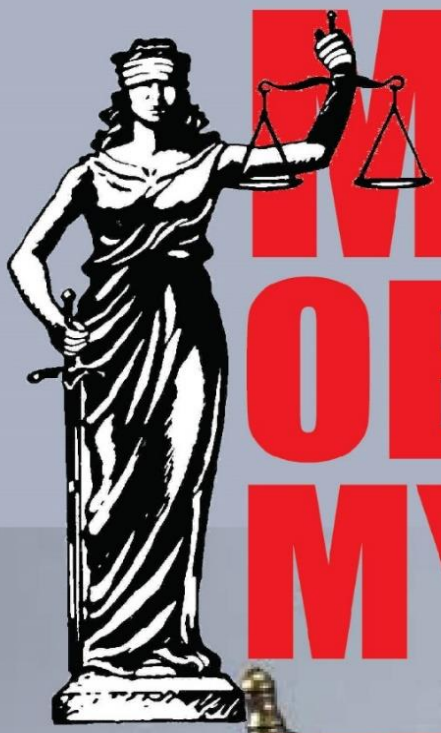
# MUCH OBLIGED MY LORD



FIRST EDITION

LEGAL PRACTICE DEMYSTIFIED

ISAAC CHRISTOPHER LUBOGO

# MUCH OBLIGED, MY LORD.

*"Legal Practice Demystified"*

**ISAAC CHRISTOPHER LUBOGO**

**MUCH OBLIGED, MY LORD.: LEGAL PRACTICE DEMYSTIFIED**



**FIRST EDITION**



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# ‘Much Obliged, My Lord’

This book consists of


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| VOLUME TWO | LEGISLATIVE DRAFTING |
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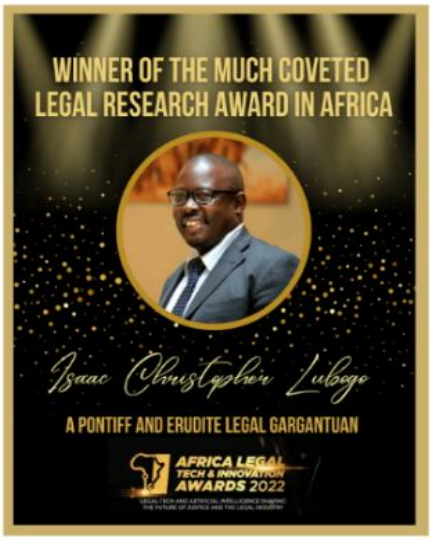


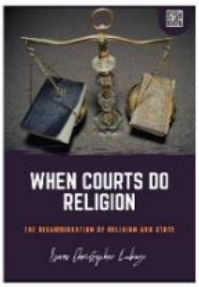


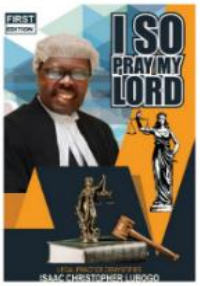


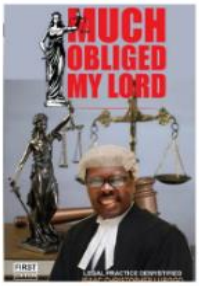


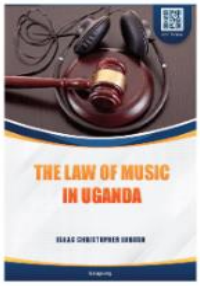


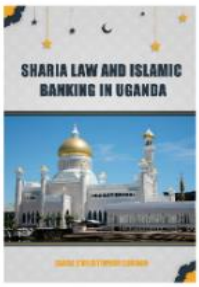



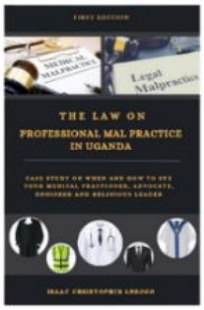


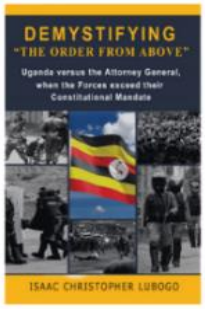



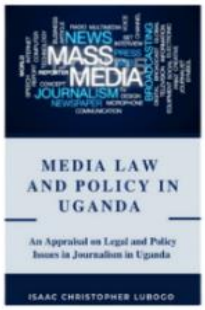


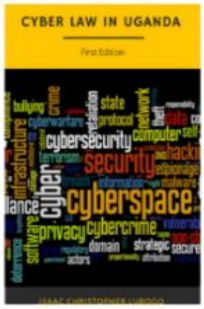


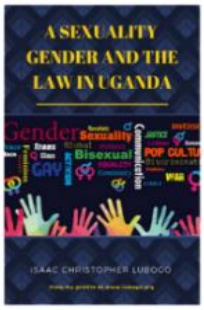


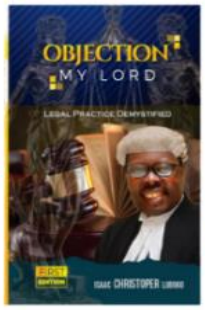


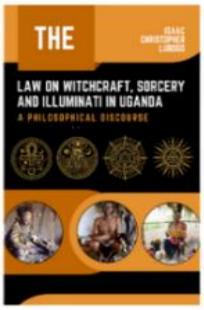




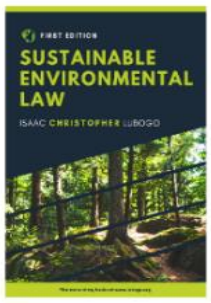


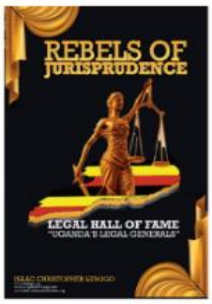


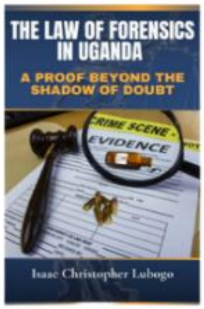


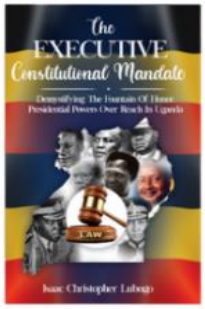


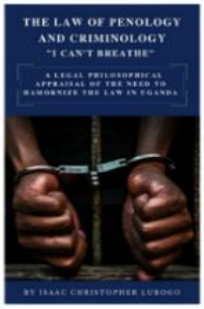


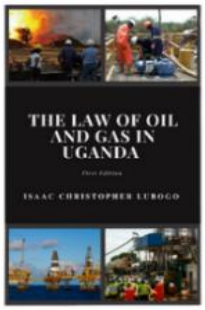


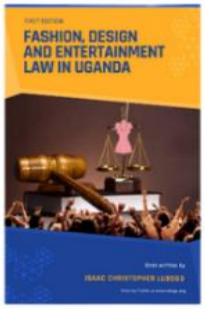



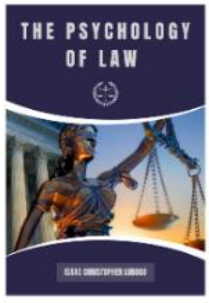


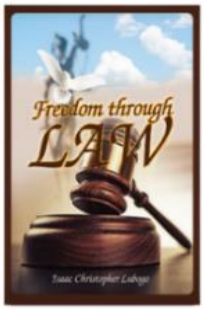


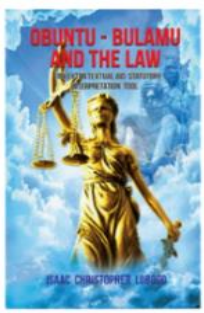


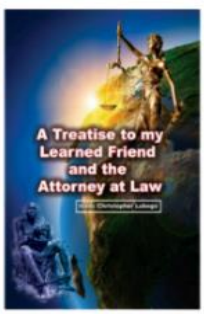


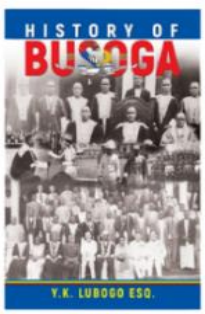


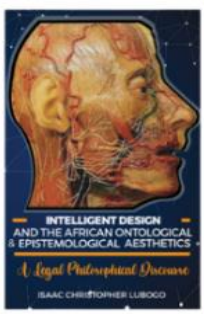


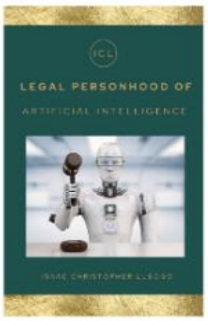


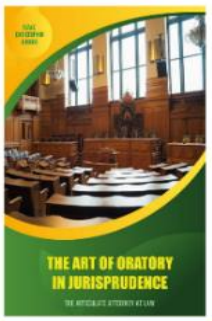

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MUCH OBLIGED, MY LORD

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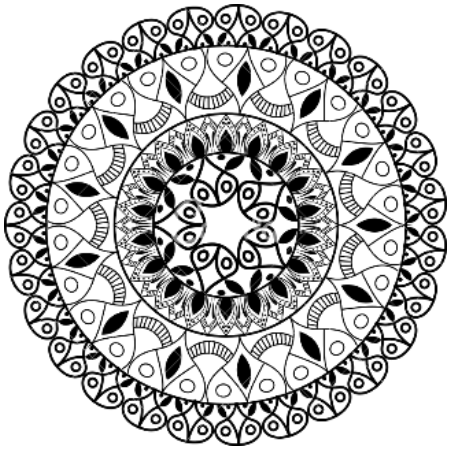
# DEDICATION

*I dedicate this book to Jireh and the Lord who breathes life and spirit on me.*



# Volume One

# CORPORATE GOVERNANCE

## DEFINITIONS OF CORPORATE GOVERNANCE

Worldwide there are on-going debates engaging professionals and academics in understanding the 'large-scale corporate failures' (Wanyama et al., 2014). However, studies show that some companies have been successful as a result of good corporate governance in Uganda (Mugisha and Berg, 2015). The variations could be explained by the various efforts, which have been made 'by government and private organizations to promote good governance in both the private and public sector' (Wanyama et al., 2014).[1]

Corporate governance means the process and structure used to direct and manage the business and affairs of a financial institution with the objective of ensuring its safety and soundness and enhancing shareholder value and shall cover the overall environment in which the financial institution operates comprising a system of checks and balances which promotes a healthy balancing of risk and return[2]. Corporate governance is the structure which directs and regulates business corporations. The structure of corporate governance specifies the distribution of rights and responsibilities among corporate participants e.g. the board, managers, shareholders and other stakeholders. According to Cadbury Report, Corporate Governance is the system by which Companies are directed and controlled (Keasey, *et al*, 2005).

Furthermore, Cadbury recognized that a system of good corporate governance allows boards of directors to be free to drive their companies forward", but exercise that freedom within a framework of effective accountability. Corporate governance outlines the rules and procedures for making decisions on corporate matters[3]. Corporate governance deals with how to make those in corporate management more accountable, more responsible and more sensitive to the interest of shareholders, creditors, members of the public and social interests respectively. Corporate governance refers to the way in which business vehicles` are governed and to what purpose. A system by which companies are directed and controlled in order to align economic and social goals with those of the individuals and the community.

## HISTORY OF CORPORATE GOVERNANCE

Corporate Governance is relatively a new discipline. This has attracted worldwide attention, particularly since the 1990s. The concept is assuming great importance of late due to the totally unexpected collapse of a few giant corporations in the United States such as world energy leader Enron and biggies like WorldCom, Adelphia, Tyco, Global Crossing, etc. The United Kingdom (UK) had also witnessed several cases of corporate corruption and

[1] https://www.researchgate.net/publication/326956933_Corporate_Governance_in_Uganda

[2] Section 3 of the financial institutions(corporate governance) regulations 2005

[3] https://mpra.ub.uni-muenchen.de/3120/1/MPRA_paper_3120.pdf

collapse, which led to setting up of Cadbury (1992), Greenbury, and Hampel (1997) Committees during the latter half of the 90s.[4]

"India also experienced some financial scandals during 1950s (LIC), eighties and nineties and post-2001 period such as the Mundra's scam involving LIC (1957), Raj Sethia's scandal involving the Punjab National Bank (PNB) in early 1985, Harshad Mehta's mega swindle involving UTI, SBI and other institutions in 1992, Unit Trust of India's two episodes during its then Chairman Mr. Pherwani's period, and again in 2001, when Mr. Subramanium was Chairman, Ketan Parekh's fraud involving Bank of India and Gujarat Co-operative Bank in 2001, Telgi's Stamp Paper scam and erstwhile Global Trust Bank's scam in early 2004." Satyam Computers episode in 2008 is another failure of governance in India. 2G spectrum is another important addition in Indian Corporate Scandal. These developments had created an environment where we were forced to go in deep about the effective formulation process of corporate governance in India.[5]

## OBJECTIVES OF CORPORATE GOVERNANCE

Corporate governance has the following objectives:

1. To align corporate goals with the goals of its stakeholders (society, shareholders etc.).

2. To strengthen corporate functioning and discourage mismanagement.

3. To achieve corporate goals by making investment in profitable outlets.

4. To specify responsibility of the Board of Directors and managers in order to ensure good corporate performance. [6]

**Some of the key aspects of governance are as follows:**

1. Although the focus is on the impact of corporate governance on both shareholders and stakeholders, the fundamental objective of corporate governance is 'enhancement of shareholder value, keeping in view the interests of other stakeholders'. The approach is refers that companies should see the code as 'a way of life'.

2. The framework applies to all listed private and public sector companies, and is split into mandatory requirements (ones that the committee sees as essential for effective corporate governance) enforceable via the listing rules, and non-mandatory requirements suggested as best practice.

3. On section relating to 'board of directors', the code covers the composition of the board, and independent directors. The board provides leadership and strategic guidance for the company and is at all times accountable to

[4] https://www.accountingnotes.net/management/corporate-governance/corporate-governance/17641
[5] https://www.accountingnotes.net/management/corporate-governance/corporate-governance/17641
[6] https://www.accountingnotes.net/management/corporate-governance/corporate-governance/17641

the shareholders. On size, the code recommends that not less than 50 per cent of the board should be comprised of nonexecutive directors.[7]

4. On chairman of the board, it recognizes that the roles of chairman and chief executive are different. The code recognizes that the roles may be combined and performed by one individual in some instances. Where there is a non-executive chairman, then at least one-third of the board should comprise independent directors. If there is an executive chairman, then at least half of the board should be independent as a mandatory requirement.

5. As per debt funding covenants, financial or investment institutions had a right to nominate directors to the board in order to protect their interest. The code decided to allow the practice to continue, but stated that such nominees should have the same responsibility as other directors and be accountable to the shareholders generally.

6. There are a number of mandatory recommendations in the code in relation to audit committee. A qualified and independent audit committee is established to help to enhance confidence in the company's disclosures. The committee should comprise a minimum of three members, all of whom are non-executive, with a majority being of independent director. It should be chaired by an independent director.

In addition, it is important to note that at least one director should have appropriate financial knowledge. The audit committee is empowered to seek external advice as appropriate, and interestingly, to seek information from any employee.

7. A remuneration committee should be established to make recommendations on the executive directors' remuneration. The committee should comprise at least three nonexecutive directors, and chaired by an independent director like the audit committee. A mandatory requirement is that there should be disclosures in the annual report relating to 'all elements of the remuneration package of all the directors, that is, salary, benefits, bonuses, stock options, pension, etc.' together with the 'details of fixed component and performance-linked incentives, along with performance criteria'.[8]

Finally, another mandatory requirement is that the board of directors should decide the remuneration of the non-executive directors.

8. The framework also gives guidelines on board procedures, including the number of meetings to be held. Mandatory requirements in relation to board meetings are—first, that they should be held at least four times a year with a maximum of four months between any two meetings; second, that a director should not be involved in more than ten committees or act as chairman of more than five committees across all companies with which he is a director. Though it limits a professional's ability to serve, it improves the time that they can commit to the companies they serve as board of director.

[7] Ibid
[8] Ibid

9. Shareholders are entitled to participate effectively in the annual general meeting. It is a mandatory recommendation that, on the appointment of new, or reappointment of existing directors, the shareholders are provided with relevant information about the director(s). Similarly, companies are mandated to disclose information, including their quarterly results and presentations, to company analysts. These may be made available via the Internet. The growing influence of institutional investors is recognized, along with the fact that they have a responsibility to exercise their votes.[9]

10. The role of the chief executive, executive directors, and key management personnel is to ensure the smooth running of the day-to-day activities of the company. A mandatory recommendation says there should also be disclosure in the annual report, either as part of the directors' report, or as a 'management discussion and analysis' report, about the company's position, its outlook, performance, and other relevant areas of interest to shareholders.

There should also be disclosure of any material financial/commercial transactions in which management has a personal interest that may have a potential conflict with the interest of the company.[10]

11. A company should have a separate section on corporate governance in its annual report, including a detailed compliance report wherein the mandatory recommendations status must be reported. Non-compliance with any mandatory recommendations should be highlighted, as should the level of compliance with non-mandatory recommendations. A company should obtain a certificate from its auditors in relation to compliance with the mandatory recommendations and it should be attached to the directors' report, which is sent each year to all the shareholders, and to the stock exchange.

12. The effectiveness of this framework depends upon the corporate response to support the regulatory framework, ability of regulatory authority to monitor and pressure from shareholders.[11]

## GENERAL PRINCIPLES OF CORPORATE GOVERNANCE

**Types of Businesses in Uganda and corporate governance practices.**

According to Organization for Economic Cooperation and Development (OECD), corporate governance is the system by which corporate businesses are managed and controlled and where obligations are established between the different persons involved in the organization; owners, board, administration, employees as well as the rules and procedures for decision making in the businesses. Its wide spread that corporate governance is a preserve of big corporations but even other kinds of businesses practice its aspects. Without good corporate governance structures, the entity cannot achieve its slated goals. **Types of businesses in Uganda include; sole proprietorship, companies, partnerships, joint ventures, cooperatives**. The object of this work is to show how the different businesses in Uganda practice the aspects of corporate governance.

[9] Ibid

[10] https://www.accountingnotes.net/management/corporate-governance/corporate-governance/17641

[11] https://www.accountingnotes.net/management/corporate-governance/corporate-governance/17641

**Sole proprietorship.**

This is an entity owned and run by one individual who is in direct control of the general management. There is no legal distinction between the business and the trader. A sole proprietorship is an **unincorporated business** that **one person owns** and manages. As the business and the owner are **not legally separate**, it is the **simplest** form of **business structure**. It is also known as individual entrepreneurship, sole trader, or simply **proprietorship**.[12] A sole trader does not necessarily work alone. He or she can employ other people. The business owner, also known as a proprietor or a trader, conducts business using their legal name. They may also choose to do business using another name by registering a **trade name** with their local authority[13]. This type of business is the **easiest** and **cheapest** form to start. For this reason, it is common among small businesses, freelancers, and other self-employed individuals[14]. A sole proprietorship **begins** and **ends** when the business **owner decides**, or upon their **death**[15]. A sole proprietorship may transform into another, more complex business structure if the business grows substantially.

**Advantages of sole proprietorship**

a) The easiest and cheapest way to start a business

Though the process varies depending on the jurisdiction, establishing a sole proprietorship is generally an **easy** and **inexpensive** process, unlike forming a partnership or a corporation Compared to other business forms, there is very little paperwork a proprietor needs to file with their local authorities. As a result, proprietors do not have to wait long before they have permission to carry on a business[16].

b) Few government rules and laws.

There are very few government rules and regulations that are specific to proprietors. Sole proprietors must **keep proper records**, **file**, and **pay taxes** on the business income and other personal income sources. Record keeping and tax filing obligations are generally no more complicated than maintaining records for individual tax filings. Due to the time and the effort, proprietors may wish to pay for specialized software and advisors to streamline the time spent on administration.

[12] https://corporatefinanceinstitute.com/resources/management/sole-proprietorship/
[13]https://corporatefinanceinstitute.com/resources/management/sole-proprietorship/
[14] https://corporatefinanceinstitute.com/resources/management/sole-proprietorship/
[15] https://corporatefinanceinstitute.com/resources/management/sole-proprietorship/
[16] https://corporatefinanceinstitute.com/resources/management/sole-proprietorship/

c) Full management control

Proprietors **control all aspects** of their business, including production, sales, finance, personnel, etc. This degree of freedom is attractive to many entrepreneurs, as the venture's success also means personal success. To be successful, proprietors must be good enough at the various aspects of their business they have control over.[17]

d) Flow-through of business profit

There is no legal separation between the owner and the business, so the owner gets 100% of the profits. Although all profits go to the owner, taxes are paid once, and proprietors **pay taxes individually**. Proprietors must pay individual taxes on the income periodically, for example, as part of the annual individual tax filing. Tax payments may be more frequent, for example, quarterly, depending on local tax rules.[18]

**Disadvantages of Sole Proprietorships.**

a) Unlimited legal liability

There is no legal separation between the owner and the business. Similar to how all profits flow to the owner, **all debts** and **obligations rest with the proprietor**.

If the business cannot satisfy its obligations, creditors may pursue the proprietor's personal assets in order to be repaid. This accountability is clearly outlined within legal documents signed with lenders, sometimes called a promissory note. A proprietor does not need to provide a personal guarantee to their sole proprietorship, as the two are the same legal entity in the eyes of the law. [19]

b) Limit to available capital

Owners put their own resources to bear when going into business for themselves. There are **limits** to their **financial resources** and the **amount of credit** they get when they seek out lending relationships. Proprietors **cannot sell shares**, or interest, in their business to raise money. Putting ideas into reality is risky and can be costly. Keeping a business going can be capital intensive. Some expenses must be incurred before revenue is generated. Any sales on credit, and any cash paid towards expenses, must be financed by working capital. Equipment and other long-use resources required for the business must be rented or financed.[20]

c) Backup and succession

If the **owner cannot or does not** want to **operate** the business, it **stops**. An owner may have a family member or trusted employee who can briefly work in place of the owner in the case of illness or any temporary and unforeseen reason. Business **interruption insurance** may cover expenses for longer-term issues, but these

[17] ibid
[18] Ibid
[19] Ibid
[20] Ibid

policies cannot complete the work that a proprietor has already taken on. Without a separate legal identity, sole proprietorships cannot readily pass any intangible assets from one owner to another. Aside from equipment and fixed assets, the value of the business is inherently tied to the proprietor[21].

d) Skills and experience

The proprietor must make "good enough" decisions in all business areas. If an owner does not have enough knowledge or skills, their decisions may be flawed. There is a finite amount of time to do things correctly or learn to do everything adequately. It can be difficult for individuals to manage all aspects of their business properly. The owner can hire employees, outside help, or get professional advice on parts of the business process[22]. Management of the business is done by the sole trader. This means that the trader makes every pertinent decision in the business, bears all profits, losses and liabilities of the business.

COMPANY.

A company is literally defined to mean a group of persons carrying on business with the view of making profits and contributing to the betterment of society.

It can also be defined as a company formed and registered under the Act, or an existing company or a re-registered company under the Act[23]. The persons who contribute the money /capital of the company are its members. The company is at law distinct from its members[24].

The types of companies in Uganda are; private companies limited by shares and limited by guarantee[25], public companies[26]and then Single member companies commonly known as SMC. A company must have the governing body. A private company has a minimum of 1 director and a public company has a minimum of two directors[27].The directors have the power of decision making and control of the affairs of the company. Article 80, Table A of the Companies Act provides for the management autonomy of the directors and Article 79 provides for borrowing powers of the directors. Table F of the Companies Act 2012 provides for the code of corporate governance which public companies must adopt. It is not mandatory for private companies to adopt that code[28].

[21] Ibid
[22] Ibid
[23] Section 2 of the Companies act 2012
[24] Salomon v Salomon (1896) UKHL 1
[25] Section 5 of the companies act 2012
[26] Section 6 of the companies act 2012
[27] Section 185 of the companies act 2012
[28] Section 14(2) of the companies act 2012

Aside from directors, other groups of people participate in company affairs and they include, company secretary[29] and Auditors.[30]

## SINGLE MEMBER COMPANIES.

A single member company is a company incorporated with one person either corporate or natural.[31] Regulation 6 and section 186 Companies Act 2012 provides for nominee and alternate nominee director, of a single member company.

Tables of the Companies Act 2012 relating to control of a company.

Table A. Management of Companies limited by shares, not being a private company.

Table F. Code of corporate Governance.

### Advantages of a SMC

a) The single owner ordinarily enjoys limited liability protection. Perpetual succession of the SMC despite the death of the single member

b) Meetings, including annual general meetings can be dispensed with, however, the reports, accounts and other activities that take place during these meetings should be prepared in writing and sent to the sole member and the Registrar of Companies

c) Quick decision making since the single member has exclusive control and full dominion of the company and is able to make independent decisions;

d) Potential additional tax benefits depending on the type and scale of investment and sectoral positioning.

## COOPERATIVE SOCIETIES.

A cooperative is a democratic form of business organized, owned and controlled by its members where each one of them has equal say in how the business is run for the promotion of their economic interests.

A cooperative society is a voluntary association that started with the aim of the service of its members. It is a form of business where individuals belonging to the same class join their hands for the promotion of their common

[29] Section 187 of the companies ac 2012

[30] Section 169 of the companies act 2012

[31] Regulation 3 of the companies (single member) regulation 2016

goals.[32] Section 28[33] provides that on registration, a cooperative shall become a body cooperate with a common seal, perpetual succession, power to hold immovable property, power to carry out transactions, institute and defend suits. A cooperative society is a special type of society, which is established by an economically weak person for the betterment and upliftment of their economic condition through mutual help.[34] Cooperatives are autonomous, self-help institutions controlled by their members. Members are selected from within the cooperative to account to the entire membership, in all matters of decision making. S.4 (1)[35], requires a minimum of 30 persons for registration. The Uganda Cooperative Alliance limited is the apex body for all registered cooperative societies. The governance structure of the cooperative includes; members' assembly which is the highest authoritative and decision making body of a cooperative. Their main duties are;

a) Approve the management report and financial statements

b) Approve the management of the Board of directors

c) Appoint members of Board of Directors

d) Approve strategic sale of assets of the cooperative

Another structure is the board of directors whose duties are fiduciary in nature, supervision, strategic management. Then the supervisory board which is the oversight body for all activities of the cooperative. Cooperative societies have managers responsible for administration of the cooperative and supporting the work of the directors in formulating major policies.

**Characteristics of cooperative societies**

1. **Voluntary association**

Everybody having a common interest is free to join a cooperative society. There is no restriction based on caste, creed, religion, color, etc. Anybody can also leave it at any time after giving due notice to the society. That is the specialty of any cooperative society. There should be a minimum of 10 members for a cooperative society, but there is no maximum limit for the membership.[36]

2. **Separate legal entity**

[32] https://www.iedunote.com/cooperative-society
[33] Cooperative Societies Act cap 112
[34] https://www/iedunote.com/cooperative-society
[35] Cooperative Societies Act cap 112
[36] https://www.iedunote.com/cooperative-society

A cooperative society after registration is recognized as a separate legal entity by law. It acquires an identity quite distinct and independent of its members can purchase, dispose of its assets, can sue, and also can be sued.[37]

3. **Democratic management**

Equalities are the essence of cooperative enterprises, governed by democratic principles. Every member has got equal rights over the function management of that society. As such, each member has only single voting right irrespective of the number of shares held or capital contributed by them.

In the case of a cooperative society, no member detects the terms and conditions of the functioning because "one man one vote" is the thumb rule.[38]

4. **Service motive**

The main objective being the formation of any cooperative society is for mutual benefit through self-help and collective effort. Profit is not at all on the agenda of the cooperative society.

But if members so like, they can take up any activities of their choice to generate a surplus to meet the day-to-day expenses.

5. **Utilization of surplus**

The surplus arising from the operation of a business is partly kept in a separate reserve and partly distributed as dividend among the members.

6. **Cash trading**

One exception in the cooperative society is that like other businesses, if never go for credit sales. It sells goods based on cash only.[39] Hence, the cooperative society hardly comes across financial hardship because of the non collection of sales dues. Members can only purchase based on credit, which is an exception to the present rule.

7. **Fixed-rate of return**

All members are supposed to contribute capital for the formation of a cooperative society or at the time of joining as a member of the cooperative society.[40]

**JOINT VENTURE.**

This refers to a business arrangement where parties agree to transact for a stipulated period of time. It is also known as a quasi-partnership. Ugandan law recognizes joint ventures. Under the Petroleum (Exploration,

[37] https://www.iedunote.com/cooperative-society

[38] https://www.iedunote.com/cooperative-society

[39] Ibid

[40] Ibid

Development and Production) Act, joint ventures may be licensed to participate in a range of petroleum related business undertakings provided there is participation by the Ugandan government or a foreign company which is at least 48% Ugandan owned. The Public Private Partnership Act 2015 also creates a legal framework for joint ventures between the government and private entities that must be special purpose companies incorporated in Uganda for a specific public project. Part II of the Act provides for management of the public private partnerships The most commonly used joint venture structures include; joint venture company which requires parties to set up a company to carry out the joint venture activities. It becomes anew legal entity separate from either of the joint venture partners, because of that, it requires its own board of directors and management. Then, an unincorporated joint venture is that which tends to be used for a single project and is usually based on a contract between the parties defining a specific set of activities. For this kind, no separate management is needed. Each party to the joint venture normally appoints non-executive directors to the board to represent it.

**PARTNERSHIP**

According to Section 2 (1)[41] , this is a relationship that subsists between two or more persons and not exceeding twenty, with a view of making profits and operating a business in common. Such are referred to as general partnership. In Smith V Anderson[42], court observed that carrying on business implies a repetition or acts of transaction. In a general partnership, every partner is a principal and agent of the other partner within the same firm, thus, subject to any agreement express or implied by the partners, every partner has a right to take part in the management of the business.[43] A limited liability partnership is one that consists of not more than twenty partners and has person's called general partners who are liable for all debts and obligations of the Partnership. It has limited liability partners who contributes their capital but are not liable for any debts and obligations of the partnership beyond the amount of capital contributed.[44]

A limited liability partnership consists of general partners and limited liability partners. The general partner is responsible for the management of the business and is also liable for the tort and contractual liabilities of the business. S.52 (1)[45] provides that a limited liability partner shall not take part in the management of the business and shall not bind the firm. The whole section provides for the management of a limited liability partnership. Conclusively, corporate governance is not a preserve for big corporations. Its principles feature in the other kinds of businesses as discussed above.

[41] The Partnership act 2010
[42] (1880) 15 CHD 247
[43] Section 26(3) of the partnership act 2010
[44] Section 47(2) of the partnership act 2010
[45] The partnership act 2010

## APPROACHES TO CORPORATE GOVERNANCE

Four approaches in the practice of corporate governance do exist, namely:

1. **The Shareholder Value Approach**;

Which is a well-established view supported by the Company Law in most advanced economies.

Expresses the view that a Board should govern entities in the best interests of all shareholders. The shareholder theory states that the sole responsibility of a business is to increase profits. Management personnel are hired as the agent of the shareholders to run the company for their benefit. Thus, they are legally and morally obligated to serve their interests. By concentrating on short-term strategy and greater risk, the shareholder theory is an outdated approach. Companies have largely woken up to the realisation that there are disadvantages to only focusing on shareholder interests. The limitations of this theory can be seen in the Enron scandal mentioned earlier. Pressure on management to increase returns to their shareholders is what led to the manipulation of company accounts, and ultimately, was the company's undoing.[46] Says the main objective in governing and controlling entities should be to maximize the wealth of shareholders by share price and dividend growth.

2. **The Stakeholder Approach**;

Which expresses the view that directors should run entities in the interests of all stakeholders of the company.

Is also called the “Pluralist Approach”.

Is concerned with creating a balance between economic and social goals and between individual and communal goals.

The previous Corporate Governance theories significantly contrast with the two roles of the BOD - control and value creation - but now include one more, stakeholders' interest concerns. Stakeholder theory has been introduced to the management since 1970 and has gradually been developed by Freeman (1984) combining corporate responsibility with related parties, including individuals, organizations that have a certain concern or interests in the company: owners, employees, trade unions, and outside parties such as lenders, suppliers, customers, communities and society. According to the Stakeholder theory, a company is a system of parties operating in a large social network. The society provides the legal and market framework for the company's operation. The purpose of a company is to create value and prosperity for stakeholders by converting their interests into products and services and to increase their wealth (Clarkson, 1995). Stakeholder theory proposes strengthening voices and providing incentives for stakeholders such as their ownership of the company (Muth & Donaldson, 1998). These measures include allowing employees to hold shares and appointing related parties such as customers, suppliers, financial advisors, employees, and community representatives as board members. It can be seen that the Stakeholder theory is broader than the Agency theory, where the responsibility of the Board is not only limited to the interests of each shareholder but towards the interests of many other related parties. Concerns towards related parties used to be overshadowed in the free market with the 1980s 'growth and ambition' stance, but now the matter reappears. The narrow focus on shareholders has extended to a larger group

[46] https://www.sefe-energy.co.uk/blog/what-is-corporate-governance-principles-and-theories-explained/

of related parties, according to Freeman (1984), Donaldson & Preston (1995), Freeman, Wicks & Parmar (2004), those are interest groups related to social, environmental and ethical issues. The stakeholder approach argues that sound corporate governance should recognize the following

a) Economic imperatives faced by companies or entities in competitive markets.

b) Efficient use of resources through sound investment.

c) Board accountability to shareholders for the stewardship of company resources.

Argues that the aim of corporate governance should be to recognize the interests of other individuals, companies and society's interests in addition to the interests of shareholders of the company in the way entities are governed, directed and controlled. However, the stakeholder approach enjoys very little coordinated legislative support. It finds very little support in company law. Rather support is found in scattered legislation such as the Employment Law, Health and Safety Legislation and Environmental Law.

3. **The Enlightened Shareholder Approach**:

Advocates that directors of a company should pursue the interests of their shareholders in any enlightened and inclusive way. Argues that directors should also look to both long term and short term objectives of the company.Argues that managers should maintain productive relationships with all stakeholders of the entity. Like the stakeholder approach, the enlightened shareholder approach lacks the coordinated company law support. Further it is argued that shareholders do not fit the image of the enlightened investor. It is further argued that most shares in public companies are owned by institutional investors who are themselves relatively unaccountable to their shareholders, e.g. Pension Funds, Insurance Companies, Medical Aid Societies, etc.

4. **The Integrated Approach**:

Was advocated by all the three King Reports especially in the area of reporting and disclosures. Takes the view that companies have a wide range of stakeholders whose views should be considered and that corporate governance should encourage participation by all the stakeholders.

## THEORIES IN CORPORATE GOVERNANCE

There are many theories of corporate governance which addressed the challenges of governance of firms and companies from time to time. The **Corporate Governance** is the process of decision making and the process by which decisions are implemented in large businesses is known as Corporate Governance. There are various

theories which describe the relationship between various stakeholders of the business while carrying out the activity of the business.[47]

**Separation of ownership and control/ agency theory**

The separation of ownership and control is a common practice in modern corporate governance, which keeps the shareholders out of managerial responsibilities and empowers the directors to take day-to-day decisions to run corporations smoothly. This is about owners (shareholders) with limited control in the company's operations. The agency problem leads to abuse of power and hence the need for separation of ownership and control splitting the role of chairman and chief executive is a corporate governance initiative that can reduce agency problems and result in improved corporate performance because of more independent decision making. In modern corporate governance, the separation of ownership and control permits some hierarchical decision-making which indirectly creates multiple conflicts among the shareholders and directors. The separation of ownership and control got huge priority in the United States and the United Kingdom. In the United States, there is a solid separation of ownership and control where a corporation is governed by a board of directors. Separation of ownership and control became more prominent with the development of limited liability companies. These deviated from the entrepreneurial model as the shareholders and providers of the funds and the residual claimants in the company are entitled to the rewards of ownership but were not directing the actions of the company that generated the rewards. The United Kingdom's 1992 Cadbury Report's often quoted definition is:

"Corporate governance is the system by which businesses are directed and controlled. Agency theory posits that corporations act as agents of its shareholders. That is, shareholders invest in corporate ownership and thereby entrust their resources to the management of the directors and officers of the corporation. In larger corporations, there is often a sharp divergence between the short and long-term interest of officers and shareholders. This is primarily brought on by short-term demand for profits and the asymmetry of information that officers and directors possess compared with that of shareholders.

**What is agency theory?**

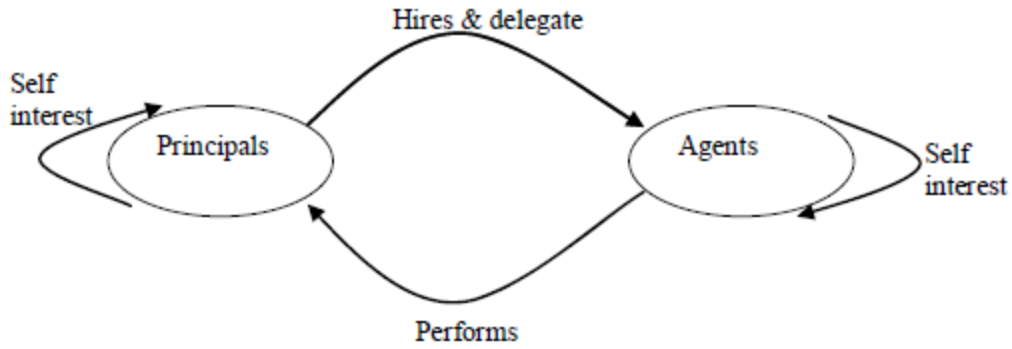
According to agency theory, the principals of the company (such as shareholders) hire the agents (such as directors of the company) to perform work.[48]

The agent represents the principal in a particular business transaction and is expected to represent the best interests of the principal without regard for self-interest. However, the varying interests between principal and agents may become a source of conflict, as some agents may not always act in the principal's best interests. Agency theory defines the relationship between the principals (such as shareholders of company) and agents (such as directors of company). According to this theory, the principals of the company hire the agents to perform work.

[47]https://www.papertyari.com/general-awareness/management/theories-corporate-governance-agency-stewardship-etc/

[48] https://www.sefe-energy.co.uk/blog/what-is-corporate-governance-principles-and-theories-explained/

The principals delegate the work of running the business to the directors or managers, who are agents of shareholders. The shareholders expect the agents to act and make decisions in the best interest of principal. On the contrary, it is not necessary that agent make decisions in the best interests of the principals. The agent may be succumbed to self-interest, opportunistic behavior and fall short of expectations of the principal. The key feature of agency theory is separation of ownership and control. The theory prescribes that people or employees are held accountable in their tasks and responsibilities. Rewards and Punishments can be used to correct the priorities of agents.[49]




[50]

This can result in miscommunication and disagreements within companies, which could lead to inefficiencies and financial losses.[51] Agency theory is a concept used to explain the important relationships between principals and their relative agent. In the most basic sense, the principal is someone who heavily relies on an agent to execute specific financial decisions and transactions that can result in fluctuating outcomes. Because the principal relies so heavily on the agent to make the right decision, there may be an assortment of conflicts or disagreements. Agency theory dives into such relationships.

In terms of business, the principal is considered to be a shareholder, while the agent is considered to be a company executive. Although it may not seem like it, shareholders and company executives are tightly connected. Each of their actions greatly affects the position of one another. Agency theory is also often referred to as the "agency dilemma" or the "agency problem."

**Different agency theory relationships**

[49]https://www.papertyari.com/general-awareness/management/theories-corporate-governance-agency-stewardship-etc/

[50] Ibid

[51] https://www.sefe-energy.co.uk/blog/what-is-corporate-governance-principles-and-theories-explained/

When it comes to business and the concept of agency theory, there several types of relationships that are closely intertwined and are faced with some sort of disagreement and these include;

1. Shareholders and Company Executives; as mentioned, the shareholder is represented by the principal. It is because the shareholder invests in an executive's business, in which the executive is responsible for making decisions that affect the shareholder's investment.

2. Investor and Fund Manager; in such a case, the investor is the principal because they are giving a portion of their income to the fund manager to allocate on their behalf.

3. Board of Directors and CEO; Up in the hierarchy, the board of directors is represented by the principal because their financial position and status are decided by the CEO. If the CEO were to make a wrong financial decision that put the organization at a deficit, the board of directors is more likely to vote against the CEO in the next election.

Corporate governance rules seek to establish a legal framework similar to that of the agent-principal relationship. These rules seek to align the incentives of officers and directors with those of shareholders. They seek to establish norms and customs that prevent the adverse results of divergent corporate interests. Further, agency theory lends itself to the duties that officers or director owe to the corporation. In simpler terms however, corporate governance is simply about the interaction and relationship among the various stake holders, in determining the direction and performance of a company. It should be noted that the foundation of modern company law emanates from the famous "SALOMON'S CASE". From this case, the veil of incorporation effectively segregates the owners from the management of the company. It should be noted that the foundation of modern company law emanates from the Therefore the company may be viewed as a conduit with two masters, namely, "the board of directors" deciding as a collective unit and "the members/Shareholders" deciding at a general meeting. The directors are the directing mind and the will of the company and carry on day to day business of the company whereas the shareholders own the company. In Uganda the roles of director and shareholders are usually married and enriched in one person. The separation of ownership and control together with the increasing involvement of other stakeholders who have an interest in the business of the company such as financiers, regulators, surrounding communities and employees has accordingly given rise to the need for a uniform and comprehensive system of control based on the predominant principles of transparency, fairness, responsibility and accountability. The *Organization for Economic Co-operation and Development (OECD)* principles of corporate governance, 2006 cover five areas: the rights of shareholders, the equitable treatment of shareholders, the role of stakeholders, disclosure and transparency, the responsibility of the board.

In Uganda, the 2012 Companies Act provides the primary framework for governance of companies and introduced a code of corporate governance that is voluntary for private companies and mandatory for new public companies. This code of corporate Governance is enshrined under Table F of the Companies Act.

Corporate governance in Uganda is approached in two forms. The mandatory form, also called 'comply or else', and the voluntary one also known as 'comply or explain'. "The former is where corporate governance standards are enshrined in legal enforceable instruments, with legal penalties for non-compliance, while the latter includes guidelines that contain best practices on particular governance issues such as treatment of shareholders, transparency and accountability among others.

**The advantages of separating ownership and management**

Separation ensures the sustainability of the business through its management by a team of professionals with the diverse skills necessary to effectively run the company. This ensures continuity within the business, even when future heirs are not particularly interested in being part of its day-to-day operations.

Separation also facilitates the maximization of capital. While every shareholder within the business will naturally have investment preferences, it becomes management's job to identify the optimal ones and identify ways in which business assets can be effectively managed to secure the highest profits for all shareholders. Separation of ownership and control distinguishes between the role and people involved in directing the company, the directors, and the shareholders or owners who provide funds. The shareholders need not have any other involvement in the company, in contrast to the entrepreneurial model where the owner provided the funds, directed the business and reaped the rewards.

**The role of shareholders**

A shareholder is a person, company, or organization that owns a share or shares of stock in a given company.[52] A shareholder can be a person, company, or organization that holds stock(s) in a given company. A shareholder must own a minimum of one share in a company's stock or mutual fund to make them a partial owner. Shareholders typically receive declared dividends if the company does well and succeeds.[53]

Also called a stockholder, they have the right to vote on certain matters with regard to the company and to be elected to a seat on the board of directors.[54] Shareholders are the residual claimants against the net assets of the company, as they bear the residual risk. Their shareholding is bonded in the company and is used by the directors to fund the activities of the enterprise. Thus from a self-interest point of view, shareholders are motivated to maximize the profits attributable to them as they are the providers of funding and can be rewarded through dividends, gains in the value of their shares or distributions as residual claimants. If the company is getting liquidated and its assets are sold, the shareholder may receive a portion of that money, provided that the creditors have already been paid. When such a situation arises, the advantage of being a stockholder lies in the fact that they are not obliged to shoulder the debts and financial obligations incurred by the company, which means creditors cannot compel stockholders to pay them.[55]

[52] https://corporatefinanceinstitute.com/resources/equities/shareholder/
[53] https://corporatefinanceinstitute.com/resources/equities/shareholder/
[54] Ibid
[55] Ibid

**The role of shareholders**[56]

Being a shareholder isn't all just about receiving profits, as it also includes other responsibilities. Let's look at some of these responsibilities.

- Brainstorming and deciding the powers they will bestow upon the company's directors, including appointing and removing them from office
- Deciding on how much the directors receive for their salary. The practice is very tricky because stockholders must make sure that the amount they will give will compensate for the expenses and cost of living in the city where the director lives, without compromising the company's coffers.
- Making decisions on instances the directors have no power over, including making changes to the company's constitution
- Checking and making approvals of the financial statements of the company

**Types of Shareholders**

There are basically two types of shareholders: the common shareholders and the preferred shareholders. Common shareholders are those that own a company's common stock. They are the more prevalent type of stockholders and they have the right to vote on matters concerning the company. As they have control over how the company is managed, they have the right to file a class-action lawsuit against the company for any wrongdoing that can potentially harm the organization.

Preferred shareholders, on the other hand, are more rare. Unlike common shareholders, they own a share of the company's preferred stock and have no voting rights or any say in the way the company is managed. Instead, they are entitled to a fixed amount of annual dividend, which they will receive before the common shareholders are paid their part. Though both common stock and preferred stock see their value increase with the positive performance of the company, it is the former that experiences higher capital gains or losses.

**Can the Shareholder be a Director?**

The shareholder and director are two different entities, though a shareholder can be a director at the same time. The shareholder, as already mentioned, is a part-owner of the company and is entitled to privileges such as receiving profits and exercising control over the management of the company. A director, on the other hand, is

[56] Ibid

the person hired by the shareholders to perform responsibilities that are related to the company's daily operations with the intent of improving its status.

**Shareholder vs. Stakeholder**[57]

Shareholder and Stakeholder are often used interchangeably, with many people thinking that they are one and the same. However, the two terms don't mean the same thing. A shareholder is an owner of a company as determined by the number of shares they own. A stakeholder does not own part of the company but does have some interest in the performance of a company just like the shareholders. However, their interest may or may not involve money. For example, a chain of hotels in the US that employs 3,000 people has several stakeholders, including its employees because they rely on the company for their job. Other stakeholders include the local and national governments because of the taxes the company must pay annually.

**Shareholder vs. Subscriber**

Before a company becomes public, it starts out first as a private limited company that is run, formed, and organized by a group of people called "subscribers." The subscribers are considered the first members of the company whose names are listed in the memorandum of association. Once the company goes public, their names continue to be written in the public register and they remain as such even after their departure from the company.[58]

**The role of directors**

In contrast, as directors receive directors' remuneration, their self-interest might cause them to direct the company in a manner that increases their directors' remuneration to the detriment of the profit attributable to the shareholders. As directors' remuneration is an expense, it directly influences the determination of profit attributable to shareholders. The directors are the specialist managers who coordinate the activities and manage the use of resources in the company to ensure the business of the company can flourish and generate profit. Goal divergence is especially likely in situations where the shareholdings of the directors are so small that they cannot be personally motivated using the same profit incentive that motivates the shareholders. The investors may not know what really happens within the company and the directors or employees always cannot imagine what the shareholders are thinking regarding any important matter. But the separation of ownership and control is beneficial in many ways. Hierarchical decision making sometimes can be more efficient than the market allocation

[57] https://corporatefinanceinstitute.com/resources/equities/shareholder/

[58] https://corporatefinanceinstitute.com/resources/equities/shareholder/

of decisions under certain conditions. In this regard, directors exercise the hierarchical position and they can take several important decisions for the smoothness of the company or corporation.

Now, the investors can only invest and uphold the capital of the company or corporation, but the directors work to identify the strategies, through which, the investors can diversify and change their allocations. The separation of ownership and control is something very special, but it creates a cost which needs to be mitigated by implementing applicable policies and mechanisms. It can be said that directors will be forced to take appropriate actions to maximise share value if a market for such corporate control is basically allowed to function. In this regard, the directors will be under the responsibility to maximise capital for the best interest of the company and the shareholders as well. Establishment of managerial duties and enforcement of such duties may be a good mechanism for mitigating the cost. These managerial duties can be established legislatively, judicially, administratively or contractually.

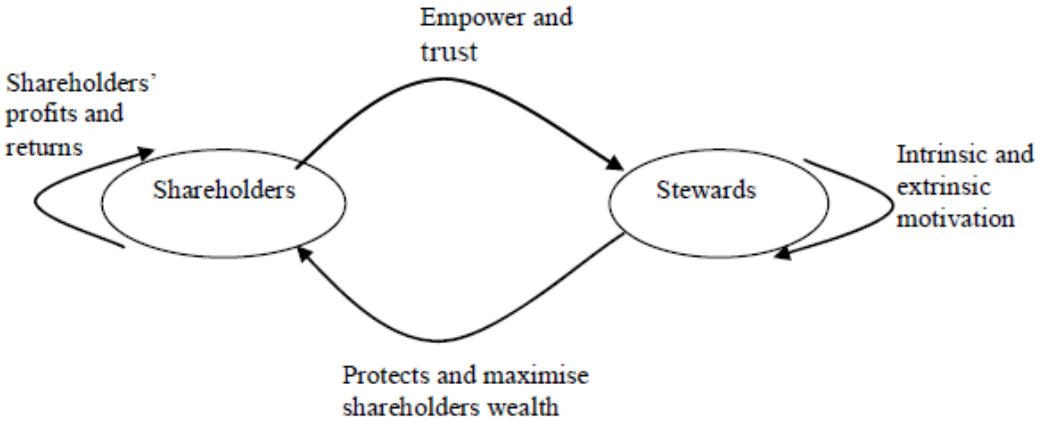
Empowerment of the shareholders can be a very positive mechanism to mitigate the cost of separation of ownership and control. It is often said that shareholders can ensure greater accountability when their voices are heard. The board has the actual power to select the chief executive officer. The chief executive officer or CEO has the power to manage the corporation and sometimes the CEO also needs board's approval for certain matters or decisions. Separation is, however, not without its disadvantages. These may include slower decision-making and reduced flexibility and agility when responding to change, as well as the principal-agent problem, which occurs when conflicts of interest or incentive arise between those who operate and manage the business. Still, in many instances, the advantages outweigh the disadvantages, most of which can be managed through implementing sound governance

In conclusion, it is true that separation of ownership and control is challenging, but without this separation of the managerial responsibilities, the company may not be able to complete its original purpose. In this regard, the practice of good corporate governance and the implementation of proper mechanisms will be much congenial to deliver an effective separation of ownership and control in the upcoming days.

**Stewardship theory**

This theory states that a steward (company executives) protects the interests of the owners or shareholders and makes decisions on their behalf. Their objective is to create and maintain a successful organisation so that shareholders can flourish. The steward theory states that a steward protects and maximises shareholders wealth through firm Performance. Stewards are company executives and managers working for the shareholders, protects and make profits for the shareholders. The stewards are satisfied and motivated when organizational success is attained. It stresses on the position of employees or executives to act more autonomously so that the shareholders' returns are maximized. The employees take ownership of their jobs and work at them diligently. [59]

[59]https://www.papertyari.com/general-awareness/management/theories-corporate-governance-agency-stewardship-etc/




[60]

Companies that follow this theory place the responsibilities of the CEO and Chairman under one executive, with a board comprised mostly of in-house members. This approach allows for more in-depth knowledge of organisational operations and a deeper commitment to success.[61] The Stewardship theory considers Corporate Goverance from a different point of view from the Agency theory, reflecting the initial legal view on the company. Davis and Donaldson (1991, p.21) argued that so-called good managers would work for the best interests of shareholders.

Basically, each company is established as a separate legal entity. Shareholders holding shares of the company nominate and appoint members of BOD. These will then be managers, or stewards, for their interests. Members of the Board of Directors have the responsibility to report to shareholders the results of such management in the role of the shareholder interest managers. The managers act towards organizational and collective orientation, not always in the way of maximizing their interests. They should perform their responsibility with independence and integrity, basing on the interests of the company, because the managers seek to achieve the company's goals (Davis, Schoorman & Donaldson, 1997, p.24).

According to Smallman (2004), where the interests of shareholders are maximized, the interests of managers are maximized, too because the success of the organization will satisfy most of the requirements and managers will have an obvious mission.

Davis, Schoorman, and Donaldson (1997) argue that both Agency theory and Stakeholder theory represents the so-called prisoner's dilemma, a problem often considered central to game theory. If the managers act as agents and shareholders expect them to do so, then a high degree of control through a strong, independent board will minimize the risk. If managers act like stewards and shareholders expect them so, then the next belief will be in the right place. The dilemma will intensify when shareholders and managers disagree over their views on their role. If shareholders expect stewardship but the managers act as agents, the executives will be likely to make use of

[60] Ibid

[61] https://www.sefe-energy.co.uk/blog/what-is-corporate-governance-principles-and-theories-explained/

the value of the company for their purposes. If they are oriented for stewardship and shareholders react as consistent, tight controllers, the managers will become frustrated, quit, or underperformed (Baker & Anderson, 2012, p.247).

The Stewardship theory, up to now, has also received quite a lot of criticism. In listed companies, for example, shareholders are further and further away from the company and not nominating members of the board. They argue that financial reports are easily understood for experts only. The company lacks transparency in complicated issues and Board members are not truly accountable to shareholders. Others argue that the Stewardship theory is rooted in law so it is nominal, it emphasizes what to do or even promotes it. Since the collapse of companies in the late 20th and early 21st century, Tricker (2012) argued that the trust members of the BOD have under the stewardship model has been eroded, this causes adverse effects on investors, shareholders, and the community. Steward protects and maximizes shareholder's wealth through firm performance. Company executives and managers working for shareholders, protect and make profits for shareholders Directors have a fiduciary duty to their shareholders and as such they are trusted to be stewards for their shareholders' interests.

**Resource dependency theory**

Focus is on the role of Board of Directors in providing access to resources needed by the company. Resource Dependency Theory, proposed by Pfeffer and Salancik (1978), explains how organizational behavior is affected by external resources. [62]

Firms change their external environment to secure access to the resources they need to survive. This means that a firm's competitiveness is determined by the way they deal with their external resources. While the resource-based view of the firm is concerned with the management of a firm's internal resources and capabilities, resource dependence theory, there is a focus on external parties, such as suppliers. The governing body is seen as the line between the company and the resources it needs.[63]

**What are the Premises of Dependency Theory?**

The premises of resource dependence theory can be summarized as follows:

- Organizations respond to the demands of elements in the environment that control critical resources.
- These resources ultimately originate from an organization's environment.
- The environment, to a considerable extent, contains other organizations.
- The resources needed by a particular organization are therefore often in the hands of other organizations.

[62]https://thebusinessprofessor.com/en_US/management-leadership-organizational-behavior/resource-dependency-theory-explained

[63] Ibid

- Resources are a basis of power.
- Legally independent organizations can therefore depend on each other.
- Power and resource dependence are directly linked. For example, organization A's power over organization B is equal to organization B's dependence on organization A's resources.
- Power is relational. In other words, it concerns how different organizations are connected.
- Power is also situational. In order words, it is dependent on what is happening at a particular time.
- Power is potentially mutual, so organizations may be reliant on each other to possess it.
- Managers attempt to manage their external dependencies to ensure survival and acquire more autonomy.[64]

The Resource Dependency Theory focuses on the role of board directors in providing access to resources needed by the firm. It states that directors play an important role in providing or securing essential resources to an organization through their linkages to the external environment. The provision of resources enhances organizational functioning, firm's performance and its survival. The directors bring resources to the firm, such as information, skills, access to key constituents such as suppliers, buyers, public policy makers, social groups as well as legitimacy. Directors can be classified into four categories of insiders, business experts, support specialists and community influential.[65]

**The Theory of Hegemony**

The theory of hegemony was □rst introduced by Gramsci (1937) [as cited by Alvarado & Boyd-Barrett, 1992] while in jail. This theory has two dimensions namely "Class Hegemony" and "Managerial Hegemony." Class hegemony explains that directors view and perceive themselves as en elite set of people at the top of the company and they will recruit or appoint other directors who are of the same caliber and can align with them (Fahr, 2010)[66]

[64]https://thebusinessprofessor.com/en_US/management-leadership-organizational-behavior/resource-dependency-theory-explained

[65]https://www.papertyari.com/general-awareness/management/theories-corporate-governance-agency-stewardship-etc/

[66]

https://www.researchgate.net/publication/338357928_Analysis_of_Corporate_Governance_Theories_and_their_Implications_for_Sri_Lankan_Companies

**Managerial hegemony**

Managerial hegemony is that corporate management members run the day to day

operations of the company and as a result directors lose control to a certain extent. This not only weakens the influence of the directors, but also casts a passive role on the directors who become mere statutory bodies, (Okpara 2011[67] It focuses on the view that directors have of themselves and the impact on corporate governance practices. Where agency theory is a failure of the board in some areas, such as minimising excessive executive pay, managerial hegemony theory argues that boards are a legal fiction dominated by management (Mace 1971). This instrumental view sees management as gaining increasing control due to the weakness of shareholders exercise of ownership and control, for example, where shareholders are dispersed or passive, and management is self-serving (Kosnik 1987; Hendry & Kiel 2004). Given the dominance of the professional management within the firm, the board plays a supportive role at best, or at worst, agency issues are dominant and the boards' role is to certify management decisions and management will resist a stronger role for the board, for example, a strategic or stakeholder engagement role (Jonsson 2005). Critics point to a lack of empirical evidence and a general lack of research in comparison to other governance theories (Stiles & Taylor 2001). However, there are examples where boards have failed to "control" management at the expense of shareholders and stakeholders (Nyberg 2011; Curran & Lyons 2013). In Ireland the report into the failure of the Irish banking system identified one institution where "The Managing Director (MD) had been given extraordinary powers by the Board and many staff reported directly to him. In August 1997, the Board had formally delegated its powers for the practical, effective and efficient management, promotion and development of the bank to the MD. This delegation of powers was most unusual given its vague and general formulation. Indeed, it is not immediately apparent what the limits to this empowerment were" (Nyberg 2011, p.27).[68] Directors in some companies see themselves as an elite group, dominating both the company organization and external linkages.

**Class hegemony**

It recognizes that the director's self-image can effect board behavior and performance

Executive directors, their self-image bolstered by access to information, knowledge of on-going operations and decision –making power, may dominate board decisions

**Stakeholder theory**

Stakeholders in an organization can be internal or external. Internal stakeholders include; shareholders whose main concern is that their investment yields profits and directors who are the shareholder representatives appointed to pilot the affairs of the organization management and the day to day operations of the organization.

[67] Ibid

[68] https://maeveoconnell.eu/2017/09/26/managerial-hegemony-an-under-researched-phenomena/

Stakeholder theory incorporated the accountability of management to a broad range of stakeholders. It states that managers in organizations have a network of relationships to serve – this includes the suppliers, employees and business partners. The theory focuses on managerial decision making and interests of all stakeholders have intrinsic value, and no sets of interests is assumed to dominate the others.[69]

External stakeholders include; employees who are individuals that make up the labour force of the organization. OECD Principles of Corporate Governance (2004), asserts that the corporate governance framework should recognize stakeholder's rights established by law or through mutual agreements and encourage active cooperation between corporations and stakeholders in creating wealth jobs and sustainability of financially sound enterprises

The organization can priotize its stakeholders in order to determine the strategic choices in managing those relationships. This is dependent on their level of power and legitimacy on the organization. It also incorporates any third parties that may have some level of dependence on the company. Directors should be accountable to a wide range of stakeholders, far beyond their fiduciary responsibility to shareholders alone. The problem with the stakeholder approach is that profit making is the primary concern and priority of profit making organizations and any attention to stakeholder interests is influenced by this. So, when the board identify stakeholders they have to be very cautious they cannot identify only those stakeholders who are in you know who are only who you know whose presence is only money related. They have to also like I said create a balance between the stakeholders, who are affected financially by the organization,[70] who have the power to influence the organization and who are not in a position to influence the organization, but who are being directly affected by the organization.[71]

And the interests of those who are really like wallflowers who are there, but may or may not have the power to influence decisions may or may not be directly affected by the organization, may or may not be investing in the organization, but are still being affected in some way shape or form. So, many times the interests of these different categories of stakeholders can be in conflict with each other and that is the biggest problem in this approach. Now the difference between stewardship and stakeholder approach is that when we talk about stewardship we are talking about serving the interests of the stakeholders, stakeholder theory is about identifying stakeholders. So,

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[69]https://www.papertyari.com/general-awareness/management/theories-corporate-governance-agency-stewardship-etc/

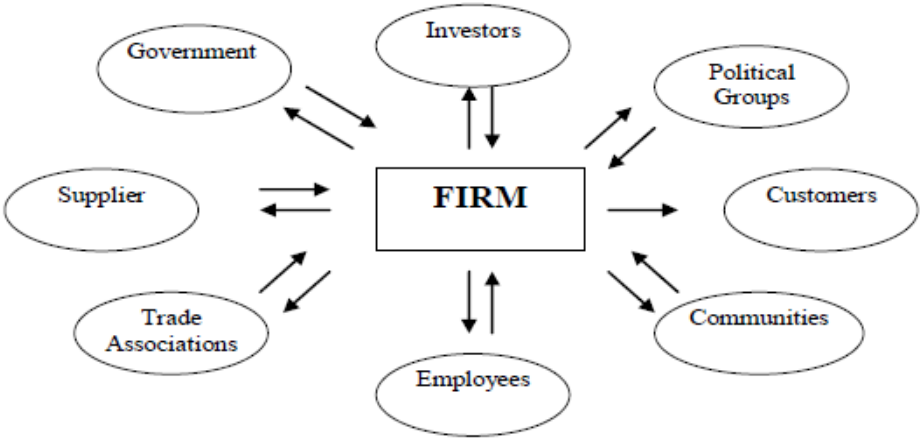
[70]

https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwiowcbq_PH8AhUAAAAAHQAAAAAQAw&url=http%3A%2F%2Fwww.nitttrc.edu.in%2Fnptel%2Fcourses%2Fvideo%2F110105081%2Flec34.pdf&psig=AOvVaw0yk1kDUJkbgZ0knJcgMCv5&ust=1675260228143428

[71]

https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwiowcbq_PH8AhUAAAAAHQAAAAAQAw&url=http%3A%2F%2Fwww.nitttrc.edu.in%2Fnptel%2Fcourses%2Fvideo%2F110105081%2Flec34.pdf&psig=AOvVaw0yk1kDUJkbgZ0knJcgMCv5&ust=1675260228143428

which of these is function related, which of these is board related, which of these theories becomes board related theory you have to think about that and maybe answer this question on the forum. [72]




[73]

**Shareholder Primacy**

It is generally accepted that the main objective of companies is to maximize shareholder's wealth.

Arguments in favour of the shareholder primacy include;

- Efficiency regarding boosting of the shareholders'
- Interests and increases societal wealth; and
- The agency claim that shareholders employ directors as their agents to manage the daily business of companies.

However, arguments against the shareholder primacy dictate that;

- Emphasis on shareholder's wealth encourages businesses to focus on short-term profit maximization.
- Neglect of moral and ethical practices.
- Corporate scandals and financial crisis as a result of fraudulent activities to promote their personal welfare.

[72] Ibid

[73] https://www.papertyari.com/general-awareness/management/theories-corporate-governance-agency-stewardship-etc/

**Benefits of corporate governance**

1. Minimize Agency Conflict

The board of directors (agent) will carry out operations on behalf of the shareholders (principal) which create agency relationship. Corporate governance ensures that the board acts according to the interest of shareholders and stakeholders. [74]

2. Increase Investors' Confidence

The Company is expected to disclose their financial and non-financial reports. This transparency will create awareness and increase confidence in investors and other stakeholders.[75]

3. Mitigate Risks

Corporate governance directs the efforts on reducing the risk in the entity below the risk appetite.

4. Compliance

The companies must comply with various internal and external rules and regulations. The internal regulations includes, companies Act, Articles of the associations, code of governance, and code of ethics. The external laws comprise of government laws and other international laws.

5. Promotes Corporate Social Responsibility

The companies should put into considerations the impact of their performance to the society. The company tries to integrate profits, social and environment factors. CSR play a critical role in the company.

6. Promotes Accountability[76]

Corporate governance ensures that there is transparency in entity. The board of directors is held accountable by shareholders of the company for the poor performance of the company.

## THE LEGAL FRAMEWORK OF CORPORATE GOVERNANCE OR CORPORATE GOVDRNANCE ENVIRONMENT

Corporate governance is the system through which companies are directed and controlled in order to achieve its objectives. It relates to how companies are governed and controlled and helps in separation of ownership

[74] https://www.linkedin.com/pulse/six-benefits-good-corporate-governance-business-ruth-jerotich
[75] ibid
[76] https://www.linkedin.com/pulse/six-benefits-good-corporate-governance-business-ruth-jerotich

(shareholders and members) and control of the company. A legal framework refers to the set of laws, regulations and rules that apply to a particular country.

The following is a discussion on the legal framework of corporate governance or corporate governance environment;

Corporate governance under the Constitution of the Republic of Uganda, 1995 as amended. The Constitution of the Republic of Uganda, 1995 as amended under its objectives, that is to say objective two which provides for democratic principles, shall be done in accordance with the laws and among them are domestic laws, international laws and East African Community laws.

**Corporate Governance under the Companies Act, 2012**

By virtue of *S.14*[77] a private company shall adopt and incorporate into its articles the provisions of a code of corporate governance contained in *table F*[78] at the time of its registration. However, this is discretionary for the case of a private company.

*Table F*[79] provides for the Code of corporate governance which deals with the internal management and structuring of a company so as to ensure the appropriate running of the company. The Code further ensures that the top management of the company is accountable to the shareholders and that decisions made in the company are for the good of the company.

The Code of Corporate Governance therefore regulates and deals with the conduct of the Board and its directors, company Secretary, risk management, integrated sustainability reporting, accounting and auditing.

The Board, who is accountable for the performance and affairs of the company, is expected to act in good faith, with due diligence and care and in the Company's Interest[80]. Although the Board may delegate its authority to the management and management committee, the board's authority remains its responsibility.[81]

*Table F*[82] further provides for the fact that the board is mandated to ensure that the principles that deal with cooperate governance as contained in *Table F*[83] are observed. It further provides that the composition of the board is made of both executive and non-executive directors.

[77] The Companies Act 2012
[78] The companies act 2012
[79] The companies act 2012
[80] Article 1 of table f of the companies' Act 2012
[81] Article 1(2) of table F of the companies' Act 2012
[82] The Companies Act 2012
[83] The Companies Act 2012

**Corporate governance under the Financial Institutions Ac of 2004 as amended**

*S. 3*[84] define a financial institution to mean a company licensed to carry on or conduct financial institutions business in Uganda and includes a commercial bank among others.

By virtue of *S.52*[85], every financial institution shall have a board of directors of not less than five directors and the board shall be headed by a chairperson who shall be anon-executive director.

The Central Bank shall first vet all persons proposed to be[86] directors of a financial institution within six months and notify the financial institution accordingly and no appointment of a person for the position of directorship shall have effect unless the above is complied with.

*S.55 (1)(a)*[87] provides that the board of directors of a financial institution shall be responsible for good corporate governance and business performance of the financial institution.

*S. 56*[88] is to the effect that a director shall in relation to a financial institution in which he or she serves, stand in a fiduciary relationship and shall without derogation owe the financial institution and its shareholders the duty to act in good faith, to act in the best interest and for the benefit of the financial institution, and that to act independently, free from undue influence of any other person and a duty to access necessary information to enable him or her to discharge his or her responsibilities among others.

*S.59*[89] provides that the board shall constitute from among its members, a committee on audit, consisting of not less than two persons to perform such functions as the board of directors shall specify. The committee on audit shall be headed by a chairperson who shall be appointed by the board of directors who shall have such functions as are prescribed by the board and the committee on audit shall meet once every financial year of the financial institution.

*S.61*[90] provides for internal auditor. It is to the effect that every financial officer shall appoint an internal auditor suitably qualified and experienced in banking whose duties, among others shall be to evaluate the reliability of the information produced by the accounting and computer systems, to provide an appraisal function, to evaluate the effectiveness, efficiency and economy of operations, to evaluate compliance with laws, politics and operating instructions.

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[84] The Financial Institutions act 2004
[85] The Financial Institutions Act 2004
[86] S.52(4) of the Financial Institutions Act of 2004 as amended
[87] The Financial Institutions Act as amended
[88] The Financial Institutions Act 2004 as amended
[89] The Financial Institutions Act 2004 as amended
[90] The Financial Institutions Act 2004 as amended

*S.62*[91] provides for external auditors who shall be nominated by every financial institution annually, from a pre-qualified list to be published by the central bank a firm of qualified auditors whose duties shall be to perform an audit of the financial statement of the financial institution and to give an opinion in accordance to this Act, the Companies Act and the International Standards on auditing as adopted in Uganda, among other elements, the annual balance sheet, profit and loss account and other financial statements required to be submitted by the Financial Institution to the Central Bank.

*S.72*[92] provides for the audit report. It's to the effect that the external auditor shall, after performing the audit, submit to the Financial Institution an audit report which shall ensure that such a report is submitted to the Central Bank within three months after the closure of the financial year.

**Corporate governance structure under the Micro Finance Deposit taking Institutions Act.**

*S.22(4)* of the Act defines corporate governance as the overall environment in which the institution operates and consists of cheques and balances which promote a healthy balancing of risks and return. The Act further provides for a corporate structure such as the board of directors, auditors including their functions and responsibilities.

**Corporate governance structure under the Uganda Retirement Benefits Regulatory Authority Act, 2011.**

*S. 1*[93] defines a retirement benefit scheme to mean a legally *binding* agreement or arrangement other than a contract for life insurance whether established by a written law or by any other instrument, under which members are entitled to benefits in the form of annuity or a lump sum payable upon retirement, or upon death, termination of service or upon occurrence of an event specified in the written law, agreement or arrangement.

The retirement benefit, once mishandled, is most likely to lead to gross unfairness such as people missing out on their pension which in turn affects their beneficiary. It's upon this that it is necessary to promote accountability and protection of stake holders, which can be done through enforcement of cooperate governance structures and appointment or creation of a competent retirement benefits regulator.

It's upon the above argument that the Uganda Retirement Benefits Regulatory Authority was formed under the Uganda Retirement Benefits Regulatory Authority Act and its function is to regulate retirement benefits in Uganda, and it further sets up a structure of retirement benefits.

Part two of the Uganda Retirement Benefits Regulatory Authority Act establishes the Uganda Retirement Benefits Regulatory Authority which shall be a body corporate with perpetual succession whose objectives

[91] The Financial Institutions Act 2004 as amended

[92] The Financial Institutions Act as amended

[93] The Uganda Retirement Benefits Regulatory Authority Act

include regulating and supervising the establishment, management and operation of retirement benefits[94]. Supervision and regulation are important aspects of corporate governance as they enforce standards and compliance of the same.

The functions of the Authority include licensing of retirement benefit schemes in Uganda[95], and to protect the interests of members and beneficiaries of retirement benefit schemes including the promotion of accountability and transparency, among others.

*S.5 (2) (a)*[96] provides that the Authority shall adopt a clear and consistent supervisory process to regulate the establishment and management of the retirement benefit schemes in the private and public nature.

*S.7*[97] provides that the Authority shall be independent in the performance of its functions and shan't be independent in the performance of its functions and shall not be subject to the direction, instruction or control of any person or authority. This is an important aspect since external or even internal influence can undermine corporate governance through the inevitable resultant corruption. There, independence is the foundation of corporate governance.

By virtue of *S.9(3)*[98]*,* the minister may remove from office a board member for inability to perform the functions of the office for infirmity of the body or mind, misbehavior or misconduct, incompetence, bankruptcy, conviction on grounds of fraud, dishonesty or moral turpitude and absence from at least four consecutive meetings of the board without reasonable cause.

*S.9(6) of the Uganda Retirement Benefits Regulator Authority Act,* provides that where a member is under investigation for an offence involving dishonesty, fraud or moral turpitude, the member shall not perform his or her duties as a board member until the investigations are concluded. S.9 also emphasizes competition and hence corporate governance.

*S.74*[99] authorizes the Authority to direct a custodian, trustee, administrator and fund manager to cease and desist from committing an act it considers to be unsafe or unsound practice that is detrimental to the prorate governance Scheme. This is an aspect of internal control which is crucial in enforcing corporate governance.

[94] S.4 of the Uganda Retirement Benefits Regulatory Authority Act
[95] S.5(1)(b) of the Uganda Retirement Benefits Regulatory Authority Act.
[96] Ibid
[97] The Uganda Retirement Benefits Regulatory Authority Act
[98] The Uganda Retirement Benefits Regulatory Authority Act
[99] ibid

*Sections 26 and 64*[100] provide for audit of the Uganda Retirement Benefits Regulatory Authority and the retirement benefit schemes respectively. This is to promote accountability which cannot be divorced from corporate governance.

*S.72*[101] places a fiduciary duty on players managing retirement benefits schemes with a duty to act with due care, skill, diligence, good faith and shall act in the best interest of the scheme members and beneficiaries[102]. Black's Law Dictionary defines a fiduciary relationship as one in which one person is under a duty to act for the benefit of another on matters within the scope of a relationship which requires a usually high degree of care and includes instances where one person places trust in the faithful integrity of another.

The creation of a fiduciary duty in the above provision is therefore an accountability mechanism. This is so considering that victims of fraud and incompetence can sue and recover damages in respect of the retirement benefits which portray the spirit of corporate governance upon which the Uganda Retirement Benefits Regulatory Authority Act was enacted.

*Part VIII*[103] of the Act provides for inspection of books of accounts, records, returns and any document or premises of a retirement benefit scheme, custodian, fund managers and administrators licensed under the Act which is meant to enforce accountability.

The Act further provides for an appeals mechanism[104] for a member who is dissatisfied with the decision of any licensed retirement benefits body who may appeal to the Authority whose appeal lies to the tribunal and that from the tribunal lies to the High Court. This is an aspect of internal control and competence hence relevant to corporate governance.

The Act further provides for offence and penalties which applies to members of authority and outsiders like applicants who knowingly provide false information to the authority. This is meant to act as bar to self-seekers who, with impunity and fraudulent intentions and likely to cheat members and beneficiaries of retirement benefit schemes which would undermine corporate governance hence the need for such measures.

**Corporate governance under the Financial Institution (Corporate Governance) Regulations, No 47 of 2005**

It defines corporate governance to mean the process and structure used to direct and manage the business and affairs of a financial institution with the objective of ensuring its safety and soundness and enhancing shareholder

[100] ibid

[101] ibid

[102] S.73(1)(a) and (b) of the Uganda Retirement Benefits Regulatory Authority Act

[103] The Uganda Retirement Benefits Regulatory Authority Act

[104] Section 82-85 of the Uganda Retirement Benefits Regulatory Authority Act

value and shall cover the overall environment in which a financial institution operates comprising a system of cheques and balances which promotes a healthy balancing of risks and return[105].

The focus of corporate governance is the manner in which the business and the operation of a financial institution is governed by its board of directors and senior management.

Corporate governance under the Anti-Corruption Act, 2009

The Act provides for what constitutes corruption and the most important thing is that this calls for a need of transparency, accountability and integrity to be exercised in relation to corporate governance. Therefore, the officers of a company are obliged to ensure that the company affairs are run in a transparent manner and not to indulge in the acts of dishonesty that can result into their prosecution.

In conclusion therefore, it is clear from the above discussion that the elements of corporate governance such as accountability, transparency, fairness and competence among others are portrayed in Uganda's legal framework.

## DYNAMICS IN THE NATURE OF CORPORATE GOVERNANCE

Corporate governance is the system through which a company is directed and controlled. The structure of corporate specifies the distribution of rights and responsibilities among corporate participants e.g. the board, managers, shareholders sand other stakeholder

The nature of corporate governance explains the antecedents and the dynamic model of corporate governance system in different firms and different locations around the -world.

The dynamic model has two levels that can be viewed;

Formal institutions and informal institutions and as well they can be regarded as corporate governance systems component

INFORMAL INSTITUTIONS

- Resource allocations
- Board Strategic planning rules
- Composition rules (i.e. proportion of insiders and outsiders, board structure rules, CEO Duality and number of committee formal compensation contracts, rules for agents with stipulation of rewards and punishments.

[105] S.3 of Financial institution (Corporate Governance) Regulations No.47 of 2005

INFORMAL INSTITUTIONS

- Norms of behavior the dos and don'ts consistent with the value and commitments
- Mission of the firm and that guide decision making by principals and agents

The dynamic model is designed to cover corporate management system and the changes around the world in which top management team (TMT) on the executive board corresponds to agents and board of directors.

1. In the dynamic model of cooperate governance system presented here the concept of missions used to substitute to goals of the principals operate governance systems are negotiated to ensure agents work to achieve the mission and the mission encompasses the desire for goals and values commitment identity and guiding principles.

Operationalizing mission is a difficult task but it can be simplified by using dichotomy of financial and non-financial goals.

2. Human interactions in organizations field level lead to development of institutions, to guide political social and economic activities in the model above the principals we have the external and internal rules as recognized.

The quality of interactions of the board members, risk management having external legal pressure and more individual and collective responsibility boards changes their roles from passive to active which required changes also in board dynamics

The way individual board of directors interact with each other in carrying out their duties

3. Increased influence of institutional investors this is due to focus on stock ownership in institutionary held investment and saving accounts and to the lesser extent there are rules in voting rights and board dynamics

4. The other dynamic is expansion of company regulation to increase accountability of directors and senior management and also provides shareholders with great powers and also there is mandatory company disclosure

There is the change in representation of the proxy during the company resolutions share holder advisory votes and executive compensation and identified fiduciary duties in certain types of proxy voting by some institutional investors.

5 The corporate secretary, the preeminence of corporate governance and the rise of shareholder engagement have resulted in fundamental shift role of the cooperate secretary in the last 6years the corporate secretary emerged as senior strategic level of a corporate officer

6 The board strategic planning roles first and foremost the purpose of planning initiative is to achieve corporate objectives but they are multi-faceted, if executed correctively that should maximize return on and effect change as well as the gap between program target and objectives and current performance a strategic planning is a continually refined and improved by eliciting dialogue and input from others instance in companies a corporate strategy is designed to increase revenue and brand reputation from new products and quality enhancement to aggressive marketing and health techniques

7 The dynamics go further to revolve in resource allocations; given the centrality of the process of innovation the performance of dynamic economies, the type of corporate governance that integrates an analysis that will promote economic performance can be determined only within conceptual of the economics of innovation, it is argued that characteristics involve accumulative, collective and uncertainty which require an allocation process which is developmental the relationship between resource allocations and corporate governance it emphasizes that in spite of continuing attempts by economists to introduce one or more characteristics of resource allocations therefore corporate governance can be seen implying the need for organizational control over the allocation of resource in the economy.

The composition of rules it's governed by the basic principal of corporate governance which include accountability, transparency fairness and responsibility. The above mentioned are some of the dynamics in corporate governance though.

## CORPORATE GOVERNANCE PRINCIPLES UNDER THE SOUTH AFRICAN KING REPORTS

The King Report on Corporate Governance is a booklet of guidelines for the governance structures and operation of companies in South Africa. It is issued by the King Committee on Corporate Governance.

Three reports have been issued: in 1994 (King I), 2002 (King II), and 2009 (King III) and a fourth revision (King IV) in 2016.

The King Report and King Code define corporate governance as "the exercise of ethical and effective leadership by the governing body".

Compliance with the King Reports is a requirement for companies listed on the Johannesburg Stock Exchange.

The King I Report

The key principles from King I Report:

- Board of director's makeup and mandate, including the role of non-executive directors and guidance on the categories of people who should make up the non-executive directors
- Appointments to the board and guidance on the maximum term for executive directors
- Determination and disclosure of executive and non-executive director's remuneration
- Board meeting frequency
- Balanced annual reporting
- The requirement for effective auditing

- Affirmative action programs
- The company's code of ethics

The King II Report

The key principles from King II Report:

- Directors and their responsibility
- Risk management
- Internal audit
- Integrated sustainability reporting
- Accounting and auditing

The king III Report

King III Report incorporated a number of global emerging governance trends:

- Alternative dispute resolution
- Risk-based internal audit
- Shareholder approval of non-executive directors' remuneration
- Evaluation of board and directors' performance

It also incorporated a number of new principles to address elements not previously included in the King reports:

- IT governance
- Business Rescue
- Fundamental and affected transactions in terms of director's responsibilities during mergers, acquisitions and amalgamations

The King IV Report

Some people did not welcome the news that the Institute of Directors in Southern Africa had initiated an update of the King Report on Governance for South Africa (2009) (King III). For them, it simply meant an additional compliance burden.[106]

[106]https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwjQo53Gh_L8AhUAAAAAHQAAAAAQAw&url=https%3A%2F%2Fwww.nhbrc.org.za%2Fw

In addition to the fact that the update offers a chance to take into account developments in corporate governance globally, the update has also been used to reposition corporate governance as a source of value to organizations, and not just a set of regulations with which they have to comply.[107]

Corporate governance repositioned as a value-add

No South African should need persuading that a lack of corporate governance underpins virtually all of the various ills that are imperiling our democracy and the welfare of society. Municipalities struggle to meet citizens' demands for service delivery because of corruption or incompetence; important public sector institutions are rendered dysfunctional by the appointment of unsuitable officials; and some parastatals are deemed to have become vehicles for enrichment. Similarly, in the private sector, claims of collusive and anti-competitive behaviour surface regularly, and controversy rages over the quantum of executive pay and the wage gap.

Corporate governance, mindfully applied, is a fundamental part of the solution to these and other challenges. The key words here are "mindfully applied", and this is where King IV hopes to make the most impact by linking governance more tightly to value creation and the achievement of desired outcomes. Corporate governance is an ecosystem made up of public companies, SMEs, non-profit organisations, and institutional investors such as retirement funds and public sector entities. All of these types of organisation affect the governance of one another in the bigger ecosystem. The King Committee therefore designed King IV to make it more accessible for users across this eco-system by:

a) a)Using a vocabulary that indicates the Report's applicability to all organisations. Thus, King IV talks about "organisations" rather "businesses" or "companies", "governing bodies" rather than "boards", and "those charged with governance duties" rather than "directors".

b) Providing supplements to help organisations across a variety of sectors and organisational types to interpret and implement King IV to suit their particular circumstances.

c) Providing guidance on how to scale the recommended practices in accordance proportionally, in line with the organisation's size and resources, and the extent and complexity of its activities.[108]

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[107] Ibid

[108] Ibid

## HOW DOES KING IV GO ABOUT INSTILLING MINDFUL APPLICATION?

King IV follows an outcomes-based approach. This approach is evident from the structural building blocks of the

King IV Code, namely governance outcomes, principles and practices.

**Governance outcomes**: Corporate governance is not presented as an end in itself, but rather a means towards realising certain benefits, or governance outcomes: ethical culture, good performance, effective control and legitimacy. In essence, King IV promotes the view that achieving the aspirations as expressed in the principles optimises organisations to realise the governance outcomes.

**Principles**:

The principles are an expression of the fundamental aspirations of any organisation wishing to achieve good corporate governance. Examples of principles within King IV are: "The governing body should lead ethically and effectively"; "The governing body should govern risk in a way that supports the organisation in setting and achieving its strategic objectives"; and "The governing body should ensure that the organisation remunerates fairly, responsibly and transparently so as to promote the achievement of strategic objectives and positive outcomes in the short, medium and long term." As should be evident from these examples, once an organisation professes to adopt good governance, it is very hard to argue why the norms as established by the principles should not be upheld.

The principles are therefore seen as fundamental and basic to good governance.

**Practices**: Organisations should implement the practices in order to support the achievement of the principles, and thus of certain governance outcomes. However, organisations are allowed greater freedom to exercise their judgement about whether to apply the recommended practices and how to do so, provided their overall aim is to achieve the aspiration expressed in the principle. In this sense, the principles represent the target for which the practices are aiming. **Apply and explain regime:** In accordance with the outcomes-based approach, King IV emphasises the disclosure not of what practices have been implemented, but rather the impact or effect of those practices. To balance the less prescriptive approach adopted in King IV, it emphasises greater transparency with regards to how organisations exercise their judgement. King IV seeks to reinforce this qualitative application of its principles and practices, by proposing an "apply and explain" approach to compliance, in contrast to the "apply or explain" advocated in King III.

## THE KING IV REPORT AND ITS PARTS[109]

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The King IV Report consists of seven parts:

**Part 1: Glossary of Terms**. This was placed upfront as an understanding of the meaning of terms used in King IV is essential for its application.

**Part 2: Fundamental Concepts**. This part contains the fundamental concepts and philosophy on which King IV is based, the distinguishing features of King IV, and how the various developments in corporate governance locally and internationally since King III came into effect in 2009 have influenced the principles and practices in the Code.

**Part 3: King IV Application and Disclosure**. This explains the application regime of King IV, and where and how King IV disclosures need to be made.

**Part 4: King IV on a Page**. This part constitutes an executive summary of King IV and demonstrates how all the parts form an integrated whole.

**Part 5: King IV Code on Corporate Governance**. Part 5 is the heart of the King IV Report, and consists of the governance outcomes, principles and practices.

**Part 6: Sector Supplements**. Sector supplements are provided for municipalities, small and medium-sized enterprises (SMEs), state-owned enterprises (SOEs), non-profit organisations (NPOs) and retirement funds.

**Part 7: Content Development Process and King Committee**

## DIFFERENCES BETWEEN KING III AND KING IV

King IV's principles and practices do not differ substantially from King III; the main difference between the two lies in King IV's approach. Specific points to notice include:

□ King III addressed boards and companies while King IV addresses governing bodies and organisations generally so as to be more inclusive.

□ Structurally, the King IV Code is built on practices implemented to support principles which lead towards governance outcomes. In King III, this differentiation between practices, principles and outcomes is not so distinct.

□ The application regime of King III was "apply or explain" whereas for King IV it is "apply and explain".

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□ King IV addresses how to apply practices proportionally, something that King III only implied.

□ King IV includes supplements to assist various types of organisation to implement King IV. These organisations are municipalities, SMEs, SOEs, NPOs and retirement funds.

## HOW KING IV WAS DEVELOPED[110]

The process for developing King IV was designed to build on the strengths of King III. A primary consideration was to involve as many stakeholders as possible; consequently, the King IV drafting process was widely consultative, and followed a participative and inclusive approach.

The drafting of King IV was led by the King IV Project Lead, Ansie Ramalho. The King Committee appointed a task team drawn from its membership to assist her, and oversee the drafting process. The King Committee itself provided final approval.

See part 7 of the Report for the membership of the task team and the King Committee.

## KING IV HIGHLIGHTS

6.1 Defining corporate governance as the exercise of ethical and effective leadership by the governing body

To move from tick-box compliance to genuine application of corporate governance, ethics have a critical foundational role to play. Only an ethical organisation made up of ethical individuals will act responsibly and fairly, even when nobody is looking. King IV understands corporate governance as a leadership issue; thus creating an ethical organisation depends on leadership that is both ethical and effective.

Ethical leadership is exemplified by integrity, competence, responsibility, accountability, fairness and transparency (ICRAFT). It involves anticipating and preventing, or at least ameliorating, the negative consequences of the organisation's activities and outputs on the economy, society and the environment, as well as on the capitals1 that it uses and affects. Effective leadership is results-driven, but goes beyond an internal focus on effective and efficient execution. Ethical and effective leadership go hand in hand, the one reinforcing the other.

King IV devotes Part 5.1 of the Code to ethics. It has three main sections. The first covers how the governing body sets an example by displaying the ICRAFT characteristics. In the second, the Code shows how the governing body ensures that the ethics within the organisation is managed. Finally, it makes recommendations for how the

[110]https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwjQo53Gh_L8AhUAAAAAHQAAAAAQAw&url=https%3A%2F%2Fwww.nhbrc.org.za%2Fwp-content%2Fuploads%2F2016%2F11%2FKing-IV-Summary-1-November-2016.pdf&psig=AOvVaw0NL-xo7y0ZNjzZqFtNJC8z&ust=1675262764140541

organisation acts as a responsible corporate citizen in the way in which it engages with internal and external stakeholders, and society as a whole.

The King IV principles that express the ideas as detailed above are:

**Principle 1**: The governing body should lead ethically and effectively.

**Principle 2**: The governing body should govern the ethics of the organisation in a way that supports the establishment of an ethical culture.

**Principle 3**: The governing body should ensure that the organisation is, and is seen to be, a responsible corporate citizen.

### 6.2 Integrated thinking

King IV advocates integrated thinking, based on the recognition that organisations do not exist within a vacuum, but rather within a complex web of interdependencies that affect its ability to create value over time. Integrated thinking underpins all of the following concepts:

- The organisation is an integral part of society and thus a corporate citizen;
- Stakeholder-inclusivity;
- Sustainable development; and
- Integrated thinking.

The above concepts are supported by the following principles in King IV:

**Principle 3**: The governing body should ensure that the organisation is and is seen to be a responsible corporate citizen.

**Principle 4**: The governing body should appreciate that the organisation's core purpose, its risks and opportunities, strategy, business model, performance and sustainable development are all inseparable elements of the value creation process.

**Principle 5**: The governing body should ensure that reports issued by the organisation enable stakeholders to make informed assessments of the organisation's performance, and its short-, medium- and long-term prospects.

**Principle 6**: In the execution of its governance role and responsibilities, the governing body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time.

6.3 Balanced composition of governing bodies and independence

**Principle 7**, "The governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance roles and responsibilities objectively and effectively", expresses the aspiration for the balanced composition of the governing body.

Having members of the governing body who are independent in appearance is an essential element in most governance codes. Academic research since the global financial crisis has however shown that, despite all of the financial institutions involved having had the prescribed number of independent directors, and more in some instances, they still failed.

Hence, it is an aim of King IV to contextualise the relevance of independence correctly. Two important points should be borne in mind:

All members of the governing body, whether executive, non-executive or independent non-executive, have a legal duty to act with independence of mind in the best interests of the organisation.

□Although important, independence is only one of the factors to be considered in achieving balance in the composition of the governing body.

The overriding concern is whether the governing body is knowledgeable, skilled, experienced, diverse and independent enough to discharge fully its governance role and responsibilities.

The need for the governing body to set and disclose progress on targets for race and gender diversity has specifically been included in the Code in order to help achieve this balance.

**6.4 Social and Ethics Committees**

**Principle 8**, "the governing body should ensure that its arrangements for delegation within its own structures promote independent judgement and assist with balance of power and the effective discharge of its duties" addresses the establishment of committees by the governing body". The King IV Code recommends that committees for audit, nominations, risk remuneration and social and ethics be considered.

The new Companies Act2 was issued after King III. Regulation 43 stipulates the formation of a social and ethics committee but, outside of the committee's name, does not address its ethics role. King IV seeks to expand on this

by recommending that the social and ethics committee should be responsible for overseeing and reporting on organisational ethics, responsible corporate citizenship, sustainable development and stakeholder relationships.[111]

While these responsibilities include organisational ethics and cover the statutory duties outlined in the Companies Act, the intent is to encourage leading practice by having the social and ethics committee progress beyond mere compliance to contribute to creating value. Accordingly, King IV urges organisations that are not legally required to establish a social and ethics committee, nevertheless to consider creating a structure that would achieve these aims.

King IV also recommends a higher standard for the composition of this committee than provided for in the Companies Act. Thus, it recommends that a majority of the members should be non-executive members of the governing body so as to bring independent judgement to bear on the matters that the social and ethics committee is responsible for.

6.5 Risk and opportunity

King IV's definition of risk consists of three parts, namely *uncertainty*; the *likelihood* of such uncertainty occurring; and the *effects*, positive and negative, of such occurrence.

King IV's understanding of risk thus balances the traditional, negative view of risk with one that recognises the potential opportunities inherent in some risks. Thus, an opportunity may present itself as the potential upside of a risk, even though that risk could adversely affect the achievement of organisational objectives.

However, King IV also recognises that not all opportunities originate from the current risks of the organisation. This is particularly true of the strategic opportunities that should be considered when setting the organisation's strategic direction. Consideration of the risks associated with such strategic opportunities affect whether the opportunity will be captured by the organisation or not.

Risk is becoming more complex, requiring risk oversight to be strengthened. Accordingly King IV recommends that the risk committee comprises a majority of non-executive members. This recommendation goes beyond what was required in King III.

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Risk governance should aim for what is stated as follows in **Principle 11**, "The governing body should govern risk in a way that supports the organisation in setting and achieving its strategic objectives".

6.6 Technology and information

**Principle 12** provides that "The governing body should govern technology and information in a way that supports the organisation setting and achieving its strategic objectives". King IV takes cognisance of the advances in technology that are revolutionising businesses and societies, and transforming products, services and business models. So profound are these effects that many believe they herald the dawn of a Fourth Industrial Revolution.

These advances happen quickly and can cause significant disruption. In line with King IV's assertion that risk often creates opportunity, organisations should strengthen the processes that help them anticipate change and respond by capturing new opportunities and managing emerging risks. The practices under Principle 12 are designed to assist the governing body to do so.

Information, like technology, is a growing source of competitive advantage for the enhancement of the intellectual capital of an organisation, and for serving its customers more effectively.

King IV recognises that information and technology overlap but are also distinct sources of value creation, each of which has its own risks and opportunities. To reinforce this distinction, this section in the King IV Code now refers to information and technology instead of information technology.

6.7 Remuneration

Remuneration has become a burning topic, and many international regulators and institutional investors are paying additional attention to disclosure and voting on remuneration. King IV had to consider the appropriate means of dealing with these developments, taking into account that South Africa is a participant in the global investment market but with its own unique set of circumstances. The approach is set out in **Principle 14**, which provides that "The governing body should ensure that the organisation remunerates fairly, responsibly and transparently so as to promote the achievement of strategic objectives and positive outcomes in the short, medium and long term".

This is how remuneration was addressed in the practices:

***Disclosure***

King IV aims to foster enhanced accountability on remuneration. It therefore includes more definitive disclosure requirements, one being that remuneration should be disclosed in three parts: a background statement, an overview of the remuneration policy, and an implementation report.

***Voting***

King IV recommends that shareholders of companies be provided the opportunity to pass separate, non-binding advisory votes on the remuneration policy and the implementation report. The remuneration policy should record the measures that the board commits to in the event that 25% or more of the voting rights exercised by

shareholders are exercised against either the remuneration policy or the implementation report, or both. King IV recommends that such measures should include engagement with the parties so exercising their votes, and addressing their objections and concerns.

South Africa is the only country in which the threshold for these remedial measures is as low as 25%; in Australia, the United Kingdom and Belgium, among others, remedial measures are only mandated if 50% or more of the votes are cast against the remuneration policy and/ or implementation report. Internationally, the vote is binding in very limited instances; for example, in the UK, on the adoption of the remuneration policy. In all other instances, provision is made for a non-binding advisory vote, for example on implementation (United Kingdom) and on adoption of the implementation report (Australia).

***Broader performance measures***

King IV furthermore recommends the use of performance measures that support positive outcomes across the triple context3 in which the organisation operates, and/or all the capitals that the organisation uses or affects. In other words, remuneration is no longer linked solely to financial performance.

In respect of executive remuneration, King IV recommends that organisations disclose what performance measures and targets were used in order to award variable remuneration.

***Wage gap***

Importantly, King IV introduces practices related to the wage gap between executives and those at the lower end of the pay scale. It recommends that the remuneration of executive management should be fair and responsible in the context of overall employee remuneration, and further how the governing body addresses this issue.

6.8 Assurance and internal audit

**Principle 15** states that "The governing body should ensure that assurance services and functions enable an effective control environment, and that these support the integrity of information for internal decision-making and of the organisation's external reports".[112]

King III introduced the combined assurance model by stating that the "combined assurance model aims to optimise the assurance coverage obtained from management, internal assurance providers and external assurance providers on risk areas". This concept needed to evolve to become more useful and effective. King IV therefore addresses the meaning of assurance for the purposes of the combined assurance model, it expands on who the

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assurance service providers and functions consist of, the users of the model and its objectives. King IV assumes an understanding of assurance that goes beyond mere technical definitions. The combined assurance model as envisaged in King IV seeks to incorporate and optimise all assurance services and functions so that, taken as a whole, these enable an effective control environment and also support the integrity of information used for internal decision-making by management and the governing body, and of external reports.

The King IV Code's recommendations do not prescribe the design of the model, allowing the governing body to exercise its discretion in this regard.

Internal audit, as one of the assurance providers to the organisation, remains pivotal to corporate governance. In recent years, it has evolved to become a trusted advisor that adds value by contributing insight into the activities of the organisation and, as a further enhancement, foresight. For King IV, this is the ideal positioning for audit.

6.9 Auditor and audit requirements

Mandatory rotation of audit firms, and mandatory tendering, have been introduced in some jurisdictions to reinforce auditor independence and audit quality. King IV leaves this decision to the audit committee and governing body, subject to legislative requirements. The Code, however, makes certain practice recommendations in support of auditor independence, amongst them that the tenure of an audit firm needs to be disclosed.

Following the UK Corporate Governance Code4 and in the interests of more informative reporting on the auditing process, King IV recommends that the audit committee discloses significant matters it considered in relation to the annual financial statements, and how these matters were addressed by the committee. This provides users of the financial statements with three different perspectives on the annual financial statements:

The governing body's description of how the annual statements were prepared, and particularly its significant assumptions.

- The auditor's explanation of what areas were considered to be most significant, and how they were addressed in the audit.
- The audit committee's disclosure of what matters it regarded as significant, and how it discharged its responsibilities in relation to these matters.

King IV also recommends that the audit committee discloses its views on audit quality with reference to audit-quality indicators.

6.10 Tax

Tax has become a complex matter with various dimensions. It has become apparent from recent events especially in the United Kingdom, involving Starbucks, Amazon and Google, that payment of taxes has become a reputational issue.

The governing body should be responsible for a tax policy that complies with the applicable laws, but that is also congruent with responsible corporate citizenship, and that takes account of reputational repercussions. Hence,

responsible and transparent tax policy is put forward as a factor in good corporate citizenship in King IV and dealt with under **Principle 3** referred to above.[113]

In conclusion, just like Table F of the Ugandan Company Act 2010, compliance with the King Reports is a requirement for companies listed on the Johannesburg Stock Exchange. A detailed comparison of the two should however be taken into consideration.

## PRINCIPLES OF CORPORATE GOVERNACE

PRINCIPLES UNDER TABLE-F OF COMPANIES ACT, 2012.

According to Regulation 3 of the Financial Institutions (Corporate Governance) Regulations, 2005, corporate governance refers to the process and structure used to direct and manage the business and affairs of a legal entity with the objective of ensuring its safety and soundness and enhancing shareholder value and covering the overall environment in which the legal entity operates while at the same time comprising a system of balancing of risk and return.

Section 14 (1) of the Companies Act, 2012 provides for mandatory adoption and incorporation of a code of corporate governance contained in table F for public companies at the time of registration. While as, for private company option to adopt and incorporate a code of governance contained in table F at the time of registration under section 14 (2) of the Companies Act, 2012.

Meanwhile, a legal entity is an association, corporation, partnerships, proprietorship trust or individual that has legal standing in the eyes of the law. The legal entities refer to both private and public entities.

*In our discussion, I demonstrate how corporate governance enhances productivity in legal entities, illustration shall be made of how the principles of corporate governance are applied in legal entities and the structures that support these principles and how the combination of the structures and principles yield productivity.*

*The Principles of Corporate governance includes effectiveness, accountability, transparency, good leadership, ethics, corporate social responsibility and relations with shareholders and their involvement. We shall discuss each of them at length below;*

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*Relations with shareholders and their rights*: Corporate governance requires that shareholders are involved in the running of the company. The rights of the shareholder including right to transfer shares, right to inspect minute books, right to vote, right to inspect auditors and others provided for under the Companies Act, 2012 should be respected and observed. Shareholders speak through ordinary resolution or special resolution.

Under Article 80 (2) of Table A, by special resolution, the shareholders can give directions to the Directors. Making decisions on instances the directors have no power over, including making changes to the company's constitution. Brainstorming and deciding the powers they will bestow upon the company's directors, including appointing and removing them from office. *Section 195* of the Companies Act, 2012 provides for the removal of a director from the board of directors by ordinary resolution in general meeting. Right to attend Annual General Meeting to vote on major issues electing directors, fundamental changes for example disposal of major asset of the company. Section 138 (1) of the Companies Act provides that a public company shall in each year hold annual general meeting. Section 138 (2) of the Companies Act provides that a private company may at the requisition of a member hold an annual general meeting. Article 20 (3) of the Table F provides that notices of general meetings shall explain the effect of all items of special business and reasonable time shall be allowed for discussion at general meeting.

Information given to investors or members should be done in good faith. Article 15 of Table F provides that a company shall report on its policies and procedures and systems and commitments to the following; social, ethical, safety, health and environment. Article 17 of Table F provides for auditing and non-auditing services. Article 18 of Table F provides for financial and non-financial information. For example, Enron company that collapsed due to poor corporate governance used to craft its information and reports in very complex technical language and ordinary members could not make sense of it.

Furthermore, Section 248 of the Companies Act, 2012 provides for the protection of members against prejudicial conduct through according them the right to apply to Court by petition for an order. In the case of Olive Kigongo V Mosa Courts Apartments Ltd HC Company Cause No.1 of 2015, Court held that to constitute unfair prejudice, the value or the quality of the shareholders' interests must be adversely affected. Shareholder involvement enhances productivity by providing a system of checks and balances on the board which in turn will ensure that they avoid reckless spending and observe prudent practices in the running of the company.

***Transparency:*** Transparency can be defined as a principle that allows those affected by administrative decisions, business transaction or charitable work to know not only the basic facts and figures but also the mechanism or processes. *Article 80(1)* of Table A of the Companies Act, 2012 provides that the business of the company shall be managed by the directors, who shall promote the success of the company and the shareholders cannot interfere with their exercise has been confirmed in case of *Automatic Self-Cleansing Filter Syndicate Co Ltd V Cuninghame [1906] 2 Ch,* where Court of Appeal affirmed that directors have power to control over a corporation and, were not bound to implement shareholder resolutions.

Article 1 provides for the board of directors which shall be accountable for the performance and affairs of the company. Article 4 of the Table F defines an executive director and non-executive director. Furthermore, Article 7 of the Table F provides for the composition of the board committees which shall in the performance of the company. The current law, therefore, entrusts the directors with the power to manage the business and affairs of

the company and shareholders cannot give directions on the affairs of the company nor overrule any decision of the directors done in the conduct of the company's business.

Among the duties of directors include to act in a manner that promotes the success of the business of the company as stipulated under section 198 (a) of the Companies Act, 2012. In *Scottish Co-operative Wholesale Society Ltd V Meyer 91959) AC 324,* Lord Denning held that the duty of the director is to do their best to promote its business and to act with complete good faith towards it.

Transparency enhances productivity in a legal entity because it increases stakeholder confidence in the management. Consequently, there will be more people willing to invest in the entity thereby reducing the cost of capital. Lack of transparency can contribute to the collapse of an entity. In the Enron case, the directors of Enron did not practice transparency in that they always hid negative information. They published doctored audit reports that hid debts and liabilities and later to the collapse of the company.

***Accountability*:** Good practice of corporate governance revolves around accountability. The board is accountable for the performance and affairs of the company to act in good faith, with diligence and care and in the interests of the company. The structure that implements this includes the audit committee, accountant, and risk manager. Article 19 of the Table F provides for the composition of an audit committee The board should have a committee on internal audit that should oversee the auditing function as clearly stipulated under Article 13 of the Table F. Article 14 of the Table F provides for the scope of internal audit which brings a disciplined approach to evaluate risk management, internal control systems and governance. This ensures compliance with procedure and processes and detects corruption and or misuse of funds. The constant audits keep the structures in check and ensure internal controls. Enron company failed miserably on this principle because they produce fake audit reports by hiding liabilities and reflecting false profits.

Furthermore, Article 11 of the Table F provides for the responsibility of the board regarding risk management processes for designing, implementing and monitoring. Article 12 of the Table F provides for the application and reporting of risk management. The areas of risk to the company includes; political risk, financial risk, human resource risk, technology risk and governance risk. Internal risks include; death of the employee, illness, fraud. The board shall ensure that appropriate systems for risk management are in place and comply with the law and relevant standards.

***Ethics:*** Ethics is conception of right and wrong behavior defining what is moral and what immoral. Some of the unethical conduct includes bribery, conflict of interest, insider dealing, discrimination, political donations, and insider lending and secret profits. Article 15 of Table F provides that a company shall report on its policies and procedures and systems and commitments to the following; social, ethical, safety, health and environment. Article 16 of Table F provides that a code of ethics shall be set for all stakeholders. provides for commitment to the code of ethics at a high level including; procedures to implement, monitor and enforce the code of ethics at a high level, assessing integrity when promoting and training on company values. The board of directors should have a committee responsible for ethics. In Enron, the company donated $ 50,000 dollars George Mason University where a director, Wendy Lee Graham, was a head of regulatory studies. This was unethical because it involved a

conflict of interest that was not disclosed. These and more led to the collapse of Enron. Upholding the principle of ethics enhances productivity by improving on the goodwill of the entity and thereby attracting investors.

***Corporate Social Responsibility*:** Corporate Social Responsibility is the concept whereby companies integrate social and environmental concerns in their interaction with stakeholders on a voluntary basis. In corporate governance, this requires that the interests of the firm's stakeholders be represented at the company board and decision-making process of the firm. This principle is associated with increased profits, increased employees' commitment and greater customer loyalty. A company's first responsibility is to provide jobs to employees, satisfy customer demand and protect and improve the society needs. It also attracts government subsidies when some governments decide not to tax charitable activities. In effect, it contributes to company's longtime sustainability.

In Conclusion, Article 22 of the Table F provides that all boards and individual directors shall ensure that principles contained in the Code are observed. The application of the principles of corporate governance by a legal entity increases its profitability, returns, competitiveness, credibility, reputation, relations with stakeholders, growth and development and all these are elements of productivity. Therefore, corporate governance is an essential tool for prosperity and economic growth of legal entities and that the entities, if run well, are the driving engines of most developed economies. If they are mismanaged and they collapse, they take down the entire economy of the nation with them.

## PRINCIPLES UNDER THE OECD

Corporate governance is a set of behavioural patterns and a normative framework. The OECD Principles address both areas.

**Decision to Develop Core Principles.**

Governance systems vary widely. No single model of good corporate governance: but need for a global language.

Detailed codes, best principles should be established at national and regional levels

Task force objective: to identify common elements or core principles underlying good corporate governance across the world.[114]

Intended Uses of the Principles

Primarily aimed at governments guidance also for stock exchanges, investprs, corporations, commissions: views primarily listed companies.[115]

The Principles are intended to assist Member and non-Member governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries, and to

[114] https://www.oecd.org/daf/ca/corporategovernanceprinciples/2412921.ppt
[115] https://www.oecd.org/daf/ca/corporategovernanceprinciples/2412921.ppt

provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the process of developing good corporate governance.[116]

The Principles focus on publicly traded companies. However, to the extent they are deemed applicable, they might also be a useful tool to improve corporate governance in non-traded companies, for example, privately held and state-owned enterprises.[117]

The Principles represent a common basis that OECD Member countries consider essential for the development of good governance practice. They are intended to be concise, understandable and accessible to the international community. They are not intended to substitute for private sector initiatives to develop more detailed "best practice" in governance.

Increasingly, the OECD and its Member governments have recognised the synergy between macroeconomic and structural policies. One key element in improving economic efficiency is corporate governance, which involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and shareholders and should facilitate effective monitoring, thereby encouraging firms to use resources more efficiently.

Corporate governance is only part of the larger economic context in which firms operate, which includes, for example, macroeconomic policies and the degree of competition in product and factor markets.

The corporate governance framework also depends on the legal, regulatory, and institutional environment. In addition, factors such as business ethics and corporate awareness of the environmental and societal interests of the communities in which it operates can also have an impact on the reputation and the long-term success of a company.[118]

While a multiplicity of factors affect the governance and decision-making processes of firms, and are important to their long-term success, the Principles focus on governance problems that result from the separation of ownership and control. Some of the other issues relevant to a company's decision-making processes, such as environmental or ethical concerns, are taken into account but are treated more explicitly in a number of other

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[116] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm
[117] Ibid
[118] Ibid

OECD instruments (including the Guidelines for Multinational Enterprises and the Convention and Recommendation on Bribery) and the instruments of other international organisations.[119]

The degree to which corporations observe basic principles of good corporate governance is an increasingly important factor for investment decisions. Of particular relevance is the relation between corporate governance practices and the increasingly international character of investment. International flows of capital enable companies to access financing from a much larger pool of investors. If countries are to reap the full benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible and well understood across borders. Even if corporations do not rely primarily on foreign sources of capital, adherence to good corporate governance practices will help improve the confidence of domestic investors, may reduce the cost of capital, and ultimately induce more stable sources of financing.

Corporate governance is affected by the relationships among participants in the governance system. Controlling shareholders, which may be individuals, family holdings, bloc alliances, or other corporations acting through a holding company or cross shareholdings, can significantly influence corporate behaviour. As owners of equity, institutional investors are increasingly demanding a voice in corporate governance in some markets. Individual shareholders usually do not seek to exercise governance rights but may be highly concerned about obtaining fair treatment from controlling shareholders and management. Creditors play an important role in some governance systems and have the potential to serve as external monitors over corporate performance. Employees and other stakeholders play an important role in contributing to the long-term success and performance of the corporation, while governments establish the overall institutional and legal framework for corporate governance. The role of each of these participants and their interactions vary widely among OECD countries and among non-Members as well. These relationships are subject, in part, to law and regulation and, in part, to voluntary adaptation and market forces. [120]

There is no single model of good corporate governance. At the same time, work carried out in Member countries and within the OECD has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist. For example, they do not advocate any particular board structure and the term "board" as used in this document is meant to embrace the different national models of board structures found in OECD countries. In the typical two tier system, found in some countries, "board" as used in the Principles refers to the "supervisory board" while "key executives" refers to the "management board". In systems where the unitary board is overseen by an internal auditor's board, the term "board" includes both.

The Principles are non-binding and do not aim at detailed prescriptions for national legislation. Their purpose is to serve as a reference point. They can be used by policy makers, as they examine and develop their legal and

[119] Ibid

[120] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm

regulatory frameworks for corporate governance that reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices.[121]

The Principles are evolutionary in nature and should be reviewed in light of significant changes in circumstances.[122] To remain competitive in a changing world, corporations must innovate and adapt their corporate governance practices so that they can meet new demands and grasp new opportunities. Similarly, governments have an important responsibility for shaping an effective regulatory framework that provides for sufficient flexibility to allow markets to function effectively and to respond to expectations of shareholders and other stakeholders. It is up to governments and market participants to decide how to apply these Principles in developing their own frameworks for corporate governance, taking into account the costs and benefits of regulation.

The OECD principles are:

a) The rights of shareholders

b) The equitable treatment of shareholders

c) The role of stakeholders

d) Disclosure and transparency

e) The responsibilities of the board.[123]

## SHAREHOLDERS

### THE RIGHTS OF SHAREHOLDERS

**The corporate governance framework should protect shareholders' rights.[124]**

[121] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm
[122] Ibid
[123] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm
[124] Ibid

Basic shareholder rights include the right to: a) secure methods of ownership registration, convey or transfer shares, obtain relevant information on the corporation on a timely and regular basis, participate and vote in general shareholder meetings, select members of the board and share in the profits of the corporation.

Shareholders have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes such as : amendments to the statutes, or articles of incorporation or similar governing documents of the company, the authorisation of additional shares and extraordinary transactions that in effect result in the sale of the company.[125]

Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures that govern general shareholder meetings:

Shareholders should have the opportunity to anticipate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes such as: Amendments to the statutes, or articles of incorporation or similar governing documents of the company, the authorisation of additional shares; and extraordinary transactions that in effect result in the sale of the company.

Opportunity should be provided for shareholders to ask questions of the board and to place items on the agenda at general meetings, subject to reasonable limitations.

Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or in absentia.

Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.

Markets for corporate control should be allowed to function in an efficient and transparent manner. The rules and procedures governing the acquisition of corporate control in the capital markets, and extraordinary transactions such as mergers, and sales of substantial portions of corporate assets, should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class,anti-take-over devices should not be used to shield management from accountability.

Shareholders, including institutional investors, should consider the costs and benefits of exercising their voting rights.[126]

THE EQUITABLE TREATMENT OF SHAREHOLDERS

[125] ibid

[126] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.[127]

All shareholders of the same class should be treated equally. Within any class, all shareholders should have the same voting rights. All investors should be able to obtain information about the voting rights attached to all classes of shares before they purchase. Any changes in voting rights should be subject to shareholder vote. Votes should be cast by custodians or nominees in a manner agreed upon with the beneficial owner of the shares. Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholdes. Company procedures should not make it unduly difficult or expensive to cast votes.[128]

Insider trading and abusive self-dealing should be prohibited.

Members of the board and managers should be required to disclose any Material interests in transactions or matters affecting the corporation.

THE ROLE OF STAKEHOLDERS IN CORPORATE GOVERNANCE

The corporate governance framework should recognise the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.[129]

The corporate governance framework should assure that the rights of stakeholders that are protected by law are respected.[130]

Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights.

The corporate governance framework should permit performance-enhancing mechanisms for stakeholder participation.

Where stakeholders participate in the corporate governance process, they should have access to relevant information.

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[127] Ibid

[128] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm

[129] Ibid

[130] Ibid

DISCLOSURE AND TRANSPARENCY

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.[131]

Disclosure should include, but not be limited to, material information on:

a) The financial and operating results of the company.

b) Company objectives.

c) Major share ownership and voting rights.

d) Members of the board and key executives, and their remuneration.

e) Material foreseeable risk factors.

f) Material issues regarding employees and other stakeholders.

g) Governance structures and policies.

Information should be prepared, audited, and disclosed in accordance with high quality standards of accounting, financial and non-financial disclosure, and audit.

An annual audit should be conducted by an independent auditor in order to provide an external and objective assurance on the way in which financial statements have been prepared and presented.[132]

Channels for disseminating information should provide for fair, timely and cost-efficient access to relevant information by users.

THE RESPONSIBILITIES OF THE BOARD

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.

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[131] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm

[132] Ibid

Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.

The board should ensure compliance with applicable law and take into account the interests of stakeholders.

The board should fulfil certain key functions, including:

1. Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.[133]

2. Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.

3. Reviewing key executive and board remuneration, and ensuring a formal and transparent board nomination process.

4. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.

5. Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for monitoring risk, financial control, and compliance with the law.

6. Monitoring the effectiveness of the governance practices under which it operates and making changes as needed.

7. Overseeing the process of disclosure and communications.[134]

The board should be able to exercise objective judgement on corporate affairs independent, in particular, from management.

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[133] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm

[134]Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm

1. Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest. Examples of such key responsibilities are financial reporting, nomination and executive and board remuneration.

2. Board members should devote sufficient time to their responsibilities.

In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.[135]

## CORPORATE GOVERNANCE CODES

The Corporate Governance Code outlines the standards for the expectations for corporate boards in protecting shareholder investments using best practices as its foundation.

The code refers to standards for good practices relating to; board composition, board development, remuneration, accountability, audit, shareholder relations

There are five pillars that make up the corporate governance codes in the UK; leadership, effectiveness, accountability, remuneration and shareholder relationships.

*Leadership* The code requires companies to ensure to shareholders that they have an effective board of directors that's capable of providing excellence in board leadership. Boards of directors are collectively responsible for the short- and long-term success of the corporations they serve. Strong leadership requires corporations to have a clear division of the responsibilities between board directors and executives. Boards are responsible for strategic planning and oversight, and the executives are responsible for the day-to-day responsibilities of running the company. The board chair is responsible for the board's leadership and the chair must ensure that the board operates as efficiently as possible in relation to all of their board duties and responsibilities.

Non-executive board directors should constructively challenge the board and help to develop successful proposals for strategy. The code expressly states that no single person should have total decision-making power on a board. *Effectiveness* The code requires corporate boards to ensure that they have a composition that encompasses the appropriate balance of skills, experience, independence and knowledge of the company so that they're able to perform their duties and responsibilities effectively:

- Boards are required to develop a formal, rigorous and transparent process for appointing new board directors.

[135] Organisation for Economic Co-operation and Development (1999). "OECD Principles of Corporate Governance"; available on the Internet
(http://www.oecd.org/daf/governance/principles.htm

- Before accepting a position on a board of directors, nominees should ensure that they have sufficient time to fulfill their board duties and responsibilities.
- Boards should avail their board directors of a comprehensive board orientation and onboarding process. In addition, boards should provide regular opportunities for board director training and education.
- Management should provide accurate information to the board that has the appropriate form and quality so that the board can fulfill its duties in a timely manner.
- Boards should also conduct rigorous annual self-evaluations for the board, individual directors and significant committees, with the goal of improving their performance. All board directors should be subject to regular elections as long as they continue to perform satisfactorily.

***Accountability*** The board is wholly accountable for the actions and decisions of the company. The board should make annual disclosures to shareholders that represent a fair, accurate and comprehensive assessment of the corporation's positions and corporate outlook. The board is additionally responsible for assessing the nature and extent of risks it is willing to take to achieve its strategic plans. Boards should participate in sound risk management and internal control systems. Boards should also establish formal procedures for corporate reporting, risk management reporting and internal control principles. Procedures should include details of relationships between the company and the internal and external auditors. *Remuneration* The United Kingdom favors remuneration packages that are designed to promote the long-term success of the company and that are directly aligned with performance. Remuneration should sufficiently challenge executives, be transparent and be rigorously applied. The company should have a formal, transparent process for developing remuneration policies and setting remuneration packages. Directors should not set their pay. *Shareholder Relationships* Boards should utilize their annual general meetings to communicate and engage with investors on their objectives and strategic planning. The board should ensure that communications with shareholders are satisfactory. These pillars are considered the minimum for the basics of good governance. Corporations are encouraged to add their own best practices as they develop them and learn from other corporations around the world.

## CORPORATE GOVERNANCE CODES IN THE USA

The US has not adopted a corporate governance code for US companies. Corporate governance matters are provided in state and federal laws, regulations and listing rules. An influential body of "best practices" literature around corporate governance also exists as guidelines to best practices for companies.

However, there are numerous agencies assigned to regulate and oversee financial institutions and financial markets in the United States, including the Federal Reserve Board (FRB), the Federal Deposit Insurance Corp. (FDIC),

and the Securities and Exchange Commission (SEC). Securities and Exchange Commission guidelines which can be adopted by the US Companies.

Companies are required to submit the Annual Corporate Governance Report to the Securities and Exchange Commission (SEC), which discusses the Companies' Board and Committee responsibilities, code on business conduct and ethics, Board and Management Remuneration, risk management and internal control system, stakeholder roles, corporate social responsibility initiatives, investor relations program and internal policy on sanctions, among others.

## CORPORATE GOVERNANCE CODES IN UGANDA

In Uganda, the 2012 Companies Act provides the primary framework for governance of companies and introduced a code of corporate governance that is voluntary for private companies and mandatory for new public companies. This code of Corporate Governance is enshrined under Table F of the Companies Act. The practices are also enshrined in Capital Markets Corporate Governance Guidelines. The guidelines were formulated by the Capital Markets Authority ("Authority"). Sections 6 and 102 of the Capital Markets Authority Statute, 1996 confer upon the Authority to developed these Guidelines as a minimum standard for good corporate governance practices by public companies and issuers of corporate debt in Uganda, in response to the growing importance of governance issues both in emerging and developing economies and for promoting domestic and regional capital markets growth. It is also in recognition of the role of good governance in corporate performance, capital formation and maximization of shareholder's value as well as protection of investors' rights.

### THE ROLE AND FUNCTION OF THE COMPANY SECRETARY

### THE OFFICE OF THE COMPANY SECRETARY; APPOINTMENT AND REMOVAL (WITHIN CORPORATE GOVERNANCE STRUCTURE)

Every company shall have a secretary.[136] Section 188 further prohibits a sole director of a company from being appointed as a company secretary. Article 110(1) of Table A, Companies Act 2012 provides that the secretary shall be appointed by the directors on such terms and conditions as they may think fit. Sub-article 2 of the same Article states that such a secretary may be removed by the directors.

Article 10(1) of Table F, Companies Act 2012 provides that the company secretary shall have a pivotal role in the corporate governance. According to 'A Manual on Corporate Governance in Uganda: Principles and Practices, the company secretary should be subjected to a fit and proper test in the same manner as is recommended for a new director. Winnie Tarinyeba in her book "Company Law, A guide to the Companies Act of Uganda" further states that directors should ensure that a person appointed as a Company Secretary has the necessary qualifications and experience to discharge their duties.

[136] Section 187 of the companies act 2012

Section 190 of the Companies Act states the qualifications of a Company Secretary for public companies as:

a) An Advocate of the High Court

b) A person who appears to directors capable of discharging duties of a company secretary.

c) Member of Institute of Chartered Public Accountants in Uganda

d) Institute of Chartered Secretaries and Administrators (Chartered Governance Institute UK)

In Panaroma Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971]2QB 711, Lord Denning defined the role of the company secretary highlighting the evolution from a clerical role to a person who performs a senior management role including signing of contracts on behalf of the company.

The Code of Corporate Governance in Article 10 Table F of the Companies Act provides that the Company Secretary has a pivotal role in the corporate governance of a company and his or her duties include:

a) Provide directors individually and collectively with detailed guidance on discharging their responsibilities

b) Induct or participate in inducting of directors

c) Assist the chairperson and CEO in setting the annual board plan

d) Administer other strategic board level matters

e) Provide a central source of guidance on ethics and good governance.

CORE DUTIES OF THE COMPANY SECRETARY WITHIN THE CORPORATE GOVERNCE STRUCTURE.

**INTRODUCTION**

Section 187(1) of the Companies Act requires every company to have a secretary and it prohibits a sole director from serving as a secretary. Section 188 of the Companies Act further prohibits a corporation with a sole director who is a director of the company from serving as a secretary to the company and a corporation as sole director, where that corporation serves as a secretary to the company.

Company secretaries around the world, Uganda inclusive, have been given the responsibility for good corporate governance practices to be followed by companies. These include but are not limited to balancing interests of a company's stakeholders like shareholders, management, customers, financiers, government, and the community as well.

In Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd, Lord Denning defined the role of the company secretary, highlighting the evolution of the role from a clerical role to a person who performs a senior management role, including signing contracts on behalf of a company and stated thus:

A company Secretary is a much more important person nowadays than he was... He is an officer of a company with extensive duties and responsibilities. This appears not only in the modern Companies Act but also by the role which he plays in the day-to-day business of the companies.... He/she is certainly entitled to sign contracts connected with the administrative side of a company's affairs, such as employing staff, and so forth. All such matters now come within the ostensible authority of a company secretary.[137]

**CORE DUTIES**

The Code of Corporate Governance in Table of the Companies Act provides that the Company Secretary has a pivotal role in the corporate governance of a company.[138]

The duties of the Company Secretary as listed under the Companies Act include:

(a) Providing directors individually and collectively with detailed guidance on discharging their responsibilities;

(b) Induction of directors;

(c) Assisting the chairperson and the chief executive officer in setting the annual board plan;

(d) Administering other strategic board level matters; and

(e) Providing a central source of guidance on ethics and good governance;

Furthermore, the board of directors can delegate some powers to management and therefore this may include delegation to the secretary.[139]

A SECRETARY'S ROLE IN COMPLIANCE AND DISSEMINATION OF THEIR ROLES IN CORPORATE GOVERNANCE.

A corporate secretary in the boardroom is one of the most important resources the board has. The corporate secretary's role has expanded over time to include many administrative and managerial duties. Corporate governance is important to companies because companies get to demonstrate that they're invested in

[137] [1971] 2 QB 711
[138] Table F of the Companies Act 2012, Article 10 (1)
[139] Table F of the Companies Act 2012, Article 1(4)

productivity, enhancing public relations and getting more involved in their communities[140].The role of Company Secretary includes advising the Company's Board of Directors of the Company on good corporate governance practices and compliances with the rules and regulations. The Company Secretary is a unique interface between the board as well as Company's management and acts as a vital link between the board and the business.

*Section 187* of the companies act 2012 provides for a company secretary. It makes it mandatory for companies to have a secretary with single member companies as the exception[141]. Further *section 10* of table F throws more light on the pivotal role of a company secretary in corporate governance[142]. The company secretary is empowered by the board to enable him or her to properly perform his or her duties.[143]

The secretary's roles in compliance with corporate governance and dissemination of information are;

a) The company secretary plays a leading role in good governance by helping the board and its committees function effectively. This is by scheduling meetings and proactively managing the agenda. This enables the board contribute fully in board discussions to enhance good decision making.

b) The Secretary is the custodian of the organization's records for example registers, the company seal, certificate of incorporation etc. Secretary ensures that the records are made available when required by authorized persons.

c) The Secretary assists the Chairman by taking the lead in developing appropriate induction plans for new directors.

d) The Secretary is the interface between the board, management and stakeholders. His/her is able to deliver information on the decisions of the board.

e) The secretary has an important role in communicating with external stakeholders like investors and is often the first point of contact for queries.

f) The Secretary ensures that the company complies with the statutory requirements, maintains statutory registers and makes the necessary filings with the registrar of companies such as annual returns, changes in capita, resolutions etc.

g) The secretary is responsible for ensuring that accurate minutes of meetings are taken and approved.

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[140] Nicholas P, '10 Responsibilities of the corporate Secretary in the board room' 21st January 2020- https://www.diligent.com/insights/corporate-secretary/10-responsibilities-corporate-secretary-boardroom/ on 07th August 2022.

[141] Section 187 of the companies Act 2012

[142] Regulation 10, Table F, Companies Act 2012

[143] Regulation 10(2), Table F, Companies Act 2012

h) It is the role of the secretary to communicate decisions and ensure implementation of the same as well as report back to the board on actions needed and updates.

i) To provide directors individually and collectively with detailed guidance on discharging their responsibilities;

j) To induct or participate in the induction of directors;

k) To assist the chairperson and the chief executive officer in setting the annual board plan;

l) To administer other strategic board level matters;

m) To provide a central source of guidance on ethics and good governance;

n) To be subject to a fit and proper test, as also directors.43

o) The company secretary is responsible to the board of directors (through the chairman) for the proper administration of the procedures and arrangements established by the board for the conduct of its own business and the company's compliance with internal and external regulations and codes relating to corporate governance. In carrying out this responsibility the company secretary should administer, attend and prepare minutes of the proceedings of the board.

p) The company secretary has the duty to send out notices and agendas for meetings to the board and members within the required time. For example, a secretary must send out a notice for an AGM with at least 21 days' notice. He/ She coordinates annual general meetings.

q) The secretary has the duty to brief all directors prior to a board meeting.

r) Ensuring that the Board has the resources to fulfill its fiduciary duties to a company's shareholders. The corporate secretary is the main 'go-to' person whenever a board director, executive or committee needs guidance, advice or resources. If the corporate secretary doesn't have the answer, it's their responsibility to find it.

s) Preparing minutes of board actions during board and committee meetings to reflect the board's proper discharge of its fiduciary duties.

t) The corporate secretary plays a key role in setting the agenda, writing meeting minutes and getting them approved, as well as engaging in pre-meeting planning.

u) Serving as a key consultant to the board of directors and to the executive management team.

v) The corporate secretary is responsible for ensuring that the corporate governance framework for the company is properly designed, implemented and maintained. The governance framework encompasses the board and its committees. Committees usually include the audit, finance, compensation, risk management and disclosure committees.

w) Corporate secretaries are responsible for the company's governance program and process development and enhancement. They have to ensure that their governance programs keep pace with the changes.

x) The corporate secretary is responsible for board director training and development.

y) Corporate secretaries are the keepers and point people for all corporate documents.

## THE RELATIONSHIP OF THE SECRETARY WITH THE MANAGEMENT, BOARD AND SHAREHOLDERS IN CORPORATE GOVERNANCE

Section 187(1) of the Companies Act, 2012 provides that every company shall have a secretary. Section 190 of the same Act provides for who qualifies to be a company secretary and these include;

i) An advocate of the High Court,

ii) A member of the Institute of Certified Public Accountants in Uganda and

iii) A member of the Institute of Chartered Secretaries and Administrators. Key to note is that before appointing someone as secretary, the directors must satisfy themselves that the person has requisite knowledge and experience to discharge the functions of secretary of the company.

The Company Secretary (UK), Corporate Secretary (USA) or Board Secretary (Asia) plays a pivotal role in the corporate governance of the company. According to Andrew Kakabadse *et al* (2017) in their work "Leadership on the Board: The Role of Company Secretary." at p. 242, the role of the company secretary has over the years evolved from simply being a "note taker" for the board, to "an administrative servant of the board" and to "board advisor" in modern times. It is in the latter role that the Company secretary has proven a key player in corporate governance.

While the Company Secretary plays a key role in achieving good corporate governance, Prof. David Justin Bakibinga in his book "Company Law in Uganda" (2nd Edition) at p. 164 opines that the office and significance of the roles of the company secretary are not much celebrated in the public domain. Within the company, the Secretary is not a member of the board but works very closely with the board, is part of the company's top management and follows up on shareholder issues. This short essay explores the relationship of the Secretary with the board, management and shareholders and how he or she supports the three entities of the company to ensure that there is sound corporate governance of the company.

## THE BOARD

The Board of Directors or simply the Board is the top most governing body of the company. It is headed by the Board Chairperson who works with the directors to steer the company towards its vision and goals.[144] As earlier

[144] Winifred Tarinyeba Kiryabwire, "*Company Law: A Guide to the Companies Act No. 1 of 2012 of Uganda*", (Kampala: Fountain Publishers, 2015), p. 159.

noted, the Secretary is in principle not a member of the Board but he/she works closely with the Board. The Secretary plays a number of roles in supporting the Board and ensuring that it complies with corporate governance requirements. The Company Secretary's pivotal role is provided for under article 10 of Table F of the Companies Act, 2012. I will now briefly discuss them in no particular order relative to the Board.

- The Secretary issues notices for board meetings, records minutes at the meetings and ensures that the Board's resolutions are accurately captured. The Secretary must then ensure that the resolutions are shared with Management and the shareholders and then filed with the registrar of companies as required by the law.

- The Secretary participates in induction and training of the Board. It is commonly remarked that Secretaries usually outlive the board. They see Boards come and Boards go. But even in the context of a "new" Secretary, as a professional on compliance and regulatory affairs, he/she is expected to induct and train directors on their roles such as their duties to the company, how to exercise their powers and most importantly, how to ensure that they comply with the statutory stipulations of their office.

- Advises the Board on all corporate governance matters. In this regard, the Secretary is a confidante, advisor and sounding board to the Board. The[145] Secretary ensures that the Board is brought up to speed with regulatory developments or compliance standards.

- Ensuring that the Board complies with filing and reporting requirements. The Secretary must, on behalf of the directors see to it that all board resolutions are filed with the registrar of companies, changes in the company's directorship are promptly filed and that the company files its annual returns within the prescribed period among other mandatory filings required by the registrar of companies and industry regulators.

**MANAGEMENT**

Management is the team in charge of the day to day running of the company/entity. The Secretary is part of the Management team. Here, the Secretary's role is to ensure that Management knows of Board resolutions from Board meetings and the needs of the shareholders. The Secretary's principal role regarding management is to follow-up in order to ensure that board resolutions or shareholder wishes are implemented by Management in accordance with the law and in the best interest of all stakeholders of the company.

## THE BOARD OF DIRECTORS, BOARD DYNAMICS AND BOARDROOM PRACTICE.

THE ROLES, RESPONSIBILITIES AND DUTIES OF THE BOARD OF DIRECTORS

[145]Andrew Kakabadse *et al* (2017), "*Leadership on the Board: The Role of the Company Secretary*.", p. 251.

The board of directors is provided for under the code of corporate governance under Table F of the Companies Act 2012. Generally, under Article 2 of Table F, the board shall be composed of;

2(a) – a balance of executive and non-executive directors,

2(b) – non executive directors shall comprise the majority,

2(c) - sufficient non-executive directors shall be 'independent directors'

2(d) a nomination committee (consisting entirely of on-executive directors, with the majority independent directors and chaired by a board chairperson and they should ensure selection of directors in a transparent manner and;

2(e) rotation of directors to ensure continuity

Under Article 1(1) of Table F, the board is accountable for the performance and affairs of the company (management of the company) and are expected to act in good faith, with due diligence and care and in the interests of the company which duties are provided for under Section 98 of the Companies Act, 2012 (duties of directors but we can confer) and shall be discussed herein.

**RESPONSIBILITIES OF THE BOARD OF DIRECTORS**

They are generally provided for under Article 1(4)(a) – Article 1(4) (x) of table F of the Companies Act 2012.

a) Provide strategic direction

b) Retain full and effective control

c) Comply with laws and regulations

d) Define levels of materiality

e) Delegate certain powers to management

f) If material, reserve powers to itself

g) Have access to company information and records

h) Agree on the procedure to allow directors to obtain independent professional advice

i) Decide on the number of directors required to make the board effective

j) Identify and monitor key risk and key performance areas

k) Identify and monitor non-financial aspects of the company

l) Record facts and assumptions which lead to conclude that business shall be a going concern in the next financial year and if not state the steps to be taken

m) Explain the effect of the proposed resolutions to be passed at shareholder meetings

n) Encourage shareholders to attend meetings

o) Ensure that the chairperson of the audit and renumeration committee and other directors attend shareholder meetings

p) Provide CVs of all directors who are appointed

q) Have a board charter setting out responsibilities published in the annual report and the board shall be responsible for—

i. Strategic plans

ii. Monitoring operational performance

iii. Monitoring performance of management

iv. Determining policies and procedures

v. Risk management

vi. Internal controls

vii. Communications policy

viii. Director selection

ix. Induction of directors

x. Evaluation of directors

r) Determine the balance between governance constraints and entrepreneurial performance

s) Review major plans of action

t) Review and guide on the annual budget and business plans of the company

u) Oversee major capital expenditures, acquisitions and divestiture

v) Ensure formal and transparent board nominations and elections

w) Ensure the integrity of the company's accounting and financial reporting systems

x) Oversee the process of disclosure and communication

Duties of directors

## DUTY TO ACT IN GOOD FAITH

The welfare of a company lies on the shoulders of its directors. They are responsible for the interests of the company and the shareholders. Directors are basically fiduciary agents of the company, so the law of trust applies to them. As explained earlier, common law developed duties and concepts which vested upon directors with specific responsibilities. These responsibilities revolved around the directors' role in the management of the assets of the company on behalf of the other shareholders. Directors were seen as fiduciaries and as such, principles of agency and the law of trust had to be applied to directors.

A fiduciary is a person in a position of confidence or trust. He has a duty of loyalty and must act in good faith in the interest of a person who depends on the fiduciary to act on his/her behalf. A fiduciary must also act with care on behalf of the person(s) for whom he is a fiduciary. Thus, the duties that the directors owe to the company are legally enforceable in case of breach of these responsibilities.

In Allen v Hyatt, the court held that the directors are trustees of the profit for the benefit of the shareholders. They cannot always act under the impression that they owe no duty to the individual shareholders. But it is of no doubt that the primary duty is to the company.

## DEALING WITH THE COMPANY'S PROPERTIES.

Directors have a duty to protect the company's properties and not expend them recklessly. If they do so, they are liable to make good the loss. In Re George Newman, the term company's property was widely defined to include contracts to which the company is entitled even if the company has lost no funds at all.

## AVOID CONFLICT OF INTEREST/MAKING SECRET PROFITS OUT OF THE COMPANY.

This duty was espoused in Aberdeen Rail Co v Blaike Bros. It was stated that since a director is in a fiduciary relationship, he is not allowed to enter into any transaction in which he has a personal interest if to do so will result into a conflict with the interest of the company.

## DUTY TO TREAT ALL SHAREHOLDERS EQUALLY

Section 198(1) (c) effects that shareholders must be treated equally. The legal concept is that a director does not owe duties to individual shareholders. As was held in Percival v Wright (supra), a director owes no fiduciary duty to shareholders.

## DUTY TO EXERCISE INDEPENDENT JUDGMENT

The directors must make their own decisions. This, however, does not prevent them from acting in accordance with the company's articles of association. For instance, a director who is placed on board as a nominee of a substantial shareholder or otherwise must act in accordance with the interests of the company that he is serving rather than the interests of the nominator.

Various Entities and the Composition of their various boards

1. The Uganda Investment Authority

The authority is established under Section 2(1) of the Investment Code Act, Cap.92

The board is established under Section 3(1) of same act.

Section 3(2) (a)-(k): Board Composition

a) Chairperson appointed by the minister

b) Executive director

c) 5 members with sound knowledge and practical experience in investments

d) A representative of the governor of BOU

e) A representative elected by Uganda Chamber of Commerce and Industry

f) A representative elected by Uganda Manufacturers Association

g) The commissioner for economic affairs, ministry responsible for finance, planning and economic development, ex officio

h) Chief Government Development Economist, ministry responsible for finance, planning and economic development, ex officio

i) Commissioner for technology, Ministry responsible for industry, ex officio

j) Commissioner for external trade, Ministry responsible for commerce, ex officio

k) Commissioner for Technology, Ministry responsible for internal affairs, ex officio

2. Uganda Revenue Authority

The Authority is established under Section 2 of the Uganda Revenue Authority Act, Cap. 196

The Board is established under Section 4(1) of the same act.

Section 4(1) (a)-(e): Composition

a) Chairperson

b) Representative from Ministry of Finance

c) Representative from the ministry responsible for trade and industry

d) Representative of the Uganda Manufacturers Association

e) The Commissioner General of URA

3. Uganda Microfinance Regulatory Authority

The Tier 4 Microfinance and Money Lenders Act, 2016

Board established under Section 11 of the Act. It is comprised of 7 members.

Section 12(1) (a) - (e): Composition of the board

a) a representative of Bank of Uganda

b) a representative of the ministry of finance

c) a representative of the ministry responsible for cooperatives

d) three persons with experience in microfinance

e) the executive director of the authority who shall be an ex officio member.

4. Bank of Uganda

The authority is established under Article 161 of the Constitution of the Republic of Uganda, 1995.

The Board is provided for under Article 161(2).

Board is divided into various committees i.e. The Strategy and Finance Committee, the Capital Projects Committee, Human Resource and Renumeration Committee of the Board, The Audit and Governance Committee of the Board, Financial Stability Committee of the Board.

Composition: Article 161(2)

The Governor

Deputy Governor 62

5 other directors

5. The Uganda National Roads Authority

It is established under Section 5(1) of the Uganda National Roads Authority Act, 2006.

The board is established under Section 8(1) of the same act.

Section 8(3) (a) – (e): Board Composition

a) Executive director – ex officio

b) Representative of the Ministry responsible for roads, not below the rank of commissioner

c) Representative of the Ministry responsible for finance, not below the rank of commissioner

d) Representative of the National Planning Authority

e) Representative of engineers nominated by the professional body of engineers

f) Two representatives from the private Sector

## BOARD AFFAIRS (URA BOARD COMMITEES, RENUMERATION AND ENTIRE BOARDROOM PRACTICES)

Corporate governance is the system of rules, practices and processes by which a firm is directed and controlled. This essentially involves balancing the interests of a company's many stakeholders (shareholders, senior management, customers, suppliers-government and community)

## CORPORATE GOVERNANCE AND THE BOARD OF DIRECTORS

The board of directors is the primary direct stakeholder influencing corporate governance. The board of directors is tasked with making important decisions such as corporate officer appointment etc. The board consists or should consist of a diverse group of individuals (those with skill, knowledge as well as those who can bring fresh perspective to the firm. Board of directors is often made up of inside and independent members. Board of directors ensures that there is accountability, transparency and ethical business practices.

The taxation handbook 4th edition 2022 at pages 17 to 23 stipulates the URA board affairs; URA is a statutory authority established by the Uganda revenue authority act cap.196 with mandate of assessment, collection and administration of taxes. URA is administered by a board of directors which the policy is making body entrusted with general oversight of the organization. The management of URA is headed by the commissioner general who is responsible for three divisions:

a. Public and corporate affairs management.

b. Staff compliance

c. Executive office.

Administratively, URA has eight departments.

1. Legal services and board affairs- houses legal firm to provide legal services on all issues that may arise and also representing the URA.

2. Customs services department- responsible for handling all customs issues including assessing and collecting international trade revenues.

3. Domestic taxes department- this is charged with domestic (Internal-Ugandan) tax affairs.

4. Corporate services department- this is a support 'engine" that includes finance, administration, IT and HR

5. Internal audit department- this offers audit assurance services to other departments on the adequacy of internal control systems

6. Tax investigations department-this charged with monitoring and pursuing all cases of taxes crime and evasion related activities.

7. Information technology and innovation- this is charged with development, planning and implementation of enterprise it systems

8. Feedback management- this concentrates on how the community can adopt the culture of paying taxes. It is a new department that organizes "tax payer programs"

"Stakeholder engagements" "annual appreciation day"

A board committee is provided for under article 7 of table f companies act 2012 and it states that the board committee shall assist the board in the performance of its duties.

## URA COMMITTEES

1. Audit committee

To endorse for board's approval new appointment re-appointment and removal of external auditors

To approve the external auditor's remuneration

To review and discuss with the external auditors the scope of their audit and any salient matters arising from the audit

To review and endorse for board's approval significant accounting policies

To review and endorse for board's approval the audited annual financial statements including the external auditors report

To review and endorse for board's approval the engagement for an external firm of certified public accountants to perform internal audit services as well as non-audit services as may be required

To review internal audit policies and work program

To receive and consider internal audit reports and managements responses to the recommendations made in these reports and or when deemed necessary to submit such reports and or responses to the URA board.

To receive and consider management report on the effectiveness of the financial reporting system, internal control; systems, risk management procedures and processes, as well as compliance with the applicable laws regulations and internal policies

To conduct or assign and oversee any ad hoc projects referred to it by the URA board

2. Development project objection consideration committee

To consider the legitimacy of submissions received at a preliminary consideration

If submissions were found to be legitimate, to consider and deliberate on the merits or otherwise of the submissions

To prepare the deliberation on the objections which will be submitted to SDEV in accordance with section 24(3) b of the URAO.

3. Finance committee

To review the funding requirements and funding methods for URA, its redevelopment projects and other works

To review and approve the terms and conditions of borrowing from all sources

To review and approve addition and deletion of URAs bank list based on the approved selection criteria

To review and endorse for board's approval the investment objectives and investment guidelines

To review and endorse for board's approval financial and treasury policies

To review and endorse for board's approval the financial aspects of the annual business plan and five-year corporate plan as well as annual budgets

To review and approve the minimum average market selling prices and target rents of development projects and to approve other sales and leasing terms including sales and leasing strategies

To review and approve any revisions or variations to the terms of committed development agreements other than those having significant financial implications

To review any other ad hoc situation that may have financial implications.

4. Human resources and remuneration committee

To review and endorse for board's approval the guiding principles for the remuneration arrangements for the senior executives and general staff of the authority, with reference to practices in the private sector and relevant statutory bodies

Remuneration arrangements shall include

1. Remuneration policies (level and mix

2. Determination of adjustments in salary and variable pay.

To review and endorse for board's approval ways and means to enhance organization effectiveness

To assess the human resources management needs of the URA under the prevailing corporate environment.

In light of the above assessment, to review and endorse for board's approval necessary policy measures to meet any identified gaps and challenges.

5. Land, rehousing and compensation committee

To review and endorse for board's approval

1. Policies and matters relating to land grants, acquisition of property by negotiation or resumption.

2. Policies and matters relating to compensation

3. Policies and matters relating to rehousing

4. The policy and terms and conditions of loans to persona under section 12 of the URA ordinance

To review and approve acquisition strategies approaches and offers for individual projects

To receive reports from management on the progress and oversee the effectiveness of implementation of the above matters

5. Planning, development and conservation committee

To review and endorse for the board's approval of

1. Selection of redevelopment projects including those with conservation elements for inclusion into the corporate plans and business plans

2. Submission of development scheme plan prepared under section 25(3) a of the URA0 to town planning board under section 25(5) of the URAO

3. Proposals for conservation of buildings sites and structures of historical cultural or architectural interest.

To review and approve planning and development parameters of development projects

To consider and advise on general planning design and conservation issues including those of government policy and statutory nature.

7. Review committee.

To review and determine by review panels empaneled from review committee cases from affected owners or occupiers arising out of the execution of policies as approved by the board in regards to; The eligibility of domestic occupiers for rehousing including compassionate rehousing.

## THE ELIGIBILITY OF DOMESTIC TENANTS FOR CASH COMPENSATION

The eligibility of owners for home purchase allowance and other ex-gratia allowances

Any other matters arising out of the clearance or rehousing of occupiers affected by the URA or URA-HS projects

The review panels shall not consider matters relating to the valuation of interests in property, business loss or any other related matters. The application is made to the secretary review committee in writing.

## BOARD ROOM PRACTICES

A board room is room where a group of people conducts meetings typically those elected by shareholders to manage the company. Boardroom practices are practices that board administrators do to quickly improve meeting outcomes. Boardroom practice mainly focuses on raising awareness and standards of corporate governance, shareholder risk management and stakeholder relationships

## BOARD REMUNERATION

Article 5 table F Companies Act 2012 provides for board remuneration

Sufficient remuneration to be made to the directors. Remuneration committee shall be appointed by the board to consider executive remuneration. The Chief Executive Officer may attend meetings of the committees on imitation. There has to be an independent non- executive director to be the chairperson of the remuneration committee. The chairperson has to attend the annual general meetings to answer questions from shareholders.

The annual report should contain a declaration of individual director's remuneration, share options and other benefits. The committee to recommend pay for non-executive directors on a merit basis. The board shall present recommendation of the remuneration committee for purpose of determining the remuneration of directors.

## BOARD ROOM PRACTICES

A board room is room where a group of people conducts meetings typically those elected by shareholders to manage the company. Boardroom practices are practices that board administrators do to quickly improve meeting outcomes. Boardroom practice mainly focuses on raising awareness and standards of corporate governance, shareholder risk management and stakeholder relationships

**These may include:**

Skills, experience, expertise of members, nomination committees, board dynamics. The way board directors interact with other in the carrying out their duties. The manner and culture reflected in the conduct of board business.

Roles or mandate and delegation

Accountability, compliance and risk management

Procedures and processes of boardroom business or conduct of business

Consensus on issues, divergent opinions, independence and objectivity

Management of stakeholder's interest

Evaluation/ appraisal of performance

**Improve meeting agenda**

List the organizations vision and strategic objectives on every agenda. This helps to keep the strategy right in front of the directors to reinforce them that board meetings are directly tied to achieving the goals

Strength building topics. The directors join the board to lend expertise to solving organizational challenges and building opportunities.

**Appreciation accountability**

Impact story- this entails opening at least a couple of board meetings on how the company is fulfilling its mandate

**Better board minutes**

Get the vitals down- note the date of the meeting who was present, what was discussed and what was decided

Avoid acronyms and jargon- all directors may not be familiar with the legalese and industry terms so all terms should be in plain language.

Keep it short and succinct- for example when there is an appointment made state the person, the role term and the date of appointment.

Highlight resolutions- format the minutes so resolution stand out, bold them and consider doing a summary at the end of minutes for efficient recall later

Use a consistent format-having the stand in follow the same effective template for familiar minutes every meeting.

## NOMINATION COMMITTEE

It refers to the group of board members who are responsible for the corporate governance of the organization. Nominating committee members typically work to evaluate the characteristics and performance of board members and are responsible for selecting the best candidates for each seat on the board.

A nomination committee includes a chair – the person responsible for overseeing and managing the committee and its decisions. The role of the chair's been traditionally held by the company's chairman. [146]

Roles of nomination committee.

The role of the committee is to assist the board with overseeing;

a) The appropriate composition of the board

b) Succession planning

c) The process for nominating, electing and appointing members to the board

[146] https://corporatefinanceinstitute.com/resources/esg/nomination-committee/

d) The basis for re-election of board members

FUNCTION OF THE COMMITTEE

In order for the committee to achieve its roles, it performs the following functions;

a) Establishing of a formal and transparent process for nomination, election and appointment of board members;

b) Considering the collective knowledge, skills and experience required by the board

c) Considering the suitable size of the board

d) Considering the diversity of the board

e) Considering whether the candidate meets the fit and proper criteria;

f) Conducting independent reference, qualification, criminal and background checks.

g) Recommend candidate to the board for consideration.

h) Ensure that inexperienced board members are developed through training

i) Oversea the annual performance assessment of the board

j) Ensuring that appropriate succession plans

## CRITERIA FOR SELECTING CHAIRMAN

The chairman of nomination committee is the person responsible for overseeing and managing the committee and its decisions.

The role of the chairs been traditionally held by the company's chairman, but there is an increasing reliance on:

1. Non -executive directors.

2. Senior independent directors.

## NON –EXECUTIVE DIRECTORS

Non-executive directors are not involved in the day-to-day running of the business. They are not employees of the company.[147] Their role is to challenge and develop strategy, scrutinize the board`s performance, manage financial controls and risk, determine remuneration, and appoint or remove executive directors if and when there is a need to do so.

Current good practice recommends that most directors on listed company boards be independent non-executive directors.

## PROCESS OF SELECTION

1. Consideration of the resume

2. Interview

3. Recommendation to the full board.

4. Appointment

## ATTRIBUTES OF NON-EXECUTIVE DIRECTORS.

Non-executive directors are not expected to have the same level of detailed operational knowledge about their organization as executive directors however.

The Code of Corporate Governance in companies Act provides those non-executive directors should have the skill and experience to bring to bear on;

a) Strategy

b) Performance

c) Standards of conduct; and

d) Resources

Non-executive directors play critical role and they include as follow;

1. Strategic direction

[147] https://corporatefinanceinstitute.com/resources/esg/nomination-committee/

Have a clearer or wider view of external factors affecting the company and its business environment. They also provide a creative and informed contribution and to act as a constructive critic in looking at the objectives and plans devised by the chief executive and the executive team

2. Monitoring performance

Responsible for monitoring the performance of executive management, especially with regard to the progress made towards achieving the determined company strategy and objectives

3. Risk

Non-executive directors should satisfy themselves on the integrity of financial information and those financial controls and systems of risk management are robust and defensible

4. Remuneration

Responsible for determining the appropriate levels of remuneration of executive directors. In large companies this is carried out by a remuneration committee, the objective of which is to ensure there is an independent process for setting the remuneration of executive directors.

5. Communication

Help connect the business and board with networks of potentially useful people and organizations. In some cases, an NED will be called upon to represent the company externally

6. Audit

Ensure that the company accounts properly to its shareholders by presenting a true and fair reflection of its actions and financial performance and that the necessary internal control systems are put into place and monitored regularly and rigorously.

## EXECUTIVE DIRECTORS

Executive directors are responsible for the day-to-day management of the company working alongside the other board members. In smaller companies, the directors and shareholders may be the same people, nut the roles are very distinct.

An executive director must have an intimate knowledge of the workings of the company. They are entrusted with ensuring that the information laid before the board by management is an accurate reflection of their understanding of the affairs of the company.

Suffice to state executive directors need to strike a balance between management of the company and their fiduciary and independent state of mind required when serving on the board.

**Executive directors perform the following roles;**

1) Lead the executive Committee

2) Develop and recommend the group strategy and budget to the board for approval and are responsible for executing the strategy once agreed by the board

3) Provide assurance to the board in relation to overall performance and risk management

4) Maintain an effective framework of internal control and risk management

5) Ensure that appropriate consideration is given to the group`s responsibilities to all stakeholders, including its shareholders, customers and colleagues.

6) Meet with major institutional shareholders

7) Set the culture of the organization, ensuring that this aligns with the company`s purpose, values and strategy.

## BOARD RELATIONSHIP WITH SHAREHOLDERS AND STAKEHOLDERS.

1. THE RELATIONSHIP OF THE BOARD WITH THE STAKEHOLDERS AND SHAREHOLDERS OF THE COMPANY.

2. PROTECTIONS FOR MINORITY SHAREHOLDERS.

Corporate Governance was ably defined by Sir Adrian Cadbury in the Cadbury committee report as the system by which companies are directed and controlled.

The Capital Markets Authority (Corporate Governance) Guidelines define Corporate Governance as the process and structure used to direct and manage business affairs of the company towards enhancing prosperity and corporate accounting with the objective of protecting and promoting shareholder's rights, realizing shareholders long term value while taking into account interests of stakeholders.

There is a demand by Society, that businesses should be well governed. This demand by society has also extended to other stakeholders who believe that the company should not only look at profit maximization but are being urged to consider the needs of society at large and of all "affected stakeholders", in addition to the requirements of their shareholders. Shareholder value is important but we have finally come to realize that it is connected to the value companies create for their customers, suppliers, employees and communities, viz. their stakeholders. Shareholders are stakeholders as well. And, how a company engages with customers, suppliers, etc. determines, in large part, both stakeholder and shareholder value.

The Boards (Board of directors of a company) are increasingly aware of the need to maintain their company's social licence in relation to shifting societal expectations. Companies face increasing scrutiny of their social and environmental performance from investors, consumers, communities, workers and governments. (stakeholders).

## RELATIONSHIP BETWEEN THE BOARD AND ITS STAKEHOLDERS

The nature of the relationship or the connection between board members and affected stakeholders is fundamentally between those ultimately responsible for a company's actions and those most directly affected by them. It is between the two people at either end of a chain of impacts: those who bear the responsibility for the impacts of those acts, and those whose rights are affected by those acts.

A corporate board has the ultimate responsibility for the actions of a company. The standards that the United Nations (UN), the Organization for Economic Co-operation and Development (OECD) and many governments have developed call on companies to prioritize their "affected stakeholders" – that is, those upon whom their business operations, products and services have the greatest impact

A corporate board is responsible for stewarding a company's strategy, providing oversight of executive management and ensuring that the company delivers for shareholders and relate with all other stakeholders in a manner to ensure that companies maximize long-term value for all stakeholders

Boards today relate to their stakeholders through Stakeholder capitalism; A form of capitalism in which companies seek long-term value creation by taking into account the needs of all their stakeholders, and society at large. This builds on earlier ideas such as "shared value" or even "corporate social responsibility" (CSR), but unlike these earlier terms, stakeholder capitalism implies a social contract between business and society. This is mainly due to changing societal expectations, as well as shifting consumer, shareholder and public expectations of responsible business and corporate citizenship.

Stakeholders[148] refer to all those who may be significantly affected by a company's operations, products, services and supply chains. A stakeholder is any person or group that has an interest in the outcomes of an organization's actions. Stakeholders include employees, customers, shareholders, suppliers, communities, and governments. Different stakeholders have different priorities, and companies often have to make compromises to please as many stakeholders as possible.

Those affected by a company and those responsible for the company are often separated by many steps. Affected stakeholders can feel distant from the boardroom, and boards are often a remote concept for those affected the

[148] World Economic Forum, "What Is Stakeholder Capitalism?", 22 January 2021: https://www.weforum.org/agenda/2021/01/klaus-schwab-on-what-is-stakeholder-capitalism-history-relevance/.

most by the company's actions. The relationship is mediated by a range of mechanisms a company puts in place to manage its interactions with affected stakeholders, examples of which are set out below:

- Board Diversity; Boards need a diverse set of directors with the skills and insights essential to understand social and environmental issues from the perspective of others. Ideally, the board itself should have awareness of the lived experience of those most vulnerable to adverse impacts associated with the company's activities.

- Communication with stakeholders; such as introducing stakeholder councils and consumer panels, Collective Bargaining arrangements that ensure there is a smooth relationship with employees. Boards have oversight of panels specifically created to hear the views of affected stakeholders. These might be: community representatives in relation to a specific activity such as infrastructure, energy or mining; consumer panels in relation to specific products; or worker representation in relation to workplaces and supply chains.

- Having the right Board structure; for addressing stakeholder (the community) concerns such Environment, Social and Governance (ESG) issues, including their roles and responsibilities with respect to human rights. Some companies have ESG committees; some add ESG oversight to existing committees; some address ESG questions in plenary sessions. The key is undertaking ESG-related actions comprehensively, with the right level of attention and with the necessary expertise.

- Other mechanisms of this kind include: Human rights defender policies and procedures – Human rights due diligence reports – Grievance mechanisms – Whistle-blower mechanisms and protections – Site visits – Enterprise risk register – Community engagement procedures – Customer and consumer feedback processes – Diversity and equal opportunities systems – Disclosure and reporting framework.

## RELATIONSHIP OF THE BOARD WITH SHAREHOLDERS

A shareholder is often described as being an 'owner' of the corporation in which they invest. A shareholder or stockholder can be a person, company, or organization that holds stock in a given company.

In Matthew Rukikaire V Incafex (U) ltd (SCCA no.3 of 2015) it was stated that when a person either individual or corporate is allotted shares subsequent to the formation of the company, that person becomes a 'shareholder', 'member' or 'owner'. Further that the process of becoming a shareholder is a two-step one, involving first a contract of allotment and then registration of the member. Citing Lord Templeman in National Westminster or Bank Plc vs. IRC (1995) A.C111 at 126 "allotment does not make a person a member of the company. Entry onto the register is also needed. Lord Templeman further stated that an applicant (for shares) is neither a member nor a shareholder while his rights rest in contract until the issue of the shares has been completed by registration.

It should be noted that shareholders are also stakeholders of a company and are affected by actions or in-actions of the Board (company stewardship) and a director of a company can be a shareholder as well.

The relationship between the Board and the Shareholders is essentially one between Ownership and Control.

From the board member's point of view, the shareholder has power and influence that exceeds their position – getting a vote in the company's decision-making, goals, and future without actually getting their hands dirty in day-to-day operations. From the shareholder's perspective, board members can be obstructive, inflexible, and motivated by self-interest.

The board of directors is responsible for overseeing the affairs of the company and protecting the interests of the shareholders. Senior managers of the company are responsible for managing the day-to-day operations of the corporation. And the shareholders have powers to check the board ensure it doesn't act contrary to the interests of the company

## SHAREHOLDERS' ROLES

Shareholders are most interested in making a financial return on their investment. Shareholders typically receive dividends if the company does well and succeeds. -

- They are entitled to vote on certain company matters at an EGM or AGM and to be elected to a seat on the board of directors.
- A shareholder has responsibilities such as appointing the company's directors, deciding on director compensation, setting limits on directors' power, and monitoring and approving the company's financial statements.
- They hire or appoint directors to perform an oversight and management role over the company and have power to remove the directors by ordinary resolution.
- They have power to use special resolutions to alter the articles of association of the company Article 80 of Table A of the CA 2012

## ROLE OF THE BOARD

Corporations are run at the highest level by a group of senior managers referred to as the board of directors (BOD).

- The BOD is ultimately responsible for providing oversight and strategic direction as well as overall supervision of the organization at its highest managerial level.
- From an operational standpoint, the practical day-to-day management of a company comprises of a team of several mid-level managers, who are responsible for providing leadership to various departments in the company. Such managers may often have different functional roles in a business organization.

- The primary roles of any management group involve setting the objectives of the company; organizing operations; hiring, leading, and motivating employees; and overseeing operations to ensure that company goals are continually being met.
- They enjoy wide range of management powers without intervention by shareholders provided they act within their powers, they may take decisions against the wishes of the majority of shareholders In John Shaw & Sons (Salford) Ltd v Shaw (1935): it was held that the powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors.

However, executive power will revert to the members in general meeting (shareholders) where, for example, the board is incapable of acting as such, or has fallen below the required minimum number, or has become deadlocked. In the absence of an effective board the general meeting has a residual authority to use the company's powers (Barron v Potter (1914)

The code of Corporate Governance under Table F of the companies Act of Uganda 2012 provides for how the Board should relate with shareholders.

Regulation 20 provides that the board should ensure there is Dialogue with institutional investors by constructive engagement which will assist in understanding objectives, Institutional investors should take all relevant factors into account, Notices of general meetings shall explain the effect of all items of special business and reasonable time shall be allowed for discussion at general meetings and that the use of a poll at general meetings shall be considered for contentious issues, and the results of decisions shall be published.

They further relate through regular communication between the Board and shareholders to build a consensus on the company's direction and highlight areas of alignment. Under Regulation 21 of Table F, the Board is to ensure it communicates, accounts and issues reports to the shareholders relating to management of affairs of the company. Therefore, ensuring a harmonious relationship between the Board and Shareholders is essential for the smooth running and ensuring success of a corporation.

## PROTECTION OF MINORITY SHAREHOLDERS

Minority shareholders are those who hold less than 51% of the shares in a corporation. They are shareholders of a corporation who do not own enough stock to control the business

The companies Act of Uganda 2012 provides all shareholders including minority shareholders depending on rights or limitations on their shares, generally they have at least the following rights:

Right to vote on major decisions and election of directors; Right to call, participate in meetings and notice of those meetings (Section 139 of the CA 2012); Right to receive dividends; and Right to inspect company records that are relevant to the shareholder's interests.

However, corporations are pervaded by the principle of majority rule (those who hold more than 50 percent of shareholding in company wield a lot of power and often get to decide on how the company is run) Majority shareholders have significant authority over how a company operates. They can make decisions regarding mergers and acquisitions, elect corporate officers, and make other important decisions.

Minority shareholders, on the other hand, have relatively little power. If they hold voting shares they can cast their vote, but unless they pool with enough other minority voters to overrule the majority shareholder(s), they cannot exercise their will against the wishes of the majority stakeholder.

This can lead to majority shareholders breaching their fiduciary duties or oppressing the minority. Shareholder oppression is conduct prejudicial to the interests of a shareholder. There are no hard and fast rules on what constitutes prejudicial conduct but the courts have provided guidance.

In the case of Alfred Byaruhanga Muhumuza & Another V. Uni Oil (U) Ltd: High Court Company Cause No.14 of 2016 held that;

"To constitute unfair prejudice, the value of the quality of the shareholder's interest that is his/her shares in the company limited by shares must be adversely affected."

Further in the case of Kigongo V Mosa Courts-Apartments Ltd Company Cause No. 01 of 2015, it was stated that

"The conduct must be prejudicial in the sense of causing prejudice to the relevant interests of members of the company i.e. shareholders and;

It must be unfair" the test for fairness is if a hypothetical reasonable standard would regard it to be unfair, and examples include:

1) Exclusion from management in circumstances where there is a (legitimate) expectation of participation.

2) The diversion of the business to another company in which the majority shareholders hold interest.

3) The awarding of the majority shareholder to himself excessive financial benefits.

4) Abuse of powers and breaches of the Articles of Association.

5) Repeated failures to hold Annual General Meetings.

6) Delaying accounts and depriving members of their right to know the state of company affairs.

Other ways include Breaching contracts governing the operation of the corporation; Voting unreasonable compensation for themselves; Making loans to the company with high interest rates; Using corporate funds for the personal benefit of majority shareholders; or Making corporate decisions that personally benefit majority shareholders.

The majority shareholder may engage in oppressive tactics to freeze out a minority shareholder. Examples include:

Refusing to pay dividends; Treating majority shareholders more favorably than minority shareholders; Preventing minority shareholders from exercising their rights to vote or participate in meetings; Breaching provisions of the shareholder agreement; Restricting access to records; and Terminating employment or limiting employment benefits in a way that disproportionately affects the shareholder's interests as compared to other shareholders.

If the majority shareholder violates minority shareholder rights or breaches their fiduciary duty, the minority may be entitled to legal remedies. Good corporate governance envisages equality between and among shareholders because companies should be seen as avenues of investment and not as avenues of power-play and exploitation

The protection from shareholder oppression is founded in Sections 247 and 248 of the Companies Act. In the recent decision of the Court of Appeal, Kigongo Olive, Uganda National Chamber of Commerce and Others Vs Uganda National Registration Bureau CACA No. 236 of 2017, Justice Christopher Madrama explained the distinction between the two provisions. In this case, the High court had allowed the addition of the Registrar of companies as a party to a suit brought under Section 248 of the Companies Act.

The honourable Judge disagreed and set aside the decision of the High Court on the grounds that Section 247 of the Companies Act gives the oppressed member the option to petition the registrar of companies for redress including investigation of the affairs of the company. The registrar is also empowered to petition court for redress on behalf of the aggrieved parties where he deems fit. The Judge noted that by virtue of this role the registrar of companies holds a quasi-judicial position and is, therefore, an option for an oppressed member. On the other hand, Section 248 of the Companies Act gives a member the option to directly seek redress from court in the event of any prejudicial conduct.

**Some of the protections in detail:**

Petition to the registrar

Minority shareholders may apply to the registrar of companies to investigate the affairs of company.[149]

Unfair prejudice claim

Section 247 and 248 of the CA2012

The minority shareholders may bring an action against majority shareholders or directors for actions that are:

[149] Section 173 (1)(a) of the companies act 2012

Fraudulent, illegal, or willfully unfair, prejudicial and oppressive to the minority shareholder or the corporation.

Unfair prejudice arises where the affairs of a company prejudice the members generally or a specific group and is designed to protect minority shareholders. If the shareholders feel they have been unfairly treated, the minority shareholders can bring an unfair prejudice claim seeking relief against the acts of the controlling directors/shareholders of the company.

A member may petition the registrar under Section 247 as an alternative remedy to winding up due to oppression or Generally, any member or personal representative may petition the court under Section 248 on the grounds that the affairs of the company are being conducted in a manner unfairly prejudicial to the interests of its members generally, or of some parts of its members, including the petitioner himself. The court must be among other things, be satisfied that the petition is well founded. (Irene Kulabako V Moringa Company cause no.21 of 2009) The brief facts of the case are that Moringa Ltd was incorporated by David case, Charles Case and Irene Kulabako holding 50%, 40% and 10% of the company's shares respectively. In this case, Irene complained that the other shareholders had:

a) Transferred company property (land in Bugolobi) to a company owned by the majority shareholders (Muwafu Holdings Ltd).

b) Paid out colossal sums of money as rent for the company's premises yet the said premises actually belonged to the company.

c) The other shareholders had also forced her to sell her shares at a low price.

The court found that indeed she had been oppressed as the minority shareholder and the defendants were ordered to buy her out at the market value of the company.

**Derivative action**

The minority have a right to maintain a derivative action to sue for damage to the company. If someone has harmed the company, such as another shareholder misappropriating company asset, even a minority shareholder can act to protect the corporation's interests by filing a derivative lawsuit on behalf of the corporation. In this case, the "derivative action" is brought on behalf of the corporation instead of individually because the shareholder has no personal right of action against the party who has indirectly injured the shareholder through his or her damage to the corporation. Such claims can only be pursued if certain requirements are fulfilled, and the court has wide discretion to examine the merits of the claim and to determine whether or not a derivative claim is appropriate in the given circumstances.

A distinction must, however, be made between minority oppression claims which directly relate to the rights of the members from derivative actions which relate to prejudicial and detrimental acts and/or omissions against the

company. It must be noted though that oftentimes a derivative action can be combined with a minority oppression action.

In the case of Alfred Byaruhanga Muhumuza & Another Vs Uni Oil (U) Ltd: [supra] Justice Musa Sekaana found that;

"The directors of the company owed fiduciary duties to the company and the company would be the best petitioner but this is not possible so the petitioner (a minority shareholder) was at liberty to bring this action against the company for his benefit as a minority shareholder and also the company in case of any alleged wrongdoing against the company.

If a minority shareholder prevails on an oppression claim, the court may provide remedies such as:

Dissolving the business and/or liquidating assets; Revising or canceling provisions of the corporation's articles or other agreements; Ordering majority shareholders to take certain actions; Issuing an injunction to prevent majority shareholders from moving forward with harmful actions; Ordering majority shareholders to purchase minority shares for fair value; and/or awarding damages.

### Practical Options available to an oppressed shareholder.

Mitigate your loss by acting early enough and being proactive in relation to the affairs of the company in so far as its possible, don't just sit and watch, register your complaint with the directors of the company, Request for a meeting to air out your grievances and forge a way forward, rally and solicit for support from other affected members, involve the majority shareholders and make your grievances known,you may also ask the majority shareholder/company to buy you out, negotiate for a shareholder's agreement which strengthens your interests on a contractual basis and also clearly sets out the expectations of each member, sell your shares to another third party taking into account preemption rights, if you fail to internally get redress petition the registrar of companies who may conduct further investigation, if you are a shareholder in a listed company you could engage the Capital Markets Authority and alternatively, as a last option petition court for redress.

An oppressed shareholder has protections under the law. However, before escalating the matter to external parties and authorities, exhaust the internally available options.

## THE ROLE OF STAKEHOLDERS IN CORPORATE GOVERNANCE

Stakeholders are the people that build the community... that inspire the community... that serve the community, this principle is to the effect that the corporate governance framework should recognize the rights of stakeholders established by law or through mutual agreements and encourage active cooperation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises. This co-operation

encourages the various stakeholders to undertake economically optimal levels of investment in firm specific human and physical capital.

Stakeholders include investors, employees, creditors, customers and suppliers, among others. Teamwork that embodies contributions from a range of different resource providers leads to competitiveness and ultimate success of the business.

The principle also supports stakeholders' access to information on a timely and regular basis and their rights to obtain redress for violations of their rights. In a nutshell, the principle advocates for the following;

A. The rights of stakeholders that are established by law or through mutual agreements are to be respected. These laws include labor, business, commercial and insolvency laws. However, if there are no laws providing for these rights, they can be provided for by contractual relations where the firm makes additional commitments to stakeholders.

B. Where stakeholder interests are protected by law; stakeholders should have the opportunity to obtain effective redress for violation of their rights. The law should not merely provide for the rights but also a transparent process through which the stakeholders can communicate and obtain redress for the violation of their rights. The process must not impede the ability of the stakeholders to do so.

C. Performance-enhancing mechanisms for employee participation should be permitted to develop. Employee participation is so important to the firm because it increases employees' readiness to invest specific skills into the firm. Examples of mechanisms for employee participation include; employee representation on boards and governance processes such as works councils that consider employee viewpoints in certain key decisions. On the other hand, there is performance enhancing mechanisms such as employee stock ownership plans, performance reward mechanisms (compensation, benefits, recognition and appreciation) or other profit sharing mechanisms.

D. Where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient and reliable information on a timely and regular basis. It is important that where the laws and practice of corporate governance systems provide for participation by stakeholders, the stakeholders have access to information necessary to fulfill their responsibilities.

E. Stakeholder, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this. It is important for a firm to put in place procedures that enable stakeholders especially employees to complain either personally or through their representative about illegal unethical practices or behavior by corporate officers because such practices not only violate the rights of stakeholders but also detriment of the company and its shareholders in terms of reputation effects and an increasing risk of future financial liabilities.

There are different mechanisms that can be used to enable employees convey their concerns to the company and these include; giving the individuals and representative bodies confidential direct access to someone independent

on the board, establishing confidential phone and e-mail facilities to receive allegations. However, it is important that the company refrains from discriminatory or disciplinary actions against such employees or bodies.

F. The corporate governance framework should be complemented by an effective, efficient insolvency framework and by effective enforcement of creditor rights. The framework for corporate insolvency must make provision for a system where a duty is imposed on directors to act in the interests of creditors when the company is nearing insolvency. Other mechanisms include encouraging the debtor to reveal timely information about the company's difficulties so that a consensual solution can be found between the debtor and its creditor.

## DIALOGUE AND COMMUNICATION OF MAJOR STAKEHOLDRS

The stakeholders of a company are persons or groups of persons or organizations that have a direct or indirect stake in the company, because they can be affected by the company's actions, objectives and policies, and they include shareholders, creditors, consumers, and employees, depositors of banks and microfinance institutions, policy holders of insurance companies, the government and the community at large.

### The Stakeholder Debate

At the very core of the debate is whether companies exist only to make profits for shareholders or whether they exist to serve a wider spectrum of stakeholders. Proponents of the former argue among others, that 'consideration of any factors other than profit maximizing either results in a deliberate sacrifice of profits or muddies the process.

On the other hand, in support of recognizing a duty to serve a wider spectrum of stakeholders it is argued that companies would be likely to achieve sustainable success by working in partnership with suppliers, customers, employees, and communities. Following this rationale, it has been argued that there ought to be a pursuit of shareholder values while bearing in mind the rights and needs of players other than shareholders. Indeed, the reality is that, there are other stakeholders who are greatly impacted by the policies and business of the company and as such cannot be altogether ignored by the company.

The following are the different examples of stakeholders

### Shareholders

Shareholders are individuals, groups, or organizations that own one or more shares in a company, and in whose name the share certificate is issued. Shareholders have a key role to play in driving long-term company performance and economic prosperity and may influence the policy decisions of the management of the company by firstly, participation in the company's governance through the annual general meetings, exercising their powers to appoint and remove directors188, and auditors,189 threatening to change the management of the company through takeovers especially where they are not performing well, exercising their powers to alter the memorandum and articles of association as provided in Section 16 of the Companies Act, 2012, and convening meetings so as to deal with matters of concern in the management of the company as provided in Section

Shareholders may also tip off the press on corporate governance violations, influence the passing of legislation affecting the directors' management, which may be directly through lobbying191 or indirectly where active participation in the company's corporate governance influences the passing of specific legislation. They may also engage in litigation where necessary.

**Creditors**

Creditors are persons whom a company owes money and the company is dependent on them for capital. Creditors may use this dependence to incorporate in the loan agreements, conditions or provisions that promote good corporate governance. They may also permit only partial fund disbursements in order to prevent the management of the company from misappropriating the company's resources to the detriment of the lenders.

**Employees**

An employee is a person who enters into a contract of service or an apprenticeship contract, including a person who is employed by the government of Uganda, a local government or a parastatal organization, but does not include a member of the Uganda Peoples Defense Forces. Employees may influence board decisions or Further, employees may influence the decisions or policies of the company's management through industrial actions, like strikes, and influencing the company's policy through exercising their rights where they own shares therein, including proposing traditional corporate governance measures through procedures similar to shareholder complaints.

**Consumers**

Consumers are important to companies because they ensure a stable and growing revenue base for the company, when they purchase the company's products or services. This is vital for shareholder wealth creation and because of this dependence, consumers may influence the management's decisions. Where consumers are disgruntled the company may not have a stable revenue base especially when customers do not buy the company's products.

**Suppliers**

Suppliers are persons who provide companies with goods or services which are needed or useful to the companies in order to enable the company to achieve its goals in the interests of the consumers. As has been discussed above, organizations seek to satisfy the needs of their customers because the customers are key to the company's success.

Suppliers play a crucial role in this regard because they improve and supply what is required by the organization to satisfy its customers.

The community is a body of persons living in the same locality as the company. As has been pointed out, communities can be affected by companies when the company's activities affect the environment for example through noise pollution, pollution of water sources such as wells, and destruction of trees and general natural vegetation cover. There are several ways in which the community can influence the policies of companies. First, communities may lobby their parliamentary representatives to address issues of public interest arising from the companies' activities.

**The Government**

The government refers to the body of persons governing a state254, and is typically comprised of the executive, judiciary and the legislature. The government has an interest in good corporate governance because it is responsible for the welfare of its citizens, and the stability of the state in general, and poor corporate governance has the potential to affect the well-being to citizens.

In conclusion, stakeholders play a critical role in monitoring the management of the company, and from the above discussion it is clear that the management's policies and actions have a direct impact on the stakeholders' interests in the company. It is therefore in the best interests of the stakeholders to be vigilant in monitoring the management, and for the companies' management to strike a balance between the rights of all of these stakeholders. Thus, stakeholders ought to be sensitized, lest they 'perish because of lack of knowledge.'

## CORPORATE SOCIAL RESPONSIBILITY

In 2016, Royal Van Zanten, a Dutch flower-exporting firm based in Uganda, came under fire for endangering the lives of its workers. The Uganda Horticultural Industrial Services Provider and Allied Workers Union (UHISPAWU) discovered that the firm was exposing its workers to dangerous chemicals, by forcing them to work moments after fumigation[150]. A total of 122 local workers were reported to have suffered toxic effects at the farm. Undoubtedly, the reputation of the firm has since taken a hit.

A company is as good as its commitment to social responsibility. Historically, the notion to protect, respect and promote human rights was the sole responsibility of states and business enterprises were rarely concerned or accountable for the protection and respect of human rights[151]. Today, through corporate citizenship's facet Corporate Social Responsibility, these enterprises are required to take into account more than just profit maximization, to ensure the states in which these enterprises are established do not suffer negative impact of such

[150] The Independent, "Poison at Dutch Flower Farm" 5 December 2015, available at https://www.independent.co.ug/poison-dutch-flower-farm/ [Accessed 7 August 2022]

[151] UCCA, "Business and Human Rights in Uganda", A Resource Handbook on the Policy and Legal Framework on Business and Human Rights in Uganda", September 2018. p.2

establishments. Corporate Social Responsibility is advantageous in as far as it builds a positive reputation, enhances organizational growth, staff retention and financial performance.

## CORPORATE CITIZENSHIP (CC)

Corporate citizenship involves the social responsibility of businesses and the extent to which they meet legal, ethical, and economic responsibilities, as established by shareholders[152]. In 2002, thirty-four chief executives of the world's largest multinational corporations signed a document during the World Economic Forum (WEF) entitled, 'Global Corporate Citizenship: The Leadership Challenge for CEOs and Boards'.[153] The forum urged businesses to engage themselves in social investment, philanthropic programmes and public policy[154].

A good corporate citizen is expected to:[155]

a. Be profitable. Good corporate citizens earn enough money that their investors receive a strong return on their investments and that other stakeholders are assured of the continuity of the business and the flow of products, services, jobs, and other benefits provided by the company[156].

b. Obey the law. Good corporate citizens, like private individuals, are also expected to obey the law. Of particular concern to businesses wishing to be good corporate citizens are laws that are designed to govern their relationships with key stakeholders such as consumers, employees, the community, and the natural environment.

c. Engage in ethical behavior. The upright corporate citizen must go beyond mere compliance with the law. This is because, laws and regulations frequently reflect "minimums" that lawmakers can agree upon in the give-and-take of political maneuvering. Therefore, the laws may not be at a level or standard that is truly needed to protect various stakeholder groups. Related to this, laws are often not kept up to date; that is, they may not reflect the latest thinking, norms, or research that indicates the level or standard at which business should be operating to protect stakeholders.

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[152] Adam Hayes, "Corporate Citizenship" *Investopedia* Available at https://www.investopedia.com/terms/c/corporatecitizenship.asp [Accessed 7 August 2022]

[153]Mark Anthony Camileri, "Global Corporate Citizenship" Available at https://www.researchgate.net/publication/351626323_Global_Corporate_Citizenship [Accessed 7 August 2022]

[154]Camilleri, M. A. "Creating shared value through strategic CSR in tourism." (2012). University of Edinburgh. https://www.era.lib.ed.ac.uk/handle/1842/6564 [Accessed 7 August 2022]

[155] Archie B. Carrol, The four Faces of Corporate Citizenship, Academia, Available at https://www.researchgate.net/publication/262906623 [Accessed 7 August 2022]

[156] ibid

d. Give back through philanthropy. Robert Payton, an expert on philanthropy, argues that it is defined as three related activities: voluntary service, voluntary association, and voluntary giving for public purposes.[157] The purposes of this giving were set out by Goizueta who noted that business should give back to society because business has a stake in civil discourse, a corporate culture of incivility and intolerance thwarts the development of a company's most important asset, its people. Businesses should serve as an example of how people are treated.[158]

### RECOMMENDED PRACTICES

The King IV Code provides for the recommended practices on corporate citizenship. It states that;

i. It should include compliance with the Constitution, law, leading standards and adherence to its own codes of conduct and policies.

ii. It should ensure that its core purposes, values and conduct are congruent with it being a responsible corporate citizen.

iii. It should oversee and monitor how the consequence and outputs affects its status as a responsible corporate citizen. This is as regards the environment, safety, public health, human rights and the economy.

Corporate citizenship is undertaken under various broad concepts such as Corporate Social responsibility as discussed below;

## DEFINITION OF CORPORATE SOCIAL RESPONSIBILITY (CSR)

World Business Council for Sustainable Development (1999):

"The continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".

"CSR is the commitment of business to contribute to sustainable economic development-working with employees, their families, the local community and society at large to improve the quality of life in ways that are both good for business and good for development" (World Bank, 2008).

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[157]Robert L. Payton, Philanthropy: Voluntary Action for the Public Good (New York: Macmillan, 1988), 32. 103

[158] Chris Roush, "Goizueta Preaches Civility in Loyola Graduation Speech," Atlanta Journal/Atlanta Constitution, 11 May 1997, C4.

"CSR is a commitment to improve community well-being through discretionary business practices and contributions of corporate resources" (Kotler & Lee, 2005).

"Social responsibility of business is to encompass the economic, legal, ethical and discretionary expectations that society has of organizations at a given point in time" (Carroll, 1979).

CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives ("Triple-Bottom-Line- Approach)[159], while at the same time addressing the expectations of shareholders and stakeholders.[160]

The UN Guiding Principles on Business and Human Rights require a company to carry out due diligence in order to assess the potential impact of their activities. A corporation:

a. "should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

b. Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

c. Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."

CSR requires a two-fold approach; while focusing on the major aim; profit maximization, a corporation must keep in mind the interests of the other stakeholders, especially the community.

Stages of corporate social responsibility

Wayne Visser described the different stages of CSR, starting with the defensive stage (focusing on compliance to the international normative framework), followed by stages that he calls 'charitable', 'promotional' and 'strategic', with the most developed stage being 'transformative.'

**a. Defensive Stage.**

[159] The Triple Bottom Line (TBL) concept was introduced in 1987 in Brundtland Commission. It states that a company should be responsible for three features: Profit, People and Planet, that is economic, social and environmental responsibility. see Paulina Kseizak & Barbara Fischbach "Triple Bottom Line: The Pillars of CSR" Journal of Corporate Responsibility and Leadership, May 2018. p.99

[160]see United Nations Industrial Development Organisation https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr [Accessed 7 August 2022]

During this stage, all corporate sustainability and responsibility practices which are typically limited are undertaken only if and when it can be shown that shareholder value will be protected as a result. During this stage, a corporation will hardly set aside expenditure on activities such as employee volunteer programs, or even pollution control programs.

**b. Charitable Stage.**

This stage is practiced in the age of philanthropy. A company supports various social and environmental causes through donations and sponsorships, typically administered through a foundation aimed at empowering community groups. For example, the Madhvani Foundation scheme which is aimed at empowering talented scholars to obtain quality education for free (being sponsored).

**c. Promotional Stage.**

Basically carried out in the age of marketing. A corporation undertakes CSR as a public relations opportunity to enhance the brand, image and reputation of the company. An example is MTN Group in Uganda with the various public undertakings. These in turn improve its image, reputation and brand.

**d. Strategic Stage.**

A corporation will relate CSR activities to the Company's core business often through strict observance to the CSR statutes and implement social and environmental management systems which typically involve cycles of CSR policy development, goal and target setting, programme implementation, audit and reporting.

e. **Transformative Stage**.

A corporation undertaking this stage can be said to be in the age of responsibility. Usually focuses its activities on identifying and tackling the root causes of present day unsustainability and irresponsibility, typically revolutionalising their processes, products and services. Typically, a corporation will change its strategy to optimize the outcomes for the larger human and ecological system.

## CONTEXTUALIZING CSR IN UGANDA

Section 14(1) of the Companies Act[161], mandates public companies to adopt and incorporate the provisions of the code of corporate governance contained in Table F, at the time of registration of its articles. Under subsection (2) a private company may similarly adopt Table F.

Article 1(a) of Table F provides that the Board of Directors is accountable for the performance and affairs of the company, and in the performance of its duties is expected to act in good faith, with due diligence and care and in the interests of the company.

[161] 2012

Further, Article 11(7) mandates directors to receive on a regular basis, reports on risk management for risks relating to, *inter alia,* physical and operational, human resources, technology, business continuity, compliance and disaster recovery plans.

According to David Katamba and Cedric Marvin Nkiko, there are currently five facets of CSR in Uganda[162]. These are workplace, environment, marketplace, economic and society/community; with community being the dominant facet.

**Environmental Concerns**

Article 11(5)(d), Table F of the Companies Act, 2012 requires directors to adopt measures to ensure business is sustainable. Sustainable development is an environmental law concept requiring the optimal use of the world's resources to protect and preserve the environment[163]. In the shrimp turtle case, the WTO acknowledged that sustainable development has been generally accepted as integrating economic and social development and environmental protection[164].

The African Commission on Human and People's Rights has been instructive in this regard;

"Government compliance with the spirit of Article 16 and Article 24 of the African Charter may also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities."

In Uganda, Section 111(3) of the National Environment Act No.5/2019 requires any developer to use and integrate environmental and social impact assessment, human rights risk assessment and environmental risk assessment in the project design. requires a developer to take all necessary measures to obtain the views of people that might be affected by the project.

In the case of Advocates Coalition for Development and Environment v Attorney General and NEMA (Miscellaneous Cause 0100 of 2004), Court found that the absence of an environmental impact assessment or

[162]David Katamba and Cedric Marvin Nkiko (2016) "The Landscape of CSR in Uganda: Its Past, Present and Future" p.155

[163]1992 Rio Declaration on Environment and Development, Principle 4, Report of the United Nations Conference on Environment and Development, UN Doc A/CONF 151/6/Rev;1

[164] United States-Import Prohibition of Certain Shrimp and Shrimp Products WTO Cases No 58 and 61, 6th November 1998.

project brief by Kakira Sugar Works before being granted a 50 year forest permit in Butamira Forest Reserve was in violation of public trust.

**Workplace Concerns**

CSR activities are characterized by benefit for both the company and the community around it. For example, in 2011, a local development partner-TechnoServe, with funding from Bill and Melinda Gates Foundation and Century Bottling Company began engaging farmers in eastern Uganda in fruit growing[165].The community took on the initiative and were able to generate income to take their children to school. Century Bottling Company was in turn, able to get raw materials to make Minute Maid.

This may not always be the case. A study conducted by the Uganda Consortium for Corporate Responsibility found that Kakira Sugar Works, engaged children in heavy, potentially harmful labour in their sugarcane plantations.[166]

**Community Concerns**

This facet is intertwined with workplace concerns, because company labour often comes from the community. It may however also involve generally engaging in charitable initiatives to enhance development in the community.

Strategic philanthropic activities are the most common CSR practices in Uganda. The majority of these practices take the form of cash donations to and sponsorships of local community institutions such as schools, hospitals, cultural organizations, and leisure and sports initiatives. For example, in 2018, Airtel launched a network site in Palabek refugee settlement, and held a two day health camp to provide health services[167]. Uganda Nile Breweries worked with an NGO, ECH, to provide HIV/AIDS education, voluntary counselling and testing (VCT) to 10,260 people amongst their farmers, truck drivers, and bar workers.[168]

**Market place Concerns**

Marketplace concerns aim at addressing best practices to be undertaken by companies in relationships with customers, suppliers and the government. It also addresses the management of the impact of the company products, and actively discourages product misuse by customers. For example, Uganda Breweries won the award

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[165] Daily Monitor, "Bulambuli Farmers find Benefits in Growing Fruits", 6 January 2021, available at https://www.monitor.co.ug/uganda/magazines/farming/bulambuli-farmers-find-benefits-in-growing-fruits-1527484 [Accessed 7 August 2022]

[166] Uganda Consortium on Corporate Accountability, "Child Labour in Agri-Business: A Case Study of Select Out-Grower Communities and Companies in Uganda's Sugar Industry" April 2020. p.23

[167] The Independent "Airtel Connects Palabek Refugee Settlement" 27 October 2018 available at https://www.independent.co.ug/this-week-airtel-connects-palabek-refugee-settlement/ [Accessed 7 August 2022]

[168] https://nilebreweries.com/sustainable-development/?age-verified=2745533188 [Accessed 7 August 2022]

for Best Concern for Consumer Issues in 2016, by the Uganda Manufacturers Association.[169]The company runs a robust campaign against drunk driving.

Similarly, the Constitutional Court dismissed a petition by British American Tobacco which challenged, among others, the requirement to place text and pictorial health warnings and messages on the packaging of cigarettes.[170] The Court found that this requirement was necessary to limit smoking and the impact of the same on human health and life. It also affirmed the right to a clean and healthy environment as sufficient to ban public smoking.

**Economic Responsibility**

Economic responsibility revolves around a firm ensuring all its financial decisions revolve around not just profit maximization but positively impacting the people around. The company may therefore allocate a percentage of its budget to Corporate Social Responsibility programs. A study conducted by David Katamba and others found that 90% of companies in Uganda allocated funds to financing their corporate social responsibility programs.[171]

CSR as a Social Contract

Social Contract gives the view that an organization has an obligation towards other parts of society in turn for its place in society. As per Jean-Jacques Rousseau in his 1762 book on Social Contract, he argued that individuals gave up certain rights in order for the government of the state to be able to manage for the greater good of all citizens.[172]

This can be related to CSR in the sense that corporations/ organizations believe that through their various activities under CSR, they are giving back to a society that they are indebted to. After all, with great power comes great responsibility and in relation to CSR, this is social responsibility

**CSR and the Ubuntu Principle**

The Ubuntu Principle is an ethic philosophy that focuses on people's allegiances and relations with each other.13To explain the principle further, Archbishop Desmond Tutu in 2008 states that[173];

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[169]https://www.ugandabreweries.com/news-room/red-card-wins-award-best-concern-consumer-issues-uganda-csr-awards [Accessed 7 August 2022]

[170] British American Tobacco Limited v Attorney General & Anor Constitutional Petition No 46 of 2016 p.43

[171] David Katamba*, et. al.* (2012) "Corporate Social Responsibility Management in Uganda. Lessons, Challenges and policy Implications" p.382

[172]David Crowther and Gules Aras, *Supra,* pg.10

[173]Available at www.ubuntu.thiyagraaj.com/Home/about-ubuntu/ubuntu-philosophy-meaning

*"One of the sayings in our country is Ubuntu- the essence of being human. Ubuntu speaks particularly about the fact that you can't exist as a human being in isolation. It speaks about our interconnectedness. You can't be human all by yourself, and when you have this quality- Ubuntu- you are known for your generosity."*

In relation to the above explanation on the Ubuntu Principle, it is safe to say that the Ubuntu principle is intertwined in Corporate Governance, particularly CSR wherein we see persons in business entities and abstract persons like companies coming to the realization that the they need the society in which they operate. This is why the corporations have an aspect of ethical considerations where they think about the impacts of their activities and policies on the public at large.

Many organizations are developing and thinking up new ways to be visible in society by leaving a positive impact. Examples of this are numerous in Uganda but a very popular one is the annual MTN marathon held at the end of each year wherein funds have been raised for cancer awareness and clean water provision. The Madhvani Group of Companies has a robust scholarship program that has seen many Ugandans achieve their academic dreams.

Corporations are slowly moving away from the entire capitalistic approach wherein they are viewed by society as money-grabbing entities that have no shred of ethical standing. Companies want to have a brand image where society sees their "softer" side.

## Principles of corporate social responsibility

Notwithstanding the fact that a company is operating in accordance with Carrolls's Pyramid, there are generally accepted principles which it must have that portray adoption of good CSR practices. These are the Principles of Corporate Social Responsibility.

**a) Sustainability:** Sustainability relates to the notion that corporations must use resources in such a way that they should never be depleted. This means that the Corporation must ensure that there are resources left for it to use in future or by the future generation. For example, a paper production company uses wood as raw materials. The principle of sustainability requires that such a company plants trees such that in future there are resources still existing to support the running of the company the future generation.

**b) Accountability:** It is undeniable that a corporation's actions affect the external environment and society in which it operates. Therefore, it is naturally accepted that such a corporation ought to assume responsibility for the effects of its actions. This requires that the corporation carries out impact assessments of its activities and report the findings to both the members of the corporation and publish the reports for the stakeholders affected. Therefore, CSR requires that such corporations remedy the wrongs they have carried out on the environment and the community in which they operate.

**c) Transparency:** Transparency runs at the forefront of Corporate Governance in general, and it is no different as regards its application to CSR. The Principle of Transparency portrays a notion that the company's activities,

whether positive or negative should be able to be ascertained from the corporations reporting mechanisms. This leaves it to the stakeholders to determine whether the corporation is practising good CSR.

**The Case for and against Corporate Social Responsibility**

From the inception of Corporate Governance Practices, there has been two warring parties namely those who push for adoption of CSR and those against it. Notwithstanding which party one sides with, it is imperative to note arguments for both parties as to come up with a neutral stand.

**Case for CSR**

Among the proponents of CSR, are scholars Balabanis, Phillips and Lyall (1998). They state that *"in the modern commercial era, companies and their managers are subjected to well publicised pressure to play an increasingly active role in the welfare of society.*[174]*"* This requires that they should be alive to their surroundings and improve the lives of the people in the community in which they operate.

i. The primary argument for CSR is that corporations are recognized as "legal persons" and that upon incorporation they receive as many rights and privileges as possible, close enough to those that accrue to actual persons. If corporations are to benefit from such legal existence, they should be expected to contribute to society, just like actual persons contribute.

ii. The other argument is that business should operate in such a way as to fulfil society's needs or expectations. Other than fulfilling personal goals like profit, the business serves society. Sometimes its continued existence depends on its acceptance by society. Therefore, corporations must be alive and receptive to what is happening in society and respond in some way.

iii. Without doubt, CSR generates a good image which attracts market and support and arguably, Corporate Virtue is good for business. Corporations must be concerned with the public image and the goodwill generated by responsible social actions carried out since in the long run, doing society good becomes profitable.

iv. Some social problems can become opportunities, or can lead to profitable ventures. For example, participation in abating the effects of pollution is core to CSR. However, it may result in the retrieval of materials that were formerly disposed of as waste, thereby generating more profits for the corporation.

**Case against CSR**

i. Notwithstanding the support for incorporation of CSR in activities of corporations, some scholars have publicly critiqued its adoption. The most notorious one is Milton Friedman, who is still quoted up to date. In

[174]Balabanis, Phillips and Lyall, "Corporate Responsibility and Economic Performance in the Top British Companies, (1998)

1970, he stated that *"there is one and only social responsibility of business, that is to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game. Which is to say, engages in open and free competition without deception or fraud."*[175]

ii. The other argument is that Social Responsibility is the role of governments following the principle of a Social Contract expounded by John Locke. It is argued that corporations should not be held responsible for providing funds and services for things that governments should be doing e.g. academic scholarships or social security mechanisms.

iii. The other argument is that Profit maximization is the primary purpose of doing business, and to have any other purpose is not socially responsible as it amounts to distortion of source allocation. This can have adverse effects on the economy in the long run.

iv. The public is also of the opinion that companies are using CSR as a mode of tax evasion; a free way of advertising that will not cost the business organisation any incomes in tax payments.

## UGANDAN COMPANIES PARTICIPATING IN CSR

A number of companies in Uganda[176] have embraced this aspect of CSR and these inter alia include;

**a) Roofings Group Limited**

This Group of companies fulfils all the legal requirements of labour. In addition, they offer other services to staff. That is, a workers' health facility with a standby ambulance, providing workers with well balanced meals, respecting the HIV/AIDS policy and conducting HIV/AIDS programs for staff. Lastly, the company periodically awards the best employees with trophies, cash prizes and iron sheets.

**b) Uganda Baati Limited (UBL)**

Established a Chandaria Medical Clinic and accordingly has strong CR component in which the company provides both free and subsidized health services to its employees and the surrounding communities of Tororo and Kampala Industrial area. The clinic provides services such as training of peer educators, screening of cervical and breast cancer for women as well as general medication.

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[175] Friedman. M, "The Social Responsibility of Business is to Increase its Profits" (13th September, 1970) *New York Times*

[176] Katamba, D., and Nkiko, C.M., (2016). The Landscape of Corporate Social Responsibility in Uganda: Its Past, Present and Future, in Stephen Vertigans, Samuel O. Idowu, René Schmidpeter (Eds), *Corporate Social Responsibility in Sub-Saharan Africa: Sustainable Development in its Embryonic Form*, Springer International Publishing, Zurich, Switzerland,

**c) Airtel Uganda Limited.**

This company has assisted rural schools under "**Esomero Lyaffe project**" to support various rural schools in construction of libraries, latrines, computer rooms, water harvesting tanks, classrooms and equipment. Beneficiaries from the project include Ndeeba Church of Uganda and St. Pontiano Kangulumira Secondary schools which are located in Kayunga District.

**d) SESACO**

This company carries out several activities aimed at improving the nutrition of mothers and children. For example, they provide farmers with high quality seeds and buys the produce from the farmers at a fair price. The company has also a skills development initiative where they train interns especially those studying food science and technology and thus have partnered with foreign organisations to provide skills. Every year, the company sends at least five (5) people including staff, suppliers and customers to go for training in nutrition and food processing to USA, Rwanda and Burundi.

**e) Nile Breweries Limited. (NBL)**

This company runs the "**Eagle Project**" which promotes sustainable growing of sorghum in Northern Uganda. The company uses strategic and transformative CSR because it was able to economically rehabilitate the people after the long civil war in the Northern Uganda. The company uses strategic and transformative CSR because it was able to economically rehabilitate the people after the long civil war in the Northern Uganda rather than giving donations. Through this kind of CSR, the company has a steady supply of sorghum (a raw material for the local beer- Eagle Brand) while the communities have a secured income.

## REDRESS MECHANISMS

In instances of violation, the United Nations Guiding Principles require that there should be remedial action. Guiding Principle 30 requires that grievance addressing forums be, among others, trustworthy and free from interference by parties, have no barriers to access, and that the parties should be aware of its procedures and steps taken when a complaint is forwarded.

The commonest forum for addressing CSR grievances is Court. Article 50 of the Constitution of the Republic of Uganda 1995 as amended, creates the right to apply to Court for redress when they contend that a fundamental right has been violated.

Corporate Social Responsibility is now requisite under the Companies Act 2012. The Board of Directors must at all times, ensure the business enterprise incorporates corporate social responsibility plans into its broader objectives. This in turn leverages growth of not just the corporation, but the society around it.

## RISK MANAGEMENT

Risk management is part of CG.

Risk refers to the possibility that something unexpected or not planned for will happen.

Risk governance in companies- a way in which directors authorize, optimize and monitor risk taking in an enterprise. It includes the skill, infrasture (i.e) organization structure, controls and information systems) and culture deployed as directors exercise their oversight. Good risk governance provides clearly defined accountability, authority and communication/reporting mechanisms.

Risk management is not easy, but it can be kept simple;

A simple framework to evaluate and take action:

- Establish objectives
- Identify risks and controls
- Assess risks and controls
- Monitor and report
- Communicate, learn, improve.
- Different risks are faced by each company and industry.
- The Board & management should ask themselves;
- What risks does the company face?
- How can these risks be measured
- What is the worst case scenario for the company for each of the risks?
- What is the company's risk appetite?
- What is the company's risk tolerance?
- What should the company do to manage the risk?
- Business risks v Governance risks
- Business risks include-
- Reputational risk
- Competition risk
- Business environment risk

- ❖ Liquidity risk
- ❖ Governance risks include-
- ❖ Structure- business models & policy frameworks
- ❖ Processes
- ❖ Information-financial performance & audit reporting
- ❖ People and culture- accountability, relationships etc.
- ❖ Identifying areas of threat to the business
- ❖ Categorizing Risk –
- ❖ Political or reputational risk
- ❖ Financial risk
- ❖ Service delivery or operational risk
- ❖ Peole/HR Risk
- ❖ Information/knowledge risk
- ❖ Strategic/policy risk
- ❖ Legal/compliance risk
- ❖ Technology risk
- ❖ Governance/organizational risk

## INTERNAL RISKS

- Human risks
- Death
- Owner
- Employee

- Illness
- Short term
- Long term
- Indefinite
- Theft and fraud
- Product and inventory theft
- Time sheet fraud
- Accounting and cash fraud
- Law morale, dissatisfaction
- Failure to perform
- Sabotage of system, equipment or customers
- Equipment and information Technology Risks
- Equipment breakdowns
- New equipment integration
- Worn older equipment
- Damage to vehicles
- Information technology downtime
- Lack of backup or recovery system
- Updates and repairs
- Power and connectivity (physical damage and outdated systems)
- Lack of administrative controls

## OTHER INTERNAL RISKS

- Physical plant repairs
- Breaks in lines crutilities

- Routine maintenance
- Incidents
- Work related injuries
- Damage to others property by employees
- Damage to your property by others.
- Strategic risk
- Reputational (i.e bad publicity)
- Demographic and social/cultural trends
- Regulatory and political trends

## Hazard Risk

- fire and other property damage
- theft and other crime, personal injury
- diseases

## Financial risk

- credit (default, downgrade)
- price (commodity, interest rate, exchange rate)
- liquidity (cash flow)

## Internal risks

- insolvency
- financial structure planning

## External risks

- interest rate

- currency exchange rate
- inflation
- Other internal risks
- cash flow changes
- unexpected costs
- loss of credit lines
- expenses to establish lines of credit

## EXTERNAL RISKS

- Competition and market risks
- loss of clients or customers
- loss of employees
- decrease in sales prices/fluctuating markets
- increases in vendor costs
- oil or gasoline price increases
- fixed cost changes (e.g rent)

## BUSINESS ENVIRONMENT RISKS

- Laws
- Weather
- Natural disaster
- Community

## RISK IDENTIFICATION

- Written business plan
- Outside sources to assit in identifying
- Risks of your vendors or supplier

- Business continuity assessment

## RISK EVALUATION

- Identify needs for business continuity
- Identify needs for potential or planned growth
- Discuss risks with managers
- Communicate risks to managers

## SWOT ANALYSIS

- Strengths
- Weaknesses
- Opportunities
- Threats
- Importance of risk management
- Cash flow
- Stability
- Credit longevity
- Risk control management and implementation
- Business Continuity
- Location to continue business operations

- Establish a manual system
- Train staff to continue operations
- Backup operating systems
- Review contracts with vendors for provisions
- Contingency operational plans
- Competition
- Check advertising
- Product lines
- Pricing
- Customer interaction
- Employee retention
- Accounting and cash control.
- Separation of duties
- Dual control of cash
- Levels of authority observed
- Periodic audits
- Plan for reserves in the budget
- Employee management
- Pre-employment screening and background checks

- Job descriptions and duties
- Communicate clear expectations
- Cross train staff
- Identify agencies that specialize in your field
- Periodic evaluations and feedback
- Risk management.
- Board responsibilities over strategy and risk

OECD principle VI.D states that the board should fulfill certain key functions, including reviewing and guiding corporate risk policy as well as ensuring that appropriate systems for risk management are in place and comply with the law and relevant standards.

Boards have an essential responsibility setting the risk policy by specifying the types and degree of risk that a company is willing to accept in pursuit of its goals.

Board responsibilities over strategy and risk

Annotations to Principle VI.D.7 note that "ensuring the integrity of the essential reporting and monitoring systems will require the board to set and enforce clear lines of responsibility and accountability throughout the organization."

The board will also ned to ensure that there is appropriate oversight by senior management.

Chapter VI.E of the Guidelines further stipulates that, when necessary, boards should set up specialised committees to support the full board in performing its functions, particularly in respect of audit, risk management and remuneration.

## ROLE OF THE BOARD IN RISK MANAGEMENT & INTERNAL CONTROLS

- Deciding the organization's risk appetite

- Ensuring that management manage risk within the Board's guidelines for risk appetite
- Monitoring the performance management, to ensure that the business is being managed within the risk guidelines set by the board
- Monitoring the risk management system to ensure it is effective and achieve its purpose.
- Why the Board is now more interested in risk management.
- Increased changes within business environments require greater speed of response in risk management.
- Increased transparency occasioned by social media, the internet.
- Changes from measurable tangible risks to intangible risks such as reputational and cyber risks- new methods of assessment and mitigation
- Risks are now interconnected and need to be managed holistically
- Recognition that risk management is not just an compliance discipline.
- RISK MANAGEMENT – TURN BULL REPORT
- Financial Controls
- Operational controls to reduce operational risks
- Machine breakdown,
- Human error
- Failure in IT system
- Failure in performance systems
- Weakness in procedure
- Poor management
- Compliance controls
- Potential consequences of failure to comply with relevant legislation and regulations.

## INTERGRATED REPORTING

Integrated reporting brings about together material information about an organization's strategy, governance, performance and prospects in a way that reflects the commercial, social and environmental context within which it operates. It leads to a clear and concise articulation of your value creation story which is useful and relevant to all stakeholders. (It's also about how companies do business and how they create value over the short, medium and long term)

The leading frame work for integrated reporting, the international Integrated Reporting Council's International frame work is based on an idea of 'shared value creation' by the providers of the 'six capitals' to include: financial, manufactured, intellectual, human, societal and environmental capitals. Integrated reporting represents a stakeholder management model already integrated.

Benefits associated with integrated reporting.

- Encouraging your organization to think in an integrated way.
- Clearer articulation of strategy and business model.

- A single report that is easy to access, clear and concise.
- Linking non-financial performance more directly to the business.
- Improved internal processes leading to a better understanding of the business and improved decision making process.

## TRIPLE BOTTOM LINE (TBL)

What Is the Triple Bottom Line (TBL)?

In economics, the triple bottom line (TBL) maintains that companies should commit to focusing as much on social and environmental concerns as they do on profits. TBL theory posits that instead of one bottom line, there should be three: profit, people, and the planet. A TBL seeks to gauge a corporation's level of commitment to corporate social responsibility and its impact on the environment over time.

In 1994, John Elkington the famed British management consultant and sustainability guru coined the phrase "triple bottom line" as his way of measuring performance in corporate America. The idea was that a company can be managed in a way that not only makes money but which also improves people's lives and the well-being of the planet.

## KEY TAKEAWAYS

- The concept behind the triple bottom line is that companies should focus as much on social and environmental issues as they do on profits.
- The TBL consists of three elements: profit, people, and the planet.
- The triple bottom line aims to measure the financial, social, and environmental performance of a company over time.
- TBL theory holds that if a firm looks at profits only, ignoring people and the planet, it cannot account for the full cost of doing business.

## UNDERSTANDING THE TRIPLE BOTTOM LINE (TBL)

In finance, when speaking of a company's bottom line, we usually mean its profits. Elkington's TBL framework advances the goal of sustainability in business practices, in which companies look beyond profits to include social and environmental issues to measure the full cost of doing business. Triple-bottom-line theory says that companies should focus as much attention on social and environmental issues as they do on financial issues.

According to TBL theory, companies should be working simultaneously on these three bottom lines:

- Profit: This is the traditional measure of corporate profit the profit and loss (P&L) account.
- People: This measures how socially responsible an organization has been throughout its history.
- Planet*:* This measures how environmentally responsible a firm has been.2

Profits do matter in the triple bottom line just not at the expense of social and environmental concerns.

## Challenges of Applying the Triple Bottom Line

The following are challenges that companies can face when applying the triple bottom line.

**Measuring the TBL**

A key challenge of the TBL, according to Elkington, is the difficulty of measuring the social and environmental bottom lines.

Profitability is inherently quantitative, so it is easy to measure. What constitutes social and environmental responsibility, however, is somewhat subjective. How do you put a dollar value on an oil spill or on preventing one for example?

## Mixing Inverse Elements

It can be difficult to switch gears between priorities that are seemingly antithetical such as maximizing individual financial returns while also doing the greatest good for society. Some companies might struggle to balance deploying money and other resources, such as human capital, to all three bottom lines without favoring one at the expense of another.

## Ignoring the TBL Framework

There can be dire repercussions when companies ignore the TBL in the name of profits. Three well-known examples of this are:

- Destruction of the rainforest

- Exploitation of labor
- Damage to the ozone layer

Consider a clothing manufacturer whose best way to maximize profits might be to hire the least expensive labor possible and to dispose of manufacturing waste in the cheapest way possible. These practices might well result in the greatest possible profits for the company, but at the expense of miserable working and living conditions for laborers, and harm to the natural environment and the people who live in that environment.

## Examples of Companies That Subscribe to TBL or Similar Concepts

Today, the corporate world is more conscious than ever of its social and environmental responsibility. Companies are increasingly adopting or ramping up their social programs. Consumers want companies to be transparent about their practices and to be considerate of all stakeholders. Many consumers are willing to pay more for clothing and other products if it means that workers are paid a living wage and the environment is being respected in the production process.

The number of firms of all types and sizes, both publicly and privately held that subscribe to the triple-bottom-line concept, or something similar, is staggering. Here are a handful of these companies:

**Ben & Jerry's**

Ben & Jerry's is the ice cream company that made conscious capitalism central to its strategy. As stated on its website, "Ben & Jerry's is founded on and dedicated to a sustainable corporate concept of linked prosperity."3 The company opposes the use of recombinant bovine growth hormone (RBGH) and genetically modified organisms (GMOs) and fosters myriad values such as fair trade and climate justice.

**LEGO**

The LEGO Group (privately held; Billund, Denmark) has formed partnerships with organizations like the nongovernmental organization (NGO) World Wildlife Fund. In addition, LEGO has made a commitment to reducing its carbon footprint and is working towards 100% renewable energy capacity by 2030.5

In addition to partnering with the World Wildlife Fund, the LEGO Group has also pledged to transition to renewable bio plastics. The first plant-derived set of LEGO toys was launched in 2019.

**Mars**

Mars Incorporated (privately held; McLean, Va.) has a sustainable cocoa initiative called Cocoa for Generations. It requires cocoa farmers to be fair trade certified to ensure they follow a code of fair treatment to workers

providing labor. In exchange for certification, Mars provides productivity technology and buys cocoa at premium prices.

**Starbucks**

Starbucks Corporation (SBUX), has been socially and environmentally focused since its inception in 1971. The company has hired more than 30,000 veterans since 2013 and is committed to hiring 5,000 more per year going forward.

## How is TBL Different from the Financial Bottom Line?

Including social, human, and environmental capital along with a company's financial capital makes it possible to get a more accurate picture of a company's impact on society.

REPORTING TO SHAREHOLDERS AND EXTERNAL AUDIT

REPORTING TO SHAREHOLDERS AND EXTERNAL AUDITORS.

- Directors' responsibility
- Role of external auditors and audit committees

### Reporting on corporate governance

Annual reports must convey a fair and balanced view of the organization. They should state whether the organization has complied with governance regulations and codes. It is considered best practice to give specific disclosures about the board, internal control reviews, going concern status and relations with stakeholders. The Singapore code of corporate governance summed up the importance of reporting and communication rules:

'Companies should engage in regular, effective and fair communication with shareholders... In disclosing information, companies should be as descriptive, detailed and forthcoming as possible, and avoid boilerplate disclosures.'

Good disclosure helps reduce the gap between the information available to directors and the information available to shareholders, and thus addresses one of the key difficulties of the agency relationship between directors and shareholders.

## PRINCIPLES VS COMPULSORY

The emphasis in principles-based corporate governance regimes is on complying or explaining; companies either act in accordance with the principles and guidelines laid down in the code or explain why and specifically how or in what regard they have not done so.

The London Stock Exchange requires the following general disclosures:

(a) A narrative statement of how companies have applied the principles set out in the Combined Code, providing explanations which enable their shareholders to assess how the principles have been applied.

(b) A statement as to whether or not they complied throughout the accounting period with the provisions set out in the Combined Code. Listed companies that did not comply throughout the accounting period with all the provisions must specify the provisions with which they did not comply, and give reasons for non-compliance.

Beyond these basic requirements disclosure guidelines in principles-based regimes tend to be based on the ideas of providing balanced and detailed information that enables shareholders to assess the company's potential. They acknowledge that judgement is important in deciding what to disclose.

Section 165 of the companies Act requires directors to attach a report to every balance sheet laid before a company in a general meeting by the directors with respect to the states of the company's affairs, the amount they recommend should be paid by way of dividend and the amount if any which if any which they propose to carry to reserves within the meaning of the Fifth Schedule.

Article 21(1) of table F provide that the board shall report, on significant and relevant matters, in a balanced and understandable manner. Subsection (2) further stipulates that the reports shall be transparent, reflect accountability, objective and comprehensive.

Article 21(3) stipulates that the balance between positive and negative is required to ensure a full, fair and honest account of performance. The directors' report shall contain—

(a)directors' responsibility to report fairly;

(b)an auditor's report on financial statements;

(c)adequate,

(i)accounting records kept;

(ii)internal control; and

(iii)risk management;

(d)consistent and appropriate accounting policies and prudent judgments have been applied;

(e)accounting standards which were followed with departures quantified and explained;

(f)a statement that there is no reason to believe that the company will not be a going concern in the year ahead; and

(g)the provisions of the Code of Corporate Practice and Conduct followed.

## EXTERNAL AUDIT AND AUDIT COMMITTEE

Audit is defined by the Sarsbanes Oxley Act of 2002 as an examination of the financial statements of any issuer by an independent public accounting firm in accordance with the rules of the Board or the Commission, for the purpose of expressing an opinion on such statements.

The Sarsbanes Oxley Act of 2002 defines an audit committee as;

A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

The audit committee of the board is seen as having a major role to play, in promoting dialogue between the external auditors and the board. The Cadbury Report in paragraph 4.35 recommends that all listed companies should establish an audit committee. Audit committees should be formally constituted to ensure that they have a clear relationship with the boards to whom they are answerable and to whom they should report regularly. There should be a minimum of three members. Membership should be confined to the non-executive directors of the company and a majority of the non-executives serving on the committee should be independent.

According to Deloitte on External Audit and the Audit Committees Beyond the Basics General responsibilities of the audit committee include;

- Oversee the integrity of the financials.
- Review financial-related disclosures.
- Hire and oversee the external auditor, including selection of the lead partner.
- Oversee internal audit.
- Review internal controls.
- Monitor risk exposures and ensure adequate disclosure.
- Manage relationships among management, internal audit and independent auditors.
- Review related-party transactions
- Consider adequacy/quality of finance organization.

- Oversight of compliance with laws and regulations

Article 19 of table f provides that the audit committee shall consist of a chairperson and at least three other persons of reputable integrity coming from outside the Board. Subsection further provides that (6) the chairperson of the audit committee shall attend the annual general meeting to answer relevant questions.

Article 17 of table F provides for Auditing and non-audit services that;

(1) Financial statements shall be presented in line with applicable national laws and in accordance with International Financial Reporting Standards unless otherwise allowed by the Institute of Certified Public Accountant Uganda.

(2) Auditors' independence should not be impaired.

(3) Internal and external audit services shall supplement one another through good audit processes.

(4) Internal and external auditors shall consult and co-ordinate effort.

(5) The audit committee shall set the principles for the use of external auditors for non-audit services.

(6) Separate disclosure shall be made to members of the non-audit services provided by the external auditor.

Article 18 of table F sets out the roles of the audit committee;

(1) The Audit committee shall determine whether or not interim reports should be audited.

(2) If interims are not audited, the audit committee shall report to the board on the reasons for the non-audit after which the interims are to be adopted by the board.

(3) The board should encourage internal or external audit consultation.

(4) Non-financial reports: any external validation shall be reported in the annual report.

## AUDIT COMMITTEE

(1) The audit committee shall consist of a chairperson and at least three other persons of reputable integrity coming from outside the Board.

(2) Written terms of reference shall be given to the audit committee to deal with membership, authority and duties.

(3) Written terms of reference shall be given to the audit committee to deal with membership, authority and duties.

(4) The annual report shall indicate if the

(a)written terms of reference are given; and

(b)committee has complied with its terms of reference.

(5) The annual report shall disclose membership.

(6) The chairperson of the audit committee shall attend the annual general meeting to answer relevant questions.

## EXTERNAL AUDITORS

External auditors play a key role in corporate governance. The role of external auditors in corporate governance is to make sure that the Board of Directors and management are acting responsibly towards the shareholders' investment interests. External auditors are expected to be independent of the company and report on the company objectively.

There are certain key things to consider when choosing external auditors, according to Deloitte on External Audit and the Audit Committees Beyond the Basics these include;

- Firm & Industry Capabilities.
- Engagement Team.
- Communications & Service Approach.
- Engagement Planning & Risk Assessment.
- Consultation & Technical Matters.
- Fee Structure.
- Independence & Quality Control.
- Technology & Value-Added Benefits.
- Auditor Change & Transition

In the case of Fomento (sterling Area) LTD v Selsdom Fountain Pen Ltd & Co. LTD (1958) 1 ALLER 11, Lord Denning held that the function of auditors is not bound only to verify the sum of the arthemetic conclusion by reference to the books and all necessary voucher material and oral explanation and inquiring whether an article is covered.

To take care to see that errors are not made. This may include errors of computation or errors of commission or downright untruth.

He further held that an auditor's function also includes the following;

To inquire into the company's account. An auditor should check the accuracy of the assertion by inquiring in the nature of any article which appears to him or her, may come within his knowledge.

Disallow the company account if need be.

They are bound to keep company information confidential. An auditor is bound to keep the information confidential and not to indulge it to outside world, but can only submit it to the shareholders and members of the company.

## CADBURY REPORT ON CORPORATE GOVERNANCE

CADBURY COMMITTEE REPORT

The Cadbury committee was set up in may 1991 by the financial reporting council of the London stock exchange[177]

The committee published its report in December 1992

Adrian Cadbury the chaiman of the Cadbury committee.

The code of best practices has been divided into four sections. They are[178];

- Role of board of directors, duties of the board and its compositions.
- Role of non-executive directors.
- Dealing with their remunerations.
- Addressing questions of financial reporting and financial controls.

Role of non-executive directors.

[177] https://www.slideshare.net/BandriNikhil/cadbury-report-on-corporate-governance
[178] ibid

- Non-executive directors should bring an independent judgement to bear on issues of strategy, performance, resoirces including key appointments and standards of conduct.
- Non-executive directors should be appointed or specified terms and reappointment should not be automatic
- Non-executive directors should be selected through a formal process and both this process and their appointment should be a matter for the board as a whole[179].
- Dealing with their remuneration

It is advisable that future service contracts should not exceed three years without shareholders' approval and that the companies act should be amended in line with this recommendation.

Shareholders require that the remuneration of directors should be both fair and competitive.

The annual general meeting provides the opportunity for shareholders to make their views on such matters as director's benefit known to their boards[180].

Addressing questions of financial reporting and financial controls.

It is the boards duty to present a balanced and understandable assessment of the company's position.

The board should ensure that an objective and professional relationship is maintained with the auditors.

The board should establish an audit committee of at least three non-executive directors with written terms of reference which deal clearly with its authority and duties.

The directors should explain their responsibility for preparing the accounts next to a statement by the auditors about their reporting responsibilities.

The director should report on the effectiveness of the company's system of internal control.

The directors should report that the business is a going concern with supporting assumptions or qualifications as necessary[181]

The major recommendations made by the committee are as follows;

- A single person shouldnot be vested with the decision making power i.e the role of chairman and chief executive should be separated clearly.
- The non-executive directors should act independently while giving their judgment on issue of strategy, performance, allocation of resources and designing the code of conduct.

[179] ibid

[180] https://www.slideshare.net/BandriNikhil/cadbury-report-on-corporate-governance

[181] https://www.slideshare.net/BandriNikhil/cadbury-report-on-corporate-governance

- A majority of directors should be independent non-executive directors i.e they should not have any financial interests in the company
- The term of the directors can be extended beyond three years only after the prior approval of the shareholders.
- A remuneration committee with majority of non-executive directors should decide on the pay of the executive directors.
- The interim company report should give the balance sheet information and reviewed by the auditor.
- The information regarding the audit fee should be made public and there should be regular rotation of the auditors.
- An objective and professional relationship with the auditors must be ensured.
- It must be reported that a business is a growing concern[182]

## CASE STUDIES

## THE 2008 GLOBAL FINANCIAL CRISIS AND THE CASE OF UGANDA TELECOM: IMPLICATIONS FOR CORPORATE GOVERNANCE

The Global Financial Crisis was the most serious financial crisis since the Great Depression of 1929. It refers to the massive financial crisis the world faced from 2008 to 2009. It took its toll on individuals and institutions around the globe. Financial institutions started to sink, many were absorbed by larger entities, and several governments were forced to offer bailouts to keep many financial institutions afloat.

PART 1: Ripple Effect of the Financial Crisis

Although the origins of the financial crisis can be traced to the US, the interlinked nature of the global financial system led to several countries being hit hard by the crisis. By mid-2008, it was clear that the crisis, and the associated liquidity squeeze, was having a major impact on financial institutions and banks in many countries.

For instance:

1. Bear Stearns had been taken over by JPMorgan with the support of the Federal Reserve Bank of New York;

[182] Ibid

2. Financial institutions in both the US (e.g. Citibank, Merrill Lynch) and in Europe (UBS, Credit Suisse, RBS, HBOS, Barclays, Fortis, Société Générale) were continuing to raise a significant volume of additional capital to finance, inter alia, major realised losses on assets, diluting in a number of cases existing shareholders;

3. Freddie Mac and Fanny Mae, two government sponsored enterprises that function as important intermediaries in the US secondary mortgage market, had to be taken into government conservatorship when it appeared that their capital position was weaker than expected;

4. In the UK, there had been a run on Northern Rock, the first in 150 years, ending in the bank being nationalised;

5. In the US, IndyMac Bancorp was taken over by the deposit insurance system;

6. In Germany, two state owned banks (IKB and Sachsenbank) had been rescued, following crises in two other state banks several years previously (Berlinerbank and WestLB);

7. The crisis intensified in the third quarter of 2008 with a number of collapses (especially Lehman Brothers) and a generalised loss of confidence that hit all financial institutions.

As a result, several banks failed in Europe and the US while others received government recapitalisation towards the end of 2008.

PART 2: Causes of the Financial Crisis

The Financial Crisis is attributed to several causes thus:

*1. Predatory lending targeting low-income homebuyers*

The largest contributor to the conditions necessary for financial collapse was, arguably, the rapid development in predatory financial products which targeted low-income, low-information homebuyers who largely belonged to racial minorities. This market development went unattended by regulators and thus caught the U.S. government by surprise.

*2. Excessive risk-taking by global financial institutions*

In the US, this was in form of the bursting of Mortgage-backed Securities (MBS) tied to real estate, as well as a vast web of derivatives linked to those MBS. They eventually collapsed in value leading to the bursting of the 'US housing bubble.' As a result, financial institutions worldwide suffered severe damage, reaching a climax with the bankruptcy of Lehman Brothers on September 15, 2008 that precipitated the international banking crisis.

*3. Subprime lending*

Due to competition between mortgage lenders for revenue and market share, and when the supply of creditworthy borrowers was limited, mortgage lenders relaxed underwriting standards and originated riskier mortgages to less creditworthy borrowers that massively defaulted.

*4. Easy credit conditions*

Lower interest rates encouraged borrowing. From 2000 to 2003, the Federal Reserve lowered the federal funds rate target from 6.5% to 1.0%. This was done to soften the effects of the collapse of the September 11 attacks, as well as to combat a perceived risk of deflation. All of this created demand for various types of financial assets, raising the prices of those assets while lowering interest rates.

PART 3: Poor corporate governance as a major cause of the crisis – an example of Lehman Brothers and Bear Stearns

In 2011, the U.S. Financial Crisis Inquiry Commission concluded that the 2008 financial crisis was an "avoidable" disaster caused by widespread failures in government regulation and corporate mismanagement. The Commission cited dramatic breakdowns in corporate governance including taking on too much risk.

The Commission portrayed poor corporate governance with the following examples:

- Citigroup executives conceded that they paid little attention to mortgage-related risks;

- Executives at American International Group were blind to its $79 billion exposure to credit-default swaps;

- Merrill Lynch managers were surprised when seemingly secure mortgage investments suddenly suffered huge losses;

- The banks hid their excessive leverage with derivatives, off-balance-sheet entities and other accounting tricks.

The Commission decided that the lack of transparency in corporate governance was the single most contributory factor to the crisis. Several empirical studies (see, eg, Allemand et. al. 2011, Grove et. al. 2011, Victoravich et. al. 2011) have since documented the corporate governance structural issues that significantly contributed to the crisis thus:

1. *CEO duality* (the CEO is also the Chairman of the Board of Directors)

At Bear Stearns, the CEO, James Cayne, had also been the Chairmen of the Board (COB) for the last seven years. At Lehman Brothers, the CEO, Richard Fuld, had also been the COB for the last seventeen years.

2. *CEO and Board of Directors entrenchment and independence* (only staggered re-elections of long-serving Board members versus all Board members re-elected every year)

At both banks, there were no staggered board elections as all members were re-elected annually. However, both CEOs had been in their jobs for more than a decade: 26 years for the Bear Stearns CEO and 17 years for the Lehman Brothers CEO. Also, there were majorities of older and long-serving Directors

3. *Seniority and advanced age of Directors* (over 70 years of age)

For Bear Stearns and Lehman Brothers, respectively, the majority of the Directors were over age 60: 85% and 91%, over age 70: 23% and 55%, and over age 80: 15% and 18%. Also, 54% of the Bear Stearns Directors were retired or just "private investors" or in academia. 91% of the Lehman Brothers Directors were retired or "private investors."

4. *Short-term compensation mix* (cash bonuses and shorter-term stock options (1 to 4 years) versus longer-term stock options, awards, and restricted stock)

Both companies had large portions of their compensation packages for their top executives in short-term cash (bonus) and stock options,

*5. Non-independent, affiliated, and diverse directors*

Long-serving Directors may lose or reduce their independent perspective. For Bear Stearns and Lehman Brothers, respectively, the number of Directors serving since the 1980's were 38% and 9% and since the 1990's were 31% and 55% for totals from the 1980's and 1990's of 69% and 64%. Also, there were only one woman and one minority on Lehman Brothers' Board and none on Bear Stearns Board.

*6. Ineffective Risk Management Committee*

Bear Stearns' risk committee only started in January 2007 just 14 months before JP Morgan Chase bailed out the company by taking it over in March 2008. Three of the four members were age 64 and the other was age 60. Lehman Brothers' risk committee had only two meetings in 2006 and 2007 before it went bankrupt in 2008. The chairman of the risk management committee was age 80 and a retired Salomon Brothers investment banker with banking experience but from a different era. The other members were age 73 (retired chairman of IBM), age 77 ("private investor" and retired Broadway producer), age 60 (retired rear admiral of the Navy), and age 50 (former CEO of a Spanish language TV station). What were the qualifications of these last three members for serving on this risk management committee?

7. *Opaque Disclosures*

Per the SEC chairman and SEC chief accountant, there was a direct line from the implosion of Enron to the fall of Lehman Brothers which was an inability for investors to get sound financial information necessary for making sound investment decisions.

Moreover, the studies also noted that when implementing the $700 billion bailout of major U.S. banks, the U.S. Treasury did not replace any existing bank Board members but added new Directors to represent taxpayer interests. Many of these original Directors oversaw the big banks and brokerage firms when they were taking huge risks during the real estate boom. A corporate governance specialist concluded: "these boards had no idea about the risks these firms were taking on and relied on management to tell them" (Barr 2008). A senior corporate governance analyst said: "this financial crisis is a direct result of the compensation practices at these Wall Street firms" (Lohr 2008).

PART 4: After-effects and lessons for Corporate Governance

In the aftermath of the financial crisis, the New York Stock Exchange (NYSE) sponsored a Commission on Corporate Governance which issued the following key corporate governance principles as take-aways from the crisis:

1. The Board of Directors' fundamental objective should be to build long-term sustainable growth in shareholder value. Thus, policies that promote excessive risk-taking for short-term stock price increases, and compensation policies that do not encourage long-term value creation, are inconsistent with good corporate practices.

2. Management has the primary responsibility for creating a culture of performance with integrity. Management's role in corporate governance includes establishing risk management processes and proper internal controls, insisting on high ethical standards, ensuring open internal communications about potential problems, and providing accurate information both to the Board and to shareholders.

3. Good corporate governance should be integrated as a core element of a company's business strategy and not be simply viewed as a compliance obligation with a "check the box" mentality for mandates and best practices.

4. Transparency in disclosures is an essential element of corporate governance.

5. Independence and objectivity are necessary attributes of a Board of Directors. However, subject to the NYSE's requirement for a majority of independent directors, there should be a sufficient number of non-independent directors so that there is an appropriate range and mix of expertise, diversity and knowledge on the Board.

6. Shareholders have the right, a responsibility and a long-term economic interest to vote their shares in a thoughtful manner. Institutional investors should disclose their corporate governance guidelines and general voting policies (and any potential conflicts of interests, such as managing a company's retirement plans).

PART 5: Comparison with Uganda Telecom

Uganda Telecom was the third largest telecom operator by market share in Uganda. However, the company was placed into receivership owing to glaring corporate governance challenges. These were documented in a Parliamentary Report authored by the then Budadiri West Member of Parliament, Nandala Mafabi. They are as follows:

1. The Shareholder Agreement and Technical Assistance and Commitment Agreement gave a lot of powers to the majority shareholder (UCOM) in making major decisions such as hiring of key managers, provision of technical assistance and borrowing loans for the company." Between 2002 and 2006, under the cover of Technical Assistance and Commitment Agreement, UCOM hired 10 top managers, including the Managing Director.

2. During this time (five years), the Managing Director was being paid US$28,000 (Shs101.6m going by the current exchange rate) per month, while the other nine managers were being paid US$25,000 (Shs90.7m at the current exchange rate) each per month. Unfortunately, during this period, the company was making terrible losses.

3. The team hired was inexperienced and incompetent, lacking basic corporate management skills. “There was no effective communication in the organization and the management was borrowing money from banks without the knowledge of the minority shareholder (GoU),” the report noted.

4. The report observed that the Uganda government representatives on the UTL Board (the Board Chair and his other colleagues), the Attorney General and Managers in the company should have averted this by advising the GoU to take action and act on the state of affairs of UTL. “They failed and therefore, they stand responsible for this great loss and mess in the company,” the report added, noting that most of the agreements have since expired but the company continues to use them without renewal. “For instance, the shareholder agreement expired in 2005, but the company continued using it to date without renewal,” the report observed.

Corporate governance is at the heart of sound financial institutional management. The price to be paid by poor corporate governance structures is often dire and widespread and has far-reaching effects as was evidenced by the Global Financial Crisis.

## CORPORATE GOVERNANCE ISSUES ARISING FROM THE FIFA SCANDAL

The Federation Internationale de Football Association (FIFA) is football’s global governing body. An international sporting federation, its President heads the organization and chairs its Executive Committee. The President is elected every four years by member organizations who vote at FIFA's Congress, the organization's supreme body. By 2015 the president was Sepp Blater who had been had been president of FIFA since 1998 (until his removal in December 2015).

In May 2015, FBI and the Swiss prosecuting authorities launched a criminal inquiry on "suspicion of criminal mismanagement and of money laundering" concerning the 2018 and 2022 world cup bidding processes. The Swiss police also planned to question ten members of the FIFA Executive Committee who participated in the December 2010 votes that chose the hosts for the 2018 and 2022 world cups. Reports from the investigations showed that the bidding process and FIFA code of ethics had been compromised during the selection of Russia and Qatar as hosts for the world cup.

## CORPORATE GOVERNANCE ISSUES ARISING FROM THE FIFA SCANDAL

Action without impact; Over the decades FUFA had had a long history of allegations of fraud and corruption with various highly visible and ineffective maneuvers, through unaccountable FIFA organized investigations statements and reforms, task forces. However all these so called reform activities appear to have been designed to get each other’s way out thus leaving. For-example after the FIFA embattled president Sepp Blatter resigned he

also announced that a new independent task force would be established. However when the Garcia[183]report which exposed many flaws around FIFA and Sepp Blatter was presented, the Committee decided to summarize the report finding in a bid to protect the individuals mentioned. The 2015 incident was a continuous from a series of the like the same events that had characterized FIFA over the years.

Corruption; The basic principles of modern cooperate governance were unknown to Blatter and totally absent from FIFA. There was a vacuum. For-example in October 2015 there was a Swiss criminal investigation into a $2000,000 disloyal payment made from FIFA funds to Michal Platini the president UEFA, European Football confederation. The money was paid in 2011 where it was claimed that Platini had worked for Blatter between 1998 and 2002. In 2011 Platini asked for more funds from the same work he had completed 8 years earlier and Blatter authorized payment by FIFA. Where the same is said to have been made to persuade Platini not to run against Blatter for FIFA president in 2011.

Ethical violations: In an interview in October 2015 shortly after the Swiss Attorney General had commenced investigations and the Ethics Committee has suspended Blatter for 90 days, latter called it total nonsense as he had employed them and they ought to listen to him. And that they couldn't be against him. This shows the long history of disregard to internal organs which were supposed to conduct their work independently thus the scandal was inevitable.

Lack of accountability; there were no controls or limits on how the president directs matters in FIFA. He was answerable to no one. As noted by a former FIFA vice president that even the executive Committee didn't know how much Blatter paid himself in salary and benefits That even North Korea's Kim Jong un and the mafia are more subjective to corporate governance than FIFA and Blatter were. He had overstayed at the age of 79 years, having stayed around for 17 years, with his unquestionable powers Blatter had missed the corporate governance concept that is vital for smooth running of such a vast entity.

Lack of transparency; FIFA adopted complex processes in arriving at its decisions for example the system for selecting teams required an advanced algebraic equation. This was meant to facilitate corruption. Complexity is frequently a sign that something is amiss, symptomatic of either poor management controls or a facade of credibility. Complexity does not make a risk management program more effective. In fact, complexity prevents the real problems from bubbling to the surface because organizations are too buried in administrative minutia to have real conversations about the behaviors that lead to fraud and corruption

In conclusion the FIFA scandal unearthed how FIFA under the leadership Sepp Blatter had complete disregard of corporate governance and how that occasioned gross mismanagement of the organization.

[183] Micheal Garcia former head of the investigative Committee of the FIFA ethics Committee

# CORPORATE GOVERNANCE FAILURES WITHIN THE OIL SECTOR.

## A CASE STUDY OF THE BRITISH PETROLUEM COMPANY DEEP WATER HORIZON SPILL AND ITS EFFECTS.

It is indeed undisputed that corporate governance is a key stimulant to the success of any organization. This is due to the fact that it deals with *policies, customs, processes, laws, and institutions* that affect the way an organization is run, controlled, directed and administered.[184]Henceforth, it can be deduced that corporate governance affects the stakeholders' relationships with an organization and the realization of the goals of an organization whereby it plays an exceptional role in the operation of companies like the BPC hereafter referred to as British Petroleum Company.

In the same premise, Corporate Governance can be said to be an internal system of control that allows the management and other staff in an organization to act with integrity and to be accountable in all their operations as it represents a system of rules and guidelines by which a company is controlled and managed. Furthermore, it should also be noted that a good corporate governance attracts customers which increases the company's' competitive advantage over other competitors and thus corporate governance mechanisms can be used to treat the cause of unethical activities together with their symptoms.[185] And further address the problems that arise in a business environment. Suffice to it as it may, Common stakeholders[186] in different organizations include the *management, shareholders, employees, customers, suppliers, the community,* and many others.

Nevertheless, it is vital to note that in cases of a corporate governance failure, the trust of the public and stakeholders decreases, leading to potentially harmful consequences for the overall success of an organization such as in the case of BP i.e. British Petroleum Company which had an issue with its lack of corporate governance[187] in 2010 when *an explosion and fire took place in the oil rig in the Gulf of Mexico and killed eleven workers as well as set off one of the largest oil spills in the history of US operations76* which resulted into the Deep water Horizon incident where about 4.9 million barrels of oil gushed into the Gulf waters, destroying hundreds of miles of fragile coastline and threatening the livelihood of the local population"[188]

The above failures which resulted from poor corporate governance led to massive disaster and the company pleaded guilty to eleven counts of felony manslaughter and agreed to pay a pre-tax toll of $40.9 billion to cover the consequences of the spill[189] and to this day, the deal is considered one of the largest resolutions in the history

[184] Agalgatti and Krishna 2007, p.121
[185] Ferell, Fraedrich & Ferell 2008, p.309
[186] Shleifer & Vishny 1986, p.472
[187] "The High Cost of BP's Lack of Corporate Governance." *RGRD Law*. 2012, Web
[188] The High Cost of BP's Lack of Corporate Governance
[189] Supra

of the United States court system. In addition to this, *three dividend payments to the company's shareholders were canceled* while BP also initiated some *significant shifts* in the board of members.

The main contributing factors to the failure in corporate governance referred to BPC's (British Petroleum company's) inability to ensure the appropriate safety of its workers and prevent environmental disasters that are a risk during oil and gas-related operations. The company's board put the lives of employees in danger by not giving safety the required level of rigor in terms of planning and implementation. During the investigation, it was revealed that the BP oil well was sealed after eighty-seven days of leakage, which also points to the lack of consideration of the corporation for environmental issues and the well-being of residents affected by the disaster. In light of the foregoing, it can be deduced that the above disasters resulted from the failure by BP to establish a *cohesive corporate governance*,

Furthermore, in light of the foregoing, corporate governance efforts should not be solely based on catering for the interests of stakeholders or suppliers but also towards accounting for workplace risks. *A better system of internal controls should be put in place* to ensure that dangerous situations do not escalate and result in an adverse impact on workers, the environment, and the community as it was for the BPC Deep water Horizon Oil Spill[190].

Needless to add is the fact that for the implementation of corporate governance to be successful, the management in an organization must be committed to all its operations[191] and among the stimulants of the same is the presence of a strong board culture which helps the management to safeguard the policies and processes in an organization so that members can follow them.

It is also vital to note that the blame for the oil spill disaster was put on the executives in London and the BPC suffered big losses. Furthermore, almost all the other parts of the plant were damaged by the explosion and the company was also fined about eighty-seven U.S. dollars in 2009. *This greatly affected the image of the company*. Henceforth, the operations of the company in some places have been criticized or projects to open operations in some places opposed. This is due to some of the incidents that have previously occurred as highlighted above.

Similarly, BPC also suffered a loss of confidence from many stakeholders in it with the blame put on the management just as that of the Texas City refinery[192] disaster where there was an explosion that killed fifteen people and injured about one hundred and seventy others. The Prudhoe Bay Oil Spill was also faced with great criticism. This therefore connotes to the fact that where there are loopholes in the corporate governance structures, the catalysts for disaster are very much alive and awakened.

It is also noteworthy that the stakeholders especially the community where the company had its operations were not pleased by the incidents and similarly were the employees because they lost their fellow employees in the

[190] Shleifer & Vishny 1986, p.472
[191] Donaldson and Dunfee 2009, p.288
[192] Mallenbaker 2007, para.2

explosion. Furthermore, the closing of the operations was not positive for the shareholders because it reduced their profits.

The oil spill was also attributed to poor corporate governance *as the management decided to cut costs for maintenance* to increase its revenue which was a total mishap as the plant ought to have been maintained so that overflow could be detected and controlled.

Furthermore, the explosion had been preceded by other minor accidents but the management did pay much attention. The engineering problems could have been addressed had the management taken a step the very first time when the refinery caused the first accident thus the inexcusably poor corporate governance which led to the deep water horizon.

The explosion also had a *great impact on the reputation of the company* as many stakeholders could not trust the company especially on hearing that the explosion was a result of a mistake that the management could have corrected henceforth the company lost some customers and shareholders to some competitors.

In conclusion therefore, the vitality of an efficient corporate governance structure cannot be under estimated as already discussed above and it is my humble conclusion that BPC'S poor Corporate Governance made the company fail in its duty towards protecting the society and the natural environment which were sacrificed for the exploration and extraction of oil. The above can rather be deduced to the fact that any loopholes in corporate governance in any institution are a recipe for disaster and thus the undisputed vitality of a good corporate governance structure.

## WORLDCOM SCANDAL IN USA

WorldCom was a provider of long distance phone services to businesses and residents. It started as a small company known as Long Distance Discount Services ("LDDS") that grew to become the third largest telecommunications company in the United States due to the management of Chief Executive Officer ("CEO") Bernie Ebbers. On June 25, 2002, the company revealed that it had been involved in fraudulent reporting of its numbers by stating a $3 billion profit when in fact it was a half-a-billion dollar loss. After an investigation was conducted, a total of $11 billion in misstatements was revealed. The investigations were initiated by Cynthia cooper, the head of WorldCom internal edit department and revealed an accounting scheme under a made up term "prepaid capacity" which term was not known to any accountants. The Securities and Exchange Commission charged WorldCom with civil fraud and reached a $2.25 billion settlement. Several executives and the CEO were indicted on charges of securities fraud, conspiracy and filing false documents with regulators.

Causes of the fraud

- There was no strategic committee and the decision makers mainly consisted of Ebbers, Chief Financial Officer ("CFO") Scott Sullivan ("Sullivan"), and Chief Operations Officer ("COO") John Sidgmore.
- The lack of internal controls allowed manual adjustments to be made in the system without the emergence of any red flags, thereby minimizing any chance of detection

- The employees at WorldCom did not have an outlet to express concerns about company policy and behavior either. Special rewards were given to those employees who showed loyalty to top management while those who did not feel comfortable in the work environment were faced with obstacles in their need to express their concerns.
- The top management of the company was unquestionable. Employees were rewarded for their loyalty to the top management other than their performance.
- The board of directors was not independent and inactive. Some of the members were appointed due to their connection to Ebbers. This created a conflict of interest especially with those with strong ties with the top management. Their closeness to Ebbers hurt their duty to be independent from the company and its management.
- The board approved personal loans for Ebbers which loans were not in the best interest of the company.

**Lessons in Corporate Governance**

Corporate governance involves the protection of shareholders by the Board of Directors. The approval of Ebbers‟s personal loans was not in the best interests of the stakeholders. There is, a need of a Board that contains individuals who not only possess business knowledge and skills but also have "healthy sensitivity to norms of proper behavior."

The focus then turns to the creation of value for the company rather than to simply avoid wrongdoing and to have a good code of ethics (Breeden, 2003).

Every Board whether at a national, business, or university level will at some point be faced with tough decisions and challenges. The key to the success of the Board is to take action and resolve any problems with competency.

Unfortunately, with WorldCom, when the Board was presented with the challenge of approving Ebbers‟s loans, among other large acquisition decisions, it failed to take action and limit Ebbers‟s power on the Board because it did not have the competency to take control of the board and take a strong position against the decisions.

There is need to have an independent audit committee as a company. The committee was comprised of a select members of the board some of whom were already compromised. The audit committee's negligence depicts another weakness in WorldCom's internal controls. Therefore, it is very important to have members in the committee that fulfill their duties by overseeing the corporation's internal control structure as well as making sure that the company complies with "laws, regulations, and standards.

The need to have external auditors. The internal auditors were already compromised and inefficient. However, the external auditor relied on their reports and as a result he was not able to give independent opinion of the financial situation at WorldCom for investors and creditors.

## HISTORY OF THE LEHMAN BROTHERS; ABSENCE OF A RESCUE REGIME

The Lehman Brothers had humble origins, tracing its roots to a general store founded by German brothers, Henry, Emmanuel and Mayer Lehman in Montgomery, Alabama in 1844. Farmers paid for their goods with cotton, which led the company into cotton trade, After Henry died, the other Lehman brothers expanded the scope of the businesses into commodities trading and brokerage services. The firm prospered over the following decades as the U.S economy grew into an international powerhouse, but the Lehman Brothers faced challenges over the years, the company survived the railroad bankruptcies the 1800s, the Great Depression, two world wars, a capital shortage when it was spun off by American Express in 1994 in an initial public offering and the Long Term Capital Management collapse and Russian debt default of 1998.

Lehman Brothers had humble beginnings as a dry-goods store, but eventually branched off into commodities trading and brokerage services. The firm survived many challenges but was eventually brought down by the collapse of the subprime mortgage market. Lehman first got into mortgage-backed securities in the early 2000s before acquiring five mortgage lenders. The firm posted multiple, consecutive losses and its share price dropped. Lehman filed for bankruptcy on September 15, 2008, with $639 billion in assets and $619 billion in debt.

Despite its ability to survive past disasters, the collapse of the U.S housing market ultimately brought Lehman to its knees.

**The reasons for the failure of Lehman Brothers;**

This was due to the fact that the board of directors not effectively oversee Lehman and leave it bankrupt , their responsibilities are the oversight of and advisory to the company , After Lehman Brothers collapsed , many observers have pointed out that it should not have taken excessive debts , diversified product portifolio and the board of directors should have monitored its strategy and risk management more carefully, all of the causes of the Lehmans failures can be traced back to the dysfunction of the board of directors and the agency problem.

In Lehman 8 out of 10 directors met the independence of standards of the NYSE in 2006, but the lacked the financial expertise and failed to reliably monitor Lehman. For Example, the finance and risk committee met only two tomes a year and the compensation committee met more times than the audit committee. Among these directors, Barlind was a theatrical producer, Evans was a career officer and a rear admiral in the US Navy, which are not financial service areas, until 2006, Lehmans board included Dina Merrill, an 83-year-old actress plus there were no current CEOs of major public corporations and former CEOs were well into retirement. The board did not properly understand the complexity and severity of the financial markets well enough to weather the storms when the financial expertise represents the shareholders best interest of Lehmans shareholders.

Lehman didn't fail due to noncompliance, in the most cases, corporate governance is understood a system of legal compliance and not beyond that. But good corporate governance contributes to shaping a company and its business beyond compliance.

Corporate Governance being at the center of the failure of the Lehman brothers; .

In spite of these control mechanisms and corporate governance, Lehman Brother's failed because the company was dominated by the CEO of the company, Richard Fuld. Richard had full control over the company and although several control mechanisms were put in place, the CEO never listened to his board of directors and followed the path to profit maximization. The downfall of the organization was mainly due to the fraudulent activities that were promoted by the management of the company. Further, having audit committee is one thing, but if the audit committee is colluding with the management team to allow off-balance sheet transactions, then no form of corporate governance mechanisms can save the company (Becht, Bolton, and Roell, 2012).

The weakness of the corporate governance mechanism at Lehman Brothers' was due to the lack of qualified independent directors who understood the financial world (Larcker and Tayan, 2011). Lehman Brothers put in place several independent directors who had no knowledge about how financial institutions are supposed to perform and this led to the downfall of the company.

Another reason for the downfall was poor risk and asset management by the company management team. Lehman borrowed excessively and did not consider their shareholders while investing all their proceeds into the mortgage market (Gakpo, 2012). The risk management wing within the company failed to control the fraudulent accounting measures used by the company. Although the risk management committee and the audit committee were aware about the fraud, they decided to remain silent. This led to the downfall of the company. The collective low ethical standards within the personnel of the company was another reason why the company failed.

From the lehman Brother failure, the following points where a take away.

- It should be understood very well by the directors that there is no doctrine – 'too big to fail'. In fact, when it is too big, the impact is also too big of something going wrong. Hence when the going is good, they (directors) need to be extra careful and most of the times, wrong decisions are taken during the best times.
- Directors must examine 'risk' for every business plan in depth and in case, they need some external assistance, they must seek the same to examine the plan. Risk, de-risk process is a must for every company.
- Directors must ask the executive management to build an information architecture – to get the right and accurate information at the right time and with the right periodicity.
- Directors must set up a process of information dissemination to the stakeholders which conveys the necessary risk factors associated with the business of the company

- Board composition and recruitment of Independent Directors – they must have some relevance to the business and not the sole criteria of the promoter's familiarity.
- Independent Director must insist for the proper familiarization program by the company in order to understand the business of the company and it should be on regular basis.
- Independent director must keep an eye on the information about the company in the public domain in general to sense the direction and must seek the necessary information.

The absence of a rescue regime was that since the collapse, the key regulators claimed they could not have rescued lehman because Lehman did not have adequate collateral to support a loan under the Feds emergency lending power.

In conclusion, directors should keep in mind that they are bound by the fiduciary duty to ensure that they govern the company in the best interests of the company and its shareholders, not themselves, including the duty of care and the duty of loyalty to the company.

## THE EQUITABLE LIFE ASSURANCE SCANDAL IN THE UNITED KINGDOM.

The Equitable Life Assurance Society was founded in 1762 and was a life insurance company in the United Kingdom. It is the world's oldest mutual insurer and pioneered age based premiums based on morality rate.

In the 1990's it had 1.5 million insurance policy holders with funds worth 26 billion under management but it had allowed large unhedged liabilities to accumulate in respect of guaranteed fixed returns to investors without making provision for adverse market changes.

In 2000 following a house of lords ruling, the court found that the company had made over-generous payouts leading it to be under-funded.

It was found that the company had focused on solvency margins and failed to consider the increasing risk of accrued terminal benefits.

Many of Equitable's with-profits policies were designed to provide a pension for the policyholder on retirement, and the lump sum available to buy an annuity depended on the sum assured, the reversionary bonuses and the larger terminal benefits. Both types of bonus were allocated at the discretion of the directors in accordance with Article 65 of the Articles of Association, the total being intended to reflect the investment return earned over the lifetime of the policy, subject to smoothing. Between 1956 and the advent of personal pension schemes in July 1988, Equitable sold policies with an option to choose at the retirement date between a fixed Guaranteed Annuity Rate (GAR) or the Current Annuity Rate (i.e. the market annuity rate at that time) (CAR). The latter reflected the anticipated investment return on the lump sum over the annuity holder's lifetime and often changed

depending on long-term interest yields and views on future longevity. No additional premium was charged in respect of the guarantee.

In 1979, legislation allowed the lump sum to be transferred to another annuity provider. As a result, communications with policyholders increasingly focused on the lump sum rather than annuity benefits.

Based on an affidavit sworn by Christopher Headdon on 28 June 1999, "from the 1980s onwards, Equitable was aware of the GAR risk. At no time did Equitable ever hedge or reinsure adequately against the GAR risk to counteract it. The reason for this was Equitable's belief that it could ... neutralise the potential effect of the GAR risk through the exercise of its discretion to allocate final bonuses under Article 65" (of the Articles of Association).

In Equitable Life Assurance V Hyman, the House of Lords decided that GAR policies required that the guaranteed rate was applied to calculate the contractual annuity; and that the effect of the differential terminal bonus rates was that the annuity was calculated at current annuity rates, not at the guaranteed rate, and was not lawful. "The self-evident commercial object of the inclusion of guaranteed rates in the policy is to protect the policyholder against a fall in market annuity rates ... The supposition of the parties must be presumed to have been that the directors would not exercise their discretion [in Article 65] in conflict with contractual rights.

Since the company had not insured against losing the case, and with no other way to make provision for the immediate £1.5 billion increase in long-term liabilities, Equitable put itself up for sale.

In May 2001, Ian Glick QC and Richard Snowden published their joint opinion on behalf of the Financial Services Authority. This concluded that there was an arguable case that the Equitable had breached the rules of its former regulators, the Life Assurance and Unit Trust Regulatory Organisation (Lautro) and the Personal Investment Authority (PIA) in failing to disclose the risk of the existing GAR policies in the Product Particulars, Key Features and With-Profits Guide to new non-GAR policy holders.

This was followed in September by the Corley Report on behalf of the Institute of Actuaries, which recommended, amongst other things, that the appointed actuary should require that there is a process for reviewing communications to policyholders, and should resist holding a dual role as Chief Executive, and that his work should be subject to peer review.

In relation to corporate governance, the directors of Equitable Life failed in managing the risks that were involved in such issuing insurance. The focus was more on solvency limits rather than on ensuring that the company could handle the risk it was taking on.

In the end, all the stakeholders were adversely affected since millions of customers lost their money and the company was insolvent.

It is therefore important that directors in a company ensure that the risk management measures set out are followed in order to protect the company as well as its stakeholders.

## ENRON SCANDAL FROM 1986 TO 1990S

### ENRON'S BEGINNINGS

Enron's origin can be traced to 1985, when Kenneth Lay helped form a company operating in one of the oldest, capital-intensive commodity industries in the world - gas and utilities. Enron was born from the merger of Houston Natural Gas and Inter North, a Nebraska pipeline company (Thomas, 2002). With the help of deregulation, Kenneth Lay was considered a pioneer in taking the energy supply business from a sleepy monopoly as a regulated utility, to a free-market commodity that previously did not exist. In the process of the merger, Enron incurred enormous debt and, as the result of deregulation, it lost its exclusive rights to the pipelines. In order to endure, a newly hired consultant Jeff Skilling, developed an innovative business plan to generate earnings and cash flow.

Through the creation of "gas banks" Enron would buy gas from a network of suppliers and sell it to a network of consumers, contractually guaranteeing both the supply and the price, charging fees for the transactions and assuming the associated risks (Thomas, 2002). In so doing, Enron created both a new product and a new model for the industry – the energy derivative. It continued to diversify beyond the pipeline and natural gas trading into becoming a financial trader and market maker in electric power, coal, steel, paper and pulp, water and broadband fiber optic cable capacity (Healey and Palepu, 2003).

Enron trading activities were reported to be very innovative; Enron had made money off gas and electricity futures; thus, the firm believed that they could the same for fiber-optic bandwidth, pollution-emission credits, even weather derivatives. Indeed, Enron moved even farther afield with its trading and risk management competency, trading wood pulp, steel, and television advertising; results were promising, for by year 2000 Enron was the seventh largest company in America and was paving the way to become the largest. In its annual reputation survey, Fortune listed Enron as the most innovative company in the United States (Curral and Epstein, 2003). Enron's gas trading idea was probably a reasonable response to the opportunities

During the late 1990s Enron had implemented repeated value innovations, lowering the cost of gas and electricity to customers by as much as 40 percent to 50 percent. Enron did so while dramatically reducing its own cost structure and by creating the first national spot market for gas in which commodity swaps, future contracts, and other complex derivatives effectively stripped the risk and volatility out of gas prices (Kim and Mauborgne, 1999). Enron was involved in every aspect of the energy supply chain, from natural gas pipelines to power marketing and allowance trading, including coal trading and coal mine. As a result, Enron made its mark on the industry and forever changed how coal and energy are traded (Fiscor, 2002). Enron was, in essence, two companies. One was an energy supply company that purchased pipelines and electrical power plants that provided energy while the other was a financial institution that functioned as a major dealer in wholesale and derivatives transactions in energy products and some financial derivatives. The energy supply side of the company had information from energy producers about production costs and distribution problems. On the dealer side of the company, it had critical knowledge of order flow as market participants came to them to either buy or sell which it could share directly with its energy-supply operations, thereby providing a major competitive advantage to Enron. The energy

supply business grew rapidly by making major investments in the United States and abroad. This rapid accumulation of assets, which was mostly financed by debt, produced a high debt-to-equity ratio that was partially hidden from investors through partnerships known as "special purpose entities." The financial institution as boom of years came to an end and as Enron faced increased competition in the energy trading business the company's profits shrank rapidly. Under the pressure from shareholders, company executives began to rely on dubious accounting practices, including a technique known as a mark to market accounting to hide the troubles. Mark to market accounting allowed the company to write unrealized future gains from some trading contracts into current income statements thus giving the illusion of higher current profits. Furthermore, the troubled operations of the company were transferred to the so-called special purpose entities which are essentially limited partnerships created with outside parties. Although many companies distributed assets to special purpose entities. Enron abused the practice by using SPEs as dumpsites for its troubled assets

Transferring its assets to the Special Purpose Entities meant that they were kept off Enron books making its losses look less severe than they really were. Ironically some of the SPEs were run by Fastow himself. Throughout these years, Arthur Anderson served not only as Enron's auditor but also as a consultant for the company

In February 2001 skilling took over as Enron's chief executive officer while lay stayed on as chairman. In August however skilling abruptly resigned and Lay had received an anonymous memo from Sherron Watkins an Enron vice President who had become worried about the Fastow partnerships and who warned of possible accounting scandals.

The severity of the situation began to begin apparent in mid-2001 as a number of analysts began to dig into the details of Enron's publicly released financial statements. in October Enron shocked investors when it announced that it was going to post a 638 million losses for the third quarter and take a 1.2 billion reduction I n shareholder equity owing in part to Fastow's partnerships. Due to this fact the world was put to notice that Enron company used to hide its worsening financial position by deploying dubious accounting mechanisms, like the Special Purpose entities in order to hide its rising debt and as a result of this the Directors of the company were indicted on charges of misleading the public and causing financial losses to the members of Public through their failure to make a right disclosure of the true financial state of the company

## CAUSES OF THE ENRON DOWNFALL

- The creation of a special Purpose Vehicles for concealing financial losses and a pile of a financial debt
- Mark to market accounting as an accounting concept is an excellent method to value securities but such a concept becomes a disaster when applied to actual business
- The lapse of proper corporate governance in the Enron company

## LESSONS LEARNT FROM ENRON SCANDAL

- Trust is fundamental in terms of running businesses and people make decisions basing on the promises made by the companies' reports being truthful
- Corporations need to have a proper structure of reasonable rules to guide their executive decision making and their employee behavior
- Corporations need to report accurately and adequately to its shareholders
- Corporations need to keep their employees informed of developments that would affect its customers, the marketability of its products and services, and employees' own financial position
- Corporations should not hide information about the risky ventures, developments adverse to its stock price or other events that worked to affect the employees' pensions
- Corporations need to develop and implement a practical code of ethics including fair play in dealing with customers, fair treatment and training of employees and respect for human right rights and dignity

In conclusion, for proper management of the corporations, there is a need to have the strong corporate governance that has to act honestly in terms of running and controlling the resources of such an entity in order to avoid the challenges that corporations like Enron faced during 1990s

## CORPORATE GOVERNANCE IS A CENTRAL AND DYNAMIC ASPECT OF BUSINESS.

The term governance is derived from the latin word *gubernare*, meaning to Steer. It usually applies to the steering of a ship. Thus, this implies that corporate governance involves the function of direction rather than control.

Corporate governance has come to the forefront of academic research due to the vital role it plays in the overall health of economic systems. Corporate governance was long ignored as a matter of potential importance for the development of a nation's economy. The wave of U.S. corporate fraud in the 1990s was attributed to deficiencies in corporate governance. The recent

2008-2009 global financial crisis, triggered by the unprecedented failure of Lehman Brothers and the subprime mortgage problems, renewed interest on the role of corporate governance in the financial sector.

The development of a strong corporate governance framework is important to protect stakeholders, maintain investor confidence in the transition countries, and attract foreign direct investment. This paper looks at the collapse of Enron and the Parmalat, which was a particular Italian scandal. Parmalat, Enron, and other American firms such as Tyco and WorldCom all have a number of fudging at their core – efforts to make the companies

look healthier than they were Parmalat's collapse began in November when its auditor raised questions about a $135 million derivatives profit. After additional evidence of accounting misstatements, the company's chief executive and founder, Calisto Tanzi, resigned on the 15th of December. Four days later, the company disclosed the fake Bank of America letter. On the 23rd of December, Italian investigators stated that the company had used dozens of offshore companies to report non-existent assets to offset themselves. This was as much as $11 billion in liabilities. Also, this is in addition to the fact that Parmalat might have been falsifying its accounting figures for as long as 15 years.

The importance of corporate governance for corporate success as well as for social welfare cannot be overstated. Examples of massive corporate collapses resulting from weak systems of corporate governance have highlighted the need to improve and reform corporate governance at the international level.

In the wake of Enron, Parmalat and other similar cases, countries around the world have reacted quickly by pre-empting similar events domestically. As a speedy response to these corporate failures, the USA issued the Sarbanes Oxley Act in July 2002. In January 2003, the Higgs Report and the Smith Report were published in the UK. This publication again was in response to the recent corporate governance failures.

Consequently, corporate governance has become one of the most commonly used phrases in the current global business vocabulary. The notorious collapse of Enron 2001, one of America's largest companies, has focused international attention on company failures. In addition, it also presents the role that strong corporate governance plays in preventing these failures.

"Corporate governance" comprises of a country's private and public institutions, both formal and informal, which together govern the relationship between the people who manage corporations (corporate insiders) and all others who invest resources in various corporations in the country.

Therefore, corporate governance generally refers to the set of rule based processes of laws, policies, and accountability that governs the relationship between the investor (stockholder of a company) and the investee (management). Corporate governance attracts a great deal of attention in the aftermath of the Asian financial crisis of 1997-1998 and the early 2000s U.S. corporate scandals, like Enron and WorldCom. However, after the threat of global contagion financial crises passed, corporate governance was relegated to the back of academic research.

Therefore, the focus of this paper is to analyze the challenges that transition countries faces when moving from a politically-based relationship to a relationship that is rule-based. Furthermore, it also analyses the role of corporate governance as a major factor in the unprecedented transformation of transition countries to a market economy.

## The Collapse of Enron

In 2001, Enron became a household name – and probably in most households in most countries around the world.

On the 2nd of December 2001, Enron became one of the 10 largest companies in the USA. In the following months, more and more evidence emerged about the weaknesses and fraudulent activity of corporate governance. However, countries across the world have been unsettled and disturbed by the shock of this event and are now examining their own corporate governance systems in micro-detail. This they do by looking for similar weaknesses and potential like Enrons. *Enronitis* has spread across the globe like a lethal virus, infecting every company and every shareholding institutions. In addition, it also had a significant effect on worrying even by the smallest shareholder and unnerving the financial markets.

Enron was a Huston-based energy company founded by a brilliant entrepreneur, Kenneth Lay. The company was created in 1985 by a merger of two American gas pipeline companies. Within a period of 16 years, the company was transformed from a relatively small concern, involved in gas pipelines, and oil and gas exploration, to the world's largest energy trading company (The Economist, 28 November 2002). Enron, the champion of energy deregulation that grew into one of the nation's 10 largest companies, collapsed yesterday. This collapse occurred after a rival backed out of a deal to buy Enron, and after many big trading partners stopped doing business with the company.

Enron, based in Houston, has been widely expected to seek bankruptcy protection. With $62 billion in assets as of September 30, it would be the biggest American company ever to go bankrupt. Hence, this company dwarfs the filing by Texaco in 1987. Late in the day, Enron's chief financial officer, Jeff McMahon, stated that the company was still talking to banks about a restructuring and a consideration of other options.

The role of a company's board of directors is to oversee corporate management in order to protect the interests of shareholders. However, in 1999, Enron's board waived conflict of interest rules to allow chief financial officer, Andrew Fastow, to create private partnerships to do business with the firm. These partnerships appear to have concealed debts and liabilities that would have had a significant impact on Enron's reported profits. Subsequently, Enron's collapse raises the issue of how to reinforce the directors' capability and will to challenge questionable dealings through corporate managers.

Several corporate governance problems have emerged due to Enron's wreckage.

Unfettered power in the hand of the chief executive is an obvious problem, and is one that characterized Enron's management. Also, there were numerous illustrations of unethical activity within the Enron organization that continued to come to light long after its downfall. For example, in May 2002, it became clear from the documents released by the Federal Energy Regulatory Commission that Enron's energy traders developed and used strategies or tricks to manipulate the markets where Califonia bought electricity.

Overall, corporate governance in Enron was weak in almost all aspects. Thus, the board of directors is composed of a number of people who lacks moral character. Also, they are often willing to engage themselves in fraudulent activity. This was the genuine root of the company's corporate governance failure.

There has been a proliferation of books on the downfall of Enron, seeking to explain why events transpired as they did. As we have seen, the USA and the UK strong reaction to Enron's collapse and corporate governance has

been hurled to the centre stage. This occurs as a result of the weaknesses at the heart of Enron's corporate governance system. The long term effects of Enron will hopeful be a cleaner and more ethical corporate environment across the globe. Furthermore, the continuous updating of corporate governance codes of practice and systematic review of corporate governance checks and balances are necessary to avoid other Enrons in the

future. Clearly, corporate governance check and balances can only serve to detect, not cure, unethical practices. A complicating factor in issues of fraud and ethical breakdown is the intangible nature of fraud. In addition, there is a grey area surrounding what is *right or wrong, good or bad* in human behaviour. Some comments made by Sheldon Zenner, an American white collar criminal and civil lawyer, when speaking of the Enron trial, helped to illuminate this issue.

Corporate Governance Failure in Parmalat Separation of ownership and control in a large stock corporation would be of no particular consequence if the interests of owners and managers coincided. Corporate governance is concerned with overcoming the problems of the monitoring and controlling of managerial performance. This occurs whenever corporate ownership and corporate control are separated as a result of dispersed share ownership. The primary function of corporate governance is to ensure that companies are run based on the interests of corporate shareholders. However, these shareholders provide financial resources in running them. In the UK and US, owners of typical corporation are many, and their shares are small relative to the size of the corporation.

The collapse of Enron during 2001 has brought about a focused attention on the effectiveness of the non-executive director function. The corporate board, with its mix of expertise, independence, and legal power, is a potentially powerful governance mechanism.

Parmalat Finanziara, the Italian dairy and food giant, is fast joining Enron and WorldCom as a household name for corporate scandal. The alleged financial fraud at Parmalat spans more than a decade. Also, it involves sums whose estimates have ballooned from EUR 4 billion to more than EUR 8 billion. Founder, chairman, and chief executive Calisto Tanzi has been ousted from the company and board and is under arrest. Enrico Bondi, who replaced Tanzi in December, has been given new authority to act as the sole administrator of Parmalat. Therefore, he has 180 days to save what he can of the company.

While Bondi races against time to unearth the sources of the scandal, some corporate governance experts are already drawing lessons.The media have termed parmalat, a particular Italian scandal, and have suggested that the situation was more likely to arise in a country like Italy than elsewhere (Mulligan & Munchau, 2003; Melis, 2005). Given the criticisms of Italian corporate governance in the literature, this is not surprising (Melings, 2005; La Porta et al., 1997).

Parmalat was owned by a complex group of companies. In addition, it is controlled by one strong blockholder (the founding Tanzi family) through pyramidal structure (see Melis 2005). Indeed, Melis (1999) explained that such ownership structures with opaque patterns of ownership and control are not uncommon in Italian companies. Furthermore, Melis (2000) stated that the weaknesses of Anglo Saxon systems of corporate governance were traditionally strong managers: strong blockholders and unprotected minority shareholders. The

case of Parmalat was typical of this form of corporate governance. This is with controlling Tanzi shareholders channeling corporate resources illegally to themselves, at the expense of minority shareholders (Melis, 2005).

Although Italian corporate governance is characterized by monitors, namely the statutory auditors and the external auditing firm, this was not able to protect the company from self-destruction. A direct analogy may be drawn between the cases of Enron and Parmalat, in terms of fraudulent activities and the companies' audit firms. However, for Enron to exist, Parmalat has survived its ordeal and has turned on the auditors in order to recover funds.

Another difference is in the way that the auditing firms involved with Parmalat managed to extricate themselves from the crisis. However, Arthur Andersen was destroyed in the aftermath of Enron. Melis (2005) highlighted a series of other serious corporate governance failures which led to the parmalat's crisis. Firstly, one of the non-executive directors in Parmalat was not independent as he had been working in Parmalat as a senior manager since 1963. Secondly, the chairman and chief executive position were not separated as was recommended by corporate governance codes of practice in Parmalat Finanziaria. Hence, both positions were held by Tanzi. Thirdly, the Preda corporate governance code in Italy specified that where a group of shareholders controls a company, it is even more important for some directors to be independent from the controlling shareholders. This was certainly not upheld by Parmalat. Also, there was no adequate explanation given by the company for this lack of compliance.

As in the case of Enron, the failure of Parmalat to establish careful checking and monitoring structures within the company's governance framework laid it bare to the abuse of power and fraudulent activity. Unless these devices for detecting fraud and misconduct are in place, it is relatively easy for Enron-like situation to arise.

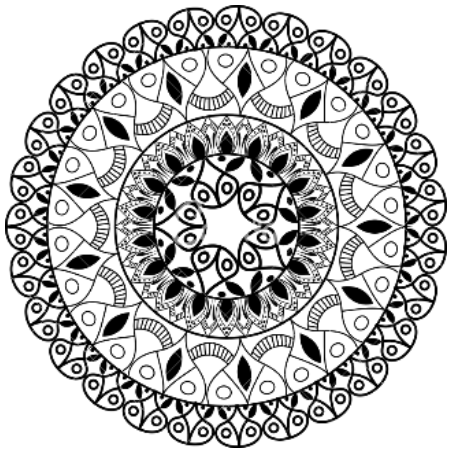
The Parmalat case may seem to differ in terms of the simplicity of its fraud. The audited statements from Bonlat were used to show cash balances that were reported by the parent company. Thus, it used in offsetting high levels of debt on its balance sheet. Each quarter with a set of forged documents would show purported cash holdings at Bonlat that matched the head office's requirements. Furthermore, Deloitte seems to have accepted

Grant Thornton's audits unquestioningly. On the other hand, bankers and investors took the audited group figures as reassurance that, although complex, the group's finances were essentially sound. In addition, they failed, to ask why a company with so much cash needed to borrow so much.

Corporate governance is the organizational arrangement by which a company represents and serves the interests of its investors. It encompasses anything from the company's boards to executive compensation schemes to bankruptcy laws.

Like the American cases, the Parmalat scandal has raised questions about how the company could fudge its numbers for so long without any help from outside. The auditors, says Mittelstaedt, should have least spoken to Bank of America to verify that they held the $4.9 billion Parmalat claimed. The system of checks and balances that support corporate governance needs to function effectively. Consequently, both Enron and Parmalat highlight the essential functions of non-executive directors, audit and disclosure, as well as ethicality of management. Corporate governance mechanisms cannot prevent unethical activity by top management. However, they can at least act as a means of detecting such activity by top management before it is too late. When

an apple is rotten, it has no cure. Nevertheless, the rotten apple can be removed before the infection spreads and infects the whole barrel. Therefore, an analysis of the Enron and Parmalat cases shows that both the US and corporate governance systems are so different in character. Additionally, they can be vulnerable to abuse and corporate governance weaknesses which are similar in nature. This is really what effective corporate governance is all about. Therefore, this study aims to explore the various checks and balances, and mechanisms by which good corporate governance ensures successful business and social welfare maximization.



# Volume Two

# LEGISLATIVE DRAFTING

## INTRODUCTION

The subject 'Legislative Drafting' is like grammar and rules of composition, difficult to remember, but when followed by the individual inspires him to develop creativity and skill to pen drafting and in particular Intelligence, memory and judgment may be the assets of an Advocate, but a draftsman should have skill and art with a sense of good drafting.[193]

The Statutes get their proper chiseling and trimming in the hands of the Judges whose interpretations play a leading role in this regard. The draftsman should be closely following these;

There is no limitation to his knowledge of the subjects-science,art, literature ,history, logic apart from law. The students should make attempts to draw up hypothetical drafts on certain chosen subjects. It is true to say with Sri. Bukshi that **a perfect draftsman is not born yet**. But to aim at reaching higher standards should be the objective of a good draftsman.[194]

## NOMOGRAPHY

'Nomography' is the name given to the subject that deals with the drafting of laws. It is, in other words, Legislative Drafting in a broad sense. The objective of 'Legislative Drafting' is to attain beauty and utility, and, the draftsman's major responsibility is to attain these two or strike a harmony between them.[195]

Legislative Drafting is both a Science and an Art. It is a science in as much as certain rules can be laid down which are of universal application.

It is an art as it consists of *a sense of the use of language,* together with knowledge of the technical interpretation. Efficiency can be reached by getting mastery of the rules, coupled with skill or natural gift.[196]

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195 Ibid

196 Ibid

Just like an artist, who decides on colour, or like a musician striking at a particular tone, the draftsman should secure his 'sense' of good drafting. His knowledge of law speaks to his intelligence memory and judgment but, drafting is a **skill and an art.**

The draftsman is in reality a ***'creative artist'***. He gives form or shape to ideas, converts vague ideas into concrete words, and reduces proposals: social, economic, political legal, reform etc. into writing. He collects ideas from several sources and his process is synthetic and not analytical.[197]

Legislative drafting mainly deals with the drafting of bills intended to become a part of statute law. But in a broader sense, it includes the drafting of statutory orders, rules and other instructions issued by the Government.

It also includes the drafting of bye-laws of corporations, municipalities and other forms of subordinate legislation.

But, to aim at perfection should be the aim of all draftsmen. The subject legislative drafting, shows the avenue to reach this perfection.

## MATERIALS USED IN DRAFTING.

As Legislative drafting is both a Science and an Art, the draftsman requires certain materials to prepare his draft. The materials, inter alia, are

i. Analogous legislation that might exist on the subject in other countries, or in other parts of Uganda. There is little in legislation that is original. Legislatures imitate each other.

ii. Legislation that already exists on the subject.

iii. Instructions received from the department or agency that sponsors the file. There instructions require to be examined carefully.

iv) The draftsman should carry out a preliminary scrutiny of the proposed legislation in order to see whether it would be in order. The proposed legislation should not offend or conflict with any fundamental provisions of the **Constitution.** It must not be ultra vires of our Constitution. It should fall within the field assigned to the legislature by the Constitution.

Also obtaining prior consent of the President, or special formalities if any should be fully observed.[198]

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198 Ibid

# CLASSIFICATION

**Classification of Statutes.**

Statutes have been classified under various heads, but for the purpose of legislative drafting they are classified as follows :

i) Statutes affecting the Constitution may require, observance of special formalities of Constitutional requirements.

ii) Statutes providing for taxation,

iii) Penal statutes dealing with crimes,

iv) Statutes dealing with local governments.

v) Statutes dealing with Statutory bodies including principal bodies or other Corporations.

vi) Statutes dealing with and affecting family laws and personal laws,

vii) Statutes dealing with the reformation of the law itself.

viii) Statues dealing with the general administration of justice and various procedures of the courts and the Tribunals.

ix) Statutes dealing with miscellaneous matters. As regards the relationship with the existing body of law on the subject, statutes may be classified as follows.

d) When there is no existing legislation on a subject, the proposed measures would be enacted for the first time which will be entirely a new piece of legislation on the Statute Book on the subject.

e) When there is already a statute on the subject and only modification or alteration is brought about by a legal instrument, it is called 'Amending Statute'.

f) A statute which aims at collecting into one Act provisions scattered in several Acts. This is called Consolidating Statute.

g) Codifying Statute. A new statute with new measures.

h) Repealing Statutes. An earlier statute is repeated.

i) Declaratory Statutes. The existing law is declared by a statute.

# COMPOSITION

**Rules of Composition for Legislative Drafting.**

Certain rules are to be followed if the draft should read well and achieve the desired object.

The rules of composition follows in literary work would be inadequate. Beauty in expression, may be achieved by following.

i) Purely literary rules intended to achieve beauty of expression,

ii) Rules peculiar to composition and

iii) Rules of Grammar.

Here (i) & (iii) are to be invariably followed.

In addition the following are the points touching the rules peculiar to legal composition.

i) Legislation is normally intended to be a command for future obedience. Sometimes it might contain statement of fact dealing with the past which should be called 'Preamble',

And the part of the draft which deals with the future intended to produce the desired legal consequences is called the body of the Statute.

ii) The simple sentence structure should be preferred to a compound or a complex sentence. If it is inevitable to employ compound or complex sentence, care should be taken at least to ensure that reader would not get lost. It is for this reason that it is always desirable to number the various clauses of lengthy sentences.

iii) The operative portion of a section should come first, and, exceptions, reservations or qualifications should be placed thereafter.

iv) The choice of words used shall be appropriate to the circumstances.

It is not the function of the draftsman to make his draft learned he has to make it **easy of reading**. Duplicating of words like 'null and void', "authorised and empowered' can be replaced by 'void' and 'authorised'.

v) An ideal sentence is a sentence that does not read wrongly if the punctuation marks, are marked. The 'stop' should not appear more than once in a sub-section; 'Provide that' should be preceded by a colon and not by a stop; coma should not be used where one can do without it; putting a dash has been described as 'the most feminine of all the points' and as such should be avoided.

vi) The style or good legal composition should be free from all **emotion and rhetoric**. It must be impersonal , consistent and not contradictory and free from metaphors and figures of speech; embroidery not needed. The

texture should be firm, useful and durable, **'A noble simplicity is its most beautiful characteristic' (Bentham).**

## DELEGATION

Delegation of Legislative Powers.

Whether legislative powers could be delegated is a question of great relevance to the draftsman. The rule is 'delegatus non potest delegare'. But, delegation has become a present day necessity owing to the pressure of time and the complexities of modern life.[199]

The legislature cannot bring out a self-contained and a complete act and as such delegation becomes a practical necessity. However, delegation within proper limits is permissible.

What are proper limits ?

According to our Supreme Court **only the essential functions are not to be delegated.** These are functions non-delegable in nature and

the legislature alone should make the law.

They are :

i) Policy making cannot be delegated to any other authority : that shall be done by the legislature itself.

ii) The legislature cannot abdicate its functions, and vest them in other authorities.

iii) The power given to the delegatee should not be unconfined and vagrant.

iv) The time for which the Act may remain in force must be mentioned in the Act itself. A power with the executive to extend the Act from time to time would not be favoured.

v) Taxation : Power to fix rates of tax should not be delegated.

vi) Penal law-defining offences & prescribing punishments, are nondelegable.

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v) To provide for exemptions, is non-delegable.

vi) viii) To repeal or amend an Act etc. is an essential function.

ix) When Tribunals are constituted in a Statute, to specify their Jurisdiction is non-delegable.[200]

## PREAMBLE.

A Preamble is usually inserted to serve as a preface to the Act. It is a key to open the minds of the makers of Act and the mischief which they intended to redress. It is an excellent aid to construction and can be resorted to unlock the mind of its makers. It would serve as a useful purpose where the act introduces a measure of social or economic reform

Preamble must be consistent with the body of the act. It usually begins with the word 'whereas It tries to justify its reasonableness before the courts, to avoid a challenge under Ultra Vires doctrine.

The preamble is not part of the Statute; it is a mere recital of the intentions of the framers, and, if the text is clear, the preamble is ignored.

It is pressed into service only to solve an **ambiguity**. Lord Halsbury opines that preamble should not be interpreted to cut down the text or to control it.

## DEFINITIONS.

Definitions have been described by Samuel Butler as a **'Wall of words round a chaos of ideas'**. They try to define the boundaries of the denotation of a word

and are meant to keep the application of the word with proper limits.

They must be **neat, well understood, clear and unostentatious**.

They should not be pompous or abstruse or circumlocutory. Words which are not used in the body of the Act should *not be defined,*

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Definitions generally begin with the word **'means' or 'includes'**.

Where the word 'means' is used, the definition excludes all things that are not covered by the words that follow. It is exhaustive.

Where the word 'includes' is used, the definition is not exhaustive and the word defined is necessarily intended to have a wider application than the things mentioned in the defining words. The words 'mean' and 'includes' should not be used together in the same definition.

Utility of definition :- Definitions help to shorten the body of the Act, assist in the explanation of difficult words of a Statute ; also to limit and define the scope.

e.g. i) 'Dishonestly' Sn. 24 I.P.C.

ii) Fraudulently' Sn. 25 I..P.C.

iii) 'Good faith' Sn. 521 I.P.C

iv) 'mesne profits of property means' Sn. 2(12). C.P.C.

## PROVISO.

The proviso, whenever necessary can be inserted below a section, subsection,

clause or sub-clause as the case may require. The proviso should always be printed separately from the main part of the section. The main functions of the proviso should always be printed separately from the main part of the section. The main functions of the proviso are as follows :-

i) To create an exception in respect of certain matters which would otherwise come within the section.

ii) To quality or restrict the operation of the main part of the section.

iii) To exclude some possible mis-interpretation of the section.

A pro vise should never be used to extend the scope of the section.

## MUNICIPAL BYE LAWS

**Drafting of Municipal bye - laws.**

Municipal l Bye laws are one of the forms of 'subordinate Legislation', and are to be drafted carefully keeping in view the amplitudes of the subject. While preparing Municipal Bye-Laws, the following requirements shall be kept in mind :

i) The matter and purport of the bye-laws should be strictly within the scope of the Parent Act (Municipalities Act) which confers power to make bye-laws.

ii) The manner of making and publication of bye-laws as prescribed by 'the Parent Act should be strictly adhered to.

iii) The bye-laws should be certain, clear and unambiguous.

iv) The bye-laws should not be repugnant to:

(a) The Parent Act provisions

(b) To the provisions of any other statute,

and iii) the General principles of law.

v) The bye-law will become void if it is **unreasonable**. Of course, the modern trends adopted by the courts of law is to take a liberal view in favour of bye-laws and not to declare them void on the ground of unreasonableness unless the bye-laws are patently **absurd or manifestly unjust.**

They become void if :they put undue **hardship on the citizens** to whom they apply.

Since local self governments are constituted by the popular majority 'of the locality, the support and co-operation of the people shall be secured for the smooth and peaceful functioning of the local self governments.[201]

## FLAWS

### Flaws in Drafting

Legislative drafting should be free from flaws. These are,

i) **Looseness** : is the most usual flaw to be found, and its peculiarity is that it might creep in, in spite of the best possible attention

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ii) **Repetition**: should be avoided for the reason that apart from being bad style, it might lead to many problems in interpretation. It may result in redundancy and inconsistency.

iii) **Obscurity:** is a fault that might arise either by reason of too many words or by reason of too few words, or wrong words. Incoherence in thought naturally leads to unintelligible expression.

iv) **Shabbiness** or slovenliness sometimes results from a carefree attitude towards words.

v) To be **very clear** and specific, the use of the words like 'Ditto' should be avoided.

vi) **Vagueness**: apart from constitutional objections, it might make the whole labour of the draftsman futile,

vii) Providing no provision for the **sanction in a statute is a flaw to be avoided.**[202]

**As if enacted in this Act'.**

One of the cardinal principles of legislative drafting is to avoid such phrases 'As if enacted in this Act'.

The reason is that these words have no purpose at all to serve, according to the Court. The context in which this phrase is used is as follows. The Parliament or legislature makes an act, it provides therein provisions for subordinate authority to make rules, schemes, etc. and it provides further that such rules etc. Shall

have effect 'as if enacted in this Act'.

On the face, the phrase 'as if ... Act' looks to be a blank cheque but in view of the decisions of the Supreme Court in the United States and India, **where there is judicial review this phrase serves no purpose**.

The reason is that even the Acts, are subject to judicial review in India. Hence the subordinate legislation is also subject to judicial review as violative of the Parent Act.

## SUB - LEGISLATION

**Subordinate Legislation.**

Legislation as a source is fertile. The 'Act' is made by the Parliament or State Legislature. This 'Act' gives birth to a number of subordinate legislation: Rules, regulations, orders schemes, bye-laws etc.

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[202]https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwiY0beSob_8AhUAAAAAHQAAAAAQAw&url=http%3A%2F%2Fwww.msrlawbooks.in%2Ffile%2FLEGISLATIVE_DRAFTING.pdf&psig=AOvVaw1bEnZ7lZU2arsiqUTJ9nyf&ust=1673515976535198

These are technically the delegated legislation. The validity of the rules, orders bye-laws etc. is judged by the courts on certain grounds. The draftsman should be shrewd enough to avoid such grounds & save them from being declared ultra vires.

Grounds :

i) Defect in the manner of exercise of power,

ii) Defect in the form of the rules etc.

iii) Defect of Substance.

i) Defect in the manner of exercise of power.

This arises as a result of non-observance of a formality by the concerned administrative authority.[203]

a) Previous publication.

b) Previous approval by the Legislature as per the Act.

c) Previous sanction of executive authority.

d) Previous consultation with some defined authority.

e) Inquiry which should be conducted

f) Laying the rules etc. before the Legislature.

ii) Defect in form :

a) Not referring to the section or quoting a wrong section while making the instrument.

b) Not referring to the conditions to be fulfilled as per the Act.

c) Combining provisions made under two different statutes.

iii) Defect in substance :

a) The delegatee should not re-delegate.

b) Power should not be exercised mala fide.

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c) Levy of fees, corporation penalty, or excluding judicial remedy etc. should not be done by Rules etc.

d) Retrospective effect should not be given to Rules, Orders etc.[204]

What is law? It is a System of rules that Lays down standards to which people within a jurisdiction ought to conform such as Legal rule, moral rule and social convention, Failure to adhere to legal rules may result in a penalty and it is worth noting that Law is never static it is always changing.

## SOURCES OF LAW

Source means origin from which something is ultimately derived, the kind of sources can be divided into two groups which are basic (primary) sources and auxiliary (secondary) sources of the law.

The basic (primary) sources of law consist of two different sub-sources: Written and Unwritten sources of law. The auxiliary (secondary) sources of law consist of two sub-sources as well: Doctrine and judicial decisions "case law".

Types of legislation and hierarchy of legislation

In the narrow sense, legislation includes Acts of Parliament, Orders, Regulations, Orders-in-Council and Statutory Instruments.

In a wider sense, legislation covers nominative rules and practices of professional, social or religious groups or societies; customary laws and ways of behavior, departmental orders and circulars for implementation of regulations and rules.

Note: all these contribute to the rule of law.

The written sources are following:

- Constitution

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- Law/Act/Code
- Statutory decrees,
- International treaties,
- Regulations and Rules and other statutory instruments
- Byelaws and Ordinances

The unwritten sources are being formed by customs or rather customary law.

Customary law means the rules of law which by custom are applicable to particular communities in Uganda

1. Constitution (Supreme Law)

In most democratic countries, the Constitution is the Supreme law of the land.

Any other law that is inconsistence with the Constitution is void to the extent of the inconsistencies.

All the other legislation must conform to the Constitution.

2. Primary/ Principal / Substantive Legislation.

As a general rule in Commonwealth jurisdictions, authority to make new written law is conferred upon the Legislature/ Parliament, this includes the authority to amend the Constitution although usually special legislative procedure must be followed. Parliament is treated as sovereign and may make law on any subject it wishes and may repeal any law enacted by a predecessor.

However, the initiation of legislation is generally the sole responsibility of Government. In Uganda, usually legislation is introduced in Parliament by a Minister acting for Government.

In a few cases, proposals may be introduced by members of Parliament not in Government (Private Members Bills)

Principle legislation therefore includes Acts of Parliament, Decrees (Passed during a period with no elected Parliament), Statutes (Passed by a Legislative Assembly and not an elected Parliament)

3. Subsidiary Legislation.

In most jurisdictions power belongs to the people who through the Constitution vest it in the Legislature.

Parliament thus has the full power to make laws. Parliament usually exercises this power to pass primary legislation i.e. Act of Parliament.

However, Parliament has the power to confer its law-making power on another person or body; thus enabling that person or body to make laws.

This process is the delegation of Parliament's legislative power and the resulting laws are known as subsidiary/ secondary / subordinate or delegated legislation.

Subsidiary legislation is a term used to describe instruments made under delegated legislation. As a general rule, however, such delegation needs to be expressed by appropriate legislature by legislation.

The principal reason why Parliament delegates its law making powers is the complexity of living in a civilized society and the necessity for so many laws containing high levels of technical details. It would be impossible for Parliament to retain absolute responsibility for all of it.

In recognizing the practical utility and necessity for delegated legislation, Parliament routinely delegates its law making function.

However, Parliament must be satisfied that, in each case, the delegation can objectively be justified. Whichever terminology you choose, the import is that they are lower than substantive laws or Acts of Parliament and certainly below the Constitution.

Types of Subsidiary Legislation

Subsidiary legislation includes the following-

Regulations: This is the term used to refer to subsidiary legislation which lays down legislative requirements, it is in quality and nature like an Act but give more details.

Rules: These are generally procedural requirements which indicate steps that must be taken for a particular purpose e.g. Court Rules

Orders; Legal Notice; Bye-laws/ Ordinances: Used to refer to laws made by local authority and deals mostly with matters of health, sanitation, welfare, education at local authority level. It may also be used to refer to rules for internal management of bodies e.g. statutory corporations.

Proclamation: refers to formal notice by a Head of State e.g. declaration of a state of emergency. Since the executive arm of government does not make laws, proclamation should strictly not be used to lay down the law.

Executive instruments/orders etc.: Used in some jurisdictions to indicate executive acts the basis of which are found in specific Acts in the jurisdictions e.g. deportation orders, EO on Standard Orders of Procedure for OWC

Whichever terminology used, the import is that they are lower than substantive laws or Acts of Parliament and certainly below the Constitution.

Distinction between Subsidiary and Principle legislation

The distinction between primary legislation and subsidiary legislation is often regarded as the division between principle and detail, or between policy and its implementation. On that analysis, matters of principle and policy are usually found in primary legislation, while detail and implementation is ordinarily the domain of delegated legislation.

The distinction may sometimes be confusing because some Acts may sometimes contain matters of detail and subsidiary legislation may contain matters of policy.

Legislation is the framework by which governments achieve their purposes, Politicians and administrators consider legislation to be a means to attain their economic, cultural, political and social policies. Governments must legislate to accomplish political objectives and certain particular public policies.

Legislation is needed to effect changes in the law, Legislation- promotes the common good in society- St. Thomas Aquinas controls man and establishes a civil society through coercion- Thomas Hobbes and J. Austin resolves disputes- Karl Llewellyn regulates behaviour of man by prescribing the conditions under which man will be deprived of their rights and freedoms – Hans Kelsen.

Legislation is used to- to structure the Government; it is worth noting that a Constitution is a charter (blueprint) for Government it provides the following:

- framework within which State laws and policies must be conducted.
- Recognises the various arms of Government
- Provides for Separation of powers
- Rule of law

Where it exists, a Constitution is the BASIC and FUNDAMENTAL (highest) law and all other laws derive their legitimacy from it.

It's therefore the best law in which to express the structure of Government of any country protect citizens from the Government and its agencies. Various Constitutions provide for various liberties and rights. It is a function of the law to protect these various liberties and rights from violations or unreasonable intrusions by persons, organizations, or government.

Bill of Rights- right to life, freedom from torture, freedom of assembly

Laws providing for redress against government action

Laws providing for procedures against arbitrariness

set standards of conduct or behavior

The law is a guidepost for minimally acceptable behavior in society.

Some activities, for instance, are crimes because society (through a legislative body) has determined that it will not tolerate certain behaviour that injures or damages persons or their property.

For example, under a typical penal law regime, it is a crime to cause physical injury to another person without justification doing so generally constitutes the crime of assault.

## THE PROCESS OF DRAFTING LEGISLATION

Law-making process begins from policy. Policy has been defined as 'a set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specified situation where those decisions should, in principle, be within the power of those actors to achieve'.

Policies are thus initiated by the government and use to tackle a wide range of issues in the society including legislation.

The drafter does not formulate policy. The job of a drafter is to translate policy into legislation.

Where does policy come from?

Policy is derived from the following –

Election Manifesto.

Through a manifesto a person or party sets out what policies they will introduce, continue, strengthen, abolish, etc.

Budget Speech

Usually used to introduce, strengthen or improve financial policies

State of the Nation Address

Government policy is many times also adopted from treaties or conventions to which a State is a party.

Note: International law requires that where a country has ratified a treaty, it is bound by the provisions of that treaty and must therefore give the force of law to treaty provisions.

The work of a drafter commences from the very moment an instruction is received to draft a Bill, through the drafting process and until a draft Bill is ready to be presented to Parliament. This procedure is known as the drafting process.

Thornton opines that, to appreciate the drafting process better, it should be viewed in a wider context. In his words-

"It is just one part of the process of legislation, whereby an idea or concept concerning the social framework of society becomes government policy, is transformed to legislative shape by means of the drafting process and eventually passes through the legislative machinery to reach the statute book as law."

The stages of the drafting process

(Read about these 5 stages and make your own notes)

Thornton distinguishes five stages in the process of drafting legislation:

Understanding the proposal

Analysing the proposal

Designing the law

Composing and developing the draft

Verifying the draft

Legal Research prior to drafting legislation

Prior to drafting legislation, a drafter must conduct research.

Legislative drafting involves the attempted solution of problems faced by Governments and by society as a whole. Therefore, an understanding of the problems will help in finding the solutions.

A drafter must understand the conditions that have given rise to the problem.

A drafter must have some basic knowledge of almost every subject matter. This basic knowledge must be supplemented by research. Counsel must also have knowledge of the law.

A drafter must be able to ask the right questions in order to understand the problem and find a solution.

A law library is important to a drafter.

## THE LEGISLATIVE SENTENCE

What is a sentence?

A sentence: Is an expression of a thought.

Contains a subject and a predicate

It is the basic unit of a language as a word is a basic unit of a sentence.

A section of an act of parliament is basically a sentence.

It is an arrangement of words to express a command or to state a prohibition to confer a power or to impose an obligation.

The basic rule is to write short simple sentences.

The structure of the sentence is important. “Big gates swing on small hinges. On the structure of the sentence hinges all problems that are likely to plague the law. Clarity is very important.

The first principle to observe is that a law consists of-

The person on whom an obligation is imposed, or on whom is conferred a power or a privilege.

The setting out clearly of what is required to be done or not to be done.

The circumstances where appropriate, under which it is intended that the law should operate. The conditions where appropriate subject to which an act may or may not be done or shall not be done.

That the structure of the sentence that constitutes the law is so clear as to leave no doubt as to the intention of the law giver.

The legislative sentence is not different from a grammatical sentemnce.

NB: Legislative drafting does not have a system of grammer or of syntax of its own.

Hence the legislative sentence consists of a subject and a predicate.

## THE SUBJECT

The subject of a sentence is an invariable noun or the equivalent of a noun. In legislative drafting, the subject is the person on whom an obligation is imposed or on whom a power, a privilege or a right is conferred.

It is essential to distinguish the subject of a grammatical sentence from the subject of a legislative sentence, often referred to as the legal subject. In the latter case it ned not be a person.

Example: this Act may be cited as the legal practitioners act 2021.

There is hereby established a fund to be known as the Sports Fund.

NB: where an obligation is imposed, the legal subject must be a person.

Example: the editor of a newspaper shall within ten days of establishment of the newspaper file with the registrar General returns.

In this case the legal subject is not universal. It is limited to a group of persons known as editors.

Where the law is intended to apply to all persons it shall be expressed as such e.g A person shall not enter a swimming pool unless the person wears a swim suit.

Though expresses in singular it applies to all persons

The legal subject can also be expressed in negative as: No person shall enter a swimming pool unless that person....

Thus it would not be appropriate to provide that,

A dog shall not enter a public park...Rather A person shall not bring a dog into a public park...

The legal subject may compose of two or more persons-

The managing director or secretary shall file with the registrar...

A doctor and nurse shall be present at the birth of a child...

## THE PREDICATE

The predicate of a grammatical sentence and of a legislative sentence is what is said about the person or the thing forming the subject of the sentence.

It contains the enacting verb of the legislative sentence and determines what is required of the subject of the sentence. The predicate in a legislative sentence is often referred to as the legal action, even though no action may be required.

Example: an editor of a newspaper shall file with the registrar returns, before an issue of a paper is published.

A police officer may without a warrant, arrest a person who the police officer suspects of having committed an offence.

THE PREDICATE – TWO OR MORE VERBS

A person shall not bring an action against a police officer unless that person-

Makes a demand in writing on the police officer for a copy of the warrant

Files within five days of making the demand, a copy of the demand, with the Registrar of courts and

Pays the fees for filing the copy of the demand

Any person-may, within ten days of delivery of the judgement, file a notice of appeal and shall serve a copy of the notice of appeal on the respondent. *( Two actions one discretionary the other compulsory)*

A police officer shall not arrest or detain a person unless....

A police officer shall not arrest and detain ....

CIRCUMSTANCES

The circumstances under which the law operates when properly expressed adds clarity to the law.

Where a person is convicted of an offence under section 1, the court may, in addition to the fine imposed on that person, order that person to pay a fine not exceeding one hundred thousand dollars.

Where a person is convicted of an offence states the

Circumstances the prevalence of which leads to the im[position of the penalty. In the absence of the circumstances, the penalty will not be imposed.

Where there is water in the swimming pool, an owner on whom notice is served shall immediately-

Evacuate the water from the swimming pool and

Bar the swimming pool from being accessed by infants.

To state a condition, "if" is normally used.

E.g if the appellant complies with section 2 , the court shall order the respondent to pay into court an amount of money equivalent to the sum claimed by the appellant.

If the appellant does what the law requires of the appellant, the court is bound to make the order for the payment into court. If the appellant doesnot comply with the section, then the court cannot order the payment into court. If the apeelant doesnot comply with that section, then the court cannot order the payment into court. The exercise of the power of the court to order the payment into court is dependent on the compliance, by the appellant, with the requirements of section 2.

## SHALL AND MAY

The basic principle in the use of the words “Shall” and “may” in a legislative sentence is that “shall” imposes a duty or an obligation hence is mandatory while “may” confers a discretionary power.

## THE MODIFIERS

A modifier is a word or collection of words that identify the subject of the sentence or the predicate of the sentence.

Ambiguity in legislative drafting often springs from the wrong arrangement of words in the structure of the sentence e.g the wrong placement of the modifiers.

E.g A person shall not kill an animal on the highway ;

The expression on the highway may modify-

Person, that is, a person who is on the highway;

Kill, that is, a person shall not kill on the highway;

Animal, that is, an animal which is on the highway.

It is important to be clear at what the prohibition is aimed

Is it aimed at the person, the killing or the animal?

Where the prohibition is aimed at the person, the provision would read,

A person who is on the highway shall not kill an animal. Therefore excluding a person who is not on a highway, And the killing would not necessarily be on the highway

Where the prohibition is aimed at the killing, the section would read,

A person shall not kill on the highway an animal. Hence the killing must not take place on the highway. But in this case the animal would be on the highway.

Where the prohibition is aimed at the animal, the sentence would read,

A person shall not kill an animal which is on the highway.

A person who drives a motor vechicle the serial number of which is obliterated commits an offence,

The expression who drives a motor vechicle could be interpreted as describing “A person.” The expression the serial number of which is obliterated modifies motor vehicle. In other words that law is aimed at the class of

persons which drives motor vechicles of a particular kind; motor vechicles the serial numbers of which are obliterated. Read the way, when the modifiers are removed the sentence stands as,

A person commits an offence. Which is meaningless.

**PENAL PROVISIONS**

Penal provisions created by any regulatory legislation must fit into and take account of the crime, general criminal law and procedure (including practice and punishment).

A penal provision has three elements-

The prohibited act ( A person who... A person shall not... No person shall...)

Contravention of the prohibited act (commits an offence): and

The sanction or penalty (is liable...)

These three elements must be kept separate.

Whether the provision applies to everybody or only to a particular person.

The prohibition should be specifically stated so that the users of the law are not left in doubt.

The drafter must state clearly the prohibited conduct the breach of which amounts to an offence and that the person is liable upon conviction by a court.

Penalty is only imposed for an offence where there is a conviction.

Avoid the use of words like “willfully “and “intentionally” because once used the prosecution has to prove them.

A penal provision should not be contrary to the provisions in the constitution e.g

A person is presumed innocent until the contrary is proved.

A person shall not be punished retrospectively

A person shall not be punished twice for the same offence

The penalty should be appropriate, consistent with similar punishments provided in other statutes, a lesser offence should not attract a maximum punishment.

A penal provision should clearly identify the legal subject hence avoid the expressions-

*"it is an offence, its is not lawful, it is unlawful"*

To deal with devaluation of fines.

UK for example uses a standard scale."

East African Countries use "currency points." These are inserted in the schedule without having to amend the whole Act. Eg In the First Schedule "a currency point is equivalent to twenty thousand shillings."

Interpretation Act states that the expression "person" includes a body corporate unless the contrary intention appears. Where a corporation is convicted of an offence especially due to negligence of its servants they may be held criminally liable eg

"Where a person convicted of an offence under this Act is a company, the Chairperson and every director concerned in the management by the company shall be guilty of the offence unless he or she proves that the act constituting the offence took place without his knowledge or consent.

Examples of drafting penal provisions.

Conditional

If a person conspires, aids or abets a public officer to commit an offence under this section, that person commits an offence and is liable on conviction .....

Declaratory

A person who in any way, hinders another person from registering as a voter, commits an offence and is liable...

Mandatory

(1) No public officer shall transfer any sum allocated for a particular project, to another project.

(2) A person who contravenes the provisions of subsection (1) commits an offence and is liable on conviction .....

Forfeiture

Where it becomes necessary to provide for forfeiture, the drafter has to be careful not to provide for forfeiture where it is not intended. This is normally in addition to other penalties.

A forfeiture provision should leave no doubt concerning-

the property to which it applies;

The circumstances giving rise to forfeiture;

Whether a conviction is necessary to sustain the forfeiture;

Whether the forfeiture arises by operation of law or an order of forfeiture or condemnation must be made by court or public official;

The moment in time when ownership of the property forfeited vests in the transferee;

Who is to be the transferee of the property forfeited and to be responsible for its disposal

***Continuing offence***

(1) An editor of a newspaper shall, within thirty days of coming into force of this Act, file with the Registrar General the declaration specified in the Schedule; and an issue of the newspaper shall not be published after thirty days unless the declaration is filed.

(2) An editor who fails to comply with subsection (1) commits an offence and is liable on conviction, to a fine of not less than five thousand shilling *for each issue of the newspaper* that is published in contravention of the subsection.

***Additions to punishments.***

(a) Disqualification and cancellation of licence or certificate

Where a holder of a licence is convicted of an offence the court ;

May order that the licence be suspended for a specified period of time or that it is cancelled ....

(b) Cessation of business

Where a person fails to comply with the requirements of this Act, the Minister may by notice in the Gazette prohibit that person from carrying on business.

The Drafter may in addition provide for consequences of defying the order of prohibition.

An order to remedy a wrong.

Court may order the defendant to do any specified work to prevent further non compliance

(d) Refund of money wrongly obtained

Where a person is convicted of obtaining money unlawfully, the court may in addition to imprisonment, order the person to refund the amount wrongly obtained

(e) Payment of compensation

Any man who has sexual intercourse with a married woman not being his wife commits adultery and is liable to imprisonment for a term not exceeding ..... and to a fine of ....; in addition, the court may order such man on first conviction to pay the aggrieved party compensation of ..... and on subsequent conviction compensation of ....

*Restoration* may also be order in cases of for example damage to the environment

(f) Fixed penalty/express penalty

These relieve pressure from the courts and prosecution in clear cut offences. In these systems the offender pays a fine and does not attend court. This is on condition that the offender accepts his guilty. Common examples are parking and other minor traffic offences.

## SAMPLE EXERCISES

Simple Prohibition

Below are various simple prohibitions – anyone of which might be sent to you by someone in the Health Department, instructing you to draft a law? Please take each prohibition separately and turn it into an effective legal provision. Think out the situations, which might occur in each case, and do not leave gaps or loose ends. Each resulting provision must be so worded as to be enforceable in a criminal court. Do draft a penalty clause and the prohibition itself.

1. No dumping of garbage, refuse etc. into the Nile River. Drop any object or discharge any waste.

2. In public parks -

no damage to trees, flowers, shrubs etc.

no playing ball, hockey or similar games

no bicycles or dogs.

3. Dogs not allowed in food stores or public eating places.

4. No unnecessary noise near hospitals.

5. No mowing lawns on Sundays or public holidays before 10.00 am; electric and hand mowers excepted.

6. No shooting off firecrackers, except on Independence Day, Commonwealth Day, and New Year's Eve – except by a

7. licensed operator having a permit to do so issued by the Magistrate.

## ORGANISATION AND STRUCTURE OF LEGISLATION

A BILL

Bill is a piece of draft legislation introduced to Parliament with the aim of having it passed into law.

Over the years, drafters have developed best practices in the way legislation is drafted.

THE MEMORANDUM OF THE BILL (SOMETIMES CALLED EXPLANATORY NOTES, DEPENDING ON JURISDICTION)

This is a prefix to the Bill. It contains the salient features of the Bill and states the objects and reasons for the introduction of the Bill.

It seeks to explain what provisions in a particular Bill mean, and what the Bill is attempting to achieve if passed as law.

Purpose: it can be an invaluable tool in terms of aiding the reader to understand why a law was enacted, what it was designed to achieve, and what it actually means.

It must be framed in non-technical language.

Every Bill must be published with an explanatory memorandum but it is not printed as part of the published legislation.

Check out the Parliamentary website, https://www.parliament.go.ug/documents/4890/bills-2020, on samples of Bills. Specifically, look at the Landlord and Tenant Bill, 2018, Bill No. 18 of 2018 and the National Climate Change Bill, 2020, Bill No.1 of 2020. These two Bills will enable you to appreciate contents of a Memorandum to the Bill.

Arrangement of sections; this comes after the Memorandum to the Bill. In a Bill, it is referred to as the "Arrangement of Clauses".

It is a collection of headnotes. It is similar to a table of contents in a book.

It aids the reader to know the full scope of the subjects delt with in the Act.

Unlike the memorandum of the Bill, the Arrangement of Clauses is published with the Act as the Arrangement of Sections.

Headings and Parts; these add to the elegance of the Act.

Driedger, *Composition of Legislation,* p.79 requires that Headings and parts should only be used as a guide to the subject matter of the Act.

**PARTS OF AN ACT**

An Act is divided into Parts to improve readability of the Act.

As rule, headings are printed in italics while parts are not printed in italics.

Where headings and sub-headings are used, the headings should be in small capital letters and the subheadings should be in italics.

An Act of considerable size should be divided in Parts while a smaller Act, need not be divided into Parts, for instance the Oaths Act, Cap. 19 has no Parts because it only has 14 sections.

***Marginal notes***

They are usually placed on the right-hand side of a section. In Uganda we use headnotes instead of marginal notes.

They do not form part of legislation. They only indicate the contents of a section so that a reader has to only glance quickly through such marginal notes in order to understand the framework and the scope of the Act.

They enable a reader to direct their attention quickly to the portion of the Act which they are looking for.

The drafter must thus ensure that the marginal note-

Is accurate;

Is consistent with the section to which it refers;

Describes rather than summarizes the section;

Informs the reader about the subject of the section to which it refers;

Is brief and straight to the point; and

Needs not constitute a complete grammatical sentence.

Note for emphasis; in Uganda we use headnotes. They serve the same purpose as marginal notes.

Sections and subsections: an Act is divided into sections.

***Sections***

A section should contain only one idea.

It should be self-explanatory.

It should be lucid (expressed clearly, easy to understand), short and simple.

The sections of an Act are numbered consecutively throughout the Act. Arabic figures are used.

***Subsections***

Where the composition of a sentence turns out to be a long one, the section should be broken into subsections.

All the subsections should, read together, form a coherent and consistent whole. They should deal with the same idea, same subject matter.

Subsections are numbered consecutively within the section. Arabic figures are in parenthesis are used.

Example- the Administration of the Judiciary Act, 2020, Act No.8 of 2020

"4. Establishment of the Judiciary Council.

(1) There is established within the Judiciary a Judiciary Council

consisting of-

(a) the Chief Justice;

(b) the Deputy Chief Justice;

(c) the Principal Judge;

(d) the Attorney General;

(e) the Director of Public Prosecutions....."

**Paragraphs**

Where a section or subsection is too long, it is better broken up into paragraphs.

Using paragraphs helps the readability of the sentence and avoids ambiguity.

They help in understanding the legislative sentence.

A paragraph should be short.

It should be a unit of thought when read together with the introductory words and with the concluding words.

A paragraph is numbered with lowercase letters of the alphabet in parenthesis. (a), (b), (c) etc

A subparagraph is numbered with the small Roman numerals (i), (ii), (iii) etc.

***Exercise I***

Redraft the sentence below using paragraphs.

The Registrar shall keep a record, in the form that he determines, in which he shall record the name and address of a person to whom he grants a licence and any dealings with or affecting a licence he has granted.

**The long title:**

It indicates the nature of the legislative measure.

The long title of a Bill is the wording at the start of a Bill that begins 'A Bill to...' and then lists its purposes, sometimes at great length. The content of the Bill must be covered by the long title and if the content of the Bill changes before it is passed the long title may also need to be changed.

An act generally contains two titles called the 'long title' and the 'short title'. The long title appears at the very beginning of the act before the preamble. It generally begins with the words, 'An Act to provide for ....

The main object of this is to indicate in brief the purpose of the Act and to provide an introduction to strangers a brief summary of the main provisions.[205]

**Long title** does not restrain the plain meaning of the statute but it may aid in resolving a difficulty, e.g. in case of ambiguity[206]

It is used to inform members of Parliament what the Bill is about and it helps to determine the scope of the Bill. It should be clear and precise.

An example-

"An Act to give the force of law in Uganda to the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement; to provide for climate change response measures; to provide for participation in climate change mechanisms; to provide for measuring of emissions, reporting and verification of information; to provide for institutional arrangements for coordinating and implementing climate change response measures; to provide for financing for climate change; and other related matters."

The enacting formula: The enacting formula is a short paragraph which precedes the clauses of the bill. That is, it introduces the main provisions of the Act.

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https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwiY0beSob_8AhUAAAAAHQAAAAAQAw&url=http%3A%2F%2Fwww.msrlawbooks.in%2Ffile%2FLEGISLATIVE_DRAFTING.pdf&psig=AOvVaw1bEnZ7lZU2arsiqUTJ9nyf&ust=1673515976535198

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https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwiY0beSob_8AhUAAAAAHQAAAAAQAw&url=http%3A%2F%2Fwww.msrlawbooks.in%2Ffile%2FLEGISLATIVE_DRAFTING.pdf&psig=AOvVaw1bEnZ7lZU2arsiqUTJ9nyf&ust=1673515976535198

It gives the Act its jurisdictional identity and constitutional authenticity.

In Uganda, the enacting formula is- "BE IT ENACTED by Parliament as follows-"

PRELIMINARY PROVISIONS

These are the introductory provisions of a Bill. They are not the main provisions of the Bill but they are very useful and cannot be avoided in any Bill.

It is not necessary for all the preliminary provisions to appear in a Bill. However, every draft must have a long title and enactment formula.

Short title:

It is the formal name by which legislation may by law be cited.

The **short title is the 'Lable of the Law'** to facilitate citation of the Act in future enactments and other instruments.

Act begins with the words **'This act may be called .....**' It should not be a misnomer or misleading.[207]

In *Vacher and Sons Ltd V London Society of Compositors [1913] AC 107 at P.128*, Lord Moulton said that the short title is a statutory nickname to obviate the necessity of always referring to the Act. It is the short name of the Act.

In *Lonhro Ltd. V Shell Petroleum Co.Ltd. (No.2) [1981] 2 All ER 456 at p.462*, Lord Diplock stated that the short title may be used to assist in the interpretation of the body of the enactment.

**Commencement:**

This provision is normally the last section of the Act. However, in most commonwealth countries, Uganda inclusive, this section is placed at the beginning of the Act. During the law revision exercise, the section is dropped.

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https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwiY0beSob_8AhUAAAAAHQAAAAAQAw&url=http%3A%2F%2Fwww.msrlawbooks.in%2Ffile%2FLEGISLATIVE_DRAFTING.pdf&psig=AOvVaw1bEnZ7lZU2arsiqUTJ9nyf&ust=1673515976535198

An Act may be made to commence at once in which case it comes into force as soon as the assent of the 'President' (or the 'Governor') is given. Where the printing and publication of the act is likely to take time, the commencement clause should not be drafted so as to make the act come into force at once.

In such a case the commencement clause should be 'This Act shall come into force on its publication ..... '. The hour of commencement of an Act is not usually mentioned.[208]

As the law does not take into account the fraction of a day, an act comes into

force on the first moment of the day, on which it takes effect. The court should have no hesitation, in fixing the exact minute the law comes into force, where such action will promote substantial justice.

It may provide for partial commencement with reference to area, subjects etc.

Eg.: a) This Act may come into force on such date as the Govt.

may by notification in the official gazette -fix.[209]

b) This Act shall come into force at once.

c) This Act shall be deemed to have come into force on .....

Take note of three (3) things-

An Act may come into force on the happening of an event, for instance, upon publication, hence may not need a commencement provision;

The act may also come into force on a fixed date. The provision is frequently worded as a command. E.g- "This Act shall be deemed to have come into force on the first day of January, 2022"

It is not worded as a statement. E.g- "This Act comes into force on the first day of January 2022."

There are occasions when it becomes necessary to make some provisions relating to the coming into force of an Act.

*Example*

Section 1 of the Industrial Property Act, 2014, Act No.3 of 2014 provides-

"1. Commencement.

This Act shall come into force on a date that the Minister may, by statutory instrument appoint; and the Minister may appoint different dates for different provisions."

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[208] Ibid

[209] Ibid

The interpretation section

Every Act should have an interpretation section. The provision normally comes after the short title.

It contains definitions of words used in the Act. Note; definitions are used in legislation as an aid to clarity, to achieve consistency and as a method of reducing vagueness.

The usual formula is- "In this Act, unless the context otherwise requires-" then follow the definitions of the relevant words or expressions, each in inverted commas, in alphabetical order.

*Example*

The Administration of the Judiciary Act, 2020, Act No.8 of 2020

Section 1. Interpretation

In this Act, unless the context otherwise requires-

"Commission" means the Judicial Service Commission established by article 146 of the Constitution;

"Council" means the Judiciary Council established by section 4;

"currency point" has the value assigned to it in Schedule I to this Act.

The advantage of having the interpretation section at the beginning of the Act is that it enables the reader to find a list of terms with their meanings before coming across them later in the Act.

Lord Thring in his book Practical Legislation, pp.96-97, regards it as logical to have the Interpretation Section at the beginning of an Act-

*"as the reader cannot understand the Act till he is master of the definitions or explanations of the terms used in the Act"*

The interpretation section should only contain words that are generally used in the whole Act. Words which are used under certain parts of the Act should be defined thereunder.

Try to keep the interpretation section concise. Do not define un necessary words.

Words that are already defined under the Interpretation Act (Cap. 3), need not be defined again.

Application provisions; an application section outlines the ambit of the Act and is intended to influence the context of all subsequent provisions.

Example- the Employment Act, 2006, Act No. 6 of 2006

"Section 3. Application of the Act

(1) Except as otherwise provided in this Act, this Act applies to all employees employed by an employer under a contract of service.

(2) This Act does not apply to—

(a) employers and their dependent relatives when dependant relatives are the only employees in a family undertaking, as long as the total number of dependent relatives does not exceed five; and

(b) the Uganda Peoples' Defence Forces, other than their civilian employees."

Statements of principle/the principles or objectives of the Act

These should be stated in a clear and concise form and the earlier that is done, the better.

They should be placed as near as possible to the Short Title, the Interpretation section and the Application section.

They should be used to indicate the legislative intent.

General and special provisions; they should follow the statement of principle or the objectives of the Act.

Provisions having general application throughout the Act, Part or section should be set out early in the Act, Part or section. Qualification, exceptions, limitations, restrictions or any other provisions which modify the general provision should rather than precede it.

MAIN PROVISIONS OF A BILL

Substantive and administrative provisions; these form the crux or backbone of a Bill. They give the reader an idea as to what the object of the Bill is. Therefore, they are the subject matter of the law in question and must be drafted with care.

They contain items such as the establishment clauses, powers and duties while the administrative provisions include appointment, conditions of service for staff, the seal etc.

The drafter must have a checklist of the topics that must be included in the substantive provisions.

Penal provisions; these must take account of crime, general criminal law and procedure.

The drafter must remember to state clearly the prohibited conduct and the corresponding punishment in case of breach.

FINAL PROVISIONS

Final provisions should be placed towards the end of a Bill. They are-

Transitional or temporary provisions; they should follow the subject matter to which they relate.

They are normally placed at the end of the Act. These can be omitted during the law revision exercise without affecting the numbering of the Act.

Example-section 100 of the Employment Act, 2006, Act No.6 of 2006. It provides-

"100. Transitional

(1) Subject to section 3(2), every person who is employed by an employer under a contract of service, must be offered employment by the same employer as from the day this Act comes into force on terms and conditions of employment no less favourable than those that applied to that employees' employment under the Employment Act repealed by section 98.

(2) The terms and conditions, including the salary payable, on which such employees were employed, continue.

(3) There is no break or interruption in the employment of employees because of the enactment of this Act.

(3) Nothing in this Act affects any rights or liabilities of any employee under any provident, benefit, superannuation or retirement fund or scheme relating to any employee or former employee."

**Repealing and amending provisions**

They are normally placed at the end of the Act. These can be omitted during the law revision exercise without affecting the numbering of the Act.

Example: the Employment Act, 2006-

"section 98. Repeal

The Employment Act, Cap 219 is repealed."

Savings provision; it prevents a change in the law as a result of a repeal or amendment. It preserves some laws, statutory instruments etc

Schedule; it is a convenient device for dealing with matters of detail which will otherwise unnecessarily encumber the main body of an Act.

It contains administrative matters e.g meetings of the Board, Forms, Treaties, repeal of several Acts, fees, value of a currency point etc

Format-

SCHEDULES

SCHEDULE 1

Section 2

Currency Point

One currency point is equivalent to twenty thousand shillings.

SCHEDULE 2

Section 12

Meetings of the Board

1.....

2.....

Cross References

Constitution

Penal Code Act, Cap. 120

## SUBSIDARY LEGISLATION

HIERACHY OF LAWS

1. Constitution (Supreme Law)

Any other law that is inconsistence with the Constitution is void to the extent of the inconsistencies.

All the other legislation must conform to the Constitution.

2. Primary/ Principal / Substantive Legislation.

Authority to make written law is conferred upon the Legislature or Parliament, this includes the authority to amend the Constitution although usually special legislative procedure must be followed and Parliament may repeal any law enacted by a predecessor.

the initiation of legislation is the sole responsibility of executive.

legislation may be introduced in Parliament only by a Minister acting for the executive.

In a few cases, proposals may be introduced by members of Parliament as members of the legislature (Private Members Bills).

Principle legislation therefore includes Acts of Parliament, Decrees (Passed during a period with no elected Parliament), Statutes (Passed by a Legislative Assembly and not an elected Parliament)

3. Subsidiary/Secondary/subordinate/delegated Legislation

Parliament has the power to confer its law making power on another person or body; thus enabling that person or body to make laws.

This process is the delegation of Parliament's legislative power and the resulting laws are known as subsidiary/ secondary / subordinate or delegated legislation.

Subsidiary legislation is a term used to describe instruments made under delegated legislation. As a general rule, however, such delegation needs to be expressed by the appropriate legislature by legislation.

Types of Subsidiary Legislation

Subsidiary legislation include-

Regulations refers to subsidiary legislation which lays down legislative requirements, it is in quality and nature like an Act but gives more details.

Rules, Orders, Legal Notice; These are generally procedural requirements which indicate steps that must be taken for a particular purpose e.g. Court Rules

Byelaws/ Ordinances: Used to refer to laws made by local governments. It may also be used to refer to rules for internal management of bodies e.g. statutory corporations.

Proclamation: refers to formal notice by a Head of State e.g. declaration of a state of emergency. Since the executive arm of government does not make laws, proclamation should strictly not be used to lay down the law.

Whichever terminology used, the import is that they are lower than substantive laws or Acts of Parliament and certainly below the Constitution.

Distinction between Subsidiary and Principle Legislation

Is the division between principle and detail, or between policy and its implementation.

matters of principle and policy are usually found in primary legislation, while detail and implementation is ordinarily the domain of delegated or subsidiary legislation.

The distinction may sometimes be confusing because some Acts may sometimes contain matters of detail and subsidiary legislation may contain matters of policy.

Delegated Legislation is Law which is made by any person other than Parliament and acting under the authority of an Act of Parliament.

## WHY DELEGATED LEGISLATION

Pressure on Parliamentary time;

The inability of Parliament to deal with technical matters;

The need for flexibility;

Saves Parliament time to concentrate on Principle legislation; and in emergency situations

## CRITICISM AGAINST DELEGATED LEGISLATION

Its extension to matters of principle including the imposition of taxation;

The amendment of Acts of Parliament;

Wide discretionary powers given to the Ministers without, in some cases, a specific limit on the exercise of those powers; and

The ousting of the jurisdiction of the Courts.

Two kinds of safeguards against this-

Before the exercise of the power,

(i) the delegation must be to a trustworthy authority, such as a minister, board etc

(ii) The limits of the delegated powers should be clearly defined.

**Example of delegating provision**

"(1) The Minister may, by statutory instrument, make Regulations prescribing the matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for the better carrying out of, or giving effect, to the provisions of this Act.

(2) The Regulations under section (1) may provide for –

(a) the procedure to be followed in the application of refugee status and the form in which the applications shall be made;

(b) the manner and form in which appeals may be made to the Minister;

(c) the issue of identification documents to persons who have applied;

## WHAT TO CONSIDER WHEN DRAFTING DELEGATED LEGISLATION

Are there limits under the Constitution on the powers to delegate the legislative powers; e.g. Security is a preserve of central government hence no ordinance on security.....

Expressly authorise the designated body to make the delegated legislation;

Ensure the power conferred is consistent with policy and substantive requirements of the Parent Act;

Ensure that the power to make the legislation is sufficiently wide to cover all the matters for which such legislation is required;

Take into account any general statutory rules relating particularly to subsidiary legislation.

Two constraining factors while drafting

The instrument must be drafted to be within the terms of the delegated powers. i.e should not amend the Principal Act...

The instrument must be drafted within the context and policy of the principal Act and consistent with the Acts terms, content and purpose.

Two principal tasks while drafting-

Drafter must be fully conversant with the principal Act, all amendments and associated legislation and the policy behind the legislation

Thorough checks must be conducted by the drafter concerning the proposals to be implemented by ensuring clarity on the following questions-

Questions to keep in mind

1. Is there a clear authority to make the subsidiary legislation?

In determining the answer the drafter should consider-

- whether the authority to legislate on the matter in question has been given;

Whether the correct provision of the principal act has been contained and is still in full force; draft under a particular section.....

Which authority in law is required to make the subsidiary legislation; Minister, Board....

Whether the requesting agency is the authority to which the power to legislate has been delegated;

Whether the law identifies any other authority that must be associated with making the subsidiary legislation, or is there any procedure that must be followed or completed before the instrument can be made; e.g in consultation with .....

Whether such authority is being correctly associated or such procedure correctly followed.

2. Can the power be exercised at the time requested?

Has the relevant provision including the provision delegating the power, come into force. An instrument can come into force before the principal Act when it is made for the purpose of commencing the principal Act.

3. Are the proposals intra vires?

Here the questions that need answering are whether-

They can be made consistent with the express terms of the delegated power, substantive provisions of the Parent Act, and the underlying policy of that Act;

The proposals involve amending any Act;

There are exemptions of cases from the operation of the Parent Act;

The proposals require creation of criminal offences or imposition of penalties beyond the general authority conferred under the Act;

They would have retroactive or retrospective effect having in mind the provisions of the Constitution in respect to criminal offences;

They would bind the state;

They would impose or alter taxes; and

They would further delegate the legislative power to another authority

4. Is there any procedural step to be taken in order to validate the instrument?

Eg consultation, commencement, laying before Parliament etc. the drafter must draw the attention of the client to these requirements.

Subsidiary legislation is made when signed by the person who has the delegated power eg Minister or chairperson of the statutory body or of the District for an ordinance.

A drafter, when drafting should take into account-

What type of subsidiary instrument is required eg is it an order, regulations or rules.

Features of the instrument

The type of instrument affects-

The title and citation;

The Mental Health (Administration of estates) Regulations, 2021

The sections and subsections carrying different nomenclatures depending on the instrument and style, eg.

Regulations: regulations/subregulation/paragraph/subparagraph

Rules: rules/subrule/paragraph/subparagraph

Byelaws: byelaw/subbyelaw/paragraph/subparagraph

Orders: section/subsection/paragraph/subparagraph

The subsidiary instrument must have the enacting provision based on the correct house style. This must –

-cite the authorised maker and the exact power under which the instrument is being made; Eg.

"IN EXERCISE of the powers conferred on the Minister in consultation with the board by section 2 of the housing Act, 1924, these Regulations are made this ..... Day of ..... 2022."

State that any associated authority provided under the principal Act in the making is so associated; and

State that any associated authority in the making of the subsidiary instrument provided for under the principal Act has such association.

The language of the instrument should be consistent with that in the Principal Act.

Definitions in the instrument must be consistent with those in the parent Act and may not be repeated in the subsidiary instrument unless necessary.

Reference to "Act" in the instrument amounts to reference to the "Parent Act" and may not be cited in full;

The short title must reflect the title of the parent Act. Eg. The Local Government(Kaboong District) (Regulation of consumption of alcohol) Ordinance, 2022.

**Signature**

The signature of the legislative authority should be at the foot of the legislation and where the legislation contains schedules the signature should follow the schedules.

It should also state the office of the signatory and the date upon which the instrument is made at the very end of the instrument.

.....

Ernest Opio

Minister responsible for Environment

Interpretation Act, Cap 3 – Part IV

14. Definition of statutory instrument.

Where any Act confers on the President, a Minister or any other authority, a power to make or a power exercisable by making proclamations, rules, regulations, byelaws, statutory orders or statutory instruments, any document by which that power is exercised shall be known as a statutory instrument, and the provisions of this Act shall apply to it accordingly.

15. Citation of a statutory instrument.

Any statutory instrument may be cited by reference to its short title, if any, or by reference to the number of the notice under which it appeared in the Gazette.

16. Publication of statutory instruments.

Every statutory instrument shall be published in the Gazette and shall be judicially noticed.

17. Commencement of statutory instruments.

(1) Subject to this section—

(a) the commencement of a statutory instrument shall be such date as is provided in or under the instrument or, where no date is so provided, the date of its publication as notified in the Gazette;

(b) every statutory instrument shall be deemed to come into force immediately on the expiration of the day next preceding its commencement.

(2) A statutory instrument may be made to operate retrospectively to any date which is not earlier than the commencement of the Act under which the instrument is made. Drafting of the "deeming provision"

(3) Nothing in this section shall be deemed to empower the making of a statutory instrument so as to make a person liable to any penalty in respect of any act committed before the date on which the instrument was published in the Gazette.

(4) A statutory instrument made and published on the date of commencement of the Act under which the instrument is made shall be deemed to come into force simultaneously with that Act.

(5) References in this section to the commencement of the Act under which a statutory instrument is made shall, where different provisions of that Act come into force on different dates, be construed as references to the commencement of the particular provision under which the instrument is made.

(6) The provisions of this section shall be without prejudice to the

operation of section 21. (Section 21 is about Exercise of power between publication and commencement of an Act.)

18. General provisions relating to statutory instruments.

(1) Any reference in a statutory instrument to "the Act" shall be construed as a reference to the Act under which the instrument was made.

(2) Terms and expressions used in a statutory instrument shall have the same meaning as in the Act under which the instrument was made.

(3) A statutory instrument may at any time be amended by the authority by which it was made or, if that authority has been lawfully replaced by another authority, by that other authority.

(4) Any provision of a statutory instrument which is inconsistent with any provision of the Act under which the instrument was made shall be void to the extent of the inconsistency.

(5) Any act done under or by virtue of or in pursuance of a statutory instrument shall be deemed to be done under or by virtue of or in pursuance of the Act conferring power to make the instrument.

(6) Every statutory instrument shall be deemed to be made under all powers enabling it, whether or not it purports to be made in exercise of a particular power or particular powers.

(7) Section 13(2) shall apply on the revocation of a statutory instrument as it applies on the repeal of any Act. (Section 13 is on effects of repeal)

19. Publication of specified instruments.

(1) All specified instruments shall be published in the Gazette and shall be judicially noticed.

(2) In this section, "specified instruments" means—

(a) orders, regulations and statutory instruments made in the exercise of power conferred by the constitutional instruments on the President or on a commission established by the Constitution; and

(b) rules, regulations, orders and other instruments having legislative effect made by an authority in Uganda in the exercise of a power conferred by an applied law.

20. Reprint of amended instruments.

Section 18 of the Acts of Parliament Act shall apply where statutory instruments and specified instruments that have been amended as it applies to the reprinting of amended Acts of Parliament.

## AMENDMENT OF LEGISLATION

Key definitions

To amend means-

to change or improve something for the better; or

to make changes to a text, piece of legislation, etc. in order to make it fairer or more accurate, or to reflect changing circumstances;

to change the words of a text, especially a law or a legal document.

Simply put, to amend means to make a change to a law.

Section 2(f) of the Interpretation Act, Cap. 3 defines “amend” to include repeal, revoke, rescind, cancel, replace, add to or vary and the doing of any two or more of those things simultaneously or in the same written law.

Examples

"The rule was amended to apply only to non-members".

“Until the Constitution is amended, the power to appoint ministers will remain with the President.”

An amending Act is an Act that amends another Act.

An amendment (amending legislation) is an alteration proposed to a Bill, Act, report, motion or resolution, adding to, substituting for, deleting from the Bill, Act, report, motion or resolution.

## REASONS FOR AMENDING LEGISLATION

An Act can be amended to remove a perceived fault, correct a problem or omission, or to simply update it.[210] It aids to remedy a defect or lacuna in the existing law.

[210] Amendments may be introduced to address circumstances and events that were not foreseen when a piece of legislation was initially signed into law.

The principal and amending legislation must always be construed to form one coherent whole. A drafter should not be short-sighted while drafting an amending law because this presents a series of technical problems. A drafter must have a long-sighted view, seeing the amendment in the context of the principal Act and both Acts in the wider context of all existing laws.

## CONSIDERATIONS WHEN DRAFTING LEGISLATION

In drafting amending legislation, the drafter must have 4 major considerations.

The drafter must have a comprehensive acquaintance of the whole of the Act (law) that is to be amended and with other laws. Understand the whole Act not only the segment that you think needs amendment,

The language and style of the amending legislation must be consistent with that of the principal Act (legislation). Use words that have been used in the principal Act. For example, there is a temptation of changing from "ocean" to "sea" or from "delivery" to "supply" or from "remuneration" to "emoluments". However, the drafter is allowed to get rid of archaic words such as "aforesaid" or "hereinafter" etc.

Study and understand the effect of the instructed/proposed amendments on other legislation and other consequential amendments.

The amending provisions must be related to circumstances as they exist when their provisions came into force by a specific commencement application or transitional provision. For example, where punishment is increased in respect of an offence, the drafter must state that the increased penalty applies only to offences committed after the coming into force of the amendment.

## TECHNIQUES FOR DRAFTING AMENDMENT PROVISIONS

The drafter may rely on two different techniques in drafting amendment provisions.

*Direct method*; this is also known as the textual amendment. It is a process of direct integration of new material into an existing statute. It is similar to the process of inserting a new spare part into an engine in the place of an old one. It is involves inserting specific words, making substitutions or deleting words, paragraphs or sections etc from the principal Act.

The new provisions are integrated into the principal Act to constitute one text.

The process may involve-

adding new parts, sections, paragraphs, definitions, words, phrases, Schedules, etc.;

repealing provisions no longer required or no longer appropriate;

repealing inappropriate provisions and replacing them with appropriate provisions.

The additional provisions that are required for the Act have to be placed into their logical positions in the text with those they follow. they should also be numbered with appropriate letters to differentiate them.

Examples

Look at-

the Tobacco (Amendment) Bill, 2020; and

the Local Governments (Amendment) Bill, 2020

Indirect method/non-textual method, is mostly practiced in the United Kingdom and is a narrative statement in the amending law stating the effect of the amendment. The amending law does not purport to amend the principal legislation, nor does it merge with it. The method creates unnecessary complexities. It does not make clear the exact effect of the new provisions on the old provisions especially when the provisions in the old are displaced. It is not user friendly. The drafter should prefer to use direct over indirect method.

On the whole textual amendments are very useful because they bring both the new and old provisions under one statute thereby facilitating the reading of the statute.

Example

Look at section 11 of the Magistrates Courts (Amendment) Act, 2007, Act No. 7 of 2007

## DRAFTING AMENDMENTS

Design of amending legislation

The design of amending legislation depends on which technique of amendment is followed-

the amending law may amend the principal law directly by deletions, substitutions or insertions

the new law may repeal and replace the old law

the new law may stand separately on enactment but may be expressed to be construed and perhaps cited as one with the law it amends.

Short title

This should state the subject matter but not the complete short title of the Act it amends, for example:

The Sugar Control (Amendment) Act, 2020

The word "Amendment" may, but need not, be enclosed in brackets.

Reference to the section amended

Each section should begin by referring to the section which is to be amended.

Example

The Magistrates Courts (Amendment) Act, 2007

"5. Amendment of section 161 of the principal Act.

Section 161 of the principal Act is amended by repealing paragraph (d) of subsection (1)."

Extent of amending section

The general rule is that one amending section should not amend more than one section of the principal Act. But this depends on the kind of amendment that is to be made. For example, it is right to amend thus:

In sections 24 to 29 of the principal Act, substitute the word "President" for the word "Minister" wherever it occurs.

*Justification*

This is right because the amendments to be made in the sections are the same.

One section may repeal continuous sections of the principal Act, for

Example:

Sections 6 to 9 of the principal Act are repealed.

Renumbering

Where a paragraph, subsection or section is inserted or repealed, the subsequent paragraphs, subsections or sections should not be renumbered. Renumbering is likely to lead to misunderstanding in relation to cross references. But during consolidation, the provisions can be renumbered.

Key point to note

A drafter should not amend an amending Act. Amend the principal Act.

AMENDING THE CONSTITUTION

Amending the Constitution is a special kind of amendment that requires time, patience, care and dedication from the drafter because anything done outside what the Constitution itself provides is *ultra vires.*

The drafter must have a copy of the Constitution and must study its content to understand who has the power to amend it, what is required before such amendment can be carried out and what can be done with such an amendment to make it valid.

Read Chapter Eighteen of the Constitution of the Republic of Uganda, 1995 – Articles 259 to 263 on Amendment of the Constitution.

In Uganda, Court has declared certain amendments of the Constitution unconstitutional. These are-

In the case of *Paul K. Ssemogerere and others vs Attorney General, Constitutional Appeal No.1 of 2002,* the issue was whether the constitutional provisions introduced by the Constitution (Amendment) Act, 2000, Act No. 13 of 2000 effectively amended the Constitution and whether all the amendments whether express, implied or by infection were passed in accordance with the procedure prescribed by the Constitution. Court held that the amendment to articles 88, 89, 90 and 97 was not done in accordance with the requisite procedure to be followed as stipulated in the Constitution and that the introduction of article 257A was superfluous and of no constitutional or legal consequence.

In *Male Mabirizi V Attorney General (Consolidated CACA No.49 of 2017, No.)3 of 2018 and No.05 of 2018)* sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act, 2018, Act 1 of 2018 were declared unconstitutional for failure to comply with the amendment procedure.

*Exercise*

The Government is desirous of regulating the sugar industry. All the functions under the Act should be performed by the Ministry of trade not the Board. Draft an amendment Bill to the Sugar Act, 2020.

## PUNCTUATION IN LEGISLATION

The purpose of punctuation is to assist the reader to comprehend more quickly the intended meaning by providing sign posts to sentences structure.

- The function of punctuation is to denote quality of connection, rather than the length of pause.

Thornton's Four Rules of Punctuation

- punctuate a sentence sparingly and with purpose.
- Every punctuation mark must serve a purpose.

- punctuate for structure and not for sound
- be conventional
- be consistent
- The drafter must use punctuation in accordance with ordinary English usage. The rules that apply to punctuation of ordinary sentences also apply to the punctuation of legislative sentences.

**The Comma (,)**

- **The drafter should use commas-**
- **to separate words:**
    - Use commas to separate distinct items or phrases when they are not tabulated, eg ants, flies, cockroaches and other insects.
    - Use a comma when there will be excessive repetition of conjunctions, eg The judge and the plaintiff and the witness and the defendants were absent in court today.
    - It is better to say
    - The judge, the plaintiff, the witness and the defendants were absent in court today.
    - Long independent clauses joined by and, but, nor etc.
    - An introductory modifying clause or phrase from what follows by a comma (At the end of the financial year, lecturers must submit...)
- **To enclose**
    - Non-restrictive modifying words or clauses (An investigator, appointed under section 403, may...)

To separate clauses

- Insert a comma at the end of introductory element in a sentence to separate that clause from the central preposition, eg: In the course of passing sentence, the judge criticised the defence counsel's handling of the case.
- A comma may not be necessary when the introductory element is short. It is in the discretion of the drafter whether one should be used in such circumstances, for example:
- Today the court heard our case.

- To separate two lengthy or compound clauses linked by a conjunction when a pause will facilitate comprehension, for example:

    - The virus the secretary inserted in the director's computer system multiplied a million-fold, yet the secretary claimed that he had not intended to damage the system.

Do not follow a conjunction with a comma, for example, do not say:

Any item seized may be sold or, otherwise be disposed of by the Custom.

- To mark off a modifying expression that introduces additional information not essential to the meaning of the sentence. Eg:

    - There shall be a chairman of the Board, **in this Act referred to as the chairman,** who shall hold office for five years.

To determine whether a modifier is restrictive and therefore essential to the meaning of the sentence or non restrictive and therefore not essential, eliminate the modifier from the sentence. If the meaning of the sentence does not change or the sentence does not become ambiguous, the modifier is non-restrictive and should be set off with comas as shown above.

- To mark off a phrase or clause that is in effect explanatory or clarificatory

- When a parenthetical element is inserted in a sentence, put a comma at either end of it. Such commas come in pairs because they function as parenthesis (round brackets); the first one introduces the parenthetical remark and the second closes it off. Parenthetical elements are pertinent but not essential to the meaning of the sentence. If a word, phrase or a clause can be deleted without affecting the meaning of the sentence, set it off with a comma, eg:

    - The court would have granted the plaintiff's prayers, **as questionable as they may be**, had his lawyer been a little more persuasive.

- To set off transitional words like, "therefore", "thus", "furthermore", "moreover", at the beginning or middle of the sentence, eg;

    In conclusion, therefore, it is pertinent to note that .....

    Moreover, it was the police that released him.

To set off a term of direct address if it interrupts the sentence

Our submission, My Lord, is that.....

To set off a title that follows a person's name

Lwanga Peter, Esq., is the managing partner of the law firm

To set off geographical locations, separating cities from States and States and states from countries eg:

Kaabong, local Government, Uganda

Semicolon(;)

- To indicate a pause that is more pronounced than that of a comma, but not a complete halt called for by a full stop.
- Within a sentence to break a single proposition or statement into separate or distinct components. Eg.
    - AN ACT TO AMEND THE HEALTH ACT; TO PROVIDE FOR A HEALTH AUTHORITY; AND FOR RELATED MATTERS.
    - To link two independent clauses joined by a conjunctive adverb or transitional expression such as “on the other hand”, ïn general”, “however”, “furthermore”, “thus”, indeed”,
    - The semicolon is placed before the conjunctive adverb or the transitional word or phrase; a comma is inserted after the adverb, word or phrase, for example:
        - The court granted the plaintiff a preliminary injunction; therefore, the defendant was restrained from selling the land.
- To separate complicated items in a series especially those that have internal commas, eg:
    - The panel investigating the sale of the land called the following witnesses: John Patrick, an Engineer;
    - frank Lampard, an industrialist; and
    - Phillip Case, an economist.

To end each separate paragraph or subparagraph in a list eg:

For purposes of subregulation (1), the matters that court shall take into account include-

(a) the value of the evidence;

(b) the importance of the evidence; and

(c) the difficulty of obtaining the evidence.

- Where there is text after the listed paragraphs or subparagraphs which relates to all of the listed items, the last listed paragraph or subparagraph usually ends with a comma rather than a semicolon, eg:
    - 120. No person, other than-
        - (a) the members and officers of court;

- (b) the parties to the suit; and
- (c) parents and guardians of the child,

**shall be allowed to attend court.**

Colon(:)

- Is an "introducer" eg:
- *To introduce a series.*
- The material preceding the colon must be able to stand on its own as an independent clause. The independent clause can include "as follow" or "the following" if necessary eg:
    - The panel invited the following: Peter, John and Mark as witnesses.
    - The witnesses invited by the panel are as follows: Peter, John and Mark.
    - The Panel shall invite three witnesses: Peter, John and Mark.

Do not insert a colon between a verb and its object or between a preposition and its object, eg:

We must invite: Mark, John and Peter.

We must serve an invitation on: Mark, John and Peter.

- To introduce a summary, elaboration or illustration
    - The court granted our prayer: it awarded two million as damages.
    - Only God can save the accused now: Police has discovered another body of a female in the septic at his home.
- To introduce a long quotation, especially when the quote is longer than the sentence eg:
- As Shola puts it-
    - "the Parliament in its plenary, urged the Kampala Capital City Authority to honour BMK by naming a street after him. It also urged the Authority to do the same for Archbishop Lwanga.
- To introduce paragraphs and subparagraphs
- 3. (1) The Authority shall have a Board consisting of:
        - (a) a chairperson;
        - (b) one representative of the following ministries:
            - (i) Ministry of defence; and

- (ii) Ministry of labour;

(c) two persons with experience in aviation; and

(d) the Director General of the Authority.

A colon or dash can be used for the same purpose.

- To mark the introduction of a proviso eg:

A person who does not comply with the provisions of this section commits an offence and is liable on conviction to a fine of two hundred currency point or six months imprisonment:

**Provided** that the Bank shall have powers to prescribe the circumstances and conditions under which the currencies may be used as a medium of exchange.

To conclude the enacting formula in a Bill

Enacted by the Council of Nakaseke:

A dash can also be used for this purpose, but never use a colon and a dash together.

Dash (-)

- Use either a dash or a colon; but never use the two together, because they serve the same purpose. It is bad drafting to say:
    - Enacted by the Council of Nakaseke:-

The colon is usually preferred to the dash because the dash takes up more space.

It is also used to emphasise material or expand an idea. Eg:

The Heath Act was written in plain language: so simple that

even an illiterate can understand it.

A pair of dashes may also be used to set off a parenthetical element, eg:

He may further avail himself of the defences – other than the bankruptcy or winding up of the owner - which the owner himself would have been entitled to invoke.

Parentheses (( ))

- Parentheses may be used to mark off further information on, clarification of or explanation of the word or phrases preceding them. These should be used in moderation in legislation because a pair of commas plays the same role. Eg:
    - The Tenant must seek and obtain the Landlord's consent, in writing, before altering the building. Instead of putting (in writing)
    - Parentheses are best used around numbers and letters that identify subsections, paragraphs and subparagaphs. Eg:
        - **1. Section**
            - **(1) Subsection**
                - **(a) Paragraph**

**(i) Subparagraph**

- To separate explanatory information which the reader does not need to grasp the purport of the sentence, eg:
    - Section 20 (which provides for penalties for offences under the Act) does not apply to this section.
    - To introduce abbreviations or shorthand references that will be used from that point on, eg:
        - Uganda Coffee Development Authority (UCDA)
        - To interpolate certain words into the title of a piece of legislation to clarify the purpose of that legislation, eg:
            - The Nakivubo War Memorial (Amendment) Act, 2021.
            - Treaty to establish the African Union (Ratification and Enforcement) Act, 2001.

Hyphen (-)

Should be used with extreme caution especially in legislation.

**Some common usages include-**

Official titles consisting of the name of an office and an adjective, eg:

Attorney-General, Vice-President, Vice-Chancellor.

Prefixes, eg:

Ex-wife, Ex-girlfriend, self-inflicted, quasi-democracy

Numbers when written out eg:

Twenty-one, ninety-nine

Apostrophe (‘)

These are not used much in legislation, however may be used-

To create the possessive case of a plural noun ending with an “s” by inserting an apostrophe immediately after the “s”, however, if the plural noun ends with a letter other than “s”, insert apostrophe (‘s) at the end of the word, eg:

Believer’s, believers’, Seller’s, sellers’, Dealer’s, dealers’

Contractions and abbreviations to signify the omission of a letter or letters, eg:

It’s for it is, They’re for they are, We’ve for we have.

These contractions are rather informal so a drafter should not use them in legislation, or other legal documents.

Quotation marks

- Also known as “inverted commas” to surround direct speech or a quoted passage or phrase. Use single quotation marks (‘ ‘) for material quoted within a quote and double quotation marks (“ “) to mark off different quotes under 50 words. Quotes of 50 words or more should be indented on both left and right and any internal quotes marked as they are in the original material.
    - Close quotation marks after a comma or a full stop, eg:

After her battle with a long illness, Rose said, “What will not kill you will only make you stronger.”

“If only you are strong enough, ”he said.....

If, however, the punctuation mark is a colon or a semicolon, close the quotation mark before the punctuation, eg:

“The following decisions **‘of the Authority shall’** require a two third majority”:

- Quotation Mark is Mark’s pen hould be used-
    - To identify terms defined in a definition or interpretation section, eg:

**“Treaty”** means....., “Function” means .....

When specific expressions need to be identified

In section 9, the words **“supreme court”** are to be substituted with the words **“court of appeal”.**

Question mark (?)

- To indicate a direct question, eg:
    - Do we have any law against human trafficking?
    - An indirect question does not take a question mark, eg:

She asked me if I am counsel appearing for the accused.

Questions are hardly ever used in legislation, only use them if you find them helpful, meaningful and will help to bring out a clearer picture or better understanding of legislation.

Exclamation mark(!)

- Used to punctuate exclamations or to indicate surprise or strong emotion, eg:
    - Wow! That is a beautiful car.
    - Damn! I am in the wrong business.

Because the law is not drafted to be emotional, exclamation marks are not appropriate in legislation or other legal documents.

Brackets ( [ ] )

- Used to indicate minor insertions (often replacing a word or short phrase)
    - Do not use brackets inside parentheses to create subordinate parentheses; it is better to use parentheses within parentheses. Hence instead of:

The Health Act (in this Act referred to as "the Principal Act [No. 1]") it is better to say:

The Health Act (in this Act referred to as "the Principal Act (No. 1)")

- Also used to indicate a change in a quote, to indicate that one or more characters have been added to or changed in quoted words, eg:
    - The Judge emphasised that "the Constitution entitles (you) to a fair hearing.
    - To indicate a change of case in the first letter of a direct quote, eg:
        - "(T)here is no cause for alarm."

Ellipses (...)

- To indicate an omission, often from a quoted matter.
- Three dot ellipses are used to indicate the omission of one or more words within a quote, eg:

- "A member of the Commission may be removed from office by the President ... if he is satisfied that it is not in the interest of the public that the member continues in office."
- Four dots that is followed by a full stop – indicates matters omitted at the end of a sentence, eg:
    - "When Government provides accommodation for orphans, it shall, so far as is reasonable practicable, ensure that the accommodation is suitable...."

If the part of the sentence omitted incudes the end of that sentence, insert a space between the last quoted word and the full stop then insert the ellipses, eg:

"The person responsible for taking the blood samples under this sections shall make a report ...."

Do not use ellipses at the beginning of quotes:

" ...the only thing we have to fear is fear itself."

## IMPORTANCE OF A DRAFTSMAN

**Justice Brijesh Kumar**

Judge,

Allahabad High Court

Legislative drafting, in itself, is a subject for serious study, but unfortunately, it appears that in India, required attention commensurating to the importance of the subject, has not yet been given to it. By and large, drafting of statute is generally in the hands of those who do not have specialized training and experience in drafting, so to say, in the hands of law-knowing "laymen in drafting". In England, the job of drafting is done professionally by those who have adequate training and expertise, but in America, the position seemed to be no better as compared to India, as would be apparent, from the fact that draftsmen were also employed from outside the public service, on bills in the government legislative programme, and from what has been said by Professor Reed Dickerson- "Whereas in London the typical bill is drafted by a full-time professional, in Washington it is drafted by an inexperienced lawyer or a partly experienced lawyer whose drafting duties are a mere incident to his other duties Certainly the most fertile single source of confused, difficult-to-read, over

lapping and conflicting statutes is the lack of uniformity in approach, terminology and style. The ravages of heterogeneous authorship appear to be large in Washington and small in London."1 Professor Dickerson further wrote: "Most legislation in the United States is drafted by people who, however good they may be in their substantive specialities, have only fleeting acquaintance with the expertise required for good drafting."

The Judicial Training and Research Institute U.P. deserves to be congratulated for recognizing the need of skilfull drafting by trained and expert draftsmen and it has already held a few similar short but successful courses in last five years. Such a course, I am informed, has not been undertaken by any other Institution so far, Legal draftsmen though occupy the rear seat or they may be called the pillion-riders, being in the background, yet they are the real persons who propel the machinery by preparing a legislation to meet a required need to combat any social evil or may be for social welfare or to meet any challenge or menace posing threat to the society. In a society governed by rule of law, the only method to meet any kind of problem and odds or to achieve any social goal is only through law, the law which is essentially framed by the legislative draftsmen.

□ Elevated to Hon'ble Supreme Court subsequent to publication of this Article.

1 Legislative Drafting in London and Washington (1959) Cambridge Law Journal, p. 49, as quoted in The

Preparation of Legislation-Renton Committee Report

It is said that legislative drafting is both, science as well as art. The job is undoubtedly creative in nature. It appears to be very much akin to the 'job of an architect'. An architect is provided with a site and the requirements. He prepares the whole project, even the minutest details right from foundation designing to front elevation. Similar is the situation with a legislative draftsman. Social requirement to have law to meet any given situation, Is reflected in the Legislature. The Legislature indicates the purpose to the draftsmen, which Is sought to be achieved by the Legislation and the draftsmen are set at work doing the whole exercise of drafting the legislation. Any defect in designing, foundation or other important arches etc. may result in crumbling of the structure; similarly any serious loophole or defect in the legislation may render

it ultra vires, ineffective and void.

These are the days of statutory laws. In past, unwritten laws held more and more of the field. In England, the common law and in India, ancient scriptures, schools of thoughts, usages and customs and unwritten laws mostly governed the conduct of the society. The codification of laws was started in England a few centuries ago. The laws initially were drafted by the Judges.

When the job was taken over by the Legislature, it was resented to. However,

what was felt was that the laws drafted by the Judges did suffer no less drawbacks, with which the laws drafted by the Legislature suffered. The emphasis is that legislation needs expertise and specialized skill in drafting. The present day situation is that there is over-burden of written laws all around.

With increasing complexities in day-to-day life, each activity is governed by one or the other legislation. Different States and the Center have their own enactments which must be several thousands in number, if put together. In these circumstances, it becomes all the more necessary that due attention is given to the proper drafting of laws and also for the reason that a common man now comes in direct touch with the statutes which are no more a matter confined to Courts of Law alone.

A legislative draftsman has to be a very knowledgeable person. He must have a grip over the Constitutional provisions. He must have good knowledge of substantive laws as well, previous legislations and current pronouncements of the Courts of Law. He must also have in mind the likely future need and how to provide some play in the provisions to cover such future exigencies without impairing the present purpose for which the legislation has been sought. The scope of the provisions cannot be too much narrowed down, nor too much expanded. He has to strike a balance on the whole. There are so many technical things which are involved; it is difficult to enumerate all of them. A few to mention are: the arrangement of the provisions, their sequence and then to have proper exceptions, explanations and provisos etc. and at times a non obstante clause too. This all has to be done skillfully and to my mind, the lesser the use of these, the better it is. To begin with, he must ascertain about the legislative competence first. It is true that it would be ideal to have legislation with simple language and short sentences with clarity, but it all is not so simple. Different situations are to be met, making it necessary to make use of ifs and buts, exceptions, explanations and provisos etc. In any case, if due care is taken, use of these things can certainly be minimized. One would often find that a provision is so lengthy that by the time one reaches the last line or clause, he would forget how it had started.

In the legal world, the words acquire special meaning. Their use becomes technical. Choice of words is thus a very important matter. The Statute Law Society2 of England had raised its criticism against the use of language before Sir David Renton Commission saying- about the language used, "Legalistic, often obscure and circumlocutions, requiring a certain type of expertise in order to gauge its meaning. Sentences are long and involved, the grammar is obscure;

and archaisms, legally meaningless words and phrases, tortuous language, the preference for the double negative over the single positive, abound". The Commission no doubt found that general condemnation was not supported by evidence, but was quite impressed by the evidence given by the Society and found legislative out-put of Parliament even incomprehensible to those who are most familiar with the subject- matter of Legislation.

Lord Denning M.R. said, "If you were seeking to see what different principles should be applied, the first would be to recommend simpler language and shorter sentences. The sentence, which goes into ten lines, is unnecessary. It could be split up into shorter ones anyway, and couched in simpler language.

Simplicity and clarity of language are essential."

But over-simplification of things may not do and the legal draftsmen may also have some difficulties. Quarrels about the meaning of the words perhaps may never end. Whatever may be the language used, disputes would still crop up, but certainly they can be minimized by careful drafting. However, it was observed by Roxburgh J, "Language draws a series of mental pictures in the mind of the person hearing the words spoken. These pictures are sometimes fairly well defined and sometimes blurred in outline, but they are never very precise. Language is a medium which disdains mathematical rules."

Lord Thring quoted Mr. Austin in his book "Practical Legislation", "I will venture to affirm that what is commonly called the technical part of legislation is incomparably more difficult than what may be called the

ethical. In other words, it is far easier to conceive justly what would be useful law, than to construct that same law that it may accomplish the design of the law giver."

An Act Is thoroughly scrutinized and critically examined by the lawyers and the Judges. It has to stand a very hard test. It makes the job of draftsmen more and more important as well as difficult. While drafting legislation, a draftsman has to be vigilant about whatever is connected with the matter, he is dealing with.

He is very often criticized and ridiculed also. This is what often he gets, hence it has been said by some of known draftsmen that this is a thankless job. But that is not so. This is a job which requires carefulness, awareness, thorough knowledge of law, procedural as well as substantive, the latest trend in the matter of interpretation of the statutes by the Courts etc. He cannot have the liberty to be even slightly loose in use of words and language. It is indeed a tight rope-walk.

I feel if there is more organized and long-duration training course in legislative drafting as a regular feature, it will do a lot of good and possibly there may be better legislation. It may help in avoiding a good amount of litigation and may bring better understanding to a common man as to where he stands in law, if the laws are such which he can well read and understand.

## THE LEGISLATIVE PROCESS

The legislative process takes the following steps when legislation is being proposed by a Ministry or Government Department in Uganda –

1. The Ministry concerned approaches Cabinet through a **Cabinet Memorandum** with a proposal for Cabinet to approve the principles for the drafting of the Bill.

Cabinet approval in principle is required before drafting of the subject legislation.

This is provided for under paragraph 2 of Section (Q-b) of the Uganda Public

Service Standing Orders, 2010.

2. Paragraph 2(b) of Section (Q-b) however permits a Bill to be drafted by the first Parliamentary Counsel if the Attorney General or Solicitor General authorises the drafting of the Bill without reference to Cabinet. According to the paragraph, this authority should be granted only in **special circumstances**. The request for the authority should be made through the responsible Minister.

3. Cabinet then considers the proposals as contained in the **Cabinet Memorandum** of the Ministry concerned and approves the principles on the basis of which a Bill is to be drafted.

4. When Cabinet approves the principles for the drafting of a Bill, it authorises the responsible Minister to issue drafting instructions to the First Parliamentary Counsel/Attorney General to draft the necessary legislation.

5. The Ministry concerned would then request the First Parliamentary Counsel

through the Attorney General to draft the legislation on the basis of the approved

principles as contained in a **Cabinet Minute**.

6. Where the instructions are not clear, the First Parliamentary Counsel will ask the ministry concerned for further instructions and where necessary request that ministry to identify an officer in the Ministry to liaise with the office of First Parliamentary Counsel in the drafting of the Bill.

7. In drafting the legislation, the office of the First Parliamentary Counsel will

interact with the Ministry concerned to arrive at an agreed draft.

8. The Ministry concerned may again consult stakeholders as to the contents of the Bill.

9. The Ministry concerned will have to submit the Bill to Cabinet for approval

together with a Cabinet Memorandum and any comments of the stakeholders.

Paragraph 7 of Section (Q-b) of the Uganda Public Service Standing Orders, 2010

provides that no Bill **without exception** should be published unless it has been

submitted to Cabinet for approval.

10. In the course of drafting the Bill the draftsperson is required to bear in mind the need to keep informed the Law Officers namely, the Attorney General and the Solicitor General. This is regulated by paragraph 6 of Section (Q-b).

**Submission of Bill to Cabinet**

11. When the Bill is being submitted to Cabinet for approval, the Cabinet memorandum of the Ministry will have to be accompanied by-

(a) **A certificate of compliance** issued by the Office of the First Parliamentary

Counsel to the effect that the Bill has been drafted by the Office of the First

Parliamentary Counsel in accordance with the principles approved in the

Cabinet decision issued for the drafting of the Bill or that the Bill has been drafted on the basis of a waiver of prior Cabinet approval in principle by the Attorney General or the Solicitor General under para. 2(b) of Section (Q-b) of the Uganda Public Service Standing Orders.

(b) **A certificate of financial implications** issued by the Ministry of Finance in accordance with section 10 of the Budget Act, 2001 and rule 107 of the

Rules of Procedure of Parliament, 2012 (the Rules), stating in respect of the

Bill in question the financial implications if any, on revenue and expenditure over the period of not less than two years after its coming into force. Rule 107(2) of the rules requires the certificate of financial implications to be signed by the Minister responsible for finance.

12. Cabinet may approve or reject the Bill or may approve the Bill subject to amendments.

13. The Office of the First Parliamentary Counsel will then incorporate any amendments approved by Cabinet in the Bill and seek the signature of the Minister concerned to an **explanatory memorandum** attached to the Bill.

14. Rule 106(2) of the Rules requires that all Bills shall be accompanied by an explanatory memorandum setting out the policy and principles of the Bill, the defects in the existing law if any, the remedies proposed to deal with those defects and the necessity for introduction of the Bill. According to rule 106(3), the explanatory memorandum shall be signed by the **Minister** or by a **member introducing the Bill (**in the case of a Private Member's Bill).

15. The First Parliamentary Counsel will authorise the Government Printer, the

Uganda Printing and Publishing Corporation (UPPC) to print and publish the Bill in the Uganda Gazette.

16. The Ministry concerned must issue a Local Purchase Order (LPO) to be issued in favour of the Government Printer (UPPC) to cover the costs of printing and publishing the Bill. This is based on an estimate of costs issued by the Government Printer.

17. Rule 106(1) of the Rules of Procedure of Parliament provides that all Bills shall be published in the Gazette.

18. After publication in the Gazette, the Ministry concerned will have to supply about 450 copies of the Bill to the Clerk to Parliament for use by parliamentarians.

19. The Ministry concerned will also have to supply to Parliament the certificate of financial implications to be tabled in Parliament for the First Reading of the Bill.

**Introduction of the Bill in Parliament**

20. The Bill then goes through the processes of Parliament necessary for passing a Bill. Rule 114 of the Rules provides that every Bill shall be read three times prior to its being passed. The processes are prescribed by the Rules from Parts XVIII - XXI as follows-

**(a) First Reading:** which is a formality, marks the formal introduction of the Bill in Parliament and the Bill is then committed to the relevant Sessional Committee of Parliament for consideration. At this stage, the committee will normally invite the relevant Minister to introduce the Bill and may invite other stakeholders to state their views on the provisions of the Bill and the committee may even sometimes hold hearings for the purpose.

**(b) Submission of Report by the Sessional Committee.** The committee must submit a report on the Bill to the plenary of Parliament and at the same time, Parliament will consider the Bill at Second Reading which is a debate on the **principles** and **policies** of the Bill and **not on its details**. According to rule 119(5) of the Rules (subject to the Rules) the Second Reading of the Bill shall not be taken earlier than the **fourteenth day** after publication of the Bill in the Gazette, unless the subrule is formally suspended for the purpose.

**(c) Committee of the Whole House Stage:** This is the stage of the Bill at which Parliament deals with the provisions of the Bill, clause by clause and all proposed amendments to the Bill. The Committee Stage is regulated by Part XX of the Rules (rules 120 - 124) of the Rules.

**(d)** At Committee Stage, the Speaker sits in the well of the House as chairperson of the Committee of the Whole House considering amendments to the Bill. (See rule 122(1)).

**(e)** According to rule 123(4) of the Rules of Procedure of Parliament the Committee of the whole House shall consider proposed amendments by the Committee to which the Bill was referred and may consider proposed amendments, **on notice**, where the amendments were presented but rejected by the relevant Committee or where, for **reasonable cause**, the amendments were not presented before the relevant Committee.

**(f) Report of Committee after Committee Stage:** This is where the Committee of the Whole House reports to the plenary on the Bill which has been committed and amendments are considered. (See rule 125).

**(g) Re-committal:** This is a stage which comes at the end of the Committee

Stage where it is felt that there are still certain amendments which have to be considered or reconsidered. (See Part XXI rule 127).

**(h) Third Reading and passing of the Bill:** At this stage the Bill is not debated and it is passed as a formality upon a motion "that the Bill be now read Third Time and do pass" (rule 126 of the Rules).

21. **Withdrawal of Bills**

"The member in charge of a Bill may, at any time, give notice that he or she

wishes to withdraw a Bill subject to the approval of the House" (rule 129(1). The

procedure for reintroducing the Bill is provided for under rule 129(2).

22. **Delays with Bills**

In order to prevent delays by Committees of Parliament to which Bills are sent for consideration, rule 130 of the Rules provides as follows;

***"DELAYS WITH BILLS***

*(1) Subject to the Constitution, no Bill introduced in the House shall be with the Committee for consideration for more than forty-five days.*

*(2) If a Committee finds itself unable to complete consideration of any Bill referred to it in sub-rule (1), the Committee may seek extra time from Parliament.*

*(3) Where extra time is not granted or upon expiry of the extra time granted under sub-rule (2), the House shall proceed to deal with the Bill without further delay."*

23. **Publication of Acts**

Sections 8 - 13 of the Acts of Parliament Act, Cap.2 regulate the preparation of presentation copies, assent by the President, presentation of a Bill for assent under Article 90(1), numbering of Acts, original copies of Acts assented to by the President or becoming law without the assent of the President and publication of Acts in the Gazette.

24. **Making a commencement instrument before Act comes into force**

It has to be pointed out that according to section 14 (3) of the Acts of Parliament Act, Cap.2, where an Act confers power on a Minister to make a statutory instrument to bring an Act into force, the power to make the instrument may be exercised even though the Act has not come into force.

25. **Private Member's Bill under Article 94(4) of the Constitution**

The foregoing information relates to Bills initiated by the Executive. However, the Constitution also provides for the initiation of Bills by private members of Parliament.

26. Thus article 94 (4) of the Constitution provides that the rules of procedure of Parliament shall include the following provisions-

*"(b) A member of Parliament has the right to move a private member's Bill;*

*(c) The member moving the private member's Bill shall be afforded reasonable assistance by the department of Government whose area of operation is*

*affected by the Bill; and*

*(d) The office of the Attorney General shall afford the member moving the*

*Private Member's Bill professional assistance in the drafting of the Bill."*

27. Following the provisions of the Constitution, rule 110 provides for the Private member's Bill and rule 111 of the Rules provides for the following procedure in respect of a Private Member's Bill-

*(1) A Private Member's Bill shall be introduced first by way of motion to*

*which shall be attached the proposed draft of the Bill.*

*(2) If the motion is carried, the printing and publication of the Bill in the Gazette*

*shall be the responsibility of the Clerk.*

*(3) Following the publication of the Bill in the Gazette, the progress of the Bill*

*shall be the same as that followed in respect of a Government Bill."*

28. **Certain provisions not applicable to Private Member's Bill**

Needless to say, a Private Member's Bill not being a Government Bill will not require Cabinet approval. It however requires a certificate of financial implications from the Ministry of Finance, Planning and Economic Development, just as does a Government Bill.

It also will not require a certificate of compliance issued by the Office of the First

Parliamentary Counsel. Otherwise the procedure for processing a Private Member's Bill is the same as that of a Government Bill.

29. **Bills introduced by Committees under rule 147**

A Committee of the House may initiate any Bill within its area of competence and

shall be introduced by the Chairperson of the Committee in the same manner as a

private member's Bill. (See rules 112 and 147 (b)

30. **Certain provisions of the Acts of Parliament Act Cap. 2 relevant to processing of legislation**

The following provisions of the Acts of Parliament Act, Cap 2 are relevant and to

be observed in connection with the processing of legislation in Uganda.

**Section 3- Title**

Every Act shall bear at the head a short title immediately followed by a long title

describing the leading provisions of the Act.

**Section 4- Words of enactment**

(1) Every Act shall be prefaced by the words of enactment specified in the First

Schedule to this Act.

(2) The words of enactment shall be taken to extend to all sections and to any

schedules and other provisions contained in the Act.

**The words of enactment referred to above are the following "ENACTED by**

**Parliament as follows;"**

**Section 15- Citation**

The citation of the short title to an Act shall be sufficient to identify the Act.

**Comment**

Because of this provision there is no longer the need to include a short title clause after a short title is incorporated in accordance with section 15 of the Acts of Parliament Act.

**Section 17- Amendment and repeal in same session**

An Act passed in any session of Parliament may be amended or repealed in the same session.

Here we shall dissect the role Parliamentary Counsel play in the enactment of legislation. In the modern world today the government cannot effectively govern if that government does not have the ability to pass legislation.

Legislation is thus the framework by which governments of whatever persuasion seek to achieve their purposes. For politicians, as well as for administrators legislation becomes the means by which they attain their cultural, economic, political and social policies.

It is significant to know that even tyrants and dictators hate the restraints which the law imposes upon them. Nonetheless, even they enact legislation which strengthens their hold on society. If administrators could, they would operate in the absence of law. They would much prefer to do their tasks in contrast to the impositions of the law.

Yet fortified by the knowledge that there would be legislation were it necessary, these self-same administrators would venture out into the arena of public administration.

Legislation then becomes the tools of their trade. The facultative aspect of legislation is often not immediately appreciated by administrators until they hit against the wall. There is then the search for an applicable law which they look upon as a kind of magic wand or master key. But, then there must be fetters on the exercise of powers and legislation in a large measure imposes those fetters.

In the Ghanaian parliamentary system of government there is a loose distinction between the powers of the executive, the powers of the legislature and the powers of the judiciary. The powers of administrative authorities, be they Ministers or departmental officials, must be derived from legislation by which their conduct must be regulated. All these assume the existence of a machinery as a part of government to deal with the drafting of laws. That is where Parliamentary Counsel come in. They are the officers in government and of the government who have the required expertise and experience to see to it that government policies are effectively translated into law for the benefit of society as a whole.

They are the architects in a large measure of social reform, of social structures being experts in the design of frameworks of collaboration for all kinds of purposes. They are specialists who weigh the past, consider the present and as much as possible project their minds into the future so that a piece of legislation placed on the statute book is of great assistance to those who govern as well as those who are governed.[211]

## THE ROLE OF PARLIAMENTARY COUNSEL

### The Genesis

In Exodus Chapter 31, we read that the Ten Commandments were written with the finger of God.[212] When Moses found that the Israelites were worshipping the golden calf, in his anger, he threw down the tablets, shattering them.[213] In time came the command to hew another set of tablets. In the process, for about forty days, Moses inscribed the tablets.[214] The Commandments written by Moses were kept in the Ark of the Covenant.

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[212] V.18

[213] Chap.32 V.19

[214] Cap.34 V . 27 – 28. It is a pity that present day Parliamentary counsel cannot have all that time to draft a simple bill of ten clauses.

There are thus two versions of the Ten Commandments: the one that only Moses read, and shattered it, and the one that he wrote for our benefit. The first set of the Commandments stated, among others, that,

**Thou shalt not covet thy neighbor's house, thou shalt not covet they neighbor's wife, nor his manservant nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbor's.**[215]

That uses thirty-two words. The second version reads,

**Neither shalt thou desire thy neighbor's wife, neither shalt thou covet thy neighbors' house, his field, or his manservant, or his maidservant, his ox, or his ass, or any*thing* that *is* thy neighbors'.**[216]

One cannot say that we have here evidence of copy-drafting or that Moses did his best to remember what the Lord had first said. Whatever it is, the second version is an improvement on the first. It uses thirty-four words to the thirty-two of the first version. Yet the second version makes it quite clear that "covet" is the appropriate word to use in relation to property and that "desire" is better placed with wife.

Thus we have a distinction between our desires and our covetousness. There are certain things we should not *covet*. There are certain things we should not *desire.* We could improve upon the earlier drafts by providing that,

**Thou shalt not desire nor covet anything that is thy neighbors'.**

And thus use eleven words where the first version used thirty-two words and the second version used thirty-four words.

The word "desire" in our draft would more appropriately relate to matters like "wife".

The word "covet" would cover property. But is a wife a thing, having regard to the use of the word "thing"? Even in Moses' day? Perhaps not. Perhaps yes. But in our modern concepts? Certainly not! Thus the brevity here is misleading and an expansion is required:

**Thou shalt not desire the wife, the manservant or the maidservant, nor**

**shalt thou covet the property of thy neighbor.**

Does this mean that a woman could desire the husband of her neighbor? Moses did not have the benefit of an Interpretation Act, so far as Holy Writ goes, to counsel him that the masculine gender includes the feminine gender and – perhaps – the feminine gender includes the masculine gender. Or shall we rely on what is often referred to as the biblical man?

[215] Deuteronomy chapter 10 v 1-5

[216] It is also an example to present day parliamentary counsel to read over their draft for as many times as it is possible to do so, inorder to improve upon the quality of the draft

However, if we do away with the archaic expression "thou shalt not", and its ilk we may end up with a preliminary draft, subject to polishing of the text:

**1. A person shall not desire the spouse nor the employee, nor shall a person**

**covet the property, of that person's neighbor; Which can be rendered as,**

**2. Regarding a neighbor, a person shall not desire the spouse nor the**

**employee nor covet the property of that neighbor; And further still**

**reduced to**

**3. A person shall not desire the spouse, an employee, nor covet the**

**property, of a neighbor.**

The "neighbor" in the context of draft 3 is likely to be interpreted by reference to Lord Atkin's definition of "neighbor" in *Donoghue V. Stevenson*:

**Who then is my neighbor? The answer seems to be – persons who are so closely and directly affected by my act that I ought to have them in mind as being affected when I am directing my mind to the acts or omissions which are called in question.**

If that is understood, then the expression "a neighbor" at the end of draft 3 is preferable to the expression, "any other person". And we have reduced the original thirty-two words to sixteen words.

Back to the little history of legislative drafting, we also know that the *juris prudentes* of Rome drafted legislation with the help of the *scribae.*

The "jurists left the drafting of the statutes to the *scribae*, who neither desired to give up their involved style nor were capable of doing so"9 Tribonian also appears to have had a great deal to do with Justinian's *Institutes* and other pieces of legislation.

But the Laws of Manu predate the Romans and the Greeks. The Code of Manu is described as, in the original.

**Written in verse and is divided into twelve chapters., In most parts, the rules are so clearly and concisely stated that nothing can be gained by attempting to summarize or condense**

The Codes of Hammurabi – 1752 B. C. – are the "completest and most perfect monument of Babylonian Law"11 The Codes were carved into a basalt pillar consisting of 282 statutes – all preserved in tact to this day. In India, Ashoka also issued edicts carved in rock and metal which,

**Spread out all over India are still with us and conveyed his messages not only to his people but to posterity.**

In Africa, early Egyptian legislation took the form of decisions or decrees by the Pharaohs, tailor made to suit their wishes and the way they wanted their Kingdoms built – in response to the problems of their Kingdoms. Among their achievements was the development of writing which took the form of hieroglyphs, a system of writing which extended to the whole of the Middle East as a result of the spread of Egyptian civilization. Thus the first recorded laws in the world are to be found in the records of the ancient civilizations of Egypt, Mesopotamia and the Yellow River of

China. The first of the Codes of Law that appeared in Mesopotamia were the laws of Eshuna in sixty sections written in Arcadian.

It can thus be seen that Legislative Drafting is of ancient lineage – and perhaps of divine inspiration.

The Problems

It is the lot of Parliamentary Counsel to perform an extremely difficult task. There is much that is beyond their control. There are many pressures on them. The nature of the task requires them to think of the past, the present and the future. The conduct of society in the past, the present particular problems of society have to be taken into consideration.

The resulting law is prospective in character by laying down rules of conduct for the guidance of society. Parliamentary Counsel have to think of the problems involved from as many different angels as possible – the simple as well as the complex. It is not just a question of changing a few ideas around. They have to think of the legal practitioners who will try to read the law – even if in bad faith – to suit a particular case and who will take advantage of a loophole. Legal practitioners are known to split hairs, to continually try to misunderstand legislation. In addition there are the judges who criticise Parliamentary Counsel for ambiguities or for the complexity of an Act of Parliament. MacKinnon L. J. said that,

**If the Judges now had anything to do with the language of Acts they are to administer, it is inconceivable that they would have to face the horrors of the Rent and Mortgage Interest Restrictions Act – horrors that are hastening many of them to a premature grave.**

Social reformers need to have their day and may condemn a piece of legislation. Parliamentary Counsel may appear radical to the conservative and as reactionary to the radicals. Often there is insufficient time to draft a piece of legislation. Time is the enemy when there is so little of it. Time is a friend when the bell rings.

Legislative drafting is an intellectual labour requiring hours of intellectual concentration, planning and strategy. Requests for legislation come with *urgent, immediate* flags. Far reaching constitutional amendments may be done over the counter. In times of emergency orders, directives, notifications affecting life and liberty are drafted at top speed. Parliamentary Counsel may work round the clock and with a heavy heart for fear of a hasty, rash draft.

They usually prepare a number of drafts before the final draft. They study their preliminary drafts, conference after conference. They revise the drafts. They re-write them again. "The inspiration of genius is seldom in final form in first form ... The pride of authorship means sweating blood." There may be calls for further clarification from the sponsoring Ministries. All this involves time and concentration. There is a constant battle between urgency and limited time. After days of hard labor when the draft is finished, a sense of relief, if not of satisfaction, pervades the atmosphere. There is a sigh. But too soon.

After a few days doubts may arise as to the accuracy of the draft, its perfection, its sufficiency.

There is then the passage of the Bill in the Legislature. Every Lycurgus and Solon sitting on the back benches will denounce the Bill "as a crude and undigested measure, a monument of ignorance and stupidity".16 Amendments may come.

Committee stage amendments may be a headache. They may or may not be ill-considered, ill-conceived. Parliamentary Counsel has to deal with all these situations.

Unpredictable sometimes as they are. Then there is a final reading, and a second sigh of relief because the ordeal is over Parliamentary Counsel work extremely hard. But, as has been demonstrated by the attempt to redraft one of the commandments of the Ten Commandments legislative drafting is not that easy.

**The Qualities**

The skills of Parliamentary require facility in the use of language, a critical, enquiring, imaginative, and systematic mind, as well as an orderliness in the formulation of thoughts and the ability to pay meticulous attention to detail.

Counsel must also have an analytical and an original mind capable of conceiving distinctly the general purpose of a statute and its subordinate provisions and the ability to express that general purpose and these subordinate provisions in a language perfectly adequate and not ambiguous. The ability to write short simple sentences devoid

of ambiguity and distracting surplusage is a pre-requisite as well as a style that is both concise and simple leaving a minimum of opportunity for individual difference of opinion.

These qualities for legislative drafting are not hard to come by. Yet few there are who are willing to undertake the arduous and highly skilled tasks that legislative drafting imposes. It demands the ability to work with colleagues and those skilled in other disciplines. It requires the ability graciously to accept criticism, whether in bad faith or in good faith. It commands a temperament of rigid self-criticism. Even though no monument has as yet been erected in honour of a critic, Parliamentary Counsel need to pay heed to criticism.

Common sense is a prerequisite. A sense of humor is desirable. So is the awareness of the cultural, economic, political, and social factors that create the problems that will have to be dealt with – and it is hoped solved – by legislation. Accuracy and precision of language may proceed from an innate habit of mind.

These faculties can be acquired. However, if, as Albert said, "a parliamentary draftsman is to do his work well, he must be something more than a mere draftsman. He must have constructive imagination, the power to visualize things in the concrete, and to foresee whether and how far a scheme will work out in practice."[217]

In fine Parliamentary Counsel must be

**An architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all.**

Thus those who seek to practice "the art of the Parliamentary Counsel" should be persons genuinely interested in legislative drafting with every likelihood of making legislative drafting a career.

**But what is it?**

The nature of Legislative drafting makes it a discipline. It has been likened unto a game of Snakes and Ladders. Snakes and ladders is a game of chance. Legislative drafting is a game of skill. It demands continuous training and experience. It demands hours and hours of concentrated intellectual labor.

Driedger considers that its skills are acquired over a period of time.20 It can be onerous and exacting, exciting and yet tedious. Its nature nurtures natural abilities of clear, cogent, concise thinking into a habit of restrained writing.

[217] *The Mechanics of Law Making*, University of Columbia Press, New York; 1914 p. 110

The audience for whom legislation is drafted varies from the learned in the law to the simple and the curious From the specialist to the lay. There are those who would try in good faith to understand legislation. There are those who would try in bad faith to misunderstand legislation. To consider "that the rules of good drafting are simply the rules of literary composition, as applied to cases where precision of language is required, and that accordingly anyone who is competent to draw in apt and precise terms a conveyance, a commercial contract, or a pleading, is competent to draw an Act of Parliament."

Is a superficial view. Martin Mayer has said that,

**Intellectually, the draftman's skills are the highest in the practice of law.**

**Judges at bottom need merely reach decisions ... negotiators and advocates need understand only as much of a situation as will gain a victory for their clients; counsellors can be bags of wind. But the documents of [legislative drafting] survive, and to draw them up well requires an extraordinary understanding of everything they are supposed to accomplish ..Probably the greatest compliment a lawyer can receive**

**The Role**

That governments need legislation cannot be gainsaid. That the governed need well drafted readable, understandable legislation is equally important. The arm of the government extends to control every aspect of the lives of the governed. Legislation of one type or another binds us. In whatever sphere one may lay a claim the tentacles of government are evident. There are Acts of Parliament to guard and to guide.

There is subordinate legislation to regulate and to rule.

In the parliamentary system of government practiced in most Commonwealth countries the Cabinet is drawn from Parliament. In that set up the Cabinet is in essence the Executive. In the nature of things the Executive controls the legislative programe of Parliament. Thus an Act of Parliament, in a very large measure, is the work of the Executive. In other words government policy motivates legislation.

Parliament in the main gives its stamp of approval to the legislative policy expressed in an Act determined and settled by the government of the day.

Most politicians, of whatever hue or persuasion, believe that legislation can be used to achieve great changes in society. That idea is very attractive to politicians. They

seem to believe that anything can be achieved by legislation. To them, "A parliament

can do anything but make a man a woman, and a woman a man." It is hard for them to realize that not all social ills can be cured by legislation.

Centuries of social behavior cannot be laid to rest at the stroke of a pen. Society did not start with a statute book in its hands. Legislation is but a mirror of society. It reflects the development of society as a whole. Thus government and the body politic need to guard against the consequences of misguided legislation.

In all these, Parliamentary Counsel have a vital role to play. It is a role that should start with the conception and the birth of an Act of Parliament. It is their primary function to express legislative policy in a language free from ambiguity. Transforming government policy into law is thus the prime function of Parliamentary Counsel. In the performance of that function, governments expect Parliamentary Counsel to ensure that the governments' policies are given legal effect. Equally, a government expects Parliamentary Counsel to express legislative intention as accurately as possible, capable of one interpretation, delineating the intention that the government intends that law to have.

The governments also expect that Parliamentary Counsel will ensure that a Bill as drafted is in conformity with all existing legislation. The Bill as well should not be in any conflict with the Common Law or the Customary Law. Least of all with the Constitution. An Act of Parliament should not stand on its own. It should form part of the law as a whole. That accounts for the reference to it as a chapter in the Statute Book. Bills as drafted should also comply with parliamentary procedure. That raises the issue of the other audience, Parliament and the body politic. The expectations of Parliament in regard to a Bill require that the Bill is self explanatory and that it is arranged in a manner that allows for orderly debate. The primary function of Parliament is to pass legislation for the public whose affairs, approaches and aspirations will be governed by the legislation. That public, the people of the jurisdiction have their expectations. They, too, expect the Act to be intelligible, precise, and free from ambiguity.

The expectations of the public stem from the fact that there are interests other than those of the government concerned with the quality and the vitality of legislation. The policy of a piece of legislation may have its genesis from the public through the manifestoes of political parties. The manifesto of a political party is an undertaking that, should it gain political power, it would introduce legislation to give effect to its policies and philosophies, cultural, economic, social or otherwise. The election of the members of a political party to office is considered an endorsement of the philosophies that motivate that political party. The public expects to see legislation that reflects the policies and philosophies it has endorsed.

Departmental officials administer legislation passed by Parliament. They thus become another source of legislative policy. In the implementation of the law departmental officials discover defects and discrepancies in the law. A piece of legislation may have become obsolete. It may have become unworkable. There may be gaps in

the existing law which need to be filled in. Departmental officials make recommendations as to how the defects and the discrepancies require alteration.

An existing law may require an amendment. Situations, may have arisen that call for a new Act. The Zambian Intestate Succession Act, 1989, purported to give jurisdiction to subordinate courts to hear matters in relation to succession. On its coming into force it was discovered that the Act did not contain provisions relating to the procedure by which the courts would exercise their jurisdiction.

Interest or pressure groups may also be the source for the initiation of legislative policy. They would seek to use legislation as a means to an end for the achievement of their purposes. Commissions of Inquiry and Committees of Inquiry are also sources of the origin of policy.

The classic theory is that Parliamentary Counsel do not initiate policy. They are only technicians whose function it is to translate policy into law. Policy issues are the preserves of others. But it is important to appreciate that the translation of policy into law requires a vivid understanding of the policy. Herein lies the inevitability of Parliamentary Counsel getting involved in policy considerations. The training given to Parliamentary Counsel, their vast knowledge of the existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they need to advise and to warn.

Parliamentary Counsel are not glorified amanuenses.[218] Yet the ability to discern the thin dividing line between policy and implementation, between practice and procedure, between the motive and the motivation, between the problem and the solution of the problem make Parliamentary Counsel candidates for early participation in the policy issues that lead eventually to the drafting of legislation.

In this participation, it is important that Parliamentary Counsel do not usurp the role of a policy maker. They have an interest in substantive policy. They have the requisite expertise. While all that is conceded, Parliamentary Counsel must appreciate their own limitations. They should not seek to dictate policy. Only thus can they, as seasoned legal advisers, help to shape policy. In that exercise, tact must tend talent as their duty demands diplomacy. Purposes must be measured by philosophical pragmatism. Causes and cures must be considered on the anvil of effectiveness and common sense. These are the fields open to Parliamentary Counsel to contribute in improving substantive policy.

[218] James Peacock, Notes on Legislative Drafting, p. 17.

On the receipt of drafting instructions, Parliamentary Counsel must examine and analyze the legislative proposals. Are the proposals capable of implementation? How harmoniously will the proposed legislation fit into the scheme of existing legislation?

What are the alternatives? Would an amendment be appropriate rather than a new piece of legislation? What are the legal difficulties inherent in the proposals?

Is there constitutional legitimacy? What are the implications in the proposals for personal rights and for vested interests? These, and more, are the questions with which Parliamentary Counsel should concern themselves. Those pertinent questions will raise pertinent issues. The resolution of the pertinent issues involves considerations which affect the policies behind the proposals. They lead to informed policy decisions.

Conferences with departmental officials, and, with the permission of the Minister, other interested persons will make it possible to iron out areas of difficulty. It is in this area that Parliamentary Counsel will deal with the precise details of the policy behind the proposals. Here is the area where Parliamentary Counsel ensure that matters overlooked are dealt with so that the Bill, as finally drafted, will not only reflect the wishes and aspirations of the sponsors but will also be a workable piece of legislation.

Matters likely to lead to litigation should be dealt with at this stage. *In Roe v. Russel*29

there was a **failure to provide for such obvious incidents of tenancy as death with or without a will, bankruptcy, power to assign and power to sub-let in whole or in part of the demised premises.**

That led Scrutton L.J. to regret that he could not order the costs of the action to be paid by the draftsmen of the Rent Restriction Acts, 1920 - 1938.30 Parliamentary Counsel thus have a duty to foresee all possible eventualities that are likely to occur. If the law is drafted to specifically exclude dogs, then cats, even tigers are not so excluded. In these circumstances, “animal” as appropriately defined would be what is required. And what about the blind man who has to rely on a dog? These are matters for Parliamentary Counsel to fill in. Once the salient questions are asked and the relevant answers are supplied, the gaps in the broad policy will be filled. Exceptions to the general rule may be required.

To adapt Hart and Sacks, 31 again, a Parliamentary Counsel is **An architect of social structures, an expert in the design of framework of collaboration for all kind of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all. The difference between a legal mechanic and a legal draftsman turns largely on an awareness of this point.**

In drawing up the legislative scheme for a Bill, Parliamentary Counsel may include matters that had not been foreseen at the conference table, or in the Drafting Instructions. Ideas crop up which would add to the practicability and sufficiency of the legislation. These ideas and other like matters would demand, as well, interstitial policy decisions which would require the approval of the sponsors of the Bill. Here again is an area in which Parliamentary Counsel contribute to improving substantive policy. In translating the substantive policy into a Bill additional policy matters may

arise.

They may not have been readily apparent before the actual drafting had begun. The ultimate responsibility for the larger policy decisions is that of the sponsors of the Bill. Yet, the success of a piece of legislation depends upon the skill and competence with which Parliamentary Counsel draft that legislation. There is, almost invariably the need to provide for sanctions. Parliamentary Counsel may need to look at alternative provisions. These approaches of Parliamentary Counsel will give the requisite direction in fulfilling the wishes of the sponsors. The manner in which a Bill is drafted contributes to an improvement to the substantive policy.

In other words, a failure to properly translate the substantive policy into the appropriate law adversely affects the policy. The wishes of the law giver in those circumstances may not have been achieved. "The most determined will in the lawgiver, the most benevolent and sagacious policy, and the most happy choice and adaptation of means, may all, in the process of drawing up the law, be easily sacrificed to the incompetency of a draftsman"[219]

A law which provides that **when two trains approach each other at a crossing, they shall both stop,and neither shall start up until the other had gone.**

Has as its substantive policy the avoidance of railway accidents at railway junctions. When studied properly it does appear that the intention of the sponsors of that piece of legislation has been frustrated. The provision is incapable of implementation.

Rights are generally pursued against the background of political reality. At times that raises issues of a purely political nature for Parliamentary Counsel. The resolution of political problems of that kind requires purely political considerations rather than legal considerations. But policy makers may wish to have a legal solution to a purely political proposal. A simple issue of a reasonable time would involve an appraisal of conditions which are economic, political or social rather than legal.

It is then a matter purely for the sponsors of the legislation to determine whether, as an example, thirty days form a sufficient period within which to file nomination papers for the purposes of an election. It is, however, within the competence of Parliamentary Counsel to determine whether thirty days form a sufficient period within which to bring an election petition. Counsel's knowledge of procedure – both of the civil law and of the criminal law – will be called in aid in determining the issue.

The aspirations of a people may present acute problems which border on the ethical.

[219] Coode, quoted by Dridger, *The Composition of Legislation*, p. 321

A political issue of the introduction of a one-party state clearly involves issues of fundamental human rights – the fundamental human rights of freedom of speech and expression, of freedom of thought, of conscience and belief, of academic freedom in institutions of learning, of freedom to practice a religion of one's own choice, of freedom to assemble and to demonstrate with others, of freedom of association. Human rights activists would argue that the step would whittle down the individual rights of freedom of speech and freedom of association. It could be argued on the other hand that, in order to achieve social cohesion and to build a national consciousness rather than promote ethnicity, a one-party state is desirable. How does a Parliamentary Counsel, taught to fearlessly defend human rights, deal with very serious situations which are against the grain of Counsel's training?

Events have shown that whilst a theory may be beautiful *in theory* the reality may be ugly. In those circumstances, what is the response of Parliamentary Counsel? However weighty the arguments about the rights and wrongs of a policy contained in Drafting Instructions, there comes a time when Parliamentary Counsel may have to say, 'No.' It is admitted that Counsel is not primarily concerned with policy matters.

It is submitted that Parliamentary Counsel is in a position to advise on policy. By virtue of Counsel's expertise and independence much can be achieved especially when Counsel has to point out the implications and the dangers inherent in a particular policy proposal.

Perhaps it should be mentioned here that Parliamentary Counsel in young countries of the world should guard against importing concepts in one system of law into their own systems of law. This question of concept should not be taken lightly. In West Africa there is the concept of allodial and communal ownership of land. A customary right of occupancy of land is perpetual in duration. Yet it confers no ownership. It confers no right of property. There is only a right of possession. There is no power of disposal.

It "is no more than a tenancy creating certain rights and obligations between occupier as tenant and the grantor, and determinable upon certain conditions"[220] To provide for fee simple absolute in possession or freehold land is thus to create problems and litigation. As was stated by the Privy Council in the Gold Coast case of *Enimil v. Tuakyi*[221]

**It seems clear from the authorities... ... that the term 'owner' is loosely used in West Africa. Sometimes it denotes what is in effect absolute ownership; at other times it is used in a context which indicates that the reference is only to right of occupancy ... ... this looseness of language is, their Lordships think, due very largely to the confused state of the law in (West Africa) as it now stands.**

**As appears from the report made in 1898 by Rayner, C.J., on Land Tenure in West Africa... ... there has been introduced into the customary law, to which the notion of individual ownership was quite foreign, conceptions and terminology derived from English law. In these circumstances it is not**

[220] B.O. Nwabueze, *Nigerian Land Law*, 1972 p. 27
[221] (1952) 13 W. A. C. A 10 (Gold Coast)

**surprising that it is difficult to be sure what is meant in any particular case by the use of the expression owner.**

*Enimil v. Tuakyi* cited the Nigerian case of *Amodou Tijani v. Secretary Southern*

*Nigeria*[222] in which the Privy Council said,

*As a rule, in the various systems of native jurisprudence throughout the empire, there is no such full division between property and possession as English lawyers are familiar with. A very useful form of native title is that of a usufructuary right which is a mere qualification of or burden on the radical or final title.*

*Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. But the Indian title in Canada affords by no means the only illustration of the necessity of getting rid of the assumption that the ownership of land naturally breaks itself up into estates conceived as creatures of inherent legal principle The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual .... This is pure native custom along the whole length of this coast, and whenever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas.*

But even here, the Privy Council got it wrong as regards the concept of individual

ownership. That concept is not foreign to the Customary Law. As Bentsi-Enchill[223]

makes it quite clear,

*The very notions of family, sub-family, and immediate family properly carry with them an acknowledgement of original individual acquisition by the founder of the family or branch of the family.*

Equally the terms, family, sub-family, and immediate family do not fully express the significance of the terms, *abusua or abusua panyin* the latter of which is equivalent to the Roman *paterfamilias*. For this purpose, Parliamentary Counsel need not be deterred from using terms which are readily understood in their jurisdiction. A Ugandan will readily understand the word *magendo* and what it imports rather than the word 'black market.

Whenever the British Crown took over the administration of a territory, the statutes of general application, the doctrines of equity and the rules of the common law as they stood in England became the basic law of that

[222] [1921] A. C. 399
[223] *Ghana Land Law* (1964) p. 81

territory. This led to the stifling of the development of the indigenous systems of jurisprudence. The indigenous laws were to be known as the Customary Law.[224]

The importation of English Law led to the dual administration of justice and its attendant problems. In Sri Lanka, for example, many different systems of law are now administered. They are Sinhalese Law,[225]

In Zimbabwe, then Southern Rhodesia, it was the Roman-Dutch Law in force in the Colony of The Cape of Good Hope on 10th June, 1891. In Ceylon, the English Law became a gloss on the Roman- Law, Islamic Law, Roman-Dutch Law41 and the English Law. A Tamil living in the Jaffna district of Sri Lanka would inherit property on his father's or mother's death according to Tamil Law. He might be called upon to be a trustee of a Hindu temple.

He would thus be subject to principles which originated in the English Courts of

Equity, and to Hindu religious law which may be relevant in determining his powers,

his rights, his duties. He would mortgage his property according to the principles of Roman-Dutch Law.

He has a choice whether to contract a marriage according to statute law or the Customary Law. His capacity to marry would be determined by statute law. If he brought an action for divorce he would, to some extent, be subject to the principles of

English Law. His claims to the custody of his children would depend on Roman- Dutch Law. His wife's right to retain property which she had brought into the marriage community and any property she may have acquired subsequently would be governed by Tamil Law.[226]

This type of situation leads to difficulties. It creates problems for Parliamentary Counsel. It highlights the dangers in importing a concept of jurisprudence in one system of law into another system of law. And Parliamentary Counsel should guard against that sort of incorporation.

**Development objectives**

The need to train more and more Parliamentary Counsel has never been greater.

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[224] Particularly in Africa.

[225] This is more commonly referred to as Kandyan Law, a term introduced by the British to describe what was originally the law of the Sinhalese. By the time the British took over Ceylon the Maritime Provinces had already been under the Dutch and were thus subject to the Roman-Dutch Law. The operation of Sinhalese Law was limited to those who could trace their ancestry to the Kandyan Provinces.

[226] The Thesawalamai Law applies to the Malabar inhabitants of the province of Jaffna, that is the Jaffna Tamils. Other Tamils are governed by the Roman-Dutch Law.

There is always a shortage of experienced Parliamentary Counsel. In some countries, if outside assistance is withdrawn there would not be a single Parliamentary Counsel to draft legislation for the government. It is still an area of critical need. Nor has it been possible for many a young independent country to provide, in the absence of formal training in the classroom, the requisite supervised in-service or on-the-ob training and apprenticeship, due to the shortage of experienced Parliamentary Counsel and the demands made on those who are experienced.

There is equally the need for more and more original legislative drafting. As young countries of the world move further and further into local solutions for the cultural, economic, political, and social problems that confront them, they will move further and further away from the models of legislation fostered in these countries before their independence. In this regard their legislative drafting services would have to be prepared to rely more on their own resources than had been the case in the past. Parliamentary Counsel in these countries must be technically, professionally, and maturely equipped to respond to the new challenges that confront their respective countries.

Parliamentary offices in these countries must attain a reasonably high measure of technical proficiency. It means that Parliamentary Counsel should have more opportunities to specialize and to gain more legislative drafting knowledge and experience. That would lead to a greater measure of proficiency in the technical and professional features of legislative drafting. This should take account of the technological advances now available, particularly in the field of computer competency, for legislative drafting.

Acquiring the necessary technical proficiency through specialization, is in economic terms, a cost factor of the legislative process. But it must be emphasized that the acquisition of the requisite technical and professional proficiency does not depend upon the mere addition of legal officers to the legal staff. It also demands acquiring from within the local community the technical experts necessary for the legislative process.

Outputs and Activities

The objectives to be achieved by the training here advocated, are immediate as well as long term. They are direct as well as indirect. The direct and immediate objectives are related to the continuation of the training of a core of Parliamentary Counsel.

They would form the cadre for the progressive development of legislative drafting techniques in their respective countries.

The skills to be acquired in response to this relate, primarily, to three functions of Parliamentary Counsel: the amanuensis function, the professional function, and the composer function. Under the amanuensis function, Counsel learn to appreciate the limitations on Counsel's responsibilities. Policy decisions are for the policy-makers.

Parliamentary Counsel should not dictate policy. They should not distort policy. They should not divert policy. Their responsibility in this regard is to comprehend the policy and translate the policy into legislative form.

The task here is to inculcate in students for legislative drafting and the participants at seminars and workshops on legislative drafting, an appreciation of the thin line that divides legal assistance from officious meddling. They should be taught to curb enthusiasm, dampen personal importance, and reach for an understanding of the policy issues involved in a given proposal for legislation. Here tact tends talent, duty demands diplomacy. These are qualities which they must imbibe if they are ever to approach the status of competent Parliamentary Counsel.

Policy issues are often not clear however much they pretend, even to the administrators. Thus Parliamentary Counsel must learn to distil from the mass of verbiage the problems that call for legislation, to foresee the pitfalls in the policy proposals, and thus be able to bring difficulties legally and administratively to the attention of the policy-makers. They must learn also to present the relevant choices that sooner or later those responsible for policy must make. But Counsel must bear in mind that,

*There are often good reasons, political or tactical, sometimes more easily*

*appreciated by the politician than the lawyer, but in many cases very sound*

*and cogent, against the adoption of counsels of perfection urged, and*

*properly urged, by the draftsman from the legal point of view*.[227]

Under the professional function, the students and the participants should be taught to anticipate the legal difficulties and the pitfalls, the inadequacies in the policy, and the relationship of the policy to the existing body of the law. This function permeates –

and supplements – the amanuensis and the composer functions. The danger here, as far as the professional function is concerned, is that time is often the enemy. So students and participants must learn to work under pressure. That is what obtains in a Parliamentary Counsel Office. It is in this regard that we seek to inculcate in students and participants the task of seeking to attain perfection – even under trying conditions.

The composer function is the test of Parliamentary Counsel's competency. That test is the ability to communicate the law to the audience: to the policy-makers, to Parliament, to the prudent man of the law, to the reasonable man

[227] *The Mechanics of Law Making.* University of Columbia Press, New York 1914 at p. 19 - 19

of the law whose life is affected by the law, and, finally to the courts. Here student and participants learn that the difference between a legal mechanic and a legal draftsman turns largely on an awareness of social structures, the design of frameworks of collaboration for all kinds of purposes, a specialization in the high are of speaking to the future, knowing when and how to try and bind, and how not to try at all.[228]

The long-term and indirect objectives relate to the law-making element, the interpretation element and the communication element. The law-making element requires of Parliamentary Counsel the ability to identify the authority who or which has the requisite competency to instruct on policy matters. This is done in order to identify the interests concerned and thus assure the clearest and most complete line of communication. Counsel must of necessity deal with the Cabinet, the Cabinet Committee on Legislation, Ministers of the Government, civil servants, and a whole body of pressure groups who seek to use the machinery of the state in order to achieve a personal or a particular political purpose.

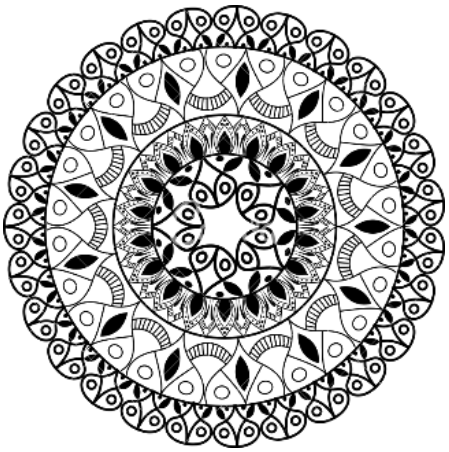
The interpretation element has two aspects: legal and political. The political aspect of a proposed piece of legislation could provoke debate, controversy, and political passion sometimes bordering on the fanatic. Parliamentary Counsel must learn to deal with matters of that kind from a distance – at an arm's length. Awareness of this is essential. If only because it leads to the legal effects of a proposed measure. There is obviously an overlap here. Counsel must learn to be a lawyer first, and Parliamentary Counsel second. There are preliminary questions of a purely legal nature that must be answered. Would the proposed measure be unconstitutional? If constitutional, what problems of fundamental human rights are involved? What would be the harmonious relationship of the proposed legislation with the existing body of law? What values of the society would be at stake?

It is under the communication element that the incompetency of Parliamentary Counsel would sacrifice the intention of the law-giver. It is an important element in the legislative drafting process. Language is the vehicle of the law. It is the medium of communication. A command of the language of the law is essential. A command of the language to express the law becomes absolutely essential. It is not just a question of style and legal language. It is a question of the ability to be clear and concise, concrete and cogent. Without the ability to communicate – and to communicate effectively – the whole edifice cracks. It will eventually tumble to the ground. The relevant legislation will face a very unwelcome reception by its audience.

[228] Hack v. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Cambridge, 1958 p. 200

The Essence

In essence legislative drafting should be likened unto a focus, a stream of technical knowledge of a special kind that unites the interplay of many minds to produce a unity of thought enunciated as a command – a law that has a beneficial effect for the audiences that are subject to the law's demands. It requires the cultivation of detachment as a necessary qualification. Legislative drafting cannot hold its audience captive. It can consistently captivate its audience to the ideals behind the policy decisions that motivate legislation. In these lie its purpose, its strengths, its value.



# Volume Three

# LEGAL AID & PROBONO PRACTICE

## HISTORICAL BACKGROUND OF LEGAL AID AND PROBONO

Historically Legal Aid has its roots in the right to counsel and a right to fair trial movement

In the 19th century continental European countries. Poor man's laws waived court fees for the poor and provided for the appointment of duty solicitors for those who couldn't afford to pay a solicitor. In the 20th century legal aid development together with progressive principles was supported by those members of the legal profession who felt that it was their responsibility to care for those on low income. It wasn't until the early 1940's that legal aid assumed a collective stature with the reconstruction of the welfare state and accelerated industrialization. [Francis Regan, 1999] "the transformation of legal aid: Comparative and Historical studies"

In Britain efforts on the state to provide legal services to the poor date back to the Rushcliffe committee appointed by Lord Chancellor on May 25th 1944 to inquire about the facilities existing in England and Wales for giving legal advice to the poor and make recommendations. The principal recommendations of the committee for legal aid, which it defines as assistance in conducting or defending proceedings in court including court fees, witnesses, and other expenses, are summarised as follows:

Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require.

This provision should not be limited to those who are normally classed as poor but should include a wider income group.

The legal profession should be responsible for the administration of the scheme, except that part of it dealt with under the Poor Prisoners' Defence Act.

Those who cannot afford to pay anything for legal aid should receive this free of cost.There should be a scale of contributions for those who can pay something toward costs. [Alex Elson " The Rushcliffe Report, University of Chicago Law Review][229]

The earliest legal aid movement appears to be of year in 1851 when an amendment was introduced in France to provide Legal assistance to the indigents . It should be noted that one need not be a litigant to seek aid by means of legal aid as it is available to everybody. Justice Blackman in Jackson vs Bishop says that "The concept of seeking justice can't be equated with value of dollars as money plays no role in seeking justice"[230]

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In Uganda legal aid was established by the Uganda law society in 1992 with the assistance from the Norwegian bar association to provide legal assistance to the vulnerable and the indigent. Uganda just like other service provider states has maintained a regulatory role by adopting laws and regulations to provide the legal services. Legal aid was born out of realisation that apart from a state brief system which handles only capital offences, there were no other service providers to provide free legal aid services to those that can't afford. Due to this establishment we have seen many laws enacted and private legal schemes aimed at the provision of legal aid e.g.....(insert examples)[231]

## BACKGROUND

According to a report prepared by the Commission on the Legal Empowerment of the Poor titled 'Making the Law work for everyone. One of the Four Pillars of Legal empowerment of the Poor is the provision of Access to Justice and the Rule of Law. The focus of pro bono services is therefore tailored around the empowerment of the poor, primarily through enabling them to access justice. There are presently a number of avenues through which pro bono services are rendered in Uganda. These include compulsion through regulations, community legal aid clinics and non-governmental organizations, and the payment of lawyers on state-briefs to represent individuals that are entitled to pro bono services. There are numerous non-governmental organizations that have been established to ensure that marginalized and poor people have access to the justice system. There is also an emphasis on improving different supportive mechanisms with a view of strengthening the national capacity to deal with identified service gaps in the Justice, Law and order Sector (JLOS). JLOS is a sector wide approach (swap) adopted by providers are vetted and supervised by the Legal Aid Sub-Committee of the Law Council under the Ministry of Justice and Constitutional Affairs. The only existing government funded pro bono initiative is the State Brief system for capital offenders. Under State Briefs, the Ministry of Justice sends out invitations to practicing Advocates requiring them to represent indigent criminals at a small fee provided by the State.

This practice is in conformity with the Constitutional provision under article 28 to the effect that a person accused of a capital offence shall be entitled to legal representation at the expense of the State. Most persons charged with capital offences cannot afford legal representation and yet the gravity of the offence requires that they be represented. As such, the State is constitutionally mandated to provide them with legal representation. Unfortunately, this system has not been adequately utilized to address the level of need in the Country. It is also noted that most lawyers assigned to handle matters on State brief hardly exercise adequate diligence in research and other means of preparation for their cases; neither do they commit themselves fully to succeeding in the matters they take up . This lack of purpose and focus renders the State brief system in Uganda inadequate. The

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basis for lack of interest in State briefs has been mainly attributed to the meager fees paid out by the State to Advocates who take up the briefs.

However, yet again, accepting payment for a State brief and then giving it lackluster attention recalls to the surface the concern for lack of integrity in pro bono legal practice. JLOS, on the other hand, has committed itself to supporting the process of developing anational legal aid and pro bono policy in an effort to promote access to justice.[232] The Law Council has been charged with coming up with the Terms of Reference for this initiative. Most legal aid service providers operate primarily in urban centers. This is attributed mostly to inadequate availability of funds to spread out their operations as well as the lack of a legal, institutional and policy framework at the national level to guide the Government of Uganda in 2000 for administration of justice and maintenance of law and order. It is pursuing a vision of 'Justice for All' in Uganda[233].

From 2007 though 2011, the Judiciary has implemented administrative, legal and judicial reforms under the Judiciary Strategic Investment Plan II, better known as JSIPII. JSIP II aimed at enhancing access to justice; improving human rights observance and strengthening the rule of law in Uganda. JSIP III which, as of March 2011 is still in draft form as it undergoes various consultations is proposing four strategic outcomes. Outcome two is to the effect that the Judiciary shall deliver '

Speedy and affordable Access to Justice particularly for children, poor men and women and other marginalized groups delivered.'[234]

The Judiciary is cognizant of the need to minimize financial and other bottleneck shampering access to justice for vulnerable persons as well as enable physical access to JLOS institutions and services, improving the quality of justice delivered and reducing on the technicalities that hamper access to justice. [235]The existence of a draft is also proof of the fact that there is no government policy on pro bono services in Uganda to guide the effective and efficient legal aid service provision. Pro bono services are thus mostly provided by civil society organizations with support from various development partners while the activities of these pro bono service the provision and regulation of legal aid and pro bono services. Similarly, there is lack of an effective supervisory mechanism for provision of these services throughout the country. The need for a holistic pro bono package is becoming paramount as most indigents seek for other support services beyond legal assistance. As a result, the Law Council

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has made some progress in revising as well as setting up a Pro bono scheme supported by a legal and regulatory framework to ensure that pro bono and legal aid service provision is done in a well-coordinated manner. These efforts are yet to bear fruit mainly because coordination of pro bono activities as well as funding such activities, are still major challenges. [236]

## LEGAL, POLICY AND REGULATORY FRAME WORK ON LEGAL AID AND PROBONO

### INTRODUCTION

#### Definition of Legal Aid

Legal aid is defined and understood differently depending on the context in which it is practiced. Legal Aid has been defined broadly in two authoritative arenas, namely the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and the General Assembly under Resolution 67/187, para 8. The United Nations Principles and Guidelines have defined Legal Aid as follows:

*"Legal Aid includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interest of justice so require."*

On the other hand, the General Assembly defined Legal aid to include;

*"the concepts of legal education, access to legal information and other services provided for persons through alternative dispute mechanisms and restorative justice processes." Further legal aid is defined to include the service provided in form of legal advice, assistance and representation at no cost to persons entitled to.*

Legal Aid is defined to include legal advise, assistance, representation, education and mechanisms for alternative dispute resolution (Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System).

The Advocates (Legal Aid to Indigent Persons) Regulations defines legal aid as the provision of legal advice or representation by a lawyer, an advocate or a paralegal, as the case may be, to a client at no cost or at a very minimal cost.

[236] Ibid

Legal aid may therefore be generally understood as the provision of assistance to people otherwise unable to afford legal representation and access to the court system. Legal aid is further defined as the provision of free or subsidized legal services to mainly poor and vulnerable people who cannot afford the service of paid lawyers[237].

The Draft National Legal Aid Policy has defined Legal aid as the provision of free legal services for poor and vulnerable citizens.

The above definitions reflect the model of legal aid adopted in Uganda and further speak to the process or methodology of delivering legal aid.

Legal aid provision aims at among others enhancing people's access to justice by ensuring equality before the law, the right to counsel and the right to a fair hearing.

Access to justice is the mechanism through which individuals, groups and communities realize their human rights. Human rights are meaningless without access to and availability of the justice system because it is through access that these rights are guaranteed and protected under the law. As such, legal aid enables all persons, particularly the poor and vulnerable, to access their right to justice as well as other human rights.

Background to Legal Aid in Uganda

Historically, legal aid was grounded in the theory of a welfare state which created many binding obligations on the state towards its citizens. Among them was the obligation on the state to extend legal services to citizens who would otherwise not be able to afford it. In the same vein, the state was expected to provide a broad range of services such as medical / health care, social security, education and housing among others. Legal aid provided a critical tool for ensuring that the state fulfilled these obligations[238]. Legal aid therefore emerged as an individual enforcement tool for a broad range of rights mainly comprised of an economic, social and cultural nature[239]. However, it was not until the early 1940s that legal aid assumed a collective stature with the reconstruction of the welfare state and accelerated industrialization[240]. The formulation of organized groups such as workers under trade unions who demanded collective rights rather than individual rights radically changed the face of available legal services. The state became duty bound to collectively provide legal aid to these groups for the enforcement of their rights[241]. On the other hand, the scope of legal aid services greatly expanded to include all other disputes between citizens for which the state was held responsible.

States therefore deployed legal aid as one of the mechanisms for the fulfillment of the above obligation[242]. Until 1980, the state was the single most active provider of legal aid services in those countries which adopted this

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[237]Comparative report by the Danish Institute of Human Rights – Access to Justice and Legal Aid in East Africa at page 7.

[238]Francis Regan (1999), The Transformation of Legal Aid: Comparative and Historical Studies. Oxford University Press, at pp. 89-90

[239]*ibid*

[240]*ibid*

[241]*ibid*

[242]*ibid*

mechanism of assistance, a situation that only began to change in the 1980s. Private legal service providers emerged to compliment the state and gradually states have reduced on the level of legal aid services they extend to their citizens. Many private service providers have come to fill this gap of legal aid services provision including Uganda. In these countries, however, the state has maintained a regulatory role by adopting laws and regulations that govern the provision of legal aid services by the private service providers.

What is Pro-bono?

Pro bono legal services

There is no universally accepted definition of 'pro bono' legal services. Most definitions focus on legal assistance provided to clients who cannot afford ordinary market rates, or to clients whose case raises a wider issue of public interest.

The word 'Pro bono' is of latin origin and carries the meaning of designated legal work undertaken without charge as for someone on a low income.[243]

This phrase is anabridgement of the term 'Pro bono publico' which derives the meaning 'for the publicgood'.[244] Drawing from this understanding, pro bono work is essentially legal aid work tovulnerable or underprivileged persons, carried out at either a low professional cost orno charge at all. Pro bono is regarded as central in providing access to justice byensuring equality before the law; the right to counsel; and, the right to a fair trial. [245]

The term pro-bono is generally used to describe professional legal services undertaken voluntarily without payment or at a low cost to vulnerable or underprivileged persons. The practical expression of this tradition requires continuous examination and renewal in order to meet the challenges of a dynamic society and profession. Thus, administration of justice will continue to be faced with the reality of litigants comprised of represented "haves" and unrepresented "have nots".

The term includes legal services provided to organizations working for disadvantaged groups or for the public good. Pro-bono can also involve lawyers and others engaging in free community legal education, law reform and other activities.

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[243] https://www.academia.edu/1546047/PRO_BONO_PUBLICO_AND_ITS_ADMINISTRATION_IN_UGANDA

[244] Ibid

[245] Ibid

All definitions of pro-bono include services that are provided on a without-fee (or without expectation of a fee) basis. Some definitions go further and incorporate work done on a reduced fee[246], or substantially reduced-fee basis.

Procedures for Handling Pro bono Matters

a) **Step 1:** The advocate is enrolled into the scheme; his/her name is entered into the scheme's database indicating the particulars and area of interest or expertise.

b) **Step 2:** The Advocate is required to sign a confidentiality and advocate acceptance form. This agrees not to disclose any confidential information he has received during the course of his participation in the pro bono scheme.

c) **Step 3:** The scheme contacts the advocates and refers to him/her a file for an identified indigent person.

d) **Step 4:** An initial meeting between the advocate and client is arranged by the scheme to extensively discuss the matter with the client and take instructions.

e) **Step 5:** The advocate submits regular updates about the progress of the file using case progress forms provided by the scheme. [247]

The goal of the Pro bono Scheme, from a Ugandan perspective is to ensure indigent,vulnerable and marginalized persons access justice and the objectives are to a) Promote equality in access to justice and improve delivery and standard of legalservices through pro bono[248]

b) Interest advocates into appreciating the provision of pro bono services,

c) Strengthen institutional linkages with other legal aid service providers,

d) Promote and emphasize the use of Alternative Dispute Resolution (ADR),

e) Promote networking and collaboration with stakeholders at local andinternational levels to improve the administration of justice.[249]

When a lawyer works pro bono, that lawyer is said to be working for the public good.As members of a profession, lawyers are bound by their ethical rules to chargereasonable rates for their services and to serve the public interest by providing free legalservice to indigent persons or to religious, charitable or other non-profit groups. Assuch, a lawyer's free legal service to various types of clients such as these is designated as probono service. [250]

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[246]For example, the definition adopted by the Law Council of Australia in 1992.

[247] https://www.uls.or.ug/pro-bono-scheme

[248]

https://www.academia.edu/1546047/PRO_BONO_PUBLICO_AND_ITS_ADMINISTRATION_IN_UGANDA

[249] Ibid

[250] Ibid

Most jurisdictions consider it necessary to provide some level of legal services to persons otherwise unable to afford legal representation on the basis that failure to do so would deprive such persons of access to justice through the court system. [251]

On the other hand, it is also considered that persons who cannot afford legal representation would be at a disadvantage under situations in which the state or a wealthy individual took them to court. This is because the State or wealthy party on the opposite side of the poor persons, would have better access to the necessary resources to ensure that the case is resolved in his or her favour.[252] This includes hiring the best (and obviously expensive attorneys) and in some sad incidences, bribing their way through the judicial system. As already emphasized above, you cannot have legal empowerment when poor people are denied access to a well functioning justice system. Societies worldwide are experiencing major imbalances in civic and economic opportunities that make the attainment of justice for all a difficult task. These imbalances are highlighted through the aforementioned Four Pillars of Legal Empowerment of the poor. They are: Access to justice and the Rule of Law; Property Rights; Labour Rights; and Business rights[253]

Such imbalances in accessibility to the attainment of Justice need to be addressed constantly through legal aid otherwise they would constitute a violation of the principles of equality before the law and due process under the Rule of law. [254]There are generally a number of delivery models for the provision of pro bono legal services:-

The 'Staff Attorney' model: This is whereby lawyers and law firms are employed on a salary basis, solely to provide legal assistance to qualifying low-income clients, similar to staff doctors in a public hospital. Examples include the Legal Aid Clinic of the Law Development Centre, Kampala, the Uganda Christian Lawyers' Fraternity and the Legal Aid Project at the Uganda Law Society Secretariat, Kampala.-

The 'Judicare' model – This is where private lawyers and law firms are paid to handle cases from eligible indigent clients. At times such programs are optional and in other instances the provision of such services at some level is a requisite of court membership.[255] The Ugandan example of the Judicare model is the State brief system or capital offenders mentioned above.-

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[251] https://www.academia.edu/1546047/PRO_BONO_PUBLICO_AND_ITS_ADMINISTRATION_IN_UGANDA

[252] Ibid

[253] Ibid

[254] Ibid

[255] Ibid

The 'Community legal clinic' - This comprises non-profit clinics serving a particular community or group-setting through a broad range of legal services such as legal representation, sensitization on fundamental topics, and so on. This is similar to Community health clinics[256]

The Bar Society model : This is where the Law Society requires every member to handle a certain number of pro bono cases each year as a prerequisite for renewal of a member's practicing certificate annually. An example of such mandatory provision of pro bono services is found in Uganda as illustrated below. In a brief historical perspective, although, for quite some time, law firms have been assisting in the provision of access to justice for those who cannot afford legal representation, it was not until about 25 years ago that this focus began to transform itself through some form of regulation, particularly in the United States of America. In 1983, the American Bar Association House of Delegates adopted a rule which states that all lawyers should "render public interest legal service." Pressure from the Bar Association and subsequent revisions which clarified the terminology ignited widespread interest and engagement. Subsequently, in 1993, the Law Firm Pro Bono Project put forth a challenge to the legal community to contribute three to five percent of billable hours to pro bono legal services. By 2007, the number of legal pro bono organizations in the U.S had drastically increased from approximately 80 organized programs in 1980 to almost 800. Similarly, the practice of pro bono work in Uganda has also been going on for quite some time though regulation first came about with the amendment of the Advocates Act in 2002. Thus, the chapter that follows describes the legislative framework of probono practice in Uganda.[257]

There is a tendency to conceive pro-bono legal services as comprising, in the main, fairly *adhoc* decisions by an individual practitioner to provide advice or undertake a litigious matter for an individual client as part of their normal practice.[258] While such activities continue to form an important core of pro-bono work, there are ways in which this model is not (and probably never was) an accurate depiction of the range of pro-bono legal services. As practiced today, pro-bono legal services have the following features:

Clients include groups, class of individuals and community organisations;

Legal services,[259] include advice, transactional services,[260] negotiation's, representation, assistance with mediation, community legal education and the preparation of policy submissions;

Pro bono service providers include always employed by small and large private practices, corporations' in-house counsel, lawyers working for government agencies and others;

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https://www.academia.edu/1546047/PRO_BONO_PUBLICO_AND_ITS_ADMINISTRATION_IN_UGANDA

257 Ibid

258 Ibid

259For discussion of the benefits of viewing legal services broadly see Renouf, G., 'A Client centred Approach to Access to Justice, NSW Law and Justice Foundation, Access to Justice Workshop, July 2002 forthcoming at http://www.lawfoundation.net.au/access/workshop.html>'

260Including drafting services in relation to contracts, funding agreements, regulatory matters, corporate structure and tax issues, mainly for non-government organisations providing welfare, legal or other community services.

Decisions whether or not to provide a pro bono service are not only made by individual practitioners but also by firms' pro bono partners/committees/coordinators according to established policies, criteria and pro bono budgets;

Pro bono legal services are increasingly provided at locations other than solicitors' offices or the courts. Locations include community legal centres (by secondees from firms as well as volunteers), on the premises of non-legal community service providers and in outreach premises established by a firm for the purpose of providing a shop front legal service;

Pro bono contributions are increasingly being made as that results in pro bono referrals, especially arrangements between community legal centres and specific firms and counsel part of 'multi-tiered' partnerships between firms and community legal services;

Practitioners are no longer on their own in locating pro bono cases, setting priorities and screening for appropriate matters. There are now a number of formal pro bono referral schemes operated by the public interest law clearing houses, legal professional bodies and the courts.[261] There is also a network of informal arrangements that result in pro bono referrals, especially arrangements between community legal centres and specific firms and counsel.

## Distinguishing Legal Aid from Pro bono

Legal Aid is a developed and continuing program, it is provided by the legal aid service providers registered as such under the Advocates (Legal Aid to Indigent Persons) Regulations.

Legal Aid is more sustainable in nature. Legal Aid Service Providers are well established and the practice is continuous. Lawyers can pursue a career in Legal Aid.

Legal Aid is completely funded. The lawyers/advocates who provide legal aid are financially resourced and paid a monthly salary to provide legal services to the vulnerable, poor and marginalized.

Legal Aid could be general or could be specialized. Legal aid provides the poor and vulnerable population a planned and well-funded access to legal service program.

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[261]Formal referral schemes include those operated by or on behalf of the professional associations in NSW (Law Society, Bar Association), Victoria (Law Institute and Bar Association) and Western Australia (Law Society). In addition there are now Public Interest Law Clearing Houses (PLICH) making pro bono referrals in Victoria, NSW and Queensland and proposals to create a PILCH in South Australia. In Western Australia the Law Society's Law Access scheme has a public interest component. The Victoria Law Foundation publishes a directory of pro bono opportunities and the National Pro Bono Resource Centre will shortly list referral agencies on its web site.

Legal Aid may be provided by Advocates or paralegals.

Please refer to the Advocates (Legal Aid to Indigent persons) Regulations for more distinguishing factors.

On the other hand Pro bono is: Free and voluntary legal services given without pay or at a low cost to indigent persons.

Pro Bono services are limited to 40 hours per advocate per year.[262]

The professional services are limited to those enumerated under regulation 3(3).

Offered by every Advocate including those engaged in provision of Legal Aid.

## *AD HOC* NOT CONTINUOUS.

Compulsory and a bare minimum of 40 hours is required of every advocate.

It's a statutory duty imposed on Advocates.

'Pro bono is an important element in the provision of access to justice, with a long and vulnerable tradition that benefits the public and the profession,' he said. But he stressed that it should only be an 'adjunct and not a substitute for a properly funded legal aid system'.

Similarities

d) Free legal advice or representation to indigents.

e) Free Community Legal Education.

f) Established under the Advocates Act.

g) Aimed at accelerating access to justice.

NB: Read the Advocates (Pro Bono to Indigent Persons) Regulations, 2009 for more distinguishing factors.

How does the need for legal aid come about?

The need for legal aid is created by the inability of persons to have all the required legal knowledge and to know all the procedures and to represent them in any legal matter impacting on them, and in which they have to protect or defend the violation of their rights.

Factors such as poverty, ignorance of the law, armed conflict, disability or other vulnerability or marginalization should not be a barrier to people progressively realizing their rights which are protected by the Constitution of

[262] Advocates (Pro Bono Services to Indigents Persons) Regulations S.I 39 of 2009.

Uganda.[263] Furthermore, the inability to afford legal representation should never diminish a person's right to access justice. The lack of an effective legal aid system denies financially disadvantaged and other vulnerable persons the right to enforce their rights because they cannot afford the high legal costs.

Access to justice, through legal aid, is therefore crucial to ensure that all persons enjoy the full range of their human rights which in turn contributes to recognizing the dignity of every human being.

Legal aid can be provided in various forms including legal advice, assistance or representation, legal information and education, prison/police visits as well as Alternative Dispute Resolution (ADR). It can be provided by advocates, lawyers, paralegals, legal assistants, social workers, academicians, community-based volunteers, customary leaders, faith-based organisations, professional associations, women or youth groups, work-based associations and various informal providers.[264]

Why Probono Legal Aid?

Lawyers and others have long been concerned with the inability of significant numbers of people to afford the legal services necessary to assert or protect their rights and interests. One response has been for lawyers individually or collectively to provide free legal services to poor or disadvantaged people. Other responses include advocacy for reform of the legal system or particular laws, welfare state funding of legal services, developing alternatives to the formal legal system and/or working for more fundamental social change.

Access to justice is an essential element in a human rights observing society where values such as equality of persons, respect for human dignity and non-discrimination are paramount.[265]

Whatever rights and responsibilities exist, they are worthless unless it is possible for all to access the law and the courts in order to ensure that those rights and responsibilities are fully observed. For instance, if a person cannot afford legal representation, this can undermine their right to a fair trial, a right which is protected under Uganda's Constitution. Therefore, access to justice is critical to make human rights and freedoms a reality.

The goal of the Pro bono Scheme, from a Ugandan perspective[266], is to ensure indigent, vulnerable and marginalized persons access justice and the objectives are to;

a) Promote equality in access to justice and improve delivery and standard of legal services through pro bono.

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[263]The Constitution of the Republic of Uganda, 1995, Chapter 4

[264]Muganzi, Richard Nsumba. "The Provision of legal aid services by state-funded mechanisms in Uganda: Challenges and Opportunities." A presentation Paper at the 2nd National Legal Aid Conference

[265]UDHR, Article 7 & 8.

[266]The Pro-Bono Handbook: A legal practitioner's guide, Uganda Law Society, (with support from the Legal Aid Basket Fund) 2011; at p. 1

b) Interest advocates into appreciating the provision of pro bono services.

c) Strengthen institutional linkages with other legal aid service providers.

d) Promote and emphasize the use of Alternative Dispute Resolution (ADR).

e) Promote networking and collaboration with stakeholders at local and international levels to improve the administration of justice.

When a lawyer works pro bono, that lawyer is said to be working for the public good. As members of a profession, lawyers are bound by their ethical rules to charge reasonable rates for their services and to serve the public interest by providing free legal service to indigent persons or to religious, charitable or other non-profit groups. As such, a lawyer's free legal service to various types of clients such as these is designated as pro bono service.

Most jurisdictions consider it necessary to provide some level of legal services to persons otherwise unable to afford legal representation on the basis that failure to do so would deprive such persons of access to justice through the court system. On the other hand, it is also considered that persons who cannot afford legal representation would be at a disadvantage under situations in which the state or a wealthy individual took them to court. This is because the State or wealthy party on the opposite side of the poor persons would have better access to the necessary resources to ensure that the case is resolved in his or her favour. This includes hiring the best (and obviously expensive attorneys) and in some sad incidences, bribing their way through the judicial system. As already emphasized above, you cannot have legal empowerment when poor people are denied access to a well-functioning justice system.

Societies worldwide are experiencing major imbalances in civic and economic opportunities that make the attainment of justice for all a difficult task. These imbalances are highlighted through the aforementioned Four Pillars of Legal Empowerment of the poor. They are: Access to justice and the Rule of Law; Property Rights; Labour Rights; and Business rights[267]. Such imbalances in accessibility to the attainment of Justice need to be addressed constantly through legal aid otherwise they would constitute a violation of the principles of equality before the law and due process under the Rule of law.

In a brief historical perspective, although, for quite some time, law firms have been assisting in the provision of access to justice for those who cannot afford legal representation, it was not until about 25 years ago that this focus began to transform itself through some form of regulation, particularly in the United States of America. In1983, the American Bar Association House of Delegates adopted a rule which states that all lawyers should "render public interest legal service." Pressure from the Bar Association and subsequent revisions which clarified the terminology ignited widespread interest and engagement. Subsequently, in 1993, the Law Firm Pro Bono Project put forth a challenge to the legal community to contribute three to five percent of billable hours to pro bono legal services. By 2007, the number of legal pro bono organizations in the U.S had drastically increased from approximately 80 organized programs in 1980 to almost 2008.

[267] *Ibid*, note 1 supra.

Similarly, the practice of pro bono work in Uganda has also been going on for quite some time though regulation first came about with the amendment of the Advocates Act in 2002.

There are presently a fairly large number of pro bono services provided in Uganda, though mainly concentrated in urban centers. The existence of the large numbers is mainly attributed to the efforts of the Justice, Law and Order Sector (JLOS) Institutions and the Civil Society Organizations (CSOs) which are appreciated for being instrumental in advancing pro bono services to the poor and marginalized groups[268]. The main objectives of most pro bono service providers include the following:

a) To provide high quality legal aid services to indigent men, women and children.

b) To promote the respect for rights and the rule of law in Uganda.

c) To lobby and advocate for legislation and policies in favour of the poor at national, district and local levels.

## Legal Aid and access to Justice

Legal aid is important because it affords a means of accessing justice when the need arises for those who cannot afford to access legal services. Access to justice is facilitated through knowledge of legal rights and obligations, and the ability to claim these rights through existing justice delivery institutions. Justice delivery institutions can be both formal through courts and other quasi tribunals, well as informal through other dispute resolution mechanisms such as traditional and cultural courts or settings, and other Alternative Dispute Resolution mechanisms provided by a whole range of institutions. Legal aid covers legal representation, alternative Dispute Resolution, Legal advice and assistance and legal information. Legal aid ensures that the right of access to a court is meaningful and practical, not theoretical and that people in need overcome obstacles to justice. It can be adjusted to suit people's needs or particular areas of the law.

The importance of legal aid is acknowledged within the United Nations system and was portrayed by the UN Special Rapporteur on the independence of Judges and Lawyers *Gabriel Knaul* whilst presenting her report in May 2013 to the UN Human Rights Council where she states:

*"Legal aid is an essential precondition for the exercise and enjoyment of a number of human rights, including the rights to a fair trial and to an effective remedy. It represents an important safeguard that contributes to ensuring the fairness and public trust in the administration of justice."*[269]

[268] *Ibid*, note 4*supra* at p. 5

[269] http://www.ohchr.org/Documents/HRCouncil/RegularSession/Session23/

Advantages of legal aid and pro bono

a) Legal aid is useful for the following reasons;

b) Guarantees and protects human rights and freedoms as provided for in the international conventions and our national laws.

c) Promotes the Rule of law.

d) Helps to quicken the process of resolving civil and simple criminal matters either through the formal or informal justice systems.

e) Reduces the escalation of disputes into more serious crimes.

f) Supports individuals and communities that are in contact or conflict with the law to access necessary assistance either directly or through referrals.

g) Minimizes the possibility of unwarranted re-occurrence of conflict.

h) Increases efficiency of the courts and the justice system by amicably resolving disputes through Alternative Dispute Resolution (ADR) mechanisms.

i) Increase public confidence in the judicial system.

j) Lowers cost alternatives to courts for resolution of legal issues at an early stage.

k) Empowers communities by raising awareness through training on law and human rights.

l) Reduces case backlog in cases where people are too poor to litigate their cases in court.

m) Helps to decongest prisons especially when it comes to minor offences.

n) Helps contributes to the economy by supporting the poor and youth when they have legal problems which distract them from income generating activities such as agriculture and petty trade.

This discussion illustrates that there are a variety of benefits associated with doing pro bono work for both law students and lawyers alike.

A) It enhances career opportunities for law students.

Following the operation of the Advocates (Student Practice) Regulations, S.I 70 of2004, Bar Course students that engage in pro bono legal practice have a twofold opportunity of not only gaining exposure into legal practice at an earlier stage, but also the opportunity to garner an impressive curriculum vitae that ultimately catches the eye of a potential employer.

A law student that gets involved in pro bono work displays honesty and commitment to help vulnerable people to access justice. Any person recruiting would thus desire to have such a law graduate on his or her team of employees.

B) Development of vital skills necessary in the legal profession

Those involved in pro bono work gradually develop vital personal organization and time management skills. To a great extent, pro bono work involves very little supervisory work for lawyers undertaking such services.

It is commitment and interest that drives the work and inevitably, without grooming personal organization and time management, one would find the work very frustrating and non-productive.

Furthermore, Legal Aid Clinics conduct training of skills in Witness Interviewing; Counseling; Alternative Dispute Resolution mechanisms; Legal writing and drafting; legal research and so on. Such skills are vital not only in legal aid service provision, but generally in the running of the legal profession. However, the opportunity to acquire such skills is more evident through Legal Aid service organizations.

Engaging in pro bono work also builds team working and interpersonal skills. Pro bono work is not so much about ensuring that a case is won through hook or crook for the sake of making a name for the lawyer handling the case – which is characteristic of private legal practice. In the alternative, the core principles that provide a basis for the work of pro bono organizations, nurture team work and commitment among the members of staff in ensuring that they leave up to those principles.

Accountability is also at the core since most legal aid service providers operate under the Legal Aid Basket Fund. As such, accountability and working under integrity become part and parcel of their day to day legal practice.

C) Boosting students' academic performance

Participation in live-client or other pro bono work boosts students' academic performance. Clinical Legal Education programs are presently conducted at the School of Law, Makerere University and the Faculty of Law, Uganda Christian University, Mukono. Such programs enable student participants to see the law in context and to understand what it means to practice law, at a deeper level. Similar programs for Bar Course students at the Law Development Centre enable them to acquire hands-on training. They get to prepare client files for trials (acquiring file management skills); they prepare witnesses and are the main point of contact with witnesses. Inevitably the student gets to understand the law he or she is studying from the perspective of a lawyer already in the field, hence better academic performance. The general norm for young law graduates is the ambition to make money in their first years of practice. As such, many of them shun working with Civil Society Organizations-Pro bono service providers, due to the perceived conception that there is hardly any money to make through such avenues. The idea of rendering pro bono services is also shunned by many lawyers, young and old since this is the opposite to 'making money'.

## Legal Aid in International Law

There are several international instruments that oblige states to ensure effective delivery of legal aid to those in need. These include;

*The Universal Declaration of Human Rights (UDHR)*[270] provides that "everyone charged with a penal offence shall be granted all the guarantees necessary for his or her defence."

*International Covenant on Civil and Political Rights (ICCPR),* signed by Uganda on 21st June 1995, guarantees individuals the right to legal assistance without payment if a person does not have sufficient means to pay for it.[271]General Comment No. 32 issued by the Human Rights Committee under the ICCPR in its discussion of Article 14 states that in capital offences, the accused must be effectively assisted by a lawyers at all stages of the proceedings.[272]

*The Convention on the Rights of the Child (CRC)* ratified by Uganda on 17th August 1990 provides for and protects the right to legal or other appropriate assistance for children charged with offences.[273]

*The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)* ratified by Uganda on 22nd July 1985, declares it a duty of the state to establish legal protection of the rights of women on an equal basis with men and ensure through competent tribunals and other public institutions the effective protection of women against any act of discrimination.[274]

From the above, it is clear that legal aid is well protected under international law and human rights. Uganda as a party to all the aforementioned instruments is mandated to provide legal aid as a means to enabling persons in contact with the law to access justice and other human rights.

While many instruments seem skewed towards legal aid in criminal, it is now conventional law that legal is equally important in civil matters.

Regional Initiatives on Legal Aid

There have been several initiatives at the regional level, all which point towards a duty by states parties, including the Government of Uganda to enhance access to justice through legal reforms and provision of legal aid especially for persons in most need.

They include; The *African Charter on Human and Peoples' Rights (ACHPR)* ratified by Uganda on 10th May 1986 provides for the right to defence, including the right to be defended by counsel of one's choice.[275]

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[270]UDHR Article 11 (1)
[271]ICCPR Article 14 (3) (d)
[272]UN.DOC.CCPR/GC/32(2007)
[273]CRC Article 40
[274]CEDAW Article 2 (c)
[275]ACHPR Article 7 (1) (c)

The *African Charter on the Rights and Welfare of the Child (ACRWC)* ratified by Uganda on 17th August 1994 provides that every child accused of infringing the law shall be afforded legal and other appropriate assistance in the preparation and presentation of their defence.[276]

The *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)* ratified by Uganda on 22nd July 2010 requires states parties to take appropriate measures to ensure effective access by women to judicial and legal services, including legal aid.[277]

The *African Youth Charter 2006* stipulates the right of every young person (accused and convicted) to a lawyer.[278]

*The Kampala Declaration on Prison Conditions 1996*[279]which addresses issues concerning prison conditions remand prisoners and alternative sentencing.

*The Kadoma Declaration*[280] on community service orders custodial sentences to the greatest extent possible.

*The Dakar Declaration 1999* on the Right to a fair trial and legal aid in Africa which emphasizes the importance of access to justice as part of a fair trial and places the primary for ensuring legal aid in criminal cases on the government[281] In accordance with the Dakar Declaration ,the African commission adopted the principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003[282] which obligates state parties to ensure that an accused person has a right to legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused if her or she does not have sufficient means to pay for it[283].

*The Lilongwe Declaration on accessing Legal Aid in the criminal justice system in Africa 2004*[284] which recognizes that the majority of people affected by the criminal justice system are poor have no resources with which to protect their rights. It notes that the government has the primary responsibility to recognize and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system and urges governments to adopt measures to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable[285].

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[276]ACRWC Article 17(2) (C) (iii)
[277]Maputo Protocol Article 8(a)
[278]African Youth Charter Article 18(f)
[279]http://www.penalreform.org/
[280]http://www.ilo.org.
[281]Dakar Declaration, Article 1 & 8
[282]http://www.achpr.org
[283]Principle G (a-c) (1-5)
[284]*ibid*
[285]Lilongwe Declaration, Article 1 & 3

*The Abuja Declaration on Alternatives to imprisonment 2002*[286] which recommends that prison should be restricted as a last resort to criminal matters.

*The Ouagadougou Declaration on acceleration prison and penal reforms in Africa 2002*[287] which aims to reduce prison population and reintegration of ex-prisoners into society[288]. Also emphasizes rights of prisoners and observation of the rule of law.

*The Kyiv Declaration on the right to Legal Aid 2007*, which recognizes that the poor and vulnerable have a right to legal and that the state has the primary responsibility of creating legal aid schemes.[289] Legal aid is a right and governments are obliged to implement sustainable, quality controlled, legal aid programs that deliver legal aid services without discrimination to all people in their jurisdictions, subject only to a transparent and reviewable assessment of need, and with special attention to women and vulnerable groups, such as indigent people, children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, asylum seekers, refugees, internally displaced persons, stateless persons, foreign nationals, prisoners, and other persons deprived of their liberty.

## Legal Aid in Uganda: Sources and Forms.

Sources of legal aid in Uganda

The legal sources highlighted above affirm that providing a system of legal aid is as significant part of how Uganda can meet its international obligations should be domesticated nationally through adoption of one key legislation aid is contained in various laws.

The Constitution of the Republic of Uganda, 1995 clearly embodies human rights, freedoms, principles of rule of law, good governance and due process as enshrined in the major human rights treaties relevant provisions as embedded in the constitution in relation to legal aid and access to justice include;

Equality before the law to all citizens.[290] This in effect means that the poor and the well to do are equal before the law for all Ugandan citizens.

[286]http://www.undoc.org
[287]http://www.achpr.org
[288]Principle 1&3 of the Ouagadougou Declaration
[289]Principle 1 & 2 of the Kyiv Declaration
[290]Art. 21 of the Constitution

The right to a fair hearing which includes among others the presumption of innocence until proved guilty, the right to adequate time and facilities to prepare one's defence, the right to an interpreter, the right to a lawyer at ones cost and right to cross examine witnesses among others[291].

An obligation on the state to provide legal representation at its expense to every person charged with any offence which carries a sentence of death or imprisonment for life[292].

The right to access to justice by every Ugandan. In this regard, the government is obligated to provide access to justice to all Ugandans" without delay" and" irrespective of their economic status[293.]

It should also be mentioned that Uganda's constitution makes provision for yet another albeit indirect avenue for legal aid in terms of public interest litigation. *Article 50(2)* of the constitution bestows on any person including any organization the right to bring an action against the violation of any person including any organization the right to bring an action against the violation of any persons; or group`s rights. In effect the provision has relaxed the rules of *Locus standi*[294.]over the years, this provision has been relied on by various individuals and organization to challenge human rights violation against citizens who would not otherwise afford the legal services[295].Such actions may therefore be said to constitute legal aid but of a strategic nature whose intended results are to benefit a larger group of persons.

The Trial on Indictment Act provides that "a person accused of an offence before the High Court be defended by an advocate"[296]. However majority of the cases tried in High Court are of a capital nature, and attract life imprisonment or the death penalty, the practice is that all accused persons appearing in the High Court must be defended by an advocate at the expense of the state or in addition to their own paid lawyer.[297]

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[291]Art. 28 *ibid*

[292]Article 28 (3) (e) of the Constitution

[293]Article 126 of the Constitution

[294]See Phillip Karugaba, 'Public Interest Litigation in Uganda, Practice and Procedure: Shipwrecks and Seamarks,' A paper presented at the Judicial Symposium on Environmental Law for Judges of the Supreme Court and Court of Appeal, 11th-13th September, Imperial Botanical Beach Hotel. Also available on http://www.greenwatch.or.ug/pdf/news/SHIPWRECKS_AND_SEAMARKS.pdf

[295]*Uganda Land Alliance v. Attorney General*, High Court Miscellaneous Case No. 0001 of 2004. The case was brought by the Uganda Land Alliance on behalf of the Benet People, a small, poor and marginalized group living on the slopes of Mount Elgon.

[296]Section 55 TIA, Cap 23

[297]

https://www.academia.edu/1546047/PRO_BONO_PUBLICO_AND_ITS_ADMINISTRATION_IN_UGANDA

The Poor Persons Defence Act cap 20, provides that "prisoners should have legal aid in the preparation and conduct of their[298] defence and if their means are insufficient to enable them to obtain such aid"[299]

Under the Act, legal aid is an entitlement where it appears desirable and in the interests of justice that a prisoner should be provided with legal aid to prepare and conduct his or her defence, and yet his or her means are insufficient to obtain legal counsel.[300]

Upon committal to prison, such a prisoner is assigned an advocate and in the remuneration of such advocate is payable from monies provided by parliament as determined by the judge[301]. The Poor Persons Defence Act and the Trial on Indictment Act are in line with the Constitution[302] and apply only to criminal proceedings and do not extent to cover other proceedings including civil and family cases.

The Magistrate Courts Act provides for any person accused of an offence before a magistrate court to be defended by an advocate as of right[303] However many persons appearing in this court are poor and cannot afford legal counsel. The result is that the majority of persons end up defending themselves, except for those cases which attract life imprisonment, where the state provides an advocate at its cost.[304]

## The Law Development Centre Act, Cap. 132

Section 3 (l) of this Act provides that the Law Development Centre shall have the function of 'assisting in the provision of legal aid and advice to indigent litigants and accused persons in accordance with any law for the time being in force.'

## The Advocates Act Cap 267

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299 *ibid*

300 Section 2, Poor Persons Defence Act Cap. 20

301 Section 3, Poor Persons Defence Act. See also Hellen Obura, 'Laws and Practices in East Africa: A case of Uganda, 'A paper presented at the 8th East Africa Judicial Conference Arusha, Tanzania. Also available at http://www.eamja.org/arusha2010.html.'

302 Section 2 of Cap 20

303 Section 158 MCA Cap 16

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Although the Constitution is specific in its provision for legal aid services, the Advocates Act cap 267 as amended by Act 22 of 2002 makes it mandatory for advocates registered with the Law Council to provide pro bono services when required or pay money in lieu[305]. The Amendment Act also defines pro bono as professional services of an Advocate given for public good to indigent persons at no charge[306]. The Advocates Act as amended goes ahead of the Constitution of the Republic of Uganda in terms of extending legal services to indigents because it does not qualify or limit the scope of legal service to criminal or civil matters or category of persons. The only qualification is that one has to be an indigent and therefore cannot afford legal services. This provision in its broadness is inclusive of children.

Section 3(e) stipulates that the Law Council shall '...exercise general supervision and control over the provision of legal aid and advice to indigent persons.' Section15A of the amendment to the same Act provides:

(i) That every Advocate shall provide services when required by the Law Council or pay a fee prescribed by the Law Council in lieu of such services;

(ii) That where any Advocate does not comply with sub section(1), the Law Council shall refuse to issue or renew a practicing certificate to that Advocate under sub section 11of this Act

.The Advocates Act, as amended, is supplemented by other laws and regulations such as those below[307].

Advocates (Legal Aid to Indigent Persons) Regulations, S.I 12 of 2007

The Regulations[308] to the Advocates Act as amended regulate and provide for the standards of operation for legal aid service providers spelling out key aspects to be observed namely:

A particular call to focus on the quality of service delivery, effectiveness and efficiency, facilities and qualification of personnel, criteria for selection of clients and geographical coverage.[309]

The overall mandate to supervise and control the provision of legal aid services to indigent persons lies with the Law Council[310].

[305] Section 15A (1)

[306]Section 15A (3).

[307]

https://www.academia.edu/1546047/PRO_BONO_PUBLICO_AND_ITS_ADMINISTRATION_IN_UGANDA

[308]Advocates (Legal Aid to Indigent Persons) Regulation, 2007.

[309]Ibid, Regulation 2.

[310]*Ibid,* Regulation 5.

The regulations also provide specifically for quality of service and client care. Specifically, legal aid service providers are required to maintain records of the clients handled, undertake adequate preparation for the case and communication with the client[311].

The regulations call for quality client care including hospitality, accessibility and appropriateness of services, conducive environment for confidentiality and more importantly an appeal for professionalism and sensitive when handling juveniles, elderly or vulnerable persons[312].

Of critical importance in the regulation is the requirement to avail information on the nature of services provided, legal aid service provider acting in the best interest of the client and means to test the satisfaction of the client.

Continuous training and mentorship for staff working as legal aid service providers is also recommended.

The scope of legal aid services is spelt out to include:

a) legal advice;

b) representation in court or tribunal in civil, constitutional or criminal matters;

c) mediation, negotiation or arbitration;

d) legal education or awareness

The Regulations call for priority to be given to certain persons including; children, orphans, people with disabilities, internally displaced persons, people living with HIV/AIDS, prisoners on remand or refugees. Further matters involving land disputes, inheritance and succession disputes, domestic violence, child maintenance and custody are among those given priority over other matters[313].

The above provisions clearly set the standard by which legal aid service providers must extend their services to the intended clients and if implemented religiously could take the provision of legal aid services to another level. However, the regulations do not point at principles for serving children considering that children have special and unique needs and international, regional and national legal systems have provided for them to be handled differently from adults. This should be translated to the policy level since policies are more targeted at the implementation level.

The provisions of the Advocates (Legal Aid to Indigent Persons) Regulations broadly acknowledge that children are a special group who need to be singled out in the provision of services. This needs to be taken a step further to develop standard guidelines on how service children under the legal regime.

The Advocates (Pro-bono Services to indigent Persons) Regulations, S.I No. 39 of 2009

[311] *Ibid,* Regulation 13.
[312] *Ibid,* Regulation 14.
[313] *Ibid,* Regulation 25.

These regulations are made pursuant to Sections 15A and 77(1) (a) of the Advocates Act. As stipulated in regulation 3, these rules make the provision of pro-bono services mandatory by every Advocate. Advocates are required to offer forty (40) hours of pro-bono services to an indigent person every year.

According to regulations 3(2) and (3), the pro bono services to be offered include:

a) Giving advice or providing representation to indigent persons;

b) Involvement in free community legal education;

c) Involvement in giving free legal advice or representation to a charitable or community organization or to a client of such an organization.

They may also include professional services relating to—

a) Administrative law;

b) Business law, in relation to a nonprofit making organization;

c) Child care and protection;

d) Criminal law;

e) Debt and credit;

f) Discrimination;

g) Employment and industrial law;

h) Family and succession law;

i) Wills and estates;

j) Human rights;

k) Land rights;

l) Tenancies;

m) Women's rights;

n) Environment and health; and

Any other matter approved by the Law Council or a body delegated by the Law Council for that purpose.[314]

Under Regulation 4, an Advocate who is unable to provide pro bono services is required, for every two professional service hours, to pay the equivalent of one currency point to the Law Council in lieu of the provision of the service. A currency point is equivalent to twenty thousand shillings (Regulation 2 thereof). An advocate who fails to comply with these provisions may have his or her application for the renewal of a practicing certificate denied.[315]

## THE ADVOCATES (STUDENT PRACTICE) REGULATIONS, S.I 70 OF 2004

These regulations are made pursuant to section 11(6) of the Advocates Act which provides for the right of Bar Course Students to practice. Regulation 7 is to the effect that no payment of any kind shall be given to a student for his or her services under these regulations.

Effectively therefore, a student's services under these regulations can be deemed as legal aid or pro bono services, though under supervision by an advocate. However, this interpretation is watered down by the fact that the supervising advocate can still bill a client for such services considering that the law is silent on the contrary.

All the above mentioned laws and regulations buttress Article 28 (3) of the Constitution in guaranteeing legal aid for needy persons in Uganda. It is relevant to note that this still provides a skewed view of legal aid where criminal justice is more emphasized than civil justice and also that there is no specific legal framework to encompass all these provisions which can be viewed as a disadvantage in the provision of legal aid services.

While the above provision greatly enhanced and entrench legal aid in the country, they generally fall short of establishing a right to legal aid per se. In the main, they attempt to create mandatory obligations on lawyers to offer free annual representation to persons who would otherwise not be able to afford legal fees, rather than putting in place a consistent and sustainable framework for the available of aid services.

Realising this glaring gap, the government recently embarked on a process of developing a law and policy for the regulation aid services sector. Although not yet passed into law, a Draft National legal aid bill has been crafted. So far, there have been various consultations on the draft documents. The draft policy aims at systematically reconfiguring the nature, scope and method of delivery of existing legal aid amidst increasing costs of providing legal aid. The policy underscores the role of legal aid to indigent persons.[316] The act also establishes a legal aid commission whose roles include among others providing and coordinating legal aid services in the country.[317] What is evident in both the draft policy and bill is the reluctance of government to assume the obligation of legal

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315 Ibid

316See Long Title, Draft Legal Aid Act 2011.

317See Section 3 and 13, Draft Legal Aid Act, 2011.

aid services provision. This is more apparent in the policy which outlines the obligation of legal aid services provision. This is even more apparent in the policy which outlines the government`s role as that of merely organizing and strengthening the legal aid sector rather than the actual provision of services. The government should ordinarily be seen to be the forefront of legal aid service provision.

1.13 The Draft National Legal Aid Policy, 2012

A more recent development is the Draft National Legal Aid Policy 2012 which provides for the right of all Ugandan citizens in need of legal aid services to have access and widens the scope to cover both civil and criminal matters. The Draft National Legal Aid Policy sets out the national framework for provision of legal aid services through an analysis of the legislative framework at the international, regional and national level. It analyzes the models of legal aid service provision including those already applied to Uganda, the advantages and disadvantages while providing recommendations moving forward. Key to note is that the draft policy recommends a mixed model of legal aid service consisting of employed legal aid providers and accredited non-state legal aid providers since it encompasses all forms of services already provided by different providers in Uganda.

The Draft National Legal Aid Policy also spells out the category of providers of legal aid to include: advocates, non-lawyers that is bar course students under the supervision of an advocate, law graduates awaiting enrolment, law clinic students and accredited paralegals and categorizes the services broadly into two, namely legal advise and assistance and legal representation. Key issues to note about the draft policy that rhyme with the recommendations of this research and that can be used as a building block for child friendly legal aid service provision include:

The Draft National Legal Aid Policy is cognizant of issues of geographical coverage and accessibility in so far as it calls for strategic location of legal aid offices around the country extending down to the sub-county levels[318].

The draft Policy calls for qualified personnel to provide services in a professional and ethical manner[319].

The draft Policy requires capacity development and training for accredited legal aid providers.[320] Legal aid service providers are called upon to train and engage in continuous legal education development[321].

A call for sensitization and awareness programmes for public officials and the general public on their duties in furthering legal aid[322].

[318]Recommendation 14.
[319]Recommendation 17.
[320]Recommendation 18.
[321]Recommendation 34.
[322]Recommendation 21.

The draft policy guides as to when legal aid services should be accessed, that is at arrest, during detention and all stages of proceedings, namely: pretrial, trial and post-trial[323].

The draft policy envisages the practice of diversion which involves diverting deserving cases for handling within the community local administration structures[324]. The draft policy requires the data, records and reports to be kept by legal aid service providers[325]. All justice actors including the Probation and Social Welfare Officers are required to provide information to the poor and vulnerable about the right to legal aid and make appropriate referrals[326]. The draft policy acknowledges the Convention on the Rights of the Child, the United Nations Standards Minimum Rules on the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty as forming the legal framework for legal aid in Uganda[327]. In relation to children the policy notes, the limitation of the national legal framework which is not sensitive to the international and regional principles and guidelines that endow the poor and vulnerable such as children to get assistance within the justice system, the draft policy qualifies children as befitting the category of those that state must provide for legal aid in the interests of justice[328], the policy recommends reference by legal aid offices to relevant psychosocial agencies, social welfare and other legal service programmes[329], an approach that is commendable since children's needs are best served under a multi disciplinary and interdisciplinary approach.

The draft policy calls legal aid service providers to pronounce themselves on quality services, which is commendable though, must speak to the detail of the vulnerable such as children who need specialized services.

The draft national legal aid policy remains broad and it is suggested that it further defines the vulnerable groups that the legal aid service providers most handle, namely the children, who can also further be categorized to include the very vulnerable such as refugees, orphans, street children, children with disabilities etc. Again in relation to the call for capacity building and training of legal aid service providers, provided for in the draft policy should further be qualified to include specialized training on handling vulnerable groups beyond poverty namely children and as stated above, even the most vulnerable amongst the children. The means and merit test should be waived in the case of children[330].

If passed by cabinet, the draft policy will govern the legal aid service provision framework in Uganda. Building on the recommendations of the policy, it is suggested that children are treated as a special category as recognized by the international, regional and national legal regime by passing guiding standards to complementary the policy.

In Uganda legal aid service delivery model has been coached around six major components[331], namely:

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[323]Recommendations 27.
[324]Recommendation 30.
[325]Recommendation 31.
[326]Recommendation 35.
[327]Paragraph 48 and 53 of the draft Policy.
[328]Paragraph 102 of the draft Policy.
[329]Recommendation 29.
[330]Recommendation 4.
[331]Findings of the Mid Term Review of Legal Aid Program of the Democratic Governance Facility 2014.

Legal advise and legal counseling;

Legal and rights awareness raising/ Sharing information as a form of empowerment;

Legal Representation;

Alternative Dispute Resolution (ADR);

Research and Advocacy; and

Capacity Building of informal justice structure and LASPs.

The above components are delivered through various schemes which include: Legal aid by the State (State Brief System), Legal aid by Non-state Actors, Legal aid by advocates under the Pro bono Scheme of Uganda Law Society. Along the above components, some legal aid service providers have specialized by providing services along themes or category of persons namely: women, children, persons with disability, refugees, land and criminal matters etc, while other have adopted a holistic model to legal aid services that provides legal services to everyone and in all spheres of justice.

## CONCLUSION

There seem to be enough legal frameworks on legal aid and pro bono on all foras, international, regional and national level. Legal aid services are however still very few, most especially in upcountry centres where they hardly access these services. More activism is needed to bridge the gap to also enable indigent persons access legal services.

### *SUMMARY*

Considering the need for legal services in Uganda, the entire legal fraternity should be encouraged and avenues made to interest lawyers, students of law and other members of the legal fraternity in legal aid and pro bono practice.

### *REVISION QUESTIONS*

Different Legal instruments (international, regional and domestic) have attempted to define 'legal aid' but do not agree on one common definition. How do you define Legal aid?

What do you understand by the terms 'legal aid' and 'pro bono'?

Discuss the rationale for legal aid or pro bono services in Uganda.

Citing the relevant provisions of the various international, regional and domestic legislations, discuss the legal, policy and regulatory framework governing pro bono practice in Uganda.

## INSTITUTIONAL FRAMEWORK (FORMAL, INFORMAL & NON-STATE ACTORS) FOR DELIVERING LEGAL AID & PRO BONO PRACTICE

Introduction

Article 126 of the Constitution of the Republic of Uganda, 1995 provides for the exercise of judicial power. Clause 2(a) of that article stipulates to the effect that in the adjudication of civil and criminal cases, the courts shall administer justice to all irrespective of their social and economic status. The emphasis placed on the last few words in the preceding paragraph is meant to raise the issue as to how achievable this constitutional provision is.[332] The major question is; Can there be effective administration of justice to all in Uganda when the majority are too poor to afford legal representation?

This topic explores the question through addressing the present administration and practice of pro bono work in Uganda. According to a report prepared by the Commission on the Legal Empowerment of the Poor titled 'Making the Law work for everyone', one of the Four Pillars of Legal empowerment of the Poor is the provision of Access to Justice and the Rule of Law. The focus of pro bono services is therefore tailored around the empowerment of the poor, primarily through enabling them to access justice.

There are presently a number of avenues through which pro bono and legal aid services are rendered in Uganda. It is important to note that pro bono and legal aid services are delivered through a private- public partnership. These have been initiated either by compulsion of regulations, advocacy for services and the real need to feel a service gap. The manifestation we see include: community legal aid clinics, non-governmental organizations, and the payment of lawyers on state-briefs to represent individuals that are entitled to pro bono services, pro bono scheme of Uganda Law Society, School of Law Clinics, Justice Centres etc.

There are numerous non-governmental organizations that have been established to ensure that marginalized and poor people have access to the justice system. There is also an emphasis on improving different supportive mechanisms with a view of strengthening the national capacity to deal with identified service gaps in the Justice, Law and order Sector (JLOS). JLOS is a sector wide approach (swap) adopted by the Government of Uganda in 1999 for administration of justice and maintenance of law and order. It is pursuing a vision of 'Justice for All' in Uganda.

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From 2000 to date, the JLOS has implemented administrative, legal and judicial reforms under the JLOS Strategic Investment Plan II, III and now IV. The planning framework of JLOS is aiming at enhancing access to justice; improving human rights observance and strengthening the rule of law in Uganda.

Institutions within JLOS are now very alert to the need to advance access to justice. Outcome two of the Judiciary Strategic Investment Plan III is to the effect that the Judiciary shall deliver 'Speedy and affordable Access to Justice particularly for children, poor men and women and other marginalized groups delivered.'

The Judiciary is cognizant of the need to minimize financial and other bottlenecks hampering access to justice for vulnerable persons as well as enable physical access to JLOS institutions and services, improving the quality of justice delivered and reducing on the technicalities that hamper access to justice.

JLOS in partnership with development partners have worked on developing a Draft Legal Aid Policy 2012 to establish a framework for access to legal services for those we cannot afford. The existence of a draft is also proof of the fact that there is no government policy on pro bono and Legal aid services in Uganda to guide the effective and efficient legal aid service provision. Legal Aid and Pro bono services are thus mostly provided by civil society organizations with support from various development partners while the activities of these pro bono service providers are vetted and supervised by the Legal Aid Sub-Committee of the Law Council under the Ministry of Justice and Constitutional Affairs.

## Key Players/Stakeholders/ Frameworks

Please take note that the beginning point for delivery of legal aid and pro bono services is the Legal, Policy and regulatory framework that has enabled the providers of Legal Aid and Pro bono services to operate.

Government of Uganda

Ministry of Justice and Constitutional Affairs: voice in cabinet, chief regulator, laws and policies. Government has played a key role in the development of the Legal and regulatory framework as well as service provision. All the legislation relating to Legal Aid and Pro Bono practice is an initiative of government in partnership with the development partners and civil society organizations.

Justice Law and Order Sector (JLOS) coordination platform for the SWAp, a planning framework and operates the development budget. JLOS has committed itself to supporting the process of developing a national legal aid and pro bono policy in an effort to promote access to justice. The Law Council has been charged with coming up with the Terms of Reference for this initiative.

The Uganda Law Council

The Uganda Law Council is established by Section 2 of the Advocates Act Chapter 267 (as amended by Act 27 of 2002) as the overall Regulatory body of the Legal Profession in Uganda. The Uganda Law Council consists of ;—

a) A Judge, appointed by the Attorney General after consultation with the Chief Justice, who is Chairperson of the Council;

b) The President of the Uganda Law Society, ex officio;

c) The Director of the Law Development Centre, ex officio;

d) The head of the department of law of Makerere University, ex officio;

e) Two practising advocates elected by the Uganda Law Society; and

f) One officer with legal qualifications in the service of the Government, appointed by the Attorney General.

The functions of the Law Council shall be—

a) To exercise general supervision and control over professional legal education in Uganda;

b) To approve courses of study and to provide for the conduct of qualifying examinations for any of the purposes of this Act;

c) To advise and make recommendations to the Government on matters relating to the profession of advocates;

d) To exercise, through the medium of the Disciplinary Committee, disciplinary control over advocates and their clerks;

e) To exercise general supervision and control over the provision of legal aid and advice to indigent persons; and

f) To exercise any power or perform any duty authorised or required by this or any other written law.

Government Legal Aid Scheme

Judiciary- State Briefs. The Judiciary implements the state brief scheme. The scheme through Judges/ Court registrars/Chief Magistrates identify lawyers who are contracted to represent persons accused with Capital offences. This practice is in conformity with the Constitutional provision under Article 28 to the effect that a person accused of a capital offence shall be entitled to legal representation at the expense of the State. Most persons charged with capital offences cannot afford legal representation and yet the gravity of the offence requires that they be represented. As such, the State is constitutionally mandated to provide them with legal representation. Unfortunately, this system has not been adequately utilized to address the level of need in the Country. It is also noted that most lawyers assigned to handle matters on State brief hardly exercise adequate diligence in research and other means of preparation for their cases; neither do they commit themselves fully to succeeding in the matters they take up. This lack of purpose and focus renders the State brief system in Uganda inadequate.

The basis for lack of interest in State briefs has been mainly attributed to the meager fees paid out by the State to Advocates who take up the briefs. However, yet again, accepting payment for a State brief and then giving it

lackluster attention recalls to the surface the concern for lack of integrity in pro bono legal practice. It is also a practice of the Judiciary to call the advocates to participate in the state brief scheme at short notice. The state brief schemes is also an actualization of the provisions of the Trial and Indictment Act, the Poor Persons Act and further Uganda's commitment implement provisions of international and regional instruments.

Justice Centres Uganda- This is an innovation of the Ministry of Justice and Constitutional Affairs and the Justice Law and Order Sector with the support of development partners. The initiatives includes the establishment of Legal Aid Centre housed by the Judiciary at different locations in the country to provide legal aid services to the poor.

Justice Centres are a one-stop-shop legal aid service delivery model that seeks to bridge the gap between the supply and demand sides of justice by providing legal aid services across civil and criminal areas of justice to indigent, marginalized and vulnerable persons. At the same time, Justice Centres seek to empower individuals and communities to claim their rights and demand for policy and social change.

Justice Centres represent the beginning of fundamental efforts to restructure the provision of legal aid in Uganda and the singular objective of making legal aid easily available and accessible at the right time to the most deserving population and at the right place. Its core values are: professional excellence; ethics and integrity; Accountability; and Non discrimination. Services offered by Justice Centres include: Legal Advice; Legal representation; Alternative Dispute Resolution (ADR); Counseling; Conducting Legal Awareness Sessions; and referrals. They also operate a toll free line for their services. The Centres are spread out all over the Northern and Eastern parts of the country. This includes the districts of Lira, Amolatar, Pader, Apac, Kitgum,Oyam, Dokolo, Kaberamaido, Kotido, Tororo, Bukwa, Bududa, Manafwa, Busia, Pallisa, Butaleja, Namutumba, Bugiri and Iganga districts. The NationalCoordination Office is at the High Court Building in Kampala.

The Law Development Centre under Cap 132 has a statutory mandate to assist in the provision of legal aid and advice to indigent. This is actualized through the Legal Aid Clinic which has 6 branches in six districts in Uganda. The Legal Aid Clinic is also used as a platform for implementation of the Advocate (Student Practice) Regulation 2004 which empower Bar Course students to extend Legal Aid and Pro Bono services to indigent persons. The limitation with this scheme is that the students are busy with training which hampers Legal Aid service provision. The coverage of the Clinic is currently at 6 districts which is insufficient considering the need.

## Pro Bono Scheme

It's a creature of statute, that is the Advocates Act and the Advocates (Pro Bono to Indigent Persons) Regulations. Regulated by the Law Council with a delegated role to the Uganda Law Society. Uganda Law Society runs the annual pro bono day a platform that is used by advocates to deliver free legal services to indigents. Before the pro bono day, there is a lot of publicity to inform the envisaged beneficiaries to come and reap the benefit.

The challenge remains that the scheme is ad hoc and therefore does not offer a sustainable service to indigents. The implementation of the Regulations still suffers a challenge of the Law Council lacking capacity to effectively monitor the adherence to the rules. The evaluation of the effectiveness of the pro bono scheme in delivering legal aid services to indigent is also difficult.

Private Legal Aid Schemes.

As mentioned earlier, legal aid in Uganda is delivered through a public private partnership between government and non-government organizations. Non-government organizations are incorporated as private entities and are registered by the NGO Board. They are further subjected to scrutiny and regulation of the Law Council. They operated under a certificate of registration by the Law Council.

Legal Aid Service Providers in Uganda work harmoniously with one another under an umbrella body called the Legal Aid Service Providers' Network (LAPSNET). During the period 1995 to 2000, various justice delivery Institutions were at the forefront in strengthening performance in Institutional establishments, pilot initiatives, as well as policy and program interventions. Civil Society Organizations also targeted the users of the justice delivery agencies with major focus on human rights education, legal rights awareness and legal aid. In 2001, LAPSNET was conceived to coordinate civil society players in addressing issues of access to justice. In April 2004, LAPSNET was registered and formalized its legal status as a company limited by guarantee. It is important to note that some of the Legal Aid Service Provider offer a holistic package of legal services and are access by all categories of people while other are specialized.[333]

The most prominent legal aid service providers in Uganda under the umbrella of LAPSNET, as well as non-members, include the following:

The Legal Aid Project of the Uganda Law Society

The Legal Aid Project (LAP) was established by the Uganda Law Society in 1992,with assistance from the Norwegian Bar Association, to provide legal assistance to indigent and vulnerable people in Uganda. The Project was born out of the realization that apart from the State Brief system that handles only capital offences and the huge back-log of cases, there was a gap in the provision of free legal service provision in Uganda despite the fact that a large part of Uganda's population lives below the poverty line, and without means of accessing justice.[334]

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[333] https://www.academia.edu/1546047/PRO_BONO_PUBLICO_AND_ITS_ADMINISTRATION_IN_UGANDA

[334]https://www.academia.edu/1546047/PRO_BONO_PUBLICO_AND_ITS_ADMINISTRATION_IN_UGANDA

LAP has branches in Kabarole, Kabale, Masindi, Jinja, Gulu, Mbarara, Adjumani, Kabale, Karamoja region and Luzira, with its head office in Kampala. To date, the project has helped and continues to help thousands of indigent men, women and children in advocating for their Human Rights.[335]

Public Defender Association of Uganda

The Public Defender Association of Uganda (PDAU) is a Nonprofit Human Rights organization that offers criminal legal aid and pro bono services to the poor.

It was conceived in 1997 as one of the new models for improved administration of justice in Uganda. It complements the Criminal Justice Reform Program which is one of the JLOS' initial key areas for reform. PDAU offers pro bono and legal aid services to indigent persons and places particular emphasis on those charged with criminal offences. The organization works with courts. Prisons, Police and other pro bono and legal aid service providers.

PDAU's legal services to poor people is a factor in promoting the right to liberty and fair hearing, alleviating poverty and ensuring professional, cost effective, complete and quality services.

The Uganda Christian Lawyers' Fraternity (UCLF)

UCLF is part of the CLEAR international network and runs a successful student work. Legal and educational community outreach and legal aid support program for walk-in clients and prisoners. In 2005, UCLF was registered as an NGO and as its first Staff Advocate handling cases on pro bono for a variety of clientele including Christian NGOs as well as prisoners, particularly hose based at Kigo Prison at Lweza. Two years thereafter it was granted a law firm status by the Uganda Law Council.

Prior to its registration as a non-governmental organization, UCLF would mobilize Christian lawyers into serving the indigent community of Uganda by ensuring that God's character of justice and mercy is communicated in both words and action. In this respect, Christian lawyers would carry out pro bono work through their respective offices and not under the auspice of UCLF.

UCLF presently operates branch offices in Kasese and Gulu with the head office based in Wandegeya, Kampala.

Refugee Law Project – Makerere University, Faculty of Law

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This was established in November 1999. It runs a Legal Aid and Counseling department which offers free information and advice to asylum seekers and refugees.[336]

FIDA Uganda, Legal Aid Clinic

FIDA Uganda was founded by a group of women lawyers in 1974 to promote their professional and intellectual growth. The organisation was also dedicated to the protection and promotion of the rights of women in Uganda through various ways. One of the ways was via the setting up of legal aid clinics to attend to women whose rights have been either violated or threatened. The first clinic was set up in Kampala in 1988 and has since been very active in providing legal services to women who cannot otherwise afford them. FIDA has also since diversified its approaches beyond legal aid services provision to include advocacy and training of defenders of women's rights. At present, the organisation boasts of a membership of over three hundred members.[337]

In terms of PIL, FIDA has been at the fore front of petitions challenging discriminative laws against women. In Uganda Association of Women Lawyers v. Attorney General and Ors, FIDA successfully challenged the provisions of the Divorce Act which made it more difficult for women to divorce abusive husbands while the reverse was not true. In the main, the petition contended that by providing for different grounds for women and men seeking divorce, the law was discriminative in as far as it required women to prove both adultery and some other ground while men only needed to prove one ground. In sum, most of FIDA's services are constrained to providing legal aid to individual persons rather than pursuing litigation with a broad impact.

**International Justice Mission (IJM)**

Similar to the Uganda Christian Lawyers Fraternity, IJM is a Christian Non Governmental Organization led by Human Rights professionals, which helpspeople suffering from injustices and oppression, who have not been able to obtain justice through local authorities. IJM investigates and documents cases of abuse and provides pro bono legal representation to vulnerable individuals. IJM has a harmonious relationship with UCLF and similar to the latter, it has a student branch at the Faculty of Law, Uganda Christian University as part of its Community outreach project.

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IJM has established itself in pro bono practice in the area of Land law andnormally works in partnership with local police and public justice officials with aview of increasing the capacity of the Ugandan justice system in handling such cases.

**Uganda Network on Law, Ethics and HIV/AIDS (UGANET).**

Uganda Network on Law, Ethics and HIV/AIDS (UGANET), was established in1995, as a Non-Governmental Organization comprising of organizational andindividual multi-disciplinary membership. This was after the recognition that thelaw has a role to play in influencing the success of HIV/AIDS interventionsintended to prevent the further spread or to mitigate the impact of HIV/AIDS.[338]

The activities undertaken by UGANET include the following: Media Advocacy;Lobbying for Legislative Reform; Legal Aid Service Provision (National andDistrict Based); Training and Capacity Building (Human Rights, the Law &AIDS); Sensitization on Human Rights, the Law and HIV/AIDs in Uganda.

**Foundation for Human Rights Initiative (FHRI)**

FHRI promotes citizen awareness of basic fundamental human rights and obligations guaranteed in the Ugandan Constitution and other international laws. It places an emphasis on good governance, respect for the rule of law, democracy and legal protection of human rights. In attempts to meet its mandate, FHRI provides legal representation, though mainly in public interest litigation cases.[339]

**Uganda Land Alliance (ULA)**

Uganda Land Alliance (ULA) is a national organisation committed to the provision of pro bono legal services to indigent persons. The range of legal services provided ranges from active legal representation in court to alternative dispute resolution of clients' complaints. Outside legal aid, the organisation is also involved in advocacy around land rights especially those of marginalized groups including women. This takes the form of advocacy in the media targeting the public and the relevant policy makers.[340]

Occasionally, ULA gets involved in strategic litigation on issues that affect a wide group of people. The biggest success so far achieved has been with the petition filed in the High Court of Uganda 2004 challenging the eviction of the Benet, a small ethnic minority group traditionally resident on the slopes of Mount Elgon. As a lead petitioner ULA, successfully contested the acts of the Uganda Wildlife Authority (UWA) in evicting the Benet

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to create space for conservation without affording them any form of compensation or any other alternatives. In the land mark decision, the court not only found the evictions illegal but also directed the government to provide the Benet with a broad range of economic and social rights, including an adequate standard of living, education and health facilities. The decision in this case contains one of the most progressive pronouncements on economic and social rights in Uganda.

This success notwithstanding, the organisation is greatly constrained and unable to take on other cases of this nature. Litigation involves a great deal of resources including finances and human assets which are presently beyond the organization's capacity. For this reason ULA is open to collaborating with other organizations so as to combine scarce resources for concerted action. ULA would be open in partnering to extend legal aid services and strategic litigation to northern Uganda areas where issues of HIV/AIDs and land rights often arise.

**Centre for Health Human Rights and Development (CEHURD)**

The Centre for Health Human Rights and Development (CEHURD) is one of the few organizations actively involved in legal aid provision on ESCRs in the form of strategic litigation. CEHURD's mission is to realize an effective, equitable, people centered public health system that ensures universal access to healthcare, while upholding general human rights guarantees. Its objectives include among others; serving as a public health law resource center in the East Africa Region, advocacy for the health rights of marginalized populations and supporting and identifying strategic cases that advance health rights.[341]

Most of CEHURD's work so far has centered on the right to health although its mandate covers a broad spectrum of all other rights. On the 27thof May 2010, the Centre together with the families of two mothers who lost their lives in government hospitals while giving birth instituted a public interest case in the High Court. The petition in the main contends that the death in both instances was a result of the country's poor healthcare system. While the case is yet to be determined, it is the first ever of its nature to be filed and a favorable decision will go a long way in curbing maternal death as a result of government's neglect in the health sector.[342]

The Center is also behind the most recent petition aimed at advancing disability rights. The petition contends that the use of words such as 'idiots' and 'imbeciles' in the law in reference to persons with mental disabilities is derogatory and unconstitutional. Furthermore, it is contended in the petition that the detention of persons with mental disabilities under the Trial on Indictments Act without due process is discriminatory. As with the maternal health case, the disability rights petition offers great hope for reform of the country's laws. Nonetheless, many challenges still abound most prominent of which is the uncertainties involved in litigation as well as its protracted nature. Others include the view that economic, social and cultural rights are not justiciable in Uganda and the reluctance of government to enforce court decisions.

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Besides litigation, the Centre undertakes various reviews aimed at identifying laws that impact on citizen's right to health, especially those that discriminate against certain groups in health service provision. While most of these laws are unconstitutional and should be challenged before the courts of law, CEHURD alone does not have sufficient capacity to solely undertake this process. PILAC and other likeminded organizations would add great value to the centers work in supporting these initiatives.

**Advocates Coalition on Development and Environment (ACODE)**

ACODE is an independent public policy think tank with operations in the Eastern and southern Africa sub regions. Its mission is to make public policies work for people through evidence-based policy research and analysis. Over the years, ACODE has come to be widely known as a public policy research and analysis think tank in the areas of governance, trade, environment, science and technology. The organisation is also a member of several civil society coalitions such as the Civil Society Coalition on Oil, police reform and the 'Return our Money' campaign.[343]

Research and policy analysis is the key driver of ACODEs work. Nonetheless over the years the organisation has brought and supported cases in the public interest. In the year 2000, ACODE together with another environmental law NGO sought a petition against the construction of a hotel in a wetland. Although the injunction was denied, the court upheld the right of citizens to petition in the public interest.In yet another successful petition, ACODE successfully challenged the degazettement of Butamira forest for the purposes of sugarcane growing. It was stated that the degazettement of the forests would affect the ecosystem and infringe on citizens right to a healthy and clean environment. Most recently, ACODE was a lead petitioner in the 'return our money' case that sought to have members of parliament return the monies they received for monitoring public programs on the ground that it amounted to a wastage and abuse of public funds. ACODE is therefore a key partner in public interest litigation as a petitioner and through research which can be utilized to identify issues for public interest litigation.

**Legal Action for Persons with Disabilities (LAPD)[344]**

LAPD is a disability rights organisation committed to promoting and defending the rights of persons with disabilities. The organisation aims at using legal tools among others to advance the rights of disabled individuals. To that end LAPD provides legal aid to indigent Persons with Disabilities whose rights have been violated. Some of the human rights issues LAPD has worked on in this respect include the right of PWDs to access land, domestic violence and child desertion. A record eighty five (85) cases of these have been undertaken so far. LAPD is also

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committed to bringing cases of a strategic interest before the courts of law in order to achieve the more comprehensive redress of violations against PWDs.

At present, LAPD has two strategic cases before the courts and on average has at least one Public Interest Litigation case per year. In Constitutional Petition No. 40 of 2010, LAPD is challenging the provisions of the law on the election of the representatives of PWDs. The law presently vests the power to organize the election of PWDs representatives in an umbrella organisation of PWDs as opposed to an electoral college as is the case with other special interest groups such as the youth. Secondly, for one to be elected as a representative of PWDs, they must be a member of the umbrella organization. And yet, not all PWDs are members of the National Union of Disabled Persons Union (NUDIPU) which is the umbrella organisation. On the whole, the petition contends that the current electoral framework discriminates against certain PWDs by denying them an opportunity to vote, campaign and contest for legislative office. The law also in effect promotes forced association, which arises from the fact that to participate in the electoral process one has to be affiliated to NUDIPU. The second petition contests the reluctance of Kampala City Council Authority (KCCA) and Makerere University to put in place access facilities for PWDs. It is contended that this amounts to discrimination against PWDs contrary to the Constitution and the Convention on the Rights of Persons with Disabilities (CRPD) which Uganda recently ratified. At the time of the interview, there were proposals to broaden the scope of defendants to include all government institutions across the country.

Aside from providing pro bono services and pursuing public interest litigation, the organization also conducts several human rights trainings, undertakes legislative lobbying, law reform advocacy in partnership with other organizations that deal with PWDs. LAPD also regularly engages magistrates and judges on the rights of PWDs. Additionally, a number of publications on the rights of PWDs have been developed and these are very useful in as far so they provide background research for select public interest cases on the rights of PWDs. In terms of achievements, the biggest so far has been the compulsion of the national broadcasting TV station i.e. the Uganda Broadcasting Corporation (UBC) to have a sign language interpreter during news hour. This notwithstanding, there still exists a number of challenges and these include protracted litigation which frustrates clients.

**Human Rights Network- Uganda (HURINET-U)[345]**

HURINET-U is a network organisation of over forty human rights organizations. These organizations are committed to diverse but complimentary human rights issues that include child rights, economic, social and cultural rights, minority rights, women's rights, media rights, labor rights and conflict resolution. In terms of structure, the organisation has three main departments that include Finance and Administration, Advocacy, Research and Information Exchange and the Capacity Building and Network Development Department. The ESCR project which is relevant in this case is domiciled in the Advocacy, Research and Information Exchange department. Under the project, civil society has been mobilized under the ESCR coalition to follow up on the government's obligations under the ICESCR. At the moment, there are also efforts to draft a shadow report comprising of civil society views on the country's progress in the realization of ESCRs. In 2008, HURINET-U

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conducted and published a report of a study on the right to health and education in Karamoja and Northern Uganda region. The ESCR campaign and research undertaken under the project present key issues for a public interest litigation case in Uganda and it would be very useful for PILAC to follow up on these initiatives.

Although HURINET-U is yet to undertake a case of public interest on ESCRs, over the years the organisation has been actively involved in public interest cases on civil political rights. In 2005, HURINET-U supported a petition brought by Muwanga-Kivumbi a member of the group Popular Resistance against Life Presidency (PRALP) challenging numerous provisions of the Police Act that among others required demonstrators to seek the written permission of the Inspector General of Police (IGP) before holding assemblies contrary to Article 29 of the Constitution that guaranteed citizens' right to assemble and demonstrate. In a landmark decision, the impugned provisions were found unconstitutional, thereby broadening the space for assembly and demonstration. Most recently in 2009, HURINET-U supported journalists Angelo Izama and Charles Mpagi Mwanguhya to challenge the acts of the Permanent Secretary, Ministry of Energy in denying access to the Oil Production Sharing Agreements (PSA) entered into between the government of Uganda and various multinational oil companies. From the above analysis and the various interviews conducted, there is great potential for partnership between HURINET-U and PILAC.

**Civil Society Coalition on Human Rights and Constitutional Law**[346]

The Civil Society Coalition on Human Rights and Constitutional law was formed in the wake of the Anti–Homosexuality Bill 2009 to among others have the bill scrapped. The main objective of the coalition at inception was to have the bill dropped and to promote a positive sexual rights agenda for Uganda. The coalition currently comprises of forty three (43) organizations including the media, human rights organizations, LGBTI groups, refugees and individual human rights activists. Legal aid is largely offered by member organizations rather than by the coalition. Nonetheless the coalition is very active in litigating high profile public interest cases. At the moment, the coordinator of the coalition has petitioned the constitutional court to challenge certain provisions of the Equal Opportunities Act. The petition contests the provision of the Act that prohibits persons involved in what is termed 'socially unacceptable behavior' from seeking redress from any court of law on the grounds of discrimination.

In 2010, the Coalition actively supported a case in which the photographs and names of several persons who were alleged to be homosexual were published in a local tabloid, the Rolling Stone. The court found this to constitute an infringement of these persons' right to privacy and accordingly issued an injunction against the newspaper in addition to awarding damages to the affected individuals.

Aside from litigation, the coalition has adopted various strategies including issuing press statements condemning homophobia and the commemoration of the international day against homophobia to further its work and the

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notion of equality in the country. This is in addition to media campaigns and the active lobbying of members of parliament. As a result, there is increased dialogue on LGBTI rights and successful lobbying of the Ministry of Health and the Uganda AIDS Commission to include issues of homosexuality in HIV/AIDS polices. The main challenge remains the considerable homophobia against gay, lesbian persons and LGBTI activists. Secondly, the idea that LGBTI rights are a western creation greatly impedes the recognition of these rights. It is therefore important that attitudes against homosexuality are changed and the very discriminative laws set aside. The Coalition welcomes all efforts to achieve this objective.

Greenwatch Uganda[347]

Greenwatch was established in 1995 and has since grown to be a leading environmental rights advocacy NGO in Uganda. The organisation aims at promoting the sustainable use, management and protection of the environment and natural resources, while at the same time enforcing the right to a clean and healthy environment. To achieve these objectives, Greenwatch works with communities, government institutions including the judiciary, police, local governments and select individuals. In terms of strategy, Greenwatch aims at empowering people to participate in environmental management decisions as well as in sustainable management and protection of the environment. On the other hand, the organisation also aims at ensuring that policy makers apply best environmental management practices in decision making. To this end, the organisation is engaged in a variety of advocacy campaigns including media advocacy, trainings and capacity building of the communities, policy makers and other relevant stakeholders.

One other important component of the organizations' work is strategic impact litigation. Over the years, Greenwatch has either in its own right or in partnership with other organizations brought a number of public interest litigation cases on environmental matters. In 1999, Greenwatch participated in a public interest case that challenged the conclusion of a Power Purchase Agreement without an Environmental Impact Assessment (EIA) issued by NEMA. Still in 2000, Greenwatch together with another environmental NGO challenged the conversion of a wetland for hotel construction in the landmark case against Golf Course Holdings. In 2001, Greenwatch successfully challenged the secrecy around the Power Purchase Agreements entered into between the government of Uganda and AES Nile Power. It was contended that the denial of information on these agreements was counter to the right of citizens to access information in possession of the state or its agencies under the Constitution. In 2002, Greenwatch brought a public interest case seeking regulation of the manufacture, use, distribution and sale of plastic bags as well as the restoration of the environment in the state it was before the menace caused by the plastic bags.Finally in 2004, Greenwatch was very active in a petition brought to seek an injunction against the transportation and exportation of chimpanzees from Uganda to China or any other country. Most efforts in the public interest have therefore been in the realm of environmental law and the right to a clean and healthy environment.

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**Justice For Children - Uganda**[348]

This is a non-profit, child-advocacy group that provides legal and social services to abused children and their protective parents when the system fails. This Organization intervenes to offer assistance on behalf of abused and neglected children to prevent their re-abuse. They ensure that abused children receive legal representation that is diligent, free of conflicts of interest and meets the highest standards of care. The Child and his or her protective parent is helped to navigate a complicated administrative judicial process that is often absurd and unjust.

Justice for Children is not only involved in saving as many children as its resources allow, but it is also actively involved in reforms to the system and laws to improve on the protection of children, the prosecution of their abusers, and recognition of children's rights in the court room.

**Platform for Labour Action (PLA)**

PLA operates a Legal Aid Clinic and has been providing legal aid services since2003. Its target population includes children in exploitative forms of work, children at risk of exploitation, informal sector workers infected and affected byHIV/AIDS, women, youth and workers earning below the threshold of Ushs.150,000 (Uganda Shillings One hundred and fifty thousand only) per month. Its target population is vulnerable, marginalized and undocumented workers. PLA has its head office in Kampala and operates branch offices in Lira, Dokolo and Amolatar districts.

Profiling of organizations that provide pro bono services in Uganda cannot be exhausted. The membership of Legal Aid service providers under LAPSNET is also quite large and includes the following:

- Justice and Rights Associates (JURIA)
- Alliance for Integrated Development and Empowerment (AIDE)
- Avocats Sans Frontieres (ASF)
- Defence for Children International (DCI)
- Inter-Religious Council of Uganda (IRCU)
- Mifumi Human Rights Defenders' Network (MHRDN)
- Uganda Gender Resource Centre (UGRC)
- Uganda Youth Development Link (UYDEL)

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- Youth Justice Support-Uganda (YJSU).

Challenges of Legal Aid and Pro bono practice in Uganda[349]

As I have labored to show, there have been efforts to establish the legal, regulatory and institutional frameworks with the vision of ensuring that justice is accessible to all alike. However, there are still a number of challenges in the practice of pro bono work in Uganda:

**Geographical Coverage**

Most legal aid service providers operate primarily in urban centers. This is attributed mostly to inadequate availability of funds to spread out their operations as well as the lack of a legal, institutional and policy framework at the national level to guide the provision and regulation of legal aid and pro bono services. Similarly, there is lack of an effective supervisory mechanism for provision of these services throughout the country.

The need for a holistic pro bono package is becoming paramount as most indigents seek for other support services beyond legal assistance. As a result, the Law Council has made some progress in revising as well as setting up a Pro bono scheme supported by a legal and regulatory framework to ensure that pro bono and legal aid service provision is done in a well coordinated manner. These efforts are yet to bear fruit mainly because coordination of pro bono activities as well as funding such activities, are still major challenges.

**Compulsion for lawyers to do pro bono work**

As already mentioned, provision of Pro bono services by Advocates in Uganda is mandatory. Much as this guarantees adequate provision of legal services by most practicing Advocates in fulfillment of the law, it should be noted that compulsion towards rendering legal aid has its criticism as well. Colin Cohen, a partner at Boase, Cohen &Collins, a law firm in Hong Kong, asserts:

"I don't believe in compulsion because I don't believe in compulsion works, but I would be in favour of a central scheme putting together a list of lawyers who are prepared to deal with pro bono cases, so that people who really need help can get it. I think the Law Society and the Bar should set up a pro bono unit."

Where an Advocate does not provide pro bono services in any given year, he or she shall, for every two professional hours, pay the equivalent of one currency point to the Law Council in lieu of the provision of the service. This creates a catch-22 situation, in other words, not every lawyer may be in a position to provide pro bono services and as such, the provision of opting out through making such payment is a good thing. However, you may find that in any given situation, there are more lawyers opting out than volunteering for pro bono services, leaving very few committed volunteers.

**Over dependence on Donor funding.**

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A number of Legal Aid and pro bono service providers rely heavily on donor funding and are accountable to the Legal Aid Basket Fund which renders their continued existence and the tenancy of their activities un-predictable. For instance, the Legal Aid Project (LAP) of the Uganda Law Society has, since its inception, been funded by the Norwegian Agency for Development Cooperation(NORAD) through the Norwegian Bar Association. A large percentage of their activities and administrative budgets are still dependent on donors. Much as various members of the Uganda Law Society have made financial contributions towards the running of the Legal Aid project, transition into financial self sustainability for such legal aid providers remains a challenge.

**Lack of Government Policy**

There is currently no Government policy on Legal Aid Services to guide the effective and efficient legal aid service provision in Uganda though, as already mentioned, a draft policy, spearheaded by the Judiciary under the Strategic Investment Plan, is in the offing.

Nevertheless, presently, Legal Aid service provision is mostly provided by Civil Society Organizations with support from various donor agencies while the activities of such legal aid providers are vetted and supervised by the Legal Aid Sub Committee of the Law Council under the Ministry of Justice and Constitutional Affairs. There, however, remains a challenge of further strengthening the supervisory role of the Law Council as well as ensuring an effective way of improving on working relations with civil society. In the absence of a National Legal Aid Scheme, effective legal representation for the majority poor and access to justice remain elusive.

**Logistical limitations**

Regardless of the large number of legal aid service providers in the country. Access to justice for many country-folk remains elusive. This is mainly based on the fact that most civil society organizations are based in Kampala, while those based up country are located in the urban areas due to easy access to utilities such as electricity and water as well as the availability of security and other necessities such as banking and communication services. As such, most peasants that fall into vulnerable positions and are in need of all sorts of legal assistance are either unable to reach the legal aid providers or, worse still, do not know where to access them. This problem is compounded further by general challenges faced in organizing community outreach programs as a way of curbing such ignorance, such as: transport hindrances in reaching grass-root communities by civil society organizations and communication problems due to language barriers.

**Execution of outcome**

Execution of court orders, orders of tribunals and other fora of dispute resolution is quite challenging as police and bailiffs charge a lot of money to undertake execution which may not readily be available. There is also a growing culture of impunity where state and private individuals disrespect and disregard court orders.

**Disrespect for Legal Aid and Pro bono Advocates**

The advocates in private practice often disrespect Legal Aid and Pro bono Advocates. They reject mediation requests and other attempts for alternative dispute resolutions and advise their clients otherwise.

Recommendations[350]

I have made an attempt to guide the reader on recommendations worth considering in improving on the Ugandan legal and pro bono practice. These are as follows:

Reforming the law on paper is not enough to change the reality on the ground. Poor people also need a legal and judicial system that they can access one that ensures that their legal entitlements are practical, enforceable and meaningful. Therefore, efforts to legally empower the poor should focus on the underlying incentive structures as well as the capacity of the judiciary and state institutions necessary to make the law work for the poor.

The current scheme on legal aid provision orchestrated by Civil Societies is much more oriented on assistance to the poor to resolve legal problems instead of empowering them to sustainably take on their legal issues themselves where possible. More emphasis should thus be placed on community outreach programs that provide awareness on basic legal rights such as land ownership and inheritance. As well as introducing legal and human rights awareness programs in schools especially in the rural areas. In the same vein, measures to improve access to justice should focus on developing low-cost justice delivery models, taking into account the cost of legal services and remedies; the capacity and willingness of the poor to pay for such services, congestion in the court system, the incentives of the Judiciary and law enforcement agencies and the efficacy of informal and alternative dispute resolution mechanisms.

In the structuring of a national pro bono Scheme, considerations should be made with the existing Law Council pro bono scheme as a foundation. Other factors to consider include physical barriers to accessing justice, timing and capacity to improve access to justice as well as the existence of formal and informal institutions to which the poor seek judicial intervention from; and the weakness of existing institutional arrangements.

Legal Aid Education should be emphasized at the law school level. This can help with curbing the need to compel lawyers to engage in Legal Aid service provision. For sustainability of legal aid provision, education on legal integrity and legal aid, remain some of the most efficient solutions because this is in line with effecting a long term impact.

Consideration should also be placed on providing for a legal aid desk at Police Stations and police posts. These would be vital contact points for persons reporting cases on any form of human rights infringement especially for victims that are unaware of how to proceed in following up their cases or seeing to it that justice is done.

Legal Aid Service providers should rigorously undertake more training of paralegals at the sub-county and parish levels so as to make it easier for persons in far-to-reach areas to know how to access justice through members of their own local communities.

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In order to boost the commitment of lawyers engaged in pro bono work, there should be an introduction of a contingency system whereby lawyers only get paid if their clients win their cases. A similar system was successfully introduced in the United Kingdom with apparent improvements in the pro bono practice.

It has also been suggested that lawyers with a reluctance towards pro bono practice should be encouraged to take on law school interns or Bar course students to specifically handle pro bono cases, and in return, the advocate supervising the student would be awarded professional contact hours for pro bono service provisions under the Pro Bono Scheme and the Advocates (Pro bono Services to Indigent Persons) regulations, 2009. In this way, the student benefits from professional exposure and training while the lawyer acquires the contact hours he or she needs for pro bono service provision without necessarily directly rendering such service.

One other way of guaranteeing the sustainability of pro bono service provision, we could take up the aforementioned suggestion of Colin Cohen, a partner at Boase, Cohen & Collins, a law firm in Hong Kong. In his criticism of compelling lawyers to render pro bono services, he advises that the law society and the Bar should set up a unit comprising a list of lawyers who are prepared to deal with pro bono cases, so that people who really need help can get it from such a unit. Such a Unit would also guarantee commitment and exercise of due diligence from the lawyers involved hence rendering effective service. After all, as has already been emphasized, the most fundamental motivation for lawyers engaged in pro bono work is the desire to see that justice is done.

More interventions should be designed and implemented in issues such as Child protection, legal support and strengthening capacity and resource mobilization. Far to reach areas such as communities in the regions of West Nile and Karamoja, as well as the Islands and shores of Lake Victoria, should be considered with interventions specific to their community situations.

Support to Civil Society Organizations (CSOs) is also greatly required by development partners and Government Institutions, so as to enable them demand downward accountability from the government on access to justice matters and in turn foster development of a vibrant civil society. All the CSOs require support in building their capacity to manage programs in both organizational and institutional development. Different regions in the country should develop strong systems and mechanisms of integrating programs into the sub-county annual plans and budgets. It should be made clear that good governance is an ideal which is difficult to achieve in its totality. Very few countries and societies have come close to achieving good governance in its totality. However, to ensure sustainable interventions, strategically futuristic actions must be taken to work towards this ideal with the aim of making it a reality.

## Conclusion

The Pro Bono service provision in the country still has a long way to go in a number of areas. The government policy and framework on pro bono service provision is not yet in place while the CSOs that have offered some kind of legal assistance to indigents are also overwhelmed by the level of need in communities beyond their capacities.

In general terms, indigenous NGOs are largely characterized by local membership that is predominantly urban. The national and local CSOs have few independent sources of funds that are almost entirely donor dependent and susceptible to pressure to follow donor agendas. As a result, there is limited human resource capacity, poor sustainability of programs and pre-occupation with service delivery roles as opposed to advocacy work.

### Summary[351]

In this module we have looked at the objectives of the pro bono scheme in the Ugandan perspective; the delivery models for the provision of pro bono legal services; objectives of most pro bono service providers in Uganda; the institutional framework on legal aid and pro bono service under the umbrella body LAPSNET; benefits of doing pro bono work; challenges of pro bono practice in Uganda; and the necessary recommendations to pro bono practice in Uganda.

### Revision Questions

"Pro bono practice is a wastage of legal practitioners valuable time in Uganda." Per Bar Course Legal aid and Pro bono practice student 2018/19. Discuss the statement.

Discuss the various barriers and solutions to Pro bono practice and legal aid in Uganda.

Discuss the various institutional framework (formal, informal and non-state actors) delivering legal aid and pro bono practice in Uganda.

4(a) Explain the five delivery models for the provision of pro bono legal services in Uganda.

(b) Discuss the benefits of doing pro bono work in Uganda.

## LEGAL AID/PROBONO OFFICE MANAGEMENT

INTRODUCTION

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Legal Aid or Probono Office Management entails a number of aspects to wit; Operating a Legal Aid Office; Project Development; Working Plan; Supervision, Monitoring and Evaluation; Report Writing; Stages of Case Management; Case Management forms; Effective representation, Process flow within formal and informal justice system and Financial Management and Accountability. For purposes of this class, we will only discuss the significant aspects to managing a legal aid or probono office. We will deal with each aspect hereunder.

Project Development

Development planning, Projects Preparation and Implementation is assuming greater importance in both the public and private sectors of the economy. As managers in our different callings and organisations, we may be involved in the management of projects and are given assignments within a Development planning, Projects Preparation and Implementation team. We therefore, need to understand at the onset, the nature of project management. This discussion introduces us to the nature and purpose of project management. We will give a definition of Development planning, Projects Preparation and Implementation and also the core nature.

Development planning

Projects Preparation and Implementation has evolved because of the need to manage complex public and private sector activities. But before we go into our discussions on Development planning, Projects Preparation and Implementation, we need to understand the subject matter. We do also need to understand our operating terminology.

Definition of Project

Project has been defined in various ways. Some authorities see projects as mere activities while others see them as programmes of action. Longman Dictionary of Contemporary English defines a project as “an important and carefully planned piece of work that is intended to build or produce something new or to deal with a problem”. From this simple definition, we can see that a project, apart from being important, should be carefully planned so as to produce something. Some of the things that a project seeks to produce may be tangible or intangible. A motorcycle is a tangible product but conducting a census is not a tangible product.

The following are examples of projects;

Construction of a 50-bed hospital at Kagugube by the Government of Uganda.

Sinking of 10 water bore-holes at Kivulu by Kampala Central Division.

From whatever angle we see these projects; some of their features are that they will require the commitment and deployment of scare resources. Also, the products will not manage themselves. They will be managed.

## Meaning of Development planning,Projects Preparation and Implementation

If we define a project as an important piece of work, project management is the planning, organising, directing and controlling of resources for a relatively short-term objective that has been earlier established to complete specific goals. For example, the construction of a 50-bed hospital at Kagugube by the government of Uganda will require a lot of resources financial, material and labour. There will be need for procurement of land. There will also be need for Architects to design the hospital. There will be need for structural engineers, civil and building engineers and electrical engineers. Different types of equipment will be sourced for e.g. X-ray machines, laboratory equipment etc. to equip the hospital. There should be a way in which all these resources should be coordinated and managed for effective and time management. In situations like these, Development planning, Projects Preparation and Implementation comes in handy to provide much needed expertise.

## Purpose of Development planning, Projects Preparation and Implementation

From the onset, it will be necessary to stress that many projects are very complex in nature. The complexities may be introduced by the nature of technology required to execute the project. For example, a census project is one of the most difficult and complex projects that public sector managers may face. Most projects such as we have mentioned may require elements of critical risks and uncertainty. For example, how do we predict what will happen next year? Even if we could predict the political future with a measure of certainty, predicting the movement of prices and costs of materials in Uganda involves a lot of risks and uncertainty. In all cases therefore, we would say that the purpose of project management is to foresee the future and associated problems and therefore, plan, organise and control key activities so that projects are completed successfully and on time too. If we see Development planning, Projects Preparation and Implementation from that perspective, it follows logically that Development planning, Projects Preparation and Implementation starts even before financial resources are committed and lasts until the completion of the project.

## Types of Projects

We have discussed the meaning of Development planning, Projects Preparation and Implementation and also the purpose. Let us go further and discuss the various types of projects that we might encounter in our different organisations as managers. Some of the types include:

Tangible Projects

Tangible projects are those projects whose output are tangible and can be seen with the naked eye. They may include the following:

a) A civil engineering project

b) A hospital building project

c) A water borehole project

d) An aircraft manufacturing plant

e) A milk manufacturing plant

f) An urban playground.

In the case of Legal aid service provision, the opening of a legal aid office/chambers/Non-government organization with a physical office is a tangible project.

Intangible Projects

Intangible projects are those that require commitment of resources but whose output cannot be seen with the naked eye. In most cases, they are social projects and in some cases they may be political projects. Examples of intangible projects are the 2010 National Population Census.

In our case, the handling of clients, giving legal advise to indigent clients, sensitization of prisoners etc is intangible.

Projects Objectives

Projects must have clear objectives. It is one of the important tasks of project managers to see that the projects they manage meet their objectives. Let us now discuss the objectives of projects.

General and specific objectives

There should be broad and specific objectives. While a broad/general objective is a much broader statement about what the project aims to achieve overall and guide us on the overall purpose of the project. Specific objectives are detailed objectives that describe what will be done during the project. The specific objectives ideally will make it easier to formulate inputs/activities that will lead to the achievement of the general objective.

In any case, both the general and specific objectives should be clear and unambiguous. They must speak to the organization's purpose, values, mission and vision. They must support the organization to fulfill its purpose.

Performance

All projects have objectives which they set out to achieve. For example a public hospital project should have the objective of providing safe and affordable healthcare to the community. Also a private sector fast food project has the objective of manufacturing food burgers, hot dogs, etc for its customers. This is a performance objective. Also, apart from the performance objective, most projects have a quality objective. For example, a hospital should have the objective of providing healthcare. This is a performance objective. But the provision of the service should be safe. For example, hospital workers (nurse, doctors, etc) while treating patients must take adequate care so as not to infect the patients with the HIV virus through use of unsterilised needle. This is a quality objective. Most organisations have quality as one of their major objectives. See, for example, what Daimler Benz has done with Mercedes Benz cars. Sony products are reputed for their amazing quality. Finally, another aspect of performance is reliability. A good product should also be reliable especially in the case of medical testing devices like PH meters. In patient care, an unrealiable thermometer may raise a false alarm concerning the health of a patient and lead to wrong diagnosis.

Completion Time

Most projects, when formulated, have completion times. A normal football match lasts for about 90 minutes. It is the duty of the referee to ensure that the football match is completed within the set time. Most public sector projects even at the time they are awarded or initiated always have a timeframe attached to them. For example, the construction of the Southern Bypass and Entebbe express highway may be projected to be completed in 24 months. That is the projected duration of the project. Any contractor who is given the contract for such a job should ensure that the road contract is completed on time. Another point to note about completion time of projects is that late completion or delivery of an agreed project will not please the sponsor of a project.

Budget

All projects involve financial outlays. The financial outlays (expenditures) attached to a project are usually controlled by the budget. The budget sets a limit as to the quantity of funds a project can consume. In most organisations, the budget for every project is usually set aside. The reason why a project should be monitored is that failure to do so in some cases may lead to exhaustion of funds and abandonment of the project in question.

We have seen that projects may have three main objectives, namely: time, performance and budget objectives. A major task facing project managers is how to balance these three objectives. What it means is that at all times; the focus of managers must be on the three items. To retain our understanding of project objectives, we will go a step further to look at a simple triangle of objectives.

## AN OVERVIEW OF A LEGAL AID PROGRAM

a) Get back to your company law- Register a company/partner/NGO. This will depend on your target. An NGO is ideal because it then comes through as a non-profit entity and will therefore attract funding.

b) Establishment of baseline- identify the target- identify the need- identify gaps- rationalize- create justification.

c) Analyze the issues further to help you design detailed interventions.

d) Develop a proposal- background to the intervention- state the problem/issue- create a general objective- specific objectives- identify the inputs/outputs- the outcomes.

e) Budget. This is be very detailed.

f) Conduct a survey/research on the key players/ key funders and their objectives to establish who is interest in the particular target that you have identified and who matches your objectives.

Office Set-up and management

One of the objectives of the Advocates (Legal Aid to Indigents Persons) Regulation is to ensure that all Legal Aid Service Providers have adequate facilities and qualified personnel to deliver legal aid services in a professional and ethical manner.

Therefore all offices/chambers of Legal Aid Service Providers must conform to the standard stipulated in the Regulations. The office/chambers of any Legal Aid Service Provider must be registered by Law Council as a such according to Regulation 6.

Registration Check List

In preparation for registration by the Law Council, it is important to take note of the following aspects:

a) A well kept office;

b) A toilet and sanitary facilities

c) A separate room for the advocate or lawyer and the paralegal (separate from that of other non legal staff;

d) Suitable desk for the advocate or lawyer and for a paralegal;

e) A secretariat desk and a computer or type writer;

f) A reception with chairs or benches for the client;

g) A book shelf;

h) A chest of drawers or filing cabinet

i) A reasonable collection of reference legal materials; including the set of the revised Laws of Uganda;

j) Properly kept files.

In case the aspiring legal aid service provider is a non-governmental organization, the regulation provide for the following additional requirements:

a) A certificate of registration issued by the NGO Board;

b) An objective in the Constitution of the Organization on provision of legal aid services

c) At least one staff must be a lawyer or an advocate and one other person with qualification of a paralegal.

When an intending applicant has fulfilled the above requirements, they may then submit an application for registration as a legal aid service provider to the Law Council following Form I of the schedule to the Advocates (Legal Aid to Indigent Persons) Regulations. Please refer to the Regulations for the form.

A certificate of registration shall be issued to an applicant who successful satisfies the Law Council that the requirements of the Regulations have been fulfilled. (Regulation 7). The Certificate is renewable annually upon re-application. Please take note that the certificate is not transferable.

## Refusal to Register an applicant as a Legal Aid Service Provider

The Law Council may reject an application for registration of a person or an institution or organization as a legal aid service provider for the following reasons:

The applicant does not meet the requirements of the Regulations (Reg.7)

If the applicant has been convicted of an offence involving dishonesty, fraud, or any offence involving moral turpitude.

There are circumstances that could lead to cancellation of the certificate of registration. These include:

If an NGO's registration status is cancelled by the NGO Board,

If the Legal aid service provider provides services in an unethical and unprofessional manner and below the standards of the regulations,

If the legal aid service provider ceases to carry on the business of legal aid service provision,

If the legal aid service provider has been convicted of an offence involving dishonesty, fraud or any other offence involving moral turpitude,

Office Practice

Quality of service

File management- a separate file to be opened for each client

Recording of information- full particulars of the client- statement of the problem of the client, expectations of the client, notes on assessment of means, legal issues raised by the problem and advice from the lawyer or advocate of the practical implications of the matter, option availed to the client;

Preparation for the case- consultation notes and legal research, advise to the client on prospects of success with regard to merits- communication to the client on prospects of the case- pleadings- court documents- other supporting documents

Notes on presentation of case: comprehensive notes of evidence- presentation of arguments on facts or the law applicable- list of witnesses or exhibits- proposed court submissions- notes on any form of alternative dispute resolution (client instructions, record of negotiation, mediation or arbitration, any supporting documents).

Client Care

Legal aid service providers are under obligation to ensure that their clients are given quality client care. The following aspects are key in determining if there is quality client care in the office of a legal aid service provider:

a) hospitality, accessible and appropriate services

b) conducive environment for confidentiality

c) professional and sensitive handling of juveniles, elderly or vulnerable people;

d) provision of information about availability and nature of services provided and any other information

e) acting on the client's instruction or if not practical in the best interest of the client

f) means of the client satisfaction surveys

g) complaints procedures

Work Practice, supervision and monitoring

There is a duty imposed on the legal aid service provider to ensure that the paralegal is supervised by an advocate or a lawyer.

Further, the legal aid service provider must ensure that there are mechanisms in place to assess the quality of services provided including:

- Regular monitoring of actions taken on cases
- Close supervision of new and inexperienced staff
- Appraisals
- Continuous training of staff
- Monthly reports on assignments
- In-house reports and external peer reviews
- Team meetings
- Staff briefings

Books and records

All legal aid service providers are under obligation to:

keep proper and accurate records of all cases or matters handled,

keep the client's account and office account separate,

Important! Please take note that any development partners may require additional standards in terms of record keeping and reporting.

Further, legal aid service provision by an advocate entails doing a professional job in the interest of a client just like in any regular practice.

Nature of services

The nature of services provided include:

Legal advice, Representation in court or tribunal in civil, constitutional or criminal matters, Mediation, negotiation or arbitration, Legal education or awareness.

Important! The nature of legal aid services provided shall be at the discretion of the provider with due consideration to the needs of the client and the resources available to the provider.

## Application for Legal Aid

Means and Merit Test.

Seeking the services of a legal aid service provider is done by way of application. The Advocates (Legal Aid to Indigents) Regulations provide for the form to be used for the application (Form III).

Please take note that in practice, most application are made orally. The legal personnel are under an obligation to assist the applicant to fill in the application form using the information provided by the client.

When the application is received by the Legal aid service provided, it is considered based on the means and merit test. Therefore the application will be granted based on the test set out in Regulation 23 of the Advocates (Legal Aid to Indigent) Regulations and availability of resources to provide the legal aid required. In case the Legal aid service provider is not satisfied that the applicant is eligible for legal aid, he or she may reject the application. Beware to give alternatives in the event the application is not granted including any necessary referrals. Further, ensure to provide feedback to the applicant without delay. In additional of an application for legal aid, the legal aid service provider may do the following:

Request the applicant to furnish additional information considered necessary for verifying any information in the application relating to means,

Request the applicant to appear personally to answer questions in connection with the application or regarding the assessment of the applicant's means.

**Key consideration for eligibility of Legal Aid include:**

a) The applicant has insufficient means to afford the services of an advocate on his or her own account;

b) The applicant has reasonable grounds for initiating, carrying on, or defending the matter for which he or she applies for legal aid or the matter is of public interest,

c) If it is a civil matter, there is reasonable prospect of success or recovery in the matter and;

d) The applicant is in need of or would benefit from the legal aid;

Any other sufficient reason.

Guidance on assessing the means and merit of person and case respectively

Means

Due consideration shall be had to

Dwelling house of the applicant

Beds and clothing of the applicant

Furniture and household utensils of the applicant

Tools and implements necessarily used by the applicant in trade or occupation.

In case all parties to a matter apply for legal aid (civil matters), the legal aid service provider shall grant legal aid to the 1st of the parties to apply. In case two applicants for legal aid are parties to a dispute, a provider may with their consent mediate the dispute. When the mediation fails, the provider shall refer the parties to any other provider and shall disqualify himself or herself from representing either of the parties in respect of that dispMerits

The merit test looks at a number of issues including whether Legal Aid considers that the applicant's matter has reasonable prospects of success. The law/procedures setting out the requirements that need to be met in criminal, family or civil law matters are important in this matter. Legal Aid provider must also consider in some cases whether the matter meets the relevant merit test. The merit test looks at a number of issues including whether Legal Aid providers considers that the applicant's matter has reasonable prospects of success. The reasonable prospects of success test is met if, on the information, evidence and material provided, it appears that the proposed action, application, defence or response for which legal aid is sought is more likely than not to succeed.

Termination of services to an applicant

Lack of cooperation from the client

Client fails to appear when called upon

Client gives false information to the provider

Where client takes the matter to another provider

Client ceases to be an indigent

For other sufficient reason

Matters to be given priority

A legal aid service provider must always look out for certain categories of persons and cases for prioritization when considering an application for legal aid. Theses include:

Issues of the elderly, widows, orphans, children, person with disabilities, internally displaced persons, persons living with HIV/AIDS, prisoners on remand or refugees;

Land disputes, inheritance and succession disputes, domestic violence, child maintenance and custody, torture and other forms of human rights abuse.

## FUNCTIONS OF THE LEGAL PERSONNEL

- assist applicants who cannot read or write fill application forms for legal aid,
- determine whether the application is eligible for legal aid
- assess the merits and prospects of success of the case if a matter is to be forwarded to court,
- provide information to the client on the regulation governing legal aid including issues relating to contributions by the client towards costs of legal aid;
- provide legal aid to clients
- represent clients in court if one is qualified to appear in court,
- if unable to represent the client for some reason, refer the matter to an advocate;
- assist the clients in negotiation or mediation of conflicts
- sensitize, educate and create awareness.

## Offenses

Operating without a license from Law Council

Operating while a license is suspended

Obstructs an inspecting office from accessing the legal aid provider's premises

Obstructs an inspecting officer from carrying out his or her duties

Important to note! The Advocates (Professional Conduct) Regulations apply to an advocate providing legal aid as they apply to an advocate in private legal practice.

## Reception

This concerns how we do receive (welcome) and attend to a client's problem. It may be at the time of first arrival or even subsequent visits. It involves the following pertinent objectives and strategy;

Focus on the client's service requirements not just the legal product.

Managing a client's expectations. These may be low or high; some may be achievable or unachievable.

Keep the client involved and in control. This helps him or her avoid losing track.

Make every client feel they are your most important client.

Develop good team and individual communication skills and habits.

A complete client care strategy should involve a mixture of the following;

Policies, processes, procedures and checklists to facilitate effective client care.

A philosophy of continuous improvement, using client feedback.

Client care is important in legal practice for a number of reasons and can bring the following benefits;

Fewer claims and complaints.

Increased client retention.

Client development and cross- selling services from different departments or practice areas.

Increased referrals.

Differentiation and positive brand appeal.

Higher recovery rates (percentage of recorded time or work in progress actually recovered in fees).

Potential for higher rates/fees.

Improved practice morale and staff/partner retention.

## COMMUNICATION

This is the ability to effectively pass over information from an advocate to a client for progress his or her instructions.

The American Bar Association, 2009 developed right effective communication tips for young lawyers which I find persuasive to even senior lawyers. They include;

Be courteous to all: Do not communicate to clients discriminatorily in terms of their financial status but do so fairly to all.

Less is more: When you choose to communicate through writing, fewer pages communicate better. If pages are voluminous, a client losses interest.

Speak the appropriate language: Whereas lawyers may want to speak the official language, effective communication is when you speak a language a client understands better.

Adopt the good communication habits of your boss or successful senior associate. This is more relevant if it has worked effectively in the law firm/work place.

Clarify instructions: Verbosity and vagueness of your instructions may communicate in opposite direction. Avoid it.

Confirm in writing important agreements with opposing counsel and your client. This helps to put your record and position on a matter expressly clear.

Keep a hard copy of all important communication and documents. This is for tracking purposes well aware that soft copies can easily be lost.

Make sure that your assistant knows where you are all times during the business day. This is for purposes of loyalty, transparency, accountability and professionalism

## INTERVIEWING

Clients want to deal with someone they trust and like, so it is important for one to conduct the initial interview to the best of his or her ability.

Interviewing clients is a skill that improves practice and experience. It majorly has three stages of action that is before the interviews, during the interviews and after the interview.

Before the interview

Plan the interview. Some knowledge of the background and issues will help. You need to ask a client a brief summary before the interview.

You need to appear professional to your client. An unkempt appearance or any untidy meeting room is not only destructing but can also give your client the impression that you are not very professional or organised.

Be practical at any place of the meeting interview.

During the interview

Your client might be anxious, particularly if they are not familiar with the legal system. Introduce yourself with a smile so they feel welcome. Build rapport by engaging in small talk.

Once every one is seated and settled, let your client know the structure of interview and that you will be making notes so they know what to expect.

Invite them to tell you their story or concerns, preferably in chronological order. Often they just need a listening ear. Steer the interview by listening actively. Focus on specific areas that are relevant. Your client does not necessarily know what is relevant but you do.

Avoid legal jargon, be respectful and maintain a balanced amount of eye contact. You should appear calm and collected, even if you feel stressed or nervous (particularly if it is your first client interview).

Sum up the interview and outline steps going forward. Depending on your technical skills and, experience you might be able to give a preliminary view. But if in doubt, explain to your client before you can form a view. Whatever you do, do not give legal advice without proper consideration, this is negligent.

Inform the client the court fees involved if he or she is to meet them. Leave time for questions.

Finally, walk your client to the exit and thank him or her or them. Remember not to take things personally, if you have a rude, pushing or condescending client, it is important to stay calm and remain professional. Also consider reporting it to your supervisor (if any).

After the interview

Make a detailed file note while it is fresh in your mind.

Diarise any follow up deadlines.

Discuss any concerns with your colleagues/supervisor.

Once approved by your supervisor, sent your advice (and any costs) disclosure documents) to your client. Call them to let them know you have sent it.

## Counseling

Counseling is the process in which lawyers help clients reach decisions by providing them with legal opinions. Since counseling accounts for a major part of the lawyers' business, in order to achieve successful counseling, a lawyer should carefully arrange the entire counseling process by strictly following a plan and steps of counseling. Generally speaking, counseling is the first substantial lawyering task after interview with clients and determine what the next steps is, mediation, negotiation, arbitration or litigation, all depending on clients' decision made in the counseling, face to face counseling and on line counseling.

There are various practical skills for legal counseling and these include inter alia; skillful use of language (the art of use of words and the art of silence), receiving, inquiring and advising clients, listening, speaking, reading and writing or recording promptly.

Counseling therefore requires one to be prepared, stay cool/calm, show empathy, watch and respond to the client's emotional reactions etc.

## Revision Questions

1. Explain the meaning and purpose of Development planning, Projects Preparation and Implementation.
2. Discuss the objectives of executing a project.
3. Discuss the critical steps to be undertaken when developing and opening a legal aid office.
4. Discuss the key objectives of Development planning, Projects Preparation and Implementation.
5. With reference to specific examples, discuss the various aspects of legal aid or Probono office management. .

## References/Further Readings

Belbin, R.M (1996). Management Teams: Why They Succeed or Fail, Oxford: Butterworth-Heinemann.

Morris, P.W.G. (1997). The Management of Projects, London: Thomas Telford ((New Paperback Edition).

Interviewing and Advise Guide

Introduction:

Problem identification

Explains structure of interview (Preliminary costs i.e. fixed fee/free first interview etc.).

Obtains client details (name, address etc.).

Allows client to explain problem, concerns, goals.

Confirms solicitor's understanding of problem, concerns, goals.

History: Client's overview

Encourages client to relate history of problem and uses appropriate questions to clarify. Avoids detailed questions at this stage.

Interacts with client in an appropriate way, maintaining engagement and interest.

Appear to take diligent and orderly notes.

Briefly checks/clarifies understanding of facts and importantly the client's concerns before questioning.

## Questioning

Identifies relevant topics and questions client appropriately, clearly, thoroughly and systematically.

Identifies missing facts, and what further facts required (eg missing documents)

## Advising

Explains client's legal rights and applies law to the client's problem.

Outlines feasible legal/non-legal options and works with client to evaluate advantages/disadvantages of each.

Encourages client to make decision (making recommendation if appropriate).

Avoids asking material questions after advising has commenced. In giving advice, does not breach any professional conduct rules.

## Concluding

a) Explains ongoing fees/disbursements.

b) Explains firm's complaints handling procedure and who will be dealing with the matter and supervising it (if appropriate).

c) Confirms plan which specifies:

i) action

ii) time frames

iii) solicitor and client tasks.

With reference to any issues arising from questioning stage.

Presentation

Introduces and concludes interview appropriately. Smooth transition between stages.

Establishes and maintains rapport with client.

Demonstrates effective listening skills.

Uses appropriate language and avoids legal jargon.

Demonstrates courteous and professional attitude.

## ALTERNATIVE DISPUTE RESOLUTION.

Alternative Dispute Resolution is a structured negotiation process whereby the parties to a dispute themselves negotiate their own settlement with the help of an independent intermediary who is neutral and trained in the techniques of Alternative Dispute Resolution

Benefits of ADR

a) Saves time because dispute resolution can be done at any time a case is filed in court, even during appeals.

b) It saves money because it is cost effective.

c) Offers confidentiality given the fact that it is strictly confidential and nothing that takes place at mediation is admissible in a court of law should ADR fail to settle the dispute and the parties litigate in court.

d) It is also user friendly and offers more control to disputants to reach an amicable settlement by themselves.

e) It allows flexibility given the fact that the process is not bogged down by strict compliance with court rules. The rules applied are simple, logical, and equitable.

f) It provides a final solution to disputes given the fact that when parties reach an agreement, it becomes a contract that is binding on them, like any other contract public.

g) It also fosters peace and harmony by generating options,

h) saving relationships and providing undoubtedly satisfactory results to disputes.

i) It effectively supplements courtroom litigation by reducing the piling up of cases in court which would otherwise create backlogs.

j) It helps decongest prisons, by the use of mediation in transformative justice.

k) It helps lawyers to have their cases disposed of faster hence ensuring their regular or certain income.

l) ADR provides a fertile ground for selecting interested lawyers for appointment to the bench.

m) Alternative Dispute Resolution helps avoid bad publicity associated with court room litigation by which litigants wash their dirty linen in public.

## LEGISLATIVE PROVISIONS ON ADR IN UGANDA

A) The Judicature Act, Cap. 13

This Act provides for Alternative Dispute Resolution under Courts direction. Sections 26 to 32 of the Act provide for situations when matters can be referred to a special referee or arbitrator to handle where such official has been granted by High Court powers to inquire and report on any cause or matter other than a criminal proceeding.

These provisions read together with section 41 of the Act, which stipulates for the functions of the Rules Committee give the origin of the Judicature (Commercial Court Division) (Mediation) Rules which have paved way to the Judicature (Mediation) Rules S.I 10 of 2013 introduced mandatory mediation for all civil matters filed in the High Court and Subordinate Courts.

B) The Civil Procedure Act (Cap. 71) and the Civil Procedure Rules S. I71-1

Order XII of the Civil Procedure Rules provides for Scheduling Conference and Alternative Dispute Resolution. Rule 1 (1) thereof provides The Court shall hold a scheduling Conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any form of settlement.

This provision is meant to help the parties consider the option of settling the matter before a Court hearing can commence.

Order XII rule 2 further states Courts emphasis on Alternative Dispute Resolution. It provides:

(1) Where the parties do not reach an agreement under rule 1, the Court may, if it is of the view that the case has a good potential for settlement, order alternative dispute resolution before a member of the bar or the bench, named by the Court.

Alternative dispute resolution shall be completed within twenty-one (21) days after the date of the order. This time may be extended for a period not exceeding15 days on application to the Court, showing sufficient reasons for the extension.

The Chief Justice may issue directions for the better carrying into affective alternative dispute resolution.

Order XLVII (47) further provides for Arbitration under Order of Court, also referred to as Court-annexed Arbitration. An arbitrator shall be appointed in such manner as may be agreed upon between the parties.

C) The Arbitration and Conciliation Act (Cap. 4)

This Act regulates the operation of arbitration and conciliation procedures, as well as the behavior of the arbitrator or conciliator in the conduct of such procedure.

This Act incorporates the provisions in the 1985 United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration as well as the UNICITRAL Arbitration Rules 1976 and the UNCITRAL Conciliation Rules 1976.

The Act also provides for the Centre for Arbitration and Dispute Resolution (CADER) as a Statutory Institutional alternative dispute resolution.

Sections 88 and 89 of the Land Act (Cap 227) provide for Customary Dispute Settlement and mediation as well as the functions of the mediator.

D) Magistrate Courts Act Cap 6

Section 160 of this Act provides for reconciliation in criminal matters.

Its important to note that ADR is applicable in both civil and criminal matters.

## NEGOTIATION & MEDIATION

Negotiation - is a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter.

b)Mediation is a method of non-binding dispute resolution mechanism involving a neutral third party who tries to help the disputing parties reach agreeable solution.

## ARBITRATION

Arbitration means a process by which a tribunal other than a court decides a dispute between two or more parties under authority granted by the parties under an arbitration agreement. There might be also compulsory arbitration-

without the consent of disputing parties.

Cases eligible for Alternative Dispute Resolution

a) Where both parties are committed to reaching a settlement.

b) Where the parties are desirous of having acontinuing relationship.

c) Where the conflict between the parties is not complicated and can be resolved through the processes of Alternative Dispute

d) Resolution.

e) Where the parties have got equal bargaining powers.

## Cases not eligible for Alternative Dispute Resolution

a) Where a legal, commercial or other precedent needs to be set.

b) Where a summary judgment can be given fast and efficiently.

c) Where parties require an injunctive or other protective relief.

d) Where publicity is actively sought.

e) Where the parties are not interested in settlement.

f) Where the offence committed cannot be resolved through

g) Alternative Dispute Resolution legally

## Roles of a Mediator/Arbitrator/conciliator

a) The mediator or neutral third party helps in facilitating communication among the parties to a dispute to assist them reach a mutually acceptable resolution.

b) The mediator helps in managing and controlling disputants emotions.

c) The mediator or neutral third party guides the disputants through the mediation steps.

d) The mediator drafts the agreement which contains the resolutions of the parties in dispute.

## Skills required for Successful Alternative Dispute Resolution

a) Communication skills: active listening

b) Show interest in what the other party has to say (affirmation/encouraging).

c) Show understanding to the way they feel, their positions and underlying issues, hidden agendas, demands, and priorities. It is important to note that showing understanding does not mean that you agree with what was said.

d) Acknowledge that people like to be listened to, and when you listen, you create a positive atmosphere.

e) Hope it may clarify many issues; make you understand the other sides point of view, and show respect to the other partys needs, hopes, and fears.

f) Hope it may help to improve the relationship, and break the cycle of arguments.

g) Effective negotiation mediation is also making sure that whatever you said was understood in the way that you meant it to be. You have to speak clearly, phrase your sentences carefully, make sure that the other party listens to you, and check with the other party to make sure that they understood you correctly.

h) Send messages that are comprehensive, and explain where you are coming from, your needs, hopes, and fears. While talking you have to assess if the other party is listening, and how they hear/receive your message.

## SKILLS REQUIRED

a) Re-framing positions as interests

Re-framing is a way of giving feedback, and showing that you listened and understood what the other party said. It is restating and capturing the essence of what the other party said. One removes the negative tones, and translates the statements of positions into statements of interests and needs.

When we start negotiating we have to identify the issues at the table. The issues have to be defined in a neutral and acceptable way to all, and not include any suggestions of the outcome, or judgment of any kind.

Typically, parties start the negotiation process by stating their position, and their conclusion of what to do based on it. If the one party opens the negotiation in this manner, that is, by stating a position, it is very helpful to re-frame it as an interest. It helps the parties to identify their interests, and move from position to interests.

b) Understanding and perception

The negotiation/mediation process is influenced by our perceptions and our interpretation of reality. Perceptions are influenced by personal experience, emotional state of mind, and cultural background.

The negotiator and mediator have to keep eye contact, listen carefully, and make sure that they understood exactly what the other party said.

c) Open questions

Questions are an essential skill for the negotiator and mediator. When asking a closed question, we get yes or no for an answer. Often these types of questions are also leading questions Would you agree that . . . or Didnt you think that it was unfair . . .

The closed questions, and the leading ones, do not provide us with the essential information we need at the negotiating table and they tend to close down the discussion.

Do you want to buy this property? will provide us only with a yesno answer, which does not include all the important information regarding the intention/ability of the buyer.

### SEPARATE THE PEOPLE FROM THE PROBLEM

It is important to understand the other partys point of view, needs, interests, and concerns. One does not have to agree with the other point of view; just understand that it is legitimate to have a different point of view, needs, and concerns.

One has to separate the people from the problem. Removing the person usually does not remove or solve the problem. However, trying to separate the person from the problem is not always practicable. There are societies in which personal relationships have a very high value, and separating the two is difficult.

## NEGOTIATION

Definition

It is a process by which people try to reach an agreement or settlement where there are differences either real or perceived. This encompasses any exchange of information made by two or more persons in search of an agreement to do (or refrain from doing) something. It is also a process of working out an agreement by direct communication between the parties. Negotiation occurs any time lawyers meet to discuss any aspects of an ongoing or proposed transaction or dispute.

It occurs when suggestions, proposals, solutions, offers, counter-offers, concessions, positions or arguments are shared. Negotiations can be interest based for example divide the pie or competitive, winner takes it all.

Negotiation can include:

Discussion and questioning

Compromise or concessions

Shared compatible (common) and conflicting interests

Exchange of information

Persuasion by argument, etc.

Negotiation can range from simple transactions e.g. bargaining over price of an item between buyer and seller To more complex or sophisticated scenarios e.g.

Separation agreements, leases and international

negotiations.

It covers all spheres of life; ordinary life (e.g. family), Commerce/business, politics etc. e.g. Israel/Palestine conflict.

Stages of Negotiation

•Preparation

The secret of effective negotiation is to prepare, prepare and prepare. This makes it no different from any other aspect of lawyering. Preparation and planning require attention to both the process of negotiation and the content that is being negotiated. Focusing on the process of negotiation requires assessing the bargaining situation to determine whether to use a problem solving or adversarial strategy. One must assess the number and nature of issues involved and the relationship factors among clients and negotiators.

Preparing for the content of a negotiation requires careful consideration of the clients goals and what is realistically possible in the negotiation and through alternative to a bargained agreement. It requires careful attention as to how information should be gotten from, given to and guarded from other persons.

Information: giving, getting, guarding

Information exchange in negotiation typically occurs in one or two ways;

Data may be given by negotiators unilaterally or disclosed in response to request made by participants.

Giving information- negotiators inevitably involve giving information about anchoring points which begin exchange and mark movements.

Getting information- one of the most effective ways to get information during a negotiation is the most obvious that is asking questions especially detailed ones may depend on the culture and context, invoke an important

norm of reciprocity in information sharing. Listening is another way of getting information because effective negotiators typically listen far more than they speak.

Guarding information- many negotiations present situation where some information needs to be protected from disclosure.

**The negotiation agenda**

The agenda has to be developed and this describes how issues in the negotiations are defined and sequenced. An agenda may be informal where negotiators simply start talking or more formal where negotiators agree sometimes in wring how the issues will be defined and sequenced.

**Proposals and offers**

Anchoring points begin exchanges and mark movement.

In problem solving strategy, these are described as proposals, options or solutions regarding how situations can be resolved in ways that meet the needs of all participants.

In adversarial strategy they are usually called offers, positions,

counter offers or concession.

**Searching for agreement**

Although the entire negotiation process is a search for agreement, several tasks either occur or intensify as lawyers move from initial proposal or offers to agreement. Adversarial strategy involves narrowing differences between initial positions until an acceptable compromise is reached. Problem solving in contrast, creates a process of elaborating, clarifying and modifying proposals until solutions are crafted that satisfy participants needs.

The Role of a Lawyer in Negotiations

• Lawyer's role (on team) ● He acts as a draftsman.

Provides Legal advice

Generally, not leader (This is a regular misconception in negotiations where lawyers want to take a lead)

MEDIATION

• Mediation is a voluntary process in which a neutral third person to the dispute (the mediator) helps with communication and

promotes reconciliation between the parties which will allow them to reach a mutually acceptable agreement. It is a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually

acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.

Mediation often is the next step after negotiation if bilateral negotiation proves unsuccessful. Mediation is voluntary, and any party or the mediator may terminate at any time.

WHEN AND HOW MEDIATION IS USED

When parties are unable to negotiate a resolution to their dispute by themselves, they may seek the assistance of a mediator who will help them explore ways of resolving their differences. They may choose to go to mediation with or without a lawyer depending upon the type of problem they have.

**WHEN AND HOW**

They may always consult with an attorney prior to finalizing an agreement to be sure that they have made fully informed decisions and that all their rights are protected. Sometimes mediators will suggest that they do this. Mediation can be used in most conflicts ranging from disputes between consumers and merchants, landlords and tenants, employers and employees, family members in such areas as divorce, child custody and visitation rights, eldercare and probate, as well as simple or complex business disputes or personal injury matters. Mediation can also be used at any stage of the conflict such as facilitating settlements of a pending lawsuit.

**Role of the Mediator**

The mediator manages the process and tries to get the parties to talk to each other.

To aid in the discussions, the mediator may ask questions to gain an understanding of the issues, help the parties understand the other person's point of view, discuss weaknesses in the arguments of the parties, or make suggestions to solve the conflict.

To be impartial and keep in confidence information received.

**Role of a mediator**

The mediator will not act as such in a dispute in which he or she has at any time acted as a professional adviser for any party, nor in respect of which he or she is in possession of any further information which was obtained by the mediator (or any member of his or her firm) as a result of having so acted or advised; nor having once acted as a mediator will he or she act for any party individually in relation to the subject matter of the mediation.

**Role of a mediator**

The mediator may meet the parties individually and/or together and may assist the parties for example, by identifying areas of agreement, narrowing and clarifying areas of disagreement, and defining the issues; helping the parties to examine the issues and their available courses of action; establishing and examining alternative

options for resolving any disagreement; considering the applicability of specialized management, legal, accounting, technical or other expertise and generally facilitating discussion and negotiation; managing the process and helping them to try to resolve their differences.

PRINCIPLES OF MEDIATION

**I. Self-Determination**

Mediation respects, values and encourages the participants ability to make their own decisions regarding what process to use, and whether and on what terms, to resolve their disputes.

**II. Informed Consent**

To fully support self-determination, mediation respects, values and encourages participants to develop and exercise informed consent throughout the mediation process.

**III Impartiality**

The duty of impartiality of the mediator is inherent in the mediation process. If a mediator believes that any party is abusing the mediation process, or that power imbalances are too substantial for the mediation to continue effectively, or that the parties are proposing a result which appears to be so unfair that it would be a manifest miscarriage of justice, then the mediator will inform the parties accordingly, and may terminate the mediation.

**IV Confidentiality and privilege**

a. The mediator will conduct the mediation on a confidential basis, and will not voluntarily disclose information obtained through the mediation process except to the extent that such matter is already public or with the consent of the parties. If, however the mediator considers from information received in the mediation that the life or safety of any person is or may be at serious risk, the duty of confidentiality shall not apply; and in such event the mediator shall try to agree with the person furnishing such information as to how disclosure shall be made.

**V. Process and Substantive Competence**

Mediators and participants are encouraged to discuss the participants expectations surrounding the desired process and the substantive knowledge, skills, and abilities of the mediator. Mediators are encouraged to fully and accurately represent their knowledge, skills, abilities or limitations, in order to satisfy the participant reasonable expectations.

**VI. Good Faith Participation**

Participants can improve the mediation process and probability of success when they participate in good faith. Mediators are encouraged to exercise independent judgment and withdraw if, in their judgment, a participants lack of good faith meaningfully affects the integrity and fundamental fairness of the process.

## PROCEDURE FOR MEDIATION

Step 1- introduction or intakes

The mediator congratulates the parties for having opted for mediation instead of going to court for litigation or attempting to solve the problem using unlawful means which would result into more problems. This way the mediator makes the parties feel at ease and explains the ground rules for the mediation process.

Step 2- Telling the story or information gathering

It is at this stage that each party is given the opportunity to tell their side of the story. The party bringing the dispute usually tells his or her story first. No interruptions are allowed while each party is telling their story.

Step 3- Identifying facts and issues

The mediator tries to identify agreed facts and issues between the parties and also seeks to identify the needs of each party.

This is done by actively listening to each side of the story and confirming with each side that these are the fact and issues as each party understands them.

Sometimes the mediator will ask each party to summarize the other partys perspective of the problem in order to check for understanding.

Step 4-Identifying alternative solutions

At this stage, the parties think of possible solutions to the problem. The mediator makes a list of the suggested solutions and then asks each party to explain his or her feelings about each possible solution.

Step 5- revising and discussing solutions

Based on the feeling of the parties as identified in step 4, the mediator revises possible solutions and attempts to identify a solution that both parties can agree to.

Step 6-Reaching an agreement

Out of the solutions suggested by the parties or combination of a number of them with some possible amendments, the mediator helps the parties arrive at an agreement that is acceptable to all the parties.

Step 7-revisng and drafting the final agreement

The mediator helps the parties re-examine and consolidate the agreement they have reached or all their different issues, then memorizes the final agreement for review by the parties and their lawyers.

## PROS OF MEDIATION

The mediator is neutral and objective.

The disputes will be able to listen to each other and see the problem as viewed by the other party.

a) The disputants personally participate in trying to solve the problem.

b) The disputants will most likely remain on speaking terms.

c) The disputants will be able to view the solution as results of their joint efforts to work for an amicable solution and not as something imposed from outside.

d) The process may be less expensive and less time- consuming than going to court.

## CONS OF MEDIATION

The parties must work towards getting a resolution that satisfies both of them. This can be difficult and time consuming.

The parties must be able to sit together at the same table and discuss the problem. This can be very difficult in some situations and time consuming.

The parties may feel that the process is not controlled enough and thus their points not being heard and understood.

The parties may worry about the agreement reached.

One party may be more verbal and aggressive making the other party feel that she /he is being dominated by the other party.

## THE ROLE OF A LAWYER IN MEDIATION

A lawyers role in mediation is to assist clients, provide practical and legal advice on the process and on issues raised and offers made, and to assist in drafting terms and conditions of settlement as agreed.

A lawyers role will vary greatly depending on the nature of the dispute and the mediation process. It may range from merely advising the client before the mediation, to representing the client during the mediation and undertaking all communications on behalf of the client.

## ETHICAL ISSUES

1. Confidentiality

As with all dealings with clients, anything that is said or done in a mediation is strictly confidential. In addition, subject to the requirements of the law and any relevant Rules of Court, a lawyer must maintain the confidentiality required by the parties and by any mediation agreement.

2. Good faith

Lawyers and clients should act, at all times, in good faith to attempt to achieve settlement of the dispute.

## WHEN TO MEDIATE

Timing is an important factor in establishing a framework conducive to settlement. There is no conclusive rule as to whether, or when, a case is suitable for mediation. Various factors should be considered, including the nature of the dispute and the mindsets of the parties.

## SELECTING A MEDIATOR

Choosing the right mediator will enhance clients settlement prospects in the mediation.

### Preparation for mediation

Preparation for mediation is as important as preparing for trial. A lawyer should look beyond the legal issues and consider the dispute in a broader, practical and commercial context.

### Preparing your client

A lawyers primary task is to help prepare clients for a mediation by:

Undertaking a risk analysis and linking risks to the clients interests;

Explaining the nature of mediation;

Identifying interests; and

Developing strategies to achieve final outcomes.

Preparation for mediation

Conference with the mediator

Pre-mediation conferences convened by the mediator are a good opportunity to establish a relationship with the mediator and arrange any practical matters relevant to convening the mediation.

## AT THE MEDIATION

Mediation is not an adversarial process to determine who is right and who is wrong. Mediation should be approached from an interests perspective as a problem-solving exercise. A lawyers role is to help clients to best present their case and assist clients and the mediator by giving practical and legal advice and support.

Skills

The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.

Offers and settlement

A primary aspect of a lawyers role is to help formulate offers, assess the practicality/reasonableness of offers made by other parties and assist in drafting settlement terms and conditions.

## POST-MEDIATION

Generally, lawyers should report on mediations in writing to clients. Lawyers may also need to address with clients (before the mediation) any reporting obligations the mediator may have to courts,government departments or other organizations.

## CONCILIATION

Conciliation in Uganda is also provided for under The Arbitration and Conciliation Act and can be defined as a process in which an independent third party or neutral person assists the parties to settle their difference but may, if necessary, deliver his or her opinion to the merits of the dispute. Conciliation is a less frequently used form of Alternative Dispute Resolution, and is often used interchangeably and indiscriminately with mediation. The Conciliator's role is to guide the parties to a settlement

Section 4 of the Arbitration and Conciliation Act further provides that a conciliator may be required to make a recommendation as to how the dispute should be settled if an agreement cannot be reached by the parties during the process. The parties must however decide in advance whether they will be bound by the Conciliator's recommendations for settlement. The parties generally share equally in the cost of the conciliation.

I. Independence and impartiality

The conciliator should be independent and impartial. He should assist the parties in an independent and impartial manner while he is attempting to reach an amicable settlement of their dispute.

II. Fairness and justice

The conciliator should be guided by the principles of fairness and justice. He should take into consideration, among other things, the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous business practices between the parties.

III. Confidentiality

The conciliator and the parties are duly bound to keep confidential all matters relating to conciliation proceedings. Similarly, when a party gives information to the conciliator on the condition that it be kept confidential, the conciliator should not disclose that information to the other party.

IV. Disclosure of the information

When the conciliator receives any information about any fact relating to the dispute from a party, he should disclose the substance of that information to the other party. The purpose of this provision is to enable the other party to present an explanation which he might consider appropriate.

V. Co-operation of the parties with Conciliator.

The parties should in good faith cooperate with the conciliator. They should submit the written materials, provide evidence and attend meetings when the conciliator requests them for this purpose.

## SMALL CLAIMS PROCEDURE

What Is a Small Claim?

Under Rule 3 of The Judicature (Small Claims Procedure) Rules 2011, a small claim means, a matter whose subject matter does not exceed ten million shillings. It has to be civil or commercial in nature. Under Rule 5, a small claim does not

include:

Family disputes relating to the management of an estate;

A claim against the government;

A suit for defamation, malicious prosecution, wrongful imprisonment, wrongful arrest or seduction;

A petition for divorce, nullification of marriage or separation of spouses;

A case involving the validity of a Will;

A claim in which specific performance is sought without an alternative claim for payment of damages, except in the case of a claim for rendering an account or transferring movable property and disputes arising out of tenancy agreements not exceeding ten million shillings in value;

Contracts of service and Contracts for service.

## THE LEGAL FRAMEWORK

The law governing the Small Claims Procedure (SCP) flows from The Constitution of the Republic of Uganda, The Judicature Act and The Judicature (Small Claims Procedure) Rules No.25 of 2011, hereinafter referred to as the Rules. The Rules were made by the Rules Committee on the 5th May 2011 in exercise of the powers conferred upon it under S. 41 of the Judicature Act. The Rules came into force on 30th May 2011.

## PARTIES TO A SMALL CLAIM

Under Rule 8, only a natural person may institute an action in a SCC. A body corporate may only become a party to an action as a defendant. It follows that when a body corporate is sued, it has a right to counterclaim under Rule 13 (b) & (c). Under Rule 5(2)(b), the Government cannot be sued in the SCC.

## INSTITUTION OF A SMALL CLAIM

The SCP is an option and it is not mandatory for a person to institute his/her claim in the SCC. Once a claimant opts to file in the SCC, the claim has to be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arose. In case of a rental dispute or claim, the claim shall be instituted in a Court within the local limits of whose jurisdiction the property is situated or where the defendant resides (Rule 9).

The SCC shall have a separate Registry at the Court and a separate case register. The Rules have also made provision for Court forms, and parties will be assisted by the Court Clerks to simply fill in the forms during the filing process.

Before instituting a small claim, the claimant has to give a notice of demand to the intended defendant requesting him/her to satisfy the claim within 14 days of receipt of the notice (Rule 10). The form of the notice is specified in Schedule 1 to the Rules. If payment is made within 14 days, that will end the matter.

If payment is not made after the 14 days, the claimant may then file his/her claim by way of a claim form specified in Schedule2 to the Rules (Rule 11). The claimant has to attach to the claim a copy of the notice of demand, the affidavit of service of the notice, copies of documents supporting the claim, and give any other information relevant for the speedy disposal of the claim.

The Judicial Officer shall then sign the summons specified in Schedule 4 to the Rules and the documents shall be served upon the defendant either by the claimant personally or by a designated process server who shall within 7 days file an affidavit of service specified in Schedule 3 to the Rules

Upon receipt of the summons, the defendant may satisfy the claim whereby the claimant will give him/her a receipt or written acknowledgement and also inform the Court within 7 days of the satisfaction of the claim. That will then end the matter. If the defendant disputes the claim, he/she will file a Written Statement of Defence (WSD), with a counterclaim where he/she has one. A form is provided for in Schedule 5 of the Rules.

Under Rule 17, where the defendant does not respond to the summons, upon proof of service, the Court shall enter judgment for the claimant. Where the defendant has filed a defense and pleadings are closed, the Court will fix a hearing date and have a notice served upon the parties.

## REPRESENTATION IN A SMALL CLAIMS COURT

Rule 8(2) & (3) provides that a person to an action in a SCC shall appear in person and shall not be represented by an advocate during the proceedings. A body corporate brought as a defendant may appear before the Court by a representative not being an advocate.

The role of an advocate therefore is to advise his or her client on the option of using the SCC as an alternative to litigation because of the amount of money involved and speed of resolution in that court. This is an opt-in

procedure and so a debt of UGX. shs 10,000,000/= and below can still be filed in normal Court but it would lose out on the advantages of the SCC.

## ALTERNATIVE DISPUTE RESOLUTION (ADR) IN A SMALL CLAIM

The SCP has room for ADR. Under Rule 22, within 14 days before the hearing of the case, a Judicial Officer shall in any appropriate case, refer the parties to mediation, arbitration or other forms of ADR. Where the parties reach an agreement, the Judicial Officer shall register a consent judgment. Where the parties fail to settle the matter through ADR, the matter will be heard by the Judicial Officer on the date fixed for hearing.

On the date of hearing, the parties shall appear with all their relevant documents, exhibits, witnesses if any, and proof of service upon the opposite party. At the hearing, the Judicial Officer shall request the claimant on oath to state the facts of his/her claim and submit any document or exhibit. The Judicial Officer may then ask the claimant any questions necessary for the proper determination of the case.

The Judicial Officer may also allow the defendant to ask the claimant or his/her witnesses any questions. The Rules however do not permit cross examination. Any questions permitted by the Judicial Officer are for the purpose of facilitating the inquiry into the parties claim and/or defense.

After the Judicial Officer has heard the Claimants case on oath, he/she will then ask the defendant to respond on oath to the claim and the defendant may also be asked questions by the Judicial Officer or by the Claimant upon permission of the Judicial Officer.

A Judicial Officer may on oath allow a witness to give evidence for any of the parties as may be necessary for the determination of the case. Only one witness shall be allowed in the Court at the time of giving evidence but a witness who has already testified, may attend the proceedings.

Under Rule 26, if the Court is of the opinion that the case contains complex questions of law or fact which cannot be adjudicated upon under the SCP, the Judicial Officer shall suspend the proceedings and the claimant may file a fresh suit under other procedures provided for by the law.

The Judicial Officer is obliged to hear every case before it expeditiously and without undue regard to technical rules of evidence or procedure but shall be guided by the principles of fairness, impartiality and should adhere to the rules of natural justice. However, under Rule 26 a Judicial officer may reach an opinion that a case contains complex questions of law or fact which cannot be adjudicated upon as a Small Claim (even though the monetary jurisdiction is correct) in which case he/she will suspend the proceedings and the claimant will have the right to institute a fresh action in another court with appropriate jurisdiction.

After hearing the case, the Judicial Officer shall make judgment either immediately or within 14 days after hearing the case (Rule 27). A format of the judgment is provided for in Schedule 7 to the Rules. A very brief judgment is envisaged and the Judicial Officer will only enumerate his/her reasons for the decision but will not indulge into detailed reasoning. The Judicial Officer shall then make out an Order in the form specified in Schedule 8 to the Rules.

The most interesting and valuable feature of the SCP is that a case can normally be heard and judgment delivered within one sitting. That is actually the norm and beauty of the Procedure wherever it is practiced. In South Africa and Zambia, hearing of a case up to delivery of judgment normally takes between 30 minutes and 1 hour. However, the duration taken will depend on the complexity of the case but most importantly on the experience and skill or tact of the presiding Judicial Officer.

### Challenge of Small Claims decisions

There is no provision for a formal appeal under the SCP. However, there are two methods to challenge a Judgment of a SCC.

1. Under Rule 30 by Review to the same court by an aggrieved party

2. By Revision by the High Court as Rule 4 (4) provides that The High Court shall have general powers of supervision over matters of small claims in magistrates courts

## SPECIAL GROUPS IN LEGAL AID/ PRO BONO PRACTICE

Legal, policy and institutional frameworks for promoting access to justice in Uganda

The concept of access to justice is fundamental as a mechanism for the possible reversal of some of the most harmful aspects of poverty, marginalization, and vulnerability and for inclusion in the post–2015 development agenda. In addition to the above, the concepts of poverty, marginalization and vulnerability are key factors in accessing the rights and welfare of citizens. The three concepts are useful for identifying those most in need of legal aid and access to justice. Briefly, the following meaning can be attached to these concepts.

Access to Justice is widely viewed as human rights in itself, and as a process of attaining human rights, thus an end to a means. Access to justice can be viewed as being two dimensional and intended to remove de facto and de jure barriers to obtaining effective remedies. One is the procedural aspect: access to courts, lawyers and law enforcement agencies- this is important for making the justice system more users friendly, effective and accessible. Substantive justice looks at the fairness of the legal system and procedures and laws in place, that is to say, access to just outcomes. These concepts can also be extended to informal or traditional systems of justice, which in many Ugandan societies' people resort to. There are various legal, policy and institutional frameworks that promote access to justice as will be discussed here-under.

## International Human Rights Framework

### The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is the earliest and most consensus building instrument of the United Nations. It is a standard setting document that highlights the importance of freedom from want and fear, combining civil and political rights in the same document and promoting the principle of human rights as indivisible, interrelated and inalienable. It recognizes the central role of rule of law as an outlet for those who are oppressed.

Article 7 of the Declaration recognizes that all are equal before the law and are entitled without any discrimination to equal protection of the law and all have right to an effective remedy by the competent national tribunals for any violation of legal or constitutional rights.

### International Covenant on Civil and Political Rights

Uganda has ratified the International Covenant on Civil and Political Rights. This Covenant sets out fundamental human rights, freedoms and guarantees that states have an obligation to respect, fulfill and protect under international law. Article 2 (2) requires states to fill gaps in legislative and other measures in protecting rights by adopting required laws or other measures to give effect to the rights recognized in the Covenant. This builds the case for substantive legal or de jure justice that recognizes the principles of fairness, equity and non-discrimination, including in the realm of access to justice.

Article 3 in its entirety looks at the procedural aspects of justice, focusing on the role of institutions in ensuring fair outcomes. It mandates effective remedies for persons whose rights or freedoms are violated. Lawful authorities within the legal system must adjudicate these rights, and meaningful remedies provided.

Article 26 of the Covenant provides that all persons are equal before the law and entitled to equal protection of the law, without discrimination based on any characteristics laid out therein. These include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Read in conjunction with Article 32 of the Constitution of Uganda, 1995, the argument can be made that groups that have been marginalized and disadvantaged are prime candidates for legal aid in order to facilitate their access to justice on an equal footing with others, to achieve the meaning of Article 26of the Convention.

The ICCPR also contains important due process guarantees during trial on criminal charges under for Article 14 (3) (d), including access to free legal representation. General Comment Number 32 of the UN Human Rights Committee makes the following critical pronouncement in this regard that the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.

While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.

For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant. Thus the United Nations standard setting entities encourage a more expansive interpretation of the provision of legal aid to other areas, to promote substantive and procedural justice.

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

Uganda is a state party to the International Covenant on Economic, Social and Cultural Rights but the instrument does not contain provisions on judicial remedies. However, current developments in international and regional jurisprudence reveal that economic and social rights are justiciable. In addition, the right to an effective remedy before a competent authority is required. In that regard, the UN Committee on Economic, Social and Cultural rights in General Comment number 9 pronounces itself thus that the right to an effective remedy need not be interpreted as always requiring a judicial remedy.

Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective.

An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

Further, in regard to justiciability, the UN Committee on Economic Social and cultural rights has this to say that the adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

Thus a reading of the international bill of human rights as analysed above is illustrative of the intentions of the drafters of the Bill of rights to promote all persons, particularly the vulnerable, from denial of their rights based on technical, procedural and substantive barriers. It is this framework that Uganda is bound to observe in its addressing poverty, vulnerability and access to justice at the domestic level.

**UN Convention on the Rights of the Child**

Uganda has signed, ratified and domesticated the Convention on the Rights of the Child(CRC). Uganda's Children Act consolidates several of the standards of the CRC. The CRC outlines the rights that children are to enjoy without discrimination, recognizing them as substantive rights holders.

Under Art 40 (2) of the CRC, children have protections that are quite significant in ensuring that as a vulnerable group, they have access to justice. It provides that a child is to be informed promptly and directly of the charges against him or her, and, if appropriate through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence. This provision automatically bestows upon a child the right to legal aid in criminal cases. The Children Act Cap 59 of Uganda was amended in 2016 and the amendments include this progressive provision. The amendments further provide that children shall receive legal aid in all other matters (civil and administrative proceedings) in addition to criminal matters. The Children Act 1996 as amended in 2016 strengthens the rights a child is entitled to and protective services.

Further, the speediness of the trial is emphasized in Article 40 (2) (iii) which requires states to have such matters without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians. The act as amended is in tandem with the CRC and is emphatic on expeditious handling of Children's cases and provides for the a timeframe within to handle children related cases . (Three months for Capital Offences and forty five days for non Capital offences). Further, the CRC and the Children Act emphasis dealing with a children without recourse to the formal justice system as much as possible (diversion). The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime call for support to child victims and witnesses that transcends mere legal processes. The Guidelines encourage provision of not only legal services that include advice or representation, but also health, psychological, social and other relevant services.

This speaks to the procedural aspects of access to justice for children, which is in their best interests given the potentially harmful impact of their interaction with the criminal justice system. Please refer to the Beijing Rules as well.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1995

The Beijing Rules were adopted by the United Nations General Assembly resolution 40/33of 29 November 1985. The Rules in essence represent the minimum conditions which are accepted as suitable by the United Nations for the handling of juvenile offenders under any justice system of dealing with such persons.

Under Rule 1.4, juvenile justice is regarded as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.

Although, the Beijing Rules do not expressly spell out the right to access to justice in the text, it is provided under Rule 13.3 that juveniles under detention pending trial shall been titled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations. Further to the above, Rule 13.5 states that while in custody, juveniles shall receive care, protection and all necessary individual assistance -social,

educational, vocational, psychological, medical and physical - that they may require in view of their age, sex and personality.

**The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

This international instrument which is also referred to as the 'international bill of rights for women' was adopted in 1979 by the UN General Assembly. The instrument essentially spells out what in effect constitutes discrimination against women and lays out the agenda or national action against different forms of discrimination. Uganda is a state party to this legislation having signed on 30th July 1980 and ratified the same on 22nd July 1985.

The right of access to justice for women is essential to the realization of all the rights protected under the Convention on the Elimination of All Forms of Discrimination against Women. Article one of the Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Important to note that Article 2 stipulates that States parties must take all appropriate measures to guarantee the substantive equality of men and women in all areas of life, including through the establishment of competent national tribunals and other public institutions to ensure the effective protection of women against any act of discrimination. While Article 15 of the Convention provides that women and men must have equality before the law and benefit from equal protection of the law. On the other hand Article 3of the Convention lays out the need for appropriate measures to ensure that women can exercise and enjoy their human rights and fundamental freedoms on a basis of equality with men.

Uganda as a state party to this Convention, has committed itself to undertake a series of measures to end discrimination against women in all forms, including but not limited to incorporating the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women.

The Constitution of the Republic of Uganda makes it an obligation to the State shall take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances that exist against them.

**The Convention on the Rights of Persons with Disabilities**

The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted by the United Nations General Assembly on 13 December 2006. Uganda signed the Convention 30th March 2007 and ratified it on 25th September 2008.

Article one sets the purpose of the Convention as being to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. It goes further to define Persons with disabilities as including those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The Convention under Article 13 provides for the 'access to justice' wherein it is stated that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. To this end, States Parties are enjoined to promote appropriate training for those working in the field of administration of justice, including police and prison staff. Major challenges remain in regard to Person with Disabilities accessing justice particularly in the formal justice system. Challenges are centered around access to justice institutions including the lack of facilities to enable effective communication.

### United Nations Convention relating to the Status of Refugees 1951.

The Convention relating to the Status of Refugees is grounded in Article 14 of the Universal Declaration of human rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries. The United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centre piece of international refugee protection today.

Under Article 16, the Convention provides for the right of refugees to access to courts in territories accommodating them at the same footing with nationals including provision of legal assistance.

## Regional Human Rights Instruments

### The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights is a homegrown continental human rights instrument, also referred to as the Banjul Charter. The Banjul Charter recognises the rights and freedoms of African citizens in the political, social, economic and cultural spheres, both individually and collectively.

The Banjul Charter recognises all persons as equal before the law and as being entitled to equal protection of the law. Principles promoting access to justice can be read in the provisions of Article 7 that recognise the right of every individual to have his cause heard. This includes the right to defence, including the right to be defended by counsel of his choice. This provision is not stated specifically as the right to free legal representation, but it is

implied in that the latter part of the sentence provides the option for an individual to choose his or her own legal representative.

The African Charter on the Rights and Welfare of the Child

This charter sets out by recognizing from the outset that the 'needs of the child due to his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security'. Within that framework, it recognises the rights of children in the area of civil, political, economic and social cultural rights. Article 4 addresses the legal status of the child in judicial proceedings within the principle of the best interests of the child. It notes that children's views must be respected in all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views.

Article 17 addresses Juvenile Justice for children in conflict with the law. It requires that such a child shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence. Further, such trials are to be determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal. Such a positive provision entails an understanding that children are to be availed legal aid to enable them realise their rights to access justice in a meaningful manner.

The Protocol on the Rights of Women in Africa (Maputo Protocol)

The Maputo Protocol is ground breaking in terms of standard setting for the protection of women's rights, and is reflective of several concerns that African women face. The protocol recognises the rights of women and their freedom from all forms of discrimination. Unlike other international instruments on women's rights, it has a specific article on access to justice, with far reaching implications. Article 8 recognises the right of access to Justice and Equal Protection before the Law, noting that women and men are equal before the law and shall have the right to equal protection and benefit of the law. Specifically, it highlights the right to effective access by women to judicial and legal services, including legal aid.

The Maputo Protocol also provides for b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women; d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; e) that women are represented equally in the judiciary and law enforcement organs; f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

On the continent, this instrument provides by far the most comprehensive compulsion to remove de facto and de jure barriers to accessing justice, including through the provision of legal aid.

African Youth Charter

The Africa Youth Charter is an instrument of the African Union. The Charter from the outset notes with concern the marginalisation of youth from mainstream society through inequalities in income, wealth and power among other things. It also notes their plight of unemployment and underemployment, poverty and hunger, illiteracy and poor quality educational systems, restricted access to health services and to information, exposure to violence including gender violence, engagement in armed conflicts and experiencing of various forms of discrimination.

The Charter recognises the socio-economic and civil and political rights of youth in Africa although it does not provide for a right to effective remedies for breaches of these rights, nor equal protection of the law. Article 18 on law enforcement enjoins states to ensure that accused and convicted young people are entitled to a lawyer.

## Other instruments (Soft Law)

Resolution on the Right to Fair Trial and Legal Aid in Africa (Dakar Declaration)

This is a resolution of the African Commission on Human and Peoples' Rights made in1999. It frames the right to legal aid within the context of fair trial guarantees and rule of law, noting that it is a non derogable and fundamental human right. It recognises the impact of other role players in the administration of justice, such as military courts and Traditional Courts but highlights their potential shortcomings that may deny a person the right to a fair trial. Other important stakeholders such as lawyers and other human rights defenders including paralegals are mentioned in the Declaration and the potential harassment they may face in trying to protect the rights of victims.

The Dakar Declaration recognises that 'most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees' and obligates governments to provide legal assistance to indigent persons to actualise the right to a fair trial. The Declaration calls on Governments to also encourage contribution of the judiciary, human rights NGOs and professional associations.

In addition, the Declaration makes several important recommendations. Among others, it calls for innovations to determine how legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes. It also seeks to promote collaborations with Bar Associations and NGOs to enable the establishment of innovative and additional legal assistance programmes, including the provision of legal assistance by allowing paralegals to indigent suspects at the pretrial stage and pro-bono representation for accused in criminal proceedings. Further, it recognises the need to protect the rights of victims of crime and abuse of power and their defenders, which is key to protecting the vulnerable and marginalized.

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa 2004

This Declaration is a pronouncement of delegates to a Conference on Legal Aid in Criminal Justice titled 'the Role of Lawyers, Non-Lawyers and other Service Providers in Africa' that was meant to be an advocacy tool for governments, the African Union and other stakeholders.

Due to its relevance and import, the African Commission formally adopted it in 2006. The United Nations Economic and Social Council too adopted the Lilongwe Declaration, which is illustrative of the normative value of this Declaration.

The Declaration links access to justice to due process, a fair hearing and to legal representation.

It also recognises the systems lack of access in Africa to legal aid among the poor. It also notes the absence of legal advice and assistance in police stations and prisons are absent, leading to various violations of suspects.

This comprehensive document calls on governments to deliver legal aid to the poor and vulnerable, especially women and children. Further, it recommends broad and expansive definitions of Legal aid to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution. The Declaration calls for the participation of a wide range of actors in the provision of legal aid, including NGOs, CBOs, FBOs, professional bodies and associations, and academic institutions.

Other areas touched on include: providing legal aid at all stages of the criminal justice process; recognising the right to redress for violations of human rights; recognising the role of non formal means of conflict resolution; diversifying legal aid delivery systems; diversifying legal aid service providers; encouraging pro-bono provision of legal aid by lawyers; guaranteeing sustainability of legal aid and Encouraging legal literacy. The Declaration in addition details an Action Plan of implementation.

The Kyiv Declaration on the Right to Legal Aid Conference on the Protection and Promotion of Human Rights through Provision of Legal Services, 2007

This Document is the outcome of a conference of 115 practitioners in 2007; it is meant to influence among others national governments, legal aid bodies and organisations. It is a far reaching document in stating many important principles of access to justice as human rights.

The preamble recognises that citizens of many states are denied access to justice and are ignorant about their human and legal rights and procedures. It states that justice for all can only be realised when its rules and operation are understandable and accessible to all, and that the provision of legal aid is a vital in promoting access to justice.

The preamble also highlights the benefits of legal aid, including elimination of unnecessary detention, speedy processing of cases, fair and impartial trials and dispute resolution, the reduction of prison populations, the lowering of appeal rates, decreased reliance on a range of social services, the advancement of social and economic rights, and greater social harmony.

The Declaration covers 14 key areas; Recognizing and supporting the right to legal aid in the justice system: Providing legal aid at all stages of the justice process: Sensitising all government officials: Viewing legal aid as one means of ensuring a justice system that is accessible and available to all: Cooperating with other stakeholders and the public: Recognizing the right to redress for violations of human rights: Recognising the role of non-formal means of conflict resolution: Diversifying legal aid delivery systems: Diversifying legal aid service providers:

Encouraging pro bono provision of legal aid by lawyers: Guaranteeing sustainability of legal aid: Promoting legal literacy through legal education and advocacy: Ensuring access to justice in programmes of assistance to justice systems in developing and transitional countries and: Guaranteeing a secure environment for the provision of legal aid.

Sustainable Development Goals (SDGs)

During the recently held United Nations Sustainable Development Summit of 25thSeptember 2015, the 2030 Agenda for Sustainable Development was adopted by world leaders. In essence, it contains a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030.

The Sustainable Development Goals, also known as the Global Goals will build on the Millennium Development Goals (MDGs) that were adopted in 2000. The SDGs go much further than the MDGs since they aim at addressing the root causes of poverty and the universal need for development that works for all people.

Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. Some of the key targets linked to this goal with regard to access to justice for the poor, marginalized and vulnerable include: promoting the rule of law at the national and international levels and ensure equal access to justice for all; developing effective, accountable and transparent institutions at all levels; ensuring responsive, inclusive, participatory and representative decision-making at all levels; ensuring public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements; and promoting and enforce non discriminatory laws and policies for sustainable development.

## National Policy Frameworks

The National Development Plan

Uganda is currently implementing its Second National Development Plan, 2010/11 -2014/15. The Second NDP (NDP II) is the ultimate planning framework for all sectors in Uganda, and offers overarching principles and priorities for achieving development in country. JLOS is identified as an enabling sector. Enabling sectors are understood to refer to those sectors that 'provide a conducive environment and framework for efficient performance of all sectors of the economy'.

The focus of JLOS as noted in the NDP is on the poor and the marginalized groups. To that end, JLOS has been undertaking reforms around removing barriers to access to justice, such as case backlog, physical distance, technical barriers, poverty, and lack of access by women and marginalized groups.

Objective 3 of the NDP III focuses on Enhancing access to "Justice for All", particularly for the poor and marginalized. The strategies focus physical access and availability of JLOS institutions and functions largely on construction and renovations of physical premises as well as equipping offices and courts in prioritizing hard to reach areas and post conflict areas.

Another strategy is the development of enabling policy and a framework for provision of legal aid countrywide and the development, implementation and integration of innovative pilots and low cost model of legal aid including paralegal advisory services, juvenile justice and use of paralegal services.

However, a criticism of the JLOS SIPs is that despite well-formulated objectives striking a balance between supply and demand, they tend to address more supply side issues than demand side. Thus the results areas tend to emphasize physical accessibility such as infrastructure, construction and addressing systemic and institutional bottlenecks, more than on those accessing the service and their ability to understand and claim rights legal rights from appropriate dispute mechanisms. In particular, the poor and vulnerable are often the most challenged in their knowledge of laws, procedures and mechanisms of access. The involvement of the non-state actors who are a critical link to the demand side has been viewed as 'perfunctory' and 'vague in its actuation'.

In response to some of these critiques, JLOS SIP III has made significant reference to these two issues, and in its ensuing programmatic and policy stance, as will be discussed later.

JLOS Strategic Investment Plan SIP III and IV

JLOS institutions are currently implementing the forth strategic investment plan (SIP IV)under the sector wide approach. There is no legal framework in which access to justice is being pursued, but under JLOS SIP IV, a law on Access to Justice Act is envisaged. JLOS since SIP I in 2000 has focused on how to improve the efficiency, effectiveness, fairness, outreach and scope of the institutions involved in administering justice and ensuring that it reaches those most in need, the poor and vulnerable. From SIP I to SIP IV, several challenges to the attainment of sector goals have been registered in various reports and joint reviews with partners. Civil society organisations working on access to justice issues have attempted to work closely on law and order issues with varying degrees of success, and the magnitude of the demand for justice services is overwhelming.

JLOS SIP IV has many far reaching principles, goals and targets to ease access to justice for all, and in particular, poor and vulnerable. Enhancing Access to JLOS services and infrastructure is one of 2 outcome areas. The vulnerable and marginalized are in the category envisaged to access JLOS services. The list of who is vulnerable is expansive and includes he persons whose access to JLOS services is limited by:-

The outputs under this outcome area are four: Rationalized physical de-concentration of JLOS services: Construction of JLOS House; Effectiveness to meet Service Delivery standards improved; improving user empowerment services and Vulnerability profiled and discrimination and bias in access to JLOS Services

eliminated. The outputs show a reasonable balance between the supply and demand side tensions that have plagued the sector.

Another important strategy of SIP four is to focus on the use of alternative conflict resolution mechanisms (ADR) in the areas of criminal, commercial, land and family justice) with emphasis to conflict affected areas of Northern Uganda. The incidence of conflict in Northern Uganda as well as its gravity and duration has resulted in severe vulnerability as will be seen, requiring heightened vigilance and sustained measures to redress some of the extremities that have occurred in the region, aggravating vulnerability, poverty and marginalisation. The provision of much needed services in the area is essential in ensuring access to justice for persons seeking to assert their rights in the political, economic and socio-cultural sphere.

The JLOS strategy on strengthening the capacity of local council courts to ease access to justice is critical to the poor, vulnerable and marginalized accessing justice at the most basic unit, the community level. This has the potential to ease case disposal and make justice physically accessible. However, concerns have persisted since the outset of the establishment of these courts over their fairness and capacity to administer justice effectively, and this is a gap that must be plugged in the lifetime of SIP four.

SIP four also focuses on minimising technicalities that hamper access to justice. In particular, the emphasis on developing a comprehensive information dissemination strategy, simplifying laws and translating into local languages and strengthening community policing programmes is critical to empowering rights holders particularly the poor and vulnerable who tend to be functionally illiterate. The focus on SGBV and building the capacity of JLOS institutions and stakeholders to address and fast track cases of Sexual Gender Based Violence (SGBV) is essential to protect the rights of women suffering from multiple forms of vulnerability.

The establishment of the Justice Centres of Uganda is a remarkable and significant development in the realization of access to justice for hitherto unreached groups. Justice Centres are JLOS initiatives geared at promoting the rights of vulnerable communities Age; material and knowledge poverty; physical impairment; powerlessness; gender based barriers and may extend to minority groups; Internally displaced persons; migrants; children; suspects and prisoners; refugees; persons living with HIV/AIDS; persons with disability among others.

The JLOS strategy on strengthening the capacity of local council courts to ease access to justice is critical to the poor, vulnerable and marginalized accessing justice at the most basic unit, the community level. This has the potential to ease case disposal and make justice physically accessible. However, concerns have persisted since the outset of the establishment of these courts over their fairness and capacity to administer justice effectively, and this is a gap that must be plugged in the lifetime of SIP III.

## National Legal Framework

The Constitution of the Republic of Uganda, 1995

The 1995 Constitution of Uganda has far reaching provisions contained in the Bill of Rights that guarantee fundamental rights and freedoms for Ugandans. When these rights are breached, the Constitution provides that for civil and criminal processes, a person shall been titled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. These are important due process guarantees that anchor the procedural and substantive aspects of access to justice. In respect of persons charged with an offence that carries a sentence of death or imprisonment for life, the provision of legal aid in the form of free representation is framed as an entitlement at the expense of theState.15 Thus the Constitution limits legal aid services for indigent persons to the realm of criminal law. However, Government of Uganda and JLOS have extended the provision of legal aid to civil rights, in the form of the Justice Centres.

The Legal Aid Bill is a fundamental document that embraces a paradigmatic shift towards rights based approaches to justice for the poor, vulnerable and marginalized. It is primarily made in furtherance of the objective of providing accessible, affordable, sustainable, credible and accountable legal aid services to indigent persons. The timely passing of the Legal Aid Bill into law will help to consolidate gains made towards realising access to justice for vulnerable groups.

**The Legal Aid Policy and Draft Bill**

The Bill contains provisions covering various areas of relevance to access to justice, including he determination of who can access legal aid and who can provide it and under what circumstances. It also addresses the role of important service providers such as civil society and NGO entities, magistrates, and quite significantly, the involvement of community based resource persons – paralegals. It also regulates the accreditation of legal aid service providers.

**The Children Act, Cap. 59**

The Children Act reiterates many of the positive and enabling positions contained in the CRC. The Children Act provides legal assistance for children in need of care and protection in conjunction with the Local Councils, one of whom is in charge of children affairs by virtue of office. One of the functions of this functionary is to protect the properties of orphans under Section 10(3).

This law also looks at community based resources to give legal assistance to children. Fit persons have been appointed under the provisions of the Children Act to facilitate the work of the judiciary for children in conflict with the law. Fit persons are community based people who are given temporary custody of children under the Children Act as an alternative to remand or institutionalization for children in conflict with or contact with the law under Section 37 (Removal of a child under emergency protection), 87 (Unfit parents during divorce, separation and nullity proceedings) and 91 (children on remand) of the Children Act.

Organisations like Legal Aid Clinic of the Law Development Centre and the JLOS Justice for Children initiatives are working with Fit persons to protect children. It is notable that Sections 37 and 87 relate to children who are at risk of suffering physical or psychological harm. The applicability of Section 37 is not necessarily linked to a legal process and this is a good example of assistance being extended as a prelude court related processes or even totally non-related.

Persons with Disabilities Act of 2006

Uganda ratified the Convention on the Rights of Persons with Disabilities was ratified by Uganda on 25 September 2008 and its optional protocol, both without reservations.

This Convention contains several far reaching provisions on the rights of PWDs. Uganda also observes the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which call for recognition of the overall importance of accessibility in the process of equalisation of opportunities in society.

The Persons with Disabilities Act defines disability as "a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environmental barriers resulting in limited participation". This definition reflects human rights based approach that closely resembles the definition of the UN Convention on the Rights of Persons with Disabilities. A National Policy on Disability buttresses the law. The Act contains several positive provisions that ensure legal protection and equal opportunities for persons with disabilities.

Article 14 of the UN Convention on the Rights of Persons with Disabilities 2006 requires government to ensure effective access to justice for PWDs on an equal basis with others. This is to be done in various ways including through the provision of procedural and age appropriate accommodations with a view to facilitating their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

What amounts to reasonable accommodations has been defined in the UN Convention on the Rights of Persons with Disabilities 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. There are deep reaching implications for the obligation on JLOS to ensure access to justice within the meaning of reasonable accommodation.

Section 25 of the Persons with Disabilities Act prohibits JLOS actors from accessing justice services, including by refusing to provide the service to the person or by making it impossible or unreasonably difficult for the person to use the service. The Act in Article 26 and 27obligates the JLOS law enforcement agents to provide physical accessibility and auxiliary aid or services to enable a person with a disability to use the service. The Evidence Act

Cap 6 has made accommodations for people with hearing disabilities allowing them to give evidence in sign language or writing, but this is limited to people with hearing disabilities and does not cover other types of disabilities such as sight.

**Pauper Suits under the Civil Procedure Rules**

Order 33 of the Civil Procedure Rules, made under the Civil Procedure Act, Cap. 65,provides for Pauper Suits. It states that "Subject to the following provisions of this Order, any suit may be instituted by a pauper. For the purposes of this Order a person is a" pauper" when he or she is not possessed of sufficient means to enable him or her to paythe fee prescribed by law for the plaint in the suit." Whereas this is a very useful provision for enhancing access to justice, the conditions for paupers suits are so stringent that few people would be able to file such suits without legal assistance. For instance, the pleadings must be set out as prescribed under the Rules, and the application must be properly signed.

The application must be presented in person, and the court requires evidence of the applicant's pauperism. Nonetheless these provisions are useful for LASPs filing civil claims on behalf of the poor, vulnerable and marginalised.

Equal Opportunities Commission Act

## Other Laws

There are a number of other Acts that have a bearing on access to justice. These are mainly the Acts that create jurisdiction of Courts and other bodies to hear disputes and dispense justice. They include the Judicature Act, Cap. 12, the Magistrates' Courts Act, Cap 16 and the Local Council Courts Act of 2006. It should also be noted that their customary courts and tribunals dispensing justice that are currently not regulated by any law. The Bataka Courts in Kagadi are a local initiative to improve access to justice but they too are not regulated. The Qadi Courts are mentioned in Article 129 (1) (d) of the 1995 Constitution of Uganda but an Act to define their powers and procedure has never been passed. The manner in which jurisdiction over various causes is defined and exercised is a crucial element on access to justice. A further analysis of jurisdiction issues and their role in access to justice is called for.

## THE LINK BETWEEN POVERTY, VULNERABILITY AND MARGINALIZATION AND ACCESS TO JUSTICE IN UGANDA

Access to Justice – What does it mean?

The United Nations defines Access to Justice as "a process which enables people to claim and obtain justice remedies through formal or informal institutions of justice, and inconformity with human rights standards."

To explore the issues relating to poverty, marginalisation and access to justice, it is important to delineate the meaning of "justice." Rawls developed the model of "justice as fairness,"encompassing ideas of both freedom and equality. Another way to look at justice is to perceive it through the eyes of the 'end-user,' an approach favoured by institutions such as the European Union.18 The end-user in this context understands justice as the amount of fairness that people experience and perceive when they take steps to solve disputes and grievances. This understanding of justice has also been named bottom-up justice.

Bedner and Vel of the University of Leiden Van Vollenhoven Institute, in their paper" An analytical framework for empirical research on Access to Justice" suggest a broad definition of Access to Justice, which takes the perspective of the justice seeker as its point of departure and looks at the process this justice seeker, has to go through to achieve appropriate redress. The various elements in the definition leave room to see Access to Justice as a process and not merely as a situation or a goal. This approach is crucial because it upholds the rights-based approach to programming for access to justice. In their conceptualization; access to Justice exists if:

People, notably poor and vulnerable suffering from injustices have the ability to make their grievances be listened to And to obtain proper treatment of their grievances

This is a comprehensive, rights-based definition that is centred on justice seekers' point of view and will therefore provide an acceptable standard of analysis in this study. The emphasis that redress obtained must be in accordance with the rule of law, that is, the principle of equality before the law, is crucial because some aspects of religious, customary and even State Law may be discriminatory and exacerbate rather than redress grievances.

## POVERTY

Uganda has experienced economic growth in the past two decades, although the trajectory has not always reflected a smooth course. The Second National Development Plan of Uganda (NDP II) indicates that the Ugandan economy grew from the implementation of the Poverty Eradication Action Plan from an average Gross Domestic Product (GDP)growth rate of 7.2% between 1997/98 and 2000/0 to 6.8% between 2000/01 and 2003/04,increasing to 8% over the period 2004/05 to 2007/08.21 In 2014 Uganda experienced a gradual recovery of economic activity, with real GDP growth projected to reach 5.9% in FY2014/15 from 4.5% growth in FY 2013/14.

Despite this evidence of economic growth, several challenges have continually confronted the country, leading to a high incidence of poverty. These include debt crisis, low agricultural productivity; low human resource development largely reflected in unskilled workers; poor connective infrastructure; insecurity and armed conflict in various pockets; disasters and persisting environmental degradation. Malaria is also identified as a leading cause of poverty and low productivity. The various constraints and persistent poverty have had an adverse effect on the quality of life of many Ugandans as reflected in several poverty and social indicators. The impact of these challenges to human development affects the majority of Ugandans, but certain groups are more predisposed to extreme and adverse effects of underdevelopment in a manner that is deleterious to their welfare and human rights. These are inevitably the poor and vulnerable who end up being marginalised and disadvantaged in such conditions, and they more often than not get trapped into a vicious cycle of poverty whose most extreme form is chronic poverty.

The causal-effect linkages between the situation of poverty and the consequential limitations on the enjoyment of human rights in various categories of populations at risk will be discussed in this section. The correlation between poverty and vulnerability leading to marginalisation will also be established. The underlying tensions between vulnerability and access to justice for poor and vulnerable groups will be examined; the overarching notion being that access to justice is the gateway to extending a human rights framework to the problem of inequality in the political, economic and social-cultural sphere.

In this regard the centrality of access to justice is fundamental as a mechanism for the possible reversal of some of the most harmful aspects of vulnerability, including victimization and chronic poverty. The UN Special Rapporteur on Extreme poverty and Human rights has acknowledged the importance of access to justice as a 'fundamental tool for tackling poverty', recommending its inclusion as a stand-alone goal or as a target in the post–2015 development agenda.

## Poverty, Marginalization and Vulnerability in Uganda

Poverty, marginalization and vulnerability are key factors in assessing the rights and welfare of citizens. From a human rights perspective, poverty is understood as a multidimensional phenomenon that includes as one of its components chronic social, political and economic inequality or 'a human condition characterized by the sustained or chronic deprivation of resources, capabilities, choices and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'.

Further, the UN Special Rapporteur on Extreme poverty and Human rights links extreme poverty to extreme inequality, positing the issue of poverty within a human rights narrative and arguing that 'a human rights framework that does not address extreme inequality as one of the drivers of extreme poverty... is doomed to fail.'

## Poverty trends analysis in Uganda

In the last two decades, Uganda has implemented several sectoral policy and programmatic interventions and measures in the fight against poverty with some level of success in the socio-economic sector. This can be deduced from the significant reduction of the population living below the poverty line from the previous rate of 56% in 1993 to 31%in 2005 and 24.5% in 2009. The Uganda National Household Survey 2012/13 indicates that the percentage of the people living in absolute poverty declined by 4.8% points from the 24.5% reported in 2009/10.

Nonetheless, 19.7% of Ugandans are poor, which is approximately 6.7 million persons. Despite recorded decline in poverty, this has not translated in sustained or significant progress in the general welfare of Ugandans. In Uganda, only two out of the seventeen MDG targets have been met, with some reversals and stagnancy in key social indicators such as maternal health, HIV AIDS. Uganda ranked Uganda ranked 161st out of 187countries on the United Nations Development Programme's Human Development Index in 2012 in the Low Human Development category. In 2014, it ranked 164 out of 187countries on the Human Development Index. The NDP II starkly states that 'Uganda is judged to be amongst the most vulnerable and least climate resilient due to poverty and low income diversity'. Moreover, approximately 43% of the population risks falling back into poverty in the event of a shock.

One of the biggest challenges on the poverty landscape is the marked regional inequality, with the central and western regions being more markedly developed than the other regions.

Statistics from the UNHS 2012/13 reveal that the rural areas, which hold about 77% of the population, constitute 89% of national poverty. The NDP II and UNHS 2012/13 both show that the greater proportion of the population living under the poverty line is located in the Northern region, explaining this result as arising from the prolonged insecurity the region experienced for over 20 years. According to the UNHS 2012/3, poverty incidences remain highest in the Northern region (44%) and least in the Central region (5.1%). At sub-regional level, Karamoja in North East dominates with 75% being income poor, followed by West-Nile (42%) and Mid-North (36%).

The NDPII observes that the mean consumption of the richest area (Kampala) is 2.5 times that of the poorest area (Northern region). There is a wide gap between poverty rates in rural areas compared to urban areas i.e. 34% and 14% respectively and greater income inequality in the urbanised central region. In the richer area of central region, the UNHS2012/13 shows that in the central region more poor people reside in Central II and Mid-West than in Central I and South West sub-regions.

Similarly, the Uganda Demographic and Health Survey Report of 2011 points out to regional disparities in the wealth index.38 The statistics show that in urban areas three-quarters of the population is in the highest wealth quintile compared to only one in nine persons in the highest wealth quintile in the rural areas. Also significant is

the finding that over 90% of the population in Kampala is in the highest wealth quintile against other regions with 35% or lower. In Karamoja, eight out of ten households are in the lowest quintile; In North, West Nile, and Eastern regions, 33% or more of the households are in the lowest quintile.

## UNDERSTANDING THE CONCEPT OF POVERTY

The definitions of poverty are varied and often tend to be highly contested, depending on the discipline and perspective. It has been suggested that in Uganda the scope of poverty reflects a lower measurement of poverty than usual; 'the poverty line used in Uganda is set at a very low level by international standards, equivalent to 'extreme poverty' or 'food poverty' in other countries. This represents the very bare minimum level of consumption needed for survival.

Such a perception reveals a grim picture of poverty in Uganda, which is tagged to survival.

Most poor Ugandans are not only poor, but they are chronically poor. Chronic poverty is the type that traps households into severe and multi-dimensional poverty and can take on an intergenerational form to the effect that those born in poverty live in it and bestow it on their children. Similarly, it can also be said that the majority of Ugandans are trapped in absolute poverty. The World Bank describes absolute poverty lines as being based on a base line of basic essentials that households need, and this is contextual.

The United Nations maintains 'Absolute poverty is a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to social services'

It is clear that the Ugandan standard of poverty closely mirrors this definition as will be illustrated below.

Uganda's Participatory Poverty Assessment (UPPAP) Project Report, 2002 document show Ugandans perceive poverty, perceiving it as 'poverty beyond the lack of income and material assets to include the absence of social aspects that support life', some of which are listed as soap, food, sugar, medicine and freedom from hunger and disease.

The UPPAP reflects perceptions of Ugandans around the distinction between individual and community-level poverty. At the personal level, poverty is defined by local people as 'inability to meet the basic necessities of life, poor access and quality of social services and inadequate infrastructure'. Thus at individual or household level poverty relates to disempowerment and helplessness. Community level poverty is seen as lacking benefits enjoyed in common or collectively, such as basic physical infrastructure and services, productive assets and social harmony within the community.

Respondents to this study considered poverty variously as including: the inability of a person to afford the day-to-day needs of life such as food, clothing, shelter, medical care, and so on; the highest degree of disempowerment; having no income and being lonely – not having any family to identify with and no means of support.

The definition of poverty matters because not only does it set the standard by which we determine whether the incomes and living conditions of the poorest in society are acceptable or not, but also because the definition adopted is essential for determining questions of fairness. The definition then influences the solutions adopted and actions to help the poorest.

Poverty is a dynamic concept as reflected in its various formations or contexts. For example ,officials and social commentators in eighteenth century France distinguished between the pauvre and the indigent. The former experienced seasonal poverty when crops failed or demand for casual agricultural labour was low. The latter were permanently poor because of ill health (physical and mental), accident, age or alcoholism. The central aim of policy was to support the pauvre in ways that would stop them from becoming indigent.

Nonetheless, most official definitions of poverty use relative income to measure who is in poverty; an income threshold is set and those who fall below it are seen to be 'in poverty'.

The World Bank sets the threshold at $ 1.25 a day,48 and the Uganda Government takes a similar position. But while this is easy to measure and does provide useful comparisons overtime, it is essentially an arbitrary definition that fails to take into account issues of justice and fairness which are crucial to this study.

A proposed alternative approach to defining poverty is to look at direct measures of deprivation rather than using income as a proxy for poverty. Looking at deprivation allows a wide range of aspects of living standards to be included. Peter Townsend, a renowned poverty scholar, argued that deprivation should not be seen only in terms of material deprivation but also in the social exclusion from 'the ordinary patterns, customs and activities' of society. This conceptualisation of poverty can assist us to take into account how the poor are prevented from accessing justice. For instance, residing a long distance away from services, including formal justice institutions, most of which are in urban centres, is one way in which the poor are deprived of their rights.

Since poverty is relative, it is important to consider the fact that poverty and material deprivation are important drivers of stigma and shame. Poor people are often depicted as't he other' through the use of particular language, labels and images about what it means to be in poverty. For instance, it is telling that in a number of local Ugandan languages, the word for "poor" is the same as or similar to the word for "lazy."50 Capitalism's emphasis on entrepreneurship and the promise it holds that anyone can become rich if they try hard enough anomalises poverty and further fuels the stigma of being poor. In addition, media images may depict poor people as dirty and diseased, in a way that negatively stereotypes those who are disadvantaged. These factors may create an atmosphere where poverty is regarded as a moral failing and poor people are blamed for their situation. This in turn further prevents poor people from seeking and accessing justice when their rights are violated.

## Barriers in Accessing Justice by the Poor, Marginalized and Vulnerable in Uganda

Physical accessibility to legal or justice delivery agencies

Accessing justice requires one to engage with the officials and institutions under the various justice/ legal systems. The poor, marginalized and vulnerable in most cases have to travel very long distances to reach and access the nearest justice institution such as the police and courts. To a limited extent for example, the physical accessibility to the High Court has improved with the introduction of criminal circuits but it remains a constraint for remandees and their dependants. The higher Courts of Record (Court of Appeal and Supreme Court)only sit in the capital city (Kampala). The Administrator General's office for long has been in the capital city, making it difficult for vulnerable widows and orphans from remote areas to obtain critical services.

According to the National Service Delivery Survey 2008, access to Magistrates Courts and Police stations is still very limited per population particularly in rural areas. Only 18.2% of the people in rural areas are able to access a Magistrate Court within a distance of less than5km compared to an overwhelming 56% in urban areas. Further, most LASP, even the few who have regional coverage are urban based. Several other JLOS institutions in the rural areas pose this challenge of remoteness and scarcity of services.

Orientation of supply side

In many cases, those responsible for the administration of justice e.g. the lawyers, judges, police, local councillors, traditional authorities (the majority of whom are men) are not trained to demystify the law or make it user friendly. Gender justice also requires that the actors involved in administration of justice are not only gender sensitive but responsive.

The same goes for child friendly approaches to justice and disability issues as well as victim centered approaches. Most JLOS institutions training one or two personnel rather on one or the other of these principles, rather than institutionalising them, thus creating silos in the organisation. When the few who have been trained people leave, institutional memory gaps are created. These lacunae only serve to accentuate an already hostile or unaware environment.

There is also suspicion around the work of LASPs by JLOS sectors and politicians, particularly when the LASPs interventions touch on power relations and economic bases.

Many LASPs are viewed as spoilers who seek to upset status quos, with some branded as anti establishment particularly in the case of activists. This limits the cooperation that the LASPs require in order to come up with comprehensive solutions for vulnerable and impoverished persons.

Lack of confidence in the justice delivery system

A common barrier to access to justice for the poor and vulnerable is lack of confidence in the justice delivery system as impartial and transparent. Individuals or groups who have been subjected to abuse, bias or discrimination are likely to be fearful of power structures and dynamics and suspicious of government agencies. Their status as poor persons in a highly monetised justice system and environment raises fears of further marginalisation and re-victimisation.

The complexities of the Justice system

The working language and technicalities involved in justice systems may prove a barrier to access to justice for the poor, who in many cases have no or little education. This results in the lack of or limited participation in justice processes. English is the official language of Uganda and the working language of justice institutions.

Cultural and social barriers

Societies tend to have deeply entrenched biased and discriminatory stereotypes that assume that the poor, marginalized and vulnerable are inherently lazy, dependant, irresponsible, undeserving and even criminally inclined. Individuals and agencies engaged in the administration of justice tend to reflect the wider societal prejudices and biases unless there is strict enforcements of codes and standards of service delivery.

Patriarchal norms are the dominant social construction of gender in Uganda, and men and women subscribe to it. These influences pervade the institutions that victims and vulnerable groups seek to access. Most notoriously, the case of domestic violence victims drives this point home; these issues are seen as private domestic matters not to be aired in public.

In the instances of sexual violence, taboos around discussing sexual terminologies have often worked against the rights of victims. Thus women, the majority of whom live in rural areas, are reluctant to refer matters to JLOS institutions against intimate partners or even strangers in more powerful positions than they. Even where they do, they face immense hostility from their communities and family members and sometimes, law enforcement agencies.

In the case of children's rights, while international norms dictate that children's rights to participate in judicial processes and to information be upheld, this is rarely adhered to. In Ugandan socio-cultural norms, children do not have rights and freedoms, and due to social construction, children will rarely assert themselves even in prejudicial situations in the justice processes.

These social barriers are extended to other groups such as refugees and PWDs, who face discrimination in the justice system based on unequal power relations and stereotypes of inferiority and other characteristics.

As a consequence poor and vulnerable persons are not treated fairly or equally in the justice chain, or in informal adjudicatory mechanisms. The bias and discrimination tends to propagate stigma and fear in the poor and

vulnerable hence discouraging them from approaching the justice system and seek the support that they need. This situation may be exacerbated when people living in poverty belong to groups that are under-represented in the justice sector and law enforcement personnel, such as women, ethnic minorities and indigenous peoples to mention but a few.

The Cost of Justice

The low levels of literacy, education and knowledge among the poor and vulnerable reduce fiscal capacity to enforce rights hence inaccessibility to justice. There are both direct and indirect costs to accessing justice, which often disproportionately disadvantages or discourages the poor and vulnerable. For example, legal representation by lawyers in Uganda is for those with means, and even some LASPs require indigent clients to pay user fees to third party institution, which they cannot afford. Poor clients have to meet their transport costs to the LASP providing assistance and to JLOS institutions. This in itself can pose challenges for the poor and vulnerable of any community.

The 2008 National Service Delivery Survey indicates the deterrent effect of user fees. The survey notes that LCs charge arbitrary fees like fines and court charges while the formal courts charge high fees for services in civil cases. The LCs are said to ask for huge amounts of money to arbitrate land disputes and the police ask to be facilitated with transport and other communication fees. Thus if an indigent person is seeking any or all of these combined services, fees may consequentially serve as an effective barrier to justice.

**Threat of corruption**

Uganda has an under-resourced and overstretched justice sector. This challenge has attracted corrupt practices with the officers and agencies that administer justice. For example, the National Service Delivery Survey indicates that 41% gave facilitation to the police, prisons29%, and magistrates 15% while customary courts had the least at 2%.

Corruption is an insidious barrier to justice, as it tends to undermine the entire reliability of outcomes from the justice system and promotes bias and discrimination against those unable to facilitate such practices. The poor who access justice are in many cases going up against an individual or entity more powerful or influential than they are. Examples could be a household or community in danger being displaced by a corporation from their lands; a widow seeking to reclaim family possessions; or a PWD seeking damages from an institution for workplace discrimination. These few examples elicit a David versus Goliath dynamic which is amplified by corruption; the powerful can afford to pay to disempower the weak.

As is the case in many countries, Uganda faces a challenge of systemic corruption, which guarantees that those with financial and social capital are able to access the justice system with greater efficiency and effectiveness, and even to secure a positive outcome. When the poor and vulnerable cannot afford to pay requested bribes for services that should befree, their claims and cases are delayed, denied or discontinued. Moreover, bribes represent

a greater burden for persons living in poverty, increasing transactional costs of accessing justice institutions and services. They are not only denied access to justice when they are unable to meet the costs of bribes or engage in other corrupt activities, but they are also discouraged from accessing the justice system when they perceive the system to be corrupt.

## Recommendations and Conclusion

Social justice and equity is key to accessing justice by all persons and groups within any given community. Social justice acts of leveller for poor and vulnerable groups to have their day in justice institutions and right wrongs or leverage more power and equity to affect their status quo positively.

The poor and vulnerable are usually victims of marginalisation, discrimination, exclusion and exploitation. This further exacerbates their situation, leading to extreme forms of poverty and vulnerability. It is recognised that there are millions of poor people in Uganda, and yet limited resources to protect their legal and human rights when violated. As such, it is important to devise means of ensuring that the most affected individuals and populations are identified for priority action including affirmative action, at the same time establishing longer term measures for sustainable service delivery for other categories facing challenges.

The following key areas should be addressed with a view to strengthening access to justice for poor and vulnerable groups.

### Short term recommendations

#### National Framework for Legal Aid

A National Legal Aid Policy and Law are imminent. These are instructive for purposes of clarifying on the scope and nature of legal aid. It is important that the mechanism for legal aid embrace a holistic approach to legal aid services. For example in Malawi, the law that was enacted on legal aid extended the scope of legal aid to include pre-trial assistance, legal advice, and legal education; the recognition of the role of other players in the provision of legal aid services such as lawyers, law students, paralegals, and NGOs and introduced a Legal Aid Board that independent of the Ministry of Justice and Constitutional Affairs. It also introduced a national Legal Aid Fund.

#### Extending the reach of legal aid

While not without challenges, it cannot be denied that the public assistance given by government in the form of legal aid as well as the invaluable work of LASPs has aided populations that that would otherwise be left on the margins of justice. Some of these efforts have resulted in good practices being established, although there is little documentation of how these practices have worked and can be replicated to adapt to other contexts.

The Justice centres of Uganda have provided essential support and broken out of the traditional state model of legal aid in criminal justice to encompass civil justice. The rolling out of Justice Centres to more districts will help

more poor and vulnerable Ugandans to seek remedies and matters would be improved if their scope widened. Justices centres in South Africa have not only legal and social workers but also attach labour officers to their justice centres.

Similarly, Uganda could consider attaching labour officers and probation Officers or Community Development Officers to these centres. LASPs and government assisted legal aid should prioritise the inclusion of social workers to provide psychosocial support to victims as vulnerable and marginalised groups require more than formal legal responses for the most part.

LASPs should be supported and capacitated to increase presence, scope, voice and impact on legal aid to the subnational level. The ambit of determining eligibility for legal aid should be widened beyond indigence in both LASPs and government to embrace vulnerability and the interests of substantive justice. For example, Legal Aid South Africa criteria for eligibility for legal aid looks beyond financial status to address for criteria like the seriousness of the case i.e. substantive justice.

Legal aid assistance by government should be guaranteed for certain categories, particularly where there are imperatives to guide this prioritization. The standards under Section 40 of the Convention on the Rights of the Child providing for state assisted legal aid in the case of a child in conflict with the law should be adopted in national practices. The South Africa Constitution provides that legal representation must be granted at State expense in civil proceedings affecting a child if substantial injustice would otherwise result (section 28(1)(h)). It is hoped that Uganda can emulate this good practice.

**Conclusion**

Access to justice is a fundamental human right and is indivisible from the other genres of human rights; it actually may in certain instances be the prerequisite for catalysing the realisation of civil, political, economic and social rights. The full realization and enjoyment of the rights of poor, marginalized and vulnerable groups or individuals depends on rights based approaches that equip communities to know and assert their rights in an atmosphere of accountability, empowerment and non-discrimination. In this regard, it is incumbent on all actors involved in promoting the right to access to ensure that core human rights values of dignity, equality and affirmative action for the weakest and most needy are embedded in the interventions that they devise.

Without effective, inclusive and affordable access to justice mechanisms, the poor, vulnerable and marginalized are denied the opportunity to enjoy, claim or reassert their rights or challenge breaches thereof. Barriers to justice that are attitudinal, procedural or physical have the effect of denying these groups the appropriate standard of justice that is critical for resolving some root causes of marginalization, discrimination, poverty and vulnerability.

**Revision Questions**

Discuss the Legal, Policy and Institutional frameworks for promoting access to justice in Uganda.

Poverty, Vulnerability and Marginalisation are the significant drawbacks to access to justice in Uganda. Discuss the Statement.

Discuss the various barriers faced by the poor, vulnerable and marginalised persons in access to justice in Uganda.

Suggest solutions to the above discussed barriers.

## VISIT/LEGAL AID CAMP

INTRODUCTION

Legal aid is regarded as central in providing access to justice by ensuring equality before the law, the right to counsel and the right to a fair trial. This module describes the ways of conducting a legal aid camp and the advantages and disadvantages of field camp/legal aid camp.

A number of delivery models for legal aid have emerged, including duty lawyers, community legal clinics and the payment of lawyers to deal with cases for individuals who are entitled to legal aid.

Legal aid is essential to guaranteeing equal access to justice for all, as provided for by Article 6.3 of the European Convention on Human Rights regarding criminal law cases. Especially for citizens who do not have sufficient financial means, the provision of legal aid to clients by governments will increase the likelihood, within court proceedings, of being assisted by legal professionals for free (or at a lower cost) or of receiving financial aid.

Legal aid has a close relationship with the welfare state, and the provision of legal aid by a state is influenced by attitudes towards welfare. Legal aid is a welfare provision by the state to people who could otherwise not afford counsel from the legal system. Legal aid also helps to ensure that welfare provisions are enforced by providing people entitled to welfare provisions, such as social housing, with access to legal advice and the courts.

Historically, legal aid has played a strong role in ensuring respect for economic, social and cultural rights which are engaged in relation to social security, housing, social care, health and education service provision, which may be provided publicly or privately, as well as employment law and anti-discrimination legislation. Jurists such as Mauro Cappelletti argue that legal aid is essential in providing individuals with access to justice, by allowing the individual legal enforcement of economic, social and cultural rights.2His views developed in the second half of the 20thcentury, when democracies with capitalist economies established liberal welfare states that focused on the individual. States acted as contractors and service providers within a market-based philosophy that emphasized the citizen as consumer. This led to an emphasis on individual enforcement to achieve the realization of rights for all.

How does the need for Legal Aid come about

The need for legal aid is created by the inability of persons to have all the required legal knowledge and to know all the procedures and to represent themselves in any legal matter impacting on them, and in which they have to protect or defend the violation of their rights.

Factors such as poverty, ignorance of the law, armed conflict, disability or other vulnerability or marginalization should not be a barrier to people progressively realizing their rights which are protected by the Constitution of Uganda. Furthermore, the inability to afford legal representation should never diminish a person's right to access justice.

The lack of an effective legal aid system denies financially disadvantaged and other vulnerable persons the right to enforce their rights because they cannot afford the high legal costs. Access to justice, through legal aid, is therefore crucial to ensure that all persons enjoy the full range of their human rights which in turn contributes to recognizing the dignity of every human being.

Legal aid can be provided in various forms including legal advice, assistance or representation, legal information and education, prison/police visits as well as Alternative Dispute Resolution (ADR). It can be provided by advocates, lawyers, paralegals, legal assistants, social workers, academicians, community-based volunteers, customary leaders, faith-based organizations, professional associations, women or youth groups, work-based associations and various informal providers.

Ways of Conducting a Legal Aid Camp or Field Visit

There are several ways of conducting a legal aid camp as discussed hereunder;

a) Prior Research

You need to get prior information concerning the topic of study before proceeding to the camp. This is important to enable you know the language of the participants, their behavior, interests and how you can attract them to participate in the camp.

The District, community leadership structure play an important role in identifying the community needs and further sharing information on the social construction of a particular community.

All efforts should be made to contact the district and community leadership to mobilize for an effective community outreach.

b) Legal Awareness Sessions on Selected Topics

Legal awareness camps should be held, in conformity with the targeted outcomes. Topics, dates and timings should be decided with direct consultation with the target community. Sessions should be structured systematically and often less packed to be affordable in a short time.

The sessions should be interactive and avoid lecture mode to enable participants fully interact. Feedback should be taken from the participants.

Selected topics should be among those affecting the people of that community. If a community has serious cases of for instance Defilement, Rape, Child neglect, Assault among others, sessions should focus on such areas and use of examples and illustrations in those areas is very critical.

c) Dress Code

Beware to dress appropriate. Get information on the ways of life of the community and dress up in a manner that will not offend your audience or distract them from listening to the real issues.

d) Interface with clients

Interface with clients has many advantages, particularly when there are numerous participants and stakeholders involved in a camp. Having a structured process for the exchange of information means that performance in satisfying the requirements can be monitored in detail and any shortcomings highlighted and addressed immediately they become apparent.

A secondary benefit of implementing the process is that it encourages meaningful communication between the supplier and receiver participants. The requirement to provide specific, detailed requests to minimize any impact and with constant monitoring areas of criticality that deviate from the plan can be quickly addressed and brought under control.

Interface with clients also encourages communication between the participants providing each with an understanding of the constraints inherent in their respective area.

Interface with clients can only be effective if all project participants embrace the concept and incorporate it into their work processes making it a formal field or camp communication method that benefits all involved in achieving flawless execution.

e) Building a Case Management Plan

Case management planning is a process focused on identifying client needs, clarifying goals and hopes, setting priorities and identifying steps/actions necessary to achieve this. It is client driven and empowers the client. Goals may be very small and concrete as well as longer-term and broad.

Planning is centred on the development of a support plan (see example below) which addresses the needs of the client as identified in the assessment process.

**The formulation of the case management plan:**

Establishes goals and expectations and identifies appropriate services for each client as perceived by the client.

Is developed on the basis of information collected during the assessment process.

Assists the client to identify short-term, and long-term goals, and action plans.

Developing a Planning Process.

**The key tasks in a planning process could include:**

Identifying appropriate community resources. Services need to be aware of the other services and resources available in the community which may be able to assist clients.

Developing a tool to assist the service such as a support plan. It provides a written record of the plan, which the service and the client have developed together to meet the client's needs. Client issues which may be addressed in the support plan include the following:

What does the client need in the immediate future to stabilize the current situation? (Crisis needs).

What is the client's long-term goal?

What is stopping the client from achieving these goals?

What can be done in the short-term to help achieve this long-term goal?

What does the person want to achieve or resolve whilst a client of the service?

What action can the client take?

What action can be taken by the agency?

Time frames for action.

Clients should be given a copy of the support plan.

Developing written policies and procedures including:

Who does the planning?

When and how planning is done.

The use of tools including written support plans.

Making sure the plan addresses the needs identified in the assessment process including the needs of all family members.

As Field instructors we need to Remember.

Goals should be achievable. If the goals are broad they need to be broken into smaller groups. Develop contingency plans so that if one goal cannot be met, there are alternatives.

Make sure the client feels ownership of the plan, that they understand it, and have a copy written in their own words and language.

Resistance to Planning.

Resistance may occur in the following forms:

Inability to think clearly.

Inability to organize themselves.

Lack of motivation.

Impatience.

**Ways to counter this resistance:**

Empathy.

Encouragement.

Positive Approach.

Others such as close friends, counsellors.

Strength (Advantages) of Legal Aid Camp

Legal Aid Camp has strengths in dispensation of justice in Uganda. There a number of advantages which include the following:-

a) Easy Access to Legal Information

Delivery of pro bono services to clients in the field by lawyers brings the indigents closer to legal services. Pro bono lawyers deliver life-changing legal assistance to indigent members of the community including senior citizens, unemployed and low-wage workers, children and adults with chronic illnesses and disabilities, survivors of domestic violence, immigrants, neglected or abused children, persons living with HIV/AIDS, and inmates in the jails and prisoners in correctional facilities.

b) Legal Aid Awareness

Legal aid delivery in camps establishes legal awareness and thus people in different parts of the country get enlightened on their constitutional rights especially those in dare need of legal services. It is also an alternative and

a complementary way of disseminating knowledge, skills, and values implicit in the practice of law and in justice education of those unable to access legal services.

c) Representation in Courts of Law

Some of the lawyers in the field for pro bono services represent their clients (the indigent persons) in courts because the lack of money to pay for lawyers to argue their cases. Basically legal aid is set up so that low-income litigants can have access to equal justice despite their financial barriers. It therefore helps the indigents to be represented in criminal cases mainly those on trial for offences that carry death penalty or life imprisonment.

d) Equality before the Law

Legal aid camps ensure fair and equal treatment of people before the law. Lawyers or paralegals educate communities in the field thereby equipping them with basics of the law. This enables them to appreciate the law in case of any legal questions in their day to day lives and thus prepares them to advocate for their rights incase of any threats or violations of the same.

e) Pro bono Services are Beneficial to Lawyers and their Firms

Pro bono work can enrich a lawyer's practice and prove beneficial for law firms. All lawyers, especially those newer to the profession, can gain knowledge and experience by handling pro bono matters that involve substantive legal work. The satisfaction of contributing to the public good and improving the lives of clients has its own humanitarian rewards that are impossible to quantify. Law firms encourage pro bono work in order to train their associates, recruit law students and other lawyers, enhance their own public reputations by giving back to their communities, and develop business.

f) Acquisition of more Experience by Pro bono Lawyers

Lawyers taking on a pro bono matter involving an area of practice in which (s)he has never practiced may gain competence by associating with another lawyers who has experience in the relevant area of practice, receiving specialized training, and/or performing the necessary legal research and study.

g) Legal Aid is an Empowerment Tool for the Poor

Legal aid provides an important tool for empowering any marginalized community through dissemination of information, creation & sharing of knowledge among community members and vulnerable groups. Legal aid services help those at risk for example women who are being trafficked or community members forcefully being evicted from their residences by the government agencies violating all kind of basic human rights.

h) Direct Contact or Touch with Pro bono Clients

Much of legal aid service lawyers' work involves individual client contact, and lawyers take on cases in which a client's fundamental rights and needs are in jeopardy. These lawyers provide direct services to their clients for free or at a reduced cost to low Income earners and elderly clients. The lawyers providing these services ensure that their clients are satisfied through direct interactions with them.

i) Provides Educational Benefits to University Law Students

The educational goals of individual service clinics offered by law students in the field tend to be more general than with community or specialization clinics. Rather than focusing on the legal needs of a particular community or on particular areas of the law the individual service model clinics concentrate on the students' attention on the core issues of law practice, what lawyers do, that come from the experience of working with a client on just about any type of case.

j) Specialised Legal Aid Services

The field providers of legal aid services first identify the particular legal needs a community in liaison with the local council leaders and then prepare relevant materials for such communities. This helps to answer most of their legal questions and empowers the poor with basic knowledge of their rights.

Legal aid providers in the field may focus on particular legal matters in order to address broader national, or even international, concerns, for example domestic violence or discrimination. This means that they discuss many different legal problems that fall within the needs of their clients.

k) Good Co-ordination and Preparation of the Lawyers

Lawyers who go to the field are better prepared to take on more advanced legal aid cases due to their deep knowledge in that specific field. They accumulate experience and therefore provide excellent legal aid service.

l) Field Camps Handle Priority Needs of their Clients

The key feature for community model legal aid clinics is that they focus on geographic or other communities, guided by community priorities, and are committed to working together with the communities that they serve and empowering them.

Community law clinics take multiple forms. Some focus on the representation of community enterprises nonprofit organizations and small businesses primarily serving low income communities.

Legal aid camp helps to handle a variety of matters, basing on the needs of a given community' This enables the legal aid providers to identify what members deem most urgent so that attention is directed on them.

m) Good Communication Skills

Usually the team going to the field has people who can ably translate from English language to the local language so that the communities targeted for legal aid understand clearly the message communicated to them.

Communities benefit daily from field lawyers' legal service and dedications aimed at successful legal aid provision brought nearer to them. Legal aid service providers consistently demonstrate that meeting the needs of such communities is of first priority through the delivery of sound legal advice, which leads to sensitisation of the masses of their rights.

## Challenges (Disadvantages) of a Legal Aid Camp

Despite the advantages given above, there are a number of disadvantages associated with delivery of legal aid services in the field. These include the following:-

a) Language Barriers

Language barrier is one of the major problems in the field especially to lawyers offering legal aid services in many different communities. It creates wrong understanding of recipients' legal problems and sometimes giving misleading advice since the language in which communication is made is not properly understood by the recipients. It thus makes the whole purpose of legal aid delivery if not difficult, impossible.

b) Poor Road Net Works in Villages

Poor roads in upcountry make movements of lawyers to far to reach districts like Moroto, Adjumani, Soroti, Serere among others very difficult. Most lawyers do not go to deep villages for fear of their vehicles developing poor mechanical conditions worse still in rain seasons. The roads are poor requiring use of stronger vehicles which most pro bono lawyers do not have. This makes delivery of legal aid services hard.

c) Understaffing of Law Firms

Most public lawyers' offices are overworked and understaffed, because of the amount of litigants they are handling. This makes it difficult for the pro bono lawyers to devote enough time in the field and therefore end up leaving bulk of the work to paralegals who are not well qualified to address the concerns of those in need of these services.

d) Fluctuations of the Dollar (Increased Prices of Fuel)

The ever increasing prices of fuel make it very hard for lawyers who sacrifice their time to render legal aid services upcountry sometimes to concentrate in urban places as opposed to rural areas. This has created more inequality in the provision of legal aid services to some parts of the country majorly upcountry areas.

e) Lack of Funding From the Government

Failure of the government and other donors to fund law firms ready to deliver these services and other organizations willing to provide legal aid services but are incapacitated by financial constraints has also contributed to little sensitization of the masses who are in dare need of legal aid services.

f) Little Time Allocated to Legal Aid by Lawyers or Other Providers

Limited time allocated to provision of legal aid services. Due to high demand for legal aid by the indigent persons as opposed to the number of legal aid providers available on the market, few clients are able to enjoy these services in terms of legal representation. There is lack of individualized and focused representation because of the little time these busy lawyers can spend working on each case. Most legal aid camps are allocated very little time to cover the targeted areas which create a lot of inefficiencies in the delivery of these services.

g) Loss of Moral to Represent, or make Adequate Research for Clients on Pro Bono Service

Problems often occur when lawyers and law firms pay no attention to pro bono matters, failing to dedicate the attention, research, and care that would otherwise be given to a paying client. Such tendencies belittle the whole essence of providing legal aid services to the needy persons.

h) Lack of Client Feedback Audit

There is no client feedback audits meant to discuss the effectiveness of providing legal aid services to the indigent persons by the lawyers and ensure that clients are satisfied with the services offered. Assessing the performance of the lawyers while in the field is critical in ensuring that there is productive, long-standing, transparent and mutually beneficial relationship by conducting face-to-face interviews.

## RECOMMENDATIONS

To ensure that there is effectiveness in Legal aid camp service delivery, the following recommendations should be considered:

a) Need to allocate enough Time to Field visits

Lawyers representing pro bono clients should ensure that they either possess or will acquire the knowledge to handle a particular matter. Law firms also should establish that their subordinate lawyers that perform pro bono work have adequate time and resources to handle their work competently.

b) Need for Funding

There is need to fund the lawyers ready to offer this service. Funding can either be done by government or Non Governmental Organisations to ensure that the players are motivated and encouraged to do this work.

c) Need to Prepare and Conduct Research before Field Visit

Lawyers who wish to do pro bono representation, especially those who lack experience in the subject matter at issue, should always prepare by way of research and learning from senior experienced colleagues in this area of practice.

d) Conducting Clients Feed Back Sessions

There is need to conduct clients feedback sessions in order to ensure that there is follow up of the earlier activities and confirm whether the participants approach has changed in terms of what was delivered in the previous session.

## Revision Questions

Discuss the different ways of conducting a Legal Aid Camp

Discuss the strengths and challenges of conducting a Field visit while in Legal aid/Pro bono service delivery.

How can the above challenges be addressed to have an effective Legal Aid Camp.

# STATUTORY LAWS

**STATUTORY INSTRUMENTS**

**SUPPLEMENT No. 6 5th April, 2007**

**STATUTORY INSTRUMENTS SUPPLEMENT**

*to The Uganda Gazette No. 17 Volume C dated 5th April, 2007* Printed by UPPC, Entebbe, by Order of the Government.

**STATUTORY INSTRUMENTS 2007 No. 12.**

THE ADVOCATES (LEGAL AID TO INDIGENT PERSONS) REGULATIONS, 2007.

ARRANGEMENT OF REGULATIONS

*Regulation*

**STATUTORY INSTRUMENTS 2007 No. 12.**

**The Advocates (Legal Aid To Indigent Persons) Regulations, 2007.**

*(Made under section 77(1) (g) of the Advocates Act, Cap 267)*

IN EXERCISE of the powers conferred on the Law Council by section 77(1) (g) of the Advocates Act, these Regulations are made this 20th day of June, 2005.

PART I—PRELIMINARY

**1. Title and commencement.**

(1) These Regulations may be cited as the Advocates (Legal Aid To Indigent Persons) Regulations, 2007.

(2) These Regulations shall come into force on the date of publication except for regulations 7 and 9 which shall come into force 12 months after the date of publication.

**2. Objectives.**

The objectives of these Regulations are—

(a) to regulate and monitor the quality of legal aid service delivery;

(b) to ensure that legal aid and advice are provided in a most effective and efficient manner;

(c) to ensure that all legal aid providers operating in Uganda have basic facilities and qualified personnel required to provide legal aid in a professional and ethical manner;

(d) to establish clear and objective criteria to be followed by legal aid providers when reviewing applications for legal aid;

(e) to encourage the provision of legal aid throughout the Country.

**3. Application.**

(1) These Regulations shall apply to persons, organisations or institutions providing legal aid to indigent persons in Uganda.

(2) These Regulations shall not apply to legal aid at the expense of the State as enshrined in article 28 (3) (e) of the Constitution (state brief system).

4. Interpretation.

In these Regulations, unless the context otherwise requires—

"Act" means the Advocates Act, Cap 267; 30

"applicant" means a person who applies to a legal aid provider for legal aid;

"calendar year" means the period from 1st January to 31st December;

"client" means a person whose application for legal aid under these Regulations has been granted;

"indigent person" means a person who satisfies the means test under regulation 24;

"legal aid" means the provision of legal advice or representation by a lawyer, an advocate or a paralegal, as the case may be, to a client at no cost or at a very minimal cost;

"legal aid provider" or "provider" means a person, an organisation or institution whose main objective is the provision of legal aid and is registered by the Law Council as a legal aid provider;

"legal personnel" means the lawyer, advocate or paralegal employed by the legal aid provider;

"paralegal' means a person who holds a qualification in law, other

than a degree in law, recognized by the Law Council.

PART II—REGISTRATION OF LEGAL AID PROVIDERS

5. Powers of Law Council.

As stipulated in section 2 of the Advocates Act, the Law Council shall exercise general supervision and control over the provision of legal aid and advice to indigent persons in Uganda.

6. Registration as legal aid provider.

No person, organisation or institution shall engage in the business of providing legal aid to indigent persons unless that person, organisation or institution is registered with the Law Council as a legal aid provider.

7. Requirements to be met before registration.

Before a person, an organisation or institution is registered as a legal aid provider, 31 at least the following requirements must be met—

(a) the office must be well kept and must meet the following basic requirements—

(i) a suitable desk for the advocate or lawyer and for the paralegal;

(ii) a separate room for the advocate or lawyer and the paralegal, separate from that of other non legal staff;

(iii) a secretarial desk and a computer or typewriter;

(iv) a reception with chairs or benches for clients;

(v) a book shelf;

(vi) a chest of drawers or filing cabinet;

(vii) a reasonable collection of reference legal materials including a full set of the Revised Laws of Uganda;

(viii) toilet and sanitary facilities;

(ix) properly kept files;

(b) if the applicant for registration is a non governmental organisation, in addition to the requirements in paragraph (a)—

(i) it must have a certificate of registration issued by the Non

Governmental Organisations Registration Board;

(ii) its constitution must state that provision of legal aid is one of its objectives;

(iii) it must have in its employment at least one person qualified as a lawyer or an advocate and one other person qualified as a paralegal.

8. Application for registration as legal aid provider.

(1) An application to register as a legal aid provider shall be made in Form I of the Schedule to these Regulations and shall be accompanied by a fee prescribed by the Law Council.

(2) The application shall indicate—

(a) full name and address of the applicant;

(b) physical location of premises of applicant;

(c) nature of services provided;

(d) geographical area of operation;

(e) name and qualifications of legal personnel; and

(f) whether the applicant meets the requirements under regulation

(3) The Law Council shall process every application for registration expeditiously.

9. Issue of certificate of registration.

(1) Where the Law Council is satisfied that an applicant for registration has fulfilled all or most of the requirements specified in regulation 7, and upon payment of a prescribed fee, the Law Council shall issue the applicant with a certificate of registration which shall entitle the holder to provide legal aid to indigent persons.

(2) A certificate of registration issued under sub regulation (1) is specified in Form II of the Schedule to these Regulations.

(3) The Law Council may refuse to issue a certificate of registration to an applicant if—

(a) the applicant for registration does not meet the requirements specified in regulation 7; or

(b) the applicant has been convicted of an offence involving dishonesty, fraud or any other offence involving moral turpitude.

(4) Where the Law Council refuses to issue a certificate, it shall give reasons for the refusal.

(5) A certificate of registration issued by the Law Council under these Regulations shall be valid for a period of one calendar year and shall be renewable upon expiry on the same requirements and conditions as the original certificate.

(6) A certificate of registration shall not be transferable.

10. Law Council to keep register of legal aid providers.

The Law Council shall keep and maintain a register of legal aid providers.

11. Power to cancel certificate of registration.

(1) The Law Council may, at any time suspend or cancel the registration of a legal aid provider issued with a certificate of registration under these Regulations in any of the following circumstances—

(a) if the legal aid provider is a non governmental organisation, upon cancellation of its registration as a non governmental organisation by the Non Governmental Organisations Registration Board;

(b) if the Law Council is satisfied or has proof that the legal aid provider is conducting the business of providing legal aid in an unethical and unprofessional manner and below the standards set in these Regulations;

(c) the legal aid provider has ceased to carry on the business for which the certificate was issued;

(d) if the provider has been convicted of an offence involving dishonesty, fraud or any other offence involving moral turpitude; or

(e) for any other sufficient cause.

(2) The Law Council shall not suspend or cancel the registration of a legal aid provider registered under these Regulations unless the Law Council has given the legal aid provider an opportunity to show cause why the certificate of registration should not be suspended or cancelled.

(3) Where the Law Council cancels the registration of a legal aid provider, the legal aid provider shall surrender the certificate of registration to the Law Council.

(4) Where a certificate of registration is cancelled, the Law Council shall publish the suspension or cancellation in at least one widely circulating local newspaper.

(5) A provider whose certificate of registration is cancelled may, if the provider has addressed the reasons that led to the suspension or cancellation, re-apply to the Law Council for issue of a new certificate.

12. Review of Law Council decision.

(1) A legal aid provider—

(a) whose application for a certificate of registration or renewal of registration has been rejected;

(b) whose certificate of registration has been suspended or cancelled, may apply to the Law council for review of its decision.

PART III—QUALITY OF SERVICES AND CLIENT CARE

13. Maintenance of files.

(1) A legal aid provider shall open and keep a separate file for each client.

(2) A client's file shall contain the following—

(a) full particulars of the client including—

(i) statement of the problem of the client;

(ii) expectations of the client;

(iii) notes on assessment of means;

(iv) legal issues raised by the problem and an explanation by the lawyer or advocate of the practical implications of the matter;

(v) advice given and options available;

(b) preparations for the case which may include—

(i) consultation notes and legal research;

(ii) advice to the client on prospects of success with regards to merits;

(iii) communication to the client on prospects of the case or matter;

(iv) pleadings, court documents or any other supporting documents;

(c) notes on presentation of the case and these may include—

(i) comprehensive notes of evidence;

(ii) presentation of arguments on facts or the law applicable;

(iii) list of witnesses or exhibits;

(iv) proposed court submissions;

(d) notes on any form of alternative dispute resolution and these may include—

(i) client instructions;

(ii) record of negotiations, mediation or arbitration;

(iii) any supporting documents.

(3) Clients files must be properly kept and the correspondence shall be filed in order.

(4) A legal aid provider shall put in place a file back up system.

14. Client care.

(1) A legal aid provider shall ensure that clients are provided with quality client care.

(2) In this regulation, client care means, but is not limited to—

(a) hospitality, accessible and appropriate services;

(b) conducive environment for confidentiality;

(c) professional and sensitive handling of juveniles, elderly or vulnerable people;

(d) provision of information about availability and nature of services provided and any other information;

(e) acting on client's instructions, or if not practical, in the best interest of the client;

(f) means of client satisfaction surveys;

(g) complaints procedure.

15. Supervision.

(1) A legal aid provider shall ensure that, in the performance of their work, a paralegal in their employment is supervised by a lawyer or advocate employed by the legal aid provider.

(2) A provider shall put in place mechanisms to ensure and assess the quality of services provided and these may include—

(a) regular monitoring of actions taken on cases;

(b) close supervision of new or inexperienced staff;

(c) appraisals;

(d) continuous training of staff;

(e) monthly reports on assignments;

(f) in-house reports and external peer reviews;

(g) team meetings;

(h) staff briefings or memoranda.

PART IV—INSPECTION BY LAW COUNCIL

16 . Access to Law Council to enter premises.

(1) The Law Council or any person authorized by the Law Council in writing shall, during normal working hours, with or without prior notice to a legal aid provider, inspect the offices of the legal aid provider to carry out such inspection as the Law Council considers necessary.

(2) The Law Council shall carry out inspection at least once in a calendar year.

(3) A legal aid provider shall not deny access to or block the Law Council or a person authorized by the Law Council from entering the offices for purposes of inspection.

17. Powers of inspectors.

A member of the Law Council or a person authorized in writing by the Law Council to inspect offices of a legal aid provider may—

(a) at any time, during normal working hours enter the offices and check whether the office possesses the basic requirements stipulated in regulation 7(a);

(b) give such directions as the inspecting officer may think necessary to ensure that the legal aid provider complies with the standards set out in these Regulations;

(c) require the production of books or records required to be kept under these Regulations;

(d) examine books or records; or

(e) carry out any other inspections as the Law Council may deem fit.

18. Books and records.

Every legal aid provider shall keep proper and accurate records of all the cases or matters handled.

19. Keeping of separate accounts.

A legal aid provider shall ensure that office accounts and client accounts are kept separate.

## PART V—RULES GOVERNING THE PROVISION OF LEGAL AID

20. Compliance with rules.

In order to provide legal aid in an orderly and efficient manner, legal aid providers shall, as far as practicable, comply with the rules laid down in this Part of these Regulations.

21. Nature of legal aid.

(1) Legal aid provided by a legal aid provider includes the doing of anything that may properly be done by an advocate for or in the interests of his or her client.

(2) Without prejudice to the generality of sub regulation (1), legal aid shall include—

(a) legal advice;

(b) representation in court or tribunal in civil, constitutional or criminal matters;

(c) mediation, negotiation or arbitration;

(d) legal education or awareness.

(3) The nature of legal aid provided to a person in any particular case shall be the discretion of the legal aid provider, taking into account the needs of the person concerned and the resources available to the legal aid provider.

22. Application for legal aid.

(1) Any person may apply to a legal aid provider for legal aid.

(2) An application for legal aid shall be made on Form III specified in the Schedule to these Regulations.

(3) Where the application for legal aid is made orally, the legal personnel shall assist the applicant to fill the application form using the information provided by the applicant.

(4) subject to these Regulations, a legal aid provider shall, on receipt of an application for legal aid consider the application and—

(a) grant the application and provide the legal aid to the applicant, if the legal aid provider is satisfied that—

(i) the applicant meets the eligibility test under regulation 23; and

(ii) the legal aid provider has, at that material time, sufficient resources to provide the legal aid required; or

(b) if the legal aid provider is not satisfied that the applicant is eligible for legal aid, reject the application.

(5) Where an application for legal aid is rejected, the provider may refer the applicant to another legal aid provider or institution.

(6) A legal aid provider shall without undue delay, notify an applicant of its decision.

(7) Before granting legal aid to an applicant, the legal aid provider may require the applicant—

(a) to furnish such additional information as the legal aid provider considers necessary for the purposes of verifying any matter alleged in the application or for ascertaining the applicant's means;

(b) to appear personally before the legal aid provider to answer any questions which the provider may put to him or her in connection with the application or in regard to the assessment of the applicant's 39 means.

(8) A legal aid provider may at any time reconsider any decision made under subregulation (4) concerning the eligibility of any person to receive legal aid.

23. Eligibility for legal aid.

(1) A person is eligible for legal aid under these Regulations if, in the opinion of the legal aid provider—

(a) the applicant has insufficient means to afford the services of an advocate on his or her own account;

(b) the applicant has reasonable grounds for initiating, carrying on, or defending the matter for which he or she applies for legal aid, or the matter is of public interest;

(c) if it is a civil matter, there is reasonable prospect of success or recovery in the matter; and

(d) the applicant is in need of or would benefit from the legal aid.

(2) A provider may grant legal aid to an applicant for any other sufficient reason.

24. Assessment of means.

(1) In assessing the means of any person for the purposes of determining whether that person qualifies for legal aid, a legal aid provider shall take into account the income and assets of the applicant, but these shall exclude—

(a) dwelling house of the applicant;

(b) beds and clothing of the applicant;

(c) furniture and household utensils of the applicant; and

(d) tools and implements necessarily used by the applicant in his or her trade or occupation.

25. Matters to be given priority.

When considering an application for legal aid under these Regulations, a legal aid provider shall consider the following—

(a) the elderly, widows, orphans, children, people with disabilities, internally displaced persons, people living with HIV/AIDS, prisoners on remand or refugees shall be given priority over other persons;

(b) land disputes, inheritance and succession disputes, domestic violence, child maintenance and custody, torture and other forms of human rights abuse shall be given priority over other matters.

26. Assignment of advocate.

(1) Where a legal aid provider is of the opinion—

(a) that a particular matter of a civil nature before a legal aid provider can best be resolved by taking it to court;

(b) that there are high prospects of the matter succeeding; and

(c) it is in the interests of justice for the services of an advocate in private practice to be engaged, the provider may engage an advocate in private practice to act in the matter.

(2) Subject to the Advocates Act, the engagement of an advocate under sub regulation (1) shall be upon such terms as may be mutually agreed between the provider and the advocate.

(3) Any fees and expenses payable under this regulation may be paid out of the damages or costs awarded to a client or any other source.

27. Termination of legal aid.

(1) A legal aid provider may at any time, terminate legal aid granted under these Regulations for any or all of the following reasons—

(a) where a client shows lack of co-operation with the provider;

(b) where a client fails to appear, without reasonable cause when called upon to do so by the legal aid provider or by the court;

(c) where a client gives false information to the provider;

(d) where the legal aid provider has proof that a client has taken the matter to either another legal aid provider or to an advocate in private practice;

(e) where a client ceases to be indigent; or

(f) for any other sufficient reason.

(2) A legal aid provider shall not terminate legal aid granted to a client under these Regulations unless the provider has given thirty days notice to the client and has given an opportunity to that client to show cause why the legal aid should not be terminated.

(3) Where a matter is in court or tribunal, a provider shall notify the court or tribunal of the termination.

28. Client may dispense with legal aid.

Notwithstanding anything to the contrary under these Regulations, a client may at any time dispense with legal aid granted to him or her.

## PART VI—FINANCIAL PROVISIONS

29. Contributions towards legal aid.

A legal aid provider may, in granting legal aid to any person under these Regulations, require the client to contribute to the cost of that legal aid to an extent which, in the opinion of the provider, is just and reasonable having regard to the means of the person concerned.

30. Deductions from awards

A legal aid provider shall, for the purpose of meeting any costs and

expenses necessarily incurred in the provision of legal aid, deduct from—

(a) any damages awarded to a client by a court; or

(b) any amounts payable to a client pursuant to a settlement negotiated with assistance provided under these Regulations, an amount not exceeding 10% of the damages or the amounts paid pursuant to a settlement as the case may be.

31. Costs awarded to clients.

(1) Where a court awards costs to a client, the costs shall, subject to sub regulation (3), accrue to the legal aid provider.

(2) For the purpose of receiving any costs payable under sub regulation (1), a legal aid provider may take all such steps and pursue all such remedies as would have been taken by the client to whom such costs were awarded, and any expenses incurred in taking such steps or pursuing such remedies shall be recovered by the legal aid provider.

(3) Where a court awards costs to a client, the legal aid provider shall refund to the client any contributions made by the client under regulation 29.

PART VII—GENERAL 42

32. Where all parties to a matter apply for legal aid.

(1) In civil matters, where both the plaintiff/applicant and defendant/respondent in a matter apply for legal aid to the same legal aid provider, the provider shall grant legal aid to the first of the parties to apply, taking into consideration all the conditions for grant of legal aid specified in these Regulations.

(2) Where two applicants for legal aid are parties to a dispute, a provider may, with their consent mediate the dispute.

(3) Where the mediation under sub regulation (2) fails, the provider shall refer the parties to any other provider and shall disqualify himself or herself from representing either of the parties in respect of that dispute.

33. Functions of legal personnel.

The legal personnel shall perform the following functions in relation to the provision of legal aid—

(a) assist applicants who cannot read or write to fill application forms for legal aid;

(b) determine whether the applicant is eligible for legal aid;

(c) Assess the merits and prospects of success of the case, where a matter is to be forwarded to the courts;

(d) Inform the applicant or clients of the regulations governing legal aid including such matters as contributions by clients towards costs of legal aid, deductions from court awards, costs;

(e) Provide legal advice to clients;

(f) Represent clients in court, where one is qualified to appear in court;

(g) Where he or she cannot represent a client in court due to reasons that the legal personnel shall provide, and with the consent of the legal aid provider, refer the matter to an advocate;

(h) Assist clients in negotiation or mediation of conflicts;

(i) Sensitize, educate and create awareness.

34. Offences and penalties.

A person who—

(a) operates as a legal aid provider without a certificate of registration granted by the Law Council;

(b) operates as a provider while the certificate of registration is suspended; or

(c) obstructs an inspecting officer from accessing the legal aid provider's premises;

(d) obstructs an inspecting officer from carrying out his or her duties under these Regulations,

commits an offence and is liable on conviction to a fine not exceeding three thousand shillings or imprisonment not exceeding three months.

35. Application of Advocates (Professional Conduct) Regulations.

The Advocates (Professional Conduct) Regulations shall apply to an advocate providing legal aid under these Regulations as they do apply to an advocate in private legal practice.

36. Law Council to issue guidelines.

The Law Council may, from time to time, in writing, issue guidelines in addition to these Regulations for the better control, supervision and regulation of the provision of legal aid.

SCHEDULE

Form I Regulation 8

THE ADVOCATES (LEGAL AID TO INDIGENT PERSONS) REGULATIONS, 2007

DISCUSSION OF THE PRIVATE STATE ACTORS (CONTINUATION)

1. **Uganda Land Alliance (ULA)**

- Established in 1995
- It is a National Organization committed to the provision of pro bono legal services to indigent persons and the vision and mission goes to the focus on equitable access and control over land all where persons actively get involved to end poverty. See:https://www.landcoalition.org/en/explore/our-network/uganda-land-alliance/
- Services Provided:
  - Active legal representation in court to alternative dispute resolution of clients' complaints.
  - Advocacy around land rights especially those of marginalized groups including women.
  - Shedding more light on land rights in articles and newsletters Read https://www.yumpu.com/en/document/view/33784506/womens-land-rights-the-time-is-now-uganda-land-alliance and https://odi.org/en/publications/advocating-for-pro-poor-land-laws-uganda-land-alliance-and-the-land-reform-process-in-uganda/
- Strategic litigation:
  - ***ULA Ltd vs Wild Life Authority (Misc Cause No. 0001 of 2004)*** Challenging the eviction of the Benet by UWA and UPDF an ethnic minority group traditionally resident on the slopes of Mount Elgon in the name of upholding wildlife laws. It helped shed more light on the land rights alternatives and also led to courts' pronouncement that the evictions were illegal.
  - While this was a great development, its right to assert that the evictions didn't stop as some were witnessed in 2008 and its in this regard that more cases like ***Muhindo & Ors vs A.G (Misc Cause no.127 of 2016)*** which is on file with Amnesty International where Court declared that Uganda's lack of adequate procedures governing eviction violates the right to life, dignity and property among others (***Find attached that article titled "13 years in Limbo, Forced evictions of the Benet in the name of conservation " for more information on evictions )***

2. **Centre for Health Human Rights and Development (CEHURD)**

- Established in 2010 as an NGO pioneering the right to health but also tackles other rights .
- CEHURD's mission and objectives are directed to promoting equitable access to health services, serving as a public health law resource center in the East Africa Region, advocacy for the health rights of marginalized populations and identifying strategic cases that advance health rights.

- Activities: The Centre undertakes various reviews aimed at identifying laws that impact on citizen's right to healt, Advocacy etc

- Litigation:

  - ***CEHURD, Prof. Twinomugisha & 2 ors vs A.G Constitutional Petition no.16 of 2011*** (The Maternal Health Case). The families of two mothers who lost their lives in government hospitals while giving birth instituted a public interest case contending that the death was a result of the country's poor healthcare system. Court observed that Government's ommission to provide basic maternal health violates the right to health which is inconsistent with National objective xiv and xx, violates the right to life as in Art 22, rights of women, amounts to inhuman, degrading treatment as in Art.24 and 44(a)

  - ***CEHURD & Ors vs Nakaseke District Local Government Council (Civil Suit No.111 of 2012)*** (The expectant mother case). The expectant mother who was in labor for 8 hrs developed a condition aka obstructed labor needed a medical personnel who was absent eventually gave birth on the veranda while all the health workers were looking and died). Court held that the right to health wasnt observed, there was negligence etc. 5 yrs later CEHURD visited the widower to see the impact on the case, and found that at least the services had improved and the hospital was more diligent

  - *C**EHURD &Yiga Daniel v. Attorney General, (Constitutional Petition No. 64 of 2011).*** The petition contends that the use of words such as 'idiots' and 'imbeciles' in the law in reference to persons with mental disabilities is derogatory and unconstitutional.

  - ***CEHURD Vs Executive Director Mulago Hospital & Anor.[2017] UGSC 10.*** The petitioners gave birth to live twins but were given 1 baby and a dead body of the other however the DNA results from the dead baby didnt match that of the parents hence the suit and Court shed more light to a right to health, communication and also held that such acts by mulago amounted to degrading treatment

  - ***Mulumbe Moses and CEHURD Vs AG, Ruth Acheng and Ors (2021)*** on the exhorbitant fees for treatment which led to a madamus order on respondent being issued to regulate the fairs of the treatment

3. **Advocates Coalition on Development and Environment (ACODE)**

   - It's a Company limited by Guarantee engaged in carrying out independent public policy, research, advocacy, capacity building and lobbying to ensure respect of human rights, good governance, transparency and accountability in the conduct of public affairs of the state of

Uganda ***( ACODE & Others vs Attorney General and Parliamentary Commission Const Petition no. 14 of 2011)***

- ACODE is therefore a key partner in public interest, an independent public policy think tank with operations in the Eastern and southern Africa sub regions.
- Its mission is to make public policies work for people through evidence-based policy research and analysis in the areas of governance, trade, environment, science and technology.
- Litigation:
  - ***ACODE vs AG Miscellaneous Cause No. 0100 of 2004.*** ACODE successfully challenged the degazettement of Butamira forest for the purposes of sugarcane growing. It was stated that the degazettement of the forests would affect the ecosystem and infringe on citizens right to a healthy and clean environment
  - ***Advocates Coalition for Development and Environment and 4 Ors v. Attorney General and Anor, Const. Petition No. 14 of 2011.*** ACODE was a lead petitioner in the that sought to have members of parliament return the monies they received for monitoring public programs on the ground that it amounted to a wastage and abuse of public funds

**4. Legal Action for Persons with Disabilities (LAPD)**

- LAPD is a disability rights organisation committed to promoting and defending the rights of persons with disabilities. LAPD provides legal aid to indigent Persons with Disabilities whose rights have been violated.
- LAPD envisions a Uganda where Human rights are actualised for PWDS, there effective representation etc
- Activities:
  - Awareness raising
  - Lobying and advocacy
  - Networking
  - conducts several human rights trainings
  - law reform advocacy in partnership with other organizations that deal with PWDs.
  - LAPD also regularly engages magistrates and judges on the rights of PWDs. Additionally, a number of publications on the rights of PWDs have been developed and these are very useful in as far so they provide background research for select public interest cases on the rights of PWDs.

- ❖ Litigation:
    - ***LAPD vs AG ,KCCA, Makerere University [2014] UGHCCD 76.*** Petition contests the reluctance of Kampala City Council Authority (KCCA) and Makerere University to put in place access facilities for PWDs.

**5. Human Rights Network- Uganda (HURINET-U)**

- ❖ Established in 1993 by a group of 8 Human Rights Organiozations and registered as an NGO in 1994
- ❖ HURINET-U is committed to diverse but complimentary human rights ***issues that include child rights, economic, social and cultural rights, minority rights, women's rights, media rights, labor rights and conflict resolution.***
- ❖ Litigation:
    - ***Human Rights Network UG & 4 Ors vs AG [2020) UGCC 6 (Const petition 56 of 2013*** in answering the question whether s.8 of the Public Order Managment Act is inconsistent with Article 92
    - Most recently in 2009, HURINET-U supported journalists Angelo Izama and Charles Mpagi Mwanguhya to challenge the acts of the Permanent Secretary, Ministry of Energy in denying access to the Oil Production Sharing Agreements (PSA) entered into between the government of Uganda and various multinational oil companies.

**6. Civil Society Coalition on Human Rights and Constitutional Law**

- ❖ Was formed in the wake of the Anti–Homosexuality Bill 2009 to among others have the bill scrapped.
- ❖ The main objective of the coalition at inception was to have the bill dropped and to promote a positive sexual rights agenda for Uganda.
- ❖ Activities:
    - Issuing press statements condemning homophobia
    - The commemoration of the international day against homophobia to further its work and the notion of equality in the country.
    - lobbying of the Ministry of Health and the Uganda AIDS Commission to include issues of homosexuality in HIV/AIDS polices

- media campaigns

❖ Litigation: ***Adrian Juuko v. Attorney General, Constitutional Petition No. 1 of 2009.*** The coordinator of the coalition has petitioned the constitutional court to challenge certain provisions of the Equal Opportunities Act that the provision of the Act that prohibits persons involved in what is termed 'socially unacceptable behavior' from seeking redress from any court of law on the grounds of discrimination.

- ***Kasha Jacqueline, David Kato Kisuule and Patience Onziema v. Rolling Stone and Giles Muhame,* Misc. Cause No. 163 of 2010, unreported.)** The Coalition supported a case in which the photographs and names of several persons who were alleged to be homosexual were published in a local tabloid, the *Rolling Stone titled* ***"hang them".*** The court found this to constitute an infringement of these persons' right to privacy and accordingly issued an injunction against the newspaper

**7. Greenwatch Uganda**

❖ Established in 1995 and has since grown to be a leading environmental rights advocacy NGO in Uganda.

❖ The organization aims at promoting the sustainable use, management and protection of the environment and natural resources, while at the same time enforcing the right to a clean and healthy environment**.** Ensuring that policy makers apply best environmental management practices in decision making

❖ Activities:

- Advocacy campaigns including media advocacy
- trainings and capacity building of the communities, policy makers and other relevant stakeholders.

❖ Litigation.

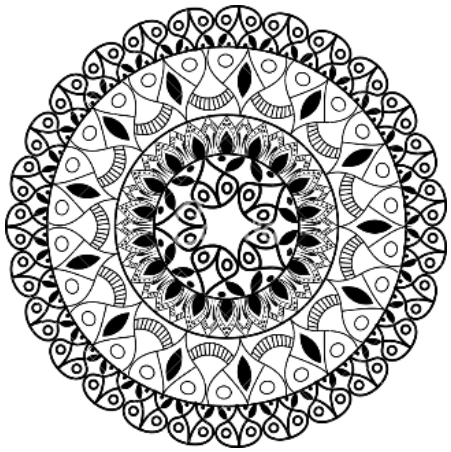
- ***Greenwatch and Advocates Coalition on Development and Environment v. Golf-course Holdings, HC Misc. Application No 390 of 2001.*** Greenwatch together with another environmental NGO challenged the conversion of a wetland for hotel construction in the landmark case against Golf Course Holdings
- ***Greenwatch v. Attorney General and National Environmental Management Authority*, Misc. Application No. 104 of 2002**. Greenwatch brought a public interest case seeking regulation of the manufacture, use, distribution and sale of plastic bags as well as the restoration of the environment in the state it was before the menace caused by the plastic bags.
- ***High Court Misc. Application No. 92 of 2004 (arising from Misc. Cause No. 15 of 2004).***a petition brought to seek an injunction against the transportation and exportation of chimpanzees from Uganda to China or any other country

**8. Justice For Children - Uganda**

- This is a non-profit, child-advocacy group that provides legal and social services to abused children and their protective parents when the system fails.
- Its an initiative of JLOS funded by UNICEF and implemented by Center for justice studies and innovations.
- Ativities:
    - offer assistance on behalf of abused and neglected children to prevent their re-abuse.
    - They ensure that abused children receive legal representation that is diligent.
    - The Child and his or her protective parent is helped to navigate a complicated administrative judicial process that is often absurd and unjust.
    - Justice for Children is not only involved with children in conflict but also goes to advocating for justice for all children.

**9. Platform for Labor Action (PLA)**

- Has been providing legal aid services since 2003.
- Its target population includes children in exploitative forms of work, children at risk of exploitation, informal sector workers infected and affected byHIV/AIDS, women, youth and workers earning below the threshold of Ushs.150,000
- Activities: social protection, human rights and accountability, research etc
- We see it being a founding member of the ***coalition against Trafficking in persons in Uganda***
- For effective [performance ot works hand in hand with private companies, trade unions CBO'S, Local government.



# Volume Four

# JUDICIAL PRACTICE

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INTERNATIONAL INSTRUMENTS:

The Universal Declaration of Human Rights (1948).

The International Covenant on Civil and Political Rights (1966).

The UN Basic Principles on the Independence of the Judiciary (1985).

The Bangalore Principles of Judicial Conduct (2002).

The African Charter on Human and Peoples Rights (1986).

Principles and Guidelines on the Right to a Fair Trial in Africa (2003).

The Commonwealth Principles on the Accountability of, and the Relationship between the Three Branches of Government (2003) – *Latimer House Principles*.

PRINCIPAL LEGISLATION:

The Constitution of the Republic of Uganda (1995).

The Judicature Act, Cap 13.

The Judicial Service Act, Cap 14.

The Administration of the Judiciary Act,2020.

The Penal Code Act, Cap 120.

The Magistrates Courts Act, Cap 16.

The Civil Procedure Act, Cap 71.

The Leadership Code Act, 17 of 2002.

The Prevention of Corruption Act

SUBSIDIARY LEGISLATION:

The Constitution (Judicial Service Regulations), S.I Constitution – 7

The Judicial Service Regulations, S.I 87 of 2005.

The Judicial Service (complaints and Disciplinary Proceedings) Regulations, S.I 88 of 2005.

OTHER SOURCES:

The Uganda Code of Judicial Conduct (2003).

Commentary on the Bangalore Principles of Judicial Conduct (2007).

Judicial independence undermined: A report on Uganda: An International Bar Association Human Rights Institute Report (2007).

SOME IMPORTANT DECISIONS:

Attorney General v Masalu Musene Wilson & Ors; Const. Appeal No. 7 of 2005.

Hon. Lady Justice Julia Sebutinde v Attorney General; Const. Ref. No. 5 of 2005.

His Worship Aggrey Bwire v Attorney General & Anor; Civil Appeal No. 9 of 2009.

Uganda Law Society & Anor v The Attorney General; Constitutional Petitions No.2 & 8 of 2002.

**BOOKS:**

Odoki, B. (1990). An Introduction to Judicial Conduct in Uganda.

Morris, H. F., & Read, James S. Indirect Rule and the Search for Justice: Essays in East African Legal History.

*H.F, Morris, H. F., & James S. Read*. (1996). Uganda: the Development of its Laws and Constitution.

# CONTEMPORARY TRENDS IN ADMINISTRATION OF JUSTICE & CONCEPT OF NATURAL JUSTICE

**Themis**: The 'Goddess' or 'Angel' of Justice (300BC)

Clear-sighted oracle with ability to see future

Weighing scales to judge based on truth & law

Stands on the law – as foundation for justice

Knowledgeable and well read

Blindfolded & impartial – does not see rich or poor, powerful or weak, black or white Sword shows strength, power, well armed

Sharp sword for execution of justice – damages, imprisonment etc

Defender of the defenseless

Mature but not old – strong/vibrant.

Sword comes after scales – weigh then act

Simply dressed & barefoot with no desire for material things/no corruption

Why female? Compassionate – justice must be balanced with compassion

Why so scantily dressed? Nothing to hide?

PERVERTING COURSE OF JUSTICE

SCALES OF JUSTICE

The Scales of Justice represents the balance of the individual against the needs of society and a fair balance between interests of one individual and those of another. The personification of justice balancing the scales dates back to the Egyptian Goddess of Justice, Maat, who stood for truth and fairness

SCROLL/BOOK

The Scroll represents learning and knowledge, the passing of time and the extent of life. Justice demands that we continue to learn as our life unfolds. Education is a responsibility of the individual and society.

SWORD OF JUSTICE

The Sword of Justice is the active force, a symbol of power, protection, authority, vigilance and might. This double-edged sword in Justice's left hand, recognizes the power of Reason and Justice, which may be wielded either for or against any party. It serves as a reminder of the necessity of real punishment, the power of the law, and ultimately, the power over life and death

THE BLINDFOLD

The Blindfold, symbolic of Blind Justice, represents equality, knowing no differences in the parties involved. Representations of the Lady of Justice in the Western tradition show that sometimes she wears a blindfold, which is more prevalent in Europe, but often she appears without one.

Rules of natural justice

Derivation from Roman law and the concept of fairness

English common law contains principles of natural justice and doctrines of equity

Religious teachings (Bible, Qur'an) including the 10 commandments

Constitution of the Republic of Uganda

Right to fair hearing

Bias rule

Evidence rule

Reasonableness of decisions

Derivation

The rules of natural justice are derived from Roman law.

The Romans believed certain basic fundamental legal principles to be self evident truths.

Simply put the rules of natural justice relate to fairness: they exist to protect the fair dealing with individuals who find themselves before a court/tribunal or any hearing to whose judgment an individual is subject.

In any instance of anyone being before a hearing the individual has a right to be heard. This is often called ***audi alterampartem***. Thus, if a student is being subjected to a engagement in exam malpractice hearing for example then the student has a right to make representations.

Linked to this right is the right to be informed beforehand of the allegations against him or her.

The other key rule from which the others are derived is ***nemo judex in parte sua*** (no-one can judge their own case).

The Right to a Fair Hearing

Any hearing must allow to the parties before it the opportunity to prepare and present evidence and to respond to arguments presenting by the opposite side.

When conducting an investigation in relation to a complaint it is important that the person being complained against is advised of the allegations in as much detail as possible and given the opportunity to reply to the allegations.

The Bias Rule

This states that no one should be judge in his or her case. This is the requirement that the deciding authority (including judicial Officers) must be unbiased when according the hearing or making the decision.

Additionally, investigators and decision-makers must act without bias in all procedures connected with the making of a decision.

A decision-maker must be impartial and must make a decision based on a balanced and considered assessment of the information and evidence before him or her without favouring one party over another.

Even where no actual bias exists, investigators and decision-makers should be careful to avoid the appearance of bias.

Investigators and decision makers should ensure that there is no conflict of interest which would make it inappropriate for them to conduct the investigation.

The Evidence Rule

The third rule is that any administrative decision or ruling/judgment must be based upon logical proof or evidence material.

Investigators and decision makers should not base their decisions on mere speculation or suspicion.

An investigator or decision maker should be able to clearly point to the evidence on which the inference or determination is based.

Evidence (arguments, allegations, documents, photos, etc.) presented by one party must be disclosed to the other party, who may then subject it to scrutiny.

Reasonableness of decisions

Any decision must be one that is within a reasonable range of decisions available to the decision maker on the evidence.

Any decision made must always be supported by detailed reasons for the decision that must be disclosed to the parties subject to the decision.

At the end of the case even the losing party who does not agree with the decision should be able to appreciate the reason for the decision & respect it.

Promoting Justice

Promoting justice is often about fighting against increasing the scope of limitation of human rights & freedoms.

“Injustice anywhere is a threat to justice everywhere”

‘Letter from a Birmingham jail’, Martin Luther King

“First they came for the communists,and I didn't speak out because I wasn't a communist.

Then they came for the socialists,and I didn't speak out because I wasn't a socialist.

Then they came for the trade unionists,and I didn't speak out because I wasn't a trade unionist.

Then they came for me,and there was no one left to speak for me.”

‘First they Came...’, Martin Niemoller, on Nazi Germany

## BIBLICAL TEACHINGS

Deuteronomy 16:20 begins, literally, “Justice, only justice, shalt thou follow.” Life and prosperity on earth are dependent upon justice. Justice does not follow man’s needs, but man follows justice. Justice is God-centered, not man-centered. Modern law is not in touch with reality, because it seeks to be man-centered and defines the Rule of Law in terms of man and the will of man. Such a view of law is treason to God’s covenant and the suicide of man.

GOD

1. Donot worship any other gods

Donot make any idols

Donot misue the name of God

Keep the Sabbath  holy

**MAN**

I. Honour your father and mother

II. Donot murder

III. Donot commit adultery

IV. Donot steal

V. Donot lie

VI. Donot covet

VII. Love thy neighbor as you love thyself

Let he who is without sin cast the first stone

Crucifixion of Jesus was the result of judicial misconduct

## Qur'an

You who believe! be upholders of justice, bearing witness for Allah alone, even against yourselves or your parents and relatives. Whether they are rich or poor, Allah is well able to look after them. Do not follow your own desires and deviate from the truth. If you twist or turn away, Allah is aware of what you do. (Surat an-Nisa', 135)

Among those we have created there is a community who guide by the Truth and act justly according to it. (Surat al-A'raf, 181)

... if you do judge, judge between them justly. Allah loves the just. (Surat al-Maida, 42)

You who believe! show integrity for the sake of Allah, bearing witness with justice. Do not let hatred for a people incite you into not being just. Be just. That is closer to taqwa. Fear [and respect] Allah. Allah is aware of what you do. (Surat al-Maida, 8)

Every nation has a Messenger and when their Messenger comes everything is decided between them justly. They are not wronged. (Surah Yunus, 47)

We sent Our Messengers with the Clear Signs and sent down the Book and the Balance with them so that mankind might establish justice. (Surat al-Hadid, 25)

Say: "My Lord has commanded justice..." (Surat al-A 'raf, 29)

So call and go straight as you have been ordered to. Do not follow their whims and desires but say, 'I have iman in a Book sent down by Allah and **I am ordered to be just between you**. Allah is our Lord and your Lord. We have our actions and you have your actions. There is no debate between us and you. Allah will gather us all together. He is our final destination.' (Surat ash-Shura, 15)
Among those We have created there is a community who guide by the Truth and act justly according to it.(Suratal-A'raf,181)

Those with faith, those who are Jews, and the Christians and Sabaeans, all who believe in Allah and the Last Day and act rightly, will have their reward with their Lord. They will feel no fear and will know no sorrow. (Surat al-Baqara, 62)

Call to the way of your Lord with wisdom and fair admonition, and argue with them in the kindest way. (Surat an-Nahl, 125)

Is it not likely that, if you did turn away, you would cause corruption in the earth and sever your ties of kinship? Such are the people Allah has cursed, making them deaf and blinding their eyes. (Surah Muhammad, 22-23)

Allah does not forbid you from being good to those who have not fought you in the deen or driven you from your homes,or from being just towards them. Allah loves those who are just. Allah merely forbids you from taking as friends those who have fought you in the religion and driven you from your homes and who supported your expulsion. Any who take them as friends are wrongdoers. (Surat al-Mumtahana, 8-9)

As for those who reject Allah's Signs, and kill the Prophets without any right to do so, and kill those who command justice, give them news of a painful punishment. (Surah Al 'Imran, 21) **2009-08-31 23:50:52**

Confucius (551-471 bc) Chinese teacher/philosopher

The strength of a nation derives from the integrity of the home.

To see what is right and not to do it is want of courage, or of principle.

When we see persons of worth, we should think of equaling them; when we see persons of a contrary character, we should turn inwards and examine ourselves.

Justice & Civil/Political Rights

The concept of justice – or lack thereof – has been the basis for agitation for civil and political rights

The American war of independence leading to US independence in 1776 ('No taxation without representation')

The French revolution

The US civil rights movement

The anti-apartheid movement

The Uganda bush war of 1980-1986

It is critical to promote a just society which will inevitably be a peaceful one (and vice versa)

Martin Luther King – 'I Have a Dream

I am happy to join with you today in what will go down in history as the greatest demonstration for freedom in the history of our nation.

... the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination. The Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity. The Negro is still languishing in the corners of American society and finds himself an exile in his own land.

**I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.**

Martin Luther King – Letter from a Birmingham jail

We must come to see with the distinguished jurist of yesterday that "justice too long delayed is justice denied." We have waited for more than three hundred and forty years for our God-given and constitutional rights. The nations of Asia and Africa are moving with jetlike speed toward the goal of political independence, and we still creep at horse-and-buggy pace toward the gaining of a cup of coffee at a lunch counter.

I guess it is easy for those who have never felt the stinging darts of segregation to say "wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize, and even kill your black brothers and sisters with impunity; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she cannot go to the public amusement park that has just been advertised on television and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky, and see her begin to distort her little personality by unconsciously developing a bitterness toward white people;

when you have to concoct an answer for a five-year-old son asking in agonizing pathos, "Daddy, why do white people treat colored people so mean?"; when you take a cross-country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored";

when your first name becomes "nigger" and your middle name becomes "boy" (however old you are) and your last name becomes "John," and when your wife and mother are never given the respected title "Mrs.";

when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never knowing what to expect next, and plagued with inner fears and outer resentments;

when you are forever fighting a degenerating sense of "nobodyness" -- then you will understand why we find it difficult to wait.

There comes a time when the cup of endurance runs over and men are no longer willing to be plunged into an abyss of injustice where they experience the bleakness of corroding despair.

I hope, sirs, you can understand our legitimate and unavoidable impatience.

Nelson Mandela – 'An idea for which I am prepared to die

I do not deny that I planned sabotage. I did not plan it in a spirit of recklessness, nor because I have any love of violence. I planned it as a result of a calm and sober assessment of the political situation that had arisen after many years of tyranny, exploitation, and oppression of my people by the whites.

I came to the conclusion that as violence in this country was inevitable, it would be unrealistic to continue preaching peace and non-violence. This conclusion was not easily arrived at. It was only when all else had failed, when all channels of peaceful protest had been barred to us, that the decision was made to embark on violent forms of political struggle. I can only say that I felt morally obliged to do what I did.

South Africa is the richest country in Africa, and could be one of the richest countries in the world. But it is a land of remarkable contrasts. The whites enjoy what may be the highest standard of living in the world, whilst Africans live in poverty and misery. Poverty goes hand in hand with malnutrition and disease. Tuberculosis, pellagra and scurvy bring death and destruction of health.

During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities.

It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.

## CONTEMPORARY ISSUES & TRENDS

When we talk of contemporary trends we are talking of emerging issues associated with the administration of justice in Uganda.

Comparison and contrast can be made with other jurisdictions to know if we are on the path towards finding solution(s) as opposed to making the problem(s) worse.

## CASE BACKLOG

Effect of Increasing population.

The population of Uganda is approximately 45.9m/= (UN Data)

The Judiciary has only 381 judicial officers across the country.

Case backlog is a perennial problem.

## CORRUPTION

CPI frequently indicate that the Judiciary is among the top 3 most corrupt institutions in the country.

Corruption is both perceived and actual and is not just about money.

Work of Anti-corruption Agencies E.g IGG, ODPP, DEI, ACD

Solicitation & receipt of gratification

Theft, diversion & Misuse of public funds

Abuse of office

Sec. 2 and Part II of the Anti-Corruption Act, is wide ranging.

Karakire Stephen –v- Uganda ACD CA 33/2015

## POLITICAL INTERFERENCE

E.g Clearance of warrants with police before execution of court orders

Direct interference with outcomes of certain trials.

## DECLINE IN MORAL VALUES

There is a general decline in moral fibre of society, with a co-relation to increase in crime rates and therefore cases, but also alot of indiscipline at both the bar and bench, etc

Conclusion

As a judicial officer, the rules of natural justice should be a part of you, you apply them to each and every case that is brought before you.

While the administration of justice has challenges that have been discussed it still remains a noble thing to do justice at all times.

As the great philosopher Emmanuel Kant says, **"to act freely is to act autonomously and to act autonomously is to act according to a law that I give myself"**

## NATURE OF THE JUDICIAL OFFICE

INTRODUCTION

The topic covers the concept of who a judge is and should be and the nature of a Judicial office.

It is expected that by the end of the discussion, students shall appreciate various judicial offices held in Uganda, how they are attained and held, as well as be able to understand attributes of Judicial officers.

The term "Judicial officers" and Judges may be used interchangeably.

COURTS OF JUDICATURE IN UGANDA

These are provided for in the 1995 Constitution of the Republic of Uganda.

The Courts of record in order of precedence are the Supreme Court, the Court of Appeal/ Constitutional Court and the High Court.

Magistrates Courts as established under the Magistrates Courts Act, namely Chief Magistrates, Magistrate Grade One and Two.

Ref: Parts II, III & IV of the Judicature Act, Section 4 of the Magistrate's Courts Act 7/2007.

APPOINTMENT CRITERIA & SELECTION PROCESS

THE ROLE OF THE JUDICIAL SERVICE COMMISSION

THE LAW

Art 142 of the Constitution provides for the appointment of justices and judges. These are appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament. (Refer to Art.147(1)(a) of the constitution of the republic of Uganda, 1995 as Amended)

Magistrates are recruited, appointed and removed by the Judicial Service Commission. (Art. 148)

## QUALIFICATIONS FOR APPOINTMENT OF JUDICIAL OFFICERS

CHIEF JUSTICE

he or she must have served as a justice of the Supreme Court of Uganda or of a court having similar jurisdiction.

or has practiced as an advocate for a period not less than twenty years before a court having unlimited jurisdiction in civil and criminal matters;

**DEPUTY CHIEF JUSTICE OR PRINCIPAL JUDGE**

He or she must have served as a justice of the Supreme Court or;

as a justice of Appeal or as a judge of the High Court or a court of similar jurisdiction to such a court or;

has practiced as an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters;

JUSTICE OF THE SUPREME COURT

He or she must have served as a justice of Appeal or a judge of the High Court or a court of similar jurisdiction to such a court or

has practised as an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters;

JUSTICE OF APPEAL

He or she must have served as a judge of the High Court or a court having similar or higher jurisdiction or;

has practised as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters or;

is a distinguished jurist and an advocate of not less than ten years' standing;

**JUDGE OF THE HIGH COURT**

he or she should have been a judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or

has practised as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters.

A person also qualifies if such person has practised as a public officer holding an office for which qualification as an advocate is required such period shall be counted in the calculation of any period of practice required under clause (1) of this article even though that person does not have a practising certificate. ***(E.g State Attorneys with the ODPP, administrative/academia positions in tertiary institutions)***

**CHIEF REGISTRAR**

***Art.145 of the constitution*** provides for the appointment of the Chief Registrar and such other number of Registrars as Parliament may by law prescribe by the President.

This is on the advice of the Judicial Service Commission. Also refer to: ***Sections 15 & 16 of The Administration of the Judiciary Act, 2020.***

MAGISTRATES

Magistrates of all ranks, Assistant and Deputy Registrars are appointed by the Judicial Service Commission after it advertises for the positions and interviews the applicants.

TENURE OF OFFICE

Art. 144 of the constitution provides for the tenure of office of judicial officers. Please note that (7) restricts the phrase "judicial officers" to Justices and Judges. The Chief Justice, Deputy Chief Justice, Justices of the Supreme Court and Court of Appeal retire on attaining the age of 70.

The Principal Judge and Judges of the High Court retire at 65 but a judicial officer may continue in office after attaining the age at which he or she is required by this clause to vacate office, for a period not exceeding three months necessary to enable him or her to complete any work pending before him or her.

What does it take for one to be a Judicial Officer? (Academic qualifications)

The Judicial Service Commission is interested in recruiting persons of high integrity, diligence and, with proven track records.

Minimum qualifications at each level are usually advertised by which interested candidates may be shortlisted. E.g For one to be a Magistrate Grade One minimum academic qualifications are a Bachelors in Law Degree and a Post Graduate Diploma in Legal Practice.

Requisite number of years of legal practice vary depending on the rank advertised. E.g For one to be a Judge of the High Court one must have practiced as an advocate of the High Court for atleast 10 years.

In common-law countries a person does not necessarily enter the judiciary at a low level; she/he may be appointed or elected to the country's highest court or to one of it's intermediate courts without any prior judicial experience.

In Uganda there are Courts set up by Statute e.g Industrial Court of Uganda and other bodies with quasi-judicial functions such as Tax Appeals Tribunal, Leadership Code Tribunal, etc. (Art.151 of the constitution of the Republic of Uganda)

## ACTING JUDICIAL OFFICERS

Judicial officers doing an "acting" role temporarily carry out duties of another person whenever such person is not available or if such position is vacant.

The Judicial Service commission has authority to appoint a judicial officer to act in a Judicial office but such appointments are limited to Chief magistrates, magistrate grade one, registrars, deputy registrar e.t.c ( Ref. Article 148 of the constitution)

The president of the Republic of Uganda has authority to appoint any Judicial officer to act in the office of Chief Justice, Deputy Chief Justice, Principal Judge, Justice of the supreme court but he only does so on advice of the Judicial Service Commission and with approval of parliament.

## JUDICIAL OATH

All Judicial officers are sworn in upon appointment into office. They are required to take a Judicial oath and an oath of allegiance. Ref: Art. 149

Constitution of the Republic of Uganda ***Fourth Schedule***

"**I _____ swear in the name of the Almighty God/solemnly affirm**

**that I will well & truly exercise the judicial function entrusted to me and will do right to all manner of people in accordance with the Constitution of the Republic of Uganda as by law established and in accordance with the laws and usage of the Republic of Uganda without fear or favour affection or ill will."**

Refer also to the First Schedule of the Oaths Act

## THE JUDICIAL OFFICE AND OFFICER

The Judicial officer's mandate is derived from the Constitution of the Republic of Uganda. (*Ref: Art.126 of the Constitution*)

Dispensation of Justice is central to the role of any Judicial officer, no matter whether serving under a civil or common law system.

Several expectations from and perceptions of the office and its officers exist. E.g a Judicial officer is expected to be beyond reproach, is of commendable character, is not well known for the wrong reasons, etc.

## QUALITIES OF A GOOD JUDGE

Is wise and well read

Diligent

Is emotionally intelligent, of good temperament

Is well kempt, respectable

Is law abiding

Is confident, commands respect

Is a good leader and manager, etc

In a Common Law system a decision in each case is a step in the growth of the law. As this process goes on fought over at every step by learned counsel and scrutinized by the court, there is a constant shaping of the law.

Judicial decision making involves balancing the demands of justice in the individual case against the need for predictability in the law and uniformity in its application.

The qualities **associated** with being a good judge are endless. Ideally, think of good and think of a judge. Those that go before judges expect to be dealt with fairly and leave happy even if they do not win their cases.

It can be said that a judge is expected to be the personification of order, fairness, law, and custom. Symbols of the scales of Justice are often used to reflect that a judge remains balanced and pragmatic.

## SYMBOLS OF JUSTICE

### LIFESTYLE OF A JUDICIAL OFFICER

There are things that you are expected not to do by virtue of being a holder of a Judicial Office.

### CHOOSING SOCIAL INTERACTIONS

Who do you socialize with? It is said that birds of a feather flock together. You can 'be yourself' with colleagues but not with other members of the public.

Where do you socialize?

Which Clubs do you go to?*

If you want to have a drink/pork/goat muchomo do you go to i) Wandegeya (kafunda) ii) Kamwokya (under the mango tree) iii) Piato Restaurant iv) Fang Fang Hotel?

How intensively do you socialize? Are you the first to open the dance and the last off the dance floor (helping the DJs pack their equipment)?

### LIMITATIONS ON SOCIAL INTERACTIONS

Need to avoid any situation that might impinge on dignity of the judicial office

Need to avoid being potential witness

Not socialize unnecessarily but need to understand society – do not become detached

Do not be a hermit – chose social interactions wisely

Remain socially conscious

Judicial officer must be alive to social norms and economic/political realities – decision by the Court of Appeal that the NRM Government was non-existent in law raised political tensions and was quickly overturned by the Supreme Court.

A Judicial Officer should not be so detached from society so as to lose sense of reality, e.g.;

Judges in Italy's Court of Appeal who overturned a conviction for rape because the victim was wearing jeans stating :

"It is common knowledge… that jeans cannot even be partly removed without the effective help of the person wearing them… and it is impossible if the victim is struggling with all her might."

Need to avoid being potential witness

Many offences are committed in public/social places – the more a judicial officer interacts with the public the more likely he will witness matters that may end up in court.

Most judicial officers serve upcountry in small stations without the luxury of being able to assign cases to other magistrates.

What Perception do you have of who a Judge is or should be?

**Could be frowned upon**

**Expected to be in control of emotions**

PERCEPTION

Is the ability to think , comprehend or understand behaviors and practices by an individual or an institution.

Perception is therefore subjective and can either be positive or negative. In the context of a judicial office, there are positive perceptions that the public holds of the judiciary , equally so, are negative perceptions.

Perceptions of the Judicial Office

What is the ***deportment*** of a Judicial Officer

Deportment – 'A persons behavior or manners: How you dress, speak, look or carry yourself'

Respected

Honourable

Dignified

Beyond reproach

Incorruptible

Perception is just as important as reality

The 'family values' test:

Would I do/say this in front of my children?

Would I do/say this in front of my parents?

Would I do/say this in front of my mother-in-law

**Maintaining dignity of the Judicial office**

Judicial office must have an aura of mystery

Partiality and bias – actual or perceived – is best guarded against by remaining isolated from society

## CONCLUSION

Several people meet minimum requirements to be Judges, but are not because for the most part it is not a 'fun' job. E.g sitting long hours, doing unending reading, limitations on social interactions, etc.

It is a calling as opposed to being just a job. The sacrifice is great but so is the reward. Making a positive difference in lives of others is highly gratifying.

## REFERENCES

1995 Constitution of the Republic of Uganda

Judicature Act Cap. 13

Magistrate's Courts Act Cap. 16

Judicial Service Act Cap. 14

Administration of Judiciary Act, 2020

The Vanishing Common Law Judge (Neil Devins & David Klein, 2017)

Uganda Judicial Code of Conduct, 2003

Public Service Act Cap. 288

Leadership Code Act Cap. 168 (as amended in 2017)

Oaths Act Cap. 19

Judicial Service Commission Regulations, 87/2005

## COMPARATIVE JUDICIAL SYSTEMS

APPOINTMENT

Judges in England and Wales are appointed by the Lord Chancellor upon the recommendation of the Judicial Appointments Commission (JAC)

The JAC was established as a public body by the Constitutional Reform Act, 2005 and was operationalized on 2006 – prior to this the Lord Chancellor had unfettered powers to appoint Judges in England and Wales.

The JAC advertises for vacancies in the courts of Judicature and applicants submit a standard nine-page application form

Short listed candidates are subjected to an oral interview and assessed on merit based on 5 criteria:

Intellectual capacity;

Personal qualities (integrity, independence, judgment, decisiveness, objectivity, ability; willingness to learn);

Ability to understand and deal fairly;

Authority and communication skills; and

Efficiency.

USA – Federal & State Judges

## FEDERAL JUDGES

Federal Judges are appointed by the President subject to confirmation by the Senate

Federal Judges serve at two levels

The Supreme Court

13 Courts of Appeal (circuit courts)

94 US District Courts

Federal Judges do not have a retirement age and serve for life (until they resign, die or are removed from office for misbehaviour)

As a rule of practice most federal Judges retire at the age of 80 – preferably during the Presidency of the party of the President who appointed them to office

Process for removal is difficult and requires a conviction by the Senate and impeachment by the House of Representatives

## STATE JUDGES

States (50) are empowered to appoint local State Judges and appointment processes vary from State to State.

Appointment – normally by the Governor with approval of the legislature

Merit selection by a Judicial Service Commission

Partisan election where aspiring Judges run for office on party tickets

Non-partisan elections where aspiring Judges submit to election without party affiliation

Appointed/selected Judges serve until they attain retirement age (normally 70)

Term of office for elected Judges range from 6-10 years

## RUSSIA

Federal Judges are appointed by the Federation Council upon the recommendation of the President

Candidates are proposed to the President by the Judicial Qualification College which is responsible for overseeing the Judiciary in Russia and establishes minimum qualifications

Judges must be at least 40 years of age and retire at the age of 70

Regional and city court Judges are appointed by the Minister of Justice

District Judges are appointed directly by the President

The Judiciary in Russia is perceived not to be independent from the executive

## SAUDI ARABIA

The Judicial system is based on Sharia Law with the Qur'an as the Constitution of the country

Judges are appointed by the Supreme Judicial Council (SJC) – a body of 11 members under the supervision of the Minister of Justice

The Head of the Supreme Court, Judges of the Supreme Court and the Secretary of the SJC are appointed by the King.

Courts hardly observe formal procedures – the country's first Criminal Procedure Code was introduced in 2001 and is largely ignored

There is a close link between religion (Islam) and the state with religious leaders exercising various judicial functions by virture of their religious offices – Judges are graduates of religious training institutes.

The Grand Mufti – the highest religious authority of the country is also the Chief Justice

Qadis and muftis preside over various courts

## EAST AFRICAN COURT OF JUSTICE

The East African Court of Justice (EACJ is an organ of the East African Community established under Article 9 of the Treaty for the Establishment of the East African Community. Established in November 2001, the Court's major responsibility is to ensure the adherence to law in the interpretation and application of and compliance with the EAC Treaty.

Arusha is the temporary seat of the Court until the Summit determines its permanent seat. The Court's sub-registries are located in the respective National Courts in the Partner States.

## COMPOSITION AND APPOINTMENT

The Judges of the Court are appointed by the EAC Summit of the Heads of State or Government from among persons of proven integrity, impartiality and independence holding high judicial office, or jurists of recognised competence, upon the recommendation of the Partner States.

Currently, there are eleven judges serving in both the First Instance Division, which is headed by a Principal Judge and an Appellate Division who work is directed by the President.

The Summit designates the President of the Court form among Judges of the Appellate Division on a rotational basis. The President heads the Court and presides over its sessions.

The Vice President, Principal Judge and Deputy Principal Judge are similarly designated by the Summit on a rotational basis. The Judges so appointed shall not be nationals of the same Partner State.

All Judges except the President and Principal Judge serve on an ad hoc basis and they hold office for a maximum period of seven years or upon attaining seventy years.

## ETHICAL THEORIES AND PRINCIPLES

Ethical theories and principles are the foundations of ethical analysis because they are the viewpoints from which guidance can be obtained along the pathway to a decision.

Each theory emphasizes different points such as predicting the outcome and following one's duties to others in order to reach an ethically correct decision.

However, in order for an ethical theory to be useful, the theory must be directed towards a common set of goals. Ethical principles are the common goals that each theory tries to achieve in order to be successful. These goals include beneficence, least harm, respect for autonomy and justice.

## BENEFICENCE

The principle of beneficence guides the ethical theory to do what is good.

This priority to "do good" makes an ethical perspective and possible solution to an ethical dilemma acceptable. This principle is also related to the principle of utility, which states that we should attempt generate the largest ratio of good over evil possible in the world.

This principle stipulates that ethical theories should strive to achieve the greatest amount of good because people benefit from the most good. This principle is mainly associated with the utilitarian ethical theory found in the following section of this paper. An example of "doing good" is found in the practice of medicine in which the health of an individual is bettered by treatment from a physician.

## LEAST HARM

This is similar to beneficence, but deals with situations in which neither choice is beneficial.

In this case, a person should choose to do the least harm possible and to do harm to the fewest people. For instance, in the Hippocratic oath, a physician is first charged with the responsibility to "do no harm" to the patient since the physician's primary duty is to provide helpful treatment to the patient rather than to inflict more suffering upon the patient.

One could also reasonably argue that people have a greater responsibility to "do no harm" than to take steps to benefit others. For example, a person has a larger responsibility to simply walk past a person rather than to punch a person as they walk past with no justified reason

**Nonmaleficence** (do no harm) is obligation not to inflict harm intentionally. This guides the scopeof criminal law and government restrictions of personal liberty.

Look at John Stuart Mill the political philopher.

## RESPECT FOR AUTONOMY

This principle states that an ethical theory should allow people to reign over themselves and to be able to make decisions that apply to their lives. This means that people should have control over their lives as much as possible because they are the only people who completely understand their chosen type of lifestyle.

Each man deserves respect because only he has had those exact life experiences and understands his emotions, motivations and body in such an intimate manner. In essence, this ethical principle is an extension of the ethical principle of beneficence because a person who is independent usually prefers to have control over his life experiences in order to obtain the lifestyle that he enjoys .

There are, however, two ways of looking at the respect for autonomy. In the paternalistic viewpoint, an authority prioritizes a dependent person's best interests over the dependent person's wishes. For example, a patient with terminal cancer may prefer to live the rest of her life without the medication that makes her constantly ill.

The physician, on the other hand, may convince the patient and her family members to make the patient continue taking her medication because the medication will prolong her life. In this situation, the physician uses his or her authority to manipulate the patient to choose the treatment that will benefit him or her best medically. As noted in this example, one drawback of this principle is that the paternalistic figure may not have the same ideals as the dependent person and will deny the patient's autonomy and ability to choose her treatment. This, in turn, leads to a decreased amount of beneficence.

A second way in which to view the respect for autonomy is the libertarian view. This standpoint prioritizes the patient's wishes over their best interests. This means that the patient has control over her life and should be content with her quality of life because she has chosen the path of life with the greatest amount of personal beneficence. Although this viewpoint is more mindful of the patient's desires, it does not prevent the patient from making decisions that may be more harmful than beneficial

Libertarians seek to maximize autonomy and political freedom, and minimize the states encroachment on individual liberties.

Look at John Locke on libertarianism.

## JUSTICE

An ethical decision that contains justice within it has a consistent logical basis that supports the decision. For example a policeman is allowed to speed on the highway if he must arrive at the scene of a crime as quickly as possible in order to prevent a person from getting hurt. Although the policeman would normally have to obey the speed limit, he is allowed to speed in this unique situation because it is a justified under the extenuating circumstances.

## ETHICAL THEORIES

Ethical theories are based on the previously explained ethical principles. They each emphasize different aspects of an ethical dilemma and lead to the most ethically correct resolution according to the guidelines within the ethical theory itself. People usually base their individual choice of ethical theory upon their life experiences

## DEONTOLOGY

The deontological theory states that people should adhere to their obligations and duties when analyzing an ethical dilemma.

This means that a person will follow his or her obligations to another individual or society because upholding one's duty is what is considered ethically correct (1,2). For instance, a deontologist will always keep his promises to a friend and will follow the law. A person who follows this theory will produce very consistent decisions since they will be based on the individual's set duties.

Deontology provides a basis for special duties and obligations to specific people, such as those within one's family. For example, an older brother may have an obligation to protect his little sister when they cross a busy road together.

This theory also praises those deontologists who exceed their duties and obligations, which is called "supererogation" (1). For example, if a person hijacked a train full of students and stated that one person would have to die in order for the rest to live, the person who volunteers to die is exceeding his or her duty to the other students and performs an act of supererogation.

Although deontology contains many positive attributes, it also contains its fair number of flaws. One weakness of this theory is that there is no rationale or logical basis for deciding an individual's duties. For instance, businessman may decide that it is his duty to always be on time to meetings.

Although this appears to be a noble duty we do not know why the person chose to make this his duty. Perhaps the reason that he has to be at the meeting on time is that he always has to sit in the same chair. A similar scenario unearths two other faults of deontology including the fact that sometimes a person's duties conflict, and that deontology is not concerned with the welfare of others.

For instance, if the deontologist who must be on time to meetings is running late, how is he supposed to drive? Is the deontologist supposed to speed, breaking his duty to society to uphold the law, or is the deontologist supposed to arrive at his meeting late, breaking his duty to be on time?

This scenario of conflicting obligations does not lead us to a clear ethically correct resolution nor does it protect the welfare of others from the deontologist's decision. Since deontology is not based on the context of each situation, it does not provide any guidance when one enters a complex situation in which there are conflicting obligations .

## UTILITARIANISM

The utilitarian ethical theory is founded on the ability to predict the consequences of an action. To a utilitarian, the choice that yields the greatest benefit to the most people is the choice that is ethically correct. One benefit of this ethical theory is that the utilitarian can compare similar predicted solutions and use a point system to determine which choice is more beneficial for more people. This point system provides a logical and rationale argument for each decision and allows a person to use it on a case-by-case context

There are two types of utilitarianism, **Act utilitarianism** and **Rule utilitarianism.**

**Act utilitarianism**

Adheres exactly to the definition of utilitarianism as described in the above section.

In act utilitarianism, a person performs the acts that benefit the most people, regardless of personal feelings or the societal constraints such as laws.

**Rule utilitarianism**, however, takes into account the law and is concerned with fairness. A rule utilitarian seeks to benefit the most people but through the fairest and most just means available. Therefore, added benefits of rule utilitarianism are that it values justice and includes beneficence at the same time

Rule utilitarianism also contains a source of instability that inhibits its usefulness. In rule utilitarianism, there is the possibility of conflicting rules. Let us revisit the example of a person running late for his meeting.

While a rule utilitarian who just happens to be a state governor may believe that it is ethically correct to arrive at important meetings on time because the members of the state government will benefit from this decision, he may

encounter conflicting ideas about what is ethically correct if he is running late. As a rule utilitarian, he believes that he should follow the law because this benefits an entire society, but at the same time, he believes that it is ethically correct to be on time for his meeting because it is a state government meeting that also benefits the society. There appears to be no ethically correct answer for this scenario

## RIGHTS

In the rights ethical theory the rights set forth by a society are protected and given the highest priority. Rights are considered to be ethically correct and valid since a large or ruling population endorses them.

Individuals may also bestow rights upon others if they have the ability and resources to do so. For example, a person may say that her friend may borrow the car for the afternoon. The friend who was given the ability to borrow the car now has a right to the car in the afternoon.

A major complication of this theory on a larger scale, however, is that one must decipher what the characteristics of a right are in a society. The society has to determine what rights it wants to uphold and give to its citizens. In order for a society to determine what rights it wants to enact, it must decide what the society's goals and ethical priorities are.

Therefore, in order for the rights theory to be useful, it must be used in conjunction with another ethical theory that will consistently explain the goals of the society (1). For example in America people have the right to choose their religion because this right is upheld in the Constitution.

One of the goals of the founding fathers' of America was to uphold this right to freedom of religion. However, under Hitler's reign in Germany, the Jews were persecuted for their religion because Hitler decided that Jews were detrimental to Germany's future success. The American government upholds freedom of religion while the Nazi government did not uphold it and, instead, chose to eradicate the Jewish religion and those who practiced it.

## CASUIST

The casuist ethical theory is one that compares a current ethical dilemma with examples of similar ethical dilemmas and their outcomes. This allows one to determine the severity of the situation and to create the best possible solution according to others' experiences. Usually one will find paradigms that represent the extremes of the situation so that a compromise can be reached that will hopefully include the wisdom gained from the previous examples

One drawback to this ethical theory is that there may not be a set of similar examples for a given ethical dilemma. Perhaps that which is controversial and ethically questionable is new and unexpected. Along the same line of thinking, a casuistical theory also assumes that the results of the current ethical dilemma will be similar to results

in the examples. This may not be necessarily true and would greatly hinder the effectiveness of applying this ethical theory

## VIRTUE

The virtue ethical theory judges a person by his character rather than by an action that may deviate from his normal behavior. It takes the person's morals, reputation and motivation into account when rating an unusual and irregular behavior that is considered unethical. For instance, if a person plagiarized a passage that was later detected by a peer, the peer who knows the person well will understand the person's character and will be able to judge the friend.

If the plagiarizer normally follows the rules and has good standing amongst his colleagues, the peer who encounters the plagiarized passage may be able to judge his friend more leniently. Perhaps the researcher had a late night and simply forgot to credit his or her source appropriately. Conversely, a person who has a reputation for scientific misconduct is more likely to be judged harshly for plagiarizing because of his consistent past of unethical behavior

One weakness of this ethical theory is that it does not take into consideration a person's change in moral character. For example, a scientist who may have made mistakes in the past may honestly have the same late night story as the scientist in good standing.

Neither of these scientists intentionally plagiarized, but the act was still committed. On the other hand, a researcher may have a sudden change from moral to immoral character may go unnoticed until a significant amount of evidence mounts up against him or her.

Ethical theories and principles bring significant characteristics to the decision-making process. Although all of the ethical theories attempt to follow the ethical principles in order to be applicable and valid by themselves, each theory falls short with complex flaws and failings. However, these ethical theories can be used in combination in order to obtain the most ethically correct answer possible for each scenario.

For example, a utilitarian may use the casuistic theory and compare similar situations to his real life situation in order to determine the choice that will benefit the most people.

The deontologist and the rule utilitarian governor who are running late for their meeting may use the rights ethical theory when deciding whether or not to speed to make it to the meeting on time. Instead of speeding, they would

slow down because the law in the rights theory is given the highest priority, even if it means that the most people may not benefit from the decision to drive the speed limit.

By using ethical theories in combination, one is able to use a variety of ways to analyze a situation in order to reach the most ethically correct decision possible

We are fortunate to have a variety of ethical theories that provide a substantial framework when trying to make ethically correct answers. Each ethical theory attempts to adhere to the ethical principles that lead to success when trying to reach the best decision. When one understands each individual theory, including its strengths and weaknesses, one can make the most informed decision when trying to achieve an ethically correct answer to a dilemma.

## THE JUDICIAL CODE OF CONDUCT

PRINCIPLES OF JUDICIAL CONDUCT IN COURT

All judicial officers in Uganda are bound by the Uganda Code of Judicial Conduct. This code was published by the Judicial Integrity committee on the 20th June 2003.

The purpose of this code is to ensure, that judicial officers administer justice while upholding the principles laid down in the constitution as well as in regional and international conventions to which Uganda subscribes.

These principles include;

**Independence**

**Impartiality**

**Integrity**

**Equality**

**Competence and diligence.**

INDEPENDENCE**:**
An independent Judiciary is indispensable to the proper administration of justice. A Judicial Officer therefore should uphold and exemplify the independence of the Judiciary in its individual and institutional aspects.

A Judicial Officer shall exercise the judicial function independently on the basis of his or her assessment of the facts, and in accordance with conscientious understanding of the law, free of any direct or indirect extraneous influences, inducements, pressures, threats or interference, from any quarter or for any reason.

A Judicial Officer shall reject any attempt, arising from outside the proper judicial process, to influence the decision in any matter before the Judicial Officer for judicial decision.

A Judicial Officer shall be independent of judicial colleagues in respect of decisions which he or she is obliged to make independently, Proper professional consultation shall be excepted.

A Judicial Officer shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary

IMPARTIALITY

Impartiality is the essence of the judicial function and applies not only to the making of a decision but also to the process by which the decision is made. Justice must not merely be done but must also be seen to be done.

A Judicial Officer shall perform judicial duties without fear, favour, ill-will, bias, or prejudice.

A Judicial Officer shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the legal profession, the litigants and the public, in the impartiality of the Judicial Officer and of the judiciary.

A Judicial Officer shall avoid close personal association with individual members of the legal profession who practice in his or her court, where such association might reasonably give rise to suspicion or appearance of favoritism or impartiality.

A Judicial Officer shall refrain from participating in any proceedings in which the impartiality of the Judicial Officer might reasonably be questioned. Without limiting the generality of the foregoing a Judicial Officer shall disqualify himself or herself from participating in any proceedings in the following instances:

Where the Judicial Officer has personal knowledge of the disputed facts concerning the proceedings;

Where a member of the Judicial Officer's family is representing a litigant, is a party , or has interest in the outcome of the matter in controversy, in the proceedings.

INTEGRITY

Integrity is central to the proper discharge of the judicial office. The behavior and conduct of a Judicial Officer must re-affirm the peoples of faith in the integrity of the judiciary.

A Judicial Officer shall respect and uphold the laws of the country.

A Judicial Officer shall at all time and in every respect be of an upright character and ensure that his or her conduct is above reproach in the view of a reasonable fair minded and informed person.

A Judicial Officer shall exhibit and promote high standards of judicial and personal integrity.

In addition to observing the standards of this Code personally, a Judicial Officer shall encourage, support and help other Judicial Officers to do the same.

Propriety
Propriety and the appearance of propriety are essential to the performance of all the activities of a Judicial Officer. A Judicial Officer shall avoid impropriety and the appearance of impropriety in all judicial and personal activities.

A Judicial Officer shall at all time conduct himself or herself in a manner consistent with the dignity of the judicial office, and for that purpose must freely and willingly accept appropriate personal restrictions.

A Judicial Officer shall exhibit and promote high standards of judicial conduct.

A Judicial Officer shall not use or lend the prestige of the judicial office to advance his or her private interests, or the private interests of a member of the family or of anyone else, nor shall a Judicial Officer convey or permit others to convey the impression that anyone is in a special position to improperly influence the Judicial Officer in the performance of judicial duties.

A Judicial Officer shall refrain from conduct and from associating with persons, groups of persons and organizations, which in the mind of a reasonable, fair-minded and informed person, might undermine confidence in the Judicial Officer's impartiality or otherwise with regard to any issue that may come before the Courts.

A Judicial Officer shall not, without authority of the law or the consent of the parties, carry out investigation of the facts of a case before him or her in the absence of any of the parties, nor communicate with any party to such a case in the absence of the other party .

A Judicial Officer shall refrain from all active political activity or involvement, and from conduct that, in the mind of a reasonable fair-minded and informed person, might give rise to the appearance that the judicial officer is engaged in political activity.

A Judicial Officer, by himself or herself or through a family member, or other person, shall neither ask for, nor accept, any gift, bequest, loan, hospitality, or favour, from any person with interest in any litigation before the courts, or from any person in relation to anything done or to be done or omitted to be done by the Judicial Officer in connection with the performance of judicial duties. Loans from banks and other financial institutions shall be excepted.

Save for holding and managing appropriate personal or family investments, a Judicial Officer shall refrain from being engaged in financial or business dealings which may interfere with the proper performance of judicial duties or reflect adversely on the image or impartiality of the Judicial Officer.

A Judicial Officer, whilst the holder of judicial office, may own and manage property and may be a dormant partner or shareholder in a firm or company but shall not serve as an officer, manager or employee of any business concern, and shall under no circumstances practice law or be an active or dormant partner or associate in a firm practicing law.

Subject to the proper performance of judicial duties, a Judicial Officer may take part in civic and charitable activities that do not in the mind of a reasonable, fair-minded and informed person reflect 'adversely upon the Judicial Officer's impartiality or performance of judicial duty

EQUALITY:

All persons are entitled to equal protection of the law. A Judicial Officer shall accord equal treatment to all persons who appear in court, without distinction on unjust discrimination based on the grounds of sex, colour, race, ethnicity, religion, age, social or economic status, political opinion, or disability.

A Judicial Officer shall not in the performance of judicial duties, by words or conduct manifest bias or prejudice towards any person or group on basis of unjust discrimination.

A Judicial Officer shall not be a member of, nor be associated with, any society or organization that practices unjust discrimination

COMPETENCE AND DILIGENCE

***Competence and diligence are prerequisites to the performance of the judicial office. A Judicial Officer shall give judicial duty precedence over all other activities.***

A Judicial Officer shall endeavor to maintain and enhance knowledge, skill and personal qualities necessary for the proper and competent performance and discharge of judicial duties.

A Judicial Officer shall promptly dispose of the business of the court, but in so doing, must ensure that justice prevails. Protracted trial of a case must be avoided wherever possible. Where a judgement is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so.

A Judicial Officer shall maintain order and decorum in court, and shall be patient and dignified in all proceedings, and shall require similar conduct of advocates, witnesses, court staff and other persons in attendance.

PROMOTION AND ENFORCEMENT

The Judicial Integrity Committee, Peer Committees, and many other institutions.

The Judiciary as a whole shall promote awareness of the principles and rules set out in this Code and shall encourage all judicial officers to comply with them.

Enforcement of these principles and ensuring the compliance of Judicial Officers with them, are essential to the effective achievement of the objectives of this Code.

The enforcement of this Code shall take into account the legitimate need of a Judicial Officer, by reason of the nature of judicial office, to be afforded protection from vexatious or unsubstantiated accusations, and to be accorded due process of law, in the resolution of complaints against him or her.

RECUSAL: The Constitution (Recusal of Judicial Officers) (Practice Directions), 2019

The backbone of the Constitution (Recusal of Judicial officers) Practice Directions, 2019 in Uganda is the need to preserve the independence, Impartiality and integrity of the Judiciary.

The major objectives of these practice directions are;

To promote adherence to Article 28 of the Constitution which enjoins the right to an independent and impartial hearing;

To promote the application of all cardinal principles of natural justice;

To promote uniformity and consistency on recusal among Judicial officers;

To promote harmony between the bar and the bench even where a member of the bar alleges bias against a member of the bench.

To avoid confrontations between Counsel and judicial officers; and

To give audience on the Counsel to judicial officers, Counsel and unrepresented litigants.

WHAT IS RECUSAL?

Recusal is defined under Paragraph 4 of the constitution recusal of Judicial officers Practice directions,2019 to mean the act of abstaining from participating in an official action in which his or her impartiality will reasonably be in question.

In essence what happens is that;

A Judicial officer will excuse himself or herself from hearing of a case when there is conflict of interest or bias in relation to a party, advocate, witness or other related matter. Judges must at all times uphold the judicial oath they took before taking up their roles. They must at all times be fair, impartial without fear or favor affection or ill will and do right to all manner of people.

The moment a judicial officer is perceived to be biased, he or should in most instances excuse himself from handling that particular matter.

Circumstances under which a judicial officer may recuse him/herself on their own motion.

Paragraph 6 provides for these circumstances and they are;

Where the impartiality of the judicial officer may reasonably be questioned.

Where the judicial officer has personal knowledge of the disputed facts concerning the proceedings.

Where a member of the judicial officer's family is representing a litigant, is a party or has an interest in the outcome of the matter in dispute which is the subject of the proceedings.

Duty of the judicial officer upon Recusal

Paragraph 6(3)(a) and (b) provides for what must be done by a judicial officer after he/she recuses themselves from a matter.

The judicial officer must notify the parties and the matter shall be allocated to another judicial officer.

The judicial officer shall state on record, the reason for recusal, notify the parties and return the file for reallocation to another Judicial officer.

Recusal at the instance of parties

Paragraph 7 provides for circumstances under which parties may apply to court for a judicial officer to recuse himself.

The following are the circumstances;

Where a judicial officer has an interest in the subject matter or has a relationship with any person who is interested in the matter

Where a judicial officer has background information or experience , such as the judicial officer's prior work as a lawyer.

Where a judicial officer has personal knowledge about the parties or the facts of the case.

Where a judicial officer has ex-parte communications with lawyers or patties to the case.

Where a judicial officer makes inappropriate comments or exhibits unacceptable conduct in the course of the hearing.

Where a judicial officer has exhibited actual, imputed or apparent bias ( these are defined under paragraph 4 of the practice directions)

Procedure for recusal at instance of parties ( paragraph 8)

A party who seeks the recusal of a judicial officer may do so by;

Letter , copied to all parties and the registrar of that court, or

Orally in open court in the presence of the parties.

The judicial officer against whom recusal is sought shall be given an opportunity to respond to the concerns raised by the parties. where the Judicial officer recuses himself/ herself; parties shall be notified and entry shall be made on the record and the file returned to the registry for allocation to another judicial officer

Where the Judicial Officer declines to recuse himself or herself, the reasons for declining shall be noted on the record and the matter shall proceed for hearing.

Where a party is dissatisfied with the decision of the Judicial officer not to recuse himself or herself, the party shall state the reasons and the hearing shall continue.

Appeals ( Paragraph 9)

Any appeal shall be made after the matter has been determined.

## JUDICIAL MISCONDUCT/OFFENCES

Judicial misconduct occurs when a judicial officer acts in a manner that is considered unethical or otherwise violates the judges obligations of impartial conduct

Judicial misconduct Breaks down the fibre of what is necessary for a functional judiciary-citizens who believe their judges are fair and impartial, judges must therefore be accountable to legal and ethical standards.

More than any other branch of government, the judiciary is built on a foundation of public faith. The judges make rulings and judgments that the people must believe that they came from competent, lawful and independent judicial officers. Judicial misconduct erodes public confidence in the judiciary and leads to complaints and conflict

In Uganda, legal and ethical standards of judicial officers are enunciated in a couple of laws and statutes to wit;

The Judicial Service Act

The Judicial Service Commission Regulations,2005 SI NO.87

The Anti Corruption Act, 2009

The Uganda Code of Judicial Conduct

## OFFENCES UNDER THE JUDICIAL SERVICE COMMISSION REGULATIONS, 2005

### THE JUDICIAL SERVICE COMMISSION REGULATIONS,2005

Conducting one self in a manner prejudicial to the good image , honour, dignity and reputation of the service **(Regulation23(a))**

Favoritism **Regulation23(b)**

Nepotism **Regulation23(b)/Section 13 Anti corruption Act**

Corruption**Regulation23(b) / Section 2 Anti Corruption Act**

Discrimination **Regulation23(c)**

Engaging in private interests. **Regulation 23(h)**

Contravening any provisions of the law

Being insubordinate, rude, abusive and disrespectful or use of vulgar language **Regulation 23(e) of the Judicial Service Commission Regulations,2005**

Late coming/absentism/ absconding from duty **Regulation23(d)/Regulation24**

Lazy/producing poor standard work **Regulation23(f)**

OFFENCES UNDER THE ANTI -CORRUPTION ACT

Loss of public property Section 10 of the Anti-corruption Act

Abuse of office section 11 of the Anti- corruption Act

Sectarianism section 12 of the Anti- corruption Act

Conflict of interest Section 9 of Anti- corruption Act

Bribery Section 5 of the Anti Corruption Act

Lack of integrity

Diversion of public resources Section 6 of the Anti corruption act.

Influence peddling Section 8 of the Anti-corruption Act

**DIVERSION OF PUBLIC RESOURCES**

***Section 6 of the Anti corruption Act.***

It involves a person converting, transferring, or disposing public funds for purposes unrelated to that for which the resources were intended, for his or her own benefit or for the benefit of a third party

**LOSS OF PUBLIC PROPERTY**

***Section 10 of the Anti-corruption act***

It involves when a judicial officer who by an act or omission, directly or indirectly, causes or allows damage or loss to occur to any public property placed in his or her custody, possession or control commits an offence.

**CORRUPTION**

***A person commits the offence of corruption if he or she does any of the following acts—***

It involves solicitation or acceptance, directly or indirectly, by a judicial officer any goods of monetary value, or benefits, such as a gift, favour, promise, advantage or any other form of gratification for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her judicial functions;

The participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this section;

any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party; or

neglect of duty.

**SECTARIANISM.**

A person who being the holder of an office does any act in connection with the office for the purpose of doing a favour or offering undue advantage to any person on the basis of that person's religion or sect, ethnic group or place of origin commits an offence.

**NEPOTISM.**

A person who being the holder of an office does any act in connection with the office for the purpose of doing favours to any person on the basis of blood relations between that person and that other person commits an offence.

**BRIBERY**

It is defined as the offering, giving, receiving or soliciting of any item of value to influence the actions of an official or other person, in charge of a public or legal duty

**ABUSE OF OFFICE**

Abuse of power or abuse of authority, in the form of "malfeasance in office" or "official misconduct", is the commission of an unlawful act, done in an official capacity, which affects the performance of official duties.

It also involves being insubordinate, rude, abusive and disrespectful or use of vulgar language **(Refer: Regulation 23(e) of the judicial service commission regulations,2005)**

DISCIPLINARY PENALTIES WHICH MAY BE IMPOSED BY THE JUDICIAL SERVICE COMMISSION UNDER REGULATION 31

Dismissal

Suspension

Reduction in rank

Order for a written undertaking from the officer not to repeat the offence

Reduction in salary

Stoppage in increments

Deferment of increments

Severe reprimands

Reprimand

Order payment of compensation

Recovery of the cost or part of the cist of any loss or damage caused by default or negligence.

Forced retirement **(Reg No.31(3))**

**CONCLUSION**

John Marshall Once Said " The power of the judiciary lies, not in deciding cases, not in posing sentences, not in punishing contempt, **but in the trust , faith and confidence of a common man".**

The ultimate task of the courts is to maintain the due process of law, the courts and judges must guarantee that everyone can have their rights and obligations determined objectively and independently.

It is vitally important from a number of perspectives that the general public have confidence in the judges and the courts and that the judges and the courts maintain their credibility.

## JUDICIAL INDISCIPLINE & MISCONDUCT

DUE PROCESS

**Having heard of the various offences that can be committed by judicial officers one may wonder how to bring such an officer to book.**

**This class is concerned with the various options available to a person aggrieved with the misuse of a judicial officer's power and authority.**

How Can a Judge be disciplined?

**How can errant judicial officers be disciplined?**

**Just like with a bad mannered child, there has to be a "parent" that can help hold such judicial officers accountable.**

## THE JUDICIAL SERVICE COMMISSION

Article 146 of the Constitution of the Republic of Uganda, 1995 as Amended

## FUNCTIONS OF THE JUDICIAL SERVICE COMMISSION

Article. 147 of the Constitution provides for the functions of the Judicial Service Commission. These are;

To advise the President in the exercise of the President's power to appoint persons to hold or to act in any of the offices of the Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal and a Judge of the High Court; and the office of Chief Registrar and Registrar.

To receive and process people's recommendations and complaints concerning the judiciary and the administration of justice and generally.

To act as a link between the people and the judiciary

To advise the Government on improving the administration of justice; and any other function prescribed by this Constitution or by Parliament. Etc.....

## ARTICLE 147 OF THE CONSTITUTION

In effect, the Commission is charged with;

Exercising disciplinary control over judicial officers

Receiving and processing public recommendations and complaints concerning the judiciary and administration of justice

The Judicial Service ( Complaints & Disciplinary proceedings ) Regulations SI 88 OF 2005

Under Section 27 of the Judicial Service Act, the Judicial Service (Complaints & Disciplinary Proceedings) Regulations SI 88 of 2005 were birthed.

Under these regulations, a person aggrieved by improper conduct of a judicial officer or with a complaint concerning the judiciary or administration of justice generally may make a complaint to the commission.

These regulations govern the manner in which one may file a complaint against a judicial officer. Please note that unlike in the case of ordinary criminal proceedings, a hearing notice is only served onto the judicial officer once it has been established that prima facie a case exists on the basis of the complaint filed.

These regulations also govern the procedure for hearing of the complaint, ensuring that principles of natural justice are conformed to. A judicial officer aggrieved by the decision of the commission may appeal to three Judges

of the High Court expressing the reason for his or dissatisfaction within 30 days after the decision of the commission.

Decisions of JSC – Force of Law

**REF: HIS WORSHIP AGGREY BWIRE –V- ATTORNEY GENERAL & JUDICIAL SERVICE COMMISSION COURT OF APPEAL CIVIL APPEAL No.9 of 2009** (Appeal from the HC decision refusing judicial review of the decision leading to his interdiction while Grade I Magistrate at Nabweru). He had been charged before the commission with being untrustworthy and lacking integrity in private and public transactions contrary to regulation 23 (g) of the Judicial Service Commission Regulations S.I 88 of 2005.

On count II he was charged with abuse of judicial authority contrary to Regulation 23 (m) of the JSC. Regulations S.I 88/2005. On count III he was charged with conducting himself in a manner prejudicial to the good image, honour, dignity and reputation of the service contrary to Regulation 23 (a) JSC. S.I 88/2005.

The Court of Appeal dismissed the appeal at the hearing of which the Judicial Service Commission had already taken a decision to dismiss the judicial officer.

Regulation 35 of the Judicial Service Commission Regulations SI 87 of 2005 allows the commission to commence disciplinary proceedings against a judicial officer, on its own accord.

The commission may proceed against a judicial officer even minus a complainant in the strict sense.

**Ref: Hw Kaweesa Godfrey –v- AG Miscellaneous Cause No.14 of 2020**

## GENERAL COMMENTS ON OFFENCES

**Offences in the regulations relate mainly to ethical conduct – action of a judicial officer may not attract criminal liability but still constitute an offence under the regulations**

**The fact that a judicial officer has been acquitted of any criminal charges is not a bar to disciplinary proceedings based on the same facts**

**Whereas the judicial code of conduct is criticised for being a voluntary non-binding code, many of the principles in the code are protected by the force of offences under the Regulations.**

**Complaints regarding conduct of a judicial officer can be handled at different levels starting with the judicial officer, superior officer, peers etc – not every complaint will lead to prosecution before JSC**

## NATURAL JUSTICE & BIAS

S. 11 of the Judicial Service Act provides that in dealing with matters of discipline the JSC shall observe the rules of natural justice. The judicial officer against whom disciplinary action is being undertaken has the right to:

Be informed of the particulars of the case

Defend himself/herself and present his/her case

Be represented by an advocate

Be told the reasons for any decision of the JSC

S. 12 of the Judicial Service Act provides for objection by a judicial officer against participation by any member of the JSC in proceedings on grounds of bias against the judicial officer

Other Channels of Enforcement.

Judicial Integrity Committee

Peer Committees

Inspectorate of Courts

Judiciary Disciplinary Committee

Enforcement of Code of Conduct

Enforcement of the principles in the Code and ensuring the compliance of Judicial Officers with them, are essential to the effective achievement of the objectives of the Code of Conduct.

The enforcement the Code shall take into account the legitimate need of a Judicial Officer, by reason of the nature of judicial office, to be afforded protection from vexatious or unsubstantiated accusations, and to be accorded due process of law, in the resolution of complaints against him or her.

## INTERNAL CONTROLS

### The Judicial Integrity Committee

Established to promote adherence to ethical standards in the Judiciary. It tours courts countrywide periodically to ascertain the extent to which judicial officers are compliant with the Code.

The Judicial Integrity Committee is headed by a Justice of the Supreme Court – it monitors compliance with the Code & conducts public sensitization. It also makes reports with recommendations after its visits and engagements with other JLOS stakeholders country wide.

2**) Peer Committees**

Established for judicial officers of the same rank working within proximity of each other to afford officers the opportunity to meet and discuss matters relating to the observance of the Code.

A peer committee may counsel a member who may appear to be falling out of line in his or her conduct.

**3) Inspectorate of courts**

The Judiciary has a Department known as ***the Inspectorate of Courts*** headed by a Justice of the Supreme Court (Chief Inspector of Courts) and constituted by three Deputy Registrars.

The inspectorate is responsible for monitoring the courts and ensuring high standards of integrity and service delivery.

Their terms of reference include responding to complaints from the public against any abuse of the exercise of the judicial function.

Ideally only the most serious and persistent cases are referred to the Judicial Service Commission.

As a public complaints management system members of the public are urged to report their complaints in writing to the Chief Inspector of Courts.

Since Deputy Registrars at circuits are sub - inspectors of courts they too can receive complaints in the High Court circuits in which they operate. E.g Jinja, Masaka, Arua, etc

In the alternative, which may be used better by whistle blowers and which may be easier for some owing to constraints of long distance, phone calls can be made to the Toll free line 0800 111900 and a complaint made.

## DISCIPLINARY COMMITTEE

4**) The Judiciary Internal Disciplinary Committee:** There is also a Judiciary Disciplinary Committee established by the Chief Justice with power given to him by Article 133(1)(b) of the Constitution to issue orders and directions to the courts necessary for the proper and efficient administration of justice. It is constituted by judicial officers as well as Human Resource Representatives.

This internal mechanism can handle complaints against support staff of the judiciary as well as judicial officers. From it a recommendation can be made to forward an officer to the Judicial Service Commission for further disciplinary proceedings.

Criminal Prosecution – IGG and DPP

Judicial officers are liable to criminal prosecution for any conduct that discloses a criminal offence

Criminal prosecution of judicial officers will normally be conducted by the DPP or IGG

Judicial officers are tried in the ordinary courts before fellow judicial officers – there is no special tribunal to try judicial officers

Conviction for a criminal offence is in itself an offence. In addition to a sentence for the criminal offence a judicial officer can suffer additional disciplinary sanctions.

## CONCLUSION

Channels through which Judicial Officers can be brought to book are multiple.

It should be noted that the options explored are not mutually exclusive. One can make a complaint against a judicial officer using more than one option discussed above.

It is in holding those in public office accountable for any wrongdoing that a system is made better.

It is also important however that complaints against judicial officers are not mala fide (made in bad faith), particularly when options for legal redress in the course of case management exist.

## A JUDGE AS A PUBLIC SERVANT & POST JUDICIAL LIFE.

What is Public Service?

"Public Service" means service in any civil capacity of the Government, or of Local government. The emoluments of civil servants are paid directly from the Consolidated Fund or from moneys appropriated by Parliament. See Art. 175 & 257(1) & Pensions Act S.2. Uganda Public Service Standing Orders, 2021, Section A,

Art 175 defines a public officer, as any person holding or acting in an Office in the Public Service.

Art 257(2)(a) gives examples: Judges and magistrates, police officers, prisons service, education service, health service.

**Ref: Section 2 Public Service Act, 2008**

**Public service is comprised of ALL persons duly appointed by the appropriate Service Commission or Appointing Authorities, to HOLD or to ACT in any office in the public service.**

**This excludes honorary employees or persons earning by way of fees, allowances and commissions, see S.3 PSA. Also See, section E of the Uganda Public Service Standing Orders, 2021**.

## GOVERNING LAW

**The Constitution of the Republic of Uganda, 1995.**

**The Code of Conduct and Ethics for Uganda Public Service**

**The Uganda Public Service Standing Orders (Edition 2021)**

**Public Service Commission Regulations, Cap 277 of the Laws of Uganda**

**The Public Service Act, Cap 288 (as amended in 2008)**

**The Public Service Commission Act, 2008**

## WHY A CODE OF CONDUCT?

The Government of Uganda has deemed it essential to establish a Code of Conduct and Ethics for Public Officers.

The Code is a comprehensive statement of the values and principles that should guide Public Officers in their daily work. The Code takes into account the ethical requirements of civil servants in general and in particular, the requirements of Public Officers, including their professional obligations.

The adoption and application of the Code promotes trust and confidence in the Public Service. A distinguishing mark of Public Service is acceptance of its responsibility to the public.

Codes can clearly articulate unacceptable behaviors as well as provide a vision for which the government official is striving. Therefore, they are a fundamental mechanism for ensuring professionalism.

The Code of conduct and Ethics for Uganda Public Service is based on the following principles: -

**Accountability**

A Public Officer shall hold office in public trust and shall be personally responsible for his or her actions or inactions.

**Decency**

A Public Officer shall present himself or herself in a respectable manner that generally conforms to morally accepted standards and values of society.

**Diligence**

A public Officer shall be careful and assiduous in carrying out his or her official duties.

**Discipline**

A Public Officer shall behave in a manner as to conform with the rules, regulations and the code of conduct and ethics for the Public Service generally and codes of professional conduct for the specific professions.

**Effectiveness**

A Public Officer shall strive to achieve the intended results in terms of quality and quantity in accordance will set targets and performance standards set for service delivery.

**Efficiency**

A public Officer shall endeavor to optimally use resources including time in the attainment of organizational objectives, target or tasks.

**Impartiality**

In carrying out public business, a Public Officer shall give fair and unbiased treatment to all customers irrespective of gender, race, religion, disability or ethnic background. A Public Officer shall make choices based solely on merit.

**Integrity**

A Public Officer shall be honest and open in conducting public affairs.

**Loyalty**

A Public Officer shall be committed to the policies and programs of the Government both at national and local levels.

**Professionalism**

A Public Officer shall adhere to the professional codes of conduct, exhibit high degree of competence and best practices as prescribed for in a given profession in the Public Service.

**Selflessness**

A Public Officer shall not put his or her own interest before the public interest. He or she should not take decisions in order to gain financial and other benefits.

**Transparency**

A Public Officer shall be as open as possible about all the decisions and actions taken.

He or she must always be prepared when called upon to give reasons for the decisions he or she has taken.

Public Service Standing Orders, 2021

In addition to what you already know other key considerations are;

Commitment to public interest - Public officials and employees shall always uphold the public interest over and above personal interest. All government resources and powers of their respective offices must be employed and used efficiently, effectively, honestly and economically, particularly to avoid wastage in public funds and revenues.

Political neutrality - Public officials and employees shall provide service to everyone without unfair discrimination and regardless of party affiliation or preference.

Responsiveness to the public - Public officials and employees shall extend prompt, courteous, and adequate service to the public. Unless otherwise provided by law or when required by the public interest, public officials and employees shall provide information on their policies and procedures in clear and understandable language, ensure openness of information, public consultations and hearings whenever appropriate, encourage suggestions, simplify and systematize policy, rules and procedures, avoid red tape and develop an understanding and appreciation of the socioeconomic conditions prevailing in the country, especially in the depressed rural and urban areas.

Nationalism and patriotism - Public officials and employees shall at all times be loyal to the Republic and to the people, of Uganda  promote the use of locally produced goods, resources and technology and encourage appreciation and pride of the country and people. They shall endeavor to maintain and defend Ugandan sovereignty against foreign intrusion.

Commitment to democracy - Public officials and employees shall commit themselves to the democratic way of life and values, maintain the principle of public accountability, and manifest by deeds the supremacy of civilian authority over the military. They shall at all-time uphold the Constitution and put loyalty to country above loyalty to persons or party.

QUESTIONS

What are the prohibited acts and transactions in Public Service in general?

What amounts to misconduct in Public Service?

CUSTOMER CARE

*Judiciary as a Service Centre*

## INTRODUCTION

In Public Service and more specifically Judicial Service it is important to note that we as officers are meant to serve clients/ customers.

Litigants and court users are customers of the court.

How do you want to be treated as a customer when you enter a shop/ restaurant/ garage? Do you not want to be paid attention and be respected?

Ref: Public Service Client Charter 2007/2008 & 2009/2010 and The Judiciary Client Charter 2020-2023

## EXPECTATIONS OF YOU AS A PUBLIC OFFICER

A Public Officer shall serve customers with fairness, transparency, promptness, clarity, respect and courtesy with a view to ensuring customer satisfaction and enhancing the image of the public service. Therefore, a Public Officer shall:-

Serve every customer in a professional manner in accordance with the set standards .

Not discriminate or harass any customer and ensure that the services are available and applied equally to all.

Accord courtesy, empathy and fairness to all customers with special attention to persons with disabilities, the aged, sick and expectant mothers.

Respond to all customers' requests with promptness and clarity.

Uphold teamwork and advance the public good for efficient service delivery.

## THE JUDICIARY CLIENT CHARTER 2020-2023

**The Judiciary Client Charter presents the commitments for the judiciary as mandated by the constitution.**

**Section 1** covers the judiciary's vision, mission, mandate and core values

**Section 2** covers key results area.

**Section 3** highlights service standards

**Section 4** is for service commitments

**Section 5** covers rights as a court user

**Section 6** covers clients obligations

**Section 7** covers accountability

**Section 8** sets out the feed back, complaints and appeal mechanism

**NOTE:** Please acquaint yourselves with the provisions of the Judiciary Client charter.

Customer Care?

A management orientation/philosophy of considering a customer as a crucial stakeholder in the operations of any entity.

A concept that focuses at the customer as the most important stakeholder in the operations of any entity.

A tendency to streamline customer-focus in an organization's planning & operations

The process of "constantly and consistently meeting customer needs, in such a way that customers feel wanted and appreciated".

"It is more than just a smile and thank you"

It means that the organization conducts itself in such a way that its customers feel that "they are the reason it exists" – I.e. to serve their needs!

Far from a smooth ride

A good court manager must learn how to navigate waters because there are so many issues/ complaints that arise daily in courts.

Impact of Good Customer Care

Improvement in corporate image and public relations

Improvement in delivery of services leading to customer satisfaction

Increased customer loyalty resulting in increased relevance of an Entity/ institution.

Creation of a strong link between an entity/institution and its customers (Relationship Marketing)

Guiding Questions to Effective Customer Service

Who is my/our Customer/client?

What does he/she need/want?

Why does he/she want/need it?

How does she/he need/want it?

When does he/she need/need it?

Where does she/he need/want it?

# POST JUDICIAL LIFE
# RETIREMENT ACCORDING TO THE ADMINISTRATION OF THE JUDICIARY ACT

### RETIREMENT BENEFITS ARE PROVIDED FOR UNDER PART 8 OF THE ADMINISTRATION OF THE JUDICIARY ACT

**These benefits are only applicable to:**

Judicial officers who retire after the commencement of the Act.

A Judicial Officer who retired before the commencement of this Act and who on the commencement of this Act is receiving a  pension in respect of his or service under the pension Act

# RETIREMENT BENEFITS FOR CHIEF JUSTICE

### SECTION 22 OF THE ADMINISTRATION OF JUDICIARY ACT

### SCHEDULE 2 (A)TO THE SAME ACT

A monthly retirement benefit equivalent to the salary payable to a sitting Chief justice

A one-off lump sum retirement benefit equivalent to 2.4% of the annual salary of the retiring Chief Justice multiplied by five and the years of service.

A furnished house or a one off payment of twenty thousand currency points payable in lieu of a house.

An annual medical allowance equivalent to the medical allowance to a sitting chief justice.

A chauffer driven car or a one-off payment of a ten thousand currency points in lieu of a car.

Security provided by the state

Two domestic servants or payment of 15 currency points per month payment in lieu of two domestic servants

A fuel and vehicle repairmen allowance of one-hundred currency points per month.

A consolidated allowance of 11 points seventy five currency points per month to cater for airtime and internet.

## BENEFITS PAYABLE TO RETIRED JUSTICE OF THE SUPREME COURT

### SECTION 24 OF THE ADMINISTRATION OF JUDICIARY ACT

### SCHEDULE 4(A) TO THE SAME ACT

A monthly retirement benefit equivalent 8% of the salary payable to a sitting Justice of the Supreme Court.

A one-off lump sum retirement benefit equivalent to 2.4% of the annual salary of the retiring Justice of the Supreme Court multiplied by five and the years of service.

A monthly housing allowance equivalent to the housing allowance payable to a sitting Justice of the Supreme Court or a One-off payment of fifteen thousand currency points payable in lieu of a house.

An annual medical allowance equivalent to the medical allowance to a sitting Justice of the Supreme Court.

A chauffer driven car or a one-off payment of a seven thousand five hundred currency points in lieu of a car.

Security provided by the state.

## BENEFITS PAYABLE TO A JUSTICE OF THE COURT OF APPEAL

### SECTION 24 OF THE ADMINISTRATION OF JUDICIARY ACT

### SCHEDULE 4(B) TO THE SAME ACT

A monthly retirement benefit equivalent 8% of the salary payable to a sitting Justice of the Court of Appeal.

A one-off lump sum retirement benefit equivalent to 2.4% of the annual salary of the retiring Justice of the Court of Appeal multiplied by five and the years of service.

A monthly housing allowance equivalent to the housing allowance payable to a sitting Justice of the Court of Appeal or a One-off payment of fifteen thousand currency points payable in lieu of a house.

An annual medical allowance equivalent to the medical allowance to a sitting Justice of the Court of Appeal.

A chauffer driven car or a one-off payment of a seven thousand five hundred currency points in lieu of a car.

Security provided by the state.

## BENEFITS PAYABLE TO THE PRINCIPAL JUDGE

### SECTION 25 OF THE ADMINISTRATION OF JUDICIARY ACT

### SCHEDULE 5(A) TO THE SAME ACT

A monthly retirement benefit equivalent 8% of the salary payable to a sitting Principal Judge

A one-off lump sum retirement benefit equivalent to 2.4% of the annual salary of the retiring principal Judge multiplied by five and the years of service.

A monthly housing allowance equivalent to the housing allowance payable to a sitting Principal Judge or a One-off payment of seventeen thousand five hundred currency points payable in lieu of a house.

An annual medical allowance equivalent to the medical allowance to a sitting Principal Judge.

A chauffer driven car or a one-off payment of eight thousand currency points in lieu of a car.

Security provided by the state.

## BENEFITS PAYABLE TO A JUDGE OF THE HIGH COURT

### SECTION 25 OF THE ADMINISTRATION OF JUDICIARY ACT

### SCHEDULE 5(B) TO THE SAME ACT

A monthly retirement benefit equivalent 8% of the salary payable to a sitting Judge of the High Court.

A one-off lump sum retirement benefit equivalent to 2.4% of the annual salary of the retiring Judge of the High Court multiplied by five and the years of service.

A monthly housing allowance equivalent to the housing allowance payable to a sitting Judge of the High Court or a One-off payment of fifteen thousand currency points payable in lieu of a house.

An annual medical allowance equivalent to the medical allowance to a sitting Judge of the High Court.

A chauffer driven car or a one-off payment of seven thousand currency points in lieu of a car.

Security provided by the state.

## RETIREMENT BENEFITS FOR OTHER JUDICIAL OFFICERS

**SECTION 26 OF THE ADMINISTRATION OF JUDICIARY ACT**

**SCHEDULE 6 TO THE SAME ACT**

**OTHER JUDICIAL OFFICERS INCLUDE;**

Chief Registrar

Registrar

Deputy Registrar

Assistant Registrar

Chief magistrates and all other grades of magistrates

**Note:** Retirement benefits payable to them are found in schedule 6 to the administration of

Further Note;

**What happens when a judicial officer dies while in service**

***Refer to Section 29 of the administration of Judiciary Act***

*The following Payment are made to the spouse/ spouses/dependants.*

*A one-off Lump-sum retirement benefit granted under paragraph 2 of the Schedules 2,4,5 and 6 of this Act.*

*The monthly retirement benefits granted under paragraph 1 of Schedules 2,4,5 and 6 of this Act for a period of fifteen years from the date of the death of the Judicial Officer.*

**What happens where the Judicial officer Dies during retirement?**

***Still Refer to Section 29 of the Administration of Judiciary Act***

*Surviving spouse or spouses and dependent children of the deceased judicial officer shall be entitled to the monthly retirement benefit for the unexpired period.*

## DISQUALIFICATION FROM RETIREMENT BENEFITS

**Section 28 of the Administration of Judiciary Act**

Circumstances under which a person shall not be entitled to retirement benefits under the Act;

Where the Judicial officer is removed from the Judiciary Service in accordance with the Constitution.

Where the Judicial officer Absconds from duty.

**NOTE:** Retirement Benefits payable to a judicial officer under part 8 of the Act are exempt from tax see: Section30(2)

## WAYS TO PREPARE FOR RETIREMENT

### SAVING

**Start saving, keep saving, and stick to your goals**

If you are already saving, whether for retirement or another goal, keep going! You know that saving is a rewarding habit. If you're not saving, it's time to get started. Start small if you have to and try to increase the amount you save each month.

**Know your retirement needs**

Retirement is expensive. Experts estimate that you will need 70 to 90 percent of your preretirement income to maintain your standard of living when you stop working. Take charge of your financial future. The key to a secure retirement is to plan ahead.

### PENSION PLAN

If your employer has a traditional pension plan, check to see if you are covered by the plan and understand how it works. Ask for an individual benefit statement to see what your benefit is worth. Before you change jobs, find out what will happen to your pension benefit. Learn what benefits you may have from a previous employer. Find out if you will be entitled to benefits.

### INVEST

How you save can be as important as how much you save. Inflation and the type of investments you make play important roles in how much you'll have saved at retirement.

**Don't touch your retirement savings**

Roll them over to an ( Individual Retirement Account )IRA or your new employer's plan

## CONCLUSION

As you strive to be judicial officers/ public servants in Uganda be part of the change you want to see. Each of us has a responsibility to make things better in Uganda.

As you choose to join the Judiciary think of retirement and life after Judiciary . Plan for the honorable life you hope for.

## THE ART OF JUDGMENT WRITING

What is a Judgment?

THE OFFICIAL AND AUTHENTIC DECISION OF A COURT OF JUSTICE UPON THE RESPECTIVE RIGHTS AND CLAIMS OF THE PARTIES TO AN ACTION OR SUIT THEREIN LITIGATED AND SUBMITTED FOR ITS DETERMINATION.

ANY DECISION GIVEN BY A COURT ON A QUESTION OR QUESTIONS OR ISSUE BETWEEN THE PARTIES TO A PROCEEDING PROPERLY BEFORE COURT.- Halsbury's Laws of England.3rd edition

THE DECISION OR SENTENCE OF A COURT IN A LEGAL PROCEEDING. ALSO THE REASONING OF A JUDGE WHICH LEADS HIM TO HIS DECISION, WHICH MAY BE REPORTED AND CITED AS AN AUTHORITY, IF THE MATTER IS OF IMPORTANCE,CAN BE TREATED AS A PRECEDENT.- ( Osborn's Law dictionary, 7th edition.)

WHAT IS EXPECTED OF A GOOD JUDGMENT

THE JUDGMENT MUST COMMUNICATE A DECISION OF A COURT.

THE DECISION MUST BE ACCOMPANIED WITH REASONS.

THE DECISION MUST RESOLVE THE ISSUES/QUESTIONS IN CONTROVERSY.

THE DECISION MUST BE FINAL ON THE DISPUTE BEFORE THE COURT.

## PURPOSE OF JUDGMENT

**LEGAL REQUIREMENT. See section 133 MCA; 82(2) TIA; Order 21(1) CPR**

To determine the guilt or innocence of an accused person.

To settle matters in controversy.

To communicate reasons to the parties for the decision.( public and appellate Court)

To provide accountability by Judicial Officers.

To serve as precedents.

To develop Jurisprudence.

To promote checks and balances under the rule of Law.

## STRUCTURE OF JUDGMENTS

JUDGMENTS ARE CONSTRUCTED LIKE OTHER PHYSICAL STRUCTURES ON PAPER.

THEY HAVE A FOUNDATION, THE SUPERSTRUCTURE, THE HEAD AND OTHER ACCESSORIES.

BUT UNLIKE PHYSICAL STRUCTURES THAT DON'T TALK, JUDGMENTS HAVE LIFE; THEY COMMUNICATE.

STRUCTURE

HEADING. ( Title, Court, Parties, Case number, Judge)

INTRO. ( Facts, issues/ingredients)

BODY/SUPERSTRUCTURE. ( Analysis/Evaluation of evidence, application of the law, resolution of issues/elements, ratio decidendi)

CONCLUSION. ( Decision)

CONTENTS

SEC. 86. TIA; 136 MCA; O.22 R. 4 CPR.

KAGOYE V R (1959) EA 900; OKENO V R (1972) EA. 32

Must be written

Language of the Court. (English)

Points for determination

Decision thereon

Reason for the decision

Dated

Signed.

FINDINGS OF FACT

State relevant facts without detail.

State only facts and history that affects the analysis and decision

Sift the grain from the chuff

Be accurate, precise and impartial

Consult the record to avoid errors

Facts be written in chronological order but if complicated, then use a thematic approach.

Point out discrepancies, if any, and make findings of fact

Consider the credibility of witnesses ie body language, audibility

CASE LAW

Kifamute Henry V Uganda. Cr app 10/1997 (SC)

Abdalla Bin Wendo and anr vrs. Rep (1953) 20 EACA. 166

Abdalla Nabulere and anr vrs Uganda (1979) HCB 77

## IDENTIFICATION OF ISSUES, QUESTIONS AND INGREDIENTS

### ISSUES

Proposition of law or fact made by one party but opposed by the other.

Order 15 rule 1 and Order 12 CPR

Each issue must be stated distinctly.

Issues are of fact or law

Issues of law may dispose of the case and may be tried first. ie POs

Issues are now framed at conferencing(O.12 CPR) Note that a PO may also be framed as an issue if it involves taking some evidence. Kasibante v Hon. Singh Katongole. El.Petition 23/2011(unreported)

Remember even after taking evidence, additional issues may framed( O.15 Rs. 3&4 CPR)

QUESTIONS

Questions are similar to issues but usually arise after evidence has been adduced. They are framed during judgment writing. They are sub issues which should be stated fairly and impartially.

They are common in applications supported by affidavits. ( whether an affidavit discloses a source of information, place of deposition, or is based on hearsay.) In criminal cases, they arise from evidence which the prosecution adduces but which the defence denies. (Whether a witness made statements that were not recorded or is giving different evidence.) Contradictions in evidence also raises questions for resolution.( Factors for proper identification)

Questions relate to facts unlike issues that may involve law. Eg. Whether the witness could identify the assailant correctly or is honestly mistaken? These are questions of fact which must be resolved in the judgment.

Focus on the questions you have framed to enable parties follow and understand why you have reached that conclusion

**INGREDIENTS**

Essential elements that constitute a crime charged.

Every crime except for those crimes of strict liability, have elements for both the mes rea and actus rue.

Ingredients should be stated clearly and fully resolved one by one in logical order to ensure the judgment flows. Remember you are communicating to the parties and other stakeholders.

Should the need arise to reserve a resolution on one element until you have resolved the next, then state so clearly but remember to resolve the shelved issue.

**BURDEN OF PROOF**

REMEMBER TO STATE CLEARLY AND CORRECTLY WHO BEARS THE BURDEN TO PROVE THE CASE OR ISSUE STATED AND TO WHAT STANDARD.

In criminal cases, the standard is beyond reasonable doubt.

In civil cases, it is on the balance of probabilities with some exceptions where fraud is pleaded.

## "BEYOND REASONABLE DOUBT"

"The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave a remote possibility

Proof

.. in his favour which can be dismissed with a sentence, of course it is possible but not in the least possible, the case is proved beyond reasonable doubt but nothing short of that will suffice"

Per lord Denning: Miller v Minister of Pensions (1947) 2 AER 372.

Art. 28(3)a Constitution.

## APPLYING THE LAW TO THE FACTS

This is the crux of judgment writing.

Evaluation of evidence is done at this stage.

Evaluate the evidence as a whole for both sides.

This is where the ratio decidendi is stated and the case is decided finally.

Judgment should refer to the principles applicable( case law and statutory law).

Each issue or ingredient framed should be disposed of separately though two or more issues may in civil matters may overlap and may be dealt with together.

The demeanor of witnesses is assessed but this should be from notes already recorded.(O.18.r.10)

Clear reasons must be given for the decision and demonstrate that both sides have had their propositions considered.

Do not consider one side in isolation of the other.

Apply only relevant cases and distinguish those you consider not applicable. Avoid loading judgment with authorities. Shah v Aguto (1970) EA 263.

Decide only those issues that dispose of the case. This ensures clarity

Analysis at this stage should be balanced and dispassionate.

At this stage, the judgment should set forth the evidence on each issue sufficiently to show its nature, what it proposes to establish, and its credibility.

Reference should be made to arguments for both sides, apply the law objectively and draw a conclusion on each issue.

For example, in murder and robbery cases that occur at night, the issue of proper identification always comes up. Analyze those factors that

Where there is an alibi, the prosecution evidence should be assessed against the defence denial before a conclusion is made.

It is not enough to conclude that the evidence places the accused at the scene without comparing that evidence against the accused evidence on the alibi. See Moses Bogere's case.

REMEMBER:

CONSIDER THE EVIDENCE AS A WHOLE BEFORE DECIDING CASE FINALLY

Evaluation of evidence of identification

"The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult and to warn itself of the of the possibility of mistaken identity.

The Court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out.

**Evaluation**

In so doing the Court must consider the evidence as a whole, namely the evidence if any, of factors favouring correct identification together with those rendering it difficult.

It is trite law that no piece of evidence should be weighed except in relation to all the rest of evidence."

Bogere Moses and anr v Uganda. Cr app. 1/97 (SC)

Consider questions and defences below.

Admissibility of evidence- hearsay rule. Sec. 59 Evidence Act. Cap 6

Discrepancies, contradictions, credibility and demeanor.

Identification by single witness. Factors for proper Identification

Circumstantial evidence. See Simon Musoke v R.(1959) EA 715

Corroboration. Accomplice, confession, Child evidence, etc

Common intention. Participation or omission to disassociate

Insanity. Complete defence

Intoxication. Qualified complete defence

Mistake. Complete defence

Provocation. Removes malice or intent

Claim of right. Complete defence

Duress. Complete defence

Self defence. Complete defence.

Alibi. No duty to prove alibi

**REMEMBER**

To decide on each count or charge to avoid omnibus convictions in criminal cases.

Put a conclusion to the judgment. " The prosecution has proved its case beyond reasonable doubt, I find you guilty of the offence of... c/s... and convict you accordingly". Or "the plaintiff has proved his/her claim on the balance of probabilities. I, therefore, make the following orders...."

**LANGUAGE AND STYLE**

Judgments have a purpose- to communicate to the parties and other stakeholders the decision of the Court in regard to the dispute.

English is the language of Court and its proper use creates good impact.

Judgments out live their authors. They act as precedents and should carry the message for posterity.

Judgments should , therefore, be understandable by even those who have lost.

Give a brief prologue to introduce the story

Avoid repeating pleadings and the law: set the scene simply and clearly.

Avoid long, winding and boring sentences.

Write in a style you are comfortable with.

Use clear sentence structures and organisation

Identify characters before telling what they did

Use spot citations like exact pages

Be formal, clear, simple and free of jargon. Use plain English. Latin may be used sparingly where necessary and inevitable.

Be concise. Avoid repetitions and overlaps except if it adds colour to style.

Be gender sensitive and avoid prejudices.

Be respectful to the parties and other readers.

Use quotes sparingly and only when they add value and emphasis.

Where possible paraphrase the law or use short quotes

Limit the use of italics for emphasis. Over use means that the reader is not alert enough to see your point without help.

Minimise the use of Latin phrases. The parties and their counsel may not be impressed yet they are the primary target group to receive the judgment.

Even in England the excessive use of Latin, has been a subject of criticism from as early as 1943. In Ingram v. United Automobile Services Ltd.(1943) 2 All E R 71 the Court observed " I think the cases are comparatively few in which much light is obtained by the liberal use of Latin phrases. Nobody can derive any assistance from the phrase Novus acus interveniens until it is translated into English"

Use of headings in a very involved long trial is advised. Examples are in Election Petitions.

Use of dramatic statements can be effective in summarizing the situation.

> " In 1972 a sword fell on the Asians living in Uganda. It was the sword of the President General Amin"

Per Lord denning in Thakrar v. Secretary of State (1974) 2 All E R. 261.

Avoid the straight narrative style which never really poses the question to be answered until the end. A judgment is not a detective story; it should consist of posing of questions and thereafter of findings of facts relevant to the questions and the stating of the answers to those questions based on the applicable law.

Avoid the narrative of PW1, PW2,PW3, PW4....stated this..... Don't repeat the testimonies in the judgment.

Use of paragraphs is advised to give readers a break. Long paragraphs are dull to read.

Proper use of Grammar and punctuation shows professionalism and makes writing easier to understand.

Read judgments by senior judges to appreciate the use of style and language in making judgments more professional

Lord Denning, The family story,(1999)p207

*" I start my judgment, as it were, with a prologue- as a chorus does in one of Shakespeare's plays- to introduce the story... I draw the characters as they truly are- using their real names... I avoid long sentences like a plague, because they lead to obscurity. It is no good if the reader cannot follow them... I refer sometimes to previous authorities- I have to do so-because I know that people are prone not to accept my views unless they have support in... the books. But never at much length. Only a sentence or two. I avoid all reference to pleading and orders- They are mere lawyers' stuff. They are un intelligible to everyone else. I finish with a conclusion- an epilogue- again as the chorus does in Shakespeare. In it I gather the threads together and give the result"*

Write judgments regularly as a way of practicing and perfecting the science and art of writing understandable judgments.

DELIVERY OF JUDGMENTS

Time is of the essence in the delivery of justice. Parties come to Court because they are aggrieved.

Delay in handing down the decision increases their agony and frustration.

Art. 28 of our Constitution requires a speedy trial as part of a fair hearing.

In Uganda, the Code of Judicial Conduct imposes 60 days as the time frame for delivery of the Court's decision.

Other Countries.

AUSTRALIA. A judgment must be delivered within 90 days from the closure of the final addresses to Court. Beyond this time, a complaint may be lodged and the judge called to order.

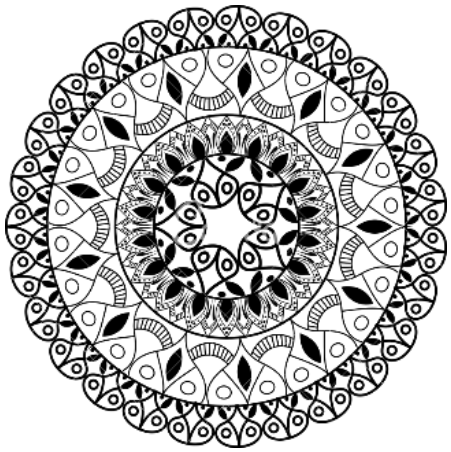
PHILIPPINES. It is a constitutional requirement under Art. 8(15) to deliver judgment within 90 days.

GUYANA. A Judge may be removed from office for persistently failing to write and deliver judgments. Art. 197(3) of the Guyana Constitution.

NIGERIA. Every Court established under this Constitution shall deliver its decision in writing not later than 90 days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within 7 days of the delivery thereof. Art. 294(1) of the Federal Constitution,1999. A judgment delivered after the set time is null and void.

**CONCLUSION**

A Judge's goal in writing a judgment is to put reason onto paper. The common law system of precedent depends on honest, reasoned, and well written judgments. Judgment writing is challenging. But writing clearly, with an effective structure and style, lets judges leave a lasting trail.



# Volume Five

# PUBLIC LEGAL PRACTICE

# THE PUBLIC SERVICE OF UGANDA

**What is the Meaning of Public Service?**

Means rendering service in any civil capacity of the Government, or of the Local government, emoluments of which are paid from the Consolidated Fund or from moneys appropriated by Parliament

See Art. 175 & 257(1), Pensions Act S.2. Uganda Public Service Standing Orders, 2010, Section A,

Art 175 defines a public officer, as any person holding or acting in an Office in the Public Service.

Examples, see Art 257(2)(a): Judges, magistrates, police officers, prisons service, education service, health service etc.

What about the President/ vice President, Speaker, Deputy Speaker, Ministers, attorney General, MP's. Are public servants?

See, Art 257 (2) (b) Constitution & ***Cap Mukula vs. Uganda HC Appeal Case No.1/2013.*** *Mukula, then a Minister was charged under the Anti-corruption Act as an employee of government. He was convicted and sentenced to serve 4 years in prison. He appealed on ground that, he was not an employee.*

The section under which Mukula was charged provided that:

*''A person being, an employee, a servant or an officer of government or public body, steals...."*

The particulars of offence described Mukula as an employee of government.

*The Court observed that, while Ministers and State Ministers are referred to as ''Ministers of Government", in the Constitution, they are not employees of Government....They are not appointed under Public Service but by the President.*

*Although their appointments are approved by Parliament, the President can revoke the appointment as and when he wishes and they cannot sue for wrongful dismissal.*

*The Court held that Ministers are Officials of Government and not employees, but the Court dismissed the appeal because no prejudice was shown.*

*NB: there is a big difference between being a Public Servant and a Government Official.*

*The policy argument behind this is to avoid a situation where the President, Vice President, Ministers, MP's are to resign their positions as requirement before vying for elective positions, in order to keep government business running.*

What Constitutes the Public Service?

S.6 Public Service Act, (PSA),

Comprises ALL persons dully appointed by the appropriate Service Commission or Appointing Authorities, to HOLD or to ACT in any office in the public service

However, this excludes honorary employees or persons earning by way of fees, allowances and commissions, see S.3 PSA, Section A of the Uganda Public Service Standing Orders, 2010.

An **honorary position** is given as an honor, with no duties attached, and without payment.

An **honorary contract** is prepared when an employee of another organization is assigned to do a period of work/research/training within the organization, but will not be paid directly by the organization.

**The Legal Framework for the Public Service**

Employment in the Public Service of Uganda is subject to the Laws of Uganda and International Labour Laws.

- The Constitution of the Republic of Uganda, 1995.
- The Public Service Act, 2008 and the Regulations
- The Uganda Government Standing Orders.
- The Local Government Act.
- Employment Act.
- The Judiciary Administration Act, 2020.
- Checklist on Submissions to Public Service Commission, 2008 Revised.
- The Pensions Act and the Regulations
- The Pensions Management Manual, 2000.
- The Administration of the Judiciary Act, 2020 and the Judicial Service Commission Regulations.
- The Retirement Benefits Regulatory Authorities Act, 2011. Requires all employers with more than 5 employees to register with NSSF and make contributions for their employees. Establishes Pension Scheme Oversight Bodies such as Uganda Retirement Benefits Regulatory Authority mandated to regulate formation, licensing, management and operations of licensed retirement benefit schemes. Also creates the Retirement Benefits Appeals Tribunal to handle contributor complaints among others.
- Before this Act, the pension sector was comprised of National Social Security Fund (NSSF) and Public Sector non-contribution Pension Scheme (PSPS) run under the ministry of public service.

A few weeks ago, the media reported that cabinet had approved contributory savings scheme for public servants as well.

- The Education Service Act.
- The Leadership Code Act, 2000.

The Structure of a Ministry

Ministry is a Government Department. There various Ministries in Uganda offering different Government Services.

For examples are Ministry of Education, Ministry f Heath, Ministry of defense, Ministry of finance etc.

Interns of structure, a Ministry is headed by a Cabinet Minister and deputised by State Minister(s) all appointed by the President on advice of the Public Service Commission.

The Minister provides political leadership and he/she is responsible for the overall administration and management of a ministry.

Let's look at the Ministry of Finance structure.

At policy level, the Ministry is headed by the Minister of Finance assisted by five Ministers of State namely:

General Duties

Planning

Investment

Privatization

Microfinance and Enterprise Development

At the technical level, a Ministry is headed by the Permanent Secretary (PS) /Secretary to the Treasury, who is the Chief Executive and Responsible Officer for the Ministry.

Ministries execute their functions through Directorates, Departments, Divisions or Units headed by technical staff.

The PS Ministry of Finance is assisted by the Deputy Secretary to the Treasury, Directors, Commissioners and other technical officers

The Ministry of Finance is comprised of five (5) Directorates namely;

Economic Affairs

Budget

Accountant General

Internal Audit

Cash and Debt Management

The above structure is supported by the Finance and Administration Department headed by the Under Secretary who is also assigned the responsibility of being Accounting Officer.

**NB**. Each Ministry/government Agencies is supposed to have PS appointer by the President on advice of the Public Service Commission. See Article 174 and Standing Order 14, 15 & 16 for appointment and functions of PS/Responsible Officer;

The Permanent Secretary(PS) provides technical leadership and acts as the Chief Executive of the ministry or government agency

The PS supervises the Ministry, Implements government policies, ensures proper expenditure of public funds by ministry/agency etc. LDC, the Director is the PS.

**NB.** Find time and familiarize your selves with the structures of various ministries and their roles, such as the Prime Minister's Office among others.

## The Structure of Local Government

Uganda operates both Centralised and Decentralised administrative units based in Districts such as District Council, Urban/City Council, and Sub-County Council among others. See Art 176 & 177 Const. Recently, more administrative units were created where some towns/municipalities were given the city status. Eg. Mbarara, Mbale, Lira, Gulu, Soroti etc. Its noted that there is no specific law providing for these cities a part from Kampala City (KCCA Act).

The Local Government is a decentralised form of administrative unit based at the district level with its own structures. See, Art 188 and the Local Government Act, and Parts II, III, IV & V.

The Chief Administrative Officer (CAO) is a Chief Executive/Administrative Office of the District, S. 7(2) PSA and s.68 of the Local Government Act.

The CAO is appointed by the Central government and provides technical leadership to the district administration.

Districts run various departments such as education, health, works, environment, planning etc. S. 63 & 64 Local Government Act.

The LCV Chairman is the political head of the District Administration with political units running up to the village level.

We also have RCC/RDC who are senior civil servants appointed by the President to monitor and oversee the implementation of government programmes at their respective cities or districts of deployment.

We also have Town mayors, and Town Clerks.

1. **Village**

This is the lowest political unit governed by the Chairman LCI and nine executive members? According to recent LCI elections, Uganda has over 60.000 villages.

2. **The Parish**

The second lowest political administrative unit comprised of villages. Each parish has LCII committee made up of all chairpersons of the village LCI's in that parish.

The parish is run by the parish Chief, who is a government employee providing technical guidance to LCII. Mostly they handle land disputes and mobilisation. Recently, government came up with the Parish Development Model to fight poverty at the grassroots level. This programme is run at the parish level across the country.

3. **The Sub-County**

Comprised of parishes, and run by the Sub-County Chief as the technical person and elected local council III (LCIII) Chairman and Executive committee.

Has an LCIII Council with a speaker and deputy. The Council consists of elected councillors representing parishes, government official involved in education and health including NGO operating in the sub-county.

In towns, the sub-county is called a Division.

4. **The County**

Made up of several sub-counties, each county is represented in Parliament by an elected MP. You heard recently more counties being created.

In urban setting, a county is equivalent to a municipality.

LCIII executive committee members of all the Sub County Committees, form the LCIV Council, who then elects an LCIV Executive Committee from themselves.

LCIV executives have limited powers except in municipalities.

5. **The District:**

Comprised of several counties and/or municipalities in the area

A district is led by elected LCV Chairman and his executive.

The LCV council is comprised of elected representatives from the sub counties and technical staff from the district.

The LCV council is the highest political authority of a local government. It has legislative and executive powers, debates budgets, decisions and makes by laws. S.9 & 10 LGA

The District or Urban council may establish or abolish offices in the public service of the district. See Standing Order Section A, Order 6.

## ETHICAL CONDUCT

The Government of Uganda has deemed it essential to establish a Code of Conduct and Ethics [the Code][352] for Public Officers.

The Code is a comprehensive statement of the values and principles that should guide Public Officers in their daily work. The Code takes into account the ethical requirements of civil servants in general and in particular, the requirements of Public Officers, including their professional obligations.

The conduct of public officers should be beyond reproach at all times and in all circumstances. Any deficiency in their professional conduct or any improper conduct in their personal life places the integrity of Public Officers, the department or unit that they represent, and the quality and validity of their work in an unfavorable light, and may raise doubts about the reliability and competence of their work.

The adoption and application of the Code promotes trust and confidence in the Public Service. A distinguishing mark of Public Service is acceptance of its responsibility to the public.

[352] The Code of Conduct and Ethics for Uganda Public Service (July 2005).

Why Ethics Codes?

Ethics codes are as old as antiquity. Religious traditions and civic cultures have codes as their foundations.

In each case codes carry general obligations and admonitions, but they are far more than that. They often capture a vision of excellence, of what individuals and societies should be striving for and what they can achieve. In this sense codes, which are often mistaken as part of law or general statements of mere aspiration, are some of the most important statements of civic expectation.

**DAMENTAL PRINCIPLES (IFAC)**

Codes can clearly articulate unacceptable behaviors as well as providing a vision for which the government official is striving. Therefore, a fundamental mechanism for ensuring professionalism is a code of ethics.

Codes of ethics are written to guide behavior. Any final analysis of the impact of a code must include how well it affects behavior.

Codes are not designed for "bad" people, but for the persons who want to act ethically. The bad person will seldom follow a code, while most people – especially public servants --welcome ethical guidance in difficult or unclear situations. The average person is not grossly immoral but often tempted, and sometimes confused, by what appears to be a virtuous path.

*"When temptations are significant, when the price of adherence (in terms, for example, of the sacrifice to our interests) is high, when the social consequences of violation (harm to others) are relatively slight, when the costs of violation are low – under such circumstances it is easy to be led from doing what you ought to do . . ."*[353].

No code, no matter how severely enforced will make truly bad[354] people good.

As James Madison wrote: "If men were angels, no government would be necessary. If angels were to govern men neither external nor internal controls on government would be necessary."[355]

[353] Judith Lichtenberg, "What Codes of Ethics Are For?" in Margaret Coady and Sidney Bloch (eds.), Codes of Ethics and the Professions, Melbourne: Melbourne University Press, 1996, p. 17.
[354] By "bad" in this sense, I mean a public servant who consciously welcomes being corrupted for either financial and/or power reasons, and who understands that they are clearly violating codes or laws.
[355] James Madison, Federalist #51 in Hamilton, Madison and Jay, The Federalist Papers, various editions

However, ethics codes can have a demonstrable impact on the *behavior* of bad people in organizations. When everyone clearly knows the ethical standards of an organization they are more likely to recognize wrongdoing; and do something about it.

Second, miscreants [person who behaves badly] are often hesitant to commit an unethical act if they believe that everyone else around them knows it is wrong.

And, finally corrupt individuals believe that they are more likely to get caught in environments that emphasize ethical behavior.

***The Role of Principles and Values*:**

Effective ethics codes are not merely a text. Rather, they exemplify the fundamental principles and values of a public service. These can include more legalistic precepts, such as restrictions on conflicts of interest. Codes can also contain values. But the critical elements in a code are the clear articulation of principles that are derived from values. This distinction has its clearest conceptualization in the 18th century writings of Jeremy Bentham.[356]

For him a principle was "a general law or rule that guides behavior or decisions," whereas values articulate "an Aspiration of an ideal moral state."

A more recent explanation of this relationship in public service comes from Terry Cooper: An ethical principle is a statement concerning the conduct or state of being that is required for the fulfilment of a value; it explicitly links a value with a general mode of action.

For example, justice may be considered a significant value, but the term itself does not tell us what rule for conduct or state of society would follow if we include justice in our value system. We would need a *principle* of justice to show us what pattern of action would reflect justice as a value.

A common form of the justice principle is "Treat equals equally and unequal unequally." We might interpret this principle as meaning that if all adult citizens are politically equal they should all have the same political rights and obligations. If one has the vote, all must have it.[357]

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[356] Jeremy Bentham, An Introduction to The Principles of Morals and Legislation (NY: Hafner Press, 1948), p. 2.

[357] Terry L. Cooper, The Responsible Administrator: An Approach to Ethics in the Administrative Role, 4th edition
(San Francisco, Jossey-Bass Publishers, 1998), p. 12.

To summarize, values are general moral obligations while principles are the ethical conditions or behaviors we expect. Unfortunately, this can become confusing in everyday language. For instance, many times “core values” or “concrete values” are terms used instead of principles but they should be intended to inform principles.

For this reason it is not uncommon for codes to being with a value (integrity) and then make the value real in principle (Do not use your public office for private gain).

Many modern public services initiate their code development through input from public servants. This creates an environment for participation as well as developing a sense of authenticity for a body of primary obligations and a context for those obligations.

The power of people in public service compared to those they serve is behind the idea that "public service is a public trust" and explains why so many governmental and professional codes impose special obligations public servants who, as *temporary stewards*, exercise public power and authority. Their position is neither theirs to own, nor is it theirs to keep.

***The Code of conduct and Ethics for Uganda Public Service is based on the following principles: -***

**Accountability**

A Public Officer shall hold office in public trust and shall be personally responsible for his or her actions or inactions.

**Decency**

A Public Officer shall present himself or herself in a respectable manner that generally conforms to morally accepted standards and values of society.

**Diligence**

A public Officer shall be careful and assiduous in carrying out his or her official duties.

**Discipline**

A public Officer shall behave in a manner as to conform with the rules, regulations and the code of conduct and ethics for the Public Service generally and codes of professional conduct for the specific professions.

**Effectiveness**

A public Officer shall strive to achieve the intended results in terms of quality and quantity in accordance will set targets and performance standards set for service delivery.

**Efficiency**

A public Officer shall endeavor to optimally use resources including time in the attainment of organizational objectives, target or tasks.

**Impartiality**

In carrying out public business, a Public Officer shall give fair and unbiased treatment to all customers irrespective of gender, race, religion, disability or ethnic background. A Public Officer shall make choices based solely on merit.

**Integrity**

A Public Officer shall be honest and open in conducting public affairs.

**Loyalty**

A Public Officer shall be committed to the policies and programs of the Government both at national and local levels.

**Professionalism**

A Public Officer shall adhere to the professional codes of conduct, exhibit high degree of competence and best practices as prescribed for in a given profession in the Public Service.

**Selflessness**

A Public Officer shall not put his or her own interest before the public interest. He or she should not take decisions in order to gain financial and other benefits.

**Transparency**

A Public Officer shall be as open as possible about all the decisions and actions taken.

He or she must always be prepared when called upon to give reasons for the decisions he or she has taken.

## OTHER RULES[358] OF PROFESSIONAL CONDUCT

**Trust, Confidence and Credibility**

(A) Every public official and employee shall observe the following as standards of personal conduct in the discharge and execution of official duties:

(a) Commitment to public interest. - Public officials and employees shall always uphold the public interest over and above personal interest. All government resources and powers of their respective offices must be employed and used efficiently, effectively, honestly and economically, particularly to avoid wastage in public funds and revenues.

(b) Professionalism. - Public officials and employees shall perform and discharge their duties with the highest degree of excellence, professionalism, intelligence and skill. They shall enter public service with utmost devotion and dedication to duty. They shall endeavor to discourage wrong perceptions of their roles as dispensers or peddlers of undue patronage.

[358] The Uganda Public Service Standing Orders (Edition 2010)

(c) Justness and sincerity. - Public officials and employees shall remain true to the people at all times. They must act with justness and sincerity and shall not discriminate against anyone, especially the poor and the underprivileged. They shall at all times respect the rights of others, and shall refrain from doing acts contrary to law, good morals, good customs, public policy, public order, public safety and public interest. They shall not dispense or extend undue favors on account of their office to their relatives whether by consanguinity or affinity except with respect to appointments of such relatives to positions considered strictly confidential or as members of their personal staff whose terms are coterminous with theirs.

(d) Political neutrality. - Public officials and employees shall provide service to everyone without unfair discrimination and regardless of party affiliation or preference.

(e) Responsiveness to the public. - Public officials and employees shall extend prompt, courteous, and adequate service to the public. Unless otherwise provided by law or when required by the public interest, public officials and employees shall provide information on their policies and procedures in clear and understandable language, ensure openness of information, public consultations and hearings whenever appropriate, encourage suggestions, simplify and systematize policy, rules and procedures, avoid red tape and develop an understanding and appreciation of the socioeconomic conditions prevailing in the country, especially in the depressed rural and urban areas.

(f) Nationalism and patriotism. - Public officials and employees shall at all times be loyal to the Republic and to the people, of Uganda  promote the use of locally produced goods, resources and technology and encourage appreciation and pride of the country and people. They shall endeavor to maintain and defend Ugandan sovereignty against foreign intrusion.

(g) Commitment to democracy. - Public officials and employees shall commit themselves to the democratic way of life and values, maintain the principle of public accountability, and manifest by deeds the supremacy of civilian authority over the military. They shall at all-time uphold the Constitution and put loyalty to country above loyalty to persons or party.

**(B) Prohibited Acts and Transactions**. - In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employees and are hereby declared to be unlawful:

(a) Financial and material interest. - Public officials and employees shall not, directly and indirectly, have any financial or material interest in any transaction requiring the approval of their office.

(b) Outside employment and other activities related thereto. - Public officials and employees during their incumbency shall not:

(1) Own, control, manage or accept employment as officer, employee, consultant, counsel, broker, agent, trustee or nominee in any private enterprise regulated, supervised or licensed by their office unless expressly allowed by law;

(2) Engage in the private practice of their profession unless authorized by the Constitution or law, provided that such practice will not conflict or tend to conflict with their official functions; or

(3) Recommend any person to any position in a private enterprise which has a regular or pending official transaction with their office. These prohibitions shall continue to apply for a period of one (1) year after resignation, retirement, or separation from public office, except in the case of subparagraph (b) (2) above, but the professional concerned cannot practice his profession in connection with any matter before the office he used to be with, in which case the one-year prohibition shall likewise apply.

(c) Disclosure and/or misuse of confidential information. - Public officials and employees shall not use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either:

(1) To further their private interests, or give undue advantage to anyone; or

(2) To prejudice the public interest.

(d) Solicitation or acceptance of gifts. - Public officials and employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favour, entertainment, loan or anything of monetary value from any person in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by the functions of their office.

As to gifts or grants from foreign governments, the government consents to:

(i) The acceptance and retention by a public official or employee of a gift of nominal value tendered and received as a souvenir or mark of courtesy;

(ii) The acceptance by a public official or employee of a gift in the nature of a scholarship or fellowship grant or medical treatment; or

(iii) The acceptance by a public official or employee of travel grants or expenses for travel taking place entirely outside Uganda (such as allowances, transportation, food, and lodging) of more than nominal value if such acceptance is appropriate or consistent with the interests of the Ugandan, and permitted by the head of office, branch or agency to which he belongs.

The Ombudsman shall prescribe such regulations as may be necessary to carry out the purpose of this subsection, including pertinent reporting and disclosure requirements.

## Engagement of Public Officers in Political Activities[359]

In view of the need to enhance confidence of the public in the public service, a public officer is prohibited from:-

a) being a founding member of a Political Party;

b) holding office in a Political Party;

c) speaking in the public anything involving matters of a Political Party;

d) showing party symbols; and

e) Engaging in canvassing support of a Political Party or organization of a candidate standing for a public election, sponsored by a political party or organization.

A Public officer may participate in politics within the provisions of the law, rules and regulations. If a public officer wishes to contest for a position in a political party, he or she will be required to retire if he qualifies in accordance with the pensions Act or resign from the Public Service.

Where the Public officer's conduct is found to be inconsistent with the code, the relevant laws and regulations shall apply to him or her.

Sanctions and Disciplinary Procedures[360]

Discipline in the Public Service entails the observance and execution of one's roles and obligations in accordance with the Public Service Code of Conduct and Ethics.

The power to discipline and remove public officers from office is provided for in the Constitution. Proper disciplinary procedure shall be followed in all cases involving discipline and removal of public officers from office.

[359] Section F-p, standing orders.

[360] Code 5 of the code of conduct and ethics, Section F-r standing orders.

The rules of natural justice must apply in all disciplinary cases of whatever description.[361]

No public officer shall be subjected to any punishment without first being informed, in writing, what he or she has done and being given an opportunity to defend himself or herself in writing. Those handling disciplinary cases must be impartial and both sides in the case must be heard.

It is essential that when disciplinary proceedings are instituted against a public officer, they are brought to a speedy conclusion including when, where applicable, action by the Police, the Director of Public Prosecutions and the Courts of law is required.

A Responsible Officer must ensure that the submissions are complete and factual, that events which led to disciplinary action are isolated as to place and time, and that supporting written documents are properly annotated and cross-referenced so as to facilitate speedy handling by the Appointing Authority.

Any act done without reasonable excuse by a public officer, which amounts to failure to perform any duty assigned to him or her, or which contravenes any laws relating to the Public Service or which is otherwise prejudicial to the efficient conduct of the Public Service or tends to bring the Public Service into disrepute constitutes misconduct.

Misconduct shall include, but not limited to, the following:-

a) Gross negligence in performance of duty;

b) Acts that bring the Service into disrepute;

c) Disclosure of information in contravention of the law;

d) Acts involving turpitude e.g. theft, corruption, tribalism, nepotism etc;

e) Negligence causing loss to the Government;

f) Malicious damage to Government Property;

g) Perjury;

h) Financial embarrassment;

i) Inside Trading;

j) Unauthorized use and possession of Government Property or facilities;

[361] Francis Oyet Ojera vs Uganda Telecom Ltd- High Court Civil Suit no. 161 of 2010.

k) Intimidation;

l) Assault;

m) Sexual harassment;

n) Act or omission against public interest; Using abusive language; Holding more than one full time employment concurrently; Unsatisfactory performance of duty; Incitement with intent to cause disobedience/strike undermining administration; Use and abuse of drugs or alcohol; Absence from duty without permission; Insubordination; Lateness for duty; Refusal to comply with a posting instruction or order; Falsification of records or documents; Making false statements; and Driving an Official vehicle under the influence of intoxicating liquor or stupefying drug.

The power to exercise disciplinary control is vested in the President, for officers of the rank of Head of Department and above. While for the rest of the Public officers, the powers are vested in the respective Service Commissions.

The Disciplinary procedures are provided in the Public Service Commission Regulations, Cap 277 of the Laws of Uganda***. See: MoPS Standing Orders (Edition 2010)***

## GENERAL MANAGEMENT[362]

An organisation which is undisciplined in record keeping opens itself to all manners of abuse. Without well-kept records, it is difficult to carry out meaningful financial audit. It is precisely for this reason why unethical officers either specialize in a) falsifying records, or b) destroying records**.** With doctored records, or in the absence of their existence, there no way one can pin down an unethical officer besides mere speculation.

At the heart of any well managed organisation is an orderly system of record keeping.

**The term Records** means recorded information regardless of form or medium created received and maintained by any institution or individual under its legal obligations, or in transaction of its business and providing evidence of the performance of those obligations or that business.

**The term "Archives"** means records of enduring value selected for permanent preservation.

### RECORDS MANAGEMENT PROCEDURES IN THE PUBLIC SERVICE

[362] Section P-d of the standing Orders.

Each Organ of the State shall establish registries and records centers for management of current and semi current records respectively. These records shall be managed according to existing regulations and standard records management procedures.

All documents which affect the official record on a public officer must be kept properly regardless of the source. This will include as applicable:-

(a) **Confidential records** include but not limited to: Submissions to and minutes of Service Commissions, cases related to discipline, medical records, security related matters, letters of appointment and confirmation, performance appraisal reports, application forms duly completed and other forms.

(b) **Open records** include but not limited to; extracts of Service Commission's minutes, letters of appointment, acceptance of offer of appointment, confirmation in appointment, adjusting salaries, changes in incremental dates, changes in names, signed service agreement forms, transfer, posting, approved leave forms, employment forms, service commissions application forms with a passport size photograph, official Oath of Secrecy, Oath of allegiance, reports, copies of Academic and Professional certificates and any other official records on an officer.

A public officer's personal records must be complete and up-to-date at any given time.

Files will be opened and maintained by the following Institutions: (a) **Ministry of Public Service:**

(i) For all officers appointed on pensionable terms and non-pensionable officers whose employment is for a specific period and gratuitable at the end of the period of employment;

**(ii)** For non-pensionable Officers for each Ministry or Department or Local Government whose employment may or may not be for a specific period of time and does not provide for payment of a gratuity. **See**; The Uganda Public Service Standing Orders, section (P - d).

(b) **Ministry/Department and Local Government:**

For all officers including Support Staff irrespective of rank or terms of service who shall have:

(i) A confidential personal file;

**(ii)** An open personal file;

**(iii)** Staff performance appraisal report folder; and

**(iv)** A computerized personal and payroll record.

## Access to Personal Records.

A public officer will have: (a) free access to his or her open personal file in his or her Ministry/Department or Local Government. (b) No access to his or her confidential file in his or her Ministry/Department or Local Government. (c) Restricted access to his or her performance appraisal report folder.

## Preservation/Disposal of Records.

It is important to preserve reliable information regarding the history of the country and it's Government. At regular intervals, public records will be appraised according to existing Retention and Disposal Schedules to determine their administrative, historical, research or informational values, which will warrant their transfer for permanent preservation in the National Archives, where they will be, managed according to existing archives procedures.

Records of enduring value (Public Archives); diaries, memoranda manuscripts, maps and other records will become of increasing importance as time passes and it is essential that all records of enduring value shall be carefully preserved. See The Uganda Public Service Standing Orders (P - d).

No records shall be destroyed without a prior written consent of the Responsible Officer so that the Officer in charge of National Records can arrange to transfer the records to the National Archives. Where officers have important records in records Centre under their care, a routine must be introduced for inspection of the records, and to fumigate records against vermin.

All records shall be preserved and any destruction of such records must be within the existing Laws and Regulations and in case of doubt advice should be sought from the Ministry responsible for National Records and Archives.

Disposition action should not take place without the assurance that the record is no longer required, that no outstanding litigation or investigation is current or pending which would involve relying on the records as evidence.

A public officer is not permitted to take official documents away from the office unless if such documents are required for the execution of an assignment outside office. Transfer of custody or ownership of records.

Records can be required as evidence of activity for periods which exceed the life of the Organ of State or business unit which created them.

In certain circumstance, it may be necessary to transfer records out of the custody or ownership of the Organ of state or business unit which created them. For example, from the restructuring of the Organ of state, where it ceases to exist or where business activities are out sourced. Where this occurs, the records requiring transfer shall be identified, removed from existing records keeping systems and physically transferred with advice from the ministry responsible for National Archives.

**Communication in the Public Service**[363]

Written communication is one of the most effective ways of communicating in Public Service. The written word helps to convey information in a precise and concise way. Used well, it can help improve performance by informing the reader about the new information like policy changes.

Unfortunately written communication is often abused. Perhaps due to lack of training, some heads of departments think of writing whenever they have to reprimand somebody. Worse still, they feel it makes a point to copy their communication to almost everyone.

A public officer must realise that written communication is just one way of sharing information and in some cases, not the best. As a manager, whatever medium of communication you use; it is worth considering other factors such as timing, the need for record, distance, recipient of the information and ability of the reader to understand the information.

**Forms of communication in the public service shall include:** (a) Telegrams; (b) Letters; (c) Fax; (d) Email; (e) Internet; (f) Telex; (g) Telephone; (h) Teleconferencing; and (i) Video conferencing. Communication in the public service shall employ the quickest and most effective form.

Correspondences shall be marked in accordance with the degree of priority of the communication in line with the records and information management procedures in the public service such as "immediate", "urgent", "emergency", "confidential", "secret" etc.

## The Dos and Don'ts in communication

When an officer in a Ministry, Department or Local Government writes an official communication, he or she does so on behalf of his or her Responsible Officer. It follows, therefore, that he or she must sign over his or her principal's designation thus: "For Permanent Secretary", "For Auditor General", "For Chief Administrative Officer", "For Town Clerk" or whatever the title of the Responsible Officer may be. See; the Uganda Public Service Standing Orders (P - b).

There are circumstances when officers sign over their own designations, for example, Permanent Secretaries and Heads of Department; Chief Administrative Officers; Town Clerks; a professional officer when his or her professional status and not his or her official position carries statutory force as when a doctor who is a Government Medical Officer signs a prescription for dangerous drugs; an officer when he or she is the only officer of his or her Department on a station or is the senior officer in charge of a particular Department's work on a station.

[363] P-a (standing orders).

An officer shall state in any communication he or she is writing, that he or she is writing under direction (without mentioning whose direction), for example, "I am directed", only if he or she is, in fact writing under direction the particular communication in hand. The phrase loses its force if it is used indiscriminately, by all public officers. Writing under direction, means writing under political direction, so the direction must have come from the President, an officer's Minister, or the Cabinet.

Communications between Ministries shall be by memorandum always addressed to the Permanent Secretary or Head of Department or Local Governments as the case may be. Where it is known that a subject is being handled by a specific officer in a Ministry, memoranda may be marked "for the attention of Mr./Mrs./ Miss.....". When a communication is addressed from one officer of one Ministry to an officer of another Ministry, the communication must invariably be routed "Thru" the Permanent Secretary of the Ministry or the Heads of Department or the Chief Administrative Officer or Town Clerk involved, and never direct.

Ministries, Departments and Local Governments should not communicate with each other by passing files, except when such files are required due to transfer or necessary for decision making, such as with Service Commissions or legal advice in the case of the Attorney General. In cases where the files are required for decision making, the Responsible Officer shall ensure that such files are returned to the sender as soon as the business is completed.

Communication in Local Governments shall be in accordance with the Local Governments Act. Ministries may communicate directly to the Local Government on professional and technical services and a copy sent to the Permanent Secretary responsible for Local Governments.

Ministries, Departments and Local Governments will on professional and technical matters communicate directly with the Government Agencies/Bodies, and on policy issues correspondence should be through the parent Ministry of the agency.

On matters related to policy, correspondence should be to the Agency/Body with a copy to the parent ministry. It will be incumbent upon the Agency/Body to make appropriate consultation with the parent Ministry before concluding the issue at hand. See; The Uganda Public Service Standing Orders (P – b).

It is important that all correspondences received whether from public bodies, firms and private individuals are acknowledged and dealt with promptly. If the answer cannot be provided immediately, the communication should be acknowledged and action taken thereafter. It should be stated in the acknowledgement as "the matter will receive early consideration and that a reply will be sent to you as soon as possible". It is important that the promise is followed up and fulfilled.

## CUSTOMER CARE AND PUBLIC RELATIONS

A Public Officer shall serve customers with fairness, transparency, promptness, clarity, respect and courtesy with a view to ensuring customer satisfaction and enhancing the image of the public service.

Therefore, a Public Officer shall:-

i) Serve every customer in a professional manner in accordance with the set standards[364].

ii) Not discriminate or harass any customer and ensure that the services are available and applied equally to all.

iii) Accord courtesy, empathy and fairness to all customers with special attention to persons with disabilities, the aged, sick and expectant mothers.

iv) Respond to all customers' requests with promptness and clarity.

v) Uphold teamwork and advance the public good for efficient service delivery.

***NB. Read the Code of Conduct and the Standing Orders.***

**The Concept of Customer (Who Is a Customer?)**

- The entity that purchases, acquires, seeks, receives, utilizes, and/or uses the output of another entity.
- Customers are all those entities (individuals and firms) that actually demand, practically seek and utilize the output/product of other entities.
- Customers are those entities (individuals & Organizations) that producers/providers of any output (e.g. market offers) seek/target to serve/sell to.
- Customers= Market/s

**Classifications of Customers:**

Customers may also be classified according to the market offer/product sought e.g.

- Tenants,
- Patients,
- Citizens/Tax payers/Community,

[364] Public Service Client Charter 2007/2008, 2009/2010.

- Passengers,
- Students,
- Buyers/Shoppers,
- Employees, etc.

## Classifications of Customers

1. Internal Customers
2. External Customers
3. Primary Customers
4. Secondary/Intermediary
5. Secondary Customers
6. Clients (Patrons) Internal Customers:

Intra Organizational Stakeholders i.e. employees/ workers/ staff, managers, executive director, etc.

**External customers:** These are basically the external stakeholders that include:

- Consumers/target beneficiaries
- Purchasing groups
- Dealers or stockists
- Service providers e.g. advertising agencies, transporters, insurance companies, & finance houses.
- Government and political departments • Social and cultural/interest groups
- General public**.**

**Classifications Of Customers Cont'd:**

- **Primary Customers:** - These are the most critical customers, also known as the target/basic customers. These are usually the ultimate/main beneficiaries of any Organization
- **Secondary Customers:** These are usually members within the supply chain who may also be regarded as intermediaries/ Subsidiaries. These constitute internal customers such as staff and other internal stakeholders

**CLIENT:** (Implies a relationship)

- An entity/ person who constantly, repeatedly and/ or frequently visits or depends on another.
- Clients pay a fee for the goods/services of their suppliers
- A client is more of long term than short term customer
- A client = a **patron**

NB: The relationship between a client and a supplier is basically interdependence

**Brainstorming Exercise one 1:**

Identify and list (with reasons) the following:

- The Primary Customers of your Organization/LDC
- The Secondary Customers of your Organization/LDC
- Clients of your Organization/LDC
- In what special way should such clients be treated/served as compared to one-off customers & why?

**Brainstorming Questions**

What is the definition of the following concepts?

- Customer Care?
- What is customer service?
- What is customer delight?
- Which of the three above is the most important and why?

CUSTOMER CARE CONCEPT (What is "Customer Care"?)

- ✓ A management orientation/philosophy of considering a customer as a crucial stakeholder in the operations of any entity.
- ✓ A concept that focuses at the customer as the most important stakeholder in the operations of any entity.
- ✓ A tendency to streamline customer-focus in an organization's planning & operations
- ✓ The process of "constantly and consistently meeting customer needs, in such a way that customers feel wanted and appreciated".
  - ✓ "It is more than just a smile and thank you"
  - ✓ It means that the organization conducts itself in such a way that its customers feel that "they are the reason it exists" – I.e. to serve their needs!

## The Concepts of: Customer Service & Customer Delight

- Customer Service (also known as Client Service) is the provision of service/s to customer/s before, during and after a purchase/Interaction. I.e. a series of activities designed to enhance the level of customer satisfaction (Turban et al, 2002)
- **Customer Delight:** This refers to the pleasure, happiness, joy, gladness, enchantment, amusement, and/or satisfaction that a customer derive from their respective interaction/dealing with an entity

**Brainstorming Question:**

- What is the significance/Importance of customer care?
- Why must we study/train in Customer Care?

✓ How important is customer care to your organization/LDC?

## Importance of Customer Care

**Good customer care leads to:**

- Improvement in corporate image and public relations
- Improvement in delivery of services leading to customer satisfaction

- Increased customer loyalty resulting in increased relevance of an Entity.
- Creation of a strong link between an entity and its customers (Relationship Marketing)

## IMPORTANCE OF CUSTOMER CARE

Proper customer care leads to:

- Improvement in staff interpersonal relations thus creating/enhancing teamwork, communication, collaboration, harmony & synergies in the Organization
- Strengthening of individuals' personal images
- Reduction in client complaints & increase in client suggestions.

**NB:** Satisfied customers cause less stress.

- Satisfied customers take up less time. Dealing with complaints and problems can be very time-consuming, and they always occur when you are at your busiest!
- Satisfied customers tell other people, which enhances your reputation. (Referral Marketing)
- Satisfying customers brings job satisfaction, and can help motivate you and your team.
- Customer care is a critical factor in the process of differentiating market offers so as to attain competitive edges that lead to attaining Organizational targets/ (Vision, mission, goals & objectives)
- It calls for the identification and management of "moments of truth" – contacts between an Entity and its customers where the Entity's reputation is at stake
- Customer care aims at closing the gap between customers' expectations and their experience

**NB: Customer care can be a policy or a set of activities**

Customer care focus: (SCOPE)

What is the scope of customer care?

Customer Care scope constitutes the whole marketing mix -I.e. emerging with the **right;**

•Product (Concept/Market offer)

•Price (Cost)

•Promotion (Communication)

•Place (Delivery Channels/location convenience)

•**Personnel (**People attributes**)**

•**Politics (**Organizational behavior & social R/ship)

•Processes (Operations/quality Management)

•Premises/Physical environment etc.

• Segmentation, Targeting & Positioning **(STP**)

## Brainstorming Group Exercise

- What are the key qualities of an ideal customer caring personnel? I.e.

What are major attributes (Attitude, Capacities, & Behavior) that should be emphasized amongst staff so as to enhance customer care at your organization/LDC?

**The Right C.C. Personnel Attributes (Optimal Attitude & Capacities):**

The suitable Customer Caring person should possess & exercise good:

•Professionalism & Knowledge

•Empathy & Understanding

•Communication Skills (Esp. Articulation & Listening)

•Decision making & Problem solving capacities (Reasonable Empowerment & autonomy)

## Interpersonal skills i.e.

•Reliability & responsiveness,

•Integrity & Ethics

•Discipline

•Modesty & Humility

•Emotional Intelligence & Intellectual Maturity

•Discretion, & Objectivity

•Prudence & Diligence

•Credibility & competence,

•Responsibility & Promptly Responsiveness

•Goal- Congruence (Approval & Pride for the product/Team/entity)

**Courtesy:** (i.e. civility, approachable, welcoming, hospitable, ready to help attitudes, pleasant and lively faces-(**smile & body posture)-**, polite, considerate, respectful and friendly customer approaches.)

**Key Guiding Questions to Effective Customer Service:**

- Who is my/our Customer/client?
- What does he/she need/want?
- **Why** does he/she want/need it?
- **How** does she/he need/want it?
- When does he/she need/need it?
- Where does she/he need/want it?

## Ten Golden Rules of Customer Care (Cartwright & Green 1997):

1. It Costs Far More To Gain A New Customer Than It Does To Retain an Existing One
2. Unless You Recover the Situation Quickly, A Lost Customer Will Be Lost for Ever
3. Dissatisfied Customers Have Far More Friends than Satisfied Ones
4. The Customer Is Not Always Right, But How You Tell Them That They Are Wrong Can Make The Difference And Ultimately They Do Pay Your Wages.

5. Welcome Complaints – They Allow For Recovery
6. In A Free Market Economy, Never Forget That The Customer Has A Choice
7. Treat Internal Customers As You Would Treat External Ones
8. You Must Listen To The Customer To Find Out What They Want
9. If You Don't Believe, How Can You Expect The Customer To?
10. If You Do Not Look After Your Customers, Somebody Else Will
11. **Tools/Tips to Boost Customer Satisfaction**

- It is vital to focus on how to:

•Cultivate Customer Service

•Observe Quality

•Captivate Your Customers

•Establish Good Business Processes

•Crystallize Your Communication

•Enhance Your Employee Relations

•Improve Your Image= Public Relations

•Create A Customer-focused Entity

## EMPLOYEES ENTITLEMENT AND RIGHTS

- Wages, S.41 Employment Act, and Standing Order Section B-a, pg44.
- Leave: see Part VI and VII. Employment Act and Standing Order Section A-n, pg 36-39 for other entitlements such as Leave.
- Notice before termination etc
- Salary Advance. This is allowed ones in 3 years and the advance should not exceed 3-month gross pay.
- Salary advance paid in situations of emergency or hardship unforeseen to the employee. Standing Order, B-a, pg46.
- Public servants who qualify for pension are entitled to be paid pension tax free. S.9 (1) Pensions Act.

- Prompt payment of pension. Art 254 Const. What happens in practice?
- Entitled to severance pay on unfair termination.S.91 &92 Employment Act, Part IX Employment Act.
- To be issued with, a certificate of Service on termination of employment. S. 61 Employment Act. An employee has to initiate a request.
- Employees are entitled to join labour unions. S. 16 PSA,
- Entitled to be buried at government expense upon death of public officer or spouse/child. Standing Order, Section O-a, pg 208.

## EMPLOYEES DUTIES/OBLIGATION

- Employee's obligations are subject to the provisions of the constitution.
- The obligations are quite massive. See s. 12 PSA and Section F of Uganda Public Service Standing Orders.
- Allegiance and Loyalty.
- Adhere to code of conducts and Ethics for Public Service.
- Portray a good image of public service in performance of duties and at home.
- To act transparently. Make decisions without regard to personal interest or gain.
- Be accountability for his/her actions.
- Act in a professional manner in performing duties, Exhibiting Expertise and Integrity.
- Dressing decently if, un-uniformed.
- Attendance and Punctuality.
- Comply with Posting Instructions.
- Not to communicate to the Press without Authority.
- Not to Accept Gifts and Presents valued more than Ugx100.000. Return to the donor immediately with an explanation.
- Article 233 Const. and Leadership Code Act, require leaders to declare income, assets and liabilities to IG. Failure may lead to disqualification from office or prosecution.

- Not to engage in active politics. The officer has to retire or resign.
- Safeguard property entrusted.
- Not to be indebted, to the extent of failing to pay debts, etc. This may attract disciplinary action.
- Undergo Medical Examination. All newly appointed public servants are mandated to undergo medical examination from a government medical practitioner. See S.33 Employment Act and Standing Order 14, page9.
- To take Official Oath and Oath of Secrecy. This applies to all newly appoint pubic officers when assuming office. See Oath Act/ Standing Order (A – k) page 25.

**Specific persons are authorized to administer these oaths are:-**

i. The Chief Justice; Head of Public Service and Secretary to Cabinet;

ii. A High Court Judge; Deputy Head of Public Service;

iii. The Head of Public Service; all Permanent Secretaries;

iv. Permanent Secretaries; public officers in their respective Ministries;

v. Heads of Department; public officers in their respective Departments;

vi. Chief Magistrates; Chief Administrative Officers and Town Clerks;

vii. Chief Administrative Officers or Town Clerks; Public officers in the Local Government

NB. The time for taking an oath is not specified nor are the consequences for failure to take Oath.

- To Assume Duty on the date the appointed takes effect. Read, Standing Order 13, page 9.

ALLOWANCES AND BENEFITS:

- Section E, Public Service Standing Orders. Pages 73-94

Content:

- Definition of ''allowance'' and '' benefits''
- The rationale for paying allowances,

- Types of allowances and conditions attached to each,
- Common fringe benefits and entitlements.

Learning outcome:

- Ability to identify various allowances and benefits for employees
- To identify conditions for qualifying for such allowance and benefit.

What are Employees Benefits?

- Employees' benefits are compensatory in nature and they include pensionable salary and pensionable allowances, gratuity, lump-sum pay at retirement, staff saving schemes, SACCOs, Merry-Go-Round saving schemes, etc.
- Duty allowance, house allowance, entertainment allowance or any other emoluments is not pensionable.

- Most benefits are provided for under the Employment Act, Pensions Act and Uganda Public Service Standing Orders.
- For private Sector Employees, the Uganda National Social Security Fund Act compels all employers with more-than 5 employees to register with NSSF and contribute 10% for employees' retirement benefit.
- But how many employers have registered?
- The 2017 Employment Benefits Survey Report by Uganda Bureau of Statistics, out of 2.666 establishments employing more than 5 employees, only 58.8% had registered with NSSF.
- Interestingly, 34.1% of employers with less than 5 employees were making voluntary retirement's benefits contributions to NSSF.
- Lack of awareness and funds was cited as a major reason for low registration with NSSF.

What are Fringe Benefits?

- Fringe or common benefits help employers recruit, motivate, and keep high-quality employees.
- Examples; health insurance, life insurance, tuition assistance, childcare reimbursement, cafeteria subsidies, below-market loans, employee discounts, and personal use of a company-owned vehicle.

## Definition and Type of Allowances

- Read, Public Service Standing Orders (E - a)

- An allowance is a payment in cash made to an officer to facilitate proper execution of an assignment or duty. It's separate from salary payment.
- For example, if HBC is assigned to conduct inspections at LDC Mbarara campus, she would be paid an allowance for that exercise.
- Why is allowance paid? There are two main reasons:-
    (a) To compensate the officer for performing extra or additional duties or responsibilities required to be carried out.
    (b) To meet out of pocket expenses the officer may incur from time to time in the course of official duties.

## Key Principles to take note

- The conditions for payment of allowance is determined by the responsible Permanent Secretary and where applicable, in consultation with the Ministry responsible for finance.
- Allowance is paid to cover personal expenses including accommodation, meals, hired transport, entertainment, and other incidentals.
- Allowances are subject to tax.
- Claims for payment of allowances must be submitted and processed following the laid down procedures and within the approved budget.
- Payment of allowances is to be done in a transparent, fair and equitable manner.
- Double payment or claim of allowance is not allowed. For example, if accommodation is provided by the organizers of a residential workshop, a accommodation allowance cannot be paid to participating civil servants.
- Public servants who choose to travel with their family members on official duty, the family members will not be paid any allowance except where a Responsible Permanent Secretary gives written approval.
- Allowance payable must be claimed within the financial year it accrued.

## Types of Allowances

There are three broad categories; Travel, Duty and Training allowances

TRAVEL ALLOWANCES (E - b) Standing Orders

**Night Allowance;**

- Paid to an officer who has travelled on duty within Uganda but out his or her duty station.
- Night Allowance is claimed for actual nights spent while away from the usual place of residence for a maximum of 21 consecutive nights.
- No additional allowance shall be paid beyond 21 nights.
- No accountability receipts are required but you have to submit the activity report.
- Night allowance claims for each public servant in FY is 150 nights maximum.
- Night Allowance outside Uganda is paid when a public officer is on official duty outside Uganda and this may be claimed in advance.
- Where a public officer is travelling on duty by air and has to "night stop", such officer may claim allowance for the cost of the night stop, if the airline is not paying for the night stop cost, or Where the night stop was not caused by the officers failure to catch a connecting flight dully booked, or

Where an option of a direct flight was not available; or

Where a night stop was not connected to the officer's personal reasons

**Safari Day Allowance in Uganda**

- Claimed where the officer is absent from duty station within Uganda for a period of six hours or more in a day, although he or she may return to the duty station the same day.

To qualify, an officer must travel a distance of 40 kilometers or more from his or her station by the most direct route.

- This allowance may be paid even where the officer travels for less than six hours in a-days duty journey under circumstances which required a meal to be purchased.
- Safari day allowance cannot be claimed concurrently with a night allowance. See Section J - a.

**Safari Day Allowance outside Uganda/Mission**

- This is paid when an officer travels on duty for a period of six (6) hours or more in a day and returns to the Country or duty station on the same day.
- The cost of any train, taxi, bus fares or any other means of transport incurred may be claimed in addition to the Safari day allowance.

**Lunch and Dinner Allowance** see (E - b)

- Lunch and dinner allowance is paid to public officers required to remain in their offices, during lunch or dinner time.
- Accounting Officers has the discretion of identifying the officers who may qualify for lunch or dinner allowance.

**Out of pocket Allowance**

- Paid to cater for incidentals when expenses for meals and accommodation are fully covered by Government or sponsor.
- Out of pocket allowance is not paid concurrently with a night allowance.

**Warm Clothing Allowance**

- Paid to a Public officer who proceeds on duty or study overseas to temperate and cold climates.
- Paid once in a period of three consecutive years.
- This allowance may be claimed before departure overseas.
- For Foreign Service Officers, warm clothing allowance is paid every three years if the officer remains working in a temperate or cold climate outside Uganda.

**Kilometrage Allowance**

- Paid to a public officer authorized to use his or her personal vehicle for official duties and stays within a radius of 40 kilometers from the duty station.

- Paid monthly and determined by the responsible PS according to the officer's grade..
- Public officer authorized to use his or her vehicle for official duty and stays beyond a radius of 40 kms from the duty station, may be paid this allowance based on the distance covered and the capacity of the vehicle.
- All claims for kilometrage allowance are submitted monthly on a prescribed form and certified by the claimant's Accounting Officer.
- Every officer authorized to use a personal vehicle on official duty must keep a log-book in triplicate showing the dates, points of departure and arrival and distance of and reasons for all journeys.
- The top copy of a log-sheet is used as a voucher to place a claim for kilometrage allowance.
- A public officer provided with a Government aircraft, motor vehicle, motor cycle or bicycle for official use is not entitled to any kilometrage allowances.

- Public officers, his/her spouse or children advised by a Government Medical Officer, to obtain medical or dental treatment outside his or her station but within Uganda, and uses his personal vehicle for the journey, may claim kilometrage allowance, provided:-

  (a) the Accounting Officer is fully satisfied that, the use of the officer's vehicle was the most economical and efficient means of transport; or

  (b) Where a Government Medical Officer gives Accounting Officer a certificate indicating that using a personal vehicle was desirable on medical grounds.

- An officer cannot claim kilometrage allowances if such journeys do not require him or her to travel outside his or her station.
- Transport allowance shall be paid to public officers to cover home to office running, using public means.

**Disturbance Allowance**

- An allowance paid to offset additional household expenses incurred

i. When the officer is compulsorily transferred from one station or

mission to another.

ii. From Uganda to a mission or vice versa or from one mission to

Another; (E - b)

iii. When transfer is caused by the needs of service delivery and not by personal reasons of the officer.

- The allowance shall be equivalent to one months' basic salary of the officer being transferred.

- A public officer whose work requires them to live in a mobile caravan, tent and not allocated a permanent Government housing, are not entitled to disturbance allowance.

**Disturbance allowance is not payable:-**

i. When an officer is transferred from one station to another but retains his or her previous living residence and

ii. When one of the married couple has received the allowance, and they are being transferred to the same working station.

**Installation Allowance**

- Paid to an officer on overseas terms on first appointment to assist him or her to equip himself or herself for work in Uganda. (E - b) 57.

**Settling-in Allowance**

- Payable to an officer, on first appointment, to whom installation allowance does not apply , see (E - c)

## EXTRA DUTY ALLOWANCES

**Acting Allowance**

- Paid when an officer is appointed to act in an office higher than his or her substantive office

- Not payable where the salary of the acting officer is already equal to or higher than that of the acting position. L
- Lapses after six months unless renewed or extended by Appointing Authority.

**Duty Allowance**

- Payable to an officer for carrying out responsibilities of a higher office in addition to the duties attached to the substantive appointment.
- Cannot be paid simultaneously with acting allowance. 1
- Payment will be authorized by Accounting Officer after getting approval from the Responsible Permanent Secretary.
- Duty allowance lapses after six months' payment.
- Duty allowance is not pensionable and does not attract gratuity for non –
- A public officer on probation shall not be considered for payment of duty allowance.

**Honoraria is an allowance**

- Payable when Government wants a particular piece of work to be carried out by an officer within a specified period of time which:-
- The work must be of exceptional importance to Government and outside the normal scope of the officer's official duties;
- Requires the direct use of the officer's special talent or professional skill or his or her active participation in the actual work

- The officer may serve as Chairperson, Deputy Chairperson, Secretary, Assistant Secretary, Member or as one of the supporting staff members, see (E - c)

- For example, Commissions of Inquiry or Review or any adhoc committee set up by the Government to undertake a special task.

- Honoraria are paid allowance on completion of the assignment at a rate determined by a Responsible Permanent Secretary.

**Sitting Allowance**

- Payable per sitting to a person appointed or co-opted on a Commission, Board, Committee, Tribunal or any other Committee or task force formed for a specific assignment and members of such a committee may be paid a sitting allowance.
- Rates payable is determined by the Responsible Permanent Secretary.

**Overtime Allowance**

- Overtime, means any period of work on weekends, public holidays or in excess of 7 hours a day, from Monday to Friday.

- When a support staff works under circumstances stated in paragraph 37 above, he or she shall be paid an overtime allowance.
- Salaried staffs are not paid overtime allowance because they committed their time to serve government.

TRAINING ALLOWANCES (E - d)

- Paid to facilitate a Government sponsored officer while undertaking a training course inside and outside Uganda.
- The course must have been duly approved and study leave granted to the officer before leaving for study.

## THE EXIT POLICY AND MANAGEMENT OF TERMINAL BENEFITS

What is the Legal Basis for Pension Payment?

i. Read, Pensions Act, Pensions Regulations, Public Service Commission Regulations and Public Service Standing Orders, Section A-n and Section L-a.

ii. Public servants who have qualified for pension are entitled to be paid pension from the consolidated fund. S.9(1) Pensions Act.

iii. Pension to be paid promptly. Art 254 Const.

iv. The rank at retirement, length of service, salary scale is considered in computing pension.

v. Section 13 of the Pensions Act limits pension to a maximum to 87% of the last pensionable emoluments.

vi. Pension scheme covers all traditional public service, Heath Service, Education service, Former EAC employees, and the UPDF.

vii. The Public Service must ensure fair, equitable, transparent, and prompt assessment and payment of pension and other terminal benefits.

Why is pension paid?

- To mitigate old age poverty due to loss of active earnings
- To attract and retain high calibre employees

Key Points:

- To qualify for pension, the officer must be retired from public service. See Section 10 Pensions Act (PA). Also see Standing Order Section N, pg36.
- The award of pension requires approval from the Pensions Authority.

What are the Exit Avenues for Civil Servants?

- Section 10 pensions Act.
- Compulsory retirement at 60 years of age or 55 years or 20 continuers' service for police officers.

i. See, sections 10, 12 PSA, Reg. 32 PSCR, 2009 and section 15 Police Act. The compulsory retirement age was raised from 55 years to 60 years in 1995.

ii. The responsible officer has to inform the affected officer about the plan to recommend him/her for compulsory retirement.

iii. The affected officers will be asked to make a written explanation within 21 days, why he/she should not be retired.

iv. After expiration of 21 days, the recommendation will be forwarded to the Secretary PSC with a copy of affected officer's explanation.

- Voluntary/Early retirement at 45 years of age with 10 years of continuous service. S.10 PA.

- Retirement on medical grounds- The illness or infirmity must be permanent and renders the officer incapable of performing his/her duties.

- Retirement on Public Interest, Reg. 46 PSCR and section 15(2) Police Act

A responsible officer shall demand a report regarding the conduct of the officer he/she considers to be retired in public interest.

The affected officer will be given an opportunity to respond to the report and why he/she should not be retired.

Where a responsible officer is not satisfied with the explanation, will submit to the Secretary PSC, a report and recommendation for retirement.

Public officers removed from office are not entitled to pension or gratuity but Pensions Authority may authorise payment, S.11, PSA

- Retirement to contest for a political office. Art 80(4) and Article 257 Constitution.
- ***Emorut Simon peter vs Akurut Violet Adome HCT EP No. 0002/2016,*** on the requirement for public servants to retire before seeking nomination for elective position.

- Resignation:

  i. Resignation must be approval and officers who resign forfeit their retirement benefits. See PSA,PA and also s17 Police Act.

  ii. Central Government employees apply to appointing authority or heads of department and Permanente Secretaries, or to Responsible Permanent Secretary, for all pensionable officers.

  iii. For Local Government employees, for example, CAO, or Town Clerk, and Deputies, apply to Permanent Secretary Min. of LG.

  iv. For other LG staff, apply to CAO/Town Clerk.

  v. The application should give a notice of 30 days for the approval.

  vi. It is subversive, to resign where disciplinary proceedings are pending. See The Public Service Commission Regulations, 2009.

- Abolition of office or retrenchment on ground of restructuring, s.10 PA.

  i. In addition, severance pay as outlined in the second schedule of the pensions Regulations is paid.

  ii. Repatriation Expenses of Ugx2.000 per km plus Ugx200.000 for town to home village transport.

  iii. 6 months' pay in lieu of notice.

  iv. Payment of approved leave.

- Abandonment of duty; Officers who abandon duty are deemed to have resigned forfeit their retirement benefits.

- Death; S. 18 Pensions Act, Pension payment ceases upon death of a public official on death.

- Retirement on Marriage Grounds. A female officer may resigns to settle down on account of her marriage and will be entitled be paid marriage gratuity. Must have served for not less than 5 years and has been confirmed in pensionable office. Reg. 17 PSCR, Reg. 10 PR

- Dismissal. Dismissed officers are not entitled to any retirement benefit but the Pension a Authority may decide to pay. S, 15 PA.

- Public officer may retire on the request of the President, or with written consent of the President, s. 10 and 12(2) PSA.

The president cannot request judges to retire, s.12 (3) PSA.

## EFFECTS OF EXIT

- Salary payment is halted and retired officer's are required to hand over office and cease to exercise any authority vested by virtue of the office.

### 1. Types of terminal benefits

- Terminal benefits are final payments to an employee upon termination of employment or exit from public service.

- Generally speaking, terminal benefits are compensatory in nature and payment may depend on many factors such as nature of employment, and reason for termination or exiting Public Service.

- **Pension:**

  i. Paid to retired public officers as a social security benefit.

  ii. Pension or gratuity can't be assigned or attached except for paying a debts due to government or taxes due authority. S. 16 PA.

  iii. Pension is payable for 15 years from date of retirement.

  iv. Ordinarily, pension ceases to be paid upon death of pensioner.

  v. If a pensioner dies before expiry of 15 years from date of retirement, pension may continue to be paid to spouse or a child for unexpired period.

  vi. The Survivors' scheme was introduced to provide support to the pensioners' family for the unexpired period.

  vii. Gratuity is paid to an officer who has held a pensionable office for over 10 years but dies. Gratuity is paid to his legal representative for 15 years from date of death. S.19 PSA

  viii. Unconfirmed officers, who die within 7 years from date of injury or decease contracted on duty, are entitled to pension but such injury or decease shouldn't have been aggravated by the deceased negligence.

## CHALLENGES

i. Unlike NSSF, the public service pension scheme is non-contributory and covers traditional public service, teaching service, the judiciary, police and prisons service, the local government and the armed forces.

ii. Non-contribution pension scheme has challenges. Pension payment in most cases, is not a priority and government is hugely indebted in pension arrears.

iii. Corruption, ghost pensioners and some pensioners have died before receiving their pension.

iv. Media reports have indicated that cabinet is considering approving contributory pension scheme for civil servants as well.

How easy is it to access NSSF saving?

- **Death Gratuity**

i. Usually paid in lump-sum upon death of an officer who did not qualify for pension. S. 18 & 19 PA

ii. If a pensioner dies before expiration of 15 years after retirement, the pension authority may continue paying the spouse or child for unexpired period. S. 18(2) PA. (Spouse or child).

iii. Officer who dies while holding a pensionable office and has served for 10 years, qualify for death gratuity. A mount paid will depend on the time served by the officer. Section 19 PA.

iv. Equivalent of 3 years' annual salary at death, or if they have served for 10 years of pensionable terms.

- **Contract Gratuity:**

i. Paid to officers hired on contract basis at the expiry of each contract.

ii. Payment is computed in accordance with the terms of the contract. The common rate is 25% of basic salary.

iii. Contract of service is not pensionable service because it's not a permanent and pensionable job.

iv. Often, retired officers are re-employed on contract. See s. 16 Police Act for example.

**2. The Procedure for Accessing Pension**

i. Steps for Retirement: Standing Order Section L-c, pg169.

ii. The officer responsible initiates an application for retirement six months before retirement date or citing other reasons for retirement.

iii. The application is addressed to the Pensions Authority through the immediate supervisor.

iv. The application is accompanied by relevant pension forms completed by Responsible officer together with payment instructions.

v. Approval of the application is communicated to the officer/applicant.

vi. The Ministry/Institution or District will then submit the required pension papers to Ministry of Public Service for payment processing.

vii. The Pensions Department at Ministry of Public Service opens a pension file, verified the approved submissions/claims for pension.

viii. The Department also computes the pension payable and pays the benefits after confirming the identity of the pensioner or beneficiary.

ix. The max months in computing pension is 435.

x. The Min. of Public Service Pensions Department performs it functions through assessment section, registry, accounts section, IT-database; and reception.

**Requirements for Processing Pension Benefits:**

i. Letter of first appointment.

ii. Letter of confirmation.

iii. Letter of promotion, if any.

iv. Last pay slip.

v. Certificates and testimonials, for teachers.

vi. Pension Forms-NS14, 20B, 25B, and 7, for non-teachers.

vii. Pension Form ED4 and submission papers for teachers.

viii. Pension Forms NS13 and NS 20B for contract gratuities.

ix. A death certificate and letters of Administration for death gratuity with requirements in (a-g) above for teachers.

x. A marriage certificate plus requirements in (a-g) above.

xi. Letter of Administration for survivor's benefit with marriage certificate for widow and birth certificates for children.

xii. Attestation Form plus requirements in (a-f) above, for Police and Prison officers.

- In relation to retirement in the Judicial service, please read JSCR and Administration of the Judiciary Act, 2020.

## TERMS AND CONDITIONS OF SERVICE IN THE PUBLIC SERVICE

A) Recruitment and Selection Process

### I). Appointing Authorities and their Mandates

So, how do people come to occupy offices in Public Service?

The fundamental principle is that, all appointing authorities must exercise their appointing power in accordance with the laid down procedures and the Laws of Uganda.

**The President:**

Art. 172 (2) Constitution, gives power to the Service Commissions or authorities to appoint persons, other than those appointed by the President and the DSC.

The power to appoint, confirm, discipline and remove Heads of Department or Ministries/Institutions/Authorities is vested in the President. Eg police Chief, Prison Commissions, DPP, Chairman Electoral Comm, KCCA ED etc.

However, the President is required to act on the advice of relevant Service Commission or Authority.

Under URA Act, power to appoint Commissioner General of URA is vested on the Minister of Finance on the recommendation of the Board**, see Section 9.** But, in practice, URA Commissioners are appointed and disappointed by the president**.**

Presidential Appointments take effect upon the president signing the **Instrument of Appointment.**

## THE PUBLIC SERVICE COMMISSION (PSC)

Art 165 of the Constitution and S.3 PSA provide for composition and tenure. You must be a person of high moral character and proven integrity to be appointed to the commission. Section 9 PSA, provides for independence of the PSC.

**Mission;** To provide government with employees of the highest calibre, in right numbers and placed in right jobs at the right time. Is this so in practice?

Art 166 of the constitution and Section 8 PSCA provide functions of PSC which include;

- Advising the president creating offices in the public service;
- To appoint, promote and exercise disciplinary control over persons holding office in public service (Art 172 & S.18 PSA).
- Review terms and conditions of service, standing orders, training and qualifications of public officers.
- To guide and coordinate District Service Commissions;
- Hear and determine complaints from persons appointed by District Service Commission and to make regulations.

Most of the above functions are conducted by the Guidance and Monitoring Department. Read, Public Service Commission Act 2008, Part II & III and the Regulations.

**Judicial Service Commission (JSC),**

Mandated to recruit and discipline judicial officers. See Art.146, 147 and 148 for the composition, tenure and functions of JSC.

- Advising the president while appointing judges and registrars
- Appointing, promoting and disciplining errant judicial officers
- The JSC shall have regard to high standards of independence, integrity, impartiality, competence and diligence as well as qualifications, merit and experience of candidates.
- The same standard is applied while appointing judicial officers already in service. Seniority is less important.

- Currently, JSC directly appoints Deputy Registrars and Magistrates but makes recommendation to the President for persons to be appointed Registrars and Judges. See Art.142 & 143 Constitution, on qualifications and appointment of judicial officers by the President.

- Also see, Service Commission report 2016/17, JSC Annual Report 2015/16 and JSC Client Service Charter 2012.
- The Judiciary Administration Act, 2020 seeks to provide for performance appraisal and life terminal benefits for judicial officers.
- Read the Judicial Service Commission Regulations.

**Education Service Commission**

Art 167 Constitution provides for the establishment, composition and tenure. Art. 168 & 172(1) (a)(b) provides the functions of the ESC.

These include; advising the president on appointment of heads of department. Appointing persons to hold/act in any office in education service determine terms and conditions and exercise disciplinary control, Report to parliament.

Read Education Service Act, 2002, Part II and Education Service Commission Regulations, 2012 Part III.

The Commission may, by writing, delegate any of its functions to a District Service Commission or any other authority or officer, s. 24.

All correspondences are addressed to the Secretary to the commission in triplicate.

**Health Service Commission**

Art. 169 provides for establishment, composition and tenure. Art 170 & 172 for the functions HSC. Also read, the Health Service Commission Act 2001, Part II and Regulations 2013, Part II&III.

Functions are similar to other service commissions but it focuses on Health service. Read, MoPs, Schemes of Service for the Nursing and Midwifery Cadre, 2017

**District Service Commission**

Art 198 & 199 provides for the establishment, composition, tenure and removal of DSC members. Art.200 Const. provides the functions of DSC.

This include: appoint persons to hold or act in any office in the district, determine terms and conditions of service, confirm appointments, exercise disciplinary control and removal of public official.

Part VI of the Local Government Act s. 52,53,54,55, 59, 60, & 61.

Recruitment must be based on approved job structures and qualification. See, MOPS Guidelines for Implementation of the New LG Strcutures,2016.

It provides a standardised recruitment framework across LG. Also read, Revised Job Specifications and Specifications for Production Department in LG, 2017.See Ministry of Public Service Job description and specification for jobs in Local Government, 2011

**A) Conditions for Recruitment**

The conditions for recruitment are determined by the organisation seeking to recruit or promote staff. Read Public Service Standing Orders

The Responsible Officer will be guided by the relevant Regulations to prepare a submission for recruitment, appointments or promotions of staff.

Appointments in Public Service are subject to availability of vacancies in the approved staff job structure and funds approved for such an exercise.

A submission for recruitment is prepared in triplicate by a government institution seeking to recruit staff.

A submission is addressed to the Secretary PSC and signed by the Responsible Officer or the Head of Department.

The submission must provide complete, clear, and accurate information on numbered pages. Read, Checklist on Submissions to Public Service Commission, 2008 Revised. Page 4. Also read, Ministry of Public Service Job Description and Specification in Local Government, 2011.

Procedure for Recruitment and Selection Method

Read, Public Service Standing Order, pg. 8.

Step 1 - Identify the Vacancies.

- Vacancies can become available when someone leaves their own role unfilled, or when organization grows or changes the structure creating more or completely new jobs vacancies.

Step 2 - Carry out a job analysis

- This helps in identifying tasks and skills required for the available positions. A job analysis can be used to determine whether a vacancy needs to be filled or the tasks and duties can be redistributed to other staff.

Step 3 - Create a job description

- This is part of the selection process and done through job analysis. A job description is a document that states tasks and responsibilities of the job. It contains information regarding the duties, salary, duty station/location and conditions of work.

- This is usually determined by relevant Service Commission in consultation with the human resource technical personnel of the recruiting seeking Institution.
- The job description and specifications should conform to the approved structures for the jobs in the public service.

- However, the job specification may be varied by the Responsible Officer with justification to be specified in the submission.

- The selection process must comply with relevant laws and procedures. See Dr. Anthony Kabanza Mbonye vs. Attorney General, Misc Course No. 294/2017.

Prof. Mbonye changed the specifications for the position of DGHS when he was the acting PS to favour himself as a suitable candidate for the job.

The PS Ministry of Public Service authorised the PS MOH to recruit staff in the Ministry including DGHS.

By letter, the PS MOH made a submission to PS Public Service for the vacancies to be filed.

Subsequently, the PS MOH assigned duties of PS MOH to Mr Mbonye for just 4 days.

As acting PS, Mbonye adjusted the submission declaring the posts by running an external advert that contained the altered job specification for the post of DGHS to favour him.

This was brought to the attention of the panellists that Mbonye had participated in the alteration of the job description for post of DGHS.

Step 4 - Create a Person Specification

- This document states the skills and qualifications needed for the job. This is determined by recruiting seeking institution and Public Service.
- The skills and qualities can be listed as either essential or desirable.

Step 5 - Advertising the Job

- Recruiting seeking institution will draft the advertisement specifying details contained in the Declaration of Vacancy Form.

- Then, send a submission to the Secretary PSC in triplicate accompanied by a draft advert and PSF1 (Declaration of Vacancy Form) clearly stating number of vacancies, salary scale, details of qualification requirements for the post, details of job descriptions, and details of duties the officer will perform upon being hired and the advert.

- For open market recruitment, a submission must include a memo signed by Responsible Officer detailing the nature of action the PSC is required to perform.
- Public Service will then run advert inviting potential applicants to apply for the jobs. The advert could be internal or external.
- An electronic recruitment system is currently run by the Ministry of Public Service. The system allows an automated process, where applications are downloaded and uploaded online.
- The applicant creates an account/profile by logging into the system using the national ID number to access the job details advertised online and qualification requirements.

The system covers recruitment and selection process using three modules:

- Public Service Commission Module where vacancies are posted.
- Application Module where details of jobs and qualification requirements are published.
- The Selection Module where successful applicants are sieved from the rest systemically.

This system is hoped to enhance uniformity, save time and to reduce corruption tendencies in the selection process.

Step 6 – Issuing Application Forms

Public service issues standard job application forms for candidates to provide all relevant information the Commission requires.

**Step 7**- Selecting and short listing qualified candidates.

**Step 8**-Preparing interview score sheets for selecting the best candidates.

**Step** 9- Issuing interview invitations letters

**Step 10**-Conducting actual interviews done by Public service officials together with technical personnel from the recruiting seeking institution.

**Step 11**- Public Service approving interview minutes and submitting the list of successful candidates to the recruiting seeking intuition.

**Step 12-** The Responsible Officer of the recruiting seeking institution acts on the minutes, by issuing appointment letters to successful candidates. S.O -10, pge9.

**Step 13**-The successful candidates have to accept the job offer in writing and to comply with posting instructions, S.O-12, page9. See duties of employees.

For District Service Commission recruitments, the DSC minutes have to be acted upon by the COA or Town Clerk by issuing appointment letters to successful candidates.

For Presidential appointments, the relevant Permanent Secretary effects the appointments after receiving the Instrument of Appointment signed by the President, S.O 10, PG 9.

**Other Submissions**

- Submissions for disciplining and dismissal of employee. This submission must be signed personally by the Responsible Officer.

- Submission for confirmation in Appointment, Termination of probation appointment, Appointment on Promotion.

- Submission for accelerated Promotion. (Promotion- for one step ahead before serving at least three years in current appointment).

- Submission for appointment on attainment of higher qualifications,

- Submission for appointment on Transfer of Service or appointment on contract, or for renewal of contract or for retirement in public interest.

In relation to the Judiciary,

- Where a vacancy occurs in the Supreme Court, Court of Appeal, High Court or the office of the Chief Registrar, Registrar, Deputy Registrar and Assistant Registrar, the Chief Justice shall report the fact to the JSC. See JSC Reg. 15.
- The Chief Justice shall forward a list of all judicial officers available to fill the post together with records of their service and recommendations.

- Where a vacancy occurs in any other judicial office, the Chief Registrar in consultation with the Chief Justice or the Principal Judge shall report the fact to the JSC. The Chief Registrar shall forward a list of officers available to fill the vacancy together with the records of their service and recommendation.

- Where a vacancy occurs in a tribunal, the responsible officer shall report the fact to the JSC.
- The Chief Registrar shall forward to the Secretary of the commission, a draft advertisement setting out the details of the vacancies, the duties and qualifications attached to the post.

- The vacancy in ant judicial office or tribunal may be advertised by the commission.
- The advert may be restricted to persons already in service, or restricted to Uganda or unrestricted. JSC Reg 16.
- The JSC may fill a vacancy by substantive or acting appointment.

- The JSC in consultation with the CJ, may fill vacancies by recruiting expatriates from outside Uganda. Reg.18.

The procedure under the Education Service Commission

- Under the Education Service Commission **Reg. 6**, appointments and recommendations for terms and conditions of service are decided by the commission through meetings.
- **Reg.16**, due consideration is given to the qualified personnel in the education service. In case of promotions, the commission takes into account the qualifications, experience and merit before seniority in the education service.
- Where a post cannot be filled through appointment or promotion, the commission shall advertise the post an inviting suitable applicants.
- **Reg.17** provides for application procedure and the application form.
- **Reg.18,** where a vacancy exists, the responsible officer will notify the secretary to the commission of the vacancy.
- Where the responsible officer recommends the vacancy to be filled by appointments, he shall forward the list of all eligible officers qualified for the post together with their record of service, and three recent annual appraisal reports for each candidate.
- **Reg. 19,** successful candidates will be issued appointment letters by the responsible officer and such candidates have to file a written acceptance or refusal of the job offer within a specified period of time.

- **Reg. 21** provides for six months' probationary appointment from date of assumption of duty.
- Where the officer's performance is satisfactory, the responsible officer shall write to the Secretary recommending confirmation.

Types of Appointments; see Page 6 of Standing Orders

- Broadly, there are two types; Pensionable and Non Pensionable Appointments. See Public Service Standing Orders (A – b).
- The appointment is pensionable if it was confirmed as such by appointing authority.
- A public officer is eligible for confirmation in appointment at the end of a probationary period, subject to satisfactory performance, and conduct
- Confirmation period is 6 months from date of first appointment.
- The power to confirm vests in the Appointing Authority.
- It's the duty of a Responsible Officer to initiate and make a submission for confirmation to relevant appointing authority for consideration.
- Un-confirmed, probationary, temporary, or part-time or non-national appointments are non-pensionable. See Standing Orders.
- Acting Appointment: Occurs when a lower ranking officer takes responsibility of a higher position in acting capacity.
- Appointment on promotion: Where an employee is appointed to fill a higher position. You must demonstrate competence to perform responsibilities in a high office.

- Contract Appointments. Retired civil servants may be re-employed on contract terms if the post requires special skills; or where the only suitable candidate available for the post is the pensioner.

Public interest litigation describes legal actions brought to protect or enforce rights enjoyed

by members of the public or large parts of it. It has been used as a tool of great social change

in India, Pakistan, Bangladesh and the Philippines on such diverse issues as the environment,

health and land issues.[365]

According to BHAGWATI J in BANDHUA MUKTI MORCHA-V-UNION OF INDIA

AIR 1984 S.C; "Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights

meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of our Constitution".1

In Australia, the criteria used by the Public Interest Law Clearing House (Vic) Inc. and the

Public Interest Law Clearing House Inc. (NSW) to determine public interest cases to support

are; The matter must require a legal remedy and be of public interest, which means it must;

a) affect a significant number of people not just the individual or;

b) Raise matters of broad public concern or;

c) impact on disadvantaged or marginalized group, and

d) it must be a legal matter which requires addressing pro bono public ('for the common good')

In Tanzania, closer to home in MTIKILA-V-ATTORNEY GENERAL [H.C.C.S No. 5 of

1993] public interest litigation was described as follows;

"It is not the type of litigation which is meant to satisfy the curiosity of the people, but it is

a litigation which is instituted with a desire that the Court would be able to give effective

relief to the whole or a section of the society...the condition which must be fulfilled before

[365] https://greenwatch.or.ug/sites/default/files/documents-uploads/SHIPWRECKS_AND_SEAMARKS.pdf

public interest litigation is entertained by the Court is that the court should be in a position to give effective and complete relief. If no effective relief can be granted, the court should not entertain public interest litigation."

In Uganda, public interest litigation is coming of age. Some examples of public interest litigation are the Rwanyarare/Ssemogerere petitions in the Constitutional Court in respect of political rights; Uganda Law Society (ULS) petition on the Referendum Act; ULS petition on execution of death penalty sentences passed by a field court martial without affording a right of appeal; the constitutional petition on the Divorce Act; Greenwatch actions; (Butamira, AES access to information, Golf Course development (now Garden City Shopping Centre), curry powder, chimpanzees kaveera), constitutional petition against the death penalty, petition on freedom of worship by Seventh Day Adventists; TEAN actions on smoking in public places and on stronger warning labels for tobacco products.

"The harvest is plentiful but the labourers are few". Many more issues abound all bedded in the Constitution but hot with controversy for example, issues of torture of suspects in detention, arrest of persons released by the Courts, street vendors' rights, pornography, prostitution, dismissal of alcoholics from police.

As you will see from the list, public interest litigation attracts a lot of attention and for this reason is often wrongly called "publicity interest litigation". Nonetheless the media are an important and indispensable ally in any battle for societal rights.

Public interest litigation is a new tool in the arsenal of civil society. It presents a strategic opportunity to engage the Judiciary in ordinary societal issues. It allows civil society 4 organizations to jump from conference table lamentations to strategic, decisive and enforceable action. It also allows the Judiciary to take its rightful place in the shaping and development of society.

The attempts at public interest litigation in Uganda have been beset with technicalities, which we propose to discuss below in a humble attempt to bring clarity to this area of the law and, by so doing, promote a culture of constitutionalism, of human rights enforcement and the Rule of Law.

The bedrock of public interest litigation lies in Article 50(2) of the Constitution. It provides: "Any person or organization may bring an action against the violation of another person's or group's human rights."

This is set against the backdrop of Article 50(1), which provides for the enforcement of individual constitutional rights. In the words of the Former President of the Law Society Mr. Andrew Kasirye, Article 50(2) makes us "our brother's keeper".3 By using the expression "any person" instead of say "an aggrieved person" it allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of. It effectively abolishes locus standi as we know it in the Common Law tradition. Whenever there is an injury caused by any act/omission contrary to the Constitution, any member of the public acting bona fide can bring an action for redress of such wrong.

Another avenue to public interest litigation lies in Article 137(3), which allows any person who alleges a violation of the Constitution to have taken place to petition the Constitutional Court. Such a violation may stem from an act or omission of a person/organization or from an Act of Parliament being inconsistent with the Constitution. The article provides;

3) "A person who alleges that;-

a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

b) any act or omission by any person or authority,

is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."

Justice Mulenga JSC in ISMAIL SERUGO -V- KCC & ATTORNEY GENERAL [Constitutional Appeal No. 2 of 1998] was emphatic that the right to present a constitutional petition was not vested only in the person who suffered the injury but also in any other person.

This is particularly pertinent since Article 3(4) of the Constitution imposes a right and duty on every citizen of Uganda to defend the Constitution.

We shall return to the matter of locus standi later.

Also worthy of mention is S.71 of the National Environment Act (Cap. 153) that empowers any person to apply for an environmental restoration order even though such person is not suffering any harm and has no interest in the land in issue.

There is also a now probably archaic S. 62(1) of the Civil Procedure Act (Cap. 71), which requires that suits for a public nuisance may be instituted by the Attorney General or two or more persons with the consent of the Attorney General.

We will move to a consideration of some of the issues that have beset public interest litigation.

## PROCEDURE IN PUBLIC INTEREST LITIGATION

"Speak up for those who cannot speak for themselves, for the rights of all who are destitute, speak up and judge fairly; defend the rights of the poor and needy."

Proverbs 31: 8-9

**Procedure under Article 50:**

We will focus first on procedure under Article 50. It presents a classic case of needing to know where one is coming from to know where one is going.

Article 50(4) provides for the making of laws by Parliament for the enforcement of the rights in and freedoms under chapter 4 of the Constitution. As a matter of fact and as has been held in cases, no rules have been made under Article 50(4).

In UGANDA JOURNALISTS SAFETY COMMITTEE –V- ATTORNEY GENERAL [Constitutional Appeal No. 7 of 1997] the Supreme Court accepted the Attorney General's argument that there was no law in place for the enforcement of rights under Article 50. Similarly in JANE FRANCES AMAMO –V- ATTORNEY GENERAL [High Court Misc. Application No. 317 of 2002], the case was roundly dismissed in the following words;

"The Constitution clearly and in no uncertain words said Parliament was to make laws for the enforcement of the rights and freedoms under the said Constitution. In my humble opinion this means that Courts can no longer apply the Rules passed in 1992. That would mean to me that until Parliament makes laws under Article 50(4), Article 50(1) is in abeyance."

However, Article 273 read with S. 48 of the Judicature Act (Cap. 13) allows the preservation and continued application of the Fundamental Human Rights (Enforcement Procedure) Rules S.I No. 26 of 1992. This was the prescribed procedure for enforcement of the rights under Article 22 of the 1967 Constitution that was the precursor of today's Article 50. It is testimony to our turbulent past that the rules for enforcement of fundamental rights were only put in place 25

years later. However the numerous cases now under Article 50 is good testimony to our recovery and restoration of the Rule of Law.

Following the coming into force of the 1995 Constitution, these rules continue to have effect by virtue of Article 273 which preserves the existing law subject to modifications as to bring them into compliance with the 1995 Constitution.

The 1992 Rules were further saved under the Judicature Act (Cap. 13) and therefore

continue to have full force and effect.

There is therefore a clear and proper legal basis for the enforcement of Article 50 and several matters have been heard under these rules.

In NATIONAL ASSOCIATION OF PROFESSIONAL ENVIRONMENTALISTS –VAES NILE POWER LTD [High Court Misc. Application No. 268 of 1999] probably the first action under Article 50, Court was quite clear that the correct procedure for the Plaintiffs to have followed in that case was by notice of motion as prescribed under the 1992 Rules.

In TEAN-V-ATTORNEY GENERAL AND NEMA [Misc. Application No. 39 of 2001], [Non-Smokers rights case] and TEAN-V-BAT [Misc. Application No. 70 of 2002] (warninglabels), PASTOR MARTIN SEMPA-V-ATTORNEY GENERAL [Misc. Application No. 71 of 2002] (on electricity tariffs), GREENWATCH-V-ATTORNEY GENERAL [Misc. Application No. 140 of 2002] (the Kaveera suit) and several cases thereafter the Judges have had no problem in applying the 1992 Rules. It therefore appears and is certainly hoped that the AMAMO line of decisions will remain isolated.

The AMAMO decision presents a tragedy in that the Court was in effect suspending the Constitution by declaring it unenforceable on account of absence of procedural rules. Sadly the Court was turning away a citizen, who was complaining of a violation of his fundamental constitutional rights, on the basis of lack of procedure! The AMAMO decision contrasts rather sharply with the approach of the Tanzanian Courts when faced with actions to enforce human rights before the relevant rules were made. In CHUMCHA MARWA VOFFICERI/ MUSOMA PRISON [Misc. Crim Case No. 2 of 1988] (MWANZA) Justice Mwalusanya ruled that since the Articles provided that Government "may" enact such rules, then it was not a must that the rules were enacted prior to the enforcement of the Bill of Rights. The Tanzanian Court of Appeal took the same position in DPP -V- DAUDI PETE [1991] LRC (Const) stating that until Parliament passed the relevant legislation the enforcement of the basic rights, freedoms and duties may be effected under the procedure that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought.

This certainly appears to be the more deserving approach, as every effort should be made to give effect to the fundamental human rights enshrined in the Constitution, as the supreme law of the land. Speaking at the lower level of tortuous liability and calling for the need for judicial creativity, a Kenyan Court had this to say;

"The law is a living thing and a court would be shirking its responsibility were it to say assuming that there be no existing recognized tort covering the facts of a particular case "why then, this must be the end to it". It would undoubtedly be shirking its responsibilities, for instance in a case in which injustice has been done, were it to take that stand. The law may be thought to have failed if it can offer no remedy for the deliberate act of one person, which causes damage to the property of another. The law must of necessity, adapt itself: it cannot stay still. If a person has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it; and indeed, it is a vain thing to imagine a right without a remedy: for the want of right

and want of remedy are reciprocal."

Trevelyan J.

KIHARA KIMANI –V- AG H.C.C.C No. 711 of 1968, It is most strange that the Rules Committee made all the other rules prescribed in S. 48 of the Judicature Act (Cap. 13), being Supreme Court Rules, Court of Appeals Rules, and Constitutional Court Rules but fell just short in making new rules for the enforcement of fundamental human rights in the High Court.

In these murky waters, comes yet another issue to befuddle us yet further. Some gazette copies of S.I 26 of 1992 contain an error. The Government Printer printed rules 3-8 of S.I 25 of 1992 Interpretation of the Constitution (Procedure) Rules[366] as those of S.I 26 of 1992 and vice versa.

Thus, rules 3-8 of S.I 25 appear on the back of S.I 26 and rules 3-8 of S.I 26 appear on the

back of S.I 25. Given the similarity of the subject matter of both instruments and the

coincidence of numbering the error is easy to make.

It was on account of this printing error that the Court of Appeal in CHARLES HARRY

TWAGIRA –V- ATTORNEY GENERAL [Civil Appeal No. 61 of 2002] concluded that

Article 50 actions had to be filed by plaint. This was also followed by the dicta in TEAN –VATTORNEY

GENERAL [Civil Application No. 63 of 2003.arising from Court of Appeal

Civil Appeal No. 23 of 2003].

In these decisions, he Court of Appeal stated that the proper procedure for an action under

Article 50 would be by suit commenced by ordinary plaint and that a notice of motion in the absence of a pending suit was an improper procedure.

Properly read and applied under the 1992 rules, the procedure is by notice of motion in the High Court. Fortunately, the hard working staff of the Chambers of the First Parliamentary Counsel have located the original instruments signed by the Chief Justice and have initiated the correction process.

Another false argument is that S.I 26 of 1992 was supplanted by Legal Notice No. 4 of 1996

The Rules of the Constitutional Court Petitions for Declarations under article 137 of the

Constitution) directions 19996. This creates the rules of the Constitutional Court by

[366] replaced by L.N. No. 3 of 1996, The Interpretation of the Constitution (Procedure) Rules 1992 (Modification)
Directions 1996

effecting modifications to S.I 26 of 1992 in so far as it applied to the Constitutional Court.

We submit that the provisions of S. I 26 of 1992 relating to the High Court as High Court,

were not modified and therefore remain in full force and effect in respect of actions under

article 50 to enforce fundamental human rights.

Before leaving the subject of procedure under Article 50 it is important to note that to

proceed under Article 50, the matter must relate directly to a fundamental human right in the Constitution. PASTOR MARTIN SEMPA's action (supra) was brought to object to new electricity tariffs that had been imposed without giving the members of the public a hearingand that accordingly the Applicant's right to fair treatment under Article 42 of the

Constitution had been infringed. The Learned Trial Judge struck out the action on the ground that it did not disclose violation of a constitutional right. He ruled "It is not enough to assert the existence of a right. The facts set out in the pleadings must bear out the existence of such a right and its breach would give rise to relief."

Procedure under Article 137(3);

With respect to Article 137(3) petitions to the Constitutional Court, the procedure is

governed by Legal Notice No. 4 of 1996 Rules of the Constitutional Court (Petitions for

Declarations under Article 137 of the Constitution) Directions 1996. These Rules were made under S.51(2)(c) of the Judicature Act (Cap. 13).

Some aspects on these Rules have given rise to contention, which we discuss below.

## D. THE DISABLING LAW

"It has been said that the Courtroom is the last forum in which the oppressed can speak

their minds. Our job as lawyers is to facilitate that opportunity."[367]

By "disabling law" we refer to that body of jurisprudence that has arisen mainly from the

[367] International Bar News September 2003. "Driven to defend the disadvantaged. A profile of George Bizos"

preliminary objections raised by the Attorney General and other respondents to have public interest actions struck out.

We set the objections in quotations in the popular form in which they are raised and we seek to discuss the relevant cases and provide some answers to the objections. Hopefully what was a shipwreck for those who went before will become a seamark for those to come.

1. "The applicant has no locus standi to bring this action"

The Constitutional Court in RWANYARARE-V-ATTORNEY GENERAL [Constitutional Petition No. 11 of 1997] found it difficult to accept that an action could be brought on behalf of an unnamed group of persons. Justice Manyindo DCJ (then) ruled that the implications on costs and the doctrine of res judicata would be too great.

To quote the Learned Judge;

"We cannot accept the argument of Mr. Walubiri that any spirited person can represent any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences. For example, how would the Respondent recover costs from the unknown group called Uganda Peoples' Congress? What if other members of Uganda Peoples' Congress chose to bring a similar petition against the Respondent, would the matter have been foreclosed against them on the grounds of res judicata."

The petitioners in that case sued on behalf of the members of Uganda Peoples' Congress

(UPC) alleging that their political rights had been infringed. The action was brought before the Constitutional Court under Articles 50 and 137 and the Court went on to hold that it could not be brought on behalf of unnamed persons.

The question arose again in the Non-Smokers rights case (Supra). This was an action

brought on behalf of non-smokers for declarations that smoking in public places violated the non-smokers constitutional rights to a clean and healthy environment and to life. It went without saying that all the non-smokers in Uganda could not be and were not named in the motion.

The Attorney General raised the objection that the action was not maintainable on the basis of the RWANYARARE decision. The Court overruled the objection and found that in public interest litigation there was no requirement for locus standi. The Court relied on the English decision of IRC -V- EXP. FEDERATION OF SELF-EMPLOYED [1982] AC 643 and the Tanzanian decision of REV. MTIKILA -V- ATTORNEY GENERAL [H.C.C.S No. 5 of 1993]. The Court further ruled that the interest of public rights and freedoms transcend technicalities, especially as to the rules of the procedure leading to the protection of such rights and freedoms. The Judge ruled that it was compelling that the Applicant would stand up for the rights and freedoms of others and he would accordingly grant them a hearing.

Unfortunately no reference was made to the RWANYARARE decision in the ruling and the Attorney General's application for leave to appeal on this point was struck out as being out of time. In MTILIKA, (supra) the Tanzanian Court relied on a similar provision in the Constitution,

which enabled citizens to bring actions in defence of the Constitution. The Court found that this provision vested citizens with both a personal and a communitarian capacity. The Court further justified public interest litigation based on the prevailing socio-economic conditions; the low literacy level, financial disablement and the culture of apathy and silence deriving from years of ideological conditioning. To the Court this justified any public spirited individual taking on the burden of the community and it would be contrary to the Constitution to deny him or her standing.

This reasoning was echoed in BATU LTD -V- TEAN [High Court Misc. Application No. 27 of 2003 Arising from Misc. Application No. 70 of 2002] where the trial Judge overruled an objection by BATU who argued that since the words "public interest" did not appear in our Constitution as they did expressly in the South African Constitution, then public interest litigation was prohibited.

The learned Judge stated;

*"It is elementary that "person", "organizations" and "groups of persons" can be read into Article 50(2) of the Constitution to include "public interest litigants" as well as all the litigants listed down in (a) to (e) of the South African Constitution. In fact the only difference between the South African provisions (i.e Section 38) and our provision (under Article 50(2) is that the former is detailed and the latter is not. That is my considered view based on the reality that there are in our society, persons and groups of persons whose interest is not the same as the interest of those who Lord Diplock referred to as "spirited" persons or groups of persons who may feel obliged to represent them i.e persons or groups of persons acting in the public interest. To say that our Constitution does not recognize the existence of needy and oppressed persons and therefore cannot allow actions of public interest groups to be brought on their behalf is to demean the Constitution."*

Locus standi in the context of actions to enforce environmental rights also holds some

potential issues. As we have seen from the treatment of Article 50, it entitles any person to enforce any of the constitutional rights including the right to a clean and healthy environment (Article 39)

Article 17(j) of the Constitution makes it the duty of every citizen, including members of the Bench, to create and protect a clean and healthy environment.

In BYABAZAIRE THADEUS –V- MUKWANO INDUSTRIES [H.C.C.S No. 466 of 2000] it was held that it was only the National Environment Management Authority (NEMA) that could bring an environmental action, based on the provisions of S.3 of the National Environmental Act (Cap. 153). It is submitted that a purposive reading of the Constitution read with the National Environment Act (Cap. 153), should open the gates to all citizens seeking to do their duty in protecting the environment. It is surprisingly the Commercial Court that has sought to bring clarity to this area of locus standi. In KIKUNGWE ISSA & 4 OTHERS –V- STANDARD BANK & 3 OTHERS [High Court Misc. Application No. 394 OF 2004 and 395 OF 2004], His Lordship Hon. Justice Geoffrey Kiryabwire considered that the grant of locus standi was one of judicial discretion to be granted where the Applicant can show;

a) that he/she is a citizen of Uganda;

b) "sufficient interest" on the matter and must not be a mere busybody;

c) that the issues raised for decision are sufficiently grave and of sufficient public importance;

d) that they involve a high constitutional principle;

The Court went further to state that the Applicant should show Court what other steps he/she has taken to protect and preserve the matter at stake and that these steps led to nothing before Court can exercise its discretion to grant locus.

In that case, 5 Members of Parliament filed an action seeking to restrain the sale of what they believed to be public property. The action was premised on Article 17(1)(d) which imposes a duty on citizens to preserve public property and the reference to citizenship must be construed in the context of that article.

However, the tests outlined by the Court and the emphasis on discretion to grant locus seem to fly in the face of Article 50 which is clear, unambiguous and unqualified. It provides that any person or organization may bring an action against a violation of rights.

2. Competent Court Article 50 prescribes the forum for enforcement of human rights actions as a "competent court"

The expression is not defined. The 1992 Rules state that the application shall be filed in the High Court. For Article 137 actions the correct forum is the Constitutional Court. The challenge always arises in determining whether the action should be under Article 50 or Article 137 and therefore deciding which the correct forum is.

WAMBUZI CJ (as he was then) in ATTORNEY GENERAL -V- DAVID TINYEFUZA

[Constitutional Appeal No. 1 of 1997] said; "In my view, jurisdiction of the Constitutional Court is limited in Article 137(1) of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional court has no jurisdiction."

In ISMAIL SERUGO –V- KCC & A.G [Supreme Court Constitutional Appeal No. 2 of

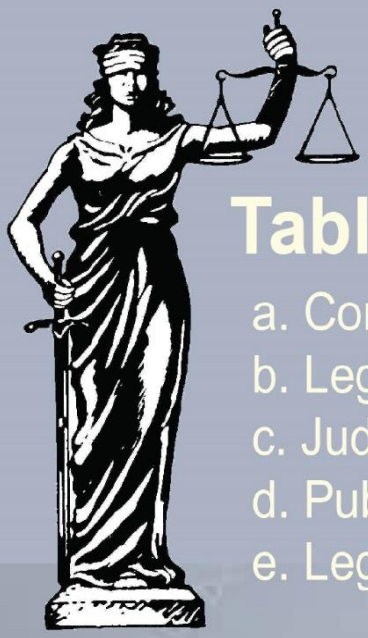
1998] the Court ruled that in the course of handling Article 137 matters, the Constitutional Court could deal with Article 50 matters. However unless the action requires interpretation of the Constitution, the Court of first instance should be the High Court.

3. 'Interpretation' or 'enforcement' or 'applying'

This use of the word "interpretation" in the mandate of the Constitutional Court prescribed in Article 137(1) of the Constitution has given rise to some difficulty. Actions have been dismissed in the Constitutional Court on the grounds that the requisite remedy is not Article 137 interpretation but Article 50 enforcement.

In ALENYO -V- THE ATTORNEY GENERAL [Constitutional Petition No. 5 of 2002]

the Court considered the word "interpretation"



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