart contracts in common law and civil law jurisdictions

Most legal orders, including the law of Ukraine, do not provide for legal rules (both general and special) on smart contracts based on blockchain technology.

The exception to this general rule is the law of the United States (Radić, 2020).³⁴ According to the law of the State of Arizona (USA), cryptographic signatures based on blockchain technology have the legal force of an electronic signature. A record that is a document or a contract based on blockchain technology is considered an electronic form and has the character of an electronic record that is a document. In fact, the legal effect or enforceability of a contract cannot

³³ The UK Legal Commission. Smart Contracts. Summary of call for evidence

Access: <https://clod-platform-e218f50a4812967ba1215eaecedeg923f.s3.amazonaws.com/uploads/sites/30/2020/12/Smart-Contracts-summary.pdf>.

³⁴ See, Darko Radić, Dejan Pilipović SMART CONTRACT – CHALLENGES AND PERSPECTIVES 111–140: p. 122-123. International Scientific Conference of Special Importance: “Transformative Technologies: Legal and Ethical Challenges of the 21st Century” 07-08 February 2020, Banja Luka Conference Proceedings Međunarodni naučni skup od posebnog značaja: “Transformativne tehnologije: pravni i etički izazovi XXI vijeka”, 07-08. februar 2020, Banja Luka Zbornik radova Banja Luka, 2020. godine.

be denied simply because it contains a smart contract clause. Thus, smart contracts are expressly permitted (Gilcrest & Carvalho, 2018).³⁵

Similar provisions are contained in the law of Nevada (USA) (Gilcrest & Carvalho, 2018).³⁶ The law of Vermont (USA) provides for a rebuttable presumption of validity of a contract based on blockchain technology (18).³⁷ Some other states have chosen to recognise smart contracts, i.e. blockchain technology, either in the form of actual legal implementation (Tennessee, Florida, Nebraska) or in the form of research projects (Hawaii, Illinois) (Blockchain State Legislation, 2020).³⁸

UK Law Commission defines a smart legal contract as a legally binding contract in which some or all of the contractual obligations are defined in and/or performed automatically by a computer program (para 2.11.).

There are three features of a smart legal contract: (1) some or all of the contractual obligations under the contract are performed automatically by a computer program (“automaticity”); (2) the contract is legally enforceable; and (3) the computer program is deployed on a distributed ledger (para 2.12.) (UK Law Commission’s Smart Legal Contracts, 2021).³⁹

A distinctive feature of smart legal contracts is automaticity: some or all of the obligations under the contract are performed automatically without the need for human intervention (para 2.14.) (UKJT).⁴⁰

The main benefit of automating a contractual obligation is that it enables contractual performance to occur without the need for human intervention. Unlike a human being, a properly coded computer program is simply unable to refuse to act or fail to perform (Green, 2020).⁴¹

Once the conditions for its performance are met, the computer program will perform the contractual obligation automatically. For this reason, computer scientists sometimes refer to smart contracts as “self-executing” contracts. From a legal perspective, the “execution” of the computer program constitutes the performance of the contractual obligations.

The automation of a contractual obligation by a computer program requires that the obligation be converted or translated into code (UKJT).⁴² Contractual obligations which follow a conditional logic (“if X, then Y”) are good candidates for being drafted in code, as conditional logic is inherent in computer programming (para 2.18.).

Some contractual obligations may not be suitable for automation by a computer program because they are not based on conditional logic and are therefore difficult to translate

³⁵ Gilcrest, and Carvalho, „Smart contracts: Legal Considerations “. 3280.

³⁶ Gilcrest and Carvalho, „Smart contracts: Legal Considerations “. 3280.

³⁷ Gilcrest and Carvalho, „Smart contracts: Legal Considerations “. 3280.

³⁸ „Blockchain State Legislation “, National Conference of State Legislatures, accessed 17 February 2020, <https://www.ncsl.org/research/financial-services-and-commerce/the-fundamentals-of-risk-management-and-insurance-viewed-through-the-lens-of-emerging-technology-webinar.aspx>.

³⁹ Smart Legal Contracts. Advice to Government. Law Commission. CP 563. Law Com No 401. November 2021. Access: <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2021/11/Smart-legal-contracts-accessible.pdf>.

⁴⁰ UKJT Legal Statement at [135].

⁴¹ S Green and A Sanitt, “Smart Contracts”, in P Davies and M Raczynska (Eds.), *The Contents of Commercial Contracts: Terms Affecting Freedoms* (1st ed. 2020).

⁴² UKJT Legal Statement at [135].

into code. These include obligations that require the exercise of discretion, reasonableness, best endeavours or some element of human judgement (para 2.20.).

«Legal» smart contracts should constitute legally binding contracts. Under the law of England and Wales, there are several requirements for the formation of a legally binding contract. These are: (1) agreement; (2) consideration; (3) certainty and completeness; (4) intention to create legally binding relations; and (5) formality requirements (compliance with formalities) (paras 2.21., 3.2.).

EU law provides for specific legal provisions relating to smart contracts.

The EU has passed a new harmonised rules fair access and use of Data (Data Act) with a mandate for smart contract issuers to include a “kill switch” to terminate smart contracts (Josh, 2023).⁴³

Article 30 of the Data Act, which was passed on Tuesday, 14 March 2023, ensures that any smart contract must have a clearly defined mechanism to terminate or interrupt its operation.

An article of the Data Law, which was adopted on 14 March 2024, ensures that any smart contract must have a clearly defined mechanism for terminating or interrupting its operation.

The provision of Article 30 states:

“Safe termination and interruption: ensure that a mechanism exists to terminate the continued execution of transactions: the smart contract shall include internal functions which can reset or instruct the contract to stop or interrupt the operation to avoid future (accidental) executions; in this regard, the conditions under which a smart contract could be reset or instructed to stop or interrupted, should be clearly and transparently defined.

Especially, it should be assessed under which conditions non-consensual termination or interruption should be permissible.” (Report on fair access and use of data, 2023)⁴⁴

The other provisions in Article 30 include a section that ensures smart contracts have strong security features to prevent mistakes or tampering by third parties.

This has raised concerns about smart contracts' immutability and the DeFi ecosystem. The EU “kill switch” presents a challenge to this fundamental immutability, which many experts have found concerning.

Some authors believe this has the potential to undermine the technology itself. “Article 30, as currently drafted, goes a step too far in addressing the issues raised by immutability” (Schrepel, 2024).⁴⁵

On 7 February 2019, the Italian Parliament approved a law on DLT and smart contracts. This Law introduces a legal definition of both DLT and smart contracts and recognizes

⁴³ See, Adams Josh, Will the “Kill Switch” in the EU’s Data Act Kill Smart Contracts? 23 March 2023, Access: <https://beincrypto.com/how-dangerous-is-the-eus-smart-contract-kill-switch/>.

⁴⁴ See, REPORT on the proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act). Report - A9-0031/2023. Access: https://www.europarl.europa.eu/doceo/document/A-9-2023-0031_EN.html.

⁴⁵ Thibault Schrepel, Post. March 14, 2024. Access: <https://twitter.com/ProfSchrepel/status/status/1635556417930252288>.

their full validity and enforceability and stating that a smart contract meets the requirements of a written form, if this form is required by law (Durovic, 2019).⁴⁶

In the Italian Law, smart contracts are defined as software based on DLTs which, once the relevant ledger entry has been validated, automatically give effect to the relevant terms agreed between two or more parties.

Smart contracts are deemed by law to be equivalent for certain purposes (i.e., consensus formation and evidentiary value) to traditional written contracts to the extent that the digital authentication of the parties is made in accordance with the procedure to be established by AgID (The Agency for Digital Italy (Agenzia per l'Italia Digitale, "AgID")).

The procedure is set in specific guidelines which is issued, and providing for the applicable technical standards (Lombardi, 2019).⁴⁷

Sweden has implemented a project on the use of blockchain-based smart contracts in the sale of real estate and entry into the real estate register, given the reliability and speed provided by this technology, and as a result, the entire project was successfully completed in 2018 (Land Administration, 2020).⁴⁸

In the Swedish doctrine of law, it is considered that smart contracts may indeed be recognized as contracts as they fulfil mechanisms for concluding contracts that are regulated in the Swedish Contracts Act, such as offer-acceptance (Ingvarsson, 2020).⁴⁹

Smart contracts may also be concluded on mechanisms that are not directly regulated by the Contracts Act, these include tacit agreements and standard form of contracts.

There are certain legal issues that are raised by the smart contracts. Torbjörn Ingvarsson draws attention to the self-execution of a smart contract as one of the aspects that could potentially prove problematic. This is because they can facilitate the automatic fulfilment of contracts that are null and void because they comprise illegal or immoral undertakings (Ingvarsson, 2020).⁵⁰

2.5 Legal nature of a crypto asset smart contract

The basis of a crypto asset smart contract is a transaction made via the Internet and may be qualified, in accordance with clause 1 of Article 202 of the Civil Code of Ukraine, as an action of a person aimed at the acquisition, modification or termination of civil rights and obligations.

⁴⁶ Mateja Durović and Franciszek Lech, "The Enforceability of Smart Contracts", The Review of the Kopaonik School of Natural Law, no. 1 (2019): 81-82. See, Italian Law No 12/2019 in relation to the Law Decree No 135/2018 (Decreto Semplificazioni). Stefania Lucchetti, „Italian law gives legal value to blockchain and smart contracts“, Law Cross Border, March 11, 2019, accessed February 17, 2020. Access: <https://lawcrossborder.com/2019/03/11/italianlaw-gives-legal-value-to-blockchain-and-smart-contracts/>.

⁴⁷ Lombardi M., Squerzoni F., Trombetti V., Frattini M. Blockchain and Smart Contracts: Italy First to Recognize an Overarching Legal Foundation. 19 February 2019.

⁴⁸ „Land Administration“, ChromaWay, accessed February 17, 2020, <https://chromaway.com/landregistry/>.

⁴⁹ Torbjörn Ingvarsson, Smarta kontrakt i svensk avtalsrätt. 2020. Uppsala Universitet. Access: www.diva-portal.se/smash/get/diva2:1383569/FULLTEXT01.pdf.

⁵⁰ Torbjörn Ingvarsson, Smarta kontrakt i svensk avtalsrätt. 2020. Uppsala Universitet. Access: www.diva-portal.se/smash/get/diva2:1383569/FULLTEXT01.pdf.

A crypto asset smart contract must meet all legal requirements for a valid legal entity and a concluded agreement.

A crypto asset smart contract will be considered valid if the general requirements for the validity of a transaction in accordance with Article 203 of the Civil Code of Ukraine⁵¹ are met when it is concluded.

Pursuant to Article 638(1) of the Civil Code of Ukraine, a contract is concluded if the parties have duly agreed on all material terms and conditions.

Therefore, the recognition of a crypto asset smart contract as a legally binding contract is essential to ensure that the results of the self-executing smart contract are enforceable and protected. If a smart contract cannot, for example, legally transfer ownership of the crypto asset it intends to transfer or does not have all the essential terms of a sales or insurance contract, then the smart contract may be declared invalid or unenforceable.

The essence of a crypto asset smart contract is that it is a self-executing contract that remains unchanged and unstoppable after the creation of a smart contract, the terms of which are included in the internal functions of a decentralised database that is not controlled by the databases of the parties to the contract or third parties.

The subject of discussion is whether a smart contract is a contract with a special form, or a type of contract concluded in electronic form.

Proponents of recognising a smart contract as a type of contract concluded in electronic form point out that the electronic form is an electronic document in which the parties set out the essential terms of the contract and which can be visually perceived. Since the parties to the contract are not able to verify the correctness of the transformation of the contract terms into the software code, it is necessary to preserve the electronic form of the contract, which is the basis for the formation of the code. If the information is distorted due to technical errors, the smart contract should be considered invalid. The electronic form of a smart contract can be used as evidence in court in the event of a dispute. It is possible to engage experts to analyse the information contained in the programme code.

Opponents of this approach point out that a smart contract cannot be considered as a type of contract concluded in electronic form, since, according to clause 3 of Article 3 of the Law of Ukraine 'On Electronic Commerce', the electronic form of information presentation is considered to be the documentation of information that allows it to be reproduced in a visual form suitable for human perception ["Law of Ukraine 'On Electronic commerce' [Law of Ukraine "On Electronic commerce", 2015]⁵². The above is not consistent with the legal nature of a smart contract [Ivanov, 2022]⁵³.

In our opinion, a smart contract of crypto assets should be considered as a transaction, the terms of which regarding the acquisition, transfer conditions and scope of rights to crypto

⁵¹ According to Article 203 of the Civil Code of Ukraine, a smart contract should provide for: legal content; the necessary scope of civil capacity of the parties; free expression of the parties' will that corresponds to their internal will; the form of the contract established by law; the contract's focus on the actual occurrence of legal consequences stipulated by it; a contract concluded by parents (adoptive parents) cannot contradict the rights and interests of their young, minor or disabled children.

⁵² On electronic commerce: Law of Ukraine from 03.09.2015 № 675-XIX. Access: <https://zakon.rada.gov.ua/laws/show/435-15/ed20030116> (date of access: 16.04.2022).

⁵³ Ivanov A. M., Shmyga V. O. Smart contracts in contractual relations: realities and prospects of use // Legal scientific electronic journal. 2022. No. 4. 151:152. – P. 151.

assets (digital assets)⁵⁴ can be expressed in the form of algorithms and functions of the system for ensuring the turnover of virtual assets.

In this regard, it is advisable to supplement Article 205 of the Civil Code of Ukraine (“Form of Transaction. Methods of Expression of Will”) with the provisions of Part 3 as follows:

“3. A transaction in respect of a virtual asset may be made in the system for ensuring the turnover of virtual assets, and the conditions of acquisition, conditions of transfer and the scope of rights to virtual assets may be expressed in the form of algorithms and functions of the system for ensuring the turnover of virtual assets, within which the turnover of virtual assets is carried out.”

2.6 Terms of a smart contract for crypto assets

To conclude a crypto asset smart contract, standard protocols are used that contain the terms of the smart contract, which may be specific, enforceable and legitimate, and may provide for security obligations.

The terms of a crypto asset smart contract may provide for security obligations, when a certain amount of cryptocurrency is blocked under the smart contract, which is transferred to the creditor only after the debtor performs certain actions.

The terms of a crypto asset smart contract must be specific (clear, unambiguous), feasible (objective), legitimate, capable of automation (no estimates such as “reasonable time” may be used), exist within the blockchain platform (where crypto assets are currently transacted).

Unless otherwise provided by the rules of the blockchain system, the terms of a smart contract may not provide for the receipt and confirmation of information from outside (in this regard, the terms of force majeure shall not be specified in the smart contract).

In the latter case, there are two possible options: the electronic form is fully transformed into a program code or only part of the electronic contract is reflected in the program code (Veres, 2020).⁵⁵

In cases determined by the blockchain operator, smart contracts can be executed based on information received from the ‘caller’, which is the basis of one of the leading blockchain projects – Chain link (Blockchain).⁵⁶ In general, this functionality is available on the Ethereum blockchain.

This network is intended to be used to facilitate the transfer of tamper-proof data from off-chain sources to on-chain smart contracts.

The ability to receive data from sources outside the blockchain is implemented through the so-called oracles (Oracles; What is Blockchain).⁵⁷

⁵⁴ For the purposes of the smart contract, it is proposed to conditionally consider cryptoassets as an analogue of digital assets within the meaning of the Law of Ukraine ‘On Digital Assets’, since this Law, although it uses the term ‘digital assets’ rather than ‘cryptoassets’, at the present stage any digital assets provided for by the system for ensuring the turnover of digital assets are essentially cryptoassets.

⁵⁵ Veres I. Legal nature of a smart contract // Entrepreneurship, economy and law. 2020. № 9. 15:18. P. 17. - Access: xpgp-journal.kiev.ua/archive/2020/9/4.pdf.

⁵⁶ Chainlink (blockchain). Access: [https://en.wikipedia.org/wiki/Chainlink_\(blockchain\)](https://en.wikipedia.org/wiki/Chainlink_(blockchain)).

⁵⁷ See, Oracles. Access: <https://stellar.org/learn/smart-contract-basics-oracles>; What Is a Blockchain Oracle? January 12, 2024. Access: <https://chain.link/education/blockchain-oracles>; Oracles. July 25, 2024. Access: <https://ethereum.org/en/developers/docs/oracles/>.

The use of oracles allows the terms of smart contracts to be fulfilled depending on the circumstances of the real world (weather conditions, a ship entering neutral waters or vice versa, arrival at a port, the value of a certain asset on the stock exchange reaching a certain level, etc.)

At the same time, it can be assumed that the current inability to include evaluative terms in the content of a smart contract will be overcome in the future due to the development and application of artificial intelligence. The use of advanced artificial intelligence will enable the smart contract to 'live independently', which will allow the software to assess the circumstances in specific situations, evaluate the behaviour of certain parties, draw conclusions about the suspension of certain or the introduction of other conditions, etc. (Radić, 2020: 121).⁵⁸

In other words, the smart contract will overcome the automatic phase and move to the level of autonomy, which will imply that the software (which will also be part of the contract) will learn through experience, change the instructions provided, create its own instructions and, on this basis, actually make decisions (Allen, 1996).⁵⁹

2.7 Conclusion, cancellation, modification, and termination of a crypto asset smart contract: Features of their storage

The peculiarity of a crypto asset smart contract is that it is impossible to withdraw from this transaction if it was made and executed in relation to virtual assets in the system for ensuring the turnover of virtual assets, within which the turnover of virtual assets is carried out, and the peculiarities of the functioning of such a system do not allow the parties to withdraw from the transaction.

In this regard, it is advisable to supplement Article 214 of the Civil Code of Ukraine with a third part, according to which it is not allowed to withdraw from a transaction that has been made and executed in relation to a crypto asset.

A smart contract for the alienation of secured crypto assets by their issuer is a contract, which has specific features of amendment and termination.

A smart contract for the alienation of secured crypto assets by their issuer is a contract, which under no circumstances may be amended or terminated at the request of the party that has joined this agreement.

The issuer of a secured crypto asset is obliged to fulfil the obligation to transfer the collateral to the party that has joined or any other person, regardless of the grounds for acquiring the right to the relevant secured crypto asset.

If the terms of a smart contract for the alienation of secured crypto assets by their issuer contain conditions that make it impossible for the party that has joined or any other person to receive the collateral for the acquired crypto assets, such person is entitled to receive compensation from the issuer for damage related to the inability to receive the collateral from the issuer.

⁵⁸ Darko Radić, Dejan Pilipović, SMART CONTRACT – CHALLENGES AND PERSPECTIVES 111–140: p. 121. International Scientific Conference of Special Importance: "Transformative Technologies: Legal and Ethical Challenges of the 21st Century" 07-08 February 2020, Banja Luka Conference Proceedings Međunarodni naučni skup od posebnog značaja: "Transformativne tehnologije: pravni i etički izazovi XXI vijeka," 07-08. februar 2020, Banja Luka Zbornik radova Banja Luka, 2020. godine.

⁵⁹ See, Tom Allen and Robin Widdison, "Can Computer Makes Contracts?" Harward Journal of Law & Technology 9, no. 1 (Winter 1996): 27.

In this regard, it is advisable to supplement the Civil Code of Ukraine with Article 634-1 “Peculiarities of Conclusion and Execution of the Accession Agreement on Alienation of Secured Digital Assets by their Issuer.”

A crypto asset smart contract has specifics regarding the grounds for amending or terminating this contract.

A smart contract for the alienation of a crypto asset that has been concluded and executed in the crypto asset turnover system cannot be amended or terminated by a court decision.

In this regard, it is advisable to supplement Art. 651 of the Civil Code of Ukraine with a part stating that a virtual asset alienation agreement cannot be amended or terminated by a court decision.

The peculiarity of a smart contract for custody of crypto assets is that the custodian may accept crypto assets for custody under this agreement, concluded in writing. In case of acceptance for storage of crypto assets that are interchangeable, the custodian is obliged to return the same amount of crypto assets to the depositor, and in case of acceptance for storage of non-interchangeable crypto assets - the same crypto assets.

In this regard, it is advisable to supplement the Civil Code of Ukraine with Article 971-1 Storage of Digital Assets in the above wording.

2.8 Execution of a crypto asset smart contract

The execution of a crypto asset smart contract is carried out automatically by digital transmissions in a certain sequence in the event of certain circumstances, without the participation of the parties, unlike a conventional contract, when the parties are obliged to perform certain actions.

A smart contract is executed when the smart contract code is executed, which is triggered by a certain transaction initiated by an external user. A smart contract can be called by another smart contract, which in turn was called by another smart contract, but at the beginning of this chain of calls there must be a call made by an external user (Chorny, 2020).⁶⁰

Fulfilment of obligations under a smart contract is carried out automatically by performing digital transactions in a certain sequence in the event of certain circumstances.

A smart contract contains an obligation that makes it possible to revolutionise everything from the supply of chains (crypto assets) and transactions involving their alienation. However, from a theoretical and practical point of view, it is not clear what the legal consequences of non-fulfilment or breach of a smart contract are. Is this “code as a right” legally binding? Can a smart contract be enforced in a traditional court or arbitration?

The issue of whether a smart contract for crypto assets can be enforced because of non-performance or fraud, or mistake is the subject of discussion.

Proponents of the traditional approach believe that smart contracts are a type of contract and therefore enforceable like other contracts under the applicable law of the relevant country. However, in the case of smart contracts, it is unlikely that enforcement will be necessary as they are automatically enforceable.

Other authors deny the enforceability of smart contracts, as they are algorithms in the blockchain that automatically fulfil obligations in such a way that all participants can immediately

⁶⁰ Chorny O. M. Cryptographic protocols of electronic cash based on blockchain technology. Access: http://ela.kpi.ua/bitstream/123456789/23503/1/Chorny_magistr.pdf (Date of access: 12.08.2020).

receive the provision without involving any intermediary or wasting time. So, if a party to a contract wants to enforce a smart contract, what exactly is being enforced? Proponents of this approach believe that a court or arbitration will not waste time on uncertainties or indefinite contracts.

Every contract involves an agreed or unified expression of will between the parties, which gives rise to obligations. A smart contract also arises because of the will of the parties, the difference being that it is made in the form of a computer code via blockchain technology. To be fulfilled, it is required to fulfil a pre-established condition that is registered in the blockchain by entering the relevant computer code.

It is worth noting that a smart contract, like any contract, may be declared invalid if the will to enter it does not meet the conditions for the validity of this transaction, regardless of the form in which this transaction is concluded, as in this case in the form of a computer code.

There is a point of view that provides for the admissibility of invalidation or enforcement of a smart contract if its terms provide for defective expression of the parties' will to enter it and enforce this contract, since blockchain technologies make it possible to provide for these conditions in the electronic register.

This approach has the right to exist but requires a clearer understanding of the legal consequences if the code does not contain conditions of invalidity or compensation for damage. In this case, the question of the admissibility of the conditions of validity provided for by applicable law (e.g., the Civil Code of Ukraine), the legal consequences of breach and liability for breach of contractual obligations remains relevant.

In view of the fact that a smart contract creates an obligation, it is appropriate to apply to this transaction the provisions of the applicable law of the relevant state regarding the legal consequences of breach of obligation and responsibility for breach of obligation (for example, Articles 203, 611-625 of the Civil Code of Ukraine, if the law of Ukraine is the applicable law).

In this regard, the proposal to provide for the following grounds for the invalidity of a smart contract in the law is noteworthy: if the software code reproduces conditions that do not correspond to the content of the smart contract according to the electronic document, the smart contract may be declared invalid (Veres, 15).⁶¹

2.9 Liability for breach of a crypto asset smart contract

The issue of liability for breach of a smart contract is relevant, due to the complexity of imposing civil liability on a particular person in the context of crypto asset smart contracts, which are self-executing transactions built into blockchain technology.

A crypto asset smart contract may contain code errors, flaws, and other vulnerabilities. There may be unforeseen circumstances, unexpected events or data during the execution of the code. The program code may affect the performance of the smart contract and the corresponding legal consequences. However, it can be difficult to identify the person who is responsible due to the absence of an obligated person under the contract, which is due to the peculiarities of distributed ledger technology.

In this regard, the approach the approach deserves attention according to which the determination of the person on whom legal liability is imposed when a crypto asset smart contract fails to perform the programmed function depends on the terms of the smart contract, and in their

⁶¹ Veres I. Legal nature of a smart contract // Entrepreneurship, economy and law. 2020. № 9. 15:18. P.15. - Access: xpgp-journal.kiev.ua/archive/2020/9/4.pdf.

absence, the provisions of applicable law on the legal consequences of failure to fulfil a contractual obligation and liability for failure to fulfil an obligation are applicable.

3. Conclusions

The conducted analysis of the smart contract of crypto assets gives grounds for such conclusions.

A smart contract should be viewed as a legally binding contract that is represented and executed by a computer program, remains unchanged and uninterrupted after its creation, and its terms are included in the internal functions of a decentralised database that is not controlled by the databases of the parties to the contract or third parties.

The legal essence of a smart contract of crypto assets is that it is a self-executing contract that remains unchanged and unstoppable after the creation of a smart contract, the terms of which are included in the internal functions of a decentralized database that is not under the control of the databases of the parties to the contract or third parties.

Despite the absence of special legal provisions on smart contracts in the applicable law, these electronic contracts might be recognised as contracts that give rise to legally enforceable obligations to the extent that smart contracts comply with the provisions of civil law on the form and procedure for concluding contracts, such as the electronic form of a transaction, offer and acceptance, and the conditions for the validity of a contract.

Since agreements may be made orally or in writing (electronic form) and smart contracts are distributed ledger technologies-based bilateral transaction represented by a computer program, smart contracts are subject to the provisions of applicable law (for example, the Article 205 (1) of the Ukrainian CC) on the electronic form of a agreement.

The terms of a smart contract of crypto assets should be specific (clear, unambiguous), feasible (objective), valid, capable of automation (evaluative terms such as “reasonable term” cannot be used), exist within the blockchain platform (on which transactions are currently carried out transactions of crypto assets) and, unless otherwise provided by the rules of the blockchain system, do not provide for the receipt and confirmation of information from the outside (in this regard, the terms of force majeure are not specified in the smart contract).

A smart contract of crypto assets, like any contract, can be declared invalid if the will to enter into it does not meet the conditions of validity of this transaction, regardless of the form in which this transaction is concluded, as in this case in the form of computer code. Considering the fact that the smart contract of crypto-assets is a transaction that gives rise to obligations, it is appropriate to apply to this transaction the provisions of the applicable law of the country regarding the legal consequences of violations of obligations and liability for violations of obligations (for example, Articles 203, 611-625 of the Civil Code of Ukraine, if the law of Ukraine is the applicable law).

As a crypto asset smart contract is a transaction that can creates a legally binding obligation, it is advisable to apply the provisions of the applicable law of the country regarding the legal consequences of breach of obligation and liability for breach of obligation to this transaction (for example, Articles 203, 611-625 of the Civil Code of Ukraine, if the law of Ukraine is applicable).

The determination of the person who is legally responsible when the cryptoasset smart contract does not perform the programmed function depends on the terms of the smart contract, and in their absence, the provisions of the applicable law regarding the legal consequences of non-fulfillment of a contractual obligation and liability for non-fulfillment of an obligation are applicable.

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Online Sexual Abuse of Children in Nigeria

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Abstract

The advent of technology has brought about unprecedented opportunities for communication and access to information which has helped in professional skills development, fostering learning, research and creativity. It has also created an avenue for criminals to exploit the 'vulnerable' in the society, particularly the children; thus, making the cyber space uncondusive for them. This paper examines the legal protection of children against online sexual exploitation and abuse in Nigeria. It identifies the various types of online child sexual abuse, examines the legal framework for the protection of children against online sexual abuse, pinpoints the challenges associated with the legal framework and proffers durable solutions that will help tackle the exponential growth in online child sexual abuse in Nigeria. This paper adopts a mixed method research design and finds that there is significant increase in online child sexual abuse in Nigeria in spite of the laws and institutions in place to address this problem. Additionally, it is revealed that the legal framework for the protection of children against online child sexual abuse in Nigeria is fraught with deficiencies. The paper concludes that Nigeria owes the obligation to protect its children from online child sexual abuse and needs to take proactive steps to ensure this. The paper recommends that measures be taken to ensure that perpetrators of the heinous crime of online child sexual abuse are brought to book to serve as deterrents to others in the society.

Keywords: sextortion, child sexual abuse, grooming, live steaming, internet.

1. Introduction

More than half of the global population has access to the internet. One of the three internet users in the world today is a child.¹ There is no comprehensive data on children's access to internet facilities. This rather varies on the income status of the country. In high income countries, children have more internet access than in most low and middle income countries.² Although, the use of internet globally is of immense benefits to the society, it has created an avenue to access and harm children. Children are being sexually abused and exploited via the internet and other computer network, thus posing an alarming threat to children's safety only at the global level but also nationally.

¹ The National Child Traumatic Stress Network, 'Sexual Abuse' < <https://www.ntsnn.org> > accessed on 23 November, 2023.

² Pennsylvania 'Coalition to Advance Respect, 'Learn Examples of Child Sexual Abuse' 2022.

Child sexual abuse is any interaction between a child and an adult (or another child) in which the child is used for the sexual stimulation of the perpetrator or an observer.³ It involves the manipulation of the child to engage in sexual activities without his/her consent. It is any sexual contact with a child that can either be physical or non-physical (in person or online).⁴ Online (non-physical) sexual acts against children include; exposing a child to pornography, photographing a child in sexual poses, using computers, cell phones or social media outlets to make sexual overtures or expose a child.

Online child sexual abuse affects both boys and girls in neighborhoods and communities and cuts across children of all ages, races, ethnicities, economic backgrounds etc.⁵ It involves the display, collection, and/or distribution of child sexual abuse material for personal sexual gratification or financial gain, interaction with pedophiles, participation in online live streams of child sexual abuse, and/or grooming of a child to engage in online and offline sexual acts.⁶

Globally, one in eight children are estimated to be victims of some form of sexual violence online or in real life compared with one in five children in Europe.⁷ In 2022, there were 32 million reports of suspected child sexual exploitation, 99.5% of which were made by electronic service providers.⁸ Online child sexual abuse is a severe problem that requires urgent attention in Nigeria. The United Nations Children's Fund (UNICEF) reports that Nigeria is one of the countries with the highest rate of online child abuse in Africa with nearly 70% of Nigerian Children at risk of online sexual exploitation.⁹

Victims of online child sexual abuse suffer a wide range of psychological and behavioral problems in both short and long terms including; increased illness loss of interest in school activities, poor academic performance, lack of self-esteem, suicidal thoughts, post-traumatic stress, inability to form lasting relationships, parenting difficulties etc.¹⁰ This type of abuse happens among whom the child has reposed confidence and trust; thereby affecting disclosure and reporting of these incidents.¹¹

Online child sexual abuse and sexual exploitation constitute a serious violation of the fundamental rights of children to the protection and care necessary for their wellbeing. Children are to be protected from abuse, negligence, violence and exploitation because the violation of these rights affects their dignified existence. Hence, States parties to international human rights instruments are obligated to put up measures that will safeguard children from all forms of abuse including sexual exploitation.

³ World Health Organisation (WHO), 'Violence Against Children Online'

⁴ Ibid.

⁵ National Society for the Prevention of Cruelty to Children, Protecting Children from Online Abuse, NSPCC Report, 31 October 2023.

⁶ C. K. Ozcalik and R. Atakoglu, 'Online Child Sexual Abuse: Prevalence and Characteristics of the victims and Offenders (2021)12(1) Journal of Psychiatric Nursing 76-81.

⁷ Human Rights Channel (Council of Europe).

⁸ EMPACT, EU Factsheet, EMPACT 2022 Results.

⁹ T. Haans, 'Empowering Nigerian Youth Through Education online Safely', 48 Percent Report <<https://www.48percent.org>> accessed 3 December 2023.

¹⁰ Brave hearts Foundation Ltd, 'What are the Effects of Child Sexual Abuse'.

¹¹ National Society for the Prevention of Cruelty to Children (NSPCC), 'Protecting Children from Online Abuse', NSPCC report, 31 October 2023.

This study will appraise the legal and institutional framework for combatting online sexual abuse in Nigeria with the aim of identifying the challenges associated with the framework and proffering solutions on how best to tackle this problem in Nigeria.

2. Types of online child sexual abuse

2.1 Online grooming

This is also known as enticement of children or solicitation of children for sexual purposes. Online grooming is described as a practice in which an adult “befriends” a child often online with the intention of sexually abusing him/her. Offline grooming also exists.¹² Research has revealed that grooming is commonly perpetrated by males and to a lesser extent do women solicit children for sexual purposes and or to groom them.¹³ Basically, the grooming process is in stages beginning with the victim selection.¹⁴

Virtually, children take part in a variety of social media platforms and communication applications that perpetrators can utilize to gain access to children’s accounts. Perpetrators chose their victims in so many ways including; through “appeal/attractiveness” (mainly determined by the perpetrators’ desires), “ease of access” (based on whether the privacy settings on the websites, platforms, and applications (apps) children use are disabled or inadequately set) and/or “vulnerabilities” (children post about isolation, being abandoned or feeling misunderstood).¹⁵ After victim’s selection, the perpetrator contacts the victim to gain access to him or her. The perpetrator then seeks to form a relationship with the victim.¹⁶

The perpetrator tries to gather information about the victim from online sources and uses same to deceive the victim, e.g., feigning common interest and hobbies, similar learning /social institutions in order to relate with the victim, build rapport and trust. The perpetrator’s purpose is to further develop the friendship into a relationship.¹⁷ Before the sexual exploitation or abuse, the perpetrator tries to ensure his safety and accesses the risk of being detected. He finds out if the victim’s accounts and/or digital devices are not monitored by the child’s parents. He communicates the exclusivity of the relationship and the need for secrecy, and isolates the child.¹⁸

Online grooming does not follow a linear process, it can happen through dynamic means driven by the motivation and capabilities of the offender and his/her ability to manipulate and control the victim.¹⁹ The ultimate goal of online grooming is to sexually exploit or abuse the victim.

¹² United Nations Office on Drugs and Crime, Module 12: Interpersonal Cybercrime, UNODC Teaching Module Series < sherc.unodc.org > accessed 4 December 2023.

¹³ A. Altamura, Online Child Sexual Abuse and Exploitation: Spotlight on Female Sex Offenders (2017) *ECPAT International Journal*.

¹⁴ G. M Winters, E. L Jeglic, and L. E. Kaylor, ‘Validation of the Sexual Grooming Model of Child Sexual Abusers’ (2020) *Journal of Child Sexual Abuse*, DOI:10.1080/10538712/2020.1801935.

¹⁵ Kenneth Lanning, ‘The Evolution of Grooming: Concept and Term.’ (2018)33(1) *Journal of Interpersonal violence*, 5-16.

¹⁶ R. O’Connell, ‘A Typology of Cyber Sex Exploitation and Online Grooming Practices’, Preston: University of Central Lancashire.

¹⁷ Ibid.

¹⁸ S. Aitken, D. Gaskell and A. Hodgkinson, ‘Online Sexual Grooming: Exploratory Comparison of Themes Arising from Male Offenders ‘Communications with Male Victims Compared to Female Victims, 39(9) *Deviant Behaviour*, 1170-1190.

¹⁹ Ibid.

2.2 Child sexual abuse / exploitation material

This is the recording of the sexual abuse or exploitation of a child or young person. It means material that represents acts that are sexually abusive and/or exploitative to a child. This includes but not limited to recording the sexual abuse of children by adults, images of children included in sexually explicit conduct and the sexual organs of children when the images are produced or used primarily for sexual purposes.²⁰ This material can be distributed via e-mail, text message, instant messaging, chatrooms, and peer-to-peer file sharing networks.

National, regional and international laws vary as to what a child sexual abuse material is. In some countries, only the depiction of real children in the material is regarded as a form of child sexual abuse material. This material is prohibited in international, regional and certain national laws. Many national laws differ in regard to criminalization of the possession, production, provision, procurement and/or distribution of the material. Many countries criminalize possession of a child's sexual abuse material only if there is intention to distribute the material. Many countries do not have provisions in their laws that specifically criminalize online child sexual abuse material.²¹

2.3 Live streaming of child sexual abuse

This involves the real-time broadcasting of child sexual abuse to viewers in remote locations. It involves the transmission across national borders over the internet. Some countries have reported cases of domestic live streaming of child sexual abuse. Live streaming of child sexual abuse can occur on online chatroom, social media platforms and communication apps (with video chat features).²² Viewers of the live streaming child sexual abuse can be passive (i.e., just to play to watch), while some can be active by communicating with the child, the perpetrator of the sexual abuse and requesting for specific sexual acts to be performed on / or performed by the child. Live streaming child sexual abuse does not occur just for financial gratification but can occur in an abusive relationship.

Although the term “live streaming child sexual abuse” is not explicitly mentioned in any international, regional or national legal instrument, it can be criminalized under sections prohibiting participation of a child in pornographic performances. For example, there was an instance of Romanian woman that was sexually abusing her one-year old daughter and three-year old son via skype for payment.²³ High levels of poverty, unemployment, job instability have been identified as factors driving live streaming of child sexual abuse.²⁴ In some regions, for instance the South East Asia, families forced use of children to perform sex acts in order to financially support families. It is not regarded as a taboo, or contrary to their cultural and social norm.²⁵

Children are sometimes forced by facilitators (either a family member or a community member) to appear in front of webcam to engage in sexual behavior or to be sexually abused.²⁶

²⁰ Law Insider, Child Sexual Abuse Material: Definition <<https://www.lawinsider.com>>accessed 5 December 2023.

²¹ International Center for Missing and Exploited Children, ICMEC Report 2016.

²² European Union Agency for Law Enforcement Corporation (EUROPOL), Internet Organised Crime Threat Assessment 2018, Europol Report, 2018.

²³ Ibid.

²⁴ A. Varrella, Live Streaming of Child Sexual Abuse: Background, Legislative Frameworks and the Experience of the Philippines (2017), ECPAT International Journal.

²⁵ Ibid.

²⁶ Internet Watch Foundation Annual Report, 2018.

This act is justified in Philippines as a child's contribution to the family whereby the money the child receives is used to feed the family including the younger ones. There are other instances of live streaming involving white girls from relatively affluent backgrounds physically alone in their bedrooms, Nigerian girls are no exemption. We have girls in the secondary school boarding houses, tertiary institutions and even in the comfort of their private dwellings live streaming for themselves and posting on the internet.

3. Online child sexual abuse, an infraction of human rights provisions

Human rights are the basic fundamental and unalienable rights available to every individual across the globe irrespective of their color, race, creed, sex, origin etc. These rights are protected at the international, regional and national levels. International human rights law lays down obligations which States are bound to respect, to protect and fulfil. Online child sexual abuse constitutes an infraction to children's rights which encompasses a broad range of rights including civil, political, economic, social and cultural rights.

In a situation of online child sexual abuse, children's rights including; right to live with dignity, right to liberty, right to personal security, right to privacy, freedom from torture and degrading treatment, right to health etc. are being tampered with. These rights are guaranteed under the International Bill of Human Rights adopted by the United General Assembly Resolution 217A(III),²⁷ the Constitution of the Federal Republic of Nigeria 1999 (as amended) and in the Constitutions of almost all other jurisdictions.

Human rights are deeply connected with dignity and its provisions are to ensure individual's dignified existence. Article 34 of the United Nations Child Rights Convention 1989 states that: "Children have the right to be protected from sexual abuse regardless of their gender or sexual orientation." This provision guarantees the protection of children from sexual abuse either online or offline. The posting of online child sexual abuse image steals the dignity of the affected children and takes the toll of their health.

The Council of Europe recognizes that human rights apply equally online or offline. The Council lays down the basic framework of principles to protect the fundamental human rights guaranteed by the European Convention on Human Rights for Internet users.²⁸ This guide emphasizes the protection of the right to freedom of expression, access to information, right to freedom of assembly, protection from cybercrimes, right to private life and the protection of personal data.

In Nigeria, the Digital Rights and Freedom Bill which seeks to protect the right of internet users from infringement of their fundamental freedom and to guarantee the application of human rights for users of digital platforms was transmitted to President Muhammadu Buhari for the Presidential assent in February, 2019.²⁹ He declined signing the Bill into law on the basis that it covers too many technical subjects and it fails to address any of them extensively.³⁰ Up till

²⁷ The International Bill of Human Rights, Universal Declaration of Human Rights, art 1 adopted by the General Assembly Resolution 217(III) of 10 December 1948

<https://www.ohchr.org/documents/publications/fact_sheet2_rev.1en.pdf> accessed 6 December 2023.

²⁸ Guide to Human Rights for Internet Users adopted on 16 April 2014 by the Committee of Ministers of the Council of Europe.

²⁹ Abisola Olasupo, 'Why Nigeria Needs to Sign Digital Rights and Freedom Bill into Law as the World goes Digital', *The Guardian*, 2 July 2020.

³⁰ Peter Newell, *Legal Frameworks for Combating Sexual Exploitation of Children*.

2023, the Bill is yet to be signed into law. The Bill if signed into law is to ensure the survival and safety of Nigerians on the internet and in the digital space.³¹

4. Legal and institutional framework for combating online child sexual abuse in Nigeria

4.1 *International framework*

4.1.1 *International Covenant on Civil and Political Rights, 1966*

This Convention was adopted by the United Nations General Assembly on 16 December 1966. It provides that every child shall have the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State without any form of discrimination as to race, color, sex, language, religion, national or social origin, property or birth.³²

This signifies that children are to be protected by the family society and the State without any form of discrimination.

4.1.2 *International Covenant on Economic, Social and Cultural Rights, 1966*

This Convention was adopted by the UNGA on 16 December 1966 and is referred to as the sister covenant to ICCPR. It disallows the economic and social exploitation of children. It lays down that special measures of protection and assistance should be taken on behalf of all children without any form of discrimination.

4.1.3 *The Convention on the Rights of a Child (CRC), 1989*

This Convention was adopted in 1989 by the UN General Assembly and it entered into force on 2 September 1990. It builds on the foundation of the International Bill of Rights. This Convention specifically protects the rights of children all over the world. It affirms the status that children are equal holders of human rights and empowered actors in the realization of these rights. It includes explicit rights to protection from all forms of violence and exploitation including sexual exploitation.

Articles 34 and 35 of the CRC require States to protect children from all forms of sexual exploitation and sexual abuse. This includes prohibiting the coercion of a child to perform sexual activity, the prostitution of children, and the exploitation of children in creating pornography.

4.1.4 *Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography*

This Optional Protocol was adopted by the UNGA in 2000 and it entered into force in January 2002. The Optional Protocol is a supplement to the UN Convention on the Rights of the Child. The main aim of the Convention is to prohibit child pornography and child prostitution. It provides detailed definitions of sale children, child prostitution and child pornography. It requires ratifying States to criminalize these actions as offences and provide support for the child victims.

³¹ Pavestones Legal, 'The Digital Rights and Freedom Bill 2019.' <pavestoneslegal.com>accessed 12 December, 2023.

³² ICCPR 1966, Article 24.

State parties are to submit reports to the Committee on the Rights of the Child on the measures they have taken to implement the provisions of the Protocol.

4.2 *Regional framework*

4.2.1 *African charter on human and peoples rights (ACHPR), 1981*

This regional human rights instrument was adopted in 1981 and it came into force in 1986. “It is a general instrument requiring States to ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of the women and the child as stated in the International Declarations and Conventions.”³³

4.2.2 *African Charter on the Rights and Welfare of the Child, 1990*

This Convention was adopted in 1990 and it entered into force in 1999. Article 27 obligates States to undertake to protect the child from all forms of sexual exploitation and sexual abuse and in particular to take measures to prevent;

- a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
- b) use of children in prostitution and other sexual practices;
- c) use of children in pornographic activities, performance and materials.

4.2.3 *The African Youth Charter*

Is a framework developed by the African Union in 2006 to guide its member States. The Charter defines youth as people between the ages of 15 to 35 years. The Charter requires States to enact and enforce legislation to protect girls and young women from all forms of violence, genital mutilation, incest, rape, sexual abuse, sexual exploitation, trafficking, prostitution and pornography.³⁴

4.3 *Domestic laws*

4.3.1 *Constitution of the Federal Republic of Nigeria, 1999 (as amended)*

The Constitution is the ground norm and the highest law of the land from which other laws derive their legitimacy. It spells out the rights of all citizens of Nigeria including children. The fundamental rights of children guaranteed by the Constitution include: right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to privacy and family life right to freedom of thought, conscience and religion, right to freedom of expression, peaceful assembly and association, freedom of movement, freedom from discrimination.

The constitution provides that some of these rights can be restricted in the interest of the State. The Constitution does not have an explicit provision on child sexual abuse.

³³ African Charter on Human and Peoples Rights 1981, art. 18

³⁴ University of Minnesota Human Rights Library, ‘African Youth Charter’, 2 July 2006. <hrlibrary.umn.edu>, accessed 12 December 2023.

4.3.2 *Child Rights Act, 2003*

This was adopted in Nigeria in 2003 to domesticate the Convention on the Rights of the Child into our laws. It requires that the well-being of every child must be respected and considered paramount.

Part III of the Act prohibits the importation of harmful publications which portray information such as the commission of crimes, acts of violence, obscene, immoral and indecent representations which tend to corrupt or deprave a child. It also prohibits any harmful publication or any photographic film or any plate thereof which aims at corrupting the morals of children in Nigeria. This provision seeks to cover materials transmitted through the media, internet, videos, electronic games etc.³⁵

4.3.3 *Cybercrimes (Prohibition and Prevention, Etc. Act), 2015*

This Act provides an effective, unified and comprehensive legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria. Additionally, the Act provides for the offence of online sexual solicitation of children, grooming, luring or predation. This is a situation where minors are engaged in sexually oriented communications (e.g. “computer chat”) often to arrange offline sexual encounters. The Pornography is one of the cybercrimes covered by the Act. The term “child pornography” shall include pornographic material that visually depicts:

- (a) a minor engaged in sexually explicit conduct;
- (b) a person appearing to be a minor engaged in sexually explicit conduct;
- and
- (c) realistic images representing a minor engaged in sexually explicit conduct³⁶

The three different categories of offences covered by the Act which are all punishable include:

(i) Creation and transmission of child pornography:

These acts usually include; the making, dissemination, circulation, publication and transmission of information containing child pornography or child sexual exploitation in electronic form. Damages resulting from such acts can cause harm to children particularly when circulated on the internet as it would be challenging to restore children’s rights once information harmful to their interests is circulated. The Act provides that any person who intentionally uses any computer system or network in or for such an act, would be liable to imprisonment for a term of 10 years or to a fine of not more than N 20,000,000 or to both fine and imprisonment.³⁷ Section 23(1) of the Cybercrimes Crimes Act provides as follows:

- (1) Any person who intentionally uses any computer system or network in or for:
 - (a) producing child pornography;
 - (b) offering or making available child pornography;
 - (c) distributing or transmitting child pornography;

³⁵ Child Rights Act, sections 17 and 18.

³⁶ Cybercrimes (Prohibition, Prevention etc.) Act 2015, section 23(4).

³⁷ Ibid, section 23(1)(i).

(ii) Unsolicited distribution and child pornographic images

This involves sharing or sending of images that contain pornographic content among several persons or groups without the consent of the recipients. This includes sharing and sending such images on social media platforms such as WhatsApp, Instagram, Facebook, Twitter and other similar networks.

‘The Act provides that any person who knowingly makes or sends other pornographic images to another computer by way of unsolicited distribution shall be guilty of an offence and upon conviction be sentenced to one year imprisonment or a fine of N 250,000 or both’.³⁸

(iii) Procurement and Possession of Child Pornography

Child pornography possession is an unusual sex crime as it forms a form of child sexual exploitation that requires no interaction with the victim. It involves receiving and keeping images that are contraband because; they show actual children (often with hidden identities) being sexually abused and exploited. Although having a sexual motive is one of the requirements for the crime, but being in possession of child pornography suggests that the perpetrators of such are sexually interested in children.³⁹

The Cybercrimes Act provides in Section 23(1) (d-e) thus;

S.23 (1) Any person who intentionally uses any computer system or network in or for:

(d) procuring child pornography for oneself or for another person;

(e) possessing child pornography in a computer system or on a computer-data storage medium.

Shall be liable to imprisonment for a term of not more than 5 years or a fine of not more than Ten Million (N10, 000,000) or to both such fine and imprisonment.

The Cybercrimes Act also provides that the sharing of sex tapes, nudes and pornography on media is punishable under the Act. It provides thus: Any person who knowingly or intentionally sends a message or other matter by means of computer systems or network that is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent;....commits an offence under this Act and shall be liable on conviction to a fine of not more than N 7,000,000 or imprisonment for a term of not more than 3 years or to both such fine and imprisonment.

4.3.4 Trafficking in Persons (Prohibition) Enforcement and Administration Act of 2015

Any person who procures, recruits or offers any person under the age of 18 years for the production of pornography, or pornographic performances or allows a person under the age of 18 years to be harbored in a brothel commits an offence and is liable on conviction to imprisonment for a term not less than seven years and a fine not less than 1million naira. There would however be additional punishment of 1 year imprisonment where such person administered or stupefied the victim with any drug substance.⁴⁰

³⁸ Ibid, section 23(2).

³⁹ J. Wolak, D. Finkelhor and M. Mitchell, Child Pornography Possessors: Trends in Offender and Case Characteristics (2011)23(1) Sexual Abuse A journal of Research and Treatment.

⁴⁰ Trafficking in Persons Act, 2015; Section 17.

4.3.5 *Criminal Code Act*

Section 170 of the Criminal Code Act provides that:

Any person who knowingly sends, or attempts to send, by post anything which;

(b) encloses an indecent or obscene print, painting, photograph, lithograph, engraving, book, card, or article, or which has on it, or in it, or on its cover, any indecent, obscene, or gross; inoffensive words, marks, or designs; is guilty of a misdemeanor and is liable to imprisonment for one year.

4.3.6 *Penal Code Act*

This Act prohibits sending dangerous or obscene things by post. The Act provides thus;

Whoever intentionally sends by post anything which:

(a) encloses anything of such a nature as to be likely to cause injury to any person or thing in the course of conveyance; or

(b) encloses any obscene book, pamphlet, paper, gramophone record or similar article, drawing, painting, representation or figure, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.⁴¹

4.3.7 *Nigeria Data Protection Act (NDPA), 2023*

The Act establishes the legal framework for the regulation of personal data in Nigeria and replaces the Nigerian Protection Regulations (NDPR) 2019. It was enacted on 12 June 2023 and has been operative since then. This law is binding on online service providers collecting personal data of children. This law was enacted in line with section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) on right to privacy as well as section 8 of the Child Rights Act on children's right to privacy.

5. Institutions protecting children against sexual abuse and exploitation

There are some governmental authorities, non-profit organizations, human rights institutions responsible for protecting the rights of children. They include but are not limited to the following:

5.1 The National Human Rights Commission

5.1.1 The National Agency for the Prohibition of Trafficking in Persons (NAPTIP)

5.1.2 Ministry of Women Affairs and Social Development

5.1.3 Federal Ministry of Justice

5.1.4 Special Presidential Committee on Human Trafficking, Child Labor and Slavery

5.1.5 Nigeria Police Commission

5.2 Non-Governmental Organizations

5.2.1 Child's Rights and Rehabilitation Network

5.2.2 International Federation of Women Lawyers

⁴¹ Penal Code (Northern States) Federal Provisions Act, Chapter P3, Section 463.

5.2.3 National Council for Child's Rights Advocates of Nigeria (NACCRAN)

5.2.4 United Nations Children Education Fund (UNICEF), Nigeria

5.2.5 Child's Rights Advocacy Group of Nigeria etc.

6. Prosecution of online child sexual offences

There has been significant increase in financial sexual extortion with reports of harm jumping from 139 in 2021 to over 10,000 reports in 2022. It involves perpetrators grooming and manipulating children into sending sexual images and videos of themselves and then extorting them for financial gain. It is also known as "sextortion".

In the United States of America v. Samuel Ogoshi and two others, charges were brought against Samuel Ogoshi, Samson Ogoshi and Ezekiel Robert for sexual exploitation and attempted sexual exploitation of a minor resulting in the death of the victim. The defendants initiated chat conversations with the victims and used online applications to research information about the victims including where they went to school or worked, families and friends. They solicited their victims to produce and send sexually explicit images of themselves. The defendants engaged in extortion. This case was filed on November 30 2022. The Ogoshi brothers have been extradited to the US for prosecution.⁴²

Furthermore, on 29 August 2023, the US Attorney's office, western District of Michigan reported that Bradon Huu Le, a 22 year old was sentenced to 70 months in prison for receipt of child pornography; in connection with sextortion scheme using the social media app, snapchat to contact at least 270 girls between August 2019 and December 2019 threatening them to send their explicit videos.⁴³

In Nigeria, there has been poor record of prosecution of sextortion. The Nigerian Police has warned Nigerians against sextortion, cyberbullying, character defamation and blackmail trending on online dating platforms. A 26 year old woman identified as Opara Joan Chizaram was arrested for attempting to blackmail a man, she got connected with on a dating platform. After months of communication, she visited the man and in the process of consensual activities, she recorded him without consent during an intimate moment and discreetly captured images of his surroundings with the intent to blackmail him.⁴⁴

The National Agency for the Prohibition of Trafficking in Persons (NAPTIP) reported the apprehension of some members of a notorious cult known for perpetrating gruesome acts of sextortion and terrorizing young girls and other residents in Abuja and its environs.⁴⁵

Under the Criminal and Penal Codes of Nigeria, publishing of sexual exploitation materials is regarded as being defamatory and attracts criminal consequences.

⁴² United States Attorney's Office, 'The Nigerian Men Awaiting Extradition for Committing Sexual Extortion,' Press Release, 3 May 2023.

⁴³ United States Attorney's Office, 'Man sentenced to 70 Months in Nationwide Sextortion case', 29 August 2023. <<https://www.justice.gov>>, accessed 12 December 2023.

⁴⁴ "Nigerian Police Alerts Citizens on Sextortion" Via Dating Platforms, Urge Fun Seekers to be Vigilant', 'Sahar Reporters, 2023.

⁴⁵ NAPTIP, NAPTIP Bursts a Notorious Sextortion Cult Perpetrating Gruesome Acts Within FCT; Arrests Members', Press Release 4 April 2023.

7. Challenges of the legal framework for online child sexual abuse

Nigeria has a legal framework for the protection of children against online sexual abuse and exploitation. However, this legal framework is fraught with deficiencies and shortcomings. Some of the challenges include;

i) Non-availability of specific laws on online child sexual abuse

The Nigerian Criminal and Penal Codes do not cover the issue of child pornography and other types of online child sexual abuse adequately. Although, the enactment of Cybercrimes Act of 2015 is laudable and a welcome development, it also covers child pornography but does not cover online child sexual exploitation extensively. The Act covers other types of cybercrimes not relating to sexual abuse or exploitation. There is need for specific and well detailed legislation(s) to cover all forms of online child sexual abuse. For example, legislations such as; Child Online Protection Act, Child Privacy Protection Act.

ii) Non-implementation of Child Rights Act 2003

The Comprehensive legislation on the protection of the rights of children in Nigeria, CRA is applicable only in 22 out of the 36 States in Nigeria. In the Northern parts of Nigeria, the law is seen as anti-religious and anti-culture. Therefore, CRA is not enforceable in the North having not been adopted

iii) Ineffectiveness of the laws

It is a different thing to have laws and it is another for the laws to be effective. Nigeria has laws on child sexual abuse, particularly the Cybercrimes Act. This Act however has its shortcomings and is considered ineffective having not been able to reduce the exponential growth of online sexual crimes against children. The non-enforceability of the laws against online child sexual abuse has resulted in the poor record of prosecution of cases in Nigeria.

iv) Limited data collection and limited generated evidence to inform policies and practice.

There is need for promotion of child participation and agencies in formulation of policies and enactment of laws on online child sexual exploitation.

v) No comprehensive remedies for victims

Our laws focus more on the offenders and the penalties to be meted out to them in given circumstances and pay little or no attention to the rehabilitation of the victims or survivors.

vi) No synergy among the agencies or investigating units

There is no collaboration of efforts between the different units or law enforcement agencies saddled with the responsibility of investigating the sexual crimes.

vii) Duplication of roles of governmental agencies.

Roles of the governmental agencies are often duplicated since there is no delineation of their roles.

viii) Paucity of funds

Most of the agencies and organizations protecting the rights of children are not well funded. They lack funds to carry out their programs and projects; such as creating awareness of these online sexual crimes, providing rehabilitation to the victims

ix) Inadequate Staffing and non-professionalism of staff

Most of the commissions protecting the rights of children do not have adequate personnel and some of those employed lack the requisite professional skills in handling child sexual offences.

x) Inadequate child sexual exploitation database

Only Ekiti and Lagos states have introduced the sex offenders registries, even the registries are not easily assessable and not regularly updated unlike developed countries such as USA, Australia, Canada that have comprehensive child sexual exploitation database.

xi) Non-availability of reporting hotline or reporting portal

Reporting hotlines and portals are not readily available to the public to enable them report illegal online content such as; child sexual abuse material.

8. Conclusion

Children are an integral part of the society and are entitled to protection due to their vulnerability. The International and regional human rights instruments as well as domestic laws ensure the protection of children from all forms of abuse including sexual exploitation. The advent of information and communication technology, apart from creating numerous benefits to the society has exposed the children to great harm and risks. Children are being sexually abused and exploited via the internet, The exponential growth in the rate of online child sexual exploitation has necessitated the examination of the legal framework for combating this menace in Nigeria

Although Nigeria has extant laws for protecting children against online sexual abuse, there is no specific legislation on online child sexual abuse in Nigeria. Child pornography and other forms of sexual abuse just form part of the extant laws. Additionally, there is a challenge with the implementation of the extant laws in curbing the crime of online child sexual exploitation. The unenforceability of these laws has affected prosecution of these cases in Nigeria. Thus, the Nigerian government is to ensure the proper investigation and diligent prosecution of the perpetrators of the crime to deter others.

9. Recommendations

The following recommendations have been proffered:

The Nigerian legislature should enact specific laws for the protection of children against online child sexual abuse. The extant laws should be harmonized and made applicable in all federating states in Nigeria. Children and their protecting agencies should be actively involved in the formulation of policies and enactment of laws regarding their protection. Our laws should also be comprehensive enough to accommodate remedies for victims.

Additionally, the roles of the governmental agencies and other organisations protecting children should be well defined to avoid clashes and duplicity of roles. The agencies should be well funded and staffed. Also, professionals should be employed to handle cases of children that have been sexually exploited.

The Nigerian Government should also ensure all states have sex offenders' registers. They should also create reporting hotlines or portals. They should create awareness of these crimes not only by introducing it in the educational curriculum but by organizing programs to sensitize the general public. Government should ensure that technology companies promote the use of acceptable safety measures on their platforms.

Parents are to devote time to monitor children's activities online. They can set up parental control on children's devices and educate them on the various forms of online abuse and encourage them to report cases to them. Children are to speak up on strange communications with them on the social media platforms.

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Social Justice in Tiv Thought System

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Abstract

Every human society demands justice which reflect not only in its laws, institutions, but social systems as well, and, it is expected that the major social institutions should distribute fundamental rights and duties and, determine the division of advantages from social cooperation. This expresses the conviction that social justice is the highest of values in the society and imperative in the ordering of societal priorities. The study appraised the concept of social justice as understood in Tiv traditional thought system. The study employed qualitative research where data were derived from books, journal articles and the internet. The historical, expository and critical methods were adopted for this paper. The historical method presented the views of various philosophers on the concept of justice as well as the history of Tiv people. The expository method relayed the concept of justice in Tiv traditional thought system while the analytical method focused on the appraisal of Tiv notion of social justice. The paper found out that, lack of social justice has bedeviled the Tiv nation. This is evidenced in jealousy, envy, land disputes, poverty, politics of bitterness, decline in value orientation, individualism, sectionalism etc. These indices have thwarted development in Tivland, retarded growth and bred suspicion and scorn. The paper therefore, concluded that if Tiv people revive their traditional value system of social justice encapsulated in Gbaaondo, swem, as well as ya na angbian, the much needed cohesion, integration, unity, growth and development that has eluded Tiv people and Tivland for so long would be realised.

Keywords: Angbian, swem, justice, social justice, cohesion and gbaaondo.

1. Introduction

It is a fact that the non-adherence to social justice have resulted to neglect of Tiv traditional values which in turn has degenerated to lack of unity, disrespect for elders, individualism or selfishness, political violence, land disputes, domestic violence, greed, poverty, insecurity, unemployment, moral decadence, kidnappings, jealousy, envy, fanaticism, politics of bitterness, sectionalism among others etc. When there is lack of social justice, positions or resources are not fairly distributed among sections or groups in the society and as such, there is bound to be resentment, hatred and lopsided growth. This has retarded growth and development in Tivland.

It is interesting to note that the contemporary practical human existential condition of the Tiv people which anchors on communalistic ontology cannot be isolated as it underpins their social justice system and socio-economic life paradoxically. As a matter of fact, the Tiv value system of communitarianism is predicated on social justice, metaphysics and morality. It is pertinent to note, however that, with the emergence of the pluralistic and heterogeneous society

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coupled with the imposing influence of globalization and the alarming rate of westernization of African traditional ideas, the Tiv people are compelled to rediscover and reassess their cultural values and ideal. It is from this background that this study appraises the concept of social justice in the traditional thought system of the Tiv people of Benue State in central Nigeria to redefine it in contemporary Tiv society. Thus, the work shall expose Tiv traditional notion of social justice; identify those factors that affect the practice of social justice in Tiv society today; and above all, critically appraise the Tiv notion of social justice in the contemporary Tiv society.

2. Conceptual definition

The following concepts are used in the work and their definition as used herein: *Justice*, *Social Justice* and *Tiv traditional Thought System*:

Justice. In *A Theory of Justice*, Rawls offers two principles of justice. First: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all (266). Second: Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity (266).

Social justice. Social justice concerns the fairness with which the goods and burdens arising from collective life are shared among members of society. Social justice is concerned more specifically with the just distribution of resources resulting from the economic, political and cultural organization of the community. Questions about social justice are therefore questions about the organization of just distribution in society. It denotes “the just state of affairs ... in which each individual has exactly those benefits and burdens which are due to him by virtue of his personal characteristics and circumstances” (Miller 20), or in Rawls’ famous statement: “the adequate repartition of benefits and burdens arising from social cooperation” (4).

Tiv traditional thought system. According to Wang in *Ieren*, Tiv traditional thought system refers to “...the system of thought underlying the behavior of the Tiv people” (xii). It also means the way the Tiv think, talk and act. It captures the Tiv understanding of reality, truth, the metaphysical realm, human relationship and the world at large. Tiv philosophy:

In other words ... can be defined as a way, method and systematic way of doing things and or understanding events reflecting both the mental and experiential capabilities of the person and or the group... whatever activity we are engaged in, whether at the level of critical thinking, analysis, speculation, and sense experience is all *ieren*. Tiv *ieren* is therefore, the fundamental basis of understanding the Tiv people in their metaphysical, epistemological, aesthetical, logical, political behaviors. Tiv *ieren* ... eschews all undue reliance on transcendentalism of the kind that reduces all phenomena to a supernatural being without the accruing benefit for man (xii).

3. Background to Tiv concept of justice

The ethics of African religion in general and the Tiv in particular is embedded in the ideas and beliefs about what is right and wrong, what is good or bad character. It is also embedded in the conceptions of satisfactory social relations and attitudes held by the members of the society. Ethics is embedded, furthermore, in the forms or patterns of behavior that are considered by members of the society to bring about social harmony and co-operative living, justice and fairness (qtd in Shishima, 49).

For the Tiv, *Aôndo* (God) is the greatest source of ethical values. He demonstrates the desire for good value system through *Gbaaondo* which means “natural truth.” He created the

universe and mankind. When God created human beings, He gave them a moral capacity, will and reason. He also gave man *Ishima* (heart). The heart is invested with the capacities of knowing, thinking, reasoning, willing, deciding, choosing and exercise of freedom. It is from the heart that thought, motive and intention arise. Thus, the heart is responsible for moral decisions and actions (Dzurgba. *On the Tiv of Central Nigeria*, 212).

Ishima is an equivalent of conscience. A distinction between good and bad, right and wrong is based on two types of heart: *Ishima i dedoo* (a good heart) and *Ishima i bo* (a bad heart). The fact that a person is capable of doing good and bad actions on different occasions suggests that the heart has two natures. Thus, a distinction between a good and a bad person is made on the dominance of either one of the natures of his heart. A good person is characterised by *dooshima* (love), *Bemshima* (kindness), *Ishima i wan* (patience), *Ishima i saansaan* (happiness), *Ishima i koron Iyol tsaha* (self-control), *Ishima i mhôn* (mercifulness) and so forth. God rewards good actions and punishes evil doers. Thus, God is a moral judge of human conduct. God's concern for moral conduct is mainly for the purpose of maintaining cordial human relationships and efficient institutions (*On the Tiv of Central Nigeria*, 13).

The Tiv man recognizes God as the Supreme Being, that because of His power beyond human control, it is right to do good and avoid evil in order to please him and gain his favor (oral interview). That is why Dzurgba says:

In Tiv traditional religion, divinities (akombo) perform specialised functions in human society. They serve in the areas of human reproduction, health medicine, farming, hunting, fishing, trading, marriage, family and so on. Some of the divinities are *Ahina*, *Igbe*, *Ikyôôr*, *gbianjôv*, *Atsewe*, *Ikyo* and *Akombodam*. The problems associated with divinities are vomiting, bleeding, abortion, irregular menstruation, sterility, impotence, headache, chest ache, stomach ache, rib-ache, and cough. These problems are believed to result from a violation of the divinities' taboos, which regulate human conduct. Such violations necessitate the acts of confession, propitiation, expiation, appeasement and submission. Acts of adoration, praise and thanksgiving follow divine blessings: sacrifices to the divinities include crops, fowls, goats, except in the case of dog which the Tiv people do not eat; the clients receive portions of their sacrifices. Each divinity has its own rules for its own clients; human conduct is therefore well regulated in everyday life (214).

Gbenda says *Akombo* in general terms are believed to have been given by *Aondo* (God). God is active; he takes an active part in affairs of the people and *akombo a sôron* is what reflects his invocation (5). *Ikyôôr* cult which is believed to be one of the *akombo* as portrayed by (Dzurgba, 214) can therefore, be traced to the recognition of *Aondo* in the life of a Tiv man. The desire of the Tiv to uphold morality motivated the introduction of the *akombo a Ikyôôr* to assist the young girls to be pure and chaste before they are given in marriage. *Akombo a kyôôr* are as old as humanity, *Aondo* created the world and gave the Tiv man the knowledge and grace to identify *akombo* in order to help maintain morality through preservation of virginity. There is no trace as to when and how the *Ikyôôr* cult came into existence but then the Tiv have a general belief that *Aondo* gave this cult to the ancestors through deities and it is regarded as one of the *akombo* that checks morality of young unmarried girls in order to maintain a harmonious relationship between man and *Aondo*.

The Tiv belief express unalloyed conviction about the values of oneness and belongingness as dictated by *ya na anigbian*. Thus, concerned with harmonious co-existence of life-forces, the Tiv man himself as a life-force, does not deliberately do anything to dislocate the enshrined coherence (50). Zaato Nor also explains that 'the Tiv man is a life-force who must relate and interrelate with other life-forces. He is also a member of a family, clan, community (society) and the universe'. Nor stresses that to the Tiv therefore, the interpenetrating relationship is a physical, moral and spiritual responsibility to promote the ontological equilibrium in the society through the sustenance of the collectivist/communal living that is embedded in familyhood. This

macro relationship as contained in the larger society is equally demanded at the micro level of familyhood relationships. The implication of this is that members of a particular family lineage must necessarily, as life-forces, sustain the existing congruence which is promoted by upholding the socio-cultural values, beliefs, integrity as well as prophecies, if any, that are associated with the family (236).

4. Understanding the concept of justice in Tiv traditional thought system

The concept of justice among the Tiv is very central to the understanding of the Tiv *Mnenge u tar* (world view) and *ieren* (philosophy). It is also built on the principles of appropriateness enshrined in harmony derived from the ontological principle of balance and proportion (Atser 70). The concept of justice in Tiv means *sha inja* which depicts appropriateness. Justice in Tiv therefore, is an act, an attitude, a system, a policy that is appropriate to many societies and the entire cosmic realities (Wang, “The Changing Faces of *Tsav* (witchcraft) Phenomenon in the Maintenance of Justice in Tiv Society,” 7).

To be appropriate or act appropriately, is to embrace such other values as farmers, communality, accommodation, what is right, what is good, what promotes tranquility and harmony, altruism and brother keeping among others (7). Justice can also be seen in Tiv understanding to mean *shami* (right). Injustice is therefore, *shamiga* (not right). *Shami* has correlates such as *Kwagh u vough* “right thing”, *sha tindi* (legal), *sha mimi* (truth), *doo* (good) and so on. However, “Right” as applied to Tiv understanding of justice assumes many meanings. For Dzurgba A “right” is *ian*. That is why a Tiv man would say, *ian yam* “my right” or “*mngu sha ian yam*” “I am on my right” or “*Mngu a ian sha kwagh ne*” “I have a right on this thing”. But as stated further by Dzurgba, this “right”, *ian*, does not arise from the individual’s merit but the merit of the society (111).

In the legal sense, justice is said to be done in Tiv when there is *ijir oron I mimi*, right judgment. But this right judgment is measured by the standards of the community. In *Justice and Judgment among the Tiv*, Paul Bohanna explored the Tiv traditional understanding of justice as demonstrated in their judgment of cases. He outlined the numerous cases to demonstrate that justice in Tiv is more evidential in instances of judgments and settlement of disputes (56).

Meanwhile, Atser in “Justice in Tiv Society” demonstrated that justice in Tiv traditional society was closely linked with *Tsav*, witchcraft, but in the positive sense of enforcing agreements, and maintenance of order, encouraging harmony, fraternity and kinship ties, where individuals act appropriately for cohesion and togetherness (70). It must be noted that the concept of justice in Tiv also reflects the comprehensiveness, communality, egalitarian and sacralism of the Tiv society. The conception of justice as appropriateness, *sha inja*, overwhelms the above indications as expression of what characterizes justice in Tiv society (Agundu & Tughhemba, 171).

Politically, the Tiv indigenous religion has employed symbols to ensure justice and fairness among the people. This is seen both in the effective leadership and followership of the Tiv people. Symbols are employed in objects such as *tsa*, *gbough*, staff of office, in the administration of their various jurisdiction. *Tsa*, tail, is used mainly for blessing from either elders or leaders. The same *tsa* is used on the other hand to reprimand, warn and even punish an offender. Indigenous religion has taught the Tiv people the various ways of evoking their ancestors using these symbolic items (Odey, Elizabeth Akpanke; Asuquo, Offiong Offiong; Onah, Gregory Ajima & Obo, Ekpenyong, 7).

It is also indigenous religion that has taught the followers the values and power of the ancestors. Tiv ancestors in themselves are symbols of the almighty God (which they refer to as *Aondo u a gbe sha man tar*). Among the Tiv, it is believed that *imo I mbavesen ka imo I ivungu*, words of elders are words wisdom. They are words of ancestors. When people excel in life, they

are simply exhibiting the radiant and splendor exhalation from the ancestors, deities and God. Tiv indigenous religion teaches that each leader not minding the level is a symbol, presentation, of ancestors. This is the belief on which the Tiv people are tied to what is termed *swem* ritual pot (98).

The *swem* ritual pot contains ashes of the late *Takuluku* who led the Tiv fairly and righteously. The belief is that his ashes are present in the *swem* ritual pot and are an indication that he is present and would still (even long after death) exercise his fairness, truthfulness and justice over whatever transpires in Tiv land or among Tiv people. It is this strong belief that up till today the Tiv indigenous religion leads the people to swear by the *swem* ritual pot. The pot is believed to make the offender's legs and stomach swell up. And if confession is not made of the offence committed, the offender finally dies. This belief shows that the practice of indigenous religion is strengthened by the involvement of symbols, *swem* ritual pot. Apart from enforcing quality leadership also ensures loyalty, obedience, justice and fairness among the followers (Odey, Elizabeth Akpanke; Asuquo, Offiong Offiong; Onah, Gregory Ajima & Obo, Ekpenyong, 8).

Economically, the Tiv have a series of economic activities apart from farming. The people practice hunting, blacksmithing, cloth weaving and other items of daily need. *Ate iwya* from where blacksmithing is done is also a ritual. Tiv indigenous religion has it that *ate iwya* is a place for safety for whoever is fraying in fear of destruction of any kind. *Ate iwya* is also believed to be a place where theft is never carried out. All that is left in *Ate iwya* is never carried away by anybody unlawfully or without any permission. Symbolically, *ate iwya* is a sacred place based on the teachings of Tiv indigenous religion (8).

As a medium of effective communication, symbols serve as a tool for information dissemination and they are: a bridge between spirits, ancestors and the living; they warn against misfortune, and are tool for dispensing justice; and they also reward the just and punish the offenders. They are instruments for promoting the communal and economic life of the Tiv people. The core experiential and daily life of the Tiv people is collectively arranged. This is because individualism is seen as a taboo, and as such, the Ubuntu proverb "I am because you are" suffices (8).

In Tiv, *Azov*, spirits or *Mbakuv*, ancestral spirits, are capable of changing to anything as it please them any time, the objective is to testify that in their community models are provided for social justice and the welfare of the inhabitants are truly realized in their social life. In a related view, the breaking of *swem* signifies that justice is set loose in the land, so those who use *tsav* in evil ways would be punished with illness and death. *Gbaaondo* therefore stands for the truth, justice unity, brotherhood and that which is truly right (Gbenda, *African Theism*, 26).

In Tiv religion, truthfulness, chastity and justice are cherished and to ensure that the cherished ethical norms meet their desired objectives. There are taboos, prohibitions and laws that guide members of the society. Violation of such always has consequences from the God, spirits. Preservation of the virginity of a girl is another crucial moral value in Tiv religion. An example of such norm in the Tiv society is tying of virginity to the *Ikyôôr* cult and sustaining by the *Ikyôôr* deity (Atuu, 27).

Ya na Angbian is a philosophy that is grounded heavily on the idea of fairness. It also emphasises on justice as a principle and believes that leadership at all levels should not be confined to one particular section, society, region, or group of persons. But rather, it should be a shared responsibility to all qualified individuals or groups. Politically, *ya na angbian* defamed the Nigeria popular adage of "winner takes all" and ethnic based politics, greed and selfishness. It is a philosophical principle which advocate fairness in everything be it political or economic resources. For Akiga, therefore, the entire philosophy of *ya na Angbian* is built on equity (Qtd in Kerker & Anshi, 30).

From the foregoing, one would observe that justice is indispensable at all levels of man's relationship with his fellowman. *Ya na angbian* is a philosophy of social justice. It is based on the social nature of man and directed towards the accomplishment of common good, accommodating the desires of others for headship too. This study seeks to review the aspect of justice called social justice.

5. Factors inhibiting the realization of social justice in tiv society today

The emergence of the modern society which is pluralistic and heterogeneous in nature has affected almost all facets of Tiv socio-cultural system and the concept of justice is not an exception. Since the intrusion of cultural influence and the colonial-missionary activities in Tiv land, a lot has changed. Anshi Martin Wang affirmed this when he asserted that "the destructions of Tiv belief system, worldview and philosophy have affected drastically, the ancient practice of *tsav* for the benefit of the members of the society and the maintenance of justice" (11).

Swem which hitherto was the symbol of justice has lost its sacredness and mystical force in ensuring justice (Agundu, "The Changing Faces of African Personality in the Pluralistic Society: The Experience of the Tiv People," 8). Almost everybody claims to be Christians, hence, *Bumum Swem*, swearing at *Swem*, is considered ungodly and devilish. The bible has now replaced *Swem* in matters of oath taking and other related activities. Unfortunately, the bible does not react drastically and promptly at one who swears at it and acts contrary or inappropriately as does *Swem*. The 'sit tight' mentality has permeated the Tiv nation and the sense of communalism is gradually becoming an allusion. Communalistic sense of justice has been replaced by individualistic tendencies. According to Wang, "brotherly love has ceased and has been overthrown by brotherly conspiracy and hatred, collectivity has given way to egoism and uncompromising individualism" (118).

It is thus, regrettable that, the modern society with its doctrines of consumerism and extreme capitalism has greatly affected the Tiv concept of justice. *Swem* is a deity in charge of justice, fairness, security, peace, stability, order and welfare. It enforces the right and duties of individuals. The culprit's stomach swells, his or her legs and arms become thinner and thinner, while the head rests awkwardly on a thin neck.

Other challenges in the effective implementation of social justice in Tiv society today includes the following.

i. Jealousy

Jealousy is one of the factors inhibiting the practice of social justice in Tiv society. Many today feel that the way to get to the top is by destroying the other person. It is better expressed as "Pull Him Down" (PHD) syndrome. However, Ahile opines that much of what goes on in Tiv society today can only be understood against the background of the social structures and relations initiated by those who colonized them. "Yes, the structures are so created to fashion the desired disparity amongst groups" (107). Justice Utsaha was cited in his speech to the *Mzough u Tiv* as saying; why are we so diametrically different from our ancestors? The Tiv man of yester years never believed in employing subversive tactics, including the issue of supernatural powers, to thwart the efforts of his brother who aspired to excel among his neighbors, this is jealousy.

ii. Envy (Iyuhe)

Iyuhe ka mtuhwem (jealousy is like ashes) and *mtuhwem*, ashes, ontologically, does not give to something positive, *mtuhwem* in itself is the waste product which is obtained from the well burnt wood. Its combination with water produces *Imtsem* also called potash. It is commonly used by cooks in the preparation of *ashwe* soup. When boiled with *ashwe*, it neutralizes that bitter taste in it. It is also used to neutralize poison. Supernaturally, *ashwe* is also a poisonous potion

used in black magic to cause disunity among a family or community members etc. *Iyuhu* leads to blackmail or slander of others. It also leads to the use of *ashwe* against a brother or sister. In fact, it is one of the major factors hindering the practice of social justice today. Once a particular person has established that he would not be a beneficiary of what is meant for their community, he or she may go as far as ensuring that others too does not get it. Such resistance go as far as involving the use of sorcery which may result in the elimination of the person designated to benefit from the position meant for the community.

iii. Religious issues

Religious issues also lead to injustice in Tiv society. There is often disagreement over leadership in the same congregation or denomination. The same thing happens when there is a disagreement over interpretation of scriptures, doctrines, sacraments or practice. Where a particular section of society dominates the leadership of a particular religious institution and other parts of the society feel not accommodated, such organizations split into factions and such factions organize themselves into new religious institutions, organization or movement. Religious controversies and schism in Christianity originate from these sources (Dzurgba, 2). Leadership tussle is one reason for the proliferation of churches in Tiv land just as the problem of commercialization of religion. This disunity and personalization of leadership by an elite community also affects negatively the implementation of social justice in Tiv land.

iv. Politics of bitterness

Politics in Tiv society has led to the erosion of moral values of honesty, sincerity, transparency, accountability, fairness and good family name. This is best captured in the maxim, *ya sha ageva*, win by force. The effort to win by force has often led to the death of many during elections. *Ya na angbian* being a justice principle ought to have a special place in Tiv politics but due to political bitterness some prominent Tiv sons go the extra mile to stop other members of their communities from flying the flag of a party in line with this justice principle. Often times, they manipulate the process via *injo*, “loan system,” to lease the position out to another community. Since they are not to have the position, then no one else will have it. Political bitterness also constitutes a serious challenge to the practice of social justice in Tiv Society.

v. Decline in value orientation

In Tiv philosophy, every member of the society has responsibility for the proper training of children born in such a society. Formation of children is not solely the responsibility of parents. One of the values that the society inculcate in the child is respect for parents, elders and others. Where one observes that a particular child is misbehaving, he or she will caution the child and report him to the parents. Nowadays, a good number of parents are not happy to receive such reports from other members of the community. By implication, there is serious decline in moral values in Tiv society. However, this is not supposed to be the case. The communitarian spirit as captured by Ikima entails thus:

a true African had always believed in communalism evidenced in sayings like; *ya kwagh na angbian, angbian ka an kpan ga*; among the Tiv meaning; “eat and give your brother/sister, and brother/sister is not a slave” respectively (qtd in Ikyaambe 62).

Strangely this is not the situation in our society today. Even the elders seem to have lost focus. Hardly have we heard that the elders have met and resolved that there should be moral reforms in Tiv society. This has paved way for vices to a level that there exists today militia groups in the land who kill, maim and destroy properties. Crime is the order of the day, particularly armed robbery, kidnapping, assassination and brigandage etc. The foregoing clearly depicts collapse of moral values and inhibition of social justice.

vi. Sectionalism

Sectionalism or factionalism in Tiv has manifested itself in many respects: political appointments, in distributing or allocating/erecting developmental structures and worst of it all, it has manifested in xenophobic dimension. “Ka Kparev” or “ka Mbavia a Mbavia gaa,” “ka Ihyarev,” “ka Masev,” “ka Isherev,” or “ka Ityoshin gaa” or generally, ka MINDA (Masev, Ihyarev, and Nongov Development Association). These stereotypes, prejudices, name calling and all kinds of pejorative, derogatory and apprehensive xenophobic feelings and attitudes have only fanned the embers of disunity and divide in Tivland. This had made clans in Tiv to build barriers against their fellow Tiv brothers to such an extent that even land is preferred to be sold to a non-Tiv by the seller than to his Tiv fellow.

vii. Westernization

Westernization of Tiv society by the British colonialists entrenched liberalism in human behavior, particularly the Christian message that no one should be judged and punished except by God. This has given room to looming social vices and crime like sexual promiscuity, armed robbery, theft and loss of respect for elders etc. The Tiv tradition which was known for altruistic pursuit of common good has been sacrificed on the altar of individualism, as everyone seems to think of himself and his family. Today, what is meant for many is hijacked by a few. This uncultured culture instituted by westernization has stagnated true development in Tiv society and has displaced social justice.

viii. Globalization

Another challenge to social justice in Tiv society is the use of technological gadgets such phones, laptop, television etc. which exposes the Tiv to social media platforms such as X, Facebook, WhatsApp, Instagram, 2go, Zoom etc. and television, cinema. These gadgets tend to isolate the individual from the public and exposes him or her to corrupt practices such as pornography and other crimes encountered on those platforms.

What is captured above is that globalization has somewhat negatively affected the spirit of social justice in the present time as people give or spend more time with technological gadgets than they should in physical contact. But that is not to say that these gadgets do not foster social justice. They do because individuals evolve communicating through social media platforms like WhatsApp, Zoom, 2go, Video Conferencing, etc.

6. A critical appraisal of Tiv notion of social justice

A systematic treatment and critical appraisal of the Tiv concept of justice will be highlighted as follows.

i. *Gbaaondo* as a basis of Tiv theory of justice

The concept, *Gbaaondo* means nature in Tiv. It is a combination of two words, “gba” and “Aondo”. *Gba* can mean “make” and can also mean /852“create” as well as a conterminous of “exist”. Meanwhile, *Aondo*, simply means God. In this context, *gba* is taken to mean create literally therefore, *Gbaaondo* denotes “God’s creation”. In Tiv worldview, *Gbaaondo* is used to qualify that which is natural, that which is right, that which is, and ought to be. Hence, the Tiv concept of justice is greatly influenced and informed by *Gbaaondo*, that is, appropriateness in Tiv understanding which reflects the natural order and cosmic harmony as well as what ought to be and is right (Agundu & Tughhemba, 171).

ii. Swem as a symbol of justice in Tiv

Swem is a religious sacralism of the Tiv people. It has to do with meaning, truth, just and logical interplay of coherence in midst of confusion and illogicality (Dzurgba. *Tivian People and their Traditional Religion: The Critical, Historical, Sociological and Ethical Perspectives*, 59). It is a doctrine whose pragmatism and reaction encompasses equilibrium and optimal result (Akwaki, 46). The Tiv people believed that, *Swem* is a very big *Akombo* (mystical force) by which they swear for harm or protection. Anybody that *bum swem* (swears by swem) and acts contrary suffers from swollen abdomen and dies. It stands for *mimi* (truth) *chia* (justification) and it is a symbol of universal justice and an enforcing power (Moti & Wegh, 51). This is even so because:

While individuals may find *Akombo* for the whole land, *swem* summons the power of the community to carry out justice. Every *Ityo* (patrilineage) is eligible to have *swem*. It is expected that a far-reaching decision be sealed by the breaking of *swem* (51).

It is thus believed that *Swem* has the power of administering instant justice and of enforcing decisions (51). Based on its known efficacy of securing instant justice Joseph Gbenda observed that “in a court of law, votaries of traditional religion take their oaths by swearing using the sacred pot *swem* to be just and honest in giving evidence (Gbenda. *African Religion and Christianity in a Changing World: A Comparative Approach*, 115).

In Tiv metaphysics, an individual's right to life, to his children's lives and welfare is protected by a divinity known as *swem*. It is responsible for social justice. It protects the innocent people, but punishes those who violate the principles of social justice and fairness by bringing all kinds of sufferings upon the lives of people, whether they do their evil deeds under the auspices of *azôv*, *akombo* or *mbatsav*; *swem* is capable of dealing with the matter effectively. It swells the stomach of the guilty person and kills him, but protects the innocent. Thus, it is the last resort in seeking for justice. *Swem's* emblem is made up of a small pot which is filled with soil and ashes. Certain feathers of certain birds are inserted in the contents of the small *tsua* (pot) and *camwood* is smeared at several places round the pot. A rope is tied at the brim with a loop as a handle. After *swem* is fully prepared, the priest asks the person who is receiving *swem* to make his or her declaration of his or her oath.

It is through *swem* that the individual and society's rights are protected and justice ensured for all. In the *swem* oath alone, we can observe that there is great ethical consciousness among the Tiv, which serves as an operative factor in assessing the moral behaviours of the Tiv. It restores confidence, trust, love, peace, pride of virginity and chastity, prohibition of incest, prohibition of adultery and rape.

iii. Justice as a means of social cohesion in Tiv

The Tiv worldview even believes that both man and the universe should work together in harmony (Atel. *Dynamics of Tiv Religion and Culture: A Philosophical Theological Perspective*, 34). In this derivation, what is appropriate is that which help to enhance and sustain the above conviction; hence the understanding of justice as appropriateness. The philosophy behind the intended-preserved-harmony between man and the universe is that, for the Tiv people, the excesses of man disrupt the relationship between man and the spirit of the universe and such causes disorder and malfunctioning of the entire cosmic nature and social equilibrium. Therefore, justice in the sense conceived, ensures appropriateness, and orderliness that avoid social disruption in the working of the society. Corroborating this point, Wang notes that justice is that which “serves to preserve the balance of the macro and microcosm, that which holds the equanimity of the totality, produces the greatest good and as such is true to the structure of the whole” (*Ieren: An Introduction to Tiv Philosophy*, 38). Social justice is therefore an essential element of ensuring social cohesion in Tiv society.

iv. *Ya na Angbian* as Tiv philosophy of justice in a socio-political sense

Informed by the Tiv doctrine of communalism and egalitarianism, *ya na angbian* becomes an appropriate philosophy of justice in the political sense. *Ya na angbian* is translated to mean “eat and give your brother”. According to Terkura Tarnande, “to the Tiv people a just and equitable society can be attained through the application of the principle of *ya na Angbian* in the appropriation of the commonwealth” (1). It is a communalistic theory and practice directed towards brotherhood. It is strongly opposed to individualism, selfishness and egocentrism. This belief is captured in the sayings like “*kon mon ngu lun ikyo ga*” (a single tree does not make a forest), “*ka tema imongu mbagbera ve fe iwa ye*” (it is only by sitting together that the people of Mbagbera have come to know the art of blacksmithing). Outside expressing the communalistic philosophy of the Tiv people, it also shows that justice for the Tiv people is also communal and not individualistic. It reveals the distributive justice of the Tiv in terms of political power. It is in this sense that Terkura Tarnande further avers that:

The import of the principle of *Ya Na Angbian* is to ensure the equitable distribution of social wealth in such a way that none of the constitutive components of Tivland is neither alienated, marginalized nor discriminated against. Fundamental to the conception of the principle ‘is a sense of community sharing, harmony, inclusiveness, unity, partnership, ownership and fairness’ consequently, monopolization and primitive appropriation of wealth and possession of power by a few privileged persons or families is forestalled (2).

This is why the Tiv have no dynasty or royal family, for them, it is justice for all to experience kingship or royal hood. Hence, the rotation of political offices and traditional positions in Tiv land.

7. The practice of social justice in Tivland today

It is believed that, no society can build a solid foundation of national development and cohesion without visiting its past cultural heritage. Thus, Government should accord recognition to traditional institutions and marry traditional value systems with the modern-socio-political system. There is also the need for Government to reintroduce moral instruction in all levels of our institutions of learning allowing moral instruction draw its content from philosophical teaching. It is observable that this will instruct the value of social justice amongst the people and also inculcate discipline in people which will greatly minimise their tendency to be corrupt.

Other areas to be looked into and reshaped include the following:

(i) The Tiv need leaders who can encounter and turn setbacks into comebacks. A leader with vision to use judiciously the wealth provided by the administration of President Bola Tinubu, to ensure national cohesion, development, unity as well as integration. A leader that can add value to the people, use their influence at the right times for the right reasons. He must walk away from political crisis and face development with utmost commitment.

(ii) There are ethical principles of social justice such as *ya na angbian*, *gbaaondo* etc. which leaders of Tiv society need to re-enact in modern society and ensure compliance to save the society from total collapse. This could be done by employing social workers under the local government system to visit communities from time to time and teach them fundamental principles of human relations to promote peace, unity and development.

(iii) Tiv value system needs to be strengthened and reconstructed. Stakeholders in Tiv need to come together and identify those negative, destructive and harmful elements in Tiv culture and jettison them. Instead of the negative “iyuhwe”, the positive “iyuhwe” should be imbibed. This is the situation where one aspires to imitate role models in order to build on legacies. It is a

situation where one is anxious to outdo and or outshine already established achievements of others. This method can ensure progress, advancement and growth in Tivland.

(iv) Similarly, government ought to promote entrepreneurship attitude by introducing policies that will develop skills among the teaming youths and make loans available for those that need finances to boost their businesses. The absence of a clientage culture among the Tiv youth have made people to apportion blame to “mbatsav” witchcraft as noted by Kenneth and Benjamin in their work “Strengthening Tiv Value System through Socio-Cultural Reconstruction: A Reflection” (137-138).

Therefore, where job opportunities are enabled by the government and Benue is opened for business to thrive through establishment of factories to cater for the abundant agricultural produce that the state possesses, a lot more of the vibrant youth could be encouraged to engage in these productive ventures, it will prevent the youth from sitting and brooding over “tsav” and “mbatsav”, for their predicament. After all the Tiv say even the “imborivungu” is not given to lazy or idle people. So, the youth should be encouraged to engage in creative and productive activities.

(v) The Tiv philosophy of “mom kohol mom,” “ya na angbian” and “ayatutu ka uno? ka se”! should be upheld. This is the only way Tiv people can bridge the gap of animosity, sentimentality, acrimony and disharmony between Tiv clans and eschew “iyuhwe”, the destructive elements.

(vi) Furthermore, efforts of spiritual leaders aimed at riding Tivland of the activities of the destructive *tsav* should be encouraged and supported by the traditional institution by banning the practice of sorcery. Meaningful efforts of successful sons and daughters should be appreciated, supported and imitated instead of blackmailing, backbiting, slandering and engaging in politics of acrimony in order to bringing such people down. Similarly, those who have made it to the top should equally aid the younger generation to also embrace the progressive patterns in order to attain the same height.

(vii) There is also the need for Tiv sons and daughters to appreciate their indigenous value system of social justice, eschew the attitude of individualism, selfishness, greed, jealousy etc. and imbibe the spirit of brotherhood, promoting common good as children of *Takuruku*.

(viii) Certain days should be set aside to honor and appreciate Tiv sons and daughters who have excelled in their various endeavors. This would spur them to intensify their efforts at developing both human and material resources.

(ix) Musicians, poets, academicians, the media, the entertainment industry, spiritual leaders and traditional institutions should intensify campaign promoting the Tiv traditional value of social justice towards ensuring progress, cohesion and development.

8. Conclusion

From the foregoing, it is obvious from the study that the Tiv concept of social justice was a cherished tool for enhancing communal living and harmonious co-existence among them. It also serves to promote fairness, equitability, communalism, trust, legitimacy and goodwill for the physical and spiritual regulation of the different life forces of the society. Without appearing anachronistic, it is imperative to rediscover and re-assert our traditional concept of justice so that peace, progress and social cohesion can be realized in Tiv society, Benue and the larger Nigerian society. Justice is for the common good of society.

It is important therefore, to also state here that there can be no peace without social justice and there can be no development without peace. The implication here is indicative of the

fact that for development in its entire ramification to take place in any clime, the attainment of and the provision of social justice is both paramount and indispensable. This is why the principle of social justice is deeply enshrined in the operational values of the Tiv people and indeed in almost all cultures of the world (Agundu & Tughhemba, 175).

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