A CRITICAL ANALYSIS OF THE LAW ON CORPORATE PERSONALITY AND ITS LEGAL IMPLICATIONS IN UGANDA; A CASE FOR UNSECURED CREDITORS, EMPLOYEES AND TORT VICTIMS.

BY

KIREETWA HERBERT

LLB/41905/133/DU

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DECLARATIOIN

I **KIREETWA HERBERT**, declare that this is my original work and has never been presented to any other university or institution for award of any academic qualification. All work is original save for the work whose sources are clearly cited.

Signed.....

KIREETWA HERBERT

Date.....24th/10/2017.....

APPROVAL

This is to certify that this Dissertation entitled "A critical analysis of the law on corporate personality and its legal implications in Uganda; a case for unsecured creditors, employees and tort victims" has been submitted at Kampala International University Faculty of Law with my approval as the Supervisor.

SUPERVISOR'S NAME: MR. BRIHAN BASAJJABALABA

Signature.....

Date.....30/10/2017.....

DEDICATION

To my Father, Mr. Kiretwa Philimon for your insightful words at all times. Thank you for your financial support and always having faith that I would hit the mark. To my Mother, Mrs. Komugisha Joy who always believed in me and gave me words of wisdom that are worth to be reckoned with but this marks the beginning.

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LIST OF LEGISLATION

1. The Companies Act, No.1 of 2012.
2. Insolvency Act, No.14 of 2011.
3. The Employment Act 2006.
4. Civil Procedure Act cap 71.
5. Civil Procedure Rules S1 71-1

LIST OF CASES

1. Uganda Motors Ltd vs. Wavah Holdings Supreme Court of Uganda Civil Appeal No. 19 of 1991 (unreported).
2. Salomon Vs. Salomon & Co. Ltd (1897) AC 22.
3. Lee vs. Lee's Air Farming Ltd (1961) AC 12.
4. Lennard's Carrying Co. Ltd V.s Asiatic Petroleum Co. Ltd (1915) AC 705.
5. Stanbic Bank Uganda Ltd Vs. Ducant Lubricants (U) Ltd, CB Richard Ellis (U) Ltd, Arinaitwe Joseph Bryan and Arinaitwe Prossy H.C.M.A No. 845 of 2013.
6. HL Bolton Co vs. TJ Graham and Sons (1956) 3 ALL ER 624
7. Trevor Ivory Ltd vs. Anderson (1992) 2 NZLR 517.
8. Williams and Another Vs. Natural Life Health Foods Ltd and Another (1998)2 ALLER 577
9. State of U.P. Vs Renusagar Power Co (1992)74 Comp
10. Bonser vs. Musicians Union (1956) AC 104.
11. The Deputy Commissioner Vs. Cherian Transport Corporation (1992) Comp
12. Sugar India Ltd. Vs Chander Mohan Chadha AIR 2004 S.C4368.
13. Tata Engineering & Loco-motive Co. Ltd. Vs State of Bihar 1964, S.C.J 666.
14. Dalmer Co. Ltd. vs. Continental Tyre & Rubber Co. (Great Britain) Ltd (1916)2 AC 307.
15. Kuemgel V Donnersmarch (1965) 1 ALL ER 46.
16. **AON** Financial Products, Inc. v. Societe Generale, 476 **F.3d 90, 96 (2d** Cir. **2007).**

LIST OF ABBREVIATIONS

AGOA	African Growth and Opportunity Act
CDS	Credit Default Swaps
FUE	Federation of Ugandan Employers
GNP	Gross National Product
GDP	Gross Domestic Product
IA	Insolvency Act 2011
CA	Companies Act 2012
CEO	Chief Executive Officer
HRM	Human Resource Manager/Personnel officer
ILO	International Labour organization
SMEs	Small and Medium Enterprizes
IV	Independent Variable
EA	Employment Act 2006.
TSE	Tokyo Stock Exchange
MGLSD	Ministry of Gender, Labour and Social Development.
NGO	Non Governmental Organization

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ABSTRACT

There was need and desire to advocate for unsecured creditors, employees and tort victims to know the law governing corporate personality in order to have smooth running of business in Uganda. Many of the aforementioned were being victimized because they didn't know what was expected from the process doing business with companies and as well most companies did know how to handle certain issues regarding the remedies, entitlements of unsecured creditors, employees and tort victims in an unfortunate event of corporate insolvency.

A combination of qualitative and quantitative methods were applied and data collected via interviews, questionnaires, observation and literatures review. The study relied on both secondary sources and government publications related to corporate personality. Data were summarized and coded into themes and sub-themes from which conclusions and recommendations were drawn.

Among the many peculiar findings included the ignorance of unsecured creditors, employees and tort victims about the law governing corporate personality in Uganda and enforcement of their legally established remedies in the actual abuse of the corporate personality.

CHAPTER ONE

1.0 General Background

A company means a company formed and registered under the Companies Act 2012 or an existing company or a company re-registered under the companies Act 2012 [1] . Given the non exhaustive definition of a company in the law, aid should be sought elsewhere to understand this amorphous entity. Henceforth a company refers to a creature of private capital, an organization by which capital is pooled together, invested and any resultant profits distributed among members by way of a payment of dividend.[2] Companies have a quasi regulatory function since they create norms and rules that influence how other companies in the market conduct themselves. They are also important for economic stability given their ability to attract foreign investment, technological development and their impact on the labour market.[3]

Company law in Uganda is substantially rooted in English common law and doctrines of Equity which became operable in Uganda by virtue of the reception Clause, 15 of the 1902 Order In Council where by English statutes, common law and doctrines of equity in England as on 11th August, 1902 (the reception date) became part of the laws of Uganda. Even with the Supreme Court of Uganda ground breaking judgment in **Uganda Motors Ltd vs. Wavah Holdings**[4] Ltd that the statutes of general application, the common law and doctrines of equity are to apply to Uganda subject to the prevailing circumstances and as the people of Uganda may so permit which same principle is also enacted into Section 14 of the Judicature Act. Ugandan Company law is still largely influenced by Common law despite the enactment of the Companies Act in 2012.

Company law locally and globally is premised on the concept of corporate personality which means that a company once incorporated becomes a separate legal entity distinct from its

[1] Section 2 of The Companies Act, 2012 Act No.1 of 2012
[2] David J Bakibinga, Company Law in Uganda, Fountain Publishers 2001 print, Page 2.
[3] Chrispus Nyombi and Alex Kibandama, Principles of Company Law in Uganda, Law Africa, Page 1.
[4] Supreme Court of Uganda Civil Appeal No. 19 of 1991 (UNREPORTED).

directors and members[5] capable of enjoying rights and suffering liabilities and responsibilities attributable to legal entities. This was best described in the case of **Lee vs. Lee's Air Farming Limited**[6] where Mr. Lee incorporated a company in which he held 2999 of the 3000 shares and worked as the chief pilot for the same company. When he was killed in the plane crash, his widow sued for compensation under Workers Compensation Act. The Privy Council disregarded the position of the lower court that he could not be a worker and at the same time the employer and held that she was entitled to compensation since the company as a legal entity could enter into a valid contractual arrangements with its director.

The concept of corporate personality as now existent in company law traces its origins from religious organizations which used the same to hold property in their own right.[7] One truism about corporate personality is that it is founded on the need to forge a capitalist society[8] that thrives on the whims of investment capitalism with advocates of limited liability arguing that it facilitates free trade and breaks down monopolies thus promoting healthy competition in the product market, capital market and the market for corporate control.

The company facilitates the productive use of small capital through easy access to equity and debt markets but importantly, corporate personality encourages investment because investors are not worried about losing their personal wealth when the juristic entity dies[9] as their liability is only limited to their unpaid share capital contribution for limited liability companies or contribution on liquidation in the case of companies limited by guarantee.

The concept of corporate personality was sealed by the House of Lords in **Salomon Vs. Salomon & Co. Ltd**[10] in the judgment of **Lord Mac Naughtan** in the following words.

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[5] Winfred Tarinyeba Kiryabwire 2015, Company Law; A guide to the Companies Act of Uganda page 69.
[6] (1961A) AC 12.
[7] Chrispus Nyombi and David Justin Bakibinga, *Corporate Personality: The Unjust Foundation of English Company Law*. Labour Law Journal, summer 2014, Page 94: RB. Ekelund., Jr., R.F Hebert, R D. Tollison G M. Anderson, and A B. Davidson (1996). Sacred Trust: The Medieval Church as an Economic Firm. New York: Oxford University Press.
[8] Ibid at Page 97.
[9] Supra Fn 3 at page 3.
[10] [1897] AC 22

The company is at law a different person altogether from the subscribers to the memorandum and, though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them.

The ruling of course was well received by advocates of free-market capitalist principles because it allowed people to invest in companies without the risk of losing their personal wealth upon default, something which is largely not available other business models.[11] However, the vast majority of creditors perhaps even now apprehend the view that companies are merely scams designed to prevent members from becoming liable for their business debts.

The abuse of the corporate personality of companies is not a new phenomenon. Perhaps in fact, the abuse of the corporate personality of companies could be as old as or even older than the firm establishment of the principle itself by the House of Lords in Salomon V Salomon.

The courts have attempted to address the problem by unveiling the corporate personality of the companies so that their respective directors are made personally liable where the companies have been used to perpetuate fraud. The concept was aptly articulated by **Viscount Haldane** in **Lennard's Carrying Co. Ltd V Asiatic Petroleum Co. Ltd**[12] in the following speech.

''..My Lords, a corporation is an abstraction. It has no mind of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called the agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation....in such a case as the present one the fault or privity is not for someone who is merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself...''

[11] Supra Fn 3 at page 5
[12] [1915] AC 705.

In conexion, the risks which are inherent in the operation of corporate personality are borne by unsecured creditors and employees who stand to lose their contracts upon default[13] since they do not have the kind of self help remedies that is available to the secure creditors like floats and charges. Unless the unsecured creditors have a statutory preference in their favor, they stand in the worst possible world because limited liability (a brain child of corporate personality) stops them from suing the shareholders or directors whilst the fixed and floating charges of the big lenders often soak up all the available assets of the company.[14]

In light of the above backdrop and the contemporary view that Company law itself is founded upon an unjust history cemented at the conclusion of the nineteenth century by the House of Lords in **Salomon V Salomon & Co Ltd** and that it is only natural to expect injustice to flow from the said feature of Company law.

1.2 Statement of the problem

Whereas unmasking the veil of incorporation is plausible for attempting to modify the injustice caused by the abstraction of the company, the corporate form continues to throw up fraud and injustice thereby exerting pressure on courts to chip away at *Salomon* which they largely do not but where there are chips, their extent and form is shrouded by uncertainty.[15] With the increased mushrooming of makeshift local companies in the country and heightened government efforts to attract foreign investments that come by way of companies, it is envisaged that in cases where the companies get undercapitalized and face corporate collapse that is insolvency, employees, transactional creditors and tort victims stand to lose out on account of corporate personality and limited liability and its attendant abuse.

It is against the above backdrop that I am carrying out a research seeking to establish whether Ugandan employees, other transactional and unsecured creditors and tort victims have the

[13] Ibid
[14] Gower and Paul Davies' Principles of Modern Company Law, Sweet & Maxwell Publishers 8th Edition, Page 39
[15] Chrispus Nyombi and David Justin Bakibinga, *Corporate Personality: The Unjust Foundation of English Company Law*. Labour Law Journal, Summer 2014, Page 102.

adequate safeguards of the law and remedies in the event that the calamity of abuse of corporate personality and corporate collapse befall them.

1.3 Purpose of the study

1.3.1 General objectives

i. The study examined the current levels of protection accorded to employees, transactional creditors and tort victims in light of the actual possibility of abuse of corporate personality and corporate collapse that is corporate insolvency.

ii. To assess the efficacy of the regime governing the protection of employees, transactional creditors and tort victims in light of the actual possibility of abuse of corporate personality and corporate collapse that is corporate insolvency.

1.3.2 Specific objectives

i. To investigate the various enactments in Uganda, concerning the protection of employees, transactional creditors and tort victims being unsecured creditors in light of the actual possibility of abuse of corporate personality and corporate collapse that is corporate insolvency.
ii. To critically analyze the international legal and non legal instruments applicable to the protection of employees, transactional creditors in light of the actual possibility of abuse of corporate personality and corporate collapse that is corporate insolvency.
iii. To identify lacunas if any that exist in the regime concerning the protection of employees, transactional creditors and tort victims being unsecured creditors in light of the actual possibility of abuse of corporate personality and corporate collapse that is corporate insolvency.
iv. To draw the attention of law makers, policy makers and the executive to the plight of employees, transactional creditors and tort victims in light of the actual possibility of abuse of corporate personality and corporate collapse that is corporate insolvency.

1.4 Significance of the study

The study comes in handy at a time when Uganda has recently endorsed the concept of single director companies[16]and an aggressive attraction and favoring of foreign investors to set up manufacturing industries and agro based establishments for value addition to Uganda's raw agricultural products.[17] With the increased mushrooming of makeshift (shell) companies in the country and heightened government efforts to attract foreign investments that come by way of companies. It is only natural and logical that the said companies will have to enter into employment contracts with Ugandan employees as well as tort victims and transactional creditors. The protection of the foregoing category of company creditors is in direct agreement with the widely accepted scholarly view that there is a stronger need for adequate company regulation given the overwhelming importance of companies to a country's economy and provision of goods or services to the general community.[18]

1.5 Scope of the study

1.5.1 Subject matter/ Thematic Scope.

The research was limited to the concept of corporate personality, the abuse of corporate personality and how the courts of law have handled the vice. The study then looked at corporate collapse and the distribution of insolvent companies' estate with emphasis laid on employees, transactional creditors and tort victims all of whom are unsecured creditors visa vis the *pari pasu* principle.

1.5.2 Temporal (time based) scope

This study was carried on from October 2016 to May 2017. Special attention was given to the new developments relevant to the title under study.

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[16] Section 4 of the Companies Act recognizes that any one or more persons may for a lawful purpose form a company....

[17] The government Under Vision 2040 envisages partnerships with companies like Cisco Systems, Google, Dell, Hp, Apple, facebook, (Pages 60-61), Shell, Total, Exxon-Mobil, Siemens, Microsoft and Intel (Page 77) thereof to achieve a *transformed Ugandan Society from a peasant to a modern and prosperous Country within 30 years.*

[18] Crispus Nyombi and Alex Kibandama, Company Law in Uganda, Law Africa, Page 7

1.5.3 Geographical scope.

The study was intended to cover the whole of Ugandan Jurisdiction as far as the abuse of corporate personality is concerned. The research looked at authenticity of the Ugandan companies both local and foreign that operate their business in Uganda, which have perpetuated fraud and the court's approach to the said companies has not been clear envisaging uncertainty.

1.6 Hypothesis

The hypothesis of the study was that the current corporate legal regime is inadequate in protecting employees, transactional creditors and tort victims being unsecured creditors because whereas the secured creditors have enforceable self help remedies by way of floats and charges, the former category lay in a helpless position as the insolvent companies estate is eaten away and their interests get swallowed up in the *pari pasu* arrangement. The fact that corporate form prevents creditors of a company from suing the directors individually allows the directors to run away from consequences of their own willful or negligent default in commercial transactions.

1.7 Chapter Synopsis

Chapter one entails the general introduction to the concept of corporate personality showing its development in company law. It also shows the legal regime governing it, a general overview of the concept, general and specific objectives of the study, Literature review and the methodology. Chapter two is basically about the arguments of the corporate personality doctrine and the various theories about the arguments and theories of corporate personality. Chapter three is about the national, regional and international perspectives and the innapplication of the doctrine of corporate personality in light of unsecured creditors, employees and tort victims and transactional creditors in Uganda. Chapter four discuses Presentation, Interpretation and Analysis of Data. Chapter five discuses the viable conclusions and recommendations of the study.

1.8 Literature review

Attention was given to Primary Legislation in Uganda namely The Constitution of The Republic of Uganda, 1995 as amended, Companies Act No.1 of 2012 and The Insolvency Act 2011 with a view of achieving the research goals. Comparative analysis with legislation from other jurisdictions like The United Kingdom, Australia and China will be done as well. In addition to the above sources, special attention will be given to Scholarly writings and text books not to mock them off but to make their works contextual to the study and Uganda in general.

1.8.1 Statutes

The Companies Act No 1 of 2012

This is the mainstream company law legislation in Uganda having repealed The Companies Act (CAP 110). The Act introduces the Single Director Company which forms the fears earlier relayed about shell corporations and the attendant fraud. The Act also modified the *Ultra Vires* doctrine and as such outsiders dealing with the company are not obliged to inquire into the powers of a company to enter into particular transactions. Therefore this study focuses on whether the victims for example of single director companies have sufficient remedies in the light of the above positions of the law in the Companies Act.

The Insolvency Act, No.14 of 2011.

This law came into force on 1st July 2013[19] and was enacted to effect corporate insolvency law reforms which were urgently needed at the time. It was enacted to combine statutory and common law insolvency rules into a single insolvency Act with the desired result of promoting ease of use and administration and saving costs in practice, to make provision for creditors to make cross border claims against companies that were not incorporated in Uganda at the dawn of liquidation[20] as achieved by sections 227 to 252 thereof which allows any adjudication order,

[19] Section 2 of The Insolvency Act, 2011(Commencement) Instrument, 2013. SI No 25 of 2013.

receiving order or a special manager or interim receiver appointed in another jurisdiction's bankruptcy proceedings to have effect in Uganda.

Whereas section 10 of the Insolvency Act sets out the claims of unsecured creditors of the company and in relation to section 62 which provides for the appointment of a liquidator for the purposes of liquidating the affairs and distributing the assets of the company[21], I find these various provisions of the law dissatisfying to safeguard the interests of the unsecured creditors. This is premised on the understanding that unsecured creditors can enforce their claims with the help of the liquidator appointed under section 62 whose functions among others is to distribute the assets of the company.

The Act falls short of the provision as to what would happen if the company has no assets to be dealt with by the liquidator. This study seeks to address this peculiar aspect.

Of particular importance to the study is section 12 of the Act which sets out the priority of payments of preferential debts which must be paid out of assets which are subject to a security interest and have become subject to that security interest by reason of its application to certain existing assets of the grantor and those of its future assets which were after-acquired property or proceeds.

As seen above, employees enjoy a preferential statutory treatment during corporate collapse which come after remunerations and expenses of the liquidator or trustee, receiver or provisional administrator's indemnity and costs of any person who petitioned court for the liquidation order including persons appearing in the petition whose costs are allowed by the court. It submitted that in light of the current socio- economic conditions obtaining in Uganda, the first three categories of preferential creditors still stand chances of soaking up the assets of the insolvent estate before the unsecured creditors benefit.

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[21] Section 62(1) of Insolvency Act 2011 provides that the company shareholders, by special resolution or the directors or any other person authorized by the memorandum and articles of the association, may appoint one or more liquidators for the purposes of liquidating the affairs and distributing the assets of the company and may fix the remuneration to be paid to the liquidator.(2) On the appointment of a liquidator, all the powers of the shall cease except where the company in a general meeting or the liquidator sanctions the continuance of those powers.

Other than this strong point which is also flawed, it is submitted that transactional creditors who cannot get wind of company documents like the ones referred to in Section 105 to qualify as preferential creditors also face an ill fated doom as their debts are destined to abate in equal proportions in accordance with the *pari passu* principle. Also importantly, tort victims are not adequately catered for by Section 12 above as the section only caters for amounts due under the Worker's Compensation Act which obviously apply only in respect of employees. The provision pays a blind eye to persons who for instance become accident run down victims, those defamed by the insolvent company among others. By merely letting these claims whittle down under the *pari-passu* arrangement is a weakness of the corporate form which this study attempts to address.

The Employment Act 2006

This is the parent Act of Parliament governing employment relations in Uganda having repealed The Employment Act (Cap 219). Section 98 thereof which is relevant to this study. The section stipulates that any employer who is not incorporated (For purposes of a company) or resident in Uganda shall be required by a labour officer to pay a bond assessed at the equivalent of one month's wages for each employee employed, or to be employed by that employed. The said bond is kept by the ministry responsible for labour on behalf of the employer and its purpose is for paying wages and other entitlements of the employee in the event of default by the employer.

This provision envisages circumstances of default by the employer company only whereas the manner of default is not disclosed. The study also seeks to address that concern.

1.8.2 Textbooks

Principles of Company Law in Uganda, Chrispus Nyombi & Alexander Kibandama

This is a recent book by a Ugandan London based Lecturer in Commercial and corporate law at Birkbeck University London and another co-author who is an Advocate of the High Court of Uganda. The book is relevant to the study because it shares similar challenges of corporate insolvency, fraud visa vis their effects on unsecured creditors namely Employees, transactional

creditors and tort victims. The learned authors describe the history of insolvency law, the reforms that were introduced and the underlying basis for the said reform.

The book is plausible because it is based on the recently enacted Companies Act No. 1 of 2012 and The Insolvency Act 2011 which are relevant to the study, it shares the dilemma of unsecured creditors and explains strategies employed by some of the unsecured creditors like the Pre-Liquidation creditors who coerce debtor companies into satisfying their debts through their ability to harm the Insolvent Companies Estate. The two learned authors however fall short of expectations because they overtly dwell on theoretical underpinnings, lamentation of the unsecured creditors' dilemma whilst not providing suggestions for reform. Therefore this study seeks to suggest reforms that may assist the unsecured creditors, employees and tort victims.

David J Bakibinga, 2013, Company Law in Uganda 2nd Edition.

This is the hitherto most celebrated Ugandan book on corporate law. The book discusses the concept of incorporation and corporate personality, it goes ahead to discuss the abuse of the corporate personality and the unveiling of the corporate personality. The learned author then goes on to discuss Corporate Insolvency and the priority of settlement of debts namely that the costs, charges and expenses of winding up including the liquidator's remuneration, the claims of preferred creditors, the debts of ordinary creditors and finally the claims of deferred creditors. In addition, the learned author does not share much of the fears of abuse of corporate personality which this study seeks to address.

Gower and Davies' Principles of Modern Company Law, Paul Davies.

This book was written by a Cassel professor of Commercial Law at London School of Economics and Political Science. Unlike the previous book, this book is aware of the challenge faced by unsecured creditor. The learned author in fact argues that unless the unsecured creditors have a statutory preference in their favor, they stand in the worst possible world because limited liability (a brain child of corporate personality) stops them from suing the shareholders or directors whilst the fixed and floating charges of the big lenders often soak up all the available

assets of the company. In addition, the author merely laments the terrible situation of the unsecured creditors but does not attempt to rock the unjust foundations of company law by suggesting any reforms in that regard. Henceforth this study seeks to suggest reforms for the same.

1.8.3 Scholarly Writings and Research papers.

Dr. Mohammed AL Bhadily, The Protection of Australian Employee Entitlements Following Corporate Collapses: Grounds For Special Attention.

It can be said with certainty and confidence that this is so far the best research work relating to the study. The author sets out to address the issue of employees' status in protecting their entitlements in the event of insolvency, by examining the means and methods that non-employee creditors use to secure their interests, the means of reducing the risk of entitlements losses, and the position of employees protecting their entitlements in the event of insolvency. The author established that employees are highly vulnerable to the loss of employment and the consequent potential loss of entitlements in case of corporate insolvency.

The paper discusses the subject from the point of view of Australian corporate law which in many respects is similar with Uganda's corporate law which affords similar preferential treatment to employees. The paper however focuses heavily on employees and ignores the other categories of unsecured creditors that this study focuses on.

Chrispus Nyombi and David Justin Bakibinga, 2014, *Corporate Personality: The Unjust Foundation of English Company Law*. Labour Law Journal, Summer.

This paper begins by briefly describing the concept of corporate personality and giving a historical account thereof. The authors then give a detailed history of the development of corporate personality from the days of Joint Stock Corporations which were mainly partnerships of hundreds or a thousand individuals which made it hard for people dealing with them to enforce their rights. The authors further go ahead and explain the abuse of the corporate form, lamenting that its foundation in Salomon v Salomon is unjust.

The paper argued that the corporate form has been throwing up fraud and forcing the courts to chip away from it without much certainty and ease. Of particular relevance to the study, the authors argue that unsecured creditors are the greatest victims of abuse of the corporate form and that in the event of insolvency, they stand to lose out as the big secured lenders soak up all the assets of the insolvent estate leaving other creditors at the mercy of the ***pari passu*** mechanism by which the remainder of the assets are shared equally in the event that they cannot fully settle the remaining debts and obligations.

Whilst the authors are in agreement with the problem at hand, they make no attempt to offer solutions to "...The unjust foundations of English Company Law..." as they call it which this study seeks to address.

1.8.4 Judicial Decisions

Stanbic Bank Uganda Ltd Vs Ducant Lubricants (U) Ltd, CB Richard Ellis (U) Ltd, Arinaitwe Joseph Bryan and Arinaitwe Prossy[22]

The applicants in this case sought to have the veil of incorporation added so that the respondents could be added to a civil suit in which they were suing the first and second respondents to recover principal sums and accrued interests on a loan advanced to the latter.

The facts were briefly that the first and second respondents had fraudulently inflated the forced resale value of the mortgage property by conspiring with the evaluator. The third and fourth respondents were directors of the first and second respondent and they could not be found for service of court process. They were served by way of substituted service in the newspapers and the application was heard exparte since they did not also turn up for the hearing.

The application was granted but up to date, the said directors cannot be found to expedite hearing and execution of the main case. The case serves to illustrate the earlier fears relayed on the abuse

[22] High Court Miscellaneous Application No. 845 of 2013.

of corporate personality. The case also shows that even secured creditors can become victims of abuse of the corporate form.

9.0 Research Methodology

Qualitative research technique will be employed in this research. Keen attention will be paid to the various primary and secondary materials concerning the protection of employees, transactional creditors, tort victims in the face of corporate personality, its attendant abuse and corporate collapse i.e. corporate insolvency. Where possible and relevant, data from the Uganda Registration Services Bureau relevant to the study will be relied upon. In the same spirit, the internet will be a great ally but not also forgetting the several statutes, text books, journals, and case law that will bring out a deeper insight and understanding of the topic.

CHAPTER TWO

2.0 ARGUMENTS, THEORIES FOR THE CORPORATE PERSONALITY

2.1 Introduction

All states have a set of rules embodied in codes, statutes or court cases that represent the formal legal order. Besides this formal set of rules, there is a separate set of non-legal norms that also play a role in the governance of society. According to Lawrence Friedman," a legal system includes three basic components: *(a) structural component,* which means "the institutions themselves" such as courts; (b) *substantive component,* such as 'laws themselves' applied by the courts (both substantive and procedural); and (c) *cultural component,* which refers to "the values and attitudes that bind system together, and which determines the place of the legal system in the culture of the society as a whole." Legal culture embodied in non-legal norms is most difficult to define, as it is not so visible and accessible compared to other two components. Legal systems are embedded in particular cultures that have their own value systems.

2.2 Non Legal Norms and Corporate Governance.

The term "governance" has a long history stretching back to the days of Plato and bears close resemblance to government.[23] It is a mixture of leadership, supervision, decision making, organizational management and regulation. However governance is not merely about rules but also the relation between different actors. From a company's view point, it is about creating conditions to extract maximum long term value through cohesive policies, consistent management, power and performance management.

Corporate governance is theoretically an area of social science bent on solving the consequences of the allocation of power within large economic organizations.[24]

[23] Rhodes, R (1996) 'The New Governance: Governing Without Government, Political Studies', Vol.44, No.4, 652.
[24] Chrispas Nyombi and Alexander Kibandama, Principles of Company Law in Uganda page 314.

Corporate governance is defined as the as the system by which businesses are directed and controlled.[25] It is further defined as the system of accountability and transparency through which corporations are directed and controlled.[26]

Corporate governance applies to any incorporated entity whose securities are traded on regulated liquid investment markets and impacts on the practices of the private companies. The burgeoning argument for embracing corporate governance codes and regulation is because it impacts upon a firm's performance and reduces exposure to risk. Lenders may judge the risk profile of complying firms as lower, this leads to lower cost of capital and enhances reputation for the company.

Non-legal norms are usually based on traditional ways of doing things in a society and rely on moral values, such as trust and reputation. In societies where values, language, meaning, traditions and customs are shared, non-legal norms based on personal relationships play a more prominent role. These norms may also play important role in determining the actual implementation of the formal legal rules. They may be of key importance for understanding the law in action, since they determine when, why, where and how people use law and legal institutions. As those norms are stronger and more important in a society, so will the implementation of formal legal rules be weaker and less effective.

Despite the various debates on comparative corporate governance, have been remarkably few analyses of the role of non-legal norms in corporate law and practice.

Many scholars writing about the legal aspect of Japanese corporate governance are aware of the cultural aspect but for various reasons have limited their analysis to the legal aspect only, or have only vaguely touched upon non-legal norms[27] The question that has not been sufficiently

[25] Report on the Committee on the Financial Aspects of Corporate Governance(Cadbury Report) Para 2.5
[26] Institute of Corporate Governance of Uganda Manual on Corporate Governance: Incorporating Recommended Guidelines for Uganda (2008).
[27] For example, Puchniak mentions culture briefly in his analysis of the role of hostile takeovers in post-war Japanese corporate governance but does not undertake an in depth analysis of the historical roots of Japanese culture and how traditional culture may have prevented hostile takeovers. Dan W. Puchniak, *The Efficiency of Friendliness:*

explored by the literature is: in what way do non-legal norms influence the corporate governance system of individual countries? The Japanese model of corporate governance, on its surface, resembles many other models. Although there are several differences between the models of corporate governance of the United States and Japan, they still maintain the same basic structure.

According to one leading Japanese legal scholar, the Japanese law resembles more the Anglo-Saxon shareholder-value model than the stakeholder model.[28]

However, this similarity is just in form. Behind the facade of legal norms that purport to regulate corporate governance, there exists the real world of corporate governance which is governed not only by legal norms, but also by non-legal norms that are in many respects far more important. An analysis of the Japanese legal regulations of corporate governance, which would be separated from the social realities, is bound to fail in its attempt to fully understand the Japanese corporate governance system. It may only reveal the rules, but not their life in the real world of practice concerning how they are applied, and how they function and shape the Japanese corporate world.

The role of non-legal norms in corporate governance has recently attracted the attention of some legal scholars.[29] Curtis Milhaupt's paper, ***The Evolution of Non legal Rules in Japanese Corporate Governance,*** is one of those few attempts focusing on the non-legal rules in Japanese corporate governance.' Milhaupt focuses on non-legal norms-in the sense that they are features of Japanese corporate governance that are not based on law but play a very important role in corporate governance. This paper will look at the issues arising from the link between Japanese culture and Japanese corporate governance, but from a different perspective than Milhaupt, and will provide, in some cases, different conclusions. More specifically, this paper will attempt to

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Japanese Corporate Governance Succeeds Again Without Hostile Takeovers, 5 BERKELEY Bus. L.J. 195, 227-28, 259-60 (2008).

[28] Takashi Araki, *Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan, 28* COMP. LABOR LAW & POL'Y J. 251, 263 (2007).

[29] On recent texts that examine the interrelation between law and culture, see Curtis Milhaupt's paper, *The Evolution of Non legal Rules in Japanese Corporate Governance,* Paton, and G.W. A Text Book of jurisprudence 1972 4rth Ed (Oxford University) page 410 Cited from Supra Note 210 Page 189

explain the background of those non-legal norms, as well as provide a more detailed elaboration on the way they affect functioning of corporate governance in practice.

2.2 Theories of Corporate Personality.

Law treats a corporation aggregate and a corporation sole as persons. About the nature of their personality different theories have been advanced. These theories have either a political undertone in so far as they attempt to project the nature of relationship between the state and the groups existing within the state or provide a philosophical explanation about the existence of such persons created by law or try to meet the practical implications of the existence of such groups as legal persons. The courts have not, however, consistently followed any particular theory in dealing with various problems relating to corporation and have, by and large, being guided by practical considerations. These theories are not a mere existence in intellectual acrobatism but lead to important legal and practical consequences.[24] various theories of corporate personalities are discussed below.

2.2.1 The Fiction Theory

According to some jurists, a corporation has a fictitious personality. This fictitious personality is attributable to the necessity for forming an individual organization existing by itself and managing for its beneficiaries, that is to say, the members of it and its affairs. In Roman law, we know of the "*persona ficta*". Savigny developed the concept of the *persona ficta*. He called fictitious persons by the term "juridical persons". Juridical persons are those who exist only for juridical purposes. While in the case of a natural person, he is born with a personality which the law has merely to recognize, it is otherwise in the case of an artificial or juridical person whose personality is created by the law (there being no personality apart from this fictitious creation by the law).[30]

[30] Sethna Jehangir M.J., on "jurisprudence" 3rd revised Ed.(1973) Page 593-595.

Michoud has raised several objections to the fiction theory.[31] One of the arguments against the theory is that from the point of view of ownership, the fiction theory takes us nowhere. If a corporation aggregate be only an imaginary person which exists only in the eyes of the law, how can a non-existing (imaginary) person hold property?

Next it has been argued that a corporation has rights. But rights can only be had by real persons; so a corporation must be real and not an imaginary person. Against these arguments it can be replied that property can be held and rights owned and exercised by a body of persons instead of by each member of such body, for it is that body which is recognized for the purposes of convenience and ownership of property and rights as a separate entity.[32]

Another argument against the fiction theory is that its upholders "mistake the part played by the legislator". "The legislator makes nothing by itself. He only considers social want, social good and social evil, and gives effect to what society generally considers as good or proper. It is idle, therefore, to suggest that the legislature creates the personality of the corporation". But here again it may be said that this argument of the realists is fallacious. The legislation of the corporations creates it, in recognition of the economic necessity and business convenience, resulting from such recognition. Even the public opinion demands and is in real need of such recognition which the legislature satisfies. Undoubtedly the legislator, like the judge, can create something new, and something worthy, or give effect to what is a commercial convenience or an economic facility.[33]

2.2.2 The Realistic Theory

According to another theory regarding personality of the corporation, a corporation has a real and not a fictitious, personality. Its reality is psychic. Gierke is a leading exponent of realist Theory which refutes the fiction theory. The realistic theory maintains that a corporation has a

[31] Michoud; La theorie se la Personalite Morale, 3rd Ed. 1924 page 18.

[32] Supra note.

[33] Ibid

real psychic personality recognized, and not created, by the law. The realist theory is also known as the sociological theory of the group personality of the corporation. The upholders of the realist theory are found not only over the continent but also in England. They hold that the collective will is, in psychology, different from the individual. An individual, all by himself may come to a particular decision; but in association with others he may come to a totally different decision. The will of the many is different from the will of an individual. So a corporation has a real psychic will, and is, therefore, not a fictitious creature of the law but a psychic personality recognized by the law.

The realistic theory, however, is incapable of being applied to a corporation sole, because the theory of the "collective psychic" will does not come in the case of a corporation sole where there is a single natural person whose will does not stand supported by the will of anyone else" (there being none else). Moreover, taking the case of an artificial person as a corporation sole, as for example, an *universitates bonorum* (like a public fund or estate), we may say that the question of the collective will cannot arise, because a public fund or estate has no collective will; there is the will of its administrator.

The realist theory can have significance only in the case of a corporation aggregate. We may say that it is from the point of view of convenience and a continuing existence (despite demise and insolvency of its members), with a limited liability of its members and a separate liability of the incorporation, that the law has thought it fit to give corporations separate fictitious personality. The realist theory asserts that group personality has the same features as a human personality. The groups have a real mind, a real will and a real power of action[34].

2.2.3 The Concession Theory

The concession theory of the personality of the corporation, which is akin to the fiction theory, but not identical with it, says that legal personality can follow from law alone. It is by grace or concession alone that the legal personality is granted, created or recognized. The grace of the

[34] Maitland F.W, Introduction to Gierke's, Political Theories of the Middle Age; F. Hallis Corporate Personality, 1st Ed. 1913 page 137

state and its law prevails. This theory is, to an extent, correct; it is correct, in the sense only that all rights, whether human or corporate, flow from what the law gives, and where the law does not give anything, at least, its recognition is necessary to validate, maintain or perpetuate what already exists or is conferred by nature or what man has taken or created for himself. In all civilized societies, man can assume his rights, only through the force of the law at his help and to his recognition.

2.2.4. The Bracket Theory

The bracket theory of the personality of the corporation maintains that the members of a corporation have their rights and liabilities referred to the corporation itself, simply from the point of view of convenience. To determine, however, the real nature of the corporation and its state of affairs, the brackets have to be removed, for the names of the members of the corporation are kept in brackets. If and when the brackets are removed, one would be able to see what the corporation is, what its true nature is, and how its members are revealed through the removal of brackets.

The great defect, however, in the reasoning of the upholders of this theory of corporate personality is that rights, duties and liabilities are thought to be possessed by natural persons alone and not by corporations which are legal entities. The bracket theory is also known as Jhering's theory, as Jhering was its exponent. It was developed in France by Vareilles-Sommieres. However, to understand the real nature of the corporation; we must remove the bracket to find out the actual position of the company[35].

2.2.5 The Organism Theory

The organism theory of the personality of the corporation is the one that expounds that the corporation, like an organism, has members (limbs), head and other organs. The individual also has a head, a body with limbs that satisfy inter-dependent functions. Corporations, such as the state, the university, the club, social and public utility organizations, have also limbs in them and

[35] Solomon V Solomon Co. Ltd., (1897) AC 22

wills of their own. A corporation, according to this theory, is a subject of legal rights and is liable to duties also. According to this theory, a subject of legal rights need not be a human being. Any being or body with a will of its own and a life of its own can have legal rights and can be subject to legal duties and liabilities. What is essential, according to this theory, is that such a being or body must have a will of its own.

According to the organism theory of the personality of the corporation, corporations are social organisms, while human beings are physical organisms. Corporations are different from those who are their members, and their wills are also different from the wills of their individual members, for it is not what individual members decide at meetings of the corporations while passing resolutions; it is what the corporation as a body decides. The will of each individual member of the corporation gets submerged into the will of the corporation. The final resolution is therefore the will of the corporation[36].

2.2.6 The Ownership Theory

Another theory of the personality of the corporation is the ownership theory. Developed by Brinz, Bekker, Demelius, and elaborated by Planiol, the ownership theory of the personality of the corporation asserts that legal rights can be had by human beings and not by corporations. According to this theory, the so-called juristic person that is the corporation is not a person at all. It is "subject less property" destined for a particular purpose, according to Planiol, subject less rights are "legal monsters". He holds that fictitious personality is not an addition to the class of persons, but is only a matter of owning or possessing property in common. It is only a "form of ownership". He adds "collective ownership is, so to speak, hidden from our eyes by the existence of fictitious beings to which we ascribe, at least in a certain measure, the attributes of personality, which are reputed owners, creditors or debtors, which make contracts, and sustain legal proceedings like true persons.

All the collective ownerships are attributed to fictitious persons, of which each is reputed the single owner of a mass of goods, and the collective ownership appears as itself an individual

[36] Ibid

ownership; a conception as false as useless. Consequently instead of teaching that we have two kinds of ownership, it is taught that there are two kinds of persons.[37] The ownership theory has some significance when it is used with reference to estates and funds which are corporations sole. But apart from this it does not hold good, in so far as it denies the existence of the corporate personality as such[38].

2.2.7 The Purpose Theory

According to this theory personality is only enjoyed by human beings, they alone can be the subjects of rights and duties. The so called juristic persons are not persona at all. Since they are distinct from their human substratum, if any, and since rights and duties can only vest in human beings, they are simply "subject less properties" designed for certain purposes.

The main implication of this theory is that law protects certain purposes and the interest of individual beings. "The property supposed to be owned by juristic persons does not belong to anything; but it does belong for "a purpose" and that is the essential fact about it. All juristic or artificial persons are merely legal devices for protecting or giving effect to some real purpose, for example a trade union[39] is the continuing fund concerned and the purposes for which it is established."

2.2.8 The Kelsen's Theory

Another important theory worth noting is Kelsen's Theory of corporate personality. According to Kelsen, personality is "only a technical personification of a complex of norms, a focal point of imputation which gives unity to certain complexes of rights and duties".

Kelsen shows that there is no significant difference between the legal personality of an individual and that of corporation, for in the case of both what is known as legal personality is nothing but a complex of norms, that is to say, what is constituted by the bundle of rights and duties and

[37] Cited by Dean Pound Roscoe in his Jurisprudence 1959 (By West Publishing Co) Vol. IV, p 255
[38] Supra
[39] Bonser V Musicians Union, (1956) AC 104.

liabilities centering round, and the norms which rule the behavior of individuals are also the norms that determine the rights and duties of corporations. For organizing rights and duties, a convenient legal device is that of legal personality.

The greatness of Kelsen's theory lies in the concept of personality as a complex of norms, giving unity to certain complexes of rights and duties. The acceptance of Kelsen's theory as a correct theory, like the acceptance of the Quasi-Realist or Quasi-Fiction Theory of personality of corporation, opens out a new avenue in favor of corporations being entitled to enjoy fundamental rights under the constitution where such rights are guaranteed.

If there be no difference between the "personality" of a natural being and that of a non-natural being like the corporation, why should fundamental rights be denied to the corporation and why should it be said that corporations are not "persons"? Why should Acts, like the Citizenship Act in India, lay down that the term "person" does not include a corporation or anybody of persons whether corporate or incorporate? Under the modern law, as it should be, relating to corporations, Kelsen's theory should be a welcome theory, as it would enable the recognition of the corporation as a person as much as a natural person, and would entitle it to greater rights as also subject it to greater duties than at present[40].

2.3 Lifting the Corporate Veil

As we know that after incorporation a company becomes a legal person separate and distinct from its members. It has a corporate personality of its own with rights, duties and liabilities separate from those of its individual members. Thus, a veil of incorporation exists between the company and its members and due to this a company \is not identified with its members. In order to protect themselves from the liabilities of the company, its members often take the shelter of the corporate veil. Sometimes this corporate veil is used as a vehicle of fraud or evasion of tax etc.

[40] Ibid.

To prevent unjust and fraudulent acts, it becomes necessary to lift the veil of the corporation or disregard the corporate personality to look into the realities behind the legal façade and to hold the individual member of the company liable for its acts or liabilities[41].

The law on lifting the corporate veil is postulated that the High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, save for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil[42]. In **Sugar India Ltd. Vs Chander Mohan Chadha**[43], the Supreme defined the doctrine of the lifting the veil of corporate personality is a doctrine that advocates going behind and looking behind the juristic or corporate personality of a body corporate.

Lifting the corporate veil was articulately considered in the case of **Stanbic Bank Ltd vs. Ducant Lubricants (U) Ltd**[44] where the Applicant Messieurs Stanbic Bank Uganda Limited commenced this application orders that the corporate veil of the first Respondent is lifted and the third and fourth Respondents are added as parties to HCCS No 438 of 2012 in their individual capacity as directors and shareholders of the first Respondent. **Justice Christopher Madrama** held that the Plaintiff was entitled to sue the third and fourth Defendants in their own individual capacity because they used the company as a vehicle to perpetuate fraud.

It is also a basic common law principle that the mind of a company where guilty intent or responsibility is being considered cannot meaningfully be separated from the minds of the directors where the will of the company is to be discerned. In the case of **HL Bolton Co v. TJ Graham and Sons**[45], **Lord Denning** held at page 630:

"*A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere*

[41] Rai Kailash on Company Law 10th Ed. 2006 Page 47.
[42] This provided for under section 20 of the Companies Act 2012.
[43] AIR 2004 S.C.4368
[44] Miscellaneous Application No. 848 of 2013, (2013) UGCOMM 199.
[45] (1956) 3 ALL ER 624.

servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.... That is made clear in ***Lord Haldane's speech in Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd***[46] *So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty."*

The lifting of the veil assumes that otherwise the acts alleged are the acts of the company. That could be a defence of a director who is sued in his own individual capacity.

In State of **U.P. Vs. Renusagar Power Co.**[47], the court held that the concept of lifting the corporate veil is a changing concept. Its frontiers are unlimited. However, it depends primarily on the realities of the situation. In **The Deputy Commissioner Vs Cherian Transport Corporation**[48], the court has held that the company is a legal person distinct from its members. It is capable of enjoying rights and being subject to duties which are not the same as those enjoyed or borne by its members. In certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal façade.

The corporate veil has been lifted by the courts and legislatures both in the interests of justice, equity and good conscience. Firstly, it may be done to ascertain whether a company is to be treated as an „Enemy Company" in times of War. Thus during the First World War in **Dalmer Co. Ltd. V Continental Tyre & Rubber Co. (Great Britain) Ltd**[49], a company which was registered in England and which should normally be treated as an English Company was nevertheless held by the House of Lords to be an enemy company because, all its directors and its shareholders except one were Germans. This is, however, not a departure from the general

[46] (1915) AC 715 AT 713,714.
[47] (1992) 74 Comp. Case 128 (SC) 260 (1992) 74 Comp. Case 563 (Mad) 4368

[48] Ibid fn 52

(1916), 2 AC 307

rule that a company is distinct from its members, it only shows that its character whether friendly or enemy is to be ascertained by looking behind the veil.

A different view has been expressed in case of **Kuemgel vs. Donnersmarch**[50], where it was held that a company which acquires enemy character in this way still remains An English Company, if it had been registered in England. Secondly, public policy may make it necessary to lift the veil of a legal personality to look at the realities of a situation. Thirdly, it may become necessary to take notice of disabilities imposed on the body corporate and its officials by the memorandum and articles or other documents of constitution.

[50] (1965) 1 ALLER 46.

CHAPTER THREE

3.0 INTERNATIONAL, REGIONAL AND DOMESTIC PERSPECTIVES

3.1 Introduction

Although the company is a creature of law, its legal personality is rarely congruent with the economic reality in different regions and cultures, and the extent to which it is bound by legal rules varies enormously. This study re-examines that struggle from a legal perspective. It surveys legal regulation of business actors or companies at the domestic, regional, international and transnational levels and highlights the challenges globalization presents to the existing models, traditional and emerging alike. The picture which emerges is unsettling: by its very nature, transnational business destabilizes the equilibrium of the traditional legal structures. Legal rules developed based on the axiom of each legal person as a distinct legal unit, bound to the legal system in which it resides, struggle to meet their compensatory and regulatory aims when confronted with the diversification of modern business structures and the loss of single State control.

3.2 Legal Personality and its Inapplicability

In Rome, during the Empire, appeared the idea of the existence of a collective entity of public law, which acted together with the citizens. So, the legal construction that we study and call "legal person," first appears in the public-law sphere and is then used for religious or professional schools or corporations. Emperor Justinian made a difference between societas and co ownership. The former was a bilateral, consensual, perfect, and in good faith contract, by virtue of which two or more persons *(socii)* were reciprocally bound to contribute to the society their property or their industry with the purpose of conducting common transactions and obtaining advantages, even though not necessarily assessed in money, as well as to enjoy them in common[51]. Co-ownership or common ownership of property could either be voluntary or not,

[51] . JOSE M. CARAMts FERRO, CURSO DE DERECHO PRIVADO ROMANO 354 (Perrot 1953). Note the difference with the Argentine Company, which always has a profit purpose.

since they might arise from a legacy or donation. Since olden days has existed the idea of transforming a group of individuals into a legal unit to develop an activity to carry out a certain purpose. Halfway through the XIX century, German jurists called legal persons to entities organized by a diversity of individuals, who formed part of those entities to fulfill a specific legal purpose, while in France they were called moral persons to be distinguished from those called civil persons.

It was then, when Friedrich Karl Von Savigny conceived the well-known theory of fiction, according to which the legal person is an artificial person, whom the law considers a subject having patrimonial rights and legal capacity; and the legal capacity an essential characteristic of the human being-is extended by the law to those ideal subjects in order to facilitate these organizations of individuals the exercise of the rights and the fulfillment of their obligations derived or inherent to the real and particular aim that these organizations pursued. Under this point of view, legal persons would only be fictitious and artificial subjects that existed solely for legal ends[52].

That fiction was supported within the legal sphere by a mechanism that permitted obtaining a unique will only for the acquisition and the exercise of the rights of that group. This idea of legal fiction was adopted in Latin America by Andres Bello in the Chilean Civil Code. The concept was then adopted by the Colombian Civil Code, whose Section **633** defines a legal person as "a fictitious person, able to exercise rights and enter into obligations as well as to be judicially and extra judicially represented[53].

Velez Sarsfield, Authority and Drafter of the Civil Codes of Argentina, Uruguay and Paraguay, also uses this idea and concept of legal persons. The traditional, simple concept coined in Spain by Giron Tena referred to a legal person as follows: the ability to be a subject, active or passive,

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[52] . *See* FRANCESCO GALGAN, LA PERSONNE MORALE EN ITALIAN NACIONAL REPORTS DEL XIII CONGRESO INTERNACIONAL DE DERECHO COMPARADO 49 (1990). 464 [Vol. 29:3

[53] . GARCiA, *supra* note 5, *at* 37.

of legal relations[54]. The Spanish lecturer has also pointed out that legal person "means the existence of a new legal subject independent from those of the group they compose[55].

In Central-European law, the Sippe is the basic organization that gathers the purposes of its members-their interests are those of the organization; the will of all its members is the will of the community. In contrast to this idea there is another concept, that of organization, which is applied at the beginning to municipal communities, territorial municipalities, charity and religious associations, and unions or corporations. The German European Law is permeated by the Roman jurists, as well as by the legal compilers and canonists.

Kelsen has pointed out "that the concept of legal person arises due to the need of imagining a person with subjective rights and legal obligations. Legal thought, he continues, is not satisfied by knowing that a human act or omission constitutes a duty or a right. Somebody has to exist that might "have" the duty or the right.

The Argentine Civil Code in Section **39** establishes that members are different-as persons-from the ideal entity, when it states that: Organizations, associations, etc. will be considered completely different persons from their members. The assets owned by the association are not owned by any of their members and neither of their members nor even all of them is obliged to pay for the organization debts, if they had not expressly undertaken the obligation to pay or to be jointly liable.

In Argentine law, there are collective assets which are not owned by only one person (common property, undivided inheritance) and other assets that do not have an individual owner, at least for a length of time. (For example, in Argentina, the trust administrations or the mutual investment funds). The legal personality implies the existence of the principle of free initiative and of asset autonomy, among others. Due to public-order reasons, the state's controlling bodies have exercised control over certain legal persons.

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[54] DICCIONARIO DE TRMINOS JURIDICOS (1999).
[55] . Jose Giron Tena, *Estudios de Derecho Mercantil in* REVISTA DE DERECHO PRIVADO *245* (1955).

The concept of legal personality was a judicial construction in Anglo-American law in the case *Salomon v. Salomon and Co. Ltd.* and in the Supreme Court of Texas ruling in *State of Texas v. Standard Oil Company. In Salomon,* the company was a mere vehicle to hide the businesses and, upon insolvency, it was considered that the corporation had been created to limit the liability of its owners. The court ordered "piercing of the corporate veil" to establish the liability of the company's members or partners. *In Standard Oil,* **(1892)** we see again a stop to the abuses that, through different strategies, caused damage to third parties and distorted reality.

This issue has been studied in different countries. In Brazil, Tepedino[56] shows us that the question of "disregarding the legal personality" has originated two trends of thought among legal scholars, one being of objective nature and the other following a subjective approach. The author reminds us that in order to accept the disregarding of the legal personality, Requiao demands the existence of fraud or abuse of the law.

In Argentina, the system is developed in a paragraph of Section 54 of the Business Organizations Act 1950 about the inadmissibility of legal personality. The conduct of an organization which is intended to cover up purposes that are beyond that of the business, and is intended to be used to infringe the law, the public order or the good faith to violate the rights of third parties shall be attributed directly to the members or the controlling companies which allowed such conduct and who will be jointly liable for the damage caused. Therefore, the legal personality is not "intervened" or "dismissed," but rather a different legal effect is applied. This effect is the inadmissibility of the legal personality. The liability is extended to the members or the controlling companies that allowed the illegal conduct set forth in the legal provisions.

The Argentine law makes reference to the "acts" of the company, that is to say, to its activities and to the legal acts arising therefrom. The activities and the acts may be internal or external. Some legal provisions are broad (infringement of the laws, of the public order) and some are more restrictive.

[56] Gustavo tepedino, notas sobre a desconsideragdo da personalidadejuridica, in a evolucao do directo no slculo xxi-estudos em homenagem ao professor arnoldo wald 126 (2007).

Argentine private law (that is civil and commercial law) has the same problems that Latin American law has-the lack of updating of legal provisions in view of new business scenarios. We believe that the limitation or not of liability is more related to the kind of organization than to the personality. It is necessary to analyze in depth whether it is necessary to keep the concept of "legal personality" or replace it.

3.3 Legal Reform and Corporate Governance in Japan.

A sweeping reform of Japanese corporate-governance laws was introduced in 2002. There are several important changes that have been introduced in the existing corporate management structure[57]. Most of the debate on reforms has revolved around the clash between the American model, which is geared towards placing primary importance on shareholders and relying on external control, and the traditional Japanese model, which is primarily a stakeholder model based on internal control.

Under the new Corporation Law which entered into force in May 2006, taking the Company Law outside the Commercial Code[58], Japanese corporations are given the option to select from two distinct corporate governance regimes-the Reformed Large Corporation, based on conventional Japanese model, and the New Type Company with committees with an executive officer **("CEO"),** based on the American model. The biggest innovation was the establishment of a totally new governance structure known as the "Committee System," which was viewed by some scholars as a sign of the Americanization of Japanese corporate governance[59]. Outside directors have been in the centre of discussion and legal reforms as an attempt aimed at the improvement of monitoring.

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[57] A detailed analysis of reforms introduced by the Corporation Law, 2006 is found in Eiji Takahashi & Madoka Shimizu, *Does the 2005 Reform Improve the Japanese Economy? The Current of Japanese Corporate Governance Reform,* 17 J. INTERDIS. ECON. (2005).

[58] Law No. 86/2005. Hostile takeovers were also the subject of legal reforms. In 2005 the Ministry of Economy, Trade and Industry and the Ministry of Justice issued the "Guidelines Regarding Takeover Defense for the Purpose of Protection and Enhancement of Corporate Value and Shareholders'

[59] For more information on the 2002 Revision, *see* Roland Gilson & Curtis Milhaupt, *Choice as a Regulatory Reform: The case of Japanese Corporate Governance* (COLUM. L. & Econ., Working Paper No. 251, 2004).

The Tokyo Stock Exchange ("TSE") has also regulated participation of independent directors. TSE Securities Listing Regulations (as of March, 2010) by Rule 436-2 provide for obligations of the companies listed at TSE to ensure at least one independent director/auditor (meaning an outside director/auditor prescribed in Article 2(15) and Article 2(16) of the Corporation Law of 2005, respectively) who is unlikely to have conflicts of interest with shareholders[60].

Since the TSE Rules leave the choice between directors and auditors, majority companies have opted to appoint auditors, who are not typically independent. The report of the TSE, based on notifications on appointment of independent directors/auditors, published on July 21, 2010, shows that out of the listed companies which submitted ID/A notifications and had already secured ID/A(s), 10.6% submitted notifications contained only independent directors, 70.7% contained only independent auditors, and 18.7% contained both independent directors and auditors.

So, the TSE Rules on independent directors/auditors, which declared better protection of shareholders as its goal, seem to be just another facade in the Japanese corporate governance system, as the main goal of having independently minded persons that would protect shareholders is compromised by allowing companies to appoint auditors who are not necessarily independent. Common Interests," aimed at creating rules for takeover defenses."

The Guidelines give specific examples of defenses, along with conditions governing their use. In principle, defenses are legitimate if they serve the interest of shareholders, and not if their goal is merely to secure the position of incumbent management. The Guidelines were clearly influenced by American law.

However, the way the rules on hostile takeovers function is also determined by business and legal infrastructure, which is quite different between the United States and Japan: the relationship between shareholders and management is very different, the status of independent directors who

[60] Tokyo Stock Exchange, Updated Consolidated Results of Independent Directors/Auditors Notifications, July 21, 2010, *available at* http://www.tse.or.jp/english/ news/09/b7gje6000000817j-att/100803_a.pdf.

may play a key role in any hostile takeover attempts is also very different, as well as the role of the courts. It remains to be seen how Japanese courts will cope with this challenging issue. For the moment, the corporate-governance reforms have not led to radical changes in the board, the presence of outside directors has not yet been adopted as a standard, and stock options and hostile takeovers are still a rarity in Japan[61].

Meetings of shareholders, however, have become more serious, indicating a greater readiness to accommodate the interests of shareholders. There is a growing tendency of individual shareholders attending the annual meetings and becoming more active at those meetings, often asking questions. Asset-management companies and trust banks were more active at this year's annual shareholders' meetings **by** voting against the management proposals. At average, ***15%*** of the management proposals were voted against, in comparison with **10%** last year.

Those proposals included retirement allowances to directors, nomination of management and proposals for issue of warrants aimed as protection device against hostile takeovers. As a result, the duration of the meetings have also become longer, and in June 2010 the average duration of annual meetings was fifty minutes-seventeen minutes longer than in June 1999[62]. It is still premature to make predictions about the impact of legal reforms of corporate governance in Japan. Time will tell whether the present legal reforms will end up in failure, just a "formal convergence" without substantially changing the way of doing things, or whether they will bring substantial changes.

3.4 Protection of Companies, Creditors and Cross border Transactions.

There are a number of business features of cross-border financial transactions that have led to commensurate developments in the law. First, the transactions are huge in size and involve a number of financial institutions. For instance, syndicated loans made to corporate borrowers in

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[61] *Puchniak, supra note* 11 at 195. 100. ES1 =, 15%1: MatWJ (H *.I N9I /24/2010) (at the Annual Meetings of Shareholders, 15% voted against) (Nihon Keizai Shinbun September, 24, 2010).

[62] M*Mg 1 916% at 13 (Nov. 30, 2010). The information on duration of annual shareholders meetings which is regularly published in the November issue of Shoji Homu (M$MA). However, it indicates no substantial change in the last four years. 510 [Vol. 29:3

leveraged finance deals are structured to appeal to different lenders' or investors' appetites for risk in exchange for a higher risk of loss and will thus be structured in tiers that include senior lenders and subordinated debt, which takes the form of a first lien or mezzanine. This business structure is a recipe for conflict because different types of lenders have different attitudes towards investment. Some take a long-term perspective while others take a short-term perspective. The approach of the two groups to a struggling or defaulting borrower can be quite different, with some lenders prepared to give the borrower some breathing space to trade out of its difficulties, while other lenders would prefer to crystallize a loss and enforce security.

Secondly, the large-sized loans entail large credit risk, and lenders and investors necessarily engage in risk-management products such as credit derivatives and swaps to hedge against the risk of loss. At the same time lenders are managing risk, large corporations are also managing the risks facing them-such as foreign-exchange risk, profit or interest risk, and commodity risk-thus creating a large and vibrant market for derivative products." Thus, a prevalent feature of modem financing is the use of credit default swaps, which are the commonest financial derivatives used to hedge against the risk of loss **by** transferring the risk to another party.

The legal nature of credit default swaps **("CDS")** was described in **AON Financial Products, Inc. v Societe Generale:**[63] Simply put, a credit default swap is a bilateral financial contract in which a protection buyer makes periodic payments to the protection seller, in return for a contingent payment if a predefined credit event occurs in the reference credit. Often the reference asset that the protection buyer delivers to the protection seller following a credit event is the instrument that is being hedged.

The court went on to clarify CDSs are different from insurance contracts: **CDS** agreements are thus significantly different from insurance contracts. They "do not, and are not meant to, indemnify the buyer of protection against loss. Rather, **CDS** contracts allow parties to "hedge" risk **by** buying and selling risks at different prices and **11.** While most derivatives are entered

[63] AON Financial Products, Inc. v. Societe Generale, 476 F.3d 90, 96 (2d Cir. 2007) (citing Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., *375* F.3d 168, 172 (2d Cir. 2004)). 2011] 557

into for speculation and arbitrage, some **10%** are used for actual hedging. For the whole spectrum of derivatives and their documentation[64] with varying degrees of correlation."

The terms of each credit swap agreement independently define the risk being transferred. Credit risk mitigation techniques are part and parcel of modem investment portfolio management but are also frequently required by the credit-rating that have become a significant feature of the larger financial transactions. Where a corporate group is involved, one technique is the provision of credit enhancement by another member of the group, say the parent company, which guarantees the obligations of its subsidiary.

Such an arrangement gives the creditor two entities to look to for the fulfilment of its obligation- the principal debtor and the credit support provider (guarantor), and, by the terms of most financial contracts, the default of the guarantor constitutes the default of the principal debtor as well.

Credit-risk mitigation was an important part of the factual matrix in the Lehman Brothers litigation discussed further below. Thirdly, many loans are actually held by institutional investors and other financial institutions rather than commercial banks, as was traditionally the case. Such providers of funds include sovereign wealth funds, private equity, hedge funds, mutual funds, pension funds, and insurance companies. The non-bank lenders get involved in the loan either at the outset, that is primary syndication level, or at the secondary level, where they acquire loan interests **by** way of purchase from the original lenders[65].

Non-bank lenders have had a tremendous impact on loan markets. First, they see their involvement in a loan as an investment that should produce viable returns on its own merit when compared to other investment instruments, and they will dispose of the loan for alternative forms of investment if the outlay on the loan is not profitable.

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[64] SIMON FIRTH, DERIVATIVES: LAW AND PRACTICE (London: Sweet & Maxwell, 2010).

[65] AON Financial Products, Inc. v. Societe Generale, 476 F.3d 90, 96 (2d Cir. 2007). *See also* Schuyler K Henderson, *Regulation of Credit Derivatives: to What Effect and for Whose Benefit?* 8 J. INT'L BANKING & FIN. L. 480 (2009) (discussing further differences

Non-bank lenders are thus unlike commercial banks that are relationship driven and tend to hold on to the loan as a market leader in the hope of ancillary services. To be able to compare the loan with other assets, such investors demand asset liquidity, transparent pricing and efficient trading procedures. The desire of institutional investors to acquire loans and the desire of banks to sell loans have resulted in many loans being sold off to international investors through Collateralized Debt Obligations.

3.5 Conclusions

If reality is a hierarchy of organized integrities, "the image of man will differ from the image created by a number of random physical particles as utmost and "true" reality. The "world of symbols, values, social entities and cultures is something "real" and its inclusion in a cosmic hierarchy might reduce the clash between "two cultures," hard sciences and human sciences, technology and history, natural and social sciences or any other antagonistic formulation[66]. Reality shows that there are a lot of systemic legal organizations or "entities" which may or not have personality. All of them, like individual subjects, do not act in isolation, but rather they interact within a community in one or more markets. They can be created or dissolved; they may or not interact with others in groups, according to the reality of the business.

In contrast to these subjects, we find others who are now called "consumers," which receive, to some extent, the result of the effort of such organizations for the production or exchange of goods or services. The population is considered a consumer and is awarded legal protection. It is necessary to construct a unified market notion for all these actors to be completed with the rules of each market relating to competition and loyalty laws. Membership and property are terms that complement each other in collective organizations.

The organization of the market would give rise to the virtual formation of a big entity which is given that name irrespective of the number of participants. And there are several markets, like national, regional and international markets. In the three market ends (the producer, the

[66] *Id. at* XVIII t

distributor or intermediary, and the consumer) rest the laws that foster freedom not only of commerce, such as the French law of March 2, 1791, by means of which any person could freely make any trade or exercise an art or profession.

There is a fourth and decisive actor in each market-the State. With its various degrees of intervention and decentralization, always present in the direct or indirect regulation of the economy rules, and therefore, in the regulation of the markets, the State's role is twofold. First, it is autonomous when playing the role of an entrepreneur, and then, at the same time, it acts as a public power as it exercises control of the economy. In the market, and with the four mentioned actors, there appear a series of conducts, legal acts, contracts and other agreements[67]

In conclusion therefore, the international perspective are aware of the corporate personality abuses and remedies have been advanced to protect people though not enough.

[67] As the author has already stated, it can be seen that there is another concept which goes beyond that of "contract" which has not been completely developed, at least

CHAPTER FOUR

4.0 PRESENTATION, INTERPRETATION AND ANALYSIS OF DATA

4.1 Introduction

This chapter focuses on presentation and discussion of the findings got during the field study in Uganda. The field results are presented in form of graphs, pictorial charts and tables. It shows the characters of respondents which are fundamental in examining protection of unsecured creditors employees and tort victims in Uganda.

4.2 The role of courts of law in interpretation of corporate personality.

Legal Rights to Create and Enforce Security.

Efficient courts are essential for enforcing the rights of creditors, especially unsecured lenders. For secured lending, reforms beyond the courts are necessary but all these have not been put in use, simplifying the steps and reducing the costs of creating and enforcing security in Uganda. Eliminating the stamp duties and taxes for creating collateral agreements as well as the requirements to notarize documents can substantially reduce costs.

Introducing out-of-court enforcement enhances the powers for secured creditors to recover debt, as it's in Albania, Germany, Thailand, and the United States. Summary enforcement proceedings through the courts are another effective reform. Moldova's reforms in 2001 introduced a fast-track enforcement procedure. Ten days after notifying the debtor, the other creditors, and the collateral registry of a default, creditors may file an enforcement order with the court. All that is required is evidence of the notifications, the default, and the security agreement.

Within three days, the judge reviews the documentation and issues an enforcement judgment.

There is no judicial analysis of the cause of dispute. Such measures increase the importance of well written security contracts, to avoid problems in the judicial review of valid documentation. And they radically change the debtor's incentives to appeal and delay the enforcement process.

In Moldova, appeals are possible but must be undertaken in a separate trial. If the debtor loses, he will bear all costs. So appeals are likely only if the debtor has a genuine dispute or grievance.

Since the reform, the time to seize and sell security has fallen from more than three years to around 70 days. More-comprehensive reforms also address the scope and clarity of rights in security agreements.

To begin with, countries must allow the debtor to retain possession and use collateral. Doing so is still impossible in Serbia and Montenegro, where the lender must take possession of assets to have a valid charge hardly a practical solution for borrowers who pledge business equipment. Also important, especially for small firms, is introducing instruments that allow security for a changing pool of assets such as inventory, receivables, property that will be realized in the future (for example crops), or a whole enterprise especially for small firms.

Clear rules that anticipate and resolve priority conflicts are essential in defining the property rights of secured creditors. Registries of collateral agreements, where lenders can check for existing liens, also support the clarity of property rights. In the United States, a lender can check by searching in an electronic registry of almost all collateral agreements. Not so in three-quarters of the world, where registries are limited to certain types of property, such as land (including many rich countries such as Germany and France). New technology makes such registries inexpensive. In a few countries, such as New Zealand, the collateral registry interface is operated by the credit bureau. That is a win-win reform. The bureau benefits from additional information on borrowers, and the government benefits by having a sophisticated electronic registry administered by experts in information technology systems.

Finally, effective reforms of secured lending require attention to insolvency as well as collateral laws. The powers allocated to secured creditors in the insolvency process are a crucial determinant of access to credit. Good collateral instruments facilitate other goals of bankruptcy also by providing the right incentives for liquidating unviable companies and rescuing viable firms. For example, liquidation is more efficient when collateral is concentrated in the hands of

one main creditor, and sale as a going concern is more likely if the whole enterprise is pledged as security for a loan.

4.3 Demographic characteristics

The main purpose of this part was to analyze the back ground information of the respondents in relation to their age, gender (sex), level of education, and marital status about what they knew about the corporate personality and its abuse. The information was presented by use of tabulation.

Table 4.1: Shows the sex/gender of the respondents

Gender	*Frequency (f)*	*Percentages (%)*
Males	15	29
Females	37	71
Total	*52*	*100*

Source: primary data

The table reveals that out of 52 respondents, who were randomly selected to answer the questions about the corporate personality, 15 were males and 37 were females.

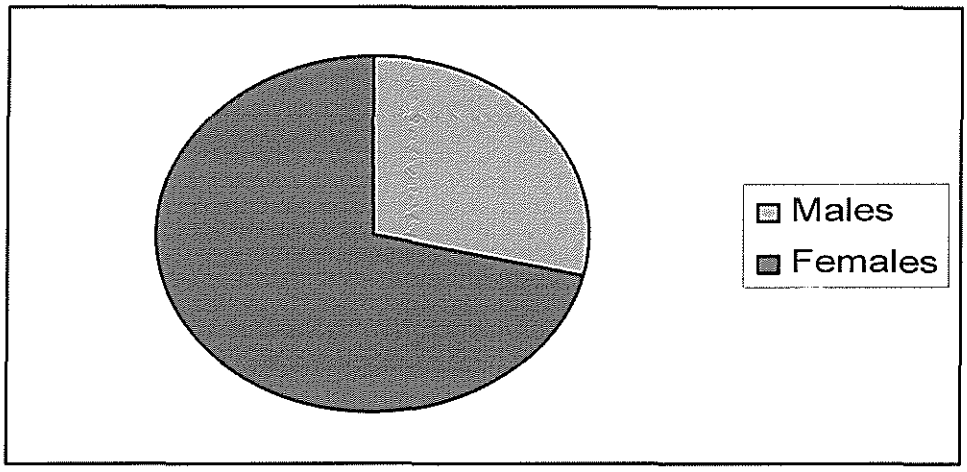


Fig 4.1: Pie chart showing the percentage gender of respondents

Source: Primary data

The pie chart above reveals that 28.8% of the respondents were males and 71.2% of them were females. The number of the females was greater than the male due to the fact that women were free to answer question and responded easily than men.

Table 4.2: Shows the level of education of the respondents

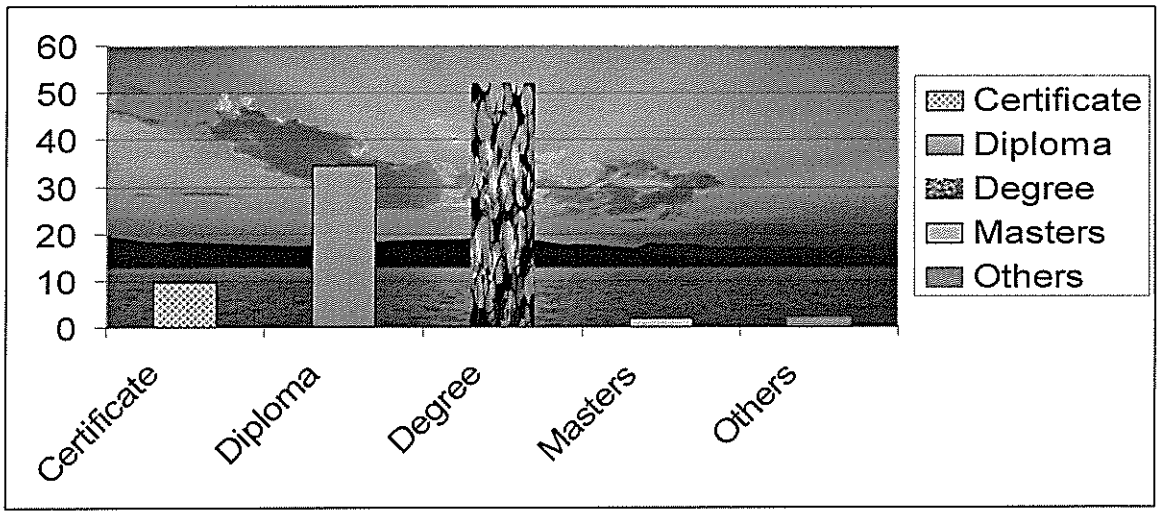
Gender	*Frequency(f)*	*Percentages (%)*
Certificate	5	9.6
Diploma	18	34.6
Degree	27	51.9
Masters	1	1.9
Others	1	1.9
Total	***52***	***100***

Source: Primary Data.

The above table describes the academic Qualifications of the respondents from whom I gathered the information needed for the study. Out of 52 respondents, majority of them who made a total of 27 and a percentage of 51.9% possessed degree in different academic fields, followed by those having Diplomas made a total of 18 respondents with a percentage of 34.6%.

The respondents who possessed certificates were 5 making a percentage of 9.6%, those possessed masters was 1 (one) making a percentage of 1.9% while 1 (one) making a percentage of 1.9% had completed senior three.

Fig 4.2 shows the education level of the respondents.



Source: Primary data

According to the bar graph above, Majority of respondents who made a total percentage of 51.9% possessed degree in different academic fields. Followed by those having Diplomas who made a total percentage of 34.6%.

The respondents who possessed a certificate made a percentage of 9.6, those who possessed masters were 1.9% while 1 (one) had completed senior three.

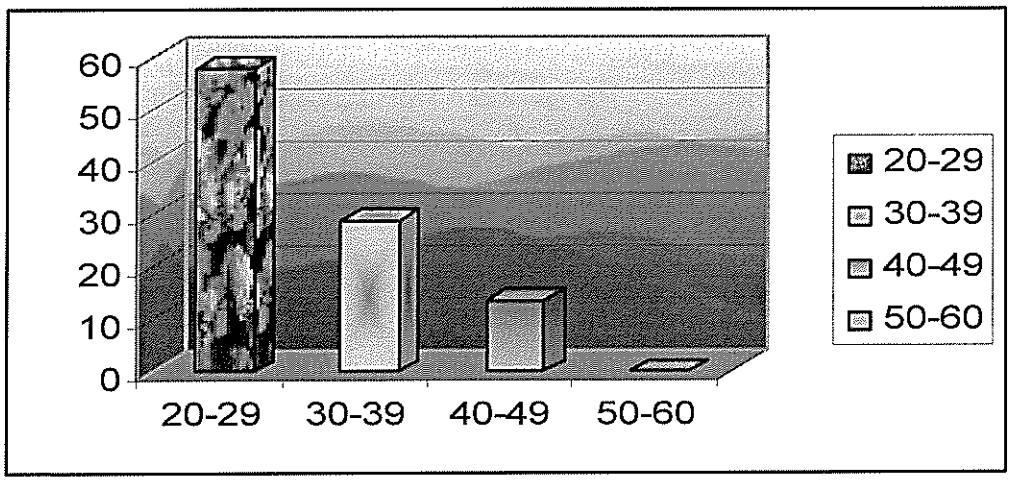
Table 4.3 shows the age of the respondents.

Gender	*Frequency(f)*	*Percentage (%)*
20-29	15	28.8
30-39	30	57.7
40-49	7	13.5
50-60	0	0
Total	*52*	*100*

Source: Primary data.

According to the table above, the data revealed the age brackets of the respondents with majority of them being the age bracket 30-39 as they made the total number of 30 followed by those in the age bracket 20-29 making a total of 15 respondents. Only 7 respondents were in the age bracket 40-49 years. And those of age bracket 50-60 there was none

Fig 4.3: Shows the age group of the respondents



Source: Primary Data.

According to the bar graph above, the data revealed the age brackets of the respondents with the majority of them being 30-39 as they made a total percentage of 57.7% followed by those in age bracket 20-29 making the percentage of 28.8%, only 13.5 of the respondents were in age bracket of 40-49 and none was in the age bracket of 50-60.

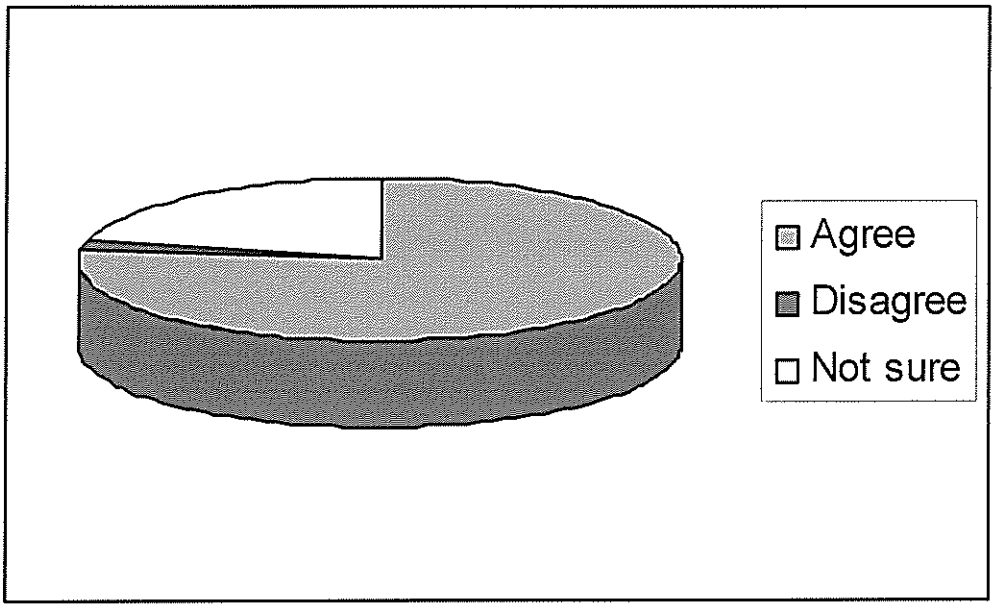
Table 4.5 shows the response of the respondents on the law of corporate personality.

Responses	*Frequency (f)*	*Percentage (%)*
Agree	40	76.9
Disagree	1	1.9
Not sure of law	11	21.2
Total	***52***	***100***

Source: primary data

According to the table above, 40 of the respondents agreed that they knew about the law of corporate personality, 1 of the respondents disagreed and 11 respondents were not sure of the law corporate personality.

Fig 4.5 shows the response of the respondents on the law of corporate personality



According to the pie chart above, the data revealed that 76.9 % of the respondents agreed that they knew about the concept of corporate personality, followed by 21.2% respondents who were not sure of the law of corporate personality and 1.9% disagreed.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS OF THE STUDY

5.1 Introduction

I have highlighted throughout this work that Companies are viewed as the best business models with the capacity to raise large sums of money from the public and reduce personal liability, a feature which is not readily in handy for other business models.[68] For this reason, Company law is one of the most debated issues in corporate law. Viewed as drivers for economic growth and stability, attraction of foreign investment, technological development and their vast impact on the labour market, companies[69] cease to be of mere interest to the directors or members but the wider public in addition to serving the interests of the state especially the principle of welfare statism by which the company is expected to make its contribution to society.[70]

5.2 Conclusions of the Study

I have come to a conclusion that whereas unmasking the veil of incorporation is plausible for attempting to modify the injustice caused by the abstraction of the company, the corporate form continues to throw up fraud and injustice thereby exerting pressure on courts to chip away at *Salomon* which they largely do not but where there are chips, their extent and form is shrouded by uncertainty.[71]

I have also presented arguments for the assertion that employees are usually in no position to negotiate contracts of employment which take into account the prospect of employer collapse.

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[68] Crispus Nyombi and Alex Kibandama, Company Law in Uganda, Law Africa, Page 1.
[69] Ibid.
[70] D.J Bakibinga, Company Law in Uganda, Fountain Publishers, page 2.
[71] Chrispus Nyombi and David Justin Bakibinga, *Corporate Personality: The Unjust Foundation of English Company Law*. Labour Law Journal, summer 2014, Page 102.

That employees are often powerless to take effective action against employers to gain protection against financial distress or against deliberate attempts by their employer to avoid paying employee entitlements; Exclusion of employees from decision-making mechanisms, especially when crucial decisions have been taken, adds to the weakness of their position.[72] Transactional creditors and tort victims face a similar dilemma.

More so, I have concluded that the priority of payment under insolvency laws, which is provided to employee entitlements in the event of insolvency, does not improve employee status because, in most cases, after payment of all secured creditors, there are no assets available for distribution to unsecured creditors.

Furthermore I have ascertained that employees are highly vulnerable to the loss of employment and the consequent potential loss of entitlements in case of corporate insolvency.

I have concluded that corporate personality was in fact a tool for capitalism driven forward by Parliament and affirmed by the House of Lords which thereby allowed companies to amass considerable wealth and become a pillar of capitalism.

That despite years of legal development, the law remains in a continual sense of uncertainty and flux. The corporate form continues to throw up fraud and injustice which continues to put courts under pressure to chip away at *Salomon*, which largely they don't but where there are chips their extent and form is very uncertain.

Furthermore, I have come reached the conclusion that in light of the historical and legal analysis, had the doctrine that breathed life into companies never came into existence or controversially affirmed at conclusion of the nineteenth century, investment capitalism would have struggled to materialize.

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[72] Dr. Mohammed AL Bhadily, The Protection Of Australian Employee Entitlements Following Corporate Collapses: Grounds For Special Attention, Page 1. Available at

http://ssrn.com/abstract=1923537 accessed 18th November 2015 at 10:00 pm

5.3 Recommendations of the Study

I recommend the use of a corporate bond to help alleviate the dilemmas highlighted in this work. This idea is borrowed from the Employment Act 2006 and the National Environment Act CAP 153. Section 98 of the Employment Act 2006 provides for employment bonds. It stipulates that any employer who is not incorporated (For purposes of a company) or resident in Uganda shall be required by a labour officer to pay a bond assessed at the equivalent of one month's wages for each employee employed, or to be employed by that employed. The said bond is kept by the ministry responsible for labour on behalf of the employer and its purpose is for paying wages and other entitlements of the employee in the event of default by the employer. This provision envisages circumstances of default by the employer company only whereas the manner of default is not disclosed.

Section 94 of the National Environment Act (CAP 153) provides for refundable performance bonds to be paid by entities dealing in activities and industrial plants which are most likely to have significant adverse effects on the environment when operated in a manner that is not in conformity with good environmental practice. The environment management authority is empowered to confiscate the bond if the entity has not conformed to sound environment management principles in the operation of the industrial plant in such a manner that adversely affects the environment.

It is my humble view that the safety porch created by the above two sections can be widened within the Insolvency laws to cover default of directors of companies in the event of corporate collapse in circumstances where the companies' assets are unable to satisfy its debts rather than sealing the fate of unsecured creditors- the employees, tort victims and transactional creditors under the *Pari-passu* principle. The bond can be made payable with a line ministry or at the company registry by the directors of the company on application by unsecured creditors in cases where they feel the company's affairs are being run in such a way that insolvency abounds.

I also recommend that the unsecured creditors should be given much similar protection like the one of secured creditors under the current regime that envisages equality of all persons.

I also recommend that hedging techniques. Hedging is best defined as the reduction of existing risks. To hedge means to use compensating or offsetting transactions to ensure a position of breaking even especially to make advance arrangements to safeguard oneself from loss of an investment or speculation[73]. These can be used to ensure that unsecured creditors, employees and tort victims share the risk of the loss with the companies. There are three hedging techniques and each is analyzed hereunder;

Stabilization and saving funds.

Under the aspect of stabilization funds, the basic economic lesson for the stabilization funds is as old as the bible. The story of Joseph describes how advised the leaders of Egypt to conserve output during the period of seven bumper years called the "fat years" and dispense the inventory during the future "lean years". These are designed to accumulate the funds when resource prices exceed a target level and to dispense the funds when the prices fall below the target level. However, in order to be effective, stabilization funds require two budgetary protections. Firstly, that surpluses in the stabilization fund, not be used as collateral to increase borrowing and there by offset the stabilization effect by increasing deficit spending. Secondly, when prices are depressed there should be fiduciary integrity of the fund so that it is jot raided for short term reasons. An example of a successful fund is Chile's Copper Fund which was established in 1985. Its savings are held in the account at the central bank and its management comes from an independent Board which includes members from the state owned copper Corporation.

The idea of saving funds is primarily to save money for the future. An example is Alaska Permanent Fund created in 1977. By the end of 2003, it had accumulated over $28 billion in assets.

Commodity Bonds

A bond is a debt security issued by a corporation or government in order to raise money. These bonds are of three types as discussed hereunder;

[73] Bryan and Garner, Black's Law Dictionary 10th Edition page 839.

A convectional Bond. This consists of regular annual or semi annual payments of interest known as coupon payments and the final payment of the entire principal upon maturity.

Commodity Indexed bonds. These are structured so that either their coupon payments or principal payments are adjusted according to a specific underlying commodity price. For instance, an oil commodity bond may might have its principal set to equal to 1000 barrels times the market price of oil at the time of maturity.

Commodity Linked Bond. This links the coupon or the principal payments to the price of the underlying commodity through an attached derivative called option. An option generates a payment only if the price of the referenced commodity of the company rises above or if it falls below the specific target price known as the strike or the exercise price.

Hedging using derivatives. This is yet a policy approach that addresses the problem more directly and does so with potentially less expense. There are a variety of derivative instruments in the market. Some are traded on Future exchanges and others are traded over the counter market.

In conclusion therefore, I am of the suggestion that if these hedging techniques can be widened and provided for under the insolvency law, they can help to accumulate the funds of the company. This can in turn cater for the entitlements of employees, unsecured creditors of the company in Case of corporate insolvency.

BIBILIOGRAPHY

STATUTES

6. The Companies Act, No.1 of 2012.
7. Insolvency Act, No.14 of 2011.
8. The Employment Act 2006.
9. Civil Procedure Rules S1 71-1

TEXTBOOKS

10. David J Bakibinga, 2013, *Company Law in Uganda*, 2nd Edition, Fountain Publishers.
11. Chrispus Nyombi and Alex Kibandama, 2014, *Principles of Company Law in Uganda*, Law Africa Publishers.
12. Winfred Tarinyeba Kiryabwire, 2015, *Company Law; A guide to the Companies Act of Uganda*, Fountain Publishers.
13. Gower and Paul Davies, 2008, *Modern Principles of Company Law*.8th Edition Sweet and Maxwell Publishers.
14. Dan W. Puchniak, 2008, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers, 5* BERKELEY
15. Paton, G.W. 1972, *A Text Book of jurisprudence* 4rth Ed (Oxford University)
16. Sethna Jehangir M.J. 1973, on "*Jurisprudence*" 3rd revised Ed.
17. Michoud, 1924, *La theorie se la Personalite Morale*, 3rd Ed.
18. Maitland F.W, 1913, *Introduction to Gierke"s Political Theories of the Middle Age*; F. Hallis *Corporate Personality*, 1st Ed.

SCHOLARY WRITINGS AND RESEARCH PAPERS.

1. Dr. Mohammed AL Bhadily, *The Protection of Australian Employee Entitlements Following Corporate Collapses: Grounds for Special Attention.*

2. Chrispus Nyombi and David Justin Bakibinga, 2014, *Corporate Personality: The Unjust Foundation of English Company Law*. Labour Law Journal, summer Page 94:

3. RB. Ekelund., Jr., R.F Hebert, R D. Tollison G M. Anderson, and A B. Davidson (1996). *Sacred Trust: The Medieval Church as an Economic Firm. New York*: Oxford University Press.

4. Takashi Araki, 2007, *Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan, 28* COMP. LABOR LAW & POL'Y J. 251, 263.

5. Curtis Milhaupt's paper, *The Evolution of Non legal Rules in Japanese Corporate Governance.*

6. Schuyler K Henderson, 2009 *Regulation of Credit Derivatives: to What Effect and for Whose Benefit?* 8 J. INT'L BANKING & FIN. L. 480.

7. Rhodes, R (1996) 'The *New Governance: Governing Without Government, Political Studies*', Vol.44, No.4, 652.

8. Report on the Committee on *The Financial Aspects of Corporate Governance* (Cadbury Report) Para 2.5

9. Institute of Corporate Governance of Uganda, 2008, *Manual on Corporate Governance: Incorporating Recommended Guidelines for Uganda.*

10.. Dan W. Puchniak, 2008, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers, 5* BERKELEY Bus. L.J. 195, 227-28, 259-60.

11. Dean Pound Roscoe, 1959, *Jurisprudence* West Publishing Co Vol. IV.

12.. JOSE M, 1953. *CARAMTS FERRO, CURSO DE DERECHO PRIVADO ROMANO* 354 (Perrot)

13. FRANCESCO GALGAN, 1990, *LA PERSONNE MORALE EN ITALIAN NACIONAL REPORTS DEL XIII CONGRESO INTERNACIONAL DE DERECHO COMPARADO* 49. 464 [Vol. 29:3

14. Schuyler K Henderson, 2009, *Regulation of Credit Derivatives: to What Effect and for Whose Benefit?* 8 J. INT'L BANKING & FIN. L. 480

CASE LAW CONSIDERED

1. Uganda Motors Ltd vs. Wavah Holdings Supreme Court of Uganda Civil Appeal No. 19 of 1991 (unreported).

2. Salomon Vs. Salomon & Co. Ltd (1897) AC 22.

3. Lennard's Carrying Co. Ltd Vs Asiatic Petroleum Co. Ltd (1915) AC 705.

4. Stanbic Bank Uganda Ltd Vs Ducant Lubricants (U) Ltd, CB Richard Ellis (U) Ltd, Arinaitwe Joseph Bryan and Arinaitwe Prossy H.C.M.A No. 845 of 2013.

5. HL Bolton Co v. TJ Graham and Sons (1956) 3 ALL ER 624

6. Trevor Ivory Ltd v Anderson (1992) 2 NZLR 517.

7. Williams and Another Vs. Natural Life Health Foods Ltd and Another (1998)2 ALLER 577

8. State of U.P. Vs Renusagar Power Co (1992)74 Comp

9. Bonser vs. Musicians Union (1956) AC 104.

10. The Deputy Commissioner Vs. Cherian Transport Corporation (1992) Comp

11. Sugar India Ltd. Vs Chander Mohan Chadha AIR 2004 S.C4368.

12. Tata Engineering & Loco-motive Co. Ltd. Vs State of Bihar 1964, S.C.J 666.

13. Dalmer Co. Ltd. vs. Continental Tyre & Rubber Co. (Great Britain) Ltd (1916)2 AC 307.

14. Kuemgel vs. Donnersmarch (1965) ALL ER 46.

15. AON Financial Products, Inc. v. Societe Generale, 476 F.3d 90, 96 (2d Cir. 2007).