Commercial Law In a Liberalised Economy: The Case of Uganda

Inaugural Lecture Delivered at Makerere University

By

D. J. BAKIBINGA

Professor of Commercial Law

A. *INTRODUCTION*

In this lecture, I will attempt to analyse the role of Commercial Law in the liberalised economic environment of Uganda. In doing so I intend to confine myself to the period from 1986 to date. Since Commercial law does not exist in a vacuum a review of the economic, political and financial policies underlying the law will precede the assessment of the law. This approach assumes that law has a moulding effect on society, its norms and general behaviour and falls within the functional school of jurisprudence and its leading proponent, Dean Pound, who conceived law as a process of balancing conflicting interests i.e. a means of social engineering. [1] In contrast, there is the economic or socialist conception of law as a superstructure over an economic base and therefore being a reflection of the economic conditions or set-up of a given society. While noting that law can be an instrument of social change, it is also intended to show that in line with the economic concept of law, commercial law is in fact a reflection of the political, economic and social set up of the Ugandan Society. This approach is supported by the view that [1a] commercial law evolves from usages of business so that the level of its influence and the degree of its subtlety at any one time are a function of the volume of economic activity and the complexity of the practices that drive commercial law.

1. See generally Paton & Derham, *Jurisprudence* (4th Ed. Oxford University Press) Chap. 1. See also *Lloyd, Jurisprudence* (Sweet & Maxwell, London) and Bakibinga., "Commercial law As an Instrument of Social change" in *Proceedings of the 22nd Annual conference of the Nigerian Association of Law Teachers* (University of Calabar, 1984)

1a Goode, R. *Commercial Law In the Next Millenium* (Sweet & Maxwell, London, 1998) p. 4

B. *DEFINITION, HISTORICAL CONSPECTUS AND GENERAL CONSIDERATIONS*

A definition of commercial law is incomplete without a brief review of its evolution. The principles of law including commercial law, which we apply in Uganda, were inherited from England and continue to be applied subject to our written law and local circumstances. These include the written law as passed by the legislature, the common law and doctrines of equity, any established and current custom or usage and the powers vested in, and the procedure observed by, the High court .[2] In the absence of such rules, the High Court is empowered to determine disputes in conformity with the principles of justice, equity and good conscience.[3]

The origin of our applicable law is apposite in understanding the evolution of commercial law. In this regard it is significant that in Europe, the usages, customs and practices of merchants (or in modern parlance, traders) administered in courts presided over by merchants were the foundation of commercial and maritime law.[4] These mercantile customs and usages were observed by the courts of seaport towns, separately from the principles of any definite system of law. The Law Merchant was developed by a distinctive class of international merchants who traded in Europe and Eastern countries.[5] It should be stressed that the Law Merchant commonly called *Lex Mercatoria* was not law in the formal sense. Rather it comprised customs which merchants recognised as binding. It may be described generally as a system of substantial justice and equity based upon trade usages, which had prevailed from the earliest times in various parts of the mercantile world. [6] Apart from customs and usages, the Law Merchant also consisted of the early written codes which were part of the ancient Law Merchant. [7]

2. Judicature Statute No. 13 of 1996, S 16 (2), (3). See also *Wavah Holdings v. General Motors* C.A. 19 of 1991 [Supreme Court (Uganda)]

3 *Ibid*. S. 16 (2) (C)

4 Holdsworth, *History of English Law* Vol. 5 pp. 93-96 (1927)

5 Bewes, W.A *The Romance of the Law Merchant*, (1923); Trakman, L.E. "The Evolution of the Law Merchant: Our commercial Heritage" *Journal of Maritime Law and Commerce* Vol 12, P. 1 (1980).

6 Tudsbery, "Law Merchant and the Common Law" *Law Quarterly Review*, Vol. 34, P. 393 (1918)

7 Holdsworth, *Supra* n. 4, pp. 129-132

The idea of trying to resolve commercial disputes speedily in order to forestall stagnation of commercial transactions and resultant costs which recently manifested itself in the setting up of a Commercial Division of the High Court in Uganda also has some historical antecedent in the administration of Commercial Law. Thus in the Middle Ages courts of fairs and boroughs' (local councils) decided disputes between merchants whether native or foreign based on mercantile customs speedily. Hence the reference to them as pie powder.[8] In addition to such courts of fairs and boroughs were courts of staple conducted in areas with disputes concerning foreign trade. In this respect foreign merchants were accorded special status guaranteeing their status within the United Kingdom. This aspect of liberalisation, which presently in Uganda is aimed at encouraging foreign investment and has further been pursued through the Law Reform Project on the Reform of Commercial Laws aimed at encouraging investment has an historical antecedent in the *Magna Carta* . *The Magna Carta* [9] provided as follows:

> All merchants shall have safety and security in coming to England and going out of England, and in staying and travelling through England, as well by land as by water, to buy and sell without unjust exaction according to ancient and right customs, excepting in time of war, and if they be of a country at war with us and if such are found in our land at the beginning of a war, they shall be apprehended without injury to their bodies and goods until it be known to us, or to our Chief Judiciary, how merchants of our country are treated who are found in the country at war with us: if ours be in safety there, the others shall be in safety in our land.

Common Law courts jealously regarded with suspicion mercantile or maritime courts, which administered canons of law, based on international usages of merchants and seamen whose origin and development were distinct from that of Common law. Common Law courts, therefore, attempted to limit the activities of those courts. The renowned Common Law Chief Justice Coke devised a means of achieving this by the

---

[8] Gross, *Selected Cases In the Law Merchant* pxvii cited in Schmitthoff, C.M. *Commercial Law In A changing Economic Climate* (2nd Ed, 1981) P. 3.

[9] This was a charter originally granted by King John of England and forms part of English Law: Statute 9 Hen. 3 protected a subject form abuse of the Royal Prerogative in the form of arbitrary arrest and imprisonment and from a mercements, purveyance and extortions. See Mckechnie, *Magna Carta*

Common Law Courts assuming jurisdiction over mercantile matters. In this vein, courts of Common Law devised the fiction that a contract made abroad was deemed to have been made in London as a means of withdrawing the suit from the Court of Admiralty. The incorporation of the Law Merchant into the Common Law was effected by Chief Justices John Holt and Lord Mansfield. [10] This was particularly evident in relation to the modern principles of the employer's liability for the torts of his employee, negotiable instruments and contract of bailment.[11]

An historical review of the genesis of commercial law is incomplete without reference to its codification. Codification of commercial law in Europe began at the onset of the Nineteenth Century. It was in fact spurred on by the Napoleonic Codification tendency. [12] The incorporation of commercial law into the *corpus* of the common law in England paved the way for the codification of commercial law. This was further justified by the view that the rules of commercial law had become fairly settled in the precedents and were also settled or clear.[13] Codification, by clearly stating the commercial rules, was helpful to merchants who wanted to, organize their business in such a way as to avoid disputes. Codification also ensured certainty of rules to be applied to given transactions.

The process of codification in England was started by Chalmers[14] who is especially credited with the codification of the law relating to Sale of Goods.[15] Codification in England differed from the pattern in Europe and America in that far from codifying the entire law or branch of law, specific areas were codified. These included laws relating to companies[16] , bills of exchange,[17] partnership,[18] sale of goods[19] and marine insurance.[20] Some of

---

[10] Holdsworth, *W. History of English Law* Vol Viii PP 47, 161-170. See also Holdsworth, W. *Some Makers of English Law* (Cambridge, 1966) P. 159 cited in Schmitthoff, *supra* n. 8, P. 56.

[11] *Ibid*

[12] See e.g Civil Code (1804) and Commercial Code (1807). Examples of other European Codes are Spanish Commercial Code (1829), Portuguese Code (1833), Dutch Code (1838) Brazilian code (1850) Commercial Codes of Italy 1865 and 1883.

[13] Chalmers, M.D. "Codification of Mercantile Law" *Law Quarterly Review* Vol. 19. P. 11.

[14] *Ibid*

[15] Sale of Goods Act, 1893 (UK) in parimateria with our Sale of Goods Act Cap. 79 (Laws of Uganda 1964 Edn)

[16] Companies Act, 1862

[17] Bills of Exchange Act, 1882

these acts have stood the test of time and were in fact transplanted to British colonies including Uganda.

It is evident from the above brief review of the genesis of commercial law that commercial law can be defined as the law, rules and regulations that regulate commercial activities. Thus understood, commercial law includes the basic law of contract, the law of agency, sale of goods, hire purchase, insurance, bankruptcy, carriage of goods, banking and negotiable instruments and arbitration. It also encompasses law, which regulates the structures for conducting commerce, namely companies, partnerships, sole businesses as well co-operatives. Contrary to the earlier practice of categorising tax law as a species of public law, it is now accepted that tax law forms part of commercial law largely because of its proximity to commercial activities and accountability. This definition is not however, exclusive. As has been put by Professor Goode[20a] commercial law represents the totality of the law's response to mercantile disputes. It encompasses all those principles, rules and statutory provisions, of whatever kind and from whatever source, which bear on the private law rights and obligations of parties to commercial transactions, whether between themselves or in their relationship with others.

C. ECONOMIC LIBERALISATION: POLICY CONSIDERATIONS

1. Overview of Economic position

An assessment of the role of commercial law in Uganda 's liberalised economy since 1986 is significant against the background of the total collapse of the economy and political anarchy which characterized the period immediately prior to the assumption of political power by the National Resistance Movement (NRM) in January 1986 and the measures aimed at reconstruction of both the economy and political structure introduced by Government since then.[21]

It has been officially acknowledged[22] that the NRM "inherited an economy that had been shattered by years of Civil war, political

---

[18] Partnership Act, 1890

[19] Sale of Goods Act, 1893

[20] Marine Insurance act, 1906.

[20a] Goode, R. *Commercial Law In the Next Millenium* (Sweet & Maxwell, London 1998) pp. 8-9

[21] See also Bakibinga, "Reform of Taxation Measures and its Effect In Uganda, 1986-1994" Paper Delivered to the Makerere Economics Society, 2nd December, 1994, P. 1.

instability and economic mismanagement." The economic problems, which faced the country at the time, have been summarised as follows:[23]

1. Rampant inflation, which eroded real incomes, hampered productive investment and damaged economic growth.

2. Poor public sector performance reflected by a budget out of control and lack of financial control in ministries and public enterprises. This led to the Government to finance its deficit through printing money, while public enterprises borrowed from Government and banks to finance their losses.

3. Lack of financial incentives for farmers and others within the system owing to the extensive system of marketing boards and their corresponding price controls.

4. An overvalued exchange rate of the shilling by about 10 times in comparison with the parallel market rates which favoured importers and reduced incentives to exporters.

5. An over dependence on coffee exports in the foreign trade sector owing to faulty policies which discouraged production of cotton, tea and non traditional products and real imports which had been declining for many years.

6. A banking system which suffered from high levels of non-performing loans and inefficient financial institutions which were improperly supervised and administered interest rates below the inflation rate thereby offering no incentive to savers.

7. Lack of entrepreneurial, technical and managerial expertise owing to past domestic instability, the nationalisation programme, and the expulsion of the Asians and the generally poor incentive structure.

---

[22] Bank of Uganda, *Economic Report, 1986-1991* (1991) P. 2. See also Ellyne, M.J. *Economic Reform In Sub-Saharan Africa: The Case of Uganda* (Bank of Uganda, 7th Joseph Mubiru Memorial Lecture July 1995) P. 6.

[23] Ellyne, *ibid* PP. 6-7. See also Bank of Uganda *Economic Report* , 1986-1991 *Ibid* pp. 2-3

8. Domestic instability which had reduced social services including health, education and water and a public infrastructure which was in terrible condition.

Furthermore, added to the above domestic problems, which were in the main due to poor economic policies, the external environment was also unfavourable for Uganda at the time.[24] Thus the price of coffee which was then responsible for 90 percent of Uganda's export revenue and over 50 percent of government revenue at the time fluctuated greatly but generally declined from a peak of US $ 5 per kilogram in 1977 to US $ 2.66 per kg in 1985 and as low as US $ 0.96 per kg in 1991. By 1991 coffee export receipts had fallen to about US $ 120 million annually or less than one-third of the level in the financial year ending June, 1987. Briefly then, within two years of the NRM Government's launching a major effort to rebuild the economy, "the international coffee market collapsed in what turned out to be the most prolonged period of declining coffee prices in more than five decades"[25]

In addition to the coffee income aspect, energy prices (including petroleum products) "had risen sharply and abruptly increased transportation costs for Uganda, a land locked country"[26] Interest rates also rose sharply in the 1980s at the same time that international commodity prices for many of Uganda's main exports began to decline. Uganda also faced a problem common to many sub-saharan African countries i.e a decline in the prices of their main exports relative to the prices of their imports. In other words a fall in the terms of trade. In real terms the country's GDP *per capita* declined by 40 percent between 1970 and 1986 while import volumes fell by about 50 percent.[27]

2. *The Structural Adjustment Programme*

It was in reaction to the pathetic state of the economy that the Government, in May 1987 shifted direction form "the traditional

[24] Ellyne, *Ibid*. pp. 7-8; See also BOU *Economic Report 1986-1991*, *Ibid*, pp. 10-13

[25] Bank of Uganda *Ibid* p. 10

[26] Ellyne, *op.cit*, p. 7

[27] *Ibid*

administrative and planning methods of the past to the Economic Recovery Programme with the support of the International Monetary Fund (IMF) and World Bank. This programme is commonly called the structural adjustment programme and was intended to rehabilitate the economy by addressing the problems outlined above with more market – oriented policies.[28] The main thrust of the structural adjustment programme was to:-[29]

(a) improve and maintain incentives for the expansion and diversification of exports and efficient import substitution;
(b) mobilise increased domestic savings through both incentives for private savings and by reducing the fiscal deficit and the operating losses of parastatals and marketing boards;
(c) increase the efficiency of the public sector and generate a substantial improvement in revenue collection through reforms in the tax system and changes in tax administration;
(d) ease the regulatory and administrative burden on the business sector, as part of a larger effort to encourage both foreign as well as domestic investment, and
(e) increase yields in the agricultural sector through improvements in the entire chain of agricultural support services- transportation, processing and marketing.

In summary, the process of liberalising the economy included,[30] the reduction of the level of inflation and regaining control over economic policy; the liberalisation of prices and markets by allowing free market price and removing institutional constraints; the rationalization of institutions and sectors, including the streamlining of the public sector and restructuring financial institutions. These would be accompanied by policies aimed at stimulating and sustaining economic development.

In political terms, the process of liberalisation can be reconciled with the NRM Ten Point Programme[31], which envisaged the building

---

[28] *Ibid*

[29] Bank of Uganda, *supra* n. 24, pp. 13-14. See also Ellyne, op.cit. p. 8 and Husain, I & Farugee, R (Ed) *Adjustment In Africa: lessons from Country Case Studies* (World Bank, Washington, 1994) p. 3.

[30] Ellyne, *Ibid.*

[31] Point No. 5 . See also Museveni, Y.K. *What is Africa's Problem?* (NRM, 1992) pp. 280-281 and Bakibinga, *supra* n. 21, p . 7.

of an independent integrated and self-sustaining economy. This has been explained to involve "the structural reconstruction of the present a symmetrical economy" by moving away from a monocultural export economy dependent on one or a few cash crops such as coffee, tea and cotton to a multifaceted economy with diversified agriculture, extensive import substitution, processing of export raw materials in order to enhance their value and building basic industries such as iron, steel and chemicals.

The next part of this lecture reviews the implementation of the liberalisation policies outlined above relative to the legislation put in place for the purpose.

D. IMPLEMENTATION OF ECONOMIC LIBERALISATION THROUGH COMMERCIAL LAW

Legislation

The analysis of the implementation of the Government's economic liberalisation programme reviews but is not limited to the following legislation which has been enacted since 1986: Bank of Uganda (Amendment) Decree[32], Currency Reform Statute[33], Exchange Control (Forex Bureau) Order[34], Investment Code[35], Government Central Purchasing Corporation Statute[36], Uganda Oil Board Statute[37], Exchange Control (Amendment) Statute[38], Uganda Development Bank (Amendment) Statute[39],Uganda Coffee Development Statute[40], Uganda Revenue Authority Statute[41], Co-operative Societies Statute,[42]

[32] No. 1 of 1986

[33] No. 2 of 1987

[34] S.I. No. 7 of 1991 made under Exchange Control Act (1964 Laws of Uganda)

[35] No. 1 of 1991

[36] No. 3 of 1990

[37] No. 2 of 1991

[38] No. 2 of 1990

[39] No. 10 of 1990

[40] No. 4 of 1991 (Amended by No. 5 of 1994)

[41] No. 6 of 1991

Accountants Statute[43], Banking (Amendment) Statute[44], Leadership code[45], External Loans (Amendment) Statute[46], Finance Institutions Statute,[47] Bank of Uganda Statute,[48] Public Enterprises Reform and Divestiture Statute,[49] Cotton Development Statute,[50] Agricultural Seeds and Plant Statute,[51] Non- Performing Assets Recovery Statute,[52] National Water & Sewarage Corporation Statute,[53] Hotel and Tourism Training Institute Statute,[54] Capital Markets Authority Statute,[55] Insurance Statute,[56] Value Added Tax Statute, [57]Income Tax Act,[58] Tax Appeals Tribunal Act, [59] Registration Services Bureau Act,[60] and Finance

[42] No. 8 of 1991

[43] No. 12 of 1992

[44] No. 10 of 1992

[45] No. 8 of 1992

[46] No. 14 of 1992

[47] No. 4 of 1993

[48] No. 5 of 1993

[49] No. 9 of 1993

[50] No. 1 of 1994 as amended by Statute No 6 of 1994

[51] No. 10 of 1994

[52] No. 11 of 1994

[53] No. 8 of 1995

[54] No. 14 of 1994

[55] No. 1 of 1996

[56] No. 7 of 1996

[57] No. 8 of 1996

[58] No. 11 of 1997

[59] No 12 of 1997

[60] No. 7 of 1998

Decrees, Statutes and Acts,[61] as well as the National Agricultural Research Organisation Statute.[62]

The assessment of the economic liberalisation policies will be considered under the following heads:

(a) Fiscal and Monetary Control;
(b) Liberalisation and Expansion of the Private Sector;
(c) Financial Institutional Discipline
(d) Liberalisation of Foreign Trade and Stimulation of Exports
(e) The significance of the External Debt and Foreign Aid

1. Fiscal and Monetary Control

It has been observed that[63] economic stabilisation starts with monetary and credit policies, which are the main tools, used to control inflation. It is necessary to control inflation because it hurts economic growth, reduces incentives to save and leads to social tensions. Inflation is caused by excessive growth in money supply, which arises from Government borrowing from the Central Bank, otherwise known as "printing money". Excessive borrowing of money by the private sector owing to negative real interest rates also causes inflation especially where the domestic supply of goods and services does not grow sufficiently fast. Inflation was at 300 percent at the end of 1986[63a]

Government, therefore, embarked onto controlling money supply by restricting credit to government and checking credit to the private sector through management of banking system liquidity.[64]The Bank of Uganda has effected this through treasury bill auction, use of reserve requirements and credit policies to the commercial banks.

The first manifestation of this strategy in legislative terms was the promulgation of the Bank of Uganda Act (Amendment) Decree[65] That Decree raised the authorised capital of the Bank to be subscribed by

---

61 1986 to 1997

62 No. 19 of 1992

63 Ellyne, *op.cit* P. 8. See also Bank of Uganda, *Economic Report 1986-1991,* pp 4-5

63a Bank of Uganda, *Ibid*; p. 3.

64 Ibid P. 9

65 No. 1 of 1986

the Government from Shs 20 million to Shs 10 billion[66], while the issued and paid up capital was raised to Shs 30 billion for authorised capital and Shs 20 billion for issued and paid up capital.[67]The Decree further amended the Principal Act by authorising the Central Bank to grant to banking and credit institutions medium and long term loans for periods not exceeding twenty years upon securities to be determined by the Board of the Bank. The Central Bank was also empowered to guarantee loans granted by banking credit or financial institutions.[68]The consolidating statute has further specified the securities to be used which include Government securities publicly offered for sale and to mature within twenty-five years provided that the advance secured does not at any time exceed 75 percent of the market value of the security pledged and that such securities exclude bonds issued for purposes of capitalisation of the Central Bank.[69]The 75 percent formula is extended to another type of security, bills of exchange and promissory notes eligible for purchase, discount or rediscount by the Central Bank.[70]Other acceptable securities are warehouse warrants issued by legally licensed general and bonded warehouses or their equivalent securing possession of goods and required reserves held by the financial institution at the Central Bank.[71] The Decree[72]also authorised the Central Bank to guarantee loans granted by financial institutions not exceeding 20 percent of the core capital or as may be determined by he Bank's Board.[73]The Bank was also empowered to establish a Credit Guarantee Scheme, a development Fund or other scheme for developmental purposes not exceeding 10 percentum of the core capital of the Bank[74]

The above measures were aimed at tightening up the provision of credit by the Central Bank to financial institutions with a view to controlling credit and funds available to the general public through the banking system. This would obviously impact on steps to control inflation within the economy.

---

[66] *Ibid*. S. 1 (a) amending section 3 of the Bank of Uganda Act No. 5 of 1966
[67] Bank of Uganda Statute No. 5 of 1993, S 15 (1), (3)
[68] Decree No. 1 of 1986, S. 1 (c) (i)
[69] Bank of Uganda Statute, 1993, S. 30 (1) (e) (i)
[70] *Ibid* S. 30 (1) (e) (ii)
[71] *Ibid* S. 30 (1) (e) (iii), (iv)
[72] No. 1 of 1986,
[73] *Ibid* S. 1 (c) (i) read together with Bank of Uganda Statute, 1993, S. 30 (1) (g)
[74] I*bid* S. 1 (c) (iii) read together with Bank of Uganda Statute, 1993, S. 30 (6) (7)

The next legislative attempt at controlling inflation was the Currency Reform Statute[75]by which the Central Bank was authorised to withdraw the old currency notes and coins and issue a new currency unit at the rate of one shilling (new currency) to one hundred shillings (old currency)[76]In addition, a tax of 30 percent was imposed on all the old currency held by the public and financial institutions.[77]The statute which came into effect on 15 May 1987, at about the same time as the onset of the Government's Economic Recovery Programme, though not popular, effectively mopped up excess money in circulation within the economy and had an impact on inflation. Implicit in this measure was a devaluation of the currency. The Bank of Uganda has observed[78] that "-----the successive devaluations that followed the adoption of the Economic Recovery Programme in mid-1987 were instrumental in compensating for the sharp deterioration in the terms of trade that occurred in the next few years[79]"

The Bank adds:

> clearly, the repeated devaluations, in conjunction with the liberalisation of foreign exchange surrender obligations helped to improve price incentives for a wide range of non-traditional exports

The resultant devaluation of the shilling following the currency reform has been put at 77 percent[79]. However, the resultant realignment of pricing and marketing policies, which culminated into the increase of petroleum prices at about the same time with the aim of generation of revenue , led to additional inflationary pressures at a time when producer prices remained depressed in real terms.[80] These problems had to be tackled in conjunction with other policies aimed at liberalising and expanding the private sector, which we shall consider in the next part.

The next piece of legislation with an impact on monetary control was the Banking (Amendment) Statute[81] which extended the

75 No 2 of 1987

76 *Ibid* S 1

77 *Ibid* S. 3

78 Bank of Uganda, *Economic Report 1986-1991*, P. 14

79 *Ibid* p. 5

79 *Ibid* p. 5

80 *Ibid*

81 No. 10 of 1992

application of the principal Act to building Societies with the result that such societies would be treated as banks or financial institutions for purposes of that Act.[82]

At this stage it is evident that the credit controls introduced by the Bank of Uganda (Amendment) Decree, 1986 which are now embodied in the Bank of Uganda Statute, 1993 restricted Government's capacity to spend through borrowing from the Central Bank. This in turn forced reform in budgetary and fiscal policy to the extent in the case of budgetary management, of operating a monthly cash management system based on available funds.[83] The further result of this was to force Government to find alternative sources of revenue to fund its expenditure plans and replace revenue lost from the elimination of commodity marketing boards.[84] It is significant, in this respect that while in 1985 over 50 percent of government revenue collection was realised from coffee exports, this source contributed nothing in the 1993/1994 fiscal year and only 3 percent of revenue following the imposition of coffee stabilization tax in the 1994/1995 fiscal year arising from the dramatic rise in world coffee prices

It was therefore necessary to pursue the objective of improving revenue collection.

Revenue Mobilisation Policy

As part of the Economic Recovery Programme which was launched in 1987 Government embarked upon major reforms of the taxation system, with the following medium –to-long term objectives.[85] First, to increase domestic revenue. Second, to widen the tax base and to gradually lower tax rates in order to enhance equity, improve on taxpayer compliance and minimise tax evasion. Third, to increase the share of domestic consumption

82 See now Financial Institutions Statute No. 4 of 1993, S.2

83 Ellyne, *op.cit*. p. 9

84 Ibid. See also Uganda Coffee Development Statute No 4 of 1991 as amended by Statute No. 4 of 1994 and Cotton Development Statute, No. 1 of 1994 as amended by Statutes Nos 5 and 6 of 1994.

85 .. Zake, J. "Creating an Enabling Environment for the Development of small Seale Enterprises Through Tax Reform: The Case of Uganda, 1986-1993"pp. 19-20 (1993) – See also Bakibinga, op.cit pp.8-9 and Ellyne, op.cit p.9, Bank of Uganda, Economic Report 1986-1991, p.14

taxes through the introduction of value-added taxes or refined sales taxes preferably at the retail level, taking into account the level of accountability skills at the taxation point. Fourth, to minimize taxes and tariffs which inhibit export competitiveness and have a direct bearing on production or output decisions. Fifth, to limit the application of exercises to a few goods such as petroleum, alcoholic beverages and tobacco. The excises would not discriminate between imported and locally produced goods. Sixth, to simplify the system of tax administration by reducing the numbers of rate bands while at the same time allowing for flexibility in implementation of tax policy. Seventh, to use import tariff for protection purposes while the Sales Tax or Consumption tax handle would be used for revenue generating purposes. Eighth, to improve tax administration by offering attractive remuneration incentives to tax collectors, recruitment and training of personnel in order to simplify tax implementation and enhance equity, and the provision of adequate facilities for the effective collection of taxes. Finally, to avoid meaningless and uncoordinated adjustments in order to allow for a period of stabilization and forward planning.

Progress towards achieving the above objectives has been made through fiscal policies reflected in the Finance Decree, Statutes and Acts from 1986 to 1997, the Uganda Revenue Authority Statute, [86] the Value Added Tax Statute[87] and the Income Tax Act.[88] These will be briefly reviewed relative to the objectives outlined above.

Income Tax

The gradual lowering of tax rates particularly in the case of income tax was realised through the Finance legislation for the fiscal years 1986/1987 to 1993/1994. In what appeared to be a frantic effort to raise revenue following the assumption of Government by the NRM, while the Corporation tax for industry and agriculture was reduced from a rate of 50 percent to 40 percent, that in respect of commercial banks and other financial institutions as well as other enterprise outside industry and agriculture was increased from a rate of 50 percent to 60 percent.[89] This was clearly discriminatory and inequitable. Subsequently, the corporate rate was

[86] .No.6 of 1991
[87] No.8 of 1996
[88] No. 11 of 1997
[89] Minister of Finance, *Budget Speech* 23 August 1987 (Government Printer, Entebbe, 1986); Finance Statute No. 1 of 1987.

lowered from 60 percent to 45% for all tax payers including those in industry and agriculture, while the income tax threshold was raised from Shs.50,000/= to Shs 240,000/= per annum.[90] The following year the threshold was raised again from Shs.240,000/= to Shs. 480,000/= per annum and the maximum individual rate reduced further from 55 percent to 50 percent. The Corporation tax rate for all taxpayers was reduced from 45 percent to 40 percent with the objective of promotion of investment through the retention of earnings and to attract new foreign and local investment.[91] In the following year the maximum individual rate of 50 per cent was altered to apply to annual income of more than Shs. 2.62 million instead of Shs 1.2 million.[92] In the 1992/1993 fiscal year[93] the income tax threshold was raised from Shs. 480,000/= to Shs 600,000/= per annum, while the maximum individual rate was reduced from 50 per cent to 40 percent on income exceeding Shs. 3.6 million. The Corporate rate was reduced from 40 per cent to 35 percent again with view to encouraging investment. As part of the objective of widening the tax base a 2 percent withholding tax on agricultural produce was introduced to cover the areas of coffee, cotton, tea, tobacco, cereals, legumes, grains fish, hides and skins, cattle trading, timber and milk.

In the 1993/1994[94] fiscal year the income tax threshold was raised again from Shs 600,000/= to Shs 840,000/= per annum and the tax brackets reduced from four to three while the tax bands were widened. In addition, the top marginal rate for individuals was reduced from 40 per cent to 30 percent for income exceeding Shs. 4.2 million, up from 3.6 million per annum. The Corporation tax rate was reduced from 35 per cent to 30 per cent. Rental income payable to individual landlords was to be disaggregated from total income and taxed at 20 percent of gross income subject to personal income tax threshold. These rates have been maintained todate and form part of the new Income Tax Act, 1997. In the 1994/1995 fiscal year.[95] withholding tax on Commercial tax transactions was increased from two percent to four percent and was applied to a range of imports and domestic transactions. Enterprises whose tax affairs were up to date were exempted

---

90 . Minister of Finance, *Budget Speech*, 3 July; Finance Statute, 1990.
91 . Minister of Finance, *Budget Speech* 28 June 1990; Finance Statute No 3 of 1991.
92 Minister of Finance, *Budget Speech*, 2nd July 1991; Finance Statute No.4 of 1992, s.6 and First Schedule.
93 . Minister of Finance, *Budget Speech* 30 June 1992; Finance Statute No.1 of 1993.
94. Minister of Finance & Economic Planning, Budget Speech, 25 June 1993; Finance Statute No.9 of 1994.

95 . Minister of Finance & Economic Planning, Budget Speech 16 June 1994; Finance Statute No.17 of 1994

from the application of this tax. Withholding tax on interest payments to individuals was reduced from 15 per cent to 10 per cent and deduction thereof constituted a final tax. Furthermore, an incentive of 100 percent accelerated depreciation for investments outside Kampala, Entebbe, Jinja and Njeru was introduced. This subsequently been reduced to 75 per cent under the new Income Tax Act which now included Namanve as one of the areas excluded.[96] The threshold on commercial transactions for purposes of imposition of withholding tax was increased from Shs 50,000/= to Shs 1 million while the withholding rate applicable to various fees was reduced from 20 percent to four percent.

As a further measure to widen the tax base, various income tax deposits, under the regime of presumptive taxation, were raised on the ground that most of the business community did not keep books of account and the deposit rates at the time were very low in comparison to estimated business incomes.[97] The other reason given at the time was that the tax system in the country "was yet to develop the capacity to assess all tax payers expeditiously".[98] Although the system of deposits was abolished in the 1994/1995 fiscal year on the assumption that taxpayers would be reached through the Taxpayer Identification Number (TIN) system which was then introduced,[99] it has been reintroduced [1]on the basis of the earlier reasons and is restricted to non-professional business activities with gross business turnover of less than Shs 50 million.

Indirect Taxes

The trend of gradual reduction in tax rates is also discernable in the area of indirect taxes including customs duty, excise, sales tax and value added tax.

Initially, in order to stimulate local production, duty payable on all industrial raw materials was suspended, while duty on new machinery, plant and equipment was waived. In the same vein agricultural inputs, pesticides, animal drugs, agricultural tractors and hard tools were to remain free of duty and sales tax.[2] In the same light customs duty on imported sugar was raised to 225 percent and that of soap to 60 percent with a view to achieving price

---

[96] . Income Tax Act No.11 of 1997, S.29 and Sixth Schedule, Part IV
[97] . Minister of Finance, *Budget Speech* July 1, 1988; Finance Statute No.3 of 1989.
[98] . Zake, *Supra* N.85, p.22
[99] Minister of Finance and Economic Planning, *Budget Speech 16 June 1994; Finance Statute No. 17 of 1994.*
[1] Income Tax Act, 1997, S. 5(5), Second Schedule.
[2] Minister of Finance, *Budget Speech* 24 July 1987; Finance Statute 1988

parity with the local products.[3] Subsequently however, customs duties were introduced on all imported raw materials at the rate of 10 percent in order to encourage utilization of local raw materials while all zero-rated duties were raised to 10 percent with a view to raising revenue.[4] In a similar vein, sales tax was introduced on all zero-rated and exempt products and excise duty of 5 percent was introduced on plastics, mattresses, paints and exercise books.

In the 1990/1991 fiscal year[5] the tariffs rates harmonization started with the numerous customs duty rate bands being reduced to five ranging from 10 to 50 percent with all rates above 50 percent being abolished. In a similar vein, sales tax boards wee reduced to four namely 10%, 30%, 70% and 150% and were applied uniformly to both locally produced and

---

3 Minister of Finance, *Budget Speech*, July 1, 1988; Finance Statute 1989

4 *Budget Speech* 3 July 1989; Finance Statute, 1990

5 See *Budget Speech* 28 June, 1990; Finance Statute No. 3 of 1991

imported goods. Raw materials were to be taxed at he lower end of the scale while luxuries were to attract the maximum rates. Excise duties were reduced to a two-rate structure of 30% and 60% and resricted to alcoholic beverages, soft drinks, cigarettes and all soap products apart from bar soap. Surtax on imported goods similar to those produced locally and carrying excise duty was imposed at the same rate as the excise duty. Anomalously taxes of government imports were abolished. This was later reversed.[6]

In the subsequent fiscal year, [7]tariff bands for sales tax were restructured from 10% 30% 70% and 150% to 0%, 10%, 20%, 30%, 40%, 50% and 100% to provide greater flexibility in managing the Sales tax regime – The excise duty rate structure was readjusted from 30% and 60% to 30% and 50%.

Readjustment of the indirect taxes duty structures continued through the following years. In the 1992/1993 fiscal year[8] a new duty structure for excise duty was introduced thereby reforming the then existing structure to 0%, 10%, 20%,30%, 40%, 50% and 70%. The Commercial Transaction Levy (CTL) was raised from 10% to 15% with catchment areas being widened to include water utilities and civil aviation. The year also marked the abolition of export duty on coffee which had been the main stay of government revenue. Bulk petroleum products were charged at an *ad valorem* rather than specific duty rates. In the 1992/1993 fiscal year[9] customs duty at the rate of 10% was imposed on agricultural inputs including agricultural machinery and tools, but excluding fertilizers, pesticides and seeds. The customs tariff structure was reduced from six rates to four rates ranging from 0% to a maximum of 30%. All luxury goods were subjected to an import excise rate ranging from 30% to 100%. A 10% customs duty on all raw materials was reimposed with the provision that the sales tax on these raw materials for registered manufacturers would be remitted and collected after production. The sales tax structure was amended from a nine rate structure to a four rate structure ranging from 0% to a maximum of 30% in preparation for a VAT structure. The excise structure was altered to a five rate structure of 0%, 10%, 30%, 50% and 70%, with a 100% rate charged on cigarettes and alcohol.

A major reform during the same year was the introduction of the Harmonised Commodity Coding system (HS) to replace the National

---

6 *Budget Speech*, 1996

7 . Budget Speech, 2nd July, 1991; Finance Statute No.1 of 1992

8 *Budget Speech* 30 June, 1992; Finance Statute No. 1 of 1993

9 *Budget Speech*, 25 June 1993; Finance Statute No. 9 of 1994.

Customs Tariff System based or the Customs Co-operation Council Nomenclature (CCCN). In the 1994/1995 financial year[10], the HS was modified to reclassify goods into luxury, intermediate and essential categories, with the aim of harmonising tax rates on the principle that luxury and less essential goods should attract the highest tax rates. The main features of the reclassification were that raw materials imports for industry would be harmonised to a duty rate of 10%, while for inputs into key industries whose raw materials were unlikely to be produced locally, the duty would be remitted.

In line with major tariff reforms introduced in the 1997/1998 fiscal year affecting non COMESA goods[11] the maximum duty rates were reduced from 30% to 20%. Excise surcharges were reduced to 10%. In the 1998/1999 financial year there has been further reductions involving movement form a four rate duty system of 0%, 5%, 10% and 20% to a three rate regime of 0%, 7% and 15%.[12] Effectively the maximum rate was reduced form 20% to 15% while 10% rates were reclassified as either 7% or 15%. A zero duty rate has been maintained for plant and machinery imports and for other essential imports[13]

It has been noted that the country has gone along way since the early 1990s when there were import tax rates of between 100 and 200%[14]

Value Added Tax

As part of the process of widening the tax-base and increasing the revenue share of consumption taxes, the government in 1994 announced the introduction of Value Added Tax (VAT) effective from 1st July 1996, thereby replacing sales tax and commercial transactions Levy (CTL)[15] VAT, which is a consumption tax imposed at each stage of the distribution chain on the value added component of goods or services, is borne by the final consumer. It is normally charged at the importation/manufacturing, wholesale, retail and finally on the consumer.[16] Its main advantage is that it is a broad-based tax capable of raising considerable sums of revenue by comparatively small increases in tax rates and consequently consumer

10 *Budget Speech*, 16 June 1994; Finance Statute No. 17 of 1994.
11 *Budget Speech* 1997
12 *Budget Speech*, 11 June, 1998, PP 25-26; Finance Bill, 1998
13 *Budget Speech,* Ibid P. 26
14 *Ibid*.
15 Minister of Finance & Economic Planning, Budget Speech 16 June 1994; Value Added Tax Statute Nol 8 of 1996
16 Bakibinga, *Value Added Tax: Introduction, Rationale and the Law In Uganda* (Professional Books Publishers, Kampala, 1996), PP. 1-2

prices. The revenue also rises automatically with inflation and with growth in consumer expenditure and enables government to transfer some of the burden from income to consumer expenditure, thereby encouraging savings.[17] Furthermore, it is a neutral tax and does not depend on a variety of tax rates and reliefs as is the case with income tax, nor does it discriminate between imports and domestic supplies or between different sectors and levels of trade as had been the case with sales tax ad excise duty. Cascading of taxes or imposing taxes upon taxes as was the case with sales tax and CTL is avoided. Since the VAT is borne by the final consumer, investment in industry and development of exports are encouraged because business inputs including capital goods are relieved from that VAT and it is fully rebated on exports.[18]

The introduction of VAT has also provided an opportunity to introduce modern and efficient tax administration mechanisms with spillover effects in the administration of other taxes. This is achieved through the existence of an invoice or paper trail, which provides the mandatory record of a registered trader's transaction from which to prepare a tax return. Since the collection of VAT is spread throughout the entire production and distribution chain, this spreads the tax risk and also ensures that the tax lost any stage of the distribution process can be recovered at a subsequent stage.[19]

A major disadvantage of the VAT are costs involved in record keeping, auditing thereof and filing returns which are required on a monthly basis with Uganda Revenue Authority[20]. This has been addressed by raising the threshold of business turnover required for registration for VAT filing purposes from Shs 20 million originally to Shs 50 million annually.[21] The effect of this is to eliminate small businesses from the administration of VAT. However, they may opt for voluntary registration in order to enable them to claim refund of VAT paid on supplies of goods or services to them.[22]

The introduction of VAT effectively introduced a uniform tax rate of 17% which replaced the rates then prevailing under the sales tax regime and CTL.[23]

---

17 *Ibid.* P. 4.

18 VAT Statute, S 20, 48; Second Schedule

19 Bakibinga, *Supra n.* 16, P. 5

20 Vat Statute, 1996, S. 32 read together with S. 2 (definition of tax period)

21 *Ibid* S. 8(2) as amended.

22 *Ibid* Ss 8(4), 9(2), 48

23 Statutory Instrument No. 1996 made under section 82(2) of VAT Statute See also Finance (No. 2) Act, 1996, S. 13 (1)

Although the introduction of VAT was initially beset by conceptual problems on the part of traders in its first year of implementation, it appears to have settled down in the second year, when the revenue target was exceeded.[24]

Stamp Duty

The trend of lowering tax rates also affected stamp duty which after being raised from 1% to 3% in 1992[25] was restored to 1% the following year. [26]Efforts to reduce it further to 0.5% in 1996 did not materialise.[27]

Tax Administration

Following a study which had been completed the previous year, the Uganda Revenue Authority (URA) was set up in September 1991.[28]Its purpose was to improve tax administration generally and to provide sufficient autonomy with a view of enhancing revenue collection.[29]It replaced the defunct revenue departments in the then Ministry of Finance. Its existence was intended to address issues of poor tax administration, incentives to tax collectors, availability of equipment and logistics, low compliance by tax payers, control systems including the use of banks for revenue collection, inadequate quantity and quality of manpower. It was further intended to move away from the bureaucratic civil service culture of work and disciplinary procedures with a view to checking inefficiency and corruption among staff. Relative to this, it was envisaged that an attractive remuneration package for staff would discourage corruption among staff. Additionally, through relative autonomy, the URA was expected to have some control over its resources and budget as well as being able to hire and fire staff independent of the shackles of the civil service rules.[30]

Tax administration was further enhanced by the introduction of the system of Tax payer Identification Number (TIN) as a means of identifying

---

24 Press Release Issued by URA, July 1988

25 Finance Statute No. 1 of 1993

26 *Ibid* No. 9 of 1994

27 Finance Bill No. 8 of 1996, S. 6

28 Uganda Revenue Authority Statute No. 6 of 1991

29 Bakibinga, "Reform of Tax Measures and Its Effect in Uganda, 1986-1994 "Paper Delivered to Makerere Economics Society, 2nd December, 1994, pp 13-14; Ellyne, *op.cit*. p.9; Bank of Uganda, *Economic Report*, *1986-1991, P - 14*

30 See generally Coopers & Lybrand, *Government of Uganda Planning for a Revenue Authority for Uganda* (1991) paras 206, 208 and IMF, *Uganda Possibilities for Tax Reform: Aide Memoire (*1991)

taxpayers through importation, licensing and employment transactions. This would form the basis for a comprehensive taxpayer base and also assist in revenue collection.[31]

A system of payment of taxes in installments was also introduced as a means of easing the process of tax collection.[32]Furthermore despite some false starts,[33] a Tax Appeals Tribunal has finally been set up to handle tax payers complaints and grievances arising from assessment to tax.[34]

Efforts to combat smuggling have also been pursued initially through the Anti Smuggling Unit and now the Revenue Protection service. However, smuggling continues to affect revenue collection largely because of price differentials of items such as petroleum, alcohol and cigarettes existing between Uganda and her neighbours.[35]

Tax Exemptions[35a]

Government has tightened up on exemptions to the extent that they have been abolished with respect to government and its parastatals and limited with regard to private bodies, particularly NGOs.[36] Previously this constituted a big drain on revenue. It is notable in this regard, that while section 22 of the Income Tax Act 1997 exempts payments of alimony, pensions, premiums on life insurance policies and contributions from retirement funds from taxation, section 23(2) disallows such payments on the part of the payer from being deduced from income for purposes of assessment to Income tax. Tax foregone in the 1997/1998 fiscal year amounted to Shs 122.7 million compared to a budgeted provision of Shs 500 million.

Effects of Fiscal Policies

The fiscal policies pursued by Government since 1986 have considerably increased revenue collection over the years. Revenue collections rose from Shs 185.4 billion in the 1991/1992 fiscal year to Shs 291 billion (1992/1993), Shs 388.5 billion (1993/1994), Shs 531.2 billion

---

31 Finance Statute No. 9 of 1994; Budget Speech, 25 June, 1993; See also Value Added Tax Statute No. 8 of 1996, S. 55; Income Tax Statute, No. 11 of 1997, S. 136

32 *Budget Speech*, 25 June, 1994; Finance Statute No. 17 of 1994

33 *Budget Speech*, 25 June 1993, Finance Statute No. 17 of 1994, Ss 34-37

34 Tax Appeals Tribunals Act No. 12 of 1997

35 Budget Speech, 11 June 1998, paragraphs 70 and 91

35a World Bank , *The Challenge of Growth & Poverty Reduction in Uganda* (1996), pp 8-9.

36 Finance Stature No. 9 of 1994, S. 40 (1) and Second Schedule; Finance Statute No. 17 of 1994; Income Tax Act No. 11 of 1997, Ss 22, 23(2); VAT Statute 1996, S 50; First Schedule

(1994/1995), Shs 646.04 billion (1995/1996).[37] In the 1996/1997 fiscal year collections rose to Shs 738.1 billion,[38] while in 1997/1998 financial year they had risen to Shs 785 billion.[39] In terms of revenue to GDP ratio revenue performance rose from 4% in 1986 to 7-8% in 1993 and 9.6% in 1994.[40]Subsequently this rose to 11.6% in 1996/1997 but fell to 11.3% in 1997/1998.[41] The revenue to GDP ratio however remains low compared to countries with rather similar circumstances such as Kenya where it is 26%, Tanzania, 14% Malawi 17% , Ghana 19% and Mozambique and Zambia at about 20%.[42]

The increase in revenue is attributable to fiscal policies of improving tax administration, widening the tax base through the introduction of consumption taxes and lowering tax rates which in turn enhances tax compliance, as well as curbing exemptions. As we shall see in the next part, increased investment and liberalisation of trade practices may also have contributed enhanced revenue through indirect taxes on imports and services.

At this point we may note that the recent promulgation of the Income Tax Act 1997 which has introduced world wide taxation,[43] a limited form of capital gains tax,[44]reintroduced presumptive taxation for non-professional businesses with a gross turnover of less than Shs 50 m per annum[45]and curbed tax exemptions[46] was a reaction towards the complete abolition of tariffs in international trade as proposed by the World Trade Organisation. This would reduce trade taxes which in 1997 stood at about 40% of collections with income tax and VAT contributing 13% and 28% respectively.[47]Hence the need to emphasize income tax and the consumption taxes.[48]

2. *LIBERALISATION AND EXPANSION OF THE PRIVATE SECTOR*

37 Bank of Uganda, *Annual Report*, 1995/1996, pp 12-13

38 Bank of Uganda, *Quarterly Economic Report April-June 1997*, pp 9-10

39 Minister of Finance, Planning & Economic Development, *Budget Speech*, 11 June, 1998, p. 21

40 Budget Speech, *Quarterly Economic Report April- June 1997*, pp 9-10

41 *Budget Speech,* 11 June 1998, Para 69, P. 21.

42 *Budget Speech*, *Ibid* para 73, p. 22

43 Income Tax Act, No. 11 of 1997, S 18(2) read together with S. 80.

44 *Ibid* Ss 19 (1) (a), 50-55

45 *Ibid.* S. 5(5), Second Schedule

46 *Ibid*. Ss 22, 23(2)

47 Bank of Uganda, *Quarterly Economic Report*, April to June 1997, P. 33

48 Letter: Commissioner, Tax Policy, Ministry of Finance & Economic Planning to Commissioner-General, URA 8 November 1994, Quoted in Bakibinga, "Reform of Tax Measures and Its Effects in Uganda" (1994) *Op.cit*. p. 28. See also World Bank Uganda; *The Challenge of Growth and Poverty Reduction* (Washington, 1996) Executive Summary, pp xiii, xv, 7

(a) ***Produce Marketing***

It has been observed[49] that reforms in the area of liberalizing markets are at the heart of structural adjustment and that economic theory shows that resource allocation is best left to market forces while appropriate pricing advances market efficiency. The consequence of this is that barriers to commerce and investment need to be removed. The maintenance of free markets dictates that government should not be involved in commercial sector activities, which should be left to the private sector.

It is in the light of this theory that legislation on liberalisation of commodity marketing, encouragement of investment both local and foreign and privatisation was promulgated.

In the area of commodity marketing liberalisation, the most significant legislation are the Uganda Coffee Development Statute 1991, the Cotton Development Statute 1994 with its amendments and the Agricultural Seeds and Plant Statute, 1993.

The Uganda Coffee Development Authority Statute[50](UCDA) effectively removed the monopoly of buying and marketing coffee from the Coffee Marketing Board. The role of the UCDA was reduced to[51] promoting, improving, and monitoring the marketing of coffee in order to optimise foreign exchange earnings and payments to farmers; controlling the quality of coffee to ensure its marketability in accordance with contract stipulations between the seller and buyer; controlling and monitoring the coffee price to ensure that it is not below the minimum price; developing and promoting the coffee and other related industries through research and extension arrangements; promoting the marketing of coffee as a final product and promoting domestic consumption. UCDA's role is, therefore, promotional and regulatory. Its functions[52] are largely those of informational with respect to terms of contracts of sale of coffee, quality, statistics, coffee prices; liaison with the International Coffee Organisation and other organisations; supervision of the coffee subsector; organisation of training for technicians, coffee processors and quality controllers; registry of bodies wishing to market coffee and certification of grade and quantity of coffee.[53]

---

[49] Ellyne, *Op-cit* P. 10

[50] No.4 of 1991 repealing the Coffee Marketing Act No. 40 of 1969. Amended by Statute No. 5 of 1994

[51] *Ibid* S. 4

[52] *Ibid* S. 5

[53] Uganda Coffee Development Authority (Amendment) Statute No. 5 of 1994, S

A related development was the suspension of the application of the Coffee Export Duty Act,[54]thereby effectively abolishing export duty on coffee.[55]A limited Coffee Stabilization tax was imposed in the 1994/1995 fiscal year. Its aim was to mop up excess liquidity arising from the coffee boom.

The effects of these legislative changes were that about 100 coffee exporters were licensed and coffee farmers received prompt payment and a much higher percentage of the export price irrespective of international market prices[56]It is also sugested[57]that the liberalization of the coffee sector not only saved that industry but was probably the single greatest contribution to the reduction of rural poverty. The developments coincided with a rise in coffee prices on the world market otherwise known as the "coffee boom", with earnings rising from Shs 111.3 billion in the 1992/93 fiscal year to Shs 456.73 billion in the 1994/1995 fiscal year.[58]

Similar to the UCDA, the Cotton Development Organisation which was set up under the Cotton Development Statute,[59]was restricted to promoting and monitoring production of cotton and representing all aspects of the cotton industry.[60] Its functions are largely the same as those of UCDA.[61]This effectively removed the monopoly of buying and marketing cotton form the Lint marketing Board.[62]

A similar statute to the ones relating to cotton and coffee, the Agricultural Seeds and Plant Statute[63] was passed. It set up a National Seed Industry Authority with the objectives of: formulating and advising Government on national seed policy; establishing a system of implementing seed policies through established technical committees; constantly reviewing the national seed supply and advising Government on the administration of the seed industry and co-ordinating and monitoring the public and private seed sector in order to achieve the national Seed Programme Objectives.[64] The role of the Authority is, therefore largely advisory, regulatory and co-ordinating. It is not involved in buying or marketing seeds.

---

54 Cap 181 (Laws of Uganda 1964 Edn)
55 Finance Statute No. 1 of 1993, S. 11
56 Ellyne, *op.cit* p. 11 and P. 23 n. 11
57 *Ibid*
58 Bank of Uganda *Annual Reports* for 1993/1994, 1994/1995 and 1995/1996.
59 No. 1 of 1994 as amended by statute No. 6 of 1994
60 *Ibid* S. 6
61 *Ibid*. S. 7 See also note 52 52 above and text thereof.
62 *Ibid* S. 34 repealing the Lint Marketing Board Act and the Cotton Act.

64 No. 10 of 1994.

There was a drop in exports of cotton in the two years following the dissolution of the Lint Marketing Board, but these began to pick up in the 1995/1996 fiscal year.[65]

(b) ***Investment***

In addition to fiscal, monetary and market liberalisation policies, the Government in 1991 embarked upon a vigorous drive to encourage foreign and local investment. Admittedly, this strategy had started way back in 1982 with the passage of the Expropriated Properties Act, 1982 whose objective was to return to Asians property which had been expropriated from them during the Amin Military Administration.[66]The departure of the Asians who were the commercial backbone of the economy adversely affected the investment climate in Uganda. This resulted into a decline in production as measured by constant GDP, by 13 percent between 1971 and 1986 which has been described as "an amazing contraction"[67]By 1995, however, the Government had returned over 3,000 properties to Asian owners, "thereby lending credibility to its commitment to foreign investors"[68]

It is against this background that the Investment Code of 1991 is analysed particularly with regard to incentives offered to investors. The main objective of the code is to facilitate more favourable conditions for investment for both local and foreign investors. The types of investment highlighted by the Code include manufacturing, tourism, commercial and agricultural ventures.[69] The Uganda Investment Authority which is charged with implementing Code has representatives from the Uganda Manufacturing Association (UMA) and the Uganda National Chamber of Commerce and Industry.[70]

The Code provides[71]for exemption from import duties and sales tax payable on any plant and machinery not available in Uganda imported for the purposes of making a new investment, provided that the plant and machinery is not more than 5 years old. To qualify for incentives,[72] the

---

65 Bank of Uganda, *Annual Report 1995/1996*, P. 16 See also Annual Reports for 1993/1994 and 1994/1995.

66 Assets of Departed Asians Decree No. 27 of 1973, Ss 4,7, 13.

67 Collier, P & Pradhan, S. "Economic Aspects of the Transition from Civil War" in Hansen, H.B. & Twaddle M. (Ed) *Developing Uganda* (Fountain, Kampala 1998) pp 19-21.

68 Ellyne, *Op.cit*, p. 12

69 Investment Code, 1991, S. 14 and Second Schedule

70 *Ibid* S. (2) (e), (f)

71 *Ibid* S. 22

72 *Ibid* Ss 13, 23

investors should either be export-oriented, engaged in resource-based import substitution or service activities, utilizes local raw materials, supplies and services, creates employment opportunities in Uganda, introduces advanced technology or upgrade indigenous technology or contributes to locally or regionally balanced socio-economic development. Originally the code required that in the case of a foreign investor one had to make a capital investment of or equivalent to capital goods worth at least US $ 500,000 while a Ugandan investor's investment had to be at least US $ 50,000. However, presently, it would appear that a foreign investor need only provide proof of availability of US $ 100,000.[73]

Upon fulfillment of the investment requirements, a certificate of incentives is issued to the investor by the Uganda Investment Authority.[74]The Code originally provided for direct taxes exemption to the holder of an incentive certificate for periods ranging from three years (where the investment was worth between US $ 50,000 and US 300,000) to five/six years for an investment in excess of US $ 300,000.[75]The holder of the incentive certificate was also entitled to first arrival privileges for a foreign investor and his expatriate staff entitling them to import duty and sales tax duty free, motor vehicle for personal use and personal effects.[76]Finally was entitlement to drawback on duties and sales tax payable on import inputs used in producing goods for export.[77]

The investment tax incentive regime had been criticised variously as contradicting the country's drive to widen the tax base and increase revenue.[78] Indeed in the 1992/1993 fiscal year, revenue loss arising from the investment tax exemptions[79]was estimated at 120 percent of total revenue raised from import duties and sales taxes on non-oil imports. The largest revenue losses came from foreign NGOs exemptions (41%) donor -–funded government projects (33%) and industry (22%). Revenue loss as a percentage of total public revenue raised was 36.% Clearly this was untenable.

As we have already seen, there has been a trend towards rationalising tax rates in order to make them equitable. With this development, a lopsided investment incentive regime laying emphasis on tax exemptions is no longer

73 Private Enterprise Support, Training & Organisational Development Centre (PRESTO), *Doing Business In Uganda: A practical Guide* (April 1998) p. 12

74 Investment Code, S. 24

75 *Ibid.* S. 25 now repealed by Income Tax Act, 1997,

76 *Ibid* S.26

77 *Ibid* S. 27

78 Bakibinga, "Reform of Tax Measures and Its Effect in Uganda 1986-1994" *Op-cit*. P. 25

79 See World Bank, *Uganda: The Challenge of Growth & Poverty Reduction* (1996), P. 8, Para 1-16.

required. Consequently, the direct tax exemption under the Code has been removed and replaced[80]with a generous depreciation regime which applies to machinery, industrial buildings, initial start-up costs and investment or initial allowance.

The question arises as to whether the investment drive through the Investment Code has yielded the desired results. Four years after the passage of the Code, the Uganda Investment Authority had issued 1200 investment licenses which indicated a potential investment of US $ 107 billion. However, due to the long lead time in realizing investment in Uganda only about US $ 400 million of the potential, had been realized in January 1995.[81]At about the same time, the World Bank[82] noted that most of the post-1991 investment had gone into the manufacturing sector which accounted for more than 70 percent on the ground investment. Most of the manufactures were largely import substitutes while 40% was agro-based.. The overall picture in 1991-1994 did not show investment directed toward export-oriented activities. Only 8 percent of the output of he firms surveryed[83]was exported in 1995 mainly to regional markets when compared to 7 percent in 1991.

The World Bank recommended more private investment in machinery and equipment as a means of stimulating growth. It concedes though[84]that reform of the regulatory and incentive environment has made Uganda more attractive to investors than many other African countries despite suffering from lack of skilled workers and management capacity. In the 1995/1996 fiscal year, total investment licensed between July 1991 and December, 1995 amounted to US $ 2.56 billion of which manufacturing constituted 30.8 percent [84a]

(C) *Privatisation of Public Enterprises*

Similar to the liberalization of markets and pricing policies, is recognition of the need to remove the monopoly positions of public enterprises which had led to abuses and corruption similar to those in marketing boards.[85] In this regard, privatisation of public enterprises is seen

---

80 Income Tax Act 1997 Ss 27-31, 33, 34, 37. See also Uganda Investment Authority, *Guide to Investing In Uganda* (March 1998), P-6.

81 Ellyne, *Op. Cit*. P. 12

82 *Uganda: The Challenge of Growth & Poverty Reduction* (1996) pp.xv, 30-31.

83 World Bank & UMA (1995)

84 World Bank *op.cit* (1996) pp 31-32

84a Bank of Uganda, *Annual Report, 1995/1996,* P. 22

85 Ellyne *op.cit*. p. 11

as part of the process of economic structural adjustment policy aimed at making the economy efficient.[86]

Public enterprises had been set up in Uganda as a means of providing goods and services, to control the pivotal aspects of the economy and also spearhead industrial development which the indigeneous private sector was not equipped to do owing to lack of capital.[87]Others, particularly marketing boards in the agricultural sector had been set up before independence to implement the imperial government's "monopoly in purchasing and marketing those crops (such as cotton and coffee) in order to curb competition from other powers such as the United States and Japan"[88]

It is now acknowledged that as policy instruments, the public enterprises have failed to achieve the objectives for which they were created of spearheading development through industrialization and commercial activities.[89]This has been due to political interference, lack of clearly defined objectives, lack of managerial skills and corruption.[90]Additionally, public enterprises have been a drain on the public treasury in terms of underwriting their losses or subsidizing their activities. In 1994 alone Government spent Shs 208 billion on such enterprises.[91]For this reason, it is felt in monetary circles that Government should privatise public enterprises involved in "commercial" business in order to enable her concentrate on non-commercial services such as education, health, infrastructure and other social services.[92]

The above considerations led Government to embark upon the policy of privatisation which is embodied in the Public Enterprises Reform and Divestiture Statute.[93] Privatisation is defined as[94] "the transfer of proprietary interest in a public enterprise from the state and include where necessary the winding-up or dissolution of that enterprise"[95] The main objectives of divestiture under the PERD statute are two. First, the reduction of

---

86 Ellyne *Ibid*. See also Tukahebwa, G.B. "Privatisation as a Development Policy" in Hansen, H.B. & Twaddle, M. *Developing Uganda* (1998) pp 60, 62.

87 Tukahebwa, Ibid P. 59. See also Suruma, "Privatisation & Democracy" Paper Delivered under the auspices of the Uganda Economics Association Kampala 25 February 1993.

88 Tukahebwa *Ibid.*

89 *Ibid* P. 60

90 *Ibid* P. 68 See also Abeywickrama, K. "Privatisation in Developing countries" New Vision 5 & 12 Sept 1993.

91 Privatisation Unit Publication, *Outlook* Vol 1 P. 1 (1995, cited in Bakibinga "Has Privatisation Run Amok?" *Uganda Law Focus* (LDC Kampala) Vol 1 No. 1 P. 90 (1998)

92 Ellyne, Op.cit p. 11

93 No. 9 of 1993 (hereinafter referred to as "PERD statute")

94 *Ibid.* S. 2

95 *Ibid* S. 2

Government equity holding in the public enterprises thereby relieving it of the financial drain on its resources and the burden of their administration and raising revenue by means of divestiture, including, where necessary, liquidation or dissolution of public enterprises and by the promotion, development and strengthening of the private sector. Second, privatisation is designed for the promotion of institutional arrangements, policies and procedures for:

- (i) ensuring the efficient and successful management, financial accounting and budgetary discipline of public enterprises;
- (ii) ensuring the separation of ownership and management functions;
- (iii) enabling Government to play its proper role more effectively as owner of public enterprises;
- (iv) enforcing accountability.

Divestiture is also aimed at the rehabilitation and restructuring, where appropriate, of public enterprises; and the promotion of local entrepreneurship. The policy objectives, therefore, envisage total and partial divestiture by Government from public enterprises as well as restructuring thereof and the promotion of efficiency and local entrepreneurship.[96]

The main objections to privatisation are firstly that public enterprises are national property which should not be disposed of and that the proceeds of such disposal do not justify the resultant economic disenfrachisement of public property.[97] Second, it is argued that the privatisation process has been lopsided favouring foreigners.[98] Third that the nation's assets are being disposed of cheaply and that there has been no accounting for the proceeds of privatisation.[99]Fourth that the process is not transparent and subject to political interference.[1] There is also the criticism, which may be premature, that privatisation has so far not achieved its avowed goal of developing private entrepreneurship with the result that middle-level entrepreneurs who lack large amounts of capital will remain sidelined as the remaining public enterprises are taken over by multinational corporations. In this regard it is said that the divestiture policy in Uganda has ignored the broadening of

96 See also Bakibinga, *Uganda Law Focus* (1998) P. 91

97 *Ibid*

98 *Ibid* p. 93 See also Tukahebwa, Op. Cit. , p. 67.

99 *The East African Newspaper*, Issue No. 99, September 23-29, 1996, pp. 1-2 cited in Bakibinga *Supra* P. 95. Tukahebwa *Ibid*. P. 64 giving examples of undervaluation of enterprises.

1 Tukahebwa, *op. cit*. P. 71. See also *New Vision Newspaper*, 6 August 1998 on the controversy surrounding the divestitures of Sheraton Hotel and Uganda Commercial Bank.

ownership which is one method of promoting local private entrepreneurship.[2]

On this issue, Uganda may have to learn from the Zambian and Nigerian examples. In contrast to the PERD statute, the Zambian privatisation law lays emphasis on the distribution of ownership among a wide spectrum of the population. For this purpose the Zambian Law provides for the setting up of a Privatisation. Trust Fund which holds shares on behalf of Zambian investors until they are able to buy them.[3].The Zambian legislation also limits foreign participation to those areas where it is necessary to develop the export market or where the nature of the business requires global linkages and international exposure, or where foreign investment or technology is required to expand the capacity of operations.[4] There is no such explicit limitation in the PERD Statute, where the emphasis appears to be on divestiture to the highest bidder. In Nigeria there is restriction of how much equity in a public enterprise under divestiture an individual or individual group may purchase.[5]Additionally, Nigeria has implemented its divestiture through the Stock Market. This approach has the effect of broadening ownership of the divested public enterprises and avoiding majority shareholdings by foreigners.

The above shortcomings in the Uganda divestiture process point to constraints which the Privatisation Unit in the Ministry of Finance and Economic Development has itself identified.[6] First, is the slow evolution of a capital market mechanism to facilitate the process. While the law governing the Capital Markets Authority has been enacted, the Kampala Stock Exchange is yet to fully take-off. Second, the bidding process has attracted speculative bidders who have presented high bids but have been unable to meet their commitments.[7] This has resulted into a lengthening of the divestiture process necessitating renegotiation and readvertisement. This in turn explains two other problems.[8] First the asset stripping and financial

---

2 Tukahebwa, *Ibid* p. 71

3 UNIDO, *Private Sector Development and Privatisation in Developing countries: Trends, Policies and Prospects Report* (Vienna 1993) cited in Tukahebwa Ibid. p. 66

4 UNIDO, *Ibid*

5 *Ibid.*

6 *Statutory Report to NRC for the Period Ending 31 December, 1995*, pp. 9-10

7 The most recent examples relate to the divestiture of Sheraton Hotel and Uganda Commercial Bank. Even where divestiture has taken place, the new owners have not fully paid up: See *New Vision* Newspaper 6 August, 1998.

8 Bakibinga, *Uganda Law Focus op. cit.* , P. 94

looting by those in control of enterprises slated for divestiture and the delay in the payment of redundancy dues. Second, the undervaluation of enterprise assets presumably in an effort to speed up the divestiture process as presumably happened with the Nile Hotel Complex and has been the source of controversy over the divestiture of Coffee Marketing Board Limited.

The issue of broadening ownership of public enterprises has manifested itself in legal proceedings by minority shareholders of he divested enterprises against Government on the grounds that their interests have not been considered.[9]

The above constraints, notwithstanding, it is evident that the divestiture process has been systematically implemented in accordance with the PERD Statute. In this regard, the Privatisation Unit has taken into account serious business plans by investors, capacity to assume existing liabilities of the enterprise and to pay retrenchment packages to employees as well as ensuring local and indigenous participation. This has resulted in the rehabilitation and functional efficiency of divested enterprises[10] such as Tororo Cement Company, Hima Cement Ltd in Kasese, Crown Beverages, Nile Breweries, Kakira Sugar Works, Jinja, Steel Corporation of East Africa, TUMPECO, Rwenzori Highlands Tea Company, Lira Hotel and the Uganda Commercial Bank not to mention petroleum companies. This has in turn increased production and generated additional indirect taxes revenue for government in the form of sales tax and value added tax, generated employment both within the enterprises and indirectly through the distributive process of products particularly beverages such as beer, soda, sugar and tea.

Concerning the allegation that the divestiture process has favoured foreigners as at September 1996, out of 42 enterprises privatized then, 25 (or 60%) had been bought by Ugandans[11]The speeding up of the take off of the stock market would address the broadening of ownership through acquisition of shares in the public enterprises by members of the public. The need to involve the public through funding facilitation, along the lines of the Zambian Law on Divestiture, still requires attention. There is also the alternative option of placing more emphasis on monitoring the performance of public enterprises rather than ownership structures.[12]

---

9 *Ibid* p. 95 Examples of such suits is the one by shareholders of the former Lake Victoria Bottling Company (now renamed Crown Beverages) and those of Imperial Hotels

10 Bakibinga *Ibid* pp. 96-97. See also Bank of Uganda, *Annual Report* 1995/1996, p. 22

11 Privtisation Unit, *Outlook* (September, 1996)

12 Bardhan, P. "The State and the Market" in Ofstad, A. and Wiig, A. (Eds) *Development Theory: Recent Trends* (Bergen, 1993) cited in Tukahebwa *op.cit*. , p. 71

The ultimate success of the divestiture process will be measured by its impact on the reduction in poverty, unemployment and inequality.[13] A process, which marginalises the majority of the people and has no direct bearing on real development of the people, cannot be said to be developmental. Nevertheless, it should be conceded that the privatisation process has contributed to the growth of the economy. The Bank of Uganda has observed in this respect:

> Growth in manufacturing reached a record high of 18. 1 percent, the highest in 20 years. This sector has benefited most from the privatisation of public enterprises, which gained momentum during the financial year (1995/1996)[14]

Overall growth of GDP at factor cost grew[15] at the rates of 8.4% in 1992/1993, 5.3% in 1993/1994, 10.6% in 1994/1995, 8.5% in 1995/1996, 5% in 1996/1997 and 5.5% in 1997/1998. Growth in the manufacturing sector remained strong and in the 1997/1998 fiscal year increased by 13 percent[16]

(d) ***Capital Market***

As has been observed above, one factor which has affected transparent and equitable divestiture of public enterprises is the absence of a functioning capital market. This problem has been tackled in legislative terms by the promulgation of the Capital Markets Authority Statute.[17] The statute establishes a Capital Markets Authority (CMA) charged with the promotion and facilitation of an orderly, fair and efficient capital markets industry in Uganda. It also provides for stock exchanges, stockbrokers and other person's dealings in securities and offences relating to trading in securities and ancillary matters. In particular, the CMA is charged with the development of all aspects of the capital markets with particular emphasis on

---

13 Adopting Seers D's definition of "development" See Seers, D. "What are We Trying to measure?" in Baster, N. (Ed) *Measuring Development: The Role and Adequacy of Development Indicators* (London, 1984) Cited in Tukahebwa *Ibid*, pp. 61,71

14 Bank of Uganda, *Annual Report, 1995/1996*, p. 22.

15 *Ibid. P*. 23. See also Bank of Uganda, *Quarterly Economic Report*, April to June, 1997, P. 26; Bank of Uganda, *State of the Economy* (September 1997) p.3; Minister of Finance, *Budget Speech*, 1998, Para 4, P. 3.

16 *Budget Speech*, 1998, para 4

17 No. 1 of 1996.

the removal of impediments to, and creation of incentives for longer-term investments in productive enterprise. It is also empowered to create, maintain and regulate, through a system in which the market participants are self-regulatory in the maximum practicable extent of a market in which securities can be issued in an orderly, fair and efficient manner.

It is obvious that the CMA statute is another device by Government to encourage foreign investment. For this purpose, the CMA is enjoined to: protect investors' interests; create a compensation fund; maintain surveillance over securities to ensure orderly, fair and equitable dealings in securities; register, license, authorise or regulate stock exchanges, investment advisers, registrars, securities brokers or dealers and their agents and control and supervise their activities with a view to maintaining proper standards of conduct and professionalism in the securities business; formulate principles for the guidance of the securities industry; monitor the solvency of license holders and take measures to protect the interest of customers where the solvency of any license holder is in doubt; protect the integrity of securities and market against any abuses arising from the practice of insider dealing; adopt measures to minimize and supervise any conflict of interest that may arise for brokers or dealers; perform the functions conferred on it by section 43 of the Companies Act relating to the issue of a prospectus or invitation to the public to take up shares in a company.

The term securities refers to shares and debentures issued by a company. A share is the interest of a member or shareholder in a company measured by a sum of money for purpose of liability and interest. It entitles the holder to share in the profits of the company relative to the proportion of shareholding and the right to vote at the company's general meeting.[18] A debenture is[19]a document acknowledging the indebtedness of a company which is normally, but not necessarily secured by a charge over property. The capital market is therefore a forum for trading in a company's shares or debentures.

The recent controversy relating to the divestiture of the Uganda Commercial Bank, where there had been allegations of impropriety on the part of the Westmont Company and Greenland Bank would have been avoided if the process of divestiture had been conducted through a stock exchange. Through the stock exchange it would be easy to verify the profile of bidders in terms of their history and financial capacity. The rules relating to offers to purchase shares on the stock exchange including the stringent

---

[18] Bakibinga, *Company Law In Uganda* (1993 Professional Books Publishers, Kampala) P. 109.

[19] *Ibid* p. 158.

requirements about insider dealing would come into play. Conduct through the stock exchange would also have avoided problems encountered with the divestiture of Sheraton Hotel and Nile Hotel complex.

Critical to capital market transactions is the regulation of inside dealing. This basically means that an insider (which expression normally refers to directors, shareholders and employees of the company) who is in possession of price sensitive information affecting the value of shares makes use of such information to make a profit is under a duty to pay over that profit to the company. The concept of insider dealing has undermined the traditional company law concept that directors owe their duties to the company and to no one else. The effect of this is that directors may owe duties in the context of insider dealing to shareholders, creditors and even employees of the company who may enforce that duty.[20]Another aspect of the capital market is the regulation of conflict of interest transactions in which brokers or dealers on the stock exchange may be involved in. The traditional company law approach is to require such persons to disclose their interest in transactions in which they are involved.[21]

It is heartening to note that Greenland Investment Company which has been at the centre of controversy surrounding the divestitures of Uganda Grain Milling company and Uganda Commercial Bank is moving towards getting listed on the Stock Exchange.[22]

Related to the principle of disclosure affecting corporate transactions is the need for a credible company's registry from which information about a company including its directors, shareholders and financial profile can be accessed. Presently, the companies registry is in a pathetic state in terms of record keeping and ability to monitor activities of the company.[23]It is hoped that this would be rectified through the promulgation of the Registration Services Bureau Act, 1997 which is aimed at computerization of the registry and decentralization thereof.

The proposed setting up of the Institute of Corporate Governance in East Africa which is geared towards accountability and transparency in corporate transactions would also enhance corporate governance through strict monitoring of corporate disclosure by companies which would enhance

---

20 *Ibid* chapter 14, pp. 253, 260-268

21 *Ibid.* pp. 293-309. See also Bakibinga, "Director's Duty to Avoid Conflict of Duty to the Company and his interests" *Gravitas Review of Business & Property Law* (Lagos, Nigeria) Vol 3, No. 14 pp. 63-71 (1990)

22

23 Paper Delivered by the Registrar-General at the Commonwealth Regional Workshop on Corpoarate Governance held at Nile Hotel Complex, Kampala 15-17 June 1998.

efficiency of such entities and also provide reliable information to investors wishing to deal with those companies.[24]

Another crucial aspect to corporate governance is the strengthening of the accounting professional body in terms of standards and qualifications of its members. The Accountants Statute, 1992 established the Institute of Certified Public Accountants of Uganda with the principal objectives of regulating and maintaining the standard of accountancy in Uganda and to prescribe or regulate the conduct of accountants. This entails prescription of courses and qualifications for accountants, licensing accountants, promotion of internationally accepted accounting and related standards regulating the conduct and ethical standards as well as the discipline of members and maintaining a register of members.

Prior to the promulgation of the Accountants Statute, there was uncertainty and confusion as to which persons qualified as accountants and consequently whose accounting records and returns were acceptable. This obviously affected the credibility of financial records filed by companies and other business entities, not to mention financial institutions. This trend also had an effect on revenue collection in terms of reconciliation of taxable income.

(e) Co-operative Societies

Another avenue for the liberalization and expansion of the private sector is through the medium of co-operative societies. Co-operative societies are regulated by the Co-operative Societies Statute.[25] Normally a co-operative society should have as its object the promotion of the economic and social interests of its members in accordance with the co-operative principles.[25a] Essentially a co-operative society can contribute to the economic and social development of a country by increasing production, improving supply and marketing channels and mobilizing human resources pursuant to governmental policy.[26] As at July 1997,[27]there were about 6,000 registered co-operative societies, sixty percent of which were formed for agricultural

24 Bakibinga, *Report on Workshop on Corporate Governance Ibid* submitted to the Dean, Faculty of Law, Makerere University 21 July 1998. See also Goode, R. *Commercial Law in the Next Millenium* (Sweet & Maxwell, London, 1998), pp. 48-49

25 No. 8 of 1991

25a *Ibid* S. 2

26 Reid & Priest, *Draft Report on Reform of Co-operative Societies Statute* (July 23, 1997) p. 1.

27 *Ibid*. See also Kabuga C & Batarinyebwa, P. K. (Ed) *Co-operatives: Past, Present and Future* (UAC, 1995 Kampala) pp 88-90, 138

marketing particularly of coffee and cotton. Many of those registered are defunct.

The Co-operative Societies Statute, though a relatively recent piece of legislation requires reform to bring it line with the current economic liberalisation policy of Government. In particular sections 30 and 32 thereof which restrict co-operatives to activities involving agricultural produce should be broadened to apply to any commodity or article produced by the work and industry of the society's members.[28] This would enable various sectors of the economy to utilize the co-operative structure. In practice, though, the Uganda Co-operative Alliance envisages Co-operation in other areas including banking, insurance, trade, savings and credit, transport and housing.[29]

Others areas which require review include[30] the role of the Registrar of Co-operative Societies, simplification of registration of the societies, conditions of registration, simplification of auditing and record keeping requirements, limitation on imposition of financial burdens on co-operatives, updating penalty provisions, strengthening control of managers, limiting the personal liability of members and protecting innocent third parties who deal with the co-operative in certain transactions.

(i) *Registrar's Role*

It is proposed that rather than the Registrar being charged with providing and administering the services required by societies for their formation, organisation, registration operation and advancement"[31]the Registrar's role should be restricted to registration, receipt of annual returns, dispute resolution, liquidation and deregistration. Similarly the Registrar's discretion to register a society[32] should be removed and his power restricted to certain objective requirements such as number of qualified members organised for a legitimate purpose. Where registration is refused based on the objective criteria, the Registrar should specify in writing the reason for a decision.[33] This would also to apply to a Registrar's decision to refuse to register an amendment to a society's bye-laws.[34] Additionally, the registrar's power to

---

28 See e.g Zimbabwe Co-operative Societies Act, S. 29.

29 Kabuga, C. Batarinyebwa, P.K (Ed) *Co-operatives, Past, Present and Future* (UAC, Kampala, 1995) Part III, Chapters 12 to 18

30 *Reid & Priest, Op. cit*. Pp. 3-19

31 Co-operative Societies Statute 1991, S 1(2)

32 *Ibid* S. 2

33 See *Ibid* S. 3

34 See *Ibid* S. 8(3)

order amendment to bye-laws[35] should be limited to situations where the existing by-laws are illegal and the order should be supported by written reasons.

(ii) Appeals Against the Registrar's Decision

The statute should clearly specify the procedure for appealing a Registrar's decision.

(iii) Membership

The restriction on shareholding to 33% of the paid-up share-capital of the co-operative[36]should be removed in order to enable the co-operative to raise operating capital without limitation. Similarly, a co-operative should be able to determine who should join it. Accordingly the restriction on membership by companies and other unincorporated bodies[37]should be removed. This principle also applies to the existing restriction on membership of a person of more than one registered society having the same or similar objects.[38]This should be left to the co-operative to determine. The restriction on transfer of shares or interest to other members of the society[39] should also be removed in the spirit of attracting new members and allowing existing members to leave the society.

Section 37 which sets out the procedure for the transfer of interests of a deceased member of a society requires amendment to allow co-operatives to determine the procedure of transfer through bye-laws.

Furthermore, the requirement that the Registrar approves amalgamation of societies and their division[40] should be removed or limited to specified situations under the statute. Where the Registrar disapproves, this should be clearly indicated in writing with reasons.

(iv) *Financial Aspects*

The requirement that the Registrar approves investment of funds by a co-operative[41] should be removed and a society be permitted to

---

35 *Ibid* S. 8 (6), (7)
36 *Ibid* S. 13
37 *Ibid* S. 14
38 *Ibid* S. 16
39 *Ibid* S. 18 (2)
40 *Ibid* Ss 24, 26
41 *Ibid* S. 44

determine its investment. Similarly, the restriction on capital expenditure after approval of estimates by the Registrar[42] should eliminated.

Prohibition of co-operatives from making or receiving loans, issuing dividends or bonus payment, dealing with non-members without the approval of the Registrar[43]should be removed and societies be given autonomy in these matters.

The Co-operative Societies Statute requires annual audits of the society by an auditor approved by the Registrar.[44]Given the different levels of development of co-operative societies, it has been proposed that societies should be permitted to use any accountant who is a member of a recognised accounting body. In addition, with village level co-operatives formal certification for auditors can be dispensed with. The restriction on an auditor performing only 3 annual audits should also be dispensed with in addition to the subjective requirements of an auditor's assessment of whether the business of the society has been efficiently run and conducted in accordance with co-operative principles.[45]

It is also provided that the elected officials of a society which fails to conduct an audit in accordance with the statute shall be deemed to have relinquished their office and thereafter the Registrar is required to convene a special meeting to elect a new committee.[46]While this provision has been praised in co-operative circles for ensuring the maintenance of financial records and their audit with accountability rising to over 80 percent in 1992.[47]It is felt[48]that such a provision is unduly harsh for societies which may initially lack experience with auditing requirements and that the Registrar should not be involved in a society's election of a new committee. The sanction for non-compliance with auditing requirements should be the imposition of a fine upon the committee members.

Section 23(1) requires registered societies to prepare an annual estimate of the society's income and expenditures for the succeeding 12 months and forward it to the Registrar for an opinion prior to submission to the general meeting. It is felt[49] that since estimates are educated guesses without clear benefit to members, co-operative societies should be allowed

---

42 *Ibid* S. 23 (1)
43 *Ibid* Ss 41, 42, 43, 45
44 *Ibid* S. 21 (1)

45 *Ibid* S. 21(1) (a), (2), (5)
46 *Ibid* S. 21(7)
47 Kabuga; C "Co-operative Law Reform In Uganda" in Kabuga, C & Batarinyebwa (Ed), *op. cit*., P. 132
48 Reid & Priest, *Op. cit* P. 13
49 *Ibid* P. 14

to opt out of this requirement. In any case there is no such requirement for companies. The role of the Registrar in an essentially business matter should also be curtailed.

Section 46 requires societies, which realise a surplus to maintain a reserve fund with contributions of ¼ of the net surplus for each year. They should also establish with the Registrar's approval a contributory provident fund to provide for pensions of permanent employees upon retirement. Since there is no similar requirement for companies, this requirement should be removed in order to reduce co-operative societies' financial burden. Similarly, the requirement under section 48 that each co-operative society contributes 1% of its annual turn over to a National Co-operative Education Fund with half retained by the primary society and the rest being sent to the secondary society, should be removed as imposing additional financial burden on the society. In a similar vein the Audit and supervision Fund to be administered by the Registrar to whom all societies contribute a supervision fee under the co-operative Societies Regulations should be abolished and the cost of the Registrar's office borne by public financing. Such a fee is an additional financial burden on co-operative societies.

Section 22 which deals with qualifications of auditors requires amendment to ensure that the qualification requirements for auditors of co-operatives are consistent with similar requirements under the Companies Act.

(vi) ***Registration***

It is necessary to simplify the process of registration of co-operatives in view of their potential for empowering ordinary people economically. Presently the Co-operative Societies Statute provides for[50] a 4-tier society structure consisting of primary societies which comprise at least 30 persons; secondary societies consisting of at least 2 registered primary societies as members; tertiary societies which consist of at least 2 registered secondary societies as members and apex societies which consist of at least 2 secondary societies. It has been suggested[51] that the law be amended to enable tertiary societies to admit other secondary and tertiary societies as members and that the definition of an apex[52] society be altered to refer to a "registered co-operative, established to facilitate the operations of all

[50] Co-operative Societies Statute 1991, S. 3
[51] Reid & Priest *Op-cit*. P. 10
[52] Co-operative Societies Statute, S. 83

primary secondary and tertiary co-operatives" This would increase flexibility and autonomy among co-operatives.

With regard to the number required to form a co-operative, although in co-operative circles[53] the increase from 10 to 30 was welcomed as curbing "brief case" societies leading to clearance of the co-operative societies register of dubious societies, in line with the liberalization of economic activity policy, it is recommended[54] that the number be reduced from 30. This would also be in line with trends in other jurisdictions.[55]

Additionally, the information required in an application for registration should be specific and the Registrar should not be given discretion to require additional information. There is also need to shorten the Registration Forms, while the concept of probationary status for a society[56]should be abolished with the result that a society is granted permanent status once it satisfies the registration requirements.

On the issue of qualification for membership of a Co-operative society, the requirement that a member should be "resident within or occupation of land within the society's area of operation as prescribed by the relevant bye-law" should be modified to allow a person of majority age and a citizen of, or ordinarily resident, in Uganda to become a member.[58] Section 12(2) which allows membership of minor needs to be recast in view of contractual requirements affecting minors.

(iv) Control of Co-operative Managers

As already pointed, there is a perceived problem of corruption amongst co-operative management which has the potential for hindering co-operative development in Uganda.[59]While, in co-operative circles it is thought[60] that the current statute has addressed the problem, more regulation of management along the lines of provisions in the Companies Act[61] is desirable. In this vein, it is suggested[62] that in order to protect members and curb the powers of managers of societies, bankrupts should be barred from office; co-operative officers banned from obtaining compensation for loss of office; managers required to disclose any personal or family interests in

53 Kabuga C & Batarinyebwa (Ed) *op.cit* p. 132
54 Reid & Priest, *op.cit.* pp 10-11
55 Zimbabwe Co-operative Societies Act, S. 12 requires only 10 members while in U.K. it has been proposed that a minimum of 2 members suffices.
56 Co-operative Societies Statute 1991, S. 5(1)
58 See also Zimbabwe Co-operative Societies Act, S. 38
59 Reid & Priest, *op.cit* p. 16; See also Kabuga, C. & Baturinyebwa, P:K. (Ed) pp. 102-103.
60 Kabuga, C. & Batarinyebwa, P.K. (Ed), 102
61 Cap 85 (Laws of Uganda 1964 Edn)
62 Reid & Priest, *op. cit* pp. 16-17

constracts with the co-operative and managers' service contracts should be available for inspection by all members.

A relatively detailed review of the Co-operative Societies Act has been undertaken given the crucial role co-operatives can play in the economic development of the country. It is significant that the current law was passed at about the same time as other legislative attempts were being made to liberalise the production and marketing of coffee[63] and cotton[64]and generally encourage investment.[65] As already pointed out, co-operatives have been historically associated with the production and marketing of coffee and cotton.[66]The liberalisation in those areas required accompanying liberalisation in the structures for handling those activities particularly the co-operatives. However, as has been seen, the Co-operative Societies Statute requires further amendment to reduce the role of the Registrar, enhance the autonomy of co-operatives, open societies up to more participation, protect the financial integrity of societies as well as controlling their managers. It is felt that these measures would improve societies as a medium for efficient production and marketing and subsequently as contributors to economic growth. Since they are closely associated with rural and agricultural economic activity, they would in turn accelerate the monetization of the economy and widening of the government revenue base in addition to poverty alleviation and general social development of the people. These tasks are more significant when viewed against the background of decentralization of governmental participation.[67]

3. FINANCIAL INSTITUTIONAL DISCIPLINE

(a) Reform of the Financial and Banking System

As part of the economic liberalisation of the economy, "the development of a stronger, more efficient and more diversified financial

63 Uganda Coffee Development Authority Statute No. 4 of 1991
64 Cotton Development Statute No. 1 of 1994
65 Investment Code Statute No. 1 of 1991.
66 Kabuga, C.D & Batarinyebwa, P.K. (Ed) pp. 78-80
67 See Local Government Act No. 1 of 1997

sector is an integral part of the structural adjustment programme"[68]Financial institutional adjustment is premised on five aspects.[69]First, a strong and stable banking and financial system is a prerequisite for growth and stability of the overall economy. Second is the importance of reform of the banking and financial system. Third, while the development of the capital markets is important, this should be accompanied by the reform and adaptation of the commercial banking system. Fourth, the successful reform of the commercial banking system should be accompanied by reform in the central banking system. Such reform should be geared towards taking he central bank out of the business of directly financing government deficits and providing mechanisms through the central bank for increasing or decreasing liquidity in the economy *without* allocating credit for specific purposes or functions. In other words the central bank's role should be supervisory rather than operational. Finally, the reform of the banking sector should aim at building confidence, an aspect which is critical at a time when banking and financial institutions are being privatised.

The relevance of the banking and financial system in a market economy hinges on its critical function of mobilizing "a society's savings and rigorously and impartially channeling those savings in the most efficient and effective uses or ivnestments"[70]Related to this is that the financial and banking system should provide the mechanism through which payments for goods and services can be made quickly, efficiently and safely in a context in which both the seller and buyer of such goods and services have confidence that such instruments used to make such payments will be honoured and accepted by all parties to that transaction and subsequent transactions. Without such confidence the system cannot work.[71] This confidence in turn depends on two main factors.[72] First, there should be a class of financial institutions and financial instruments which the public views as safe and convenient outlets for its savings, where at least some fraction of those savings are highly liquid and can be used to make payments. Second any institution which provides the public with access to financial instruments having those characteristics must invest the public savings carefully and prudently in a way which promotes economic

68 Kikonyogo, C.N. (Governor of Bank of Uganda), Introductory Remarks to Bakstansy, P. "The Role of the Central Bank and the Importance of A strong and stable Financial System" (Sixth Joseph Mubiru Memorial Lecture 25 August, 1993 Bank of Uganda) pp. 2-3.

69 *Ibid* pp. 7-8

70 *Ibid* p. 9

71 *Ibid* pp. 9-10

72 *Ibid* p. 11

efficiency and growth. The dominant institution which presently plays the role of repository of the society's savings and the medium for effecting payments is the commercial bank. Even where capital markets are highly developed as in developed economies participants in such markets rely very heavily on the banking system for their financing facilities.

Commercial banking, however, carries with it the risk of loss of confidence known as the "systematic risk phenomenon" which can affect the financial system as a whole [73] and in turn cause damage to the real economy[74] It is because of this risk phenomenon that there is general agreement that banking and financial institutions must be regulated. Hence the role of the central bank is helping to preserve and enhance the stability of the banking and financial system in order to prevent the undermining of economic performance. The central bank plays three major roles. First the formulation of monetary policy. Second, broad oversight of the financial system and thirdly the oversight of and direct participation in the operation of payment systems.[75]

How then has Uganda gone about reform of the banking and financial sector? The most recent attempts at reform in this context started with the promulgation of the Financial Institutions Statute[76]and the Bank of Uganda Statute.[77]A brief review of this legislation is undertaken against the background of the perceived role and functions of banking and financial institutions.

The Financial Institutions Statute, 1993 broadly provides the procedures for applying for a banking licence, criteria for the Central Bank to consider granting or refusing a licence application and conditions under which the Central Bank may revoke a licence.[78]Second, the statute establishes minimum capital requirements[79]and on-going capital adequacy requirements[80] and authorises the Central Bank to prescribe maximum working balances that financial institutions may hold in foreign currencies.[81]Third, the statute outlines certain prohibited or restricted activities of financial institutions in the areas of credits, investments and

---

73 *Ibid* ; See also Goode, R. *Commercial Law In the Next Millenium* (Sweet & Maxwell 1998) pp. 46-47

74 This has happened recently in countries in the Far East such as South Korea and Indonesia.

75 Bakstansky, *op.cit* p. 13

76 No. 4 of 1993

77 No. 5 of 1993

78 Financial Institutions Statute, 1993, Part II

79 *Ibid* S. 12, 14

80 *Ibid.* S. 13

81 *Ibid* S. 17

dividends.[82]Fourth, the statute provides for the supervision of financial institutions by establishing auditing and record-keeping requirements and information that must be provided to the Central Bank.[83]It also empowers the Central Bank to inspect financial institutions and impose sanction[84] Fifth, the law regulates the liquidation, seizure and reorganisation of financial institutions and authorises the Central Bank to seize banks under certain circumstances and to act as receiver in the liquidation of a financial institution.[85] Sixth, the law creates a Deposit Protection Fund to be maintained by contributions from licensed financial institutions, and permits the Central Bank to make loans or other accommodations it deems desirable to reduce or avert a loss to the Fund.[86]Finanally the law addresses miscellaneous matters such as branches, mergers, restriction on transfer of shares in financial institutions, disqualification of banking officers, bank holdings and related matters[87]

The close supervision of banking and financial institutions inherent in the Financial institutions statute is in line with the notion that in view of "risk-taking and the need to maintain public confidence in the banking system, banking in all countries is subjected to a higher degree of official oversight and regulation than is the case for most other forms of private enterprise"[88] This explains provisions of the statute on: inspection and examination of financial institutions, protection against loss on the part of depositors and investors in the form of the requirement for a deposit protection fund maintained by the Central Bank and linked to an emergency liquidity facility and official regulation of, or participation in, the workings of the payments system evident in restrictions on credit.

While a relatively recent piece of legislation, the Financial Institutions Statute requires, nevertheless, review in certain respects.[89]First there is need to protect the identity of depositors, the integrity of financial information provided and the right to financial privacy, which could be reflected in a provision to that effect. Second, the definition of "banking business" in section 2 of the statute requires enlargement to include authority to deal in foreign exchange; issue letters of credit; administer funds, invest in securities and other properties and exercise fiduciary powers. This would

82 *Ibid* ss 18-20
83 *Ibid*_ ss 21-27
84 *Ibid* ss 28-29
85 *Ibid* ss. 30-33
86 *Ibid* ss 34-38
87 *Ibid* Part VIII
88 Bakstansky, *op. cit*. P. 17
89 Reid & Priest, *Draft Report on Financial Institutions Statute* submitted to Uganda Law Reform Commission(23 July, 1997) pp. 2-11

reconcile the statute with powers given under the Uganda Commercial Bank Act.[90] Third, with regard to section 7 relating to an application for a licence, there should be provision for a right by the applicant to be heard and a procedure for review of the Minister's decision following appeal from a decision of the Central Bank as well as a right to appeal the Minister's decision in the Commercial Division of the High court. A similar procedure for review and appeal should apply to the Central Bank's imposition of additional conditions for granting a licence under Section 7(5). Fourth, in the spirit of encouraging foreign investment, the minimum capital requirement for both local and foreign persons or financial institutions under section 12 should be made uniform. Similarly, the capital adequacy requirements under section 13 may need to be revised upwards. Fifth, section 35(5) which allows the Central Bank to terminate the protection of the Deposit Protection Fund for depositors of institutions which the Central Bank believes is conducting business in a manner detrimental to its own interests and those of its depositors, should be deleted as it exposes depositors in that institution to loss without recourse to the Central Bank. Sixth, Sections 2 and 5 should be amended to authorise the Central Bank to grant limited licences to non-citizen banks to operate a limited wholesale bank branch or agency to engage in large scale international transactions. Seventh, under section 35 the Central Bank should establish objective standards for determining required contributions to the Deposit Protection Fund. The same approach is desirable in establishing initial and annual licensing fees for financial institutions under section 8. This could be in a statutory instrument issued by Bank of Uganda. Finally, the statute needs to address or make reference to other legislation dealing with bank fund transfers, cheque collection rules and procedures, negotiable instruments and letters of credit.[91]

In practical terms, the Financial Institutions Statute has been invoked to rescue ailing banks such as Sembule Investment Bank (now Allied Bank) and Nile Bank both of which have reverted to private control following a period of direct intervention by the Central Bank.

The reform of financial institutions was accompanied shortly afterwards by similar reform of the Central Bank itself. Thus, the Bank of Uganda Statute 1993. The statute, which repealed the Bank of Uganda Act, 1966, re-establishes Bank of Uganda as the Central Bank for Uganda and provides for its powers and functions.[92]It also provides for a Board,

---

90 S. 3 (1)

91 See Bills of Exchange Act Cap 76. For proposed reforms to the Act see Reid & Priest, *Draft Report on Bills of Exchange Act* submitted to Uganda Law Reform Commission 23 July 1997

92 Bank of Uganda Statute, 1993, Ss 3, 5 and 6, 54

remuneration and conditions of service of directors[93] as well as principal officers and staff of the bank.[94] The Statute further stipulates the capital and reserve fund for the bank, the mode of distribution of its profits, the unit of currency and its handling by the bank in terms of determination of value, auctioning of foreign currency, issue of notes and coins, their status as legal tender, replacement of lost or imperfect notes and exemption from stamp duty in respect of currency issued.[95] There are also provisions on credit and other banking operations of the bank, publication of rediscount rates and maintenance of external reserve equal to at least 4 weeks import requirements of the country.[96] The statute further regulates the relationship between the Central Bank and Government including advising the government, rendering services, formulating monetary policy, making temporary advances to Government, participation in development financing including the management of loans and grants for development projects through Commercial Banks.[97] The Statute further regulates the relationship between the Central Bank and financial institutions [98] including: provision of facilities of a clearing house to those institutions; ensuring the provision of adequate and reasonable banking services for the public; ensuring the maintenance by the institutions of minimum cash reserve balances; control of credit, interest rates and charges imposed by financial institutions; request by statutory instrument the provision by the institutions of all information required by the Bank under the law and use the institutions as its agents with regard to the issue and withdrawal of currency. In addition, the statute provides for accounts and statements to be submitted by the bank to the Minister of Finance on a quarterly basis relating to its assets and liabilities.[99] Finally are miscellaneous provisions relating to secrecy by the Bank's Board, officers and employees, exemption from tax, prohibition of financial institutions from use of certain words in their names, directives to the bank by the Minister, preparation of annual reports, bye-laws of the bank relating to its operations, offences against the statute as well as regulations issued by the Minister.

---

93 *Ibid* Ss 8-14
94 *Ibid* Ss 28-29
95 *Ibid* Ss 15-27
96 *Ibid* Ss 30-32
97 *Ibid* Ss 33-36
98 *Ibid* Ss 37-42
99 *Ibid* Ss. 43-45

Banking experts' stress[1] that as formulator of monetary policy, the Central Bank should not directly finance the budgetary deficits of governments. This has been partly achieved by section 34(3) of the statute, which limits temporary advances, by the Bank to the Government to 18 percent of the recurrent revenue of the Government. In any case the Treasury is required to submit to the Bank at the beginning of each financial year all its requirements for temporary advances for the year.[2]. The Bank is also obliged to charge interest on any advance to the Government or local government subject to the discretion of the Board and to report excess drawings of advances to the Minister[3]

Banking circles also argue[4] that the central bank should not be responsible for the direct financing of other types of enterprise since it runs the risk of its balance sheet being weighed down with low quality assets which would adversely affect confidence in its financial integrity. The Bank of Uganda Statute achieves this by requiring that the central bank's involvement in development financing be conducted through commercial banks,[5] the only exception being in relation to the administration of its credit Guarantee scheme or Development Finance Fund established under the statute.[6]

To enable the Central Bank to manage the weaknesses in the banking system and improve financial discipline, further restructuring and recapitalisation was advocated.[7] This process which began during the 1994/1995 fiscal year[8] is authorised by the Bank of Uganda Statute sections 15 and 16, which raised the authorised capital of the bank to Shs 30 billion to be subscribed by Government and also provided for a minimum issued and paid up capital of the Bank of Shs 20 billion. The statute also provides for a general reserve fund from which transfers can be made to the capital of the Bank.

There have also been calls for central bank independence in order to enhance its role of formulating monetary policy and professional

---

1 Bakstansky, op.cit. p 18; Fry J.M. "The Fiscal Abuse of Banks" (International Monetary Fund, 1991); Fry, J.M. "Can a Central Bank Go Burst?" in *Papers in Money Macro economics and Finance* (Manchester School 1991) pp. 85-98

2 Bank of Uganda Statute, 1993, S. 34 (2)

3 *Ibid* Ss. 34(4), 35

4 Bakstansky, op.cit p. 18; *Central Banking* Vol III/1 (1992), P.20

5 Bank of Uganda Statute, 1993, S. 36.

6 *Ibid* S. 36(2) read together with S. 30(6)

7 World Bank (IBRD), Uganda: *The Challenge of Growth and Poverty Reduction* (1996) p. 13

8 Bank of Uganda, *Annual Report* 1994/1995, P. 35; *Annual Report* 1995/1996, P.27

objectivity.[9]This is in part catered for by section 49 of the Bank of Uganda Statute, 1993 which subjects ministerial directions to the Bank relating to financial and economic policy of the Bank to consultation with the Governor prior to issuance thereof. Additionally, if after such consultation, the Minister disagrees with the Governor of the Bank, he can only issue directives to the Bank following the approval thereof by cabinet. Furthermore, such directive should be submitted to Parliament within 15 sitting days following its issuance.

It is evident that efforts have been made to revamp the financial and banking system in this country. However, bearing in mind that the central bank is the major holder of the government debt, such responsibility should be accompanied by orderly efforts to provide liquidity to the whole economy through open market operations or other suitable medium.[10] Hitherto, the Bank has used the device of issuing treasury bills in order to finance the Government deficit. However, this method is thought to be inappropriate since the resultant interest paid on redemption of such bills amounts to an additional fiscal burden.[11] The obvious alternative which has been tried elsewhere is the development of a market for government securities, including a viable secondary market for such securities.[12]If such a market exists, it is perceived as capable of serving three critical purposes.[13]First, it provides a more market-oriented method of financing budget deficits. Second, it facilitates a more effective approach to monetary policy, thereby strengthening the balance sheet of the Central Bank. Third, it provides the foundation upon which other elements of the capital market can be developed. It is heartening to note that the Government is taking seriously the development of the capital market as shown by the promulgation of the Capital Markets Authority Statute, 1996.

(b) *Control of Insolvency*

A main characteristic of the banking sector has been high credit losses resulting into about 50% of the banking system's loans being non-performing. The failure of borrowers to repay their loans in turn forces up the interest cost on the good paying customers.[14]

---

9 Bakstansky, *op. cit*. P. 16; Semakula-Kiwanuka; M.M. *Central Banking In Africa and the Challenge of Development* Fifth Joseph Mubiru Memorial Lecture (Bank of Uganda, 15 December 1992) pp. 31-33

10 Bakstansky, *Ibid*, p. 19

11 IBRD, *The Challenge of Growth and Poverty Reduction*, *op.cit*., p. 12

12 See now the Capital Markets Authority Statute No. 1 of 1996

13 Bakstansky, *op.cit* p. 19. See also Ellyne, *op. cit* p. 18

14 Ellyne *Ibid*. p. 17

The changes introduced by the Financial Institutions and Bank of Uganda Statutes will in part address this problem by restricting credit and advances to deserving persons. However, much more critical is the need to weed out of the financial system persons who are likely to become insolvent or are not financially stable. This requires stringent enforcement of the laws governing insolvency. A brief review of the bankruptcy legal regime is undertaken.

Laws to regulate insolvency and ancillary aspects of the debtor-creditor relationship have been developed in commercial societies for a variety of reasons.[15]First, if a troubled company can be re-organised and its business rescued, the aim is to preserve jobs, pay creditors, produce a return for its owners and obtain for the country the benefits of the productivity and enterprise of its citizens and investors. Second, where the company is non-viable as a going concern, it has to be liquidated. However, in doing so, the creditors should be paid using a proper yardstick of priority while an honest debtor should be relieved form oppressive indebtedness arising from business misfortune and allowed to start a fresh. The law should, in the Ugandan context, strike a balance between the governmental objective of changing a debt avoidance mentality to a culture of debt payment and treating deserving cases of insolvency fairly. In this respect, it should be recalled that the rampant non-performing portfolio of loans mainly associated with government-owned banks such as the Co-operative Bank, Uganda Commercial Bank and Uganda Development Bank arose from loans being advanced to borrowers on political rather than credit-worthy grounds. This takes us back to the banking principle that the decision to advance credit should be objectively made by banking professionals based on sound banking practice and considerations.[16]

The legal provisions regulating the relationship between debtors and creditors are to be found in three Acts: the Bankruptcy Act,[17]the Deeds of Arrangement Act[18] and the Companies Act.[19] Both the Bankruptcy Act and the Deeds of Arrangement Act are reproductions of English legislation made in 1914. The Companies Act is largely a reenactment of the British Companies Act of 1948 with local variations.

---

15 Reid & Priest, *Draft Report on Bankruptcy Act and Deeds of Arrangement Act* submitted to Uganda Law Reform Commission (23 July 1997) P. 1

16 Bakstansky, *op.cit* p. 15

17 Cap 71 Laws of Uganda 1964 Edn

18 Cap 72 *Ibid*

19 Cap 85 *Ibid*

The Bankruptcy Act regulates bankruptcy proceedings generally following a petition, filed in court, for bankruptcy based on specified bankruptcy acts. The Deeds of Arrangement Act provides a procedural framework for debtors and their creditors and administration of composition agreements by which a creditor may accept less payment than the amount of his/her claim to be distributed rateably in discharge and satisfaction of the whole. This procedure falls outside bankruptcy proceeding composition agreements, and in order to be valid, must comply with the provisions of the Act relating to registration and administration.

The Companies Act contains general provisions applicable to the winding up of companies. The provisions comprise one-third of that law[20]and relate specifically to insolvent companies.

The bankruptcy legal provisions require modernization to take into account current commercial trends and realities as well as developments in other jurisdictions.

In the first place, the provisions governing bankruptcy should all be consolidated in one law as has happened in Britain, for easy reference and amendment from time to time. This means that the winding up provisions in the Companies Act would be transferred to the bankruptcy legislation. Second, there is need to develop comprehensive reorganisation and restructuring provisions within the bankruptcy law. The aim would be to avoid total liquidation of an entity, encourage efficient operation of the entity with a view to paying off creditors, thereby avoiding the disruption, which could affect both the creditors, employees and other interested parties in the event of liquidation. The existing provisions in the Companies Act on reorganisation and reconstruction of companies contemplate liquidation as the end result.[22]Reform of this tendency may be based on legislation in the United States[23]and United Kingdom,[24] which provide detailed guidance on many aspects of reorganisation of a company. This would include: contents of the scheme of arrangement and its written description; the classification of different kinds of creditor claims in a scheme; the treatment of different claims in the scheme; the solicitation of creditors for votes accepting the scheme; the circumstances (if any) under which classes of creditors need not vote to accept the scheme but may still be bound by it and the likelihood that the company will have the financial ability to make payments required and

---

20 Companies Ac*t Ibid*, Part VI, Ss 212-348

22 Companies Act, Cap 85, Ss 207, 304

23 Bankruptcy Code, Chapter 11

24 Insolvency Act, 1986

perform its obligations, under the scheme. Additionally, it is suggested[25] that any creditor should have a right to file a re-organisation proposal and that such proposal or voluntary arrangement require the approval of at least 2/3 of the affected class (by value). Such proposal or arrangement should treat all members of a particular class equally. The main objection to such recommendations is that they may prove too costly to administer.

Thirdly, should be introduced involuntary proceedings with a view to expediting debt collection from debtors.[26]In this respect the acts of bankruptcy hitherto in existence[27]should be replaced with the requirement that a person who is unable to pay its debts as they become due is subject to an involuntary petition. This approach would, in future, prevent the need for a non-performing assets trust as created under the Non-Performing Assets Recovery Trust Statute 1994. In other words debts would be recovered as and when they become due for payment.

Fourth, it is proposed that statutory provisions such as section 207 of the Companies Act relating to arrangements and reconstructions, which have never been used, should be removed from the Act. Fifth, there is need to establish qualifications and a code of conduct for liquidators and other insolvency practitioners in order to prevent abuses by such persons which have been rampant in Uganda. It is proposed that such persons should be members of a recognised accounting or legal body or be approved by the relevant authority. Furthermore, insolvency practitioners who have been disqualified on account of abuses or illegal activities should be suspended for a minimum of five years unless cause be shown otherwise.

Sixth, section 29 of the Bankruptcy Act which provides for discharge from bankruptcy should be modified to allow a first time applicant to be discharged after a stipulated period, say six years[28] if there is no objection from the trustee in bankruptcy or any creditor. Such a provision should also indicate exceptions where discharge is not possible.[29]

Seventh, the penalty provisions which are now meaningless with values of between Shs 100 and 1,000/=[30] should be updated to take account of current currency values using the currency point method recently introduced in legislation.

---

[25] Reid & Priest, *op. cit*. P. 4

[26] See e.g U.S Bankruptcy Code, S. 303

[27] Bankruptcy Act Cap 71 (Uganda), S. 3

[28] See e.g Bankruptcy Code, S. 727(a) (8) (U.S)

[29] See e.g *Ibid*, S 523

[30] See e.g Bankruptcy Act Cap 71 (Uganda) Ss 26(1) (c) and 42(1) (b); Companies Act, Cap. 85 (Uganda), S 223.

Finally, in order to expedite the handling of bankruptcy matters, a Bankruptcy court under the Commercial Division of the High Court should be set up.

It remains to note that as a means of dealing with non-performing loan portfolios and in readiness for the privatization of the Uganda Commercial Bank (UCB) the Non-Performing Assets Recovery Trust Statute (NPART) was passed in 1994. The statute established a trust with a view to the expeditious recovery of certain loans and investments made by UCB whose recovery is overdue. The Trust is empowered to hold on behalf of he Government any non-performing asset of the UCB which has been transferred to it under section 11 of the Statute. It is also authorised to take such action as may be necessary to recover all outstanding amounts in respect of all transferred non-performing assets and to establish and manage a sinking fund into which is deposited all recoveries from the non-performing assets redemption of bonds. The Trust is further authorised to examine the circumstances leading to default in making good the debt owing to loans received under the Rural Farmers Scheme and recommend and take corrective measures so that the farmers' loans scheme can be revived for their benefit.

It is evident that the NPART statute is a fire fighting measure, which would not have arisen, had credit been advanced by UCB following professional banking practice and loans administered and monitored on a regular basis with appropriate recovery measures being invoked. The resultant non-performance of loans, has, as we noted, created a burden for other borrowers in terms of high interest rates. This has in turn created a chicken and egg scenario in that high interest rates has made it difficult for borrowers to repay loans. Cautious advance of credit coupled with a stringent recovery approach and invocation of the bankruptcy legal provisions would have prevented the escalation of non-performing loans.

The need to prudently administer credit is all the more urgent when it is realized that commercial banks' outstanding loans and advances rose from Shs 140.9 billion in 1993 to 319.6 billion in 1996[31]climbing further to 344.9 billion in 1997.[32]About 20% of these loans had been advanced to the agricultural sector with 17.87% thereof non-performing. About 80% had been advanced to the trading and manufacturing sectors. These appeared to be largely performing.[33]

---

31 Bank of Uganda, *Annual Report 1995/1996* Appendices 19-22

32 Bank of Uganda, *Quarterly Economic Report* April-June 1997, Appendices 20-22.

33 Bank of Uganda, *Annual report 1995/1996*, Appendix 21

(b) Insurance

The drive towards financial institutional discipline has been extended to insurance companies by the Insurance Statute.[34] That statute repealed the Insurance Decree of 1978 and removed the supervision of insurance companies from the Bank of Uganda.[35] The statute arose from concern about the inability of insurance companies to meet insurance undertakings under policy contracts and the need to control the practice of insurance by restricting it to persons who are financially sound.

The statute applies to all insurance and insurance companies,[36] restricts the use of the words, "insurance", "assurance" and "reinsurance" to persons licensed as insurers under the statute[37] and requires insurance business to be conducted by registered companies, statutory insurance corporation, a registered co-operative insurance society or a mutual insurance company.[38]

In terms of financial solvency, the Insurance Statute raised the minimum capital requirement for insurance companies from Shs 2 million to Shs 200 million in the case of life or non insurance business and to Shs 500 million in the case of reinsurance business for local companies.[39] Foreign companies should in those cases have a minimum of Shs 1 billion and Shs 2.5 billion respectively.[40] Such capital may be invested in assets in Uganda as may be approved by the Bank of Uganda or held in the form ordinary shares with uniform value.[41] There is also provision that 5 percent of the profits made annually should be transferred to the paid up capital of the insurer before payment of dividend and after provision for taxation.[42] The minimum capital requirement or security deposits requirements may be amended by the Minister of finance following recommendation from the Insurance Commission[43] established under the Statute.[44]

---

34 No. 7 of 1996
35 *Ibid* Ss 99(1), 101
36 *Ibid* S. 1(2)
37 *Ibid* S. 3(1)
38 *Ibid* S. 4
39 *Ibid* S. 6(1)
40 *Ibid* S. 6 (2)

41 *Ibid* S. 6(3)
42 *Ibid* S 6(5)
43 *Ibid* S 6(6)

The statute also requires every insurer to establish and maintain at the Central Bank a security deposit of 10 percent of the prescribed paid up capital of the company and this forms part of the assets in respect of the insurer's capital.[45]Such deposits may be invested by the Central Bank in short term investments approved by it and any income accruing from the deposits is payable to the insurer[46]The security deposit is made available to the insurer to cover losses from liability on claims which cannot be met from available resources and to discharge liabilities on policies upon the closure or winding-up of the insurance business[47]

The statute further regulates the formation of mutual insurance companies which are exempted from the minimum capital and security deposit requirements[48] and provides for the registration by the Insurance Commission of the directors, senior executives and technical personnel of the insurer.[49]

The Insurance Statute has led to better control of insurance through the Insurance Commission (which effectively took off in 1997) and which is able to supervise the insurance industry much more effectively than under the previous arrangement through a Commissioner attached to the Public Service.[50] Furthermore following the expiration of the two year of grace period for complying with minimum capital requirements and security deposits,[51]the Commission was able to license 18 insurance companies of which 3 cater for both Non-Life and Life Insurance while the rest handle non-life insurance only. Nine companies are yet to be relicensed pending their satisfaction of the statutory requirements.[52]The statute has also led to more order with the majority of companies being able to honour claims under the insurance policies. It has also led to strengthening of the Insurer's Association and Association of Insurance Brokers, both of which are represented on the Commission[53]and which have welcomed the new law. Loss Assessors and Adjusters have yet to form an association, although nine firms have been licensed by the Commission to date.

---

44 *Ibid* Ss. 14 - 27

45 *Ibid* S. 7 (1), (2)

46 *Ibid* S 7(3), (4)

47 *Ibid* S. 8

48 *Ibid* Ss 9, 10

49 *Ibid* Ss 11, 12

50 Author's Interview with the Secretary to the Insurance Commission Ms Evelyn Nkalubo on 26 August 1998.

51 Insurance Statute 1996, S. 100

52 Author's Interview with Secretary, Insurance Commission *op.cit*

53 Insurance Statute 1996, S. 17(e), (f).

4 *LIBERALIZATION OF FOREIGN TRADE AND STIMULATION OF EXPORTS*

Foreign trade and exportation of commodities and services forms part of the external sector of the economy. In this regard,[54]the removal of foreign trade restrictions and freeing of the exchange rate are part of the major policy to create balance in the external sector of the economy. Furthermore,free trade has shown itself to increase economic growth and benefit the consumer. In this vein, real depreciation of the exchange rate can improve the competitiveness of exports and encourage import substitution, while the liberalization of external payments provides confidence to foreign investors and encourages the return of flight capital. This is evident from the Ugandan experience particularly since 1990.

It will be recalled that the external balance on trade and services went into deficit as coffee prices declined.[55] Thus in 1987 the official exchange rate was Shs 14 to US $ 1 but was limited to licensed importers. All other imports were paid for at the parallel market rate of about shs 150 to the US dollar or 1000 percent higher. Since coffee earnings had to be surrendered to Government at the official rate of Shs 14 to the US dollar, this reduced farmers' incentive to produce and sell coffee officially or encouraged smuggling. The discrimination in foreign exchange dealing was also evident from the availability of the limited foreign exchange at a cheaper rate to officially licensed importers (normally industrialists) while everybody else had to obtain it from the more expensive parallel market. The effect was that the rural agricultural sector was used as a means to generate cheap foreign exchange for the urban industrial sector. In other words agriculture was subsidizing industry.[56]

While the government continued to control the exchange rate during the 1980s, high inflation still resulted in periodic administrative devaluations from Shs 14 to the US dollar in 1986 to Shs 440 to the US dollar in July 1990. It is against this background that the Government introduced a forex bureau system under the Exchange Control (Forex Bureaux) Order.[57]The bureaux system provided foreign exchange to anyone at a market determined rate with minimal restrictions relating to

---

54 Ellyne, *op.cit*. P 12

55 Bank of Uganda, *Economic Report, 1986-1991,* pp. 53-55

56 Ellyne, *op.cit* pp 12-13

57 Statutory Instrument No. 7 of 1991 which was retroactive from July 1990 was made under the Exchange Control Act (Cap 138 Laws of Uganda 1964 Edn)

licensing of bureaux operators,[58]mode of operation,[59] limit on the amount which may be purchased in respect certain goods and services[60] and conversion of remittances of foreign exchange into shillings at forex bureaux.[61]At the time of the creation of the bureaux system, in July 1990, the bureaux dollar rate had a premium of 45 percent above the Bank of Uganda rate. In 1992, the auction system was introduced for allocating donor funds to the private sector through the Bank of Uganda.[62]With these reforms the bureaux dollar premium fell from 45 percent to 16 percent in April 1993,[63]while the nominal exchange rate depreciated form Shs 440 to 1216 to the U.S. dollar and the real exchange rate depreciated by above 30 percent.[64]In November, 1993, the foreign exchange auction system was abolished and replaced with an interbank/interbureau system that effectively unified the foreign exchange market.[65]Following the formal unification of the forex market in April 1995, the exchange rate appreciated by about 26 percent against the US dollar[66]owing to rising foreign direct investment high shilling interest rates and strong coffee prices. The unified exchange market removed discrimination among groups or sectors within the economy and the rate of exchange can appreciate or depreciate according to economic conditions.

The liberalisation of the foreign exchange market has in turn eased the forex exchange constraint, which had bedevilled the private sector. Consequently, the annual volume of foreign exchange inflows through forex bureaux increased from US $ 90 million in 1990/1991 to about US $ 368.95 million in 1994/1995, while the interbank exchange market accommodated an additional Us$600 million, during the same period rising to US $ 1,354.03 million at the end of 1996.[67]The inflows of forex into the country has been sustained by a high volume of private transfer which reflect the return of flight capital by non-residents including returning Asians and increasing numbers of tourists.[68]The

58 *Ibid*, Paras 4-12
59 *Ibid*, Paras 13-16
60 Parts IV and V
61 Part VI
62 Bank of Uganda, *Annual Report, 1991-1992,* P. 29
63 *Ibid Annual Report 1992-1993*, P. 17
64 *Ibid* p. 18
65 *Ibid Annual Report 1993-1994*, P.25
66 *Ibid Annual Report 1994-1995*, pp. 26-27
67 Bank of Uganda, *Annual report, 1995/1996*, Appendix 25; Quarterly Economic Reprot April- June 1997, Appendix 26, P. 48
68 Ellyne, *op. cit*, p. 14

effect of this is that official foreign reserves have increased from less than two weeks of imports in 1986 (about US $ 20 million) to about 4.3 months of imports by June 1996 (about US $ 430 million)[69]rising further to U $ 621 million as at the end of June 1997.[70] Since, however, the exchange markets are still young and thin, Government aims to build up foreign reserves to at least 6 months of imports to be used to cushion the foreign exchange market.[71]

Ultimately, the success of Uganda's external sector will depend upon the expansion of exports to pay for rising imports and the diversification of the export sector away from a monocultural commodity-coffee. This is being pursued through the liberalisation of agricultural sector and the exchange rate, as we have seen, which allows farmers to realize a negotiated price for their products. Additionally, there exists an export promotions Board,[72] a refinance window in the Bank of Uganda to assist exporters of non-traditional goods. Furthermore, the National Agriculture Research Organisation (NARO) was created[73]to increase research in the agricultural sector. There is evidence of success of these measures. While in 1986/1987 fiscal year coffee accounted for 96 percent of the country's exports, in the 1994/1995 fiscal year, despite the coffee boom at the time, non-coffee goods accounted for 25 percent of exports.[74]It is significant that the majority of the new non-coffee exports tend to be very high value added products such as fruits and vegetables, flowers and fish fillet.

Additionally steps have been made to streamline and improve the tourist sector, which is also a major source of income. This was manifested through the setting up of the Hotel and Tourism Training Institute under the Hotel and Tourism Training Institute Statute[75] whose objective is to provide studies and training in subjects related to tourism, hotel management and catering.[76]

5. *SIGNIFICANCE OF THE EXTERNAL DEBT AND FOREIGN AID*

---

69 Bank of Uganda, *Annual Report 1995/1996* P. 15
70 Bank of Uganda, *State of the Economy* (Sept. 1997) p. 3
71 Ellyne, *Op.cit*. P. 14
72 Created under the Uganda Export promotion Council Act, No. 17 of 1969
73 See National Agricultural Research Organisation Statute No 19 of 1992
74 Ellyne, op.cit p. 14
75 No. 14 of 1994
76 *Ibid* S. 4

External loans and foreign aid have become significant in efforts to sustain investment and growth especially under difficult terms of trade geared towards economic development.[77]Historically this trend was spurred on between 1986 and 1991 when there was a dramatic fall of 60 percent in international coffee prices leading to a shortage of export generated foreign exchange to increase imports.[78]The solution was to turn to donors with a view to increasing foreign grants and loans to Uganda as a means of assisting the country's economic recovery through the expansion of imports. This led to an increase in Uganda's external debt from US $ 1.1 billion (or 35 percent GDP) in 1986 to US $ 2.5 billion (or 110 percent of GDP) in 1991.[79]Since then, the rate of increase of external debt greatly slowed down declining to 56 percent of GDP (or US $ 3.4 billion) in June 1995.[80] This rose to US $ 3.563 billion as at June 1996[81] and US $ 3.653 in June 1997.[82] About 75.3% was owed to multilateral institutions while 12.7% to non-Paris Club bilateral creditors and 9.3% to Paris Club creditors.

The crisis in public financing which became evident in the 1990/1991 fiscal year when a deficit of US $ 108.22 million was registered[83]was specifically addressed by the External Loans (Amendment) Statute.[84] The resort to massive borrowing was obviously an emergency measure and efforts have since been made to curtail that tendency in four main ways. First, has been the trend to borrow from multilateral institutions such as the World Bank and IMF whose loans are disbursed on consessional terms of 40 years at between 0.5 % and 0.75% of interest.[85] Second, in order to reduce the debt stock the government undertook a debt buy back in 1993, assisted by the World Bank in addition to negotiated debt write-offs and debt relief for servicing the multilateral debt.[86] It should be stressed that debt relief is largely limited to loans other than those from multilateral institutions which need to recover loans in order to lend to other borrowers.[87] It is in this light that in recognition of Uganda's adherence to the structural

77 Ellyne, *op.cit*. P. 15
78 Ibid. p. 14. See also Bank of Uganda, *Economic Report, 1986-1991*, P. 55
79 *Ibid*. p. 14. See also Bank of Uganda, *Economic Report*, 1986-1991, p. 62
80 Bank of Uganda, *Annual Report 1994/1995*, p. 23
81 Ibid *Annual Report 1995/1996*, pp. 18-19
82 *Ibid. Quarterly Economic Report April-June 1997*, P. 15
83 B.O.U. *Economic Report 1986-1991*, P. 54
84 No. 14 of 1992, Ss. 2,3 amending the External Loans Act (Cap 156 Laws of Uganda 1964 Ed.)
85 Ellyne, *op.cit*. p. 15 Bank of Uganda, *Annual Report 1993/1994*, p. 23
86 B.O.U *Ibid*
87 Ellyne, *op.cit*. p. 15

adjustment programme, Uganda became the first debtor country to receive the highly preferential “Naples Terms” which provided for 66 percent reduction in eligible debt stock or about US $ 650 million.[88]Third, has been the move away from donor loans to grants advanced on concessional terms.[89]Fourth, the Constitution of Uganda, 1995 has introduced stringent conditions for contracting loans which include approval by the Parliament.[90]

The rise of donor assistance from US $ 230 million in 1986 to US $ 650 million in 1994, however, poses the danger of excessive dependence on donor funds which could lead to an appreciation of the real exchange rate resulting in undue competitive pressures on domestic producers in other economic areas.[91] Hence the strategy to reduce debt stock and service obligations and control over new borrowing, resorting to grant assistance or borrowing on concessional terms.[92]

The dependence on donor funding points to the need to increase private sector investment and widening the tax base to enable the Government to be more self-financing. Domestic financing of investment in turn requires a healthy and efficient banking sector and the development of the domestic capital markets, aspects which we have considered.*TURE OUTLOOK*

The economic liberalization so far considered has mainly focused at the macro-economic level. In terms as of commercial law, liberalization needs to be extended to the micro-economic level and specifically the reform of commercial laws with a view to encouraging both local and foreign investment and more autonomy in decision making unfettered by over regulation of micro-economic business entities. Aspects of this tendency have been examined in relation to co-operatives.

It is in that light that the current exercise by the Uganda Law Reform Commission to modernize, simplify and reform commercial law should be seen. The Law inherited from Britain is not only archaic but complex in the sense that where it has been codified as in the cases of Sale of Goods Companies and bills of sales, its understanding requires reference to a mass of scattered case law decisions some of

---

88 Ibid. See also *Uganda Confidential* Newspaper 11-17 September 1998, p. 16

89 Ellyne, *Ibid*. p. 16

90 Constitution of Uganda, 1995, Article 159

91 Ellyne, *op.cit* p. 16

92 Bank of Uganda, *Annual Report 1995/1996*, p. 18, *Quarterly Economic Report April-June 1997*, pp. 14-15

which date many years if not centuries ago. As has been put by Professor Goode in the context of Britain:

> How is it that we feel able to embark on the 21st century with commercial law statutes passed in the 19th? How can we seriously confront the problems of modern commerce with legislation enacted in the era of the steam coach, which had to be preceded by a man with a red flag; when the aeroplane, television, the computer and spacecraft were all in the future?[93]

The Uganda Law Reform effort [94]aims to reform core commercial law legislation such as that relating to Companies, Partnerships, Deeds of Arrangement, Bankruptcy, Co-operative Societies, Licensing, Sale of goods, bills of exchange, copyright, Patents, trade marks in addition to commercially related legislation in the areas of land transactions, town and country planning, environment and tourism. Other areas where we do not have legislation such as consumer protection, product safety, hire purchase, transport safety, antitrust or monopolies and competition law are also addressed. Reform is also geared towards employment and trade union laws, laws regulating the professions including advocates, engineers, architects and auctioneers, as well as arbitration and immigration.

A random illustration of the probable results of the Commercial Law Reform exercise indicates that a Core Company Law Act stripped of securities and insolvency provisions, codifying directors' duties and powers as well as minority shareholders' remedies is likely to emerge along the lines of New Zealand and Hong Kong corresponding legislation. Additionally, registration and filing of returns for small companies will be simplified. In the area of Bills of Exchange, reform will address the new phenomenon of electronic financial documents and transfers.[95] Arbitration Law is likely to incorporate provisions of the United Nations Commission on International Trade Law (UNICITRAL) which was aimed at advancing and co-ordinating the harmonisation of international trade law and also emphasize alternative dispute resolution

---

93 Goode, R. *Commercial Law In the Next Millenium* 49th Hamlyn Lecture (Sweet & Maxwell, London 1998), p. 101

94 Reid & Priest *Draft Reports on Commercial & Related Legislation* submitted to Uganda Law Reform Commission 1997-1998.

95 See also Goode, *Op.cit* pp. 96-98

(ADR) which is simpler and cheaper in commercial terms than traditional arbitration.[96] ADR has in fact been introduced in civil proceedings.[97]A simpler arbitration mechanism is crucial to foreign investor confidence in Uganda.[98]Liberalization of trade laws in turn calls for the harmonisation of the laws of the affected countries. At a regional level, Uganda would be required to harmonise its laws with those of members of the East African Co-operation and COMESA, an aspect which appears to have began with Customs Laws and tariffs as well as monetary and financial co-operation.[99]

Finally, licensing procedures require both easing and simplification as well as transparent administration. This is particularly urgent with respect to legislation governing investment, liquor, market protection, cattle products, fishing, plants, timber and other produce as well as leasing of wildlife protected areas. All these are areas of commercial activity which suffer from archaic rules, overregulation and official arbitrariness as well as overcentralization.[1]

CONCLUSION

In this lecture, I have considered commercial law against the background of political, economic and social factors existing in Uganda between 1986 and todate. The analysis shows that commercial law has reacted to the economic factors underlying the Ugandan society and particularly the need to reform and restructure the economic conditions of the society aimed at improving growth, efficiency and ultimately development. This tendency is in line with the jurisprudential thesis that law is a superstructure over an economic base and reflects the economic conditions or set up. In historical legal terms, the trend of commercial law in the past twelve years in Uganda, reflects the earlier recognition of commercial law as a collection of usages customs and practices of the

---

96 *Ibid* pp. 98-99

97 Civil Procedure (Amendment) rules S.I. No. 26 of 1998, Rule 7.

98 Minutes of Workshop 3 on the Reform of Commercial Laws Held on 24 & 25 June, 1997 Sheraton Hotel, Kampala (Uganda Law Reform Commission) p. 12.

99 See e.g East African Co-operation Draft Treaty, Articles 70-102.

1 Bakibinga, D.J. *Report on Reform of Licensing Procedures* submitted to Uganda Law Reform Commission August 1997. The report reviews the Liquor Act, Cap 95; Enguli (Manufacture & Licensing) Act, Cap 96; Markets Act, Cap 99; Hides & Skins Trade Act, cap 225; Hides & Skins (Export Duty) Act Cap 183; Cattle Traders Act, Cap 224; Fish & Crocodiles Act, cap 228; Trout Protection Act, cap. 229; Cotton Development Statute No. 1 of 1994; Plant protection Act, Cap. 244; Timber Export Act, Cap 247; Produce Marketing Act No. 37 of 1970; Uganda Tea Authority Decree No. 8 of 1974; Uganda Wildlife Statute, No. 14 of 1994; National Environment Statute No. 4 of 1995.

merchants. As my former Dean at Queen Mary College, London, Professor Roy Goode has put it:[2]

> One thing is certain: that in the future as in the past, commercial law will *be driven by and fashioned from the legitimate needs And practices of the mercantile community; for commercial Law, above all, is a user's law,* and it is from the creativity of Merchant and financier in devising new instruments and new Business methods that it will continue to evolve.

Translated to the Ugandan scene, the reforms undertaken, during the period under consideration, have been a reflection of the needs and requirements of the mercantile or in modern parlance business community. This explains fiscal and monetary reform which has led to: the liberalisation of foreign exchange transactions; the reduction in customs tariffs and rates of income tax; the streamlining of tax administration and abolition of tax exemptions in order to ensure a level ground for commercial activity and competition. Similarly, the introduction of the consumption tax, VAT, which is a neutral tax with minimal impact on business activity, should be seen in this light. Furthermore, the liberalisation and expansion of the private sector, which has been manifested in the abolition of commodity marketing boards, encouragement of private investment, privatisation of public enterprises, development of capital markets and deregulation of the co-operative sector reflect the requirements of the business community for a free and efficient environment for commercial transactions. In the same vein, financial institutional discipline has been geared towards an efficient, sound and viable banking and insurance system which would best serve the financial needs of the business sector. Finally, while ordinary thinking has frowned upon the country's increasing indebtedness, from a business person's perspective, the shortfall in capital for conducting commerce has to be made up by borrowing. The availability of funds, if properly used, has the potential for stimulating economic activity and growth, which are ultimately beneficial to commercial initiative. Looked at from another perspective, loans are a form of foreign investment in the country.

It remains to add that while economic growth indicators over the past twelve years have been impressive, certain aspects of commercial law particularly in the areas of co-operatives, financial institutions, insolvency, banking, licensing etc. still require additional reform aimed largely at

---

[2] Goode, R. *Commercial Law In the Next millenium,* op.cit., Preface, Pxvii

deregulation, fairer administration, modernization and decentralization. The reforms envisaged would encourage more participation in commercial activities unhindered by overbearing state interference. Ultimately, however, the success of the economic reform effort will be judged by its impact on the social and economic conditions of the ordinary Ugandan. In this respect, the reforms undertaken at the macro-economic or national level will have to be translated to the micro-economic or local level within the framework of the Local Government Act, 1997.

SELECT BIBLIOGRAPHY

A. *BOOKS*

Bakibinga, D.J.
Company Law In Uganda (Professional Books Publishers, Kampala, 1993).

Bakibinga, D.J VAT: *Introduction, Rationale & The Law in Uganda* (Professional Books Publishers, Kampala, 1996).

Bewes, W. *The Romance of the Law Merchant* (1923).

Goode, R. *Commercial Law In the Next Millenium* (49th Hamyln Lecture, Sweet & Maxwell, London 1988)

Hansen, H.B. & Twaddle, M. (Ed) *Developing Uganda* (Fountain Publishers, Kampala 1998).

Holdsworth, *Some Makers of English Law* (Cambridge, 1966).

Holdsworth, *History of English Law* Vols 5 & 8 (1927).

Hussein, I. & Farugee, R (Ed) *Adjustment In Africa: Lessons From Country Studies* (World Bank, Washington, 1994).

Lloyd, Lord *Introduction to Jurisprudence* (Sweet & Maxwell, London 3rd Ed, 1972).

Museveni, Y.K. *What Is Africa's Problem*? (NRM, Kampala, 1992).

Ochiengh, E.O. *Economic Stabilization and Adjustment programmes in Uganda*, 1981-1995 (Uganda Economics Association/Friedrich Ebert Stiftung, 1997).

Paton & Derham, *Jurisprudence* (4th Ed Oxford University)
Schmitthoff, C.M. *Commercial Law in A Changing Economic Climate* (2nd Ed, 1981)

B. *ARTICLES*

Abeywickrama, “Privatisation In Developing Countries” *New Vision* 5 & 12 Sept 1993.

Bakibinga, D.J. “Director’s Duty to Avoid Conflict of Duty to the Company and his Interests” *Gravitas Review of Business & Property Law* (Lagos) Vol. 3, No. 14 pp 63-71 (1990).

Bakibinga, D. J. “Has Privatisation Run Amok?” *Uganda Law Focus* Vol. 1 No. 1., pp. 90-98 (1998).

Collier, P. & Pradhan, S “Economic Aspects of the Transition from Civil War” in Hansen & Twaddle, *Developing Uganda* (Fountain Publishers, Kampala, 1998) pp. 19-37.

East African Newspaper 23-29 September 1996
New Vision Newspaper 6 & 7 August, 1998
Trakman, L.E. “The Evolution of the Law Merchant: Our Commercial Heritage” *Journal of Maritime Law & Commerce* Vol. 12 (1980).

Tudsbery “Law Merchant and the Common Law” *Law Quarterly Review* Vol. 34 (1918).

Tukahebwa, G.B. “Privatisation as a Development Policy” in Hansen & Twaddle, *Developing Uganda* (Fountain Publishers, Kampala, 1995) pp 59-72.

Zake, J. “Creating an Enabling Environment for the Development of Small Scale Enterprises Through Tax Reform: The Case of Uganda,” (1986-1993). *In agents of change: Studies on Policy Environment for Small Enterprise in Africa*, Ed. English, P. Henault, G. International Development Research Centre Ottawa, 1995

B. *INSTITUTIONAL & GOVERNMENTAL PUBLICATIONS*

Bakstansky, P. *The Role of the Central Bank and the Importance of a strong and stable Financial System* (Sixth Joseph Mubiru Memorial Lecture, Bank of Uganda, 25 August, 1993)

Bank of Uganda, *Economic Report 1986-1991*
Annual reports 1991/1992 to 1995/1996

Quarterly Economic Report, April to June 1997
State of Economy (September, 1997).

Ellyne, M.J. *Economic Reform In Sub-Saharan Africa*: *The Case of Uganda* (7th Joseph Mubiru Memorial Lecture, Bank of Uganda, July 1995)

Fabunmi, J.0. *Commercial Law In The Context of Economic Development*: *The Nigerian Experience* (Inaugural Lecture Series 85, Obafemi Awolowo University Press, 12 May 1987)

Government of Uganda, *Finance Decree/Statutes/Acts, 1986-1998*.

Kabuga, C. & Batarinyebwa, P.K. (Ed) *Co-operatives: Past, Present and Future* (Uganda Co-operative Alliance, 1995)

Minister of Finance, Planning & Economic Development, *Budget Speeches, 1986-1998*

Privatisation Unit, *Outlook* Publication 1995-1996

Reid & Priest, *Draft Reports on Reform of Co-operative Societies Statute, Financial Institutions Statute, Bankruptcy and Deeds of Arrangement Acts, Bills of Exchange Acts* (Uganda Law Reform Commission, 1997)

Ssemakula-Kiwanuka, M.M. *Central Banking In Africa and the Challenge* of Development (Fifth Joseph Mubiru Memorial Lecture, Bank of Uganda, 15 December 1992).

Uganda Investment Authority, *Guide to Investing In Uganda* (March 1998)

World Bank (IBRD) *The Challenges of Growth & Poverty Reduction In Uganda* (Washington, 1996)

UNPUBLISHED WORKS

Bakibinga, D. J. “Commercial Law As an Instrument of Social Change”

Paper Delivered At the 22nd Annual Conference of the Nigerian Association of Law Teachers, University of Calabar 4 April, 1984

Bakibinga, D. J. “Reform of Taxation Measures and Its Effects in Uganda, 1986-1994” Paper Delivered to the Makerere Economics Society, 2nd December, 1994.

Bakibinga, D.J. *Report on Reform of Licensing Procedures* submitted to Uganda Law Reform Commission (1997).

Bakibinga, D. J. *Report on Reform of Company Law In Uganda* submitted To Uganda Law Reform Commission, 1997.

Fetaa, M & Bakibinga, D.J. “Relationship Between Taxation Regimes and Investment Policies In Africa: The Uganda Case”; Paper Delivered at the 9 th Technical Workshop of the Association of African Tax Administrators, Cairo, Egypt, 2-5 December, 1996.